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In our last issue we published the names of those who, in addition to the present Benchers, were up to that time brought to the attention of their brethren as desirable candidates. A number of other names have since then been nominated by various law associations or by members of the Bar in their own localities. So far as we have heard these additional names are as follows:—J. T. Garrow, Q.C., Goderich; A. H. Macdonald, Q.C., Guelph; G. C. Gibbons, Q.C., London; A. H. Clarke, Windsor; F. R. Ball, Q.C., Woodstock; J. E. Farewell, Q.C., Whitby.

ANIMUS FURANDI.

We have received several comments, pro and con., as to the conclusion arrived at by one of our contributors on the case of *Reg.* v. *Ashwell*, (ante page 52). It has been suggested in one of these, that under sec. 305 of the Criminal Code, such an act as was in question in that case would be theft, on the ground that it would be "fraudulently and without colour of right converting" the sovereign received. In answer to this, it is suggested that inasmuch as when the sovereign was given, it was intended that the recipient should have a shilling, it cannot be said that when he changed the sovereign into twenty shillings, he did so "without colour of right"; for when he so converted it, it might be that he did so under a "colour of right," viz., to get the one shilling he was entitled to, so that the subsequent fraudulent determination to keep the balance, could not be deemed a fraudulent converting of the *sovereign* without colour of right; and further, that though, under the Code, he might be successfully indicted for stealing

nineteen shillings, that being in substance all that he actually did fraudulently appropriate to his own use, he could not be convicted of stealing a sovereign.

Whilst this argument is ingenious, we cannot see our way to accept it. If we understand the case of *Reg.* v. *Ashwell* correctly, the decision rested upon the Common Law, and it was held by one-half of the Court that it was necessary for larceny at common law that there should be a felonious taking and a felonious carrying away. Under sec. 305 of the Criminal Code, theft, as larceny is now designated, may be either "fraudulently and without colour of right taking," or "fraudulently and without colour of right converting," etc., and sub-sec. 3 provides that "it is immaterial whether the thing taken was taken for the purpose of conversion or whether it was at the time of conversion in the legal possession of the person converting."

The subject, of course, is not free from difficulty, but the law at present, as we understand it, is that a party seeking to borrow a shilling and having been handed a sovereign by mistake, and learning subsequently of the mistake, would render himself liable to a charge of larceny of the whole sovereign by converting any portion of that sovereign to his own use. It was the borrower's duty, immediately he discovered the mistake, to return intact the sovereign, which it was never intended should come into his possession. We are inclined to think, therefore, that in case he converted the sovereign by changing it and then used the proceeds, he could be convicted for the larceny of the whole sovereign, and not simply of the nineteen shillings, a portion thereof, and that a conviction for the larceny of the whole amount would be good in law. If, however, the borrower immediately returned the nineteen shillings, telling its owner that he had obtained the sovereign by mistake, and had changed it, using the shilling which he had sought to borrow, that would be an answer to a charge of larceny and would show that the man had never intended to convert to his own use anything more than that which he originally sought to borrow. But if, on discovering the mistake, he

converts the sovereign to his own use, the doctrine of *Reg.* v. *Ashwell* applies, and he is guilty, the animus furandi being held to exist at the time of the taking.

WAGERING CONTRACTS.

What these are has been said to be very accurately defined by Hawkins, J., in the well known case of *Carlill* v. *Carbolic Smoke Ball Company*, 92, 2 Q.B. p. 490, as follows: "A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and the other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either party. It is essential to a wagering contract that each party under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract. A bet on a horse race is the best illustration. A. backs Tortoise with B., for £100, to win the Derby. B. lays 10 to 1 against him, that is, £1,000 to £100. How the event will turn out is uncertain until the race is over, but each must be a winner or loser on the event. Under the wager neither has any interest except in the money he may win or lose by it. There may be a property in the horse, but that interest is altogether apart from the bet, and each party is in agreement with the other as to the nature and intention of the engagement."

Wagering contracts were good at common law, unless they were of mischievous or immoral tendency, or contrary to the policy of the law. Such were—(1) A wager which would give a party an interest in interfering with the course of justice, e.g., a wager on the conviction or acquittal of a man charged with forgery. (2) Where the ascertainment of

the fact would tend to make third persons the objects of public curiosity. In the case of *Good* v. *Elliott*, 6 T.R., 693, Buller, J., said:—"I am of opinion that a bet on a lady's age, or as to whether she has a mole on her face, whether she has a wart on her face (which is considered a nasty thing), is void." (3) Wagers which gave either party an interest in doing or procuring some unlawful act. Such is the well-known case of *Gilbert* v. *Sykes*, 16 East, 150, in which the plaintiff, a country parson, when dining with the defendant, the squire, made a bet at the defendant's own table, after dinner (as the report is careful to say). The conversation turned upon the probability of the assassination of Napoleon Bonaparte, then First Consul, and by the terms of the wager, the defendant received from the plaintiff 100 guineas on the 31st of May, 1802, in consideration of paying the plaintiff a guinea a day thereafter as long as Bonaparte lived. The defendant paid his guinea up the 25th of December, 1804, and then stopped, whereupon the plaintiff brought his action, but was held not to be entitled to succeed, on grounds of public policy, and on the ground, amongst others, that a person who was drawing a guinea a day as long as Napoleon lived, would be slow to perform the duties of a citizen in the event of Napoleon, as was threatened, invading England.

So numerous were the actions brought upon these wagers at one time, that the time of the court was wasted in adjudicating upon them, and the judges took upon themselves to postpone the trial of all actions of this kind until the rest of the business had been disposed of, or in the language of Bayley, J., in *Gilbert* v. *Sykes*, "until the courts had nothing else to attend to."

The practice of betting finally grew to such alarming proportions that the Legislature had to intervene, and the first statute restricting the power of enforcing gaming debts was passed, namely, 16 Charles II., chap 7. This statute, after reciting that all games and exercises should not be used otherwise than as innocent and moderate recreations, and not as a calling and means of livelihood, and that young people wasted their time and fortunes in the immoderate use of the same,

enacts, after providing against cheating and fraud, "in playing at or with cards, dice tables, tennis, bowls, skittles, shovelboard, or any cock-fighting, horse-races, dog-matches, or other pastimes or games whatsoever," that any person who should play at any game aforesaid or any other game, except with ready money, or who should make any bet or lose any sum of money upon such games to an amount over £100, should not be compellable to make good the same, and that all securities given for such gaming debts should be void.

This statute did not make betting illegal as long as it was unaccompanied by fraud, and all parties were at liberty to wager to any amount, provided they paid ready money. Securities for a less sum than the £100 were not invalidated by this Act.

The next statute is 9 Anne, c. 14, which carried the restrictions on private betting and gaming considerably further than the Statute of Charles II. It prescribed additional penalties for fraud, it made the maximum sum which a person might lose £10, instead of £100. It made it penal to exceed the limit thus laid down and provided that even if the sum lost were paid in cash, the loser might recover it back if over £10, and it provided that securities of every kind given for such purposes should be void. This statute does not deal with wagering generally, but only with gambling and betting at games, sports, or pastimes, and in the case of *Applegarth* v. *Colley*, 10 M. & W. 723, it was decided that the games and pastimes aimed at by both statutes are the same. Certain games have been expressly decided to be within the Acts, for example—horse-racing, dog-races, cricket and foot-racing, and, no doubt, football and lacrosse would be equally within the mischief of the statutes.

Inasmuch as the effect of these Acts was to make securities affected by them void, even in the hands of innocent holders for value, great hardship was caused to many innocent persons who had given value for bills and notes which had originally been given for gaming transactions. Thus in the case of *Shillito* v. *Theed*, 7 Bing. 405, the defendant had accepted a bill of exchange for £185, drawn on him for the payment of

a wager on a legal horse race. It was argued that as the plaintiff was a bona fide indorsee of the bill for value, it was not avoided in his hands, but Tindal, C.J., held that as the statute avoided the security to all intents and purposes, not even a bona fide indorsee for value could sue.

Next came the statute 5 & 6, Wm. IV., c. 41, which repealed the Act of Anne so far as regarded the avoidance of securities given for gaming debts, and declares that the consideration for which they are given is illegal, or in other words, puts such securities on the same footing as those given for an illegal consideration. The holder of such an instrument may enforce it, if after proof of its illegal inception, he is able to show that he gave value for it, and was ignorant of its origin; in other words that he was a bona fide holder for value.

The next step in England was to make all wagers void. This was done by the Act of 8 & 9 Vict., c. 109, sec. 18, which enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and that no suit shall be brought or maintained in any court of law or equity, for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." This enactment, however, was not to apply to contributions towards a plate or prize or sum of money to be awarded to the winner or winners of any lawful games, sport, pastime or exercise.

The Gaming Act of 1892 carried the law still further in regard to wagers, by making it impossible for a man to recover any commission or reward promised to him for making or paying bets, and by prohibiting the recovery of money paid in discharge of the debts of another.

By the statute of 8 & 9 Vict., the Acts of Charles II. and Anne were repealed, but the statute of Wm. IV. is not affected, and the result would seem to be in England that all contracts of wager are null and void, but as to any securities given, if the wager is upon a game or pastime, it comes with-

in the statute of William IV., and the security is held to be taken upon an illegal consideration, so that every subsequent purchaser may be called upon to show that he gave value for it, and if he can be proved to have known of the illegal consideration for which it was first given, he may still be disentitled to recover upon it.

But if the wager is not upon a game or pastime, but upon some other subject, the statute of Victoria is the only one that applies. That Act says nothing about securities, but merely makes the contract void. The security has simply no consideration, and therefore, though worthless as between the original parties to the wager, is good in the hands of a purchaser for value, even though he may have full knowledge that there was no consideration for the giving of the security.

The law of Ontario limps, pede claudo, far behind that in England. The statute of Anne has been held to be in force here, but not the statute of 5 & 6, Wm. IV. (See *Bank of Toronto* v. *Macdougall*, 28 U.C.C.P., p. 345). Therefore, a wager on a game or pastime, if exceeding £10, would be equally void here under the statute of Anne, and in England under 8 & 9 Vict.

But in regard to a bill or note given for the amount of a bet, it would be different. In England, the holder would be entitled to recover on it under 5 & 6 Wm. IV., provided he had no knowledge of the illegality; but in Ontario he could not recover because by the statute of Anne the security is void, and in this case it matters not that the bet was less than £10. In *Re Summerfeldt & Worts*, 12 O. R. 48, it was held that a cheque for $200, given in settlement of losses in matching coppers, was a security void under the statute of Anne, even in the hands of a bona fide holder for value, without notice.

