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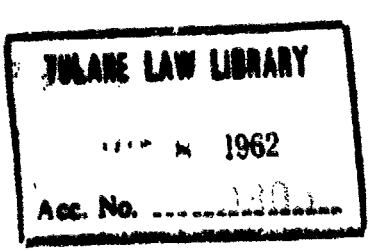

TABLE OF CANADIAN CASES

Reported and Noted in this Volume.

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VOL. XXXIII. JANUARY 2, 1897. NO. 1.

The *Legal News* of Montreal, in referring to the painful circumstances under which a member of the Montreal Bar recently came to an untimely end, suggests that possibly the profession is becoming overcrowded. However that may be in the Province of Quebec, it certainly is so in Ontario, as all of us know to our cost. High class education for the masses is a fine thing in theory, but it has manifest disadvantages, if (as it does) it takes young men unduly from tilling the ground from whence they came, or from the ranks of mechanical labor (avocations both honorable and independent) to a profession overcrowded to excess, and in which but few of them can expect to make more than a bare and uncertain subsistence, and which many will have to abandon, to obtain elsewhere a means of existence.

We are glad to be able to give to our readers in this our first number for 1897, a valuable account of the growth of the municipal institutions in Canada, by Mr. C. R. W. Biggar, M.A., Q.C. It would be difficult to find anyone more competent than Mr. Biggar for a task of this sort, as he has had special training during his professional career in this branch of the law. He was for several years joint City Solicitor for Toronto with the late Hon. J. B. Robinson. After several years of private practice he was recalled to the position of City Solicitor for Toronto in 1888. This he resigned in 1894, being succeeded by the present Chief Justice, Sir William Meredith. He is at present engaged in the preparation of a new edition of Harrison's Municipal Manual, which will probably be issued some time this year. As an old member of the staff of this journal, we wish him success in the undertaking, and can, we think, safely predict that the work so well

commenced by Robert Alexander Harrison, at one time the editor of this journal, will be no less better done in these later days by Mr. Biggar.

THE NEW CONSOLIDATED RULES.

We would draw the attention of practitioners in Ontario to the supplement which we send to our readers with this number of the CANADA LAW JOURNAL. It consists of extracts, etc., from the draft of the new consolidation of the Rules just completed by the Rule Commissioners, and is being distributed with a view to obtaining suggestions for the improvement of the practice, as the Commissioners desire the new consolidation to be as complete as possible. This thoughtful action on their part will, we are sure, be fully appreciated, and will no doubt evolve some valuable hints of which the Commissioners will gladly avail themselves. Correspondence should be addressed to Mr. Thomas Langton, M.A., Q.C., Secretary of the Commission, at an early date, so as to be ready for the final revision which the Commissioners hope to be able to have ready in the month of February next.

The pamphlet above referred to sets out in full a number of the Rules which have been re-modelled so as to make a change in the present practice, and gives a list of Rules which it is proposed to repeal. Amongst the more important of the changes we note the following:

Rule 214.—Amended so as simply to provide that one or more Judges shall be selected for vacation duty.

Rule 215.—To be rescinded.

Rule 1429.—Amended so as to make Divisional Court sittings monthly. This change appears to be connected with other changes noted hereafter, respecting the business in Divisional Courts and the Court of Appeal.

Rule 245.—Special endorsements may be made, though claims for unliquidated demands are also endorsed.

Rule 1310.—Appearance in Algoma, Nipissing, Rainy River and Thunder Bay to be within twenty days in all cases.

Provision is also made for entry of a conditional appearance by leave of the Court or Judge.

Rule 300.—Persons may be joined as plaintiffs in whom any right to relief arising out of the same transaction or occurrence or series of transactions or occurrences is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise, subject to special provision as to separate trials and costs. This is the adoption of the recent English Rule passed in consequence of *Smurthwaite* v. *Hannay*, 1894, A.C. 494; 31 C.L.J. 154.

Rule 1313.—Where a defendant claims contribution against a co-defendant, copy of the statement of claim or writ need not be served with the third party notice, and service may be effected on the solicitor in the action, if any.

In actions by or against persons carrying on business under firm names, the English Rules contained in O. 48 a, are adopted, except Rule 11, which is amplified.

Rule 554.—The cases in which special cases may be stated are extended so as to embrace not merely questions of law upon which the payment of money may depend, and enable the Court to award judgment for any specific relief.

Payment into and out of Court.—Several Rules on this subject are amended. Orders and reports showing infants entitled to money are to state the date of the birth of the infant, failing which the money will not be paid out. The mode of payment into Court with a pleading at Gore Bay, Bracebridge and L'Orignal is amended; the officer receiving the money being required to pay it into Court as soon as possible.

Rule 487.—Only one existing officer of a corporation may be examined without special order, and no past officer is to be examined without special order.

Rule 506.—The depositions of an officer taken for discovery may be used as evidence whether the officer was cross-examined or not. A part may also be used, but in that case either any other part may be put in as explanatory, or the

whole of the examination of the officer may be put in as evidence on the part of the corporation.

