THE
Canada Law Journal.

VOL. XXIX. FEBRUARY 1, 1893. No. 2.

THERE are some things "which no fellow can understand." For instance, why does Strong, J., as appears by the report, begin his judgment in *Barton* v. *McMillan*, 20 S.C.R., at p. 408, by saying that the judgment of the Court of Appeal ought to be reversed, and then wind up his judgment on page 416 by saying, "The appeal must be dismissed with costs"?

WE are glad to observe that the learned reporters of the Court of Appeal have added to the last volume of the Ontario Appeal Reports an appendix showing the cases that have been appealed to the Supreme Court, together with the result of such appeal. So far, so good; but would it not be still better if the reporters would also kindly refer us in future appendices of this kind to the volume and page of the Supreme Court Reports where such cases are to be found? We venture to think it would, and trust they will add to our obligations by following the suggestion.

THE *Albany Law Journal* has the following sensible observations on the subject of exhaustive judgments: "There are very few cases nowadays in which long judgments are required, or even defensible. In new States, where the law has not been declared and the judges have little business to occupy them, such judgments are not reprehensible. So in cases of difference of opinion in the particular court or among the various States courts; and so in cases of grave constitutional importance. But the time has long passed when it was requisite for judges to write down all the mental processes by which they arrived at the conclusion, or to convince the lawyers that they had examined the authorities."

THE judgment of His Honour Judge McDougall, published in another place (*post* p. 69), is an intelligent and sensible decision on a point which has not, so far as we know, heretofore been judicially determined. The courts have very properly refused to listen to the testimony of jurors to prove irregularities or misconduct committed in the jury room, or to state what has passed therein, or to disclose the method adopted by the jurymen in arriving at their verdicts. But there is a marked difference between this and showing by jurymen themselves attempts at undue influence or corruption on the part of litigants or their friends. In the latter case, the learned judge thought he should receive their evidence and set aside a verdict given under such circumstances.

AN item in the *Cape Law Journal* brings forcibly to one's mind early days in this Province, long before railways were thought of, and when the grandfathers of some of our profession carried bags of flour on their shoulders to their homes in the western wilds, now St. Patrick's ward in the city of Toronto; whilst others, who lived north of "Muddy Little York," took the stage, and besides the privilege of paying their fare were also allowed to walk beside the wagon, carrying a fence rail to help lift it out of mud holes when occasion required. It appears that Mr. Justice Buchanan had to go on circuit during the rainy season from Umtata to Kokstad, arriving at the latter place after four days' journey an hour or two before the sitting of the court, but, owing to the breakdown of the vehicle, with nothing but the clothing he wore. We are told the learned judge accepted the loan of a gown of moderate proportions from one of the Bar, and also a pair of bands, to uphold the dignity of his position. Two barristers who also braved the journey, but travelled by a different route, were reported to have been drowned in crossing a bridgeless river, but turned up in a wrecked condition in time to protect the interests of their clients.

THE Supreme Court of Michigan has given a judgment (*Mahoney* v. *Detroit City Railway*), referred to on page 90 of the current volume of the *Central Law Journal*, which is of some interest in these days. It appears that the defendants' street car in which

plaintiff was riding did not go to the end of their line—plaintiff's destination. The conductor informed him when the car stopped he could take another car to the end of the line. Plaintiff had paid his fare in the first car, but had no transfer or any evidence, except his own statement, that he was entitled to ride on the second car without paying. On his refusal to pay the fare demanded he was ejected, and brought an action for damages. It was held that he could not recover, even if he had a contract with defendant for a ride to the end of the line, because the conductor was not bound to accept his statement that he had such a contract; it was plaintiff's duty to pay his fare, and seek redress for violation of contract." The case is not, perhaps, as clear in favour of the company as the learned judge seemed to think. There was either a contract to carry the plaintiff, or there was not. If there was, was it not the duty of the company to carry out that contract, and, if necessary, provide transfer tickets, or, as is done in some cities, have a transfer agent? And why should the plaintiff be put to the expense of a suit to establish his rights? Why should the company seek to shelter itself by the ignorance of its agent? As far as this passenger was concerned, the conductor was the company.

FEES FOR ABSTRACTS.

A question under the Registry Act was lately decided by the Inspector of Registry Offices with regard to what fees are payable to a registrar for an abstract of lands which have been subdivided into a number of smaller lots. The case arises out of *Morse* v. *Lambe*, a mortgage action in which there are 271 defendants. The mortgage was taken upon two township lots just outside of Toronto. Since the date of the mortgage, the two lots have been cut up into between three and four hundred small lots, and the persons interested in these lots were made parties. In order to ascertain what mortgages were against the lands, it was necessary to file an abstract of title in the Master's office. The plaintiff asked for an abstract of the lands mentioned in the mortgage. The registrar claimed that in order to give this he had to give abstracts of some 360 lots on the subdivision. A question of fees arising, it was referred to the Inspector, under the

late Act, who decided in favour of the contention of the registrar. The solicitor who ordered the abstract appealed, and the appeal was heard by Mr. Justice Robertson on the 28th ult., who reversed the finding of the Inspector, but refused costs of the appeal, as the question was a new one and not at all free from doubt. It is understood to be the intention to take the case to the Divisional Court. Whatever the decision upon this mooted point may be, the profession will be greatly interested in it.

CURRENT ENGLISH CASES.

(Law Reports for December.—*Continued.*)

COVENANT—RESTRAINT OF TRADE—UNREASONABLE COVENANT.

In *Rogers* v. *Maddocks* (1892), 3 Ch. 346, the plaintiff claimed an injunction to restrain a breach of covenant not to carry on a particular business. The plaintiff was a brewer, and engaged the defendant as his traveller to procure orders from and sell malt liquors, and also, if required by the plaintiff, aerated waters, etc., to the class known as wholesale purchasing agents. The defendant agreed that for two years after the termination of his employment with the plaintiff he would not be concerned in selling malt liquors or aerated waters, etc., within a certain district. During his employment with the plaintiff, the defendant was never called on to sell anything but malt liquors, and it was alleged that the plaintiff had no business for the sale of aerated waters, etc. After leaving the plaintiff's employ, the defendant became a traveller for rival brewers within the prescribed district, and the plaintiff claimed an injunction to restrain him from so doing. The defendant contended that the restriction was too wide, and therefore void. Stirling, J., construed the covenant as only prohibiting the defendant from selling wholesale within the prescribed limits, and held that the stipulation as to aerated waters, etc., was severable, and he granted an interim injunction, only restraining the defendant from selling malt liquors wholesale. From this order the defendant appealed, and by agreement the appeal was treated as the trial of the action. The Court of Appeal (Lindley, Lopes, and Smith, L.JJ.) differed from Stirling, J., and were of opinion that the covenant restrained the defendant from selling both retail and wholesale within the pre-

scribed district, and was not wider than was necessary for the reasonable protection of the plaintiff, for that selling wholesale and retail are not two distinct businesses, but only two distinct modes of carrying on the same business. They, however, agreed with Stirling, J., that the stipulation as to aerated waters, etc., was severable.

SPECIFIC PERFORMANCE—POWER OF ATTORNEY—CONTRACT FOR SALE OF BUSINESS UNDER POWER OF ATTORNEY—WAIVER OF DOUBTFUL TERMS OF CONTRACT BY PURCHASER.

Hawksley v. *Outram* (1892), 3 Ch. 359, was an action by a purchaser to enforce the specific performance of a contract for the sale of a partnership business as a going concern. The contract had been entered into on behalf of one of the vendors by his attorney acting under a power. The action was resisted on the ground that some of the terms of the contract were unauthorized by the power of attorney. The contract was made under the following circumstances: The business agreed to be sold was carried on by the defendants in partnership. The firm was in embarrassed circumstances; one of the partners was in America. By a power of attorney, in general terms, the absent partner authorized one of his co-partners to sell his interest in the business. The contract in question was made for the sale of the business to the defendant. The property sold was valued at £20,000; the debts of the defendant firm were estimated to amount to £15,000. The contract, among other things, provided that the plaintiff should pay the defendants' debts, and that if they did not exceed £15,000 the defendants were to be entitled to £5,000 "deferred capital," on which they were to get interest on certain specified conditions. If the debts exceeded £15,000, the "deferred capital" to which the defendants were entitled was to be reduced, and the defendants were to be entitled to call on the plaintiff to take over the "deferred capital" to which they were entitled, at a sum equal to two-fifths of its nominal amount; and if the concern was converted into a joint stock company, the defendants were to receive shares for their "deferred capital"; and if the debts were less than £15,000, the plaintiff was to pay the difference in cash at the end of two years. The contract also contained the stipulations (1) that plaintiff might use the defendants' name in carrying on the business; and (2) that the defend-

ants would not carry on a similar business within a radius of fifty miles. Romer, J., who tried the action, dismissed it as against all the defendants, on the ground that the clause in restraint of trade was not authorized by the power of attorney; and as the contract could not be enforced against the absent partner, it could not properly be specifically enforced against any of the defendants. The Court of Appeal (Lindley, Lopes, and Smith, L.JJ.) took an entirely different view of the matter; and though it was argued in appeal that the stipulation as to the part of the purchase money called "deferred capital" in the contract constituted a partnership between the plaintiff and defendants which was unauthorized by the power of attorney, their lordships refused to accede to t . argument, but held that it was a mode merely of ascertaining the amount and mode of payment of that part of the purchase money, and was authorized by the power of attorney; and although inclined to the opinion that the stipulation in restraint of trade was a reasonable and necessary term of sale of a going concern, and therefore authorized by the power of attorney, yet as both that and the stipulation authorizing the use of the defendants' name were stipulations introduced for the benefit of the plaintiff, it was open to him to waive them, and as he did, in fact, waive them, they afforded no ground for refusing specific performance, which was accordingly decreed, the waiver of the stipulation in restraint of trade being limited to the defendant who had acted by attorney.

COPYRIGHT—INTERNATIONAL COPYRIGHT ACT, 1886.

Lauri v. *Renad* (1892), 3 Ch. 402, may be briefly referred to as establishing that The International Copyright Act, 1886, cannot be construed so as to revive or recreate a right which had expired before the passing of that Act. Kekewich, J., also expresses the opinion that although two or more registered owners of a copyright take as tenants in common, yet any one or more of them may maintain an action for the infringement of the entire copyright; also that a translation of a play into a foreign language, in order to be protected by the law of international copyright, need not be an absolutely literal translation; it is sufficient if it is substantially a translation.

PATENT, VALIDITY OF—DISCONFORMITY BETWEEN PROVISIONAL SPECIFICATIONS—INCOMPLETENESS OF SPECIFICATION—DISTINCTION BETWEEN DISCOVERY AND INVENTION.

In *Lane, Fox* v. *Kensington & Knightsbridge Electric Light Co.* (1892), 3 Ch. 424, the Court of Appeal (Lindley, Lopes, and Smith, L.JJ.), affirming a judgment of Smith, J., held a patent void because the completed specifications were for a different invention from the original specifications, and because the invention was not, when the patent issued, used for the main purpose designated, and also because the specifications were insufficient to enable an expert of ordinary competence and skill to carry it out without further experiment and invention. Lindley, L.J., also makes some interesting observations on the difference between invention and discovery, and lays it down that the mere discovery that a known machine can produce effects not before known to be producible by it is not patentable. To entitle a person to a patent, he must make some addition, not only to knowledge, but to previously-known inventions, and must produce either a new and useful thing or result, or a new and useful method of producing an old thing or result. "On the one hand, the discovery that a known thing can be employed for a useful purpose for which it has never been used before is not alone a patentable invention; but, on the other hand, the discovery how to use such a thing for such a purpose will be a patentable invention if there is novelty in the mode of using it, as distinguished from novelty of purpose, or if any new modification of the thing or any new appliance is necessary for using it for its new purpose, and if such mode of user, or modification, or appliance involves any appreciable merit."

