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Those of the "briefed" and "briefless" who were able to get away for a holiday, are returning either to work or to wait, as the case may be, glad to have escaped the hottest vacation that has ever been experienced in the province of Ontario, and glad to hear that there are well-founded expectations of brighter business prospects for the future.

Speaking of vacation, the feeling is a growing one that we would do well to spend it in some of the many beautiful and health-giving spots to be found within our own borders, rather than go farther and fare worse. The lakes of northern Ontario are popular with many, and some of us may have crossed the continent westward, nilst others make their annual vacation pilgrimage to the shores of the St. Lawrence. There are few, however, who seem to know the possibilities for recruiting weary brains to be found on the rivers and shores of the Maritime Provinces. Let the disciples of Izaak Walton take their fishing rods to some of the streams of New Brunswick or Nova Scotia, whilst those who want salt water bathing can find none better than is to be had at the many beautiful sea beaches that abound in these provinces, If possible, let them go as far as St. John or Halifax, and see the beauty of their surroundings, and enjoy the best of all sea beaches at Cow Bay. Ours is a country of magnificent distances, and the Atlantic is many miles away, but difficulties arising from this cause are reduced to a minimum by the excellent management and comfortable service of the Canadian Government railway system, and travellers say that the Intercolonial has the smoothest road bed on the continent. It is time, moreover, that we of the long robe knew more of each other in this great Dominion.

BIGAMY AND DIVORCES.

I. BIGAMY UNDER THE CODE.

The bigamy sections of the Criminal Code of Canada do not prohibit the practice of bigamy as defined in the books, namely the crime of having two wives or husbands at the same time (*a*). The going through the form of a bigamous marriage, not the relationship afterwards, is the indictable offence. Moreover, it is not an offence under the Code for a foreigner resident in Canada to go through the form of a bigamous marriage in another country, even though he may have left Canada with "intent to go through such form of marriage." Nor is it an offence for a Canadian resident abroad to go through the form of a bigamous marriage there. Either may return to Canada with his second choice and take up his residence next door to his lawful wife and be free from molestation under our criminal laws (*b*). Several attempts have been made in the Courts in the interest of Canadians given to plurality of wives, to narrow still further the effect of the bigamy sections. They have sought to have it declared that the Dominion Parliament has no jurisdiction over Canadians while outside the territory of Canada—in other words that the sections in question are ultra vires of the Dominion Parliament.

The Canadian law as to bigamy has been practically unchanged, so far as its territorial scope is concerned, since its enactment in 1841. In 1853 its constitutionality was unsuccessfully attacked in a lower Canadian court in the *McQuiggan case*, 2 L.C.R. 340, and in 1887 the point was raised in Ontario in the *Brierly case*, 14 O.R. 525. The indictment against

(*a*) Sec. 275. Bigamy is the act of a person who, being married, goes through the form of marriage with any other person in any part of the world; . . . . .

No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

(*b*) In *The Queen* v. *Liston* (unreported), tried at the Toronto Assizes in 1893, Chief Justice Armour held that section 278 of the Code, which is the only section which it could be argued covers adultery, was intended to apply only to Mormons.

Brierly charged that, being a married man and a British subject resident in Canada, he took to wife another woman at Port Huron, Michigan, having left Canada with intent to commit the offence. Brierly was convicted, subject to a case reserved for the opinion of the High Court as to whether the Dominion Parliament had power to enact the sections in question. The case was argued before the Chancery Divisional Court, and Chancellor Boyd and Mr. Justice Ferguson delivered elaborate judgments, reviewing the statute and the case law, and upheld the constitutionality of the Act. In 1894 the question was raised once more in this Province in the *Plowman case*, 25 O.R. 656, in which the facts were practically identical with those in the Brierly case. The point was argued before the Queen's Bench Divisional Court, and at the conclusion of the argument Chief Justice Armour delivered the judgment of the Court (composd of himself and Mr. Justice Falconbridge) quashing the conviction on the short ground that, "the second marriage is the offence, and the Dominion Parliament has no power to legislate about such an offence in a foreign country." This case stood as the interpretation of the law until the recent judgment of the Supreme Court on the special case referred by the Governor-General-in-Council as to whether the Parliament of Canada had authority to pass sections 275 and 276 of the Code. The Court was divided in opinion, the Chief Justice in a characteristically able, vigorous and elaborate argument, holding with the Queen's Bench Divisional Court that the sections were ultra vires. The other members of the court taking part, namely, Justices Gwynne, Sedgewick, King and Girouard, agreed with the Chancery Divisional Court that the sections were intra vires of Dominion jurisdiction. It should be added that the case was presented to the Court ex parte on behalf of the Department of Justice.

It was conceded by Sir Henry Strong, as by Chief Justice Armour, that the Imperial Parliament may enact regulations governing the conduct of British subjects in foreign countries, and it was also conceded that such power may be dele-

gated by the Imperial Parliament, but Sir Henry thought it clear "beyond question" that the power of legislation as regards criminal law conferred upon the Dominion Parliament is confined to offences committed within the Dominion, and does not warrrant personal jurisdiction as to matters outside of it.

Mr. Justice Gwynne and the other members of the Court, all of whom delivered written opinions, took the national, rather than the colonial, view of the status of the Canadian Parliament. Mr. Justice Gwynne said: "I confess it appears to me that the whole proceedings adopted for the purpose of framing the constitution of the Dominion must be designated a sham and a farce . . . . . if the Parliament of this great Dominion, now extending from ocean to ocean and embracing within its limits half a continent, and having under its sovereign control all matters relating to marriage and divorce and criminal law especially, and to the peace, order and good government of Canada generally, should be held not to have jurisdiction to exercise that control in the terms of sections 275 and 276 of the Criminal Code. Bordering as Canada does upon several foreign States, in many of which the law relating to marriage and divorce are loose, demoralizing and degrading to the marriage state, such legislation as is contained in the above sections of the Criminal Code seems to be absolutely essential to the peace, order and good government of Canada, and in particular to the maintenance within Canada of the purity of the marriage state. . . If the Courts should hold otherwise they would in my opinion inflict a deadly stab upon the constitution of the Dominion." To which the hard and fast legalist might possibly reply, *Fiat justitia ruat cælum.*

II. AMERICAN DIVORCES IN CANADA.

The language of Mr. Justice Gwynne naturally suggests an inquiry as to the status of American divorces in Canada, and as to the effect, if any, of the judgment of the Supreme Court upon the validity here of such divorces. In a nebulous

way it is, I think, generally assumed that prior to the *Plowman case* American divorces were of little or no validity in Canada; that while the judgment in that case was accepted as an interpretation of the law, such divorces were effective, and that since the judgment of the Supreme Court American divorces have been relegated once more to the limbo of worthless things. In point of fact neither decision made any new declaration, or indeed any declaration whatever of the law in the subject of the status of foreign divorces in Canada. It is true that the Criminal Code (s. 275) makes a divorce a good defence to a prosecution for bigamy, and Plowman had a Chicago divorce. But his divorce was founded upon a sham domicil, and was for that reason rejected as a defence by the trial judge. No further reliance seems to have been placed upon it by his counsel, and no mention of it appears in the report.

For a long time the English courts inclined to the view that the right to divorce, and therefore the validity of a foreign divorce in England, depended upon the law under which the marriage was celebrated, After the Matrimonial Causes Act of 1857, however, by which jurisdiction was given to the civil courts in matrimonial causes, the principle which is now fairly well recognized began to prevail. That principle is that jurisdiction in matters of divorce depends upon the domicil of the parties at the time of the commencement of the divorce proceedings. If, therefore, the parties being domiciled, that is to say having their permanent home, in a foreign country, are divorced there, without collusion or fraud, by a court of competent jurisdiction, such a divorce has in England the same effect as an English divorce, and that quite irrespective of the place of marriage; or of the residence or allegiance of the parties; or of their domicil at the time of the marriage; or of the place in which the offence in respect of which the divorce was granted was committed; or even, it would seem, of the fact that the divorce may have been for a cause not recognized as sufficient in England (*a*). Lord Penzance thus states the policy of the English law:

(*a*) Dicey's Conflict of Laws, pp. 269, 391, 755.

"It is both just and reasonable that the differences of married people should be adjusted according to the laws of the community to which they belong, and dealt with by the tribunals which alone can administer these laws. An honest adhesion moreover to those principles will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." (*a*)

Notwithstanding the absence of divorce courts in some of the Provinces, there can be no doubt that the law in all the Provinces as to the validity of foreign divorces is similar to that of England. The Supreme Court at Ottawa settled the point in *Stevens* v. *Fisk*, 8 Leg. News 42; Cassels Dig. 235. In that case, the parties being natives of the United States and domiciled in New York, were married there. Subsequently they removed to Montreal, where the husband took up his permanent residence. The wife some time afterwards returned to New York to her mother, and instituted proceedings for divorce in that state, on the ground of adultery. The husband was served in Montreal, and appeared by attorney, but filed no defence, and a divorce was accordingly granted. The question of the validity of the divorce in Quebec arose in a civil action brought by the former wife against the former husband for an account. If the divorce was valid the action was maintainable under the laws of Quebec; otherwise it was not. The trial judge held that the divorce was binding and effective. The Court of Queen's Bench, composed of five judges, held by a majority of one that it was not, and that "notwithstanding such decree, according to the laws of the said Province" the plaintiff was still the wife of the defendant. In the Supreme Court Chief Justice Ritchie and Justices Gwynne and Henry agreed with the trial judge, while Mr. Justice Strong (dissenting) thought the Court of Queen's Bench was "perfectly right." Mr. Justice Gwynne based his opinion, as he did in the later case as to the validity of the bigamy sections of the Code, largely upon grounds of public policy, arguing, however, from rather a different point of view. He said:

(*a*) L.R. 2 P & D. 435, 442.

"That upon one side of the line of 45 degrees of latitude the plaintiff and defendant should be held to be unmarried, with all the incidents of their being sole and unmarried, and that upon the other side of the same line they should be held to be man and wife, is a result so inconvenient, injurious and mischievous, and fraught with such confusion and serious consequences, that in my opinion no tribunal not under a peremptory obligation so to hold should do so. Such a decision would, in my opinion, have the effect of doing great violence to that *comitas inter gentes* which should be assiduously cultivated by all neighboring nations, especially by nations whose laws are so similar, and derived from the same fountain of justice and equity, as are those of the State of New York and Canada, and between whom such constant intercourse and such friendly relations exist."

