# Canada Law Journal.

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The annual meeting of the Canadian Bar Association will be held at the city of Ottawa on the 18th and 19th insts. We understand that international subjects will be largely in evidence.

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The sudden death of D'Alton McCarthy, Q.C., M.P., will be received with universal regret. The profession has been deprived of one of the most brilliant advocates and soundest lawyers that has ever adorned its ranks. As a public man he had statesmanlike ability of the highest order, and it may as truly be said of him as of any knight of old that he was without fear and without reproach. The tragic circumstances attending the accident which caused his death are known to all. He never rallied, and only to a certain extent recovered consciousness, passing away on the evening of the 11th inst. at the age of 62, having been, up to the time of the accident, in full vigour of mind and body.

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Our namesake of Albany again refers to the law which at present compels witnesses to "kiss the book," on tendering their evidence. It is a time-honoured custom, of no value in itself and with many disadvantages. We are told that Maryland has just placed upon the statute book a law abolishing the practice, and substituting therefor the more solemn and decorous form of swearing by uplifted hand. Three years ago Pennsylvania did the same, and others of the States will probably follow their example. This would seem distinctly better than the practice of applying the lips to a generally filthy article, or to the provision which obtains in some countries of providing Bibles covered with celluloid or other washable material.

Decisions affecting the ubiquitous bicycle and its riders will soon take a volume to themselves. Our friends of the wheel will take some comfort from the recent dictum of a Maryland judge, to the effect that where a street is impassable it is not a breach of a town ordinance prohibiting the riding of wheels on sidewalks, to leave the roadway and use the sidewalk. In the case before him the rider turned on to the sidewalk to avoid a bad place in the roadway, which the evidence showed was impassable for a bicycle. He was promptly collared by a policeman, but it was held that his excuse was sufficient. The question as to whether bicycles are to be classed as necessaries for an infant has also recently been discussed. The Appellate Division of the New York Supreme Court recently held that a bicycle is not an article of necessity for a girl seventeen years old, who lives in the house of her employer. It appears that she had agreed to pay $45 for a wheel, but returned it after paying only part of that sum. It was held that she was entitled, on the ground of infancy, to recover all that she had paid. In England an infant of nineteen, an apprentice, purchased a racing bicycle from the plaintiff company, and having ridden it for some time, and won races therewith, declined to pay the purchase money. The Judge of the County Court at Leicester held that the bicycle was "necessary." This judgment was sustained by the Queen's Bench Division. It would rather seem that here, as in many other instances, hard cases make bad law. We fail to see where the necessity comes in, though many find it a luxury, and a very convenient mode of progression.

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A new series of Canadian reports devoted exclusively to criminal and quasi criminal cases has just been announced to be published by the Canada Law Journal Company. It is thought that it will be sure to meet with the encouragement and patronage which a work of such importance demands. The need of a series of "Canadian Criminal Cases," the title very aptly chosen for the work, has been manifest for a long time, but more particularly since the passing of our Criminal

Code in 1892. It is expected to include, at the rate of one volume per annum, not only all current cases, but all important decisions under the Code since its institution. Annotations following the full report will make this series a complete commentary on Canadian criminal law and practice, with the advantage of its being brought up to date from time to time with each succeeding number. The editorial management has been undertaken by Mr. W. J. Tremeear, of the Toronto Bar, who will, we doubt not, do his work with care and efficiency.

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There has been some adverse criticism in this country upon the action of the United States in beginning hostilities against Spain by seizing her merchant shipping before making a formal declaration of war. There is, we think, no substantial reason to be urged in support of this view. While Grotius and others of the earlier writers on International Law undoubtedly favor the necessity of formal notice before the commission of an act of war, owing to the increased facilities of their times for communication between States and their representatives abroad, modern publicists hold that it is not necessary to make a solemn and formal challenge to the enemy in order to legitimate acts of hostility directed against him. (See Walker's Science of International Law, p. 242, and Hall's International Law.) Even so early as the seventeenth century the practice of making formal declarations of war began to fall into disuse. Blackstone, it is true, states that formal notice is necessary (1 Comm. 258); but the English repudiated his opinion by their unannounced seizure of the Danish fleet in 1807, and on other occasions. In *Oom* v. *Bruce*, 12 East 226, Lord Ellenborough said that "formal declarations of war only make the state of war more notorious; but though more convenient in that respect, are not necessary to constitute such a state." See also the "Nayade," 4 C. Rob. 251; the "Eliza Ann," Dods. 247; and the "Hiawatha," Blatch. (Prize Cas.). The fact that formal declarations were issued before the Italo-Austrian war in

1866, the Franco-Russian war in 1877, and the Russo-Turkish war in 1853, does not demonstrate that there was any legal necessity to make the same. Spain must blame her lack of "alert militarism" for her great losses at the outset of the conflict. All through the long diplomatic controversy preliminary to the beginning of hostilities she appeared to have been actuated by the belief that the Americans were only "bluffing." She took her chances with her eyes open, and cannot blame her reverses as due to any breach by her adversary of the international etiquette of war.

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## *EXECUTIONS AGAINST LAND.*

The last number of the Ontario Reports includes the decision of Ferguson, J., in *Neil* v. *Almond*, 29 O.R. 63, which will prove quite a surprise to many practitioners. There has been for many years past a sort of tacit understanding in the profession that by keeping a writ of fi. fa. lands renewed, the right of the execution creditor against the lands of his debtor under the writ might be preserved for an indefinite number of years, and that any sale which might be made by the debtor of his lands whilst the execution was in the sheriff's hands would be liable to be defeated by a sale had under the writ. The case of *Neil* v. *Almond* seems to show that this view of the law is erroneous. The facts of that case were as follows: Job Almond placed a writ of execution against the lands of James Ellis in the sheriff's hands, on 20th April, 1884, which was kept duly renewed. In 1885 Neil purchased certain lands of James Ellis, which were bound by the writ, of which Neil had no actual notice. Neil subsequently, in 1891, mortgaged the land to the Canada Permanent L. and S. Co., which mortgage at the time of the action was still subsisting. It having been discovered that the lands were still subject, as was supposed, to Almond's execution, the sheriff was about to offer them for sale thereunder, when Neil commenced his action to restrain further proceedings under the execution against the lands so purchased by him. He contended that the execution creditor's claim under the writ was governed

by R.S.O. (1887), c. 111, s. 23 (R.S.O. 1897, c. 133, s. 23), which provides that no action "or other proceeding" shall be brought to recover out of any land any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime payment or acknowledgment be made or given by the party by whom the same is payable.

The learned Judge holds that the execution of a writ of fi. fa. is a "proceeding" within the meaning of that section, and that unless it takes place within ten years from the time the writ was first placed in the sheriff's hands the statute operates as a bar to the execution of the writ. This, as we have already remarked, is a very important—and we may add, without any intention of impugning its accuracy—a very surprising decision, because, as we have already observed, we think the general opinion of the profession has been the other way.

The wording of the section would rather tend to the conclusion that the liens referred to therein, and intended to be affected thereby, are liens created by the act of the parties, and not liens arising by operation of law as a result of legal process. The words "no action or other proceeding shall be brought" to recover money secured by any lien, are certainly not very happily chosen, if they were intended to apply to executions. The writ itself by its delivery to the sheriff is the lien, it is also itself "the proceeding" by which the lien is enforced, no other "proceeding," as far as the execution creditor is concerned, being necessary to enforce it, and with all due respect to the learned judge, there seems to be room for contending that the "proceeding" which the statute contemplates, is a "proceeding" by the party and not by the officer of the court in execution of its process.

In both *Smith* v. *Brown*, 20 O.R. 165, and *Casper* v. *Keachie*, 41 U.C.R. 599, referred to by the learned judge, the acts which were held to be "proceedings" were acts of the party, and therefore those cases are really no authority for the pre-

sent decision. The point involved is certainly a very nice one, and one which we venture to think would bear further ventilation.

