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The Minister of Justice has introduced several measures during the present session of the Dominion Parliament of interest to the Profession, which we shall refer to hereafter, if and when they become law.

The country is fortunate in having in the above important position a man of the capacity and learning of Mr. Fitzpatrick. It is pleasant, moreover, to know that the one who is thus at the head of the legal profession in this Dominion is, in other respects also, a worthy exponent of its highest and best traditions.

We are constrained to urge the desirability of more attention being paid to the study of the Civil Law by Canadian lawyers educated outside the Province of Quebec. Questions involving its knowledge are constantly arising, not only by reason of inter-provincial commerce in the Dominion, but, with our expanding industries, cases requiring the determination of rights under contracts executed and to be performed in foreign countries where the Civil Law prevails will become more frequent. An instance of the latter was brought to our notice the other day, when a friend at the country Bar in Ontario appealed to us to put him straight, if we could, in respect of a contract of guarantee, framed under the Roman-Dutch law of Natal, which contained a clause whereby the sureties renounced "beneficium ordinis, seu excussionis, vel divisionis." Now our correspondent was classicist enough to read the Latin, but how far could that carry him in its literal import along the road to the legal meaning of the clause in the contract? He would never so discover that the sureties were simply renouncing the civil law privilege of a surety to require (1) the creditor to exhaust his remedy against the principal before proceeding against him; and (2) the further privilege to compel the creditor to sue each of the sureties for their portion of the debt respectively, and not one for the whole. We might suggest to our law-schools to improve their curricula along this line.

In connection with the suggestion we make above as to more attention being paid to the study of the Civil Law in Canada, it is interesting to note that Professor Maitland, in his recently

published Rede lecture on "English Law and the Renaissance," deals at length with the proposed abolition of the Common Law in the reign of Henry VIII. Had such a judicial revolution been effected the political genius of the English people would have lost much of what constitutes its aggressively distinctive type to-day, and that loss would, perhaps, have been deplorable; but that the adoption of the Civil Law, as a whole, would have denationalized the race we do not for a moment believe. We think that in the process of attrition between a rule of law born of the experience of Roman civilization and an antagonism thereto inhering in some Anglo-Saxon jural concept, it would be the former that would suffer. Is that not true of the Civil Law everywhere? Again, the Civil Law is the foundation of the legal systems of both Germany and France: Have they not preserved their distinctive racial qualities notwithstanding this common origin of their laws?

We are glad to know that an Act was passed at the late session of the Ontario Legislature legalizing the Scotch form of oath to which attention was drawn in a recent issue of this Journal. We trust that the form of oath thus authorized may be generally adopted, and that it may be administered with due reverence. Arrangements ought at once to be made by the Government to have it printed on card-board in good large type, and copies sent to every Court official authorized to administer oaths. The intention is, we presume, that the witness shall himself utter the prescribed words and not merely assent thereto when spoken by the officer. In Scotch Courts it is we believe the custom for the judges and the counsel to rise and remain standing while a witness is sworn. This adds to the solemnity; but it is perhaps too much to expect that such a practice should be followed in a country where solemnity and reverence are somewhat at a discount with very large sections of the community, although perhaps on that very account it is all the more necessary that the spirit of reverence for sacred things should be cultivated amongst us.

AUTHORITY OF COUNSEL TO COMPROMISE ACTION.

The recent decision of the English Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) in the case of *Neale* v. *Gordon-Lennox*, 112 L.T. Jour. 546, reversing the decision of Lord Alverstone, C.J., seems to throw the law as to the power of counsel to effect a compromise, into a state of confusion in Ontario. Following a decision of the English Court of Appeal in *Stokes* v. *Latham*, 4 Times R. 305, a Divisional Court (Meredith, C.J.C.P., and Rose, J.,) held in *Benner* v. *Edmonds*, 19 P.R. 9, that a compromise of an action by a plaintiff's counsel without authority is not binding on the plaintiff and may be set aside, even though such want of authority is not known to the other side. Now the Court of Appeal in *Neale* v. *Gordon-Lennox* holds that a compromise effected by counsel, even though against the instructions of his client, is binding, and cannot be set aside where the fact that the counsel is acting contrary to his client's instructions is not known to the other side. Whether *Stokes* v. *Latham* was considered or cited in the recent case does not appear from the note in the Law Times Journal. That case never got into the regular reports, and it is possible that the reason it did not was because the discriminating reporter may have come to the conclusion that it was "bad law." It would probably be a good plan for our Courts to hesitate about deciding cases on the authority of decisions reported only in such ephemeral publications as the Times Reports, especially where unsupported by any decision in the more carefully edited reports. *Stokes* v. *Latham* was eminently a hard case; it appeared that the plaintiff's solicitor was only anxious to secure his costs, that his bill was £268, and he instructed a compromise for £150 which he immediately obtained payment of to himself under a charging order obtained before his bill was taxed; at the same time there was no evidence that the defendant had not acted perfectly bona fide, and yet the Court granted a new trial without even requiring the £150 to be refunded. The question arises, which is now the law in Ontario, *Benner* v. *Edmonds* and *Stokes* v. *Latham*, or *Neale* v. *Gordon-Lennox*?

UNLICENSED CONVEYANCERS.

In September of last year a report was presented to convocation by a special committee of the Law Society of Upper Canada on the subject of unlicensed conveyancers. The report recommended legislation providing for the licensing (or at least recognising as a class having some rights) of persons who, at the time of the passing of the Act had been accustomed to transact conveyancing business. Copies of the report and of a draft bill founded upon it were sent to the county law associations throughout the Province for their consideration. The County of York Law Association referred the matter to their committee on legislation, and that committee has reported that "it cannot see its way to recommend the licensing of the unlicensed conveyancers, believing that if the proposed Act were passed, it would be in practice ineffective, and likely to lead to further encroachment upon the lawyer's field." We understand that other Associations approve of the suggested legislation.

There are many who think that the passing of such an Act as above indicated would be a serious mistake — that they would no longer be unlicensed conveyancers, but would have a recognized legal status, from which they never could be dislodged; that the effort to confine the privilege to those who are at present transacting such business would certainly fail and that the legislature would be forced to establish a general system of licensing conveyancers, or to continually pass special acts enabling certain named persons to practice. These unlicensed conveyancers are generally influential men in their own neighbourhood, who take an active part in elections, and several hold seats in the legislature. We have seen in the past that a number of persons, notwithstanding the opposition of the Law Society, obtained special acts enabling them to practice law. Is it likely that the legislature would be more firm in resisting the demands of this large and influential class demanding the less important right to act as conveyancers? Would it not be better not to interfere with their right to draw conveyances, but try to make it unlawful and punishable by fine to charge for their services? If legislation on the lines indicated could be obtained, unlicensed conveyancers would soon disappear. On the other hand it is said that the class

recognized by the proposed legislation will soon die out and leave the profession in a stronger position.

We have before us the example of the medical profession, who have been largely successful in upholding their rights. The system adopted by them is not to license unqualified persons, as the above Act would in effect do, but making it penal to charge for such services. Might it not be well to approach the subject in the light of the experience of those who have successfully grappled with the situation? But the difficulty here would be to pass such a measure in the House constituted as it is. The true inwardness of the situation is that the profession is not true and loyal to itself. Their influence is quite sufficient for their protection if they were to pull together.

DID STRATO MURDER BRUTUS?

While the tragedy, so familiar to students of classic annals, by which the famous tribune's life was closed, affords suitable groundwork for ventilating the discussion attempted by this article, its writing has, in fact, been suggested by the aspect which, applying the touchstone of the law, two recent occurrences—the going over the Falls in a barrel by Mrs. Taylor, with the avowed sanction and express furtherance of her business manager, and the inoculation by a physician in New York of a young woman with virus from a tuberculous cow—would have presented, had the individuals put in jeopardy by them not survived at once, or in the near future, the experiments undergone.

Let us shortly review the incident to which the caption alludes, as outlined for us by Shakespeare in the play of Julius Caesar, not failing to remember that it enjoys clear foundation in fact, so far as the central idea of the catastrophe is concerned. It comprises the final scene of that magnificent production; and, with Antony's immediate finding of the body, and his cordial panegyric on the dead, forms an arresting climax to its sustained grandeur. Before transcribing that portion of the dialogue which reveals the situation, it may not be out of place to announce that Brutus, according to this version, had previously begged two others, Clitus and Dardanius, attending him on the battlefield, to do him the service that Strato is presently found compliant enough to render. The par-

ticipants having been left alone, Brutus addresses Strato in these words:

> "I prithee, Strato, stay thou by thy lord;
> Thou art a fellow of a good respect;
> —Thy life had had some smatch of honour in it;
> Hold then my sword, and turn away thy face,
> While I do run upon it. Wilt thou, Strato?"
>
> Strato—"Give me your hand first. Fare you well, my lord."
>
> Brutus—"Farewell, good Strato. Caesar, now be still;
> I killed not thee with half so good a will."
>
> (He runs on his sword, and dies.)

It cannot be determined, with any approach to certainty, whether the accomplice in this gloomy transaction was a slave, under the régime prevailing in the republic, and marking the sharply-defined cleavage between orders of its people, or a simple domestic retainer, not oppressed by the yoke; if the community—a suspicion, albeit, for which history yields but small warrant—found room in its economy for such a grade. In the cast of characters provided, he and the rest of those in Brutus' retinue are denominated servants, a somewhat ambiguous title, one must admit, on which to base a conclusion. What, nevertheless, gives distinct colour to the persuasion that he was naught else than a bondman is recollection of the prominent article in the code that soldiery might not lawfully be drawn from this rank of society.

