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One of the Toronto newspapers has published a daily reminder of the number of days during which North Renfrew has been without a representative in the Provincial Legislature. The profession in the County of York, Ontario, might in a similar way be reminded that its County Court has been without a Clerk for upwards of three years. Meantime the locum tenens is, under the law, the Clerk of the Peace, who, if he be really allowed to enjoy the fees, has a very good thing. We presume from the position not being filled there is no need for the services of any one but a junior clerk. This is probably correct, but if so, why not be economical and appoint the present warming pan without extra salary. If, however, another appointment is to be made, as was intimated last Session by the Attorney General, we trust the position will be given to some member of the profession. There are many such to whom such a sinecure would be a God-send, and this is the class that are entitled to positions of this kind, and not some political hanger on of the lay species, e. g. a baker or farmer, or such like.

It has been recently decided by a Divisional Court, (Street and Britton, JJ.), on appeal from the County Court of Wentworth, in the case of *Dunn* v. *Malone*, that it is not possible for parties by any form of words to contract themselves out of the provisions of the Interest Act, (60 & 61 Vict. c. 8, D.), and the Act amending it (63 & 64 Vict. c. 29, D.) The principal Act requires that any written or printed contract for the loan of money on any security other than real estate, where the interest is payable at a rate per day, week, or month must also explicitly state what is the equivalent yearly rate, on pain that no more than six, (or in cases where the amended Act applies, five) per cent. per annum shall be recoverable. In the case in question the rate was five per cent. per month, but no statement of the equivalent yearly rate was mentioned, but the parties expressly agreed that the contract was a sufficient compliance with the Act, and the borrower expressly waived the benefit of the Act, but all to no purpose, as the Court held. On

first sight it may appear that this decision is an invasion of the fundamental maxim, *Quilibet potest renunciare juri pro se introducto*, for the law in question seems particularly and expressly a law for the protection of debtors, just as much as a statute of limitations, which any debtor is competent to waive, or that protection which the law throws round infants, invalidating contracts made by them during infancy, which defence they nevertheless may waive on attaining majority. Street, J., who delivered the judgment of the Court, however, adopted the reasoning of the American Court in *Mabee* v. *Crozier*, 22 Hun, N.Y., 264, and *Bosle* v. *Rheene*, 72 Pa., St. 54. These were cases in which it was held that a debtor could not waive the provisions of statutes against usury, because otherwise such acts which were founded on public policy, might thus be rendered nugatory. This may be thought an invasion of that right of freedom of contract which some persons hold so dear, but which like many other good things is capable of being used perniciously.

DISCOVERY AND PRODUCTION.

SOME CONTRASTS BETWEEN THE LAW OF DISCOVERY AND PRODUCTION IN ENGLAND AND IN ONTARIO.

The right to discovery, as it now exists, may be said to have had its origin almost entirely in the Courts of Equity. Courts of Common Law, before the passing of the Common Law Procedure Act, exercised certain very limited powers, which might be said to partake of the nature of discovery. These were not based upon any idea, such as pervaded the equitable practice of discovery. They were rather what might be termed limited rights arising, in a measure, out of the rules as to pleading, and limited to the inspection of documents. They divided themselves into three heads:—

I. The inspection under the practice of profert and oyer of a document under seal, where it was relied upon by a party in his pleading, the rule being strictly one of pleading that the party must make profert that he bring the document into court, the other party shall then be entitled to demand oyer of it.

II. The other branch of the practice consisted in the right of a party to an action to inspect documents in his adversary's posses-

sion when he had an interest therein. This practice was not founded upon any principle of discovery, as understood in equity, but upon the right or claim in the nature of ownership arising from the interest of the party in the documents.

III. The class of cases in which, at Common Law, inspection was allowed of documents of a public character, either by rule in the action itself, if they were in the possession of a party to litigation, or by mandamus, if they were in possession of a third party, depended upon a similar principle, and might not inaccurately be said to be an extension of the same principle.

Discovery, in the sense of obtaining disclosure from an opposite party of facts within his knowledge, apart from inspection of documents in the limited cases referred to above, was unknown to the Common Law. The basis of the right, as it at present exists is, as stated in the opening, to be found in the practice of the English Court of Chancery, which has descended to us.

It is far beyond the scope of this article to examine into the causes which gave rise to this exercise of jurisdiction by the Courts of Equity, a practice which, while not altogether without parallel in other systems of law, is in many respects unique in legal history.

Prior to the passing of the Judicature Act equity had arrived at what might be said to be a complete law and practice in regard to discovery. The right had been established in a party to proceedings before the civil Court, including (what was, indeed, the most common case of an action purely for discovery) of a party to an action at law to extort, on oath, from another party to the proceedings, his knowledge of facts concerning the matter in question, and the production of all documents, except certain special classes privileged from discovery in his possession, relating to such matter. The damaging nature of the disclosure to the case of the party required to make it was no answer, indeed, was considered rather a reason for the giving of discovery, and a party very frequently was compelled to give discovery which would prove the whole cause of action of his adversary.

Definite rules have been arrived at as to the circumstances under which and the character of the proceeding in aid of which discovery was given, some of which survive in our present practice. Indeed it was said by Lord Selborne in *Lyell* v. *Kennedy*, 8 A.C. at p. 223, that the right of discovery under existing practice at the date of that decision, since the Judicature Act, was not in principle

more extensive than it formerly was in the Court of Chancery. However this might have been at the time of the delivery of the judgment in that case, it is now reasonably clear under the rules in force in Ontario (Rules 439-462, as amended by rules recently passed and coming into effect on the 1st of September, 1903, Rules 1250-1251) that the right of discovery is, in some respects, at least wider than the right under the former practice of the Court of Chancery, a notable instance being that a party to an action of tort has as full a right to discovery, both by way of production of documents, and by way of oral examination of his adversary, as in the case of an action on a contract or a purely equitable action to enforce a trust. This was a right which did not exist under the old equity practice.

Some few restrictions upon the apparently unlimited right of discovery, given by the Judicature Act and the Rules derived from the formerly existing doctrine of the Court of Chancery still survive in our law. These will be noticed subsequently in dealing with recent cases under the various headings of privilege from discovery.

The law and practice of discovery in the Province of Ontario, while descended from, and based upon the principles and practice of the English Court of Chancery, with a few principles introduced from the practice of common law at the time of the enactment of the Common Law Procedure Act and Administration of Justice Act, following the passing of similar Acts in England, has been so far defined and regulated by statute and rules that, so far as the actual practice is concerned, it might almost be said to be completely controlled thereby.

An English practitioner, familiar only with the practice as at present existing in England under the present Order 31, upon coming to practice in this Province would find that while his knowledge of the general principles, applicable to the law of discovery, would be fully available in determining such question, for instance, as the right to refuse discovery in an action for penalties, the grounds for, or the extent of the privilege based upon legal professional communication, would, nevertheless, find that the manner in which, as a matter of practice, his discovery should be obtained, nay more, the cases and circumstances in which he had a right to discovery were very different from what was in vogue under the practice to which he had been accustomed. It would very

probably strike him that the most marked difference lay in the greater ease and facility with which discovery is obtainable in this Province, and the much greater latitude allowed therein. A few sharp contrasts would, perhaps, illustrate this :—

Under the Ontario Practice, as a matter of right, after delivery of Statement of Defence (except in certain special cases to be hereafter noticed where no right of discovery exists) he would be entitled to summon his adversary by subpœna and appointment, or by seven days' service of notice of the appointment upon his solicitor to appear before a special examiner, and conduct a practically unlimited cross-examination of him upon oral question and answer, an examination the scope of which would be wider than could be conducted at a trial, as discovery is not limited strictly to what is evidence, but may extend to anything which may, in itself, lead to the obtaining of evidence. In England he would have no such right. At the same stage of action, or similar in this to the Ontario practice, in special cases at an earlier stage, he may make an application to the court or a judge for leave to deliver interrogatories in writing for the examination of his adversary. Before he can make this application he must give security for costs. (Order 31, Rules 25 and 26.) This security being first in the sum of five pounds, with an additional sum of ten shillings for every folio by which the number of folios in the interrogatories exceed five. Then, upon the application before the judge, the giving of leave to administer interrogatories is not a matter of course. The interrogatories have to be submitted to the judge, and the leave is given as to such only of the interrogatories submitted as the court or judge shall consider necessary for disposing fairly of the cause or matter, or to save costs. The practice, as followed, is strictly in accordance with the rules, and it is safe to say that the practice in this matter affords the most marked contrast at present existing between the practice in England and the practice in Ontario, which is emphasized by the obvious consideration, that in England the answers to these interrogatories are carefully framed by the solicitor for the party, after full consultation and consideration, as against the practice in Ontario, which requires the party to go to examination without any knowledge of what specific questions will be asked of him, the form in which they will be put and compelled to answer, as in court, upon the questions as then imme-

diately presented without any opportunity of either consultation or consideration in regard to any question or point arising.

The practice as to discovery of documents affords a very similar contrast. In Ontario the order to produce issues as a matter of course upon præcipe upon the application of the party immediately after settlement of defence is due or has been filed. In England, under the provisions of Order 31, Rules 12, 13 and 14, just as in the case of administering interrogatories, the party has to obtain the leave of the court or judge for the issue of the order. The granting of the application is by no means a matter of course. The judge may either refuse or adjourn the application if satisfied that the discovery asked for is not necessary, or not necessary at that stage of the proceedings, or he may limit the discovery to certain classes of documents as may be thought fit. There is a proviso added at the end of the rule, apparently to emphasize the discretionary nature of the proceeding, "provided the discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for fairly disposing of the cause or matter, or for saving costs." This initial difference, it will be at once seen, colors the whole of the subsequent practice as to discovery of documents. The principles applicable in Ontario and England may, generally speaking, be said to be the opposite of one another. In England the right is, in most instances, a limited right sharply defined by the terms of the order. In Ontario the right is a general right to have production of every document in any way relevant. In the one case the right to a further affidavit depends altogether on the convincing the court, not merely that a document or documents relating to the matter are in existence, but also of the fact that these are necessary to the case of the party applying. In Ontario all that has to be shewn is the existence of a relevant document.