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*BILLS OF EXCHANGE ACT, 1890, AND AMENDMENTS.*

It was anticipated that the practical identity of the Bills of Exchange Act, 1890 with the Imperial Act of 1892 would give special value to the English judicial decisions. The omission of s. 60 of the latter Act was a very important divergence, and has led to far more reaching results than were foreseen.

This is exemplified by the judgment in *London and River Plate Bank* v. *Bank of Liverpool* (1896) 1 Q.B. 7. The facts were briefly as follows: In 1893 Hippolyto Garcia, a merchant in Monte Video, purchased at the plaintiffs' branch there a draft at 120 days on the plaintiffs in London, payable to the order of Fueyo & Co. The bill was drawn in three parts, and on April 19th Garcia sent the first of exchange to the payees in Havana in payment of an account. On April 23rd he wrote again enclosing the second of exchange. Neither of these letters ever reached Fueyo & Co. On June 20th a person calling himself Pedro Garcia was introduced to Messrs. Loychate & Co., of Havana. He produced the first and second of exchange of the draft purchased by Hypolyto Garcia at Monte Video, and asked them to discount the bill. It then bore the forged indorsement of Fueyo & Co. It was forwarded to the agents of Loychate & Co., at Liverpool, by whom it was paid into their account at the Bank of Liverpool, and it was subsequently paid by the plaintiffs to this bank. On the discovery of the forgery some months afterwards this action was brought against this bank, and the Liverpool agents of Loychate & Co., as money received by the defendants for the use of the plaintiffs.

The trial took place before Mathew, J., in the Commercial Court, and with the result that the action was dismissed with costs. In the course of his judgment the learned judge laid stress upon the principle that if there is an interval of time

in which the position of the holder may be altered the money once paid cannot be recovered back. "That rule," he continued, "is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back." This case is therefore authority "that when a bill becomes due and is presented for payment, and is paid in good faith, and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries." In Canada this rule is, subject to the amendment hereinafter referred to, applicable to cheques as well as bills and notes. In England, by force of s. 60, it is limited to the two latter instruments.

This decision caused a good deal of concern amongst bankers here, as it practically left them without legal recourse if they had the misfortune to pay a bill or cheque bearing a forged indorsement. In England the danger was confined to customers' bills and drafts at short dates drawn by other bankers. The banks in Canada were on the other hand not protected in the case of cheques payable to order. The only case in which the bank was protected was when the person to whom the money had been paid by mistake had not changed his position. In the case in question the Bank of Liverpool would have been seriously compromised if they had been compelled to repay the money, as they had lost their right of giving notice that the bill had not been paid.

In an able article in the *Canadian Journal of Commerce*, 1897, at p. 242, it is pointed out that the "altered position may have occurred in a very short time." Another writer says, "Negligence is immaterial, and if the holder has had the money during any period, however short, during which his position may theoretically have been altered, you cannot touch him. And this practically cuts your chances down to nil. Short of catching him within five minutes after he leaves your bank I don't see how you can do anything."

The decision was not indeed new law. In *Cocks* v. *Masterman*, 9 B. & C. 902 (1829), it was laid down that the holder of a bill is entitled to know on the day when it becomes due whether it is honoured or dishonoured, and that no notice of the forgery having been given on the day the bill becomes due, the parties who had paid the money were not entitled to recover it back. There the bankers had paid an acceptance which was discovered afterwards to have been forged, and had the following day given notice of the fact to the party who had received the money.

The attention of the then Minister of Justice having been drawn to the danger, he introduced the last amendment to the Act. This enactment 60 & 61 Vict., c. 10, s. 2, after repealing s. 24, sub-s. 2 of the original Act, added by 54 & 55 Vict., c. 17, s. 4, provides that:

"2nd. If a bill bearing a forged or unauthorized indorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid, or from any indorser who has indorsed the bill subsequently to the forged or unauthorized indorsement, provided that notice of the indorsement being a forged or unauthorized indorsement is given to each such subsequent indorser within the time and in the manner hereinafter mentioned; and any such person or indorser from whom said amount has been recovered shall have the like right of recovery against any prior indorser subsequent to forged or unauthorized indorsement. 3rd. The notice of the indorsement being a forged or unauthorized indorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the indorsement is forged or unauthorized, and may be given in the same manner, and if sent by post may be addressed in the same way as notice of protest or dishonour of a bill may be given or addressed under this Act."

It is not known that there is any similar enactment in England. The amendment will in practice occasion consid-

erable difficulty. In the first place it may be pointed out that it only applies to indorsements and will not afford any relief to banks paying forged acceptances or drafts, but leaves the law as to them as it was before. The words "reasonable time" in sub-s. 3 are somewhat unfortunate. It might have defined what would be a reasonable time. Doubtless the same rule would be applied as in giving notice of dishonour of a bill or note, i.e., it will be in time if given not later than the following day.

But a more serious difficulty arises from there being no limitation of the time within which the discovery may be made and its consequent remedy resorted to. In practice the Act will no doubt be chiefly confined to cheques. Most customers have monthly settlements with their banks, although not always so. Many customers, especially outside of the business classes, allow long periods to elapse without ever calling for their cheques. But even otherwise, cases may arise where a cheque apparently paid to the proper person may afterwards prove to have been paid on a forged or unauthorized indorsement. A right of action arises on discovery of the fact and notice given. Will this right exist after six years? Is the customer of a bank whose cheque is so pai "a person on whose behalf such payment is made?" The value of crossing cheques and thus acquiring the protection of the Bills of Exchange Act will be in consequence of this legislation more than ever manifest.

E. H. SMYTHE.

# ENGLISH CASES.

## *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*



**RAILWAY**—INTERFERENCE WITH ROAD—PENALTY FOR NOT SUBSTITUTING SUFFICIENT ROAD—RAILWAY ACT, 1845 (8 & 9 Vict., c. 20), ss. 53, 54—(RAILWAY ACT, 51 VICT., c. 29, s. 183 (D.)

In *Llewellyn* v. *Vale of Glamorgan Ry. Co.* (1898) 1 Q.B. 473, an appeal was had from a decision of Wright, J. (1897) 2 Q.B. 239. The action was brought to recover a penalty from a railway company for not providing a sufficient road in place of a private road at a place where the same was interfered with by their railway. The English Railway Act imposes a penalty of £20 a day, payable "to the owner" in case of a private road, for every day during which the substituted road shall not be made. The plaintiff was only a part owner of the road interfered with, and the defendants contended that all other co-owners were necessary parties. The Court of Appeal (Smith, Chitty and Collins, L.JJ.) overruled this objection, and held that any owner of any part of the road interfered with might recover the penalty for his own use, and that only one penalty was recoverable. The Dominion Railway Act (51 Vict., c. 29), s. 183, only applies to highways, but the penalty thereby imposed would appear also to be single.

**ELECTION**—RECOUNT OF VOTES.

*Monkswell* v. *Thompson* (1898) 1 Q.B. 479, was a case stated under the Municipal Corporations Act. The point presented for the decision of the Court was a very simple one. There were eight candidates for a school board election. The first five were declared elected. A petition was presented against the return of the candidate who stood fifth on the list, on the ground that the candidate who stood sixth on the list had really the larger number of votes, and a recount was ordered of the votes cast for these two candidates, when it appeared that the 6th candidate had really the larger number of votes,

and he claimed on this recount to be returned elected. The respondent objected that the votes cast for the other four candidates, as to whom there was no dispute, must also be recounted, but the Divisional Court (Hawkins and Channell, JJ.) held that this was unnecessary, and that the sixth candidate was entitled to be declared elected, and dismissed the appeal.

**PRACTICE**—SERVICE OF WRIT—DEFENDANT DOMICILED OUT OF JURISDICTION—ARGUMENT THAT WRIT MAY BE SERVED ON AGENT IN ENGLAND—ORD. IX. RR. 1, 2—(ONT. RULES, 145, 146).

