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The disposition made by the majority of the Court of Appeal (Ontario) of the case of *Johnston* v. *Catholic Mutual Benevolent Association*, 24 A.R. 88, strikes us as somewhat curious. The action was brought by the plaintiffs on behalf of themselves and all other creditors of the late Patrick O'Dea, to recover the amount of a benefit certificate which had been issued by the defendant Association to Patrick O'Dea, and held by him at the time of his death. Patrick O'Dea had made a will whereby he purported to bequeath the moneys payable under the certificate to certain legatees named in his will, and the executor of the will was also a defendant. The Association paid the money into Court to abide the result of the litigation. The majority of the Court of Appeal (Hagarty, C.J.O., Burton and Osler, JJ.A.) decided that neither the plaintiffs, nor the executor, nor the legatees had any right to the money, and yet, strange to say, directed a reference to the Master to inquire who was entitled to it. This seems a very peculiar direction to make, inasmuch as none of the actual parties to the action appear to have had any interest in prosecuting the reference. One would have thought that the only judgment the Court could properly give under such circumstances would have been one dismissing the action, and ordering the money paid into Court to be paid back to the Association, leaving it to the parties really entitled to the money to take such proceedings for the payment of the fund to them as they might think proper: but to burthen them with the costs of a reference in an action instituted by persons found to have no title to, or interest in the fund whatever, seems certainly a new departure. It is true that Osler, J.A., suggests that the legatees, or some of them, might, as next of kin of the deceased, maintain their claim to the fund, but there is nothing in the report

to show that any of the legatees were as a matter of fact next of kin, or made parties to the action, either as legatees or next of kin, or that any of the next of kin who were declared entitled to the fund were in any way parties, by representation or otherwise, to the litigation, and according to the ruling of the Court of Appeal, the case was clearly one in which the executor did not represent in any way the parties beneficially entitled. It is possible the case may not be properly reported, but certainly as it stands it is a singular one.

BIGAMY.

An important desision on this subject has recently been given in the Supreme Court. By an order-in Council passed in April, 1896, the Government referred to the Supreme Court the validity of sections 275 and 276 of the Criminal Code, making it bigamy for a British subject resident in Canada to go through a form of marriage in any part of the world after leaving Canada with that intent, if he is already lawfully married. Counsel for the Dominion Government appeared, but no one appearing on the other side, the Court refused to consider the question ex parte, and it was allowed to stand over. The prior decisions on this point were as follows:

It was held by the Chancery Divisional Court in Ontario (Boyd, C., and Ferguson and Robertson, JJ.) in the case of *Regina* v. *Brierly*, 14 O.R. 525, that R.S.C. c. 161, s. 4, which is substantially the same as the section of the code under consideration, was quite within the jurisdiction of the Dominion Parliament.

Later, however, the Queen's Bench Divisional Court (Armour, C.J., and Falconbridge, J.) in the case of *Regina* v. *Plowman*, 25 O.R. 656, held exactly the contrary, basing their judgment upon the decision of the Court of Appeal in England in *Macleod* v. *Attorney-General of New South Wales*, (1891) A.C. 455. These two decisions of courts of co-ordinate jurisdiction left the question in considerable doubt.

This reference to the Supreme Court was brought on again

May 1st, and after argument was considered in elaborate judgments by at least two members of the Court. Their Lordships hold, reversing *Regina* v. *Plowman*, that these sections of the Code are clearly within the jurisdiction of the Dominion Parliament to legislate for the peace, order and good government of Canada.

Mr. Justice Gwynne says: "For my part I cannot entertain a doubt that the Parliament of Canada can pass an Act as effectual to affect Her Majesty's subjects, who being married and resident in Canada, go through a form of marriage out of Canada, having left Canada with the intent of going through such form of marriage, fully to the same extent as an Act in like terms passed by the Parliament of the United Kingdom could affect her Majesty's subjects resident in the United Kingdom, who, being married, should go through a form of marriage outside of the United Kingdom, having left any part thereof for the purpose of so doing."

Mr. Justice Girouard upholds the validity of these sections for the reasons given by the Chancellor in his judgment in *Regina* v. *Brierly*, and distinguishes the case of *Macleod* v. *Attorney-General of New South Wales*, on the ground that the provision (s. 275 (4)), which restricts the extra territorial application of our Act to persons who leave Canada with intent to go through the bigamous marriage, is wanting in the New South Wales statute which was under consideration in that case.

Chief Justice Strong, however, dissents entirely from this view, holding that the judgment in *Macleod* v. *Attorney-General of New South Wales* shows clearly that in the opinion of the Privy Council all such extra-territorial jurisdiction is denied to Colonial Legislatures.

DOWER IN MORTGAGED LANDS.

A widow's right to dower in lands of her husband mortgaged by him to secure his own debt, where she joins in the deed, to bar dower, was until the Act of 1895, a question of considerable doubt. This matter was referred to in these pages on a previous occasion (vol. 31, p. 114).

It was held by the Divisional Court (Falconbridge and Street, JJ.) in *Pratt* v. *Bunnell*, 21 O.R. 1, following the cases prior to the Act, that under the Dower Act, R.S.O. c. 133, ss. 5 & 6, where the mortgage was given to secure the unpaid purchase money of the land, upon sale under the power in the deed, the widow was entitled merely to dower in the surplus after payment of the mortgage. The decision rests on the principle that under these circumstances all the husband's interest in the land is his equity of redemption, and that therefore the wife is dowable out of the value of the equity alone. In the later case of *Gemmill* v. *Nelligan*, 26 O.R. 307, it was held by Robertson and Meredith, JJ., that where the mortgage was given to secure not the purchase-money, but a loan to the husband, that then the wife was entitled to dower out of the surplus only, but to be computed, as to the amount, upon the whole value of the land as ascertained by the sale.

The principle of this decision is that in such cases the wife joining in the deed does so practically as surety for her husband, and is entitled to have the mortgage discharged by him or his estate before her dower is computed (see *Robertson* v. *Robertson*, 25 Gr. 486). As this latter decision deals only with mortgages to secure loans and leaves the prior case untouched, as an authority, where the mortgage is given for unpaid purchase-money, the result of the two is to attach to the Dower Act a totally different meaning according as it is applied to the two classes of mortgages.

To remedy this peculiar result the Act of 1895, c. 25, s. 3, was passed, which declared, following the above cases, that in the event of a sale by the mortgagee "the amount to which she (the wife) shall be entitled shall be calculated on the basis of the amount realized from the sale of the land, and not upon the amount realized from the sale over and

above the amount of the mortgage only. This section shall not apply where the mortgage is for the unpaid purchase-money of the land," and this section applies only to mortgages hereafter made.

This whole subject came up in Weekly Court on March 16th, in the case of *Smith* v. *Smith*, the facts of which were as follows: A father conveyed his farm to his son, who gave a mortgage back to secure an annuity to the father for life, and certain payments to the mortgagor's brothers, etc., the son's wife joining in the deed. Upon a sale of the land by the father under his power of sale, the wife claimed dower, computed on the whole proceeds of the sale. Chief Justice Armour held that the mortgage was given to secure unpaid purchase money, and that the widow was therefore entitled to dower in the surplus only. As to the amounts payable to the brothers and sisters of the mortgagor, there is a dictum of the Vice-Chancellor in *Wakefield* v. *Gibbon*, 1 Giffard 401, that such a payment cannot be considered as any part of the consideration to the father for his conveyance, and could therefore hardly be properly called purchase money; but this case does not appear to have been mentioned to the Chief Justice. The father having died, the widow's dower was computed on the surplus of the proceeds of the sale, after deducting the actual payments made to the father, and the capitalized value of the payments to be made to the brothers, etc., at the time of the sale.

LEGAL CIRCUMLOCUTION.

We are apt to think we have made considerable improvement in legal procedure since the days when Dickens held up to ridicule the circumlocution office, and yet a perusal of the recent case of *McDonald* v. *Dickenson*, 24 A.R. 31, must convince any unprejudiced person that after all our strivings after simplicity and expedition in the disposition of cases, we are still very far from having attained an ideal condition, so far as litigation is concerned.

