Canada Law Journal.

VOL. XXXIV. MARCH 15, 1898. NO. 6.

We regret to record the death of Chief Justice Davie of the Province of British Columbia. Having been born in March, 1852, he was in the prime of life, a young man for so high a position. It was thought that he had many years of usefulness before him, but he had been in bad health for some time, and the end was not entirely unexpected. Mr. Davie was called to the Bar in 1877. He was elected to the Legislative Assembly in 1882, and in 1891 became Premier of British Columbia. He retired from politics in 1895, and succeeded Sir Matthew Baillie Begbie as Chief Justice of the Supreme Court of that province.

Sir Herbert Stephen, Barrister-at-Law and Clerk of Assize for the Northern Circuit in England, has recently written on the subject of Prisoners on oath, present and future. He argues strongly and well against the proposal that all prisoners should be allowed to give evidence on their own behalf. His contention is that, under the proposed system, a number of innocent persons will be convicted, and it is his opinion that even at present several innocent prisoners are annually convicted on the Northern Circuit alone, in consequence of giving evidence themselves. His views apparently coincide with those of Mr. E. F. B. Johnston, Q.C., who recently wrote an able article in these columns (33 C.L.J., p. 667) under the caption "The prisoner as a witness," and he lays it down as a general rule, subject of course to all just exceptions, that the accused should never be put in the witness box. These views expressed by two gentlemen so eminently qualified to give an opinion on this subject, one in England and one in Canada, must carry great weight.

ASSIMILATION OF PROVINCIAL LAWS.

As we have on a former occasion pointed out, The Confederation Act expressly contemplates this assimilation of Provincial laws in the English-speaking Provinces, but this is a sphere of legislation in which as yet, during the 30 years which have elapsed since Confederation took effect, practically nothing has been done. The statesmen of the past may, perhaps, be excused the neglect with which they have treated this subject. They have had a new constitution to mould and put into working order, and may have thought that any such scheme as the assimilation of Provincial laws, might very well be allowed to wait "a more convenient season." But the question is deserving of consideration whether the time has not now arrived when the serious attention of practical statesmen ought not to be turned to this subject and a scheme evolved for carrying it into effect.

The method by which the Confederation Act proposes to bring about a uniformity of law in the Provinces of Ontario, New Brunswick and Nova Scotia, is for the Dominion Parliament to pass an Act making provision for the uniformity of all or any of the laws in those Provinces relative to property, or civil rights, and of the procedure of all or any of the courts in those three provinces, "and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall notwithstanding anything in this Act, be unrestricted," but any Act of the Dominion making provision for such uniformity of law is not to have any effect in any Province until adopted by the Local Legislature thereof. See B.N.A. Act, s. 94.

The effect of this provision seems to be that if a Province were once to adopt a Dominion Act making provision for the uniformity of law on any particular subject, the power of legislation on that particular branch of law would thereafter be forever transferred from the Local to the Dominion Parliament. It is possible that the jealousy of any interference with the Provincial powers of legislation which undoubtedly

exists may make this section a dead letter, but any benefit which might accrue from its adoption might to a large extent, we believe, be secured by the Provinces themselves, without forfeiting any legislative power whatever. But it is obvious in order to attain this end, some sort of concert would have to be established between the various Provinces, and though it would be impossible by this means to insure absolute uniformity of action, yet it might be possible to secure a very practical and subtantial uniformity in a great many matters, without any interference or legislation by the Dominion Parliament.

The main question to be considered is whether a uniformity of law is desirable. If it is desirable then it is not very hard to believe that some effective means could be devised for attaining that end.

Perhaps it would be too much to expect that the whole body of law should be attempted to be dealt with at once, and it might be more prudent to attempt to bring about an accord in some one particular department at a time. In order that the best system for general adoption might be secured, it would probably be necessary to have some sort of consultative body established, having the confidence of all the Provinces, to whom should be delegated the duty of preparing such measures as, on a comparative view of the laws at present in force in the various Provinces, might be deemed best to be recommended for general adoption.

'OBITER DICTA.'

After following the newspaper reports of the solemn farce that has just been enacted in France over the trial for criminal libel of Messieurs Zola and Perrieux, we who are governed by English law—so often stigmatized as the perfection of unreason—will read with a keener sense of appreciation than ever before, the encomium of that great and wise Frenchman, De Tocqueville, upon our juridical system: "Look at England, whose administrative laws still at the present day

appear so much more complicated, more anomalous, more irregular than those of France! Yet there is not a country in the world in which, in the days of Blackstone, the great ends of justice were more completely attained than in England: that is to say, no country in which every man, whatever his condition of life—whether he appeared in court as a common individual or a prince—was more sure of being heard, or found in the tribunals of his country better guaranties for the defence of his property, his liberty, and his life."

* * *

It appears from the February number of the *Law Magazine and Review* (p. 143) that some of the English County Court Judges are given to even more slovenly methods in determining cases before them than their Canadian brethren. In an action (before His Honour Judge Selfe, in the Deal County Court) for damages for the killing of a dog of larcenous propensities, by means of a spring gun, the defendant contended that the gun had been set on the supposition that the marauder was a fox, and that the setting up of a "gun or trap" for the correction of such quadrupedal "vermin" was perfectly legal—quoting "Addison on Torts" (7th ed. 143) in support of this view. Fortunately, however, counsel for plaintiff referred His Honour to the statute in such case made and provided, where the words were found to be "gin or trap." His Honour in pronouncing judgment said the case had been the means of discovering a very serious misprint, which if not brought to light, might have led him to give a different decision to what he would now pronounce," and he awarded the plaintiff £5 and costs. Our Canadian County Court Judges, with a few brilliant exceptions, are often remiss in the matter of research, but we believe there are very few of them who would accept a text-book version of a statute as final and authoritative. Our own limited experience has taught us that errors in the average legal text-book stand "thick as leaves in Vallombrosa;" and, while admitting in this connection the truth of the adage: "Humanum est errare," we are

free to say that the peccable quality in text-writers is quite superhuman—indeed we are not sure but what *in*human is the proper word for it.

* * *

In *The Auer Incandescent Light Mfg. Co. (Limited)* v. *Dreschel et al.*, the Exchequer Court decided a question in our patent law which was theretofore res integra. The case turned upon the meaning of the following clause in section 8 of the Patent Act: "Under any circumstances if a foreign patent exists, the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires." Burbidge, J., holds that the expression "any foreign patent" should be limited to foreign patents in existence when the Canadian patent was granted.

* * *

It is commonly believed that the wig, bands and gown have constituted the forensic habit of the legal profession in England from time immemorial, but the fact is they came into vogue at a comparatively recent date. The white linen bands are a survival of the prevailing fashion amongst gentlemen at the time of the Commonwealth. The short wig dates from the Restoration; and "thus it happens," says Mr. Inderwick (*The King's Peace*, p. 200), "that by a very perversity of conservatism, that head-dress, which in the seventeenth century was worn alike by kings and courtiers, by clergymen and soldiers, by Jeffreys on the bench, and by Titus Oates in the dock, has become in the nineteenth century the distinct characteristic of the advocate and judge." Mr. Inderwick is also of the opinion that it was not until the middle of the reign of King Charles I. that counsel under the rank of serjeant took to wearing silk or stuff gowns, and thus became "gentlemen of the long robe." Until the reign of James I. the Bar in general seems to have had no official costume. The scarlet robes of the judges appear to date from a very much earlier period, and do not owe their origin to England. An old painting of the trial of Savonarola, in

1495, represents the judges in robes of scarlet. The stern old Puritans objected to the judges "painting the town red" when they came on assize in their rubious toggery, and petitions were presented to the Protector, requesting that his judiciary should no longer be permitted to "affright the country with their blood-red robes, and their state and pomp." Richard II. prescribed a judicial costume of green, but because the judges regarded this colour as equivocal in its symbolism, or for some reason not appearing of record, it did not remain long in vogue. If it were to be revived, however, it could be worn with excellent effect by some judges of our own times. That learned lawyer, Mr. Augustine Birrell, Q.C., says somewhere, in a vein somewhat reminiscent of *Sartor Resartus*, that "there is a great deal of relativity in a dress-suit." We ourselves would fain trespass so far upon the philosophic domain of Herr Teufelsdrockh, as to remark that there has always been a deal of *subjectivity* in the vestments of the Bench.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

ARBITRATION—STATEMENT OF CASE BY ARBITRATOR—REFUSAL OF ARBITRATOR TO STATE CASE—SETTING ASIDE AWARD—ARBITRATOR, DUTY OF—ARBITRATION ACT, 1889 (52 & 53 VICT., C. 49) SS. 10, 11, 19—(R.S.O. c. 62, SS. 11, 12, 41.)