The contrast between the Ontario practice and the English practice, not only on the question of the right to discovery, but as to the attitude of the judges in regard thereto in dealing with the every-day practice, is well illustrated by reference to the case of *Kennedy* v. *Dodson*, L.R. (1895) 1 Chy. 334, an action brought for a declaration that the defendant and the bankrupt, of whom the plaintiff was trustee in bankruptcy, had purchased a certain piece of land as co-partners and for partnership accounts. The plaintiff delivered interrogatories to the defendant, enquiring as to list of

properties purchased by himself and the bankrupt, jointly, prior to the particular transaction in question, and a number of interrogatories following that as to terms and conditions of the purchase, proportion of the purchase money, etc. In disallowing these interrogatories Lord Herschell, at page 338, after dealing with the suggestion that if it could be proved that in prior transactions the bankrupt and the defendant had been purchasing lands on partnership terms that would render it probable that such was the nature of the transaction in this case, proceeds: "But that is not relevant evidence. Cases of this description are not determined upon probabilities, but upon evidence of what happened upon the particular occasion. It is said that many of these questions might be put to the defendant in cross-examination, but that could not be for the purpose of proving what the particular transaction had been, except only to the extent of shewing that the defendant's evidence as to this particular transaction was not to be credited because of the admissions made by him in regard to the other transactions, but because those questions might be put to the defendant in cross-examination it by no means follows that evidence of such transaction would be relevant evidence to be given in chief at the trial. I entertain a strong opinion that interrogatories of this description, unless strictly relevant to the question at issue in this action, ought to be rigorously excluded; they cause a great amount of hardship and oppression; they cast upon the defendant, merely because a writ has been served upon him, the burden of a considerable amount of trouble and annoyance, and if he refuses to answer he may be sent to prison. Here the defendant is asked to give a list of all the properties prior to 1873 in which he and the bankrupt were jointly interested, and to state the terms and conditions upon which such properties were purchased. In order to answer that question he must rake up all these transactions for a period of twenty years before 1873. It is said that he may have diaries relating to these transactions—so much the worse for him. He will be a lucky man if he has destroyed them. Nothing shews better than this the wisdom of destroying books and papers relating to transactions which are done with. In my opinion there has sometimes been great laxity in times past in allowing interrogatories. It is a system which has made the very name of law stink in the nostrils of many sensible men of business. They state that they would rather pay the claim than

take the trouble necessary to answer interrogatories of this description, which causes a vast amount of trouble and difficulty unless they are clearly relevant to the issue."

In the same case Mr. Justice Lindley, referring to the same interrogatories, says :—

"They are opposed to the fundamental principles of discovery which are stated in Sir J. Wigram's Treatise on Discovery :—

'The second proposition stated is as follows It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters and facts which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial and which the defendant does not, by his form of pleading, admit. That renders it necessary to say a few words as to what are matters of fact, which, being well pleaded in the bill, are material to the plaintiff's case. What ought a properly drawn bill to contain? It ought to contain a statement of those facts, and those facts only, which, if proven, will entitle the plaintiff to relief.' And again in the same judgment, 'I doubt whether this information would be admissible in evidence, but, suppose it would, it does not follow that the plaintiff would be entitled to discovery of it. Examining witnesses at a trial and obtaining discovery before the trial are two totally different matters.'"

A not inconsiderable experience in practice motions in regard to discovery in our own courts leads the writer to venture the opinion that if the precise point decided in *Kennedy* v. *Dodson* were to arise in our courts upon a motion to compel answer to such questions, certainly prior to the decision of that case, a considerable number of the questions which might have been framed upon the examination for discovery relating to the matters covered by the interrogatories there refused would have been ordered to be answered, and, even with the authority of that case (which would of course be treated with all the respect that a decision of the Court of Appeal in England commands in our courts) it is not improbable that upon an argument based upon the language of Rule 439 "a party may be compelled to attend and testify in the same manner, upon the same terms and subject to the same rules of examination as a witness," helped out with the provisions of Rule 448, providing for the production on the examination of all

books, papers and documents which would be bound to be produced at the trial under a subpœna duces tecum—the plaintiff in that action, if in Ontario, would have been enabled to compel the discovery there sought. Reference may be had, too, to the language of Lord Justice Lindley in *Wills Trade Marks* (1892) 3 Chy., at page 207. "There is nothing in modern times which requires greater care than making orders for discovery and inspection of document." Contrast such decisions and language of judges in English courts with the decision of the King's Bench Division in *Evans* v. *Jaffray*, 3 O.L.R., at page 327, a case which was very fully argued and in which the court, at page 342, practically confesses its inability under our practice to deal with such questions other than by the indirect method of disallowing costs, Mr. Justice Street, in delivering the judgment of the court, saying:—"Several of the questions mentioned in the examinations were clearly irrelevant. Others were so loosely framed as to make it impossible to deal with them. The examinations of both defendants were frequently rambling and vague, and were unnecessarily prolonged by the repetition of the same questions in different forms. This is a growing evil and adds much useless expense to litigation as well as to the labour, both of judges and counsel. It can only be checked by entirely disallowing the costs of an examination, which is unnecessarily long."

Similarly, in regard to discovery of documents, the language of Order 31, Rule 12 of the English rules of the Supreme Court (particularly the last clause thereof) "provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter, or for saving costs" is to the same effect as the concluding language of Order 31, Rule 2, with reference to interrogatories and the decisions have followed very much along the same line. See *Dowsing* v. *Falmouth Local Board* (1887), 37 Chy. Div., on page 242, where Lord Justice Cotton, in delivering the judgment of the Court of Appeal, says: "The tendency to extend the power of the court to order discovery ought to be very carefully checked and certainly not encouraged." And see also *Attorney-General* v. *North Metropolitan Railway* (1892) 3 Chy., at page 370, where Mr. Justice North declined altogether to order an affidavit of documents or the general inspection of the defendant's books, the relators in the action being trade rivals, and dealing with the

question as to the extent to which interrogatories should be allowed, says, at page 74: "I think they are entitled to some information, but only of a very limited character, and one must be very careful not to give any information to the plaintiffs, which is not necessary for the purpose of enabling them to prosecute their own case when it may be most unfavorable to the defendants for general purposes that their rivals in trade should have that information."

Had this case been in our courts the ordinary order for discovery would have been issued upon præcipe and the ground upon which that judgment proceeds would not have afforded any ground whatever for privileging the documents from production and inspection. The sole question upon any motion in reference to the affidavit would have been, "Do entries in the books in question relate to the matter in question in the action? If so they must have been produced. It may be that the entries would not be evidence and could not be used at the trial; even that would make no difference provided they referred in any way to the matters in issue.

Another marked contrast in the provisions of the rules between the Ontario and the English practice is in regard to the time and place of production of documents, although in actual practice no difference exists upon this point. Technically, under the form of our order to produce, a party fails to comply with the whole order unless he deposits the documents with the office from which the order issues. Under the form of the order it is the right of the party issuing same to insist upon this being done in this Province. In England this is a matter left to be fixed when the order to produce is issued, and the office of the court is, except in very rare instances, not the selected place.

Another marked contrast between the Ontario practice and that in this province at present is in regard to the conclusive effect given to the affidavit on production. The law in England, down to the passing of what is now Order 31, Rule 19 (a), sub-sec. 3, which was first passed in November of 1893, was the same as that in Ontario—the affidavit was treated as conclusive. No contradictory affidavit could be received, nor would an interrogatory, looking to cross-examination upon the affidavit on production, be allowed.

The only ground upon which a motion for further and better affidavit on production could succeed was on admission of the party himself, either in pleading in answer to interrogatories or in some other document emanating from himself, perhaps the most common source being some reference in documents already produced by him to other documents not produced. The opposite party was practically limited to these items as his only basis for getting further production; otherwise the affidavit filed was conclusive. Since the passing of the rule above referred to in England a practice has grown up to make application for a further affidavit on production based upon affidavits of the party referring to specific documents which, in the belief of the deponent, either are or have at some time been in the possession or power of the opposite party. This practice has been narrowly, not to say jealously restricted, as will be seen by reference to such cases as *White* v. *Spafford*, 2 K.B. 24, *Graves* v. *Hindman*, 18 T.L.R. 115. In Ontario, however, there is no such practice. No rule such as Order 31, Rule 19 (a), sub.-s. 3, of the English rules has been passed or adopted in our courts, and the law is still in Ontario as it was in England prior to the passing of that rule — the affidavit is conclusive unless further affidavit can be obtained on some of the grounds referred to above. Indeed, in this regard recent alterations of the Ontario rules have been in the direction of restricting any right to challenge the affidavit.

Prior to the 1st of September, 1894, the rule which then existed as Rule No. 512 provided, "The deponent in every affidavit on production shall be subject to cross-examination," and under this rule, cross-examination on affidavit on production with a view to obtaining further and better production was not an infrequent proceeding. That rule was rescinded by rule which came into force on the 1st of September, 1894, and by the same set of rules an exception of the affidavit on production was introduced into the rule which is at present Rule 490, allowing cross-examination of a person who has made affidavit to be used in any action or proceeding. The rule so rescinding was passed along with a number of others, notably the rules dealing with the question of costs of examinations for discovery, making costs of such examination to be borne in any event by the party taking same unless otherwise ordered by the trial judge, which latter rule subsisted for a com-

paratively short time when it was repealed, and the present rule, leaving this in the discretion of the taxing officer, substituted.

