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DIARY FOR APRIL.

1. Tues.....County Court Sittings (except York).
3. Thur.....Prince Leopold born, 1853.
5. Sat.....Canada discovered, 1499.
6. Sun.....*6th Sunday in Lent.*
7. Mon ....Non-jury sittings of County Court (except York)—County Court Term and Surrogate Court Term.
11. Fri .....*Good Friday.*
12. Sat.....County Court Term ends.
13. Sun.....*Easter Sunday.*
14. Mon ....*Easter Monday.* Princess Beatrice born, 1857.

TORONTO, APRIL 1, 1884.

PLAYFULNESS in lawyers is much to be commended; it shows a buoyancy of disposition which speaks of innocency of heart, and is always calculated to create an agreeable impression. Hence we cannot doubt that the following passage in the appellant's factum in the *Dominion Telegraph Company* v. *Gilchrist* will be of much service to the cause of the appellant, and will be fully appreciated by the Judges of the Supreme Court:—

"The plaintiff in this case is known as a very clever man, not liable to be imposed upon or unfairly dealt with, but, if the portions of his evidence which he would have the Court believe are to be believed, he is the most credulous man in the universe; but this cannot be believed by anyone who is acquainted with him or his reputation. Anyone who believes that he is the credulous babe he pretends to be in evidence, believes an impossibility."

BUT if playfulness is commendable in lawyers, so also is it in legislatures, and a good joke once made should always be preserved. An excellent one is being kept on record in our statute books by the "Eternal General" as we once heard an intelligent small boy call Mr. Mowat. The following communication explains to what we are referring, but we fail to see why our correspondent should feel annoyed; on the contrary, we are grateful that such a sense of humour exists among the members of the Government. We most of us learn to distrust the man of sour countenance, but those who appreciate innocent fun are generally men of integrity:—

"I see that in the Attorney-General's Married Woman's Property Bill, now before the Provincial Parliament, sec. 8, R. S. O. 125, is re-enacted verbatim. When I was a student 'grinding' for my Intermediates, I used to feel a perpetual annoyance with the closing simile in the section—that under certain circumstances a married woman shall have and enjoy all the earnings of her minor children in as full and ample a manner as 'if she continued sole and unmarried.' I still feel inclined to ask every time I read the section: How many minor children is a woman, who continues sole and unmarried, supposed to have? Cannot Mr. Mowat substitute some other phrase which will not be open to the imputation of hinting at a very lax state of morals among the readers and compilers of the Revised Statutes?"

IN the recent case of *Reg.* v. *Price*, Mr. Justice STEPHENS held that the cremation of a corpse, provided it be performed decently and inoffensively, is not a criminal offence. In a case of *Williams* v. *Williams*, 20 Ch. D. 659; 46 L. T., N. S. 275, Mr. Justice KAY expressed a very strong opinion that a testator could not lawfully direct his executors to give his corpse to a third person for the purpose of being burned. In that case the plaintiff by fraudulent representations had got possession of the testator's corpse for the purpose of cremating it, pursuant to the express written directions given to her by testator before his death; and the learned judge held that, having wrongfully obtained possession of the corpse, the expense of the cremation could not be recovered from the testator's estate, notwithstanding that the testator expressly directed that the costs of the cremation should be borne by his estate.

EQUITABLE EXECUTION.

IN the recent cases of *Fuggle* v. *Bland*, 11 Q.B.D. 711, and *Westhead* v. *Riley*, 49 L.T., N.S. 776, the English Courts appear to be finding a way of giving relief to creditors in cases in which according to the cases of *Horsley* v. *Cox*, 4 L.R. Chy. 92 (followed in this Province in *Gilbert* v. *Jarvis*, 16 Gr. 265, *St. Michael's College* v. *Merrick*, 1 App. R. 520; and *Fisken* v. *Brooke*, 4 App. R. 8), a creditor has hitherto appeared to be without remedy.

In *Fuggle* v. *Bland*, judgment had been recovered against a husband and wife; the latter was entitled to a reversionary interest under her father's will, and the plaintiff applied for the appointment of a receiver of this interest and the Court (LOPES and POLLOCK, JJ.) appointed the plaintiff himself receiver, without requiring security. In *Westhead* v. *Riley*, the defendant, against whom judgment had been recovered, was a solicitor, and, as such, was entitled to recover certain costs out of a fund standing in the Palatine Court of Lancaster, under an order made in that Court in an administration action, in which the defendant had acted as solicitor. After the costs had been taxed, the plaintiff, Westhead, obtained *ex parte* an injunction restraining the defendant from receiving the costs, and he subsequently moved on notice to the defendant for the appointment of a receiver of the costs, which was granted by CHITTY, J., on the authority of *Fuggle* v. *Bland*.

In *Gilbert* v. *Jarvis*, the plaintiff was a judgment creditor of the defendant, who, he alleged, was entitled to a large sum from the estate of her deceased husband as executrix and devisee, and the plaintiff claimed to have her husband's estate administered, so far as necessary for the purpose of having the amount of the indebtedness to the defendant ascertained, and made available for the payment of his claim.

This relief the Court of Appeal held (following *Horsley* v. *Cox*) could not be given; but it appears difficult to distinguish the facts of that case from those of *Fuggle* v. *Bland*, and according to the latter case under such circumstances as existed in *Gilbert* v. *Jarvis*, the Court would now appoint a receiver. The claims in respect of which the receiver was appointed, in both *Fuggle* v. *Bland* and *Westhead* v. *Riley*, were not claims which could be attached under the garnishee clauses of the Common Law Procedure Act, see *Webb* v. *Stenton*, 11 Q.B.D. 518; *Vyse* v. *Vyse*, 76 L.T. 315; *Dolphin* v. *Layton*, 4 C.P.D. 130; *Stevens* v. *Philips*, 10 L.R. Chy. 417. The non-attachability of a claim would therefore seem to be no longer a bar to its being reached by way of equitable execution.

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

PRACTICE.

SHEPPARD V. KENNEDY.

Lis pendens—Vacating same—Endorsement on writ.

A *lis pendens* should not be vacated unless it appears from the endorsement on the writ or the pleadings that the claim upon the land is not an appropriate remedy. There should be clear and almost demonstrative proof that the writ is an abuse of the process of the Court.

Jamieson v. *Lang*, 7 P. R. 404, approved of.

When a plaintiff seeks to register a *lis pendens* he should be more precise in respect to the endorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands.

[March 5.—Boyd, C.

This was an application to vacate a *lis pendens* under the following circumstances:

On Feb. 9th, 1884, the plaintiff issued a writ in the Chancery Division against M. Kennedy and T. J. Stewart, and endorsed it as follows: "The plaintiff's claim is to have a deed made between the defendant, M. Kennedy, and the defendant, T. J. Stewart, set aside and cancelled, of lots 4

and 5 in the 2nd range south of the Durham Road in the township of Kinloss, in the County of Bruce, and to restrain the defendants from disposing or encumbering the same."

The defendant, Kennedy, showed by affidavit that there had been no sale of the said lands from him to Stewart; that a deed had indeed been drawn up and signed by him, and handed to Stewart, but with the understanding that Stewart should satisfy himself as to the title, and as to incumbrances, and the sale should only be carried out if these enquiries proved satisfactory; that, on enquiry, Stewart found four writs of execution against the lands of Kennedy in the Sheriff's hands, and thereupon sent back the deed, which had been cancelled, and refused to go on with the sale; that Kennedy had then taken steps to have these writs of execution set aside, and had succeeded in the case of three of them; that the fourth was the execution of the plaintiff in a County Court case against Stewart, and Kennedy had made a similar application to set this aside, which was pending, the Judge having heard the application, but reserved judgment.

In answer, the plaintiff produced the affidavit on which Kennedy was moving to set aside his execution, in which Kennedy admitted the debt due on the promissory note, on which the plaintiff was suing in the County Court; and also shewed that Kennedy had no other means wherewith to pay his claim, which would be endangered by vacating the *lis pendens*; and that the consideration in the deed from Kennedy to Stewart was $2,400, whereas the land was worth $3,000 or $4,000; and that Kennedy was apparently trying to realize on his property, and would return with the proceeds to Dakota, where he had been residing for two or three years past.