With regard to a wager upon something other than a game or pastime, the law is also somewhat different in Ontario from what it is in England. As we have no general statute here similar to the 8 & 9 Vict., chap. 109, a wager upon something other than a game or pastime is legal, and the contract valid and enforceable, unless in those cases

in which some particular kind of wagering contract is dealt with by statute, or unless it is illegal at common law, by its tendency to indecency, or to wound the feeling of some third party, or as being opposed to public policy. In England, as before shown, such a contract is void, though a security given is enforceable in the hands of a subsequent holder for value.

Horse racing was held to be a game within the 9th Anne, and therefore any race for £10 a side or upwards was illegal, until the passing of 13 Geo. II., chap. 19, which has been held to be in force in Ontario. The immediate results of the previous statutes on the subject of betting had been that a large number of races were started for small prizes under £10, so as not to infringe the law, a practice which tended to deteriorate the breed of horses, and to remedy this the Act of 13 Geo. II. was passed. By this Act all horses were to be entered by their real names, and no person was to start more than one for the same plate, under pain of forfeiting the horse. No plate or sum was to be run for under the value of £50, and all horses must be entered by their owners under this Act.

Bets on horses not owned by the betters have been held void in this province.

In the case of *Sheldon* v. *Lowe*, 3 O.S. 85, Robinson, C.J., said: "Prima facie, every wager upon a horse race is illegal. Since 13 Geo. II., chap 19, it is very clear that betting on a horse race, if the horses ran only for that wager and were not the property of the persons betting, is an illegal wager." In *Battersby* v. *Odell*, 23 U.C.R. 482, the conditions of a match were as follows:—"W. A. Barnes matches his black mare 'Lady Burwell,' to trot Joseph Lamb's chestnut mare 'London Lass,' for $200 a side, mile heats, best three in five." Barnes acted for the plaintiff, who owned the black mare, and the match was made, and this paper signed by him and one Charles, who had no interest in the other mare. Barnes deposited $200 of the plaintiff's money with the defendant, as stake-holder, for which the plaintiff sued. It was held that the transaction was illegal under 13 Geo. II., chap 19, Charles not owning the horse to be run by him, and that the

plaintiff was not estopped from showing the other horse and the money to be his, and that he was entitled to recover. In the case of *Davis* v. *Hewitt*, 9 O.R. 435, the plaintiff and defendant agreed to match a colt owned by Davis against a colt owned by one S. Under the agreement, the stakes were deposited with P., who, default being made by Davis, handed over the amount which Davis deposited to Hewitt, though Davis had previously demanded it back. Davis sued Hewitt and P., to recover the deposit, and it was held that the race was an illegal one under 13 Geo. II., c. 19, one of the participants not being the owner of the horse he bet upon, and therefore Davis could not recover back from Hewitt the deposit money, being himself in pari delicto. It was held, however, that he could recover it back from the stake-holder who had improperly paid it over.

The result of these cases seems to be that the statute of Anne still applies to horse racing, and that any bet on a race over £10 is still void, and any bet is void unless there is also a match between the horses of at least $200, as required by 13 Geo. II., c. 19, because if not, the whole race is illegal, and a wager on an illegal game is contrary to public policy.

It is a matter for consideration as to whether it would not be desirable to follow the English legislation on this subject, and thus restrict, as far as possible, an evil of serious dimensions in Ontario at the present day, an evil which pulpit and press combine to deprecate and deplore with apparently very little result.

N. W. HOYLES.

CORRESPONDENCE.

PROVINCIAL LAW ASSOCIATION.

To the Editor of the Canada Law Journal.

SIR,—I desire to ask the profession throughout the Province to consider the advisability of forming a central or Provincial County Law Library Association, comprising the several County Law Library Associations of the Province, and having for its objects the establishing of Law Library Associations in the counties where not now established, and improving those already established, also securing law reforms and reforms beneficial to the profession. It has seemed difficult in the past to procure regulation or legislation beneficial to the profession, particularly outside of Toronto, because the profession has been unable to emphasize their desire in concerted united effort. For instance, it will be generally admitted by the profession, outside of Toronto, that they suffer an injustice in being required to pay the same fees to the Law Society as paid by the Toronto practitioners. This injustice might be removed by a united effort to reduce outsiders' dues or increase the grants to the Law Library Associations in the different counties. A great many of the profession have felt that they have suffered an injustice by reason of every Tom, Dick and Harry being allowed to do conveyancing and other similar work that should properly be done by the profession. Others have complained that ministerial officers in the outside counties sometimes trench upon the field of the lawyer. These, and other grievances arising from time to time, might be dealt with by the Association as above suggested, and the influence resulting from the united effort throughout the Province would certainly be more efficacious in accomplishing the desired result, whether asked for from the Judges, Benchers or Legislature, than at present.

Hoping that the members of the profession throughout the Province may be led to think and act upon this matter.

Yours etc..

Belleville, March 16, 1896. W. C. MIKEL.

DIARY FOR APRIL.

1 Wednesday.....Ontario Law School Easter vacation begins.
3 Friday.....*Good Friday.*
4 Saturday.....New Legislative Buildings at Toronto opened, 1893.
5 Sunday.....*Easter Sunday.* Canada discovered, 1499.
6 Monday.....*Easter Monday.*
8 Wednesday.....Hudson Bay Company founded, 1692.
11 Saturday.....Ontario Law School Easter vacation ends.
12 Sunday.....*1st Sunday after Easter.*
17 Friday.....Hon. Alexander Mackenzie died, 1892.
18 Saturday.....First newspaper in America, 1704.
19 Sunday.....*2nd Sunday after Easter.* Lord Beaconsfield died, 1881.
20 Monday.....Last day for notice for call and admission Ontario.
23 Thursday.....St. George.
24 Friday.....Earl Cathcart, Governor-General, 1846.
26 Sunday.....*3rd Sunday after Easter.* Battle of Fish Creek, 1885.
27 Monday.....Battle of York, 1813. Ontario Law School closes.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

[Dec. 9, 1895.

PROVINCE OF ONTARIO *v.* DOMINION OF CANADA AND PROVINCE OF QUEBEC, IN RE INDIAN CLAIMS.

Constitutional law—Province of Canada—Treaties by, with Indians—Surrender of Indian lands—Annuity to Indians—Revenue from lands—Increase of annuity—Charge upon lands—B.N.A. Act. sec. 109.

In 1850, the late Province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron Districts, by which the Indians' lands were surrendered to the Government of the Province in consideration of a certain sum paid down, and an annuity to the tribes, with a provision that "should all the territory thereby ceded" by the Indians "at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time."

By the B.N.A. Act, the Dominion of Canada assumed the debts and liabilities of the Province of Canada, and sec. 109 of that Act provided that all lands, etc., should belong to the several provinces in which the same were situate, "subject to any trust existing in respect thereof and to any interest other than that of the province in the same."

The lands so surrendered are situate in the Province of Ontario, and have for some years produced an amount sufficient for the payment of an increased

annuity to the Indians. The Dominion Government has paid the annuities since 1867, and claims to be reimbursed therefor by Ontario.

Held, affirming the award of the arbitrators, that the payment of the annuities was a debt or liability of the Province of Canada assumed by the Dominion under the B.N.A. Act.

Held also, reversing the said award, that the provision in the treaties as to increased annuities, had not the effect of burdening the lands with a "trust in respect thereof," or "an interest other than that of the Province in the same" within the meaning of said sec. 109, and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the annuities, but only liable jointly with Quebec as representing the said Province of Canada.

Appeal allowed with costs.

Irving, Q.C., *S. H. Blake*, Q.C., and *J. M. Clark*, for Province of Ontario.

Robinson, Q.C., and *Hogg*, Q.C., for the Dominion of Canada.

Girouard, Q.C., and *Hall*, Q.C., for Province of Quebec.

Quebec.] [Feb. 18.

DRYSDALE *v.* DUGAS.

Nuisance—Livery stable—Offensive odors from—Noise of horses—Damages.

An action for damages was brought by a householder against the proprietor of a livery stable adjoining his premises which, it was claimed, constituted a nuisance, from the offensive odors proceeding from it, and from the noise made by the horses at night. The pleas to the action were that the stable was a necessity to the residents of the place, and that it was built according to the most improved modern methods of drainage and ventilation. The trial judge found that the odors and noise were a source of injury and gave judgment for the householder with damages for past damage, and a separate amount for damages in the future unless the cause of offence were removed at a certain time. The Court of Queen's Bench affirmed the first holding, but reversed that as to future damages.

Held, GWYNNE, J., dissenting, that if the stable was offensive to the plaintiff he could recover damages for the inconvenience caused thereby, and the two Courts having found that the cause of offence existed, their judgment should be affirmed.

Appeal dismissed with costs.

Greenshields, Q.C., for the appellant.

Robidoux, Q.C., for the respondent.

New Brunswick] [Feb. 18.

CITY OF ST. JOHN *v.* CAMPBELL.

Municipal corporation—Repair of streets—Non-feasance—Elevation of sidewalk.

In the city of St. John, N.B., a sidewalk on one of the streets adjoining private property had been covered with asphalt whereby it was raised considerably above the level of the private way. After a time water dropping from a

house on the adjoining property wore away a portion of the sidewalk, and C. in stepping on it from the private property fell and was injured, and brought an action against the city for damages. At the trial of the action she was nonsuited, but the nonsuit was set aside by the full Court, and a new trial ordered.

Held, reversing the judgment of the Supreme Court of New Brunswick, (33 N.B. Rep. 131) that if the accident occurred from the level of the sidewalk being raised above that of the private way, it was not mis-feasance; and if from the street being out of repair it was mere negligence or non-feasance, and in neither case was the city liable. *Municipality of Pictou* v. *Geldert* (1893), A.C. 524, and *Sydney* v. *Bourke* (1893), A.C. 433, followed.

Appeal allowed with costs.

Pugsley, Q.C., and *Baxter*, for the appellants.

Currey, Q.C., for the respondent.

New Brunswick.] [Feb. 18.

ST. PAUL FIRE & MARINE INSURANCE COMPANY *v.* TROOP.

Marine insurance—Voyage policy—"At and from" a port—Construction of policy—Usage.

A ship was insured for a voyage "at and from Sydney to St. John, N.B., there and thence," etc. She went to Sydney for orders, and without entering within the limits of the port as defined by statute for fiscal purposes, brought up at or near the mouth of the harbour, and having received her orders by signal, attempted to put about for St. John, but missed stays and was wrecked. In an action on the policy evidence was given establishing that Sydney was well known as a port of call, that ships going there for orders never entered the harbour, and that the insured vessel was within the port, according to a Royal Surveyor's Chart, furnished to navigators.

