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A CORRESPONDENT writes to us in reference to the new Criminal Code, speaking of some novelties which have been introduced thereby, and says that he has put one of these novel provisions to a practical test. He seems to have lent a book to an acquaintance, which was not returned. Many requests had been made to that end, but without any result. Desiring not merely the return of his book, but also to bring before similar offenders the enormity of such an offence, and doubtless seeking to ascertain the scope of the new provision, he took upon himself, refusing the cautious advice of his legal adviser, to proceed under section 355 of the Code, and laid an information to the effect that the delinquent had converted the book to his own use with intent to deprive the owner temporarily or absolutely of the same, and, therefore, to steal the same, contrary to the statute 55 & 56 Vict., cap. 29, sec. 305. Instead of the dreaded action for damages he was delighted to receive the book within a few hours, coupled with a request to withdraw the information, which he, with great magnanimity, consented to do. We sincerely hope that the same law will apply to other articles generally considered as being more or less public property. Perhaps, for example, some public-spirited individual will take the umbrella question in hand before the wet season arrives. We are glad to see that the Criminal Code is thus being used to educate the conscience of the unconscionable borrower, and we, with our correspondent, will "bless the author of this section, and think highly of the Police Court as a rough-and-ready means of protection" under like circumstances.

NEW RULES OF COURT.

It is probably within the knowledge of most of our readers that, very shortly after the promulgation of the Consolidated Rules, steps were taken by the various law associations throughout the Province, acting under the leadership of a committee of the County of York Law Association, to secure divers amendments and additions to the Rules.

The labours of these various bodies finally culminated in the preparation of a pamphlet of considerable size by the aforesaid committee, embodying the various changes which were deemed desirable, which was in due time laid before the judges.

These proposed changes, we believe, have been very carefully and maturely considered by the judges, and although, in their wisdom, they have not seen fit to adopt all of the suggestions made, yet they have adopted a very considerable number of them, and have also added thereto various amendments and additions which, in their own experience, they have found necessary.

These Rules, having been tentatively resolved upon in March last, were again deliberated upon, and finally adopted on the 23rd of June last, and are to come into force on the 1st of September next.

While many of these new Rules correct merely verbal errors and slips of various kinds in the Consolidated Rules, many others will be found to effect very material changes in the practice, which it will be necessary for practitioners to master before the long vacation shall have expired. We, therefore, propose to point out shortly some of the most important changes which have been effected.

Rule 15 is amended so as to enable the Clerk of the Process to issue certificates of *lis pendens* : R. 1284.

The doubts heretofore existing as to the precise nature of the report of a Referee are set at rest, and such reports are to be filed, and to be subject to the same incidents as to confirmation, appeal, etc., as Masters' reports : R. 1288.

Rules 30, 41, and 138, defining the jurisdiction of the Master in Chambers, Local Judges, and Local Masters in Chambers, have been amended in some not very material particulars : RR. 1287, 1289, 1491. Jury notices cannot hereafter be struck out by these officers except for irregularity.

Money may now be paid into court in any part of .e Province where there is an agency of the Canadian Bank of Commerce: R. 1294.

The regular sittings of the Chancery Divisional Court have been changed, and in future are to be held as follows, viz.: The third Thursday in February, the last Monday in May, and the first Thursday in December: R. 1305.

When an original writ has been lost, a copy may be ordered to be sealed and served in lieu thereof: R. 1308.

The English Rule of 1893, regulating service out of the jurisdiction, has been virtually adopted. The principal changes in Rule 271 being that pro ·sion is made allowing a defendant resident out of the jurisdictic to be sued for a tort committed within the jurisdiction. Provision is also made for service out of the jurisdiction of proceedings for winding up companies, and for the service of other petitions and notices of motion; and also for obtaining leave to effect service out of the jurisdiction, which it would appear is now intended to be obtained before service is effected, although Rule 274 is not expressly repealed: R. 1309.

Heretofore it has been necessary, wherever a defendant has been served with a writ of summons out of the jurisdiction, at the same time to serve him with the statement of claim, even though the writ was specially indorsed. Considerable unnecessary expense was thus incurred. In future, where the writ is specially indorsed under Rules 245, 246, or 248, a statement of claim need not be served with the writ: R. 1311.

The third party procedure has been changed, and the English Rules of 1883 (170-177) have been adopted. Under these new Rules, leave to serve a third party n ·ist be obtained in Chambers. The notice is to be stamped with a seal similar to a writ of summons, and is to be in the form appended to the Rules, and a copy is to be filed, and it is to be served in the same manner as a writ, and with it is to be served a copy of the statement of claim, or, if there be none, then a copy of the writ of summons.

If the third party wishes to dispute the plaintiff's claim, or his own liability to the defendant, he must enter an appearance within eight days after service, or such further time as may be allowed. In default, he is deemed to admit the validity of the judgment and his liability to the defendant. Where the third party does not appear, and the defendant suffers judgment by

default, he may, on satisfying the judgment, or before satisfaction by leave of the court or a judge, seek judgment against the third party. Or, in case the action goes to trial, and results in favour of the plaintiff if the third party be in default of appearance, the judgment against him in favour of the defendant may be made at the trial, but execution may not issue against him, without leave, until after the defendant has satisfied the judgment, and, if the action is otherwise decided in favour of the plaintiff, the judgment against the third party may be obtained on motion.

Where the third party appears, the defendant serving him may apply for directions as to the mode in which his liability is to be determined. Provision is also made giving the court or judge jurisdiction as to costs in such cases; and also for disposing of claims to contribution and indemnity between co-defendants: R. 1313.

In future, in mortgage actions where a new day for redemption has been appointed after the lapse of six months, the further time to be allowed is to be one month: R. 1316.

Demurrers are abolished: R. 1322; and hereafter questions of law may be raised by any party in his pleading; they may, by consent of the parties or leave of a judge, be brought up for adjudication in a summary way and without waiting until the trial, otherwise the question is to be disposed of at or after the trial. Pleadings disclosing no valid cause of action or defence may be struck out on motion: R. 1322.

Ever since the consolidation of the Rules the profession has been groaning more or less at having to effect service personally on non-appearing defendants, and it will be a relief to find that the former practice enabling such defendants and parties who sue or defend in person without giving any address for service to be served with all proceedings not requiring personal service by posting them up in the office where the proceedings are being conducted: R. 1330.

Rule 484 has been amended so as to make the time of long vacation no longer to run as regards appeals to a Judge in Chambers: R. 1331; but, as already intimated, the new Rules do not come into force until the 1st of September, and, therefore, do not apply to the present vacation.

Examinations for discovery are hereafter not to be had in the long vacation except by leave: R. 1333.

Where an action is brought by an assignee of a chose in action for its recovery, his assignor is to be liable to examination for discovery: R. 1334.

Another important change in the practice relating to discovery is effected by the rescission of Rule 512, which permitted cross-examination on affidavits on production of documents: R. 1337.

The practice prior to the consolidation of the Rules as to cross-examination on affidavits used on a motion has been restored, so as to enable the court to make an order before such cross-examination has been had, if it shall see fit: R. 1345.

Provision is made for taking evidence under commissions in shorthand, and an amendment has been made in the form of the commission consequent thereon: R. 1346.

The old procedure has been revived enabling a defendant to move to dismiss for want of prosecution if the plaintiff does not go to trial at the next sittings at which the action can be tried after the expiration of six weeks from the close of the pleadings: R. 1348.

In mortgage actions judgment may hereafter be entered on præcipe where only a dispute note is filed by the defendant, due provision being made for notifying the defendant of the taking of the account: R. 1349.

Examination of a judgment debtor may hereafter be had even where the judgment is for costs only: R. 1360; but the provision of Rule 935, enabling claims and demands which would be available under equitable executions to be garnished, has been abrogated: R. 1361.

Where property sought to be replevied is returned "eloigned," the plaintiff may in his statement of claim either claim a return of the goods and damages for their detention, or damages for their conversion: R. 1367.

A bond for security for costs with affidavits of execution and justification is hereafter to be filed with the proper officer, and, if no notice is made to disallow it within fourteen days after notice of filing, it is to stand allowed; but it may be allowed or disallowed at an earlier date on special application: R. 1378.

We have now touched upon all the principal subjects affected by the new Rules, which were published in the *Ontario Gazette* of the 14th July last.

The new Rules have been numbered in continuation from the Consolidated Rules, and we believe it is intended to take advantage of the publication of this new batch to include and republish with them all other Rules which have been passed since the consolidation, which will prove a convenience to practitioners.

We understand that Messrs. Holmested and Langton are hard at work on a new edition of the Judicature Act and Rules, which will, no doubt, be welcomed by the profession.

CURRENT ENGLISH CASES.

TRUSTEE—STATUTE OF LIMITATIONS—TRUSTEE ACT, 1888—(51 & 52 VICT., C. 59, S. 8)—(54 VICT., C. 19 (O.))—MORTGAGE—SALE OF MORTGAGED PROPERTY—FRAUD OF AGENT OF MORTGAGEE—CONCEALED FRAUD.

In *Thorne* v. *Head*, (1894) 1 Ch. 599, the Court of Appeal (Lindley, Kay, and Smith, L.JJ.) have affirmed the judgment of Romer, J., (1893) 3 Ch. 530 (noted *ante* p. 90). The action, it will be remembered, was brought by a subsequent mortgagee to recover the surplus proceeds of a sale of the mortgaged property effected by the defendants as prior mortgagees, whose solicitor had been permitted to retain the surplus in his hands, which he misappropriated, having lulled inquiry by continuing for some years to pay the second mortgagees interest on their mortgage. The Court of Appeal agreed that this payment of interest had not the effect of keeping alive the claim against the first mortgagees, who were not parties or privies to the payment, nor cognizant of their solicitor's fraud. They also agreed that the cause of action arose when the first mortgagees received the purchase money: also that the defendants could not be deemed to have been guilty of the fraud perpetrated by their solicitor, nor was his fraud one for which they were legally responsible as having been committed by their agent for them or for their benefit, inasmuch as the solicitor's sole purpose was to benefit himself. Neither as far as the defendants were concerned was the time for bringing the action extended by reason of the concealment of the fraud by the solicitor, because the defendants were not parties to such concealment; neither could the fund be deemed to be in the defendants' possession or converted to their own use within the meaning of the Trustee Limitation Act, 51 & 52 Vict., c. 59, s. 8 (54 Vict., c. 19, s. 13 (O.)). The Act, therefore, furnished a good defence.