The motion was made before Mr. Dalton, Master in Chambers, on Feb. 27th, 1884, who, on March 3rd, 1884, gave judgment as follows: "It is not useful for me to consider this case particularly, for *Jamieson* v. *Laing*, 7 P. R. 404, must prevent me probably from granting what is asked. I, therefore, take the course suggested in that case of referring to a Judge, that the relief also there suggested may be given to the defendant if he be entitled."

On the same day the matter was again argued before Boyd, C.

H. J. Scott, Q.C., for the motion.—The plaintiff has no right to tie up the defendant's land in the manner he is attempting to do. It is an abuse of the practice of the Court. *Jamieson* v. *Laing*, 7 P. R. 404 is of doubtful authority. If the plaintiff's execution proves good there is no need of the *lis pendens*, at all events the plaintiff should be sent to a speedy hearing.

A. H. F. Lefroy, contra.—*Jamieson* v. *Lang* is an authority in our favour, but our case is a stronger one than that, for (1) we are at present, at all events, judgment creditors, with executions in the Sheriff's hands; (2) the defendant, Kennedy, admits our debt, and, therefore, on the principle that he who seeks equity should do equity, the *lis pendens* should not be vacated unless he pays into Court what he admits is owing. Moreover, admitting the debt as he does, this can scarcely be called an illusory and fictitious suit.

BOYD, C.—By the endorsement on his writ the plaintiff's claim is to "have a deed made between the defendant, Kennedy, and the defendant, Stewart set aside and cancelled, of lots 4 and 5 (giving description), and to restrain the defendants from disposing or encumbering same." It is further stated by endorsement that plaintiff sues on behalf of himself and of all other creditors of the defendant, Kennedy.

By virtue of this writ the plaintiff has registered a certificate of *lis pendens*, which the defendant now moves to vacate. There is no complaint of the insufficiency of the endorsement of claim, and it is not asked that the action should be dismissed, or the writ taken off the files as an abuse of the power of the Court. The motion is to vacate the registration of the *lis pendens*, on the ground that the action is illusory. Of this I am not so clearly satisfied that I will deprive the plaintiff of the chance of litigating as to the meaning of the transaction between the defendants. It may well be that nothing more happened than is detailed in their affidavits, but no suitor is obliged to submit to a preliminary trial of his case on affidavit. If the plaintiff chooses to go on to attack both defendants on the footing of there being a deed of the property from one to the other, which was intended to defeat and defraud creditors, he should not have his right to a trial intercepted in a summary way. I cannot, upon the materials before me, conclude the plaintiff by saying that his action is fictitious and illusory. He may be beaten at the trial, but my very strong impression is that he has the right to prosecute the litigation to that point, if he is so advised.

The endorsement on the claim may be developed into a statement of claim, which will show a valid cause of action against both defendants. At present no cause of action is clearly stated in the endorsement. It may be sufficient under R. 11, but my own view is that where the plaintiff seeks to register a *lis pendens* he should be more precise than

in ordinary cases, and by his endorsement he should define generally the grounds of his claiming an interest in the land. The right to register a *lis pendens* arises from the statute R. S. O. cap. 40, sec. 90, as it merely places on record the historical fact that litigation is pending, touching a particular property. While this litigation is pending, I see great difficulty in making any such order as is asked here to vacate the registration of the *lis pendens*, except in that class of cases when it appears from the endorsement or pleading that the claim upon the land is not an appropriate remedy. Thus, if a wife sued for alimony, and alleged that unless her husband was enjoined from selling his land he would dispose of it to her prejudice, and upon this statement registered a *lis pendens*, the judge might and would declare that the certificate had improperly issued, and the registration of that order would operate to clear the registry.

But here there may be a cause of action affecting the land and the motion is not to set aside the writ as a vexatious thing, but merely to vacate the registration. As at present advised, I cannot clearly say that the action is illusory and fictitious, even if a direct attack was made upon the writ, and that being so, I should not now interfere. *Jacobs* v. *Raven*, 30 L. T. N. S. 266, I had occasion to consider the cases in which such an action as the present could be sustained in *Campbell* v. *Campbell* 29 Gr. 252.

But this is a case in which the trial of the action should be expedited. The plaintiff should serve his statement of claim forthwith and go down to trial at the next sittings of the Court at Goderich.

I approve generally of the practice laid down in *Jamieson* v. *Laing*, 7 P. R. 404, where the motion is to take the writ off the files as an abuse of the process of the Court. There should be a clear and almost demonstrative proof that it is so before the plaintiff's right to hear his case tried is interfered with.

But where the motion is to vacate the registration of the *lis pendens* because the remedy against the land is not appropriate to the cause of action which is pending, then I see no reason why the Master may not finally dispose of the matter without referring it to a judge. I reserve the costs of the present application to be dealt with subsequently."

NORDHEIMER V. MCKILLOP.

Commission to take evidence—Credibility of witness—Rule 285.

A commission to examine as a witness a person who has absconded from the Province, will not be refused on the ground that he is alleged not to be a credible witness and that his cross examination in open Court is desired.

This was an action of replevin. One G. was tenant of the defendant; he had purchased, on the hire-receipt principle, from the plaintiff, a piano which was put into his hotel at B. Before the plaintiff would allow the piano to be put into the hotel they required G. to obtain from the landlord a waiver of all distress for rent as against said piano. This waiver he signed himself under and in pursuance of a power of attorney. G. absconded to the States and defendants destrained the piano for rent alleged to be due. Plaintiff replevied upon the strength of the waiver. The plaintiff now applied for a commission to examine G. to prove that he signed the waiver under power of attorney, and also to prove that no rent was due at date of seizure. Defendant resisted the application on the grounds that G. was not a credible witness, that he could not be believed upon his oath, and that they desired him to be present in Court that he might be subjected to a rigid cross-examination and show his demeanour to the jury.

McPhillips, for motion. The credibility of G. cannot be tried on affidavits in Chambers, but was a question for the jury at the trial. A good case for the commission has been made out.

Clement, for defendant, relied upon *Crofton* v. *Crofton*, L. R. 20 Chan. Div. 674, and cases there cited.

On March 4th the Master in Chambers made the order. The defendant appealed.

Clement, for appeal.

McPhillips, contra.

March 10th, GALT, J., affirmed the order of the Master in Chambers, and dismissed the appeal with costs to the plaintiff.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

Ontario.]

ROSENBERGER ET AL. V. GRAND TRUNK RAILWAY COMPANY.

Railways—Failure to sound whistle, etc.—Accident through horse taking fright—Con. Stat. Can. chap. 66, *sec.* 104—*Findings—Evidence.*

Held (affirming the judgment of the Court of Appeal for Ontario and of the Court of Common Pleas), that Con. Stat. Can. chap. 66, sec.

104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage either in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle as they are directed to do by said statute, whether such damage arises from actual collision or, as in the case here, by a horse being brought near the crossing and taking fright at the appearance or noise of the train.

The jury in answer to the question, "If the plaintiff had known that the train was coming would they have stopped their horse further from the railway than they did?" said "yes."

Held, that though this was not very definite, yet taken with the evidence on which the jury acted, and as the question was not objected to by counsel at the time it was put by the judge, it was sufficient.

Appeal dismissed with costs.

Bethune, Q.C., for appellants.

Bordly, for respondents.

Ontario.]

BOTHWELL ELECTION PETITION.

HAWKINS v. SMITH.

Ballot—Scrutiny—Irregularities by Deputy Returning Officers—Numbering and initialing ballot papers—Effect of—The Dominion Elections Act, 1874, *sec.* 80.

In a polling division there was no statement of votes either signed or unsigned in the ballot box, and the deputy returning officer had endorsed on each ballot paper the number of the voter on the voters' list. These votes were not included either in the count before the returning officer, the re-summing up of the votes by the learned Judge of the County Court, nor in the recount before the judge who tried the election petition.

Held (affirming the decision of the Court below), that these ballots were properly rejected.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or with more than one cross, or with an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper, and a line dividing the paper in the middle.

Held (affirming the rulings of the learned Judge at the trial), that these ballots were valid.

Per RITCHIE, C.J.—Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary, a clear intent not to mark with a cross as the law directs, as for instance by making a straight line or a circle, then such non-compliance with the law renders the ballot null.

Division I., Sombra.—During the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer initialed and numbered about twelve of the ballot papers, but finding he was wrong at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took the ballots out of the box and obliterated the marks he had put upon them.

Held (GWYNNE, J., dissenting), that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, they should be held good, and that said irregularities came within the provisions of sec. 80 of the Dominion Elections Act, 1874; *Jenkins* v. *Brecken*, *Queen's County Election*, 7 Can. S.C.R., 247, followed.