Held, affirming the decision of the Supreme Court of New Brunswick, (33 N.B. Rep. 105,) that the words "at and from Sydney" meant at and from the first arrival of the ship; that she was at Sydney within the terms of the policy; and that the policy had attached when she attempted to put about for St. John.

Appeal dismissed with costs.

Currey, Q.C., for the appellant.

Pugsley, Q.C., for the respondents.

New Brunswick] [Feb. 18.

MOWAT *v.* BOSTON MARINE INSURANCE CO.

Marine insurance—Goods shipped and insured in bulk—Loss of portion—Total or partial loss—Contract of insurance—Construction.

M. shipped, on a schooner, a cargo of railway ties for a voyage from Gaspé to Boston, and a policy of insurance on the cargo, provided that "the insurers shall not be liable for any claim for damage on . . lumber . . but liable for a total loss of a part, if amounting to five per cent. on the whole

aggregate value of such articles." A certificate, given by the agents of the insurers when the insurance was affected, had on the margin the following memo., in red ink: "Free from partial loss unless caused by stranding, sinking, burning or collision with another vessel, and amounting to ten per cent." On the voyage a part of the cargo was swept off the vessel during a storm, the value of which M. claimed under the policy.

Held, reversing the decision of the Supreme Court of New Brunswick (33 N.B., Rep. 109), TASCHEREAU, J., dissenting, that M. was entitled to recover; that, though by the law of insurance the loss would only have been partial, the insurers, by the policy, had agreed to treat it as a total loss; and that the memo. on the certificate did not alter the terms of the policy, the words "free from partial loss" referring not to a partial loss in the abstract, applicable to a policy in the ordinary form, but to such a loss according to the contract embodied in the policy.

Held, further, that the policy, certificates and memo. together constituted the contract, and must be so construed as to avoid any repugnancy between their provisions and any ambiguity would be construed against the insurers from whom all these instruments emanated.

Appeal allowed with costs.

Palmer, Q.C., for the appellant.

Weldon, Q.C., for the respondent.

Exchequer Court.] [Feb. 22.

COOMBS *v.* THE QUEEN.

Railway Co.—Purchase of ticket—Rights of purchaser—Continuous journey—Right to stop over—Conditions on ticket.

C. saw an advertisement by the I. C. Ry. that on March 30th, 31st, and April 1st, excursion tickets would be issued at one fare, not good if used after April 1st. He purchased a ticket on March 31st, his attention not being drawn to conditions on the face of it, "good on date of issue only," and "no stop-over allowed," and he did not read them. He started on his journey on March 31st, and stopped over night at a place short of his destination, and took a train for the rest of the trip the next morning, when the conductor refused to accept the ticket he had and ejected him from the car as he refused to pay the fare again. He filed a petition of right to recover damages from the Crown for being so ejected.

Held, affirming the decision of the Exchequer Court (4 Ex. C.R. 321), that if the ticket had contained no conditions it would only have entitled C. to a continuous journey, and not have given him the right to stop over at any intermediate station, and he had still less right to do so when he had express notice that he could only use the ticket on the day it was issued and would not be allowed to stop over.

Appeal dismissed with costs.

Orde, for the appellant.

Newcombe, Q.C., Deputy Minister of Justice, for the respondent.

EXCHEQUER COURT OF CANADA.

Nova Scotia.] Jan. 20.

STRONG *v.* SMITH.

RE "THE ATALANTA."

Maritime law—Action by owner of unregistered mortgage against freight and cargo—Jurisdiction.

This was an appeal from judgment of MCDONALD, C.J., local Judge of Nova Scotia Admiralty District.

A mortgagee, under an unregistered mortgage of a ship, has no right of action in the Exchequer Court of Canada, against freight and cargo; and unless proceedings so taken by him involve some matter in respect of which the Court has jurisdiction, they will be set aside.

Appeal allowed with costs.

C. H. Cahan, for appellants.

E. McLeod, Q.C., for respondents.

BURBIDGE, J.] [Feb. 3.

ANDERSON TIRE CO. *v.* AMERICAN DUNLOP TIRE CO.

Patent of invention—R.S.C., c. 61, sec. 37, and amendments—Importation after prescribed period—Sale, effect of.

The defendants were the assignees of Patent No. 38284 for an improvement in tires for bicycles. They imported, after the period allowed by the Patent Act for importations of the patented invention to be lawfully made, some twenty-two tires in a complete and finished state, and fifty-nine covers that required only the insertion of the rubber tube to complete them. In the completed tires and in the covers in the state in which they were imported was to be found the invention protected by the said patent. These tires and covers were not imported by the defendants for sale, but to be given to expert riders to be tested, and for the purpose of advertising the tire so patented. However, one pair of such tires was sold through inadvertence or otherwise, but they were not imported for sale. The defendants had a factory in Canada where the invention patented was manufactured, and the value of the labour displaced by the importation complained of, only amounted to two dollars and eighteen cents.

Held, in accordance with the decisions in *Barter* v. *Smith*, 2 Ex. C. R. 455, and other cases upon the same enactment, which the Court felt bound to follow (sed dubitanter), that the facts did not constitute sufficient ground for cancellation of the patent under the provisions of the 37th section of the Patent Act.

Ross and *Rowan*, for the plaintiffs.

Lash, Q.C., *Cassels*, Q.C., and *Anglin*, for defendants.

BURBIDGE, J.] [March 2.

DAMASE LAINÉ & CIE *v.* THE QUEEN.

Contract for work and labour—Specifications—Interpretation of—Accident to subject-matter interfering with performance—Liability—Interest allowed against the Crown in cases arising in Province of Quebec.

The suppliants entered into a contract with the Crown to "place a second-hand, compound screw surface condensing engine" in a certain steamship belonging to the Dominion Government. That was the character of the work to be done as expressed in the body of the contract. However, by the specifications annexed to and forming part of the contract, it was stipulated, inter alia, that the old engine and paddle-wheels were to be broken and taken out of the steamer at the contractor's expense, the old material to be their property, and that they should stop up all the holes both in the bottom and side of the vessel; that the contractors were to make new any part of the engine or machinery, although not named in the specifications, which might be required by the Minister, etc., and to complete the whole ready for sea to the satisfaction of the Minister, etc.; the whole to be completed and ready for sea, on a full steam pressure of 95 lbs. per square inch, ready to commence running on a certain date; the whole work to be in first-class style and to the entire satisfaction of the engineer appointed to superintend the work. It was further agreed that the steamer was "to be put in perfect running order;" that the alterations of any parts of the steamer, for the purpose of fitting up the new works, and any openings or cuttings or rebuilding, were to be executed and furnished at the cost of the contractors; and any work done or alteration made in the deck, or any displacement of iron or wood work, was to be done and replaced to the satisfaction of the officer in charge, free of cost to the Department. It was also provided that the steamer was to have a satisfactory trial trip of at least four hours' duration, steaming full speed, before being handed over to the Department; that the contractors were to repair and make good any defect or damage that might occur to the new parts within four months after the final acceptance of the same by the Department.

The vessel was built of iron and very old. The suppliants had taken the old engine out of the hull, and had grounded her, preparatory to placing her in a dry dock in order to complete their work under the contract. Owing to the fact that the bottom of the vessel under the old engine seat had been eaten away by rust, it gave way and was broken in when she grounded. It was established that the accident did not occur through the negligence of the suppliants; but the Crown insisted that the suppliants were liable to repair this damage under the terms of the contract and specifications.

Held, 1. That there was nothing to show by the terms of the contract and specifications that either party at the time of entering into the contract contemplated that the portion of the steamship lying below and hidden by the engine seat would require renewing; and that the stipulation in the specifications that "the steamer was to be put in perfect running order," was intended to apply only to the work the suppliants had expressly agreed to do, and should not be extended to other work or things which they did not agree to

do, or to replace or renew. *Paradine* v. *Jane*, Aleyn 27; *Appleby* v. *Myers*, L.R., 1 C.P. 615; and *Taylor* v. *Caldwell*, 3 B. & S. 826, referred to.

2. (Following *St. Louis* v. *The Queen*, unreported) that interest may be allowed against the Crown upon a judgment on a petition of right arising ex contractu in the Province of Quebec in the absence of any express undertaking by the Crown to pay the same, or any statutory enactment authorizing such allowance.

3. But such interest should only be computed from the date when the petition of right is filed in the office of the Secretary of State.

Belleau, Q.C., for suppliants.

Newcombe (D.M.J.), Q.C., and *Hogg*, Q.C., for Crown.

BURBIDGE, J.] [March 2.

KIMMETT *v.* THE QUEEN.

Petition of right—Claim against the Crown in respect of services rendered to a committee of Parliament—Liability.

The Crown is not liable upon a claim for services rendered by anyone to a Committee of Parliament, at the instance of such Committee.

McLean v. *The Queen*, 8 S.C.R. 210, referred to.

E. A. Lancaster, for suppliant.

W. D. Hogg, Q.C., for the Crown.

Province of Ontario.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT.] [Jan. 2.

MILLIGAN *v.* SUTHERLAND.

Chattel mortgage—After acquired goods—Description—Sufficiency of.

Where persons carrying on business as manufacturers of hoops and staves at their factory at B., and also as general store keepers at L. in the same county, made a chattel mortgage conveying their goods and chattels to defendant, as set forth in two schedules annexed thereto, schedule A. covering the machinery and other goods and chattels in the factory, and which, after describing them, extended to all other goods and chattels thereafter purchased or manufactured or brought on the premises, whether for the business of stave manufacturing or not, or into or upon any other premises thereinafter to be occupied by the mortgagors, or either of them, it being understood that all logs, staves and bolts manufactured and timber brought on the mortgagors' premises or not, after the execution of the mortgage, should be covered thereby; the other schedule, covering the goods and chattels in the general store, and extending to goods and chattels thereafter brought into the said store premises, etc.

Held, that the provision in schedule B. to after-acquired goods, referred only to goods brought into the store in which the business was then being carried on, and not to goods brought into a store at B., to which that business

had been subsequently removed; neither would the provision as to after-acquired goods in schedule A. apply to the after-acquired goods brought into the store at B., for the reference thereto was only to goods of the character referred to in that schedule.

Crothers, for the plaintiff.

Aylesworth, Q.C., for the defendant.

DIVISIONAL COURT.] [Jan. 26.

SMITH *v.* TOWNSHIP OF ANCASTER.

Municipal Law—Toll roads—Control and repair.