In *Montgomery* v. *Liebenthal* (1898) 1 Q.B. 487, the Court of Appeal (Smith, Chitty and Collins, L.JJ.), gave their approval to *Tharsis Sulphur Co.* v. *Société Industrielle des Meteaux* (1889) 60 L. T. 924. That case had decided that it was competent for litigants to contract themselves out of the Rules as regards the mode of service of process, so long as they do not ask the Court to do something prohibited by the Rules. In the present case the defendants were domiciled or ordinarily resident in Scotland, and the contract upon which the plaintiff sued provided that service of proceedings on the defendants might be made by leaving the same at the office of the London Trade Association, and by posting a copy to the defendants' address in Scotland, which should be deemed good service, any rule of law or equity to the contrary notwithstanding. The writ was served in the manner prescribed by the contract, whereupon the defendants moved before Phillimore, J., to set the service aside, which motion he refused, and the Court of Appeal sustained his decision. The defendants relied on the *British Waggon Co.* v. *Gray* (1896) 1 Q.B. 35 (noted ante vol. 32, p. 105), but the Court of Appeal held that case to be distinguishable on the ground that there the parties had agreed to something which was expressly prohibited by the Rules. So that the rule on this point may be formulated thus, that it is competent for parties to contract as to the mode of service of process in any case which the Court has jurisdiction to entertain, but it is not competent for them to contract so as to give the Court jurisdiction in any case in which the Rules prohibit it from exercising jurisdiction.

**ELECTION**—PETITION—SCRUTINY—CLAIM OF SEAT—ELECTION PETITION RULES, 1868, RR. 6, 7—(DOMINION ELECTION RULES 6, 7).

*Furness* v. *Beresford* (1898) 1 Q.B. 495, was an election petition in which the petitioner, the unsuccessful candidate, claimed to have a scrutiny, alleging that he was entitled to the seat as having had a majority of lawful votes. The respondent applied for particulars under Election Rule 6 (see Dominion Election Rule 6), and an order was made in Chambers therefor, but on the appeal of the petitioner this order was set aside, the Court of Appeal (Smith, Chitty and Collins, L.JJ.) being of opinion that Rule 6 did not apply in such a case, but that Rule 7 (see Dom. Elect. Rule 7) was exclusively applicable thereto, notwithstanding there was an allegation in the petition that certain persons were guilty of corrupt and illegal practices, illegal payments, illegal employment, and illegal hiring at the election, and that the votes of such persons ought to be struck off the poll.

**SOLICITOR**—CHARGING ORDER—PROPERTY RECOVERED OR PRESERVED—SOLICITORS' ACT, 1860 (23 & 24 VICT., C. 127) S. 28—ONT. RULE 1129.

*In re Humphreys* (1898) 1 Q.B. 520, throws light on the construction to be placed on the new Ont. Rule 1129, which embodies in substance the provisions of the Imp. Stat. 23 & 24 Vict. 127, s. 28. That section empowers the Court to make a charging order in favour of a solicitor for the amount of his costs on the property recovered or preserved. The English Act does not contain the words "through the instrumentality of the solicitor," which are found in Ont. Rule 1129, but they probably add nothing to the force of the Rule. In this case the solicitors acting on behalf of the trustees of a bankrupt's estate were instructed to take proceedings for the arrest of the bankrupt for offences against the Debtors' Act, 1869, and he was arrested in Australia, whither he had gone with the proceeds of the sale of his stock in trade. On his arrest a sum of money, the proceeds of the sale, were found upon him, and was taken possession of by the Australian police, and under a power of attorney prepared by the solicitors, this money was handed over by the police and transmitted to the solicitors for the trustee in bankruptcy. The Court of Appeal (Smith, Chitty and Collins, L.JJ.) agreed

with the Divisional Court (Wright and Kennedy, JJ.) in holding that the money in question was not money recovered or preserved in any civil suit or proceeding, and therefore not properly the subject of a charging order. Further that the power to grant such orders is discretionary, and that such discretion should be rarely exercised in bankruptcy proceedings.

**PRINCIPAL AND AGENT**—HOLDING OUT PERSON AS HAVING AUTHORITY AS AGENT—EVIDENCE FOR JURY—JUDGMENT CONTRARY TO FINDING OF JURY.

*Spooner* v. *Browning* (1898) 1 Q.B. 528, is a case in which the judge at a trial submitted certain questions to the jury, to which they returned answers which would have entitled the plaintiff to judgment, but the judge, on further consideration, being of opinion that there was no evidence for the jury on one of the questions, rejected the findings on that question, and entered judgment for the defendants. The action was brought to make the defendants liable for the frauds of a clerk in their employ, under the following circumstances. The defendants were stockbrokers, and the clerk in question was employed at a small salary, and he was also allowed by the plaintiffs a commission on all business introduced by him and accepted by the plaintiffs, but he was not authorized to accept orders on their behalf. On three occasions the plaintiffs gave orders to the clerk for the purchase of shares on the plaintiffs' behalf, which orders were transmitted by the clerk to the defendants and executed by them, and they sent bought notes to the plaintiff in respect of the shares so purchased, and the price of the first two lots of shares the plaintiff paid, by cheque delivered to the clerk, but drawn payable to the defendants' order; for the third lot he gave a cheque also to the clerk, but payable to the clerk's own order. The defendants received all of these cheques and credited the plaintiff with the amount of them. Subsequently further orders for the purchase of shares were given by the plaintiff to the clerk, who did not transmit them to the defendants, but made out and handed to the plaintiff bought notes purporting to show purchase of shares in pursuance of the orders, and to be signed by the defendants, which were in fact forgeries. For these supposed purchases

the plaintiff gave the clerk cheques payable to his own order, the proceeds of which he misapplied to his own use. The jury on this evidence found (1) that the clerk had no express authority to receive orders for the defendants, but (2) that the defendants had held him out to the plaintiff as having such authority. On the latter point, however, the majority of the Court of Appeal (Smith and Chitty. L.JJ.) held that the judge at the trial was right in holding that there was no evidence to support such a finding. Collins, L.J., was, however, unable to agree with the rest of the Court, and was of opinion that there was some evidence that the defendants by their conduct represented or permitted the clerk to represent, that orders received by him would be executed by the defendants unless they gave notice to the contrary. He also thought there was evidence of the defendants having held the clerk out as having authority to receive payments by cheque payable to his own order.

**CRIMINAL LAW**—MALICIOUS INJURY TO PROPERTY—ACT DONE IN ASSERTION OF RIGHT—EXCESS OF DAMAGE.

In *The Queen* v. *Clemens* (1898) 1 Q.B. 556, the Court for Crown cases reserved (Russell, C.J., and Grantham, Wright, Bigham and Darling, JJ.), lay down that the proper direction to be given to a jury on an indictment for malicious injury to property where it is claimed by the defendant that the act was done in the assertion of a right, is: Did the defendants do what they did in exercise of a supposed right? And if they did, but on the facts before them the jury are of opinion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of the alleged right, then that the jury ought to find them guilty of malicious damage. In this case two wooden structures were erected on a piece of meadow land on the sea shore, over which the defendants claimed to have certain rights of user for recreation and for mending and drying nets, etc., and the defendants in the assertion of these rights pulled down the buildings and threw them into the sea. The Court thought that this was an excess of damage for which they might properly be convicted.