Per HENRY, J.—On the trial of an election petition ballots numbered by the deputy returning officer, as in the present case, should be held bad; but it did not lie in the mouth of the present appellant, who had acted upon the return of the returning officer and taken his seat, to claim that the proceedings were irregular and say that the election was void.

Hector Cameron, Q.C., for the appellant.

Lash, Q.C., for the respondents.

New Brunswick.]

VENNING, *appellant*, v. STEADMAN,

VENNING, *appellant*, v. HARRISON,

VENNING, *appellant*, v. SPURR, *respondents*.

Trespass—31 Vict. ch. 60, secs. 2, 19—Order in Council, 11 June, 1879—Construction of—Fishery officer—Action against—Notice—Damages.

Appeal from the Supreme Court of New Brunswick.

Three several actions for trespass and assault were brought by A., B. and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly fishing for salmon in front of their respective lots. The defendant was a fishery officer, appointed under the Fisheries Act (31 Vict. ch. 60), and justified the seizure on the ground that the plaintiffs were fishing without licenses in violation of an Order in Council of June 11th, 1879, passed in virtue of sec. 19, ch. 60, 31 Vict., and which order was in these words: —"Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited." The defendant was armed, and was in company with several others—a sufficient number to enforce the seizure if resistance was made—and there was no actual injury. A. (who was a County Court Judge) recovered $3,000, afterwards reduced to $1,500, damages; B. $1,200, and C. $1,000.

Held, 1. That secs. 2 and 19 of the Fisheries Act, and the Order in Council of the 11th June, 1879, did not authorize V., in his capacity of Inspector of Fisheries to interfere with A., B. and C.'s exclusive right as riparian proprietors of fishing at the *locus in quo*.

2. (GWYNNE, J., dissenting.) That when V. committed the trespasses complained of he was acting as a Dominion officer under the instructions of the Department of Marine and Fisheries and not as a Justice of the Peace, and was not entitled to notice under Cons. Stat. N.B. ch. 89, sec. 1, or ch. 90, sec. 8.

3. That the damages were excessive, and on that ground a new trial should be granted.

Appeal from a judgment of the Supreme Court of New Brunswick on a motion for a non-suit or new trial.

The facts and pleadings are stated in the report of these cases in 22 N. B. Rep. p. 639 (1) (see alse *Phair* v. *Venning*, 22 N. B. Rep. 362).

Harrison and *Burbridge*, for appellant.

Wetmore, Q.C., for respondent.

QUEEN'S BENCH DIVISION.

IN BANCO.

MUREAU v. BOLTON.

Grant to life tenant—Remainder-man in fee—Partition and sale of life estate—Prohibition.

The interest of a tenant for life is not within the Partition Act, and a prohibition on his application was granted to prevent sale.

ARMOUR, J., dissenting.

McMichael, Q.C., for plaintiffs.

Clement, contra.

LOCKIE v. TENNANT.

Third party.

A third party can only be joined before trial, and an original defendant, if he desires to secure indemnity against a third party, must sue independently.

Osler, Q.C., for plaintiff.

T. G. Blackstock, for third party.

Robinson, Q.C., and *J. H. Macdonald*, for defendants.

WALTON v. APJOHN.

Ontario Election Act—Algoma election—Refusal of votes.

The duties of a deputy returning officer are not judicial, but ministerial only, unless personification, etc., is attempted, and if he refuses the votes of any entitled to vote he is amenable to consequences under the Election Act. In this case the vote of a party was refused because he could not specify his land with precision, though he alleged it to be in one of several localities mentioned by him: the deputy returning officer was held liable. HAGARTY, C.J., *dubitante*.

No notice of action necessary in such a case.

A foreign commission opened between the parties before trial cannot be objected to at trial because of any defect in the manner of execution.

Osler, Q.C., and *Meek*, for plaintiff.

Maclennan, Q.C., and *Proctor*, contra.

GILES v. MORROW.

Dower—Report of Commissioners—Time for moving against.

A motion within first four days of Michaelmas Sittings against the report in action of dower filed 29th May previously, *held*, too late.

McPhillipps, for motion.

T. G. Blackstock, contra.

RICE v. GUNN.

Principal and agent—Gambling contract—"Options"—"Differences"—Onus of proof—Proof of foreign law.

Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money, for which they sued, defendants having refused to settle for losses sustained.

Held, reversing the judgment of PATTERSON, J.A., that, assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal; it lay upon defendants to establish clearly that such was the character of the dealing; and this defence not having been clearly proved, judgment was given for the plaintiffs.

After judgment at the trial, but before the argument in *banc*, the defendants put in a report of a case, bearing upon the question, decided in the Supreme Court of the U. S., verified by affidavit; *held*, admissible.

Where the opinions of experts on foreign law are conflicting, the Court will examine for itself the decisions and text-books of the foreign country, in order to arrive at a satisfactory conclusion.

KERR v. CANADIAN BANK OF COMMERCE.

Assignment for creditors—Validity of—Trusts to pay partnership debts only—Power to pay off liens in full—Change of possession.

W. and W. made an assignment of all their assets, both separate and partnership property, to the plaintiff in trust to realize and pay "all the just debts of the said creditors of the said debtors rateably and proportionably, and without preference or priority." There was a proviso that the trustee might pay any creditor in full whose debt constituted a lien on any part of the assets, whenever he deemed it advisable so to do. It appeared that one of the partner's had no property, and owed but $110; that the other had some household furniture which was seized for rent, which it satisfied; that he owed less than $100 otherwise; and that all these separate debts had been satisfied.

Held, CAMERON, J., dissenting, that the assignment was not void in providing for payment of partnership creditors only.

Held, also, that the provision that the trustee might pay off any lien or charge on the assets, did not invalidate the assignment.

Held, also, that there was, under the facts stated, an actual and continued change of possession.

Moss, Q.C., and *Lees*, for motion.

J. K. Kerr, Q.C., contra.

Rose, J.] [Feb. 26.

IN RE HARDING AND WREN.

Arbitration—Costs.

When the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs and half those of the award.

A direction as to the costs in such a case held severable from the rest of the award.

Holman, for motion.

Smith (St. Mary's), *contra*.

Rose, J.] [Feb. 26.

REGINA v. BERNARD.

Conviction—Prior conviction—Refusal to receive evidence of—Costs.

A warrant was issued by a magistrate for the apprehension of the defendant, who was

brought before another magistrate theron, convicted and fined. Subsequently the magistrate who had issued the warrant, caused the defendant to be summoned before him for the same offence, and again convicted and fined him, after refusing to receive evidence of the prior conviction.

The Court quashed the second conviction with costs.

Held, that, even assuming that the first conviction was void by reason of the defendant having been brought before a magistrate other than the one who issued the warrant, his appearance and pleading thereto amounted to a waiver, and, at any rate, the magistrate who convicted the second time could not take advantage thereof.

Watson, for motion.

Alan Cassels, contra.

Cameron, J.]

RE DOVER AND CHATHAM.

Drainage—Award—Surveyors' Report.

Under the Municipal Act the surveyor's report and plans with a view to drainage, in which a couple of townships are interested, should shew the work towards which the servient one is to contribute; and a report which does not comply with secs. 529 *et seq.* of that Act renders void the award confirming the surveyor's assessment.

COMMON PLEAS DIVISION.

HARRISON V. LEACH.

Local Judge of High Court—Order for speedy judgment—Varying same.

On 19th January, plaintiff obtained an order for speedy judgment from one of the county judges, Middlesex, as local Judge of the High Court, under which judgment was signed and execution placed in the sheriff's hands. It was the practice of both the local courts judges in the county to insert a provision that all creditors whose writs of summons had issued prior to that of the creditor applying for the order should be allowed to come in and share rateably with such creditor, provided they obtained judgment within a limited time. The plaintiff's solicitors were not aware of such practice, and in good faith obtained the order without such provision; nor did the learned judge suggest its insertion. Another creditor, whose writ was issued prior to plaintiff's, applied to the local judge, who granted a summons bringing plaintiff before him, and on the return thereof, on 24th January, under an order amending the order previously made by him, by requiring the provision as to rateable distribution to be inserted therein, and directing the sheriff to be governed thereby. The plaintiff thereupon appealed to CAMERON, J., who held that the learned judge had no power to make the order of 24th January, which was thereupon set aside on appeal to the Divisional Court.