CONTRACT—ARBITRATION—AGREEMENT THAT AWARD SHALL NOT BE IMPEACHABLE FOR FRAUD—PUBLIC POLICY.

In *Tullis* v. *Jacson* (1892), 3 Ch. 441, the question was raised whether a stipulation in a building contract that disputes should be referred to the arbitration of the architect, and that his award should not be impeachable on any "pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy," was valid. It was contended by the plaintiff that it was contrary to public policy, and that he was entitled to impeach the certificate for fraud on the part of the architect; but Chitty, J., although of

opinion that a contract containing such a stipulation, obtained by fraud, might clearly be set aside, yet where it was entered into *bonâ fide* it was a perfectly valid stipulation, and binding on the parties. Chitty, J., quotes with approval the forcible language of the late Master of the Rolls (Sir G. Jessel) in *Printing & Numerical Registering Co.* v. *Sampson*, L.R. 19 Eq. 465: "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." But it is also well to note that such a stipulation might, even according to Chitty, J., be ineffectual to prevent a party setting it up as a defence to a charge of fraud on his own part, for he says: "I need hardly say that if the case had been that the trustees themselves had been party in any way to the fraud, it would have been very different, and it may be that Mr. Levett's argument (and as at present advised, I think it would have been so) would have succeeded." Mr. Levett was counsel for the plaintiff.

COVENANT IN RESTRAINT OF TRADE—LIMITATION AS TO TIME AND SPACE—VALIDITY OF COVENANT—PUBLIC POLICY.

Badische Anilin Und Soda Fabrik v. *Schott* (1892), 3 Ch. 447, is another action to enforce a covenant in restraint of trade. The defendants had been employed to act as agents in England for the plaintiffs, a foreign corporation whose business was the manufacture and sale of aniline and alizarine colours, tar products, and the like. The defendants' duties were to purchase raw material in England and to sell the plaintiffs' goods in 16 counties in the north of England, and in Wales, in which they had an exclusive agency for sale; and the defendants bound themselves that in the event of their retiring from the agreement, or after its termination otherwise, for three consecutive years "not to enter any like or similar business, nor to start a business of that kind themselves, nor to give information of any kind about the business." In July, 1892, the defendants determined the agency, and thereafter commenced to carry on business in Manchester as dealers in chemicals, colours, and other products

manufactured by the plaintiffs, and solicited the custom of the plaintiffs' customers. The plaintiffs applied for an interim injunction, which was resisted on the ground that the covenant was void, being unlimited as to space. Chitty, J., granted the injunction, and thus states the result of the authorities: "When the restraint is general—that is, without qualification—it is bad as being unreasonable and contrary to public policy; when it is partial—that is, subject to some qualification as to time or space—then the question is whether it is reasonable, and if it is reasonable it is good in law." Applying this rule to the case in hand, he finds that the plaintiffs' trade is confined, not to all, but to a special class of chemical products, and that the area of that trade was world-wide; that the agreement, being limited as to time, was not invalid if reasonable, and he finds it was reasonable, and not more than was necessary for the protection of the plaintiffs' trade, in being unlimited as to space; but he points out that restrictions of this kind depend on the particular circumstances of each case, and that what would be a valid restriction in the case of a mercantile business of world-wide extent would be quite unreasonable for the protection of a business of a merely local character.

COPYRIGHT—COMMERCIAL DIRECTORY—HEADINGS IN DIRECTORY—ADVERTISEMENTS—INJUNCTION—MATERIALS OBTAINED BY SERVANT FOR HIS MASTER'S BUSINESS.

In *Lamb* v. *Evans* (1892), 3 Ch. 462, Chitty, J., granted an interim injunction to restrain the infringement of a copyright. The circumstances of this case were somewhat peculiar. The plaintiffs' book in question was called a commercial directory. It consisted of a series of advertisements, arranged under suitable headings, indicating the various trades or manufactures carried on by the advertisers. These advertisements had been procured by the defendants Evans and the plaintiffs' travellers, who were paid therefor by commission, they on their part procuring not only the advertisements, but also the necessary blocks for printing them, together with translations of the advertisements into other languages. The defendants Evans became associated with a rival company (their co-defendants), who proposed to issue a similar directory, and the Evans proposed to give to this rival company the use of advertisement blocks, etc., which they had

procured while in the plaintiffs' service, which was the infringement complained of. This rival company had issued a specimen copy of the proposed rival publication; the "copy" from which this was printed consisted of printed portions cut out of the plaintiffs' work, with the addition of written matter supplied by the defendants Evans, with the result that the specimen copy was almost a *verbatim* reprint of a part of the plaintiffs' work. Chitty, J., held that, although the plaintiffs had no copyright in the advertisements themselves, they had a copyright in the headings under which they were arranged, and he accordingly restrained the defendants from copying them. He also restrained the defendants from using blocks and advertisements obtained by the defendants Evans while in the plaintiffs' employment.

TRADE MARK—FOREIGN TRADE MARK—REGISTRATION—INTERNATIONAL CONVENTION.

In re Carter Medicine Co. (1892), 3 Ch. 472, may perhaps be interesting to some of our readers who do not follow the poet's advice and "throw physic to the dogs," inasmuch as an application by an American medicine company to register "Carter's Little Liver Pills" as a trade mark was refused by North, J.

WILL—CONSTRUCTION—FORFEITURE CLAUSE ON ASSIGNING, OR ATTEMPTING TO ASSIGN.

In re Porter, Coulson v. *Capper* (1892), 3 Ch. 481, turns upon the construction of a forfeiture clause in a will, whereby it was provided that if the devisees should, within a specified period, assign his or her expectant share or any portion thereof, or attempt to do so, such devisee should forfeit all benefit under the testator's will. The shares of the devisees were by the will, subject to this clause, vested interests. One of the devisees went to Australia and married a domiciled Australian, and subsequently made a post-nuptial settlement whereby she purported to assign her share as devisee to trustees of the settlement. According to the law of Australia the settlement was null and void, except to the extent of the husband's interest, and the question was whether it operated as a forfeiture of the devisee's interest under the will. North, J., held that it did, and that the forfeiture clause was valid, and that though the devisee's interest was a vested interest under the will, yet it was subject to be divested in the event which had happened.

COPYRIGHT—NEWS—CUSTOM TO PIRATE—COSTS.

Walter v. *Steinkopff* (1892), 3 Ch. 489, is the action brought by the *Times* newspaper against the *St. James' Gazette* to restrain infringement of the plaintiff's copyright in matter published in the *Times* newspaper. The pirated matter consisted of extracts from a long article or letter on "America," by Rudyard Kipling. Of this article the defendants had published in the *St. James' Gazette* selected passages, being a *verbatim* copy of about two-fifths of the entire article. They had also published various paragraphs in substantially the same language as they appeared in the *Times*, consisting of items of an ephemeral character. The plaintiffs claimed an injunction against publishing the Rudyard Kipling articles and also four other of the paragraphs, in all of which they proved a copyright. As to the Kipling article, the plaintiffs' claim was practically undisputed; but the defendants attempted to justify their action generally on the ground of an alleged custom prevailing among journalists, which North, J., was of opinion was entitled to no more weight in a court of justice than an alleged custom to commit highway robbery on Hounslow Heath. As to the Rudyard Kipling article, he granted an injunction, but as to the other matters he refused to make any order, as they were of a mere ephemeral character, and no substantial injury had been done the plaintiffs by the defendants' publication; and though declaring that the plaintiffs had a copyright in them as well as in the Kipling article, he only granted the plaintiffs the costs of the action so far as it related to the Kipling article, because the defendants, in publishing the other matter, had only done what they had been doing for twelve years past without any complaint on the part of the plaintiffs, and the action was commenced without any previous notice to discontinue such practice.

INFANT—CONTRACT FOR SERVICE—AGREEMENT IN RESTRAINT OF TRADE.

In *Evans* v. *Ware* (1892), 3 Ch. 502, the question of how far an infant's contract can be enforced against him by injunction was considered by North, J. By the contract in question, an infant, in consideration of being employed as a milk-carrier, agreed not to compete in business with the plaintiff within a radius of five miles for two years after leaving. After attaining his majority he left, and commenced to violate the agreement. The learned

judge was of opinion that the contract was one for the benefit of the infant and binding upon him, and granted the injunction as prayed.

MORTGAGOR AND MORTGAGEE—CHARGE ON SHARES—TRANSFER OF SECURITY TO NOMINEE OF MORTGAGOR—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., C. 41), SS. 2, 15—(R.S.O., C. 102, S. 1, S-S. 4, & S. 2.)

In *Everitt* v. *Automatic Weighing Machine Co.* (1892), 3 Ch. 506. the plaintiff was a shareholder of the defendant company and was a debtor to the company, and by the articles of association it was declared that the company should have a first and paramount lien on the shares of each member for his debts to the company, and that for the purpose of enforcing such lien the directors might, on default in payment of a debt, sell the shares and transfer them to a purchaser. The defendants were about to execute this power, and this action was brought to restrain them from doing so, and to compel them to transfer the shares to a nominee of the plaintiff on payment of the amount due from the plaintiff to the company. The motion for the injunction was resisted on the ground that the lien on the shares was not a "charge" within the meaning of the Conveyancing and Law of Property Act (44 & 45 Vict., c. 41), s. 2, and therefore s. 15 of that Act did not apply (see R.S.O., c. 102, s. 1, s-s. 4, and s. 2). North, J., however, held that the lien of the company was a charge within the Act, and on the plaintiff undertaking, on four days' notice by the company, to pay the sum due from him, upon their transferring the shares to his nominee, he restrained the company, until the trial or further order, from selling the shares.

COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY — POWER OF APPOINTMENT — SPECIFIC PERFORMANCE — COVENANT BY HUSBAND AND WIFE THAT WIFE'S POWER, IF EXECUTED, SHOULD BE EXECUTED IN FAVOUR OF COVENANTEE—BREACH OF COVENANT.

In re Parkin, Hill v. *Schwarz* (1892), 3 Ch. 510, was an action to enforce specific performance of a covenant made by a deceased woman and her intended husband to the trustees of their marriage settlement, that any power of appointment which should thereafter become vested in the wife should, if executed by her, be executed in favour of the trustees of the settlement. After the marriage, and during coverture, the wife had become entitled to a power of appointment by will, and she died leaving a will

executing the power in favour of other persons than the trustees of the settlement. The suit was brought against the beneficiaries under the deceased wife's will, claiming that the covenant should be specifically performed, and that, notwithstanding the appointment made by her will, they were entitled to the fund appointed. For the executors of the deceased wife, it was contended that as the power was to be exercised by will she could not by covenant affect th rights of those entitled in default of appointment. The trustees of the settlement, on the other hand, claimed that the beneficiaries under the will were volunteers, and their rights could not prevail against those entitled under the settlement, as they were claiming for valuable consideration. Stirling, J., was of opinion that specific performance of the covenant could not be decreed, but he was of opinion that the wife's estate was liable in damages for the breach of the covenant, and that the measure of the damages was the value of the property appointed by the will, and that the property so appointed was thereby made assets for the satisfaction of the debts of the wife, including the trustees' claim, which was an ante-nuptial debt of the wife.