Rule 1277.—Non-jury actions at Toronto are to be entered not later than the expiration of the time mentioned in the notice of trial, and the action is not to be placed in the peremptory list before the expiration of ten days from the entry. Remanets at Toronto non-jury sittings are not to require fresh notice of trial.

Rule 739.—Summary motions for judgment may be made in respect of any cause of action specially endorsed, though the writ may also be endorsed with other claims. Amendments of the writ may be ordered on such motion and judgment awarded in accordance with the amended writ. The motion is to be a motion for judgment and not for an order for judgment.

Rule 1420.—Reports of local Masters are to be filed in the office of the Deputy or Local Registrar for the county in which the proceedings were commenced.

Rule 848.—A report is to become absolute at the expiration of fourteen days from the day of filing the same. The fourteen days to be computed as in other cases, so as not to include the day of filing.

Appeals.—An attempt has been made to divide appeals between the Divisional Courts and the Court of Appeal. All appeals which include a motion for a new trial, whether combined with, or as an alternative of any other motion against the judgment, are to be made to a Divisional Court and not to the Court of Appeal.

Appeals may be either to a Divisional Court or to the Court of Appeal in the following cases:

1. In actions tried without a jury.

2. In actions tried with a jury.

(*a*) Upon the ground that the judgment is wrong as directed to be entered upon the findings of the jury.

(*b*) Upon the ground that notwithstanding the findings of the jury, the applicant is entitled to judgment.

(*c*) In any case in which the provision above alluded to as to motions for a new trial does not apply.

On appeals to the Court of Appeal, security for costs of the appeal is to be given before the reasons of appeal are delivered, and upon the security for costs being allowed, execution is to be stayed pending the appeal, except

(*a*) Where the judgment directs the assignment or delivery of personal property, or

(*b*) Directs the execution of a conveyance or other instrument, or

(*c*) Directs sale or delivery of possession of real property, or

(*d*) Awards of mandamus or injunction.

In cases (*a*), (*b*) and (*c*) execution is only to be stayed as mentioned in Con. Rule 804, and in case (*d*) on special application to the Court of Appeal.

It is provided, however, that upon special application the Court of Appeal or a Judge may order that execution shall not be stayed except upon such terms as may be just, including the giving of security for the debt or damages or costs or any less sum, and on the other hand the same Court or Judge may direct execution to be stayed, dispensing with any security for costs or otherwise as may be just.

The procedure on appeals to the Court of Appeal is to be slightly different. Notice of hearing is to be served within one month after the pronouncing of the judgment for, and not less than fourteen clear days before the first day of the sittings of the Court, which commences after the expiration of one month from the pronouncing of judgment. Reasons of appeal are to be delivered not later than fourteen days before the first day of such sittings. The reasons may form part of the notice or be delivered separately.

Rule 991.—Partition proceedings may be taken by any adult person entitled to compel partition of land.

Rule 1045.—All the Rules relating to bailable proceedings have been re-drawn and modernized, though the procedure is not substantially changed.

Amongst new provisions are the following:

In non-jury actions in the County of York the action may be dismissed for want of prosecution if the plaintiff does not

serve notice of trial within six weeks after the pleadings are closed.

Where defendant fails to appear or to plead, the action is considered pro confesso, and the defendant is not to be entitled to notice of any subsequent proceedings in the action except where otherwise provided by the Rules. The Rules elsewhere provide that notice shall be served where an interlocutory judgment is signed and notice of assessment is necessary, also in certain cases where the defendant is to be notified of the taking of accounts in the Master's office.

An appeal is to lie to the Divisional Court or to the Court of Appeal from the judgment or order of a Judge in Court upon appeal from the report of a Master or a Referee, in the same manner and subject to the same restrictions as in the case of other judgments or orders of a Judge in Court.

A person not within Ontario may be proceeded against as a garnishee in cases where he might be sued by the debtor within Ontario.

A præcipe order may be issued by a client for delivery and taxation of a solicitor's bill, or for the taxation of the bill already delivered, within one month from the delivery, and by the solicitor for the taxation of a bill delivered, at any time after the expiration of one month from the delivery, provided an order has not been already obtained.

Where security for costs is ordered, proceedings in the action are to be stayed from the service of the order until the security is given, and if given by bond until the bond is allowed.

The following Rules are omittted from the consolidation: Consolidated Rules 51 to 54, 70, 161, 162, 189, 305, 341, 369 b, 378, 482, 514 to 518, 532, 538, 568, 572, 580, 581, 631, 679, 686, 691, 692, 746, 747, 793, 854, 903, 1129, 1134, 1219 to 1224.

Some of these are obsolete or unnecessary, and others not adopted to the practice in Ontario, but a few appear to have been omitted designedly so as to change the practice. Amongst these may be noted 341, preventing, in an action for recovery of land, the joinder of other causes of action; 378,

requiring a third party served with a counter-claim to enter an appearance, and 854, providing for an appeal from the Taxing Officers in Toronto to the Master in Chambers or the Master in Ordinary, pending a taxation.