Naturally, a seeker in the drama for enlightenment as to any fact treads infirm ground. Shakespeare may, availing himself of poetic license, have transformed him into a soldier, or may, with as much likelihood, since there is no evidence that he actually took part in any fighting, mean to introduce him as belonging to the class, already shewn to be precluded from engaging in war. The circumstance, furthermore, that Brutus calls upon Strato to hold his (Brutus') sword, indicating, as it might be supposed to do, that the former did not himself possess one, lends countenance to the view that he was not, at the time, discharging a military function. Many of the histories however, justify the opinion that he was a soldier, and repudiate the Shakespearian account by the assertion that it was his sword which inflicted the deadly wound.

The bearing of all this on the controversy may not be evident to such as have not drunk from the spring of antiquity.

As, under the Roman polity, however, a master had, up to Hadrian's time, the absolute right to put his slave to death, the question as to whether this relation subsisted between the actors is decidedly material; for, if Strato might fairly anticipate, on refusing to comply with the request, his own destruction at Brutus' hands, he would, in carrying it out, assuredly be excused. But the nicety is canvassed only because it serves to endow the event with fuller interest for legal understandings, the writer proposing to treat the episode as though the social fabric at Rome, when it transpired, had been what we survey in the world to-day.

Proceeding to deal with the problem in the abstract, the proposition will not, it is safe to affirm, be denied that, for one to be accessory to the murder of a person depriving himself of life, there must exist, or be imputable to him, as being gifted with judgment, able to exert discrimination, a belief that, where its adequacy is not palpable, the means employed is calculated to achieve the purpose.

What difference in principle, it may be asked, is there between the case in point and that, more readily called to mind, perhaps, than any other, of the attendant upon a sufferer from some hopeless malady, who might respond to his pathetic entreaties to end his misery by the administration of a draught of poison? Would it, for a moment, be questioned that, no matter how profound the anguish that was being endured, no matter how imminent the unavoidable issue might be seen to appear, justification for assenting to his prayer could not validly be set up?

The argument, after all, resolves itself into this: can there be, under any circumstances, exemption from guilt in abettors of a suicide.

The authority making known the conditions which establish complicity in the act of a felo de se is *R.* v. *Dyson*, Russ. & Ry. 523. The issue arising there was a compact entered into between a couple, one of whom perished, to drown themselves. The judge told the jury that, if they believed the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner, but if they both went to the water with the purpose of drowning themselves, each encouraging the other in the commission of a felonious act, the survivor was guilty of murder. He also told the jury, that, though the indictment charged the prisoner with throwing the deceased into the water, yet, if he were present at the time she threw herself in, and consented to her

doing it, the act of throwing was to be considered as the act of both. The jury found that the prisoner and deceased went to the water with the purpose of drowning themselves, and the prisoner was convicted ; and, on a reference to the judges, they were clear that, if the deceased threw herself into the water by the encouragement of the prisoner, and because she had thought he had set her the example in pursuance of the agreement, he was principal in the second degree, and guilty of murder.

In *R.* v. *Allison*, 8 C. & P. 418, where it appeared that the prisoner and the deceased, who had been living together as man and wife, being in great distress, agreed to poison themselves, and both afterwards took laudanum, the woman alone dying, Patteson, J., held, on the authority of *R.* v. *Dyson*, that if two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died. *R.* v. *Jessop*, 16 Cox 104, adopts the ratio decidendi of the earlier cases.

The law in England being settled on the subject, it is a matter for surprise that in the case of George Pearson who was convicted in Hamilton about a year and a half ago for murdering a young woman, said to be his sweetheart, the Crown omitted to question as a defence raised on his behalf the allegation that they had agreed to die together.

The two remaining instances expose features peculiar to themselves. In that of the sacrilegious tempting of the Almighty by the demented creature at Niagara she, invited with new rashness the hurling of His thunderbolts on her head, by supplications throughout the ordeal to be preserved from danger, but no intention that life should be taken was harboured either by the principal in the adventure, or her equally culpable seconder. There was, on the contrary, the sincerest desire, the most fervent hope on the part of each that its ending might be propitious, in order, as one reason, that pecuniary benefit should be reaped from the notoriety it was expected to bring. If criminality should otherwise be thought to inhere, would this have altered, had death ensued, the position of the agent, who had performed a series of overt acts in prosecution of their joint design, amongst them, superintending the construction of the barrel, and committing it subsequently to the river above the Falls? Still, there having been, as before stated, no resolve to terminate her own existence, a factor needed

to constitute that murder of one's self, which suicide is by the books defined to be, and to make assisters liable, the contention that he would have been anywise privy to the commission of a capital offence, would be difficult to maintain. The authorities of the State of New York, in whose territory the plan had been evolved, and where much of its working out was compassed, had, it was then matter of common knowledge, distinctly warned the agent that he would be proceeded against criminally, in the event of a calamitous result. Their attitude in connection with the affair shewed, at any rate, their conception of it, not as a mere display of lunacy, but as a highly nefarious enterprise.

The last example is that of the inoculation. The object here was to discredit, if such might be done, the theory publicly advancd by Professor Koch that consumption could not be transmitted, through contact with one of the brute creation afflicted with the disease in life, or by partaking of its flesh, to a human subject. Assuming the acquiescer in the test to have developed, and ultimately died of consumption, how would the experimenter have been affected? That it was practised in the interests of science could not avail him as a defence, for the life of no human being can be rightfully exposed to hazard with the purpose of verifying any shadowy conjecture. Will it be doubted that he would be judged no less accountable for the death than if it had supervened immediately upon the transference by him of the foreign substance to his victim's blood? This proceeding bears no resemblance whatever to the action—apparently the sole instance where a dealing attended with fatal consequences will be protected by consent—of the surgeon who, in order to prolong a threatened life, performs an operation which, instead of accomplishing that end, precipitates death.

J. B. MACKENZIE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

POWER OF APPOINTMENT — EXERCISE OF POWER BY WILL — INTENTION— BLENDING OF APPOINTED PROPERTY WITH TESTATOR'S OWN PROPERTY — WILLS ACT, 1837 (1 VICT. C. 26), S. 27—(R.S.O. C. 128, S. 29).

In re Marten, Shaw v. *Marten* (1902) 1 Ch. 314. The question was whether a testatrix who had a general power of appointment had exercised it. By her will she made an express appointment of part of the funds subject to the power, and after bequeathing some specific and pecuniary legacies she made the following bequest. "As to the rest and residue of my real and personal estate, I devise, bequeath and appoint the same, subject to the payment thereout of my debts, funeral and testamentary expenses unto Henry Shaw." Henry Shaw having predeceased the testatrix, it was necessary to determine whether the residue of the fund not expressly appointed, was covered by the residuary bequest, or whether it devolved on those entitled in default of appointment. Byrne, J., decided that the residuary clause did not operate as an appointment of the residue of the fund, and with him agreed Williams, L.J., but the majority of the Court of Appeal (Cozens-Hardy and Romer, L.JJ.,) came to the conclusion that the residuary clause amounted to a blending of the property subject to the power with the testatrix's own, and that it was an effectual execution of the power under the Wills Act, 1837 (1 Vict. c. 26), s. 27, (R.S.O. c. 128, s. 29), and that, therefore, subject to the payment of debts, legacies and testamentary expenses, the appointed fund, so far as it had lapsed by the death of Henry Shaw, went to the testatrix's next of kin, and not to those entitled on default of appointment.

COSTS—EXPROPRIATION OF LAND—WARRANT FOR DELIVERY OF POSSESSION— JUD. ACT, 1890 (53 & 54 VICT. C. 44), S. 5—(ONT. RULE 1130).

In re Schmarr (1902) 1 Ch. 326, the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.,) held that under the Judicature Act, 1890, s. 5, (Ont. Rule 1130), the High Court has now discretion-

ary power over the costs of proceedings for the expropriation of land, and may order the costs of a warrant to put the expropriators in possession, in consequence of the refusal of the owner to deliver possession, to be paid out of the fund in Court.

COMPANY — DEBENTURE — "PROPERTY" INCLUDES GOOD-WILL — MANAGER — DEBENTURE HOLDERS' ACTION.

In re Leas Hotel Co., Salter v. *Leas Hotel Co.* (1902) 1 Ch. 332, was a debenture holders' action to enforce payment of debentures issued by a hotel company, which were made a charge on all the company's "lands, buildings, property, stock in trade, furniture, chattels and effects whatsoever both present and future." A motion was made to Kekewich, J., to appoint a manager of the defendant company's business, the right to which appointment turned on whether the charge covered the good-will; the learned Judge considered that the word property covered it, and made the order asked.

ADMINISTRATION — TRUSTEES CARRYING ON TESTATOR'S BUSINESS — TRUSTEES' RIGHT TO INDEMNITY — DEFAULTING TRUSTEE — CLAIMS BY CREDITORS OF BUSINESS CARRIED ON BY TESTATOR'S TRUSTEES — INDEMNITY.

In re Frith, Newton v. *Rolfe* (1902), 1 Ch. 342. Kekewich, J., was here called on to apply the principle established by *Dowse* v. *Gorton* (1891) A.C. 190, viz., that where a trustee carries on the business of his testator, pursuant to a trust in this behalf, he is entitled to indemnity out of his testator's estate against debts so incurred; and that creditors of the business are entitled to be subrogated to this right of the trustee who has incurred the debt. In the present case there were three trustees, two of them had shewn a clear account, but the third had been found to be in default to the testator's estate to the amount of over £921, and it was contended that so long as any one of the trustees was in default, none of the trustees were entitled to indemnity out of the estate, and consequently the creditors of the business could have no claim; but Kekewich, J., was of the opinion that the right of the trustees to indemnity was a several, and not a joint right, and that any one of them, not in default to the estate, was entitled to indemnity against debts incurred in carrying on the business, and consequently that the creditors of the business were entitled to the benefit of that indemnity, as it was competent for them to sue any one of the trustees.