In re Palmer (1898) 1 Q.B. 131, an application was made to the Court to set aside an award on the ground that the arbitrators had refused to state a case, as requested by the applicant. Day, J., granted the application and his order was affirmed with a slight variation by the Court of Appeal (Lindley, M.R., and Chitty, L.J.), that Court holding that s. 19 (41 of Ont. Act) impliedly confers on a party to an arbitration, the right at any stage of the proceedings to apply to the Court for an order directing the arbitrator to state in the

form of a special case any question of law arising in the course of a reference; and where an application is made bona fide to the abitrator to state a case, or give the applicant an opportunity to apply to the Court for such an order, it is such misconduct on the part of the arbitrator to refuse as will justify the Court in setting aside the award, and remitting the matter to the arbitrator for reconsideration. And the materiality of the question of law depending on a question of fact, the arbitrators were directed if they found the question of fact in a certain way, then to state the case on the question of law as asked.

ORIMINAL LAW—LIMITATION OF TIME FOR COMMENCING PROSECUTION—COMMITTAL FOR RAPE, TRIAL FOR MISDEMEANOUR—(CR. CODE, S. 551.)

In *The Queen* v. *West* (1898) 1 Q.B. 174, the prisoner was committed for trial for rape within the period allowed for commencing a prosecution for that offence, and also within the time for commencing a prosecution for unlawfully having carnal intercourse with a girl between the ages of thirteen and sixteen. By the English criminal law a person on an indictment for rape may be convicted of the lesser offence. The depositions taken on the preliminary examination showing that the charge of rape could not be maintained, an indictment for the lesser offence was found by the grand jury, upon which the prisoner was tried and convicted. The trial took place after the time for commencing a prosecution for the lesser offence would have expired, but the Court for Crown Cases Reserved (Lord Russell, C.J., and Hawkins, Mathew, Grantham and Darling, JJ.) held that the prosecution was in time and affirmed the conviction. If, however, it had not been possible on an indictment for rape to have convicted for the misdemeanour, it is possible the decision might have been otherwise. We do not observe any provision in the Criminal Code authorizing a prisoner indicted for rape to be convicted of illicit intercourse.

EVIDENOE—CRIMINAL LAW—PROOF OF AGE OF CHILD.

In *The Queen* v. *Cox* (1898) 1 Q.B. 179, the only point discussed is as to the sufficiency of certain evidence. The

point to be proved was that certain children were under sixteen. Evidence was given by two persons who had seen the children, and who stated what they believed were their respective ages, all of them being under sixteen: and also by a school mistress, who said the children attended a public elementary school, and she believed they were under sixteen. Counsel for the prisoner contended that proof of age could only be given by production of a certificate of birth and evidence of identity; but the Court (Lord Russell, C.J., and Hawkins, Mathew, Grantham and Darling, JJ.) held that there was no such rule of evidence, and that the evidence tendered was sufficient to be left to the jury, and the conviction of the prisoner was accordingly affirmed.

CONSPIRACY—COMBINATION TO INDUCE A PERSON NOT TO EMPLOY ANOTHER.

Huttley v. *Simmons* (1898) 1 Q.B. 181 is a case which follows *Allen* v *Flood* (1898) A. C. 1 (noted *post*), but in this case the element of conspiracy was also in question, which was not involved in *Allen* v. *Flood*. The plaintiff was a cab driver, and the defendants were members of a trades union, and the plaintiff complained that the defendants had maliciously conspired together and with others, to induce and had induced one Young not to employ the plaintiff. Darling, J., was of opinion that the defendants could only be liable for damages for conspiracy if the acts done or conspired to be done, would apart from any preconcert, have involved civil injury to the plaintiff; and that according to *Allen* v. *Flood* the inducing of one person not to employ another involves no civil injury, and therefore the defendants by conspiring to do such an act, incurred no liability.

EXECUTOR—INTERMEDDLING BEFORE PROBATE—EXECUTOR DE SON TORT.

The Attorney-General v. *New York Breweries Co.* (1898) 1 Q.B. 205, may be briefly noticed, as it incidentally determines that where an executor before probate procures himself to be registered as the holder of shares owned by the deceased, as his executor, that is such an intermeddling with the estate as will constitute him an executor *de son tort*, and as such liable to pay probate duties.

MARITIME LAW—CHARTER PARTY—GENERAL WORDS—EJUSDEM GENERIS.

In re Richardsons (1898) 1 Q.B. 261 is an instance of the application by the Court of Appeal (Smith, Rigby, and Collins, L.JJ.) of the doctrine of ejusdem generis in the construction of a charter party. The action was for damages for delay in loading a vessel. The charter party provided that delays caused inter alia "by strikes, lock-outs, accidents to railway," and also "other causes beyond the charterer's control," were excepted. A railway communicating with the port of lading was injured by a flood, and goods could not be brought down, and in consequence defendant's men were discharged for want of employment. After the arrival of the ship in port the railway was repaired, and goods arrived in sufficient quantity to load the vessel, but the defendants could not get the necessary workmen. The court held that the general words "or other causes beyond the charterer's control," were controlled by the previous specific words, and only referred to matters ejusdem generis with them, and that the delay in loading the ship could not be attributed to accident to the railway or anything ejusdem generis with a lock-out which was confined to a dismissal of workmen in consequence of a trade dispute.

BILL OF EXCHANGE — PROTEST — NOTICE OF DISHONOUR — BANK WITH SEVERAL BRANCHES—NOTICE TO WRONG BRANCH.

Fielding v. *Corry* (1898) 1 Q.B., 268 was an action on a bill of exchange in which a defendant, one of the indorsers, claimed to be discharged by reason of want of proper notice of dishonour not having been duly given to a subsequent indorser. The bill was put into the Cardiff branch of the Gloucester bank for collection, and forwarded by that branch to the London and Westminster Bank, who presented it on Saturday 10th Nov. The bill was dishonoured and on Monday a notice of protest was sent by mistake to the Cirencester branch of the Gloucester Bank. On the following day the mistake was discovered, and notice of dishonour was telegraphed to the Cardiff branch, and all other indorsers, including the defendant, were notified in due time. Smith and Rigby, L.JJ., were of opinion that the notice to the Bank was sufficient, but Collins, L.J., dissented.

LANDLORD AND TENANT—COV: .NT TO REPAIR—NOTICE OF BREACH —FORFEITURE—RE-ENTRY—RENT FALLING DUE, AFTER NOTICE OF BREACH OF COVENANT TO REPAIR—ACTION FOR RENT AND POSSESSION—CONVEYANCING ACT, 1881 (44 & 45 VICT., C. 41) S. 14, S.-S. 1, (R.S.O. (1897) C. 170, S. 13, S.-S. 1).

Penton v. *Barnett* (1898) 1 Q.B. 276 was an action by a landlord against his tenant to recover possession of the demised premises for breach of a covenant to repair. Notice of the breach had been duly served on the tenant under the Conveyancing Act, 1881 (see R.S.O. (1887) c. 143, s. 11) to repair within a given time. Three days after the expiration of the notice a quarter's rent became due, and the repairs not having been made as required for about twenty days afterwards, the landlord brought the action to recover possession of the demised premises, and also for the quarter's rent. The defendant contended that the plaintiff by bringing an action for the rent which accrued due after the alleged cause of forfeiture for non-repair according to notice, had waived the right to insist on the forfeiture, and at the trial Ridley, J., gave judgment for the defendant, but the Court of Appeal (Smith, Rigby and Collins, L.JJ.,) reversed his decision on the ground that the claim for rent was only an election to treat the defendant as tenant up to the date on which the rent became due, and that the plaintiff was entitled to rely on the subsequent continued neglect to repair, without giving any new notice, as the breach of the covenant to repair was a continuing breach.

