Canada Law Journal.

VOL. XXXII. AUGUST 17, 1896. NO. 13.

We are glad to learn from the reporter of the Supreme Court that every case decided by that court up to this date, which will appear in the Reports, is in type and will shortly be issued. This is an unprecedented state of affairs in the history of the Supreme Court, and reflects much credit upon the reporters. We understand also that there are only three cases now standing for judgment. Under these circumstances there will be no Supreme Court cases to note until after the Court sits in October next.

CODIFICATION ON THE IMPERIAL PLAN.

The following resolution brings again before us a subject of increasing interest in this part of the empire, and to which reference was recently made in these columns under an article entitled "Uniformity of Law in the Dominion," (ante p. 464) The resolution referred to was moved by Professor Wilson at one of the sittings of the Congress of the Chambers of Commerce of the British Empire recently held in London:

"That the bills of Exchange Act of 1882, the Partnerships Act of 1890, and the Sale of Goods Act of 1893 and other and consolidating statutes, have established the practicability benefits of codifying British commercial law; that it is highly expedient that the commercial law of the whole British Empire should now be embodied in a code; and that, therefore, Government be memorialized by the Congress to initiate the steps necessary in order to the appointment, for the purpose of drafting such a code, of a commission on which the United Kingdom and all the colonies and countries embraced in the Empire should be duly represented."

This resolution emanated from the Aberdeen Chamber of

Commerce, and the canny Scotch head which was responsible for its exploitation in that body may possibly have become impressed with the utility of such an undertaking as a factor in the construction of a workable scheme of Imperial federation by a perusal of the works of the great German jurist, Thibaut—of whom Austin said that he was the possessor of a "sagacity not surpassable." In his "Uber die Nothwendigkeit eines allegemeinen bürgerlichen Rechts für Deutschland," (which is, in many respects, the grandest argument for codification ever written) Thibaut expresses the view that in confederating the German States the "only unity practicable and needful was that of Law"; and he lays down the bold proposition that the promulgation of a code, at once "clear, precise and adapted to the requirements of the time," is one of the chief essentials of a strong and enduring confederation.

This theory was most bitterly oppugned by a school of contemporary jurists in Germany, of whom the great von Savigny was the most illustrious. While the trophy of dialectics is, perhaps, in fairness to be accorded to von Savigny, there is no doubt that the real triumph of the controversy belonged to Thibaut, for eventually Germany adopted, by legislation, all the more important of his suggestions. But whatever the origin of the codification resolution introduced at the London conference, the fact that it was adopted, and, so far as we are at present aware, adopted without opposition, demonstrates in a very unequivocal manner how the wind is blowing in both legal and political circles in England at the present time.

The views expressed by Thibaut, as above stated, are material and of much interest in this Dominion. What would more tend perhaps than anything else to break down and destroy the wall of separation that surrounds and isolates the Province of Quebec would be the uniformity of her laws with those of the English-speaking provinces. What legislator in these days of political changes will have breadth enough of view and strength enough of influence to accomplish this most desirable step towards the unification of this Dominion?

WHAT IS AN ARREST?

There have been reported in this JOURNAL the judgments of Mr. Justice Rose in *Forsyth* v. *Goden* (ante p. 288) at the Middlesex Spring Assizes, and of Mr. Justice Meredith in *Fleming* v. *Woodyatt* (ante p. 335) at the Brant Spring Assizes, both of which have to do with the discussion here raised. The occasion, therefore, would seem an opportune one to collect the cases which settle the principles and outline the procedure that should govern in this connection.

It must, to start with, be accepted as incontrovertible that to constitute an arrest matters need not be pushed by the sheriff or constable to the length of manual contact.

The stronger and later authorities both here and in England further show that where there has been ambiguous or doubtful action, the making of an arrest can never (so far as these should be proclaimed by monologue, or verbal passages between them) hinge upon the officer's attitude to, or dealing with, the person whom the compulsion of his office may, or is meant to overawe. The effectuation of a proper result depends mainly, if not altogether, on the consideration that the former may, by suggestive act or declaration, have given the passive subject of the encounter reasonable ground for supposing that his failure to submit to the desired directions (be it in the way of imperative mandate or bare request) would be promptly followed up by some visible application of force; and has so persuaded him to yield to what he deems to be inevitable. In this view of the operation, an element of weight and moment, from which the acquiescing party might, in fairness, apprehend ulterior treatment of this sort, is the announcement that a warrant or writ has been issued or is held against him, though it has been judged unimportant to be divulged that the instrument at the time was in the personal possession of the officer, or how the fact was in this respect.

In our own Courts the most instructive case perhaps which may be found is that of *McIntosh* v. *Demeray*, 5 Q.B. 343. In that case the sheriff went to the debtor's house and

told her, without laying his hands upon her, that she must come to his (the sheriff's) house ; which she did, and remained there till discharged, but not under actual constraint. The writ was not then in the sheriff's possession ; but on a previous occasion when the Deputy-Sheriff had gone to the house for a similar purpose, he had it with him, and so informed the debtor, though afterwards leaving her at home undisturbed.

The Court, after determining that nothing had occurred on the first visit to constitute an arrest, as to the later transaction, held, that while the merely insisting upon the debtor's going to the sheriff's house did not of itself amount to an arrest, yet the fact that the debtor, in having gone to his house as desired, and having remained there till discharged had been duly arrested. Robinson, C.J., pronouncing the judgment of the Court, dwelt on the immateriality of the non-possession of the writ during the interview, even using this detail of the proceeding to argue no definite intention on the part of the sheriff at the moment to make an arrest. He said, moreover, (still speaking of the second visit) "he (the sheriff) did not in fact arrest the defendant, nor do anything that could be deemed equivalent." Proceeding he asserted that "so far as the language used went, the effect would have been the same as if the officer had written a note to plaintiff, insisting on her coming to his house. There was no arrest thus far."

The person influenced here being a woman, it might be objected that the judgment is devoid of that cogency and strength which would attend it, had a member of the sterner sex been affected by the incident. Yet it suggests no distinction, and turns upon nothing of this kind; nor is there a single judicial utterance affecting the topic that speculates upon the reason of the thing as capable of being differentiated on this account. *Simpson* v. *Hill*, 1 Esp. 431, though treating of a nearly parallel case in which one of the weaker sex figured, led to us theorizing upon this head.

The case of *Sandon* v. *Jervis*, E.B. & E. 935, affords a curious illustration of the accidents that may arise, on the one hand or the other, to validate or defeat an arrest at-

tempted to be made at one's house. It was there held that if a pane in a window of the defendant's dwelling be broken, the officer, so long as the opening has not been of his creation, may lawfully put his hand through the aperture to make an arrest.

In *Morse* v. *Teetzel*, 1 P.R. 369, a bailable capias having issued, the deputy-sheriff asked the defendant to find bail, whereupon they both went in search of this, after which a bail bond was executed, and given to the officer, but the defendant was not at any time placed in durance. There had been no exhibition of process here either, the party being simply informed at the outset that there was an operative writ against him. Richards, C.J., in giving judgment, approves of the decision in *Reynolds* v. *Matthews*, 7 Dowl. 580 (per Littledale, J.) though, while doing so, he states that controversies of this nature can as a rule only attain judicial solution by a due appreciation of their particular facts. In *Reynolds* v. *Matthews*, a sheriff's officer having a warrant to arrest the defendant, met him on the street and told him he had a warrant against him. They then went to the defendant's house, when the defendant sent for two persons who came and executed a bail bond. Richards, C.J., (to use his own expression) "echoed" Littledale, J.'s words, "I think there was an arrest in this case."

Russen v. *Lucas*, 1 C. & P. 153, is a singularly apposite authority to show the inadequacy of words alone from which to deduce an arrest. The constable went to a public house where the party (one Homer) he proposed arresting was seated, saying to him, "I want you," to which Homer replied, "Wait for me outside, and I will come to you." The officer then went out to wait, permitting his perspective prey to depart through another door. Abbott, C.J., said, "Where words will not constitute an arrest, if a constable should say 'I arrest you,' and the party runs away, that would not be an escape," but if the party acquiesce and goes with the officer, it will be a good arrest. If H. had gone even into the passage with the officer the arrest would have been complete." *Homer* v. *Battyn* (cited in Buller's N.P.,) affirms the same principles,

while *Wood* v. *Lane*, 6 C. & P. 774, is startling almost in its revelation of the seemingly trivial basis upon which the sufficiency of an arrest may be maintained.

In *Chinn* v. *Morris*, 2 C. & P. 361, Best, C.J., laid down the rule that where a constable tells a person given into his charge that he must go with him before a magistrate, and such person, in consequence, goes quietly, and without force being used, it is an arrest. He said, "I should think it an imprisonment if a constable told me that I must go to Union Hall, for I should know that if I refused he would compel me." In *Pocock* v. *Moore*, Ry. & M. 321, where the constable said to the plaintiff "You must go with me," on which the plaintiff said he was ready to go, and went with the constable towards a police office, without being seized or touched, this was ruled to be an imprisonment. This seems to be near on all fours with the prefatory case of *Forsyth* v. *Goden*.