Let us for a moment consider the history of this case. It was an action brought against a reeve of a township and two

other persons to recover damages sustained by the plaintiff by being thrown out of her carriage, owing to her horse having shied at a pile of tile drain pipes which had been left by the defendants, while rebuilding a culvert, by the roadside, without any covering. The action was first tried at the Spring Sittings at St. Thomas in 1893. The defendants raised the objection that they were fulfilling a public duty, and the placing of the tiles on the roadside was done by them in the performance of such duty, and that they were entitled to notice of action. The learned Judge ruled in favor of this contention and dismissed the action for want of notice of action. The case was carried to the Divisional Court (Armour, C.J. Q.B., and Falconbridge, J.), and the judgment of the Judge at the trial was reversed, and a new trial ordered: 25 O.R. 45. The case was then carried to the Court of Appeal, and the judgment of the Divisional Court was affirmed. The case accordingly came on for trial a second time on 10th February, 1896, when, on the answers of the jury to certain questions submitted to them, a judgment was given in favor of the plaintiff for $400. Now mark the next step in the legal drama: the case was again carried to the Court of Appeal, this time by the defendants, and in January, 1897, after four weary years of litigation, it is ultimately decided that the plaintiff had no right of action against any of the defendants, and the judgment in her favor is set aside and the action dismissed (Burton and Maclennan, JJ.A.—Osler, J.A., dissenting): 24 A.R. 31. Considering the comparative smallness of the amount of the claim, this appears to be a very deplorable result, and as Burton, J.A., very justly remarks, "it is not very creditable to our system of jurisprudence, that it has taken two trials, one motion to the Divisional Court, and two to this Court, before reaching this result." We think even stronger language might be justified, and that it is little short of an outrage on common sense, that it should have taken all that circumlocution to arrive at a final adjudication of the case.

It may be useful therefore to inquire in what way all this round-about method of determining the case might, and ought to have been, avoided.

If we were asked to point out where the crucial mistake was made, we should be inclined to say that it was on the occasion of the first trial. We are aware that it is often a great temptation to a judge of assize to decide a case on some preliminary point. So long as the case is cleared from the docket, there is an inclination to feel that all has been done that need be done. This method of disposing of cases by short cuts ought to be very cautiously exercised, if, indeed, it ought not be entirely abandoned. If the learned judge who first tried the case had refrained from ruling on the question of notice of action, and had required each party to give all his evidence, reserving the question of notice of action, the case would probably have taken a longer time to try in the first instance, but time would really have been saved to the litigants. Instead of the case drawing its slow and weary length through four years of a battledore and shuttlecock litigation, the Court would have been able to give the proper judgment without any second trial, because had the course we have suggested been adopted, the provisions of Rule 755 might have been invoked on the first appeal, and the case would then have been ended. Under the former practice at common law, if a wrong judgment was given at a trial, the only remedy was to obtain a new trial; and some judges seem anxious to perpetuate this antiquated practice, notwithstanding that under the present procedure it is possible to avoid it.

Judges seem occasionally to lose sight of the fact that it is a duty they owe to the public to administer the law in the way that is calculated to be least oppressive to the litigants. A desire to save judicial time and hurry through business by short cuts, may and does in some cases result in the most serious injustice to suitors. And we feel sure that it is only necessary to draw attention to the fact to induce our judges to pause before yielding to the temptation to take short cuts—more particularly in cases which must result in a new trial, if the short cut is afterwards found by an Appellate Court to be the wrong road.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

STATUTE OF FRAUDS—SECRET TRUST—PURCHASE AS TRUSTEE—PAROL EVIDENCE OF TRUST—EXPRESS TRUST—STATUTE OF LIMITATIONS—BANKRUPTCY OF TRUSTEE—LACHES.

Rochefoucauld v. *Boustead* (1897), 1 Ch. 196, is an important case, more especially because it may be said to give the quietus to *Bartlett* v. *Pickersgill*, 1 Eden 515, which for some time past has been regarded as doubtful authority, although not definitely overruled. The action was brought by the plaintiffs claiming to be cestui que trust, against the defendant claimed to be her trustee, and the object of the suit was to compel the defendant to account as trustee in respect of certain estates in Ceylon, in which the plaintiff had been interested as mortgagor, and which by arrangement between the plaintiff and defendant it was alleged the defendant had purchased from the mortgagees upon a secret trust for the plaintiff, subject to a lien in the defendant's favor for all moneys advanced by him for the purchase or subsequent working of the estates. The defendant claimed that he was the beneficial owner; that the trust alleged was not in writing, and he relied on the Statute of Frauds as a defence; that the plaintiff's claim was bound by the Statute of Limitations or by the defendant's bankruptcy, and by the laches of the plaintiff. The plaintiff, in order to prove the trust, relied on letters of the defendant and the parol evidence of the plaintiff and others, as affording evidence of its existence, and one of the principal questions argued was whether under *Bartlett* v. *Pickersgill* this parol evidence was admissible, and the Court of Appeal (Lord Halsbury, L.C., and Lindley and Smith, L.JJ.), came to the conclusion that that case was inconsistent with the later modern decisions, and was no longer law; that the statute does not prevent proof of a fraud, and that it is a fraud when land is conveyed to a person as trustee, and who knows it was so conveyed, to deny the trust,

and claim it as his own, and therefore the evidence was admissible, and they moreover held that the evidence established the trust alleged. The Court of Appeal also held that such a trust is "an express trust," within the definition given in *Soar* v. *Ashwell* (1893), 2 Q.B. 390 (see ante vol. 30, p. 17), and therefore not liable to be barred by the Statute of Limitations, or the bankruptcy of the trustee. The plaintiff had delayed for twelve years after the correspondence closed in which her right was denied, to bring the action, but there was evidence that she had done nothing actively to lead the defendant to suppose that she had given up her claim, and that she was impecunious, and it was held that the mere lapse of time was no bar, the trust being express.

PRINCIPAL AND AGENT—PRINCIPAL, LIABILITY OF FOR FRAUD OF AGENT—FRAUD ON COURT—FRAUDULENTLY OBTAINING PAYMENT OF MONEY OUT OF COURT— FRAUD —SOLICITOR—PROCEEDINGS TAKEN IN NAME OF SOLICITOR—RATIFICATION OF ACT OF AGENT—SOLICITOR, PARTNER.

Marsh v. *Joseph* (1897), 1 Ch. 213, was an interlocutory petition in an action for the payment back into Court of a sum of over $20,000 which had been fraudulently obtained out of Court on a proceeding fraudulently taken in the names of certain solicitors, Clear and Green, without their authority. It appeared that the perpetrator of the fraud, a man named Hales, who was an uncertificated solicitor, had in the name of Clear and Green as solicitors caused a petition to be presented to the Court, and by means of false affidavits caused an order to be made for the payment of the money in question out of Court; and by forging the indorsement on the cheque had succeeded in appropriating the money to his own use, and that after the money had thus been obtained out of Court, Hales had informed Clear, one of the firm of Clear & Green, that he had been taking some proceedings in his name and that a cheque for his costs therefor was lying at the Paymaster-General's, and without being informed, or instituting any inquiry as to the nature of the proceedings, Clear, although protesting against the name of his firm having been used without permission, had received and cashed the cheque for the costs, £15, out of which he paid Hales £10 14s. 6d., which the latter represented had been paid to counsel, and

handed the balance, £4 5s. 6d., to his partner, Green, who kept the books of the firm, and who placed it to the firm's credit. Subsequently, on the fraud having been discovered, and Hales having been convicted of the fraud on his own confession, the persons really entitled to the money thus fraudulently obtained presented the petition praying that the money might be restored, and on the request of the Commissioners of the Treasury, the solicitors, Clear & Green, were cited to appear, and an order was asked to compel them to refund the whole amount fraudulently obtained, and Kekewich, J., being of opinion that if the solicitor had promptly inquired into the matter when the information was given to Clear of the proceedings having been taken in his firm's name, so much of the fund as was then on deposit in a bank, and which was afterwards withdrawn, would probably have been recovered, held that the solicitors were liable to make good that portion of the fund so withdrawn from the bank which, including the £15 above-mentioned, amounted in all to £85. From his order both the petitioners and respondents appealed, the petitioners claiming that the solicitors were liable for the whole amount improperly obtained out of Court, and the solicitor Clear contending he was not liable for anything except £15, and Green contending that he was only liable for the £4, 5s. 6d. The Court of Appeal (Lord Russell, C.J., and Lindley and Smith, L.JJ.) disagreed with Kekewich, J., and came to the conclusion that in order to constitute a binding adoption of unauthorized acts, the person alleged to have adopted them must have full knowledge of what those acts were, or there must be such an unqualified adoption that the inference may be drawn that he intended to take upon himself the responsibility for such acts, whatever they were; and it being established to the satisfaction of the Court in this case that Clear & Green knew nothing of the fraud, and had no reason to suspect its commission by Hales, they could not be said either to have had knowledge of the acts of Hales, or to have intended to adopt them, whatever they were, and could not, therefore, be said to have adopted or ratified them. The Court of Appeal also considered that prompt action in disowning the proceedings on

the part of Clear & Green would not have saved any part of the fund, and on the contrary that it was probable that it might have led to the loss of over $9,500 which still remained in the bank when the fraud was discovered, and which was recovered. The Court of Appeal therefore gave effect to the respondent's appeal and held Clear only liable for £15, and Green, his partner, only for the £4 5s. 6d.