WILL—CONSTRUCTION—APPORTIONMENT—BEQUEST OF SHARES WITH DIVIDEND—APPORTIONMENT ACT, 1870 (33 & 34 VICT., C. 55) SS. 5, 7 (R.S.O. C. 170, SS. 4, 8).

In re Lysaght, Lysaght v. *Lysaght* (1898) 1 Ch. 115, it was held by the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) reversing the judgment of Kekewich, J., that where a testator bequeaths shares in a limited company coupled with a declaration that the shares so bequeathed shall carry the dividend accruing thereon at the testator's death, such declaration was a stipulation within the meaning of the Apportionment Act, 1870, s. 7 (see R.S.O. c. 170, s. 8) which prevents the Act applying, and consequently the whole

of the dividend accruing at the time of the testator's death goes to the person entitled under the will to the income on the shares so bequeathed.

COMPANY—WINDING-UP—RESTRICTIONS IN ARTICLES AS TO WINDING-UP—CONTRIBUTORY.

In re Peveril Gold Mines (1898) 1 Ch. 122, this was an application by the shareholders of a limited company to stay proceedings under a winding-up order. The applicants contended that the petitioners who had obtained the order had no right to make the application therefor on the ground that by the articles of association it was provided that no such application should be made without, (*a*) the consent in writing of not less than two of the then board of directors, or (*b*) in pursuance or by permission of a resolution passed at a general meeting of the company, or (*c*) unless the applicant or applicants should hold not less than one-fifth of the capital issued upon which all calls should have been paid. Byrne, J., held the stipulation in the articles invalid, and his decision was affirmed by the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.)

RECEIVER—POWER TO APPOINT—COMPANY—DEBENTURE HOLDER—EXERCISE OF POWER.

In re Maskelyne, Stuart v. *Maskelyne* (1898) 1 Ch. 133, is a case which shows that where debentures are issued by a limited company containing a condition that, at any time after the principal moneys thereby secured should have become payable, a specified company (being one of the debenture holders) might appoint a receiver of all or any part of the property thereby charged, such power is fiduciary and must be exercised in the interest of the debenture holders as a class; and where it was shown that an appointment of receiver under the power had been made in the interest of shareholders, and not in that of the debenture holders, North, J., held that the Court had jurisdiction to appoint a receiver in the interest of the debenture holders in place of the one so appointed by the company, and his judgment was sustained by the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.)

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—ADMISSION OF MARRIED WOMAN—ESTOPPEL.

In *Bateman* v. *Faber* (1898) 1 Ch. 144 the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) have affirmed the decision of Kekewich, J. (1897) 2 Ch. 223, noted ante vol. 33, p. 759), to the effect that the admission under seal of a married woman cannot operate by way of estoppel against her, so as to defeat a restraint against anticipation, even in favour of third parties who have advanced money on the faith of such admission. "The result" (Lindley, M.R., says) "is that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a feme sole," and although there was no fraud in the present case, nevertheless all the Judges of the Court of Appeal agree that even a married woman's deliberate fraud will not enable her to get rid of the restraint on anticipation.

WILL—CONSTRUCTION—LEGACY—ERRONEOUS STATEMENT OF INDEBTEDNESS—FALSA DEMONSTRATIO—INTENTION.

In re Rowe, Pike v. *Hamlyn* (1898) 1 Ch. 153, the construction of a will was in question. The testatrix, who was universal devisee and legatee under her deceased husband's will, bequeathed to her grandniece, "the sum of £300 in addition to the sums owing to her from my late husband's estate." As a matter of fact nothing was legally owing from the husband's estate, but the husband had given the niece, as the testatrix knew, an I.O.U. and a promissory note for two sums of £500, which, however, were not enforceable for want of consideration. The question was whether the legacy was good for £300 or £1,300. Romer, J., was of opinion that there was simply a gift of £300, coupled with an erroneous statement of indebtedness, which, had the testatrix known it to be erroneous, might have induced her to give more; but the Court of Appeal, (Lindley, M.R., and Chitty and Williams, L.JJ.,) were unable to agree with this, and, having regard to the position in which the testatrix stood to her husband's estate, considered that the bequest must be read as of £300, plus the two sums of £500, which she intended should be paid out of her husband's estate, which had devolved on her.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] TURNER *v.* BENNETT. [Nov. 10, 1897.

Will, construction of—"Own right heirs"—Limited testamentary power of devisee—Conditional limitations—Appeal—Acquiescence by appellants in judgment appealed from—Costs.

Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of an intestacy unless a contrary intention appears, and where a devise was to the only daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention and the daughter inherited as the right heir of the testator.

Appeal dismissed with costs.

McCarthy, Q.C., *McCullough* and *Lobb*, for appellants. *Wm. Mortimer Clark*, Q.C., and *Macklem*, for respondents Bennett and others. *Hodgins*, for the executors.

Ontario.] [Nov. 10, 1897.

TOWNSHIP OF SOMBRA *v.* TOWNSHIP OF CHATHAM.

Municipal corporation — Assessment — Extra cost of works—Drainage — R.S.O. (1877) c. 174—46 Vict., c. 18 (Ont.)—By-law—Repairs—Misapplication of funds—Negligence—Damages — Re-assessment—Intermunicipal works.

Where a sum amply sufficient to complete drainage works as designed and authorized by the by-law for the complete construction of the drain has been paid to the municipality which undertook the works, to be applied towards their construction, and was applied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards by another by-law levy or cause to be levied from the contributors of the fund so paid any further sum to replace the amount so misapplied or wasted.

Appeal allowed with costs.

Aylesworth, Q.C., for appellants. *Wilson*, Q.C. for respondents.

COURT OF APPEAL.

Osler, J.A,] HOLMES *v.* BREADY. [Feb. 19.

Appeal—Taxation of costs in Court of Appeal—Form for appeal from taxation.

An appeal does not lie to the Court of Appeal or a Judge thereof, but to the High Court or a Judge thereof, to review the taxing officer's taxation of the costs of an appeal to the Court of Appeal from a judgment of the High Court.

There has been no such change in the Act or Rules as to make *Petrie* v. *Guelph Lumber Co.*, 10 P.R. 600, inapplicable, and it is therefore to be followed.

C. A. Moss, for the plaintiff. *G. G. Mills*, for the defendant.

Province of Ontario.

HIGH COURT OF JUSTICE.

Meredith, C.J., Rose, J., MacMahon, J. } [Feb. 26.
} TATE *v.* NATURAL GAS AND OIL CO. OF ONTARIO.

Parties—Addition of—Rule 206 (2)—Amendment—Alternative claim—Rule 192—Company—President—Contract.

The plaintiff, having a claim for arrears of salary and damages for wrongful dismissal, sued the defendant company therefor, alleging an agreement made with the president and certain directors before the company's incorporation, and a subsequent by-law and resolution of the company ratifying the agreement. In consequence of what was alleged in the statement of defence, and after discovery had, the plaintiff applied for leave to amend by adding another company and the president of the defendant company as defendants, fearing that he might not recover against the defendant company, because, although they got the benefit of his services, it might appear that his contract was not with them, but with the other company, or that, from want of authority of those who assumed to act on behalf of one or other of the companies, his contract was in law with the president personally, or the president was liable to him in damages as upon a warranty of authority.

Held, that the plaintiff was entitled by virtue of Rule 192, to have the question as to which one of the three parties was responsible to him, decided in one action; and, although he had omitted to join two of them originally, an order should be made, under Rule 206 (2), adding these two as defendants at this stage of the proceedings, ROSE, J., dissenting. *Bennetts* v. *McIlwraith*, (1896) 2 Q.B. 464, followed.

Aylesworth, Q.C., for plaintiff. *W. R. Riddell* and *A. D. Crooks*, for defendants and proposed parties.

Moss, J.A.] PATTERSON *v.* CENTRAL CANADA L. & S. CO. [Feb. 26.

Permissive waste — Tenant for life—Growth of weeds—Leave to appeal—R.S.O. 1897, c. 51, s. 77, sub-sec. 4.

An application by the plaintiffs for special leave to appeal to this Court from the order of a Divisional Court, affirming the judgment of Street, J., which was mainly in favour of the defendants, in an action by remaindermen against tenants-for-life for waste.

The plaintiffs made complaint with respect to several matters in which they alleged there had been error, but the most important claims rested upon the contention that a tenant-for-life is liable to the remainderman for permissive waste.