In *Grainger* v. *Hill*, 4 Bing. N.C. 212, Vaughan, J., one of the Judges forming the Court (which adopted the law as enunciated in the decision relied on by Buller) declared "If the party is under restraint and the officer manifests an intention to make a captive, it is not necessary that there should be an actual contact." Does this conceive some purpose of the constable, so patent as not to be mistaken by any one, who, apprized of the surroundings, should be called on to interpret it? Or does it consider his intention, as possible of being divined from some significant act on his part, without reference to the other interested figures understanding of it? Or, coming in line with, and supporting the harmonious course of the decisions, has it not rather allusion to the officer's design as gathered from his demeanor by the person whose will becomes controlled by him—whose free agency he has labored to destroy?

The case of *Wilson* v. *Brecker*, 11 C.P. 268 (a judgment of the full Court) adjudges the theory of an arrest advanced in *Homer* v. *Battyn*—the decision which furnishes the foundation for Mr. Justice Buller's comments—to be satisfied by the *constructive* surrender of the party.

In the English Courts, *Berry* v. *Adamson*, 6 B. & C. 528,

and *George* v. *Radford*, 3 C. & P. 464, and in our own, *Joyce* v. *Perrin*, 3 O.S. 300, well illustrate the futility of the act of the constable that has stopped short of extorting an assent to the meditated duress, to establish an arrest.

George v. *Radford* is conspicuous by force of its new facts, and valuable as well for the aspect of the matter suggested in argument by the counsel engaged; while a casual remark of the Chief Justice (Tenterden) pointedly confirms the estimate of an arrest reiterated by the Courts. A sheriff's officer, having a warrant from the sheriff to arrest a party for debt, went to him, and having read his warrant, and taken a fee which had been tendered him, proceeded to the party's attorney to let him know the facts so that bail might be put in. Counsel, combating the claim that an arrest had been made, observed, "here the officer reads a paper, gets some money, and goes away without requiring the party to go with him." Tenterden, C.J., "If the party had gone with the officer, that would have been enough."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

The Law Reports for June comprise: (1896) 1 Q.B., pp. 565-700; (1896) P. pp. 145-153; (1896) 1 Ch. pp. 685-985; and (1896) A. C. pp. 93-272.

ARBITRATION—REFERENCE TO THREE ARBITRATORS—AWARD OF MAJORITY OF ARBITRATORS—AWARD, VALIDITY OF.

United Kingdom Mutual S. A. Association v. *Houston*, (1896) 1 Q.B. 567, exhibits the difference between the office of an arbitrator and an umpire. Under an agreement for a reference to three arbitrators, two of them made an award in which the third arbitrator refused to concur, and it was held by Mathew, J., that the award was null and void for want of the concurrence of the third arbitrator, and that it is not compe-

tent for a majority of arbitrators to make a binding award. The dictum of Watson, B., in *Winteringham* v. *Robertson*, 27 L.J. Ex. 301, that where there is a reference to three arbitrators, the three must make the award—is therefore held to be good law.

PRACTICE—WILL—ADDRESS OF DEFENDANT IN WRIT INCORRECTLY STATED—ORD. II. R. 3—(ONT. RULE 231).

Smith v. *Hammond*, (1896) 1 Q.B. 571, is a decision of a Divisional Court (Pollock, B. and Bruce, J.), on a small point of practice. The defendant had been served with a writ of summons in England in which his address was incorrectly stated to be at a place in England, whereas his true address was in Londonderry, Ireland. The defendant applied to set the writ aside on this ground, but the court held that the mistake did not vitiate the writ, and the application was refused with costs.

CONTEMPT OF COURT—PUBLICATION TENDING TO PREJUDICE LEGAL PROCEEDINGS—NEWSPAPER COMMENTS.

In *The Queen* v, *Payne*, (1896) 1 Q. B. 577, an application was made to commit the publisher of a newspaper for contempt of court in publishing statements alleged to be calculated to prejudice the applicant in respect of certain criminal proceedings pending against him for larceny and embezzlement. The motion was refused. Lord Russell, C.J., says, p. 580; "Every libel on a person about to be tried is not necessarily a contempt of court; but the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending," and with this, Wright, J., agreed.

PROMISSORY NOTE—AGREEMENT TO PAY MONEY—BILLS OF EXCHANGE ACT (45 & 46 VICT. C. 61) SEC. 83, S-S. 3 (53 VICT., C. 33 (D.) SEC. 82, S-S. 3.)

Kirkwood v. *Smith*, (1896) 1 Q.B. 582, involves a comparatively small point. The action was brought on a written agreement for the payment of money which was treated by the plaintiff as being a promissory note, for the recovery of which a special mode of procedure is provided by statute (18

& 19 Vict., c. 67.) The defendant contended that the document was not a promissory note, and therefore that the procedure adopted was not applicable. The agreement besides providing for the payment of a certain sum of money by instalments, and that the whole should become due in default of payment of any one instalment, also contained a stipulation to the following effect, "No time given to, or security taken from, or composition arrangements entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party." The Divisional Court (Lord Russell, C.J., and Wright, J.,) held that the document was not a promissory note, having regard to the Bill of Exchange Act. s. 83, s-s. 3 (53 Vict. c. 33 (D.) s. 82, s-s. 3) which they considered showed to what extent only extraneous provisions might be introduced into promissory notes. Lord Russell says at p. 585, "I think it is safer to take the provisions of sub-sec. 3, by which 'a note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof,' as importing that if the document contains something more than is there referred to, it would not be valid as a promissory note."

STATUTORY DUTY — REMEDY FOR BREACH OF STATUTORY DUTY — PENALTY — DAMAGES.

Clegg v. *Earby Gas Co.*, (1896) 1 Q. B. 592, was an action against a gas company to recover damages sustained by plaintiff, by reason of the defendants' neglect to supply the plaintiff with gas. The defendants were empowered to manufacture and supply gas under the provisions of a statute which prescribed a penalty not exceeding 40s. for each default. The question therefore arose whether any action for damages could be maintained, and whether or not the plaintiff was confined to the remedy given by the Act, viz., an action for the penalty. The Court (Wills and Wright, JJ.) held the action was not maintainable. The rule of law is thus stated by Wright, J.: "The general rule of law is that, when a general obligation is created by a statute, and a specific remedy is provided, that statutory remedy is the only remedy."

PRACTICE—COSTS—SOLICITOR—REVERSAL OF JUDGMENT—REPAYMENT OF COSTS.

In *Hood Barrs* v. *Heriot*, (1896) 1 Q. B. 610, the plaintiff had been ordered to pay costs by an order of the Court of Appeal, from which order he successfully appealed to the House of Lords. Pending the latter appeal the respondents' solicitors demanded payment of the costs in question. The appellant called on them to give an undertaking to refund them if the appeal proved successful, but this they declined, and threatened to issue execution, and thereupon in order to prevent execution the appellant paid the costs. On the reversal of the order he demanded back the costs from the solicitors, and on their refusal to refund them he made the present application to the Court of Appeal to compel them to refund them. The Court of Appeal (Lord Esher, M.R., Smith and Rigby, L.JJ.) doubted whether it had any jurisdiction to entertain the application, but assuming that it had, the application was refused, the Court being clearly of opinion that there was no liability on the part of the solicitors to refund the costs, there being no undertaking on their part so to do.

PENALTY—LIQUIDATED DAMAGES.

Willson v. *Love*, (1896) 1 Q.B., 626, was an action arising out of the breach of a covenant in a lease not to remove hay or straw off the devised premises during the last twelve months of the term, and the lease provided that an additional rent of £3 per ton should be payable by way of penalty for every ton of hay or straw removed. The plaintiff sued for £3 per ton by way of liquidated damages, but it appeared in evidence that hay had been removed and that there was a difference of 5s. per ton in the relative manurial value of hay and straw. The Judge at the trial ruled that the sum of £3 per ton mentioned in the lease was a penalty, and not liquidated damages, and that the true measure of damages was the manurial value of the hay removed: and this ruling was upheld by the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.,) it being considered that the doctrine is now so firmly established that where a single lump sum is made payable by way of compensation on the occurrence of one or

more of several events, some of which may occasion serious, and others less serious, damages, then the sum is a penalty and not liquidated damages—that it cannot be shaken by the adverse criticisms of Sir George Jessel in *Wallis* v. *Smith*, 21 Ch. D., 243. Here the removal of straw created a less damage than the removal of hay, and yet the same sum was fixed for the removal of both; thereupon the rule applied and the sum fixed must be regarded as a penalty, and the actual damages only could be recovered. The fact that the parties had called the sum fixed "a penalty," though admitted not to be conclusive of the question, was, nevertheless, held to be a fact which was entitled to some weight.

ARBITRATION—UMPIRE—BIAS—MISCONDUCT OF UMPIRE.