In the synopsis of the second chapter of Mr. Gemmill's book on divorce in Canada appears the phrase "American divorces of no effect in Canada," and in the text itself that phrase is expanded thus: "It has been clearly settled that under no circumstances would Parliament recognize an American divorce as valid and conclusive in Canada." The only authority cited in support of this proposition is the Ash divorce case which came before Parliament in 1887. The parties in that case had been married at Kingston, Ont. Shortly afterwards the wife abandoned the husband because, as she alleged, of his intemperate habits. He went to Massachusetts, where after a residence of several years he procured a divorce, and subsequently married another woman in this province, returning, however, with her to his home in Massachusetts. The first wife then applied at Ottawa for a divorce, upon the only ground recognized there, namely, adultery, alleging that the second marriage was bigamous. There could be no bigamy, and no adultery, and indeed no necessity for a Canadian divorce, if the American divorce was valid in Canada, and as the bill passed Mr. Gemmill appears to have assumed that that fact gave legislative sanction to the view he expresses. It is true that an extreme view was strongly urged in the Senate, and that it was apparently accepted there. In con-

cluding his address in support of the Bill Senator Abbott said: "In my opinion and in the opinion of the Minister of Justice the judgment of divorce in this case is not binding in this country, and *a fortiori* it cannot be binding in this House."(*a*) But it is manifest that neither the vote in Parliament on this bill, nor the opinions of individual Senators, nor indeed the opinions of all the representatives in both the Senate and the House collectively, assuming that they were all of the opinion of Senator Abbott, could have any binding effect, outside of the Ash case, either upon any future Parliament, or upon any Canadian court of justice.

Under *Stevens* v. *Fisk* and the English authorities, it is submitted that an American divorce will be held to be valid in the Canadian courts if (1) the court granting it was a court of competent jurisdiction; (2) the parties were in good faith domiciled in the state in which the divorce was granted at the time when the divorce proceedings were commenced; (3) the proceedings were free from fraud and collusion; and it is apprehended that this would be the case even though the divorce were from the bond of a marriage contract entered into in Canada, and were granted on no better ground than "incompatibility of temper." Cases in which both parties were not domiciled at the time of the divorce in the state granting it, present more difficulty, arising partly from the legal fiction that husband and wife are one, and partly from the absence of jurisdiction of the courts of one country over the subjects of another. As to the latter point the New York Court of Appeals recently declared invalid a divorce granted in Dakota on the petition of a wife, where the husband being domiciled in New York was served there, but did not appear, on the ground of want of jurisdiction in the Dakota court over a resident of New York (*b*). *A fortiori*, a Canadian court would doubtless refuse to recognize an American divorce where the respondent was a British subject resident in Canada, and had not appeared or submitted to the jurisdiction of the foreign tribunal. As to domicil, the

(*a*) Senate Debates, 1887, p. 228.

(*b*) 57 Albany Law Journal (1898) 198.

English courts hold to the view that the domicil of the wife in divorce as in other matters, is the domicil of the husband, and that therefore divorce proceedings must be in the country of the husband's domicil. The American courts on the other hand recognize that for the purpose of instituting divorce proceedings a wife may acquire a separate domicil.

In *Stevens* v. *Fisk* the Supreme Court adopted the ratio decidendi of the American cases, though the judgment on that point may also, perhaps, be justified by the analogy of the English authorities, which appear to recognize, as an exception to the general rule, that, in the case of an English marriage where the husband deserts the wife and goes to a foreign country, the wife may maintain divorce proceedings in England (*a*).

However that may be, it is at least doubtful, in view of a recent decision of the Privy Council (*b*), whether the rule as to a wife's domicil adopted by the American courts would now be followed in this country, to any greater extent, at all events, than was done in *Stevens* v. *Fisk*.

It is hardly necessary to add that our courts, following both English and American precedent, will not recognize a divorce granted by a country in which the parties (or one of them) was not domiciled at the commencement of the divorce proceedings; and, if the divorce be a mere sham devised for the occasion, as in the *Plowman case*, the divorce will certainly be of no validity here, and probably of none anywhere else—even in the state where granted.

W. E. RANEY.

(*a*) Dicey's Conflict of Laws, 275.
(*b*) *Le Messurier* v. *LeMessurier*, (1895) A.C. 517.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

DISCOVERY — PRACTICE — PRIVILEGE — DOCUMENTS IN PREVIOUS ACTION — SECONDARY EVIDENCE.

In *Calcraft* v. *Guest* (1898) 1 Q.B. 759, the Court of Appeal discuss the alleged conflict between the cases of *Minet* v. *Morgan*, L.R. 8 Chy. 361, and *Wheeler* v. *Le Marchant*, 17 Ch. D. 675, and hold that rightly understood both cases are consistent with each other. In this case, after the trial certain documents connected with a prior litigation in reference to the same matter between the plaintiff's predecessor in title and third parties were discovered, and the defendant obtained copies thereof. The documents belonged to the plaintiff, and were privileged from production. Judgment having been given in favour of the plaintiff, the defendant appealed, and on the appeal claimed to read the copies he had taken of the documents in question. For the plaintiff it was argued that as the documents were privileged the copies were inadmissible. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) were of opinion that though the privilege remained, and that although the plaintiff could not be compelled to produce the originals, nevertheless the defendant being in a position to give secondary evidence of their contents, was entitled to do so, and that such evidence was admissible.

CHOSE IN ACTION — ASSIGNMENT — MORTGAGE — ABSOLUTE ASSIGNMENT WITH PROVISO FOR REDEMPTION—ASSIGNMENT OF PART OF DEBT—JUDICATURE ACT 1873 (36 & 37 Vict., c. 66), s. 25 s.-s 6—(R.S.O. c. 58 (5), (6),)—PARTIES.

Durham v. *Robertson* (1898) 1 Q.B., 765 turns upon the construction of the Eng. Jud. Act, s. 25, s.-s. 6 (from which Ont. Jud. Act, s. 58 (5) (6) are taken), and which enables the assignee of a chose in action claiming under an absolute assignment in writing to sue in his own name for the debt assigned. The question was whether the assignment relied on was abso-

lute within the meaning of the Act, and not by way of charge only. The assignment was in these words: "Re Building Contract, South Lambeth Road. In consideration of money advanced from time to time we hereby charge the sum of £1,800, which will become due to us from John Robertson on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you." Notice of this was given to Robertson. Wills, J., who tried the action gave judgment in favour of the plaintiff. The Court of Appeal (Smith, Chitty and Collins, L.JJ.) however took a different view of the matter, and held that although an absolute assignment by way of mortgage with a proviso for redemption express or implied is within the statute, as was determined in *Tancred* v. *Delagoa Bay* (1889) 23 Q.B.D. 239, yet that the document relied on in the present case was by way of charge, and therefore not within the Act. In arriving at this conclusion Chitty, L.J., takes occasion to disapprove of the decision in *Brice* v. *Bannister*, 3 Q.B.D. 569. He also expresses a doubt whether an absolute assignment of part of a debt would be within the statute, but on this point neither Smith nor Collins, L.JJ. express any opinion. The defect in the plaintiff's proceedings it was also held could not, after trial, be cured by the addition of the assignors as parties.

COUNTER CLAIM—CAUSE OF ACTION AGAINST PLAINTIFF BY DEFENDANT JOINTLY WITH ANOTHER PERSON—JOINDER OF PARTIES—ORD. XVI., R. 11, ORD. XXI., R. 11—(ONT. RULES 206, 248).

Pender v. *Taddei* (1898) 1 Q.B. 798, shows that there are limits to the right of pleading a counter claim. In this case the defendant set up a counter claim by himself and another person jointly, against the plaintiff; and he added the other person as a party defendant to the counter claim, but the Court of Appeal (Smith, Chitty, and Collins, L.JJ.) were unanimous that the Rules do not admit of such a counter claim being set up, and affirmed the order of the Judge at Chambers striking it out. Ord. xxi., r. 11 (Ont. Rule 248) was held not to authorize the adding as a defendant a party jointly interested with the defendant pleading the counter claim.

MANDAMUS—JUSTICES—HEARING AND DETERMINATION ACCORDING TO LAW —STATUTORY JURISDICTION.

In *The Queen* v. *Cotham* (1898) 1 Q.B. 802, a mandamus was granted to justices to hear and determine a matter according to law. The matter in question was an application for a license, which the justices had statutory power to grant in certain circumstances. The justices had entertained an application, and had granted it without regard to the provisions of the statute, and inasmuch as it was obvious that they had acted upon some considerations altogether outside the statute, it was held that they had not heard and determined the matter according to law, and that a mandamus to compel them so to hear and determine it ought to go.

MALICIOUS INJURY—ADDING WATER TO MILK—FRAUDULENT MOTIVE—ABSENCE OF MALICE—24 & 25 VICT. C. 97, S. 52—(CR. CODE, S. 511).

Roper v. *Knott* (1898) 1 Q.B. 868, this was a case stated by a magistrate. The defendant was charged with malicious injury to the plaintiff's property. The defendant was a milk carrier in the plaintiff's employment, and the alleged offence consisted in adding water to the milk delivered to him for carriage to the plaintiff's customers. The addition was made, as alleged, to protect the defendant from loss by accidental spilling of the milk. No milk was delivered on the morning when the addition was made, but the whole of the milk was spoiled and thrown away, and the loss occasioned thereby was 10s. 8d. The magistrate found that the addition was made for the purpose of enabling the defendant to make a profit for himself by selling the surplus milk and not accounting for it, but that there was no intention to injure the plaintiff, but he felt bound by the decision in *Hall* v. *Richardson*, 54 J. P. 345, to acquit the defendant. The Court for Crown Cases reserved (Lord Russell, C.J., and Day, Wills, Grantham, Wright and Kennedy, JJ.), were agreed that *Hall* v. *Richardson* was not good law, and remitted the case to the magistrate to convict the defendant. This case would seem to be an authority for interpretation of the Cr. Code s. 571 in a similar case.

ORIMINAL LAW—BETTING—PLACE USED FOR BETTING—ARCHWAY ON STREET—BETTING ACT (16 & 17 VICT. C. 119) SS. 1, 3—(CR. CODE SS. 197, 198).

In *The Queen* v. *Humphrey* (1898) 1 Q.B. 875, the question to be determined was whether an archway which was a private thoroughfare leading from a public street into a yard containing dwelling houses, stables and workshops, which the prisoner was accustomed to resort to for the purpose of betting with persons who came to him there, was a "place" within the meaning of the Betting Act, 1853 (16 & 17 Vict. c. 119) ss. 1, 3, (Cr. Code, ss. 197, 198). The Court for Crown Cases reserved (Lord Russell, C.J., Hawkins, Wills, Kennedy and Ridley, JJ.), held that it was. The case is noteworthy for the observations made on the case of *Powell* v. *Kempton Park* (1897) 2 Q.B. 242 (see ante vol. 33, p. 762), which is said to have been a collusive action brought to get rid of the effect of the decision in *Hawke* v. *Dunn* (1897) 1 Q B. 579, (see ante vol. 33, p. 578). Lord Russell, C.J., seems to intimate that the decision of the Court of Appeal in *Powell* v. *Kempton Park*, would not be binding on the Court for Crown Cases reserved, although entitled to be treated with deference and respect. The judges are agreed, however, on the desirability of further legislation to get over the difficulty created by the difference of judicial opinion as to what is and what is not "a place" within the meaning of the Act.