PRACTICE—COSTS—SEVERING IN DEFENCE—APPORTIONMENT OF COSTS—APPEAL—JUDICATURE ACT, 1873, S. 49—ORD. LXV. R. 1; (ONT. JUD. ACT (1895), S. 68)—(ONT. RULE 1170).

In re Isaac, Cronbach v. *Isaac* (1897), 1 Ch. 251, Kekewich, J., had deprived a trustee who had severed in his defence from his co-trustee, of costs, by directing that but one set of costs should be taxed, and that they should be paid to the co-trustee; from this order the trustee appealed, and the Court of Appeal (Lindley, Smith and Rigby, L.JJ.) held first, that the costs of a trustee are not "left to the discretion of the Court," within the meaning of the Judicature Act, 1873, s. 49 (Ont. Jud. Act, 1895, s. 68, Ont. Rule 1170), and that therefore an appeal lay from the order giving the whole of the costs to the respondent co-trustee; and secondly, that a trustee ought not to be deprived of costs, merely on the ground of his having severed in his defence, without giving him an opportunity to explain the reasons therefor so that the Court may be able judicially to decide whether or not the severance was improper. The Court of Appeal being of opinion that a reasonable ground for the severance had been shown, therefore varied the order of Kekewich, J., directing that the one set of costs allowed to the trustees should be apportioned, but so as to give the appellant only the costs applicable to the work done by him alone.

VENDOR AND PURCHASER—PURCHASER LET INTO POSSESSION BEFORE COMPLETION—EJECTMENT—RECEIVER—RESCISSION—MOTION FOR DELIVERY OF POSSESSION.

Cook v. *Andrews* (1897), 1 Ch. 266, was an action brought by a vendor for the rescission of the contract of sale, and for recovery of possession of the leasehold property, the subject of the contract. By the contract in question it was provided that possession should be given to the purchaser on payment of a specified portion of the purchase money, he undertaking

also to pay the rent and other outgoings, and also on taking possession to pay the cost of a new fence. The specified part of the purchase money having been paid, the defendant was let into possession, but he neglected to pay the rent and taxes or the cost of the new fence, and the plaintiff had to pay the rent and taxes to prevent a forfeiture. The plaintiff brought on the present motion to compel the defendant to deliver up possession forthwith in default of paying the amounts due under the contract; but North, J., was of opinion that as the action was for rescission of the contract, the relief now asked was in the nature of a claim for specific performance, which was inconsistent with the plaintiff's claim for rescission, and therefore could not be granted, but he permitted the notice of motion to be amended by asking for the appointment of a receiver, which appointment he made, so far as was necessary to provide for the payment of the rent and taxes now due, and the rent and taxes and other outgoings accruing due pending the action.

LANDLORD AND TENANT—FORFEITURE—BREACH OF COVENANT—NOTICE OF BREACH —ACTION TO RECOVER POSSESSION FOR BREACH OF COVENANT—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., C. 41), S. 14, SUB-SEC. 1; (R.S.O., C. 143, S. 11, SUB-SEC. 1).

In *Fletcher* v. *Nokes* (1897), 1 Ch. 271, the plaintiff, a landlord, claimed to recover possession of the demised premises for an alleged breach of covenant. The plaintiff had given the defendant a notice of the breach complained of, but the notice was in general terms, "you have broken the covenant for repairing the inside and outside of the the demised premises, Nos. 10 11, 12, 13 and 14 River St.," and the question was whether the notice was sufficiently specific in this respect to satisfy the Conveyancing and Property Act, 1881, s. 14, sub-sec 1, (see R.S.O., c. 143, s. 11, sub-sec. 1). North, J., held that it was not, and that it did not "specify the particular breach," as required by the Act, because it did not specify in which of the houses default had been made, or whether it had been made in all of them. He considered that the notice required ought to be such as would enable the tenant to understand with reasonable certainty what is the breach complained of, so that he may have an opportunity of

remedying it. It was then claimed that the plaintiff was nevertheless entitled to recover damages for the breach of the covenant, as the Act only applied to enforcing a right of re-entry, but North, J., held that the notice of action was a condition precedent to bringing the action, and that though a general claim for damages had been made by the plaintiff, no particulars had been given, and he refused to try an issue as to the state of repair of the several houses, and dismissed the action with costs.

SOLICITOR AND CLIENT — BILL OF COSTS, DELIVERY OF — TAXATION — AGENCY CHARGES.

In re Pomeroy, (1897) 1 Ch. 284, Stirling, J., held that when a country solicitor delivered to his client a bill of his costs, in which he charged a lump sum for the charges of his London agent, but failed to give the details thereof, the bill was an incomplete bill, the delivery of which for twelve months before any application was made to tax it, could not preclude the clients' right to have a proper bill in detail delivered and taxed, and that such charges could not be treated as a disbursement.

WILL — GIFT FOR LIFE — POWER TO TENANT FOR LIFE TO APPOINT AMONGST A CLASS — GIFT OVER IN DEFAULT OF APPOINTMENT — GIFT BY IMPLICATION — POWER COUPLED WITH TRUST.

In re Weekes' Settlement, (1897) 1 Ch. 289. A testatrix devised to her husband a life interest in certain real property, and gave him "power to dispose of all such property by will among our children." There was no gift over in default of appointment. There were children, but the husband died intestate. The children of the testatrix claimed that the power was one coupled with a trust, and there was an implied gift to them equally. Romer, J., however, decided that that contention could not prevail, and that before a gift could be implied in favor of the children there must be a clear indication in the instrument creating the power that the donor intended it to be regarded as a trust, and as there was nothing in the will to indicate any such intention, a gift in favor of the children in default of appointment could not be implied, and therefore he held that the testatrix's heir-at-law was entitled.

REPORTS AND NOTES OF CASES

Province Ontario.

COURT OF APPEAL.

Quebec.] [March 24.

BEAUHARNOIS ELECTION CASE.

BERGERON *v.* DESPAROIS.

Controverted election—Preliminary objections—Service of petition—Bailiff's return—Cross-examination—Production of documents.

A preliminary objection filed to an election petition was that it had not been properly served. The bailiff's return was that he had served it by leaving a copy "duly certified" with the sitting member. By Art. 56 C.C., a writ or other document is served by giving a copy to the person on whom service is to be effected, certified by the prothonotary, attorney or sheriff, and it was claimed that the return in this case should have shown by whom the copy was certified. On the hearing the counsel for the sitting member wished to cross-examine the bailiff as to the contents of the copy, without producing it, but was not allowed to do so.

Held, that the bailiff's return was good. Art. 78 C.C., only requires a return that he had served a copy, and the words "duly certified" were superfluous.

Held, also, that counsel could not cross-examine the bailiff as to the contents of the copy served without producing it or laying a foundation for secondary evidence.

Appeal dismissed with costs.

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

Choquet, for respondent.

Practice.] [April 27.

SMITH *v.* MASON.

Costs—Infants—Next friend—Costs out of estate or shares.

The plaintiffs, infants suing by a next friend, claimed against their father and the executors of a will a forfeiture by their father of his share of the testator's estate, and that they had become entitled to it. The action was occasioned by facts which, if they occurred, were done by the legatee after the testator's death. The action was successful in the High Court, but was dismissed on appeal to the Court of Appeal.

Held, that the costs should not be made payable out of the testator's estate, nor out of the share of the infant's father, but should be paid by the next friend, without prejudice to his claim for indemnity, out of the shares of the infants whenever they should come into possession.