COMPANY—DIRECTORS—MISAPPLICATION OF MONEYS OF COMPANY—BREACH OF TRUST—STATUTE OF LIMITATIONS—TRUSTEE ACT, 1888 (51 & 52 VICT., C. 59—(54 VICT., C. 19 (O.)).

In re Lands Allotment Co., (1894) 1 Ch. 616, is another decision under the Trustee Act, 1888 (51 & 52 Vict., c. 59)—(54 Vict., c. 19 (O.)), in which he Court of Appeal (Lindley, Kay, and Smith, L.JJ.) held that the directors of a company sued for misapplication of the moneys of the company were entitled to the benefit of the Act. The facts as to one branch of the case were that the directors of the Lands Allotment Company which had no power to invest in the shares of other companies in March, 1885, accepted £35,000 of fully paid-up shares in another company in discharge of a debt. These shares were subsequently referred to in the balance sheets as "assets; by B. S. Company," and the item was explained by the chairman at the general meeting in 1885 to mean that it represented the amount due by B. S. Company for an estate purchased from the Lands Allotment Co. The same item was repeated in successive balance sheets till 1889. The shares in the B. S. Company were accepted without any fraudulent intent, and the Court of Appeal (affirming Wright, J.) held that even if the acceptance of the shares was a breach of trust the directors were protected by the Statute of Limitations, and that there had been no fraudulent concealment on their part, notwithstanding the false statement of the chairman to prevent the time running. Another branch of the case arose on the following facts: In July, 1889, the directors of the Lands Allotment Co. passed a resolution to invest a further sum of £5,200 in more paid-up shares of the B. S. Company. Two directors, Brock and Theobald, were not present at this meeting, but they were present at the next meeting, at which the minutes of the previous meeting were read and confirmed. Brock was in the chair and signed the minutes. Brock was also in the chair at the general meeting, and referred to the new investment, and, speaking on behalf of the directors, said: "We carefully considered the matter, and deemed it advisable to accept the right of subscription, and have no reason to regret our decision." On this part of the case the Court of Appeal were unable to agree with Wright, J., who had exonerated both Brock and Theobald from liability, the Court of Appeal being of opinion that although the attendance at the meeting at which the minutes

were confirmed would not have made them liable for the *ultra vires* investment, yet Brock had, by his action as chairman at the meeting, and by his statement at the general meeting, showed that he took an active part in the investment, and was therefore liable.

SETTLEMENT—CONSTRUCTION — LIMITATIONS—OMISSION OF WORDS OF INHERITANCE—EQUITABLE ESTATE IN FEE.

In re Whiston, Lovatt v. *Williamson*, (1894) 1 Ch. 661, is a case upon the construction of a marriage settlement made on August 21st, 1845, whereby an equitable estate in fee was limited to the children of the settlor, but without words of inheritance or any other words indicating that they were to take the fee simple. The question was whether, the estate limited being an equity of redemption, the children took a fee simple or merely a life estate. Chitty, J., held that the same rule applied to equitable estates as to legal estates, and that the children, for want of words of inheritance, only took a life estate. In Ontario, since July 1st, 1886, words of inheritance in a deed are no longer necessary in order to pass the fee: see R.S.O., c. 100, s. 4. We may observe that the learned judge adopts the opinion of the modern text writers, Elphinstone and Lewin, in preference to that of the older ones, Cruise, Hays, Butler, and Williams, who all considered that, in limitations of equitable estates, the courts were at liberty to regard the intention of the settlor, and did not follow the law.

ADMINISTRATION—SPECIFIC LEGACY OF MONEY—LEGATEE DEBTOR TO ESTATE—RETAINER.

In re Taylor, Taylor v. *Wade*, (1894) 1 Chy. 671, a testator had bequeathed the profits of a business represented by moneys in the hands of the executor to a person who was a debtor to his estate, and the simple question Chitty, J., was called on to decide was whether the executors had a right to retain the debt due to the estate out of the legacy, and he held that they had as against the legatee and his assigns for the benefit of creditors.

SETTLEMENT—POWER OF APPOINTMENT—CONSTRUCTION.

In re L'Herminier, Mounsey v. *Buston*, (1894) 1 Ch. 675, a power was given by deed to appoint by will the income of per-

sonal estate, and "subject to such appointment" of the income trusts of the capital were declared, and the question was whether the power extended to the capital. North, J., held that an unlimited power to appoint the income necessarily involved a power to appoint the corpus, and therefore the power extended to the capital.

Reviews and Notices of Books.

A Treatise on the Foreign Powers and Jurisdiction of the British Crown. By William Edward Hall, M.A., Barrister-at-Law. Oxford: At The Clarendon Press. London: Henry Frowde, Oxford University Press Warehouse, Amen Corner, and Stevens & Sons (Ltd.), 119 and 120 Chancery Lane, 1894.

Mr. Hall's book is a very valuable addition to legal literature; but not to legal literature only, for it covers ground of great interest to every British subject, as well as to all nations having colonial possessions. A perusal of its pages will remind a subject of Her Majesty the Queen of the extent and importance of her colonial possessions, whilst the general reader will find in its pages an amount of interesting matter of a general character only to be otherwise gathered with great labour from various sources difficult to reach.

As stated in the preface, the work defines "the powers and jurisdiction which the British Crown exercises or has a right to exercise in places not within the dominions of great Britain, whatever the source may be from which such powers and jurisdiction are derived. The subject is one in which guidance from previous writers is wholly wanting; it has never yet been treated as a whole; even its different parts, taken separately, have not received adequate attention. Little published material exists outside of Acts of Parliament, treaties, orders in council, some important Parliamentary papers, and a few cases decided in the courts. In the main the work is naturally, and, indeed, necessarily, based upon these."

Part I., which is introductory, treats of the foreign powers and jurisdiction in their international and constitutional aspects, and the agents through whom power and jurisdiction are exercised.

Part II. treats of the persons who are possessed of the status of British subjects, defining the general functions of agents of the British Crown in foreign countries. It treats also of the celebration of marriage by British agents in foreign states.

Part III. is devoted to the powers and jurisdiction of the Crown in eastern states, in protectorates, and in barbarous countries. As might be supposed, our eastern possessions, and the eastern states having more intimate connection with British rule, occupy a large portion of this part of the work. The last chapter of this part is devoted to jurisdiction on the high seas, to precedence in British vessels, fishery regulations, revenue, and quarantine jurisdiction, etc.

The great empire of which we form a part still continues its march of progress into the uncivilized portions of the globe. Africa, at present, especially feels the touch of her strong but helpful hand, and those interested in the progress of the Anglo-Saxon through the Dark Continent will read the book before us with much interest in connection with the recent Uganda debate in the House of Commons.

We would recommend those of our readers connected with Law Associations to have Mr. Hall's work added to their libraries, whilst those who can, in these hard times, afford it should have it at home for reading and reference. From a typographical standpoint, the volume is produced in the best style of the Oxford University Press.

Real Property Statutes of Ontario, being a selection of the Acts of practical utility. By A. T. Hunter, Barrister-at-Law, author of "A Treatise on Power of Sale under Mortgages of Realty." The Carswell Co. (Ltd.), 1894.

A Treatise on the Investigation of Title to Real Estate in Ontario. Second edition. By E. D. Armour, Q.C., Toronto. The Carswell Co. (Ltd), 1894.

These two books have been received, and will be noticed hereafter.

DIARY FOR AUGUST.

1. Wednesday...Slavery abolished in British Empire, 1834.
3. Friday.....Battle of Fort William Henry. Columbus sailed on first voyage, 1492.
5. Sunday.....*11th Sunday after Trinity.*
6. Monday.....Thos. Scott, 4th C.J. of Q.B., 1804.
7. Tuesday.....Duquesne, Gov. of Canada, 1752.
11. Saturday. ...Battle of Lake Champlain, 1814.
12. Sunday.. ...*12th Sunday after Trinity.* First American Railroad completed, 1830.
13. Monday.....Sir Peregrine Maitland, Lieut.-Gov., 1818.
14. Tuesday.....Battle of Fort Erie, 1814.
15. Wednesday. .Decision in Behring Sea arbitration, 1893.
16. Thursday.....Battle of Detroit, 1812.
17. Friday.....Gen. Hunter, Lieut.-Gov., 1799.
18. Sunday..... *13th Sunday after Trinity.* River St. Lawrence discovered, 1535.
24. Friday.....St. Bartholomew.
25. Saturday.... .Francis Gore, Lieut.-Gov., 1806.
26. Sunday.....*14th Sunday after Trinity.*
31. Friday.... ...Long vacation ends.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Exchequer Court.] [May 1.

CARTER *v.* HAMILTON.

Patent of invention—Novelty—Infringement.

C. & Co. were assignees of a patent for an article called "The Paragon Black Leaf Check Book" used by shopkeepers to prepare duplicate accounts of sales, and the invention claimed was "In a black leaf check book composed of double leaves, one-half of which are bound together, while the other half fold in as fly leaves, both being perforated across so that they can readily be torn out, the combination of the black leaf bound in to the book next the cover and provided with the tape bound across its end, the said black leaf having the transferring composition on one of its sides only." What was alleged to be new in this patent was the device, by means of the tape across the end of the black leaf, by which it could be folded over without soiling the fingers or causing the leaf to curl up.

C. & Co. brought an action against H. for infringing this patent, the alleged infringement consisting of a similar device, but with about half an inch of the carbonized leaf free from carbon, the leaf being turned over by means of this margin instead of the tape.

Held, affirming the decision of the Exchequer Court of Canada (3 Ex. C.R. 351), that the evidence at the trial showed the device for turning over the black leaf without soiling the finger to have been used before the patent of C. & Co. was issued, that the tape across the end of the black leaf was the

only novel element in the patented article, and that the device used by H. was not an infringement of the patent depending on the tape to render it patentable.

Appeal dismissed with costs.

W. Cassels, Q.C., and *Edgar* for the appellants.

Johnston, Q.C., and *Heighington* for the respondents.