In *Re Haigh & The London and N. W. Ry.*, (1896) 1 Q. B. 649, a motion was made to set aside an award on the ground of alleged bias on the part of the umpire by whom it was made. The reference was had to determine the value of land expropriated by a railway company, and the alleged bias consisted in the fact that the umpire had during the pendency of the arbitration and before the making of the award, given evidence on behalf of the same railway company in another inquiry, as to the value of other land expropriated by the company. Day and Wright, JJ., refused the motion, although Wright, J., expressed some doubt.

UNLIQUIDATED DAMAGES—CREDITOR.

In *The Queen* v. *Hopkins*, (1896) 1 Q B. 652, the question came up for decision whether a person having a claim for unliquidated damages against another person, is, before judgment recovered, in the position of a creditor of the defendant, within the meaning of the statute which makes it a misdemeanor for a debtor to make any gift or transfer of the property with intent to defraud his creditors or any of them. The Court (Lord Russell, C.J., and Pollock, B.; Hawkins, Wills and Cave, JJ.) held that he was not. This decision agrees in principle with the conclusion of the Ontario Courts in *Cameron* v. *Cusack*, 17 A.R. 489; *Ashley* v. *Brown*, Ib. 500, and *Gurofski* v. *Harris*, 27 O. R. 489.

LICENSING ACT—SALE OF LIQUOR TO DRUNKEN PERSON—SALE BY SERVANT CONTRARY TO INSTRUCTIONS—EMPLOYER, LIABILITY OF, FOR ACT OF SERVANT—LICENSING ACT, 1872 (35 & 36 VICT., C. 94), SEC. 13—(R.S.O., C. 194, SEC. 73).

Commissioners of Police v. *Cortman*, (1896) 1 Q. B. 655, shows that even in the domain of criminal law a person who has a statutory duty to perform cannot by delegating it to another escape responsibility for the breach of duty, although the breach be committed by his servant contrary to his instructions. In this case the breach complained of was the sale of intoxicating liquor to a drunken person contrary to the provisions of the License Acts (see R.S.O., c. 194, sec. 73). It appeared that the sale had been made by the defendants' bar keeper in his absence, and contrary to his express instructions. The magistrate before whom the complaint was made doubted whether under the circumstances the defendant could be convicted, but the Court (Lord Russell, C.J., and Wright, J.) held that the defendant was guilty of the offence charged, and should be convicted, the act of the servant being within the scope of his employment.

PROBATE—FOREIGN WILL—GERMAN LAW—PROBATE OF COPY.

In the goods of Von Linden, (1896) P. 148, application was made for probate of a foreign will of a deceased German domiciled in Wurtemberg—which had been proved in Wurtemberg in accordance with the local law and deposited with a notary, who by the law of the country was forbidden to part with its custody. It contained a direction that during the life of the applicant (his widow) she should enjoy the usufruct of his estate without giving security, which according to the local law entitled her to collect the personal estate as if it were her own. Part of the personalty was in England. Jeune, P.P.D., held that the widow was executrix according to the tenor and probate of a copy of the will was granted to her limited to such time as may elapse before the original will is brought in.

DIARY FOR AUGUST.

1 Saturday.....Slavery abolished in British Empire, 1834.
2 Sunday .....*Ninth Sunday after Trinity.*
3 Monday .....Battle of Fort Wm. Henry, 1757.
6 Thursday ....Thos. Scott, 4th C.J. of Q.B., 1804.
7 Friday.....Duquesne, Governor of Canada, 1752.
9 Sunday .....*Tenth Sunday after Trinity.*
11 Tuesday.....Battle of Lake Champlain, 1814.
13 Thursday ....Sir Peregrine Maitland, Lieut.-Gov., 1818.
15 Saturday.....Battle of Fort Erie, 1814.
16 Sunday .....*Eleventh Sunday after Trinity.* Battle of Detroit, 1812.
17 Monday .....Gen. Hunter, Lieut.-Gov., 1799. Last day for notice for call and admission, Ontario.
19 Wednesday . River St. Lawrence discovered, 1535.
23 Sunday .....*Twelfth Sunday after Trinity.*
25 Tuesday.....Francis Gore, Lieut.-Gov., 1806.
30 Sunday .....*Thirteenth Sunday after Trinity.*
31 Monday ..... Long Vacation, Ontario, ends.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] [May 18.

CRAWFORD *v.* BRODDY.

Will, construction of—Death without issue—Executory devise over—Conditional fee—Life estate—Estate tail.

A testator died in 1856 having previously made his last will which was sub-divided into numbered paragraphs and dated on the 27th May, 1852. By the third clause he devised lands to his son F. on attaining the age of 21 years—"giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years"—and by a subsequent clause he provided that "At the death of any one of my sons or daughters having no issue, their property to be equally divided among the survivors." F. attained the age of 21 years and died in 1893, unmarried and without issue.

Held, that the sub-division of the will into sections or paragraphs could not authorize a departure from the general rule as to the construction of wills according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnancy or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to the property devised to the testator's sons and daughters by all the preceding clauses of the will.

Decision of the Court of Appeal for Ontario reversed.

Held, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee and that, thus, the first devisee took an estate in fee subject to the executory devise over.

Appeal allowed with costs.

Chrysler, Q.C., for appellants.

Blain and McFadden, for the respondents.

Ontario.] [May 18.

RENNIE *v.* BLOCK.

Chattel mortgage—Mortgagee in possession—Trespass—Negligence—Wilful default—Sale under powers—"Slaughter sale"—Practice—Parties—Agent of bailiff—Assignment for the benefit of creditors—Revocation of.

A mortgagee in possession selling mortgaged goods, which constituted the general stock of a trader, must conduct the sale in such a manner as a merchant would do in the ordinary management of his business, and where the goods were sold recklessly or improvidently, at unusually low prices and without taking proper precautions to prevent them being lost or damaged, the mortgagee is wilfully in default and liable to account not only for what he actually received, but also for what he might have obtained for the goods, of which he was the trustee, had he acted with proper regard for the interest of the mortgagor.

Where the plaintiff's right of action accrues from the wilful default of a mortgagee in possession, the agent or bailiff acting for the mortgagee is not a proper party to be joined as a defendant in the suit.

After the commencement of the action the plaintiff made a general assignment of his estate for the benefit of his creditors, but at the first meeting of the creditors they all refused to execute or accept the benefits thereof, whereupon the assignee notified the plaintiff in writing of such refusal, and that the assignment had not been registered, but no formal reconveyance was made.

Held, that under the circumstances, the plaintiff was not precluded from proceeding with his action, and that the execution of a written instrument was not necessary to restore the assignor to his original rights.

Appeal allowed with costs.

O'Donoghue, Q.C., and *Meek* for appellant.

Watson, Q.C., for respondents.

Ontario.] [June 6.

STEPHENS *v.* BOISSEAU.

Debtor and creditor—Payment by debtor—Appropriation—Preference—R.S.O. (1887) c. 124.

A trader carrying on business in two establishments mortgaged both stocks to B. as security for indorsements on a composition with his creditors and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B. who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes, and there were some

notes not matured, and B. consented to the sale of one of the mortgaged stocks taking the purchaser's notes in payment, and applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favor of B., who received, out of the proceeds of the sale of the goods under an order of Court, the balance remaining due on his mortgage. See *Horsfall* v. *Boisseau*, 21 Ont. App. R. 663. The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt which was paid by the purchase of the first stock, and which payment was alleged to be a preference to B. over the other creditors.

Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R.S.O. (1887 c. 124 sec. 8; that his position was the same as if his whole debt, secured and unsecured, had been overdue and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt and would have had the benefit of the law of set-off as to the unsecured debt under sec. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale which would have deprived B. of the benefit of such set-off.

Appeal dismissed with costs.

Gibbons, Q.C., for the appellant.

Kappele, for the respondent.

Quebec.] [June 6.

LAINE *v.* BELLAND.

Chattels attached to realty—Hypothecation of.

An action was brought by L. to revendicate an engine and two boilers under the resolutory condition (condition resolutoire) contained in a written agreement, providing that until fully paid for they should remain the property of L., and that all payments on account of the price should be considered as rent for their use, and further, that upon default L. should have the right to resume possession and remove the machinery. The machinery in question had previously been imbedded in foundations in a saw mill which had been sold separately to the defendants, and at the time of the agreement the boilers were still attached to the building, but the engine had been taken out and was lying in the mill yard, outside of the building. While in this condition the defendants hypothecated the mill property to the respondent, and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered. The respondent intervened in the action of revendication and claimed that the machinery formed part of the freehold and was subject to his hypothec upon the lands.

Held, that notwithstanding the conditions in the agreement, the dealings

that had taken place between L. and the defendants and the consent by L. that the machinery should remain affixed in the mill, constituted an absolute sale thereof so long as it continued incorporated with the freehold, and, in so far as regarded the rights of persons who were not parties to the agreement, the engine and boilers had become immoveables by destination and formed part of the real estate.