TENANT FOR LIFE.—REMAINDERMAN—INTEREST ON CHARGES—ARREARS PAID OFF BY SALE OF ESTATE.

In *Honywood* v. *Honywood* (1902) 1 Ch. 347, there was a contest between tenant for life and remainderman under a settlement as to the liability for payment of interest on charges upon the settled property. Byrne, J., holds that where, by the same settlement, several estates are settled, the tenant for life is bound, out of the aggregate rents and profits of the whole, to keep down the interest on the aggregate charges on all the estates; and where arrears of interest are paid off by a sale of any of the charged estates, he is bound out of future accruing rents and profits of the rest of the settled estate to recoup the capital the amount of such arrears.

COMPANY—PREFERENCE SHARES—DIVIDENDS—LOSS OF CAPITAL.

Bond v. *Barrow Hæmatite Steel Co.* (1902) 1 Ch. 353, was an action by certain preference shareholders of the defendant to compel the payment of dividends on their shares. It was contended that the plaintiffs were entitled to payment of dividends on their shares out of the balance standing to the credit of profit and loss, and that in the case of preference shares no declaration of dividend by the directors is necessary as a condition precedent to an action for such dividends. Farwell, J., however, negatived this contention. As no dividends had been declared, this, of course, was sufficient to dispose of the case; but Farwell, J., also deals with other questions argued. It was admitted that the company had lost capital to the extent of £250,000, and the sum appearing as profit amounted to only £240,000. The defendants contended that the lost capital must be made good before any dividends could be payable. Farwell, J., was of opinion that the company was not necessarily bound to apply the profits to making good the lost capital, that the proposition that "dividends must not be paid out of capital," is not identical with the proposition that "dividends may only be paid out of profits," and that where dividends are paid out of a balance of profit, that is not a payment out of capital, though capital to a larger amount than the profit may have been lost, because the balance standing to the credit of profit and loss does not automatically become part of the capital assets to the extent of losses which have been incurred of capital. The question of whether these are profits available for distribution is in his opinion

to be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses; and that while circulating capital, i.e., capital necessary for the actual carrying on of the undertaking, must be kept, yet there may be a loss of fixed capital and still profits distributable as dividends without first making good such losses.

RAILWAY COMPANY—TOLLS—UNDUE PREFERENCE—ULTRA VIRES—RAILWAY CLAUSES ACT, 1845 (8 & 9 VICT. C. 20), S. 90—RAILWAY AND CANAL TRAFFIC ACT, 1854 (17 & 18 VICT. C. 31), S. 2—(DOMINION RAILWAY ACT (51 VICT. C. 29), S. 224).

Anderson v. *Midland Ry. Co.* (1902) 1 Ch. 369. This was an action by a shareholder of the defendant company against the company and a customer of the company to whom it was alleged the company had given an undue preference by carrying goods for him at a lower rate than that charged to other customers; to restrain the company from continuing such transactions, and to compel the customer to account for the extra freight he should have paid. The case came before Buckley, J., on the point of law whether the plaintiff had any cause of action, and he decided that though the transaction complained of was an undue preference which might give the plaintiff a right to complain before the railway commissioners as a breach of the Railway Acts above referred to, the transaction was nevertheless not ultra vires of the company, and gave the plaintiff (an individual shareholder) no right of action.

LANDLORD AND TENANT—LEASE—RENEWAL "AT COSTS OF LESSEE"—ARBITRATION AS TO AMOUNT OF FINE—COSTS.

In *Mostyn* v. *Fitzsimmons* (1902) 1 K.B. 512, a simple question of construction is involved. An agreement between landlord and tenant provided that a renewal of the lease should be "at the costs of the lessee" on payment of a fine to be determined by the landlord's surveyor, or, at the option of the lessee, by two arbitrators and an umpire. The lessee elected to have the fine fixed by arbitration, and the question was whether the costs of the reference were part of the costs he was bound to pay. Wright, J., held that the costs referred to in the agreement were only the ordinary conveyancing costs, such as the costs of drawing, settling and completing the new lease, but that they did not include the costs of the reference, which were in the discretion of the umpire who had made the award.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

TWO MOUNTAINS ELECTION.

Que.] ETHIER *v.* LEGAULT. [Feb. 18.

Controverted election—Lost record—Substituted copy—Judgment on preliminary objections—Discretion of court below—Jurisdiction.

The record in the case of a controverted election was produced in the Supreme Court of Canada on an appeal against the judgment on preliminary objections and, in re-transmission to the court below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was reconstructed in substitution of the lost record, and upon varification as to its correctness, the court below ordered the substituted record to be filed. Thereupon the respondent in the court below raised preliminary objections traversing the correctness of a clause in the substituted petition which was dismissed by the judgment appealed from.

Held, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to revise the discretion of the court below in ordering the substituted record to be filed. Appeal dismissed with costs.

Belcourt, K.C., for appellant. *Beaudin*, K.C., for respondent.

N.S.] BROWN *v.* MOORE. [Feb. 18.

Statutory publication—Penal statute—Wholesale purchase—Liquor license Guarantee—Validity of contract—Forfeiture—Nova Scotia License Act Practice.

An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect.

The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute. Appeal dismissed with costs.

J. J. Ritchie, K.C., for appellant. *Borden*, K.C., for respondent.

N.S.] COMMERCIAL BANK OF WINDSOR *v.* MORRISON. [Feb. 19.

Banking—Bills and notes—Conditional indorsement—Principal and agent—Knowledge by agent—Constructive notice—Deceit.

A promissory note indorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the indorser where the condition has not been fulfilled. *Pym* v. *Campbell*, 6 E. & B. 370, followed.

The principal is affected by notice to the agent unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the principal to shew that the agent had an interest in deceiving his employer. *Kettlewell* v. *Watson*, 21 Ch. D. 685, and *Richards* v. *The Bank of Nova Scotia*, 26 Can. S.C.R. 381, referred to. Appeal dismissed with costs.

J. J. Ritchie, K.C., for appellant. *Roscoe*, K.C., for respondent.

N.B.] McCLEAVE *v.* CITY OF MONCTON. [Feb. 19.

Principal and agent—Police constable—Illegal act—Liability of Municipal corporation—Respondeat superior.

M. was convicted by the Police Magistrate of Moncton of the offence of keeping liquor for sale in his hotel contrary to the provisions of The Canada Temperance Act. The conviction was quashed on certiorari on the ground that the police officer who laid the information for a search warrant had himself illegally executed such warrant. M. then brought an action against the city claiming damages for unlawful entry into his hotel and carrying off liquors therefrom and for the value of the liquor destroyed under the Act.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the police officer was not the agent of the city in executing the warrant though his appointment came from the city; that the city only performed a statutory duty in appointing him and the doctrine of respondent superior had no application. Appeal dismissed with costs.

Teed, K.C., for appellant. *Chandler*, K.C., for respondent.

Que.] BEAUHARNOIS ELECTION. [Feb. 20.

Trial of petition—Extension of time—Appeal—Jurisdiction.

On May 25, 1901, an order was made by Mr. Justice Belanger for the trial of the petition against the appellant's return as a member of the House of Commons for Beauharnois, thirty days after judgment should be given on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on 29th October, and on the 19th

November, on application of the petitioner for instructions, another order was made by the said judge which directed that judicial days only should be counted in computing the said thirty days and stating that such was the meaning of the order of 25th May, and that the 6th December would be the date of trial. On the petition coming on for trial on 6th December appellant moved for peremption on the ground that the six months' limitation for hearing had expired. The motion was refused, and on the merits the election was declared void. On appeal to the Supreme Court,

Held, DAVIES, J., dissenting, that an appeal would not lie from the order of 19th November; that the judge had power to make such order, and its effect was to extend the time for trial to 6th December, and that the order for peremption was, therefore, rightly refused.

Beique, K.C., and *Brossoit*, K.C., for appellant. *Bisaillon*, K.C., and *Laurendeau* for respondent.

Present, SIR HENRY STRONG, C.J., and SEDGWICK, GIROUARD, DAVIES and MILLS, JJ.

Que.] RICHELIEU ELECTION. [Feb. 20.

Appeal—Judgment dismissing petition—Want of prosecution.

There is no right of appeal to the Supreme Court of Canada from a judgment dismissing a petition against the return of a member of the House of Commons for want of prosecution within the six months prescribed by R.S.C., c. 9, s. 32.

Fitzpatrick, K.C., for motion. *Bisaillon*, K.C., contra.

N.S.] OLAND *v.* MCNEIL. [Feb. 20.

Sale of land—Conveyance absolute in form—Mortgage—Resulting trust—Notice to equitable owner—Estoppel—Inquiry.

The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price may validly convey such interest without notice to the equitable owners.

Borden, K.C., for appellants. *O'Connor*, for respondent McNeil. *Newcombe*, K.C., and *Drysdale*, K.C., for respondent Wallace.

N.S.] PETERS *v.* WORRALL. [Feb. 20.

Action for account—Agent's returns—Compromise—Subsequent discovery of error—Rectification—Prejudice.

P. was agent to manage the wharf property of W. and receive the rents and profits thereof, being paid by commission. When his agency terminated W. was unable to obtain an account from him and brought an

action therefor, which was compromised by P. paying $375, giving $125 cash and a note for the balance and receiving an assignment of all debts due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that on one of the accounts assigned to him $100 had been paid and demanded credit on his note for that sum. This W. refused, and in an action on the note P. claimed that the error avoided the compromise, and that the note was without consideration, or in the alternative, that the note should be rectified.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as by the compromise W. was prevented from going fully into the accounts and perhaps establishing greater liability on the part of P., W. was entitled to recover the full amount of the note. Appeal dismissed with costs.