SOME NOTES ON THE GROWTH OF MUNICIPAL INSTITUTIONS IN CANADA.

'Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions, it cannot have the spirit of liberty."

DE TOCQUEVILLE, "Democracy in America," Vol. I, c. 5.

ONTARIO, 1788—1849.

The Province of Upper Canada, even before it was formally set apart by the Constitutional Act of 1791 (31 Geo. III., c. 31), had been divided by Lord Dorchester's proclamation of 24th July, 1788, into four Districts, namely: Luneburg (*a*), commencing at the present eastern boundary of the Province of Ontario and extending to a north and south line drawn through the mouth of the River Gananoque; Mecklenburgh, from this to a similar line running through the mouth of the River Trent; Nassau, from this to the end of Long Point on Lake Erie; and Hesse, comprising all the rest of the Province from thence to its western boundary (the middle of the Detroit and St. Clair Rivers and of Lake Huron (*b*)), and extending north-westward to the undefined limits (if any) of the King's jurisdiction. (See the proclamation in Thomson & McFarlane's collection of the Statutes of U.C. (1831), at p. 23).

For the purpose of Parliamentary representation, and also for militia purposes, (*c*) these Districts were afterwards

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(*a*) This is the original spelling.

(*b*) Treaty of Paris, 1783; Houston—"Documents Illustrative of the Canadian Constitution," p. 269.

(*c*) De la Rochefoucauld-Liancourt. "Voyage dans les Etats Unis et le Haut Canada;" (1795-1797) Vol. I., p. 434. "County Lieutenants," answering to the Lords Lieutenant of English counties, were appointed by Governor Simcoe in and for each of the 19 counties established by this Proclamation. To them was committed the organization and command of the militia of the county, and the magistrates thereof were appointed upon their recommendation. A list of the first County Lieutenants thus appointed is given at p. 142 of a recent and most interesting history of the Western District, entitled "Harrison Hall and its Associations," by His Honor Judge Woods, of Chatham, Ont.

divided, by a proclamation (*a*) of Governor Simcoe, dated 16th July, 1792, into the nineteen original counties of Upper Canada, viz., Glengary (*b*), Stormont, Dundas, Grenvill (*b*), Leeds, Frontenac, Ontario (consisting of "Isle Tonti," or Amherst Island, "Isle au Foret," or Gage (now Simcoe) Island, Grand (or Wolfe) Island, and "Isle Cauchois," or Howe Island) Addington, Lenox (*b*), Prince Edward, Hastings, Northumberland, Durham, York, Lincoln, Norfolk, Suffolk, Essex and Kent. It was not, however, until 1849 (more than fifty years later) that the County succeeded the District as a division for municipal or judicial purposes.

The four original Districts,—re-named at the opening Session of the first Parliament of Upper Canada (32 Geo. III., c. 8), the "Eastern," "Midland," "Home" and "Western" Districts,—had, by Jan. 1st, 1800, been increased by sub-divisions consequent upon accretion of new territory and growth in population to eight, the Johnstown, Niagara, London and Newcastle Districts being thus formed. (*c*) In 1849, when the County first became the unit of division for municipal and judicial, as well as for Parliamentary purposes, there were twenty Districts in Upper Canada. (*d*)

The management of local affairs in each of these Districts, including much of the work afterwards entrusted to municipal councils, was, until 1842, transacted by the (crown-appointed) Justices of the Peace for each District in their General Quarter Sessions assembled.

In 1793, and for some years thereafter, the Court of General Quarter Sessions for the Eastern District used to meet twice a year at New Johnstown (now a mere hamlet in the Township of Edwardsburgh, three miles east of Prescott) and twice a year at Cornwall; that for the Midland District in like manner alternately at Kingston and Adolphustown; the Home District Court quarterly at Newark (Niagara-on-the-lake); and the

(*a*) Thomson & McFarlane's Statutes of U.C. (1831) p. 24.

(*b*) This is the original spelling.

(*c*) 38 Geo. III., c. 5, ss. 10, 25, 32, 37; Proclamation, Jan. 1st, 1800, recited in 42 Geo. III., c. 2.

(*d*) 12 Vict., c. 79, Sched. B.

Court for the Western District "in the town of Detroit," with an annual special Session of the Peace at Michilimackinac, now "the British Landing," Mackinac Island, Mich., (33 Geo. III., c. 6, and see 36 Geo. III., c. 4; 41 Geo. III., c. 6). (*a*)