Reviews and Notices of Books.

Reports of the Exchequer Court of Canada. Reported by Charles Morse, LL.B., and published by L. A. Audette, LL.B., Registrar of the Court.

The first number of the third volume of the Exchequer Court Reports has made its appearance. In contains, in addition to cases determined on the Exchequer side of the court, several important cases in maritime law decided by the local judges in admiralty. We understand that the second number, now in press, contains the recent decision of Sir Mathew Begbie, C.J. (Local J. in British Columbia), in the celebrated sealing case *re The Oscar and Hattie.* Such cases as these make the reports invaluable to those of the profession engaged in admiralty cases.

Banks and Banking, containing a full annotation of the Banking Act, 53 Vict. (D.), c. 31 (1890). By J. J. Gormully, Q.C., and R. V. Sinclair, Barrister-at-Law. Ottawa: A. S. Woodburn, 1892.

This is a second edition of a compact and handy annotation of the Banking Act. It contains also those sections of the criminal code of 1892 which are of special importance to bankers. The book is, we apprehend, intended more especially for bankers; but as it collects together and refers at length to the authorities appropriate to the various enactments, it is also of interest to every practitioner who has the luck in these dull times to be a bank solicitor, as well as to those who may find themselves on the opposite side in litigation.

The work of the editors is well and carefully done; whilst the typography reflects credit on the Ottawa printers. Printers there, however, ought to know their business, judging from the bills the public have to pay them from time to time.

Proceedings of Law Societies.

COUNTY OF CARLETON LAW ASSOCIATION.

Annual Report of the Board of Trustees for 1892.

To the Members of the County of Carleton Law Association:

Gentlemen,—The Trustees, in presenting their fifth Annual Report to the association, are pleased to again report the affairs of the association in a prosperous condition.

Annual fees to the amount of $180 have been paid, and the association, in addition to the grant of $291.42 from the Law Society, has received also a Provincial grant of $58.82. After expending about $370.00 in the purchase of books, and after paying all necessary expenses of the association, there remains a balance on hand of $131.32.

The library now contains 1,116 volumes, of which 105 volumes were added during the year, as appears by the schedule hereto annexed. The books purchased for, and now in the library, apart from those presented to the association, represent a value of about $3,306. Your trustees are pleased to report on the present good condition of the library, due to the

care of the librarian, who, in addition to other duties, notes up in the Revised and Consolidated Statutes the amendments of subsequent years.

It is with regret, however, that your Trustees are unable to report any increase in the membership of the association.

Early in the year the President, accompanied Mr. W. F. Burton, of the Hamilton Law Association, and other gentlemen, in a deputation to the Minister of Justice for the purpose of asking that the Government legal publications, such as the Dominion Statutes, Orders in Council, Supreme Court Reports, and *Canada Gazette*, be given gratis to the various law associations of Ontario, to which request the Minister at once acceded.

The limited accommodation afforded to the judges and barristers in the court house having long been the subject of complaint by the profession, the President and Vice-president, accompanied by His Honour Judge Mosgrove, attended before the County Council at its June sittings and pointed out the bare and inefficient condition of the judges' retiring room and the barristers' consulting room. The Council, while not granting all that was asked, has since provided a retiring room for the County Judges, refurnished the rooms occupied by the Assize Judge and the barristers, and repainted the court room and the corridors.

The subject of decentralizing legal business also received the attention of the association. An opinion prevails with many members of the profession that the interests of the litigating public would be better served by the residence of one or more of the Superior Court judges in the districts situate at some distance from Toronto, such as Ottawa and London; that such judges should hear and determine all matters for those districts, which must now be sent to Toronto. At the meeting of the association held to discuss the matter there was considerable difference of opinion, but a resolution was ultimately passed favouring an increase of the jurisdiction of the County Court judges, as preferable to what was proposed. The Secretary was authorized to correspond with the other associations in the Province on the subject, but only one reply has been received.

At another meeting a committee was appointed to confer with the judge of the Exchequer Court respecting changes in some items in the tariff of costs allowed practitioners in that court. This committee has not yet concluded its work.

During the year Mr. Winchester inspected the library and books of your association, and he expressed himself as pleased with everything in connection therewith.

Your Trustees desire to record the presentation to the association by their President, Mr. J. A. Gemmill, of portraits of the first two judges of the county, the late Judge Armstrong and the late Judge Lyon.

The particulars required by the By-laws accompany this Report, being:

(1) The names of the members of the association.

(2) A list of the books contained in the library.

(3) A list of the books added to the library during the year,

(3) A detailed statement of the assets and liabilities of the association at the date of the Report, and of the receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the Report of the Auditor will be submitted to you for your approval.

J. A. GEMMILL, *President.*
Ottawa, Dec. 31, 1892. J. M. BALDERSON, *Secretary.*

COUNTY OF FRONTENAC LAW ASSOCIATION.

ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR 1892.

The President begs leave to present the Annual Report for the year, 1892.

The membership at the commencement of the year was twenty-one. Mr. R. W. Shannon, our Secretary-Treasurer, resigned shortly afterwards because of removal from the city, and Mr. T. L. Snook became a member the subscription membership thus remaining twenty-one. During the year this number was diminished by the retirement of Messrs. Shibley and Lyon, the former removing from the city, and the latter ceasing practice.

Our income for the year was $142.60, of which $42.00 was derived from membership fees, $41.85 from the annual grant of the Law Society, and $58.82 from that of the Ontario Government. In addition to this was the balance from last year, $7.58, making the total amount at our credit for the year $150.25. There was expended during the year the sum of $116.00, leaving a balance on hand of $34.25. The Treasurer's Report submitted herewith gives a statement in detail of the year's receipts and disbursements.

Our library now consists of 353 volumes. Several of these are duplicates, of which a list was given to the Inspector of Legal Offices at the time of his last inspection, at his request, for the purpose of arranging for their disposal among other associations not provided with them. No word has yet been received of any action taken by him in the matter.

In common with other law associations, we passed and forwarded to the Law Society resolutions requesting that they should furnish the Dominion and Ontario Statutes and the Supreme Court Reports to the profession, along with the usual law reports supplied by them in connection with the annual fee. We have not been informed of any action taken by the Law Society upon these resolutions.

An order in council of the Dominion Government was passed during the year, giving to law associations the Supreme and Exchequer Court Reports, *Canada Gazette*, and two copies of the annual Statutes of the Dominion. Correspondence was had with Ottawa for the purpose of procuring the Revised Statutes of Canada free, but our efforts were unsuccessful. The Law Society provided the library with the Ontario Digest, 1880-1890, free, except as to the price of binding.

Owing to the considerable increase in the number of volumes in the library since the printing of the last catalogue, we decided to have a new catalogue prepared and printed, and expect that our Secretary will be able to supply the members with copies at an early date.

During the year we purchased a large portrait of the late Dr. Henderson, Q.C., first president of the association, and had it hung in Judges' Chambers, whose walls are also embellished with a portrait of a group of the judges of the Supreme Court for Ontario; the room in which the library is kept not being a desirable one for the purpose.

The subjects presented to us for discussion during the year were few. A proposal by Toronto University to the Law Society, to permit graduates of that University to take their first year's lectures at the University, and have the same allowed as if taken at the Law School, caused Mr. E. Martin, Q.C., of Hamilton, to send out a circular requesting the views of the law associations in the matter. We passed a resolution against such a change on the grounds, among others, that it would interfere with the usefulness of the Law School and impair the revenues of the Law Society, and we also resolved that if such request were complied with the same privilege should be granted to all the other universities in the Province. The objections to such proposal were brought before the Law Society, and we have not yet heard of the success of the University.

The Carleton Law Association, taking up the ever-recurring question of the decentralization of legal business, sent us a copy of a resolution passed by them, giving, as their remedy for the difficulty, the increasing of the jurisdiction of the County Courts, for the purpose of getting our views thereon. We did not agree with them in their solution of the difficulty, and so resolved and notified them.

The question of legal and conveyancing disbursements, and the mode of their collection, came up before us for discussion, and was referred to a committee to consider and report, which probably will soon be done. We note that the County of York Law Association have moved in the direction of amending the Consolidated Rules of Practice. They supplied us with a printed copy of the amendments which they proposed bringing to the notice of the judges. We took no action, but left the matter in their hands.

The present mode of electing Benchers is, I am strongly of opinion, most unjust to outside practitioners, who by it do not obtain the representation to which they are entitled, the Toronto Bar dominating the whole Province in the matter. In my view, the Province should be divided into districts for the purpose of the election of Benchers. This would enable the voters to have some knowledge of the candidates and secure a more representative body of Benchers, and vacancies occurring in the representation of a district could be conveniently filled by election in the district.

The long period elapsing between sittings for the hearing of non-jury cases calls for attention and, I think, remedy. There should be some means provided for the more speedy hearing of such cases when or soon after they are ready for trial. It is a matter which this and other associations might profitably discuss.

Among the noteworthy events of the year, there occurred two of general interest to the Province, but of special interest to the Kingston Bar. These were the death of Sir Alexander Campbell, late Lieutenant-Governor of Ontario, and formerly and for many years a member of this Bar, and the elevation to the same high office of another member of the same Bar, and a member of this association, the Hon. G. A. Kirkpatrick.

All of which is respectfully submitted.

JAMES AGNEW, *President.*

Kingston, Jan. 13, 1893.

COUNTY OF YORK LAW ASSOCIATION.

ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR 1892.

To the Members of the County of York Law Association:

GENTLEMEN,—The Trustees of the association, in presenting their seventh Annual Report, are again able to congratulate the stockholders upon the continued success which has attended the establishment of this association, and of the other Law Associations in the Province. There are now twenty Law Associations in existence, having a membership of 888 members, and possessing libraries which contain, in all, 17,757 volumes of Reports and text-books.

There were on the 31st of December, 1892, 388 members of this association, 363 of whom have paid their fees for the year 1892. During the year four members died, three severed their connection with the association by removal from the county or resignation, and thirty-nine practitioners became members. There are now 2,251 volumes in the library, 193 having been added during the year.

A portrait of Mr. J. K. Kerr, second President of the association, has

been presented by Mr. C. Robinson, Q.C.; a portrait of Mr. Charles Moss, Q.C., President of the association during 1891, has been presented by Mr. Kingsmill, Q.C.; and a bust of the Hon. Edward Blake, Q.C., has been presented by Mr. Lash, Q.C.

During the past year much attention has been given to the proposed changes in the rules of practice. In conjunction with the other associations, a Report of the Joint Committee of the Law Associations has been prepared embodying suggested changes in the rules. A summary of this Report is printed in the *Law Times*, 1892, at page 275. This Report has been laid before the judges for their consideration, and it is hoped will be adopted, as the suggestions are carefully framed, having only in view simplification of the practice and advancement of the interests of suitors.

No advance has been made in securing from the judges a compliance with the request continually urged upon them during the last five years to abolish the separate sittings of the Chancery Division for the trial of actions and its separate weekly sittings held as if the Judicature Act had never been passed. It must be plain to any one who has given attention to the manner in which business has drifted away from the Chancery sittings for the trial of actions that the holdings of these sittings is unnecessary, and is a pure waste of judicial strength. It is believed that the profession are unanimous in the desire to see these separate sittings abolished, and to have established a system of sittings (not lessened in number) for the trial of jury and non-jury cases according to a plan somewhat similar to that which has been laid before the judges in full detail by the Joint Committee of the Law Associations.