MASTER AND SERVANT—FACTORY ACT, 1878 (41 & 42 VICT. C. 16), SS. 17, 83, 94, (R.S.O C. 256, SS. 6, 9, 14)—EMPLOYMENT OF YOUNG PERSON DURING PROHIBITED HOURS WORKING FOR AMUSEMENT.

In *Prior* v. *Slaithwaite S. Co.* (1898) 1 Q.B. 881, the defendants were charged with a breach of the Factory Act, 1878 (41 & 42 Vict., c. 16), (see R.S.O. c. 256, ss. 6, 9, 14) for permitting a young person in their employment to work during the time allowed for a meal. The evidence showed that the young person, contrary to his orders, and for his own amusement, had oiled part of the machinery during the hour allowed for a meal. The Court (Wills and Kennedy, JJ.) held that this was an employment within prohibited hours within the statute, and that the defendant company was liable for the statutory penalty.

ADMINISTRATION—PRESUMPTION OF DEATH—DISAPPEARANCE FOR 7 YEARS

In the goods of Winston (1898) P. 143. This was an application for letters of administration to the estate of a man who had been last heard of in July, 1891. The application was made before the lapse of seven years for the purpose of proving a claim in a Chancery suit. The application was granted, but it was directed that the grant should, except in so far as it might be required in the Chancery Division, remain in the registry till the expiration of the seven years.

INJUNCTION—COMPANY—SIMILARITY OF NAME—DECEPTION.

Manchester Brewery Co. v. *North Cheshire and Manchester Brewery Co.* (1898) 1 Ch. 539. This was an action to restrain the defendants from using the name "North Cheshire and Manchester Brewery Co." In 1897 two companies existed called the "Manchester Brewery Co." and "the North Cheshire Brewery Co." The former had its brewery in Manchester and had a large business there. The latter had its brewery in Macclesfield, and had business there and also in Manchester. In that year the latter company's business was sold to persons who started a new company called the "North Cheshire and Manchester Brewery Co." There was no evidence of any fraudulent intent on the part of the defendants, and Bryne, J., who tried the action, thought no sufficient ground was shown for the interference of the Court. The Court of Appeal (Lindley, M.R., and Rigby and Collins, L.J.J.) were of a different opinion and considered there was a sufficient similarity of name between the plaintiff company's and that adopted by the defendant, as to be likely to deceive the public into a belief that there had been an amalgamation of the two companies, and an injunction was granted.

Correspondence.

EXEMPTIONS FROM DISTRESS.

To the Editor of the Canada Law Journal:

Sir,—I observe in your valuable periodical two recent decisions, *Harris* v. *Can. Perm. L. & S. Co.*, 34 C.L.J. 39, and *Shannon* v. *O'Brien*, *ib.* 421, bearing upon the exemption sec-

tion of the Landlord and Tenant Ac., and your observations upon them in your July issue. I also venture to think these judgments are somewhat open to question, though given by judges whose decisions are entitled to much weight. There cannot be any question but that the legislation referred to, s-s. 2 of s. 30 R.S.O. (1897) c. 170, is vague and of difficult construction, but if that alone would enable our judges to ignore a statute, we should have a considerable portion of our legislation disregarded. Judge Snider states in his judgment in the latter case, "I recognize that it is my duty to give effect to the intention of the legislature, if I can discover it," and it is in that view, not as defending vague legislation of this kind, that I venture to think the meaning of this sub-section can be found. Without going into a lengthy or elaborate argument, I would say that I have had to advise more than once on the sub-section referred to, and while recognizing the difficulty of construction, I have given the opinion that under the statute, the landlord's bailiff when more than two months' rent was in arrear, could seize and sell sufficient of the exempted goods to settle the amount of rent that accrued after the two months' rent fell due, that is for the third and subsequent months, and should the tenant before sale pay or tender the rent other than for such first two months the bailiff would have to withdraw from possession, in other words that, so far as such exempted goods are concerned, the first two months' arrears of rent could be considered only as giving the right to seize for the rent that subsequently thereto accrued due, and except as to the giving of such right said two months rent would virtually have to be considered as non-existent.

It appears to me that this interpretation overcomes many of the difficulties suggested by the learned judges, and gives a reasonable interpretation to this certainly somewhat obscure enactment. I might add that the sub-section referred to was probably enacted to enable monthly tenants with small means and few chattels to obtain leniency from their landlords during the winter months when work is difficult to be had, a landlord being often willing to risk the loss of two months' rent when he would not be prepared to lose more.

Barrie. SUBSCRIBER.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Nova Scotia.] CUMMINGS *v.* TAYLOR. [May 6.

Assignment for benefit of creditors—Preferred creditors—Money paid under voidable assignment—Levy and sale under execution—Statute of Elizabeth.

Where an assignment has been held void as against the statute 13 Elizabeth, c. 5, and the result of such decision is that a creditor who had subsevuently obtained judgment against the assignor, and notwithstanding the assignment, sold all the debtor's personal property so transferred under execution issued upon the said judgment, was entitled to all the personal property of the assignor so levied upon by him under his execution, such creditor has no legal right or equity to an account, or to follow moneys received by the assignee or paid by him, under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible. Appeal allowed with costs.

Lovett, for the appellants. *McNeil*, for the respondents.

Ontario] JORDAN *v.* PROVINCIAL PROVIDENT INSTITUTION. [June 14.

Life Insurance—Application—Representation—Warranties—55 Vict., c. 39 s. 33 (2) (3) (Ont.)

The provisions of sub-section two of section 33 of "The Insurance Corporations Act, 1892" (Ont.), requiring any condition or warranty endorsed on the policy providing that the contract of insurance should be avoided by reason of statements in the application, to be limited to cases in which such statements may be material to the contract, do not require the materiality of the statement to appear on the endorsement, but the contract will only be avoided thereby if such statement is subsequently judicially found to be material under the following sub-section. A misrepresentation in such a statement if so found to be material will avoid the policy notwithstanding that it was made in good faith and in the conscientious belief that it was true. Appeal dismissed with costs.

Reeve, Q C., and *Day* for appellant. *Osler*, Q.C., and *MacMurchy* for respondent.

Ontario.] ANDERSON *v.* GRAND TRUNK RAILWAY. [June 14.

Railway—Use of railway premises—Invitation—Trespass—Negligence.

At a place called Lucan Crossing, on the line of the Grand Trunk railway, passengers are received and allowed off, tickets being sold to and from such place. There is no depot, but a small building, part of which is used for a

waiting room, and no right of way to the public highway is provided, passengers being obliged to cross the railway tracks. M., on returning from London, to a place about three miles from Lucan, found he could only get to the latter place, owing to a violent snowstorm, and arriving there started to walk to his home, but in going along the track to reach the highway he was struck by a train and killed. In an action by his administrators for damages

Held, that notwithstanding the usage for many years of the tracks by passengers for egress from the train, M. could not be said to be on the track by invitation or license of the company, and the action would not lie. Appeal allowed with costs.

Osler, Q.C., for appellant. *Aylesworth*, Q.C., for respondent.

Nova Scotia.] MULCAHEY *v.* ARCHIBALD. [June 14.

Debtor and creditor—Transfer of property—Delaying or defeating creditors—13 Eliz., c. 5.

A transfer of property to a creditor for valuable consideration, to prevent its being seized under execution at the suit of another creditor, and with intent to delay the latter in his remedies, or defeat them altogether, is not void under 13 Eliz., c. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor. Appeal allowed with costs.

Harris, Q.C., for appellants. *McInnes*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Rose, J.] MCMILLAN *v.* MUNRO. [May 10.

Registry law—Priorities—Mortgage for balance of purchase money.

The plaintiff agreed to sell a parcel of land, one half of the purchase money to be paid in cash and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made and the deed delivered to the purchaser. The mortgage was delivered to the vendor's agent to be registered. The purchaser had obtained the cash payment from the defendant upon the security of a first mortgage upon the land in question, and this mortgage was prepared, executed and delivered before the execution and delivery of the deed, and was registered before the deed and before the mortgage to the plaintiff. Upon receiving the deed the purchaser handed it to the defendant's agent, who then registered it, the plaintiff's mortgage having in the meantime been also registered. The plaintiff and the defendant acted in good faith, and each without knowledge or notice of the other's mortgage.

Held, that the Registry Act did not apply; that the defendant's mortgage

was valid only by estoppel and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the claim of the plaintiff for the balance of purchase money, and that the plaintiff's mortgage was therefore entitled to priority. *Nevitt* v. *McMurray* (1886), 14 A R. 126, applied.

Judgment of ROSE, J., reversed.

E. H. Tiffany, for appellant. *A. C. Macdonell*, for respondent.

From Rose, J.] WILSON *v.* LYMAN. [May 10.

Trade mark—Trade name—"Fly poison pad."

The plaintiffs sold sheets of paper, saturated with fly poison, under the name of "Wilson's Fly Poison Pad." These words were registered by them as a trade mark, and were printed on each sheet, and the sheets became known in the trade as "pads"

Held, that the word "pads" was *publici juris*, and that the defendants, who were manufacturers and vendors of fly poison, were entitled to describe as "pads" sheets of paper used by them for a similar purpose, the general appearance of the sheets being different, and their name appearing prominently on them.

Judgment of ROSE, J., affirmed.

S. H. Blake, Q.C., and *J. J. Scott*, for appellants. *D. E. Thomson*, Q.C., and *D. Henderson*, for respondents.

HIGH COURT OF JUSTICE.

Boyd, C.] [April 12.

CANADA PERMANENT LOAN & SAVINGS CO. *v.* TRADERS BANK.

Fixtures—Plant and machinery—Included in mortgage—Agreement for security—Subsequent mortgage—Chattel mortgage—Constructively affixed—Notice.

The plaintiffs were mortgagees from a manufacturing company, and their mortgage in addition to the land and premises included "all the plant and machinery now upon or hereafter placed upon said land, all of which plant and machinery are to be considered as fixtures for the purpose of this mortgage," and provided "that none of the machinery . . . will be removed during the currency of this mortgage," and after the covenant to insure "the foregoing covenant to insure shall apply to machinery as well as to buildings and the company (plaintiffs) shall have a first lien" etc., and was duly registered. The defendants were assignees of a subsequent mortgage which included the plant and machinery in similar terms, but subject to plaintiff's mortgage, and were also mortgagees under a chattel mortgage, covering "all the machinery and plant on the said premises" and most of the machines, etc. In an action for a declaration that the plaintiffs had a lien on certain machines, and for an injunction to restrain the defendants from removing them

Held, that all the chattels of the nature of plant or machinery put upon the premises were constructively converted into fixtures for the purposes of security; that the things not structurally affixed were constructively affixed, and the onus of proving that was discharged by proving the agreement in the mortgage that the second mortgage having been made subject to the first the presumption of law is that there was notice of the prior one which continued when the chattel mortgage was taken, and that the defendants were in no better position than the mortgagor company, and as the latter could not remove them, the defendants holding with notice were equally bound.