In general a next friend is in the same position as any other litigant, and receives or pays costs personally as between himself and the defendants.

Foy, Q.C., for the appellants, the executors.

Ritchie, Q.C., for the plaintiffs.

Moss, Q.C., for the defendant, J. C. Smith.

HIGH COURT OF JUSTICE.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [March 1.

MERCHANTS BANK *v.* HENDERSON.

Promissory note—Payable at particular place—Necessary time to have funds to answer—Presentment.

When a promissory note is made payable at a particular place it is the duty of the maker to have the funds necessary to answer the note at such particular place, and to keep them there until they are called for by the holder of the note.

The plaintiffs, the holders of a promissory note payable at a particular place, obtained a waiver of protest from the endorser without presentment at the place named.

In an action on the note against the maker, although it was shown that at the date the note matured there were sufficient funds at the place named (a banker's office) to meet the note, as well as at the time the banker failed, still as sufficient funds had not been kept there all the time until presentment, the plaintiffs were entitled to judgment.

Judgment of the First Division Court of the County of Frontenac affirmed.

Smythe, Q.C., for the appeal.

Britton, Q.C., contra.

Mr. Cartwright, Official Referee. [March 18.

CURRIE *v.* SQUIRES.

Change of venue—Motion by plaintiff—Balance of convenience.

Motion by defendants to change venue from Toronto to Lindsay: cross-motion by plaintiff to change it to Whitby. Cause of action, which was for libel and slander, arose near Lindsay, where all parties then lived. But plaintiff having moved to Toronto, laid the venue there. It appeared that four of plaintiff's and all of defendants' witnesses lived near Lindsay, but two of plaintiff's witnesses lived in Toronto.

Held, doubtful whether venue could be changed on the application of the plaintiff except under such circumstances as those in *Mercer* v. *Massey*, 16 P.R. 171.

Held, that there was no authority to change venue to such an intermediate place as Whitby.

Held, also, acting on analogy to Rule 1463, that where four of plaintiff's and all of defendant's witnesses reside where the cause of action arose, the balance of convenience is in favor of that county, and the venue will be changed if defendants desire it. Costs in cause: extra costs of witnesses occasioned by change of venue to be paid by defendants; plaintiff to have leave to appeal and to serve notice of trial for Lindsay without prejudice to said appeal.

J. H. Moss, for defendants.

N. B. Gash for plaintiff.

Mr. Cartwright, Official Referee. [March 18.

LEASK *v.* HELLYARD.

Adding parties—Service by posting up.

Action to set aside a will on the ground of undue influence. Plaintiff, who is one of the next of kin to deceased, moves to add other next of kin. Present defendant objects that as to such defendants these proceedings being, in the High Court, should be commenced by writ as provided in Rule 224. No one appears for proposed defendants, though served with notice of motion.

Order made adding them as defendants; statement of claim and copy of this order to be served on them, and statement of defence to be put in within eight days, otherwise all further proceedings may be served on them by posting up.

Scott, Q.C., for plaintiff.

Masten, for present defendant.

ARMOUR, C.J.] [March 20.

FREEBORN *v.* FREEBORN.

Action on covenant in mortgage—Statute of Limitations—Dower in partitioned lands.

Motion by plaintiff for judgment on the pleadings in an action against the administrator, the widow and the heirs-at-law of a deceased mortgagor, the action being upon the covenant in the mortgage, and to have it declared that the lands had been effectually partitioned between plaintiff and intestate. The plaintiff and intestate were tenants-in-common, but partitioned, and intestate made a mortgage on his half, which is now sued on.

On behalf of the widow and the heirs-at-law it was argued that as more than ten years had elapsed since the last payment of interest, the Statute of Limitations, R.S.O., c. 111, s. 23, barred the action both as to principal and interest, the mortgage containing the usual acceleration clause. In support of this *Hemp* v. *Garland*, 4 A. & E. (N.S.) 519, and *Reeves* v. *Butcher*, (1891) 2 Q B. 509, were referred to. It was admitted that the case of *Allan* v. *McTavish*, 2 A.R. 278, was against this view, but it was argued that this case having been decided on the Act of 1877, which is amended in R.S.O., 1887, is not now law.

On behalf of the widow it was argued that she was entitled to one-sixth of each half of the land as dower.

For the plaintiff it was contended that the case is governed by R.S.O., c. 60, s. 1, being an action on a specialty, and not an action to recover "land or rent," under R.S.O., c. 111, s. 23, and that therefore the period within which action must be brought is twenty years. As to the widow's dower it was argued that the partition was a complete conveyance of the husband's interest in the half taken by the intestate, and that the widow had therefore no dower in that half.

Held, that the widow was clearly only entitled to dower in the divided half of the land to which her husband became entitled.

Held, that the plaintiff's claim upon the covenant was not barred by ten

years lapse of time. *Allan* v. *McTavish*, 2 A.R. 278, followed. If the words "out of any land" in the second line of s. 23, of R.S.O., 1887, c. 111, had been in the English Act, the decision in *Sutton* v. *Sutton*, 2 Chy. 511, would have been the other way.

Shepley, Q.C., and *Ebbels* (Port Perry), for plaintiff.

W. R. Riddell, for defendants, the widow and heirs-at-law.

Simpson (Bowmanville), for defendant administrator.

FALCONBRIDGE, J.] [March 27.

RE GOULDEN AND THE CORPORATION OF THE CITY OF OTTAWA.

Liquor License Act—By-law—Limiting licenses—When to be passed—"Year" —Calendar year—R.S.O. c. 194, s. 20.

A corporation passed a by-law on May 4th limiting the number of tavern licenses.

Held, that the word "year" means calendar year, and that the words "before the 1st March in any year" in s. 20 of the Liquor License Act, R.S.O. c. 194, mean in the months of January or February in any year, and the by-law was quashed with costs.

Haverson, for the motion.

H. M. Mowat, contra.

Mr. Cartwright, Official Referee. [March 29.

ONTARIO BANK *v.* SHIELDS.

Examination for discovery—Officer of corporation—Bank clerk.

Motion by defendant under Rule 487 for an order for examination of teller in plaintiff bank, the actior being to recover money alleged to have been paid out by the teller to defendant by mistake.

The cases of *Consolidated Bank* v. *Neilson*, 7 P.R. 251; *Odell* v. *City of Ottawa*, 12 P.R. 446, and *Coleman* v. *G.T.R.*, 15 P.R. 125, were referred to by defendant.

It was contended for the plaintiff that in the cases cited the officer examined was a person in authority, that here the teller was a mere clerk or servant, and that there is no authority to examine such a person: *Leitch* v. *G.T.R.*, 13 P.R. 369, and *Rosenheim* v. *Silliman*, 11 P.R. 7.

Held, on the authority of *Leitch* v. *G.T.R.*, 13 P.R. 369; *Webster* v. *City of Toronto*, 15 P.R. 21; *Coleman* v. *City of Toronto*, 15 P.R. 125, that the teller not being in any position of power or authority is not such an officer as may be examined under the Rule.

Motion dismissed. Costs in cause.

On appeal to ROSE, J., in Chambers, this ruling was upheld.

F. C. Cooke, for defendant.

J. H. Moss, for plaintiff.

FALCONBRIDGE, J.] [March 31.

RE SHANACY & QUINLAN.

Restraint on alienation—Absolute—Devise on condition.

Petition by vendor under R.S.O., 1887, c. 112, for an order in respect of objections to title made by purchaser.

A testator devised real estate to two grandchildren (naming them), "their heirs and assigns forever," and provided as follows: "And I further will and direct, and it is an express condition of this my will and testament that none of the devisees herein . . . that is to say neither my said grandchildren nor their trustees, nor the said . . (another devisee) shall either sell or mortgage the lands hereby devised to them."

Held, that the restraint on alienation being absolute and unqualified, was invalid.

Held, also, that the grandchildren being the only children of the testator's deceased children, could make title as heirs at law.

A. E. H. Creswicke, for the vendors.

Geo. A. Radenhurst, for the purchaser.

ROSE, J., In Chambers. [April 3.

DOHN *v.* GILLESPIE.

Action on foreign judgment—Defence of fraud—Perjury.

Motion by defendant by way of appeal from order of local judge at Barrie allowing plaintiff to sign judgment under Rule 739 in an action upon a foreign judgment, on the ground that the foreign judgment was obtained by fraud and perjury.