This association has also continued to urge the question of increasing the judicial salaries. One great obstacle met with at Ottawa in advancing this question is the opposition made on behalf of the County Court judges to any increase of the Superior Court judges' salaries unless the salaries of the County Court judges are increased at the same time. The Trustees believed that an increase of the Superior Court judges' salaries should first be sought, and that the advancement of a claim to have the salaries of the County Court judges increased as well meant only a failure to secure an increase in any judicial salaries. The result of the introduction of the question before Parliament during last session proved the view of the Trustees to be correct, and the whole judicial salaries question has apparently been abandoned by the government. The Toronto Board of Trade has, however, taken up the matter of these salaries, and it is to be hoped that the other associations will by representation to their local members assist in securing the solution of a vexed and difficult question.

The Trustees call attention to the serious delay that occurs each year in the issue of the Provincial Statutes. As far as they can ascertain, there

is no reason why the Statutes should not be published in the regular form within a short time after the Royal assent is given ; and the Trustees invite the serious attention of the Attorney-General to this matter, in order that it may be remedied.

In September last the County of Carleton Law Association appointed a committee to further a more equitable distribution of legal business, to be brought about by an increase of the jurisdiction of the County Courts. The committee was directed to interchange opinions with the associations other than the York Law Association, and with the members of the profession outside of Toronto. It is to be regretted that in the consideration of a question of so much interest to the whole profession the views of this association are not to be sought through meetings of the Joint Committee of the Law Associations, whose work has, without regard to anything like sectionalism, been aimed solely at the promotion of the interests of the whole profession. It has always been admitted at the meetings of the Joint Committee that the representatives of this association sought to carry out the views of the representatives of other associations without particular regard to the interests of their own.

The Trustees cannot close their report without referring in terms of great regret to the death of the Vice-President of the association, Mr. N. Gordon Bigelow, Q.C. The services Mr. Bigelow rendered to the Bar while upon the board were of great value, and the sudden termination of his career as an advocate and a public man was a great loss to the community. The Trustees record also the deaths during the year of the following members : G W. Badgerow, T. C. Milligan, G. H. Douglas, J. G. Holmes.

The particulars required by the By-laws accompany this Report, as follows :

(1) The names of members admitted during the year.

(2) The names of members at the date of this report.

(3) List of books added to the library during the year.

(4) A detailed statement of the assets and liabilities at the date of this Report, and of the receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the Report of the Auditors will be summitted to you for approval. There is also submitted the Librarian's Report and extracts from the Inspector's Report upon the library of this association.

The following officers were elected for the year 1893 :

President, Mr. Z. A. Lash, Q.C. ; Vice-President, Mr. J. J. Foy, Q.C. ; Treasurer, Mr. Walter Barwick ; Secretary, Mr. A. H. O'Brien ; Curator, Mr. E. D. Armour, Q.C. ; Historian, Mr. D. B. Read, Q.C. ; Auditors, Messrs. E. B. Brown and Percy Torrance ; Trustees, Messrs. J. A. Worrell, Q.C. A. R. Creelman, Q.C., Angus MacMurchy, George Kappele, and W. H. Blake ; Committee on Legislation, Messrs. John Hoskin, Q.C., Charles Moss, Q.C., E. D. Armour, Q.C., A. H. Marsh, Q.C., Beverley Jones, Harry Symons, Walter Barwick, and W. H. Blake.

DIARY FOR FEBRUARY.

1. Wednesday..Sir Edward Coke born, 1552.
5. Sunday.....*Sexagesima Sunday.*
6. Monday.....Hilary Term begins. W. H. Draper, and C.J. of C. P., 1856. Q.B. and C.P. Divs. H.C.J. sit. County Ct. Non-Jury sittings in York begin.
7. Tuesday.....Convocation meets.
9. Thursday....Union of Upper and Lower Canada, 1841.
10. Friday .....Convocation meets. Canada ceded to Gt. Brit., 1763.
11. Saturday....J. Robertson appointed to Chancery Div., 1887.
12. Sunday.....*Quinquagesima, Shrove Sunday.*
14. Tuesday.....Toronto University burned, 1890.
16. Thursday....Chancery Div. H.C.J. sits.
17. Friday.....Convocation meets.
18. Saturday....Hilary term and H.C.J. sittings end.
19. Sunday.....*Quadragesima. 1st Sunday in Lent.*
21. Tuesday.....Supreme Court of Canada sits.
26. Sunday.....*2nd Sunday in Lent.*
27. Monday.....Sir John Colborne, Administrator, 1838.

Reports.

COUNTY COURT OF THE COUNTY OF YORK.

[Reported for THE CANADA LAW JOURNAL.]

CAMPBELL *v.* JACKSON.

Misconduct of jurors—New trial—Affidavits of jurymen, when receivable.

Although affidavits of jurors will not, as a general rule, be received to impeach their verdicts; they are receivable to show attempts at bribery or other corrupt or undue influence, provided such attempts are made when the members of a jury are separated during the adjournment of a trial. A verdict obtained under such circumstances was set aside and a new trial ordered.

[TORONTO, December 8, 1892.

This was an application to set aside a verdict for the defendant, and for a new trial, upon the ground of improper conduct on the part of the defendant and one of his witnesses, in having conversation with and making statements to some of the jurors empanelled on the case during the adjournment of the trial, and when the jury had been allowed by the court to separate. It was also charged that the defendant and the same witness caused the injured horse, the subject of the litigation, to be shown to some of the jurors at an adjournment, in the absence of the plaintiff, and without the knowledge or consent of the court. Other acts of misconduct were also charged.

The plaintiff, to establish these alleged acts of misconduct, tendered as his sole evidence the affidavit of a juror who sat on the case, and the examination and cross-examination of some four or five other fellow-jurors who were examined as witnesses upon this pending motion.

The defendant filed affidavits in reply, denying some of the alleged acts and explaining and qualifying others, and also making counter-charges of misconduct on the part of the plaintiff.

C. Millar for plaintiff.

A. Abbott for defendant.

McDOUGALL, Co. J.: The important question to be determined *in limine* is: Can the affidavits of jurors who have sat in a case, as to alleged charges of misconduct on the part of one of the parties to the litigation, and committed outside of the jury-room and court-room, be received to establish the alleged misconduct? It is well established by a number of English decisions, and also by cases in our own courts, that no testimony of a juror can be received to prove any irregularity or misconduct committed in the jury-room, or while they are deliberating as an organized body, presided over by their foreman, and performing their ordinary and usual duties. They cannot be heard to state what passed in the jury-room, or as to the reasons for their verdict, or as to their method of arriving at it: *Regina* v. *Fellowes*, 19 U.C.R. 48; *U.S. Express Co.* v. *Donahoe*, 13 P.R. 158; *Vaise* v. *Delaval*, 1 T.R. 11; *Farquhar* v. *Robertson*, 13 P.R. 156. But such affidavits have been received to correct a mistake in receiving or recording a verdict: *Jamieson* v. *Harker*, 18 U.C.R. 590. In *Coster* v. *Merest*, 7 Moore 87, affidavits of jurors were not received where they were tendered to rebut an inference that the jurors had seen certain hand-bills published by one of the parties reflecting on the character of the other. I have, however, been unable to find any case which says that the testimony of a juror is to be excluded when it speaks as to facts relating to his own conduct when separated from his fellows, or the acts or declarations of a party to or with him while he is so separated touching the question being litigated.

Supposing one of the parties to the litigation approached one of the jurors in the case, during the hour of adjournment, with an offer of a bribe; surely if that party were ultimately successful and obtained a verdict, the affidavit of the juryman would be receivable to prevent the party from holding his verdict after such attempt to corrupt. I cannot better express the principles which govern the courts upon these questions than by an extract from the judgment in an American case—*Heffron* v. *Gallupe*, 55 Maine 563: "The theory of our jury trials is that all parties and witnesses are to be heard in open court, in the presence and under the direction of the presiding judge. The law is extremely tenacious of this cardinal doctrine, and looks with distrust and aversion upon any departure in practice from its strictness. The oath of the juror is to decide according to law and the evidence given to him—given to him according to the rules of evidence in open court, and with the parties face to face. It surely cannot mean evidence given to a juryman by a party outside the court-room, to be pondered on in secret before joining his fellows in deliberation on the verdict. There are cases where the court will not stop to inquire whether the juryman is actually influenced or not, but will set aside the verdict on any evidence of any tampering or attempted tampering with members of a jury. There are cases—and we wish there were more of them—where conscientious jurors have informed the court of improper advances made directly or indirectly by interested parties, expressing their indignation at the insult and their contempt for the author. In those cases, and in others like them, the court in its discretion will deprive a party of his verdict as a punishment for the attempt to corrupt the fountain of justice. We deem it misconduct not merely when direct bribery is attempted, but when jurors are approached with the design of forestalling their judgments by statements of what are alleged facts, although

not testified to, or with appeals calculated to awaken prejudice, partiality, or favour."

It seems to be a well-settled rule, based upon considerations of public policy, that if the successful party to a suit has attempted by any improper means to influence a verdict in his favour, whether by corrupting or intimidating jurors, by arousing prejudices, by treating or other undue civilities, the verdict will be set aside as a punishment to the offender and as an example to others, and this without consideration whether the attempt was successful or not.

I think, therefore, that the general rule that affidavits of jurors will not be received to impeach their verdicts may be qualified by this direction, that affidavits will be and ought to be received to show attempts at bribery or other corrupt and undue influence, if such attempts are made when the members of a jury are separated during the adjournment of a trial.

Now, looking at the testimony of the jurors, what does it show? Murphy swears that a man whom he does not know approached him as he was leaving the jury-box on the second day, and, accosting him, walked with him, and spoke warmly in favour of the defendant; and in his cross-examination he says that this person also told him that he would not believe the plaintiff on oath. Rossiter, another juryman, says he was also approached and spoken to by another of defendant's witnesses on leaving the jury-box, who said that defendant ought to succeed, and who also urged that the horse was not damaged much, and that he (the juryman) should overlook some slip the defendant had made in the witness-box when giving his evidence, as he (the defendant) was a little confused from not being accustomed to give testimony. He also said that he would like to give a licking to some juryman who, he stated, had expressed an opinion in favour of the plaintiff; and in cross-examination the juryman says that this witness' name was James Burns. Porter, another juror, says that he and a juror named Empringham saw the injured horse at the Schiller House during the trial; that the defendant and his witness, Burns, were present; that the defendant asked him into the hotel to have a drink, but that he declined; that while looking at the colt he (Porter) expressed an opinion that the animal was not worth $5, as he was ruined, whereupon the defendant's witness Brown, or Burns, immediately took up the statement and wanted to fight the juryman, calling him a coarse name, swearing at him, all in the presence of the defendant. After the trial he says this witness Brown, or Burns, apologized to him, and he (the juryman), Burns, and the defendant all had a drink together with the crowd. It was subsequently admitted that the name of the witness who had had the altercation with Porter was Burns. Another juryman, Barker, corroborates the facts alleged as to the altercation between Burns and the juryman Porter, and Burns wanting to fight Porter; and he says the defendant was present, and was praising up the colt in the presence of this juryman. Another juryman, Kimee, says he was spoken to in Jackson's (the defendant) interest, and told that he (the defendant) ought to win; but he cannot identify or name the person speaking to him.

Now from all these circumstances it is very clear that the most improper communications and advances were made to the jurors in the interests of the

defendant, who subsequently succeeded; that the defendant himself was present when the colt was unwisely and improperly shown to several jurymen, and that he offered to treat Porter and the other jurymen present.