**SHIP**—CARRIAGE OF BULLION—BILL OF LADING—IMPLIED WARRANTY.

*Queensland National Bank* v. *Peninsular and Oriental S.S. Co.* (1898) 1 Q.B. 557, was an actior brought against a steamship company to recover damages for the non-delivery of bullion entrusted to them for carriage from Australia to England. The bill of lading was subject to exceptions of "Robbers or thieves by sea or land, loss by thefts or robberies by sea or land, and whether by persons directly or indirectly in the employment or service of the company, or otherwise," etc., etc.; and the question presented to the Court for adjudication was whether there was any implied warranty in the bill of lading that the bullion room in the ship was reasonably fit to resist thieves, and whether if such warranty was broken the exceptions apply. On these points Mathew, J., gave judgment in favour of the plaintiff, and the Court of Appeal (Smith, Chitty and Collins, JJ.), unanimously affirmed his decision. The contract being for the carriage of bullion, which was to be carried in a room specially intended for that class of freight, the Court of Appeal held that there was an implied warranty that that room was reasonably fit to resist thieves, following in this respect *The Maori King* v. *Hughes* (1895), 2 Q.B. 550, and other cases where such an implied warranty of the fitness of the vessel in respect of other kinds of freight has been held to exist.

## Correspondence.

### ABSURDITIES IN THE CANADA TEMPERANCE ACT.

*To the Editor of the Canada Law Journal.*

SIR,—In the Province of Nova Scotia, under the Canada Temperance Act, offenders are tried before a stipendiary magistrate, two justices of the peace or other persons mentioned in the Act. As my objection refers only to cases tried before a stipendiary magistrate or two justices of the peace, I will content myself by referring to them. As matters stand now, if a case is tried before two justices of the peace an appeal lies to the County Court; if the case is tried before the stipendiary magistrate then no appeal lies. Now it

might be contended that the cause of this is that legal gentlemen hold the positions of stipendiary magistrates, hence the appeal being taken away. Even if this were true I would not for one moment admit that the right of appeal should not exist. But it is not correct that "gentlemen of the robe" hold the positions of stipendiary magistrates. In fact in the municipalities the reverse is generally the case. By the Towns' Incorporation Act lawyers are appointed recorders, and these gentlemen frequently hold both offices, recorder and stipendiary magistrate, but not always. I have said if the case is tried before a stipendiary magistrate there is no appeal, but the reverse if the case is tried before two justices. Now suppose the case is tried before two magistrates, one of whom is a stipendiary and the other just an ordinary justice, then an appeal lies. Certainly it appears absurd on the face of it that if an information is heard before the stipendiary alone, no appeal, but if before the stipendiary sitting as an ordinary justice, but none the less a stipendiary, and another justice, then the party aggrieved has his appeal. Looking at this matter from a reasonable standpoint the position is absurd and the Act should be so amended that an appeal would lie in any case.

As matters stand now the prosecuting officer can lay his information before a favourable stipendiary, and on very weak evidence obtain a conviction, and the defendant is really without remedy. If any legal questions are to be taken advantage of, the defendant, at great expense, has to apply to a Judge of the Supreme Court for a writ of certiorari, and, assuming it is granted, by this time the prosecutor has found out, or possibly knew from the start, he had no right to a conviction, and does not oppose the same being quashed, the result of which is that while the defendant succeeds in quashing a conviction which should never have been entered against him, he does so at his own expense, the costs amounting to as much, if not more, than if he had paid the penalty in the first instance. This is not fair and is one-sided legislation of the worst kind. Amend the Act by giving appeal in all cases, and providing that costs shall abide the result of the case, opposed or unopposed, and fair play will be shown on both sides. As the law on the matter stands now great injustice can be, and often is, done to innocent parties who have not the necessary means to pay for expensive litigation to get their rights protected.

FAIR PLAY.

# REPORTS AND NOTES OF CASES

## Dominion of Canada.

### SUPREME COURT.

HOGABOOM *v.* RECEIVER-GENERAL.

Ontario] IN RE CENTRAL BANK. [Dec. 9, 1897.

*Winding-up Act—Moneys paid out of Court—Order made by inadvertence—Jurisdiction to compel repayment—R.S.C. c. 129, ss. 40, 41, 94—Locus standi of Receiver-General—55 & 56 Vict., c. 28, s. 2—Statute, construction of.*

The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into Court. It appeared that by orders issued either through error or by inadvertence, the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

*Held*, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene, although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

*Held*, also, that even if he was not so entitled to intervene, the provincial courts had jurisdiction to compel repayment into Court of the moneys improperly paid out. Appeal dismissed with costs.

*S. H. Blake*, Q.C., and *W. R. Smythe*, for the appellants. *Newcombe*, Q.C., and *F. E. Hodgins*, for the Receiver-General. *McCarthy*, Q.C., for the respondent Holmested.

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Ontario.] BURNS & LEWIS *v.* WILSON. [Dec. 9, 1897.

*Insolvency —Fraudulent preference—Chattel mortgage—Advances of money—Solicitor's knowledge of circumstances—R.S.O. (1887) c. 124—54 Vict., c. 20 (Ont.)—58 Vict., c. 23 (Ont.).*

In order to give a preference to a particular creditor, a debtor who was in insolvent circumstances, executed a chattel mortgage upon his stock in trade in favour of a money-lender by whom a loan was advanced. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor who, at the same time, delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was made in this manner to avoid the appearance of violating the Acts respecting assignments and preferences, and to bring the case within the ruling in *Gibbons* v. *Wilson*, 17 Ont. App. R. 1.

*Held*, that all the circumstances necessarily known to the solicitor in the transaction of the business, must be assumed to have been known to the mortgagee, and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a *bona fide* payment of money within the meaning of the statutory exceptions. Appeal allowed with costs.

*Gibbons*, Q.C., for the appellants. *Ritchie*, Q.C., for the respondent Wilson *John J. Scott*, fo the respondents, the W. E. Sanford Man. Co.

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Ontario.] SMALL *v.* THOMPSON. [Dec. 9, 1897.

*Mortgage—Married women—Implied contract—Disclaimer.*

Where a deed of lands to a married woman, but which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon and a covenant to the same effect with the vendor, his executors, administrators and assigns, and she took possession of the lands and enjoyed the same and the benefits thereunder without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that in assenting to take under the deed she bound herself to the performance of the obligations therein stated to have been undertaken on her behalf, and an assignee of the covenant could enforce it against her separate estate. Appeal allowed with costs.

*Armour*, Q.C., for the appellant. *Aylesworth*, Q.C., for the respondent.

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Ontario.] MALONEY *v.* CAMPBELL. [Dec. 9, 1897.

*Conveyance subject to mortgage—Obligation to indemnify—Assignment of—Principal and surety—Implied contract.*

The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgaged debt, and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same. Appeal dismissed with costs.

*C. H. Ritchie*, Q.C. (*Boland* with him), for the appellant. *McPherson* and *Clark*, for the respondent.

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Ontario.] BANK OF HAMILTON *v.* HALSTEAD. [Dec. 9, 1897.

*Banking—Collateral security—R.S.C. c. 120, Schedule "C"—53 Vict., c. 31, ss. 74, 75—Renewals—Assignments.*

An assignment made in the form "C" to the "Bank Act" as security for a bill or note given in renewal of a past due bill or note, is not valid as a security under the seventy-fourth section of the "Bank Act."

The judgment of the Court of Appeal for Ontario (24 Ont. App. R. 152) affirmed. Appeal dismissed with costs.

*John J. Scott*, for appellant. *Gibbons*, Q.C., and *Henderson* for respondent.

Ontario.] WASHINGTON *v.* GRAND TRUNK R. W. Co. [Dec. 9, 1897.

*Railway—51 Vict., c. 29, s. 262 (D.)—Railway crossings—Packing railway frogs, wing-rails, etc.—Negligence.*

The proviso of the fourth sub-section of section 262 of "The Railway Act," 51 Vict., c. 29 (D.), does not apply to the fillings referred to in the third sub-section, and confers no power upon the Railway Committee of the Privy Council to dispense with the fillings in of the spaces behind and in front of railway frogs or crossings and the fixed rails of switches during the winter months. Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183) reversed. Appeal allowed with costs.

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

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Quebec.] PERRAULT *v.* GAUTHIER. [Feb. 16.

*Trade union—Combination in restraint of trade—Strikes—Social pressure.*

Workmen who in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation or other illegal means take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not thereby incur liability to an action for damages. Appeal dismissed with costs.