Exchequer Court.] [May 8.

MAYES *v.* THE QUEEN.

Contract—Public work—Special quality of timber—Inspection—Change in terms of contract—Authority of engineer—Delay.

M. contracted with the Dominion Government to build a bridge in connection with a railway under construction in Nova Scotia. The contract called for the use of creosoted pine timber, of which the creosoting could only be done in South Carolina. By one clause in the contract no change could be made in its terms without an Order in Council therefor, and by another clause M was not to bring any suit or proceeding for damages caused by delay.

The timber was procured in South Carolina, and M. wrote to the engineer asking for an inspection. The engineer undertook to send an inspector to South Carolina, but neglected to do so for some weeks, and M. was put to greater expense in transporting it to Nova Scotia by reason of the delay. Having proceeded against the Crown for damages, a demurrer was filed to his petition of right.

Held, affirming the decision of the Exchequer Court (2 Ex. C. R. 403), that by the express terms of the contract the Crown was not liable; that the engineer could not bind the Crown by entering into a supplementary contract for inspection, and that M. had by his covenant no cause of action based on delay.

Appeal dismissed with costs.

Pugsley, Q.C., for the suppliant.

W. H. B. Ritchie for the Crown.

Ontario.] [May 22.

FRANK *v.* SUN LIFE ASSURANCE CO.

Life insurance—Payment of premium—Contract dehors the policy—Avoidance of policy.

A policy of life insurance contained no condition making it void in case of non-payment of premiums, or any note, etc., given for a premium. The first premium was not paid in cash, but the assured signed and gave to the company an agreement in the form of a promissory note, payable at a certain time for part, and a like agreement payable at a later period for the other part, each of said documents containing an undertaking by the assured that if it was not paid when due the policy should be void. The assured died after the time for payment of the first agreement, but before the second had matured, and leaving the first unpaid.

Held, affirming the decision of the Court of Appeal for Ontario (20 A.R. 564), that, by the failure to pay the part of the premium as agreed by the overdue instrument, the policy was void.

Appeal dismissed with costs.

Wilkes, Q.C., for the appellant.

Aylesworth, Q.C., for the respondents.

Ontario.] [May 23.

SNETZINGER *v.* PETERSEN.

Arbitration and award—Submission—Question of fact—Second award—Arbitrator functus officii.

S. and P. were engaged in business together, under a written agreement, in the packing and selling of fruit, and, a dispute having arisen as to the state of account between them, a third party was chosen to enable them to effect a settlement. S. claimed that such third party was only to go over the accounts and make a statement, while P. contended that the whole matter was left to him as an arbitrator.

The arbitrator, having gone over the accounts, made out a statement showing $235 to be due to S. Some time after he presented a second statement, showing the amount due to be $286. S. was given a cheque for the latter amount, which he claimed to be only taken on account, and he afterwards brought an action for the winding up of the partnership affairs.

Held, affirming the decision of the Court of Appeal for Ontario, that whether or not there was a submission to arbitration was a question of fact as to which this court would not interfere with the finding of the trial judge that all matters were submitted, confirmed as it was by the Divisional Court and Court of Appeal.

Held, further, that there was a valid award for $235; that, having made his award for that amount, the arbitrator was *functus officii*, and the second award was a nullity; and that the Divisional Court was wrong in holding that, as P. relied only on the second award, the judgment should be against him on the case as claimed by S.

Appeal dismissed with costs.

Riddell for the appellant.

McCarthy, Q.C., for the respondents.

Quebec.]

HUNT *v.* TAPLIN.

Appeal by defendant—Amount in controversy—Pecuniary interest—R.S.C., c. 135, s. 29.

The plaintiff, who had acted as agent for the late M.S., brought an action for $1,470 for a balance of account as *negotiorum gestor* of M.S. against the defendants, executors of M.S. The defendants, in addition to a general denial, pleaded compensation for $3,416 and interest. The plaintiff replied that this sum was paid by a *dation en paiement* of certain immovables. The

defendants answered that the transaction was not a giving in payment, but a giving of a security. The Court of Queen's Bench held that the defendants had been paid by the *dation en paiement* of the immovables, and that defendants owed a balance of $1,154 to the plaintiff. On application being made to the Registrar of the Supreme Court in Chambers, the security for appeal to the Supreme Court was allowed.

On motion to quash the appeal by the plaintiff for want of jurisdiction, on the ground that the amount in controversy was under $2,000,

Held, that the pecuniary interest of the defendants affected by the judgment appealed from was more than $2,000 over and above the plaintiff's claim, and therefore the case was appealable under R.S.C., c. 135, s. 29. *MacFarlane* v. *Leclaire*, 15 Moo. P.C. 181, followed.

Motion to quash refused with costs.

Buchan for motion.

Butler, Q.C., *contra*.

Quebec.]

MONTREAL STREET RAILWAY CO. *v.* CITY OF MONTREAL.

Street railway contract with municipal corporation—Taxes.

By a by-law of the city of Montreal, a tax of $2.50 was imposed upon each working horse in the city. By section 16 of the appellant's charter it is stipulated that each car employed by the company shall be licensed and numbered, etc., for which the company shall pay, "over and above all other taxes, the sum of $20 for each two-horse car, and $10 for each one-horse car."

Held, affirming the judgment of the court below (Q.R. 2 Q.B. 391), that the company are liable for the tax of $2.50 on each and every one of its horses.

Appeal dismissed with costs.

Branchaud, Q.C., and *Geoffrion*, Q.C., for the appellant.

L. J. Ethier, Q.C., for the respondent.

Quebec.]

MCINTOSH *v.* THE QUEEN.

Criminal appeal—Criminal Code, 1892, s. 742—Undivided property of co-heirs—Fraudulent misappropriation—Unlawfully receiving—R.S.C., c. 164, ss. 85, 83, 65.

This was an appeal from the Court of Queen's Bench for Lower Canada (appeal side).

Where on a criminal trial a motion for a reserved case made on two grounds is refused, and on appeal to the Court of Queen's Bench (appeal side) that court is unanimous in affirming the decision of the trial judge as to one of such grounds, but not as to the other, an appeal to the Supreme Court can only be based on the one as to which there was a dissent.

A conviction under s. 85 of the Larceny Act, R.S.C., c. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under s. 65.

A fraudulent appropriation by the principal and a fraudulent receiving by the accessory may take place at the same time and by the same act.

Two bills of indictment were presented against A. and B. under ss. 85 and 83 of the Larceny Act.

By the first count each was charged with having unlawfully and with intent to defraud taken and appropriated to his own use $7,000 belonging to the heirs of C., so as to deprive them of their beneficiary interest in the same.

The second count charged B. (the appellant) with having unlawfully received the $7,000, the property of the heirs, which had before then been unlawfully obtained and taken and appropriated by said A., the taking and receiving being a misdemeanour under s. 85, c. 164, R.S.C., at the time when he so received the money. A., who was the executor of C.'s estate, and was the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving.

On the question submitted, in a reserved case, whether B. could be found guilty of unlawfully receiving money from A., who was custodian of the money as executor, the Court of Queen's Bench for Lower Canada (on appeal), Sir A. LACOSTE, C. J., dissenting, held the conviction good.

At the trial it was proved that A. and B. agreed to appropriate the money, and that when A. drew the money he purchased his railway ticket for the United States, made a parcel of it, took it to B.'s store, handed it to him, saying: "Here is the boodle; take good care of it." On the same evening he absconded to New York.

Held, affirming the judgment of the court below, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B., or previously, B. was properly convicted under s. 85, c. 164, R.S.C., of receiving it, knowing it to have been unlawfully obtained.

GWYNNE, J., dissenting.

Appeal dismissed.

Mr. Saint Pierre, Q.C., for the appellant.

J. F. Quinn, Q.C., for the respondent.

Quebec.]

MCLACHLAN *v.* MERCHANTS BANK.

MCLAREN *v.* MERCHANTS BANK.

Partnership—Dissolution—Married woman—Benefit conferred on wife during marriage—Contestation—Priority of claims.

On the 10th April, 1886, J. S. McL., a retiring partner from the firm of McL. & Bros., composed of the said J. S. McL. and W. McL., agreed to leave his capital, for which he was to be paid interest, in a new firm, to be constituted by the said W. McL. and one W. R., an employee of the former firm, and that such capital should rank after the creditors of the old firm had been paid in full. The new firm undertook to carry on business under the same firm name up to 31st December, 1889. J. S. McL. died on the 18th November, 1886. Mrs. A. McL., the wife, separate as to property of J. S. McL., had an account in the books of both firms. On the 17th April, 1890, an agreement was entered into

between the new firm of McL. Bros. and the estate of J. S. McL. and Mrs. McL., by which a large balance was admitted to be due by them to the estate of J. S. McL and to Mrs. J. S. McL. The new firm was declared insolvent in January, 1891. Claims having been filed respectively by Mrs. J. S. McL. and the executors of the estate of J. S. McL. against the insolvent firm, the Merchants Bank of Canada contested the claims on the following grounds, *inter alia:* (1) that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886; (2) that Mrs. J. S. McL.'s moneys formed part of J. S. McL.'s capital; and (3) that the dissolution was simulated.

Held, reversing the judgment of the Court of Queen's Bench (Q.R. 2 Q.B. 431) and restoring the judgment of the Superior Court, that the dissolution of the partnership was simulated; that the moneys which appeared to be owing to Mrs. J. S. McL., after having credited her with her own separate moneys, were in reality moneys deposited by her husband in order to confer upon her during marriage benefits contrary to law, and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors. FOURNIER and KING, JJ., dissenting.

Appeal allowed with costs.

Laflamme, Q.C., and *Greenshields*, Q.C., for the appellants.

Hall, Q.C., and *Geoffrion*, Q.C., for the respondents.

Quebec.]

CHAMBERLAND *v.* FORTIER.

Appeal—56 Vict., c. 29, s. 1—Action negatoire—Rights in future—R.S.C., c. 135, s. 29 (b), amended.

In an action *negatoire*, the plaintiff sought to have a servitude claimed by the defendant declared non-existent, and claimed $30 damages.

Held, that under 56 Vict., c. 29, s. 1, amending R.S.C., c. 135, s. 29 (*b*), the case was appealable, the question in controversy relating to matters where the rights in future might be bound.