I do not think I can allow a verdict to stand obtained under such circumstances. It may be that what took place did not influence the jury in the defendant's favour; but as to that it is immaterial if what was done was done with that object and intention. I think clearly that it was. The defendant's own conduct was highly imprudent and improper, as sworn to by the jurors examined; and this, coupled with the gross misconduct of Burns, his witness—some of the acts being committed in the defendant's presence without protest or remonstrance from him—must impose upon the defendant the responsibility for Burns' conduct.

I do not think that the plaintiff is altogether free from blame. There is evidence that he was seen in the company of the juror Porter, though this is denied by both the plaintiff and Porter. He was also present when the colt was being looked at, and when several of the jurors were standing around; but there is no evidence of any improper statement or communication made by him or his witnesses, and the event shows that the defendant was more successful in securing the finding of the jury.

Upon the consideration of all the facts, I order the verdict entered for the defendant to be set aside, and a new trial had between the parties. I direct that the cost of this application be costs to the plaintiff in the cause, and the costs of the first trial abide the result of the second trial.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Referred by Governor-General in Council.] [Dec. 13.

RE COUNTY COURT JUDGES OF BRITISH COLUMBIA.

Constitutional law—Administration of justice—Constitution of provincial courts—Powers of Federal Government—Appointment and payment of judges—B.N.A. Act, s. 92, s-s. 14.

The power given to the Provincial Governments by the B.N.A. Act, s. 92, s-s. 14, to legislate regarding the constitution, maintenance, and organization of Provincial courts includes the power to define the jurisdiction of such courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts.

The Consol. Statutes of B.C., c. 25, s. 14, enacted that "Any County Court judge appointed under this Act may act as County Court judge in any other district upon the death, illness, or unavoidable absence of, or at the request of, the judge of that district, and while so acting the said first-mentioned judge shall possess all the powers and authorities of a County Court judge in the said district: provided, however, the said judge so acting out of his district

shall immediately thereafter report in writing to the Provincial Secretary the fact of his so doing and the cause thereof;" and by 53 Vict., c. 8, s. 9 (B.C.) it is enacted that "Until a County Court judge of Kootenay is appointed, the judge of the County Court of Yale shall act as and perform the duties of the County Court judge of Kootenay, and shall, while so acting, whether sitting in the County Court district of Kootenay or not, have, in respect of all actions, suits, matters, or proceedings being carried on in the County Court of Kootenay, all the powers and authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters, and proceedings; and for the purpose of this Act, but not further, or otherwise, the several districts as defined by sections 5 and 7 of the County Courts Act, over which the County Court of Yale and the County Court of Kootenay, respectively, have jurisdiction, shall be united."

Held, that these statutes were *intra vires* of the Government of British Columbia under the said section of the B.N.A. Act.

By the Dominion statute, 51 Vict., c. 47, The Speedy Trials Act, jurisdiction is given to "any judge of a County Court," among others, to try certain criminal offences.

Held, that this expression, "Any judge of a County Court," in such Act means any judge having, by force of the Provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a County Court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial Legislature to do so.

Held, also, that The Speedy Trials Act is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure.

Emilius Irving, Q.C., for Attorney-General of British Columbia.

Sedgewick, Q.C., for Attorney-General of Canada.

Ontario.] [Dec. 13.

ARCHIBALD *v.* MCLAREN.

Action for malicious prosecution—Reasonable and probable cause—Inference from facts proved—Functions of judge and jury.

In an action for malicious prosecution, the existence or non-existence of reasonable and probable cause is to be decided by the judge and not the jury.

A., staff-inspector of the Toronto police force, laid an information before the police magistrate charging M., a married woman, with the offence of keeping a house of ill-fame. In laying the information, A. acted on a statement made to him by a woman who alleged that she had been a frequenter of the house occupied by M., and stated facts sufficient, if true, to prove the charge. A warrant was issued against M., who was arrested and brought before the magistrate, who, after hearing the evidence, dismissed the charge. M. and her husband then brought an action against A. for malicious prosecution.

The action was tried three times, each trial resulting in a judgment of nonsuit, which was set aside by a Divisional Court and a new trial ordered.

From the judgment ordering the third new trial A. appealed, and the judges in the Court of Appeal being equally divided the order for new trial stood. A. then appealed to the Supreme Court of Canada.

At the last trial of the action it was shown that A. had requested the police inspector for the division in which M.'s house was situate to make inquiries about it, and that after the information was laid the inspector informed A. that there were frequent rows in the house owing to the intemperance of M., and that he thought there was nothing in the charge. The trial judge did not submit the case to the jury, but held that want of reasonable and probable cause was not shown; but the Divisional Court held that he should have asked the jury to find on the fact of A.'s belief in the statement furnished to him, on which he acted in bringing the charge

Held, TASCHEREAU, J., dissenting, that A. was justified in acting on the statement, and, the facts not being in dispute, there was nothing to leave to the jury; that the trial judge rightly held that no want of reasonable and probable cause had been shown, and his judgment should not have been set aside, and must be restored.

Appeal allowed with costs.

Maclaren, Q.C., for the appellant.

Tytler for the respondents.

Quebec.]

DUFRESNE *v.* PREFONTAINE.

VALLEE *v.* PREFONTAINE.

Builder's privilege—Arts. 1095, 2013, 2103 C.C.—Expert—Duties of—Procès verbal—Art. 333, et seq., C.C.P.

Held: (1) That it is not necessary for an expert, when appointed under Art. 2013 C.C., to secure a builder's privilege on an immovable, to give notices of his proceedings to the proprietor's creditors, such proceedings not being regulated by Art. 333, *et seq.*, C.C.P.

(2) That there was evidence to support the finding of fact of the courts below that the second *procès verbal* or official statement required to be made by the expert under Art. 2013 had been made within six months of the completion of the builder's works.

(3) That it was sufficient for the expert to state in his second *procès verbal*, made within the six months, that the works described had been executed, and that such works had given to the immovable the additional value fixed by him. The words completed "*suivant les règles de l'art*" are not *strictissimi juris*.

(4) That if an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle the interested parties to ask for a reduction of the expert's valuation.

Appeal dismissed with costs.

Geoffrion, Q.C., *Béique*, Q.C., and *Beaudin*, Q.C., for appellants.

Girouard, Q.C., and *Madore* for respondent.

AUBERT-GALLION *v.* ROY.

44, 45 Vict., c. 90 (P.Q.)—Toll-bridge—Franchise of—Free bridge—Interference by—Injunction.

By 44, 45 Vict. (P.Q.), c. 90, s. 3, granting to respondent a statutory privilege to construct a toll-bridge across the Chaudière River, in the parish of St. George, it is enacted that "So soon as the bridge shall be open to the public as aforesaid, during thirty years no person shall erect, or cause to be erected, any bridge or bridges, or works, or use or cause to be used any means of passage for the conveyance of any persons, vehicles, or cattle, for lucre or gain, across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll-bridge or toll-bridges, or who shall use or cause to be used, for lucre or gain, any other means of passage across the said river, for the conveyance of persons, vehicles, or cattle, within such limits, shall pay to the said David Roy three times the amount of the tolls imposed by the present Act for the persons, cattle, or vehicles which shall thus pass over such bridge or bridges; and if any person or persons shall at any time, for lucre or gain, convey across the river any person or persons, cattle, or vehicles, within the above-mentioned limits, such offender shall incur a penalty not exceeding ten dollars for each person, animal, or vehicle which shall have thus passed the said river; provided always that nothing contained in the present Act shall be of a nature to prevent any persons, cattle, vehicles, or loads from crossing such river within the said limits by a ford, or in a canoe or other vessel, without charge."

After the bridge had been used for several years, the appellant municipality passed a by-law to erect a free bridge across the Chaudière in close proximity to the toll-bridge in existence. The respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a free bridge.

Held, affirming the judgments of the courts below, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll-bridge, and an injunction should be granted.

Appeal dismissed with costs.

Lemieux, Q.C., and *Taschereau*, Q.C., for appellant.

Fitzpatrick, Q.C., for respondent.

MCGREGOR *v.* CANADA INVESTMENT & AGENCY COMPANY.

Will—Construction—Usufruct—Sheriff's sale—Effect of—Art. 711, C.C.P.

The will of the late J. McG. contained the following provisions:

"Fifthly. I give, devise, and bequeath unto Helen Mahers, of the said parish of Montreal, my present wife, the usufruct, use, and enjoyment during all her natural lifetime of the rest and residue of my property, movable or immovable, . . . which I may have any right, interest, or share at the time of my death, without any exception or reserve.

"To have and to hold, use, and enjoy the said usufruct, use, and enjoyment of the said property unto my said wife, the said Hannah Mahers, as and for her own property, from and after my decease and during all her natural lifetime.

"Sixthly. I give, devise, and bequeath in full property unto my son, James McGregor, issue of my marriage with the said Helen Mahers, the whole of the property of whatever nature or kind, movable, real, or personal, of which the usufruct, use, and enjoyment during her natural lifetime is hereinbefore left to my said wife, the said Helen Mathers, but subject to the said usufruct, use, and enjoyment of his mother, the said Helen Mahers, during all her natural lifetime as aforesaid, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever. Should, however, my said son, the said James McGregor, die before his said mother, my said wife, the said Helen Mahers, then and in that case I give, devise, and bequeath the said property so hereby bequeathed to him to the said Helen Mahers in full property to be disposed of by last will and testament or otherwise as she may think fit, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever.

"To have and to hold the said hereby bequeathed and given property to the said James McGregor, his heirs and assigns, should he survive his said mother, as and for his and their own property forever, and in the event of his predeceasing his said mother unto the said Helen Mahers, her heirs and assigns, as and for her and their property forever."

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), that the will of J. McG. did not create a substitution, but a simple bequest of usufruct to his wife and of ownership to his son.

Held, also, that a sheriff's sale (*délaissement*) of property forming part of J. McG.'s estate under an execution issued against a person who was in possession under a title from the wife, such sale having taken place after J. McG.'s son became of age, was valid and purged all real rights which the son might have had under the will. Art. 711, C.C.P. *Patton* v. *Morin*, 16 L.C.R. 267, followed.

Appeal dismissed with costs.

Honan and Lafleur for appellant.

Laflamme, Q.C., and *H. Abbott* for respondent.

North-West Terr.] [Dec. 13.

FAIRCHILD *v.* FERGUSON.

Promissory note—Form of—"Sixty days after date we promise to pay," and signed by manager of company—Liability of company on.

R., manager of an unincorporated lumbering company, gave a promissory note for logs purchased by him as such manager, commencing, "Sixty days after date we promise to pay," etc., and signed it "R., manager O.L. Co." An action on this note against the individual members of the company was defended on the ground that it was the personal note of R.; that the words "manager," etc., were merely descriptive of R.'s occupation; and that the defendants were not liable.

Held, affirming the judgment of the Supreme Court of the North-West Territories (1 N.W.T. Rep., part 3, p. 41), that as the evidence showed that when the note was given both R. and the creditor intended it to be the note of the company, and as R., as manager, was competent to make a note on which the members of the company would be liable, and as the form of the note was sufficient for that purpose, the defence set up could not prevail, and the plaintiffs in the action were entitled to recover.

Appeal dismissed with costs.

Ewart, Q.C., for appellants.

Ferguson, Q.C., for respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[Dec. 24.

WALKER *v.* DICKSON ET AL.