Drysdale, K.C., and *Mellish*, for appellant. *Harrington*, K.C., for respondent.

N.B.] THE KING *v.* LIKELY. [Feb. 20.

Expropriation of land—Damages—Valuation—Evidence.

The Crown expropriated land of L. and had it appraised by valuators, who assessed it at $11,400, which sum was tendered to L., who refused it and brought suit by petition of right for a larger sum as compensation. The Exchequer Court, on said petition, awarded him $17,000. On appeal by the Crown from this judgment of the Exchequer Court:—

Held, GIROUARD, J., dissenting, that the evidence given on the trial of the petition shewed that the sum assessed by the valuators was a very generous compensation to L. for the loss of his land, and the increase by the judgment appealed from was not justified. The Court, while considering that a less sum than that fixed by the valuators should not be given in this case, expressly stated that the same course would not necessarily be followed in future cases of the kind. Appeal allowed with costs.

McAlpine, K.C., for appellant. *Stockton*, K.C., for respondent.

N.S.] HAWLEY *v.* WRIGHT. [Feb. 20.

Negligence—Personal injuries—Use of elevator—Contributory negligence.

H. entered an elevator in a public building after inquiring of the boy in charge if a certain tenant was in his office, and being told he was not, he remained in the elevator while it made a number of trips in response to calls, and had been in it over ten minutes when a call came from the fifth floor. The elevator went up and the passenger who had rung entered, H. at first making no attempt to get out. The operator then shoved to the

door of the elevator, and at the same time started the wheel, which had to be completely turned around to move the elevator. On turning the wheel the door would close if shoved with the hand which was done. While it was being turned H., without giving warning, tried to get through the door, and the elevator being then descending, he was caught between it and the floor and injured, so that he died soon after. In an action by his administrator against the owner of the building:—

Held, that the accident was entirely due to the conduct of H. himself, and the owner was not liable. Appeal dismissed with costs.

O'Connor, for appellant. *Harris*, K.C., for respondent.

N.S.] SKINNER *v.* FARQUHARSON. [Feb. 20.

Will—Capacity of testator—Insane delusion.

F. in 1890 executed a will providing generally for his wife and making his son residuary legatee. In 1897 he revoked this will and executed another by which the provision for his wife was reduced, but still leaving sufficient for her support, and the son was given half the residue, testator's daughter the other half. His wife was appointed executrix and guardian of the children. Prior to the execution of the last will F. had frequently accused his wife and son of an abominable crime for which there was no foundation, had banished the son from his house, and treated his wife with violence. After its execution he was for a time placed in a lunatic asylum. On proceedings to set aside this will for want of testamentary capacity in F.:—

Held, reversing the judgment of the Supreme Court of Nova Scotia (33 N.S. Rep. 261), SEDGEWICK, J., dissenting, that the provision made by the will for testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the belief that when it was executed testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them, and the will was therefore valid. Appeal allowed with costs.

Borden, K.C., for appellant. *Harrington*, K.C., for respondent.

Ont.] TOWNSHIP OF ELIZABETHTOWN *v.* AUGUSTA. [March 11

Drainage—Removal of obstruction—Municipal Act, 1883, s. 570 (Ont.)—Municipal Amendment Act, 1886, s. 22—Report of engineer.

In 1884 a petition was presented to the council of Elizabethtown asking for the removal of a dam and other obstructions to Mud Creek, into which the drainage of the township and of Augusta, adjoining, emptied. The council had the creek examined by an engineer, who presented a report with plans and estimates of the work to be done, and an estimate of the cost and proportion of benefit to the respective lots in

each township. The council then passed a by-law authorizing the work to be done, which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force (s. 570 of the Municipal Act, 1883). In 1886 the Act was amended and a fresh petition was presented to the council of Elizabethtown which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval), but presented to the council his former report, plans, specifications and assessment, and another by-law was passed under which the work was done. In an action to recover from Augusta its proportion of the assessment:—

Held, affirming the judgment of the Court of Appeal (2 O.L.R. 4), STRONG, C.J., dissenting, that the amendment in 1886 to s. 570 of The Municipal Act, 1883, authorized the council of Elizabethtown to cause the work to be done and claim from Augusta its proportion of the cost.

Held, further, reversing said judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment. Appeal allowed with costs.

Watson, K.C., and *H. A. Stewart*, for appellant. *J. A. Hutcheson*, for respondent.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] HAMBLY *v.* ALBRIGHT & WILSON. [March 20.

Patent for invention—Process for manufacturing phosphorus—Importation and non-manufacture.

Held, 1. Sec. 37 of The Patent Act (which provides that a patent shall be void at the end of two years from the date thereof unless the patentee, his legal representative or assignee, within that period or any authorized extension thereof commence and continuously carry on in Canada the construction or manufacture of the invention patented in such a manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada) does not apply when the invention is for an art or process.

2. A patentee is not in default for not manufacturing his invention unless or until there is some demand for it with which he has failed to comply or unless some person has desired to use or obtain it and has been unable to do so at a reasonable price; and where the invention is a process only the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by anyone for a reasonable

sum. *Anderson Tire Co. of Toronto* v. *The American Dunlop Tire Co.* 5 Ex. C.R. 100, referred to.

3. The effect of s. 37 of the Patent Act is to make the patent void only as to the interest of the person importing or causing to be imported the article made according to the process patented; and importation by a licensee will not avoid the patent so far as the owner is concerned.

Aylen, K.C., and *A. W. Duclos*, for the plaintiff. *Maclennan* and *C. A. Duclos*, for the defendants.

Burbidge, J.] TUCKER *v.* THE KING. [March 20.

Demurrer to petition of right—Claim for services rendered as commissioner under R.S.C. c. 115—Contract—Public office.

Held, 1. A person appointed under the provisions of R.S.C. c. 115, as a commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown cannot recover against the Crown payment for his services as such commissioner, there being no provision for such payment in the said enactment or otherwise.

2. The service in such a case is not rendered in virtue of any contract but merely by virtue of appointment under the statute.

3. The appointment partakes more of the character of a public office, than of an employment to render a service under contract express or implied.

Newcombe, K.C., for demurrer. *Leet*, K.C., contra.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] [April 10.

FORD *v.* METROPOLITAN R.W. CO.

Street railway—Negligence—Failure to give warning of approach of car—Backing car in the dark.

Action for negligence. The plaintiff travelling by electric railway car along a country road in a southerly direction on a dark night, got off at a regular stopping place. He then turned back along the road and after walking for some distance, the car by which he had travelled, backing northward, struck him. It appeared that there was a light at both ends of the car but that the current was very weak at the time, and the light given very slight, and the motorman came within four or five feet of the plaintiff before seeing him. The car was going along at the rate of only three or four miles an hour. The motorman did not sound the gong or give any other warning of his approach.

Held, that there was evidence of negligence on the part of the defendants to leave to the jury, and appeal from the judgment which was in favour of the plaintiff, dismissed.

Aylesworth, K.C. and *Hellmuth*, for the appellants. *H. Lennox* and *S. B. Woods*, for the respondents.

From Ferguson, J.] DOVER *v.* DENNE. [April 12.

Trusts and trustees—Liability for breach of trust by co-trustee—"Honestly and reasonably"—52 Vict. (2), c. 15, s. 1.

A testator devised his estate to his three executors upon trust. One of the executors was a solicitor, and with regard to him the will provided that in the administration and management of the estate he should be entitled to the same professional remuneration as if he were not trustee. Another executor was in England, and the third, the defendant, was told by the testator that the solicitor-trustee was to have the management of the estate, and consented to act upon that understanding. All three proved the will and acted as trustees, but the whole management of the estate was left to the solicitor, and at his death it was found that he had, without the knowledge of the defendant, misappropriated the moneys of the estate, and that his own estate was insolvent. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be wealthy.

Held, that the defendant, having acted honestly and reasonably within the meaning of 62 Vict. (2), c. 15, s. 1, was not liable to make good to the estate the loss occasioned by the misconduct of the solicitor. Decision of FERGUSON, J., affirmed.

Aylesworth, K.C., and *Edwards*, K.C., for the appellants. *Watson*, K.C., and *Hayes*, for the respondents.

From Meredith, C.J.C.P.] [April 12.

MACLAUGHLIN *v.* LAKE ERIE AND DETROIT RIVER R.W. CO.

Patent—License—Right to manufacture—Changes in article manufactured.

By written agreement the plaintiff granted to the defendants the license and right to use a certain patented invention of his, being an automatic air break, and to equip their rolling stock in whole or in part with the same during the term of the patent. He also bound himself to supply the railway company with the air brake and equipments at a certain price. The plaintiff complained that though the object of his agreement was that his brake might be advertised by its user on the defendant's road in the form in which he had patented it, the defendants were injuring his invention by substituting a different mechanical device of their own for one of those employed by him in the construction of the instrument and using the brake as thus altered to his detriment. The plaintiff contended that

if the defendants used his invention at all they must use it in accordance with the form described in his patent, and asked for an injunction.

Held, ARMOUR, C.J., dissenting, that the defendants had a right so to do. In the absence of agreement there is nothing to prevent a licensee from making such changes or alterations as he thinks proper, and there was no stipulation here restricting the ordinary legal right of the licensees to make for their own use such changes or alterations in the article covered by the invention which they had been authorized to use as they might think proper, or restricting the use of the invention to the precise form in which the plaintiff had himself given it birth. Appeal allowed.

W. Cassels, K.C., and *A. W. Anglin*, for the plaintiffs. *J. H. Rodd* for the respondent.

From Boyd, C.] [April 10.