S. H. Blake, Q.C., and *C. J. Leonard*, for plaintiffs. *James Parks*, for defendants.

Rose, J.] O'NEIL *v.* HOBBS. [May 21.

Division Courts—Tort—Payment of money into Court.

In a Division Court action for a tort, money paid into Court by a defendant in alleged satisfaction of the plaintiff's claim at once becomes the plaintiff's, but when he proceeds with the action it must, under Rule 170, remain in Court until after judgment is given in the action, when any costs awarded the defendant, after the payment in, must be deducted therefrom.

Where, therefore, after payment into Court by a defendant of a sum of money in alleged satisfaction of the plaintiff's claim and costs, the plaintiff proceeded with the action, and judgment was given in the defendant's favor, an order made by the Division Court Judge directing the sum so paid in to be paid out to the defendant was set aside, and the amount directed to be paid out to the plaintiff after deducting the costs awarded to the defendant.

Talbot Macbeth, for motion. *Toothe*, contra.

Street, J.] [June 4.

CORNWALL WATERWORKS CO. *v.* CORPORATION OF CORNWALL.

Waterworks—Municipal corporations—R.S.O. c. 199—Award fixing amount to be paid for property—Passing of by-law to raise amount—Right of corporation to take possession—Agent of corporation—Mortgagees.

Upon the making of an award fixing the amount to be paid for waterworks in an arbitration under R.S.O. c. 199, between a town corporation and a waterworks company, and the passing of a by-law for raising the said amount, the corporation is entitled under section 62, to the possession of the property, and therefore no action would lie against the corporation to recover the possession so required, nor would an action lie against an agent of the corporation duly appointed to procure possession.

The six months provided for by section 64 within which the amount must be paid, otherwise the waterworks company may resume possession, must have elapsed before action brought to recover possession, is not sufficient that the said time should have elapsed at the time the action was tried.

Mortgagees of the waterworks company, who were not parties to the arbitration, or referred to in the award, and who have taken no part in the taking possession, were not necessary parties to the action

D. B. Maclennan, Q.C., for the plaintiffs. *Leitch*, Q.C., for the corporation and their agent. *A. Bruce*, Q.C., for the mortgagees.

Rose, J.] SLATTERY *v.* DUN. [June 16.

Security for costs—Libel—Newspaper—Commercial Agency Sheet—R.S.O. c. 68, s. 1.

A printed paper issued daily by the conductors of a mercantile agency to persons who are subscribers to the agency, for the purpose of giving the information required by such subscribers, is a "newspaper," and "printed for sale," within the meaning of s. 1 of R.S.O., c. 68; and the publishers are, therefore, in an action for libel brought against them, entitled to the benefit of the provisions as to security for costs contained in s. 10.

W. H. P. Clement, for plaintiffs. *Wallace Nesbitt*, for defendants.

Ferguson, J.] RE LEWIS. [June 21.

Intestacy—Release by son of intestate—Claim by next of kin of son—Advancement.

A son in consideration of his father conveying to him certain land, accepted it as an advancement, in lieu of and in full of all claims and demands against his father's estate, either for wages, or as one of his next-of-kin or next of kin, and agreed that he would neither make any claim against the estate, nor attempt to set aside or invalidate any will or conveyance made by the father. On the death of the father intestate, the son's children, he having died in his father's lifetime intestate, claimed as co-heirs or next of kin of their grandfather, to share in the estate.

Held, that the children's claim could not be maintained, for they took, if at all, per stirpes, i.e., as representatives of their father, and as their father was precluded by the agreement he had entered into from taking anything, so were the children.

Alfred Hoskin, Q.C., for adult daughters of intestacy. *A. E. Hoskin*, for administrators. *W. Macdonald*, for the sons of adult children. *A. T. Boyd*, for son's infant children.

Meredith, J.] TYTLER *v.* CANADIAN PACIFIC RAILWAY CO. [June 29.

Jurisdiction—Cause of action—Service of writ—Railway.

A writ of summons in an action to recover damages against a railway company for an accident which happened in British Columbia, was issued out of the High Court of Justice for Ontario, and was served on the defendants' claims agent in Toronto in said Province. The head office of the railway was in the Province of Quebec, but the company carried on business in Ontario, where there were many hundred miles of its railway, and millions of its capital invested, and where hundreds of its officers and servants resided.

Held, that the action was properly brought in Ontario, and the service of the writ therein was valid.

Tytler, for the plaintiff. *Robinson*, Q.C., and *Aylesworth*, Q.C., for the defendants.

Ferguson, J.] ATKINSON *v.* CITY OF CHATHAM. [July 16.

Municipal corporations—Highway—Obstruction—Telephone pole—Non-repair—Runaway horses—Liability Notice—Contributory negligence—Indemnity—Telephone Company—Erection of poles—Sanction of corporation—Damages.

A city highway, sixty-six feet wide, had upon it, near the angle formed by a sharp turn in the road, a telephone pole planted twelve feet from the centre line, and so far from the sidewalk that there was a beaten track for carriages between the two. The horses attached to a sleigh, which was being driven up and down this highway for the pleasure of the occupants, in daylight, ran away, and their driver lost control of them when approaching the pole, but at some distance from it, and before reaching the angle. In making the turn the horses and sleigh described a curve and brought the sleigh against the pole, overturning the sleigh, whereby the horses and sleigh were damaged, and bodily injury was caused to one of the occupants.

Held, that the pole was an obstruction upon the highway, which at this point, from this cause alone, was out of repair, and not in good or reasonable repair; and the city corporation, having notice and knowledge of the obstruction, and also of its dangerous character, and there being no contributory negligence, were liable in damages for the injuries sustained. *Sherwood* v. *City of Hamilton*, 37 U.C.R. 410, followed. *Foley* v. *Township of East Flamborough*, 29 O.R. 139, distinguished.

Driving a horse that has before run away, as one of a pair of horses, is not of itself negligence contributing to the disaster.

Held, also, upon the evidence, that the pole was planted where it stood under the superintendence of the corporation, and with their sanction, and they could not recover indemnity from the telephone company by whom it was erected. Quantum of plaintiffs' damages considered.

Atkinson, Q.C., and *C. R. Atkinson*, for plaintiffs. *Douglas*, Q.C., and *Aylesworth*, Q.C., for defendants. *M. Wilson*, Q.C., for the telephone company, third parties.

Falconbridge, J., Street, J.] IN RE MATHIEU. [July 20.

Parent and child—Custody of infant—Rights of father—Discretion of Court.

Where a husband has done no wrong, and is able and willing to support his wife and child, the court will not take away from him the custody of his infant child, merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. It must be the aim of the court not to lay down a rule which will encourage the separation of parents who ought to live together and jointly take care of their children. The discretion given to the court over the custody of infants, by R.S.O. c. 168, s. 1, is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit.

In re Agar Ellis, 10 Ch. D. 71, and *In re Newton* (1896), 1 Ch. 740, specially referred to.

And where a wife, without any other reason than that she was tired of living in the country to which her husband had taken her, left him and returned to her mother's house, taking with her their daughter, aged five years, the court made an order giving the custody of the child to the father, and allowing the mother access at reasonable times.

F. C. Cooke, for the father. *A. D. Crooks*, for the mother.

Falconbridge, J., Street J.] JUSTIN *v.* GOODISON. [July 25.

Surrogate Court—Removal of cause into High Court—Appeal from an order made before removal.

Immediately upon the making of an order removing a cause or matter from a Surrogate Court into the High Court, under s. 34 of the Surrogate Courts Act, R.S.O. c. 59, such cause or matter becomes an action in the High Court, and ceases to be a cause or matter in the Surrogate Court; and therefore an appeal under s. 36 of the Act from an order made in the Surrogate Court before the removal, cannot be entertained if launched after the removal. The practice to be followed is the practice prescribed in High Court proceedings. *Harris* v. *Judge* (1892) 2 Q.B. 565, *Duke* v. *Davis*, (1893) 2 Q.B. 107, and *Doll* v. *Howard*, 11 Man. L.R. 21, followed.

Justin, for plaintiffs. *R. U. Macpherson*, for defendant.

Falconbridge, J., Street, J.] DONALDSON *v.* WHERRY. [July 30.

County Court—Order in term—Reversal of verdict—Jurisdiction—Rule 615—Appeal to High Court—R.S.O. c. 55, s. 51—Landlord and tenant—Co-tenants—Release of one—Agreement—Consideration—Principal and surety—Discharge of principal—Effect on surety—Reservation of remedies.

In a County Court action tried with a jury a verdict was found for the defendant, and judgment in his favour ordered by the trial judge. Upon motion by the plaintiff to set aside the verdict and judgment, and to enter judgment for the plaintiff or for a new trial, the County Court, in term., made an order setting aside the verdict and judgment, and ordered judgment to be entered for the plaintiff.

Held, that, under the provisions of s. 51 of the County Courts Act, R.S.O. c. 55, an appeal by the defendant from the order of the County Court in term, lay to a Divisional Court of the High Court.

In order to put an end to a sealed contract for a tenancy, and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than an agreement between the tenants, though made in the presence of the landlord, that one of them is to pay the amounts overdue and accruing; there must be a consideration and an agreement to discharge.

A discharge of the debtor by his creditor, with a reservation of remedies against the debtor's surety, operates merely as a covenant not to sue, and does not operate as a release of the surety.

The County Court Judge, in term, had jurisdiction, under Rule 615, to direct the proper judgment upon the evidence to be entered, for he had before him all the materials necessary to finally determine the questions in dispute.

W. C. McKay, for the plaintiff. *Mulvey*, for the defendant Wherry.

Falconbridge, J., Street, J.] IN RE SOLICITORS. [August 3.

Solicitor—Retainer—Joint or several—Severance of defence—Apportionment of costs.

Notwithstanding that the retainer of a solicitor by two persons is in form a joint one, the court will look into the facts of the case to discover the real nature of the transaction, and will determine the rights of the solicitor and clients accordingly; such a retainer does not necessarily make the persons signing it joint debtors to the solicitor to whom it was given, but it may be taken distributively. And, upon the facts of this case, the client whom the solicitor sought to charge with the whole costs of the defence to an action conducted up to a certain stage jointly on behalf of this client and another, two of the defendants in the action, and afterwards on behalf of this client alone, and by a new solicitor on behalf of the other, was held liable for only one half of the joint costs during the time that the two clients were represented by the same solicitor, but thereafter for the whole of the costs reasonably and properly incurred by such solicitor.

Aylesworth, Q.C., for the solicitors. *J. E. Jones*, for Jane S. Fletcher.