The powers of Justices of the Peace at these Sessions assembled included (inter alia) the erection and management of court-houses, gaols and asylums: laying out and improving the highways: making assessments for these purposes, and also "to pay the wages of members of the House of Assembly," (34 Geo. III., c. 6; 36 Geo. III., c. 7; 47 Geo. III., c. 7); making regulations to prevent accidental fires (32 Geo. III., c. 5); the appointment of district and township constables (33 Geo. III., c. 2, s. 10); fixing the fees of gaolers (32 Geo. III., c. 8, s. 17), of town or parish clerks (33 Geo. III., c. 2, s. 13), and of pound-keepers (Ibid and 34 Geo. III., c. 8, s. 3); the appointment of street and highway surveyors (50 Geo. III., c. 1, s. 2; 4 Geo. IV., c. 9, s. 4), and inspectors of weights and measures (4 Geo. IV., c. 16, s. 4); the regulation of ferries (37 Geo. III., c. 10); the establishment and regulation of markets in various towns, [*e.g.*, Kingston in 1801 (41 Geo. III., c. 3), York in 1814 (51 Geo. III., c. 15), Niagara in 1817 (57 Geo. III., c. 4), Cornwall in 1818 (59 Geo. III., 1st session, c. 4), Perth in 1822 (2 Geo. IV., c. 15)]; also the granting of certificates to applicants for licenses to sell liquor (34 Geo. III., c. 12), and to ministers or clergymen of "dissenting" congregations, authorizing them to solemnize marriages (38 Geo. III., c. 4, ss. 1 & 2; 1 Wm. IV., c. 1).

The germ of that democratic system of municipal institutions which has now so completely superseded this oligarchic method of government through nominees of the Crown may be found so far back as 1793 in the Act, 33 Geo. III., c. 2, entitled "An Act to provide for the Nomination and Appointment of Parish and Town Officers within the Province." This Statute enabled any two of His Majesty's Justices of the Peace by their warrants, to authorize the constable of any parish, town-

(*a*) See "Harrison Hall and its Associations," pp. 36-38.

ship, reputed township or place, to assemble on the first Monday in March (afterwards changed to the first Monday in January) in each year, the inhabitant (ratepaying) householders of the parish, township, etc., in the parish church or chapel, or in some convenient place within the parish, etc., to choose for the ensuing year a parish, town or township clerk, two assessors, a collector, a number (repeatedly increased) of overseers of highways and fence viewers, a pound-keeper and two town-wardens. If there was a parish church and a duly appointed minister thereof, he appointed one warden, and the "town-meeting" (*a*) elected the other, the two being then styled "churchwardens." Beyond simply electing these officers to carry out the laws made by Parliament, the meeting had no legislative power except to determine the height of lawful fences, and (by 34 Geo. III., c. 8), "to ascertain and determine in what manner and for what periods horned cattle, horses, sheep and swine, or any of them, shall be allowed to run at large, or to resolve that they or any of them shall be restrained from so doing." (*b*) [For extracts from the

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(*a*) "The town-meeting of New England played a most important part in the education of the people in self government. There all the qualified male inhabitants met together, and discussed and decided a wide range of matters of local concern. Why was this system not introduced in its entirety into Canada? It is frequently supposed that the reason was that the British Government, taught by the experience of the revolted colonies, feared the town-meeting as a school of independence. It is true that town-meetings were suppressed in Nova Scotia in 1770, the very year that Boston town-meeting, under the guidance of Samuel Ada.. ., was leading all the other "towns" of Massachusetts, in opposition to the Government of King George. This may accordingly have been one of the reasons why the local government established in Upper Canada took the shape it did. But there is another and still more important reason that has hitherto been overlooked. It is that it was not the example of New England that was directly before the eyes of the first settlers in Upper Canada, but the example of the neighboring State of New York. It was from thence that most of the U. E. Loyalists came. Indeed an old settler writing in 1816, expressly describes (Canniff, History of Ontario, p. 159), the system of government established in 1791, and the years immediately following, as 'a constitution similar to that which they (the old settlers) had lost during the Rebellion in the Province of New York.'"—(Prof. Ashley's Introduction to "The Ontario Township," by J. M. McEvoy—Tor. Univ. Studies in Political Science, 1st Series, No. 1.)

(*b*) "The two questions 'What shall be a lawful fence?' and 'What animals shall be free commoners in the township for the year?' were the only questions concerning which town-meetings might really legislate, but they might and did discuss far weightier matters. Public sentiment on the largest public questions was here fostered. This, however, was not so important or valuable as the quality of mind that was developed. Little as was their law-making power, it was enough to show every man present the real necessity for laws, how laws were made, that laws were simply rules which ought to be the most advantageous that could be devised for the community, and that the community had an undoubted right to change these laws if they saw that a change would be an improvement. It was the conception of law that was fostered in the men of Ontario by their town-meetings which led in a large measure to the establishment of responsible government in this province."—McEvoy, "The Ontario Township," p. 20.

minutes of some of these "town-meetings" see Canniff's "History of Ontario," pp. 454, 471, 481, 492. The earliest is that of Adolphustown, the date of which, as given by Canniff, is 6th March, 1793, though the Act did not come into force till July 9th of that year.]

The two wardens thus elected (or elected and appointed) became "as a corporation to represent the whole inhabitants of the township or parish," with power to sue, prosecute and defend on their behalf; but except as aforesaid they were entirely without any legislative capacity. The Justices of the Peace for the District in their Quarter Sessions assembled retained all the authority above indicated; in case of non-election by the ratepayers, they appointed the town officers, and in every case they filled any vacancies occurring during the year by death or removal (46 Geo. III., c. 5; 48 Geo. IV., c. 14, s. 4).