HOSPITAL FOR SICK CHILDREN *v.* CHUTE.

Will—Construction—Power of advancement.

A testatrix by her will directed her trustees to pay an annuity to each of her three children, and empowered the trustees "from time to time to make such advances as they may deem proper out of the corpus or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable." On the death of all the children of the testatrix the undisposed of residue was directed to be divided among their children then living, and in default of a grandchild living at the death of the last surviving child of the testatrix, then the undisposed of residue was to be divided among certain charities.

Held, that a division of the estate among the children made by the trustees in good faith two years after the death of the testatrix was a valid exercise of the power.

Judgment of BOYD, C., affirmed. *S. H. Blake*, K.C., and *James Bicknell*, for appellants. *W. H. Blake*, *H. O'Brien*, K.C., and *Lundy* for other charities. *J. H. Macdonald*, K.C., and *F. C. Jones*, for respondents, the trustees. *Shepley*, K.C., for respondent, Frank E. Bilton. *Riddell*, K.C. for respondent, Naomi Bilton.

From Lount, J.] [April 10.

IN RE VILLAGE OF MARKHAM AND TOWN OF AURORA.

Municipal corporations—By-law—Bonus—Promotion of manufactures—Removal of industry "already established"—Motion to quash registered by-law—Delay.

By s. 9 of the Municipal Amendment Act, 1900, a new sub-section, 12, is added to s. 591, of the Municipal Act, R.S.O. 1897, c. 223, which new section provides that councils of municipalities may pass by-laws for granting aid by way of bonus for the promotion of manufactures within the

limits of the municipality, but (*e*) "no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province."

Held, that by-laws of a town granting aid to persons who were carrying on a manufacturing business in a village, and who, as the by-law recited, were about to remove their plant and machinery and carry on the same business in the town, were illegal under c. 1 (*e*), notwithstanding that these persons had determined, before negotiating with the town, to remove their business *from* the village at all events, and *to* such other place as should offer the largest inducement.

The by-laws were quashed, upon an application made within three months after they were registered, and nearly three months after they were passed, notwithstanding that the industry had been in the meantime established in the town and the money paid over to the manufacturers.

Decision of LOUNT, J., reversed.

Raney and *A. Mills*, for the village (appellants). *Aylesworth*, K.C., and *T. H. Lennox*, for the town (respondents).

From Divisional Court.] RENNIE *v.* QUEBEC BANK. [April 10.

Chose in action—Assignment of—Validity—Notice—Bank Act—Statute of Elizabeth — Execution — Interest in partnership — Sale — Action — Parties.

Action by husband and wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets and business of a partnership. The assignment was made in February, 1896, as security for a past due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, and placed execution in the sheriff's hands in July, 1896. Under that execution, the sheriff, without making any actual seizure of the partnership assets, purported to sell and convey to the wife in October, 1896, all the undivided share or interest of the assignor exigible under execution in the partnership assets or business. This action was begun in November, 1898.

Held, that the assignment was not invalid under the Bank Act, nor under the statute of Elizabeth, there being no evidence that it was made with intent to delay and defraud the husband in his action against the assignor.

Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity.

Per ARMOUR, C.J.O. — Debts are not included in the expression "goods, wares, and merchandise," as used in the Bank Act.

The effect of placing the execution in the sheriff's hands was to bind the goods of the partnership, so that they were liable to be seized, but no seizure of any specific assets having been made, and all the assets of the

partnership having been sold, realized, and disposed of, the execution creditor lost any benefit which he might have derived from the seizure of specific assets and the sale thereunder of the undivided interest of the execution debtor therein; and nothing passed to the wife by the sale to her.

Per OSLER, J. A.—The husband was not a proper party to this action, the purchaser at the sale under the execution being the only person interested in getting rid of the assignment.

Judgment of a Divisional Court, 1 O.L.R. 303, affirmed.

O'Donohoe, K.C., and *Norris*, for appellants (plaintiffs). *Aylesworth*, K.C., and *H. G. Kingstone*, for respondents (defendants).

From Ferguson, J.] TUCKETT-LAWRY *v.* LAMOUREAUX. [April 12.

Will—Annuity—Ademption—Evidence.

A testator gave by his will to each of two daughters an annuity for life of $6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and instructed his soliciter to alter his will so as to reduce her annuity by that amount. He died suddenly and the will was not altered.

Held, that the doctrine of ademption applied, and that notwithstanding the different nature of the two gifts, and even without the evidence of intention, the second daughter's annuity must be treated as reduced pro tanto.

Held, also, however, that the evidence of intention was admissible and was conclusive.

Judgment of FERGUSON, J., 1 O.L.R. 364, affirmed.

Martin, K.C., and *Aylesworth*, K.C., for appellant. *Shepley*, K.C. and *Ambrose*, for respondents.

From Divisional Court.] [April 12.

IN RE TOWNSHIP OF NOTTAWASAGA AND COUNTY OF SIMCOE.

Assessment and taxes - Equalization of assessment - Appeal to County Court judge - Time for delivering judgment - Imperative enactment.

The provision in sub-s. 7 of s. 88 of the Assessment Act, R.S.O. 1997, c. 224, that the judgment of the County Court Judge on appeal from the equalization by the county council of the assessment of the county shall not be deferred beyond the 1st day of August next after such appeal, is imperative. Judgment of a Divisional Court, 3 O.L.R. 169, reversed.

Hewson and *Creswicke*, for appellants. *Haughton Lennox*, for respondents.

From Divisional Court.] GRAVES *v.* GORRIE. [April 12.

Copyright—Works of Fine Art.

The Imperial Act, 25 & 26 Vict., c. 68, an Act for amending the law relating to copyright in works of Fine Arts, does not extend to Canada.

Judgment of a Divisional Court, 1 O.L.R. 309, affirming that of ROSE, J., 32, O.R. 266, affirmed.

J. T. Small, for appellants. *J. H. Denton*, for respondent.

From Robertson, J.] [April 12.

ANDERSON *v.* MIKADO GOLD MINING CO.

Master and servant—Non-observance of Rules—Mines Act.

A master is entitled to make and insist on the observance of reasonable rules for the conduct of his business, and if in consequence of the non-observance of these rules by a servant, that servant is injured, the master is not liable.

It was held that the master was not liable in damages for the death of the servant resulting from the servant using in direct violation of rules the cage instead of the ladders to ascend from a mine, although the ladders did not in some particulars conform to the requirements of the Mines Act.

Judgment of ROBERTSON, J., reversed.

Aylesworth, K.C., and *Rowell*, for appellants. *Clute*, K.C., and *A. R. Clute*, for respondent.

From Boards of County Judges.] [April 12.

IN RE ASSESSMENTS OF BELL TELEPHONE CO.
TORONTO ELECTRIC LIGHT CO.
TORONTO RAILWAY CO.
TORONTO INCANDESCENT LIGHT CO.
OTTAWA ELECTRIC LIGHT CO.

Assessment and taxes—Valuation of property—Electric companies—Rails, poles and wires—Wards—Franchise—Going concern—Integral part of whole.

1 Edw. VII., c. 29, s. 2, has made no difference in the mode of valuing for assessment purposes the rails, poles, wires and other plant of electric companies erected or placed upon the highways of municipalities, which was held to be proper by the decision in *In re Bell Telephone Co. Assessment*, 25 A.R. 351; MACLENNAN, J.A., dissenting.

That Act merely removes one of the difficulties pointed out in the previous case, but does not extend the principle on which the value of such property, apart from the franchise of the company or its use as a going concern is to be ascertained by the application of the rule provided by s. 28 of the Assessment Act for ascertaining its value. It is now to be valued as if

it were all in one ward, that is to say, as a whole or as an integral part of a whole, but still without reference to its connection with a franchise or its use as the property of a going concern.

Decisions of Boards of County Court Judges affirmed.

Aylesworth, K.C., and *Fullerton*, K.C., for the corporation of the City of Toronto (appellants). *Taylor McVeity*, for the City of Ottawa (appellants). *G. Lynch-Staunton*, K.C., and *E. H. Ambrose*, for the Bell Telephone Co. (respondents). *O'Brien*, K.C., for the Toronto Electric Co. and the Toronto Incandescent Light Co. (respondents). *J. Bicknell*, and *J. W. Bain*, for the Toronto Railway Co. (respondents). *H. M. Mowat*, K.C., for the Ottawa Electric Light Co. (respondents).

From Meredith, J.] MADILL *v.* TOWNSHIP OF CALEDON. [April 16.

Way—Highway—Sidewalk thereon built by voluntary subscription and Statute labor—Liability of municipality to repair.

The judgment of MEREDITH, J., reported ante, was affirmed on appeal. *Johnston*, K.C., and *E. G. Graham*, for appeal. *Du Vernet*, contra.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Street J.] [April 8.

RANKIN *v.* STERLING.

Vendor and purchaser—Purchaser taking possession—Making improvements—Requisitions on title—Title—Waiver—Damages—Reference.

Plaintiff under an agreement for purchase of land paid part of the purchase money, went into possession and made improvements, the defendant agreeing to furnish abstract and make out a perfect title. An abstract was furnished which shewed the title in one R. V. N. who became the owner in 1862 and made a mortgage to his vendor W. which was not discharged; plaintiff's requisitions on title pointed out these defects. Defendant proferred a declaration to shew title by length of possession which was objected to as incorrect in its statement of facts as to the length of possession, and plaintiff's solicitor wrote defendant's solicitor that "It looks very like as though it would be impossible to get the title made right." In an action for specific performance alleging the making of permanent improvements by the plaintiff in which the defendant set up that he had a good title, was ready to convey and that the plaintiff had waived his right to insist on a good title by his acts of ownership,

Held, that the plaintiff having insisted upon a good title being shewn and the defendant asserting a good title in himself; the plaintiff remaining in possession and making improvements after the defects in the paper title had been called to his attention, was no waiver of his right to insist on a good title being shewn.