Falconbridge, J., Street, J.] CROSS *v.* CLEARY. [August 5.

Contract—Specific performance—Agreement to bequeath estate—Remuneration for maintenance—Implied promise—Annual payments—Arrears—Statute of Limitations.

The plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate, upon the strength of a verbal agreement which she alleged was made between her and the deceased. Her evidence was that he said: "You give me a home as long as I live, and when I die you have what is left;" to which she answered "all right;" and he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made, but made his will in favour of other persons.

Held, that, apart from the Statute of Frauds, the evidence was not such as the court could act upon by decreeing specific performance of the alleged agreement in substitution for the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or anyone else. Such an agreement must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it.

Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging, and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears.

W. R. Riddell, for the plaintiff. *Aylesworth*, Q.C., for the defendants.

Falconbridge, J., Street, J. } IN RE RENFREW ESTATE. [August 22.

Revenue — Succession duty — Liability of estate for — Property in another Province — Testator domiciled in another Province — Surrogate Courts — Jurisdiction.

The Judge of a Surrogate Court has jurisdiction to determine whether a particular estate, of which probate or administration is sought, is liable or not to pay succession duty, and the amount of such duty; his decision being subject to appeal.

Where a deceased person has his domicile, prior to and at the time of his death, in another Province, and the value of his property in Ontario is under $100,000, although his whole estate, including property in the Province of his domicile, exceeds $100,000, and his whole estate in this Province is by his will devised and bequeathed to his wife and children, the property in this Province is not liable to pay succession duty.

Judgment of Judge of Surrogate Court of York affirmed. For full report of this case in the Court below, see ante p. 318.

Aylesworth, Q.C., for the Treasurer of Ontario. *D. T. Symons*, for the executors.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] GATES *v.* LOHNES. [May 23.

Slander — Words imputing commission of unnatural offence — Innuendo — Not necessary to prove where meaning of words obvious — Words not actionable per se — Evidence of hostile witness.

In an action of slander the words complained of accused plaintiff of the commission of an unnatural offence.

Held, (1) It was not necessary to give evidence to prove the innuendo, the meaning of the words being perfectly obvious and unmistakable. (2) Words which without knowledge on the part of those who heard them of the matter to which they referred, could convey no defamatory meaning were not actionable *per se*. (3) Evidence was properly received to show such knowledge. (4) There was no authority for excluding as discredited the whole of the evidence of a witness, who was ruled to be hostile, on the ground that the evidence showed that she had previously made a statement inconsistent with part of her testimony on the trial.

F. B. Wade, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] ORWITZ *v.* MCKAY. [May 23.

Trespass to person—Causing arrest under capias—Malice negatived—Sufficiency of affidavit—Matter for magistrate—Evidence required—Form of writ—Effect of adjudication by magistrate—Party causing arrest not liable though writ set aside—Directions to jury—Discretion of Judge.

The plaintiff H. O. was arrested under a capias issued in a suit brought against him by defendant under the name of C. O. for goods sold and delivered. After his arrest plaintiff took the objection that the capias being against C. O. he could not be dealt with under it, and the magistrate before whom he was brought thereupon dismissed the proceeding. In an action by plaintiff for false arrest the evidence showed that plaintiff rendered his account to plaintiff under the name of C.O., and that while plaintiff objected to certain charges, and requested time for payment, he made no objection to the manner in which the account was made out.

Held, that the jury were justified under the circumstances in negativing malice on the part of defendant.

The affidavit upon which the capias issued showed that plaintiff had been absent from his place of business for some weeks, and was said to have been in the United States, and that the person from whom he purchased his stock was in possession during his absence, and was still so, apparently, at the time the affidavit was made.

Held, (1) These facts would indicate to the magistrate that the business of plaintiff was at an end, and that there was nothing to detain him in the county. (2) Much less evidence would be required to authorize the issue of a capias by a justice of the peace, than would be required to authorize the issue of such a writ in this court. (3) The sufficiency of the grounds set forth in the affidavit was a matter for the magistrate.

The capias being correct in point of form, and the magistrate having jurisdiction over the subject matter, and the defect if any being at most one which would render the writ voidable,

Held, (1) It was competent to defendant to rely upon the adjudication of the magistrate as an answer to the plaintiff's claim of trespass. (2) If the capias was issued through an error of the magistrate the person who directed its issue would not be liable even though the capias were set aside.

The facts as to malice were left to the jury, who were told that absence of reasonable and probable cause was evidence of malice, but they were not directed as to whether in the opinion of the trial judge there was or was not reasonable and probable cause. The judge having submitted to the jury with proper directions all the facts upon which the question of reasonable and probable cause depended, and having determined upon their findings that there was reasonable and probable cause,

Held, that it was in the discretion of the judge to determine the best method of dealing with that aspect of the case, and that plaintiff had suffered no prejudice from the course pursued.

F. B. Wade, Q.C., and *V. Paton*, for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] PALGRAVE *v.* MCMILLAN. [May 23.

Costs—Retaxation before Judge—Appeal from—Discretion of Judge—Wrong principle—O. 63 R. 23—Act of 1885, c. 36.

Costs taxed before the Taxing Master were retaxed before a Judge of the Court after notice in writing pursuant to the provisions of O. 63 R. 23 (Acts of 1893, Appendix).

Held, (1) The right of appeal was retained by the Act creating the office of Taxing Master, Acts of 1885, c. 36. (2) The Court would not interfere with the retaxation unless some very gross error had been committed, violating well settled principles of taxation of costs. (3) On retaxation, the judge under the provisions of the rule, had the fullest discretion as to items or parts of items, and having acted within his powers, and it not being shown that the retaxation proceeded upon any wrong principle, that the appeal must be dismissed with costs.

It was brought to the notice of the court that the Taxing Master limited the costs of retaxation to his own fees, and refused the costs of the application before the Judge.

Held, That he erred in doing so, the party succeeding being entitled to all necessary costs incurred in obtaining the result arrived at.

T. J. Wallace, for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] RHODENHIZER *v.* BOLLIVER. [May 23.

Parent and child—Gift to daughter living at home—Evidence—Transmutation of possession.

Held, affirming the judgment of the County Court Judge, and dismissing defendant's appeal with costs, that evidence that a cow was said to belong to plaintiff's daughter, while the daughter was living at home, was not sufficient to support an alleged gift in the absence of evidence of any point of time when it could be said that there was a gift, or of any transmutation of possession.

F. B. Wade, Q.C., for appellant. *J. A. McLean*, Q.C., contra.

Full Court.] [May 23.

NORTH SYDNEY MINING AND TRANSPORTATION CO. *v.* GREENFF.

Receiver—Application for appointment of, by way of equitable execution—Recorded judgment—Will bind interest of mortgage in land—Sale of interest under execution—R.S., 5th series, c. 84, s. 21, s. 7 (i); R.S., 5th series, c. 124.

The plaintiff company having recovered several judgments against defendant, upon which executions had been issued, which remained unsatisfied, made application to a judge at Chambers for the appointment of a receiver to receive the rents, interest and profits to which defendant might become entitled by virtue of a mortgage upon the lands of L., the mortgage not being yet due.

Held, affirming the judgment of the Chambers Judge refusing the application and dismissing plaintiff's appeal with costs, that the Court should not

appoint a receiver by way of equitable execution, merely because it would be a more convenient way of obtaining satisfaction of the judgment than the ordinary modes of execution.

Held, that the legal title to the land being in defendant, the judgments, when recorded, would clearly bind such interest. (R.S., 5th series, c. 84, s. 7 (*t*) and s. 21).

Held also, that there was nothing to prevent the sale of such interest under execution in accordance with the provisions of R.S., 5th series, c. 124, in the same way as any other interest of a judgment debtor in real estate.

Henry, for appellant. *Mellish*, for respondent.

Full Court.] PALGRAVE *v.* MCMILLAN. [May 23.

Motion to vary order for judgment refused—Laches.

On motion to vary the order for judgment made upon the trial of the cause, so as to award to plaintiffs the costs of certain issues raised upon the counterclaim, it appeared that there was an appeal which was disposed of some years previously, and that the decision now sought was not asked for upon the determination of the appealor, that the trial judge was asked to make the order in the form desired, or to deal specially with the costs upon the issues, which appeared to have been considered unimportant. It could not be said that the omission to obtain the order in the form desired, either from the trial judge, or upon appeal, was a "mere slip."

Held, that even if the Court had the power to grant the relief sought, they should not exercise it under the circumstances, and after the long delay that had taken place.

T. J. Wallace, for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] SCHNARE *v.* ZWICKER. [May 23.

Breach of covenant for quiet possession—Counterclaim for rectification—Evidence—Rectification ordered—Covenant not to be implied where deed contains express warranty on same subject—Quære, whether action will be on warranty in freehold—Conveyance where freehold is called in question—Evidence as to breach held insufficient.

Plaintiff claimed damages for breach of covenant for quiet possession and warranty in relation to several lots of land alleged to be contained in a deed from defendant to plaintiff. Defendant counterclaimed to have the deed rectified on the ground that the intention of the parties was to convey the interest of defendant alone in the land in question. The evidence showed that at the time the deed was given defendant was the owner of four undivided sixths of the land, the remaining two-sixths being owned by E. S. and L. S. respectively; also that after the making of the deed by defendant plaintiff purchased from E. S. her one-sixth interest and endeavoured to purchase the one-sixth interest owned by L. S. The interest of L. S. was conveyed to A., who commenced an action for partition, which was the breach of warranty relied upon.

Held, that as the deed did not carry out the real intention of the parties, the trial judge was right in directing it to be rectified so as to convey the interest of the defendant alone in the lots described.

Held also, that as the deed contained an express warranty, no other covenant on the same subject could be implied.

Quaere, Whether an action for breach of covenant would lie on a warranty where the warranty is in a freehold conveyance, and the freehold is called in question.

Held also, that assuming an action would lie in this case for breach of covenant for quiet possession, or warranty, no sufficient breach had been proved, the alleged disturbance of possession not having been made by defendant, or any one claiming under him.

F. B. Wade, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] MARSHALL *v.* MATHESON. [May 23.

Counterclaim—Evidence to support judgment for defendant upon—Costs.

In an action by plaintiff against defendant on a promissory note, the latter counterclaimed for damages on account of the failure of plaintiff to deliver goods according to contract, by which defendant was prevented from making sales and lost commissions, etc. The evidence given in support of the claim went to show that some parties refused to take goods on account of delay in the delivery of them, but it was not shown how many persons so refused, or what quantity of goods they refused to take, or the dates or times at which the alleged refusals were made.

Held, that the evidence was insufficient to support the judgment in defendant's favor on the counterclaim, and that the appeal as to the counterclaim must be allowed with costs, but as plaintiff appeared to have been somewhat in fault, that the counterclaim should be set aside without costs.

J. A. Chisholm, for appellant. *H. McInnes*, for respondent.

Full Court.] GUILD *v.* DODD. [May 23.