Held, that the appeal must be dismissed; that the local judge has no power to vary the order granted by him without concealment or fraud, and after it had been acted upon.

G. M. Rae, for the plaintiff.

R. M. Meredith, for the applicant.

MURPHY V. DALTON.

Clearing land—Setting out fire—Sudden rising of wind—Negligence—Watching fire.

The defendant, for the purpose of clearing his land, set out fire on same. There was a thin, bare lot taken out of the south-east corner of the defendant's lot, on which there was a mill, and near the mill a quantity of lumber belonging to the plaintiff. The defendant set out the fire on Monday, but before doing so consulted with the plaintiff, who agreed that the weather was favourable for the purpose, the wind blowing in the direction away from the plaintiff's property. In setting out the fire he burnt up around the plaintiff's property so as to prevent the fire from spreading to it in case of change of wind. The wind continued in the same direction on Tuesday and Wednesday, and in the interval there were falls of rain, in consequence of which the defendant did not keep a watch over the fire. On Thursday morning there were indications of a change of wind and the defendant sent his son to go and watch the fire, but when he arrived the wind was blowing at the rate of from thirty-five to forty miles an hour, and by reason of this sudden rising of the wind the fire was communicated to the plaintiff's lumber, which was destroyed. The evidence

shewed that, even if plaintiff had been watching the fire he could not have prevented its spreading.

Held, under the circumstances, the defendant was not liable for the damage sustained by the plaintiff.

Osler, Q.C., for the plaintiff.

Falconbridge, for the defendant.

NOTT v. NOTT.

Arbitration—Award—How to be executed.

The three arbitrators to a reference on the close of the evidence agreed on their finding, and a minute thereof was made in writing by one of them, but not signed; and it was understood that nothing further was to be done but have a formal award drawn up and executed. Next day the award was drawn up and executed by two of the arbitrators, in the presence of each other, but in the absence of the third arbitrator, who a couple of days afterwards executed it in the presence of one of the other arbitrators.

Held, that the award should have been executed by the three arbitrators together, and not having been so executed is invalid.

Marsh, for the plaintiff.

C. *Ritchie*, for the defendants.

WELTON v. NORTHERN RAILWAY CO.

Railways—Accident—Negligence—Contributory negligence—Automatic bell.

The defendants' track crossed the highway at an acute angle and was some seven feet above the highway, which was graded up to it, and the view was obstructed by some bushes. The plaintiff, early in the morning, it not being quite daybreak, was sitting on a bob-sleigh driving a yoke of oxen along the road, when, just as he came on the track, he saw a train approaching, when he jumped to the off side on to the track and hit the off ox to spring aside and clear the track, but before plaintiff could get clear himself, he was struck by the train and injured. It was objected that if the plaintiff had jumped on the nigh side he would have escaped injury, and that by his act he voluntarily placed himself in a position of danger. The plaintiff, however, said that the way he acted was the quickest way of getting out of the danger. On the part of the plaintiff, it was shown that neither the bell was rung nor the whistle sounded; while defendants proved that the bell was an automatic bell and being rung by the action of the wheels; that it was ringing when the engine left the last station. One of plaintiff's witnesses stated that these bells get out of order. The jury found that the whistle was not sounded or the bell rung—that it was not in good order; and that the plaintiff, under the circumstances, exercised reasonable care.

Held, that it could not be said that the findings were not justified by the evidence, and the Court, therefore, refused to interfere.

Creasor, Q.C., for the plaintiffs.

Osler, Q.C., for the defendants.

MAUGHAN v. CASIE.

Trespass—Highway—Registry Act—Right of way—Surveyors' Act—Short Forms Act—Contemporaneous conveyances—Pleading—Unity of title.

The trustees under C.'s will executed contemporaneous conveyances under the Short Forms Act of a farm divided into six parcels to the six surviving children, according to a registered plan. The farm had theretofore been held by unity of title. The description of parcel 2 included a lane described in the plan as a right of way, the use of which was reserved in the deed for the owners of parcels 4 and 6, which adjoined it, and to whom it was a way of necessity. Parcel 3, which adjoined the way (but to which it was not a way of necessity) was conveyed without any mention of the lane.

Held, that the grantee of parcel 3 could not claim a right of way over the lane, parcel 2 being expressly subjected to a right of way in favour of parcels 4 and 6. That the owner of parcel 3 could not burden parcel 2 with any other servitude than that granted to the owners of parcels 4 and 6. *Held*, also, that R. S. O. c. 102, does not apply, because of the exception expressly made in the deed in favour of parcels 4 and 6. That there was not a continuous easement; that the way was not a public highway; that the plaintiff's right had not been barred by the Statute of Limitations; that the ownership by defendant of a part of parcel 4 did not justify the trespass complained of. The pleadings remarked upon.

Bethune, Q.C., and *J. E. Robertson*, for the plaintiff.

S. Blake, Q.C., and *Delamere* for the defendant.

IN RE H. L. LEE.

Extradition—Forgery—Information—Pleading—Depositions—Authentication of—Copy of account book—Admissibility of—Corroberative evidence.

The information charged that the informant hath just cause to suspect and believe that the prisoner "is accused" of the crime of forgery, but the information went on to charge that the prisoner did feloniously forge, etc.

Held, sufficient, the expression objected to being surplusage; and also that the objection was not tenable under the Criminal Act of 1869, the offence being perfectly understood by the Court and prisoner.

Held, also, that in a proceeding of this kind a plea to the information is not essential.

An objection was taken to the sufficiency of the declaration made by the Governor of the Foreign State under his official seal.

Held, sufficient.

The authorities of a bank having refused to allow one of their books to be brought to Canada. *Held*, that secondary evidence was admissible.

Objection was also taken to the sufficiency of the corroborative evidence given in the case; but it was *held* sufficient.

Murphy, for prisoner.

Fenton, Crown Attorney, for Crown.

MACDONALD V. MURRAY.

Agreement—Sale of land—Certified copy—Secondary evidence—Admissions at former trial—Registered document—Fraud—Short-hand evidence in—Non-suit—Reply—Interrupting Judge's charge.

The plaintiff sold defendant two lots on Main Street, Winnipeg, under an agreement signed by all the parties. The agreement was duly registered. The Registrar, who was examined under a commissioner, refused to produce the original but put in a copy duly certified by himself. Its admission was objected to because the commissioner had not certified to it. The defendants had admitted the agreement at a former trial but objected to it at the subsequent one. Defendants objected that as the land was in Manitoba and out of the jurisdiction, the Court could not give complete relief to the defendants. The evidence of one of the witnesses was objected to because of its being taken in short-hand before a special examiner and an office copy put in. Evidence offered in reply to defendant's evidence of fraud was objected to on the ground that he had already given evidence to disprove it. The learned Judge, before whom the case was tried, decided to non-suit plaintiff because the agreement had not been properly proved, but allowed the case to go to the jury on the question of fraud. Defendant's counsel claimed that the decision to non-suit, placing the burden of proof on him, gave him the right to reply. Defendant contended that the plaintiff's counsel by interrupting the judge during his charge to the jury influenced the jury in his favour and gave them a right to a new trial.

Held, that (1) the certified copy of the agreement was sufficient; (2) the fact of the land being out of the jurisdiction was of no consequence, as complete relief could be given; (3) the evidence of the witness taken in short-hand was properly admitted; (4) the evidence offered in reply was properly admitted; (5) the defendants having admitted the agreement at the former trial, could not object to it at the subsequent one.

Held, also, that (1) there was no evidence of fraud on the part of the plaintiff; (2) the defendants had not the right to reply; (3) that, as to the objection of the interruption by counsel, it was for a Judge to preserve order at the trial, and as he did not interfere, the Court refused to do so.

Lash, Q.C., and *Holman* for plaintiff.

McMichael, Q.C., *McCarthy*, Q.C., and *Osler*, Q.C., for defendants.

[March 7.

VERRATT V. MCAULAY ET AL.

Principal and surety—37 Vict. ch. 45, sec. 6, D.

Held, that the liability of sureties on a bond given under 37 Vict. ch. 45, sec. 6, D., was not restricted to the default of the inspector in the duties of his office, but included also, the de-

fault of a deputy inspector; and that such default was proved.

Creasor, Q.C., for the plaintiffs.

Osler, Q.C., and *Wink*, for the defendant.