A macadamized road, portions of which were in Townships of A and B, and under the control and management of the Minister of Public Works, was, under the powers contained in sec. 52 of 31 Vict., c. 12, (D) declared to be no longer under his control; and by sec. 53 it was declared that the road should be under the control of, and managed and kept in repair by, the municipal or other authorities of the locality. Subsequently the Township of B passed a by-law authorizing the Township of A, for the purpose of keeping the said road in repair, to take possession thereof, and, so long as they kept it in repair as a toll road, to retain possession; and the Township of A also passed a by-law assuming the said portion of the road.

Held, that both these by-laws were invalid; and consequently the Township of A had no authority to levy tolls on the part of the road so assumed.

Corporation of Ancaster v. *Durrand*, 32 C.P. 563, distinguished.

G. Lynch-Staunton, for the plaintiff.

Cassels, Q.C., and *Waddell*, for the defendants.

DIVISIONAL COURT.] [Jan. 26.

ABRAHAM *v.* HACKING.

Married woman—Contract—Separate estate.

Where, at the time of a contract being entered into by a married woman, the only property possessed by her consisted of her engagement and wedding rings, a silver watch and chain and her clothing,

Held, that this was not separate estate such as she could be deemed to have contracted with reference to.

Elliott, for the plaintiff.

Maybee, contra.

DIVISIONAL COURT.] [Feb. 19.

DENNIS *v.* HOOVER.

Life tenancy—Lease for life—Rent payable half yearly in advance—Death of life tenant during half year—Apportionment.

Under a lease made by a tenant for life, the rent was payable half yearly in advance. The life tenant died a few days after the rent came due. Part of the rent was remitted to her on the day she died, but was never received by her, but by her executor, and the balance was paid to the executor on his representation that he was entitled to it.

Held, that the rent must be deemed to have been received by the executor for the use of those entitled to it, and was therefore apportionable between the executor and the remaindermen.

Where the rent had been paid over by the executor to those entitled under the life tenant's will, the executor was held entitled to an order for repayment.

St. John, for the plaintiff.

McCulloch, for the defendant.

D. C. Ross and *J. Nason*, for the third party defendants.

DIVISIONAL COURT.] Feb. 20.

THIBADEAU *v.* GARLAND.

Insolvency—Purchase of debt after knowledge of insolvency—Right of set off.

After a trader had become insolvent and had absconded, but before he had made an assignment for benefit of creditors, a person indebted to the insolvent and aware of his insolvency, purchased from a creditor of the insolvent a debt due to the creditor by the insolvent, which he claimed to be entitled to set off against his debt to the insolvent,

Held, under R.S.O., c. 224, sec. 23, in connection with the general law of set off, he might properly do so.

McCarthy, Q.C., for the plaintiff.

Ritchie, Q.C., and *Masten*, for the defendant.

DIVISIONAL COURT.] [Feb. 20.

BROWN *v.* CARPENTER.

Appeal—Divisional Court—Discovery of new evidence—Motion for new trial—Judgment of County Judge—Right of appeal—Law Courts Act, 1895, sec. 44, s.s. 3.

Under sec. 44, sub-sec. 3 of the Law Courts Act, 1895, 58 Vict. c. 13 (O.), a motion for a new trial on the ground of discovery of new evidence must be made before the County Court, and, there being no provision giving any right of appeal, the judgment of the County Court Judge is final and absolute ; and this applies to a judgment given before the coming into effect of the said Act.

Quære, per FERGUSON, J., whether, where judgment was delivered and proceedings in appeal had been commenced before the coming into force of the Law Courts Act, it can be proceeded with.

Shepley, Q.C., and *J. E. Farewell*, Q.C., for the plaintiff.

McGillivray, for the defendant.

BOYD, C., STREET, J. } [Feb. 26.
MEREDITH, J. }

HENRY *v.* DICKEY.

Consideration for mortgage—Given by prisoner for value of stolen goods—Validity of—Promise to prisoner.

The defendant, a prisoner on the charge of larceny, sent for the agent of the owner and offered to give security by a mortgage on his property for the value of the goods stolen. The agent told him he would have to take his trial just the same, whether he gave a mortgage or not, and he could not release

him from his position even if he secured him, but he let him know that on making a settlement he would endeavor to get a mitigation of the sentence, which he afterwards did.

Held, (affirming a Local Master: STREET, J., dissentiente) that there was no promise and no agreement that there should be any interference with the course of justice, and no promise to stifle or suspend the prosecution, and no step taken which interfered with the due prosecution of the offender, and that the mortgage which was given was a valid security.

Per STREET, J.—The mortgage was obtained by promising, if it was given, endeavours would be made to have the punishment made as light as possible, and such a bargain is founded on an illegal consideration, and a security given in consequence of it cannot be enforced.

Hamilton Cassels, for the appeal.

Grierson, contra.

BOYD, C.
ROBERTSON, J. } [Feb. 26.

ROSE *v.* MCLEAN.

Trade name—Geographical designation—Injunction—Literary publication.

The plaintiffs being publishers of a journal devoted to the interests of the book-sellers in Canada, and called "The Canadian Book-seller," sought to enjoin the defendants from altering the name of the journal which they had been publishing for eleven years under the title "Books and Notions," to "The Canadian Book-seller and Stationer," and from selling it under the latter name.

Held, reversing the decision of MCMAHON, J., that the plaintiff was not entitled to the injunction sought for.

Per BOYD, C.—Two elements must co-exist in a case of this kind where the inhibition is without regard to the use of a common geographical name, the first of which was present in this case, but the second absent. The first is that the publication must have been such as to connect the proprietor with the publication in the mind of the trade or community interested, but further there must also have arisen in connection with such prior user of the geographical name, some secondary meaning attributable to the epithet which is sought to be appropriated—some secondary meaning connecting character or quality of the product. Here, however, the title "Canadian" in connection with "Bookseller" did not mean, so far as appeared from the evidence, any special kind of periodical or publication, but merely asserted the fact that the particular print, "The Book-seller," was a Canadian publication. A man cannot have monopoly or property in a geographical name as such.

C. Robinson, Q.C., and *LeVesconte*, for the motion.

Kappele and *Bicknell*, contra.

BOYD, C.,
ROBERTSON, J. } [Feb. 26.

PRIDE *v.* ROGERS.

Crown lands—Locatee—Jurisdiction—Statute of Limitations.

Certain land was located by the Crown to one Rogers, who left the Province in 1868, and was last heard of in 1877. The defendant, a son of Rogers,

had resided continuously on the property since 1881, cultivating and improving it. The plaintiff, a sister of the defendant, resided on the property off and on till 1887, when she went away. Rogers had two other children who had not been in possession of the land. This action was brought in 1895.

Held, that Rogers must be presumed to have been dead by 1884, and the defendant had acquired by the operation of the Statute of Limitations a good title as against the children who had not been in possession, but the plaintiff's claim as to one-quarter was as good as the defendant's, and in making partition the Crown should recognize the right of the defendant to the improvements.

The Statute of Limitations applied because the rights involved upon the record were merely private rights not affecting the pleasure or the soverignty of the Crown.

As both parties to these proceedings had put themselves upon the Court, and the whole case had been investigated without any objection to the jurisdiction to decree partition, the fee being in the Crown, no effect should be given to any such objection to the jurisdiction. Moreover, under R.S.O., c. 44, sec. 21, sub-sec. 7, there is jurisdiction to "decree the issue of letters patent from the Crown to rightful claimants," and declaratory relief may in a suitable case be given which will work practically the result of a partition of the property, if the Crown is willing to act upon the judgment of the Court.

Kingston, Q.C., for the plaintiff.

W. H. Blake, for the defendant.

ARMOUR, C. J., STREET, J.
FALCONBRIDGE, J. [March 16.

SPENCER *v.* GRAND TRUNK RY. CO.

Railways—Mail car—Posting letters on—Moving train—Invitation—Licensee—Post office department.

A person who posts a letter on a mail car attached to a train about to start, although the car is furnished with a slit for posting letters under instructions from the post office department, is a mere licensee.

The invitation to post, if any, is the invitation of the post office department and not the railway company.

Held, that the plaintiff, who in attempting to post a letter on a moving train, tripped and fell over a peg placed in the ground by the company and was injured, could not recover.

Judgment of MEREDITH, C.J., affirmed.

Maclaren, Q.C., for the plaintiff.

Osler, Q.C., for the Grand Trunk Ry. Co.

Wallace Nesbitt and *MacMurchy*, for the Canadian Pacific Ry. Co.

WINCHESTER, Master.
DIVISIONAL COURT. [Feb. 17. Mar. 16.

REGINA EX REL. SUTHERLAND *v.* LEVETT.

Municipal election—Returning officer—Refusal of vote to qualified elector—Awarding seat to relator—Municipal Act, s. 118.

Application to unseat the respondent from the office of town councillor, and to declare the relator entitled to the seat, on the ground that the clerk of

the town, who acted as returning officer at the election, refused to permit two legally qualified voters to take the proper oaths of qualification or to vote although they stated they wished to vote for the relator and intended to do so. Without these votes there was an equal number of votes for the relator and the respondent, and the returning officer gave his casting vote in favor of the respondent.

Counsel for the respondent admitted that he must be unseated, but contended that the relator should not be awarded the seat, and no costs should be given against the respondent. An order was made by the Master in Chambers unseating the respondent and declaring the relator entitled to the seat. Costs to be paid by the respondent. The following cases were referred to: *Reg. ex rel. Dundas* v. *Niles*, 1 U.C. Chamb. R. 198; *Reg. ex rel. Dillon* v. *McNeil*, 5 U.C.C.P. 137.

Aylesworth, Q.C., for the relator.

W. E. Middleton, for the respondent.

The respondent appealed from so much of the Master's judgment as awarded the seat to the relator. The Divisional Court, MEREDITH, C.J., ROSE, J., and STREET, J., allowed the appeal, and ordered a new election to be held.

MEREDITH, C.J.] [Dec. 29, 1895.

BAIN *v.* ANDERSON.

Master and servant—Action for wrongful dismissal—Indefinite hiring—Common law rule—Contract not under seal.

Action for damages for wrongful dismissal of the plaintiff, who had been in the employment of a certain company as superintendent of its factory.

Notwithstanding the statement of the law, found in certain text books and the earlier cases, that where no time is limited either expressly or by implication, for the duration of a contract of hiring or service, the hiring is considered, in point of law, a hiring for a year; the more modern cases have modified the law as so stated, and it is now pretty well settled that at all events as to many kinds of service there is no inflexible rule that an indefinite hiring is a hiring for a year, but the question is one of fact to be determined according to the circumstances of each particular case, and that in the absence of anything to qualify it, a jury may properly find as an inference of fact that the hiring is a yearly one.