Action for conversion—Question for trial judge—Costs.

In an action brought by plaintiff against defendant to recover damages for the conversion of a quantity of hay, plaintiff's right to recover depended upon whether the hay in question was "upland" or "intervale."

Held, dismissing plaintiff's appeal with costs, that the question was peculiarly one for the trial judge, the evidence being contradictory, and the question being one that the judge has exceptional advantages for determining.

F. A. Laurence, Q.C., for appellant. *H. A. Lovett*, for respondent.

Full Court.] FEINDEL *v.* ZWICKER. [May 23.

Trespass—Counterclaim for rectification of deed—False and fraudulent representations as to boundary of land bargained for—Remedy against vendor.

Plaintiff agreed to sell to defendant a lot of land extending up the river as far as the line of property of G., which line was represented as being marked

by a pine tree. In an action of trespass brought by plaintiff against defendant for piling logs on a portion of the land bargained for, it appeared that the boundary of G.'s property was not marked by the pine tree, but that the tree fell several rods short of it, and that the title to the land between the tree and the line of G.'s property, and in respect of which the action was brought, remained in plaintiff. The evidence showed that defendant was induced to complete the purchase by the false and fraudulent representations of plaintiff that the whole lot was being conveyed up to G.'s line, plaintiff intending at the time to reserve for his own use the portion of the lot intervening between the tree and G.'s line.

Held, HENRY, J., dissenting, that defendant was not entitled under these circumstances to have his deed rectified on the ground of mutual mistake but that his only remedy was against plaintiff for the fraud.

E. B. Wade, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court] CRAVEN *v.* WILLIAMSON. [May 23.

Breach of promise of marriage—Order for arrest of defendant under O. 44, R. 1—Affidavit for.

In an action for breach of promise of marriage an order for the arrest of defendant was obtained from a commissioner under O. 44, R. 1, which authorizes the making of such an order upon proof, to the satisfaction of the commissioner, that the plaintiff has a good cause of action. The order was obtained on an affidavit of plaintiff's father, stating that plaintiff had a good cause of action, but not giving the date of the contract, or showing that a time was fixed when the marriage was to take place, and that such time had elapsed, or that it was to take place within a reasonable time, and that such time had expired. No material was placed before the commissioner upon which he could exercise his judgment in determining for himself that there was a contract and a breach.

Held, affirming the judgment of MEAGHER, J., discharging the order for arrest, that the affidavit was insufficient, and not in conformity with the requirements of the order regulating the practice. *Dewolf v. Vinco*, 1 N. S. R. 26, questioned.

Henry, for appellant. *Rowlings*, for respondent.

Full Court.] HICKMAN *v.* BAKER. [May 23.

Money had and received - Evidence—Change of position—Application for leave to adduce further evidence.

Plaintiff shipped a quantity of fish by the schooner "Gleaner," of which J. was master, with the understanding that the fish was to be sold by J., and the balance, after deducting freight and expenses, remitted to plaintiff. The fish was sold by J. and the defendant B., and at the request of J. the money was paid over to B., who sought to retain it in satisfaction of an amount due him by J. The evidence showed that B. was twice informed by J. that he had the fish on freight, and he had means of ascertaining, by the exercise of due

diligence, that the fish was the property of plaintiff. It appearing that nothing had occurred to induce B. to change his position in any way to his prejudice, and that he sought to retain the money and apply it in satisfaction of the debt due by J., without having received any authority therefor from anyone,

Held, that the judge of the County Court was right in finding in plaintiff's favor, and that defendant's appeal should be dismissed with costs.

Held, further, that defendant's application for leave to adduce further evidence must be refused with costs, the rule which permits that to be done upon appeal being limited to cases originating in the Supreme Court.

W. B. A. Ritchie, Q.C , for appellant. *Rowlings*, for respondent.

Full Court.] ATTORNEY-GENERAL *v.* PARKER. May 23.

Succession Duty Act—Acts of 1895, c. 8, s. 5 and 7—Does not apply to funa transferred by power of appointment exercised after passage of Act where testator died previously.

By the Succession Duty Act, Acts of 1895, c. 8, s. 5, all property passing either by will or intestacy, etc , shall be subject to a succession duty, etc., and by s. 7 the duties imposed, unless otherwise provided, shall be due and payable at the death of the deceased, or within ten months thereafter, etc.

M.P.B., by his last will, directed his trustees to invest a portion of his estate and pay the income arising therefrom to his brother C., and at their discretion to pay C. a portion of the principal, and, after the death of C , to pay the principal remaining to such uses and purposes as C. should by deed or will appoint. M.P.B. died on the 19th April, 1891, some four years before the passage of the Succession Duty Act. C. died on the 30th December, 1897, having exercised his power of appointment by will made the 3rd June, 1897.

Held, that the fund in question did not pass within the meaning of the Act, s. 5, by the exercise of the power of appointment by C., the appointees taking under the instrument creating the power, and not by virtue of the power itself.

Held also, that the Act, s. 7, must be construed as applying only to deaths occuring after the passing of the Act.

A. McKay, for plaintiff. *W. B. A. Ritchie*, Q.C., and *J. A. Chisholm*, for defendants.

Meagher, J.] JORDAN *v.* MACDONALD. [July 12.

Costs—Event— Where first verdict for plaintiff and second for defendant.

This was an action against a constable for damages for false imprisonment. The plaintiff was arrested by the defendant under a warrant issued against the plaintiff for assault upon another constable acting in the discharge of his duty. The arrest was made by the defendant in another county before endorsement of the warrant, and the plaintiff claimed that the arrest was therefore illegal. On the first trial, a verdict was found in favour of plaintiff, but the trial judge deprived the plaintiff of costs on the ground of misconduct, and gave no costs to defendant. The plaintiff appealed from this judgment, and the defendant applied for a new trial, which was granted, the plaintiff's appeal as to costs not having been considered. On the second trial a verdict

was found for defendant. Defendant applied for an order for judgment for the costs of both trials, and plaintiff opposed same on the ground that defendant was not entitled to such an order when the first verdict was against him, and also because the order of the first trial judge, depriving both parties of costs, was outstanding.

Held, that the defendant was entitled to the costs of both trials, and that the order of the Court of Appeal, granting a new trial, by implication, discharged the order of the first trial iudge on the question of costs.

Fulton, for defendant. *J. A. Chisholm*, contra.

Province of New Brunswick.

SUPREME COURT.

Full Court.] THOMSON *v.* CITY OF ST. JOHN. [June 15.

Negligence—Tug injured in a harbour—Jury's findings—Weight of evidence.

In an action for damages for injury to a tugboat by a "dodger" in one of the slips of St. John harbour, the jury found that the damage was caused by the "dodger," and that the tug was properly in the slip at the time, but negatived a question as to the harbour master being guilty of negligence in not discovering the obstruction. The defendants had contended all through their case that there was no "dodger" in the place complained of. There was a great mass of testimony as to the harbour master's inspection of the harbour.

Held, on a motion for a new trial, a verdict having been entered for the defendants on the findings of the jury, that, although the plaintiff has made out a strong case, upon which the court might have found differently from the jury, there was not such a preponderance of testimony as would warrant the setting aside of the verdict. MCLEOD, J., dissenting.

McLean, for plaintiff. *Skinner*, Q.C., for defendant.

Full Court.] LABELLE *v.* NORWICH UNION FIRE INSURANCE CO. [June 15.

Policy—Improper answer as to ownership of land—Agent's answer when real facts disclosed—Whether application a warranty.

Defendant company issued a fire policy on a building, owned by the plaintiff, which stood on the highway. In the application for the insurance, signed by the defendant, the question "are you the owner of the land on which the building stands?" was answered "yes," but it was proved on the trial that the plaintiff when making the application stated to the company's agent, who filled in the answers, that the building stood on the highway, and that the agent notwithstanding wrote down the answer "yes," stating at the same time that this was the proper answer under the circumstances. The application was not referred to in the policy except that the property was described "as per plan on the back of the application," and this reference was relied on as making the application part of the contract, and a warranty by

the insured, under the following condition, endorsed on the policy: "If an application, survey, plan or description be referred to in this policy it shall be a part of this contract, and a warranty by the insured."

Held, on a motion for a nonsuit, per Hannington, Landry and McLeod, JJ., Tuck, C.J., and Vanwart, J., dissenting, that this was not such a reference to the application as would make it, under the condition specified, a warranty by the insured, the plan on the back only being referred to, and not the application itself; also, that the agent of the company in incorrectly writing the answer to the question as to the ownership of the land, after the plaintiff had truthfully stated the facts, must be taken as having acted as the agent of the company, not of the insured, thereby precluding the company from taking exception to it.

Palmer, Q.C., and *Baxter* for plaintiff. *Earle*, Q.C., and *C. J. Coster* for defendant.

Full Court.] EXPARTE SIMEON JONES. [June 15.

Civic assessment—Taxes on income—Residence.

The applicant a few years ago transferred his business and all his real estate in the City of St. John to his children and removed to New York, where he had an office on Broadway in connection with his business in stocks and bonds, and boarded and lodged (when in that city) at Hotel Plazza. He continued a director, however, of the Bank of New Brunswick, which had its head office in St. John, and attended in the year 1897 sixty-five meetings of the Board at the City of St. John in that capacity, receiving therefor an allowance of $4.00 per meeting. He had also, since his removal to New York, spent regularly two months or more of the summer season in the Province, a part of which time he spent fishing, and the remainder in the city, living at his old home with his children, where he stayed on all other occasions also when he was in the city. He was assessed on his income as a resident of St. John, and, objecting thereto on the ground that he was not a resident of the city, the Board of Assessors heard evidence as to his residence, when the facts substantially as above were disclosed. At the hearing the applicant stated his domicile as at Hotel Plazza, New York, but the Board found, notwithstanding, that he was a resident of St. John.

Held, on motion to make absolute a rule nisi for certiorari, that the finding of the Board was warranted by the evidence, and that applicant was liable to assessment on income as a resident of St. John. Rule discharged.

Currey, Q.C., in support of rule. *C. J. Coster*, contra.

Full Court.] ROBINSON *v.* SCHOOL TRUSTEES OF ST. JOHN. [June 15.

Innocent holder of unauthorized school bond—Negligence of School Board—Estoppel.

Plaintiff was holder of a school bond, which bore the seal of the Board, the signature of the chairman of the Board (since deceased), and what purported to be the signature of J.M., the secretary (since removed). The Board never received any value for the bond, and claimed that its issue was unauthorized. The bond, however, got out and into the hands of W. and M.

who hypothecated it to a bank, from which plaintiff received it. Both W. and M. had since died, and how they came in possession of the bond was not known. In an action for overdue coupons, E. M., who was employed in the office of the secretary of the School Board, testified that he was directed by a superior officer of the Board to fill in the bond under the designation of 277a, that he did so, and that subsequently he saw the bond lying on a table in the office with the seal of the Board affixed and bearing the signature of the chairman. J. M. swore that he did not sign the bond as secretary, and that the signature appended thereto as his was a forgery. The judge left it to the jury to find whether J. M. did in fact sign the bond, and also whether the Board or their officers were guilty of such negligence in connection with the bond as that it would be inequitable and unjust that the defendants should be permitted as against the plaintiff (an innocent holder for value) to set up that the bond was not duly executed, or the issue thereof unauthorized by the Board. The jury found in the affirmative.