HAMILTON PROVIDENT LOAN CO. v. CAMPBELL.

Interpleader—Right to crops.

The plaintiffs were mortgagees of land on which the crops in question were grown. On April 15th, 1882, the mortgagor, C., being in default, plaintiffs, in consideration of C. giving them a chattel mortgage on some of his goods, agreed that he should remain in possession as if there had been no default. In June plaintiffs took proceedings for ejectment against the land, recovered, on the 30th September, judgment by default, and on same day placed a writ of *hab. fac. pos.* in sheriff's hands, who took possession thereunder. On 2nd July possession had been taken of the land, under the mortgage, on behalf of plaintiffs but it did not appear that they continued in actual possession. On 11th July the defendant obtained a judgment against C. for $860, and on 17th, execution was placed in sheriff's hands, and he seized and sold the growing crops thereunder. On interpleader to determine the title to the crops on the 17th July,

Held, that on that day the mortgagor, C., was entitled to the possession of the crops as against the plaintiff's, and so, therefore, was the defendant; and that the plaintiff's recovery on the 30th September did not estop defendant from shewing their right to the crops on the day claimed.

Muir, for the plaintiffs.

G. H. Watson, for the defendant.

DUCK v. CORPORATION OF TORONTO.

Municipal corporation—Accident—Negligence—Notice—Drain.

After a block pavement had been laid down on Queen street, one of the most travelled roads in the City of Toronto, a drain, about two and a-half feet wide, was opened out across the street to the street railway track and then tunnelled under the track. It was filled in with loose earth, not rammed down. On Sunday it rained, in consequence of which the earth was washed down and sunk, leaving a very dangerous hole. On Tuesday or Wednesday some residents in the neighbourhood, seeing its dangerous condition, took some cedar poles and placed them lengthways in the hole. On Thursday night, about nine o'clock, the night being dark, and there being no light at the hole, and the street lamp not being sufficient to disclose the hole, the plaintiff, his wife and another, were driving along the road, and on reaching the place and not seeing the hole, the horse stumbled and fell, and the plaintiff was pitched out of the waggon and injured. The jury found that the accident was caused by the waggon coming in contact with the drain or hole. The defendants, however, urged that the evidence shewed that accident was caused by the waggon coming in contact with the poles, and as they had not put them there they were not liable.

Held, that the fact whether the accident was caused by the drain or the poles, was immaterial, for under the circumstances the defendants must be deemed to have had notice of the condition in which the drain was in at the time of the accident.

Osler, Q.C., and *J. T. Small*, for the plaintiff.

McWilliams, for the defendants.

MORRISON ET AL. v. EARLS.

Promissory note—Syndicate—Partnership—Rescission—Misrepresentation of price of land.

Action on a promissory note for $1,000, made by defendant to one M. The note was given in payment of the first instalment of the purchase money of a share in a syndicate, formed under an agreement which stated that "We the undersigned hereby covenant, promise and agree with each other to form ourselves into a syndicate" to purchase a lot of 300 acres of land in Manitoba from M. for $50,000, divided into fifteen shares of $3,333·33 each, to be paid to the trustee of the syndicate; the expenses of purchasing, advertising, selling, etc., to be borne proportionately by each member according to his shares; appointing M. trustee to form the syndicate; and on completion the members could re-appoint M., or any other person, trustee to carry out the effects of the syndicate. The syndicate was completed and the defendant appointed trustee; and a conveyance of the same made to him. It appeared

that M., by fraudulently representing to defendant that the price he (M.) paid for the land was $50,000, whereas it was only $31,000; that the land was well worth that sum; was suitable for being laid out as town lots, and that it could be readily sold at largely remunerative prices, induced the defendant, who resides in Toronto and had no knowledge or means of acquiring knowledge, but relied on the truth of his statement, to enter into the agreement. The defendant, in consequence, asked to have the agreement and note rescinded.

Held, that M. was not in a position alone to put an end to the agreement and have the note cancelled, for that the so-called syndicate was in fact a partnership, and as the fraud was that of M. and not of the partnership, it would not avoid the agreement so long as all the partners were not asking for its rescission; and that the defendant's remedy must be by cross-action or counterclaim for deceit.

J. H. Macdonald, for the plaintiff.

McMichael, Q.C., for the defendant.

McFARLANE v. GILMOUR.

Tramway—Accident—Negligence of fellow-servant.

The defendant, the proprietor of extensive mills, constructed a tramway to carry lumber from one end of his yard to the other; but defendant's employees were permitted, for the purposes of their employment, to use the cars, which were drawn by a steam engine. The track was laid on ties placed on wet ground not very carefully prepared and very little ballasting done, and none where the accident happened. The plaintiff, one of the defendant's employees, was on one of the cars going to where he had some work to do, when the car was thrown off the track and the plaintiff was injured. It was attempted to be shewn that the accident was caused by the faulty construction of the road; but the evidence shewed that the cause was through a rail having been misplaced. It was proved that the defendant employed a competent foreman, who delegated the duty of keeping the track in repair to one B., a fellow-servant of the plaintiff, and, so far as appeared, was fully competent to perform such duty; and that B. neglected to replace the rail.

Held, that the accident having been caused by the negligence of a fellow-servant, the defendant was not liable.

Dickson, Q.C., for the plaintiff.

Bell, Q.C., for the defendant,

CANADIAN PACIFIC R. R. CO. v. GRANT.

Railways—Carriage of goods—Delay—Damages.

The plaintiffs sued defendant for $2,700, the balance alleged to be due on the carriage of timber to Quebec. The defendant counter-claimed for damages, sustained by reason of the plaintiffs' neglect and delay in furnishing cars as soon as notified that defendant's timber was ready, whereby defendant was delayed in loading and forwarding his timber to Quebec. The defendant also claimed damages for plaintiffs' neglect in forwarding cars to carry some 600,000 feet of timber, part of the contract; and also for loss of value of timber by reason of its being kept over until the following year; and expenses caused by the delay in carrying quantity carried.

Held, affirming the judgment of the learned Judge at the trial, that on the evidence plaintiffs were entitled to recover the $2,700 claimed by them; and that the defendant was entitled to recover $1,420 damages under his counter-claim for the delay in loading after notification; but was not entitled to recover any of the other items of damages claimed. Each of the parties to be entitled to costs as if the claim and counter-claim were a separate action.

Bethune, Q.C., and *McTavish*, for the plaintiffs.

McCarthy, Q.C, and *T. S. Plumb*, for defendant.

WEBSTER v. LEYS.

Married women—Next friend.

In an action by a married woman, commenced before the O. J. Act, it was held on demurrer that the plaintiffs must sue by next friend, and an order was made out accordingly. Subsequently and after the passing of the O. J. Act, the next friend became insolvent. On an application to PROUDFOOT, J., for the appointment of a new next friend, he made an order for such appointment, holding that he was bound by the previous order, and that nothing was shewn entitling the plaintiffs to take the benefit of the provisions of the O. J. Act.

On appeal to the Divisional Court the judgment of PROUDFOOT, J., was affirmed.

Davidson Black, for the plaintiffs.

Kingsford, for the defendant.

FIELD v. GALLOWAY.

Company—Action for unpaid stock—Payment.

Action against defendant to recover from him, in respect of his unpaid stock in a joint stock company, the amount of an unsatisfied judgment recovered by the plaintiff against the company. The defendant set up as a defence, that one B. recovered judgment against the company and duly assigned it to one G., who duly assigned part of the money recovered, to the extent of $500, to the defendant, which sum the defendant claimed to set off against the plaintiff's claim. The defendant further set up that one M., who was the assignee of the remainder of the judgment, recovered a judgment against the defendant in respect of his unpaid stock, which defendant paid to M., who released the company from their liability on the judgment against them, to the extent of the $500. The assignment of part of the judgment to defendant and the recovery of the judgment by M. against defendant was after the commencement of the plaintiff's action.

Held, that the defence set up by the defendant constituted a good defence to the action.

C. Ritchie, for the plaintiff.

W. Cassels, Q.C., for the defendant.

HALL v. GRIFFITH ET AL.

Action, settlement of—Right of solicitors to costs.