It was conceived by many practitioners that the only purpose of the rescission of the former Rule 512 was to put an end to the practice of separate cross-examinations upon affidavit on production for the purpose of saving costs, and that, notwithstanding the rescinding of this rule, it was still open to the party either upon examination for discovery or by way, for instance, of examination as witness upon motion, to interrogate him as to other documents in addition to those referred to in his affidavit on production.

An attempt was made in *Dryden* v. *Smith*, 17 P.R. 500, to examine the party who had made the affidavit on production as witness upon a motion made for further and better affidavit on production referring to specific documents, or, rather, classes of documents. It was held by the present Master in Chambers (then sitting as referee for the Master in Chambers) and by the present Chief Justice of Ontario (then Mr. Justice Moss) that that procedure amounted in effect to an attempt to cross-examine on the affidavit on production, and could not be done. The language used by Mr. Justice Moss in the concluding passages of his judgment at pages 504-505 left open the question as to whether or not upon the examination of the party for discovery questions designed to extract admissions as to the existence of other documents than those mentioned in the affidavit on production, and thus, in effect, a cross-examination upon the affidavit might not have been permitted, and this question was not definitely settled by any authority in our courts until October, 1902, when, in a case of *Standard* v. *Seybold*, Chief Justice Meredith, delivering the judgment of the Divisional Court (Common Pleas Division), held that an opposite party might not indirectly, by means of an examination for discovery, do what he could not do directly—cross-examine upon an affidavit on production.

This case may be regarded, for the present at any rate, as settling the point that we are now in Ontario in the same position as parties were in England under the old practice before the passing of the amended rule, and the right to obtain a further and better affidavit on production is limited to the cases in which it can be obtained upon some documentary admission of the party making the affidavit as above set out.

Our practice of discovery, both by examination for discovery and production of documents, is a most useful and valuable one; one which, in many instances, is a most valuable instrument in enabling parties to get at evidence of facts, and thus in the result enabling courts to do justice between parties. It is also a means of very greatly shortening trials, thus effecting a considerable saving of time and expense, but in its present form it is also a practice capable of great abuses, and being an instrument of much oppression. Many solicitors of experience can give curious instances where actions have been brought largely for the purpose of getting at an examination of the parties, or discovery of documents in regard to business transactions in reference to which the plaintiff was anxious to enquire sometimes for ulterior business purposes, sometimes with a view to further, or other litigation, against, perhaps, different parties; numbers of instances also in which parties have been added and pleadings have been framed in an action designed to procure relief for the express purpose of obtaining also discovery and production in regard to ulterior matters can be given.

As illustrating the occasionally oppressive nature of the Ontario practice, a case occurred in the writer's own experience in which the defendant, an English gentleman residing and domiciled in England, made a party to a litigation in Ontario and held as party therein (for no other reason than that relief was sought against and writ had been served in Ontario upon other parties domiciled here) was compelled to make no less than four successive affidavits on production, scheduling a vast mass of correspondence and also to submit to a very lengthy and much drawn out examination upon commission, all in an action which was nothing but a fishing excursion from its inception, as was shewn by the fact that when the plaintiff was forced to trial therewith he abandoned his action without the case being even called in court. The expense to the one defendant of the proceedings in regard to discovery and production alone of his solicitors in Ontario, exceeded $600. The writer is not informed as to what his expenses in England (where his own solicitors were acting in the matter) were, but it is safe to say they must have been very nearly, if not quite, equal to those of the Ontario solicitors. One can imagine that it is such instances as these that Lord Herschell had in mind in the passage above

cited when he said: "It is that system which had made the very name of law stink in the nostrils of many sensible men of business."

Practically all the recently reported cases in Ontario on the question of discovery have to do with some one or other of the various grounds of privilege and in regard to this branch of the law the cases illustrate that there is no contrast between the law of Ontario and the law of England on any of these points, but rather that the cases are based upon and follow the principles enunciated in the English cases.

One well known ground of privilege from discovery is that the discovery sought from the party will criminate him or expose him to penalty. In reference to this the decision in *Lamb* v. *Munster*, L.R. (1882), 10 Q.B.D. p. 110, has always been followed in this province, holding that "I decline to answer upon the ground that my answer might tend to criminate me" is a sufficient claim of the privilege. The belief that it would tend to criminate need not be asserted. This is an absolute privilege and has always been given full effect to in our Court as may be illustrated by the case of *Van Sickle* v. *Axon*, 17 P.R. 535, where an affidavit on production stated "I have in my possession or power a certain document relating to the matter in question in this action. I object to produce the said document, the naming and production of which said document might tend to criminate me or might tend to bring a criminal prosecution against me for a crime of which in fact I am innocent, and for which I might be criminally prosecuted" and proceeded following the ordinary form to negative the possession of any other document. This was held to be sufficient and a motion against the affidavit upon the ground that the document was not sufficiently described failed before the local Judge, the present Chief Justice Moss, (then Mr. Justice Moss), in Chambers, and the Divisional Court of the Common Pleas Division. It appears to have been thought by some that when the present Criminal Code was enacted in 1892 this privilege would disappear from our law. In this view it was obvious that the fact that the privilege in civil cases depended upon the Ontario statutes had been overlooked.

The question came up very shortly after the passing of the Code and was settled upon the appeal in *Wiser* v. *Heintzman*, 15 P.R. p. 407, that the formerly existing law had not been altered by the passing of the Dominion statute. For

recent illustrations of effect being given to this ground of privilege see *De Ivry* v. *The World*, 17 P.R. p. 387, where in an action of libel, it was held that the party to be protected against answering any questions not only that has a direct tendency to criminate him but that forms one step towards doing so, and upon the officer of the Corporation pledging his oath to the belief that such would or might be the effect of his answer, he was entitled to the privilege.

This question also arose when this ground of privilege was set up in the case of *Hopkins* v. *Smith*, 1 O.L.R. at p. 659, where the action being for maintenance, upon an order for production being issued by the plaintiff and appointment to examine the defendants motion was made to set aside the order and appointment upon the ground that the statement of claim charged them with a criminal offence and they were entitled to refuse to answer any question tending to criminate them. The question really in issue was whether or not maintenance was a criminal offence, and it being held that it was, the motion was upheld.

It is interesting to notice too that the Divisional Court adopted the view expressed by Sir William Meredith, C.J., in *Malcolm* v. *Race*, 16 P.R. 331, holding in effect that it was not necessary in a case such as this to put in an affidavit on production taking the objection, or to attend upon the examination and wait until the question was asked and then decline to answer same, but that "It is better to stop such examination in limine than to allow it to proceed subject to objections to questions which may be asked." This practice has been again approved and followed in *Johnston* v. *London & Paris Exchange* (1903), 6 O.L.R. 50.

In connection with this matter and the claiming of such privilege it is interesting to note as an illustration of how questions supposed to have been long ago settled, occasionally crop up. The case of *Nunn* v. *Brandon*, 24 O.R. p. 375, in which the late Mr. Justice Rose, at the trial of an action for libel following the opinion expressed by him in *Harkins* v. *Doney*, 17 O.R. 21, held that the refusal of the defendant upon his examination for discovery to answer as to his being the author of the libel complained of and the reason given by him "I refuse to answer for fear of incriminating myself" afforded evidence from which a jury might draw the inference that he was the author of the libel

in question. On appeal, which was heard by the Common Pleas Division, this judgment was reversed.

In penal actions the practice since the Judicature Act has expressly followed the old practice of the Courts of Equity which refuses altogether discovery in such a class of actions or in aid of a forfeiture, this notwithstanding the wide language of the rule which is perfectly general in its terms, making no distinction between classes of actions or containing any reference to any particular action or class of actions. In a recent case, in which it was sought on behalf of the plaintiff in a patent action to obtain the benefit of this rule, *Parramore* v. *Boston*, 4 O.L.R. 627, the attempt failed so far as this point was concerned, upon the ground that this was not an action for forfeiture but merely a case of the defendant defending himself against a right asserted on the part of the plaintiff, and that the discovery sought was not discovery as to a forfeiture, but simply a discovery of the happening of the event on which the claim or right of the plaintiff, if such had ever existed, would terminate.

A curious exception to this principle is illustrated by a case of *Regina* v. *Fox*, 18 P.R. 343, wherein an action for penalty under the Alien Labor Act, the plaintiff was held entitled to examine the defendant for discovery before the trial. The exception, however, is a purely statutory one, the decision proceeding upon the language of s. 2 of The Canada Evidence Act, 56 Vict. (Canada), c. 31, which was held, having regard to the provisions of s. 5 of 61 Vict. c. 53 to give the right.

The next of the most ordinary grounds of privilege is that based upon professional confidence as between solicitor and client. This is well illustrated by the recent case of *Clergue* v. *McKay*, 3 O.L.R. p. 63, (and in appeal at page 478), in which case Mr. Justice Street, upon appeal from the Master, notes in the course of his judgment "there has been a progressive development in the particularity required in the description of correspondence between a solicitor and his client in order that it may be held to be protected from discovery by reason of privilege; that which was formerly assumed from general statements must now be specifically set forth and sworn to, the reason being that as the affidavit cannot be contradicted, the ground upon which the privilege is claimed must be set forth explicitly and fully so that the Court may judge whether the documents so described are properly withheld from

production, and expressly stating that this decision goes beyond the decision of the case of *Hoffman* v. *Crehar*, 17 P.R. 404 (also a decision of Mr. Justice Street.)