Semble, it is also a question of fact whether such a contract of hiring is not subject to be put an end to by reasonable notice to be given by either of the parties to it, and as to what in the particular case is reasonable notice.

The fact that the employer in this case was an incorporated company, did not render it less liable under a contract inferred from the conduct of the parties. At one time the exceptions to the common law rule as to the liability of corporations upon contracts were very limited, being based upon the principle of convenience almost amounting to necessity, and applied to small matters of daily occurrence. A more liberal rule is applied in the modern

cases, traceable to the vast increase in the extent, importance, and variety of corporate dealings which has taken place in modern times.

Gibbons, Q.C., for plaintiff.

Osler, Q.C., and *McMullen*, for the defendants.

[Jan. 3.

MEREDITH, C.J.]

ONTARIO WESTERN LUMBER CO. *v.* CITIZENS TELEPHONE AND ELECTRIC CO.

Corporations—Contract not under seal—Trading company—Partly performed—Liability.

Contracts not under the corporate seal made with trading corporations relating to purposes for which they are incorporated, or, partly performed and of such a nature as would induce the Court to decree specific performance thereof if made between ordinary individuals, will be enforced against them.

Where, therefore, an electric light company, while they were making changes in their factory, entered into a contract by correspondence, merely for the use, at a specified amount, of one of the wheels in the plaintiffs' mill, which was used and a part payment made, the contract was held to be binding on it, and the plaintiffs entitled to recover the balance due, notwithstanding the absence of the corporate seal.

Ewart, Q.C., and *McLennan*, for the plaintiffs.

Langton, for the defendants.

[Jan. 3.

MEREDITH, C. J.]

SILLS *v.* WARNER.

Will—Devise to religious body—Minister's residence—Necessity for user as—Gift for school teacher's residence—Validity.

A testator by his will, made six months prior to his death, gave to his wife a life estate in a house and lot of land, and, by a subsequent clause, directed that after her death the property should go to the trustees for the time being of a named Presbyterian church for a manse, if required, or to be kept in good repair and rented for the benefit of the congregation thereof; and in case the said Presbyterian church should cease to exist, etc., and a Congregational church be organized in lieu thereof, then to the trustees of such Congregational church, for rental and benefit thereof, or for a parsonage. The widow died shortly before the commencement of this action, which was for the construction of the will, and the land had not yet been used for a manse, etc.

Held, that the devise was valid.

By another clause, certain other land was given to the trustees of a named common school section, on which a teachers' residence might be erected, or it might be rented for the benefit of the school funds, subject, however, to a condition of preserving and keeping in order an adjoining plot, etc.

Held, a devise for charitable purposes within the 9 Geo. II., c.. 36, and, not being excepted by any legislation from the operation thereof, was therefore void.

Clute, Q.C., for the plaintiff.

Warner, for defendant Warner.

Smoke and *Wilson*, (Napanee) for defendants Wilson, Carson & Amey.

Ruttan, for the Official Guardian.

Deroche, Q.C., for the defendants the School Trustees and the defendants the Trustees of the Presbyterian Church.

Preston, Q.C., for the several legatees.

Gibson, for the Attorney-General of Ontario.

MEREDITH, C.J.,] [Jan. 3.

HARPELLE *v.* CARROLL.

Distress—Withdrawal—Arrangement with tenant—Second distress—Fraud—58 Vict. c. 26, sec. 4—Construction of.

After a landlord had distrained for rent, he withdrew the distress under an arrangement made with the tenant, whereby the tenant gave him a chattel mortgage on the goods and chattels, the mortgage containing a provision that in case the mortgagee should feel unsafe or insecure, or deem the goods in danger of being sold or removed, the mortgage money should immediately become due and payable. The mortgagee, before the time for payment had elapsed, deeming himself unsafe, and the goods liable to be sold, and having ascertained that the mortgagee had fraudulently concealed from him the existence of a prior mortgage to the defendant, issued a second distress warrant to distrain, as well for the said rent as for another year's rent which had become due in the meantime.

Held, that the withdrawal of the first distress, not being a voluntary one, but under the special arrangement, did not prevent the landlord from making the second distress.

Semble, the second distress could be supported by reason of the first distress having been withdrawn through the tenant's fraud.

Sec. 4 of 58 Vict., c. 26, (O) does not preclude a right of distress, unless there is an express contract therefor contained in the lease; and in any event, the section is not retrospective.

Machar, for the plaintiff.

Smyth, Q.C., and *Deroche*, Q.C., for the defendant.

MEREDITH, C.J.] [Jan. 4.

BROOKS *v.* GIBSON.

Statute of Limitations—Trespasser—Possession—Tax title, R.S.O., c. 111 sec. 5, s-s. 4—Construction of.

A person claiming title by possession to land derived through prior trespassers, and by his own possession, can only acquire a title to the land of which there has been actual possession for the statutory period.

Sub-sec. 4 of sec. 5 of the Real Property Limitations Act, R.S.O., c. 111, requiring twenty years possession as to non-cultivated lands, only operates in favor of the patentee and those claiming under him, and not to a title acquired under a sale for taxes.

Hamilton Cassels, for the plaintiff.

E. G. Porter, contra.

MEREDITH, C. J.] [Jan. 6

DONNELLY *v.* AMES.

Ejectment—Evidence—Possession—Seisin—27 & 28 Vict. c. 29, sec. 1.

In an action for the recovery of land, proof of possession is prima facie evidence of title; and, in the absence of proof of title in another, is evidence of seisin in fee; but the plaintiff must recover on the strength of his own title; and if it be proved that the title is in another, even though the defendant does not claim under or in privity with such other, the plaintiffs' action will fail.

Where, in such an action, the plaintiffs claimed to have acquired a title thereto by possession, but which possession was merely that of a squatter, commencing in 1851, on land then patented and in a state of nature, such possession being without the knowledge of the patentee or those claiming under him,

Held, under 27 & 28 Vict., c. 29, sec. 1, that in order to create a good title by possession, forty years possession at least was necessary; and the action therefore failed as against the defendant in possession, though not claiming through or in privity with the patentee.

The plaintiffs claimed under the will of their father, which had never been registered; while the defendants claimed under a chain of title derived through conveyances by the successive occupants, which were duly registered.

Quære as to the effect of the Registry Act in such cases.

Walkem, Q.C., and *J. B. Walkem*, for the plaintiffs.

Shepley, Q.C., and *Mudie*, for the defendants.

ROBERTSON, J.] [Jan. 6.

RE ONTARIO FORGE & BOLT CO.

Auditor—Right to rank as clerk, etc.—Winding up Act.

An auditor employed in auditing books of a company does not come within the designation of "clerks and other persons having been in the employment of the company in or about its business or trade," so as to entitle him to the special privilege given by sec. 56 of the Winding up Act, R.S.C., c. 129, to be collocated in the dividend sheet for arrears of salary, or wages, etc.

Akers, for the application.

John Greer, contra.

BOYD, C.] [Jan. 22.

LONGBOTTOM *v.* CITY OF TORONTO.

Pleading—Notice under 57 Vict., c. 50, sec. 13 (O.)—Want or insufficiency of—Enquiry by judge—Defendants prejudiced.

The want or insufficiency of the notice under 57 Vict., c. 50, sec. 13 (O.), is no bar to an action if the judge is of opinion there was reasonable excuse, or that the defendant was not prejudiced.

Held, that it is proper practice for the defendant to set up want of notice

in case the statement of claim is silent on the point, and then the judge can go into the cases (if any), excusing the want or insufficiency, and as this was not done in this case, and the judge could not say that the defendants were prejudiced, a motion for judgment in favor of the defendants was refused.

A. M. Denovan, for the plaintiff.

H. L. Drayton, for the defendants.

BOYD, C.] [Jan. 22.

REGINA *v.* ROSE.

Municipal election—Personation—Conviction—Prior and subsequent enactment as to same offence—Repugnancy—55 Vict., c. 72, secs. 167 and 210 (O.).

When a clause in a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent clause in the same statute imposes a different penalty for the same offence which cannot be reconciled either as cumulative or alternative punishment, the former clause is repealed by the latter. This principle being applied to sections 167 and 210 of the Consolidated Municipal Act, 1892, a person convicted of personation under the former clause was discharged as illegally convicted on a return to a habeas corpus.

Robinson v. *Emerson*, 4 H. & C. 352, and *Mitchell* v. *Brown*, 1 Ell. & Ell., at p. 275, followed.

Murphy, Q.C., for the defendant.

J. R. Cartwright, Q.C., for the Attorney-General.

STREET, J.] [Feb. 18.

JARVIS *v.* CITY OF TORONTO.

Municipal corporations—Expenditure of public money—Contribution to costs of private action—Injunction.

A ratepayer having brought an action against a gas company on behalf of all the gas consumers of the city, for an account of moneys alleged to have been improperly obtained in the past by the company from the consumers of gas, and with the intent of reducing the price of gas to consumers, the defendants' Executive Committee reported in favor of authorizing the counsel to grant money to carry on the action and any other actions which might be brought by ratepayers where the Corporation was interested, or could have brought such action.

Held, that the plaintiff was entitled to an injunction to restrain any such payment by the defendants.

If the plaintiff had instituted the action upon the promise on the part of the defendants to indemnify him, it might well be that such a promise would, under the circumstances, have been within their powers; but voluntarily to pay him after litigation the costs which he had incurred, without any obligation to do so, would be ultra vires of the Municipal Council.

Shepley, Q.C., and *Lobb*, for the plaintiff.

Robinson, Q.C, and *McGregor*, for the defendants.

STREET, J.] [Feb. 20.

REGINA EX REL. HARDING *v.* BENNETT.

Municipal corporations—Municipal elections—Quo warranto—Disqualification—Interest in contract—Property qualification.

Quo warranto to unseat R. W. Bennett, who had been declared elected alderman for the City of London.

In 1892 the City Council passed a by-law exempting the property of the respondent's partnership from taxation, except as to school rates.

Held, the exemption not being founded upon any contract, but being an exemption without a contract as provided by 56 Vict., c. 35, sec. 4, there was no disqualification.

Regina ex rel. Lee v. *Gilmour*, 8 P.R. 514, distinguished.

Held also, as to property qualification, that the respondent was entitled to qualify upon his rating upon the assessment roll of 1895 as the joint owner of a freehold estate in the partnership property aforesaid, the three partners being rated for this property as freeholders to the amount of $10,000 : 55 Vict., c. 42, secs. 73 and 86.