That such parts of the machinery as were actually attached to the mill or built into the foundations at the time of the hypothecs were charged thereby as part of the freehold, and that the conditions in the agreement did not confer any privilege upon the unpaid vendor which would deprive the registered hypothecary creditor of the priority he had acquired under the provisions of the law relating to the registration of real rights.

Wallbridge v. *Farwell*, 18 Can. S.C.R. 1, followed.

Appeal dismissed with costs.

Belleau, Q.C., for appellants.

Robitaille, for respondent.

Nova Scotia.] [May 18

CITY OF HALIFAX *v.* LITHGOW.

Municipal corporation—Repair of streets—Pavements—Assessment on property owner—Double taxation—24 Vict., ch. 39 (N.S.)—53 Vict. ch. 60, sec. 14 (N.S.)

By sec. 14 of the Nova Scotia statute, 53 Vict., ch. 60, the City Council of Halifax was authorized to borrow money for covering the sidewalks of the city with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done, and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L.'s property, and he refused to pay half the cost on the ground that his predecessor in title had in 1867, under the Act 24 Vict., ch. 89, furnished the material to construct a brick sidewalk in front of the same property, and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid ; that it authorized no exemption in favor of property owners who had contributed to the cost of sidewalks laid under the Act of 1861 ; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing, because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless and dangerous.

Appeal allowed with costs.

MacCoy, Q.C., for appellant.

Bell, for respondent.

Nova Scotia.] [June 6.

WARNER *v.* DON.

Personal chattels—Fixtures—Mortgage.

The "fixtures" included in the meaning of the expression "personal chattels" by sec. 10 of the Nova Scotia Bills of Sale Act are only such articles

as are not made a permanent portion of the land, and may be passed from hand to hand without reference to, or in any way affecting, the land; and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.

An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia Bills of Sale Act (R.S.N.S. 5, ser. c. 92) and there is now no distinction in this respect between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee.

Appeal dismissed with costs.

Harris, Q.C., for the appellant.

Harrington, Q.C., for the respondents.

New Brunswick.] [June 6.

RICHARDS *v.* BANK OF NOVA SCOTIA.

Principal and agent—Agent's authority—Acting beyond scope—Representation.

The manager of a branch of a bank induced the drawee of a draft to accept by representing that the bank held goods as security for it, and when the goods were sold the draft would be protected. This representation was made to serve the interests of the manager himself, who was speculating in the goods, as well as those of his brother. The bank sued the acceptor on the draft who pleaded that he was induced to accept by fraud of the manager and for the accommodation of the bank.

Held, affirming the decision of the Supreme Court of New Brunswick, that the representation made to further the private ends of the manager himself, or of a third person, could not be said to be the representation of the bank, and that it was immaterial whether or not the acceptor believed the agent had authority to make it.

Held also, that if the manager was the bank's agent to present the draft and procure its acceptance, the bank was only affected with the agent's knowledge of what was material to the transaction, and what it was his duty to make known to his principals.

Appeal dismissed with costs

Blair, Q.C., Attorney-General of New Brunswick, and *Pugsley*, Q.C., for the appellant.

Bordon, Q.C., and *Coster*, for the respondents.

North West Territories.] [May 18.

HOWLAND *v.* GRANT.

Debtor and creditor—Composition and discharge—Acquiescence in—New arrangement of terms of settlement—Waiver of time clause—Principal and agent—Deed of discharge—Notice of withdrawal from agreement—Fraudulent preference.

Upon default to carry out the terms of a deed of composition and discharge a new agreement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented.

Held, that a creditor who had benefited by the realization of the assets and by his action gives the body of the creditors reason to believe that he had adopted the new arrangements, could not repudiate the transaction upon the ground that the new arrangements were not fully understood, without at least a surrender of the advantage he had received through them.

The debtor's assent to allow such repudiation and grant better terms to the one creditor, would be a fraud upon the other creditors, and as such inoperative and of no effect.

Appeal dismissed with costs.

Kappele, for the appellants.

Lougheed, Q.C., for the respondent.

Exchequer Court.] [May 18.

MURRAY & CLEVELAND *v.* THE QUEEN.

Contract—Public work—Progress estimates—Action for payment on—Engineer's certificate—Revision by succeeding engineer.

A contract with the Crown for building locks and other work on a Government canal provided for monthly payments to the contractor of 90 per cent. of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer that the work certified for had been executed to his satisfaction, approved by the Minister of Railways and Canals; the certificate and approval was to be a condition precedent to the right of the contractor to receive payment of the 90 per cent., and the remaining 10 per cent. of the whole work was to be retained until its final completion; the engineer was to be the sole judge of work and material, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final, and he could make any changes or alterations in the work which he should deem expedient.

The work to be done included the construction of a dam, and after it was begun the engineer decided that the state of the river bed required such dam to be made much deeper than was first intended. The earth for the dam was all to be brought from a certain place, but owing to the change that place could not supply enough, and by direction of the engineer the material excavated from the lock pits and entrances thereto was used for the purpose, and paid for at the same rate as that first used, and the contractor was also paid the price specified in the schedule for carrying away the excavated material and depositing it in a bay in the vicinity. The engineer who certified to these payments having resigned, his successor caused a new examination and measurement of the work to be made, and decided that the contractors should not have been paid for the excavated material under both classifications as above mentioned, but allowed them a smaller sum than was paid as extra cost of depositing the material, which the contractors refused to accept, and a reference was had to the Exchequer Court to determine whether or not they were entitled to the larger amount.

Held, reversing the judgment of the Exchequer Court, that the engineer

in charge when the work was done, having decided as to its character and value, his decision was final and could not be reopened nor reversed by his successor.

Held, also, that the necessary certificate having been given and approved by the Minister, the contractors could proceed by action upon the progress estimate, and were not obliged to wait until the work was completed and the final certificate given before suing.

Appeal allowed with costs.

McCarthy, Q.C., and *Ferguson*, Q.C., for appellant.

Hogg, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] [Oct. 29, 1895.

COWAN *v.* ALLEN.

Will—Construction—Executory devise—Dower—Practice—Administration—Judgment—Adding parties.

A testator, after devising specifically described properties to each of his three sons, each devise being subject to charges in favor of named beneficiaries, proceeded as follows: "I will and bequeath that should any of my three sons die without leaving issue and leave a widow, she shall have the sum of fifty dollars per annun out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." One son, after the testator's death and after accepting the devise to him, died without lawful issue, leaving a widow.

Held, per HAGARTY, C. J. O., and OSLER, J. A., that this clause took effect upon the son's death and gave an executory devise over.

Per BURTON, and MACLENNAN, JJ.A., that the clause was limited to death in the testator's lifetime.

In the result the judgment of ROBERTSON, J., was affirmed.

Held also, per HAGARTY, C. J. O., and OSLER, J. A., that notwithstanding the executory devise the deceased son's widow was entitled to dower, BURTON and MACLENNAN, JJ.A., expressing no opinion on this point.

Per MACLENNAN, J. A: If a person is improperly made a party in the Master's office after judgment in administration proceedings, he is not limited to moving against the order making him a party, but may appeal from the report.

Moss, Q.C., and *R. R. Hall*, for the appellants.

Shepley, Q.C., for the respondent, Allen.

W. R. Riddell, for the respondent, Jean Cowan.

[June 6.

From Boyd, C.]

CONSUMER'S GAS COMPANY OF TORONTO *v.* CITY OF TORONTO.

Assessment and taxes—Toronto Gas Company—Mains and Pipes.

The mains and pipes of the Consumers Gas Company of Toronto laid under the public streets are assessable for municipal taxation under the Consolidated Assessment Act, 1892, 55 Vict. Ch. 48 (O.)

Toronto Street R. W. Co. v. *Fleming*, 37 U.C.R., 116, considered.

Judgment of BOYD, C., 26 O.R. 722, affirmed, OSLER, J. A., dissenting.

McCarthy, Q.C., *S. H. Blake*, Q.C., and *Miller*, Q.C., for the appellants.

Robinson, Q.C., and *Caswell*, for the respondent.

[June 6.

From Robertson, J.]

JAMIESON *v.* LONDON AND CANADIAN LOAN COMPANY.

Landlord and tenant—Lease—Mortgage of lease—Assignee of term.

A mortgage of lease after reciting the lease, granted and mortgaged to the mortgagees (a loan company) their successors and assigns forever, the lease and the benefit of all covenants therein contained and all that parcel of land (describing it), habendum unto the mortgagees, their successors and assigns for the residue yet to come and unexpired of the term of years created by the lease, less one day thereof, and all renewals and substituted estates and right of renewal and other interests of the mortgagor.

Held, reversing the judgment of ROBERTSON, J., that the one day excepted might be taken as the last day of the term, and that the mortgagees were not assignees of the term and liable for the rent.

Robinson, Q.C., and *Arnoldi*, Q.C., for the appellants.

Armour, Q.C., and *W. H. Irving*, for the respondent.

[June 6.

From C. P. Div.]

SPROULE *v.* WATSON.

Evidence—Will—Letters probate—Testamentary capacity.