As towns arose, and markets were established therein, the Quarter Sessions were further empowered to make for these towns "such prudential rules and regulations as they might deem expedient," relative to watching, paving, lighting, keeping in repair, cleansing and improving the streets of such towns; regulating the assize of bread; slaughter houses and nuisances; firemen and fire companies; enforcing the laws relative to inspection of weights and measures; and as to horses, swine or cattle running at large in the town. (57 Geo. III, c. 2; 59 Geo. III., c. 5; 4 Geo. IV., c. 30); and see 7 Geo. IV., c. 12 (Kingston).

Gradually, however, the power to regulate these matters was transferred in towns to representative bodies annually elected by the resident (male) householders under the name of "Boards of Police." To these, from the very first, were granted additional powers, e.g., to appoint the town clerk, treasurer and street surveyor, assessors, collectors and bailiffs, and to fix their remuneration; to make assessments for purchasing real estate for the use of the town, and for procuring fire engines, aqueducts (*sic*), and a supply of pure wholesome water; lighting, paving and repairing the streets;

to regulate and license victualling houses and public exhibitions of showmen and mountebanks; to regulate carts and carmen, wharves and quays, the weighing of hay, the measuring of wood; to prevent riding or driving on sidewalks or at an immoderate pace, the firing of guns and pistols, squibs and fire balls, injury to shade trees, the pulling down or defacing of sign boards (evidently there were "Mohocks" in those days), indecent inscriptions on buildings, walls and fences, encroachments on streets, etc., and "generally to prevent vice and preserve good order in the town," and "to make such rules and regulations therefor as they might deem expedient," with power to enforce the same by inflicting a penalty of one pound ten shillings for violation of any by-law or ordinance of the corporation. (See 2 Wm. IV., c. 17 (Brockville); 3 Wm. IV., c. 16 (Hamilton); 4 Wm. IV., c. 25 (Cornwall); c. 26 (Port Hope); c. 27 (Prescott); 6 Wm. IV., c. 14 (Belleville); 7 Wm. IV., c. 42 (Cobourg); c. 44 (Picton). In later statutes the list of powers entrusted to these Boards of Police is much more extensive, e.g., 8 Vict. c. 62, (Niagara); c. 63 (St. Catharines); 9 Vict., c. 71 (Cobourg).

Still larger powers were granted by the incorporation Acts of certain cities and towns, [e.g.: Toronto in 1834 (7 Wm. IV., c. 39), Kingston in 1838 (1 Vict., c. 37), Cornwall in 1846 (9 Vict., c. 72), Bytown, Dundas, London and Brantford in 1847 (10-11 Vict., c.c. 43, 45, 49),]: and their municipal government was vested in a mayor and common council, the mayor being chosen by (but not in every case from) the council.

In 1847, a general Act (10-11 Vict., c. 42) was passed enabling the inhabitant householders of any town or village not specially incorporated, to elect "Police Trustees" who were empowered to enforce within the town or village the regulations now contained in s. 667 of the present Municipal Act (1892), regulations which (mirabile dictu) have remained on our statute books unamended for fifty years!

Municipal affairs in rural localities, however, still continued to be managed by the Quarter Sessions for the District acting through the officers appointed under the "Parish and Town

Officers Act" of 1833, and the amendments thereto, as consolidated and re-enacted by the "Township Officers Act" of 1837, (1 Vict., c. 21).

The contrast, thus continually becoming more marked, between the measure of local self-government accorded to the urban as compared with the rural elector, was one which could not fail to produce, and certainly did produce, in the latter a feeling of profound dissatisfaction, which indeed was not wholly without cause. Mr. McEvoy, in his interesting paper on "The Ontario Township," says: (pp. 20-[illegible]).

"A full and careful study of the 'orders' of the different District Courts of Quarter Sessions would, I believe, do very much to explain and justify the irritation which was so prevalent during the time that these Courts exercised their taxing and regulating authority. The Court of Quarter Sessions was composed of the magistrates of the District. The London District consisted of some thirty-two townships, which may be roughly described as those now constituting the counties of Middlesex, Oxford, Huron, Elgin, Brant and Norfolk. At some of the sessions of this Court I find that twenty-three magistrates were present, but the usual number present was from six to eleven. . . . All the public funds available for the building of roads and bridges in six counties were in the hands of these eight or ten men appointed for life by the Government. In the matter of roads and bridges they were indifferent and incompetent; they neither knew the needs of the District nor were they sufficiently anxious to supply them to make them at all fitted to open up a new country. In the matter of gaols and other public works the Court was also invested with large authority. They procured plans and estimates for the building of a gaol and court house, of what dimensions they deemed fit, erected these buildings and ordered the people to pay whatever expense had been incurred in the process. Their worships also ordered what fare the prisoners should get, and contracted for the supply of provisions; they ordered what fees the District officers should receive; they had control of public charity and occasionally voted a pittance for the relief of an unfortunate pauper. They exercised the right of granting or withholding the authority to solemnize marriage, ministers of any but the English Church being allowed to perform this ceremony only after much trouble and annoyance. Besides this large statutory authority they might venture on almost any stretch of power and no person was willing or able to make question of their actions. A body of public officers with such large and unrestricted powers would now be considered by the people somewhat dangerous, even were it members annually subject to popular election. The magistrates, however, who exercised these enormous powers in Quarter Sessions were life-appointees of the Government, who often had very meagre qualifications to recommend them for public office. They were frequently old army officers with pensions, and almost always men of sufficient income from some source to render them indifferent to and independent of the hardships and wants of the average hardworking settler."