It might be well to note in considering this decision the special facts of this case it being one in which the solicitors had obviously acted not merely as such, but had also acted as real estate agents in connection with the transfer of the property, and it is to be noted that the decision does not purport to go further than, indeed expressly proves the statement of the law in *Gardner* v. *Irvin*, 4 Ex. Div. at p. 49, in which it is indicated that it is sufficient to state that the letters are professional communications of a confidential character for the purpose of obtaining legal advice; such statement of the law being again approved in *Ainsworth* v. *Wilding*, 1 R.(1900), 2 Chy. at p. 315, which also, it may be noted, again settled the point which appears to crop up periodically, that if documents for which privilege can be claimed are brought into existence for the purpose of an action which is not proceeded with, the privilege does not cease, but can be claimed in a subsequent action other than that for which they were originally brought into existence. See on this point *Pearce* v. *Foster* (1885), 15 Q.B.D. 114; *Calcraft* v. *Guest*, L.R. (1898), 1 Q.B. p. 761, although it was thought that this had been conclusively settled by the language of the judgment of the Court of Appeal in *O'Shea* v. *Wood* (1891), Probate 286. See also *London Life* v. *Molson's Bank*, June 11, 1902, where Chief Justice Falconbridge followed and applied the cases of *Wheeler* v. *LeMarchant*, L.R. 17 Chy. D. 675; *Minet* v. *Morgan*, L.R. 8 Chy. 367, and *London* v. *Blackney*, 23 Q.B.D. 332.

Privilege on the ground of professional confidence does not extend to cases where questions of fraud are raised. This principle has been long ago settled in England and is perhaps most clearly enunciated there in the recent case of *Williams* v. *QueBrada Railway* (1895), 2 Chy. 751, and by the case of *Bullivant* v. *Attorney-General* (1900) A.C. p. 196, which latter case went off upon the ground that there was no proof of fraud. A recent case in our own Courts of *Smith* v. *Hunt* (1901), O.L.R. p. 334, shews that these cases have been entirely adopted and followed by our Courts.

It might be worth while for the framers of our Rules to consider whether or not some provisions should not be made to prevent an abuse of this principle. Under our system, pleadings are not sworn to. A party is at liberty to put such pleading as he may

see fit upon the record. He runs no risk except perhaps in remote instances that of costs, by placing the plea of fraud thereon. He is not even under the existing practice held strictly to what were formerly considered well settled rules of pleading, but is given very wide latitude to frame his own much as he might see fit. It is very easy when production of correspondence and documents, which would otherwise be privileged under this head, is desired, to frame a plea charging fraud so as to entitle the party to the wide latitude of discovery, which the present position of the law gives him. This is by no means a fanciful possibility of evil —it is an existing condition which has not infrequently to be dealt with. It is difficult to suggest any effectual remedy which would not involve a radical change in our present practice in the way of limiting the right to discovery as it now subsists. The obvious suggestion of requiring an affidavit from the party seeking the discovery verifying the plea of fraud would be a very crude remedy, if a remedy at all, and open to objections which are patent on the face of it. Under the English practice no such difficulty can arise, or at least if it arises is fully dealt with upon the application for leave to administer interrogatories, or for the order for production as the case may be.

There is scarcely any point in our practice which is more important to the interests of those who require to consult solicitors than that the confidential relation and privilege based upon it should subsist and be fully preserved, and to that end some limitation should be imposed upon this method of destroying the privilege by the introduction of an allegation of fraud often entirely unfounded.

Another ground of privilege which has been recently considered by our Courts and in which the English authorities have been followed, is that which arises where a party swears in his affidavit that documents relate exclusively to his own title or case, are part of the evidence supporting same, and do not support or tend to support the case of the other party and contain nothing impeaching his own case. A recent authority establishing and illustrating this proposition in England. was the case of *Frankenstein* v. *Gavin Cycle Co.*, (1897), L.R. 2 Q.B. p. 62, following *Attorney-General* v. *Emerson*, (1882), 10 Q.B.D. p. 191. This case was followed in our own Courts in a case of *Griffin* v. *Fawkes*, 17 P.R. p. 540.

It may be noted that the statement in the affidavit in order to effectually make the claim of privilege must be a positive statement. "To the best of the knowledge, information and belief" of the party will not do. See *Diamond Match Co.* v. *Hawkesbury Lumber Co.* (1901) 1 O.L.R. p. 577, which case followed the old case of *Coombe* v. *Corporation of London* (1842) 1 Y. & C. 621, and also *Quilter* v. *Heatley* (1883) 23 Chy. Div. p. 42.

English authority was again followed and approved when it was held in *Platt* v. *Bucke*, 4 O.L.R. p. 421, that privilege on the ground of professional confidence did not exist when the client of the solicitor with whom the privileged correspondence was had, was the common grantor of both the plaintiff and defendant.

Another rather striking adoption of the English practice is illustrated by such cases as *Bedell* v. *Ryckman*, 5 O.L.R. at p. 670; *Graham* v. *Temperance*, 16 P.R. 536; *Dickerson* v. *Radcliffe* (1897) 17 P.R. 576; *Sidney Cheese & Butter Factory* v. *Brower* (1900) 19 P.R. p. 152; *Evans* v. *Jaffray*, 3 O.L.R. p. 341, where following English decisions discovery with regard to matters of account has been refused until the plaintiff shall have established his right to the account, a practice which has arisen in our law solely through the following of English decisions. So far as the language of the rules is concerned the right is absolute, subject to no such limitations as imposed by these cases. The cases, however, have clearly defined and settled the rule; any subsequent cases that may arise can only determine its applicability to particular facts and circumstances.

It is scarcely to be expected that any further limitations upon the right of discovery will come into our practice through the influence of English decisions so long as our rules remain in their present condition, although the cases last referred to may be taken as indicating that it is not impossible.

ROBT. MCKAY.

Toronto.

KILLING NO MURDER.

We, on this side of the line, favoured with a polity which distinctions of colour and race do not bind to the observance of diverse canons of law for their treatment, instead of being amazed by its recurrence, take, as a matter of course—with the experience of a quarter of a century before us—any prostitution of justice in the Southern States, where the life or limb of a negro is at stake. We have been encouraged to fancy, however, that in so far as dealings in those communities between whites are concerned, they had crept from the sombre recesses of barbarism into the clear sunlight of civilization. A recent affair in South Carolina robs us of the comforting assurance.

One Gonzales, editor of a newspaper in Charleston, had, by allusions printed in his columns—all of them condemning political actions merely of the State's executive, and none of them exceptionally bitter—given umbrage to the individual chosen for his target. Meeting, not long afterwards, the presumptuous journalist in one of the city's thoroughfares, he, without the least warning, drew his revolver and shot him dead.

Indicted and brought to trial for the offence, his counsel offered and maintained on his behalf a plea which every one learning of it will, I venture to say, regard as unexampled in tenor. The discussion of its character may be forestalled by the remark that it was submitted by the trial Judge to the jury and upheld by them, and the prisoner acquitted. He set up the astonishing claim that the killer was exonerated because his victim and he having entered into an agreement whereby one might shoot the other on sight, he, on the occasion of their meeting, construing a movement of Gonzales in the direction of his pocket as an attempt to produce his weapon, anticipated the latter's design by the discharge of his own first.

Should not the Court have declined at once to entertain the plea by reason of its constituting in law no answer to the indictment, and have prevented disclosure of any facts which might have gone to support it. For, supposing a deliberate compact to have been formed, as contended—the engagement to have represented something more, on both sides, than mere bravado—on what principle could it relieve the prisoner of accountability? Consent by the deceased that his life should be taken would afford no justification.

The reasoning in the old case of *Rex* v. *Sawyer*, Old Bailey, 1815, has never yet been impugned. There, it was determined, that "he who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head." So, in *Rex* v. *Alison*, 8 C. & P. 418, there, upon an indictment for the murder of a woman, it appeared that the prisoner and the deceased, who passed as husband and wife, being in very great distress, agreed to take poison, and each took a quantity of laudanum, in the presence of the other, and both lay down in the same bed together, wishing to die in each other's arms, and the woman died, but the prisoner recovered; Patteson, J., told the jury that, supposing the parties mutually agreed to commit suicide, and one only accomplished that object, the survivor was guilty of murder in point of law.

The celebrated case of *Reg.* v. *Dudley*, 14 Q.B.D. 273, 15 Cox C.C. 624; where a man, who, in order to escape death from hunger, killed another for the purpose of eating his flesh, though he had the fullest ground for believing that it afforded the only chance of preserving his life, might, also, be referred to.

Duelling—odious in conception, vengeful in practice as it is—appears, in contrast with the invention for destroying your enemy, of which Governor Tillman boasts the patent, a correct, even laudable, institution; for by that process of settling differences, each adversary has an equal chance of life.

But, if in addition to the existence of the understanding alleged to have been come to, the prisoner had been required to furnish reasonable evidence that Gonzales sought to carry it out—and it is hard to conceive how the original agreement, if sufficient, would be strengthened by its production—is anything to be found here which fulfils the requirement? A pedestrian, who is about to pass another carrying, without a suggestion of menace, a walking-stick, might just as fairly see danger in posse of an assault in his possession of that ordinary, and quite lawful accompaniment, and prevent its occurrence by setting upon its owner.

The South Carolina jury which allowed this brutal murderer to escape are entitled to the satisfaction that the civilized world is revolted by their action.

J. B. MACKENZIE.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From MacMahon, J. [Sept. 14.

MIDLAND NAVIGATION CO. *v.* DOMINION ELEVATOR CO.

Maritime law—Custom of port—Arrival of vessel—In port or at point of loading (elevators)—Awaiting turn—Not loaded in time—Departure without cargo to save insurance—Freight.