Letters probate issued by the proper Surrogate Court are, notwithstanding the Devolution of Estates Act, only prima facie evidence as far as real estate is concerned of the testamentary capacity of the testator, and in an action asserting title to real estate under the will the defendant is entitled to give evidence to show want of testamentary capacity.

Judgment of the Common Pleas Division affirmed.

W. M. Douglas, and *Frank Ford*, for the appellant.

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

[June 6.

From Robertson, J.]

TOWNSHIP OF LOGAN *v.* HURLBURT.

Public Health Act—R.S.O. Ch. 295, sec. 34—Person suffering from infectious disease—Failure of Board of Health to isolate—Consequent spread of disease.

The directions of sec. 84 of the Public Health Act, R.S.O. Ch. 205, are imperative, and where, instead of acting as directed in that section, the mem-

bers of a local board of health allow a person suffering from an infectious disease to go into an adjoining municipality, they are liable to repay to that municipality moneys reasonably expended in caring for the sick person and preventing the spread of the disease.

Judgment of ROBERTSON, J., affirmed, HAGARTY, C. J. O., dissenting.

Idington, Q.C., for the appellants.

Aylesworth, Q.C., and *F. H. Thompson*, for the respondents.

From C. P. Div.] [June 6.

TRUSTS CORPORATION *v.* HOOD.

Principal and surety—Assignment of mortgage—New mortgage—Reservation of rights.

A covenant by the assignor of a mortgage with the assignee that the mortgagee moneys shall be duly paid makes the assignor a surety for the mortgagor, but he is not discharged by the assignee extending the time for payment and taking from the mortgagor a new mortgage on the same land to secure the debt, there being at the time, although by parol only, an express reservation of rights against the assignor.

Judgment of the Common Pleas Division, 27 O.R. 135, affirmed, OSLER, J. A., dissenting.

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

Aylesworth, Q.C., for the respondents.

From Chy. Div.] [June 6.

HENDERSON *v.* HENDERSON.

Limitation of actions—Purchase of farm—Mortgage to secure purchase money—Possession by son of purchaser—Payment of mortgage—Effect of discharge.

In March, 1881, the plaintiff's testator purchased a farm, and had it conveyed to himself, giving to the vendor a mortgage to secure $3,600, part of the purchase money. In April, 1881, one of his sons, with his assent, went into possession upon the understading that he should apply the profits derived from the farm, after providing for his own living, towards payment of the mortgage, and there was some evidence that the father promised that when the mortgage was paid he should have the farm subject to payment of an annuity to his father and mother. The son contributed from time to time $1,800 towards payment of the mortgage, which, the balance being made up by the father, was paid off on the 30th of March, 1886, a statutory discharge acknowledging payment by the father being on that day made and registered. The father after this declined to convey the farm to the son and promised to leave it to him by will, but died in 1894, leaving a will in favor of the plaintiffs. The son continued in possession of the farm until his death in 1892, and the defendants, to whom he devised his property, continued in possession after his death, this action being brought to eject them. From time to time during the life time of the son the father had spent a few days at the farm, but had not actively interfered in the management.

Held, reversing the judgment of the Chancery Division, 27 O.R. 93, that title had not been acquired as against the father and his devisees.

Per BURTON, and MACLENNAN, JJ.A. The execution and registration of the discharge gave, in any event, a new starting point for the statute.

Watson, Q.C., and *L. M. Hayes*, for the appellants.

E. B. Edwards, for the respondents.

From Q. B. Div.] [June 6.

MCGUINNESS *v.* DAFOE.

Justice of the Peace—Felony—Issue of warrant—Absence of written information—Notice of action.

A justice of the peace, who, knowing that a sworn information is necessary, issues his warrant for the arrest of a person charged with felony without requiring an information, is liable to trespass.

A notice of action alleging that the defendant on the 8th of September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused the plaintiff to be arrested and kept under arrest on a charge of arson, and on said 8th of September, maliciously, illegally and wrongfully, and without any reasonable and probable cause, caused the plaintiff to be brought before him, and to be committed for trial, and to be confined in the common gaol, is sufficient.

Judgment of the Queen's Bench Division, 27 O.R. 117, affirmed.

W. R. Riddell, and *H. E. Rose*, for the appellant.

Clute, Q.C., and *J. A. Macintosh*, for the respondent.

From Ferguson.] [June 6.

JOHNSTON *v.* CONSUMERS GAS COMPANY.

Toronto Gas Company—Reserve fund—Plant renewal fund.

The judgment of Ferguson, J., (27 O.R. 9), was reversed on the ground that there being no admission in the stated case of any over-payment by the plaintiffs, they had no locus standi.

McCarthy, Q.C., *S. H. Blake*, Q.C., and *Miller*, Q.C., for the appellants.

Robinson, Q.C., and *J. McGregor*, for the respondents.

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

ROGERS *v.* TORONTO PUBLIC SCHOOL BOARD.

Negligence—Unsafe premises—Volunteer.

A person entering upon premises on the express or implied invitation of the occupant is entitled to assume that they will be in a reasonably safe condition, but one who visits them for his own purpose and without the knowledge of the occupant does so at his own peril.

The superintendent of a coal company, without the knowledge of the defendants, went to a school house to look at the coal-bins in order to decide how he could most conveniently deliver coal ordered by the defendants, and was severely hurt by falling into an unguarded hole in the cellar.

Held, reversing the judgment of ARMOUR, C.J., that he could not recover damages.

Robinson, Q.C., and *F. E. Hodgins*, for the appellants.

Osler, Q.C., and *H. S. Osler*, for the respondents.

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

SMITH *v.* TOWNSHIP OF ANCASTER.

Municipal Corporations—Way—Toll roads.

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 27 O.R. 276, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 2nd and 3rd of June, 1896.

The appellant's counsel stated that the toll-gate in question had been moved to a point within the Township of Ancaster, and asked to have the judgment of ROBERTSON, J., fixing the rate of toll, restored.

The Court held that the appellant had obtained by the judgment appealed from full relief in respect of the one toll-gate attacked, and dismissed the appeal with costs.

G. Lynch-Staunton, for the appellant.

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

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

BROUGHTON *v.* TOWNSHIP OF GREY.

Municipal Corporations—Drainage by-laws—Initiating township—Contributing township.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 26 O.R. 694, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 8th of June, 1896.

The appeal was dismissed without costs, the members of the Court being divided in opinion, HAGARTY, C. J. O., and OSLER, J. A., thinking that the appeal should be allowed, and BURTON and MACLENNAN, JJ.A., that it should be dismissed, the action in their opinion being unnecessary. See now 57 Vict. ch. 56 (O.)

J. P. Maybee, for the appellant.

Garrow, Q.C., for the Township of Grey.

G. G. McPherson, for the Township of Elma.

HIGH COURT OF JUSTICE.

FERGUSON, J.] IN RE PLUMB. [June 3.

Trusts—Marriage settlement—Mortgage investments—Loss on realization—Apportionment thereof between tenant for life and remaindermen

Where trustees of a marriage settlement had invested the trust fund on mortgages upon which loss was inevitable,

Held, on petition to the Court for advice, that such loss should be appor-

tioned between the tenant for life and the remaindermen ; and when on realization of any security a loss occurred, accounts must be taken, (1) of the amount required to pay off the security in full ; (2) of what portion of such amount, if it had been paid would have been payable to the tenant for life, and what portion would have belonged to the principal of the trust fund ; (3) of what interest upon the security had already been paid to the tenant for life ; and after such accounts had been taken, the amount actually realized from the security should be added to the amount already paid to the tenant for life, and the total divided between the tenant for life and the estate in proportion to the amount they would have been entitled to if the whole of the security had been paid in full, the tenant for life standing charged as to her portion thereof with the amounts already paid to her.

H. D. Gamble, for the trustees.

H. J. Scott. Q.C., for the tenant for life.

Harcourt, for the infant remaindermen.

Divisional Court.] [April 10.

LEE *v.* ELLIS.

Principal and surety—Advance to wife—Charge on her estate—Covenant of husband and wife—"Ordinary legal rights"—Account.

A married woman who under the terms of her father's will, was entitled to receive her share of his estate on coming of age, agreed, on attaining her majority, with the other beneficiaries, to postpone the division. An agreement was afterwards executed between the husband, wife and trustee of the estate, whereby, after reciting the above facts, the trustee agreed to advance her certain moneys which she agreed to repay within a specified period, the advance being made a charge on her share of the estate. The agreement also provided that the amount of the advance should be deducted from her share in case of non-payment, or of a division of the estate prior to the date fixed for repayment. The husband was a party to the agreement for the purpose only of joining in the covenant, and it was expressly agreed therein that none of the provisions of the indenture should "in any wise effect or prejudice the ordinary legal rights" of the trustee to enforce payment.

Held, that notwithstanding the latter clause, the husband was liable as a surety only, and that he was entitled to be exonerated by his wife and to the benefit of her property in the trustee's hands, and to an account in regard thereto from the date of the covenant sued on.