Yet nearly half a century elapsed before "the conception

of law fostered in the men of Ontario by their town-meetings" came to its birth, and (as we shall presently see) it was born at last amid sore travail. In 1841 (the year of the Union of Upper and Lower Canada) was passed the "District Councils Act" (4 & 5 Vict., c. 10), by which the inhabitants of each District were, from January 1st, 1842, constituted a municipal corporation, and the persons qualified to vote for township officers under the "Township Officers Act" were empowered also to elect representatives to a "District Council" in which was vested (s. 39) the powers to pass by-laws relative to roads, bridges, public buildings, schools, the expense of administration of justice, to determine the remuneration of all District and township officers, and to levy taxes for these purposes upon real and personal property within the District. To these elective Councils were now transferred (s. 51) all the powers theretofore vested in the Quarter Sessions relative to highways and bridges or work connected therewith, the appointment of road surveyors and other road officers, and the right to levy taxes for any purpose connected with the subjects over which the District Council was thenceforward to have jurisdiction.

This important Act, "which established the municipal system in Upper Canada," was introduced during the first session after the Union, by the Honorable S. B. Harrison, then Provincial Secretary for Upper Canada. (*a*) The late Sir

(*a*) A very interesting sketch of the public life of the Hon. S. B. Harrison is given by His Honor Judge Woods, in "Harrison Hall and Its Associations" (pp. 12-13, 29-30). From it, from Rev. Dr. Scadding's "Toronto of Old," and from Dent ("The Last Forty Years") we learn that before coming to Canada in 1837 he had taken his degree at Cambridge and had already attained some distinction at the English Bar. His edition of "Woodfall on Landlord and Tenant" was well and favorably known to the profession both here and at home, and he was also the originator and compiler of an "Analytical Digest of all the Reported Cases determined in the House of Lords, the several Courts of the Common Law in Banc and at Nisi Prius, etc., from M.T. 1756 to E.T. 1843, including Crown Cases reserved; in Four Volumes;" the precursor, in fact, of our beloved "Fisher's Digest." In 1839 he became Private Secretary to the Lieutenant Governor of Upper Canada, Sir Geo. Arthur, and in 1841 Provincial Secretary for Upper Canada in Lord Sydenham's Cabinet, and member for Kingston in the First Parliament of United Canada.

Besides the District Councils Bill referred to in the text, he introduced the first general School Bill for U. C., and moved the celebrated resolutions of Sept. 3rd, 1841, respecting Responsible Government in Canada, which "constitute, in fact, the articles of agreement upon that momentous question between the Executive authority of the Crown and the Canadian people" (Todd's "Parliamentary Government" p. 36.) In 1844 he was elected to the Second Parliament of Canada as member for Kent (which, as well as Hamilton, had rejected him in 1841), but resigned his seat before

Francis Hincks, then member for Oxford, tells us in his "Reminiscences of my Public Life," that the Governor (Lord Sydenham) had strongly recommended the establishment of municipal institutions in Canada by the Union Act (Imp. Stat. 3 & 4 Vict. c. 35).

He says (p. 63):

"Clauses with this object were included in the Bill sent by him to England (*a*); but during the discussion in the House of Commons they were withdrawn, as being more properly a subject for local legislation. Lord Sydenham thereupon introduced into the Special Council an ordinance for their establishment in Lower Canada, and framed it so as to secure, as far as in his power, that it should not become a dead letter. The Municipal Bill introduced into the Assembly during the first session of the first Union Parliament, was substantially the same as the Lower Canadian ordinance; and it soon became apparent that there would be formidable opposition to it. The Conservatives of Upper Canada, led by Sir Allan MacNab, were strongly opposed to the extension of popular control over the local affairs of the people. The Lower Canadians were prejudiced against the ordinance of the Special Council, and had no desire to support any measure emanating from a Government to which they were in strong opposition. Mr. Baldwin [the Hon. Robert Baldwin, then one of the members for Hastings] grounded his opposition to the Bill on the provision for the appointment of the warden, treasurer and clerk, by the Crown instead of by the municipal bodies; and I believe I am correct in stating that his opinions were shared by the Reformers generally. At an early stage of the proceedings, the Lower Canadian ordinance was referred to the Committee of the Whole on the Upper Canada Bill, with the view to having them made alike in all essential points. This rendered it impossible for the Government to yield to the Upper Canadians on points that were deemed essential for Lower Canada, and it was soon formally announced that if any important amendments were made in the Government Bill it would be withdrawn."

