Canada Law Journal.

VOL. XXXVIII. FEBRUARY 1, 1902. NO. 3.

His many friends in the profession are heartily in sympathy with the Chancellor of Ontario in a serious attack of illness, which has confined him to the house for some weeks. We are glad to know that he is recovering, though it may be necessary for him to recruit his strength by rest from work for some time.

Two appointments from the Orient have recently been made to the Judicial Committee of the Privy Council, Sir Andrew Richard Scoble, K.C.S.I., and Sir John Winfield Bonser. They both hail from Lincoln's Inn. The former was at one time the Advocate General at Bombay and the latter Chief Justice of Ceylon.

The *Law Times*, in chronicling the election of Mr. English Harrison, K.C., to the office of vice-chairman of the Bar Council, admits the qualifications of Mr. Harrison for the honour conferred upon him, but regrets "that someone has not been chosen who is more widely known outside the legal profession." And this goes to shew that even in conservative England the Bar has reached the conclusion that a good lawyer is all the better for the ability "to do something outside."

The late Rai Hukm Chand, M.A., was at once a type and illustration of the evolution of the Hindu mind under British institutions in India. He was for some years past assistant legal adviser and secretary to the Legislative Council of His Highness, the Nizam's, Government. He was a man of wide knowledge and erudition. His book on Res Judicata, which is to be found in every adequate law library, attests his familiarity with the common law; while that on the "Law of Consent" is a very valuable contribution to comparative jurisprudence, and is of international scope and importance.

Some time ago we felt it our duty to draw attention to a matter in connection with the Ontario Bench, which seems now to be taking a somewhat more definite shape. It is stated publicly

that a "movement is on foot to compel the retirement from the Bench of certain judges who are incapable either by extreme age or physical infirmity to perform their judical duties"; it being the expressed intention of bringing the matter before the House of Commons when it meets. It is a great pity that there should be any occasion to discuss matters of this kind in the public press, as that can only tend to bring the administration of justice more or less into disrepute. But what is to be done, when due attention does not seem to be paid by the proper authorities to such an important matter?

It is our sad duty to record in this issue the death of Hon. Angus J. McColl, Chief Justice of the Supreme Court of British Columbia, which occurred suddenly last week in Victoria. The late Chief Justice was only in the 48th year of his age when he died, and was then the youngest incumbent of the presidency of a Provincial Supreme Court in the Dominion. He was a son of the Rev. Angus McColl, D.D., and was born in Chatham, Ont, in 1854. He was called to the Bar of Ontario in 1879, and subsequently went to British Columbia, and was admitted to the Bar of that Province, and practised his profession with success in Vancouver. At the time of his appointment as a Puisné Judge of the Supreme Court of B.C. in 1896 he was a member of the leading firm of Corbould, McColl, Wilson & Campbell. On the death of the Hon. Theodore Davie in 1898, he succeeded to the Chief Justiceship. He was made a local Judge in Admiralty of the Exchequer Court of Canada in the same year, and in 1899, as such local Judge, was clothed with jurisdiction in respect of Prize cases by virtue of a warrant of the Lords Commissioners of the Admiralty constituting the Exchequer Court a Prize Court in time of war. The deceased was the third holder of the office of Chief Justice in the Province to die within the past decade, his predecessors being Sir Matthew Begbie and the Hon. Theodore Davie.

Complaints are made from time to time in reference to the practice of making changes in the lists of cases set down at Osgoode Hall for argument, and as to which it is said that the officials in charge of the list frequently postpone cases or take

others out of their order for the convenience of counsel, without reference or notice to the other side. This certainly should not be allowed. It is, of course, very reasonable that arrangements between counsel should, as far as possible, and with due regard to the interests of the suitors, be facilitated; but it is quite a different thing when cases are postponed ex parte. The solicitor who takes pains to enter his case early on the list has a right to have it heard at the beginning of the Sittings, and he, or rather his client, should not be delayed until the end of the Sittings, or possibly thrown over altogether, because it is not convenient for Mr. A. or Mr. B., engaged on the other side, to take it in its place. The counsel for whose convenience the list is thus "knocked into pi" is usually some much desired leader who has more business on hand than he can attend to. But the client who wants a favorite counsel must, with the supposed advantage of having secured his services, take also the risk of his being elsewhere when his case is called. The practice referred to often works a great injustice to many litigants. The good-natured officials who have charge of such matters would not willingly hurt anybody, but their desire to be civil sometimes results in injustice.

HON. MR. JUSTICE GWYNNE.

In the fullness of years, but in the possession of all his faculties, has passed off the scene the last of those judges who take the memory back to a past generation. The eminent judge and courteous gentleman who was laid to rest in Ottawa on January 8th in his 88th year was (with the exception of his personal friend, Senator Gowan, who came from Ireland in the same year, and who still enjoys good health) the last of those who were cotemporaries with him at the Bar and on the Bench. He was, like them, a man of whom the country was justly proud, and who left their mark for good in its character and history.

Mr. Gwynne was born on March 30, 1814, at Castleknock, Ireland, being the son of the Rev. Wm. Gwynne, D.D. Having been educated at the Trinity College, Dublin, he came to Canada in 1832, where he commenced the study of the law, and after being called to the Bar went to England, where he spent some time in the chambers of Sir John Rolt, afterwards Attorney-General of England, and a Lord Justice of Appeal. On his return to Canada

he formed a partnership for the practice of the law with the late Robert J. Turner and W. V. Bacon. During a few years he lived in Hamilton, as solicitor for the Great Western Railway Company; and then returning to Toronto resumed practice there in the firm of Gwynne, Armour & Hoskin in 1863, the only survivor being Mr. John Hoskin, K.C., senior partner in the present firm of McCarthy, Osler, Hoskin & Creelman.

On Nov. 12, 1869, Mr. Gwynne (then a Q.C. and a Bencher of the Law Society) was appointed a Judge of the Court of Common Pleas of Ontario where he did good service for his country until he obtained well deserved promotion by his appointment to the Supreme Court of Canada on Jan. 14, 1879. That position he occupied until the day of his death.

Mr. Gwynne married in 1852 the youngest daughter of the late Dr. Durie, K.H., a retired army officer. Our esteemed fellow-citizen, Mr. W. D. Gwynne, of Toronto, barrister and special examiner, is his only son. One of his daughters married the late Ernestus Crombie, formerly a well known practitioner in this city, another married Rev. H. G Baldwin, and another married Mr. Collingwood Schreiber, C.M.G., Deputy Minister and Chief Engineer of Railways and Canals.

It is said that when Mr. Gwynne was appointed to the Bench it was feared by some that his health was not sufficiently good to warrant the expectation that he would be able to stand the strain of judicial work; but, though he never spared himself, his careful, temperate habits, his genial disposition and his strong will-power enabled him to stick to his work, with scarcely an intermission, up to a few days before his death on the 7th of Jan., 1902. In fact his last short illness was apparently due to the intense application he gave to an important judgment he was preparing for delivery. It had been his desire for some years to retire into private life, but the Government did not see its way to giving him his full salary on retirement. This would have been a graceful act to one who had devoted more than a generation to the public service and who had so worthily and faithfully fulfilled the onerous duties entrusted to him.

Mr. Justice Gwynne was a sound and able lawyer, highly educated in general literature and a constant student. As a judge it might perhaps be said that the turn of his mind was subtle and analytical. He had, moreover, a remarkable aptitude for

weighing evidence, and, in cases involving difficult and abstruse points in the construction and interpretation of documents, he had few equals. He was a man of strong and definite views of his own, and if he had a fault as a judge it was an inclination to cling to the view of the case which had presented itself to his own mind. No judge of any Bench was ever more high-minded, conscientious, painstaking and laborious in the discharge of his duties. As a man both in public and in private life he won the respect and affection of all. A polished gentleman of the old school, none more affable, courteous, kindly and true hearted than he. He has left the record of a useful, well-spent life; and a very large circle of friends mourn his loss.

THE SUPREME COURT.

The unsatisfactory condition of things in connection with the administration of justice in the Supreme Court of Canada having become public property, there is no reason why a journal specially devoted to the interests of the profession should apoligize for a free discussion of the subject.

A letter recently appeared in a daily newspaper published in Montreal, which stated broadly that this Court is "generally and perhaps unavoidably the award of political service, and lacking, through no fault of its occupants, that finality which would give weight to its decisions." The writer refers to a raison d'être of the court, viz., that for the better interpretation of our constitution certain functions were delegated to it on the principle that these decisions would be accepted as being free from the colour of party, and comes to the conclusion that nothing has been gained by the existence of such a court, mainly because it does not enjoy the confidence which the Courts of Appeal of the various provinces largely do, and because the settlement of questions of constitutional law affecting the Dominion and its provinces, which was one of the principal reasons for the existence of the Court, as a rule, go to the Privy Council for final adjudication; the Privy Council, in fact, overshadowing the Supreme Court.

If the above be true, and who can deny it, there is a strong argument either for the abolition of this court entirely, or for its reconstruction upon such a basis as will insure the attainment of the objects for which it was established.

But this is not all. A daily paper, the principal Government organ, in its Ottawa news, in referring to a scene which recently took place in that court, headed the item: "Supreme Court Judges Squabble." If the details there given had been found in one of the yellow journals, it would probably have shared the fate of many of the news items contained in that class of publications, and would either not be read at all, or, if read, assumed to be untrue. But the occurrence having been reported in a leading journal, not given to sensational paragraphs, the item demanded attention. In answer to enquiries on the subject, we were informed that the reporter's statement of what took place was correct. If this be so, the word "squabble" is not too strong. The unseemly event above referred to is only a sample of what has frequently taken place before, but under different circumstances. The Chief Justice was not present. Episodes of this character, and others much more objectionable, might be referred to, which might be expected in a magistrate's court in a mining camp, but are highly indecorous in the highest Court of Justice in the Dominion. The spirit of discord and misrule which has been a characteristic of this court is somewhat remarkable where many of its members are models of courtesy and kindness. Every one knows perfectly well where the blame lies for this miserable condition of things. The attention of the Government has been called to it time and again, and the Government, of course, must be held responsible. It is idle to say that nothing can be done. Something must be done. The court cannot be a success, but must be a discredit to the country, until some change is made which will supply or remove any discordant element, and cause its business to be conducted with proper regard to the respect due to itself, as well as to the feelings and rights of those whose duty calls them to assist in its deliberations. It would be quite within the bounds of moderation to use very strong language in reference to the present condition of things, but it is unnecessary—it is common talk. All this is, of course, outside the consideration of the value or necessity for the existence of the court. The country looks to the Government to do what is necessary in both respects, and the responsibility cannot be evaded or ignored.