Plaintiff contended that the allegations of defendant were insufficient to bring the case within *Hollender* v. *Ffoulkes*, 26 O.R. 61; *Abouloff* v. *Oppenheimer*, 10 Q.B.D. 295, and *Vadala* v. *Lawes*, 25 Q.B.D. 310, nothing being charged against the plaintiff himself, but the alleged perjury being that of a witness in the foreign court.

Held, that there was no evidence to show any fraud on the part of the plaintiff or that the evidence alleged to be false was so to the knowledge of plaintiff.

Appeal dismissed with costs.

R. D. Gunn, (Orillia) for defendant.

W. H Blake, for plaintiff.

BOYD, C.] [April 20.

LEWIS *v.* DOERLE.

Will—Charitable bequest—Validity of—Lands in Ontario—Foreign lands—Debts and testamentary expenses—Liability for—Realization.

A testator, domiciled in a foreign country, died in 1891, possessed of certain lands and personal estate in that country, and also of lands in Ontario. His personal estate was insufficient to pay his debts. By his will, after specific bequests and devises, he gave the residue of his estate, real, personal

and mixed, wherever situated, to his trustees, to promote, aid and protect citizens of the United States of African descent in the enjoyment of their civil rights, or in case of such trust becoming inoperative, to his heirs-at-law.

Held, that the devise of lands, so far as Ontario was concerned, was void and inoperative.

2. That the trustees held the lands to the use of the heir-at-law until satisfaction should be made thereout for the charges thereon of debts and testamentary expenses, and the heir-at-law was entitled to a conveyance thereafter.

3. That the Ontario lands were liable to contribute pari passu with the other lands for the payment of debts and testamentary expenses.

4. That the proportion chargeable on Ontario lands might be raised by sale of an adequate part, or the rents might be applied therefor.

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

Moss, Q.C., for the defendants.

STREET, J.] [April 21.

CITY OF KINGSTON *v.* KINGSTON ELECTRIC R.W. CO.

Contract—Enforcement of—Municipal corporations—Street railways—Running cars—Specific performance—Mandamus—Action—Injunction—Declaration of right.

The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of the agreement between them, set out in the schedule to 56 Vict., c. 91 (O.).

Held, that the agreement was one of which the Court would not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendants' railway under the agreement in question, in all its minutiæ, for all time to come.

Bickford v. *Chatham*, 16 S.C.R. 235, followed.

Fortescue v. *Lostwithiel and Fowey R. W. Co.*, (1894) 3 Ch. 621, not followed.

2. Nor would it be expedient to grant a judgment of mandamus for the performance of a long series of continual acts involving personal service and extending over an indefinite period.

3. The prerogative writ of mandamus is not obtainable by action, but only by motion.

Smith v. *Chorley District Council*, (1897) 1 Q.B. 532, followed.

4. To grant an injunction restraining the defendants from ceasing to operate the part of their line in question, would be to grant a judgment for specific performance in an indirect form.

Davis v. *Forman*, (1894) 3 Ch. 654, followed.

5. Nor was there any object in making a declaration of right under s. 52, sub-sec. 5, of the Judicature Act, 1895, where the terms of the contract were plain and were confirmed by statute, and the only difficulty was that of enforcing them.

John McIntyre, Q.C., for the plaintiffs.

Whiting, for the defendants.

OSLER, J.A.] [April 22.

TOOGOOD *v.* HINDMARSH.

Jury notice—Striking out—Legal and equitable issues—Irregularity—Discretion.

Where both legal and equitable issues are raised by the pleadings, a jury notice cannot be regarded as irregular.

Baldwin v. *McGuire*, 15 P.R. 305, distinguished.

Where it is apparent that an action should be tried without a jury, a Judge in Chambers will strike out the jury notice as a matter of discretion.

L. G. McCarthy, for the plaintiff.

W. H. Blake, for the defendant.

BOYD, C., In Chambers. [April 24.

IN RE GEROW *v.* HOGLE.

Prohibition—Division Court—Procedure—Issue of blank summons—R.S.O. c. 51, s. 44.

The issue by the clerk of a Division Court of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, though contrary to the provisions of s. 44 of the Division Courts Act, R.S.O. c. 51, does not affect the jurisdiction of the Division Court, nor afford ground for prohibition, but is a matter of practice or procedure to be dealt with by the Judge in the Division Court.

G. H. Stephenson, for the primary debtor and garnishee.

DuVernet, for the primary creditor.

BOYD, C., In Chambers. [April 27.

IN RE CLAGSTONE AND HAMMOND.

Land Titles Act—R.S.O., c. 116, ss. 61, 131—Cautioner—"Interest"—Appointee of purchaser—"Owner"—Implied revocation of appointment.

The provision of the Land Titles Act, R.S.O., c. 116, permitting registration of cautions against registered dealings with lands, s. 61, applies to "any person interested in any way" in the lands.

Held, that, as the Land Titles Act relates mainly to conveyancing, whatever dealing gives a valid claim to call for or receive a conveyance of land is an "interest" within the scope of the statute; and an appointee or nominee of the purchaser of an interest in lands has a locus standi as cautioner; and where such an appointee registered a caution as "owner," and there was no doubt of the substantial nature of his claim, his caution was supportable as against any objection in point of form, by virtue of s. 131.

Held, also, that an action brought by the original purchaser, after the registration of her appointee's caution and pending proceedings to set it aside, for specific performance of a contract to convey to her the interest, in respect of which she had made the appointment, did not, under the circumstances in evidence, put an end to such appointment.

George Ross, for the registered owner.

Moss, Q.C., for the cautioner.

BOYD, C.] [April 27.

CROFT *v.* CROFT.

Discovery—Rule 928—Examination under—"Transfer" by judgment debtor.

A judgment debtor had made a transfer of his property, after the debt sued for was incurred, to a mortgagee of the land of his wife, which had the effect of giving a benefit to the wife by reducing the incumbrance.

Held, that the judgment creditor was entitled to an order under Rule 928 for the examination of the wife as a person to whom the debtor had made a "transfer" of his property; but quaere as to the scope of the examination.

W. N. Ferguson, for the judgment creditor.

A. B. Armstrong, for the judgment debtor.

BOYD, C.] [April 29.

IN RE CLEMENT AND DIXON.

Arbitration and award—Extending time for making award—R.S.O. c. 53, s. 43—Voluntary submission—Award already made—"Good cause."

The Court has jurisdiction under R.S.O. c. 53, s. 43, to enlarge the time for making an award upon voluntary submission after the making of the award; and it is "good cause" for so enlarging that the arbitrators themselves, pursuant to their powers under the submission, did all they could to enlarge, but were unable at the time to get the original submission whereon to make the indorsement as to enlargement.

J. C. Hamilton, for Thomas Dixon.

Aylesworth, Q.C., and *Kilmer*, for R. B. Clement.

BOYD, C.] [May 1.

HUTHNANCE *v.* TOWNSHIP OF RALEIGH.

Parties—Misjoinder of plaintiffs—Rule 324—Striking out—Leave to bring new action—Ante-dating writs—Terms—Statute of Limitations.

Upon the defendants' application, in a case of misjoinder of plaintiffs, under Rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff who shall proceed, and that the names of the others be struck out.

But there is no power to direct that the rejected plaintiffs shall be allowed to issue writs of summons for their respective causes of action against the defendants, nunc pro tunc, as of the date when the writ in the original action was issued; there is no power to alter the date of the process.

Clarke v. *Smith*, 2 H. & N. 753; *Nazer* v. *Wade*, 1 B. & S. 728, and *Doyle* v. *Kaufman*, 3 Q.B.D. 7, 340, followed.

Nor can a term be imposed that in the new actions the defendants be restrained from setting up the Statute of Limitations.

Smurthwaite v. *Hannay*, (1894) A.C. 494, 506, specially referred to.

H. J. Scott, Q.C., for plaintiffs.

E. D. Armour, Q.C., for the defendants.

COUNTY COURT OF PRINCE EDWARD.

REG. EX REL. HUDGIN *v.* ROSE

Municipal election—County Court jurisdiction—Municipal Act, 1892, s. 188.

County Courts have no jurisdiction to try election cases under Municipal Act, 1862, s. 188, and proceedings must be instituted in the High Court.

[PICTON, Feb. 15.—MERRILL, Co. J.