Notwithstanding the exemption by-law above mentioned the partnership property remained liable to pay school rates, which, by 54 Vict., c 55, sec. 110, had to be levied by the municipality upon the taxable property within it ; nor did the amendment in 56 Vict., c. 35, sec. 4, debar the respondent from so qualifying ; for the words "exempt from taxation" in that section must be held to mean exempt from payment of all taxes, whereas the property of the respondent was not exempt from school taxes.

Hellmuth, for the relator.

Moss, Q.C., for the respondent.

STREET, J.] [Feb. 25.

RE HENDRY.

Division Courts—Warrant—"Backing"—Where arrest can be made—R.S.O., c. 51—ss. 242 & 243.

There is no authority for the "backing" of a Division Court warrant by a magistrate, and a defendant in a Division Court action cannot be arrested under a warrant issued under sec. 242 of the Division Courts Act, outside of the county in which the Division Court is situate from which the warrant issued.

History of ss. 242 & 243, R. S. O., c. 51, (Division Courts Act), considered.

F. Cook, for Hendry.

R. McKay, for the plaintiff.

Douglas Armour, for the gaoler.

WINCHESTER, Master.] [Feb. 24.

REGINA EX REL. PERRY *v.* ALEXANDER.

Municipal election—Leasehold qualification—Joint assessment.

It being necessary for a candidate for the office of town councillor, who desired to qualify on leasehold, to show that he was possessed of $1,200 of such

property, the respondent qualified upon two leasehold properties, one of which was assessed in his own name at $600, and the other to himself and one Hall at $1,000. The respondent leased the second property but sublet a small part thereof to Hall.

Held, that the assessor should have assessed each tenant of the second property, under sec. 21 of the Assessment Act of 1892, and that the property possessed by the respondent was sufficient, he owning $600 in his own name and three-fifths of $1,000 in the name of himself and Hall, making in all $1,200 leasehold. Motion refused and election confirmed. Each party to pay his own costs.

Sec. 86 Con. Mun. Act, 1892, *Regina ex rel. McGregor* v. *Ker*, 7 U.C.L.J. 67; Con. Assessment Act, 1892, ss. 20, 21, *Re McCulloch*, 35 U.C.R. 449, referred to.

Clute, Q.C., for the relator.

Aylesworth, Q.C., for the respondent.

WINCHESTER, Master.] [Feb. 27.

DAVIDSON *v.* COLUMBIAN FIRE PROOFING CO.

Writ of summons—Notice—Service—Foreign partnership.

On motion by defendants, a foreign partnership, residing in the United States, to set aside service of notice of writ of summons and statement of claim.

Held, that a foreign partnership residing out of the jurisdiction, and having no office within the jurisdiction, cannot be sued in the firm name in Ontario.

Dobson v. *Festi* (1891) 2 Q.B. 92, followed.

H. Cassels, for defendants.

D. C. Ross, for plaintiff.

WINCHESTER, Master.] [Feb. 28.

NEFF *v.* HASTINGS.

Pleading—Crim. con.—Embarrassing pleading struck out—Leave to amend.

In an action for crim. con. the plaintiff pleaded that before the marriage of the plaintiff and his wife the improper relations were commenced between the defendant and the plaintiff's wife, and were continued after the plaintiff's marriage. On motion to strike this paragraph out of the statement of claim, it was

Held that the paragraph should be struck out, but with leave to the plaintiff to amend. Costs to defendant in any event.

Perrin v. *Perrin*, 1 Addams 1; *Weedon* v. *Timbrell*, 5 T.R. 357; *Fitzgerald* v. *Fitzgerald*, 32 L.J.N.S., P.M. & A. 12, referred to.

Geo. Ritchie, for the defendant.

H. M. East, for the plaintiff.

[Mar. 13.

WINCHESTER, Master.]

SAMPLE *v.* MCLAUGHLIN.

Security for costs—Proceedings to stay action—Solicitor—Retainer.

Where persons residing out of the jurisdiction instituted proceedings to have an action in which they were plaintiffs stayed, or to have their names struck out as plaintiffs, on the ground that the solicitor had no instructions from them to bring such action,

Held, that the solicitor was not entitled to security for costs in such proceedings, although the applicants resided out of the jurisdiction and were not possessed of property within the jurisdiction.

Cochrane v. *Fearon*, 18 Jurist 558; *Re Percy*, 2 Ch. D. 531; *Watteen* v. *Billam*, 3 DeG. & Sm., 516; *Palmer* v. *Lovett*, 14 P.R. 415, referred to.

W. M. Douglas, for the solicitor.

D. Armour, for the applicants.

DIVISION COURTS.

FIRST DIVISION COURT, COUNTY OF PRINCE EDWARD.

WILSON *v.* DAYTON.

Division courts—Jurisdiction—Title to land—R.S.O. c. 51, sec. 69, s-s. 4.

In an action for rent of land the defendant alleged that there was an actual sale to him by the plaintiff (although no conveyance was made) and that he went into possession and made improvements thereunder. Although the defendant claimed only for damages for breach of contract of sale, not apparently insisting on any further claim of ownership, it was held that the title to land came in question within the meaning of the Division Courts Act, sec. 69, sub-sec. 4, and that therefore a Division Court had no jurisdiction.

[PICTON, February 10, 1896—MERRILL, Co. J.

This was a claim for rent of land. The defendant disputed the claim, and also counter-claimed for damages for breach of contract of sale of the land in question.

E. M. Young, for plaintiff.

J. A. Wright, for defendant.

MERRILL, Co. J.—It is first necessary to dispose of the question of jurisdiction. For although no notice under sec. 176 of the Division Courts Act, disputing the jurisdiction has been given, that has been held to be required only where some Division Court would have jurisdiction. See *Mead* v. *Creary*, 8 P.R. 374, 32 C.P. 1; *Re Knight* v. *Medora & Wood*, 14 A.R. 112: and *Re Graham* v. *Tomlinson*, 12 P.R. 367.

Sec. 69 of the Division Courts Act provides that "the Division Courts shall not have jurisdiction in any of the following cases." . . 4. "Actions for the recovery of land, or actions in which any right or title to any corporeal or incorporeal hereditaments, . . comes in question."

If this is applicable to the matter of the counter-claim, then, unless sec. 74 of the Act enables me, I cannot deal with the counter-claim in this Court. That section provides that "where, in any proceeding before a Division Court, the defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer, shall be given to the defendant upon any such counter-claim."

I have not been able to find any decision of material assistance to me in construing this section, and a somewhat careful examination of it has left me in doubt as to its meaning. In *Davis* v. *Flagstaff Silver Mining Co.*, 3 C.P.D. 228, the question of jurisdiction had reference only to the amount of the claim pecuniarily, and not to its character otherwise. Here it is not the amount claimed by the counter-claim that affects the jurisdiction, but its character as involving a question of title to land.

If all that portion of sec. 74 following the word "controversy" had been omitted, no difficulty of construction could have arisen. But to say that the court shall dispose "of the whole matter in controversy so far as relates to the demand of the plaintiff, and the defence thereto," and then to attach this rider, "but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim," is not this to place the matter back just where it was before?—at least, as to cases where title to land would come in question. Does the last quoted clause indicate the intention of the Legislature to confine the enlarged jurisdiction to cases formerly beyond it by reason merely of the amount or sum claimed as debt or damages being too large, but not to give jurisdiction in cases where Division Courts could not, before that, administer relief, such as where the right or title to land was involved?

I am of the opinion that such was the intention of the Legislature; that a fair construction of the section supports this view, and that if in this case a question of right or title to land is involved, this Court has no jurisdiction to deal with it. In *Re Crawford* v. *Seney*, 17 O. R. 74, the Division Court was held to have jurisdiction. There the plaintiff agreed to sell a parcel of land for a certain price; $10 of the purchase money was paid, and the defendant went into possession. After remaining in possession a considerable time, and not being satisfied to accept such title as the plaintiff could give him, he at length abandoned possession; and the owner then brought the action for use and occupation. The only dispute seemed to be whether the defendant had continued in possession as prospective purchaser, or had become a tenant of the plaintiff, and liable as for use and occupation, the title remaining in the plaintiff during the whole time.

Here the circumstances are somewhat different. The defendant alleges, not that there was merely an agreement for a sale, but an actual sale by the plaintiff to him, and that he went into possession thereunder, and made improvements, etc., and no conveyance having been made by the plaintiff as was agreed, the plaintiff entered into possession, whereby the defendant sustained damages, and counter-claimed accordingly.

From the wording of the counter-claim it might be inferred that the defendant has chosen to abandon all claim to any right or title in the land, leaving such undisputed in the plaintiff, and contents himself with a mere claim for damages. But the defendants' right to damages for breach of a contract of sale must necessarily depend upon a valid contract having been made. In that case the ownership or title (equitable, at least) would pass to, or vest in, the defendant. If not, then no such ownership passed, and the defendant would not, of course, be entitled to damages.

In either case, I would seem to be determining a question of title to or right in the land. The defendant having chosen to abandon all claim to right or title therein (if he has done so), would not relieve me of the necessity of determining such, in order to ascertain whether he were entitled to damages. In fact I would have to dispose of the same question that would be presented for decision by a superior Court, were the defendant asking for a decree for specific performance. This case, therefore, is apparently not governed by *Re Crawford* v. *Seney*, presenting some features not possessed by that case; and I find myself, though reluctantly, forced to the conclusion that this Court has no jurisdiction to try the matter of the counter-claim herein.

As to the plaintiff's claim, that being disputed by the defendant, and he contending that whatever sum he did owe, was as interest on the purchase money, and not as rent, it would appear that in order to determine this, I would first have to say whether the defendant held as tenant or owner, and thus the right or title to the land would, apparently, be brought in question.

It would seem desirable that Division Courts should have jurisdiction in all cases, even where the title to land should come directly in question, where the amount or sum claimed, or the value of the land, should not exceed a certain limit. It may be noticed that these courts already have jurisdiction in at least two cases in which the title to land may come in question. (1) In interpleader proceedings under certain circumstances. See *Munsie* v. *McKinley*, 15 C.P. 50. (2) Where damages are claimed, (not exceeding $20) for overflowing land for the purpose of driving logs or timber, etc., under powers conferred by The Timber Slide Companies' Act, "the action . . . may be brought in the Division Court, which shall have jurisdiction to hear, try, and dispose of the case, notwithstanding the question of any title to lands may be raised." (But the court shall not determine the matter of title, etc.) See 52 Vict., c. 16, sec. 13.