It is most unpleasant to have to call attention to such matters, but to ignore them is not the way to remedy the evil. The dignity of the Bench and the respect of the public for the proper adminis-

tration of justice are matters too important to be trifled with. That they are and have been trifled with cannot be denied, and it is just as well to have it understood at once. When judges are men of surpassing learning, having intellectual attainments above their fellows, possessing the confidence of the profession in a marked manner, occasional outbursts of temper and discourteous treatment of counsel is largely overlooked. But such is not the case here, for, as has already been said, the Courts of Appeal in the various provinces stand higher in the estimation of the Bar than does the Supreme Court of Canada. Speaking generally, defeated litigants in the Provincial Appellate Courts do not go to the Supreme Court because they expect more careful consideration or better exposition of the law, but rather on the off chance of a reversal by another set of judges, gambling on the uncertainty of the law. Let it be remembered moreover that in the Supreme Court there are never more than two judges from any one province. To these two, or perhaps to one of them, is often in effect left the criticism of three, four or five judgments of men of at least equal attainments, and having special knowledge of the law affecting their various provinces. Is it likely that a reversal under such conditions would be considered a satisfactory adjudication?

We do not desire to make any comparison between the learning and capacity of the judges on the various Benches, for that were "odious," but there is one unfortunate fact in reference to the Supreme Court, which of necessity makes their judgments of less value than those of courts below, where there is entire harmony between the judges. In every court of an appellate character it is a matter of necessity, in order to obtain the best results, that there should be a free interchange of opinion and a careful discussion of each case before judgments are finally prepared. We have been credibly informed that in the Supreme Court it is the practice for the judges to deliver their judgments without any previous consultation, or even without the members having any knowledge of what conclusions their brethren have come to.

Another matter may here be referred to. Admittedly the better opinion is that in a court such as the Supreme Court of Canada, which is the court of last resort in the Dominion, there should be one judgment delivered as the judgment of the court, without dissenting opinions, and it should not be known that there were any differences of opinion. Certainly, so far as the Supreme Court is

concerned, there would be fewer differences of opinion if there were that free interchange of thought among the judges which is usual in other courts. What the public want and what is best for litigants is a decision as final as possible. Appeals are encouraged by dissenting opinion. The judgment of the court should be the opinion of the majority. The views of the minority judges, though very interesting to themselves, are, in the above connection, of no value to the public, and injurious rather than otherwise.

If the Court is to be continued (the wisdom of which may be questioned) it must be reorganized, and the judges selected from the very best men at the Bar, regardless of provinces, politics or party. Political claims have been disregarded by strong governments before now in this country, and should always be disregarded. This is the rule rather than the exception in England and notably so in reference to several appointments recently made. A legal contemporary in the United States says: "Non-partizanship has for some time been making progress in respect to judicial offices in this country. It has now extended beyond such offices to all municipal offices." And this is illustrated by the fact that two important positions have recently been given to Democrats by a Republican President.

If necessary—and there is a necessity, which might as well be faced and acted upon at once—salaries must be paid which will induce the leaders of the Bar to go on the Supreme Court Bench. At present they will not, and cannot be expected to give up their larger emoluments at the Bar, especially if they have to leave their old homes and associations and reside in a strange place. The position must be made a prize instead of being a sacrifice.

Those who think that the Supreme Court has outlived its usefulness, or that it is, for other reasons, an unnecessary expense, may in the consideration of this subject call attention to the undoubted fact that the Judicial Committee of the Privy Council has been enormously strengthened of late years and now comprises the best legal talent and greatest judicial capacity which the Empire can afford. Such was not the case when the Supreme Court of Canada was first established.

If the court cannot be so reorganized as to command the confidence of the profession and the public let it be abolished, and let appeals be made direct to the Privy Council. The inherent difficulties of forming a satisfactory Court of Appeal for the whole

Dominion are so great that the task seems almost hopeless. But certainly the task can never be accomplished by the present "laissez-faire" policy or by the appointment of men because they have a political "pull," or by appointing those who for some reason it is desirable to shelve. Any government that would do such things would be blind to the fact that every such appointment not only weakens the Bench, and so is an injury to the country, but also reflects upon the high standing of the appointing power. As a writer in the lay press has recently expressed it: "To treat the Bench as a mere place of reward for political service, and appoint men to it whose only claims are those of political services, is little short of a crime."

REVISED STATUTES OF ONTARIO, VOL. III.

At the present session of the Ontario Legislature the Government will ask the sanction of the Legislature to a third volume of the Revised Statutes.

This volume will consist of a revision and consolidation of all Imperial Statutes relating to property and civil rights which have been incorporated into the law of Ontario by virtue of Provincial Legislation. There will also be found in this volume an "Appendix" containing Imperial constitutional Acts, and certain Imperial Acts of a practical character relating to the mode of procuring evidence of the law of other British possessions, or of foreign countries, which Acts are expressly extended to the colonies; also the original Habeas Corpus Act, and a table of all Imperial Acts (other than those relating to criminal law) which are in force in Canada, ex proprio vigore. The Appendix is at the beginning of the volume instead of the end, as is usual. The matter contained in it, however, has really nothing to do with the Revised Statutes of Ontario, but is conveniently published with this volume.

The object of this work is to reduce to order and symmetry a branch of our statute law, which has hitherto been involved in doubt and obscurity. Henceforth we need not go outside of the Ontario statute book to obtain the statute law relating to property and civil rights. It will, of course, be a somewhat novel experience to find ourselves citing the Statute of Frauds as R.S.O. c. 338, and the Statute of Elizabeth, as R.S.O. c. 334, or the Statute of Distri-

butions, as R.S.O. c. 335, or De donis, and Quia Emptores, as R.S.O. c. 330, and Magna Carta, as R.S.O. c. 322, but though the statutes may lose somewhat of the flavor of antiquity by the new nomenclature, there will be the abiding sense that the law they contain is unchanged.

With regard to some of the Acts above mentioned we observe that the reviser has judiciously given as short titles to the Acts the names by which they have so long been colloquially known, e.g., "The Statute of Frauds" is the legalized short title of c. 338, "The Statute of Distribution" that of c. 335.

By order in Council of December, 1899, Mr. Holmested, the Senior Registrar of the High Court, was appointed to make the revision and consolidation, under the supervision of a Committee composed of Sir John Boyd, K.C.M.G., Chancellor of Ontario, Sir William Meredith, Chief Justice of the Common Pleas, Mr. Justice Moss, the Hon. W. G. Falconbridge, Chief Justice of the King's Bench, and Sir Thomas Taylor, the former Chief Justice of Manitoba. With this Committee, we presume, rested the decision as to what statutes were to be included, and the form which the revision should take.

Mr. Holmested's knowledge of law, his literary ability and exactness, combined with the high judicial position and legal attainments of the members of the Committee, is at least a prima facia guarantee that the work has been satisfactorily performed.

As we look at this volume we cannot but wonder why the public and profession were allowed to grope for over a hundred years in the dark for the matter contained in this revision. The thanks of the profession are certainly due to the Attorney-General for this excellent addition to the statute law.

The present consolidation does not of course include the Imperial Statutes in force relating to the criminal law. That is a matter within the jurisdiction of the Dominion Government, but we may say that the absence of a similar consolidation and revision of the Imperial Statutes relating to the criminal law is a continual source of trouble and inconvenience. This branch of the law will never be on a satisfactory footing until it is dealt with in a similar manner.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

TRUSTEES -TRUST ESTATE—SHARES IN LIMITED COMPANY—RECONSTRUCTION SCHEME—EXCHANGE OF OLD SHARES FOR NEW—SANCTION OF COURT—JURISDICTION.

In re New (1901) 2 Ch. 534, applications were made to the Court in this and two other cases for orders authorizing trustees to exchange certain shares held by them in a limited mercantile company upon trust, for new shares in the same company, and debentures proposed to be issued in furtherance of a scheme for reconstruction of the company. The evidence shewed that the company was in a prosperous condition, and that the new shares would be more readily realizable, and that the scheme would be greatly to the advantage of all parties interested under the several trusts. Cozens-Hardy, J., refused the applications, but the Court of Appeal (Rigby, Collins and Romer, L.JJ.) made the orders asked. In one of the cases the trustees had power to invest in shares and debentures of such a company as the proposed new company, but in the two other cases they had no such power, and as to them the Court of Appeal required an undertaking on their part to apply for power to further retain the shares and debentures which they should obtain under the scheme, if they desired to retain them beyond a year after the reconstruction should be carried out.

INTEREST—TRADESMAN AND CUSTOMER—IMPLIED AGREEMENT BY CUSTOMER TO PAY INTEREST.

In *Re Anglesey, Wilmot* v. *Gardner* (1901) 2 Ch. 548, the Court of Appeal (Rigby, Collins and Romer, L.JJ.) have reversed the decision of Cozens-Hardy, J., founded on a decision of Kekewich, J. *In re Edwards* (1891) 61 L.J., Ch. 22. The action was for the administration of a deceased person's estate; a tailor proved a claim for an overdue account for £3,318 5s. 3d., of which £1,155 16s. was for interest. The right to the interest was based on the ground that there had been an implied agreement to pay it, based

on the fact that the claimant had from time to time rendered accounts to the deceased, claiming interest after the lapse of three years from the time goods were supplied, which was included from time to time in the bills rendered, and that the deceased debtor had never objected to such charge, and had from time to time made payments on account of the bills so rendered to him. This was held to constitute evidence of an implied agreement to pay interest as charged, and *In re Edwards* was consequently overruled.