An action brought by a Montreal firm of solicitors for one C. against the now plaintiff, H., was suited for $3,700, of which H. paid $3,000 and gave the solicitors a note for $5,500, made by the defendant Griffith, endorsed by Gimson, and held by H. as endorsee, out of which they were to take the $700 and their costs. They sent a clerk to Toronto, where defendants lived, to settle matters. Not being able to do so he left the note with M. & Co., a Toronto firm of solicitors, for collection. M. & Co. commenced proceedings, and issued a writ which was served on the defendants. After this C. and the plaintiff settled the $700 between them. A settlement was proposed between the solicitors, which M. & Co. agreed to, provided their costs and the clerk's expenses to Toronto were paid; and defendants solicitors said they would recommend this being done. Negotiations for a settlement had been going on between the parties themselves, and on 26th November plaintiff proposed that defendants should pay $5,000 clear of everything to the plaintiff, which on 2nd December was accepted by defendants. This settlement was effected without the knowledge of the solicitors. On 4th December defendants' solicitors were informed of the other parties being interested in the note besides the plaintiff. On 6th December the parties met and settled matters by plaintiff accepting $5,000 in full of all claims under the action. The note which was held by M. & Co. was never delivered up to the defendants.

Held, that the effect of the agreement of 2nd December was that defendants should pay the costs, etc., and that the settlement made on the 6th December must either be treated as being intended to carry out such agreement, or if not, then that the settlement must be deemed to have been made with full knowledge through their solicitors and they must pay the costs, and that the settlement must be made through M. & Co.; that defendants in choosing to settle the amount of the note with H., without requiring the delivering up of the note, must be held liable for whatever lien or charge C. or others had upon the note, because they were not bound to pay it unless it was given up to them.

ONTARIO AND QUEBEC RAILWAY COMPANY v. PHILBRICK.

Railways—Tender of compensation for lands taken—Omission to offer crossing until arbitration commenced—Less amount awarded—Costs—Railway Act, sec. 9, sub-sec. 19.

By sec. 9, sub-sec. 19 of the Consolidated Railway Act, where the sum awarded by the arbitrators as compensation for land taken and damages is not greater than that offered by the company, the costs of the arbitration shall be borne by the opposite party, but if otherwise they must be borne by the company, and in either case they may, if not agreed upon, be taxed by the Judge.

On August 2nd, 1883, the O. and Q. R. W. Co. served P. with the statutory notices of their inten-

tion to take $3\frac{88}{100}$ acres of P.'s land, and tendering $3685 as compensation therefor and damages. This notice was abandoned, and another notice given on the 23rd November, offering the same amount of money, but reducing the quantity of land to $1\frac{88}{100}$ acres. The offer was refused and arbitration proceeded with. The railway cut off P.'s land from the highway, and on the plan attached to the notice no crossing was shewn. The arbitrators met on the 27th December, when the company tendered a deed binding themselves to make and maintain a crossing. The arbitrators assessed the compensation and damages at $3516, or $119 less than the amount tendered; but this was after taking into consideration the value of the crossing to P.

Held, by reason of the offer to make the crossing after the arbitrators met, the tender then made was not the same as that made prior to the arbitration: and, therefore, the provisions of the section as to costs did not apply.

A rule for a mandamus to the County Judge to tax the costs to the company, and for a prohibition preventing him taxing costs to P. was refused.

Quære, whether the Judge had under the circumstances any power to decide as to costs at all. If he should decide that he has such right his authority to do so may be questioned by an application to the Court for such purpose.

G. T. Blackstock, for the company.

McMichael, Q.C., and *Shepley*, contra.

CHANCERY DIVISION.

Ferguson, J.] [March 4.

LONDON AND CANADIAN CO. v. WALLACE.

Will—Construction—Direction to carry on testator's business—Power to mortgage.

A testator left his real and personal estate to trustees in trust to sell and invest the proceeds in such securities as they should think proper, and distribute the proceeds among his family as therein directed, and then proceeded:—

"Until sold as aforesaid, I direct that my trustees keep my schooners employed for freight and hire as far as possible, and for such purpose to engage all necessary assistants, and keep the said vessels in repair; and may store grain and other goods and merchandise in my warehouse for hire or storage; and may take such action as they think advisable in common with other joint proprietors to work and develope my interest in the mine known as 'The Baring Gold Mine,' but the outlay by them shall not at any time exceed $1,000."

Except this liberty to employ a sum not exceeding $1,000 in the development of the gold mine, there was no authority given by the will to employ any part of the estate in carrying on the business beyond what was embarked in it at the time of the testator's death.

The trustees carried on the business of the schooners and, as I understand, of the warehouse, and made certain repairs to the vessels, and by so doing became indebted to the Ontario Bank, and for the purpose of meeting this indebtedness contracted by themselves in carrying on the business, they made the mortgage in question in this action to the plaintiffs, who now sought payment or foreclosure.

The estate of the testator was not charged by his will with any sum except his debts, which were all paid before the execution of the mortgage.

It was shown that the plaintiffs had notice of the purpose for which the money borrowed on the mortgage was required.

Held, that the mortgage in question could not be upheld as a charge upon the property, and R.S.O. c. 107, secs. 7, 17 and 20, had no application to the case, though the plaintiffs were entitled to a personal order against those who had executed the mortgage.

All that a will, which directs the testator's business to be carried on, authorizes executors to do is to continue in it so much of the testator's estate as may be embarked in it at the time of his death.

Smith v. *Smith*, 13 Gr. 81, followed.

F. Arnoldi, for the plaintiffs.

Moss, Q.C., for the defendants.

Ferguson, J.] [March 4.

KINCAID v. READ.

Husband and wife—Debtor and creditor—Liability of wife for husband's contract.

Plaintiff agreed with J. R. to build a house on certain land for $850. After building the house he discovered the land belonged not to J. R., but to J. R.'s wife, who at the time of the agreement was an infant, and was in no way a party to it. About a year afterwards J. R. and his wife sold and conveyed the land and house to M., an innocent purchaser. The plaintiff was only paid a portion of the $850,

and now brought suit to recover against the wife of J. R. the balance, or the amount by which the building or the house had increased the value of the land.

He argued that the credit which J. R. got from him must be regarded in the light of property for the purpose of a voluntary settlement by J. R. on his wife; and that, although the property having been sold to an innocent purchaser he could not have a lien, yet the potential equity was such as to entitle him to judgment against the wife of J. R. as asked, and he relied mainly on *Jackson* v. *Bowman*, 14 Gr. 156, and *Collard* v. *Bennett*, 28 Gr. 556.

Held, that inasmuch as there was no property or fund transferred or settled upon the wife that would have been liable to seizure by a creditor, the plaintiff could not recover against her.

S. H. Blake, Q.C., and *Hudspeth*, Q.C., for the plaintiff.

Cameron, Q.C., and *Moore*, for the defendants.

Ferguson, J.] [March 4.

COTTINGHAM v. COTTINGHAM.

Sale of land—Description—Surplus—Compensation.

At a sale of land one of the parcels described in the advertisement of sale as "The east part of lot No. 9 in the 5th con. of Fenelon, *one hundred acres*," was sold at $31 per acre, and in the conveyance to the purchaser was described as "*one hundred acres more or less.*" The parcel really contained $124\frac{68}{100}$ acres, but this was not discovered by the parties interested in the purchase money until long afterwards.

On a petition filed claiming payment for the surplus $24\frac{68}{100}$ acres at the same rate per acre that the sale was made or that the purchaser deliver up possession of the same to the petitioners,

Held, that as the land was sold at so much *per acre*; that petitioners were entitled to payment for the surplus at the same rate, with interest from the time of sale; or that the purchaser should deliver up possession of the same to the petitioners, and, that the purchaser might elect which he would do; but if he had made any improvements he was entitled to be paid for them.

S. H. Blake, Q.C., and *Hudspeth*, for petitioners.

Hopkins, for the respondent.

Ferguson, J.] [March 10.

OXFORD v. OXFORD.

Will—Construction—Right of cestui que trust to possession of the property.

A testator by his will provided: "Notwithstanding the directions hereinbefore contained I desire that if my son, W. O., returns to T. within five years from the date of my death my said executors shall hold in trust for him from the time of his return to T. said lots . . . during the term of his natural life, and shall pay over to him all rents, issues and profits thereof, and after his death shall divide the same between his children in such manner as he shall by his last will and testament direct and appoint, and in default of such direction or appointment to divide etc., etc."

Held, that the intention of the testator was that the possession of the property should remain with the trustees, and an action by the *cestui que trust* to recover such possession was dismissed with costs, the evidence tending to show that it was not the personal occupation, but rather the management of the property that was sought.