Application was made before the Judge of the County Court of the County of Prince Edward, in Chambers, for an order or fiat under the above section, with a view of contesting the validity of the election of one George Neison Ross, as a county councillor for the said county for the year 1897.

The following preliminary objections were taken: (1) That the County Court in which the proceedings were instituted had no jurisdiction. (2) That the proceedings were wrongly entitled. (3) That the affidavits in support of the motion could not be read, as they had not been mentioned in the notice of motion.

Wright, for the application.

Widdifield, contra.

MERRILL, Co. J.: In view of the opinion I have formed as to the matter of the first objection, it will not be necessary to discuss the others.

As to jurisdiction, Mr. Wright relies upon the authority of certain statements in Holmested & Langton's work on the Practice under the Judicature Act and Rules. At page 810 of that book, in the notes under R. 1038, the case of *Dougherty* v. *McClay*, 13 P.R. 56, is cited as an authority for the statement that "if the proceedings are taken before a Judge of the County Court they must be styled in County Court." A reference to the case itself, however, will show that that point was not considered. The proceedings there were in the High Court, and the decision was simply that a County Court Judge had not then any authority, as such, to give leave under R. 1038 to serve notice of motion to initiate quo warranto proceedings, etc., and that he had no authority at all to act in proceedings of that nature as a Local Judge of the High Court, that power being expressly excepted in s. 41.

Again, on the same page of the work referred to it is stated that "when the Junior Judge of the County Court is officiating it would seem that he is to grant the leave to serve the notice of motion in cases brought in the County Court." And the case of *Reg. ex rel. McDonald* v. *Anderson*, 8 P.R. 241 is cited. The decision in that case, however, appears merely to relate the power of a County Court Judge in Term time to grant a fiat, and has no reference to County Court jurisdiction. And the writ in that case was issued from the office of the Deputy Clerk of the Crown.

In a note at the foot of p. 817 of the work referred to, after speaking of the forms being entitled in the High Court, the authors say, "but where the Judge of the County Court gives leave under 52 Vict., c. 36, s. 46, to serve the notice of motion, this and all other proceedings must be entitled in the County Court," etc. But the statute quoted does not, I think, furnish any authority for such statement. S. 46 enacts that the Judge of the County Court shall

have the same jurisdiction as a Judge of the High Court to try, etc.; and no jurisdiction appears to have been conferred upon the County Court itself by that section.

Now at the time of the decision in *Dougherty* v. *McClay* it seems quite clear that the County Court had no jurisdiction. At p. 57 it is said. "The action or proceeding was one in the High Court always." This was in March, 1889. If the County Court now has jurisdiction, from what source did it derive it; or how has it been conferred? Giving the County Court Judge, either as such, or as Local Judge of the High Court, power or authority to try the matter would not, of course, confer on the County Court any increased jurisdiction. The County Court Judge has always had this power under s. 187 of the former Act (R.S.O., 1887), and all the cases decided since then, so far as brought to my notice, either show or imply that the sole jurisdiction, so far as institution of proceedings is concerned, rests in the High Court.

S. 187 of the Act of 1892 is similar to that of R.S.O., 1887, and ss. 189, 207, of the present Act seems at least to imply that the proceedings must be in the High Court. And Rule 1386 (rescinding Rules 41, 1289 and 1380) show simply what jurisdiction a Judge of the County Court shall have as Local Judge of the High Court, and has no reference to County Court jurisdiction.

I think I must therefore hold that the County Court has no jurisdiction in the present matter, and that the proceedings have been wrongly instituted, and I dismiss the motion but without costs, as the applicant has been led into the error (if such it is) by relying upon what would reasonably be considered good authority.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [March 9.

RE ESTATE OF CUNNINGHAM.

Petition for administration de bonis non—Assets omitted from inventory—Adverse possession—Statute of Limitations.

On the settlement of the estate of the deceased it was found that the sum of $2,188.15 was due to E.W.D., the surviving administrator, but that there were no assets out of which the same could be paid.

The petitioner, who was acting administrator of the estate of E. W. D., applied to the Court of Probate for the County of Hants for administration de bonis non of the estate of C., alleging that at the time of his death C. was interested in certain property, gypsum rocks and quarries which escaped the notice of his administrators, and had not been included in the inventory of his estate.

Held, affirming the judgment of the Probate Court, that petitioner was entitled to the administration prayed for.

Held, also, that the Court consider or deal with the questions whether the right of C. to the property had been lost by adverse possession, or whether petitioner's right of action was barred by the Statute of Limitations.

R. L. Borden, Q.C., and *W. McDonald*, for appellant.

A. Drysdale, Q.C., for petitioner.

Full Court.] [March 9.

MACK *v.* MACK.

Partner winding-up firm's business—Compensation—Commission to executors.

On appeal from judgments settling terms of order for accounting, and as to Referee's report,

Held, inter alia, that a partner is not entitled to compensation for winding up the business of the firm.

Also, that in determining the amount of compensation to be awarded to executors under the statute, the commission of five per cent. mentioned must be treated as the maximum amount, and should not be allowed where the amount of the estate is large in proportion to the time and trouble required in connection with its settlement.

H. McInnes, for plaintiff.

W. B. A. Ritchie, Q.C., for defendant.

RITCHIE, J.
In Chambers. [April 14.

IN RE MOORE.

Collection Act of 1894—Committal by Commissioner under—Jurisdiction—Release of party committed—Terms imposed.

One Moore was committed to jail by a Commissioner of the Supreme Court, acting under the provisions of the Collection Act, 1894, c. 4, and now applied for his discharge under R.S. (5th series), c. 117.

Held, that the jurisdiction of the Commissioner must appear on the face of the warrant.

Held, also, that the Commissioner had jurisdiction in two cases only, viz: (*a*) when the judgment was for a debt, and (*b*) where it was for a wilful or malicious breach of contract, or for a tort.

Held, also, that the warrant was insufficient, the ground stated being merely that the "said debtor contracted said debt without having at the time any reasonable expectation of being able to pay the same," instead of alleging that the judgment was for a debt due from the said H.C.M. to the plaintiffs, and that the debtor contracted said debt without having at the time any reasonable expectation, etc.

Held, also, that the contention that the warrant was in the words of the form could not prevail, as the form must vary to suit the circumstances of each particular case, and the expression "said debt," as used, could not be construed to mean the judgment just previously mentioned, which would include damages, the distinction being clearly drawn by s. 9, which was the only authority for the issuing of the warrant.

Held, also, that under R.S. c. 117, s. 10, in giving relief from the im-

prisonment, the Court was precluded from imposing any terms upon the party committed, except in relation to the keeper of the jail, who would be exempted from any civil action in respect of the imprisonment.

C. H. Cahan, for the judgment creditor.

F. F. Mathers, for the judgment debtor.

RITCHIE, J. }
In Chambers. } [April 14.

PAYZANT *v.* LAWSON.

Overholding tenant—Question of tenancy in dispute will not be determined summarily on affidavit—Costs.

Plaintiff held a mortgage on property in the city of Halifax, occupied by tenants of the defendant, among whom was C. The mortgage was foreclosed and the mortgaged premises were conveyed to plaintiff by sheriff's deed. Plaintiff thereupon demanded possession from C., who was not a party to the suit, of the portion of the premises occupied by him, which C. refused to give, and an application was made at Chambers, summarily, for an order requiring C. to give up possession. The motion was opposed by C., who stated on affidavit that he had become a tenant of plaintiff under an agreement entered into with plaintiff's agent, who was authorized by plaintiff for that purpose. The affidavit was supported by the production of receipt for two months' rent. Plaintiff admitted receipt of the rent, but replied that C. was allowed to go into possession on the understanding that he would go out whenever he was required to do so.

Held, that under these circumstances there was no jurisdiction to hear and determine the matter on affidavit in a summary way, but the procedure would be under the Act in relation to tenants overholding, or by action to recover the possession of the premises.

Order refused with costs.

J. A. Payzant, for plaintiff.

F. T. Congdon, for the tenant,

RITCHIE, J., }
In Chambers. } [April 14.

WEATHERBE *v.* WHITNEY.

Interrogatories as to information and belief—Where necessary to answer—Servants and agents—Striking out questions where irrelevant, etc.—Where questions are premature.