*Lafleur* and *Lanctot*, for appellant. *Geoffrion*, Q.C., for respondent.

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Quebec.] MACDONALD *v.* GALIVAN. [Feb. 26.

*Appeal — Jurisdiction — Appealable amount — Monthly allowance—Future rights—'Other matters and things"—R.S.C. c. 135, s. 29 (b)—56 Vict., c. 29 (D.)—Established jurisprudence in Court appealed from.*

In an action *en declaration de ptaernite* the plaintiff claimed an allowance of $15 per month until the child (then a minor aged four years and nine months) should attain the age of ten years, and for an allowance of $20 per month thereafter "until such time as the child should be able to support and provide for himself." The Court below, following the decision in *Lisotte* v. *Descheneau*, 6 Legal News, 107, held that under ordinary circumstances, such an allowance would cease at the age of fourteen years.

*Held*, that the demande must be understood to be for allowances only up to the time the child should attain the age of fourteen years and no further, so that apart from the contingent character of the claim the demande was for less than the sum or value of two thousand dollars, and consequently the case was not appealable under the provisions of the twenty-ninth section of "The Supreme and Exchequer Courts Act," and that, even if an amount or value of more than two thousand dollars might become involved under certain contingencies as a consequence of the judgment of the Court below, no appeal would lie. *Rodier* v. *Lapierre*, 21 S.C.R. 69, followed.

*Held*, also, that the nature of the action and demande did not bring the

case within the exception as to "future rights" mentioned in the section of the Act above referred to. *O'Dell* v. *Gregory*, 24 S.C.R. 661, followed. Appeal quashed with costs.

*A. R. Hall* and *Smith*, for the motion. *St. Pierre*, Q C., contra.

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Ontario.] BALDERSON *v.* THE QUEEN. [March 8.

*Statute, construction of—Civil Service—Superannuation—R.S.C. c. 18—Abolition of office—Discretionary power—Jurisdiction.*

Employees in the Civil Service of Canada who may be retired or removed from office under the provisions of the eleventh section of "The Civil Service Superannuation Act, R.S.C. c. 18, have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority. Appeal dismissed with costs.

*Hogg*, Q.C., for the appellant. *Newcombe*, Q.C., for the respondent.

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Ontario.] DRESCHEL *v.* AUER INCANDESCENT LIGHT CO. [March 14.

*Appeal—Jurisdiction—Amount in controversy—Affidavits—Exchequer Court Acts, 50 & 51 Vict., c. 16, ss. 51-53 (D.) 53 & 55 Vict., c. 26, s. 8—Patent Act, R.S.C. c. 61, s. 36.*

On a motion to quash an appeal where the respondents filed affidavits that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the Court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion. Motion refused with costs.

*Duclos* for motion. *Sinclair*, contra.

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# Province of Ontario.

## HIGH COURT OF JUSTICE.

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Street, J.] [March 29.

CORPORATION OF CORNWALL *v.* CORNWALL WATERWORKS COMPANY.

*Waterworks—Town taking over same—Arbitration to determine value—Necessary parties—Mortgagees.*

The omission to serve notice on the mortgagees of a waterworks company, of arbitration proceedings under R.S.O., 1887, c. 164, to determine the amount to be paid by a town for such works and property, and their not being parties, and in which the award made was less than the amount of their claim, does not entitle the company to have such award referred back, and the mort-

gagees made parties; but the rights of such mortgagees could not be affected thereby.

*Aylesworth*, Q.C., and *Cline*, for Company. *Leitch*, Q.C., and *E. D. Armour*, for town. *Bruce*, Q.C., for certain mortgagees.

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Street, J.] GIVENS *v.* COUSINS. [April 2.

*Vendor and purchaser—Security for payment of purchase money—Portion of purchase money realized under security—Judgment recovered against purchasers for balance—Agreement—Right to rescind.*

Where a vendor under a contract for sale, sold certain lands to a purchaser, who, on the day named for payment of the purchase money, paid a portion thereof, giving security for the payment of the balance at a later date, when, having failed then to make payment, the vendor realized on the security, which, however, left a balance still due, for which the vendor recovered judgment against the purchaser on his promise to pay under the contract, and afterwards notified the purchaser that unless the amount was paid by a day his right under the contract and his interest in the land would be forfeited, time being declared to be the essence thereof.

*Held*, that the recovery of the judgment did not affect the right of the vendor to terminate the contract, nor was it a condition precedent to cancellation that the plaintiffs should return the payments they had received.

*John Greer*, for plaintiffs. *W. H. Blake*, for defendant.

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MacMahon, J.] WELLER *v.* CARNEW. [April 2.

*Landlord and tenant—Lease—Habendum for one year—Subsequent clause for notice to terminate—Repugnance.*

In a lease with habendum for a year, there was inserted, after the covenant for quiet enjoyment, a clause that it was agreed that either party might terminate the lease at the end of the year, on giving three months' notice prior thereto.

*Held*, that the clause was repugnant to the habendum, and must be rejected, and that the lease terminated at the end of the year without any notice.

*Northrop*, for plaintiff. *E. Gus Porter*, for defendant.

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Armour, C.J., Falconbridge J., Street, J. [April 5.

CUNNINGTON *v.* PETERSON.

*Bills of exchange and promissory notes—Addition of maker's name—Alteration not apparent—Holder in due course—Bills of Exchange Act, 1890—58 Vict., c. 33, sec. 63 (D).*

In an action on a promissory note signed by several parties it was shown that the name of one of the alleged makers was not signed by him or with his authority, but was added to the note after others had signed it, although before the note came to the hands of the plaintiff, a holder for value,

*Held*, that the plaintiff being the holder of the note in due course, and the alteration not being apparent he could avail himself of it as if it had not been altered under the proviso to s. 63 of the Bills of Exchange Act, 1890, 58 Vict., c. 33 (D.): *Reid* v. *Humphrey* (1881) 6 A.R. 403, distinguished.

*W. M. Douglas*, for the appeal. *E. G. Graham*, contra.

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Boyd, C.] IN RE TOWNSHIP OF HAMILTON SCHOOL SECTION. [April 12.

*Public Schools—School section—Appeal from Township to County Council—"Alteration"—R.S.O., 1897, c. 292, s. 39.*

The amendment of the Public School Act made by 54 Vict, c. 55, s. 82 (R.S.O., 1897, c. 292, s. 39), has limited the right of appeal to the County Council against neglect or refusal of a township council to employ, with applications of trustees or ratepayers, for the formation, division, union or alteration of a school section or school sections. It is now only when the neglect or refusal is a neglect or refusal to "alter" the boundaries of the section or sections that there is such an appeal; and there is no appeal where the neglect or refusal is to form, divide, or unite.

An "alteration" means some change of the course of lines delimiting the territorial area of the section or sections, leaving it in other respects intact; and not a division of one section into two, which changes the thing itself.

*Clute*, Q.C., for the Township of Hamilton. *W. R. Riddell* for certain ratepayers.

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Boyd, C., Ferguson, J.] HUNTER *v.* TOWN OF STRATHROY. [April 16.

*Costs—Summary disposal of, in Chambers—Jurisdiction—Absence of consent—Object of action not attained.*

The plaintiff claimed in this action damages for injury to person and property by the alleged negligence of the defendants in having a foul drain in front of his property, and an injunction. The defendants denied the plaintiff's allegations, and alleged that if the plaintiff had suffered any injury it was by his own negligence. Before trial of the action, the defendants opened and inspected the drain and did some work upon it. The plaintiff professing to regard this as a compliance with his demand, asked the defendants to consent to the costs being disposed of by order in Chambers, to which the defendants answered that the work was being done in the ordinary course of municipal work, without the intention of admitting any liability, and refused to consent. The plaintiff moved in Chambers, without consent and against the objection of the defendants, and obtained an order for payment by the defendants of the costs of the action.