COPYRIGHT — INFRINGEMENT — WORK OF ART — PENALTY — "EVERY SUCH OFFENCE"—FINE ARTS—COPYRIGHT ACT, 1862 (25 & 26 VICT., C. 68) S. 6

Hildesheimer v. *Faulkner* (1901) 2 Ch. 552, is a decision under the Imperial Copyright Act, 25 & 26 Vict, c. 68, which has been held not to be in force in Ontario: *Graves* v. *Gorrie*, 1 O.L.R. 309, but as that case is now in appeal, it may be worth while, in case the judgment is reversed, to note the decision here. The point involved was as to the proper amount of damages to be allowed for an infringement of a copyright of a picture. It was found as the result of a reference that 1,012,600 copies of the picture had been made by the defendants, and under the Act the making of each picture was a separate offence, in respect of which, under s. 6, a penalty was incurred. Kekewich, J., thought that, acting on the principle laid down in *Green* v. *Irish Independent Co.* (1899) 1 Ir. R. 386, he was bound to award at least a farthing penalty for each picture, that being the smallest coin recognized by the law, but the Court of Appeal (Rigby, Collins and Romer, L.JJ.) held that there was no such obligation to award some particular sum for each infringement, but that it was competent to award a lump sum to cover all the penalties, and accordingly reduced the damages from £1,241 15s. 10d. to £200, and *Green* v. *Irish Independent Co.* was disapproved.

TRUST—TENANT FOR LIFE—REMAINDERMAN—LOSS OF TRUST FUND—APPORTIONMENT OF LOSS.

In re Alston, Alston v. *Houston* (1901) 2 Ch. 584, a loss was made of part of a trust fund invested upon a mortgage, and the question was how the loss was to be apportioned as between the tenant for life and the remainderman. Kekewich, J., held that the amount realized ought to be apportioned between the tenant for life and the remainderman in proportion to the amount due at the date of its realization in respect of arrears of interest and in respect of principal.

WILL CONSTRUCTION—GIFT TO ILLEGITIMATE CHILDREN—NOMINATIVE—GIFT TO NEXT OF KIN OF CHILDREN, SOME OF WHOM ILLEGITIMATE.

In re Wood, Wood v. *Wood* (1901) 2 Ch. 578, is one of those cases which fails to commend itself as good sense, and we are inclined to doubt whether it is even good law. A testator having some children (three of whom were illegitimate) by his will directed that after the death of his widow his residuary estate should be held in trust for such of his seven children as should be then living and attain 21, and he directed his trustees to retain the share of each daughter and pay her the income during her life and then to her husband for life, if she should so appoint, and subject thereto in trust for her children, and in default of children to the persons entitled under the Statutes of Distribution in case she had died possessed thereof without being married. Kekewich, J., held that one of the illegitimate daughters having died without making an appointment in favour of her husband, and without issue her share passed to her legal personal representatives as if it had been absolutely bequeathed to her, and not to those who would have been her next of kin if she had been legitimate. He being of opinion that he was bound by the decision of Lord Hatherley, *In re Standley*, L.R. 5 Eq. 303, notwithstanding what is said about it by Stirling, J., *In re Deakin* (1894) 3 Ch. 565, and that though it was competent for the testator to recognize her illegitimate children as legitimate, yet that would not have the effect of constituting as their next of kin those persons who would be so, if such children had been legitimate.

WILL—CONSTRUCTION—DEVISE OF REAL ESTATE—BEQUEST OF LEASEHOLDS.

In re Guyton Rosenberg (1901) 2 Ch. 591, was an application under the Vendors and Purchasers' Act to resolve the following point raised by a purchaser. The vendor's predecessor in title died, having by his will devised "all his real estate," and having also bequeathed "all his leaseholds." At the time of his death he was entitled to the reversion in fee, subject to a term of 99 years, and he was also assignee of a sub-lease of the whole of term of 99 years less two days, which was outstanding, and the question was whether all the testator's interest in the property in question passed under the devise of "all his real estate," and Cozens-Hardy, J., held that it did.

VENDOR AND PURCHASER—VOIDABLE CONTRACT—ASSIGNMENT OF CONTRACT—PAYMENTS ON ACCOUNT TO ASSIGNEE OF VOIDABLE CONTRACT—MONEY HAD AND RECEIVED.

Fleming v. *Loe* (1901) 2 Ch. 594, was an action by the assignee of a contract for the sale of land for specific performance of the contract. The contract was voidable for misrepresentations made by the vendor. Before electing to avoid the contract the purchaser had made payments on account to the assignee; these, by counter-claims, he claimed to recover. The action was dismissed, and judgment given by Cozens-Hardy, J., for the defendant on his counter-claim. In giving this relief to the defendant the learned judge explains that *Aberaman Ironworks* v. *Wickens*, L.R. 5 Eq. 485; 4 Ch. 101, where such relief was formerly refused in the Court of Chancery, turned on the fact that that Court had no jurisdiction to deal with a legal claim for money had and received, a defect in jurisdiction which no longer obstructs the course of justice under the Judicature Act.

LANDLORD AND TENANT—SPORTING RIGHT—YEARLY RENTAL—INCORPOREAL RIGHT—NOTICE TO DETERMINE.

Lowe v. *Adams* (1901) 2 Ch. 598, appears to be a case of first impression, and it is somewhat strange that it was not covered by authority. The owner of land had made a lease of the sporting rights over his land to the defendants for a year certain, from March 25, 1895, to March 25, 1896; after March 25, 1896, the defendants continued to enjoy the sporting rights, for which they paid rent sometimes yearly and sometimes half yearly. Early in March, 1901, the landlord gave notice that the rights were determined as from March 25, 1901. The question in controversy was whether this was sufficient notice. On the part of the defendant it was contended that as in the case of a lease of land he was entitled to six months' notice, terminable on March 25. Cozens-Hardy, J., however, considered that the reason of six months being deemed reasonable in the case of a tenancy of land was due to the consideration that a tenant who has sowed should be allowed to reap, but that in the case of a tenancy of incorporeal hereditaments, the rigid rule applicable to corporeal hereditaments ought not to be applied, and that the notice in question having been given at the end of the shooting season was reasonable and sufficient.

"*DESPISE NOT THE DAY OF SMALL THINGS.*"

A New Years Story.

Chapter I.—The Mouse and the Lady.

The London gamin, a ragged urchin, had somehow got hold of a crust of bread and a piece of cheese; he munched away eagerly at his treasure, as much to him as pate de foie gras to the epicure. Though he guarded his windfall with care, in his ravenous haste a crumb of cheese dropped from his lips upon the pavement, and there it lay unheeded.

Lady Morden, wife of the well-known Privy Councillor, came sweeping along in dignity where the cheese was lying; and just as she passed, a mouse, attracted by the food, ran out and picked it up. Lady Morden, though the wife of a baron and peer of the realm, and though herself an authoress of no mean rank, was nevertheless a woman; and the sight of that enemy of her sex gave her such a start that she slipped and fell, breaking her ankle. She was carried to her house, and Lord Morden advised of the accident. Lord Morden had never ceased to be the fond lover he was, when, as Harry Morden the handsome young barrister of the Inner Temple, he had wooed and won Gladys, his fair cousin, on the Star and Garter Terrace, at Richmond. He refused to leave her side, and sent word to the Lord Chancellor that he should not be able to be present at the meeting of the Judicial Committee set for the following day. Upon consideration, the Lord Chancellor found too small a number of the Committee available to hear the very important appeal set for argument upon that day; he was forced, therefore, much against his will to send for Sir Thomas Neville, who had begged off for a week's fishing. Sir Thomas answered the call after much grumbling, with an Englishman's sense of the impropriety of interfering with a day's sport.

Chapter II.—The Politician and the Legislation.

A couple of years ago there was a change of Government in the loyal colony of Kakabeka. The veteran politician, "Uncle Thomas" (as he was fondly called by his followers), had to give way to the force of public opinion or public caprice. The new premier was known as "Huge One" from the fact of his standing five feet one and a half inches in his shoes and stripping at 117 pounds. His other soubriquet he won later by unmercifully decapitating all civil servants who were suspected of too strong a leaning towards "Uncle Thomas." This name was the very appropriate one of "The Man who keeps his Sword."

The new premier introduced and passed a bill forbidding the manufacture, sale, trading, giving, using, touching, tasting and smelling of cigarettes, the drafting of the bill which was to be a most stringent one having been entrusted to a well-known anti-tobacconist, a King's Counsel, who, from his chubby appearance and amiable smile, was commonly known as "Jam." As was expected, this bill was promptly brought

before the Court of King's Bench of the Province of Kakabeka at Pile O'Mud, the Capital City; and, as was expected, the Court of King's Bench promptly held the Act ultra vires of the Province. Whereupon the Government appealed to His Majesty's Privy Council.

Chapter III.—The Counsel and the Judge.

This appeal it was that was set for hearing; and a more important appeal never came before even such an august body as the Judicial Committee. Most learned and elaborate arguments were had, the usual amount of interruption came from the bench, and K.C.'s and juniors, as always, watched eagerly the expression of opinion of the various members of the Board. The argument has, however, become very celebrated from the fact that the leader for the respondents stole a march upon the Lords of the Privy Council and actually finished two sentences and was well into a third before he was interrupted. This was only accomplished by a most Herculean effort, by a stern repression, resulting in each sentence filling not more than one and three-quarter pages of the published report of the argument and by taking advantage of a moment when the Lords were busy talking amongst themselves. Nevertheless, it was regarded as a brilliant triumph, and will be spoken of with admiration as long as the Court lasts. At the close of the argument the leading counsel for the respondents sighed and said "If we had only had Lord Morden instead of Sir Thomas we should have had 'em." His junior, Mr. Flippen, in the more breezy vernacular of Pile O'Mud, said "D——n Sir Thomas, he has cooked our goose."

Chapter IV.—The Judgment and the Result.