Held, also that this case came within the general rule which restricts the damages of the purchaser to the costs of the investigation of the title and did not come within the doctrine that a purchaser is entitled to substantial damages from a vendor who, to save trouble, or moderate expense or from caprice refuses or wilfully neglects to perform his share of the contract—the rule being in the absence of fraud or other special circumstances "If a purchaser takes possession under a contract and afterwards rejects the title he must relinquish the possession, and equity cannot prevent the vendor turning him out by an ejectment although he may have expended money in improvements"; and a reference to title was ordered. Judgment of MACMAHON, J., reversed in part.

Warren, for the appeal. *Watson*, K.C., and *Payne*, contra.

Meredith, C.J.C.P.] PHILLIPS *v.* HANNA. [April 10.

Prohibition—Division Court—Instalments of principal and interest due on mortgage—Division of cause of action—Jurisdiction.

Plaintiff on Nov. 2, 1901, brought an action in a Division Court for one year's interest due Feb. 1, 1901, and for interest on that interest amounting together to $81.50 due on a mortgage, the principal of which was overdue.

Held, that the interest sued for, being interest per diem, was not due the plaintiff qua interest, but was recoverable only by way of damages and the case did not come within R.S.O. c. 60, s. 79, sub-s. (2).

Held also that the plaintiffs if entitled to recover interest from Feb. 1, 1900, they were entitled to recover as their damages interest down to the date of the issue of the summons so that the sum to which they were then entitled would be about $140, which sum was divided for the purpose of suing in the Division Court and that is forbidden by s. 79; and prohibition was granted.

R. McKay, for the application. *F. E. Hodgins*, contra.

Divisional Court.] [April 10.

MORRISON *v.* GRAND TRUNK R.W. Co.

Evidence — Discovery — Examination before trial—Railway company—Engine-driver.

An engine-driver in the employment of a railway company is an officer thereof, within the meaning of Con. Rule 439, and may be examined for discovery under the provisions of that rule.

Knight v. *Grand Trunk R.W. Co.* (1890), 13 P.R. 386, overruled; *Leitch* v. *Grand Trunk R.W. Co.* (1888), 12 P.R. 541, 671 (1890), 13 P.R. 369; *Dawson* v. *London Street R.W. Co.* (1898), 18 P.R. 223; and *Casselman* v. *Ottawa, Arnprior and Parry Sound R.W. Co.* (1898), 18 P.R. 261, considered and applied.

J. G. O'Donoghue, for plaintiff. *D. L. McCarthy*, for defendants.

Armour, C.J.O.] [April 12.

MYERS *v.* SAULT STE. MARIE PULP CO.

Negligence—Fellow servant—Evidence—Duty to guard machinery.

A workman employed by the defendant company in order to do his work had to climb a step ladder and step over the unguarded rim of a cogwheel to a plank on which he did his work. In coming from his work a truckman removed the ladder as he was stepping on it, and in recovering himself his leg went through the spokes of the wheel and he was injured. At the trial the jury in answer to questions found: that the injury to the plaintiff was caused by the negligence of the defendant company and not by his own negligence or want of proper care; that it was only to a certain extent caused by the negligence of a fellow-servant, for if the wheel had been properly guarded and the ladder properly fastened to the floor the accident would not have happened; that the negligence of the defendant company consisted in not guarding the wheel and fastening the ladder; that the wheel was a dangerous part of the mill gearing and was not as far as practicable securely guarded; that he would not have received the injury if it had been so securely guarded.

Held, 1. The findings of the jury as to negligence were amply supported by the evidence and could not be interfered with.

2. The defendant company were bound by the common law to take all reasonable precautions for the safety of their workmen, and it was for the jury to say what were such reasonable precautions.

3. The defendant company was also bound by the Factories Act to securely guard as far as practicable all dangerous parts of their machinery.

4. The jury having so found and their finding being supported by the evidence the intervention of the truckman in wrongfully taking away the ladder did not relieve the defendant company from the consequences of their negligence for their negligence still remained an operative cause of the workman's injury.

Mann v. *Ward* (1892), 8 Times L.R. 699, not regarded as an authority.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed, but as the damages were considered excessive a new trial granted unless the plaintiffs consent to reduce the amount of damages.

Riddell, K.C., and *Irving*, for the appeal. *Douglas*, K.C., contra.

Robertson, J.] IN RE GLENN, REX *v.* MEEHAN. [April 12.

Criminal law—Municipal elections—Illegal voting—Indictable offence—Information—Police magistrate—Mandamus.

Voting in more than one ward at a municipal election by general vote, contrary to the provisions of 1 Edw. VII., c. 26, s. 9 (O.), is an indictable offence, and mandamus lies to a police magistrate having territorial

jurisdiction to compel him to consider and deal with an application for an information for such an offence.

McEvoy, for the applicant. *Du Vernet*, for the magistrate.

Britton, J.] [April 14.

IN RE SALTER AND TOWNSHIP OF BECKWITH.

Intoxicating liquors—Local option by-law—Directions to voters—Motion to quash—Electors' status to oppose.

A local option by-law named, as one of the polling places, a small unincorporated village, without specifying any house, hall, or place in the village. Polling had taken place at this village year after year at municipal elections, and any house or place in it could be easily found.

Held, following *In re Huson and South Norwich* (1892) 19 A.R. 343, that the polling place was sufficiently defined.

But *held* also, that as directions to voters had not been, as required by the Municipal Act, ss. 142 and 352, furnished to the deputy returning officers, and as there was not clear evidence of the posting up, under the direction of the council, of the by-law at four or more public places, the by-law must be quashed, these not being irregularities cured by s. 204, and the fact that no harm had, as far as shewn, resulted, being no answer.

The municipal council having decided not to oppose the motion to quash the by-law, certain electors were allowed, at their individual risk as to costs, to oppose it in the council's name.

Re Mace and Frontenac (1877) 42 U.C.R. at p. 76, followed.

Watson, K.C., and *J. Grayson Smith*, for application. *Maclaren*, K.C., and *McNeely*, for respondents.

Boyd, C.] GUNN *v.* HARPER. [April 29.

Administrator ad litem—Death of appellant between argument and judgment—Dismissal of appeal—Security for costs.

Where an appellant to the Court of Appeal being the plaintiff in the action, died between the date of the argument and the date of the judgment of the court, which judgment dismissed the appeal, an administrator ad litem was appointed in order that the costs might be recovered from the sureties to the plaintiff's bond, given as security on the appeal.

Semble, that such appointment was not necessary as the court might direct judgment to be entered as of the date of hearing, in the name of the plaintiff.

Delamere, K.C., for defendants. No one for the representatives of plaintiffs.

Meredith, C.J.C.P., Lount, J.] [May 3.

CARR *v.* O'ROURKE.

Executors and administrators—Surrogate Courts—Grant of administration —Nominee of next of kin in Ontario—Discretion—Revocation—Fraud.

Only one of the next of kin, the sister, of an intestate resided in Ontario, and, upon the consent of the sister and her children, letters of administration were granted by a Surrogate Court to the defendant, the husband of the sister's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in the defendant's petition that all of the nex of kin had renounced in his favour, but it was plain from the renunciation, which was filed, that this statement was intended to refer only to the next of kin resident in Ontario.

Held, that the Surrogate Court had before it all these who were required by s. 41 of the Surrogate Court Act, R.S.O. 1897, c. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature of the property of the deceased, and the age and illiteracy of his sister, that the judge had not exercised his discretion improperly in directing the grant to be made to the defendant.

Semble, that, even if the discretion had been improperly exercised, the grant would not have been revoked.

The practice of the Surrogate Courts in this Province is to apply the provisions of s. 59 of the Act more liberally than do the English courts the corresponding provision of the English Probate Act.

Held, also, affirming the finding of the Surrogate Court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant.

Wilson, K.C., and *O'Flynn*, for plaintiff. *Aylesworth*, K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] SEAMAN *v.* MCFARLANE. [Jan. 25.

Administrator—Settlement of accounts—Discharged as to moneys paid co-administrator in capacity of solicitor for party interested.

D. was one of the administrators of the estate of M. and also acted as solicitor, agent and man of business for plaintiff, the widow of M. He received in his capacity as solicitor and agent a large sum in money and securities to which plaintiff was entitled as her share of the estate.

There was some evidence to shew that at the time D. received the money and securities plaintiff was advanced in years, partially blind and incapacitated as to business, but the evidence as a whole shewed that the money and securities were received by D. with the knowledge and consent of plaintiff, and it was not until afterwards that plaintiff, becoming dissatisfied with the manner in which D. was conducting her business, took steps to enforce a settlement. D. died suddenly without having accounted to plaintiff and leaving his estate in an insolvent condition.

Held, that the other parties to the administration, the co-administrator and sureties were entitled to be discharged in respect to the money and securities received by D. on behalf of plaintiff.

H. Mellish, for appellant. *W. B. A. Ritchie*, K.C., and *H. McInnes*, contra.

Full Court.] MILLER *v.* GREEN. [Feb. 22.

Libel—Directions of Trial Judge as to—Malice—Taking away privilege sustained—Ambiguous or equivocal words—Reception of evidence to explain—Substantial wrong or miscarriage—O. 37, r. 6.

Defendant who occupied the position of general manager of a life insurance company wrote a letter to F., a policyholder in the company, in which he stated that plaintiff had been removed from his office as local agent of the company and assigned as the reason for such removal that they had tried for a considerable time past to get plaintiff to attend properly to their business and that it was only because it was clearly necessary that the change was made. He stated further that to give plaintiff the opportunity of getting the benefit of commissions on outstanding business the attention of certain matters had been left in his hands, but that he (defendant) now found that he had collected money which, up to the present time, they had been unable to get him to report.