Moss, Q.C., for plaintiff.

Blake, Q.C., for defendants.

Ferguson, J.] [March 10.

MAKINS v. ROBINSON.

Mechanics lien—Conveyance of premises before registration of lien.

R. and E. (partners) employed M. to do certain work and furnish certain machinery for their mill, the last of which was furnished on the 28th July, and a lien was registered by M. on the 24th August; but on the 24th July R. and E. had, without the knowledge of M., conveyed the premises to P. who had registered his deed on the 29th July.

Held, M.'s lien was not affected by the conveyance, and that he was entitled to judgment to enforce his lien.

Held, also, under s. 2, s.-s. 3 of the Mechanics' Lien Act, that P.'s name not being mentioned in the lien registered should not invalidate the lien.

S. H. Blake, Q.C., and *Stewart*, for plaintiff.

G. T. Blackstock, for purchaser.

Moore, for defendant, Elliot.

Ferguson, J.] [March 10.

SAUNDERS v. BREAKIE.

Will—Construction—Description of lands—Waste—Injunction.

A testator by his will devised his property as follows: "First, I devise and bequeath to my son, W. A. S., the easterly part of my lot No. 6 in the 3rd con. west of Yonge St., in the township of York, being described as ⅓ part of the length and the entire width, measuring westward from the easterly limit of the said lot No. 6, and containing by admeasurement 66⅔ acres, etc. Second, I give, devise and bequeath unto my son, H. D. S., all my personal property, . . . and I also devise and bequeath to my said son, H. D. S., the middle part of my said lot No. 6 in the 3rd con. west of Yonge St., in the said township of York, being described as ⅓ part of the length and the entire width, measuring westward from the land heretofore devised to my son, W. A. S., of the said lot No. 6, and containing by admeasurement 66⅔ acres, etc. Third, I devise and bequeath to my daughter, Annie, the wife of J. B., of the said township of York, farmer, the remaining ⅓ part of my said lot No. 6, in the 3rd con. west of Yonge St., in the said township of York, being described as ⅓ of the length and entire width of the said lot No. 6, measuring westward from the land heretofore devised to my son, H. D. S., and extending to the westerly limits of said lot No. 6, containing by admeasurement 66⅔ acres, be the same more or less, to have and to hold the said hereby devised land and premises unto, and to the use of my said daughter, A., for, and during the term of her natural life, with remainder thereof on her decease to the children of her body and their heirs and assigns for ever."

The following was a codicil: "I do hereby alter . . . my said will so that should my said daughter, A., the wife of J. B., die without issue or should outlive her issue, the remainder thereof shall revert to my own heirs, share and share alike."

The testator had during his lifetime sold and conveyed away 12 acres from the easterly ⅓ part of the lot, and 5 acres from the centre ⅓.

Held, that the land was virtually described by metes and bounds, and that each devisee took, according to the measurements given, viz., ⅓ part of the length of the lot and the whole width of it, as the testator had title to and power to devise.

Held, also, that on the application of the reversioner the defendants, J. B. and A. B., while they had the right to cut and destroy timber for the purpose of properly cultivating the land, they had no right to cut and *sell* the same timber, even if cut for the same purpose, and an account was ordered to be taken of that already sold and an injunction granted restraining the cutting and *selling* the timber from off the land.

Maclennan, Q.C., for plaintiff.

C. H. Ritchie, for adult defendants.

Plumb, for infant defendants.

Boyd, C.] [March 12.

CARD v. COOLEY.

Will—Construction—Widow's election between dower and devise.

A testator devised to his wife "one half of the place where I now live, being etc., . . . so long as she shall live, and no longer . . . also the half of all the goods and chattels I may own at the time of my demise to dispose of as she may think proper for the benefit and partial support of my daughter . . . "

He also devised "to my grandson . . . the place or homestead where I now live, it being (same property) with all that appertains thereto subject nevertheless to the following conditions, that is to say: my wife shall have quiet and peaceable possession of one-half of all said premises with all that appertains to said half of said homestead for her own use and benefit as long as she shall live."

There was also a devise to the grandson of one-half of all the goods and chattels he owned at the time of his death.

Held (reversing the decision of the Master at Belleville), the widow was not entitled to dower in the homestead and the life estate in half of it, but must elect which she would take.

Dickson, Q.C., for appeal.

Clute, contra.

Boyd, C.] [March 12.

RE QUIMBY, QUIMBY v. QUIMBY.

Will—Construction—Annuity and share under statute of distributions—Dower—Election.

A testator by his will directed his trustees, 1. To pay to his wife so long as she should remain his widow the clear yearly sum of $500; and in the event of her marrying again, the yearly sum of $300 only, from the time of such marriage. 2. When his son should attain the age of twenty-one years to make over to him one-half of the estate. 3. When the son should attain the age of thirty years to make over to him the whole of the residue of the estate—subject, however, to the payment of the annuity to the wife as aforesaid. 4. If the son should die before attaining the age of thirty years to hold "the said real and personal estate moneys and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions."

The last codicil changing the trustees, constitutes them and the survivor of them, and the heirs, executors, administrators and *assigns* of such survivor, trustees of all the property in the will mentioned, and with all the powers originally given by such will to the trustees.

The son and only child attained the age of twenty-one years, received half of the estate, and died before attaining the age of thirty years.

Held, that the use of the word *assigns* would point to the inference that the distributees under the statute would be trustees for the payment of the annuity to the widow, and that she was entitled to her share (one-half) of the residue under the Statute of Distributions in addition to her annuity.

Held, also, that as the testator had dealt with his whole estate, real and personal, in the residue in question, as a blended fund to be distributed after the manner of personalty, that the widow was not entitled to dower out of the real estate as well, but was put to her election.

Chalmers v. *Stovill*, 2 *Ves.* & *Bea.* 203, and *McGregor* v. *McGregor*, 20 *Gr.* 45, referred to and followed.

Moss, Q.C., and *Carscallen*, for plaintiffs.

Hoyles, for the trustee.

W. A. Reeve and *Teetzel*, for other defendants.

Boyd, C.] [March 12.

MCDOUGALL v. LINDSAY PAPER MILL CO.

Master's Report—Priority—Jurisdiction of Master to question judgment.

Plaintiff having brought his action on a mortgage and obtained a judgment under Rule 78, O.J.A., a reference was ordered to the Master at Lindsay.

On the reference several judgment creditors were made parties, and the Master decided that they, although subsequent in date to the plaintiff's mortgage, were entitled to priority over the mortgage on the ground that the mortgage was not sanctioned or ratified by the shareholders of the company.

Held, on appeal, that the Master had no jurisdiction to question the validity of the mortgage or the judgment founded thereon, and that the other judgment creditors are bound by the judgment the same as the defendants, unless they move to vary or set it aside, as notified by notice T. served under G. O. 444, and that the priorities should be reversed, the plaintiff being declared to be first.

Moss, Q.C., and *Hudspeth*, Q.C., for appeal.

Osler, Q.C., and *M. McIntyre*, contra.

Ferguson, J.] [March 19.

WARDROPE v. CANADIAN PACIFIC R. W. Co.

Garnishee proceedings—Debtor and creditor—Evidence.

A judgment creditor does not become a creditor of the garnishee by service of the garnishee order upon him. There is not the existence of a debt from the garnishee to the attaching creditor. He has the right against the garnishee that is expressly given him by the estate, and nothing more; and although the garnishee can be compelled to pay the attaching creditor if the course pointed out by the statute is pursued, the position of the garnishee is not that of a debtor to the attaching creditor. He continues to be a debtor to his own creditor until he has paid into Court, or to the attaching creditor after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor as to the amount paid or levied.

Held, therefore, that the plaintiff, who had obtained a garnishee order, garnishing a debt due from the B. and O. Railway to W. S., his judgment

debtor, (which railway was now represented by the defendants) was not a "creditor" of the B. & O. Railway, holding a *bonâ fide* claim against them within 27 Vic., c. 57, s. 10.

A copy of an order and of a writ of execution issued pursuant thereto admitted in evidence, a witness testifying that he had made the copies from the originals, which were satisfactorily proved to be lost.

A memorandum or entry found in a book in the office of a sheriff, appearing to be a memorandum or entry of the receipt of a certain writ by the sheriff, admitted in evidence, the sheriff and the then deputy sheriff being dead, and the existing deputy sheriff having proved the handwriting, and the place from which the book was produced.