By sec. 158 of R.S.O., c. 44, where the defence or counter-claim involves matter beyond the jurisdiction of the court, provision is made for the transfer of the proceedings to the High Court. But that is only upon the application of a party to the proceedings. I cannot, ex mero motu, order such transfer.

Province of New Brunswick.

SUPREME COURT.

MCDONALD *v.* RESTIGOUCHE SALMON CLUB.

Deed of infant—Reasonable time to repudiate after obtaining majority.

Held that five and one-half years is an unreasonable time to wait after coming of age to decide whether a deed executed while under age shall be repudiated or not.

Held also, TUCK, J., dissenting, that where defendant in an action of ejectment claims title, ouster must be proved by plaintiff under 57 Vict., c. 10, sec., 66.

(EN BANC—FREDERICTON, Feb. 7.

This was an action of ejectment to recover possession of an undivided interest in a lot of land of which the plaintiff alleged he and the defendants were tenants in common. On June 4th, 1880, the Crown granted the land in question to John P. Mowatt and John M. Fraser as tenants in common. Fraser was at this time about 17 years of age. The lot in question fronts on the Restigouche river, and its principal value lies in the fishing privileges appurtenant to it. Soon after the grant issued Fraser's father entered into negotiations with one Winchester who sought to purchase certain lands for the defendants. The purchase price agreed upon was $33,000, but the land to be conveyed included the undivided interest of Fraser to the river front of the lot in question; the interest of Mowatt having been already secured by defendants. Fraser, at the request of his father, executed a conveyance to Winchester of his undivided half-interest in that portion of the lot in question lying between the road and the river front, leaving the title to an undivided one-half part in the residue of the lot in Fraser. This conveyance to Winchester was dated June 15th, 1880; Winchester immediately conveyed to the defendants and they continued in possession ever since. In November, 1889, Fraser executed a deed of his interest in the whole lot to the plaintiff, and it was under this deed that the plaintiff claimed. The plaintiff therefore claimed an undivided half part of the whole lot, and a tenancy in common with the defendants, while the defendants claimed the absolute title to that portion of the lot between the road and the river, and admitted the tenancy in common as to the residue. Nine years elapsed from the time of the conveyance from Fraser to Winchester and the date of the conveyance from Fraser to plaintiff; and over five years and a half from the time Fraser came of age until he conveyed to the plaintiff, four years of which Fraser's father was alive.

Two questions were left to the jury: (1) Whether at the time the deed was made to Winchester, Fraser represented himself to be of age. (2) Whether the time which elapsed from the time Fraser came of age until he gave the deed to the plainttff was an unreasonable time for him to take to consider whether he would repudiate the deed to Winchester or not. The first question the jury refused to answer, and to the second they answered "we do not think the time taken was unreasonable.

The trial Judge directed a verdict to be entered for the plaintiff on the issue of title for an undivided one-half portion of the lands lying between the road and the river; and directed the jury to find for the defendants on the

issue of ouster as to the remainder of the lot. Leave was reserved to the defendants to move to enter the verdict for them on the whole case ; and for the plaintiff to move to enter a verdict for them on the issue of ouster as to the whole or part.

Weldon, Q.C., for the defendants, moved the full court to enter a verdict for the defendants on the issue of title, contending that in point of law an unreasonable time had elapsed before Fraser repudiated the first deed ; that the question of unreasonableness is for the court and not for the jury ; that it was misdirection in the learned Judge to leave the second question to them, and that he should have directed a verdict for the defendants.

Pugsley, Q.C., and *Montgomery* for plaintiffs, contended that infants' contracts are void and voidable, and that as this deed is against the grantors' interest, it is void. They also contended that the plaintiff was not called upon to prove ouster where that had not been denied by the defendant, and therefore moved that a verdict for the plaintiff be entered on the issue of ouster also.

The following authorities were cited: *Doe dem. Foster* v. *Lee*, 2 Han. 486 ; *Doe dem. Seely* v. *Charlton*, 21 N.B. 119, 120 (1892) ; *Carter* v. *Silber*, 2 Ch. 289 ; *Zouch* v. *Parsons*, 3 Burr. 1794, 1804 ; *Doe dem. Duffin* v. *Simpson*, 3 Ken. 194 ; *Dyer* v. *Dyer*, 2 Cox 92 ; *Finch* v. *Finch*, 15 Ves. 43 ; *Stock* v. *McAvoy*, L. R., 15 Eq. 55 ; *Collinson* v. *Collinson*, 3 DeG., M. & G. 409 ; *Foley* v. *Canada Permanent Loan & Savings Co.*, 4 O. R. 38 ; Perkins on Conveyancing, 15 ed., sec. 12 ; ——— v. *Handcock*, 17 Ves. 383 ; *Allen* v. *Allen*, 2 D. & R. 338 ; *Mills* v. *Davis*, 9 C. P. 510 ; *Featherston* v. *McDonell*, 15 C. P. 162 ; *McCoppin* v. *McGuire*, 34 U.C.R. 157 ; *Drake* v. *Ramsay*, 5 Ohio 252 ; *Wallace* v. *Lewis*, 4 Har. (Del.) 75 ; *Irving* v. *Irving*, 9 Wall., 617, 627 ; *Lumsden's Case*, 4 Ch. App. 31 ; *Carter* v. *Silber*, 2 Ch. Div. 278.

Held, (overruling *Foster* v. *Lee*, and *Seeley* v. *Charlton*, cited supra) that Fraser did not repudiate within a reasonable time after the coming of age, and that the deed from Fraser to Winchester is good.

Held, also (TUCK, J., dissenting), that plaintiffs should have proved ouster as to the residue of the lot.

On this latter point, sec. 66 of the Ejectment Act (57 Vict., c, 10) was cited.

Province of Manitoba.

QUEEN'S BENCH.

TAYLOR, C.J.] [March 2.

MCLEAN *v.* REEKIE.

Negligence—Fire, damages for setting out.

This is a case in many respects similar to the case of *Booth* v. *Moffatt*, noted ante p. 41, the decision in which has since been affirmed by the Full Court, and it would hardly be necessary to make a special note of it here, except that the subject is one of extensive application and very great interest throughout Manitoba and the North-West, and it is well to emphasize the

responsibility which all persons incur who set out fire on the prairie and do not thoroughly extinguish the same. The defendant, who lived in a thickly settled neighbourhood, at a time of the year when everything was very dry, and there were a great many grain stacks on adjoining farms, when little fall ploughing had been done, and on a very windy day, sent his boy to burn a number of heaps of straw on his own property, and it was proved that the plaintiff's grain stacks had been destroyed by a fire which started from the burning heaps of straw. The defendant had taken no steps to make sure that the fire he set out had been extinguished, and trusted that the fire was out, without going or sending any one to see.

Held, that the defendant was responsible for the damages so caused to the plaintiff.

Appeal from County Court of Morden dismissed with costs.

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

Munson, Q.C., for defendant.

KILLAM, J.] [March 5.

THE QUEEN *v.* EGAN.

Criminal Code—Summary trials—Appeal from magistrate's decision.

In this case the simple point decided was that section 808 of the Criminal Code, although badly expressed and wrongly punctuated, prevents an appeal from the decision of a Police Magistrate on a summary trial under Part LV. of the Code, because it must be read as if it was framed thus:

"The provisions of this Act relating to preliminary inquiries before justices, except as mentioned in secs. 804 and 805, and the provisions of Part LVIII., shall not apply to any proceedings under this part."

Hence secs. 879-884, being in Part LVIII., which are the only clauses providing for any appeal from a conviction by a magistrate, do not apply in case of a conviction on a summary trial under Part LV.

MacLean, for the Crown.

Ashbaugh, for the prisoner.

KILLAM, J.] [March 5.

MAXWELL *v.* M. AND N. W. RAILWAY CO.

Practice—Production of documents—Receiver—Railway Company.

This was an appeal from an order requiring defendants to produce books and documents to give the plaintiff discovery.

It was contended on the appeal that as the company was in the hands of a receiver who was entitled to the custody of the books and documents, the company could not be required to produce them; but the receiver had not in fact taken possession of them.

Held, that the plaintiff was entitled to the production. The usual order, however, was varied by directing only that the books and documents be produced to the plaintiffs or their solicitors on demand after twenty-four hours notice at the company's general offices, and that the plaintiffs or their solicitors be allowed to take copies of, or extracts from, such portions of the contents thereof as relate to the matters in question.

The judge contended that it would be better not to take the books out of the actual possession of the company, as there was a plausible ground for the claim that the receiver could take possession of the books and papers at any time, and because the parties to the suit in which the receiver had been appointed, were not before the Court on the present application.

Order varied on appeal, without costs.

Wilson, for plaintiff.

Phippen, for defendant.

DUBUC, J.] March 5.

WHITLA *v.* AGNEW.

Practice—Examination of judgment debtor—Production of books—Notice to produce.

The defendant in this case contended that he could not be compelled to produce his books and documents on his examination as a judgment debtor, as he had not been served with *subpœna duces tecum*, and relied upon the language of Rule 736 of the Queen's Bench Act of 1895 (Ont. Rule 929), which provides that any person liable to be examined as a judgment debtor "may be compelled to attend and testify, and to produce books and documents, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness."

Held, that the word "witness" in this Rule is not necessarily limited to a witness at a trial, but that the practice on such an examination is analogous to, and may properly be assimilated with, the practice upon an examination for discovery under Rules 374 and 384, and that it was quite sufficient to serve a notice to produce such books upon defendant, which had been done.

Appeal from order of Referee, dismissed with costs.

Elliott, for plaintiff

Vivian, for defendant.

Full Court] [March 7.

GILES *v.* MCEWAN.

Statute of Frauds—Hiring and service—Quantum meruit—Joint creditors.

This was an appeal from the decision of TAYLOR, C.J. (noted ante vol. 31, p. 678). In addition to the facts there mentioned it might be stated that the plaintiffs were dismissed from the service of the defendant two days before they would have completed their year of service, and no justification for the dismissal was proved.

Held, that the plaintiffs could recover for the value of their services, and that the verbal agreement might be given in evidence for the purpose of showing the amount that defendant had agreed to pay, and that the hiring was a joint one, although no action could be brought directly upon it. *Maddison* v. *Alderson*, 8 App. Cas., at p. 475.

Held, also, that the plaintiffs could sue jointly, and only jointly, for the value of their services.

Pulbrook v. *Lawes*, 1 Q.B.D. 284; *Mayer* v. *Payne*, 3 Bing. 285; *Knowlman* v. *Bluett*, L.R. 9 Ex. 307, followed.