Vineberg v. *Hampson* (19 Can. S.C.R. 369) distinguished.

Motion to quash refused.

Languedoc, Q.C., for the motion.

Amyot, Q.C., *contra*.

Quebec.]

PARÉ *v.* PARÉ.

Accounts—Action—Promissory note—Acknowledgment and security by notarial deed—Novation—Arts. 1169 & 1171, C.C.—Onus probandi—Art. 1213, ... —Prescription—Arts. 2227, 2260, C.C.

In an action of account instituted in 1867, the plaintiff claimed, *inter alia*, the sum of $2,361.10, being the amount due under a deed of obligation and *constitution d'hypothèque*, executed in 1866, and which on its face was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that the amount was payable on the terms and conditions and the

manner mentioned in the said promissory note. The defendant pleaded that the deed did not effect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal aside), Q.R. 2 Q.B. 489, that the deed did not effect a novation: Arts. 1169 & 1171, C.C. At most, it operated as an interruption of the prescription and a renunciation to the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue: Art. 2264, C.C. And as the onus was on the plaintiff to produce the note, and he had not shown that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years: Art. 2260, C.C.

As to the other items of the accounts, the Supreme Court restored the judgment of the Court of Review, whereby the amount found due to plaintiffs was compensated by the balance to the credit of the defendant which appeared in the plaintiffs' books.

Appeal allowed with costs.

C. A. Geoffrion, Q.C., for the appellant

A. Ouimet, Q.C., for the respondent.

Quebec.]

ROYAL ELECTRIC CO. *v.* CITY OF THREE RIVERS.

Contract—Electric plant—Reference to experts by court—Adoption of report by two courts—Reference clause in contract to arbitration.

The Royal Electric Company having sued the city of Three Rivers for the contract price of the installation of a complete electric plant, which under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side), on an appeal, affirmed the judgment of the Superior Court. On appeal to the Supreme Court of Canada,

Held, (1) Where there are concurrent findings of two courts on a question of fact, this court will not interfere, unless the findings of fact are conclusively wrong.

(2) That when a contract provides that no payment shall be due until the work has been satisfactorily completed, a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract.

Quære: Whether a right of action exists, although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration. See *The Quebec Street Railway Company* v. *The City of Quebec* (13 Q.L.R. 201).

Appeal dismissed with costs.

Beique, Q.C., and *Geoffrion*, Q.C., for the appellant.

Geo. Irvine, Q.C., for the respondent.

Quebec.]

ROYAL ELECTRIC CO. *v.* LEONARD & CO.

Action en garantie—Contract—Sub-contract—Legal connection (connexite).

The appellants, who had a contract with the city of Three Rivers to supply and set up a complete electric plant, sublet to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the city of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works, having sued the city of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents.

Held, affirming the judgments of the courts below, that there was no legal connection (*connexite*) existing between the contract of the defendant and that of the plaintiffs with the city of Three Rivers, upon which the principal demand was based, and therefore the action *en garantie simple* was properly dismissed.

Appeal dismissed with costs.

Beique, Q.C., for the appellants.

A. R. Oughtred for the respondents.

Quebec.]

ATLANTIC & NORTHWEST R.W. CO. *v.* JUDAH.

Railway expropriation—Award—Additional interest—Confirmation of title—Diligence—The Railway Act, ss. 162, 170, 172.

On a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent. on the amount of an award previously deposited into court under section 170 of the Railway Act, and praying further, that the company should be enjoined and ordered to proceed to confirmation of title in order to proceed to the distribution of the money, the company pleaded that the court had no power to grant such an order, and that the delays in proceeding to confirmation of title had been caused by the petitioner, who had unsuccessfully appealed to the higher courts for an increased amount.

Held, reversing the judgment of the courts below, that, by the term of section 172 of the Railway Act, it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon.

Held further, that, assuming the court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title.

The Railway Act, section 172, FOURNIER, J., dissenting.

Appeal allowed with costs.

H. Abbott, Q.C., for the appellant.

Branchaud, Q.C., for the respondent.

Nova Scotia.] [May 1.

CITIZENS' INSURANCE COMPANY *v.* SALTERIO.

Fire insurance—Condition in policy—Assignment of policy—Change of title in property insured.

A condition in a policy of insurance against fire provided that the policy should not be assignable without the consent of the company indorsed thereon, and that in the event of any sale, transfer, or change of title in the property insured, the liability of the company should thenceforth cease. S., the insured under this policy, gave a chattel mortgage to a creditor of all his stock-in-trade insured thereby, and also "all policies of insurance on said stock and all renewals thereof." The consent of the company to the giving of this mortgage was not indorsed on the policy.

Held, reversing the decision of the Supreme Court of Nova Scotia, that as the chattel mortgage and subsequent transactions showed that S. intended the policy to pass to the creditor, there was a breach of the condition, and the policy was void.

Held, further, that though the chattel mortgage was not a "sale" or "transfer" of the insured property within the meaning of the condition, it was a "change of title" therein which freed the company from liability.

Appeal allowed with costs.

Newcombe, Q.C., for the appellants.

Chisholm for the respondent.

Nova Scotia.] [May 1.

STUART *v.* MOTT.

Res judicata—Different causes of action.

S., in 1883, brought a suit for specific performance of an alleged verbal agreement by M. to give him one-eighth of his—M.'s—interest in a gold mine. At the hearing, M. denied the alleged agreement, but admitted that, in order to prevent S. from acting in the interest of rival mine-owners, he had promised to give him one-eighth of his interest in the proceeds of the mine when sold. Judgment was given against S. in the suit, on the ground that his alleged agreement was within the Statute of Frauds, and void for not being in writing. Some years afterwards, the mine having been sold, S. brought another action against M. for payment of the share in the proceeds which M. had admitted he promised to give him.

Held, reversing the decision of the Supreme Court of Nova Scotia (24 N.S. Rep. 526), that the judgment in the former suit for specific performance was not *res judicata* of the claim made by S. in his subsequent action.

Appeal allowed with costs.

Osler, Q.C., and *Newcombe* for the appellant.

Borden, Q.C., and *Mellish* for the respondent.

New Brunswick.] [May 1.

ST. JOHN GASLIGHT CO. *v.* HATFIELD.

Master and servant—Common employment—Negligence—Questions of fact—Finding of jury.

The St. John Gaslight Co. being engaged in laying a main through one of the public streets of the city applied to one Wisdom, a plumber and gasfitter,

for the services of a competent man, and H. was sent by Wisdom to work on said main. While H. was working at one end of a pipe he was injured by gas escaping therefrom being set on fire from a salamander, used in carrying on the work, and exploding. One of the servants of the company whose duty it was to turn on the gas at this pipe every evening, and turn it off every morning, had neglected to turn it off the morning the accident happened, and there was evidence that the salamander had been moved from its usual place, and put near the end of the pipe where H. was working by order of the manager of the company.

In an action by H. for damages from such injury, the jury found that the company was guilty of negligence, and that H., at the time of the injury, was not in the service of the company, but in that of Wisdom. A verdict in favour of H. was sustained by the Full Court.

Held, affirming the decision of the Supreme Court of New Brunswick, that the finding as to negligence was warranted by the evidence.

Held, further, that whether or not there was a common employment between H. and the servants of the company was a question of fact, and the jury having found that H. was not in the service of the company their finding would not be interfered with on appeal.

Appeal dismissed with costs.

Hazen for the appellants.

Currey for the respondent.

New Brunswick.] [May 10.

GRANT *v.* MACLAREN.

Executors and trustees—Probate Court—Passing of accounts—Res judicata.

G. was executor and trustee under a will, and as such passed his accounts yearly in the Probate Court. The accounts so passed contained all the charges and disbursements of G., both as executor and trustee, and the beneficiaries under the will were not represented by counsel on any occasion before the Probate Court. A suit in equity having been brought to remove G. from his position as executor and trustee, the judge in equity, before entering upon the merits, ordered a reference to take the accounts of G., and the referee reported that, having taken them, a number of items were disallowed as improper charges. On exceptions to this report, the equity judge held that the action of the Probate Court in reference to the accounts was final, and not open to review by the court in such suit. On appeal, this ruling was reversed by the Supreme Court of New Brunswick, and the referee's report confirmed. On appeal to the Supreme Court of Canada,

Held, affirming the decision of the court appealed from, that the Probate Court had no jurisdiction over the accounts of G. as a trustee; and as it appeared that the items disallowed related to the duties of G. in that capacity, the referee could properly deal with them.

Held, further, that the Supreme Court would not reconsider the items dealt with by the referee, as he and the Supreme Court of New Brunswick had exercised a judicial discretion as to the amounts, and no question of principle was involved.

The plaintiffs' bill in the equity suit set out a letter written by G. to one of the plaintiffs, threatening that if proceedings were taken against him to make disclosures of malpractices by the testator which might result in heavy penalties being exacted from the estate.

Held, that this was such an improper act by G. that the court should have immediately removed him from the trusteeship of the estate.

Appeal dismissed with costs.

McLeod, Q.C., and *Palmer*, Q.C., for the appellants.

Hazen for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From Chy. Div.] [June 30.

GRANT *v.* NORTHERN PACIFIC JUNCTION RAILWAY COMPANY.

Railways—Carriers—Connecting lines—Misdelivery of goods—Principal and agent—Consignor and consignee.

This was an appeal by the defendants from the judgment of the Chancery Division, affirming that of STREET, J., reported 22 O.R. 645, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 19th of March, 1894.

J. McGregor and *R. G. Smyth* for the appellants.

W. Nesbitt and *T. Wells* for the respondents.

At the conclusion of the argument the appeal was dismissed with costs.

From ARMOUR, C.J.] [June 30.

MERIDEN BRITANNIA COMPANY *v.* BRADEN.

Bills of sale and chattel mortgages—Simple contract creditors—"Void as against creditors"—55 Vict., c. 26, s. 2 (O.).

"Void as against creditors," in s. 2 of 55 Vict., c. 26 (O.), which extends the provisions of the Act respecting mortgages and sales of personal property to simple contract creditors suing on behalf of themselves and other creditors, must be read "voidable as against creditors," and it is not until an election is made by the simple contract creditors so suing, by the commencement of proceedings to attack it, that it is too late to validate a defective chattel mortgage by taking possession under it, and a sale of the goods by the mortgagee before action cannot be impeached.