And so it was. Counting noses, there was a majority of one in favour of allowing the appeal. And now in the Province of Kakabeka all is confusion; the Government have not yet had time to consider the effect of the decision (so they say); and there, as in the older Provinces, licensed vendors of cigarettes are pondering what is to be their fate, and anti-tobacconists do not know where "they are at." In our own metropolitan city "The Umpire" and "The Noose" are calling upon Mr. Rawhouse to implement the promise they allege he made to prohibit the use of cigarettes as far as the British North America Act would permit. "The Planet" is busy collecting the views of clergymen and others. "The Sphere" has a number of able and learned articles upon the use of cigarettes and the like narcotics amongst the ancient Aztecs, while "The Tellacram" still considers that whatever is, is wrong.

Every one is on the qui vive for the next step; business is at a standstill in many lines, and everything is unrest.

Chapter V.—Finis.

And all this from that little crumb of cheese.

W.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT OF CANADA.

Ont.] HOTCHKISS *v.* WILSON. [Nov. 11, 1901.

Principal and agent—Promoter of company—Agent to solicit subscriptions—False representations—Ratification—Benefit.

Promoters of a company employed an agent to solicit subscriptions for stock, and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters:—

Held, affirming the judgment of the Court of Appeal, 2 O.L.R. 261, that the latter, having benefited by the sum paid by W., were liable to repay it thought they did not authorize and had no knowledge of the false representations of their agent.

Held, per STRONG, C.J., that neither express authority to make the representations, nor subsequent ratification or participation in benefit, were necessary to make the promoters liable; the rule of respondeat superior applies as in other cases of agency. Appeal dismissed with costs.

Shepley, K.C., for appellant. *Aylesworth*, K.C., and *McEvoy*, for respondent Wilson. *R. V. Sinclair*, for respondent company.

Ont.] ASH *v.* METHODIST CHURCH. [Nov. 12, 1901.

Appeal—Church discipline.

Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference. Appeal dismissed with costs.

Riddell, K.C., for appellant. *Maclaren*, K.C., for respondent.

Que.] HAMELIN *v.* BANNERMAN. [Nov. 16, 1901.

Deed—Riparian rights—Penning back waters—Warranty—Improvement of watercourses—Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate court.

A deed of sale of lands bordering on a stream, with the privilege of constructing dams, etc., therein, provided that in case of damages being caused through the construction of any such works, the seller or his suc-

cessors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators, and the purchasers should pay the amount awarded.

Held, that under the deed, the purchasers were liable not only for damages caused by the flooding of the lands, but also for all other damages occasioned by their building dams and other works in the stream; and that the provisions of art. 5535 R.S.Q. did not entitle them to construct or raise such dams without liability for all damages thereby caused.

Held, also, that an objection as to arbitration and award being a condition precedent to an action for such damages which had been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Supreme Court.

On a cross-appeal, the Supreme Court refused to interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence. Appeal and cross-appeal dismissed with costs.

J. A. N. MacKay, K.C., and *Alfred MacKay*, for appellant. *Atwater*, K.C., and *Beauchamp*, K.C., for respondent.

Que.] [Nov. 16, 1901.

THE CANADIAN FIRE INSURANCE CO. *v.* ROBINSON.

Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent.

The lex fori must be presumed to be the law governing a contract unless the lex loci be proved to be different.

The appointment of a local agent of a fire insurance company is one in the nature of a delectus personæ, and he cannot delegate his authority nor bind his principal through the medium of a sub-agent. *Summers* v. *The Commercial Union Assurance Co.*, 6 S.C.R. 19, followed.

The local agent of a fire insurance company was authorized to effect interim insurances by issuing interim receipts, countersigned by himself, on the payment of the premiums in cash. He employed a canvasser to solicit insurances who pretended to effect an insurance on behalf of the company by issuing an interim receipt countersigned by him (the canvasser) as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium.

Held, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority.

Held, further, that even if the agent might be said to have power to appoint a sub agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurances. Appeal allowed with costs.

Foran, K.C., and *Lafleur*, K.C., for appellant. *Aylen*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] [Dec. 19, 1901.

IN RE ARMY AND NAVY CLOTHING CO.

Company—Winding-up—Liquidator's bond—Money received as assignee—Finality of certificate.

After the assignee for the benefit of creditors of an incorporated company had sold part of the assets and received the proceeds he was appointed liquidator under the Winding-up Act, and gave security by a bond which recited all the proceedings and orders and was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay as liquidator :—

Held, that the security applied to the funds received by the liquidator as assignee, and that the sureties were responsible upon his subsequent misappropriation thereof.

The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties and should form a valid and binding charge against them :—

Held, that the sureties had the right to appeal from the certificate in accordance with the usual practice of the Court.

Judgment of Divisional Court affirmed.

James Bicknell, for appellants. *J. A. MacIntes* , for respondents.

From Divisional Court.] WILSON *v.* SHAVER. [Dec. 19. 1901.

Sale of goods—Future delivery—Destruction before measurement—Property passing.

Whether the property in goods contracted to be sold has or has not passed to the purchaser depends in each case upon the intention of the parties, and the property may pass even though the goods have not been measured and the price has not been ascertained.

The property in the cordwood in question in this case was held to have passed to the purchaser before measurement, although owing to the destruction of the wood by fire the price could not be ascertained with precision.

Judgment of a Divisional Court, 1 O.L.R. 97; 37 C.L.J. 165, affirmed.

F. A. Magee, for appellant. *W. H. Blake*, for respondent.

From Ferguson, J.] [Dec. 20, 1901.

BRANTFORD ELECTRIC CO. *v.* BRANTFORD STARCH WORKS.

Deed—Description—Falsa demonstratio.

By an indenture of lease lessees were given the right to "a sufficient supply of water for the purpose of propelling a wheel not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises. The "present wheel" was forty inches in diameter:—

Held, that the governing words were "not exceeding forty-four inches in diameter," and that the subsequent words, "being the size of the present wheel upon the premises," should be rejected as falsa demonstratio.

Judgment of FERGUSON, J., reversed, MACLENNAN, J.A., dissenting.

Armour, K.C., and *E. Sweet*, for appellants. *Shepley*, K.C., and *W. T. Henderson*, for respondents.

HIGH COURT OF JUSTICE.

Street, J.] ONTARIO BANK *v.* YOUNG. [Oct. 31, 1901.

Bills and notes—Bona fide holder—Bills of Exchange Act, s. 21, sub.-s. 3.

This was a motion for summary judgment under Rule 616 by the payees of a note made by the defendant. The latter admitted the making of the note, but said he made and left it with the officers of a certain company to be used by them in procuring an advance from the plaintiffs, the payees, for the purposes of the company, and that it was deposited by the company with the plaintiffs as security for part advances instead. The defendant did not allege any fraud on the part of the company to induce him to make the note; nor that the plaintiffs had any notice of the terms on which he delivered the note to the company; but only that the plaintiffs took the note without consideration.

Held, that the plaintiffs were entitled to judgment.

J. H. Moss for plaintiff. *McKay* for defendant.

Meredith, J.] MAPILL *v.* TOWNSHIP OF CALEDON. [Nov. 13, 1901.

Highway—Sidewalk thereon built by voluntary subscription and statute labour—Liability of municipality to repair.

A municipality is liable to keep in repair a sidewalk built on a highway within its limits, notwithstanding the fact that the sidewalk was put there by voluntary subscription and statute labour, although the municipality never assumed any control over it, nor was any municipal money or statute labour expended on it with the knowledge of the council, where the council was aware that the sidewalk was there and had opportunity and time to repair it.

DuVernet and *W. D. Henry*, for plaintiff. *Johnston*, K.C., and *E. G. Graham*, for defendants.

Master in Chambers.] CLERGUE *v.* MCKAY. [Nov. 14, 1901.

Production—Letters between party to suit and solicitors—Solicitors also real estate agents—Privilege.

Where certain letters had passed been a party to a suit and a firm of solicitors who had also been acting as his real estate agents, an affidavit on production where privilege is claimed for the letters must set forth and distinguish what communications took place between him and his real estate agents and what between him and his solicitors in order to claim privilege for the latter as the former are not privileged. *Moseley* v. *Victoria Rubber Co.* (1896) 55 L.T.N.S. 482 followed.

R. U. McPherson, for the motion. *W. M. Douglas*, K.C., contra.

Falconbridge, C.J.] HALL *v.* HATCH. [Dec. 9, 1901.

Execution—Seizure by sheriff's bailiff of money being paid debtor in a bank Property passing.

A superannuated civil servant had presented his superannuation certificate at the wicket of a bank, which paid superannuation allowances for the Dominion Government. The teller counted out the amount coming to him, and placed the money on the ledge of the teller's wicket; when, before the payee had touched it, the money was seized by a sheriff's bailiff under an execution against th ayee.

Held, that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it. Judgment of Local Master at Ottawa affirmed.

J. F. Code, for claimants. *Travers Lewis*, for execution debtor. *R. V. Sinclair*, for execution creditor.

Ferguson, J.] RE JELLY. [Dec. 14, 1901.

Vendor and purchaser—Sale under direction of the Court—Error in fixing reserve bid—Opening biddings.

A purchaser at a sale under the direction of the court having no knowledge of an irregularity in fixing the reserve bid cannot be affected by such irregularity and a motion made to set aside a sale and open the biddings on the ground that in fixing the reserve bid the value of one part of the property was not taken into consideration was dismissed with costs. The referee not having in his report approved of the sale, but having made a special report regarding it the purchaser although ready was unable to pay the balance of his purchase money into court.

Held, that he should be allowed to pay it in without interest and without prejudice to his right to object to the title

James Bain, for plaintiff. *Wm. Davidson*, for adult defendants. *J. H. Moss*, for purchaser. *Harcourt*, for infant defendants.

Falconbridge, C.J., Street J.] [Dec. 20, 1901.

IN RE NOTTAWASAGA AND COUNTY OF SIMCOE.

Assessment—Equalizing of assessments—Appeal—County Judge—Limitation of time within which judgment to be delivered—Directory enactment—R.S.O. (1897) c. 224, s. 88, sub-ss. 1-7.