Moss, Q.C., for the plaintiff.

Marsh, Q.C. for the defendant.

MACMAHON, J.] [May 11.

POCOCK *v.* CITY OF TORONTO.

FERRIER *v.* CITY OF TORONTO.

Municipal corporations—Licenses—Petty chapman—Ultra vires—Damages.

A municipal corporation whose existence is derived solely from the statutes creating it, is not liable for damages arising out of the enforcement of

a by-law passed under a misconstruction of its powers, unless such liability is expressly or impliedly imposed by the statute.

A city corporation acting in excess of its powers, passed a by-law amending an existing by-law for licensing pedlars, prohibiting them from peddling on certain streets, and the officers of such corporation in carrying out the by-law, declined to issue licenses except in the restricted form, which the plaintiff refused to accept, and, while attempting to peddle without a license was interfered with by the police, over whom the corporation had no control.

Held, that the corporation were not liable.

Neither does any liability arise where a licensee, who had taken out a license in the restricted form is damnified by being prevented by the police, from peddling on prohibited streets.

DuVernet, for the plaintiff.

Fullerton, Q.C., and *H. L. Drayton*, for the defendants.

ARMOUR, C.J.] [May 18.

MCCULLOUGH *v.* NEWLOVE.

Interest—Work and services—Reference—58 Vict. ch. 12, sec. 118 (O.)

On a reference in an action in which money is claimed for work and services, agreed to be paid for at a fixed rate, the referee may, under 58 Vict. ch. 12, sec. 118 (O.), allow interest on the amount claimed from the time they became payable.

Watson, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *W. H. Blake*, contra.

Province of New Brunswick.

SUPREME COURT.

En Banc.] [June 10.

EX PARTE LEBLANC.

Canada Temperance Act—Recount—Lost Ballots.

In 1896 an election was held in Westmoreland County under the Canada Temperance Act, the result being to uphold the Act.

A recount was demanded, but when Wells, Co.J., opened Court for that purpose it was discovered that a number of the ballot boxes had been stolen, and an adjournment was made to give an opportunity to find them. At the re-opening of the Court the missing boxes had not been obtained. Wells, Co.J., held that he could not go on with the recount without having all the ballots before him, and dismissed the application for a recount.

In Easter Term *Welch* and *Atkinson*, showed cause against a rule nisi for a mandamus to compel Wells, Co.J., to proceed with the recount, arguing that the recount could not be held unless all the ballots were before the Judge and that secondary evidence could not be admitted.

Teed and *Grant*, contra, contended that it might not be necessary to count the individual ballots as they might be able to prove on a rcecount that all the ballots cast were illegal.

Held, (TUCK, C.J., dissenting) that the mandamus should go, and that the County Court Judge should hear secondary evidence as to the lost ballots.

TUCK, J.] [July 2.

EX PARTE DUNCAN.

Habeas corpus—Infants—Right of father to custody of.

This was an application by Mr. Duncan to obtain the custody of his two children, the elder being two years and seven months old, and the younger eleven months old and still unweaned. The husband relied on his common law rights and the wife relied on ch. iii., Acts, 1885, N.B., which enacts as follows: "Whenever any application shall be made to any Court or Judge whatever, under this Act or any other law whatever, for the custody or control of any infant or infants it shall be the duty of any Court or Judge before whom the said application shall be heard, to take into consideration the interests of such infant or infants in deciding between the claim of the parents of such infant or infants.

The difficulty between Mr. and Mrs. Duncan was purely a religious one, the father having the children brought up in the Protestant faith, and the mother wishing them educated as Roman Catholics. The parents separated.

The application was refused on the ground that the best interests of children of such tender years demanded the mother's care where the mother was, as in this case, eminently respectable.

McLatchey and *Macrae* in support of the application.

Mott and *Currey*, Q.C., contra.

ST. JOHN COUNTY COURT.

WELLS, CO. J.] [June 9.

St. John County Court—Jurisdiction.

The St. John County Court has no jurisdiction in an action of debt when the sum demanded is within the jurisdiction of the City Court of St. John, and the defendant has a residence within the city; and his temporary absence does not affect the question.

Chapman, for plaintiff.

Carleton, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] [June 29.

COLQUHOUN *v.* SEAGRAM.

Fraudulent preference—Husband and wife—Assignment of debt.

This was a rehearing of an appeal from a County Court in an issue to try the right to a debt due to the husband of the plaintiff. The decision of TAYLOR, C.J., on the appeal is noted ante vol. 31, p. 494.

The principal point urged upon the rehearing was that the assignment from the husband to the wife was a fraudulent preference. All the judges agreed that the circumstances showed that the debtor was insolvent, and was aware of his insolvency, and that the effect of the assignment was to give the plaintiff a preference over his other creditors, but they were unable to decide whether there was sufficient pressure upon the debtor to bring the case within the authority of *Molsons Bank* v. *Halter*, 18 S.C.R. 888, and *Stephens* v. *McArthur*, 19 S.C.R. 446; and as the only evidence on this point was that of the debtor, who said that he had made the assignment at the request of the plaintiff's solicitor, and the County Court Judge had decided the issue in favor of the defendant on another ground (namely, that the husband could not assign the debt to his wife), which the Court held to be untenable.

Held, that a new trial should take place to enable the County Court Judge, with or without the assistance of a jury, to determine whether the debtor was actuated solely by a desire to prefer his wife in making the assignment, or whether the request to do so was the moving cause.

Decision of Park, B., in *Van Casteel* v. *Booker*, 2 Ex. 691, approved.

Per BAIN, J., the evidence showed there was no real pressure actuating the mind of the debtor, and that he had made the assignment solely with the intent to prefer, and the original verdict for defendant should be restored.

Hough, Q.C., for plaintiff.

Crawford, Q.C., for plaintiff.

Full Court.] [June 29.

POCKETT *v.* POOL.

Malicious prosecution—Assault—Criminal Code, 1892, sec. 53.

This was an action for malicious prosecution under the following circumstances: The plaintiff and defendant were owners of adjoining parcels of land separated by a road allowance which was not straight, but was such that if straightened the plaintiff would have more land and the defendant less. In January, 1895, a surveyor proceeded to resurvey the original line and straightened it, removing the old mounds, and constructing new ones, but this was not done under the authority of an Order-in-Council as required by the Dominion Lands Act, so that the old boundary remained the legal boundary between the lands of the parties.

In the following April the plaintiff entered upon the land in dispute, and

proceeded to harrow and sow a crop upon it, when the defendant appeared upon the scene, and ordered him to leave, which he refused to do, but went on to complete the sowing. The defendant then laid an information before a magistrate charging the plaintiff with assault, when the plaintiff was arrested, taken before a magistrate and committed for trial. On being discharged he brought this action. At the trial, the jury found that the defendant was not justified in thinking, from the actions and conduct of the plaintiff when ordered off the land, that he would resist by force a forcible attempt on the part of the defendant to remove him, and that the conduct of the defendant in entering proceedings against the plaintiff was malicious. The defendant's contention was that the plaintiff should be held to have committed an assault within the meaning of section 53 of the Criminal Code, 1892, and that the defendant was therefore justified in taking the proceedings complained of.

Held, however, that there can be no assault under section 53, unless force is used to repel force, and as defendant had used no force to eject the plaintiff, and plaintiff had merely refused to leave, there was no ground for charging an assault, and that the verdict in the plaintiff's favor at the trial must stand.

Howell, Q.C., for plaintiff.

Wilson, for defendant.

Full Court.] [June 29.

MILLER *v.* IMPERIAL LOAN CO.

Distress for rent—Distress for interest—Mortgage—Attornment — Evidence.

One Robertson had given a mortgage to defendants upon certain land, and then leased the property to one Reid, who made a sub-lease to the plaintiff for nine months. The plaintiff then raised a crop of wheat, barley and oats upon the land, when it was seized by defendants' bailiff under a warrant to collect the alleged arrears of interest on Robertson's mortgage. The mortgage contained the usual provision that the defendants might distrain for arrears of interest. It also contained an attornment clause, by which the mortgagor became a tenant to the defendants of the land at a yearly rental equal to the amount of the interest payable under the mortgage.

The warrant under which the bailiff acted was not produced at the trial, and was said to have been lost; but the Court inferred from the evidence that it directed the bailiff to distrain for arrears of interest, and not for rent due.

The plaintiff then sued in trespass and trover.

Held, that under R. S. M., ch. 46, sec. 2, the distress was wholly illegal, as defendants could only take the goods of the mortgagor for arrears of interest due by him.

It appeared that after the seizure and sale of the crops the plaintiff's husband agreed with the defendants' manager to pay the defendants $200 if they would abandon their claim to the crop, and procure a release from the person who had bought it at the sale. This money was afterwards paid, and accepted by the defendants, and they contended that the agreement was an admission of rent being due, and that the statute 11 Geo. II., ch. 19, sec 19, applied so as to prevent the plaintiff from bringing an action such as the present, and that she

was restricted to an action on the case for any special damages that might she be able to prove.