Quære: Whether such election can be brought by a simple contract creditor whose debt is not due.

Judgment of ARMOUR, C.J., reversed.

J. J. Scott and *A. M. Macdonell* for the appellants.

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

From ROSE, J.] [June 30.

SHERATT *v.* MERCHANTS BANK OF CANADA.

Husband and wife—Gift—Chose in action.

A husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.

A gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it.

Judgment of ROSE, J., affirmed.

McCarthy, Q.C., and *E. M. Malloch* for the appellants.

Watson, Q.C., and *J. M. Rogers* for the respondent.

From Q.B. Div.] [June 30.

JOHNSON *v.* GRAND TRUNK RAILWAY COMPANY OF CANADA.

Negligence—Evidence—Railways—Release.

This was an appeal by the defendants from the judgment of the Queen's Bench Division (*ante* p. 276), and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th and 29th of May, 1894.

Osler, Q.C., for the appellants.

Stuart Livingston for the respondent.

June 30th, 1894. The appeal was dismissed with costs, the court agreeing with the reasons given in the court below.

From FERGUSON, J.] [June 30.

EVANS *v.* KING.

Will—Construction—Estate tail—Shelley's case—Intention.

A testator, by the third clause of his will, devised certain lands "to my son James for the full term of his natural life, and, from and after his decease, to the lawful issue of my said son James to hold in fee simple; but, in default of such issue him surviving, then to my daughter Sarah Jane for the term of her natural life; and, upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane to hold in fee simple; but, in default of such issue of my said daughter Sarah Jane, then to my brothers and sisters and their heirs in equal shares." By a later clause the testator added: "It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will."

Held, reversing the judgment of FERGUSON, J., 23 O.R. 404, that the clauses must be read together, and that, having regard to the latter clause, and to the direction that the issue of James were to take in fee simple, there was a sufficiently clear expression of intention to give James a life estate only to prevent the application of the rule in Shelley's case.

J. Bicknell for the appellant.

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

From MEREDITH, J.] [June 30.

MCMILLAN *v.* MCMILLAN.

Mortgage—Priorities—Assignment—Payments by stranger.

This was an appeal by the plaintiff from the judgment of MEREDITH, J., reported 23 O.R. 351, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 22nd and 23rd of May, 1894.

June 30th, 1894. The appeal was dismissed with costs, the majority of the court holding that, on the evidence, the payments in question had not been made with any intention of taking over the mortgage.

MACLENNAN, J.A., held that the payments had been made with this intention, that the plaintiff had sufficient interest in the mortgage, owing to the possibility of his own lands being resorted to to make good any deficiency, to entitle him to make the payments, and that he had an equitable lien for the amounts paid, but that this unregistered equitable lien was cut out by the respondent's registered mortgage.

Hoyles, Q.C., for the appellant.

W. H. Blake for the respondent.

From C.P. Div.] [June 30.

SAMUEL ET AL. *v.* FAIRGRIEVE ET AL.

Bills of exchange and promissory notes—Patent of invention—Transfer of patent—"Given for patent right"—53 Vict., c. 33, s. 30, s-s. 4 (D.)—Consideration—Composition agreement.

Subsection 4 of section 30 of the Bills of Exchange Act, 1890, 53 Vict., c. 33 (D.), requiring notes, the consideration of which consists in whole or in part of the purchase money of a patent right, to have thereon the words "given for a patent right," does not apply to notes given by a firm to cover the individual indebtedness of one of the partners, part of the consideration to the unindebted partner for joining in the notes being, to the knowledge of the creditor, the transfer to him by the indebted partner of an interest in a patent.

An advance of money by a creditor to a debtor whose debt has been released by a composition agreement is sufficient consideration for notes given by that debtor and his partner to the creditor for part of the released debt.

Judgment of the Common Pleas Divison, 24 O.R. 486, reversed.

Watson, Q.C., and *J. Parkes* for the appellants.

Moss, Q.C., and *C. W. Thompson* for the respondents.

From ARMOUR, C.J.] [June 30.

TOWN OF TRENTON *v.* DYER.

Assessment and taxes—Roll—Certificate of clerk—Collector—Bond—R.S.O., c. 193, s. 120.

The provision contained in s. 120 of the Assessment Act, R.S.O., c. 193, requiring the clerk to deliver to the collector the roll, "certified under his hand," though possibly directory as to time, is imperative as to the certificate,

and a roll, unsigned by the clerk, is not sufficient authority to entitle the collector to distrain, and he and his sureties are not liable, under their bond, for the amount of uncollected taxes.

Judgment of ARMOUR, C.J., reversed, BURTON, J.A., dissenting.

J. A. O'Rourke and *A. A. Abbott* for the appellant.

Marsh, Q.C., for the respondents.

From ROSE, J.] [June 30.

PALMATIER *v.* MCKIBBON.

Ways—Dedication—50 Geo. III., c. 1—"Omnia præsumuntur rite esse acta."

A road was surveyed in 1834, and the surveyor's report was made to the Quarter Sessions in that year. The records were, however, lost or destroyed, and there was no evidence that the road had been adopted by the Sessions under the Act then in force, nor was there any order directing it to be opened. It was, however, actually opened in 1853 with the assent of the owners of the land, and was used for several years, and statute labour was done upon it.

Held, that the maxim, "*Omnia præsumuntur rite esse acta*," applied, and that the due adoption of the road by the Quarter Sessions should be presumed.

Held, also, that the evidence of the dedication was sufficient.

Held, also, *per* MACLENNAN, J.A., that the expressions "laying out" and "opening" a road are used in the Act 53, Geo. III., c. 1, in an equivalent sense, and that actual work on the ground is not required before the road becomes a public highway.

Judgment of ROSE, J., reversed.

Aylesworth, Q.C., for the appellant.

Clute, Q.C., for the respondent.

From Chy. Div.] [June 30.

INNES *v.* FERGUSON.

Statute of Limitations—Prescription—Easement.

The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner.

Judgment of the Chancery Division reversed.

Bayly, Q.C., for the appellant.

Purdom for the respondent.

From ROSE, J.] [June 30.

KERRY *v.* JAMES.

Bills of sale and chattel mortgages—Agreement to give security—R.S.O., c. 125, s. 6—Assignments and preferences—55 Vict., c. 26, s. 2 (O.).

An assignee for the general benefit of creditors is, by virtue of 55 Vict., c. 26, s. 2 (O.), entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor to the same extent as an execution creditor.

As against such an assignee an oral agreement, of which he has notice, by the assignor to give to an endorser a chattel mortgage to secure him against liability, will be enforced.

Judgment of ROSE, J., affirmed.

R. S. Cassels for the appellant.

Gibbons, Q.C., for the respondents.

From County Court, York.] [June 30.

HOWDEN *v.* LAKE SIMCOE ICE CO.

Negligence—Nuisance—Highway.

Allowing a broken wagon to remain on the highway for nearly two hours is not in itself sufficient evidence of negligence to support an action by a person who strikes against the wagon while passing in a street car. Such a broken wagon does not become a nuisance or obstruction to the highway until, having regard to the difficulty of removing it, it has been allowed to remain thereon for an unreasonable time.

Judgment of the County Court of York affirmed.

Kappele for the appellant.

Bruce, Q.C., for the respondent.

From FALCONBRIDGE, J.] [June 30.

ROBERTS *v.* MITCHELL.

Negligence—Nuisance—Highway—Damages—Overhanging cornice.

The owner of a building, from which a cornice overhanging the sidewalk falls because the nails fastening it to the building have become loosened by ordinary decay and injures a passer-by, is liable in damages without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection.

Judgment of FALCONBRIDGE, J., affirmed.

Osler, Q.C., for the appellant.

G. F. Henderson for the respondent.

From Q.B. Div.] [June 30.

OSTROM *v.* BENJAMIN.

County Court—Jurisdiction—Claim over $300—Liquidated or ascertained amount—R.S.O., c. 47, s. 19, ss. 2.

Whenever a sum up to $400 is agreed on by the parties as a remuneration for a service to be performed or as the price of any article sold, if the service be performed or the article be delivered in pursuance of the bargain, the amount may be recovered in the County Court, denial of the contract and price not availing to oust the jurisdiction.

Robb v. Murray, 16 A.R. 503, considered.

Judgment of the Queen's Bench Division affirmed, OSLER, J.A., dissenting.

F. E. Hodgins for the appellant.

A. J. Russell-Snow for the respondent.

From ARMOUR, J.] [June 30.

JARVIS *v.* CITY OF TORONTO.

Registry Act—Easement—Notice—Equitable interest.

A municipal council who, with the oral consent of the owner, built a sewer through land, acquire an equitable right to compel a conveyance of so much of the land as is occupied by the sewer, but a purchaser of the land without notice of the consent or of the existence of the sewer is protected by the Registry Act.

Judgment of ARMOUR, C.J., affirmed.

E. D. Armour, Q.C., and *H. M. Mowat* for the appellants.

Moss, Q.C., and *W. D. McPherson* for the respondent.

From C.P. Div.] [June 30.

MILLOY *v.* GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railways—Carriers—Warehousemen.

When a shipper stores goods from time to time in a railway warehouse, loading a car when a carload is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire the shipper has no remedy against the company.

Judgment of the Common Pleas Division, 23 O.R. 454, reversed.

H. S. Osler for the appellants.

Fullerton, Q.C., for the respondents.

From Chy. Div.] [June 30.

TAYLOR *v.* BRANDON MANUFACTURING CO.

Patent of invention—Novelty—Specifications—Ambiguity.

There is no inventive merit in making in one piece the cap-bar and protector of a washing machine, the cap-bar and protector having been previously made in two separate pieces.

A specification providing merely that such a protector is to be arranged at an angle is void for uncertainty.

Judgment of the Chancery Division affirmed.

Osler, Q.C., for the appellant.

Shepley, Q.C., for the respondents.

From ROBERTSON, J.] [June 30.

SCULLY *v.* ROBERTSON.

Mortgage—Payment—Solicitor.