This letter was handed by F. to plaintiff who in addition to acting as the local agent of the company was a solicitor, and acted as her legal adviser. In an action by plaintiff against defendant claiming damages for libel.

Held, 1. The trial judge correctly directed the jury that if the statements made by defendant in the letter in question as to the reasons for dismissing plaintiff were made by him, knowing them to be false, this was malice beyond all doubt and his privilege was wholly gone.

2. The reception of evidence of F. as to the meaning which she attached to the words of the letter was not under O. 37, r. 6, a substantial wrong or miscarriage in the trial and was not therefore ground for a new trial.

3. Per GRAHAM, E. J.—As in this case plaintiff was dealing with words which had not a plain and obvious meaning, but were ambiguous or

equivocal, it was not necessary to ask witness the preliminary question required in the case of *Daines* v. *Hartley*, 3 Ex. 200.

Held, per TOWNSHEND, J., (who concurred generally with GRAHAM, E.J.)—That the direction as to malice should have been to the effect that if the statements contained in defendant's letter were false to the defendant's knowledge this would be evidence from which the jury might infer malice and that the letter was written with the object of injuring plaintiff and was therefore an abuse of the occasion which would take away defendant's privilege.

MEAGHER, J., read a dissenting opinion in which MCDONALD, C.J., concurred.

W. E. A. Ritchie, K.C., in support of appeal. *Roscoe*, K.C., and *Milner*, contra.

Full Court.] CONFEDERATION LIFE ASSOCIATION *v.* BROWN. [Feb. 22.

Principal and surety—Discharge of surety—Non-disclosure of wrongful acts.

The defendants, F.W.B. and J.A.K., were sureties on a bond given to the plaintiff Association by the defendant B. for the faithful discharge of his duties as an agent of the Association. Among such duties were the remittance at least once in each month of all moneys or securities collected for or on account of the Association, such remittances to be made by bank draft, marked cheque, post office order, or by express.

The evidence shewed that B. remitted moneys by his own personal cheques, instead of as directed, and on a number of occasions asked to have such cheques held over for a few days in order to enable him to provide funds to meet them.

Held, 1. These and other acts of disobedience under the terms of the agreement would have justified the dismissal of B. That it was the duty of the Association to have notified the sureties of his derelictions of duty, and that having failed to do so and having continued him in their employ with knowledge that he was violating his instructions they could not recover against the sureties for the default of B.

2. Findings of the jury negativating knowledge on the part of the Association of the irregularities of B. being against the weight of evidence must be set aside with costs and a new trial ordered.

H. McInnes and *J. A. Kenny*, for appeal. *J. A. Chisholm*, contra.

Full Court.] HARRINGTON *v.* LOWE. [Feb. 22.

Amendment—Error as to effect of—Appeal allowed from order imposing terms—Costs.

The judge of the County Court for District No. 7, in granting an amendment of plaintiff's statement of claim, imposed the terms that plain-

tiff should pay all the costs of the action, including the costs of the motion for the amendment.

When the cause was called for argument counsel for defendant admitted that the order appealed from was wrong, the learned Judge having been in error as to the effect of the amendment, which he regarded as setting up a wholly different case from that originally set up.

Held, that the plaintiff was entitled to have his appeal allowed with costs up to the time of the argument, with a fee for attendance before the Court at that time.

Stairs, for appeal. *Harrington*, K.C., contra.

Full Court.] THE KING *v.* CONRAD. [Feb. 22.

N.S. Liquor License Act—Conviction sustained—Sale by person "suffered to be or remain on the premises"—Burden of proof—Word "occupant."

The N.S. Liquor License Act, R.S. (1900) c. 100, s. 111, provides that "The occupant of any house, shop, room, or other place in which any sale . . . has taken place shall be personally liable to the penalty . . . notwithstanding such sale . . . was made by some other person who cannot be proved to have so acted under or by direction of such occupant."

Held, that defendant was properly convicted for sales made by his son who lived with him in a house occupied by defendant and his family.

Held, per RITCHIE, J., that the service upon the person convicted of an incorrect copy of the minute of conviction followed by service of a correct one would not in any way invalidate the proceedings or prevent the magistrate from preparing a conviction in accordance with the original minute made by him, and issuing process to enforce the penalty or imprisonment.

Held, per GRAHAM, E. J., that the son living with his father was a person suffered to be or remain on the premises within the meaning of the Act, s. 111, sub-s. (2).

Held, also, that the burden was on defendant of proving that the sales were made without his authority.

Held, also, that defendant was an "occupant" within the meaning of the Act.

J. J. Power, for appellant. *Drysdale*, K.C., and *W. W. McLennan*, for respondent.

Full Court.] THE KING *v.* BRENNAN. [March 5.

Inland Revenue Act—Conviction for having in possession unlicensed still—Words "at any place."

Defendant was convicted before the Stipendiary Magistrate in and for the city of Halifax for that he did in the said city of Halifax on the 11th day of February, 1892, without having a license under the Inland Revenue

Act then in force, unlawfully have in his possession in the city of Halifax aforesaid a still suitable for the manufacture of spirits without having given notice thereof as required by the said Act, the said still not being registered under s. 125 of the said Act. The prosecution and conviction were under the Inland Revenue Act, R.S.C., c. 34, s. 159, sub-s. (*e*), as amended by the Acts of 1898, c. 27. The Act as it originally stood read "Everyone who without having a license under this Act then in force has in his possession any such still, etc., in any place or premises owned by him, or under his control, without having given notice thereof, etc., is guilty, etc." As amended it read, " . . has in his possession at any place any such still, etc."

Held, 1. Sustaining the conviction. The amendment gave the Act a much wider operation and did not confine it to cases where the place was owned or controlled by the accused, and was intended to cover all cases of actual or constructive possession no matter where the still was, the words "at any place" in the amended Act being equivalent to "anywhere."

2. The gist of the offence was not having possession of the still in any particular place, but having possession of it anywhere or at all.

3. The intention of the Act was to prevent any unauthorized person from having possession of a still, etc., in any place at any time or in any capacity.

Held (per WEATHERBE, J., dissenting), that the word "place" as used in the Act was intended to mean such place as one might intend to carry on the work of distilling in, and that the words "City of Halifax" in the conviction were no more adequate for the purpose for which they were used than the words "Province of Nova Scotia" would have been

J. J. Power and *W. F. O'Connor*, in support of appeal. *F. F. Mathers*, contra.

Full Court.] THE KING *v.* KENNEDY. [March 5.

Inland Revenue—Illicit still—Jurisdiction of Stipendiary Magistrate to convict—Misdemeanour.

The defendant in this case was convicted for a like offence committed at the same time as in the case of *The King* v. *Brennan*. In addition to the grounds relied on in the Brennan case in support of the application to set aside the conviction and for the prisoner's discharge the further objection was taken that the jurisdiction of the magistrate, under s. 113, was limited to cases where the penalty or forfeiture was not in excess of $500, whereas reading ss. 124, 159 and 160 together the penalty or forfeiture in this case would be in excess of that amount. Also that under the terms of the commitment the prisoner was required to be held until he paid a larger amount than he was adjudged to pay. It being admitted that there was a good conviction.

Held, 1. Sections 886, 896 of the Criminal Code applied and that the objections taken afforded no ground for the prisoner's discharge.

2. Calling the offence a misdemeanour would not affect the jurisdiction of the Stipendiary Magistrate which was clearly given under the Inland Revenue Act, R.S.C., c. 34, s. 113.

3. Following the *Attorney-General* v. *Flint*, 16 S.C.R. 707, that the Dominion Parliament had power to create such a Court.

W. F. O'Conner, for application. *F. F. Mathers*, contra.

Full Court] [April 7.

COX *v.* THE NOVA SCOTIA TELEPHONE CO., LIMITED.

Negligence. Excavation on public street—Insufficient light and protection against accident—Verdict against company sustained—Costs.

The defendant company made an excavation across a sidewalk on a public street in the city of Halifax for the purpose of laying cables underground. The excavation was protected after working hours by a number of barrels with planks laid across the top from one to another. Plaintiff while passing along the sidewalk after dark, in the absence of the watchman, fell into a portion of the excavation from which the barricade had been removed after it had been placed in position, and was severely injured.

The evidence given on the trial shewed that the barrier erected was of a frail and insufficient character, and that the place was insufficiently lighted, and that if it had not been for the want of care on the part of defendant in these particulars the accident would not have happened.

Held, that plaintiff was entitled to a verdict and that defendant's appeal must be dismissed with costs.

W. B. A. Ritchie, K.C., for appellant. *Harris*, K.C., and *W. E. Thompson*, for respondent.

Full Court.] KAULBACH *v.* MADER. [April 7.

Administration—Party accepting letters cannot renounce without order of Court—Execution—Order for held bad for non joinder and as issued without jurisdiction—Costs.

Letters of administration in the estate of H. N. K. were granted to his widow S. K. and to his two children E. R. and R. K. S. K. by deed assigned all her interest in the personal property to E. R. and R. K., and by the same deed puported to renounce all her rights, authority and power as administratrix of the estate. E. R. and R. K. obtained from the judge of the County Court for District No. 2 an order permitting them to issue execution on a judgment obtained by H. N. K. in his lifetime against defendant.

Held, 1. Following *Jost* v. *McNeil*, 20 N.S.R. 156, that S. K. having accepted letters of administration could not renounce without the order of the Court of Probate, and that the order made on the application and in the names of E. R. and R. K. only was bad and must be set aside.