*Held*, that under these circumstances, there was no jurisdiction to summarily dispose of the costs in Chambers, the object of the action not having been substantially attained. *Knickerbocker* v. *Ratz*, 16 P.R. 191, distinguished.

*Osler*, Q.C., and *D. L. McCarthy*, for defendants. *W. H. Blake*, for plaintiff.

Armour, C.J.] CLANVILLE *v.* STRACHAN. [April 28.

*Bankruptcy and insolvency—Insolvent debtor—Ranking on estate—Valuing security—Party primarily liable—R.S.O. c. 147, s. 20—Construction of.*

By s. 20 of the Assignment Act. R.S.O. c. 147, it is provided that "every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof, and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon."

*Held*, that this means that if, as between the debtor and the third party, the latter is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value upon his security. It matters not if, according to the form of the transaction, the debtor and the third party are both apparently primarily liable to the creditor; if, as between themselves, the third party is primarily liable and the debtor only secondarily liable, the creditor must put a specified value upon his security, for in such case the third party is the party "for whom the debtor is only secondarily liable." The form of the transaction is not to be looked at, but the substance of it, in order to ascertain whether the third party is the party primarily liable for the claim; and if it be found that he is, the debtor is then only secondarily liable for the claim within the meaning of the provision. The reason and object of the provision was to prevent the estate of a debtor being burdened by claims for which the debtor was only secondarily liable to a greater extent than was necessary for the protection of a creditor, and to augment his estate as much as possible.

*In re Turner*, 19 Ch. D. 105, referred to.

*Shepley*, Q.C., for plaintiff. *Worrell*, Q.C., for defendants.

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Ferguson, J., Robertson, J., Meredith, J.] [May 2.

WRIGHT *v.* CALVERT.

*Costs—Set-off—Interlocutory costs—Rules 1164, 1165—Discretion of taxing officer—Appeal.*

An appeal by the defendant Calvert from an order of Rose, J., in Chambers, allowing an appeal from the ruling of one of the taxing officers at Toronto, and directing a set-off of certain costs awarded to the appellant against the amount of the plaintiff's judgment debt and costs, notwithstanding the assertion of a lien by the solicitor for the appellant.

The plaintiff had recovered judgment in the High Court against two defendants for debt and costs. The plaintiff, after examining the defendant Calvert as a judgment debtor, made a motion for a receiver, which was dismissed without costs, and a motion to commit the defendant Calvert for refusal to answer and for making unsatisfactory answers upon his examination, which was also dismissed without costs. The plaintiff appealed to a Divisional Court, by one appeal, from the orders dismissing these motions, and his appeal was dismissed with costs.

On taxation of the costs of this appeal, the taxing officer was asked to set

them off against the plaintiff's judgment debt and costs, but the defendant, Calvert's solicitor, asserting a lien on the costs awarded to him, the taxing officer refused to make the set-off.

The motion to ROSE, J., was by way of appeal from the taxing officer's ruling, and also a substantive motion for an order directing a set-off.

Rule 1164 provides that "where a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is liable to pay, and may adjust the same by way of deduction or set-off, or may delay the allowance of the costs such party is entitled to receive, until he has paid or tendered the costs he is liable to pay; or the officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto, in the same manner as costs ordered to be paid may be recovered. Rule 1165: "A set-off of damages or costs between parties shall not be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought; but interlocutory costs in the same action awarded to the adverse party may be deducted."

*H. T. Beck*, for the defendant Calvert, contended that the costs awarded him were not interlocutory costs, and, even if they were, the granting of a set-off was in the discretion of the taxing officer, and no appeal from such discretion lay to a Judge in Chambers or other tribunal.

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

*Held*, that the costs were interlocutory costs, and a set-off was properly directed by the Judge in Chambers, to whom an appeal lay from the taxing officer's ruling.

Appeal dismissed with costs, to be fixed by the Registrar.

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Armour, C.J., Falconbridge, J., Street, J. [May 4.

BANK OF TORONTO *v.* KEYSTONE FIRE INS. CO.

*Trial—Jury notice—Striking out—Duty of Judge presiding at jury sittings—Transfer to non-jury list.*

An appeal by the defendants from an order of MEREDITH, C.J., made when presiding at the Toronto Jury sittings, striking out the jury notice served by the defendants, and transferring the action for trial to the Toronto non-jury sittings, was allowed, STREET, J., dissenting, and the case was ordered to be reinstated on the list of actions for trial with a jury, and the jury notice restored; but this not to interfere with the right of the Judge presiding at the trial to direct that the action should be tried without a jury; and the costs to be costs in the cause.

Per ARMOUR, C.J.—The Chief Justice of the Common Pleas was not the Judge presiding at the trial of the action within the meaning of s. 110 of the Judicature Act, for he declared as soon as it was called that he would not try it, and then ceased to have any power over it. Nor could the order be supported as one made in Chambers under s. 44 of the Judicature Act, for the order, as issued by the plaintiffs, did not profess to have been made in Chambers, nor did the Chief Justice in making it profess to make it as a Judge sitting in Chambers, nor was any foundation laid for it as for an order in

Chambers, but the order was made by the Chief Justice, sua sponte: see *Bull* v. *North British Canadian L. & I. Co.*, 11 P.R. 83. The duty of a Judge presiding at the trial of a cause in which a notice for jury has been given, when he directs that it be tried without a jury, is to proceed at once with the trial of it. The litigants are entitled to have their cause tried in its order upon the docket, and they are the only persons whose convenience ought to be consulted, and neither the convenience of the Judge holding the sittings, nor of the jury, nor of the counsel, should be allowed to stand in the way of their right to have their cause tried in its order upon the docket.

Per STREET, J., dissenting.—The Chief Justice was not the Judge presiding at the trial, but he had the power, sitting as a Judge in Chambers to strike out the jury notices and transfer the cause to the non-jury list upon good reason being shown for not proceeding with the trial at once. The case was one in which it was proper to strike out the jury notice, but when it was struck out it did not follow that the case should be transferred to a non-jury list, but the contrary. The case, however, having been transferred to the non-jury list, should remain there, and the appeal be dismissed.

*McCarthy*, Q.C., and *L. G. McCarthy*, for defendants. *S. H. Blake*, Q.C., and *R. McKay*, for plaintiffs.

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Ferguson, J., Robertson, J., Meredith, J. [May 6.

IN RE MONTREAL AND OTTAWA R. W. CO. AND OGILVIE.

*Appeal—Award—Railway Act—Forum—Transfer to proper Court—Rule 784.*

The proper forum for the hearing of an appeal from an award under the Dominion Railway Act is a Judge in Court, and not a Divisional Court; the provision of Rule 117 respecting proceedings directed by any statute to be taken before the Court, and in which the decision of the Court is final, is not applicable to an appeal of this kind. *In re Potter and Central Counties R. W. Co.*, 16 P.R. 16, approved.

Where an appeal was brought in the wrong Court, an order was made under Rule 784 transferring it to the proper Court, upon payment of costs.

*W. R. Riddell*, for the company. *L. G. McCarthy*, for the claimants.

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Street, J.] IN RE HICKS *v.* MILLS. [May 6.

*Costs—Scale of—County Court action—Motion to change venue—Appeal.*

The costs of an application to the Master in Chambers, under rule 1219, to change the place of trial in a County Court action, should be taxed on the County Court scale, but the costs of an appeal from the Master's order to a Judge in Chambers and of a further appeal to a Divisional Court should be taxed on the High Court scale.

*N. F. Davidson* for the plaintiff. *J. H. Moss* for the defendant.

# Province of Nova Scotia.

## SUPREME COURT.

Full Court.] MCKENZIE *v.* JACKSON. [March 8.