The onus of showing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal is upon the mortgagor, and, unless this onus is clearly discharged, the mortgagor, and not

the mortgagee, must bear the loss arising from the solicitor's misappropriation of the funds.

Judgment of ROBERTSON, J., reversed.

Watson, Q.C., for the appellants.

W. H. Blake for the respondents.

From FALCONBRIDGE, J.] [June 30.

WATEROUS ENGINE WORKS CO. *v* MCCANN.

Mortgage—Fixtures—Machinery—Lien agreement—Fire insurance.

The plaintiffs sold certain mill machinery under an agreement which provided that a mortgage of the mill property was to be given to them by the purchasers to secure the price; that the machinery was not to form part of the real estate, but was to remain personal property; that the title was not to pass till payment of the price; and that the plaintiffs might insure the machinery.

After the machinery was placed in the mill the purchasers gave to the plaintiffs a mortgage on the mill property and all machinery therein, and this mortgage contained a covenant to insure.

After this the plaintiffs insured the mill and machinery, and the purchasers, without their knowledge, also placed insurance thereon.

The mill and machinery were destroyed by fire, and the plaintiffs were unable to recover owing to the breach of condition, and claimed the benefit of the purchasers' insurance of the machinery.

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., affirming the judgment of FALCONBRIDGE, J., that the plaintiffs were entitled to the money payable to the purchasers under their policy, the mortgage being the governing instrument.

Per BURTON and OSLER, JJ.A.: That they were not so entitled, the machinery being, by the agreement, personal property, and not included in the mortgage or protected by the covenant to insure.

F. A. Anglin for the appellants.

W. H. Blake for the respondents.

From Q.B. Div.] [June 30.

GIBSON *v.* TOWNSHIP OF NORTH EASTHOPE.

Drainage—Petition—Withdrawal.

The plaintiff, in 1884, after signing a petition for the construction of a drain wrote to the council objecting to the work for reasons set out, but in 1885 the council passed the necessary by-law, and issued debentures. Subsequently, the plaintiff gave notice of his intention to move to quash the by-law, but afterwards he withdrew this notice and tendered for the work. In 1889 he attacked the by-law, alleging, among other grounds, that it was void by reason of his withdrawal.

Held, per HAGARTY, C.J.O., that before 53 Vict., c. 50, s. 35 (O.), a petitioner could not withdraw.

Per BURTON, J.A.: That there was no power of withdrawal, and that in any event the question whether there had been withdrawal or not was for the council.

Per OSLER and MACLENNAN, JJ.A.: That there was a power of withdrawal, but that the plaintiff was estopped from maintaining the action, his conduct having been such as to induce the council to believe that their jurisdiction was not contested.

Judgment of the Queen's Bench Division reversed.

Idington, Q.C., for the appellant.

J. B. Rankin for the respondent.

From C.P. Div.] [June 30.

COUNTY OF LINCOLN *v.* CITY OF ST. CATHARINES.

Municipal corporations—Road.

Under the legislation relating to the Queenston and Grimsby Road and the city of St. Catharines, that city is not liable to pay to the county of Lincoln any part of the expenditure of the latter in connection with that road.

Judgment of the Common Pleas Division affirmed.

S. H. Blake, Q.C., and *J. C. Rykert* for the appellants.

Aylesworth, Q.C., and *F. W. Macdonald* for the respondents.

HIGH COURT OF JUSTICE.

Practice.

Court of Appeal.] [June 30.

RATLF *v.* BOOTH.

Reference—O.J.A., s. 101—Assessment of damages—Discretion—Appeal.

The right of the trial judge to refer the question of damages, as a question arising in the action, under s. 101 of the Judicature Act, is indisputable, at all events as a matter of discretion, and subject to review; and it is for the party objecting to the reference to show that the discretion has been wrongly exercised.

And where, in an action for damages for injury to the plaintiff's land on the bank of a navigable river, and to his business as a boatman, by the acts of the three several defendants, who owned sawmills higher up on the stream, in throwing refuse into it, it appeared that the plaintiff's title to relief and the liability of the defendants had been established in a former action, and the trial judge heard the case only so far as to satisfy himself that the plaintiff had established a *prima facie* case on the question of damages, and directed a reference to assess and apportion them among the defendants, reserving further directions and costs;

Held, that there was no miscarriage, and the discretion of the trial judge should not be overruled.

McCarthy, Q.C., and *A. C. Sinclair* for the appellants.

Moss, Q.C., for the respondent.

Court of Appeal.] [June 30.

KNICKERBOCKER *v.* RATZ.

Costs—Settlement of action—Power of master or judge in chambers to dispose of costs—Consent—Principle of decision—Circumstances of case—Appeal.

An appeal by the plaintiffs from an order of a Divisional Court of the Chancery Division, 16 P.R. 30, affirming, as the result of a disagreement, an order of a Judge in Chambers, reversing an order of the Master in Chambers, upon a summary application, disposing of the costs of the action in favour of the plaintiffs, was allowed and the Master's order restored.

Held, (1) That he had a jurisdiction to make the order, which did not necessarily depend upon consent of the parties to go before him.

North v. *Great Northern R.W. Co.*, 2 Giff. 64, and *Thompson* v. *Knights*, 7 Jur. N.S. 704, followed.

(2) That the Judge in Chambers had exercised his discretion and reversed the Master's order upon a wrong principle, and his discretion was appealable.

Wansley v. *Smallwood*, 11 A.R. 439, and *Crowther* v. *Elgood*, 34 Ch.D. 691, followed.

(3) Agreeing with the opinion of BOYD, C., in the court below, that when the action was begun the circumstances justified it, and there was nothing to take the case out of the ordinary rule that the person in the wrong shall answer in costs.

Proctor v. *Bayley*, 42 Ch.D. 390, distinguished.

W. M. Douglas for the appellants.

W. H. P. Clement for the respondents.

MANITOBA.

COURT OF QUEEN'S BENCH.

Full Court.] [July 9.

COMMERCIAL BANK *v.* ROKEBY.

Demurrer—Duress—Promissory notes signed under threat of criminal prosecution—Undue influence.

Rehearing of demurrer to pleas overruled by Mr. JUSTICE BAIN.

The action was to recover a balance due upon certain promissory notes signed by the defendant, who had paid considerable sums on account.

The first plea demurred to alleged that the defendant had been induced to sign the notes in question by threats of a criminal prosecution in settlement of a claim preferred against him by the plaintiff, for which defendant was not really liable; that he had acted without legal or independent advice, and had been induced to believe that he was liable for the amount, and had signed the notes in that belief, and in consequence of such threats, although he had not really committed any crime in connection with the matter.

The other plea was one of counterclaim for the moneys paid on account of said notes, but it did not allege that such payments had been made under the influence of such threats or other pressure or undue influence.

Held, as to the first plea (DUBUC, J., dissenting), that it showed sufficient grounds in equity for granting relief to the defendant, as the contract was shown to have been entered into solely in consequence of threats and undue influence, and not voluntarily, and that the defendant was not a free agent, but acted under the influence of fear.

McClatchie v. *Haslam*, 65 L.T.N.S. 691, and *Asbaldiston* v. *Stewart*, 13 Sim. 513, followed.

Held, also, that the plea of counterclaim could not be supported, as it did not show that the payment in question had been made in consequence of any fresh threats or undue influence or pressure

Demurrer to first plea overruled, and to second plea allowed without costs of rehearing in either case.

Tupper, Q.C., and *Phippen* for the plaintiff.

Howell, Q.C., and *Machray* for the defendant.

Full Court.] [July 9.

WARK v. CURTIS.

Demurrer—Allegation that defendant contracted by deed—Contract not under seal signed by one partner in firm's name without authority from co-partner—Partner signing liable.

Rehearing of demurrer allowed by TAYLOR, C.J.

The Full Court reversed the judgment noted *ante* p. 290, and overruled the demurrer on the ground that it was not alleged in the court demurred to that the agreement set out had been executed under seal. The agreement, as given *verbatim* in the declaration, concluded with the words: "In witness whereof the said parties hereto have hereunto set their hands and seals," and the signatures were copied with the letter "S" after each, but the declaration did not allege that the defendant contracted by deed or under seal, and the court held that they could not infer from the use of the words quoted that the agreement had been under seal.

Appeal allowed, and demurrer overruled without costs.

Hagel, Q.C., for the plaintiff.

Culver, Q.C., for the defendant.

Full Court.] [July 9.

THE QUEEN *v.* HOLMAN.

Dominion Elections Act, R.S.C., c. 8—Ballot-box stuffing—Deputy returning officer not formally appointed can be convicted under s. 100, s-s. (c), if he has acted in the office.

This was a case reserved for the opinion of the court as to whether a deputy returning officer who acted as such, but was not appointed by a commission under the hand of the returning officer, as prescribed by s. 30 of the Dominion Elections Act, R.S.C., c. 8, can be convicted of the misdemeanour made punishable by s-s. (*c*) of s. 100 of the Act.

The accused acted during the whole of the polling day as deputy returning officer at one of the polling booths. He had received from the returning officer

an appointment of a deputy signed by him with the blank for the name not filled up.

He was convicted of fraudulently putting into the ballot-box ballots that he was not authorized to put in.

Held, following *Rex* v. *Gordon*, 2 Leach 581; *Rex* v. *Holland*, 5 T.R. 607; and *Rex* v. *Dobson*, 7 East 218, that the accused having acted in the office, and having been the deputy returning officer *de facto* on the day in question, was properly convicted of the offence charged.

Howell, Q.C., for the Crown.

Hagel, Q.C., and *Phippen* for the prisoner.

Full Court.] [July 9.

BENNETT v. ATKINSON.

Sale of wheat—Liability of principal when agent supplied with cash to pay for goods purchased—Receipt of goods by purchaser—Principal and agent—Admissions of agent, when evidence.

The defendants employed one Isaac Bennett, in the fall of 1891, to purchase wheat for them at Virden, and supplied him with printed forms of receipts to be given to persons delivering the grain, as follows:

"Grain Warehouse, Virden,

'89–.

"Received from bushels No. wheat at per bushel.

"Amount $ "ATKINSON & Co.

"*Per*

"N.B.—This ticket will not be honoured unless written with ink or indelible pencil, and indorsed by person receiving payment."