Held, that there was not sufficient evidence that any interest was in arrear on the mortgage or any rent overdue, and that the agreement entered into by the plaintiff's husband could not be construed as an admission that any rent was due by Robertson, and therefore that the case was not brought within the last mentioned statute.

Verdict of KILLAM, J., at the trial, giving the plaintiff $529 damages, affirmed with costs.

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

Clark, for defendants.

Full Court.] [June 29.

WATEROUS ENGINE WORKS CO. *v.* WILSON.

Contract—Retrospective legislation—Implied covenant—Lien on land—Promissory notes—Statute of limitations.

Judgment of BAIN, J., (noted ante page 298) affirmed.

In addition the following may be noted:

Defendants had given promissory notes to secure the price of the engine and the plaintiffs' remedy on the notes was barred by the Statute of Limitations before the commencement of the action.

Held, notwithstanding, that their claim for payment of the purchase money, being secured by a contract under seal, was not barred.

The promissory notes referred to being put in evidence, appeared by the indorsements to have been held by a bank at maturity, and defendants claimed that the right of action was not in the plaintiffs, but they had not raised this defence by their pleadings or at the trial.

Held, that effect should not be given to it now, as plaintiffs might have been able to show that the notes had only been indorsed for collection, or had been taken up since by them.

Ewart, Q.C., and *Sutherland*, for plaintiffs.

Clark, for defendants.

Full Court.] [June 29.

RE CLOUTIER.

Municipality—By-law—Early closing of shops—Delegation of powers.

This was an appeal from an order of TAYLOR, C.J., dismissing an application to quash a conviction made under by-law 858 of the city of Winnipeg. This by-law prevented the appellant from keeping his shop open after 7 o'clock in the evening, except on Saturdays, and on the day immediately preceding any civic holiday, and during the days on which the exhibition of the Winnipeg Industrial Exhibition Association is being held. It was contended on behalf of the city of Winnipeg and the Retailers' Association that this by-law was valid, under the Shops Regulation Act, R.S.M., ch. 140, sec. 3, as amended by 57 Vict., ch. 32, sec. 2, which provides that any municipal council may, by by-law, require that, during the whole or any part or parts of the year,

all or any class or classes of shops within the municipality shall be closed, and remain closed on each or any day of the week at and during any time or hours between seven o'clock in the afternoon of any day and five o'clock in the forenoon of the next following day.

Held, that the by-law in question was void for uncertainty by reasons of the exceptions it contained, and for delegation of the power of the Council to the Industrial Exhibition Association, which might hold an exhibition at any time it pleased, and thus indirectly determine the days when the shops might remain open.

Elwood v. *Bullock*, 6 Q.B. 382; *Re Kiely*, 13 O.R. 451, and *Regina* v. *Webster*, 16 O.R. 187, followed.

Appeal allowed, and conviction quashed without costs.

Munson, Q.C., for appellant.

Campbell, Q.C., for City of Winnipeg.

Culver, Q.C., for Retailer's Association.

Full Court.] [June 29.

ROBERTSON *v.* BRANDES.

Practice—Queen's Bench Act, 1895—Pending business—Jury trial.

This action was commenced before the Queen's Bench Act, 1895, came into force, and neither party had, according to the practice then in force, expressed an intention or made an application to have the case tried by a jury. The cause of action was not, before that Act came into force, but is now, one of those which by sec. 49 it is provided shall be tried by a jury. The plaintiff entered the record for trial at the Spring Assizes as a jury case, paid the jury fee of $25, and the case was accordingly tried by a jury who gave the plaintiff a verdict.

Counsel for defendant at the trial objected to the case being tried by a jury on the ground that Rule 983 (a) provided that the action should be continued up to the trial or hearing, according to the previous practice of the Court, and that, therefore, it should have been tried by a judge without a jury.

Held, on motion by defendant to set aside the verdict, that the proper construction of the words "up to" in Rule 983 (a) is that they are exclusive and not inclusive of the trial or hearing, and that the procedure adopted was therefore correct.

Application dismissed with costs.

Martin, and *Mathers*, for plaintiff.

Ewart, Q.C., for defendant.

Full Court.] [July 10.

HECTOR *v.* CANADIAN BANK OF COMMERCE.

Practice—Production of documents.

This was a rehearing of the order made by TAYLOR, C.J., an appeal from the Referee (noted ante, page 461.)

With reference to the paragraph in the affidavit of the bank manager on production referring to certain documents as follows: "The books of the said

bank consisting of deposit ledgers, liability ledgers, manager's register of collateral securities and letter books," the Full Court decided that this description was altogether too indefinite, and ordered the bank to file a further affidavit showing how many and which of the letter books referred to contain any entry relating to the matters in question in this cause. The order would have included the other books as well as the letter books, but that plaintiff's counsel was satisfied with the offer to furnish copies of the accounts.

With regard to the other branch of the order appealed from, the Full Court affirmed the Chief Justice and the Referee, holding that it was sufficient reason for objecting to produce letters that had passed between the managers at Brantford and Winnipeg that they were privileged communications relating soley to the defendant's case, and did not concern plaintiff's case.

Appeal allowed in part without costs.

Mulock, Q.C., for plaintiff.

Perdue, for defendants.

BAIN, J.] [June 25.

DIXON *v.* WINNIPEG ELECTRIC STREET RAILWAY CO.

Workmen's Compensation for Injuries Act—Retrospective legislation—Limitations of actions—Notice of injury.

The plaintiff sued for an injury sustained by the alleged negligence of a fellow workman. The accident causing the injury occurred in May, 1894; there was no evidence that a notice of the injury had been given within 12 weeks; and the action was not commenced until September, 1895, so that at the time of the passing of chapter 48 of the statutes of 1895, 29th March, the plaintiff's right of action for the injury had ceased to exist. Under section 7 of the Workmen's Compensation for Injuries Act, by the amendment of 1895, however, this section was repealed, and the following substituted therefor: "No action for the recovery of compensation under this Act shall be maintainable unless commenced within two years from the occurrence of the accident causing an injury or death.

Held, that this legislation was not retrospective, and had not the effect of restoring a right of action which was gone before it was passed, and that the plaintiff should be non-suited.

Howell, Q.C., for plaintiff.

Munson, Q.C., for defendant.

North-West Territories.

SUPREME COURT.

En Banc.] [June 5.

PAUL *v.* FLINN.

Pleading—Embarrassing—Adding parties—Third party procedure.

This was an appeal (by special leave) from an order of RICHARDSON, J., striking out certain paragraphs of the statement of defence. The action was brought for foreclosure of a mortgage given by the defendant and K., his since-deceased partner, to plaintiffs. Prior to the issue of the writ an order was made under sec. 492 (10) of the Judicature Ordinance, that no action be brought, and that all actions and proceedings pending against the administratrix of the estate of K. be stayed for a period of four months.

The paragraphs of the statement of defence struck out alleged that as the defendant was the surviving partner of the firm of K. and himself, the administratrix of the estate of K. should be made a party, inasmuch as he was entitled to contribution from the said estate, and by the above order was prevented from proceeding against the estate for contribution. From the order striking out this portion of the statement of defence the defendant appealed.

Held, that the said paragraphs were bad in law and were properly struck out; that if the defendant wanted the administratrix of the estate of K. joined as a defendant, he should have applied under sec. 46 of the Judicature Ordinance, and that the defendant's proper means of obtaining the contribution he alleged he was entitled to was by the Third Party procedure provided by the Judicature Ordinance.

Appeal dismissed with costs.

Robson, for respondent.

Secord, Q.C., for appellant.

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

RICHARDSON, J.] [June 8.

MASSEY *v.* MCLELLAN.

Writ of execution — Expiration of — Judicature Ordinance, sec. 327, and Ordinance No. 5 of 1894.

Plaintiffs issued a fi. fa. lands on 7th October, 1893. Under sec. 327 of the Judicature Ordinance, as then in force, every writ of execution remained in force for one year from its date and no longer, if unexecuted, unless renewed. By Ordinance No. 5 of 1894, which came into force 7th September, 1894, said sec. 327 was amended so as to read: "Every writ of execution . . shall remain in force for two years from its date, and no longer, if unexecuted, unless renewed. . ."

Plaintiff's writ of execution was not renewed until 22nd August, 1895. Under it the sheriff sold certain lands.

Upon application to confirm such sale,

Held, that Ordinance No. 5 of 1894, coming into force prior to the expiration of one year from the date of plaintiff's writ of execution, such writ remained in force for two years from its date without renewal.

Robson, for applicant.

Secord, Q.C., for defendant.

RICHARDSON, J.] [June 13.

PAUL *v.* FOWLER.

Exemptions from seizure—"Homestead"—Chapter 45 of Revised Ordinances of the North-West Territories.

Upon application to confirm a sale by the Sheriff under writs of execution of certain parcels of land of the judgment debtor, it was contended on behalf of the latter that a certain parcel of 160 acres was exempt from seizure as a homestead under sec. 1 (9) of cap. 45 of the Revised Ordinances. It was admitted that the judgment debtor did not reside or have any buildings on the parcel in question, and consequently,

Held, that the parcel in question was not exempt from seizure as a homestead.