2. The order was bad because it permitted execution to issue on the judgment "for the benefit of the said E. R. and R. K." instead of requiring any sum realized to be applied according to law under the direction of the Court of Probate.

3. As the appellant had failed on the merits, a larger amount appearing to be due on the judgment than was claimed, there should be no costs to either party either in this Court or in the Court below.

Wade, K.C., for appellant. *Kaulbach*, for respondent.

Province of New Brunswick.

SUPREME COURT.

In Equity, Landry, J.] [April 2.

CITY OF ST. JOHN *v.* WILSON.

Charter of the City of St. John—Boundary construction—Fishing privileges.

By the charter of the City of St. John the land given to the city is defined, together with all the lands and waters thereto adjoining or running in, by or through the same," and part of the description of the bounds of the city is, "from thence along the north shore of the said river at low water mark to," etc. By Act 26 Geo. 3, c. 46, the fisheries between high and low water mark is vested in the city. The boundary of the city where fishing lots 3 and 4 are is low water mark.

Held, that the fishing privileges in these lots between high and low water mark was not vested in the city.

Skinner, K.C., for plaintiff. *Pugsley*, A.G., *Earle*, K.C., and *J. R. Campbell*, for defendants.

In Equity, Barker, J.] TRAVERS *v.* CASEY. [April 15.

Will—Construction—Intestacy.

The testator S., the Roman Catholic Bishop of St. John, by his will declared that "although all the Church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education and charity, in trust, according to the intention and purposes for which they were acquired and established, yet to meet any want or mistake, I give

and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentiops for which they are used and established." At the time of the testator's death certain real estate belonging to Church was standing in the name of the testator, and he was also entitled to certain real estate in his own right. The income from both classes of property was treated by the Bishop in his lifetime as a common fund and drawn upon by him for Church and personal purposes.

Held, that the testator did not die intestate with respect to his private estate.

Pugsley, A.G., for plaintiff. *Stockton*, K.C., *Carleton*, K.C., and *Barry*, K.C., for defendants.

Barker, J.] FREEMAN *v.* STEWART. [April 15.

Specific performance—Unilaterial agreement—Time the essence of agreement.

In an agreement to sell land on or before a specified date, unaccompanied by an agreement on the part of the offeree to purchase, time is of the essence of the contract, and specific performance will not be granted if the purchase money is tendered after the expiration of the time.

McLeod, *Vince* and *Hartley*, for plaintiff. *Connell*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Richards, J.] COX *v.* SCHACK. [March 20.

Chattel mortgage—Lien note—Assignment for creditors—Exemptions.

Action by plaintiff as assigned for the benefit of the creditors of F. Couse to restrain the sale by defendant of shop fittings which he had seized and removed from Couse's store after the assignment to plaintiff under a lien note given to defendant by Couse to secure a balance of the price of the fittings due to defendant, and for an order for the return of the fittings and a declaration that the lien note was void as against the plaintiff. The fittings in question were manufactured articles, but the defendant had not put on them his name or any other distinguishing mark as required by section 2 of the Liens Notes Act, R.S.M., c. 87, and the lien note, though it contained a description of the fittings, had not been registered under The Bills of Sale and Chattel Mortgage Act. It provided in the usual manner that the property in the fittings should remain in the defendant and should not pass to Couse until paid for in full, and that on default the defendant might enter and retake them. It was procured by the defendant after Couse settled for the fittings in the manner agreed on, and after they

had been practically completed and placed in position in Couse's store and after the property in them had, as the learned Judge found on the evidence, passed to Couse. Defendant had asked for the lien note on the advice of the manager of a bank which had discounted for defendant the notes of Couse for part of the price.

Held, 1. As between Couse and the defendant the lien note was a good security, and, although the property in the goods had already passed to Couse, it might be treated as a chattel mortgage for the debt secured by it.

2. The provisions of section 2 of the Lien Notes Act, R.S.M., c. 87, are only for the protection of bona fide purchasers or mortgagees without notice of the claim of the lien holder, and therefore the lien note was valid as against Couse although the manufacturer's name or some other distinguishing name was not put upon the fittings.

3. The lien note, being an instrument intended to operate as a mortgage of goods which remained in Couse's possession until the assignment, and not being registered as required by section 5 of the Bills of Sale and Chattel Mortgage Act, 63 & 64 Vict., c. 31, was null and void as against the creditors of Couse, including the plaintiff as his assignee by virtue of paragraph (d) of section 2 of the Act.

It was doubtful upon the wording of the assignment whether Couse had reserved any exemptions to which he would be entitled under sub-section (f) of section 43 of the Executions Act, R.S.M., c. 53, viz.: "The tools and necessaries used by the judgment debtor in the practice of his trade, profession or occupation, to the value of five hundred dollars," and it was not shewn that Couse ever claimed any part of the fittings from the assignee or asked to have any part of them set aside or exempt, or that he had not got out of other articles of his estate all his exemptions under that sub-section; and the fittings were shewn to have cost originally over $2,500, and no proof of their having depreciated in value had been given.

Held, that the defendant could not claim the benefit of any such exemption even if it was reserved by Couse in the assignment.

Elliott, for plaintiff. *Wilson* and *Machray*, for defendant.

Bain, J.] KING *v.* CARRIERE. [April 12.

Criminal Code, 1892, s. 773—Speedy trial—Preferring indictment for offence different from that charged in the information.

The accused was committed for trial on a charge of having received certain specified sums in his capacity of treasurer of a municipality and fraudulently and unlawfully appropriating and converting the same to his own use. He then elected to take a speedy trial under the provisions of Part LIV. of the Criminal Code.

At the time appointed for his trial counsel for the Crown asked leave, under section 773 of the Code, to prefer an indictment against the accused in respect of a general shortage in his account with the municipality, charging him with theft of the amount of such shortage and stated that he did

not intend to prosecute for the theft of the specific sums charged in the information, as, although the accused had received those sums, it would be impossible to prove that he had not deposited them to the credit of the municipality in the bank where its account was kept. Counsel for the Crown in support of the motion relied on the fact that a considerable part of the evidence appearing in the deposition related to the general shortage in the accounts of the accused.

Held, that, as a person who has once elected to take a speedy trial before a judge without a jury cannot afterwards withdraw that election, a judge should not, against the will of the accused, give his consent to any charge being preferred against him other than the one set forth in the information unless it is clear that, while it may be more formally or differently expressed, it is substantially for the same offence as the one on which he was committed for trial and for which he has consented to be tried without a jury, and that the application should be refused. Order for discharge of accused.

Patterson, for the Crown. *Bonnar* and *Affleck*, for accused.

Province of British Columbia.

SUPREME COURT.

Full Court.] —— [Jan. 10.

MCKAY *v.* VICTORIA YUKON TRADING CO.

Trial by judge without a jury—Findings of fact—Commission—Evidence—Reversal by appellate court.

In an action in the Yukon for damages for breach of contract tried before CRAIG, J., without a jury, the evidence for the defence being evidence taken on commission, the Judge held that the contract sued on was made with defendant company and not with one Munn as alleged by the defence, and gave judgment for plaintiffs.

On appeal to the full court of the Supreme Court of British Columbia it was held, reversing the finding and allowing the appeal, that the judge had failed to appreciate the commission evidence. Different rules govern an appellate court when considering the soundness of findings based on evidence taken on commission as distinguished from that given by witnesses present in court.

Duff, K.C., for appeal. *Peters*, K.C., and *Griffin*, for respondents.

Irving, J.] REX *v.* JORDAN. [Feb. 15.

Summary conviction—Appeal—Notice of—Parties to be served—R.S.B.C. 1897, c. 176, s. 7.

This was a summons by prosecutors that HENDERSON, Co. J., be prohibited from proceeding in an appeal from a summary conviction by a

magistrate whereby Jordan was convicted on 20th January of an infraction of the Medical Act and fined $50.00, and in default of payment distress was to be levied and in default of distress he was to be imprisoned for 30 days. On 24th January Jordan deposited with the magistrate the amount of the fine and $50.00 for security for costs.

Held, 1. A notice of appeal from a summary conviction (Provincial) served upon the convicting magistrate is not invalid because it is not also addressed to and served upon the respondent.

2. It is not a pre-requisite to the right of appeal that the person convicted should have been taken into custody.

Quære, whether service of notice of appeal on respondent's solicitor would not be sufficient in any event.

L. G. McPhillips, K.C., for the summons. *Bowser*, K.C., contra.

Hunter, C.J.] PIKE *v.* COPLEY. [April 15.

Practice — Special indorsement — Interest till judgment — Amendment — Re-service or re-delivery.

Summons for judgment under Order XIV., in an action for principal and interest due under a covenant in a mortgage. The statement of claim indorsed on the writ in addition to the claim for principal and interest compute to a certain date previous to issue of writ contained a claim for interest on the principal until payment or judgment.

Held, 1. Such claim for interest was not a subject of special indorsement under Order III., r. 6.

2. Where on an application for judgment under Order XIV., it appears that part of the claim is not the subject of special indorsement it is not open to plaintiff to obtain amendment and proceed, but a new summons must be taken out.

3. Where the indorsement of a writ has been amended, re-delivery but not re-service is necessary.

Prior, for the summons. *Barnard*, contra.

Bole, Co.J.] TAYLOR *v.* DRAKE. [April 18.

Jury—Special—Fees when not serving—R.S.B.C. 1897, c. 107, s. 61.

Action against a sheriff by a special juror for fees.

Held, that a special juror who is summoned for the trial of an action in the Supreme Court is entitled to $2 for each day's attendance at court although he does not actually serve, and notwithstanding the fact that he lives so near to the court house that he is able to live at home and visit his office occasionally during the day.

Young, for plaintiff. *Pooley*, for defendant.