They instructed their agent that he was to put the wheat he bought for them into the elevators of McBean Bros., and ship it out from time to time as they required it. In pursuance of an arrangement made either by the defendants themselves or their said agent with Messrs. McBean Bros., the latter had set apart three bins in their elevator for the defendant B.'s wheat, and the defendants knew that McBean Bros. were receiving wheat for them at the time, and paid for the privilege. One Colter was in charge of the elevator for McBean Bros.; he did the weighing, and defendants' buyer handed to him the printed forms of receipts or tickets.

The practice proved was that the buyer, after fixing prices and grades with the seller, would direct him to deliver the grain at the elevator, when Colter weighed it, filled up the blanks in one of the receipt forms, first getting the price and grade from the buyer, and then gave the receipt to the seller. The latter would then take the receipt to the defendants' buyer and get his money.

The plaintiff's claim was for 1,112.30 bushels at 50 cents per bushel, and 486.46 bushels at 56 cents, and two receipts for these amounts dated 24th October, 1891, were produced and proved. These receipts were in the above

form, filled up by Colter, and initialled by him after the word *per*, under the name "Atkinson & Co."

Colter proved the delivery of the wheat mentioned in the receipts, and that the defendant's buyer had, after the delivery of all the wheat, told him the prices and qualities to be inserted in the receipts, which he then issued in the usual way to the plaintiff.

Neither the plaintiff nor Isaac Bennett was called as a witness. One of the defendants swore that they got the elevator man bound by the weight and his tickets; that these tickets were usually cashed by the man buying and returned to the defendants; that the defendants would ascertain the wheat bought and the price paid from the elevator books and shipments received; that the buyer rarely sent any reports of what he was buying; that Isaac Bennett was to buy for cash and was supplied with the cash, and that he had no authority to buy for them otherwise than for cash; that the defendants gave him no authority to buy on credit, and that they had settled with him.

The action was tried before TAYLOR, C.J., who entered a nonsuit, on the ground that the plaintiff has failed to prove any agreement on the part of the defendants to pay for the wheat at the price alleged.

Held, KILLAM, J., dissenting, that the defendants were not liable, as their agent had no authority to buy for them except for cash, and they had supplied him with the cash, and it was not proved that they had actually received the wheat.

Per BAIN, J.: That the statements of the agent as to the prices having been made after the transaction was concluded, and not as part of the *res gestæ*, would not have been admissible as evidence if objected to at the trial before the close of the plaintiff's case; but not having been objected to, they should now be held sufficient.

Per KILLAM, J.: The plaintiff's case was sufficiently proved, for the evidence showed that the agent was authorized to buy on the very terms on which he did buy, and that he was not to pay cash before delivery of the wheat. There was no evidence to show that he bought on credit or that the plaintiff was not entitled to demand his money immediately on getting the tickets, as the property in the wheat passed to the defendants upon the delivery at the elevator.

Judgment of nonsuit affirmed and appeal dismissed with costs.

Ewart, Q.C., and *Wilson* for the plaintiff.

Culver, Q.C., and *Hough*, Q.C., for the defendants.

Full Court.] [July 9.

COMMERCIAL BANK VS. ALLAN.

Promissory notes payable on demand with interest half-yearly on dates specified —Presentment for payment—Reasonable time—Discharge of indorser—Notice of dishonour—Writ of summons, service of, not equivalent to notice of dishonour.

Appeal from judgment of DUBUC, J., in favour of plaintiffs on both promissory notes sued upon.

The notes bearing date 1st November, 1890, were made by F. H. Brydges payable to defendant or order, and were indorsed by the defendant to the plaintiffs.

They were worded as follows: "On demand—months after date I promise to pay, etc., with interest at 10 per cent. payable half-yearly on 30th April and 31st October." Interest had been paid up to 30th April, 1892, but no further payments had been made. The first note was presented for payment and protested on 4th July, 1893.

Counsel for defendant contended as to this note:

(1) That the instrument was not a negotiable promissory note, not being payable at a fixed or determinable future period, and that defendant incurred no liability by simply indorsing it.

(2) That it had not been presented for payment within a reasonable time.

Held, affirming DUBUC, J., that it was a promissory note within the meaning of s. 82 of The Bills of Exchange Act, and that the indorser was liable upon it; also that there was nothing to show that it was not presented within a reasonable time, as the provision for payment of interest half-yearly showed that it was intended that the holder should have the option of demanding payment at once or postponing the demand for an indefinite period.

The court did not decide whether the plaintiffs could recover the overdue instalments of interest without having given notice of dishonour on each default in payment.

The second note sued on was presented for payment and dishonoured on 14th October, 1893, and the plaintiffs issued and served the writ of summons on the same day, but no notice of dishonour of this note before action was given, counsel for plaintiffs claiming that the service of the writ was sufficient notice of dishonour.

Held, reversing DUBUC, J., that plaintiffs could not recover on said note in this action for want of due notice of dishonour prior to the issue of the writ.

Appeal dismissed as to first note and allowed as to second note without costs.

Tupper, Q.C., and *Phippen* for the plaintiffs.

Howell, Q.C., and *Machray* for the defendant.

KILLAM, J.] [June 26.

IRISH *v.* DURHAM.

Demurrer—Pleading—Meaning of "drive"—Words in plea given same sense as in declaration.

The plaintiff declared against the defendants that they had with force and arms driven and struck a horse and carriage, which they were then driving, upon and against the plaintiff, who was then lawfully on a public highway, with such force and violence that the plaintiff was knocked down and trampled upon, etc. One of the defendants pleaded not guilty; also that he was not driving the said horse and carriage as alleged. To this plea the plaintiff demurred, claiming that it was not a sufficient answer to the declaration, for that the defendant might have been in control of the vehicle although not actually holding the reins, and that the person who was actually driving

might have been his servant or under his control, and that the plea should have negatived this as well as denying the actual driving.

Held, that if the word "driving" in the declaration extended to the control of the vehicle, where the person had not actually the reins in his hands, it would have the same extended meaning in the defendants' plea, and that the demurrer should be overruled.

Mathers for the plaintiff.

Mulock, Q.C., for the defendants.

KILLAM, J.] [July 3.

GILLIES *v.* THE COMMERCIAL BANK OF MANITOBA.

Banking Act—Security for debt to bank—Covenant to pay creditors of covenantee—Trust in favour of stranger to the deed—Relief against trustee not answering, when co-defendants, the cestui que trustent, succeed in their defence—Specific performance of agreement to pay plaintiff's creditors.

This was a suit in equity in which the plaintiff sought to compel specific performance of an agreement of the defendant bank to pay certain creditors of the plaintiff out of the proceeds of real estate and chattels mortgaged to the bank to secure its claim against the plaintiff.

The bank's claim exceeded the amount realized by the sale of the securities, and it claimed the right of set-off, whereas the plaintiff claimed that the bank was bound under the terms of their covenant contained in the chattel mortgage in question to apply the moneys realized in payment of the trade or commercial creditors of the plaintiff.

The plaintiff was carrying on a mercantile business, and being indebted to the bank and other creditors in large amounts applied to the bank for assistance, when an arrangement was entered into between the bank and the plaintiff whereby the plaintiff mortgaged to the bank certain real estate and all her stock-in-trade, and all future stock to be acquired during the currency of the mortgage, and assigned all the book debts, and agreed to assign all future book debts of the business, as security for the debt to the bank.

The chattel mortgage, besides the usual provisos for redemption, seizure, and sale in case of default, etc., for application of the proceeds and covenants for payment, contained a covenant on the part of the bank to pay "the commercial or trade indebtedness of the mortgagor and the expenses of running the business, etc., from and out of the proceeds of the sale of said goods, chattels, and stock-in-trade, and the proceeds of the collections of said book accounts and debts now being assigned to them, but so as that the same shall not increase the present indebtedness due from said mortgagor to said mortgagees beyond the amount now due for principal under these presents, and any interest due or accruing due thereon to said mortgagees as hereinbefore provided."

This covenant of the bank was given to enable the plaintiff to obtain credit in carrying on her business.

The plaintiff, as part of the same agreement, kept her bank account with the defendants' bank, and deposited with it, from day to day, the receipts from

her business, and made all payments in connection therewith by cheques against this account, except petty cash items.

On or about the 1st of March, 1893, the plaintiff, being indebted to the bank in the sum of $5,975, and being in default, the bank entered upon the premises, took possession of the property, and sold both land and stock-in-trade, having completed the transfers and received the purchase money before the filing of the bill of complaint herein. The amount thus realized was not sufficient to pay the plaintiff's indebtedness to the bank.

Held, (1) that the securities taken were valid under s. 48 of the Banking Act then in force, R.S.C., c. 120.

(2) That the plaintiff had no equity under the circumstances to compel the bank to perform its covenant to pay her creditors without offering to perform the agreement on her part, and to pay her debt to the bank.

(3) That under the circumstances no trust was created by the said covenant of the bank in favour of the creditors referred to therein, such covenant having been intended to refer only to the proceeds of the plaintiff's sales, and to deposits and collections of book debts while the business was being carried on, and having been given only with a view to enable the plaintiff to keep the business going. *Gandy* v. *Gandy*, 30 Ch.D. 67; *Gregory* v. *Williams*, 3 Mer. 582, referred to on this point.

The purchaser of the mortgaged land sold by the bank was made a party to the suit, and the bill claimed that the sale to him was invalid, and asked that the deed to him should be set aside, and a declaration made that he held it merely as trustee for the bank. He did not defend, and the bill was taken *pro confesso* against him.

Held, nevertheless, that as the case failed against the bank, no decree could be made against the purchaser, and that the bill should be dismissed as against both defendants.

Bill dismissed with costs.

Howell, Q.C., and *Darby* for the plaintiff.

Tupper, Q.C., and *Phippen* for the defendants.

DUBUC, J.] [July 3.

BUDD *v.* MCLAUGHLIN.

Misrepresentation—Rescinding contract for—Warranty or misrepresentation—Fraudulent concealment of unsoundness of horse.

The plaintiff filed his bill setting out that the defendant had, by false and fraudulent representations as to the soundness of the animal, induced the plaintiff to purchase a stallion for $500, and to give his promissory notes therefor, secured by a mortgage on his farm, and claiming a rescission of the contract and cancellation and delivery up of the notes and mortgage.