Held, on a motion for a new trial, that the direction was proper, and the finding under the evidence warranted.

Pugsley, Q.C., and *A. G. Blair, jr.*, for plaintiff. *Skinner*, Q.C., for defendants.

VanWart, J.] O'LEARY *v.* LANAGAN [July 14.

Promissory note—Endorser—Waiver of notice of dishonour—No knowledge of non-presentment.

Plaintiff, in absence of presentment and notice of dishonour, sought to hold defendant as endorser of a promissory note on the following statement made by defendant to plaintiff after dishonour: "If he (the maker) doesn't pay I suppose I will have to." At the time the statement was made defendant was not aware that the note had not been presented.

Held, on review, that the defendant was not liable.

F. H. J. Bliss, for plaintiff. *Phinney*, Q.C., for defendant.

McLeod, J.] CARLING BREWING CO. *v.* FAIRWEATHER. [July 20.

Arrest—Affidavit to hold to bail—Words of statute—Variance—59 Vict., c. 28, s. 1—Cause of action—Goods bargained and sold—Averment of delivery.

On the ground that a defendant cannot be held to bail on an affidavit stating him to be indebted for goods bargained and sold without an averment of delivery, the arrest of the defendant on an affidavit of debt "for goods bargained and sold, and for goods sold and delivered," was ordered to be set aside.

It is not a sufficient compliance with 59 Vict., c. 28, s. 1, to state that the defendant is "justly and truly indebted" to the plaintiff, without stating that the debt is due.

Hazen, Q.C., and *Raymond*, for the plaintiffs. *Allen*, for the defendant.

McLeod, J.] CLARKE *v.* WEBBER. [August 1.

Chose in action—Action by assignee.

An assignee, under the Assignments and Preferences Act, 58 Vict., c. 6, (N.B.), may sue in his own name in an inferior Court for the recovery of a debt due the insolvent.

Geo. J. Clarke, for the plaintiff. *W. H. Trueman*, for the defendant.

McLeod, J.] LAWTON *v.* DUNN. [Aug. 25.

Attorney—Privilege.

An attorney of the Supreme Court cannot be sued in the City Court of Saint John

J. L. Carleton, for plaintiff. *M. B. Dixon*, for defendant.

Barker, J.] JOHNSON *v.* SULLIVAN. [Aug. 26.

Specific performance—Evidence.

Specific performance of a parol agreement for the sale of an interest in land will not be granted unless the evidence of the plaintiff as to the agreement is so corroborated either by independent testimony or the surrounding circumstances, or both combined, as to leave no substantial doubt that the defendant's version of the transaction is erroneous, and that of the plaintiff's correct

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Barker, J.] CALHOUN *v.* BREWSTER. [Aug. 26.

Specific performance—Agreement—Treaty—Conflicting evidence—Dismissal of bill—Costs.

Where in a suit for the specific performance of an alleged agreement for the sale of land the Court held that the agreement had not been definitely concluded, and had not reached beyond treaty, though understood by the plaintiff to be an agreement, the bill was dismissed without costs.

W. B. Chandler, and *M. G. Teed*, for plaintiff. *H. A. Powell*, Q.C., for defendant.

SAINT JOHN PROBATE COURT.

Trueman, J.] IN RE COLWELL'S ESTATE. [Aug. 22.

Administration—Application by creditor—Delay of next of kin—Grant to next of kin—Costs.

Where a creditor of an intestate applied three months after the death of the intestate for grant of administration of the estate, and at the return of the citation letters were granted to the next of kin, the creditor was allowed his costs. *Cole* v. *Rea*, 1 Phillim. 428, followed.

A. A. Wilson, for creditor. *J. B. M. Baxter*, for next of kin.

ST. JOHN COUNTY COURT.

Forbes, Co. J.] IMPERIAL OIL CO. *v.* YOUNG. [August 5.

Review—Affidavit—Compliance with language of statute—58 Vict., c. 21.

An affidavit by the plaintiffs in an application for review from a Justice's Court, that they "believed a substantial wrong and injury had been done to them," etc.

Held, to be sufficient within 58 Vict., c. 21.

L. P. D. Tilley for the plaintiffs. *J. Roy Campbell*, for the defendant.

Forbes, Co.J.] STOCKTON *v.* MALLORY. [Aug. 22.

Garnishee—Defence by debtor—Hearing—45 Vict., c. 17.

An order under s. 7 of 45 Vict., c. 17, was served upon the judgment debtor in addition to the garnishee, and at the return the judgment debtor gave evidence in disproof of the existence of the debt sought to be garnisheed. The judge having pronounced in favor of the validity of the debt the judgment debtor now applied under s. 16 of the Act to discharge the debt from attachment on the ground that the proceedings under s. 7 only affected the garnishee and could not bind the judgment debtor. Application granted.

C. A. Palmer, Q.C., for judgment creditor. *H. A. McKeown*, for judgment debtor.

Forbes, Co.J.] BANK OF MONTREAL *v.* CROCKETT. [August 23.

Specially indorsed writ—Acceptance of service by attorney—Appearance and plea—Summary judgment.

Acceptance of service and undertaking to appear were indorsed by defendant's attorney on a specially indorsed writ. On an application to set defendant's appearance and plea aside, and for leave to sign judgment for want of a defence, defendant contended that it would leave the proceedings as though default had been made in the undertaking of defendant's attorney, giving rise to an attachment against him, but not entitling plaintiff to judgment, since there was no service upon the defendant Application granted.

E. F. Jones, for the plaintiff. *D. Mullin*, for the defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] SCARRY *v.* WILSON. [June 27.

Trustee and cestui-qui-trust—Costs—Appeal as to costs.

This was an action against defendant for a reconveyance to the plaintiff of certain lands which she had for her own purposes, and by the advice of her solicitor, conveyed to defendant to hold in trust for her, and asking an account

of the money which defendant had received by mortgaging the property. The statement of claim also charged misconduct in various ways. The statement of defence offered to reconvey the property and account for all moneys received, but defendant claimed a sum of $100, which he alleged that the plaintiff had agreed to allow him for his services as trustee. The trial judge found that plaintiff had agreed to pay the $100, but in ordering the reconveyance and taking of accounts, he directed that no remuneration be allowed to the defendant, and declined to make any order for costs. The defendant appealed on both grounds.

Held, (1) that defendant should be allowed the $100 remuneration agreed on. (2) Following Hill on Trustees, 566, and cases there cited, no misconduct having been proved, that the defendant was entitled to his costs as between solicitor and client. (3) That an appeal as to costs may be heard and decided when, as here, the appellant succeeds on another substantial ground of appeal. *Harpham* v *Shacklock*, 19 Ch. D. 215.

Semble, that an appeal as to costs may sometimes be entertained when the appellant raises another ground of appeal, not merely colourable, although he does not succeed in it; or where the giving or withholding of costs is not wholly discretionary, as in the case of a trustee guilty of no misconduct: *Farrow* v. *Austin*, 19 Ch. D. 58; *Turner* v. *Hancock*, 20 Ch. D. 303; *Re Knight's will*, 26 Ch. D. 82.

Howell, Q.C., for plaintiff. *Ewart*, Q.C., for defendant

Killam, J.] ALLEN *v.* CLOUGHER. [Aug. 18.

Costs—Scale of costs—Practice.

The plaintiff recovered a verdict in the Queen's Bench for $101.09 in a suit on two promissory notes amounting with interest to $532.47. No certificate for costs was granted, but the plaintiff contended that the evidence showed that the action was really one for the balance of an unsettled account, exceeding in the whole $400; and on that account not of the proper competence of a County Court, and that no certificate was necessary. On an application to a Judge for a direction to the taxing officer as to the scale on which the costs should be taxed,

Held, that in the absence of a certificate from the Judge before whom the action had been tried, the record alone and not the evidence should be looked at.

So far as the record showed the action to be within the proper competence of a County Court, and, following the statute, only County Court costs should be allowed to the plaintiff, and the defendant was entitled to tax his costs of the action as between attorney and client, and to set off against the plaintiff's costs and verdict so much of such costs of defence as exceed the taxable costs of defence which would have been incurred in the County Court. Costs of the application allowed to the defendant.

Phippen, for plaintiff. *Allen* and *Cameron*, for defendant.

Province of British Columbia.

SUPREME COURT.

McColl, J.] STEELE *v.* PIONEER TRADING CORPORATION. [June 16.

Practice—Judgment debtor—Corporation—Examination of officer of—Nulla bona

Application to examine A. J. Mangold, as an officer of the defendant company under Rule 486. The defendant company was formed in England for the purpose of exploring for and acquiring mining properties in British North America, and Mangold held an unlimited power of attorney from the company to act for it within any part of such territory. An execution against defendant's goods had been issued, and no return had been made.

Held, that a judgment debtor is examinable under Rule 486, notwithstanding that a fi. fa. in the sheriff's hands has not yet been returned nulla bona. Rule 486 is in aid of execution and differs from the Ontario enactment under consideration in *Ontario Bank* v. *Trowern*, 26 C.L.J. 190, which is in aid of attachment of debts. Order for examination made.

J. H. Senkler, for plaintiff. *J. A. Russell*, contra.

Bole, Local Judge.] SMITH *v.* YOUNG. [July 20.

Indian marriage—Validity of.

The plaintiff sued as mother and next to kin of J. W. S., deceased, for the purpose of being declared entitled to receive money in court to the credit of her son's estate, all his debts having been discharged by the defendant and his predecessor in office as official administrator of Nanaimo District. The plaintiff, an Indian of the Cowichan tribe, married John Schmidt, father of J. W. S., in 1868, according to the custom of the Cowichan tribe; they lived together far many years, and had one child, the said J. W. S., who was born in 1870. The father died in 1890, and by his will left all his property to his said son, who died unmarried and intestate in 1892. The estate was administered by the official administrator, and there is now a sum of money standing to the credit thereof. At the time of the Indian marriage both parties were at all events nominally Christians, and had abundance of facilities for being married in accordance with the laws of the then colony of British Columbia.

Held, that the Indian marriage was invalid. Judgment for defendant; costs of all parties to be paid out of the estate.

Sastry Velaider Aronegary v. *Sembecutty Vaigalie*, 6 App. Cas. 364 distinguished.

R. L. Reid, for plaintiff. *R. McBride*, for defendant.

Walkem, J.] GILL *v.* ELLIS. [August 8.