Held, that there is nothing in the provisions of the Assessment Act, R.S.O. (1897) c. 224, s. 88, sub-s. 1 (which gives a municipality dissatisfied with the decision of the Council in respect to the equalization of assessments the right to appeal to the County Judge or otherwise as in that section mentioned) necessitating the passing of a by-law by the municipality authorizing such an appeal. It is one of the matters in regard to which the determination of a Council may be satisfied by a resolution.

Held, also, that the provision at the end of sub-s. 7 of s. 88, providing that where all parties to the appeal have agreed to have a final equalization of the assessment made by the County Judge, the judgment of the latter is not to be deferred beyond the first day of August next after such appeal is directory and not imperative, and the authority of the County Judge who heard the appeal does not come to an end after the date mentioned. A County Judge in such an appeal has power if necessary to complete the taking of evidence and deliver judgment even after that date which is only mentioned as directing him to proceed with all reasonable and possible expedition to determine the matter.

It would seem that the intention of the Legislature was that the county rate should not be struck until appeals against the equalization had been determined, and that they did not foresee the possibility of an appeal being prolonged to an extent to interfere with the machinery for the collection of taxes through the county.

A. Creswicke and *C. Hewson*, for appeal. *Houghton Lennox* for Township of Nottawasaga.

Meredith, C.J., MacMahon, J., Lount, J.] [Dec. 21, 1901.

DAVIS *v.* CROWN POINT MINING CO.

Mechanic's lien—Mining location—Blacksmith—Cook.

A blacksmith employed for sharpening and keeping in order tools used for the work of mining is entitled to a lien for his wages in the mining location, but a cook who does the cooking for the men employed is not. Adjoining mining locations, even when they are water lots, if "enjoyed with" the mining location on which the mine is situated are subject to liens for work performed in the mine.

Le Visconte, for appellants. *W. N. Ferguson*, *J. H. Spence* and *Rowell*, for the various respondents.

Street, J.] BAGSHAW *v.* JOHNSTON. [Dec. 23, 1901.

Mechanic's lien—Statutory action to realize—Joining other causes of action—Parties—Architect.

In an action begun under s. 31 of the Mechanic's and Wage Earners' Lien Act, R.S.O. 1897, c. 153, by the filing of a statement of claim, to realize a lien created by the Act, the plaintiff cannot include other causes of action and other matters.

Where the plaintiff in such an action claimed to be entitled to a lien against the owner of land who had erected a building thereon, and joined as a defendant the architect of the building, whom he charged with fraudulently refusing to give a certificate for the amount which the plaintiff claimed to be entitled to recover, and asked that the architect might be ordered to pay the amount claimed, with damages for his fraudulent breach of duty, and the costs of the action, the name of the architect was struck out.

Semble, that, as against the owner, the claim to a proper certificate might be maintained in this action as one of the matters involved in the claim to a lien.

D. C. Ross, for plaintiff. *Rolph*, for defendant Johnston. *McBride*, for defendant Siddall.

Street, J.] BERTUDATO *v.* FAUQUIER. [Dec. 23, 1901.

Security for costs—Delay in applying for.

An appeal by the defendants from an order of the Master in Chambers dismissing their security for costs. The plaintiff sued for damages in respect of injuries received by him in August, 1901, at Sudbury, while in the employment of the defendants, owing to their alleged negligence. The action was begun on Feb. 12, 1901, statement of claim delivered on the 10th June, 1901; statement of defence on the 20th June, 1901; and the action was set down for trial at the Toronto sittings beginning on Sept. 16th, 1901. The trial was by consent adjourned until the winter sittings, the defendants desiring to examine a man named Cardomano, who was present when the plaintiff was injured. On Sept. 25, 1901, the plaintiff came from Pittsburgh to Toronto and submitted himself to examination by the defendants for discovery. He then stated that he was living at Pittsburg Pennsylvania, that his family were there, and that he did not intend to return. After the injury in August, 1901, the plaintiff was brought to Toronto, where he lived until August, 1901, when he went to Pittsburgh. After the examination for discovery in September the defendants issued a commission to Montreal to examine Cardomano as a witness, and he was examined thereunder early in December. In the same month the plaintiff examined the defendants for discovery, and gave notice of trial for the Toronto sittings beginning on the 6th January, 1902. The defendants launched their motion for security for costs on Dec. 19, 1901, and it was

heard on Dec. 21, 1901. The Master declined to order security on the ground of delay in applying after information come to the defendants that the plaintiff had permanently moved out of the jurisdiction, relying upon *Pooley's Trustee* v. *Whetham*, 33 Ch. D. 76. The defendants appealed.

R. U. McPherson, for the appellants, contended that the defendants were justified in delaying the motion until after the examination of Cardomano, in order that they might be able to swear to a defence on the merits.

G. G. S. Lindsey, K.C., for plaintiff.

STREET, J., held that the delay in moving after the information obtained by the defendants on Sept. 25, 1901, was not sufficiently accounted for or explained, and dismissed the appeal with costs to the plaintiff in any event.

Meredith, C.J.] PHILLIPS *v.* MALONE. [Dec. 23, 1901.

Writ of summons—Service out of jurisdiction—Rule 162 (e)—Contract—Place of performance—Quebec law—Discretion.

An agreement between the plaintiff and defendants provided for the purchase by the defendants who resided and carried on business in Montreal, in the Province of Quebec, from the plaintiff of certain plant and machinery and stock in trade of a business carried on by him at Montreal. A part of the stock in trade was not at once to be purchased, and provision was made that it was to be held by the defendants on consignment, and sold by them for and on account of the plaintiff; and that if at any time the plaintiff should be willing to sell to the defendants this part of the stock, or any portion thereof, the defendants should purchase the same at the stock price thereof. The agreement was signed by the plaintiff in Toronto, in the Province of Ontario, and afterwards by the defendants in Montreal. The plaintiff sued for the price of the goods referred to in the latter part of the agreement, alleging that he had elected to sell the goods to the defendants and had notified them of his willingness to do so, whereupon they became liable to pay him the price.

Held, that the contract was made in Montreal, and the obligations arising out of it were to be governed by the law of Quebec, according to which the domicil of the debtor is the place of payment, and therefore the action was not founded on a breach within Ontario of a contract to be performed within Ontario, and service of the writ of summons out of Ontario should not be allowed: Rule 162 (e).

In another view, the obligation to pay did not arise directly from the provisions of the agreement, but in order to make it complete there must have been an election to sell, and notice thereof to the defendants, and, as a notice of the election was given by letter received by the defendants in Montreal, there was another difficulty in the way of the plaintiff.

Having regard to all the circumstances and to the fact that the defendants were not possessed of any property in Ontario which could be reached

by process upon a judgment recovered in this action, a proper discretion was exercised in setting aside the order allowing service of the writ out of Ontario.

Comber v. *Leyland* (1898) A.C. 524, referred to.

Worrell, K.C., for plaintiff. *George Kerr*, for defendants.

Meredith, C.J.] IN RE YOUNG. [Dec. 23, 1901.

Will—Construction—Devise—Condition—Vested estate subject to be divested Application under Rule 938—Executors—Locus standi.

The testatrix devised certain land to her grandson "when he arrives at the age of twenty-five years. Should he not survive till the age of twenty-five years, I give (the same land) to my son Andrew, and should he die without heirs of his natural body, I give (the same land) to my son Robert, his heirs and assigns forever."

Held, that the land was vested in the grandson, subject to be divested in the event of his not attaining the age of twenty-five years.

Doe dem. Hunt v. *Moore*, 14 East 601, *Phipps* v. *Ackers*, 8 Cl. & Fin. 583, and other cases cited in Theobald on Wills, 5th ed., p. 497, referred to.

Semble, that the executors having no estate in the land given to them by the will, and none under the Devolution of Estates Act, seven years having elapsed since the death of the testatrix, had no locus standi to make an application under Rule 938 to have questions arising under the will determined.

W. N. Ferguson, for executors. *W. E. Middleton*, for J. T. Young. *W. Proudfoot* for the other parties.

Trial of Action, Lount, J.] [Dec. 26, 1901.

HODGINS *v.* O'HARA.

Company—Shares—Subscription—Allotment—Failure to organize company—License—Insurance Act.

A life insurance company was incorporated by a special Act passed June 13, 1898, which enacted that the Insurance Act and the Companies Clauses Act should be read as forming part thereof. By s. 4, the provisional directors were authorized forthwith to open stock books, procure subscriptions, and do what was necessary to organize the company. By s. 5, as soon as $250,000 of the capital stock of the company should be subscribed and ten per cent. of that amount paid into a bank, the provisional directors were to call a meeting of qualified shareholders, who were to elect a board of directors. By s. 6 the company was not to commence the business of insurance until $65,000 of the capital had been paid in cash. Stock books were opened, and on June 23, 1899, the defendants each subscribed for 100 shares. Efforts to obtain subscribers for stock to the

amount required by the Act of incorporation wholly failed, not more than $75,000 having been subscribed. No payments were made on the stock subscribed for by the defendants. Tne plaintiff, having an unsatisfied judgment and execution against the company for the recovery of money, sued the defendants as shareholders holding unpaid stock, under the Companies Clauses Act, R.S.C., c. 118, s. 30.

Held, that to constitute a binding contract to take shares in a company, when such contract is constituted by application and allotment, there must be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of the allotment having been made: *In re Scottish Petroleum Co.*, 23 Ch. D. 430; *Nasmith* v. *Manning*, 5 A.R. 126; *Ward's Case*, L.R. 10 Eq. 659.

The subscription for stock amounted to nothing more than an offer, and required to be completed by an allotment of stock to the subscribers: Bickley's Companies Acts, 7th ed., p. 64; Palmer's Company Law, 3rd ed., p. 69; *Pellatt's Case*, L.R. 2 Ch. 527; *Ritso's Case*, 4 Ch. D. 774; *Hobb's Case*, L.R. 4 Eq. 9.

The company never was organized; it had no business existence; it never had stock to allot; it never had directors; and therefore it never could make an allotment.