The plaintiff, during negotiations for the sale, having asked for, and the defendant having promised to give him, a warranty as to soundness, etc., the defendant, after the sale and delivery of the horse was complete, sent to the plaintiff a paper worded as follows: "I certify that the horse, Pride of

Oxford, etc., has been an average foal-getter while in my possession, but what he will do I cannot say, under other management," and signed by himself. Counsel for the defendant contended that this was a warranty, and that the plaintiff's rights were limited to whatever he could claim under it, that there was no warranty as to soundness, and that evidence could not be received of any warranty or misrepresentation outside of the written warranty delivered. The learned judge found on the evidence in favour of the plaintiff, and

Held, that all the circumstances connected with the sale could be inquired into, and that the evidence fully justified the conclusion that the defendant had been guilty of fraudulent concealment of the disease from which the horse was then suffering, and from which he died a few months afterwards; also that the plaintiff was entitled to have his contract rescinded, and to a decree as asked for in the prayer of the bill.

Derby v. *Peek*, 11 App. Cass. 359, and *Redgrave* v. *Hurd*, 20 Ch.D. 1, followed.

Decree for the plaintiff, with costs.

C. P. Wilson and *Baker* for the plaintiff.

Howell, Q.C., and *Machray* for the defendant.

DUBUC, J.] [July 5.

NANTON *v.* VILLENEUVE.

Tax sale—Effect of tax deed—Description of land—Proceeding under repealed statute—Effect of validating clauses of Assessment Act—R.S.M., c. 101, ss. 190 and 191.

Trial of issue under The Real Property Act.

The plaintiff claimed the inner and outer two miles of lot No. 59 under a tax sale deed from the rural municipality of St. Francois Xavier, dated October 18th, 1893.

The defendants were the owners of the land at the time of the tax sale.

No evidence was given to show that the tax sale deed had been made and executed in duplicate, as required by section 187 of the Assessment Act, R.S.M., c. 101.

Held, that this was no objection to the validity of the sale.

O'Brien v. *Cogswell*, 17 S.C.R. 420, distinguished as to this point.

The next objection taken by the defendant was that the old seal of the municipality had been used, whilst the name of the municipality had been changed. The present municipality had, however, adopted the old seal.

Held, following *McCrae* v. *Corbett*, 6 M.R. 426, that this objection was not fatal.

The warrant given by the reeve of the municipality authorizing the treasurer to hold the tax sale was dated August 18th, 1891, and professed to be given under the Municipal Act of 1886. This Act, however, was repealed by the Municipal Act of 1890, which came in force June 1st of that year.

Held, that the warrant was for this reason invalid, and conferred no authority on the treasurer to sell the lands in question.

The statute requires that the assessor shall enter every piece or parcel of land on the assessment roll by a true and accurate description thereof. The land in question was described on the assessment roll simply as "lot 59," but it was advertised for sale as "the inner and outer two miles of lot 59," and was so described in the tax deed under which the plaintiff claimed.

The district registrar gave evidence to show that "lot 59" would include only the inner two miles of the lot.

As to this objection, the learned judge apparently inclined to adopt the view of the district registrar, but expressed no decided opinion.

Upon the whole case, however, it was

Held, following *O'Brien* v. *Cogswell*, 17 S.C.R. 420; *Archibald* v. *Yonville*, 7 M.R. 473; and *Alloway* v. *Campbell*, 7 M.R. 506, that the provisions of sections 190 and 191 of chapter 101 of the R.S.M., as amended by sections 6 and 7, chapter 26, 55 Vict., did not extend to cover irregularities and defects connected with the assessment, the imposition of the rate and other steps required to be taken before land could be sold for taxes, and that the tax sale in question was, therefore, void.

Verdict for defendant without prejudice to any claim of plaintiff for a lien for taxes paid by him.

Munson, Q.C., and *Bezvisto* for the plaintiff.

Ewart, Q.C., and *Coutlee* for the defendant.

Flotsam and Jetsam.

VACATION DREAM.

(By our Legal Lunatic.)

So now my vacation is over;
Oh, why did I wander to where
I lived not in peace or in clover,
Nor enjoyed a stray smile from the fair?

The stars glitter bright in the heavens,
Rich odours are borne on the breeze;
But, oh, for a breath of replevin,
Or a glimpse of the basest of fees!

No widow will have me, or spinster,
'Tis my "want of appearance," no doubt;
But in Melbourne or stately Westminster,
That would bring an "attachment" about.

So bring me my reckoning, waiter:
Call a Hansom and take me away
To the land where the coy *allocatur*,
Sings a song to the gallant *fi. fa.*

Yes, take me away to the court-land,
With text-books and precedents packed,
To assumpsit and trover and tort-land,
Where wives both expand and contract.

There I'll choose me a widow *discoverte*,
With a house and an ample rent-roll,
Or at large in the gay market *overt*
Trip it lightly with the tender *feme sole*.

Then be she as fat as a porpoise,
Or be she but *cutis* and bone,
I will issue a *habeas corpus*,
And have the dear dame for my own.

Her *wasts* will no more be a common,
I shall hold her affections in fee;
Though at one time affianced to some one,
She'll be *levant* and *couchant* with me.

To the feast I'll invite every Fiction,
Every lay-figure known to the Court,
But my fancy outruns all the diction
That would give an idea of sport.

Possession makes love to Reversion,
Defeasance is friendly with Bond,
While Cruelty calls on Desertion
To Marriage's toast to respond.

There is Larceny winking at Trover,
And Fraud arm-in-arm with Trustee,
And the Legal Estate is won over,
And drinks with the third Mortgagee.

Onus twirls in the waltz with Presumption,
And Fiction is flirting with Fact,
While both give the *pas* to Assumption,
And Argument's rights are intact.

Estoppel to Waiver makes overture,
Due Diligence waits on *Lachesse*,
Gentle Infancy's setting to Coverture,
And Lunacy romps with Duresse.

Then Divorce bids them all fill their glasses,
And dilates on the soul-stirring theme;
Co-respondent invites all the lasses
To drink deep to the *Baron* and *Feme*.

—*Australian Law Times.*

Law Students' Department.

LAW SCHOOL EXAMINATIONS.

Third Year Pass.

1. (*a*) What must a defendant show to bring a third party before the court?

(*b*) If the third party does not appear, how is he affected by the judgment in the action?

(*c*) If a third party appears, what rights has he as to delivering pleadings and obtaining order for production, and examination of the original parties to the action? Answer fully.

2. An official referee, to whom an action was referred, finds all the issues in favour of the plaintiff.

(*a*) What steps must the plaintiff take if he desires to enforce the findings?

(*b*) If the defendant is dissatisfied with the finding, what course is open to him?

3. A. issued a writ for foreclosure against B.

(*a*) What other relief may he claim in the same action?

(*b*) If there are subsequent incumbrancers, what steps must be taken to procure a final order of foreclosure?

4. If a plaintiff discontinues his action, or is nonsuited, or if his action is dismissed for want of prosecution, can he bring a second action for the same debt as was claimed in the first action?

5. (*a*) When is a pleading demurrable?

(*b*) When should the defence of the Statute of Limitations be raised by way of demurrer?

(*c*) If a pleading is demurred to, what course is open to the party whose pleading has been demurred to, and who is willing to submit to the demurrer without having the demurrer brought on for argument?

6. Has the court power to grant relief to a mortgagor who makes default on the payment of an instalment of principal or interest by reason of which the whole principal money becomes due and payable? Answer fully.

7. What cause of action may be joined without leave with an action for the recovery of land?

8. Point out clearly the distinction between a set-off and a counterclaim. Must a counterclaim be connected with the plaintiff's original cause of action? Answer fully.

9. (*a*) What defences must be specially pleaded?

(*b*) If a defendant intends to resist a claim on the ground of fraud, will it be sufficient for him to allege that he was induced to enter into the contract by the fraud of the plaintiff, or must he set out the circumstances from which the fraud is to be inferred?

10. What is the effect of a bare denial of a contract alleged in the statement of claim?

11. If the plaintiff in an action dies, can the action be continued in the

name of some other person? If so, what steps would you take to make such other person a party?

12. If a defendant intends to rely on a plea of "not guilty by statute," how must he plead so as to be allowed to give evidence under such plea?

Third Year Honours.

1. (*a*) What questions may be referred under section 102 of the Judicature Act? Answer fully.

(*b*) When may a reference under this section be to a special referee?

2. Point out clearly the right of a judgment creditor to examine persons other than the debtor to ascertain what means the debtor has to pay the creditor's claim, the persons that may be examined, and the steps that must be taken before such person can be examined.

3. (*a*) When will a counterclaim against a person other than the plaintiff be allowed?

(*b*) Draw the formal parts of a pleading (style of cause) when defendant sets up a counterclaim which raises a question between himself and the plaintiff along with some other person.

4. (*a*) When are the pleadings in an action deemed to be closed?

(*b*) If pleadings have been "noted," what is the effect of such noting?

5. A defendant maintains that a question in the action should be determined not only as between himself and the plaintiff, but as between the plaintiff defendant, and some other person.

Should such person be made a party, plaintiff, or defendant? What steps must be taken to bring them in, and what are the rights of such third person, after an application has been made to add him as a party, and after he has been added as a party?

6. A. If the High Court has no jurisdiction, how must the question of jurisdiction be raised (*a*) if the question of jurisdiction depends on disputed facts, (*b*) if the facts are not in dispute?

B. Is the entry of appearance always a submission to the jurisdiction? Answer fully.

7. (*a*) In what cases is a defendant entitled to an order for security for costs?

(*b*) If a plaintiff shows that he has personal property in the province worth $800 will a præcipe order for security for costs be set aside?

(*c*) How many bondsmen are required on a bond for security for costs?

8. (*a*) Has a judge power to set aside his own order?

(*b*) If three months after an order has been made it is discovered that the order is clearly wrong, and the judge who made the order intimated on an application to him that he had no power to set it aside, but would do so if he had power, can a party affected by the order obtain any relief against it, and, if so, how? Answer fully.

9. When will relief be granted by way of interpleader?

(*a*) What must an applicant show before the court will direct an issue?

(*b*) When will the claimant be made plaintiff and when defendant in the interpleader issue?