*Assessment for school purposes—Municipal Assessment Act of 1895—Incorporation of provisions in Public Instruction Act—Amendments made subsequently—Mistrial—Secretary of school trustees not responsible for arrest of party indebted for poll tax.*

Defendant C., as secretary of the school trustees made an affidavit under the Acts of 1895, c. 5, s. 54, before the defendant J., a justice of the peace, setting forth that plaintiff was indebted to the trustees in a sum of money, being the balance of a poll tax imposed for school purposes, and that a demand had been made for payment, but the money had not been paid. Upon this affidavit J. issued a general warrant, under the Assessment Act of 1895, s. 55, which was delivered to the defendant H., a constable, to execute. H. returned that he was unable to find any goods of the plaintiff, and that the amount and costs were still due. The magistrate thereupon issued a warrant, under which plaintiff was arrested, and for this arrest the action was brought. The Act in relation to public instruction, Acts of 1895, c. 1, s. 44, provided that in default of payment the amount assessed for school purposes should be collected under the "provisions of the Municipal Assessment Act of 1895." The Municipal Assessment Act (Acts of 1869, c. 5) contained no provision for imprisonment in default of payment, but by the Act to amend and consolidate the acts relating to Municipal Assessment (Acts of 1896, c. 14) such a provision was added.

*Held*, that the incorporation in the Public Instruction Act of 1895 of the provisions of the Municipal Assessment Act of 1895 had not the effect of incorporating also the amendments made to the latter act in the following year, there being nothing in the words used to justify the construction that the rates were to be collected under the Municipal Assessment Act as amended from time to time.

Through some inadvertence, to which the conduct of the plaintiff's solicitor contributed, the action, which was one for false imprisonment, was tried as if it were an action for malicious prosecution, and on answers of the jury to questions submitted to them judgment was entered for defendants.

*Held*, that there had been a mistrial, and that, except to the defendant C., the judgment entered for defendants must be set aside with costs, and a new trial ordered.

As to the defendant C., dismissing the action with costs.

*Held*, also hat defendant C. was not liable in any way for the acts complained of, the presumption being that he was only seeking to have the law carried out, and all that he did being consistent with that view.

*H. Mellish* for appellant. *W. B. A. Ritchie*, Q.C., and *J. A. Mackinnon* for respondent.

Full Court.] GARDEN *v.* NEILY. [March 8.

*Principal and agent—Transfer of property by agent in excess of authority—Right of principal to recover—Costs—Detinue—Specical damage.*

Plaintiff placed a mare in the custody of B. for sale with permission to make use of her pending the finding of a purchaser.

*Held*, 1. B. was not justified in parting with the property otherwise than as authorized, and that plaintiff was entitled to recover against defendant, who, by pressure, induced B. to make use of the property so entrusted to him for the payment of his own debt.

2. The trial Judge was right in assessing damages for the detention of the mare as well as for the value.

3. The action on plaintiff's part being for the enforcement of a legal right, and there being no omission or neglect on his part, that the trial Judge was wrong in depriving him of costs.

4. The discretion of the Court in relation to costs must be exercised judicially, and that the fact that defendant and B. were principal and agent, and that B. acted in good faith was not sufficient reason for depriving plaintiff of costs to which he was otherwise entitled.

Per MEAGHER and HENRY, JJ., MEAGHER, J., dissenting, that in detinue damages for the loss of the use of any species of personal property may be recovered without an allegation of special damage.

*W. E. Roscoe*, Q.C., for appellant. *J. A. Fulton*, for respondent.

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Townshend, J. In Chambers. [April 28.

MURPHY *v.* MONASTERY, ETC., OF THE PRECIOUS BLOOD.

*Cy-pres—Legacy—Particular purpose.*

The testatrix by her last will made the following bequest: "I direct my executors to expend the sum of six thousand dollars towards the establishing in Halifax a house of the Nuns of the Precious Blood." Under the rules of the Roman Catholic Church, to which the said community belongs, the permission of the head of the diocese must first be obtained before any religious community can be established in the diocese. On application by the above-mentioned order, whose head house is in Quebec, to the Archbishop of Halifax for permission to open a house there, the Archbishop by letter dated February 9th, 1897, refused to grant permission until he could be assured that the community had such means as would make them self-supporting. The executors took out an originating summons asking for directions

On behalf of the residuary legatees it was contended that by reason of the inability of the nuns to obtain the permission of the Archbishop the legacy had lapsed into the residue, and that the doctrine of cy-pres did not apply: *In re White's Trusts*, 33 Ch. D. 449. Counsel for the nuns contended that the bequest might be applied to the uses of the order elsewhere than in Halifax, that the permission of the Archbishop was not necessary as the money was to be expended only "towards" the establishment of a house in Halifax, and in any case that the bequest should remain in the hands of the executors until further opportunity were given to the nuns to establish themselves in Halifax.

*Held*, that there was nothing in the bequest to indicate a general charitable purpose, and the gift having been designated for a particular specified body the doctrine of cy-pres did not apply. The nuns have no claim for the use of the money elsewhere than in Halifax, and the permission of the Archbishop being conditional, and there being no sufficient evidence to show that the opening of a house in Halifax is impossible, following *Attorney-General* v. *Bishop of Chester*, 1 Bro. C.C. 444, an enquiry will be directed to ascertain whether the direction of the testatrix can be carried out.

*H. T. Jones*, for executors. *D. McNeill* and *H. McInnis*, for residuary legatees. *J. A. Chisholm*, for the monastery.

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# Province of New Brunswick.

## SUPREME COURT.

Full Bench.] [Feb. 22.

PERRY *v.* LIVERPOOL, LONDON AND GLOBE INSURANCE CO.

*Fire insurance—Misrepresentations in application—Reversal of verdict.*

The defendant company resisted payment on the grounds that plaintiff in the application on which the policy was issued represented that there was no other insurance and no encumbrance on the property, whereas in fact there was other insurance and also a mortgage thereon. The plaintiff claimed, and the jury found, that the answer to the questions contained in the application as to there being no mortgage on the property, was written by the agent of the defendant company without the latter asking plaintiff the question, and the plaintiff signed the application without knowing that it contained the question and answer referred to. As to other insurance the jury found that plaintiff at the time of the application bona fide believed that there was no other insurance on the property. Also that the facts of the mortgage and other insurance on the property were not facts material to the risks. On these findings that trial judge directed a verdict for the plaintiff.

*Held*, on motion for a reversal of the verdict that the misrepresentation complained of and contained in the application signed by the plaintiff discharged the company of liability regardless of the findings of the jury, and that the defendant was entitled to the verdict.

*W. Pugsley*, Q.C., for plaintiff. *C. A. Palmer*, Q.C., for defendant.

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Full Court.] LANG *v.* BROWN. [April 19.

*Notice of motion—When to be given to trial judge.*

The notice of motion provided for in s. 366 of the Supreme Court Act must be given to the trial judge before the opening of the term next following the trial.

*C. A. Palmer*, Q.C., for plaintiff, in support of motion. *J. D. Phinney*, Q.C., contra.

Full Court.] MACPHERSON *v.* SAMET. [April 21.

*County Court action on promissory note—No particulars or formal claim of damages.*

It is not necessary in an action on a promissory note in a County Court to endorse on the writ, or to serve the defendant with, particulars of the plaintiff's claim, nor is it necessary that a formal claim of damages should follow in the declaration of the setting out of the note and its presentment and non-payment.

*C. E. Duffy*, for appellant. *J. W. McCready*, for respondent.

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Vanwart, J.] THE BREWERIES *v.* MCCOY. [April 22.

*Defective judgment docket—If clerk's entry is right judgment will not be set aside.*

The docket, which the plaintiff's attorney delivered to the clerk with the judgment roll, on which judgment was signed, did not contain the venue or the number of the roll, but both these particulars were entered in the clerk's alphabetical docket as provided by section 171 of the Supreme Court Act.

*Held*, that this docket is simply for the convenience and information of the clerk, so that if the latter's entry in the alphabetical docket contains the required particulars the judgment cannot be attached because of the attorney's defective docket paper.

*J. D. Phinney*, Q.C., for plaintiff. *W. Vanwart*, Q.C., for defendant.