A party interrogated is bound to make enquiries, and to give his information and belief only in cases where the transactions enquired about are those of his servants and agents, and where he is interrogated as to such information and belief, and not where he is merely asked what he himself knows, 17 Q.B.D. 110.

A party interrogated can decline to answer and may move to strike out interrogatories as scandalous, irrelevant, oppressive, immaterial, or not put bona fide, but the onus of showing this is upon the party interrogated.

In a case where partnership, agency, etc., are in controversy, many questions which might be relevant on the final disposition of the cause, will be held premature and not material until the questions of partnership and agency are decided.

Order made allowing certain interrogatories, and striking out others.

R. L Borden, Q.C., for plaintiff.

W. B. Ross, Q.C., for defendant.

MEAGHER, J., In Chambers. [April 14.

RICHMOND, C.B., ELECTION PETITION.

FLYNN *v.* GILLIES.

Extension of time for service—Services of order for exhibiting original or certified copy—Whether necessary—Failure to do so does not invalidate service—Irregularity in signing order—Effect not given to—Affidavit—Requirements as to swearing—Certificate of Commissioner—Inference from.

An order was made in this case extending the time for service of the petition twenty days beyond the prescribed period. The service of the petition was now attacked because, as was alleged, the order extending the time was not properly signed, and, in the second place because the original or an authenticated copy of the order was not exhibited to the respondent at the time the service was made.

Held, that such exhibition of the original, or an authenticated copy of the order, was unnecessary. But, assuming that a change was made in this respect by Order 65, R. 1,

Held, also, that failure to comply with the terms of the rule did not make the service of the order invalid.

The irregularity complained of in connection with the signing of the order was the use of a wrong initial in signing the name of the prothonotary and Clerk of the Court. It was not clear, as a matter of fact, whether or not the name was signed incorrectly in this respect, but admitting the existence of the mistake,

Held, that effect should not be given to the objection, as the order appeared to be regular in all other respects, and the fact that it was granted by the Court clearly appeared.

It was further objected that the affidavit verifying the petition was not regularly sworn, as the petitioner in swearing to the affidavit had merely held up his right hand, instead of taking the oath on the Book in the regular way.

Held, that this objection, if sustained, would have been fatal, it not appearing that the petitioner belonged to the class of persons permitted to affirm, or be sworn in any other than the regular way.

Held, also, that the taking of the affidavit having been certified by the Commissioner, in the absence of clear proof to the contrary, it must be assumed to have been regularly sworn.

F. T. Congdon, for petitioner.

W. B. A. Ritchie, Q.C., for respondent.

RITCHIE, J. In Chambers. [April 21.

RICHMOND, C.B., ELECTION PETITION.

FLYNN *v.* GILLIES.

Application for further extension of time for trial.

On the 16th day of March last, the time for the trial of the petition in this case was extended until the 30th day of April inst. Application was now made for a further extension of time until July 1st.

Held, notwithstanding it appeared that there had been a great deal of delay since the petition was filed, as it also appeared that the petitioner had not been unduly negligent in not bringing the petition to trial, the further extension of time now asked for should be granted.

Held, further, that the provisions of the Act were applicable, and that the requirements of justice rendered a further extension of time necessary.

F. T. Congdon, for petitioner.

W. B. A. Ritchie, Q.C., for respondent.

Full Court.]

THE QUEEN *v.* DIXON.

Crown case reserved—Threatening letter—Prima facie case—Jury allowed to compare writing in question with letter admitted to have been written by accused, and draw conclusions—Whether document once received need be tendered a second time—Proof of handwriting—Matters of form and substance—Evidence.

Indictment for sending a threatening letter to one McD. The letter purported to be signed by defendant, and was to the effect that he was in possession of evidence upon which he could have McD. fined for selling liquor after hours, and concluded with the words, "now if you like to settle the account between us it will be all right; send me a receipt for the amount by the morning, and all is well, otherwise you know what to expect." The evidence for the prosecution consisted of a letter written by defendant, in which B., the inspector of licenses, was informed of the sale of liquor after hours by McD.; a statement of the clerk who took the evidence on the trial of the charge, that, on that occasion, defendant was shown the letter upon which the present prosecution was based, and was examined in reference to it; and a statement by B. that after his arrest he had a conversation with defendant, in which the latter said he had written McD. a letter, "that if he would square up some matter between them all would be well; otherwise he would inform against him."

On this evidence the trial Judge received the letter tendered by the prosecution, being of the opinion that a prima facie case had been made out. Subsequently evidence was given for the defence showing that the letter defendant was accused of sending to McD. was the letter which the latter's counsel produced on the occasion of the former trial, and in reference to which defendant was then examined. The trial Judge, in charging the jury, after

all the evidence was in, allowed them to compare the letter admitted to have been written by defendant with the letter in dispute, and to draw their own conclusions from the comparison of the two.

Held, that he was justified in doing so.

Held, also, that the prisoner's admission that he had written a threatening letter to the prosecutor, the identification of the particular letter in the conversation with the license inspector, the examination of defendant in reference to the letter on the former prosecution, and the fact that the threat made had been actually carried out, furnished sufficient evidence to enable the jury to convict.

Per MEAGHER, J.: All that is necessary to entitle a jury to compare a doubtful or disputed writing with one admitted to be genuine, is that the two writings should be in evidence for some purpose in the cause.

Held, also. Assuming that the trial Judge erred in receiving the disputed writing at the close of the case for the prosecution, the evidence given subsequently clearly identified it, and connected defendant with it, and justified its submission to the jury.

Held, also. That a document once having been received, is before the Court at every subsequent stage of the cause, and there is no necessity for tendering it a second time.

Held, also. The reception of the letter by the Judge did not necessarily imply that the defendant had written it, or that it contained the elements necessary to show the defendant's guilt. These were questions exclusively for the jury.

Held, also. The defendant's guilt being evident, there was no substantial wrong or miscarriage of justice, and no reason for quashing the conviction or awarding a new trial.

Held, also. If the letter had been tendered a second time, in view of the evidence given subsequently, the trial Judge would have been bound to receive it, and the question therefore resolved itself into a mere matter of form, not involving any question of substance.

Per WEATHERBE, and HENRY, JJ., dissenting: The trial Judge erred in receiving the letter when he did, in the absence of proof of handwriting, and that it was improperly submitted to the jury.

Per WEATHERBE, J.: No writing can be compared by the jury unless it has first been received on prima facie evidence or admission of handwriting.

Held, also, where a conviction depends upon proof of handwriting by comparison, the comparison must be made in open Court.

Per HENRY, J.: Assuming that the letter was improperly admitted in the first instance, evidence received subsequently could not justify its being submitted to the jury, unless, after the giving of the additional evidence, it was tendered or received a second time.

Held, also, assuming that there was no ground for receiving the letter at the time it was received, and that the adjudication made by the trial Judge at that time was wrong, the fact that other evidence was given later, upon which he might have made a good adjudication, was immaterial.

Held, also, whether the accused should have been convicted on other evidence independently of the letter was a question for the jury and should not have been submitted for the opinion of the Court.

Held, also, in the absence of a direct and unmistakable enactment, the

Court should not, upon a case reserved, affirm a conviction, because, in the opinion of the Court, there is sufficient good evidence to support a verdict, where material evidence has been improperly received.

J. W. Longley, Q.C., Attorney-General, for Crown.

C. S. Harrington, Q.C., for defendant.

Province of New Brunswick.

SUPREME COURT.

Full Court.] [April 27.

EX PARTE THOMAS PATCHELL.

C. T. A. conviction- Sale to soldiers—Exemption.

Held, that a sale of liquor at the canteen of No. 4 Co., Royal Regiment of Canadian Infantry, at Fredericton, by a waiver thereof, to a member of the 71st Battalion in uniform, during the period when said battalion was assembled in camp for annual drill, was exempt from the operation of the Canada Temperance Act, said canteen having been established and being managed as provided by s. 15 of the Queen's Regulations, to which regulations the Court held the R.R.C.I. corps was subject, as well as the 71st Battalion, during the period of their annual drill. Vide s. 28 Militia Act, sub-sec. 3, and ss. 63, 73, 7. and 82; also Queen's Regulations, s. 1[illegible].

Rule absolute for certiorari to remove conviction.

A. J. Gregory, in support of rule.

C. W. Beckwith, contra.

Full Court.] [April 27.

EX PARTE QUIRK.