The plaintiff company being the owners of a vessel called the "Midland Queen," agreed by telegram with the defendant company to carry a cargo of wheat from F. W. to G. at four and a half cents a bushel, confirming same as follows: "We confirm Midland Queen four and half G. load F. W. on or before noon fifth December." The wheat was in the elevators of the C.P.R. at F.W., and the Midland Queen arrived in that harbour on December 3rd, but as several vessels had arrived before her and she had to take her turn to get to the elevators according to the regulations of the C.P.R., the owners of the elevators there, of which all parties were aware, she was not loaded by the time fixed and had to leave for home without a cargo in order to save her insurance. In an action for the freight,

Held, that the defendants' duty was to furnish a cargo at the elevators which was the only place of loading at F. W., and the contract should be read as if the words "at the usual place" were inserted and that the plaintiffs' contract was to proceed to the usual place of loading, receive the cargo and carry it to the point of destination; that the loading was to be done by noon of the fifth; that the defendants not having done anything to obstruct the vessel in getting to the elevators, and the plaintiffs having failed to show that the defendants were in default their action should be dismissed, and that the vessel not having arrived sufficiently in advance to secure her turn in time, the defendants were entitled to such damages as fairly resulted from the breach of contract and as were in contemplation of the parties.

Judgment of MACMAHON, J., at the trial reversed, MACLENNAN, J.A., dissenting.

Per MACLENNAN, J.A., when the contract contains an unqualified time limit for loading on the part of the charterer, and the ship has arrived at the designated port in sufficient time, the charterer is answerable for

not loading within the time, whatever be the nature of the impediment which prevents him from performing it.

Aylesworth, K.C., and *C. A. Moss*, for the appeal. *C. Robinson*, K.C., and *F. E. Hodgins*, K.C., contra.

From MacMahon, J.] STEWART *v.* WALKER. [Nov. 16.

Will—Probate—Lost will—Evidence—Solicitor—Privilege—Declarations.

The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor, and in an action to establish the lost will of a testator who was illegitimate and had died without issue statements of the testator to his solicitor in reference to the making of and provisions in the will were held against the objection of those who claimed under the lost will to be admissible in evidence.

Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it, and statements of this kind were in this case held to be sufficient corroboration of the evidence of the plaintiff, who had drawn and was claiming large benefits under the will in question, which, it was alleged, had been lost or stolen.

The facts that the testator was aware that unless he made a will his property would go to the Crown; that he was an experienced man of business possessed of a large estate; that he had, after the will had been made, several times spoken of it as in existence and had mentioned some of its provisions; and that during his last illness, of some days' duration, he had expressed no wish to make a will, were held sufficient to rebut the presumption of destruction of the will by the testator.

Judgment of MACMAHON, J., affirmed.

Aylesworth, K.C., and *Shepley*, K.C., for Attorney-General of Ontario. *Watson*, K.C., and *Grayson Smith*, for plaintiff. *S. H. Blake*, K.C., *Riddell*, K.C., and *Lorn McDougall*, for other respondents.

HIGH COURT OF JUSTICE.

Boyd, C.] FAWKES *v.* ATTORNEY-GENERAL. [Feb. 20.

Lands Title Act, R.S.O. 1897, c. 138—Transfer of owner—Induced by fraud—Forged Conveyance by transferee—Subsequent purchaser for value without notice—Assurance Fund—Claim on.

Plaintiff, being the owner of land registered under the Land Titles Act, R. S. O. 1897, c. 138, was, by the fraud of two persons, G. & H., induced to transfer her land to one D. Subsequently a transfer to McD.,

purporting to be signed by D., was registered, but D.'s signature was forged. McD. then transfered to O'M. and O'M. to B., both being parties to the fraud with G. & H., when B. transferred to C., an innocent purchaser, for value, without notice. All the transfers were duly registered. None of the parties to the fraud being financially responsible an action was brought for compensation for the loss of the land out of the Assurance Fund under sections 130 and 132 of the Act.

Held, that the plaintiff was not "wrongfully deprived" under s. 132 and that she could not recover.

Rowell, K.C., and *S. C. Wood*, for plaintiff. *Clute*, K.C., and *McGregor Young*, for defendant.

Britton, J.] [Oct. 19.

CENTRAL TRUST CO. OF NEW YORK *v.* ALGOMA STEEL CO.

District Courts—Jurisdiction—Recovery of land—Mortgages—Injunction—High Court action—Multiplicity.

The plaintiffs, being mortgagees of land, issued out of the District Court for the district in which the land was situated a writ of summons endorsed with a claim to "recover possession of the land, and for an order that the defendants do forthwith deliver up possession" thereof, describing the land.

Held, that the endorsement was one under Con. Rule 138, and that it was for "the recovery of land situate in the district," within the meaning of R.S.O. 1897, c. 109, s. 9, sub-s. 2 (d).

Independent Order of Foresters v. *Pegg*, 19 P.R. 80, distinguished.

The fact that the plaintiffs had also brought an action in the High Court for a declaration of right in regard to the same land, in which they might have claimed the same relief as in the other action, was not a ground for enjoining the plaintiffs from proceeding in the District Court.

Shepley, K.C., and *Middleton*, for the defendants. *Ritchie*, K.C., and *J. Bicknell*, K.C., for plaintiffs.

MacMahon, J.] IN RE KINNY. [Oct. 22.

Will—Charitable devises and bequests—Designation of beneficiaries—Perpetuities—Mortmain Acts.

Testator bequeathed all his property "to that Presbyterian congregation where I belong to and had my first communion, Churchtown . . . Ireland. The presiding clergyman, committee and elders to have full control of all after me. They shall have the power to sell or rent to the best advantage. . . . The minister and committee and ruling elders shall give me a decent funeral monument, not to exceed £100 sterling, and then the widow and the orphan and neglected children to be seen after by

the minister, committee and ruling elders, having succeeding authority to remember the poor of the church at Christmas every year, and to cheer the poor and the broken-hearted with the joy of Christ's death and suffering together with the presents presented by the minister, committee and ruling elders at the Christmas time every year." By a codicil he appointed two persons, executors and trustees, and vested all his property in them as trustees for the purposes mentioned in the will. He died within six months after making the will and codicil, leaving both real and personal property.

Held, that the beneficiaries, namely, the widows and neglected children and the poor, were sufficiently designated, and came within the meaning of sec. 6 of the Mortmain and Charitable Uses Act, 2 Edw. VII., c. 2; and, the gifts being charitable, the rule against perpetuities did not apply to them. The minister, committee and elders were the almoners named for the purpose of carrying the charitable design into effect.

Held, also, that the word "assurance" in sub-s. 6 of s. 7 of that Act refers to a deed, not to a will, and therefore leaves s. 4 of R.S.O. 1897, c. 112, untouched, and under that section a devise in favour of a charity is good though made within six months before testator's death.

Mickle, for executors. *Armour*, K.C., for the Presbyterian congregation. *A. W. Holmested*, for the heirs-at-law and next of kin.

Maclaren, J.A] ATKINSON *v.* PLIMPTON. [Oct. 27.

Writ of summons—Service out of jurisdiction—Sale of goods—Breach of contract—Place of performance—Property passing—Order for service—Affidavit—Non-disclosure—Discretion as to forum.

The defendants lived in England. One of them, being in Ontario, saw the plaintiffs, who lived in Ontario, and it was agreed that the plaintiffs should send samples of their goods to the defendants, which they did. The defendants, after inspection, ordered goods from the plaintiffs, to be shipped to Liverpool, via Leyland line from Boston, delivered f.o.b. vessel, and they were shipped accordingly. There was no evidence as to whether the goods were insured, or if so, by whom, in whose name, and for whose benefit. A second order was given and the goods shipped in the same way. Before this order was filled the defendants were sued in England for infringement of copyright in respect of a part of the goods, and in consequence returned the goods covered by the second order, and refused to pay for what they so returned.

Held, 1. The property in the goods passed to the purchasers on the delivery on board the vessel at Boston, and that an action would thereupon lie in Ontario, which was the place for payment for goods sold and delivered. The purchasers were entitled to inspect before accepting, but, even in case of a sale by sample, prima facie the place of delivery is the place for inspection, and there was nothing in the contract to rebut the

presumption. Therefore the action came within Rule 162 (1) (*e*), being for a breach within Ontario of a contract to be performed within Ontario; and service of the writ of summons on the defendants out of Ontario was properly allowed.

2. It was not necessary for the plaintiffs, in obtaining an ex parte order allowing them to serve the defendants abroad, to disclose the facts that the defendants had refused to receive the goods and returned them to plaintiffs, and that they were in Ontario at the time of the application, or the facts regarding the copyright, or that the defendants had paid for all the goods which they retained.

3. A proper discretion had been exercised in favour of an Ontario action; it was not a case in which the plaintiffs should be compelled to sue the defendants in England.

Lopez v. *Chavarri*, [1901] W.N. 115, distinguished.

J. T. Small, for defendants. *Middleton*, for plaintiffs.

Street, J.] GRAHAM *v.* BOURQUE. [Nov. 2.

Chose in action—Assignment of money payable in respect of contract—Damages for interference with the work—Attachment of debts.

A contractor for the construction of a drain assigned to a bank as security for advances "all and every sum or sums of money now due or to become due and payable to me by (the employer) in respect of a certain contract existing between myself and the said (employer) for the consrtuction of section three of the drain," describing it. The cost of doing the work was increased owing to the employer negligently allowing water to flow into the drain, and the contractor obtained a judgment against the employer for damages for the negligence.;

Held, that the amount payable under this judgment passed to the bank as money payable in respect of the contract and was not attachable by a judgment creditor of the contractor.

Middleton, for the bank. *J. H. Moss*, for the judgment creditor. *W. N. Ferguson*, for the garnishees.

Meredith, C.J. MacMahon, J. Teetzel, J.] [Nov. 4.

IN RE CONFEDERATION LIFE AND CLARKSON.

Will—Power to sell—Power to exchange.