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# Province of Manitoba.

## QUEEN'S BENCH.

Dubuc, J.] DOUGLAS *v.* PARKER. [April 1.

*County Court—Appeal from County Court—County Courts Act, s. 315, 59 Vict., c. 3, s. 2—Amount in question.*

This was an appeal from the County Court of St. Norbert in a case tried by a jury before His Honour Judge Prud'homme. The plaintiff's claim was for the value of about fourteen tons of hay alleged to have been taken by the defendant. The jury at first brought in a verdict that the defendant should give fifteen tons of his own hay to the plaintiff; but, on being directed to retire and give a verdict for an amount certain, if for plaintiff, or to give a verdict for defendant, they finally brought in a verdict for defendant. This verdict was said to have been explained on the supposition that in the opinion of the jury the hay belonging to plaintiff which had been taken was of little or no value.

*Held*, following *Aitken* v. *Doherty*, 11 M.R. 624, that the Judge appealed to might review the evidence with the view of determining the value of the

hay in question ; that such value appeared to be certainly less than $20 ; and under s. 315 of the County Courts Act as amended by 59 Vict., c. 3, s. 2, the plaintiff was not entitled to appeal ; and that the appeal should be dismissed with costs.

*McMeans*, for plaintiff. *Elliott*, for defendant.

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Bain, J.] GRAHAM *v.* BRITISH CANADIAN L. & T. CO. [April 1.

*Practice—Queen's Bench Act, 1895, Rules 621, 646—Time for entering appeal —Entry of judgment.*

This was a motion to strike out an appeal by the plaintiffs against the decision of the Chief Justice pronounced on the 27th November, 1897, whereby he ordered that certain mortgages should be declared void, but that defendants should have a lien on the land for certain sums paid for taxes. The minutes of the judgment were not settled until 23rd February, 1898, and the judgment was formally entered on 24th February, in compliance with Rule 621 of the Queen's Bench Act, 1895. The notice of appeal was given within two weeks from the date of the entry, but defendants contended that the notice should have been given within two weeks from the date of the decision, relying on Rule 646 (c) and (d).

*Held*, notwithstanding the apparent inconsistency between paragraphs (a) and (d) of Rule 646 that the two weeks should run from the date of the entry of any judgment or decree required by the practice to be entered. Application dismissed without costs.

*Ewart*, Q.C., for plaintiffs. *Mulock*, Q.C., for defendants.

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Killam, J.] NICHOL *v.* GOCHER. [April 25.

*Married woman—Liability on contract—Separate estate—Separate business.*

The plaintiff's claim was against a married woman for wages as a farm labourer in her employ, for money lent to and paid for her at her request, for money collected by her for him, and for the price of animals sold to her. The chief point of interest arose under the defence of coverture, the plaintiff contending that defendant carried on the business separately from her husband, and relying on *Wishart* v. *McManus*, 1 M.R. 213, and *Velie* v. *Rutherford*, 8 M.R. 168 ; and the defendant, that she did not carry on the business separately from her husband and was therefore not liable.

The plaintiff was employed as the defendant's servant, and it was understood between them and defendant's husband that the farm was hers, and that the farming operations were being carried on as hers. The negotiations for the employment of the plaintiff were conducted by the husband, though partly in the defendant's presence ; and it was the husband who was consulted by the plaintiff in all matters of importance relating to the farm, though at times the defendant was present.

The husband gave defendant the benefit of his advice and assistance and

also acted as book-keeper for her in a banking business carried on in her name at the same time, but it did not appear that he had any fixed salary or what was the arrangement, if any, between him and defendant.

*Held*, that such participation by the husband would not, in the case of an outsider contracting with the wife, absolutely prevent the finding that the business was carried on by the wife separately from her husband, and that on the evidence such finding was the proper one in this case. If, however, the defendant, on the same state of facts were claiming the profits or preceeds of the farming operations as against her husband's creditors, it would be impossible to hold it sufficiently proved that the business was bona fide intended to be that of the wife alone. It depends on the circumstances of each particular case what is the degree or nature of the participation by the husband which prevents the finding of a separate business.

*Merchants' Bank* v. *Carley*, 8 M.R. 258, and *Goggin* v. *Kidd*, 10 M.R. 448, distinguished. Verdict for plaintiff with costs.

*Bonnar* for plaintiff. *Phippen* and *Dubuc* for defendant.

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# Province of British Columbia.

## SUPREME COURT.

McColl, J.] CALLANA *v.* GEORGE. [April 19.

*Mining location—Validity of—Non-compliance with statutory requirements —Interpretation of statute.*

This action was for the possession of three claims located by the plaintiffs in August, 1896. In place of putting up posts, the plaintiffs built monuments of stones and fastened the necessary notices on them. It was admitted that it would have been possible to obtain posts, as there was timber about a mile distant, and the same could have been procured and put up in one day. The Mineral Act makes no provision for stone monuments in place of posts, but the plaintiffs relied on the proviso which declares that a failure to comply with any of the requirements as to location shall not be deemed to invalidate a location if it shall appear that the locator has actually discovered mineral in place on said location, and that there has been on his part a bona fide attempt to comply with the provisions of the Act, and that the non-observance of the formalities was not of a character calculated to mislead other persons desiring to locate claims in the vicinity.

*Held*, that there was not such a compliance with the statute as would entitle plaintiffs to the protection of the above proviso.

*McPhillips*, Q.C., *Wilson*, Q.C., and *Plunkett* for plaintiffs. *Davis*, Q.C. *Elliott* and *Duff* for defendants.

[We should like to see this case go to appeal.—ED. C.L.J.]

## Book Reviews.

*The Civil Code of Lower Canada, and the Bill of Exchange Act, 1890*, with all statutory amendments verified, collated and indexed, by ROBERT STANLEY WEIR, D.C.L., of the Montreal Bar: Montreal, C. Theoret, Law Publisher, 11 and 13 St. James Street, 1898.

The publisher claims that this is the most accurate English edition of the Code yet published. The concordance of the Code of Civil Procedure and the Code of Napoleon, is to be found at the foot of each article. This compilation will no doubt be of great use to our professional brethren in the Province of Quebec, as well as to those in other provinces who are interested in codified law. This again brings to one's mind the wish that there might be one law for every province of this Dominion.

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*The Principles of Equity*, by EDMUND H. T. SNELL, of the Middle Temple, Barrister-at-Law; 12th Edition, by ARCHIBALD BROWNE, M.A., of the Middle Temple, Barrister-at-Law: London, Stevens & Haynes, Law Publishers, Temple Bar, 1898

This book is stated to be "for the use of students and the profession." It is not necessary to introduce it to either one or the other in this country. Students have now, and for many years have had to study it in the Law School, or for the Bar examination, and a leader of the Bar recently remarked "I must have it, as I like to read it occasionally." The mere fact that it is in its 12th edition is sufficient evidence of its value. We scarcely join with the author in his regret that the size of the book has been materially increased. We presume his sorrow arises from a desire to keep the work within the smallest possible compass. That he has presented the subject in the most simple and condensed form in this edition as in previous ones, may be taken for granted.

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*Living Age.*—In its issue for May 28, the *Living Age* will begin the publication of the most striking English serial of the year, "John Splendid," by Neil Munro, now in course of publication in Blackwood's Magazine. The *Living Age* has bought the right to print this story from the owners of the American copyright, and will continue its publication in weekly instalments until it is completed.

## Flotsam and Jetsam.

NEGLIGENCE—OBSTRUCTION IN STREET.—A foot passenger in a city is not limited to travelling on the sidewalks or crosswalks. He may, while exercising due care in so doing, walk along or across a street, and may leave the sidewalk at such points as suits his convenience; and he has a right to presume, and act upon the presumption, that the street is reasonably safe and free from dangers to travellers for its entire width. (*Heckman* v. *Evenson* [N. Dak.], 73 N.W. Rep. 427.)