Some of the divisions in the Bill were exceedingly close; and the clause providing that wardens should be appointed by the Crown was carried by the casting vote of the Chairman of the Committee (Dent,—"The Last Forty Years," Vol. I., p. 147).

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the first session of that Parliament, on account of the resolution of the Administration of which he was a member to transfer the seat of Government from Kingston to Montreal. He was thereupon appointed Judge of the Surrogate Court, and (later) District Judge for the Home District (including Toronto) where he died in 1867. "Conscientious scruples as to the infliction of capital punishment prevented him from accepting a seat on the Superior Court Bench, but upon the County Court he conferred a new dignity by becoming one of its Judges." Dr. Scadding says: "The memory of Judge Harrison as an English gentleman, genial, frank and straightforward, is cherished among his surviving contemporaries."

(*a*) The Bill was drafted chiefly by the Hon. James Stuart, then Chief Justice of the Court of Queen's Bench for Lower Canada, who, for his services to Lord Durham and Lord Sydenham, was afterwards created a Baronet of the United Kingdom (Dent,—"The Last Forty Years," Vol. I., pp. 42-3.)

Speaking in support of the third reading, Mr. Hincks said:

"The honorable and gallant knight from Hamilton [Sir Allan MacNab (*a*),] and the honorable and learned member for Lennox and Addington (Mr. J. S. Cartwright), say that this Bill is republican and democratic in principle: and that if it be adopted the people will have almost uncontrolled power. At the same time we are assured by the honorable and learned member for Hastings (Mr. Baldwin) that it is 'an abominable bill,' 'a monstrous abortion,' 'that he views it with detestation.'" (Reminiscences, p. 66.)

But as Dr. Bourinot justly observes ("Local Government in Canada," p. 70):

"Imperfect as was the Act of 1841, it marks the commencement of a new era in the municipal government of Canada. In the course of a few years it was amended, and the people at last obtained full control of the election of their own municipal officers."

In 1843 the Honorable Robert Baldwin, (*b*) then Attorney-General for Upper Canada, introduced a general municipal Act "to provide for the incorporation of the townships, towns, counties and cities in Upper Canada." The Bill passed its third reading in the Legislative Assembly, and was sent up to the Legislative Council, from the seclusion of which it never emerged; and a fortnight before the close of the Session the Baldwin-Lafontaine Government (all but Mr. Dominick Daly) resigned office on account of their differences with Sir Charles Metcalfe over the (then burning) question of Responsible Government. (Dent,—"The Last Forty Years," cc. 13-16.)

It was not until March, 1848, during a Session which ended on March 23rd, that the second Baldwin-Lafontaine Government was formed. Early in the following Session (1849) Mr. Baldwin re-introduced (with some amendments suggested by the experience of the preceding six years) the Bill which the Legislative Council had killed in 1843, but

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(*a*) I think it was probably in the discussion upon this Bill that Sir Allan MacNab gave to the District Councils to be thereby created the afterwards historic title of "sucking republics." Perhaps some reader of the LAW JOURNAL can verify my conjecture?—C.R.W.B.

(*b*) Why has no one yet written a satisfactory biography of the Honorable Robert Baldwin? Surely a memoir of the life and times of one who took so prominent a part in Canadian politics during those eventful years in which the struggle for Responsible Government was fought and won,—the eponymos, so to speak, of the "Baldwin Reformers" a political species not yet wholly extinct,—might be made most interesting to students of Canadian History. Materials, apparently ample, for such a work are still accessible in documents in the possession of Mr. Baldwin's numerous descendants, and in the recollections of his surviving contemporaries.—C. R. W. B.

which now passed into law as 12 Vict., c. 81, entitled "An Act to provide by one general law for the erection of municipal councils and the establishment and regulation of police in and for the several counties, cities, towns, townships and villages in Upper Canada."

In the same Session, by an Act 12 Vict., c. 79—after reciting that by reason of the sub-division of the Districts of Upper Canada their boundaries had in many cases become identical with the boundaries of Counties, and that there was no longer any sufficient reason for their continuance, and that it was therefore expedient to abolish the territorial division of the Province into Districts, and, "following in this respect the example of the mother country," to retain only the name of "County" as a territorial division for judicial as well as for other (including municipal) purposes—it was provided that the District gaols, court-houses, grammar-schools and District officers should thenceforth belong to the Counties and Unions of Counties (20 in number) mentioned in the schedule to the Act; and by c. 80 of the same Session all previous (local) Acts of incorporation were repealed, together with most of the "Township Officers Act" (1 Vict., c. 21); the "District Councils Act" (4 & 5 Vict., c. 10) and the "Police Trustees Act" (10 & 11 Vict., c. 42), with the amendments thereto respectively.

These statutes were, however, only ancillary to the principal Act—viz., the General Municipal Act (c. 81)—which not only incorporated all the most valuable provisions of the statutes thus repealed, but also, with a prescience which shows it to be the work of a master mind, sketched in outline at least, the frame-work of the municipal system of Canada as it has since continued to this day.