Held, that the question of fact as to the existence of thistles, mustard and quack grass at the time of the defendants taking possession must be deemed concluded by the finding of the trial judge, affirmed by the Divisional Court. And unless, as to them, the law was that the tenant for life was liable for permissive waste, the defendants were not liable for the deterioration they had occasioned. In view of the array of modern authority in favour of the rule that tenant-for-life is not liable for permissive waste, in the absence of some provision in the instrument creating his estate expressly imposing the duty to keep in repair, no case has been made out for further litigating these questions in this action. See *Zimmerman* v. *O'Reilly*, 14 Gr. 646, where the question was decided against the remainderman. Eliminating this, the other matters were not sufficient to bring the case within s. 4 of s. 77 of the Judicature Act, R.S.O. 1897, c. 51.

N. F. Davidson, for plaintiffs. *D. W. Dumble*, for defendants.

Meredith, C.J., Rose, J., MacMahon, J.] [March 3

MCBRIDE *v.* HAMILTON PROVIDENT AND LOAN SOCIETY.

Distress— Mortgagor and mortgagee—Decease of mortgagor—Seizure of goods of another on mortgaged premises—Authority of bailiff—Principal and agent—Mortgagee's agent controlling bailiff—Evidence—Admissibility—Letter of solicitor before action.

An appeal by the defendants from the judgment of the Judge of County Court of Lambton in favor of the plaintiff for $125 damages upon the findings of the jury in an action for trespass and illegal seizure and sale of the plaintiff's goods upon premises mortgaged to the defendants by Mary Ann McBride, the seizure and sale purporting to be under a warrant issued by the defendants to their bailiff to destrain the goods of Mary Ann McBride for arrears due under their mortgage, she having been for some years dead at the time of the seizure, of which the defendants were ignorant. When the defendants found that the goods were those of the plaintiff, a brother of the deceased, they ordered their bailiff to withdraw. The jury, however, found that one Stone was the agent of the defendants, and instructed the seizure and sale after he had been told that the goods were the plaintiff's.

P. D. Crerar, for the defendants, contended that there was no evidence of Stone's agency, and they were not liable for what their bailiff did in seizing the plaintiff's goods under a warrant to seize the goods of the deceased.

Aylesworth, Q.C., for plaintiff.

Held, that the intention was to seize the goods upon these premises, and the bailiff was acting within the scope of his authority as agent for a principal in making the seizure upon the premises, and the defendants were liable for his act, although the mortgagor was dead and the title in the goods and chattels had passed to another.

Lewis v. *Read*, 13 M. & W. 834, and *Hascler* v. *Lemoyne*, 5 C.B.N.S. 530, referred to.

But, if this view was not tenable, the defendants interfered with the making of the distress, through Stone, who, according to the plaintiff's evidence, was present when the distress was made, accompanied the bailiff when the latter was making the inventory, was told that the deceased mortgagor did not own the chattels, answered that he did not care, that they were on the place, wrote out the inventory and advertisement, and acted so as to convey the impression to the plaintiff that he was in control and management; and upon this evidence there was a question to submit to the jury as to the authority of Stone to act in directing and controlling the distress. See *Tate* v. *Latham*, (1897) 1 Q.B. at p. 509.

A letter written by the solicitor of the defendants to the solicitor for the plaintiff before action was improperly received in evidence; *Wagstaff* v. *Wilson*, 4 B. & Ad. 339, but this was immaterial, as there was no application for a new trial.

The appeal was dismissed with costs.

Meredith, C.J., Rose, J., MacMahon, J.] [March 3.

WALLS *v.* SAULT STE. MARIE PAPER AND PULP CO.

Parties—Assignment of debt sued on—Reassignment—Assignment by way of security only—Amendment—Adding assignee as a party.

An appeal by the defendants from the judgment of the Judge of the District Court of Algoma in favour of the plaintiff upon the findings of the jury, in an action in that Court brought to recover the balance due to the plaintiff under a contract for getting out wood. The appeal was on the grounds that the plaintiff's claim had been assigned before action to one Plummer, and only reassigned at the time of the trial, and the plaintiff was not entitled when the action was begun, and that the amount of the verdict was too large upon the evidence.

Held, that it was not clear that the plaintiff did not retain in himself an interest in the amount coming from the defendants, and that the assignment was not made by way of security, in which csae the plaintiff could recover in his own name: *Prittie* v. *Connecticut Fire Ins. Co.*, 23 A.R. 449.

After action and before trial the plaintiff gave security to Plummer for the

indebtedness to him, and on the day before the trial Plummer gave the plaintiff a reassignment. Even if the objection could be held to be well taken, this would be a proper case for amendment, adding Plummer as a party: *Dawson* v. *Graham*, 41 U.C.R. 532; *McGuin* v. *Fretts*, 13 O.R. 699.

Davis v. *Riley*, (1898) 1 Q.B. 1, distinguished.

Held, also, that upon the evidence the Court could not interfere with the verdict.

W. E. Middleton, for defendants. *W. M. Douglas*, for plaintiff.

Street, J.] IN RE CAMPBELL AND VILLAGE OF SOUTHAMPTON. [March, 3

Municipal corporation—Closing street—By-law—Notice of intenton to pass—Absence of notice as to day on which to be considered—Invalidity of by-law—Motion to quash—Discretion—Acquiescence—Estoppel.

Motion by William D. Campbell for a summary order quashing by-law No. 297 of the village corporation, being a by-law "for the purpose of expropriating and closing up certain portions of the public streets of the village of Southampton," upon the grounds, among others, that the municipal council had no power to pass the by-law without proper notice, and no notice, as required by law, was given of the intention of the council to pass it; that the notice of the intention of the council to pass the by-law, alleged to have been given, did not fix any time for the by-law being considered and for hearing persons opposed to it or whose rights might be affected thereby; that the applicant, who had bought property affected by the by-law, had no notice or knowledge of the day fixed for the passing of the by-law and had no opportunity of opposing it.

Idington, Q.C., for the applicant.

W. H. Blake, for the village corporation, contended that s. 546 of the Municipal Act, 55 Vict., c. 42, does not require that a time should be fixed by the published notice; that the failure to fix a time was not fatal to the by-law; and that the applicant had waived or acquiesced in the defect, if any, nine months having elapsed since the by-law was passed, and he having bought his property after notice of the proposed by-law had been given.

Held, that, as it was decided in *Re Birdsall and Township of Asphodel*, 40 U.C.R. 149 that the notice of intention to pass the by-law should state the day on which it is to be considered by the council, the statute is to be read as if it contained a direction to that effect, and the notice here not having so stated, the by-law was invalid; and, under *Re Osirom and Township of Sydney*, 15 A.R. 372, and *Re Robertson and Township of North Easthope*, 16 A.R. 214, there was no discretion to refuse to quash such a by-law; and, in fact, there was no acquiescence amounting to an estoppel. Order made quashing by-law with costs.

Street, J.] HOLMES *v.* BREADY. [March 8.

Costs—Scale of—Taxation of in Court of Appeal—High Court action.

An appeal by the plaintiff from the taxation of his costs incurred in the Court of Appeal. The plaintiff recovered judgment in this action for a sum within the jurisdiction of the County Court, and was allowed costs on the

County Court scale only, the defendant being allowed to set off the difference between costs on the High Court and County Court scale. The defendant appealed to the Court of Appeal, upon the ground that the action should have been dismissed, and the appeal was dismissed with costs. Upon the taxation of these costs the taxing officer held that they must be taxed as in a County Court action.

By Rule 1130 the costs of all proceedings in the branches of the Supreme Court are in the discretion of the Court or Judge before whom they come for hearing or determination.

Held. that the Court of Appeal having ordered the defendant to pay the costs of the appeal generally, without any limitation as to scale or amount, and there being only one tariff of fees payable upon appeals from the High Court, that tariff must govern the allowance of costs under the order of the Court of Appeal.

Rule 1132 applies only to the costs of the action in the High Court, and not to the costs of an appeal from that Court to the Court of Appeal, which are not within the discretion of a Judge of the High Court.

C. A. Moss, for the plaintiff. *G. G. Mills*, for the defendant.

THIRD DIVISION COURT.

COUNTY OF HURON.