Mortgagor and mortgagee — Indemnity — Mesne purchasers — Parties — Practice.

The equitable doctrine of the right to indemnity of a vendor of land sold subject to a mortgage applies only as against a purchaser in fact, and therefore where, at the request of the actual purchaser, the land in question was conveyed to his nominee by deed, absolute in form, but for the purpose of security only, this nominee was held not liable to indemnify the vendor.

It is not proper in the action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title.

Judgment of the Common Pleas Division reversed.

Moss, Q.C., and *G. B. Gordon* for the appellants.

Bain, Q.C., and *Kappele* for the respondent Dickson.

Haverson for the plaintiff.

FARQUHAR *v.* CITY OF HAMILTON.

Arbitration and award — Contract — Referee — Engineer — Municipal corporation.

Under a contract with a municipality for the laying of block pavements on certain streets, with a provision that "the decision of the city engineer on all points coming within this contract and specifications shall be final and conclusive, whether as to the interpretation of the various clauses, the measurements, extra work, quantity, quality, and all other matters and things which may be in dispute, and from his decision there shall be no appeal." The city engineer is not disqualified, in the absence of fraud or of bad faith, from deciding whether certain work is or is not extra work, and does or does not fall within the plans and specifications. The possible bias of the engineer in favour of the plans and specifications drawn by him is not sufficient to disqualify him.

Judgment of ROSE, J., affirmed on other grounds.

Osler, Q.C., and *McBrayne* for the appellants.

Mackelcan, Q.C., and *Watson*, Q.C., for the respondents.

[Jan. 17.

HAGAR v. O'NEILL ET AL.

Illegality—Consideration—Mortgage—Foreclosure.

To an action for foreclosure of a mortgage given to secure part of the purchase money of a house, it is no defence to show that the house was purchased for immoral purposes, and that a part of its price was given in consideration of its suitability for those purposes. The mortgage is entitled to succeed on the strength of the legal title.

Judgment of the Chancery Division, affirming that of STREET, J., 21 O.R. 27, affirmed.

Shepley, Q.C., for the appellant.

Armour, Q.C., for the respondent.

HOWARD v. HERRINGTON.

Jurisdiction—Replevin—Tax collector—Venue—County Court—R.S.O., c. 55, s. 4—R.S.O., c. 73, s. 15.

A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R.S.O., c 73, and under section 15 of that Act, and section 4 of R.S.O., c. 55, a County Court action against him for replevin of goods seized by him and for damages for malicious seizure must be brought in the county where the seizure and alleged trespass took place. The Consolidated Rules as to venue do not override these statutory provisions.

Judgment of the County Court of Hastings reversed.

J. W. Gordon for the appellant.

C. E. Lyons for the respondent.

TYRELL v. SENIOR ET AL.

Will—Mortmain—Methodist Church—R.S.O., c. 237—47 Vict., c. 88, s. 6 (O.).

Section 6 of 47 Vict., c. 88 (O.), does not confer upon the Methodist Church the powers of the Connexional Society of the Wesleyan Methodist Church in Canada to take by devise without reference to the restrictions of the Religious Institutions Act, and a bequest payable out of reality made by will executed within six months of the testator's death was held void.

Smith v. *Methodist Church*, 16 O.R. 199, approved.

Per HAGARTY, C.J.O., and MACLENNAN, J.A.: The Methodist Church may take under a gift to "The Missionary Society of the Methodist Church in Canada."

Judgment of GALT, C.J., affirmed.

J. J. Maclaren, Q.C., for the appellants.

R. M. Macdonald for the respondent.

C. J. Holman for the executors.

HILES *v.* ELLICE.

CROOKS *v.* ELLICE.

Drainage—Municipal corporations—By-law—54 Vict., c. 51 (O.).

Under the Drainage Trials Act, 1891, 54 Vict., c. 51 (O.), the referee has power to award either damages or compensation, whether the case before him be framed for damages only, or for compensation only, and on such a reference it is unnecessary to consider whether the by-laws in question are or are not invalid.

Reports of the referee upheld; Burton, J.A., dissenting on the ground that the references in question were not within the Act.

M. Wilson, Q.C., and *E. Sidney Smith*, Q.C., for the appellants.

J. P. Maybee and *F. W. Gearing* for the respondents.

IN RE CITY OF TORONTO AND TORONTO STREET R.W. CO.

Toronto Street Railway Company—Franchise—Property—Roadbed.

Under the statutes and agreements affecting the Toronto Street Railway Company, the possibility of exercising the franchise beyond the period of thirty years therein mentioned, if the city did not choose to take over the railway, is not "property," the value of which could be taken into consideration by the arbitrators in arriving at the amount payable by the city on assuming the ownership of the railway.

Nor was the company entitled to any allowance for permanent pavements constructed by the city under an agreement by which the company, in lieu of constructing and maintaining such pavements, as provided by former agreements, paid the city an annual allowance for the use thereof.

Judgment of ROBERTSON, J., 22 O.R. 374, affirmed.

McCarthy, Q.C., *Moss*, Q.C., and *Shepley*, Q.C., for the appellants.

Robinson, Q.C., *S. H. Blake*, Q.C., and *Caswell* for the respondents.

MCGEACHIE *v.* NORTH AMERICAN LIFE ASSURANCE CO.

Insurance—Life insurance—Premium—Non-payment—Forfeiture—Election—Waiver.

Under a policy of life insurance with a condition that if any note given for a premium should not be paid at maturity the policy should be void, but the note should nevertheless be payable, the insurers are not bound on non-payment of the note to do any act to determine the risk. In the absence of an election to continue the risk it comes to an end, and mere demands for payment of the note, and a refusal during the currency of the note to accede to the insured's request for cancellation of the policy, are not sufficient evidence of such election.

Judgment of the Queen's Bench Division, 22 O.R. 151, reversed, and that of STREET, J., at the trial, restored.

J. K. Kerr, Q.C., for the appellants.

Aylesworth, Q.C., and *Marquis* for the respondents.

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

Railways—Negligence—Ways—Crossing—Station yard—51 Vict., c. 29, s. 256 (D.).

The defendants used part of a highway for station-yard purposes, eight tracks crossing it from west to east, the west end of the yard being less than eighty rods from the highway. The defendants in shunting some flat cars drew them from the east end of the yard to the west end, and then, after a pause, sent them in an easterly direction on another track, the shunting engine and tender following some distance behind on the next track to the south. The plaintiff, who was on the highway, attempted to cross after the flat cars had passed and was struck by the tender. There was no lookout man on the tender, and there was contradictory evidence as to the ringing of the bell at all, though at most it was not rung until the engine had run some distance towards the highway, and the whistle was not blown.

Held, per HAGARTY, C.J.O.: That there was sufficient in the general facts of the case to justify the finding of the jury in favour of the plaintiff, and that that verdict should not be disturbed.

Per OSLER and MACLENNAN, JJ.A.: That the provisions of 51 Vict., c. 29, s. 256 (D.), applied, and that the finding of the jury was right.

Per BURTON, J.A.: That section 256 did not apply to shunting in a station yard, and that there had been misdirection on that point, but that the defendants had no right to use the highway as part of their station yard, and were therefore trespassers *ab initio*, and liable for all damages resulting from their dangerous user thereof.

In the result the judgment of the Queen's Bench Division, 21 O.R. 705, was affirmed.

E. M. Wells, Q.C., for the appellants.

Elgin Myers for the respondents.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Dec. 24.

IN RE UNITT AND PROTT.

Assignments and preferences—R.S.O., c. 124—Assignment for benefit of creditors—Benevolent society—Interest of debtor in fund—R.S.O., c. 172, s. 11.

An assignment by a debtor of all his estate for the benefit of his creditors under R.S.O., c. 124, is a voluntary assignment, in the sense that it is optional with the debtor whether he makes it or not; but the form in which it is made, and the effect of such form not being optional with him, in this sense it is not voluntary; and having regard to the provision of s. 11 of the Benevolent Societies' Act, R.S.O., c. 172, such an assignment does not pass to the

assignee the benefit to which the debtor is entitled in the fund of a society properly incorporated under that Act.

F. E. Hodgins for Unitt.

E. D. Armour, Q.C., and *Abbott* for Prott.

SAGE *v.* TOWNSHIP OF WEST OXFORD.

Reference—Drainage Trials Act, 1891, ss. 9 11—Action for damages for not providing sufficient outlet—Jurisdiction to refer compulsorily—Drainage referee—"Construction"—"Operation."

In an action against a township corporation for damages for flooding the plaintiffs' lands, they alleged that the defendants, in executing certain work and making certain drains under the drainage clauses of the Municipal Act, had brought water down upon the lands without providing any sufficient outlet for it.

Held, that the damages complained of arose, if not from the "construction," at all events from the "operation" of the drainage works of the defendants; and therefore the court, or a judge, had jurisdiction under s. 11 of the Drainage Trials Act, 1891, to compulsorily refer it to the referee appointed under that Act.

Semble, there was no jurisdiction to refer this case under s. 9 of the Act; for according to the construction placed by the Supreme Court of Canada upon s. 591 of the Municipal Act, which is in the same words as s. 9, the damages were complained of did not arise from the construction of the drain within the meaning of s. 9.

Williams v. *Township of Raleigh*, 28 C.L.J. 471, considered.

Aylesworth, Q.C., and *J. B. Jackson* for the plaintiffs.

M. Wilson, Q.C., for the defendants.

MCLEAN *v.* CITY OF ST. THOMAS.

Deed—Construction of—Municipal corporation—Conveyance of land to, for waterworks purposes—Power of corporation to sell land—R.S.O., c. 192, s. 29—Conditions in deed—Right of way—Construction of grant.

A deed of conveyance of land, under the Short Forms Act, from the plaintiff to the defendants, recited that the defendants had determined to construct waterworks in their municipality, and for that required the land for buildings and other purposes connected with the waterworks, and the plaintiff had agreed to sell them such lands for such purposes for the consideration and subject to the conditions set forth. The consideration was a valuable one. The grant was to the defendants and their assigns forever, for the purposes mentioned in the recital, of the land described, with full right of ingress and egress to and from the said lands for the defendants, their employees, and others doing business on and about the said waterworks, with teams and otherwise, from New Street northerly along the road now used by the plaintiff west of his orchard, etc.; *habendum* to the defendants, their successors and assigns, for the purposes aforesaid, to and

for their sole and only use forever, subject, nevertheless, to the following conditions: The first condition was that the defendants should fence and keep fenced at their own expense the land conveyed to them, and place an entrance and gate on the right of way at the north and south limits of the land conveyed for the use of the plaintiff, his heirs and assigns, and all persons claiming under him or them, whenever he or they may require the same. The second condition was that the defendants should put and maintain the right of way in a reasonable state of repair until the happening of a certain event, and thereafter that the plaintiff and defendants should each bear a proportionate part of the repairs necessary, according to their respective requirements. Certain other conditions were also made. There was a covenant for quiet possession for the purposes aforesaid, and subject to the conditions aforesaid. The plaintiff released to the defendants all his claims upon the land, save as aforesaid, and for the purposes aforesaid. The conveyance contained no provision that the lands should not be put to any other use, and no condition making the grant void upon the happening of any event subsequent to the grant.

Held, (1) that under the terms of the conveyance the defendants acquired an absolute estate in fee simple, free from any condition of defeasance, and unincumbered by any trust restricting the use to which they should put it; and that under s. 9 of the Municipal Waterworks Act, R.S.O., c. 192, they had the right to dispose of the land when no longer required for waterworks purposes.