J. Maclennan, Q.C., and *Francis*, for the plaintiff.

T. Lash, Q.C., and *Walker*, for the defendants.

Ferguson, J.] [March 24.

ST. THOMAS v. CREDIT VALLEY R. W. CO.

Specific performance against railway—Agreement to run trains.

By deed of September 6th, 1881, the defendants covenanted with the plaintiffs, for valuable consideration, that all their passenger trains should run to and from a small station on Church street in the City of St. Thomas, for the purpose of checking baggage, and of accommodating passengers.

Subsequently, about August, 1882, the defendants ceased to run any of their passenger trains to or from the station in Church street.

The plaintiffs now brought this action, claiming that the defendants should be ordered to run all their passenger trains from this station, as agreed, seeking specific performance of the agreement.

Held, that specific performance could not be granted, and the plaintiffs must be left to their remedy in damages; for it appeared beyond doubt that in order to perform what the plaintiff asked either running powers would have to be obtained from the C. P. R. Co., who were owners of the station in Church street, or a new line of road built by the defendants for a considerable distance, at great expense and difficulty; servants would have to be kept, and there would be involved the doing of continuous daily acts, such as the providing and selling of tickets, providing checks for baggage, and the doing continuously of all those things that are usually done at a passenger railway station, and under such circumstances the Court would not order specific performance.

Lord Lytton v. *Great Western Railway Co.*, 2 K. & J. 394, and *Wallace* v. *Great Western Railway Co.*, 3 O. A. 44, distinguished.

D. McCarthy, Q.C., and *T. S. Plumb*, for the plaintiffs.

C. Robinson, Q.C., *J. Bethune*, Q.C., and *Blackstock*, for the defendants.

PRACTICE.

Mr. Dalton, Q.C.] [January.

GAGE v. CANADA PUBLISHING CO. ET AL.

Security for costs—Insolvent surety—Right to new surety.

When one of the sureties in a bond given to secure the costs in the Court below became worthless the Master in Chambers held that the respondent was entitled to a new one.

Holman, for plaintiff.

Davidson, for Publishing Co'y.

Barwick, for defendant Beatty.

Mr. Dalton, Q.C.] [January.

LOVELACE v. HARRINGTON.

Examination—Notice of appointment—Rule 455.

Rule 455 O. J. A. applies to the Chancery Division of the High Court of Justice.

A copy of appointment to examine was served on the plaintiff's solicitor on a Saturday for a Monday.

Held, insufficient notice.

Holman, for plaintiff.

Hoyles, for defendant.

Rose, J.] [January.

PERKINS v. MISSISSIPPI.

Cause of action—Breach of contract—Jurisdiction—Rules 45-8 O. J. A.

An action for damages for breach of contract by the defendants, a corporation in Liverpool, England, in not delivering certain machinery at the railway station nearest to Ottawa.

The writ and statement of claim were served on the defendant's agent in Montreal, and under Rule 48 O. J. A. the plaintiffs now applied for an order allowing the service on the ground that the case was one within Rule 45. The affidavit made and filed by the plaintiff's solicitor set out,

"2. The paper writing shown to me, marked Exhibit A, is a true copy of the statement of claim delivered in this action;"

"3. This action is brought to recover damages for breach of contract on the part of the defendants in not delivering the machinery, in the statement of claim mentioned, at the railway station nearest to Ottawa under the terms of the contract."

But the affidavit did not state that the deponent knew the fact, either of his own knowlege or on information and belief, nor that the defendants ever entered into a contract with the plaintiff and undertook to deliver the machinery at the railway station nearest to Ottawa.

The bill of lading containing the contract in question provided *inter alia* "that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded, upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order, . . . freight . . . to be paid by the consignees." "That the goods are to be delivered from the ship's deck, *when the shipowner's responsibility shall cease. Through* goods sent forward by *rail* are deliverable at the railway station nearest to the place named hereafter." "That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred."

Held,—1. That the affidavit did not afford the proof required under Rule 48; 2. That the bill of lading showed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa; nor any contract, the breach of which was made in Ontario, because, if there was such a contract in the bill, force and effect could not be given to the stipulations in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck, etc., and hence though leave would be given to file further affidavits; such leave was therefore unnecessary.

And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage for any loss, etc., arising beyond their line, no damage for a breach in this Province would result to the plaintiff, and though technically within Rule 45, sub.-sec. c., discretion should (if any exist) be exercised in refusing to allow the service.

In cases of this kind an order allowing service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, etc., within the jurisdiction, as it shifts the onus of proof to the plaintiff, and requires him to conduct, it may be, a long and expensive litigation to procure a decision on a point properly raised at the commencement of the action.

Service disallowed.

Lefroy, for plaintiff.

Richards, Q.C., contra.

Mr. Dalton, Q.C.] [January.

ADAMS v. BLACKWELL.

Interpleader—Sheriff.

S. placed an execution in the sheriff's hands on 11th December, and A. one on the 12th December. On the 20th the landlord put in a claim for rent. The sale took place on the 21st; the sum of $1,707.06 was realized. On the 24th H. notified the sheriff that he claimed all the moneys in his hands, and not to pay any over to anyone else. On the 27th December the sheriff paid S. in full and took a bond of indemnity.

A motion by the sheriff for an interpleader order against H. and the landlord was refused with costs.

Aylesworth, for the sheriff.

Holman, for the plaintiff.

H. J. Scott, Q.C., for the landlord.

Mr. Dalton, Q.C.] [January.

BANK OF COMMERCE v. BANK OF BRITISH NORTH AMERICA.

Third party—Amendment.

A cheque had been drawn upon the plaintiffs, payable to the Hamilton Tool Co'y, and upon an endorsement, purporting to be that of the Tool Co'y., the defendants cashed the cheque, and upon presentation by them to the plaintiffs, were repaid the amount.

The Tool Co'y repudiated the endorsement, and the plaintiffs sued the defendants for the amount of the cheque.

This was an application to add a third party, based on an affidavit of the defendant's solicitor, that he had good reason to believe, and did believe that the third party was the beneficial plaintiff, and that there were equities which would attach as against the third party, if he were a third party, which would not attach against the present plaintiffs.

The motion was refused, but leave was given to the defendants to amend by alleging that Ryan, the third party, was the beneficial plaintiff, and to set up any defence that might be open to them on that ground.

Aylesworth, for the defendants.
Holman, contra.

Rose, J.] [Feb. 29.

WALTON v. WIDEMAN.

Changing place of trial.

An appeal by the plaintiff from the order of the Master in Chambers, changing the place of trial from Toronto to London.

The plaintiff lived and carried on business in Toronto, the defendants in Parkhill, near London. The action was brought upon a contract to purchase certain goods obtained by an agent of the plaintiff, who solicited the order in Parkhill, where the contract was signed. The goods were to be delivered by the plaintiff to the Grand Trunk Railway Company in Toronto. The defence set up fraud in obtaining the contract. The plaintiff proposed to have the action tried at Toronto. The defendants swore that they intended to call six witnesses, that the cause of action arose in Parkhill, and that the expense of a trial at Toronto would be greater by $30 than at London. The plaintiff swore that he intended to call six witnesses and give evidence himself, that four of the six lived in Toronto, one east of Toronto, and one in Parkhill, and that the extra expense of a trial at London would be about $25.

Held, that the cause of action arose in Toronto, and that there was no such preponderance of convenience in favour of London as would justify a change of the place of trial, following *Noad* v. *Noad*, 6 P R. 48; *Davis* v. *Murray*, 9 P. R. 222; and *Robertson* v. *Daganeau*, 19 C. L. J., 19.

Appeal allowed and venue restored to Toronto.

F. E. Galbraith, for the appeal.
Aylesworth, contra.

Boyd, C.] [March 24.

FREEL v. MACDONALD ET AL.

Local Masters—Jurisdiction—Judgment—Rules 80, 422 O.J.A.

Rule 422 O.J.A. and its sub-section (*a*) must be read together and hence the limitation in the sub-section of the jurisdiction of the County Judge in certain cases curtails that of local Masters in similar cases.

The local Master at Hamilton, in the county of Wentworth, gave leave to sign final judgment under Rule 80 O.J.A. in an action in which the solicitor for the defendants had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton.

Held to be *ultra vires* under Rule 422.

Hoyles, for the defendants.
Holman, for the plaintiff.