A testator devised her real estate to be equally divided between her children when the youngest of them should attain twenty-one, with a power to the executor "to sell or dispose of any or all of the above real estate should he think it to the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales."

Held, that the executor had no authority to exchange the lands of the testatrix for other lands.

C. P. Smith, for vendors. *Ludwig*, for purchaser.

Divisional Court.] [Nov. 11.

IN RE WARBRICK AND RUTHERFORD.

Landlord and tenant—Overholding tenant—Writ of possession—Prohibition to County Judge and Sheriff—Certiorari—R.S.O. 1897, c. 171, s. 6.

After an order had been made on the landlord's application under the Overholding Tenants' Act for the issue of a writ of possession, but before the writ had been issued the tenant applied for an order for the removal of the proceedings into the High Court and for prohibition to the Judge of the County Court and the Sheriff;

Held, per STREET, J., that proceedings under the Overholding Tenants' Act can be removed into the High Court only when s. 6 of that Act applies; that that section does not apply until a writ of possession has been issued; and therefore that the applicant was not entitled to relief.

Per BRITTON, J., that whether s. 6 is exclusive or not, it at least amply protects the tenant's rights and that the applicant was not entitled to relief either under that section or under the general jurisdiction of the Court.

Judgment of MACMAHON, J., affirmed.

Robert McKay, for tenant. *W. T. J. Lee*, for landlord.

Divisional Court.] [Nov. 12.

IN RE JELLY, UNION TRUST CO. *v.* GAMON.

Executors and administrators—Evidence—Corroboration—R.S.O. 1897, c. 73, s. 10.

Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not shew on their face whether they had been given on account of rent or in respect of advances.

Judgment of the Master-in-Ordinary affirmed.

Bicknell, K.C., for the appellants. *J. H. Moss*, for respondent.

Divisional Court.] IN RE MCDONALD. [Nov. 12.

Will—Construction—"Dying without heirs."

A testator gave and devised to his daughter all his real and personal property, subject to the payment of certain legacies and charges, and "in the event of her dying without heirs" then to the testator's brothers and sisters:

Held, that the ulterior devisees being related to the first devisee the "heirs" of the first devisee must be construed to be "heirs of the body" and therefore that as to the realty the daughter took an estate tail, and as to the personalty an absolute estate.

Judgment of FALCONBRIDGE, C.J., varied.

H. J. Wright, for executors. *J. H. Moss*, for daughter. *F. W. Harcourt*, *J. H. Spence*, and *A. W. Holmested*, for brothers and sisters and their children.

Divisional Court.] MOONEY *v.* GROUT. [Nov. 13.

Contract—Services by near relations—Implied right to remuneration—Presumption.

The presumption against an implied right to remuneration for services rendered by near relations arises only when the persons rendering the services, and those to whom they are rendered are in effect living together as members of the same household, but even where this is not the case the implied right to remuneration may in the case of near relations be negatived on very slight grounds.

The Court held on the facts in this case that the plaintiff, a married woman who left her own home to nurse her sister, was not entitled to remuneration for her services.

Judgment of MEREDITH, C.J., affirmed.

Clute, K.C., and *J. A. MacInnes*, for appellant. *Marsh*, K.C., and *Thistlethwaite*, for respondent.

Meredith, C.J.C.P.] COUTTS *v.* WIARTON BEET SUGAR CO. [Nov. 14.

Unorganized territory—R.S.O. c. 109, s. 9, sub-s. 3—Setting down appeal.

Motion by defendants to the Divisional Court by way of appeal from a judgment of the District Court of the District of Manitoulin for an amount exceeding $200.

Held, that under sub-s. 3 of s. 9, c. 109 R.S.O.: Such an appeal may be set down for hearing in the same manner as if it had been an appeal from a judgment of the High Court.

Middleton, for applicants.

Divisional Court.] DUNN *v.* MALONE. [Nov. 21.

Interest—Contract—Chattel mortgage—Statement of rate—Interest Act, 1897—60 & 61 Vict., c. 8 (D)—Statutes—Waiver.

A chattel mortgage provided for the payment of $125, the principal money, in consecutive monthly instalments of $5 each, and for payment of $5 more with each instalment for interest. The yearly rate to which this

was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897.

Held, that this being an Act passed on grounds of public policy for the benefit of borrowers its application could not be waived and that the mortgagee was entitled to interest only at the legal rate.

Judgment of SNIDER, Co. J., affirmed.

McBrayne and *Martin Malone*, for appellant. *D'Arcy Martin*, for respondent.

Province of Nova Scotia.

SUPREME COURT.

Ritchie, J.] THE QUEEN *v.* MURRANS. [Oct. 20, 1893.

Liquor License Act of 1886—Conviction for third offence set aside—Form of conviction.

On June 15, 1893, L. M. was convicted of an offence against the Liquor License Act of 1886, committed on June 3, 1893. On July 14 he was convicted of another offence, committed on July 5. On September 22 he was convicted of another offence, committed on June 3, the latter conviction being made as for a third offence and involving an increased penalty, viz., loss of the license and disqualification from holding a license for the period of three years.

Held, quashing the conviction and allowing a writ of certiorari, that the accused could not be adjudged guilty of a third offence against the Act, carrying an increased penalty, unless it was proved that the offence took place on a different day from the days on which the previous offences were committed, and after the information on which the first conviction proceeded was laid.

(This old case has been handed to us with a request for publication.)

Full Court.] REX *v.* BURNS. [March 10.

Criminal law—Breaking and entering with intent to commit assault—Raising window left partly open not a "breaking"—Misdirection—Crim. Code, s. 410.

Defendant was convicted under s. 410 of the Crim. Code for breaking and entering the dwelling house of D., with intent to commit an assault upon W. The only evidence of the breaking was that, immediately after

the accused left the house, a window in the dining room and one in the back porch were found wide open, sufficient to allow a person to pass through, that when the family retired, on the previous night, the window in the dining room was entirely closed, and the window in the porch open only a few inches, and resting upon a can, and that plants growing below the porch window, which had not been disturbed the previous evening, were broken as if they had been trodden upon. Apart from this evidence, it was left uncertain by which window the accused entered. The trial judge directed the jury that the lifting of the porch window from where it rested, as well as the lifting of the dining room window, was, under the Code, a "breaking" of the dwelling house.

Held, 1. The direction as to the lifting of the porch window was erroneous, and that the conviction must be set aside.

2. The prisoner should not be discharged, but there should be a new trial.

Per MEAGHER, J., dissenting. The conviction should be affirmed.

(This case was considered and decided without argument on either side.)

Full Court] REX *v.* HILL. [March 10.

Criminal law—Shooting with intent to kill—Comment upon failure to call wife of accused—Conviction set aside—New trial ordered.

On the trial of a charge of shooting with intent to kill, counsel for the Crown in closing commented upon the fact that prisoner's wife, who had been a witness on the preliminary examination before the magistrate, was not called. On a Crown case reserved,

Held, that the comment in question was not justified by the fact that it was made in reply to an explanation offered by counsel for the defendant to account for the omission to call the wife, and that the conviction must be set aside. The defendant should not be discharged, but that there should be a new trial.

Morse, for the prisoner. *Longley*, K.C., Attorney-General, for the Crown.

Full Court.] REX *v.* COHN. [March 10.

Criminal law—Perjury in connection with affidavit—Duty of court to consider statements as a whole—Charge preferred without consent of judge dismissed—Crim. Code, s. 773—Case improperly stated—Pendency of civil action.

Defendant was convicted in the County Court on several charges of perjury alleged to have been committed in connection with an affidavit sworn to in a cause pending in the Supreme Court. One of the charges was not contained in the information in the magistrate's court, but was

preferred by the Crown prosecutor before the judge of the County Court without the latter having in any way expressed his consent to the preferring of the charge, as required by the Code, s. 773. Another charge was that defendant falsely swore that a sum of money was not received by him, "whereas said sum was received by the defendant firm." There was no allegation that the defendant, knowing that the money had been received, "corruptly swore, etc.," and the statement as sworn to appeared to have been literaliy true.

Held, 1. Both convictions were bad and must be set aside.

2. The different allegations being contained in the one affidavit, the judge was wrong in considering each charge separately without reference to the other allegations in the affidavit, and that he was bound to weigh the statements as a whole in arriving at a conclusion as to the guilt or innocence of the prisoner.

3. It was not competent for the judge to submit a question as to whether there was legal evidence to sustain the conviction and send up the evidence for review, but that he must state the effect of the evidence to support a certain charge and reserve the question as to its sufficiency in point of law.

Semble. The charge of perjury should not have been brought during the pendency of the civil action in the Supreme Court.

C. S. Harrington, K.C., *Power* and *O'Connor*, for defendant. *Cluney* and *H. McInnes*, K.C., for the Crown.

Full Court.] REX *v.* PHINNEY (No. 1.) [March 10.

Criminal law—Theft—Defence of insanity—Evidence—Acquittal—Crown case reserved—Motion to quash dismissed—Crim. Code, ss. 305 (a), 706.

Defendant was indicted for theft under s. 305 (*a*) of the Criminal Code. The act of theft was admitted, but it was contended that there was evidence of insanity at the time the act was committed. The trial judge charged the jury that there was no such evidence and that the case did not come within s. 736 of the Code. The jury, having found the prisoner not guilty, two questions were reserved for the opinion of the court:

(1) Whether there was evidence of insanity as required by s. 736, and

(2) If not, whether there should be a new trial.

The court was moved to quash the case reserved on the ground that where there had been an acquittal the Crown could not have a case reserved or on appeal.

Held, MEAGHER, J., dissenting, that the motion must be dismissed and the reserved case proceeded with to ascertain whether there was evidence of insanity sufficient in law for submission to the jury.