Practice—Vacation—Trial pending—Rule 736 (d).

The trial of this action was set down for 29th July, in Victoria, and on that day there being no judge available to take the trial, it was by consent adjourned into vacation by WALKEM, J. The case came up for hearing on 8th August, and counsel for defendant objected to the trial proceeding during the vacation. August and September are the vacation months in B.C.

Held, that the trial was not "*pending*" within the meaning of the vacation Rule 736 (d), and it would have to be adjourned until after vacation.

L. P. Duff, for plaintiff. *A. P. Luxton*, for defendant.

LAW SOCIETY OF UPPER CANADA.

HILARY TERM, 1898.

Tuesday, Feb. 8th, 1898.

Present: Between 10 and 11 a.m, the Treasurer and Messrs. Barwick, Bayly, Edwards, Hoskin, Idington, Kerr, Martin, McCarthy, Strathy, Watson, and after eleven, Messrs. Aylesworth, S. H. Blake, Gibbons, Osler, Wilkes.

The consideration of the Report of the Legal Education Committee upon the proposals of the principal as to honours and compulsory attendance on lectures was deferred until the first meeting of Convocation in Easter Term next.

Mr. Watson from the Finance Committee reported as follows: That their attention has been drawn to the advertisement of one J.B.D in the *Brampton High School Gazette*, in which he describes himself as a solicitor. They have made enquiries of Mr. Austen the local registrar of the High Court at Brampton, and have received from him the accompanying letter, which with the newspaper containing the advertisement they submit for the consideration of the Benchers. The report was referred to the Discipline Committee for investigation and report.

Ordered that the application for call of Mr. W. J. McCamon, a solicitor of five years' standing, and the application for certificate of fitness of Mr. Lennox Irving, a solicitor of five years standing, be referred to a special committee, consisting of Messrs. Bayly, Edwards and Wilkes, to subject these gentlemen respectively to examinations under the Statute 57 Vict., c. 44. Ordered that Mr. G. A. Payne, a solicitor of ten years standing, be called to the Bar, and that Mr. G. L. Taylor, a barrister of ten years' standing, do receive his certificate of fitness as a solicitor.

It was, on motion of Mr. Edwards, seconded by Mr. Kerr, ordered that it be referred to a joint committee, composed of the Legal Education and Finance Committees, to consider and report upon the advisability of increasing the fees of students with the view of making the Law School as far as possible self-supporting. Ordered that Mr. Shepley be convener of said Committee.

Ordered that it be referred to the Committee on Journals and Printing to report upon the propriety of establishing a system for giving notice to members of Convocation of the business to be laid before Convocation, particularly as follows: Notice of all business to come before Convocation during Term, and of which notice has been given, or which has been directed to be taken up at any of its meetings, or which has been referred to a committee to report upon, and that the said committee be requested to report upon the first day of Convocation next Term.

Mr. Barwick gave notice of motion for leave to introduce to-morrow the following rule: The proceedings of the Benchers in Convocation shall be conducted as much as may be according to the ordinary Parliamentary mode.

Mr. Strathy, in the absence of Mr. Aylesworth, Chairman of the Library Committee, presented the Librarian's annual report on the state of the Library. The report was adopted, and it was ordered that same be printed and distributed to the profession with the next number of the reports.

Mr. Strathy, in the absence of Mr. Shepley, presented the various reports of the Legal Education Committee.

Ordered that Mr. L. F. Clarry, and Mr. W. Barclay Craig, be called to the Bar and receive their certificates of fitness.

The report of the Committee on the results of the Second and Third Year Examinations held before Christmas in certain of the subjects of these years was received.

The case of the complaint of Mr. J. O. Connors against Mr. T. C. Robinette, barrister and solicitor according to the order of Convocation of the 16th of November last, was considered. Ordered that Mr. Robinette be reprimanded by the Treasurer in the presence of Convocation. Mr. Robinette was called before Convocation and reprimanded by the Treasurer.

Mr. Bayly, from the Special Committee appointed to examine Messrs. McCamon and Irving, reported that each of these gentlemen had passed a satisfactory examination. Ordered that Mr. McCamon be called and that Mr. Irving receive his certificate of fitness.

Mr. Watson then moved, pursuant to notice given, to rescind the resolutions of Convocation relating to the publication of a Century Digest: Yeas, Messrs. Edwards, Kerr, Aylesworth, Watson and Barwick. Nays, Messrs. Martin, Idington, Wilkes, Blake, Hoskin, Osler, Strathy, Bayly and McCarthy. Lost.

The report of the Reporting Committee, dated 5th February, 1898, with respect to the Century Digest was read as follows: "Your Committee have had under consideration the resolution of Convocation of the 16th November last with reference to the cost of editing and compiling the proposed Century Digest, and they beg to report as follows: "It is estimated that the Digest will contain 5 200 pages. Upon this basis, the total cost of editing and compiling is placed by the editor, Mr. J. F. Smith, at $18,200, and your Committee advise Convocation to place the work in the hands of Mr. Smith, under a formal contract to be executed on the basis of $18,200, being the outside sum which his services are to cost the Society. From the above sum should be deducted at the rate of $3 per page should the work fall short of the estimated number of pages as above. There should be paid by the Society to the editor as the work progresses such pro rata sum as Convocation may determine from time to time. The Editor is to report to Convocation each Term as to the condition of the Digest, and Convocation are to be at liberty to call for extra compilers being appointed so as to speed the work from time to time without thereby increasing the total sum payable as above." The Report was adopted. Convocation ordered that the contract be submitted to Convocation before being executed on behalf of the Society.

The following gentlemen were then called to the Bar: L. F. Clarry, W. Barclay Craig, G. A. Payne, W. J. McCamon.

Mr. Watson, from the Finance Committee, presented the annual report of receipts and expenditure for 1897.

The report of the Legal Education Committee on Mr. C. C. Grant's application for admission as a student-at-law was taken into consideration, and it was ordered that Mr. Grant could not be allowed admission. The same Committee further reported as follows: The Committee have considered the report of the Examiners in respect to Mr. J. C. L. White, who was permitted to write on the subjects of Practice, Equity and Evidence of the Second Year. No paper was set for him in Practice for reasons set out in the letter of Mr. Kingsford to the Secretary submitted herewith. Mr. Hoyles disclaims any knowledge of the matter, and says he was not consulted upon the subject. The Committee, while recommending that under the circumstances, Mr. White be allowed to write in Practice at the Easter Examinations, cannot do otherwise than to report to Convocation its regret that the senior Examiner should have assumed that he had authority to disregard the directions of Convocation. The report was adopted. The case of Mr. J. C. E. being mentioned, and correspondence bearing upon his case being read, the matter was directed to stand over to be reported upon by the Legal Education Committee.

Upon reading the letter of Mr. N. F. Paterson, Q.C., accompanied by a circular of one C. G. S., it was ordered that the same be referred to the Discipline Committee for enquiry and report. Ordered that the complaint of His Honour Judge Dartnell against Mr. S. S. S., a student-at-law, be referred to the Discipline Committee for investigation, and report. Ordered that the complaint of D. D. Reid and Marian Reid against Mr. J. M. G. be referred to the Discipline Committee for enquiry, and report. Ordered that the complaint of Mrs. Wessner against Mr. O. E. K. be referred to the Discipline Committee for enquiry, and report.

Mr. Martin, from the County Libraries Committee reported upon the application of the County of Perth Law Association for a loan under the provisions of Rule 83. Ordered that an advance or loan of $325 be made to the said Association repayable in ten equal yearly payments.

The letter of Mr. W. F. Langworthy, barrister, Port Arthur, dated 26th January, 1898, on behalf of members of the profession in the District of Thunder Bay with reference to the establishment of a local law library at Port Arthur was read, and the matter referred to the County Libraries' Committee.

Wednesday, Feb. 9th.

Present: The Treasurer and Messrs. Aylesworth, Barwick, Guthrie, Robinson and Watson.

Mr. Barwick, in pursuance of notice given yesterday moved for leave to introduce a rule to be inserted after Rule No. 16 in page 12 of the printed rules of 1896: "(16a) The proceedings of the Benchers in Convocation shall be conducted as much as may be according to the ordinary Parliamentary mode." Convocation granted leave accordingly, and the draft rule was read a first and second time.

Friday, Feb, 18th.

Present: The Treasurer, Messrs. Barwick, Bayly, Bruce, Martin, Osler, Ritchie, Robinson.

Ordered that Mr. McBride, whose notice has remained duly posted, be called to the Bar, and Mr. G. F. Kelleher, who has attended additional lectures required, be called to the Bar and receive his certificate of fitness.

Mr. Osler from the Reporting Committee presented the quarterly report of the editor on the state of the reporting, as follows: "I have to report that there are in the Court of Appeal 25 unreported judgments, 15 of November, which will issue this week, and 10 of January. In the High Court Mr. Harman has 2, 1 of November ready to issue, and one of February. Mr. Lefroy has nothing unreported. Mr. Boomer has 5, of which 2 of November are ready to issue, and 3 of February. Mr. Brown has 17 cases unreported, 9 of December, ready to issue, and 8 of January. There are 16 unreported practice cases, 12 of December, ready to issue, and 4 of January. The Digest to the last Practice Volume, just closed, is ready to issue. The Digest of the Volume of Appeal, which will be closed this week, is in type, and the Digest of Volume 28 O.R. will be in the printers' hands early in the ensuing week."

Mr. Osler then presented the draft contract for the compilation of the Digest in pursuance of the direction of Convocation. Mr. J. F. Smith, Q.C., the Editor, was in attendance by request. The terms of the draft contract were discussed, and as a result some suggestions made were ordered to be embraced therein, and the draft as re-read after emendations, was approved. The Reporting Committee were ordered to have the contract engrossed, with power to make alteration not affecting the substance, the contract to be then duly executed.

Mr. Barwick then moved the third reading of the rule which had been twice read on the 9th inst. The said rule was then read a third time and passed: "16 (a) The proceedings of the Benchers in Convocation shall be conducted as much as may be in the ordinary Parliamentary mode."

Messrs. James McBride and G. F. Kelleher were then introduced and called to the Bar.

Ordered that the letter of Messrs. Jarvis and Vining be referred to the Finance Committee, with a request to report to Convocation.

Mr. Bruce, from the Discipline Committee, reported upon the complaint of Mrs. Wessner against Mr. O. E. K., solicitor, that the matter had been adjusted between the parties and the complaint withdrawn, and that in the matter of the complaint of M. J. Reid and D. D. Reid against Mr. J. M. G., a prima facie case had not been made out. The Committee were discharged from the further consideration of these two cases. Mr. Bruce, from the Discipline Committee, reported that in the matter of the complaint against Mr. J. B. D., a prima facie case had been made out. Ordered that the said complaint be referred to the Discipline Committee for investigation, and report.