(2) That the grant of the right of way gave to the defendants and their employees footway, carriage-way, and way for horses, but conferred no right of way upon persons to whom the defendants might sell or lease land.

Hoyles, Q.C., and *James A. McLean* for the plaintiff.

Doherty for the defendants.

MCNAMARA *v.* SKAIN.

Building contract—Action by contractor for price—Drawback of twenty per cent.—Action brought before drawback due—Counterclaim for liquidated damages for delay—Reply of matters arising since action—Amendment—Construction of contract—Extension of time—Necessity of application for—Enforcement of provision for liquidated damages.

In an action by a contractor to recover the balance due under a building contract, the defendants sought to take the benefit of a provision in the contract which entitled them to retain twenty per cent. of the full amount of the contract price and extras till thirty days after the completion of the work. The trial judge allowed this defence to be set up, though it was not pleaded; and he found that the work had not been completed for thirty days when the action was begun. The defendants, however, pleaded a counterclaim for liquidated damages under the contract for delay in the completion of the work; and the trial judge allowed the plaintiff to amend his reply by setting up as an answer to the counterclaim that the twenty per cent. had accrued due since the action was begun.

Held, that the trial judge had dealt properly with the pleadings and the questions depending on them; and that the plaintiff might reply matters of defence arising after action as an answer to the counterclaim.

Toke v. *Andrews*, 8 Q.B.D. 428, followed.

Semble, the claim for liquidated damages might have been pleaded merely as a set-off, and if it had been the plaintiff could not have replied matters arising subsequent to action brought.

Fletcher v. *Dyche*, 2 T.R. 32, referred to.

The contract in question provided for the making of alterations and doing additional work during the progress of the buildings without affecting or avoiding the contract; the amount to be paid therefor to be agreed upon, and such agreement to state the extension of time (if any) to be granted by reason thereof. It also provided that the contractor should pay fifty dollars a week liquidated damages if he failed to finish the work at or before the time agreed upon; due allowance to be made for extension of time for additional work or alterations. Also that the contractor should take care to have the work completed by the day named, "subject only to such provision for an extension of time as is herein provided." Also that should any delay occur by reason of inclemency of the weather or of strikes, the architect should have power to extend the time for completion. The work was not completed until more than twelve weeks after the day agreed upon. The plaintiff attempted to excuse his delay on the ground that it was caused by extras and alterations; but he had never asked for or been granted any extension of the time in consequence.

Held, that by the terms of the contract the onus was thrown upon the plaintiff of showing that certain extensions of time had been actually determined upon before action brought, and, not having shown this, that he was not entitled to any extension; and there being no allegation that the plaintiff was prevented by any act or default of the defendants from completing the work by the time stipulated, and no application for relief having been made under s. 52, s-s. 3, of the Judicature Act, R.S.O., c. 44, and no case made upon which such relief could have been granted, that the defendants were entitled to the liquidated damages claimed.

G. G. Mills for the plaintiff.

McMichael, Q.C., and *J. A. Mills* for the defendants.

CHATFIELD v. CUNNINGHAM.

Mortgage — Foreclosure — Action on covenant — Opening foreclosure — Redemption — Sale after foreclosure — Validity of, as an exercise of the power of sale — Private sale — Inadequacy of price — Previous efforts to sell — Diligence — Presumption of fraud — Judgment creditor — Status of, to attack sale — Judgment recovered after sale.

Mortgagees brought an action upon their mortgage to foreclose the equity of redemption, and after judgment for foreclosure, but before final order, brought another action and recovered judgment therein against the executors of the mortgagor upon the covenant contained in the mortgage. Under this judgment, after final order of foreclosure in the other action, the mortgagees issued a writ of *fi. fa.* lands and placed it in the hands of a sheriff, who sold under it certain lands not comprised in the mortgage, the mortgagees becoming the purchasers.

In an action for redemption brought by a judgment creditor of the mortgagor's executors,

Held, that the same result must follow as if the second action had not been begun until after the foreclosure was complete; the foreclosure was opened *ipsô facto* by the proceedings taken upon the covenant; and any person entitled to redeem had the right to bring this action without first setting aside the final order; the right to redeem under such circumstances not being merely a personal equity in the mortgagor.

The mortgage contained a power of sale without notice on default for one month. After the foreclosure and the issue of execution upon the personal judgment, the mortgagees sold and conveyed the mortgaged premises to a purchaser at a private sale for $9,000. Neither in the contract of sale, nor in the conveyance, was there any recital of the title of the mortgagees.

Held, that the equity of redemption being then at large, the sale and conveyance were to be upheld as an exercise of the power of sale.

Carver v. *Richards*, 27 Beav. 488, and *Kelly* v. *Imperial Loan Co.*, 11 A.R. 526; 11 S.C.R. 516, followed.

The mortagees, prior to accepting the offer of $9,000 for the property, had offered it for sale by auction, after giving wide notice of their intention to do so, and no bidders had appeared; they had since offered it for sale constantly by land agents, and through their own manager, without success. The $9,000 obtained by the mortgagees fell $1,000 short of satisfying their claim, after crediting the proceeds of the sale of the lands bought by them at the sheriff's sale. Within a few months after the $9,000 sale, the purchaser resold portions of the land for $11,000, and retained a portion which he valued at $2,000.

Held, that the mortgagees had not acted negligently or carelessly in the sale they made, and had taken all the reasonable care and exercised all the diligence that a prudent owner would have used; they were not bound to offer the property a second time for sale by auction unless some reasonable prospect of obtaining a purchaser had appeared; but even if the property was sold at an undervalue, there was nothing in the circumstances of the sale which could lead to the conclusion that the inadequacy was so great that fraud should be presumed, and in the absence of such a presumption the sale to the purchaser was binding.

The plaintiff's judgment against the mortgagor's executors was not obtained till a year after the sale of the property for $9,000. Under the plaintiff's execution the sheriff advertised the property in question for sale, and at such sale the plaintiff became the purchaser and received a conveyance from the sheriff.

Held, that under the circumstances, even supposing the sale for $9,000 to have been an undervalue, the plaintiff was not entitled to an account from the mortgagees of the price which they ought to have obtained; for he was not an incumbrancer at the time of the sale, and the title, legal and equitable, had been vested in the purchaser before the sheriff's sale.

Moss, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *H. Cassels*, Q.C., for the defendants.

Chancery Division.

Full Court.]* [Jan. 16.

REGINA *v.* ARNOLDI.

Misbehaviour in office—Public functionary—Auditing public accounts—Criminal law.

Special case reserved.

The defendant, an officer in the public service of Canada, having charge of public dredging in Quebec and Ontario, in respect to the expenditure and audit of public moneys for such purposes, used his own steam yacht for the purpose of towing the dredges from place to place, and of furnishing them with supplies, etc. He registered the steam yacht from time to time in the name of one or other of his friends, in whose name he made out the accounts for the use of the yacht in order to avoid newspaper notoriety in the matter, but not with the view of making any dishonest gains out of the department, and, in fact, no undue gains were made by him. In his capacity as such public officer he then certified to the justness and accuracy of the accounts respecting the use of the steam yacht, as though for services rendered by contractors with the government, and thereby received for himself payment for those services.

Held, that the defendant had been guilty of misbehaviour in office, which is an indictable offence at common law, and it is not essential that pecuniary damage should have resulted to the public by reason of the irregular conduct of their officer. The gravity of the administrative transgression was not to be ascertained by mere pecuniary results. The defendant was tempted to do what he did by the prospect of gain; he prospered by the dereliction of duty, and to accomplish his purpose it was necessary to conceal the actual transaction.

C. T. Blackstock for the defendant.

B. B. Osler, Q.C., and *Hogg*, Q.C., for the Crown.

BROWN *v.* MOYER.

Slander and libel—Fair comment—Evidence of facts—Admissibility—Pleading.

Motion for new trial in action for libel.

The plaintiff brought this action against the editor of the Berlin *Daily News* in respect to an alleged libel contained in an article in his newspaper, commenting upon the conduct of the plaintiff as a municipal councillor in connection with the refusal of the council to exempt a certain manufactory from taxation. Justification was not pleaded, but the defendant claimed the right at the trial, and was permitted to give evidence under the plea of fair comment to show how the plaintiff had acted in the committee of the council upon the consideration of the application for exemption.

Held, that the evidence was properly admitted.

Per BOYD C.: Justification technically is not pertinent in such a case unless statements of facts as published are themselves libellous; but if the commentary on certain facts is complained of, then under fair comment may be proved the actuality of the occurrences alleged in order that the jury may pass

upon the comment. In this case, however, as the matters commented on are not explicitly set forth on the face of the article, nor particulars given in the pleading, and the plaintiff may have therefore been taken by surprise, he should have a new trial on payment of costs.

Per ROBERTSON, J.: The evidence was properly admissible, and the jury having considered it and the whole article in which the alleged defamatory matter appeared, and having concluded that under the circumstances what was said in the article was not libellous, the verdict should not be interfered with.

Clement for the motion.

Johnston, Q.C., *contra*.

DEROCHIE *v.* CORNWALL.

Municipal corporations—Defective sidewalk—Ice—Negligence.

At a certain point in the sidewalk in a frequented street in the town of Cornwall, the sidewalk, having settled through age and decay, formed a depression where water lodged and ice gathered so as to impair the safety of pedestrians, more or less, throughout the winter. On March 7th, 1891, ice, seven inches in thickness, had formed at the place, and the plaintiff met with the accident complained of in this action. No outlet had been provided by the municipality for the water thus gathered upon the place of passage. Many complaints had been made to the corporation about the state of affairs at this point, and the place had been in as bad condition as at the time of the mishap for over a week.

Held, that the plaintiff was entitled to damages as found by the jury.

Per BOYD, C.: The walk was out of repair because not safe at this point, having regard to the travel on it and the resources of the municipality.

Per ROBERTSON J.: This was not the case of a sudden thaw and an equally sudden change of temperature to freezing, where the whole sidewalk in the municipality would be slippery and dangerous to walk upon, in which case no reasonable attention or care on the part of the authorities could avert the state of things, and it would be unreasonable to hold the municipality liable; but it was the case of disrepair and decay of the sidewalk, which it was within its power to prevent by ordinary care and watchfulness.

MEREDITH, J., *dissentiente*. The evidence did not prove negligence, and judgment should be entered for the defendants.

B. B. Osler, Q.C., and *Leitch*, Q.C., for the appellants.

Moss, Q.C., *contra*.

COLEMAN *v.* CITY OF TORONTO.

Trial—Dispersing jury before verdict—Irregularity—Waiver—Verdict on one of several issues.

Action for damages for nuisance causing diphtheria.

At the trial of this case, the matter was left to the jury at six o'clock in the evening. The judge afterwards informed the sheriff's officer that if the jury had not come to an agreement by nine o'clock, he was to let them go. After nine o'clock the officer dispersed the jury, telling them they could go where

they liked, but had better come into the jury-box the next morning. They gave no sealed verdict because they had not agreed on all the issues, but they returned to the jury-box next morning at the opening of the court. Their names were not called, but it was assumed both by judge and counsel that it was the same jury, and they so spoke and were interrogated. A juror stated that they had not been able to agree. Counsel for the plaintiff asked the judge to ask the jury whether they agreed whether the cause of complaint in the action was a nuisance or not. Further conversation then followed between counsel and judge, which evidently suggested the next statement from the jury, namely, that they were agreed as to the diphtheria, but that it was not caused by the nuisance. The judge then asking for the record, counsel for the plaintiff objected that the finding must be a whole finding or none at all. The judge did not assent, and thereupon counsel for the plaintiff submitted that, in view of the apparent disagreement upon the main issue, the jury should be discharged. The judge did not assent to this, however, but put the matter formally to the jury, and recorded that the jury found that the diphtheria was not caused by any nuisance created by the defendants.