J. J. Ritchie, K.C., for prisoner. *Longley*, K.C., Attorney-General, for the Crown.

Townshend, J.] REX *v.* MCIVER. [April 7.

Canada Temperance Act—Imprisonment with hard labour to enforce penalty —Jurisdiction—Amendment—Affidavit of plaintiff's solicitor—Sufficient under R.S.N.S. 1900, c. 181.

A warrant of commitment for a first offence against the provisions of the second part of the Canada Temperance Act authorized the detention of defendant for a specified term "at hard labour" as a means of enforcing the payment of the pecuniary penalty enforced.

Held, 1. The warrant was bad for excess of jurisdiction. Code, s. 872 (*a*) and (*b*).

2. No amendment could be allowed under ss. 117 and 118 of the Canada Temperance Act, the penalty imposed being greater than that authorized by the Act.

3. An affidavit of the prisoner's solicitor was sufficient to found the proceedings upon, the language of the statute (R.S.N.S., 1900, c. 181) "of securing the liberty of the subject" being "upon sufficient cause shown by or on behalf of any person, etc."

T. R. Robertson, for the prisoner. *W. R. Tobin*, contra.

Ritchie, J.] PICKLES *v.* SINFIELD. [Nov. 4.

Slander—Findings in favour of plaintiff—Nominal verdict—Costs.

Action for slander, for words spoken imputing unchastity to the plaintiff, and the commission of an indecent act by her in a public place under s. 177 of the Criminal Code, without claim for special damage. Defence: (1) Denial of words spoken. (2) That they did not bear the meaning put on them by the plaintiff. (3) Mere words of abuse spoken in an altercation provoked by the plaintiff. The action was tried before a jury, who gave the plaintiff a verdict of $1.00 damages. The defendants moved to deprive the plaintiff of costs.

RITCHIE, J.—The defendant denied the speaking of the words, and the only other defence was, that it was mere abuse spoken in the course of a quarrel between the parties. The jury by their verdict have found both these questions in plaintiff's favour, and I see no reason of depriving her of the costs of the action, in which she was successful.

J. Power, for plaintiff. *H. Mellish* and *J. M. Davison*, for defendants.

Full Court.] WATSON *v.* LEUKTEN. [Nov. 15.

Seaman's wages—Jurisdiction in amounts under $200—Merchants' Shipping Act, 1894 s. 165.

On July 2. 1903, *W. B. A. Ritchie*, K.C., moved in Chambers to strike out a claim for seaman's wages on the ground that it disclosed no reasonable cause of action, and as being frivolous and vexatious. The plaintiff, a seaman and British subject residing at Halifax, brought an action against the defendant, the Master of the British Steamship "Dahome", who at the

time of the bringing of the suit, was then at the Port of Halifax, for $39.67 for wages due the plaintiff, under articles terminable at Halifax, for services performed as a seaman on such steamship. The defendant was arrested under an order in the nature of a writ of Capias. The point raised by the motion was, whether s. 165 of The Imperial Merchants' Shipping Act, 1894 excluded the plaintiffs' right to bring an action in the Supreme Court of Nova Scotia instead of a Court of summary jurisdiction for an amount under $200.00, when the Master was at Halifax (though not residing there,) at the time of the bringing of the action.

John J. Power, contra.

GRAHAM, E. J. The plaintiff, a seaman, has brought an action for wages against the Master of the "Dahome" claiming a sum less than £50 or $200. This is an application to strike out the claim for wages on the ground that the Court had not jurisdiction. No doubt for the benefit of the seaman, the statute gives him for any claim under £50 or $200 the right to sue for the same before any Court of summary jurisdiction at any place in which any person on whom the claim is made "is or resides." Then it provides negatively that he shall not sue in a Superior Court except where neither the owner nor the Master "is or resides" within twenty miles of the place of discharge or of being put on shore.

Here the Master not only was in the place but he was arrested upon an order of arrest in the nature of a capias by the plaintiff. The plaintiff's counsel contends that I am to read the word "or" as if it was "and." This construction would prevent a seaman from getting a speedy recovery of the sum due him under £50 in a Court of summary jurisdiction unless the person against whom the claim was made both was there, and hence could be served with process, and also resided there.

In my opinion, as service may be made under the Act at the place of residence as well as personally, the Master or owner might be reached in many more cases by the Court of summary jurisdiction by constructing the word "or" in its ordinary sense.

The Legislature had an object when it used the expression "is or resides." The point is so clear that I have no hesitation in striking out the claim because there is no reasonable cause of action. The Court has no jurisdiction to entertain it.

The plaintiff appealed from the above judgment and order to the Supreme Court in Banco (RITCHIE, TOWNSHEND and MEAGHER, J.J.) and on Nov. 16, the appeal was heard and by oral judgment dismissed with costs and the above judgment affirmed.

Full Court.] MUNRO *v.* TOWN OF WESTVILLE. [May 4.

Building contract—Time for completion—Delay in giving possession—Extras—"Written order"—Damages.

A building contract contained a provision that the work should be completed by the contractor by a specified date with a penalty of $5 a day

as liquidated damages for each day that the work should remain unfinished after that date. It was agreed on the part of defendant that the contractor should be put in possession of the premises and should be furnished with the lines and levels by another fixed date and that for every day thereafter he should be entitled to have two days added to the time for the completion of his contract. It was further agreed that the contractor should have no action for damages or otherwise against the town by reason of said delay.

Held, 1. Affirming the judgment appealed from, that the clause of the contract denying plaintiff's right to an action for damages applied to the giving possession of the premises only, and not to the delay in furnishing lines and levels, and that plaintiff was entitled to recover for extra work resulting from the latter delay.

2. The delay in putting plaintiff in possession of the premises and in furnishing lines and levels, and delay caused by extra work which he was called upon to do, relieved plaintiff from the obligation to complete his work by the date agreed, and that defendant was debarred from enforcing payment of the penalty agreed upon.

One of the clauses of the contract provided that if alterations were required in the work, a fair, a reasonable valuation of work added or omitted should be made by the architect, and that the sum payable to plaintiff should be increased or diminished by such amount, provided that where the amount was not agreed upon the contractor should proceed with the work on the written order of the architect, and that the amount payable therefor should be fixed as further provided.

Held, 1. Alterations under this clause only required a written order where the architect and contractor differed as to the valuation.

2. The furnishing of plans by the architect, showing additional work was a "written order" within the meaning of the contract; and the burden was upon plaintiff of showing that work claimed for as extra was ordered by the architect.

3. In determining the amount to which plaintiff was entitled for extra work the trial judge had the assistance of an assessor, but the court on appeal were not furnished with the assessor's report, or with the reasons for allowing plaintiff different items claimed by him.

Held, MEAGHER, J., dissenting, that the court could not adopt the views of the trial judge and the assessor as to disputed items under these circumstances, but must consider the different items and the evidence bearing upon them.

Harrington, K.C., for appellant. *W. B. A. Ritchie*, K.C., and *Jennison*, for respondent.

Full Court.] BARRY *v.* ALLAN STEAMSHIP CO. [May 4.

Contract—Uncertainty.

The findings of a trial judge on questions of fact will not be disturbed unless it appears clearly that such findings are erroneous.

In an action on a contract to furnish supplies to be used in floating one of the defendants' steamships, where the evidence was of a contradictory character, the trial judge, as to certain amounts claimed, found in favour of defendant on the ground that if plaintiff wished to make a contract under which he would be fully paid, whether the services were or were not performed, that should have been clearly expressed in his tender and not left in doubt.

Held, that his decision ought not to be disturbed.

Harris, K.C., for plaintiff. *McInnes*, K.C., for defendant.

Full Court.] DOMINION COAL CO. *v.* DRYSDALE. [May 4.

Mines and minerals—Mandamus to compel commissioner to decide application.

Plaintiff company applied to C., the Commissioner of Mines for the Province of Nova Scotia, for a coal mining lease, covering an area adjacent to an area previously leased to M. A dispute having arisen in relation to the application the commissioner held an investigation and announced as the result of his enquiry that the lease granted to M. was not to be considered as in any way void or uncertain, but was to be and remain the evidence of the contract between the Crown, represented by the Commissioner, and M.

Held, affirming the judgment of RITCHIE, J., that plaintiff's application was not disposed of by this decision, but that plaintiff was entitled to a mandamus, requiring defendant, as Commissioner of Mines, to consider plaintiff's application and give a decision thereon.

Ritchie, K.C., for appellant. *W. B. Ross*, K.C., and *Pearson*, for respondent.

Full Court.] REX EX REL. CORBIN *v.* PEVERIL. [May 4.

Certiorari will not lie to remove proceedings of ministerial character—Power of court to set aside process improvidently issued—Procedure—Questions excluded under.

A writ of certiorari was directed to the road commissioners of District 17 in the municipality of Halifax to remove the record of the assessment roll of said district, assessing the inhabitants for road taxes, and the return made to the county treasurer of persons who had made default. A writ

was also directed to the Stipendiary Magistrate for the county to remove the record of a return of defaulters who had not paid or commuted their taxes, and the warrant of distress issued by him thereon. There was a motion to quash or set aside the assessment roll, the warrant of distress, etc. It appeared that the allowance of the writs had not been opposed and there was no motion to set aside the orders or to quash the writs or either of them. The amount of the tax was fixed by law, the value of the property by the county assessors, the rate of assessment by the county council, and the Stipendiary Magistrate, in issuing his warrant of distress against defaulters, was not called upon to exercise any judicial function.

Held, 1. The proceedings were of a purely ministerial character and not a proper subject for certiorari.

2. The process having improvidently issued, the court had power of its own motion to set it aside, and that under the circumstances appearing in this case the writs should be superseded and the returns thereto taken off the files of the court.