Held, also, that as no license was obtained by the company from the Minister of Finance within two years from the passing of the Act incorporating the company, such Act expired and ceased to be in force on the 13th June, 1900, and the company ceased to exist: The Insurance Act, R.S.C., c. 124, s. 24.

A. Millar, K.C., for plaintiff. *A. W. Anglin*, for defendants.

Falconbridge, C.J., Street, J.[[Dec. 26, 1901

WALSH *v.* WALPER.

Execution—Fieri facias—Liquor license—Covenant by lessee to reassign license—Running with the land—Interpleader issue.

A license under the Liquor License Act cannot be seized by a sheriff under a writ of fieri facias. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into such a license.

The right to sell liquor at a particular place under such a license is a personal one and is not assignable by the holder of it unless he obtain the consent and comply with the conditions of s. 37 of Liquor License Act, R.S.O. c. 245.

A covenant in the lease of a hotel by the lessee that at the expiration of the lease he will assign to the lessor the license, if any, then held by him, is not a covenant binding upon the assignee of the term as such. It is a merely personal covenant having nothing to do with the land or its tenure.

Idington, K.C., for claimant. *W. H. Blake*, for execution creditor.

Street, J., Britton, J.] IN RE JONES *v.* BISSONNETTE. [Jan. 3.

Practice—Writ of summons—Service out of jurisdiction—Order before action—Parties—Causes of action—Joinder—Rules 120, 128, 162 (g), 164.

The proper practice under the Rules as they stand (Rules of 1897, Nos. 120, 128, 164) is to obtain, before the issue of the writ of summons, an order fixing the time for appearance to be inserted in the writ proposed to be issued, and allowing it to be served out of the jurisdiction.

Where the affidavit filed on an application for such an order shewed that the cause of action alleged against three of the defendants, one of whom lived in Ontario, was the causing an information to be laid against the plaintiff in Quebec, and the plaintiff to be arrested upon a warrant in Ontario by the fourth defendant, and taken to Quebec and prosecuted there upon a criminal charge, of which he was acquitted, and that against the fourth defendant the unnecessary and unjustifiable handcuffing of the plaintiff in Ontario:—

Held, that the plaintiff was not entitled to join the fourth defendant with the other three, the causes of action being separate and having nothing to do with each other.

Held, also, that, as one of the three remaining defendants lived in Ontario, and it was alleged that he joined in the laying of the information, he was a proper party to the action, within the meaning of Rule 162 (*g*), and an order should be made for the issue and service of the writ upon the other two in Quebec.

Croft v. *King* (1893) 1 Q.B. 419, followed. But the order should contain a clause providing that in case the action should be dismissed as against the defendant in Ontario, the plaintiff should consent to its dismissal as against the other defendants as well.

W. R. Riddell, K.C., for plaintiff.

Falconbridge, C.J., Street, J., Britton, J.] [Jan. 6.

IN RE GEDDES AND COCHRANE.

Landlord and tenant—Lease—Renewal—Increased rent—Arbitration.

In a lease for twenty-one years the rent fixed was, for the first year $106.88, for the next four years $130 a year, for the next five years $145 a year, and for the remaining eleven years $178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, "*at such increased rent* as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants . . as are contained in these presents." The lease provided for the appointment of arbitrators to determine the rent to be paid under the renawal lease.

Held, that the arbitrators were bound to award an increased rent under

the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase was to be based upon the rent reserved for the whole term, and not for any particular year or years of it; it might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past.

In re Geddes and Garde, 32 O.R. 262, approved.

H. D. Gamble, for the lessor. *John Macgregor*, for the lessee.

Lount, J.] [Jan. 7.

TOWNSHIP OF GLOUCESTER *v.* CANADA ATLANTIC R. W. CO.

Way—Road allowance—Obstruction—Railways—Fences—Municipal corporation—By-law—Railway Act of Canada—Railway Committee of Privy Council—Injunction—Removal of obstruction—Jurisdiction.

An action for an injunction to restrain the defendants from obstructing a highway in the township, by fences on both sides of the defendants' tracks where they crossed the highway, and for a mandatory order compelling the removal of the fences.

Held, 1. The allowance for the road in question having been made by a Crown surveyor was a highway within the meaning of s. 599 of the Municipal Act, and, although not an open public road used and travelled upon by the public, it was a highway within the meaning of the Railway Act of Canada, 51 Vict., c. 29.

2. Although the road allowance had not been cleared and opened up for public travel and had not been used as a public road, it was not necessary for the municipality to pass a by-law opening it before exercising jurisdicting over it; the council might direct their officers to open the road and such direction would be sufficient.

3. The right of the railway company under s. 90 (g) of the Railway Act to construct their tracks and build their fences across the highway was subject to s. 183, which provides against any obstruction to the highway, and s. 194, which provides for fences and cattle guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public use or with the control over it claimed by the municipality.

4. The Railway Committee of the Privy Council had no jurisdiction to determine the questions in dispute; s. 11 (h) and (q) of the Railway Act not applying.

5. The Court had jurisdiction to grant the relief sought.

Fenelon Falls v. *Victoria R. W. Co.*, 29 Gr. 4, and *City of Toronto* v. *Lorsch*, 24 O.R. 227, followed.

6. The highway being vested in the township corporation who desired to open and make it fit for public travel, the plaintiffs were entitled to have

the defendants enjoined from obstructing it and ordered to remove the fences.

G. F. Henderson, for plaintiff. *Chrysler*, K.C., and *C. J. R. Bethune*, for defendants.

Robertson, J.] McDERMOTT *v.* HICKLING. [Jan. 7.

Mistake—Recovery of money paid under mistake of fact—Mortgage—Account—Acknowledgment—Laches—Estoppel—Statute of limitations—Costs.

Upon a mortgage made in 1885 for $2,750, the mortgagors made payments from time to time to the mortgagee, and after his death in Sept., 1892, to his executors. Written receipts were always given to the mortgagors, and an account was kept by the mortgagee in a book, but he failed to credit a payment of $153 made on the 1st of November, 1890, and a further payment of $25.16 made July 27, 1892. On Nov. 28, 1894, the three executors assigned the mortgage to one of themselves in part payment of a legacy to him from the mortgagee. The amount mentioned in the assignment as due upon the mortgage was $1,159 and interest, but this was made up from the book, and in arriving at it credit was not given for the two payments of $153 and $25.16. On March 2, 1895, one of the mortgagors signed a written acknowledgement that the amount due at that date was $1,159.54 for principal and $76.49 for interest. Further payments were made from time to time by the mortgagors, and on Feb. 23, 1901, they made a final payment of $47,488, which was supposed by them and by the assignee to be the balance due, though the true amount was about $168 only. On Aug. 23, 1901, this action was brought by one of the mortgagors (who had acquired the rights of the others) to recover $306.88 and interest from Feb. 23, 1901, as money paid under a mistake of fact. The action was begun against the assignee only, but the plaintiff afterwards added the executors as defendants, and claimed an account and to surcharge, etc.

The mortgagors were uneducated and incapable of keeping accounts or understanding them when made out, and depended entirely on the mortgagee, and after his death upon the active executor, for the keeping of the account, and although they had the written receipts in their possession they never had the account checked by them or an independent account made up from them.

Held, 1. The money paid in excess of the amount due having been paid in ignorance of the facts, was recoverable notwithstanding the acknowledgement and notwithstanding laches, the mortgagors not having waived all enquiry, because it would be unconscientious for the assignee to retain it. *Marriott* v. *Hampton*, 2 Sm. L. C., 10th ed., p. 431; *Kelly* v. *Solari*, 9 M. & W. 54, and *Townsend* v. *Crowdy*, 8 C.B.N.S. 493, followed.

2. There was no estoppel, neither the assignee nor the estate of the mortgagee having been placed in a worse position than if the overpayment had not been made.

3. The plaintiff's claim was not barred by the Statute of Limitations, because no cause of action arose until the 23rd February, 1901, when the mortgagors paid a sum in excess of what was really due.

4. The plaintiff should have only such costs as he would be entitled to had he commenced his action in the first place against the executors.

H. H. Strathy, K.C., and *C. W. Plaxton*, for plaintiff. *W. A. Boys*, for defendant G. W. L. Hickling. *D. M. Stewart*, for defendants as trustees.

Meredith, C.J., Lount, J.] [Jan. 8.

MCGUINNESS *v.* MCGUINNESS.

Execution—Sale of land under—Distribution of proceeds—Costs of execution creditor—Creditor's Relief Act, s. 26.

The appellant, on Feb. 2, 1900, placed in the hands of the sheriff for execution a writ of execution against the goods and lands of the execution debtor issued on a judgment recovered by the appellant against him, and the writ was indorsed with the usual direction to the sheriff to levy in accordance with its provisions. Later on the same day the respondents placed their writ of execution against the goods and lands of the execution debtor in the hands of the sheriff for execution; it was issued upon a judgment for costs which they had recovered in an action brought by the execution debtor against them. No further steps were taken by the appellant, but the respondents' solicitor directed the sheriff to advertise for sale under their writ certain lands of the execution debtor. The lands were in pursuance of this direction duly advertised to be sold under the respondents' writ only, and the sheriff offered the lands for sale pursuant to his advertisement, under the respondents' writ, but no sale was effected for want of buyers. A writ of ven. ex. was then issued on the respondents' judgment and delivered to the sheriff, under which he sold the lands.

Held, that the respondents were the creditors at whose instance and under whose execution the seizure and levy were made, within the meaning of s. 26 of the Creditors' Relief Act, R.S.O. c. 78, and they were, therefore, entitled to be paid in full their taxed costs and the costs of their execution, in priority to the other execution debts and claims, out of the residue of the proceeds of the sale in the hands of the sheriff for distribution after deducting his own fees and charges.

W. H. Wallbridge, for appellant. *H. L. Drayton*, for respondents.

Meredith, J.] IN RE SOUTHWOLD PUBLIC SCHOOL SECTIONS. [Jan. 10.

Public schools—Union of school sections—Powers of arbitrators—Appeal to county council—I. Edw. VII., c. 39, s. 42.