Appeal allowed with costs and County Court verdict for plaintiff restored.

West, for plaintiff.

Bradshaw, for defendant.

KILLAM, J.] [March 11.

HOLMWOOD *v.* GILLESPIE.

Statute of Frauds—Sale of land—Quantum meruit.

This was an action in the County Court for the balance of the purchase money of a piece of land which had been sold by the plaintiff to the defendant, and conveyed to him at the plaintiff's request by a third party, who had originally purchased from the plaintiff, and had verbally agreed to resell to him. There was no agreement in writing signed by the defendant respecting the purchase of the property by him, but he had received a deed, and apparently no question of title was raised.

The Judge of the County Court found that the defendant had promised to pay the balance due, and held that the plaintiff was entitled to recover upon an account stated.

The defendant then appealed to a Judge of the Queen's Bench, and relied upon the decision of TAYLOR, C.J., in *McMillan* v. *Williams*, 9 M.R. 627, that a common law action for a balance of the purchase money of land sold under a verbal agreement cannot be maintained, although the deed has been delivered.

Held, following *Giles* v. *McEwan*, (noted ante vol. 31, p. 678) that the plaintiff was entitled to recover.

Appeal dismissed with costs.

Aikins, Q.C., for plaintiff.

Clark, for defendant.

(*Note.*—This case differs from *McMillan* v. *Williams* because there was no evidence of any promise by the defendant to pay the balance claimed, and he had, in fact, disputed the indebtedness.)

The Referee, TAYLOR, C.J. } [March 12.

DOLL *v.* HOWARD.

Practice—Transfer from County Court to Queen's Bench—Statement of claim necessary.

This action, originally brought in the County Court and transferred by order of the County Court Judge, under sec. 86 of the Queen's Bench Act, 1895, the plaintiff as his next step, served a notice of trial, when the defendant moved before the Referee to set it aside.

Held, follow *Davies* v. *Williams*, 13 Ch. D. 530, and *The Carisbrook*, 38 W.R. 543, that the action must be commenced de novo, and a statement of claim filed in the Queen's Bench before anything further can be done, and that the notice of trial must be set aside.

The Chief Justice, on appeal, affirmed this decision.

Hough, Q.C., for defendant.

Mathers, for plaintiff.

Province of British Columbia.

SUPREME COURT.

DAVIE, C.J.] [March 3.

GRIFFITHS *v.* CANONICA & ROLSTON.

Lease—Agreement—Registration—Notice—Fraud.

G. leased to C. a certain piece of property for a term of years, and the same day G. entered into an agreement with C. to sell to him the buildings on said premises. C. covenanted to pay rent in advance, to keep premises in good repair, pay insurance and not to assign lease without the consent of G., further that any breach of covenants nullified lease at the option of G. The lease was duly registered, but the agreement was not. The lease did not directly refer to the agreement. C., without the knowledge or consent of G., assigned the lease to one R. for one-half of the period of his, C.'s, time under the lease, and R. registered his sub-lease. In the meantime C. failed to pay in insurance premiums and also the instalments of purchase for buildings; as soon as G. became cognizant of C.'s assignment of lease, he refused to accept rent money from either C. or R., and brought suit for repossession of the premises and buildings and for cancellation of his agreement and lease to C., as well as C.'s sub-lease to R. It appears R. had knowledge of the agreement between C. and G., and that C., as per that agreement, was not to assign lease without G.'s consent.

The defendants depended on the Land Registry Act, R. specially referring to sec. 35. Defendants also set up that sub-lease being only for half the period, was not an assignment.

Held, that R. having notice of the contemporaneous agreement could not plead or obtain the proteetion of sec. 35 of L. R. Act, and such being the case the defects of C.'s title directly affected R. *Paget* v. *Mitchell*, L.R. 28 Chy. D. 255.

Judgment for G. against C. and R. for arrears of rent, vacating term of lease and cancelling registration of lease and sub-lease, also for costs of suit.

Russell and *Godfrey*, for plaintiff.

McGee, for Canonica.

Wilson and *Campbell*, for Rolston.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

SCOTT, J., In Chambers. [March 5.

RANDALL *v.* ROBERTSON.

Practice—Adding co-defendant—J O., sec. 46.

The action was for damages for illegal distress of plaintiff's goods for arrears of rent. Defendadt, who in distraining acted as bailiff for one Osborne, plaintiff's landlord, from whom he took a letter of indemnity, applied with

consent of Osborne to have him added as a co-defendent, with leave to Osborne to set-off or counter-claim against plaintiff for (1) arrears of rent; (2) conversion of goods; (3) rescision of an agreement for sale of goods.

Held, that the matters in respect of which Osborne desired to counter-claim do not arise out of the subject matter of the action, and are not involved in the cause or matter in respect of which the action is brought.

Montgomery v. *Foy*, 14 R. Sept. (1895), distinguished.

Application refused with costs in the cause to plaintiff in any event.

McCarter, for application.

Harvey, for plaintiff, contra.

SCOTT, J.
In Chambers.

[March 5.

MCCARTHY *v.* BRENER.

Practice—Service out of jurisdiction—Small debt procedure.

This was an application to set aside the service of a summons issued out of this Court under the provisions of the Judicature Ordinance for small debt procedure (Ord. 5, 1894), and served on the defendants at London, Ontario, where they resided, without any order having been obtained, on the following grounds: (1) That defendants are resident and domiciled out of the jurisdiction of the Court, which has no inherent jurisdiction over them. (2) That the Legislature has no power to subject such persons to the jurisdiction of the Courts. (3) That there is no Ordinance authorizing service out of the jurisdiction of a summons such as this. (4) That the summons was not issued for service out of the jurisdiction, and no leave has been obtained. (5) That the service has not been allowed by a Judge, nor was leave obtained for such service. (6) That it does not appear by the pleadings and proceedings that this is a proper case for service out of the jurisdiction. (7) That sec. 32 (*e*) of Ord. No. 5, of 1894, has not altered the law respecting service out of the jurisdiction.

Held, (1) that as the principle of assuming jurisdiction over absent defendants in certain cases is part of the universal practice of nations and the colonies (Piggott, pp. XLVIII., and 201), and the Dominion Parliament has conferred on the Territorial Legislature the right to provide for the administration of justice in civil cases in the territories and procedure in the territorial Courts. The Territorial Legislature has the right to assume jurisdiction over absent defendants, and has power to make provisions for service on them out of the jurisdiction as a part of the procedure of the Courts.

Held, (2) that the ordinance does authorize the service out of the jurisdiction of the small debt summons, and that no order is necessary either for the issuing or serving of the summons.

Held, (3) That it is not necessary to show by the statement of claim that the cause of action is one falling within the cases mentioned in sec. 32 of the Judicature Ordinance, but if the defendant can show affirmatively that it is not a case where service out of the jurisdiction would be allowed under the said section, the service of the summons will be set aside.

Application dismissed, with costs in the cause to the plaintiff in any event.

Muir, Q.C., for application.

P. McCarthy, Q.C., plaintiff in person, contra.

BOOK REVIEWS.

Recollections of Lord Coleridge, by W. P. FISHBACK; Indianapolis and Kansas City, the Bowen-Merrill Co., 1895.

This is a very well written and interesting sketch of the life of this well known man. It brings to our notice numerous incidents in the life of Lord Coleridge unconnected with his legal career, with which all lawyers are more or less familiar.

FLOTSAM AND JETSAM

"The time during which a party might address the Court was regulated by a clepsydra or water clock."—*London Law Times, 15th Feb., 1896, p 361.*

"If a case could be found about absolutely nothing, I think it would go on forever!"—*Per* FERGUSON, J.

In ancient Greece an orator did stop
When the clepsydra marked the final drop.
But now, alas! he may go on and pour
His vapid eloquence from hour to hour,
And Patience on the judgment seat must sit
And hear *forever* talk devoid of wit.

THE MONROE DOCTRINE.—The frequent reference to the "Monroe doctrine" at the present time makes it desirable to examine the occasion of its origin and what it really consisted of. In 1823 Spain had for some years been engaged in a contest with her revolted colonies in South America, and an interference on the part of the allied European powers was contemplated on behalf of Spain, with a view to reconquest of the colonies. Both Great Britain and the United States protested against this interference, and on the 2nd of December President Monroe, in his seventh annual message to Congress, enunciated his doctrine as follows: "In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparations for our defence With the movements in this hemisphere we are of necessity more intimately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. The difference proceeds from that which exists in their respective governments. . . We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to

declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety." Though sound as a political doctrine, and wise in the circumstances which gave rise to its enunciation, it is too vague to be applied as a rule of international law, and even as a political formula requires careful limitation to circumstances and purposes similar to those of its origin; while in result, as truly said by a writer ten years ago, it has been its fate to be "perverted at home and misunderstood abroad." To quote the same writer ("Essays on Modern International Law," by J. T. Lawrence): "Just as American interference in European affairs is permissible when American interests are clearly involved, so is European interference in American affairs justifiable if definite and unmistakable European interests are concerned. The Monroe doctrine objected to the trajection of European State systems across the Atlantic, but it did not declare for the closure of the American hemisphere to European diplomacy." The United States have on several occasions interfered in the settlement of matters within the Eastern hemisphere. *e.g.*, the surrender of Denmark of the Sound dues, the Egyptian Law of Liquidation in 1884, and the West African Conference at Berlin in 1885; but the present is not the first notable occasion upon which they have attempted to extend and misapply the Monroe doctrine On the question of the Panama canal the United States contended that it should be under American control, and refused to surrender this control to any European power or combination of European powers. When in 1889 there was some possibility of the French Government getting control, the United States Senate resolved that the government of the United States would look with serious concern and disapproval upon any connection of any European government with construction of the canal, and must regard any such connection or control as injurious to the just rights and interests of the United States, and a menace to their welfare. Just as Mr. Blaine attempted in 1889 to wrest the doctrine beyond its proper scope, so now Mr. Olney and President Cleveland are trying to "go one better," by claiming that in a boundary dispute between Great Britain and an independant American republic, the United States shall determine the mode in which the dispute shall be tried.

We may note the following limitations to the doctrine in its relation to Great Britain and the present dispute as to Venezuela. (1) It is a mere doctrine of political formula and not a rule of international law. We have Calvo's authority for this, and even Wharton admits it. (2) Great Britain is itself an American power. What of Canada, Jamaica, Trinidad, British Honduras, or British Guinea? (3) The doctrine was directed against the introduction of European "political systems" into America. Neither the making or control of a canal, nor the method of settling a boundary dispute with another American State, is the introduction of a "European political system."—*The Law Times* (*England.*)