The affidavits filed shewed an intention to attack the legality of the formation of the district under Acts of 1900, c. 23, and the appointment of the commissioners.

Held, that this could not be done in this form of proceeding.

Kenny, in support of motion. *Ritchie*, K.C., and *J. T. Ross*, contra.

Full Court.] REX ex p. RAMSEY *v.* MEIKLE. [Aug. 5.

Seaman—Withholding wages and refusing discharge—Seamans' Act of Canada, R.S.C., c. 74, s. 261, sub-s. (d)—Imperial Shipping Act, Part 2—Not applicable to ship registered and being in Canada.

J. M., the master of the "Wobun," a British ship of Canadian register, was convicted before the Stipendiary Magistrate, in and for the County of Cape Breton, for that he, the said J. M., wrongfully and unlawfully refused to pay R., a seaman serving on board said ship, a sum of money claimed to be due him for wages, and further, for refusing to discharge said M., he being then entitled to his discharge.

Held, 1. The refusal to pay M. his wages or to give him his discharge was not a criminal offence, and the proceedings taken were not warranted by the Seamans' Act of Canada, c. 74.

2. The ship being at the time the proceedings were instituted within the jurisdiction of the Government of the British possession in which she was registered the case was within the exception mentioned in sub-s. (*d*) of s. 261, and Part 2 of the Imperial Shipping Act was not applicable.

Semble, that if the magistrate had power to rescind the contract and had undertaken to do so the judgment would require to be in a different form.

Henry and *G. A. R. Rowlings*, for defendant, in support of motion. *O'Connor*, for the informant and magistrate, contra.

Full Court.] [Aug. 5.

OVERSEERS OF POOR, DISTRICT 7, PICTOU *v.* OVERSEERS OF POOR, DISTRICT 6.

Pauper—Proceedings to determine place of settlement—Order by Stipendiary Magistrate held bad—Remedy by appeal or certiorari.

Proceedings were taken by the plaintiff district before a justice of the peace with a view to having a pauper made chargeable to Poor District No. 5 in the County of Pictou. Subsequently and without notice to District No. 5 discontinuing proceedings against that district. Proceedings were commenced before another justice with a view of having the pauper made chargeable to the defendant district. On the depositions taken before the magistrate applied to in the second instance the Stipendiary Magistrate for the county (who was also County Treasurer) took further depositions and made an adjudication that the pauper was legally chargeable to the defendant district.

Held, that the adjudication so made was bad, both because of the failure to give notice of discontinuance of the original proceedings, and because the Stipendiary Magistrate, as County Treasurer, was a party to the proceedings and should not have acted.

Held, that the order made under the circumstances mentioned was open to attack either by certiorari or by appeal.

W. B. A. Ritchie, K.C., and *J. U. Ross*, for appellants. *H. Mellish* and *E. M. McDonald*, for respondents.

Full Court.] LAKEVIEW MINING CO. *v.* MOORE. [Aug. 5.

Action to recover land—Title under Crown grant—Party in possession by permission—Estoppel—Non-disclosure of fact in petition—Objection based upon—How raised.

In an action to recover land plaintiffs relied upon a grant from the Crown dated March 14, 1891. Defendants limited their defence to a portion of the land claimed and as to that portion depended upon title acquired in 1893 from H. who entered as a servant of plaintiffs, and by their permission erected a house on the land in 1890.

Held, 1. The possession of H. was not sufficient to prevent the Crown from granting to plaintiffs.

2. H. having entered by plaintiffs' permission, both defendants and H. were estopped from denying plaintiffs' title.

3. If the Crown was misled by the omission of plaintiffs to disclose in their petition that the land was in the occupation of H. that objection could not be raised by a third party in collateral proceedings, but must be raised in a proceeding to be taken before the Governor in Council to have the grant vacated.

4. The case was not within the provisions of R.S. (5th series) c. 9, and that the occupancy being that of a person in possession by permission of plaintiff did not require to be disclosed.

T. J. Wallace, for appellant. *D. McNeil*, for respondent.

Ritchie, J.] WATSON *v.* LEUKIEN. [Nov. 24.

Bail bond—Motion to deliver up for cancellation refused—Practice—Exoneretur.

Motion on behalf of the defendant for an order that the bond on the defendant's arrest, dated the 16th of May, A.D., 1903, be delivered up to the defendant's solicitor herein to be cancelled, the plaintiff's action having been dismissed.

Held, following *Allison* v. *Desbrisay*, 4 N.S.R. 21 (Cochran) and *Beam* v. *Beatty*, 2 O.L.R. 362, that the proper practice was for the Prothonotory to enter an exoneretur on the bail bond, which was a record of the court, and the same was ordered to be done accordingly.

J. A. Chisholm, for motion. *John J. Power*, contra.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] CANADIAN PACIFIC R.W. CO. *v.* LECHTZIER. [Oct. 10.

Landlord and tenant—Overholding tenant—Landlords and tenants Act, R.S.M., 1902, c. 93, s. 15—Colour of right—Summary proceedings.

This was a summary proceeding under the Landlords and Tenants Act, R.S.M., 1902, c. 93, to recover possession of the premises in question which were held under a written lease creating a tenancy from week to week.

The tenant gave evidence tending to shew that agents of the landlord had, prior to and at the time of the execution of the lease, agreed and promised verbally that the tenant would not be required to give up possession until the landlords would build on the land. This was denied by one of the agents and the tenant admitted that said agent had refused to put such a term in the lease although asked to do so.

Held, that such promise, if proved, was of too indefinite a character to support the contention of the tenant that he was not holding over without color of right, and that an order for a writ of possession should issue as the landlord had proved a demand of possession and service of a regular notice to quit under the Act.

To constitute a color of right there must be some bona fide question of right to be tried: *Price* v. *Guinane*, 16 O.R. 264; *Gilbert* v. *Doyle*, 24 U.C.C.P. 71. Whether there is colour of right or not, and what constitutes colour of right are matters of law to be determined by the judge: *Wright* v. *Mathison*, 519 U.S.S.C.R. 50. If effect were given to the contention set up by the tenant he might in case the company sold the land or did not build on it be entitled to hold it in perpetuity.

Robson, for landlords. *Andrews*, for tenant.

Bain, J.] IN RE STALKER. [Nov. 2.

Infant—Custody of—Right of mother of illegitimate child to his custody.

Application on return to a writ of habeas corpus by the mother for the custody of an illegitimate child, a boy twelve years of age. The mother who was only seventeen years old when the child was born was unable to support him and arranged with one Setter to take the child and a formal document was drawn up and executed by which the mother released and abandoned the child and all her right and title as his mother to the custody, control and possession of the child to Setter forever, and Setter on his part agreed to maintain, care for and educate the child. The mother married in 1893 and there are now five children of the marriage. She never interfered with the control of the child by Setter and his wife, or manifested any interest in him until a few weeks before the application when she made a demand upon Setter for his custody. He had in the meantime been maintained and brought up by Setter and his wife as their own. They had no other children and were in fairly comfortable circumstances. The reasons given by the mother for now wanting to take back the child were that he was made to do work too hard for his age and that Setter had not educated him; but the judge found that although the boy had never attended any school it was because there was no school near enough, and that Mrs. Setter had herself taught him and his education had not been neglected, also that there was no foundation for the charge of his being overworked. The judge also found that the Setters had brought up the child with the same care and affection that they would have bestowed on a child of their own, and expressed himself as satisfied that if he had a discretion to exercise in the matter it would be in the best interests of the child to leave him with the Setters.

Held, following *Reg.* v. *Nash*, 10 Q.B.D. 454, and *Barnardo* v. *McHugh*, (1891) A.C. 388, that although the mother of an illegitimate child has prima facie a right to his custody notwithstanding any agreement she may have made to the contrary, yet the court has a discretion to refuse to accede to her wishes if it is shewn that it would be detrimental to the interests of the child to return him to her control, and that under the circumstances in this case such discretion should be exercised by leaving the child with the Setters.

The husband of the applicant had expressed his willingness that his wife should have the child and said that he would bring him up as one of his own family, but there would be a great risk that were the child to be taken into the husband's family he would soon find himself in an uncomfortable and unhappy position and might be a cause of dissension and trouble there.

A. J. Andrews, for applicant. *Haney*, for Setter.

Province of British Columbia.

SUPREME COURT.

Full Court.] Ross *v.* THOMPSON. [Nov. 4

Water rights — Decision of Gold Commissioner — Appeal from — Evidence on.

Appeal from decision of FORIN, Co. J., refusing to hear new evidence on an appeal before him under s. 36 of the Water Clauses Consolidation Act. Sec. 36 of the said Act provided that the appeal should be in the form of a petition setting forth the facts and law relied on, which petition, along with an affidavit verifying it, should be filed and served and to which the respondents should file and serve their answer.

Held, that the fact that there was to be a petition and an answer contemplated the raising of issues and that the appeal should be a trial de novo. Appeal allowed with costs.

Taylor, K.C., for appellant. *Wilson*, K.C., for respondent.

UNITED STATES DECISIONS.

COMPANY—PUBLIC PURPOSES.—A corporation authorized to develop and use the water power of a river, and generate electric or other power light or heat, and utilize, transmit, and distribute it for its own use or the use of other individuals or corporations, is held in *Fallsburg Power & Mfg. Co.* v. *Alexander* (Va.) 61 L.R.A. 129, to be for a private, and not a public purpose, and therefore not entitled to exercise the right of eminent domain.

STREET RAILWAY.—A chartered street railroad is held, in Savannah, *T. & I.* of *H. R. Co.* v. *Williams* (Ga.) 61 L.R.A. 249, to be a "railroad company," within the meaning of a statute making railroad companies liable to one servant for injuries inflicted by the negligence of a fellow servant.

ANALYTICAL INDEX.

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