Doyle, J.J.] BEATTIE *v.* MCDONALD. [Dec. 14, 1897.

Division Court—Claim in excess of jurisdiction.

A judge trying a case in a Division Court on a claim for an amount within the jurisdiction, is not ousted of jurisdiction because, in arriving at his decision thereon, he has incidentally to consider and adjudicate upon a claim, the amount of which exceeds the jurisdiction. The following cases were referred to: *Re Legarie* v. *Canada Loan Co.*, 11 P. R. 512; *Re Hutson* v. *Valliers*, 19 A.R. 154; *Re Mead* v. *Creary*, 32 C P. 1.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] LINDBERG *v.* THE CITY OF HALIFAX. [Jan. 15.

Municipal corporation—Payment of claim enforced by threat to turn off water—Action to recover amount paid—Party entitled to bring—Voluntary payment—Quasi contract—Ratification—Application to add or substitute plaintiff—Conditions—Duress.

Plaintiff was owner of a brewery in the city of Halifax, which he commenced to operate in the year 1891. In that year a two-inch water service pipe was supplied by the city at the request of S., who, in the absence of L.,

was acting as superintendent in the construction of the brewery. A dispute subsequently arose between the city and L. as to whether the latter was liable to pay for the pipe so supplied and for the cost of connecting it with the main water pipe and the wall of the building. While this dispute was still outstanding and unsettled L. sold the property to the Halifax Breweries Co., Limited, in which he had a large interest as shareholder, by which company the business was afterwards carried on. On the 30th July, 1896, the amount claimed as due to the city not having being paid, an official in the employ of the city was sent to the brewery for the purpose of turning off the water as a means of enforcing payment. The manager of the company thereupon under protest and in order to avert serious loss which would have been caused by the turning off of the water, paid the amount in dispute, and made a demand upon L. for reimbursement, who, notwithstanding his claim that the amount was not due and should not have been paid, repaid the company the amount advanced and brought his action against the city to recover it.

The Judge of the County Court for the County of Halifax, before whom the case was tried, found that L. was not liable for the amount in dispute or any part of it.

Held, this being so, that the demand made upon L. by the company for indemnity was unwarranted, and that the payment by L. having been voluntary he was not entitled to recover.

Held also, that the money having been obtained from the company by means of unlawful pressure exerted by city officials upon the company, the latter and not L. acquired the right of action against the city.

Held also, that the trial Judge was wrong in the theory upon which he proceeded, that the circumstances warranted the view that the company acted as agent of L. in respect to the payment of the money, and that L. by reimbursing the company ratified the payment so as to acquire a right to sue the company to recover back the sum paid.

(*a*) Because the money was paid by the manager of the company for the protection of the company and not as agent of L.

(*b*) Because the company under compulsion and against its own will paid money as to which it knew that L. repudiated liability, and the idea that the payment was made as agent of L. was therefore excluded.

(*c*) Because the sole liability of the city being based upon a fictitious or quasi contract to which L. was not a party, the payment made by him to the company could not entitle him to sue upon it.

(*d*) Because the wrong done by the city being a wrong done to the company, and the only cause of action therefore being that of the company the transaction between the company and the city was not one that could be ratified by L.

After argument of the appeal application was made for leave to add or substitute the company as plaintiff.

Held, that this could only be done on payment of costs, and with leave to the city to raise any defence which it might be advised to meet the claim made by the company.

Per GRAHAM, E.J., dissenting.

Held, That the money having been clearly and unequivocally paid for L., and both parties having acted on that basis and with full knowledge, the fact that the company was relieved from pressure did not make it a payment by the company as principal.

Held also, that the subsequent ratification of the payment by L. was as effectual as if there had been a previous request.

Held also, that the act of payment was not ratified as a satisfaction of the claim of the city, but as an advance conditionally made to remove the pressure, and with a view to recovering the money; that the case was practically the same as if L. had been present when the money was paid, and had authorized the payment for him under protest.

Held also, that the city having received the money as coming from L., there was privity which enabled the action to be maintained.

Held also, that the mere threat to employ colourable legal authority to enforce payment of an unfounded claim is such duress as will support an action to recover the money paid under it.

Appeal allowed with costs.

C. S. Harrington, Q.C., and *C. P. Fullerton*, for plaintiff. *W. F. MacCoy*, Q.C., for defendant.

Full Court.] JENKINS *v.* MURRAY. [Jan. 15.

Vendor and purchaser—Responsibility of vendor for mistake or negligence of agent—Damages.

Defendant placed a number of lots of land in the hands of N., with instructions to sell. The correspondence in relation to the transaction was conducted through defendant's son-in-law, F., with whom she lived, and who acted under her instructions.

The lots in the hands of N. consisted of five lots known as "the swamp lots," five lots on Plover street, and sixteen lots on Brussels and Acadia streets.

On the 7th June N. wrote to F. asking what he would take for the lots, naming them, and on the 19th of the same month telegraphed F. as follows: "Offered $1,000 for lots mentioned in my letter 7th instant. Wire." After some further correspondence F. telegraphed "Accept offer." Whereupon N. closed the sale and received a payment of $100 on account of the purchase money. Defendant refused to complete the sale on the ground that she had been misled by F., and thought she was only authorizing the sale of the lots known as "the swamp lots."

Held, reversing the judgment of HENRY, J., for defendant, that defendant was responsible for the mistake or negligence of her agent, and for damage caused by the breach of a contract which she had authorized him to make, the terms of the contract being clear, and plaintiff's conduct in the whole transaction unimpeachable.

W. B. A. Ritchie, Q.C., for appellant. *A. Drysdale*, Q.C., for respondent.

Graham, E.J., at Chambers.] [Feb. 18.

IN RE MERCHANTS' BANK OF HALIFAX.

Assessment Appeal Court—Case stated by—Evidence—Bank held not liable to assessment on increased capital not required for local business.

Case stated by the Court of Appeal on assessment for the City of Halifax, under s. 343 of the City Charter for the opinion of a Judge. The Bank had increased its capital from $900,000 to $1,500,000. The increases were authorized by a resolution of the shareholders, which did not state the object in increasing it, but which gave the directors power to increase from time to time, as they saw fit.

The resolutions of the directors making the increases, in one case stated that the object of the increase was for the purpose of extending the business of the bank in Montreal. In the case of the other increases the object was not stated.

By s. 316 of the City Charter banks are assessed on their paid-up capital, as it was in 1883, when the act was first passed at the rate of ¾ths per cent., and on any increase of their paid-up capital, "provided, however, that in the event of any bank increasing its capital for the purpose of extending its business outside of the city, said bank shall not be assessed in the city on such increased capital." The city assessors had assessed the Merchants Bank of Halifax in respect to its capital, $1,500,000. The bank appealed to the Court of Appeal on assessment, and before that court the officers of the bank swore that the several increases in its capital were made for the purpose of extending its business outside of the city, and were not required for the business of the bank in the City of Halifax, and gave figures which conclusively showed this to be the case.

The Court of Appeal on Assessment held that the evidence of the officers of the bank to show the object for which the capital was increased was inadmissible, and that the only evidence receivable to show this was the resolution of the shareholders. At the request of the bank they, however, received the evidence, and submitted the question to a Judge of the Supreme Court under s. 343 of the City Charter.

GRAHAM, E.J., who heard the argument, decided that the Court of Appeal was bound to hear the evidence of the officers of the bank, and that under the circumstances the Bank was not liable to be assessed on the amount of the increases of capital, but only on the sum of $900,000, the amount of its capital in 1883.

R. E. Harris, Q.C., for bank. *W. F. MacCoy*, Q.C., for City of Halifax.

Province of New Brunswick.

SUPREME COURT.

Barker, J., In Equity. } FLEMING *v.* HARDING. [Dec. 21, 1897.

Practice—Leave to file bill—Order absolute.

Where bill was not filed within the time provided by 53 Vict., c. 4, s. 22, owing to a settlement of the suit pending, and defendants had not appeared, an order absolute was granted, giving leave to file the bill with direction for service of order on defendants.

A. P. Barnhill, for the application.

Full Court.] QUEEN *v.* MCGUIRE. [Feb. 22.

Power of judge to summon second grand jury—Jurors serving on a previous panel—Order to one coroner.