Robson, for applicant.

Johnstone, for judgment debtor.

RICHARDSON, J.] [June 13.

MORRISON *v.* MORRISON.

Practice—Service of writ of summons—Indorsement thereon of day of month and week of service thereof—Judicature Ordinance, secs. 556, 537 & 80 & Eng. Margl. Rule 62—Irregular default judgment—Setting same aside.

Plaintiff signed final judgment on default of appearance and issued execution thereon. The writ of summons was not indorsed with the day of the month and the week of service thereof, and the affidavit of service was silent as to any such indorsement having been made.

Upon application on behalf of defendant to set aside the judgment so entered and all subsequent proceedings,

Held, that as the Judicature Ordinance contains no special provisions relating to the service of original writs of summons, while under Marginal Rule 62 such provisions existed in England at the date of the coming into force of the Judicature Ordinance, by sec. 556 of the Judicature Ordinance, English Marginal Rule 62 is incorporated with the said Ordinance: That as no form of affidavit of service is contained in the appendix to the Judicature Ordinance the form prescribed by the English practice is to be used. That the original writ of summons having no indorsement as required by English Marginal Rule 62, plaintiff had no right to sign judgment under sec. 80. That the judgment so signed was an irregularity and abuse of the Court power, and one which the defendant was entitled ex debito justitiae to have set aside: *Hughes* v. *Justin*, 9 R., 215; *Anlaby* v. *Praetorius*, 20 Q.B.D., 764.

Judgment and subsequent proceedings set aside with costs.

Robson, for applicant.

Secord, Q.C., for plaintiff.

BOOK REVIEWS.

Ontario Assignments Act, with notes, by R. S. CASSELS, of Osgoode Hall, Barrister-at-law, second edition; Toronto, The Carswell Co. Ltd., Publishers, 1896.

This is the second edition of Mr. Cassels' excellent little book, containing various improvements on the former edition. We need add nothing to what we have already said in reference to this brief but accurate summary of the law treated of.

Commentaries on the Constitution of the United States, historical and judicial, with observations on the order of revisions of State Constitutions and a comparison with the Constitutions of other countries, by ROGER FOSTER, of the New York Bar. Vol. I.; Boston, the Boston Book Co. Toronto, The Carswell Co. Ltd., 1896.

This is one of the many books on a subject of much importance to those whom it immediately concerns, and is at the present time, of special interest to many in other countries who have invested their money in the United States, and who are beginning to think that it is about time to withdraw it, and not have it subject to the ever-changing and crude notions of those who seem to hold the largest influence in public affairs in that country. The Constitution of the United States is, of course, a written one, with many safeguards, but none too many, and it is well that a knowledge of them should be widespread. We doubt not the book before us, which seems to have been prepared with great care and by one thoroughly competent for the task, will be very useful, especially at this time, when, in view of the present political outlook, the best men and the most reliable journals are starting an educational crusade which cannot but be beneficial, and will, we trust, result in the sober thoughts of those who love their country and are not led away by popular clamour having due weight.

Commentaries on the Laws of Ontario, being Blackstone's Commentaries of the Laws of England, adapted to the Province of Ontario, by R. E. KINGSFORD, M.A., LL.B., formerly one of the Lecturers of the Law Society of Upper Canada, author of "A Manual of Evidence in Civil Cases," Deputy Police Magistrate, City of Toronto. Vol. I; Rights of Persons. The Carswell Co. (Ltd.), publishers, etc., 1896.

We are glad to know that Mr. Kingsford's valuable addition to the legal literature of Ontario has been placed on the curriculum of the Law School. This is in itself a sufficient recommendation to the profession and the public.

The object of the compiler has been to produce a book not intended for lawyers only, but for the general need. His references to case law are therefore limited. The book is more a compendium of our statute law, arranged after the manner of Blackstone. Historical references and illustrations by analogy from the civil law, and a variety of other matters, which are found in the volume which he took as a foundation, are properly left out. Mr. Kingsford has done his work well. In a word he has given to us a well written, in-

telligent and convenient summary of the laws affecting us as citizens of the Dominion. To facilitate reference to the statute law, the author has added to each section a complete statutory reference table containing a list of statutes, arranged in the order of subjects dealt with. The marginal notes referring to the matter treated of in the various clauses of the statutes, will be found very convenient.

Mr. Kingsford will, we understand, continue his work by giving in due course a second volume, to contain the law relating to the rights of things, or personal and real property, and a third and final volume, which will deal with the law of wrongs, other than Criminal Law.

PROGRESS OF LAW IN THE UNITED STATES.

It must be admitted that there is not much to be learned from our neighbors to the south of us on the subject of law or its administration, but at least we can get something that will be entertaining for the "dog days."

There has recently been a reign of terror in the city of Cripple Creek, Colorado. Singularly enough the terrorists have not been burglars, strikers or miners, but consist of the police magistrate, the sheriff and the city police. The leading Denver journal tells us that the "Czar of the town is Jim Marshall, a notorious tough, and formerly a bartender in a saloon." He is also the sheriff. We are then told that "the chief lieutenant of Marshall is R. L. Mullen, the police magistrate, whose brutality has aroused the town to such an extent that there are rumors of lynching him. Mullen is ably seconded in his doings by George Washburn, the city and district attorney."

This gang collect an enormous revenue from some 240 saloons and gambling dens, and from the 800 prostitutes of the city. The city has a population of 15,000. These moneys are supposed to belong to the city, but the only record kept of them is the stub of the receipt book in which the sheriff declares with justifiable pride that he keeps a memo. of the license fees paid. This is highly edifying and instructive. We have only to keep our eyes open and we shall learn by degrees.

For fear that complaint might be made that this journal does not pay enough attention to the administration of justice in police courts, we copy from the same Denver newspaper the reports of some important judgments delivered by the aforesaid Judge Mullen.

"Two weeks ago, at the first trial of a street preacher and his wife, Police Magistrate Mullen, fearing a riot, ordered the court room to be cleared. Rex Molette, an attorney, attempted to enter the court room. He was stopped on the stairs leading to the room by 'Doc' Damson, a notorious bad man and one of Marshall's deputies. Molette attempted to pass Damson, when the burly deputy set upon him and beat him terribly, finally kicking him downstairs. A crowd of bystanders rescued Molette, but Damson immediately placed him under arrest and dragged him before Mullen. 'What's the charge?' asked Mullen. 'Disturbing the peace, your honor,' said Damson. 'Guilty or not guilty?' Molette was forced to stand up bleeding and bruised.

'May it please your honor,' he said, 'I want a continuance until I can get an attorney.' 'Can't have no continuance and you don't need any attorney,' said Mullen. 'Can I see the papers charging me with any crime?' 'We don't need papers,' said Mullen. 'Are you guilty or not guilty?' 'Not guilty, your honor.' Damson then made a brief statement of his side of the case and without any defense Mullen fined Molette $100 and costs, and ordered Damson to throw the prisoner into jail. Despite the work of numerous friends who offered to pay the fine or furnish an appeal bond, Molette was kept in jail over night."

The next case is important, as there is no decision to be found in the books on the subject :

"Recently a man sitting in the room during a trial happened to scratch his nose. Mullen shouted from the bench, 'Here you, quit picking your nose in my presence.' 'Your honor, I was not picking my nose ; I meant no offense.' 'Shut up ; I don't want any of your back talk. I will fine you $5 for contempt. Officer, take that man to jail.' The officer dragged the man to jail without further ceremony."

We hear complaints occasionally that prisoners in our jails are made too comfortable. Some valuable suggestions may perhaps be had from the description of the Cripple Creek house of correction as described in the same paper. The attorney who had the audacity to defend the street preacher was very properly "cast into prison" for such a scandalous contempt of court. He thus describes the new and improved method adopted by our go-ahead neighbors for making crime unpopular. Describing the jail he says :

"The walls of the cells are covered with lice and kept in the greatest filth. A worse punishment is, however, in store for many unfortunates than filthy cells. In the centre of the jail is situated a torture chamber that would do justice to the horrors of the inquisition. It is a box of wrought iron and called the sweating dungeon. When a prisoner is locked in it, not a ray of light penetrates its gloom and the air has no circulation. On the outside of this big iron box is placed a large stove. A fire built in the stove gradually heats the walls of this box until the air inside becomes stifling and the walls so hot that the prisoner cannot bear his hand against them. The awful horror of this torture can be better imagined than described. A prominent attorney of Cripple Creek who stood inside this cell but a moment when the box was heated said that he believed he would kill himself before enduring an hour of such terrible agony. It was in this cell that the street preacher was placed, while his wife was locked in a small cell with a negro woman."

And all this is the latter end of the 19th century ! and the city is connected by rail and telegraph with the city of Washington, the capital of the most enlightened country on earth, and this state of things has, we are also informed, been going on for over two years.