An application was made to a township council to alter the boundaries of school sections 12, 13 and 14, by taking about 1,200 acres from 13 and adding them to 12, and by taking about 2,000 acres from 14 and adding them to 13. The county council refused the application; an appeal was taken to the county council against such a refusal; and arbitrators were appointed by the latter council under the authority of s. 42 (3) of the Public Schools Act, I. Edw. VII., c. 39. The arbitrators made no alteration in the boundaries of any of the sections, but by their award assumed to unite sections 12 and 13, and recommended the building of a new school house in a central position in the thus united sections.

Held, that it was not within the power of the arbitrators to unite the two school sections upon an appeal against a refusal to comply with an application to alter boundaries only. The arbitrators are given power. "to form, divide, unite or alter the boundaries;" but that means to form, divide, unite, or alter in accordance with the subject-matter of the appeal. Award set aside without costs.

Aylesworth, K.C., for applicants. *J. M. Glenn*, K.C., for the township and county. *T. W. Crothers*, amicus curiæ.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] McLAUGHLIN CARRIAGE CO. *v.* FADER. [Dec. 28, 1901.

Order for arrest Practice in relation to obtaining and setting aside—Inference from affidavits shewing that defendant is keeping out of the way—Appeal dismissed where to allow it would be futile.

Defendant was arrested under an order for arrest granted on the affidavit of plaintiff's solicitor that he had probable cause for believing and did believe that defendant unless he was arrested was about to leave the province. The order for arrest was set aside, and the bond directed to be delivered up to be cancelled, by order of the Chief Justice at Chambers, who was satisfied, on reading the affidavits produced before him, that defendant, at the time of his arrest, was not about to leave the province.

Held, 1. The judgment of the learned judge at Chambers was one that the Court, on appeal, would not interfere with.

2. That following *Hunt* v. *Harlow*, 1 Old. 709, a statement of belief that defendant is about to leave the province being all that is required

under the practice to procure an order for arrest, defendant is entitled to be discharged if he negatives that intention, unless plaintiff can state facts from which it can clearly be inferred that it was the intention of defendant to leave.

3. Such an inference was not to be drawn from affidavits merely tending to shew that defendant was keeping out of the way to avoid service of an order for his examination under the Collections Act.

4. It would be futile to allow plaintiff's appeal, as at the time the order for defendant's examination, under the Collections Act, was served the order for arrest was effete, and the bond cancelled, and no stay of proceedings had been obtained, and the liability of the sureties could not be restored.

D. McNeil, for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Full Court.] DILL *v.* WHEATLEY. [Dec. 28, 1901.

Draft—Liability of acceptor for accommodation of third party not discharged by payment made by drawer—Case of accommodation acceptance for drawer distinguished.

Plaintiff agreed to sell certain cattle to M. on condition that M. would procure someone to accept a draft for the price. Defendant at the request of M. accepted a draft for the amount, and the second draft given in renewal for the first, and agreed to accept a third draft in renewal of the second but refused to do so at the instance of M., who, in the meantime, had become insolvent. Plaintiff furnished all the money used to retire the second draft with the exception of the sum of $10 paid by M.

Held, 1. Affirming the judgment of the County Court Judge with costs that defendant was not relieved from his liability on the second acceptance by the payment made by plaintiff, and that plaintiff was entitled to judgment for the amount of the acceptance less the sum of $10 paid by M.

2. The case was distinguishable from one where the acceptor accepts for the accommodation of the drawer who takes it up at maturity and negotiates it to someone who sues the acceptor.

F. H. Bell and *W. B. MacCoy*, for appeal. *W. E. Thompson*, contra.

Full Court.] McDONALD *v.* LOWE. [Dec. 28, 1891.

Pleading—Practice—Plea set aside as bad.

Plaintiff's statement of claim alleged that on or about a certain date he was the owner of certain property described, and that on or about the date mentioned defendant converted to his own use the goods and chattels described.

Held, that pleas which denied that plaintiff was the owner of the goods and chattels described without adding the words "or any of them," and which confined the denial of plaintiff's ownership of the goods and chattels and defendant's conversion of them to the dates mentioned in the statement of claim were bad and must be set aside.

C. P. Fullerton, for plaintiff. *H. Stairs*, for defendant.

Full Court.] THE KING *v.* O'HEARON. [Dec 28, 1901.

Canada Temperance Act—Question as to previous convictions under s. 115, sub-s. (a)—May be addressed to counsel where defendant represented by.

On application to quash a conviction for a fourth offence against the provisions of the Canada Temperance Act on the ground that the question whether defendant had been previously convicted was not addressed to the defendant as required by s. 115, sub-s. (a) of the Act.

Held, 1. Dismissing the application with costs, that it was not necessary that the question referred to should be addressed to defendant in a case where he was represented by counsel. 2. If defendant could be adequately represented by counsel in pleading to and trying the main case (which it was clear he might be under ss. 850, 854, 855, 856 and 857 of the Code) he could equally be represented by counsel in respect to this enquiry.

S. Jenks, for application. *T. S. Rogers*, contra.

Full Court.] ACORN *v.* HILL. [Dec. 28, 1901.

Landlord and tenant—Construction of agreement for lease—Distress for rent—Action claiming damages for, dismissed—Costs.

Defendant contracted to let to plaintiff a house then under construction for the term of one year from the 1st June, 1900, at the rental of $20 per month, payable monthly in advance. It was agreed that in the event of the house not being completed by June 1st there should be a proportionate reduction in the rent. The house was not completed by the time agreed, but plaintiff moved in on June 24, when the work was still unfinished. No rent was charged for the month of June, but plaintiff paid rent in advance for the months of July, August, September and October, and continued in occupation of the premises until the 1st May, 1901, when he moved out. In an action by plaintiff claiming damages for goods distrained by defendant for rent in arrear.

Held, dismissing the plaintiff's appeal with costs, that the trial judge was right in construing the agreement as a letting for a year from the 1st June, 1900, with a condition that if the occupancy was prevented by reason of the house not being ready for occupation at that time there should be a

deduction from the rent in respect to the period of time during which the house was not occupied.

Held, also, that the payments made by plaintiff shewed a waiver of the provision in respect to the house being finished by a fixed date, or rather in respect to the deduction which was to be made in consequence of its not being finished.

C. P. Fullerton, for appellant. *G. A. R. Rowlings*, for respondent.

Full Court.] THE KING *v.* GIOVANETTI. [Dec. 28, 1901.

Canada Temperance Act—Stipendiary magistrate for county—Jurisdiction where offence committed in incorporated town.

Defendant was convicted by a stipendiary magistrate for the county of Cape Breton of having kept for sale upon his premises intoxicating liquors contrary to the provisions of the second part of the Canada Temperance Act. The offence for which defendant was convicted was committed within the limits of the town of Sydney, an incorporated town in the county of Cape Breton. Under R.S.N.S. 1900, c. 33, it is enacted that "every Stipendiary Magistrate shall have jurisdiction, power and authority throughout the whole of the county for which he is appointed."

Held, 1. In the absence of legislation giving exclusive jurisdiction to the stipendiary magistrate of the town of Sydney the words of the statute must be construed as including parts of the county embraced within the limits of incorporated towns.

2. Section 14 of c. 33 which was relied upon as indicating a contrary intention was not to be given such a construction, but was merely intended to give certain powers to stipendiary magistrates for the counties where exclusive jurisdiction had been conferred upon the magistrates for incorporated towns. Appeal allowed and order below reversed with costs and costs of the appeal.

C. P. Fullerton, for appellant. Nem. con.

Full Court.] IN RE SKEFFINGTON. [Dec. 28, 1901.

Illegitimate child—Order for adoption set aside at instance of mother—Consequences of order not fully understood at time of consent—R.S.N.S. (1900), c. 122—Acts 1901, c. 47.

An order was made by the judge of the County Court for District No. 1, under the provisions of R.S.N.S. 1900, c. 122, permitting the adoption of an illegitimate child of S., whose written consent to the making of the order was first obtained as provided by the Act, s. 2, sub-s. (*a*).

Subsequent to the making of the order c. 47 of the Acts of 1901 was passed under the provisions of which application may be made to set aside an order for adoption where it appears that the party signing the consent

thereto "did not at the time of signing the same clearly understand the full effect and purport thereof." The judge of the County Court who made the order having died application was made under the Act of 1901 to his successor to set the order aside and to restore to the mother the custody of her child. It having been made to appear on such application that the effect of the order for adoption had not been fully explained to the mother at the time she signed the consent thereto, and that she had very little idea of the consequences of her act.

Held, that the learned judge was right in setting aside the order for adoption, and there was no reason for interfering with his decision.

W. H. Fulton, for appellant. *M. H. Lenoir*, for respondent.

Full Court.] [Dec. 28, 1901.

MANCHESTER *v.* HILLS.

Bill of sale—Effect of possession under, in absence of filing as against subsequent attachment—Words "hirer, lessor, bargainor."

Plaintiffs sought a declaration that a transfer of a stock of goods and merchandise from the defendant J. H. to his brother G. H. was void under the provisions of c. 11 of the Acts of 1898 relating to Assignments and Preferences, and under ss. 1, 3, 4 of the R.S.O. (5th ser.) c. 92 of the Prevention of Frauds on Creditors by Secret Bills of Sale because it was not filed in the office of the registrar of deeds for the county. The transfer in question was a document executed by J. H., January 12, 1899, under which he transferred to G. H. a stock of goods in store to the amount of $1,500, and agreed to pay for the same by paying notes of B. & Co. to the amount of $500, and by giving ten notes for the balance, of $100 each, one payable every six months. The document of transfer concluded "The said G. H. to hold the goods in store, and whatever goods may come in after shall become the property of the said G. H. until the said G. H. claim is paid in full. If I fail to pay any of the above named notes the said G. H. can take over possession of the business and all stock in the said store at time of me failing to meet or pay above or aforesaid named notes." This document was not filed in the registry of deeds for the county, and was not accompanied by any affidavit.