Defendant was arrested and committed for trial for theft during the sitting of the Carleton Circuit Court, and after the grand jury had been discharged the Court ordered the sheriff to summon a new grand jury, which found a true bill. It transpired that the informant and principal witness in the case was a brother of the sheriff who summoned the jury and His Honour for this reason quashed the indictment and ordered a coroner to summon a third jury. This, jury, comprising several men who had been on the sheriff's jury which found a true bill on the indictment that was quashed, also found a true bill, and the prisoner was convicted.

Held, on a case reserved, that the Court had the power, inherent in itself, to order the summoning of a second grand jury.

Held, also, that the fact of several of the jurors of the last panel having served on a previous grand jury in the same case would not invalidate the indictment.

Held also, that the order for the coroner's jury need not go to all the coroners of the county but that it was sufficient for it to go to and for the return to be made by one coroner.

A. B. Connell, Q.C., for prisoner. *A. S. White*, Attorney-General, for Crown.

Full Court.] TROOP *v.* EVERETT. [Feb. 22.

Suggestion of death of parties—Judge's order allowing same.

This was an application to rescind an order of the Chief Justice allowing plaintiff to enter a suggestion of the death of a co-plaintiff and one of the defendants. It was contended that there was no provision in the statute authorizing a Judge to make such an order, and that consequently he had no power to do so.

Held, (per TUCK, C.J., and LANDRY and MCLEOD, JJ., VANWART, J., dis-

senting), that even if there were no authority in the statute for the order, no injury could result to any of the parties, and therefore the order should not be set aside.

VANWART, J., based his dissenting judgment on the ground that under the terms of the order, if the defendant failed in the action he would be prejudiced to the extent of the costs.

C. A. Palmer, Q.C., for plaintiff. *A. H. Hanington*, Q.C., for defendant.

Full Court.] QUEEN *v.* SCHOOL TRUSTEES OF CANTERBURY. [Feb. 22.

Mandamus—Schools Act—Defective writ—New writ issued.

The Court in Trinity Term granted a rule absolute for a mandamus to compel the defendants to admit five children of one Miller (of schoolable age) to the privileges of the district school. The mandamus was issued, and the trustees, having made a return to it in which they objected that the writ was defective in that it went to them by their individual names and not in their corporate capacity, and also that it did not set out the names and ages of the children whom they were commanded to admit, counsel for the applicant moved on the second common motion day of Michaelmas Term to set aside the answer. The Court was of opinion that the writ was defective in not setting out the names and ages of the children, and without quashing the first writ ordered a new writ to be issued. The new writ was directed to the trustees in their corporate capacity and set out the residence of the father as well as the residence, names and ages of the children, whose admission was commanded. The trustees in Hilary Term moved, pursuant to notice, to set aside the second writ on the ground that the Court had no power to direct the issue of a second writ until at least the first was quashed, and also on the ground that the second writ was bad in that it contained more than one distinct right, viz.: the right of the parent to have his children admitted to school as well as the right of each of the five children to be admitted.

Held, (HANINGTON, J., dissenting, BARKER, J., in part) that the second writ was a valid writ, that it was necessary to set out the residence of the parent and the residence and ages of the children to establish the right of the parent under s. 74 of the School Act, c. 65, Con. Stat., and that therefore there was only one distinct right.

F. St. J. Bliss, and *H. B. Rainsford*, for the trustees. *J. W. McCready*, and *Geo. W. Allen*, contra.

Full Court.] FRASER *v.* MACPHERSON. [Feb. 22.

Bill of sale—Husband to wife—After-acquired property—Consideration.

Defendant took an assignment of a first bill of sale on a number of hhrses, carriages and other livery stable property of the plaintiff's husband. This bill of sale purported to convey to the mortgagee, in addition to the said property described in the schedule, "any and all the property that may hereafter during the continuance of these presents be brought to keep up the same, in lieu thereof and in addition thereto, either by exchange or purchase, which so soon as obtained and in the actual or constructive possession of the said mortgagor

shall be subject to all the provisions of this indenture." Subsequently the plaintiff loaned her husband $600, and took from him for security a bill of sale, covering all the property described in the schedule of the defendant's bill of sale, and some additional horses, carriages, sleighs, etc., which he had since acquired. The schedule of the second bill of sale was as follows: "Eight horses, 8 single harnesses, 3 sets double harness, 8 pungs, 2 buggies, 3 waggons, 5 buffalo robes, 1 large sled, C.P.R, 1 double buss sled, 6 wraps; also all other goods, furnishings and articles and materials, now or hereafter during the continuance of these presents used in connection with the livery stable now owned by the said J. E. F., and all property hereafter acquired therein," and the bill of sale itself contained the same provision as to after-acquired property as the first one. After this again the plaintiff's husband executed a third bill of sale to the defendant, covering all his livery stable property, and subsequently gave him a delivery order of the same. Defendant having seized all, plaintiff brought an action of trover for the conversion of the property described in the second bill of sale, or so much thereof as was not covered by defendant's first bill of sale, and also for the conversion of a phaeton, which she claimed to own by reason of her having given her husband the money with which to purchase it. On the trial before McLeod, J., without a jury, plaintiff's husband testified that he gave the third bill of sale and delivery order to the defendant in consideration of the latter's undertaking to pay off his wife's claim. The Judge found a verdict for the plaintiff, assessing the damages at $480. On a motion for a reversal of the verdict or for a new trial, defendant contended that the plaintiff's bill of sale was void as being from husband to wife (the Married Woman's property Act of 1895, it was argued, not providing for such a transfer), and for insufficiency of the description of the property, and also that the provision in the first bill of sale as to after-acquired property, coupled with F.'s subsequent delivery order, subjected all the after-acquired property to the provisions of the first bill of sale. For the plaintiff it was contended that the provision in the first bill of sale as to after-acquired property was ineffectual for not indicating the same sufficiently for identification, either as to its character or its future location.

Held, per TUCK, C.J., and HANINGTON, LANDRY and MCLEOD, J.J., (BARKER and VANWART, JJ., no part) that the verdict was right, and should not be disturbed.

J. W. McCready and *J. H. Barry*, for plaintiff. *G. F. Gregory*, Q.C., for defendant.

Tuck, C.J., In Chambers. } KENNEDY *v.* NEALIS. [Feb 28.

Execution against body—Costs payable by decree of Equity Court—Bail to the limits.

Costs being payable by the defendant under decree of the Equity Court an order absolute was obtained from the Court for an execution against the body of the defendant, he was arrested. On an application for an order to the sheriff to take bail to the limits,

Held, that the application should be granted, and that the case was distinguishable from *Ex parte Wright*, 32 N.B., in that it was not an application by habeas corpus to set aside the decree of the Equity Court.

A. O. Earle, Q.C., for the prisoner. *W. B. Wallace*, contra.

ADMIRALTY DISTRICT.

McLeod, J.] LAHEY *v.* MAPLE LEAF. [Feb. 28.

Salvage claimed under $100—Costs—Colonial Courts of Admiralty Act—Admiralty Acts 1891 (54 & 55) and Admiralty rules.

Plaintiffs agreed to accept $25 for salvage services rendered to the yacht "Maple Leaf" in the harbour of St. John, and being unable to obtain a settlement with the owner, brought an action for salvage, claiming $100. The value of the yacht was $400. The defence charged the salvors with misconduct, negligence and unskilfulness, whereby the yacht had been considerably damaged, and contended that under the Wrecks and Salvage Act, c. 81, s. 44, R.S. Can., the claim should have been brought before the Receiver of Wrecks, and that costs should not be allowed to the plaintiffs, and should be certified to the defence. The plaintiffs contended (1) that the Act did not apply where negligence, etc., were charged, citing *The John*, Lash. 13; *The Fenix*, Swa. 13; *The Comte Nesselrood*, 31 L.J., Ad. 77; (2) That Rule 224 of the Admiralty Rules, 1891, contemplated that the action should be brought in the Vice-Admiralty Court; (3) That Rules 132, 133 by leaving costs in the discretion of the Judge had repealed the provisions of c. 81, s. 44, R.S. Can., as to costs, citing *Garnett* v. *Bradley*; (4) That c. 81, s. 4, 3 App. Cas. 944, R.S. Can., was repealed by the Colonial Courts of Admiralty Act 53, 54 Vict., c. 27, s. 2, ss. 2, citing the *W. J. Aikens*, 4 Exch. Rep. 7. Salvage having been awarded:

Held, that plaintiffs were entitled to costs, c. 81, s. 44, did not apply where the defence disputed that salvage services had been rendered by charging negligence, and only applied where the only question of dispute was as to the amount of salvage that should be allowed.