Held, that any irregularities in the course of the proceedings, such as the dispersing of the jury over night and the omission to identify the constituents of the jury in the morning, were waived by the conduct of the plaintiff's counsel. They had been treated on all hands as not discharged, and as competent to deal with the case, and the issue on which the jury had agreed must be recorded as finally disposed of by their verdict, so as not to be opened on the farther litigation of the case.

Ritchie, Q.C., and *Boultbee*, Q.C., for the plaintiff.

Piggott, Q.C., for the defendants.

BOYD, C.] [NOV. 12.

LANGLOIS *v.* LESPERANCE.

Deed—Habendum repugnant to the grant.

Grant of lands to A. and his heirs forever, *habendum* to A. and his wife for their natural lives and the life of the survivor, and from and after the death of both of their lawful heirs and assigns.

Held, A. took in fee simple to the exclusion of the wife.

T. Mercer Morton for the plaintiff.

A. R. Bartlett for the defendant.

[NOV. 28.

RE SUSKEY & THE CORPORATION OF THE TOWNSHIP OF ROMNEY.

By-law—Amending former by-law—Township council—Power to pass 55 Vict., c. 42, s. 573 (O.).

The power to amend a by-law given under s. 573, Consolidated Municipal Act, 1892, which does not provide sufficient means "fully to carry out the intention thereof," means the completion of the work so as to make it efficient,

though there may be some deviations and variations, or even additions, to the work as originally planned by the engineer.

During the construction, certain "extra work and necessities" were recommended by the engineer,

Held, that the by-law providing for them was an amending by-law under s. 573, Consolidated Municipal Act, 1892, and that the township council had power to pass it under that section.

Pegley, Q.C., for the motion.

Atkinson, Q.C., *contra*.

MEREDITH, J.] [Dec. 13.

SMITH *v.* CORPORATION OF THE CITY OF LONDON.

Municipal corporations—By-law limiting hours for sale of intoxicating liquors—Injunction.

Motion to continue an injunction.

Held, that it is not *ultra vires* of a municipal council by by-law to deal with the limitation of the hours during which intoxicating liquors may be lawfully sold.

Semble, if the intended action of the municipal council were clearly *ultra vires*, and if it would be injurious to the rights of the plaintiff as a ratepayer, and if there were no other adequate relief as a remedy, relief by way of injunction may be granted.

C. Moss, Q.C., for the plaintiff.

W. R. Meredith, Q.C., for the defendant.

Common Pleas Division.

Div'l Court.] [Dec. 23.

REGINA *v.* STONE.

Cheese factories—Action to prevent frauds against—Intra vires Dominion Parliament—Information taken and summons issued by interested magistrate—Hearing before another magistrate—Defendant appearing and answering charge—Validity of conviction.

The Act, 52 Vict., c. 43 (D.), an Act to provide against frauds in the supplying of milk to cheese factories, etc., is *intra vires* of the Dominion Parliament.

The justice of the peace before whom the information was laid, and who issued the summons, was claimed to be interested. The hearing, however, took place before and the adjudication and conviction was made by another justice, whose qualification was not attacked, while the defendant pleaded to the charge

and raised no objection to the validity of the proceedings until the application for a certiorari.

Held, that the conviction could not be impugned.

DuVernet for applicant.

Riddell, contra.

MULLIGAN *v.* THOMPSON.

Seduction—Married woman—Non-access of husband—Action by parent—Evidence.

The parent of a married woman may maintain an action for her seduction where non-access of the husband is proved; and evidence thereof, as well as of the seduction, may be given by the married woman.

Pepler, Q.C., for the plaintiff.

Marsh, Q.C., and *Mickle* for the defendant.

CLOSE *v.* CORPORATION OF WOODSTOCK.

Municipal corporation—Drain bringing down noxious matter—Use of drain by others—Excavations on plaintiff's land.

Where a municipal corporation constructed a drain through the plaintiff's land, whereby noxious matter was brought down and deposited thereon, the corporation is liable therefor, notwithstanding there were excavations on the plaintiff's land but for which the noxious matter might have passed off, the plaintiff not being bound to have his land in a state of nature; nor was it any answer that the drain was used for such purpose by others as well as the defendants.

Osler, Q.C., for the plaintiff.

G. T. Blackstock, Q.C., for the defendants.

RE HARPER.

Habeas corpus—Appeal.

Under R.S.O., c. 70, s. 1, the writ of habeas corpus may be made returnable before "the judge awarding the same, or before a judge in chambers for the time being, or before a Divisional Court"; and by s. 6 an appeal is given from the decision of the said court or judge to the Court of Appeal.

Held, that the right of appeal must be exercised in the manner provided by the statute, and therefore an appeal from a judge in chambers must be to the Court of Appeal.

DuVernet for the defendant.

J. R. Cartwright, Q.C., *contra.*

LAMOTT *v.* PARKES.

Estate tail—Conveyance by tenant in tail—Bar of entail.

Lands were granted to trustees upon trust for M.A.L. and F.L., her husband, during their joint lives; and after F.L.'s dea.. if M.A.L survived him, to her and the heirs of her body in fee; and in case M.A.L. died either before or after F.L., to the heirs of her body as tenants in common; and in case M.A.L. died without issue, to her right heirs in fee. M.A.L. died in 1879, F.L. surviving her and being still alive, leaving several children, her eldest son being F.H.L., who conveyed to P., under whom the defendant claimed.

Held, that M.A.L took an estate tail in possession; and the effect of the conveyance to P. was to bar the issue and all remainders, and vest the lands absolutely in P. in fee.

Moss, Q.C., for the plaintiff.

Moncrieff, Q.C., for the defendant.

REGINA *v.* GROVER.

General Sessions—Order by, to sheriff to abate nuisance—Validity of—Certiorari—Right to issue—Costs.

The defendant was convicted at the General Sessions on an indictment for a nuisance in obstructing the highway by the erection of a wall thereon, and directed to abate the nuisance. The nuisance not having been abated, the court made an order directing the sheriff to abate same at defendant's costs and charges, and to pay to the County Crown Attorney forthwith after taxation the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the said order.

Held, that the Sessions had no authority to make the said order to the sheriff, the proper mode in such case being a writ *de nocumento amovendo*; that the order being a judicial act was properly removed by certiorari, and must be quashed, but without costs.

Remarks as to the jurisdiction of the Sessions as to the costs.

DuVernet for the motion.

J. M. Clark, contra.

ROSE, J.] [Nov. 15.

ROSEBACK AND CARLYLE.

Municipal corporations—Court of Revision—Right of counsel to appear before.

The Court of Revision of a city created under the Municipal Act, R.S.O., c. 184, is not obliged to hear counsel in support of an appeal against an assessment of property under the Assessment Act, 53 Vict., c. 48 (O.), and a mandamus for such purpose was required.

George Lindsey for the plaintiff.

Herbert Mowat, contra.

STREET, J.]

ROSS *v.* ROSS.

Jurisdiction—Ontario courts—Title to land outside of Ontario.

The courts in this Province have no jurisdiction to entertain actions for determining the title to lands in the Province of Manitoba, even though the parties be resident herein.

R. M. McKay for the plaintiff.

I. Hoskin, Q.C., for the defendants.

ARMOUR, C.J.] [Jan. 19.

CORPORATION OF GEORGETOWN *v.* STIMSON.

Municipal corporation—By-law—Payable by instalments based on aggregate debenture debt—Variation in different years—Registration—Effect of.

A by-law passed under the Municipal Act, R.S.O., c. 184, was made payable by instalments, but in settling the amount payable in each year the total existing debenture debt was estimated; and although the aggregate annual amount payable under all the by-laws was appropriately equal to that payable in other years, there was a very large variance in the amounts payable in the different years under the present by-law. The by-law was duly registered under s. 351, and notice published under s. 354, and no application made to quash within three months after the said registry.

Held, that the by-law and debentures issued thereunder were valid, and binding on the municipality.

W. Laidlaw, Q.C., for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

Practice.

BOYD, C.] [Jan. 9.

PLUMMER *v.* COLDWELL.

Costs—Scale of—Action to compel delivery up of promissory note for $230—Note wrongfully held by defendants—Action of tort.

In an action brought in the High Court to restrain the defendants by injunction from negotiating a promissory note for $230, and to compel them to deliver it up to the plaintiff, or for damages for its detention, it was determined that the note was wrongfully held by the defendants, who had obtained it under the pretence of discounting it, but really with the view of making it the subject of garnishment.

Held, that the action sounded in tort and not in contract, and could not have been brought in a County Court; and the successful plaintiff was therefore entitled to tax his costs on the High Court scale.

Johnson v. *Kenyon*, 13 P.R. 24, distinguished.

Robb v. *Murray*, 16 A.R. 502, followed.

H. T. Beck for the plaintiff.

W. R. Riddell for the defendant Millar.

Chy. Div'l Court.] [Jan. 16.

CARTON *v.* BRADBURN.

Costs—Order of trial judge as to, under Rules 1170, 1172—"Good cause"—Set-off of costs.

In an action for damages for malicious prosecution and arrest brought in the High Court of Justice and tried by a jury, the plaintiff recovered a verdict of $50. The trial judge entered judgment for this sum with costs to the plaintiff on the scale of the County Court, and ordered that the defendant should not be allowed to set-off his extra costs occasioned by the action being brought in the High Court. He was of opinion that the plaintiff had reasonable grounds for bringing the action in the High Court; that the conduct of the defendant was wrong; and that the verdict might well have been larger.

Held, that there was was no "good cause," under Rule 1170, for depriving the defendant of the set-off provided for by Rule 1172.

McNair v. Boyd, 14 P.R. 132, followed.

E. B. Edwards for the plaintiff.

Watson, Q.C., for the defendant.

Court of Appeal.] [Jan. 17.

ROSS *v.* EDWARDS.

Staying proceedings—Vexatious action—Abuse of process of court.

Held, reversing the order of the Queen's Bench Divisional Court, 14 P.R. 523, and restoring that of MACMAHON, J., *ib.*, that this was not a case in which the exceptional power of the court to refuse to allow its process to be abused by a frivolous section could be properly exercised.

McCarthy, Q.C., and *A. Ferguson*, Q.C., for the plaintiff.

Robinson, Q.C., and *Shepley*, Q.C., for the defendants.

ROBERTSON, J.] [Jan. 25.

IN RE SLOSSON.

Insurance moneys—Infant—Foreign trustee—Security—R.S.O., c. 136, s. 12.

An infant was entitled to share in certain insurance moneys accruing under a policy upon the life of her deceased father. The infant lived with her mother in a foreign state, and the mother had there been appointed by a Surrogate Court guardian of the infant, and had given security to the satisfaction of that court. The mother petitioned the High Court to be appointed trustee under R.S.O, c. 136, s. 12, to receive the infant's share of the insurance moneys without security.

Held, that the security given by the petitioner in the foreign court would not attach to her appointment as trustee under the Act, and the court declined to appoint her unless she furnished the necessary security here.

Re Thin, 10 P.R. 490, followed.

Re Andrews, 11 P.R. 199, not followed.

E. P. McNeill for the petitioner.

W. F. Burton for the insurance company.