After G. H. had taken possession of the stock of goods under the power to do so contained in the document, plaintiffs attached the goods as the property of J. H., an absent or absconding debtor, and sought to have the transfer to G. H. set aside on the grounds above mentioned. G. H. counterclaimed against plaintiffs for the conversion of his goods.

Held, affirming the judgment of the trial judge and dismissing plaintiffs' appeal, that the document in question came within the term "bill of sale" as defined by R.S. (5th series) c. 92, s. 10, and should have been filed and was liable to be defeated for non-filing up to the time that G. H. took possession under it.

Held, also, that G. H. did not come within the category of a "hirer, lessor, or bargainor" within the meaning of s. 3 of c. 92, and that such section had therefore no application.

W. B. A. Ritchie, K.C., for appeal. *T. S. Rogers*, contra.

Province of New Brunswick,

SUPREME COURT.

In Equity. Barker, J.] [Dec. 17, 1901.

AITON *v.* MCDONALD.

Security for costs—Suit against administratrix—Estate insolvent.

Security for costs was ordered where plaintiff resided out of the jurisdiction in a suit against an administratrix for the payment of a sum of money alleged by the will to have been received by the intestate as guardian of the plaintiff, it appearing that the intestate's estate was insolvent, and there also being no satisfactory evidence of the alleged indebtedness.

A. O. Earle, K.C., and *A. A. Wilson*, K.C., for application. *C. N. Skinner*, K.C., and *A. W. MacRae*, contra.

In Equity. Barker, J.]

SAGE *v.* SHORE LINE RAILWAY CO.

Railway bonds—Mortgage—Foreclosure—Receiver and manager—Operating railway—Repairs—Salvage—Receivers' certificates—Priority of bondholders—Jurisdiction.

A railway company issued bonds secured by mortgage of the company's property. In a suit for foreclosure the mortgage receivers and managers of the property and business of the company were appointed with liberty to operate the railway and to maintain the road and property in good and sufficient repair, either by credit or by cash out of the earnings of the road. Repairs being necessary and the earnings being insufficient the receivers were empowered to issue receivers' certificates made a first charge on the company's property and on the moneys to be realized from the sale of the company's property in priority to the bondholders.

McLean, K.C., for receivers. *Earle*, K.C., for plaintiffs. *Puddington*, for defendants.

Barker, J.] SIMPSON *v.* JOHNSTON. [Dec. 17, 1901.

Trustee—Breach of trust—Relief—61 Vict., c. 26—Costs.

A testator devised and bequeathed his real and personal estate to his wife "to be hers in such a way that she shall during her natural life have the full use, benefit and enjoyment thereof." He directed his executors to sell his real estate and to invest any money belonging to his estate in certain specified securities "so that my said wife may have the interest and income arising therefrom during her life," and appointed his wife and the plaintiff executors. Proceeds from the sale of the real estate came to the hands of the plaintiffs, and were by them remitted to the widow, living in England. The widow invested part of the proceeds in securities in the name of herself and one of the plaintiffs, and disposed of, though in what manner did not appear, the balance of the principal monies. A suit was brought by the plaintiffs after the widow's death to be relieved from liability for the loss of such part of the estate. By Act 61 Vict., c. 20, a trustee who has acted honestly and reasonably, and ought fairly to be excused for the breach of a trust, and for omitting to obtain the directions of the Court of Equity in the matter in which he committed such breach, may be relieved by the Court from personal liability for such breach. Relief granted, but without costs.

A. J. Trueman, K.C., for plaintiffs. *S. L. Fairweather*, for next of kin.

In Equity, Barker, J.] FOREMAN *v.* SEELY. [Jan. 7.

Solicitor and client—Authority to collect principal and interest under mortgage—Possession of mortgage securities.

In the absence of legal proceedings to enforce a mortgage security there is nothing in the mere relation of solicitor and client from which an authority may be implied to the solicitor to receive interest or principal due the client on the mortgage, even though the solicitor arranged the mortgage loan. The solicitor must have either express authority for the purpose or the course of dealing between the parties must have been such as to necessarily imply such an authority; and the onus of establishing that is upon the mortgagor. An authority to receive interest confers no authority to receive principal, and the possession of the mortgage securities is no evidence of authority to receive money due on them.

Province of Manitoba.

KING'S BENCH.

Full Court.] THE KING *v.* HURST. [Dec. 21, 1901.

Criminal Code, 1892, ss. 354, 611—Indictment—Date of commission of offence—Evidence of similar acts at other times—Judge's charge—Fraudulent removal of goods.

The accused were convicted by the jury at the trial on a count for concealing certain household goods for the purpose of defrauding the insurance company by which they had been insured by representing that they had been destroyed by fire and collecting the insurance money upon them, also on a count which alleged a removal of said goods on or about the 11th day of September, 1900, for a like fraudulent purpose. Both counts were framed under 354 of the Criminal Code, 1892. Evidence was given at the trial shewing the removal of some of the goods in question on the 13th of August and of others on the 11th of September, 1900, and in his charge to the jury the learned judge did not distinguish between the goods removed August 13 and those removed Sept. 11 but left the case to them in such a way that they could convict on both counts or on either of them as to both sets of goods. At the request of the accused the judge reserved for the opinion of the Full Court the following questions: 1. Could the accused be convicted of the offences charged in respect of the goods removed on the 13th of August, 1900? 2. Could the accused be so convicted in respect of the goods removed Sept. 11, 1900? And in stating the case he certified that in his opinion the evidence of the removal of goods Aug. 13, 1900, materially influenced the verdict of the jury.

Held, that the conviction of the accused on the count for concealment of goods was right and should be affirmed, but that, although the evidence of the removal in August was probably admissible for the purpose of shewing a criminal intent in the removal in September, yet the conviction for the removal should be set aside on the ground of misdirection by the judge in his charge to the jury in telling them that they could convict for the removal in August.

BAIN, J., in giving the judgment of the court quoted the provisions of s. 611 of the Code and proceeded: "Now here it would seem that, while the count identified the offence which the accused were called upon to meet as having occurred Sept. 11, at the trial they were called on to meet another distinct charge of an offence which, it was alleged, they had committed Aug. 13, and the same count was thus made to apply to two separate transactions. The result could hardly be otherwise than that the prisoners were placed at a disadvantage on the trial of this count, and, as regards this count, I think there may not have been a fair trial. I think, there-

fore, that the conviction of the accused on this count should be set aside."

Patterson and *Bonnar*, for the Crown. *Howell*, K.C., and *E. L. Howell*, for accused.

Province of British Columbia.

SUPREME COURT.

Full Court.] KcKINNON *v.* PABST BREWING CO. [July 8, 1901.

Contract—Action for extras—Authority of agent—Setting aside findings of jury.

M. contracted to build a building in Vancouver for defendants, a Milwaukee company, the contract providing that no extras would be allowed unless their value was agreed upon and indorsed on the contract. S., who intended to occupy the building for the purposes of a bottling company, of which he was a member, ordered extras, but no indorsement thereof was made on the contract. In an action for the price of the extras the jury found "that S , as authorized agent for the company, ordered the extras for it, and that it did either hold out or permit S. to hold himself out as its agent for the purpose of ordering extras."

Held, by IRVING, J., dismissing plaintiff's action, and affirmed by full Court, that such indorsement on the contract was a condition precedent to plaintiff's right to recover.

Macdonell, for plaintiff. *Wilson*, K.C., and *Bond*, for defendant.

Drake, J.] REX *v.* NICHOL. [Nov. 27, 1901.

Costs—Criminal libel—Depositions not used at trial—Abortive trial—Crim. Code, ss. 833, 835.

Motion by defendant for an order that the costs reserved to be dealt with by the trial Judge by the order of McColl, J. (now C.J.), dated 31st August, 1898, be taxed and paid to defendant.

This was a criminal libel action, and the defendant in support of his plea of justification, obtained a commission, and had the evidence of certain witnesses out of the jurisdiction taken, for use at the trial. The order granting the commission provided that the costs of the commission be reserved to be dealt with by the trial Judge. The evidence was used at the first trial and the jury disagreed. At the second trial the jury again disagreed. At the third trial defendant was acquitted, but the evidence was not used owing to the private prosecutors giving evidence

and admitting substantially what was stated by the witnesses in their depositions before the commissioner.

Held, per DRAKE, J., that as the commission evidence was not put in by defendant as part of his case, defendant should be deprived of the costs of it.

Held, also, that defendant was not entitled to the costs of the abortive trials.

Langley, for defendant. *Cassidy*, K.C., for prosecution.

Book Reviews.

A treatise on injunctions and other extraordinary remedies. By Thomas Carl Spelling. 2nd edition. Boston: Little, Brown & Co. 1901.

This is a second edition of Mr. Spelling's well-known work, and consists of two volumes, comprising in all nearly 1900 pages. The largest portion of the work is devoted to the subject of injunctions, but the law relating to habeas corpus, mandamus, prohibition, quo warranto and certiorari is also fully considered. As this is a second edition, it is hardly necessary to give a detailed review of its contents. The number of cases cited is enormous, principally of course United States decisions, but they are by no means confined to those of that country. In this edition Mr. Spelling has wisely followed the excellent arrangement adopted in the first edition, but has added a number of new sections required for further clearness and exactitude owing to the development of the law. The author seems to have the happy faculty of gathering together appropriate cases into the numerous sub-divisions of each subject so that the work is a valuable digest as well as an excellent treatise. As some one has said, he dominates his subject, and does not allow his subject to confuse or dominate him.

UNITED STATES DECISIONS.

SOLICITOR—PRIVILEGE—Privileged communications to an attorney are held, in *Koeber* v. *Somers* (Wis.) 52 L.R.A. 512, not to include a conversation giving authority to compromise on action, since the giving of such authority necessarily implies a right to communicate the fact.

SLANDER OF CORPORATION.—Slander of a person who is a majority stockholder and officer of a corporation, when not spoken with respect to the business of the company, is held in *Brayton* v. *Cleveland Special Police Co.* (Ohio) 52 L.R.A 525, to give the corporation no right of action either for the slander or for the injury to its business which resulted from the loss of public confidence in such person. A note to this case reviews the authorities as to actions for libel or slander of a corporation.