W. H. Trueman, for the plaintiffs. *J. R. Dunn*, for the owner.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] KELLY *v.* WINNIPEG. [Feb. 10.

Municipal law—Ultra vires—Wages of workmen employed by corporation.

Appeal from decision of Bain, J., noted ante. p. 177, dismissed with costs.

Tupper, Q.C., and *Phippen*, for plaintiff. *Ewart*, Q.C., and *J. Campbell*, Q.C., for defendants.

Dubuc, J.] PEARSON *v.* CANADIAN PACIFIC R.W. CO. [Feb. 25.

Workmen's Compensation for Injuries Act, 1893—Lord Campbell's Act—Death by accident—Negligence.

This was a demurrer to the plaintiff's statement of claim which was issued to recover damages for the death of her husband alleged to have been caused by negligence of the defendants or their servants. Letters of administration had been taken out by a brother of the deceased, but as he was in the employ of the company he refused to sue. The demurrer was on two grounds. 1. That the statement of claim did not sufficiently show that the deceased was a workman entitled to the benefit of The Workmen's Compensation for Injuries Act," 56 Vict., c. 39. 2. That the Manitoba statute relating to compensation for death by accident governed the right of action, instead of Lord Campbell's Act, and that the widow had no right to sue notwithstanding the refusal of the administrator to do so.

Held, that the Act respecting compensation to families of persons killed by accident, R.S.M. c. 26, must govern in this Province instead of Lord Campbell's Act, and must be read along with The Workmen's Compensation for Injuries Act of 1895, and that such an action as the present can only be brought by the executor or administrator of the deceased person.

The demurrer was allowed without costs as the other ground alleged failed.

Howell, Q.C., for plaintiff. *Aikins*, Q.C., and *Culver*, Q.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Drake, J.] DUNSMUIR *v.* KLONDIKE & COLUMBIAN GOLD FIELDS. [Mar. 1.

Replevin—Motion to set aside writ of—Sureties

This was a motion to set aside a writ of replevin. The plaintiff had a time charter on the steam tug "Czar," a vessel on the British Registry, and he was in possession of her. The defendants purchased the tug from the registered owner and she was delivered to the defendant by the owner without the knowledge or consent of the plaintiff. The plaintiff replevied and the defendants moved to set aside the writ of replevin on the ground amongst others that the bond given to the sheriff was illusory and the sureties were not worth the amount for which they had become bound.

Held, that there is no language in the Replevin Act, Con. Stat. B.C. 1888, c. 101, that makes it necessary to take sureties at all, and that a bond without sureties fulfils the language of the Act.

Motion dismissed with costs.

C. E. Pooley, Q.C., for plaintiff. *Gordon Hunter*, for defendants.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

PACIFIC INVESTMENT COMPANY *v.* SWANN.

Interim injunction—Equitable execution in England and in N. W. T.—Execution before judgment—Court not empowered to extend statutory remedies—Receiver—Discretion—New modes of enforcing payments.

The assets of a ranch company were, in a suit of *Barter* v *Swann*, placed in hands of a receiver for the purpose of winding up the company and dividing proceeds of assets between Barter and defendant herein. The receiver, being about to sell the assets for the purpose as alleged of paying the defendant his share of the proceeds to enable him to defeat his creditors, including the plaintiff, an injunction was granted by Rouleau J., restraining defendant from receiving any such proceeds until after the trial of this action.

Held, 1. That no injunction could be granted until after judgment obtained.

2. The right of a creditor to have a receiver is distinct from his right to attach debts due to the debtor, and is a means of enabling the judgment creditor to realize on the debtor's property unattainable by ordinary execution. The attachment of debts is an ordinary mode of execution and the extension of that by giving the right to a creditor before judgment does not authorize an extension in such a case to other remedies.

3. That the fact of a judge granting an injunction when no jurisdiction to do so does not prevent another judge from setting aside his order.

Order made dissolving the injunction.

[REGINA, Jan. 15, SCOTT, J.

This was an application to dissolve an interim injunction granted ex parte to the plaintiff until trial. The plaintiffs were a company incorporated and doing business in Utah, U.S. They sued the defendant on an English judgment for $12,000 on calls alleged to be due on stock in their company. The defence consisted mainly in putting plaintiffs to the proof of their claim. The defendant's only assets it appears from affidavit were his interest in the Quorn Ranch Co., the assets of which had been vested in two receivers, of whom defendant was one by a decree in an action brought by one Barter against defendant. By the decree the amount realized on the assets was to be divided equally between Barter and the defendant.

It was alleged on affidavit filed in the present action that the receivers were about secretly to dispose of the assets, and pay over to the defendant his share to enable him to defeat his creditors, the plaintiff in particular. The plaintiff's advocates, though they had at various times advised the receivers, had been purposely kept in ignorance of the contemplated sale. The plaintiffs thereupon applied for and obtained ex parte an interim injunction until trial, restraining the receivers in Barter *v.* Swann from paying over any money to the defendant.

The defendant moved to dissolve the injunction on the ground that it was issued improvidently, contrary to law and equity, and not just or convenient.

James Muir, Q.C., for defendant. This is an attempt to procure equitable execution prior to judgment. The courts will not in respect of a simple contract restrain a defendant from disposing of his assets, or appoint a receiver or grant an injunction in order to hold moneys or goods to enable plaintiff to retain assets out of which to make his judgment if subsequently recovered. The provision for garnishment or attachment before judgment was a purely statutory remedy. To extend these provisions as asked by plaintiff would be practically legislation by the Court. There are no authorities for granting injunction or receiver under similar circumstances.

C. C. McCaul, Q.C., for plaintiffs, admitted that defendant's grounds were sound in English law, but our law differs from that in England. The Court will grant equitable relief by way of receiver where money cannot be reached by ordinary garnishee process. In England money cannot be garnished or property attached prior to judgment. In the N.W.T. a simple contract creditor has the right at law to garnish moneys prior to judgment in liquidated demands (J.O. 368) or to attach personal property where the debtor has attempted to sell or dispose of same intending to defraud his creditors generally or plaintiff in particular (J.O. 394). If the plaintiffs were able to show that moneys were already in the the receivers' hands payable to Swann, they would be able to garnish the receivers and attach the moneys in their hands. It is only because the assets are in the hands of the receivers and not in the defendant's hands that plaintiffs cannot avail themselves of s. 394, and attach the goods themselves. The plaintiff therefore asks the Court to extend the equitable principle underlying the doctrine of equitable execution (subsequent to judgment) in England to an analagous state of facts arising in this country before judgment.

SCOTT, J.: If the plaintiffs had recovered judgment against the defendant in this action I think it will be conceded that upon disclosing these facts he would be entitled to this injunction, but there does not appear to be any authority which goes the length of holding that he is entitled to any such remedy before obtaining judgment.

It is, however, contended on behalf of the plaintiff that the principle upon which in England such relief is granted after judgment applies with equal force here, to cases where such relief is applied for before judgment, and the ground for such contention is the fact that by the law of England, no provision is made for the attachment by a creditor before judgment of a debt due to the debtor, that here debts may be attached by the creditor before he obtains judgment, and his remedies are thus extended beyond those possessed by him in England, and that, as the courts in England have interfered to protect him in the remedies possessed by him there, the court here should interfere to protect him in the more extensive remedies possessed by him here.

In this case, by reason of the fact that no moneys payable to the defendant have yet reached the hands of the receivers there is no debt which can be attached. What the plaintiff obtains in effect by this injunction is that the

defendant's interest in the proceeds of the property in hands of the receivers is bound until such times as there shall be moneys of the defendant in the hands of the receivers which can be attached, or until the plaintiff obtains judgment, and is thereby placed in a position to apply for a receiver of the defendant's interest in the proceeds. I think it will be conceded that he is not entitled to an injunction to obtain the first object alone.