C. T. A. conviction— Service of summons—Prima facie evidence thereof.

Application for certiorari to remove a conviction under the C. T. Act on the ground of insufficient service or for want of service of the summons. The constable went to residence of defendant in the county where the offence was committed and knocked at the door. A young woman opened a window and asked him what he wanted. He said he wanted to see defendant. She replied that defendant was not home. The constable then said he had a paper for defendant, whereupon the young woman left the window and the constable threw the paper (copy of summons) into the room through the window. This was on Dec. 1st, 1896. The constable swore to these facts on the return of the summons on Dec. 4th, and also that he had tried to open the outside door of defendant's house at the time of service, but could not do so, and that the young woman appeared to be over sixteen years of age. He also swore that he had been at this house on a previous occasion on other business, and this same young woman had spoken of defendant as her mother. After taking the evidence of the constable the Justices adjourned the Court until Dec. 11th, and afterwards sent a registered letter to defendant containing a notice that the trial had been so adjourned. On Dec. 11th the Court again met and proceeded with

the evidence, and a conviction was made against defendant, who did not appear. Defendant obtained a rule nisi on her own affidavit stating that she was not at the place spoken of, and did not arrive home until Dec. 5th, and that she had no knowledge of the alleged delivery of a paper writing against her.

Held, that the evidence of service given by the constable was good prima facie evidence of service, and that defendant's affidavit was not sufficiently explicit, and that there had been sufficient notice to her of the time and place of hearing, and that being so, it rested upon the defendant to show affirmatively that she had not received the registered letter with the notice of adjournment. Rule discharged.

A. Le B. Tweedie, in support of rule.

D. Jordon, Q.C., contra.

McLEOD, J.
In Chambers. [March 18.

BONNELL *v.* WALLACE.

City Court of Saint John—Adjournment—Proof of presentment of note—Judgment by default—C.S. N.B., c. 60, s. 35.

Review from the City Court of Saint John. At the trial in the City Court on Angust 28th, 1896, the 27th being the regular Court day, both parties being present, an adjournment was made for four weeks. On September 24th, being the regular Court day for that week, the plaintiff obtained judgment by default. The day following defendant appeared at the Court to defend. The action was on a promissory note, payable on demand, and at a particular place. The plaintiff did not prove presentment.

Held, (1) That under s. 35, c. 60, C.S., evidence of presentment is unnecessary in an undefended case, but

(2) That a new trial should be had, as the magistrate had no jurisdiction to proceed with the case until the 25th of September.

Mont. McDonald, for plaintiff.

A. W. MacRae, for defendant.

TUCK, C.J.,
In Chambers. [April 12.

ACKERMAN *v.* MCDOUGALL.

Parish Court—Evidence—C.S. c. 60, s. 4.

Held, that the Act is obligatory that the Commissioner's return should show that the evidence taken at the trial had been read over and subscribed to by the witnesses.

Stockton, Q.C., for plaintiff.

Dunn, for defendant.

BARKER, J.,
In Equity. [April 20.

JEFFRIES *v.* BLAIR.

Practice—Foreclosure and sale—Judgment—53 Vict., c. 4, s. 130.

An offer to suffer judgment by default is not applicable to a suit for the foreclosure and sale of mortgaged premises.

White, Q.C., Solicitor-General, for plaintiff.

Alward, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

BOLE, LOC. J.] [April 5.

JONES *v.* MCDONALD.

Attachment of debts--Parol equitable assignment.

In this case a garnishing summons having been served on the garnishee the claimants came in and relied upon a parol agreement as an equitable assignment made to them, admittedly antecedent to the date upon which the garnishee summons was served, or had come to their notice, and also upon certain written requests to pay same, signed by the judgment debtor, and addressed and handed to the garnishee. It was contended on behalf of the judgment creditor that these orders are really bills of exchange, and that in the absence of a written acceptance thereof by the garnishee he was not liable to the claimants with respect thereof, but still continued liable to the judgment debtor alone, and that there was no equitable assignment thereof.

Held, that there was a parol equitable assignment to each claimant of a portion of the money in the garnishee's hands, of which assignment the garnishee had notice, and assented, the written documents having been given as a consequence of an independent parol agreement to assign.

Held, also, that an equitable assignment need not necessarily be in writing.

Province of Manitoba.

SUPREME COURT.

TAYLOR, C.J.] [April 22.

BOYDY *v.* ASHDOWN.

Bills of Sale Act, R.S.M., c. 10, s. 2—Chattel mortgage—Security for money.

Held, following *Matheson* v. *Pollock*, 3 B.C. R. 74, that if a bill of sale of goods and chattels apparently absolute on its face, is shown to have been really taken only as a security for money, it will be declared void as against the creditors of the bargainor.

James, for plaintiff.

Cooper, Q.C., and *Macdonald*, for different defendants.

Book Reviews.

Tariff of Costs under the Judicature Act, with Index to Tariff "A," Practical Directions and Precedents of Bills of Costs, by J. A. MCANDREW, one of the Taxing Officers of the Supreme Court of Judicature for Ontario; Toronto, Goodwin & Co., law publishers, 1897.

Whatever may be the result of recent discussions as to doing away with tariff costs, we have them for the present, and this being so, it is of great benefit to have the assistance of one so competent as Mr. McAndrew to help us in the framing of our bills of costs. No one could be found more capable of giving information on this branch of office work. It would take too long to enumerate the many useful forms that he gives, nor is it necessary, as the book will soon be in every lawyer's office in Ontario.

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NEW CURRICULUM.

FIRST YEAR.—*General Jurisprudence.*—Holland's Elements of Jurisprudence. *Contracts.*—Anson on Contracts. *Real Property.*—Williams on Real Property, Leith's edition. Dean's Principles of Conveyancing. *Common Law.*—Broom's Common Law. Kingsford's Ontario Blackstone, Vol. 1 (omitting the parts from pages 123 to 166 inclusive, 180 to 224 inclusive, and 391 to 445 inclusive). *Equity.*—Snell's Principles of Equity. Marsh's History of the Court of Chancery. *Statute Law.*—Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.—*Criminal Law.*—Harris's Principles of Criminal Law. *Real Property.*—Kerr's Student's Blackstone, Book 2. Leith & Smith's Blackstone. *Personal Property.*—Williams on Personal Property. *Contracts.*—Leake on Contracts. Kelleher on Specific Performance. *Torts.*—Bigelow on Torts, English edition. *Equity.*—H. A. Smith's Principles of Equity. *Evidence.*—Powell on Evidence. *Constitutional History and Law.*—Bourinot's Manual of the Constitutional History of Canada. Todd's Parliamentary Government in the British Colonies (2nd edition, 1894). The following portions, viz: chap. 2, pages 25 to 63 inclusive; chap. 3, pages 73 to 83 inclusive; chap. 4, pages 107 to 128 inclusive; chap. 5, pages 155 to 184 inclusive; chap. 6, pages 200 to 208 inclusive; chap. 7, pages 209 to 246 inclusive; chap. 8, pages 247 to 300 inclusive; chap. 9, pages 301 to 312 inclusive; chap. 18, pages 804 to 826 inclusive. *Practice and Procedure.*—Statutes, Rules and Orders relating to the jurisdiction, pleading, practice and procedure of the Courts. *Statute Law.*—Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.—*Contracts.*—Leake on Contracts. *Real Property.*—Clerke & Humphrey on Sales of Land. Hawkins on Wills. Armour on Titles. *Criminal Law.*—Harris's Principles of Criminal Law. Criminal Statutes of Canada. *Equity*—Underhill on Trusts. De Colyar on Guarantees. *Torts.*—Pollock on Torts. Smith on Negligence, 2nd ed. *Evidence.*—Best on Evidence. *Commercial Law.*—Benjamin on Sales. Maclaren on Bills, Notes and Cheques. *Private International Law.*—Westlake's Private International Law. *Construction and Operation of Statutes.*—Hardcastle's Construction and Effect of Statutory Law. *Canadian Constitutional Law.*—Clement's Law of the Canadian Constitution. *Practice and Procedure.*—Statutes, Rules and Orders relating to the jurisdiction, pleading, practice and procedure of the Courts. *Statute Law.*—Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

NOTE.—In the examinations of the Second and Third Years, students are subject to be examined upon *the matter of the lectures* delivered on each of the subjects of those years respectively, as well as upon the text-books and other work prescribed.