Then is he entitled to obtain the second object? I think not In my view the right of a creditor to have a receiver appointed by way of equitable execution is something distinct and apart from his right to attach debts due to the debtor. They are different modes of execution. It is true that the former remedy appears to have arisen from the fact that the debtor may be entitled to a fund or property which cannot be reached by ordinary execution, but they are distinct remedies. This is shown by the provision in Ontario respecting attachment of debts, which enacts that any claim or demand arising out of trust or contract which can be made available under equitable execution may be attached. It may be that if such a provision had been in force here the plaintiff would have been entitled to the injunction as granted if it were necessary to protect him. (The learned Judge then referred to Annual Practice, 1895, p. 924 : *Wills* v. *Luff*, 38 Ch. D. 197 ; *Re Shepherd*, 43 Ch. D. 131.)

I think a reasonable deduction from the authorities is that it is a means of enabling the judgment creditor to realize upon the property of the debtor which cannot be reached by the ordinary modes of execution. The attachment of debt is one of those ordinary modes of execution and the extension of that remedy does not, in my view, imply the extension of any other remedy. If it implied, for instance, the like extension of the remedy of equitable execution, I see no reason why it should not also imply the like extension of the ordinary remedy by execution against lands or goods. A number of authorities were cited on the argument to show that the Courts would not at the instance of a creditor interfere to prevent a debtor disposing of his estate even if it were shown that the creditor was thereby being defrauded, and it was conceded by the plaintiff's counsel that such was the case, but, if the plaintiff is right in his contention, I see no reason why a creditor in such case would not be as much entitled to the interference of the Court in his behalf as the plaintiff is in the present case.

It was also contended that my brother Rouleau having exercised discretion in granting the injunction I should not interfere with his exercising of it. I admit that the contention is sound, if the granting of the injunction was a matter within his discretion, but I do not think it was. Although s.-s. 8 of s. 25 of the Judicature Act of 1893 provides that an injunction may be granted in all cases in which it shall appear to the court to be just or convenient, yet it was held in *Harris* v. *Beauchamp Brothers* (1894) 1 Q.B. p. 801, that those words do not refer to an arbitrary or unfettered discretion on the court, and do not authorize the court to invent new modes of enforcing payments in substitution for the ordinary modes. In my opinion the granting of the injunction was not within the discretion of my brother Rouleau.

It was also contended on behalf of the plaintiff that the court would not permit its officers, viz., the receivers, to deal with the defendant's property in a

way in which the defendant himself would be prevented from dealing with it, viz., by attachment under section 394 of the C. J. Ordinance. I think a reasonable answer to that contention would be that the injunction does not in any way prevent them from dealing with the property. All that it seems to prevent is the payment over to him of his share of the proceeds, and that could not be prevented by attachment under s. 394. Even if it were conceded that the plaintiff were entitled to the injunction granted I think it could not reasonably be contended that he was entitled to an injunction restraining the receivers from selling the property. That would interfere with Mrs. Barter's rights under the decree in *Barter* v. *Swann*.

For the reasons I have stated, I am of the opinion that the injunction should be dissolved, and being of that opinion it is unnecessary for me to dispose of the other objections raised by the defendant. Defendant is entitled to the costs of this application.

As the question involved is an important one, plaintiff may desire to appeal from the order dissolving the injunction. Should he do so the parties may not be in the same position when the appeal is disposed of as they are now. If it is eventually found that the defendant is now entitled to receive and dispose of his interest under the decree he should not be deprived of that right until such time as he may lose it; on the other hand if it is found that he is not so entitled his being permitted to receive or dispose of it would be an injury to the plaintiff. It was suggested on the argument that I might by my order provide against both of these contingencies, but upon considering the matter I cannot devise any order which will leave the parties in the same relative position upon the determination of the appeal as they are now.

Richardson, Rouleau, Wetmore, McGuire, JJ.] [March 4, 5, 1897.

REGINA *v.* PAH-CAH-PAH-NE-CAPI, *alias* CHARCOAL.

Crown case reserved—Admissibility of evidence of admission by accused upon trial for murder.

Held, per WETMORE, J., that the only evidence against the accused was admission made by him to James Wilson, an Indian agent, in words, "I also killed a boy up the river;" that Mr. Wilson stated he was instructed to act as legal adviser to Indians under his jurisdiction, and as a rule told them he was legal adviser to help them, and that he was not prepared to say he did not hold out any threat or inducement to prisoner to make the statement; that Mr. Wilson was a person in authority to carry out the Indian Act, and a J.P., (53 Vict., c. 29, s. 9;) and it was difficult to conceive a case in which more strongly to insist upon the rules as to non-admissibility of confessions to a person in authority without sufficient previous warning than in the case of Indians. It lay on the crown to prove no inducement or threat, and this was not shown satisfactorily by the evidence of James Wilson or his interpreter, though the latter said "I can remember any statement he (prisoner) made was voluntary; since it was not shown the interpreter knew what in law a voluntary statement was, or what in law an "inducement" amounted to, that it was not necessary to con-

sider whether the communication was privileged at common law or under N.W.T. Act, 869. *Regina* v. *Fennell*, 7 Q.B.D. 147, *Regina* v. *Romp*, 17 O.R. 567, and *Regina* v. *Thompson*, 5 Reports, Q.B.D. 393 cited in support.

Held further, that the conviction should be quashed, and the prisoner discharged as to this offence.

RICHARDSON, ROULEAU and MCGUIRE, JJ. concurred.

Rimmer, for accused and Department of Indian Affairs. *Johnstone*, for Attorney-General of Canada.

Book Reviews.

American Negligence Reports (Current Series). New York, 1897: Remick & Schilling. Canadian agents: Canada Law Journal Co.

This is a new publication, issued first in monthly numbers, and afterwards in permanent form to include all the current state and federal decisions, beginning January, 1897, relating to the subject of "Negligence." The monthly numbers are advance sheets only, not intended for binding, and for which no extra charge is made. The first permanent volume is now complete, including notes of English cases, and annotations, and is supplied, binding and expressage included, for $5.50. One of the current numbers gives a full report of the decision of the Supreme Court of Pennsylvania in *Donahue* v. *Kelly*, in which the principle laid down in the famous "Squib" case, 2 W. Bl. 892, 1 Smith's Leading Cases, 9th ed., 737, was extended so as to absolve from liability a person who picked up a flaming gasoline lamp for the purpose of throwing it into the street, but before he could reach the door the flames burned him, and he threw it instinctively towards the door, causing thereby an explosion which injured the plaintiff. The series will be found of inestimable value by lawyers conducting cases which come under this branch of the law.

INTERNATIONAL ARBITRATION.

The time has not yet arrived when men have beaten their swords into plowshares and their spears into pruning hooks. But at least there are many who think with General Sherman that "war is hell," and who are endeavouring to impress this fact upon the thoughtless and the jingoes who rave so loudly about the glory of the shambles that they cannot hear the shrieks of the tortured, or the heart-broken wails of the widow and the orphan. Amongst those who are doing a good work in this connection is the editor of *The Pen or Sword*, 686 Madison street, Chicago, a paper which has just been started in the interest of peace and international arbitration. We are not surprised to

see amongst the eminent men who are encouraging this paper and the ca e it supports, such names as those of His Excellency the Governor-General, the Lieutenant-Governor of Ontario, and Hon. J. R. Gowan, C.M.G., Senator, who has been elected Vice-President of the International Peace Association. As the editor remarks this makes a splendid beginning for Canada. It would be difficult to select a more representative trio. Many others will doubtless follow their example, by helping on the cause both with money and influence As these are days of "wars and rumours of wars," let us think what war mea.s, both in blood and treasure worse than wasted.

A story is current among Maritime lawyers to the following effect. At a Bar dinner, Dr. S., during the course of his speech, was observed to button his coat more tightly around him, shiver a little and look round at the windows, doors and ceiling, as if searching for something. On being asked what the trouble was, he replied, "I thought Mr. ——— must be about somewhere. I seemed to notice so many *drafts*." Possibly other of our readers than those in the Maritime Provinces recognize the party referred to.

EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

1. Rules 36, 38 and 83 of the Exchequer Court of Canada are repealed, and the following substituted therefor :

36. Every allegation of fact in any pleading in an action, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, person of unsound mind not so found by inquisition, or other person judicially incapacitated.

38. No pleading shall, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

83. If the Attorney-General, petitioner or plaintiff, does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.

Ottawa, Jan. 24, 1898.