It would not be too much to apply to the scientific, comprehensive and statesman-like enactment known as the "Baldwin Municipal Act of 1849," the words used by the learned editors of the last edition of Mr. Arnold's treatise on the English Municipal Corporations Act, and say that "it may fairly be termed the Magna Charta of the Municipal Institutions" of Canada. To how large an extent it forms the basis

of our present municipal law will appear from the notes appended to many sections throughout the new edition of "The Municipal Manual" to which some portion, at least, of this article will form a prefatory chapter.

Although amended at nearly every session of Parliament from 1849 to 1897—though seven times consolidated, and on each occasion to some extent recast—the changes made in it during the past half century have been chiefly in the direction of amplification and detail. Never has the principle of local self-government been more fully carried out than in the Act of 1849; and, though the powers of municipal councils have since been extended to many subjects not at that time foreseen and therefore not therein provided for, they have in respect of other matters been since then curtailed. Especially since Confederation there has been a tendency to transfer to government officials and to bodies such as boards of health, license commissioners and police commissioners, of a less directly representative and popular character, than our Municipal Councils, certain of the powers which were formerly exercised by these Councils or by their officers.

Furthermore, the Baldwin Act and its lineal descendants have in their turn become the progenitors and paradigms of the Municipal Institutions Acts in force to-day in nearly every other Province of the Dominion. This will be more fully shown in a future paper, in which I hope to attempt a comparison of the Municipal Act of Ontario with those of Quebec, Nova Scotia, New Brunswick, Manitoba (whose municipal legislation is almost precisely the same as in Ontario); British Columbia (where it is very similar, but I think better arranged) (*b*), and the North-West Territories, where the Ordinance (*c*) governing municipal institutions is taken almost wholly from the Ontario Statute then in force (55 Vict., c. 42).

C. R. W. BIGGAR.

(*b*) See the Consolidation of 1896, 59 Vict., c. 37 ("Municipal Clauses"); c. 38 (Municipal Elections"), and c. 39 ("Municipal Incorporation").

(*c*) Ordinances N. W. T., No. 3 of 1894.

CAUSERIE.

"Give me leave to speak my mind!"
—*As You Like It:* Act II., sc. vii.

"With the legal professors
Questions have put, and opinions given."
—GOETHE: *Reinecke Fuchs.*

We suspect it is an heretical, if not an impious, thing to decline to bow to the critical deliverance of the literary Jove who sits enthroned in the "Easy Chair" of the *Green Bag*, but when the grounds of his animadversions are entirely suppositious and self-created, considerations of fair play compel us to demur at what risk soever of his dread fulminations in reply.

In the November number of his magazine he refers to some playful allusions we made sometime since to Dr. F. W. Maitland's fatal cudgelling of the "Mirror of Justices," and declares that we therein improperly ascribed to Mr. Justice Gray (formerly of the Massachusetts' Supreme Court, but now of the Supreme Court of the United States) a superabundant faith in the authority of the "Mirror." We traverse this averment in toto, and subjoin the exact words we used in referring to the learned judge on the occasion in question, to demonstrate how hollow and baseless our critic's strictures are. This is what we said: "In the well-known case of *Briggs* v. *Light Boats, etc.* (11 Allen 166), Mr. Justice Gray refers to the 'Mirror' as an authority to show that in the early days of English law the sovereign was amenable to an ordinary action at the suit of a subject." This is all that we had to say about the case in our article, and while the Olympic mind may discern some esoteric meaning in the words used other than their plain and ordinary import, the common sense of mundane beings will apprehend that we do not ascribe to the learned judge either approval of the "Mirror" or the reverse of it. We simply say that he refers to it as an authority. Now let us see if the report of the case bears out our statement. We quote from the opinion at page 166 of 11 Allen: "The earliest assertion, in an English law

book, of the King's liability to an action, is probably the statement in the 'Mirror of Justices' compiled by Andrew Horne in the reign of Edward I. or Edward II"—and the learned judge then proceeds to extract what is said concerning the subject in c. 1, § 3, and c. 5, § 1 of the 'Mirror.' Afterwards he says: "But the Mirror is of no *great* (the italics are ours) authority in matters of earlier history." Upon these facts how can it be said that we misrepresented Mr. Justice Gray? *Cadit quæstio!*

Admitting that the criticism we complain of is replete with the unique characteristics of its author, and that he stands without a rival in the ranks of literature to-day, yet we humbly venture to advise him that he will have to restrain his propensity to carp, unless he is careless of being regarded as at once the possessor and victim of

"A mind well-skill'd to find or *forge* a fault"!

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We sadly miss Professor Browne's urbanity and thoroughly decent attempts at wit from the "Easy Chair" of the December *Green Bag*. As to the individual who essays to fill the want of Mr. Browne's amusing literature by ribald jests at the expense of the Canadian people, garnished with a prurient quotation from a sordid egomaniac and *poseur* in vice whose works meet with little attention nowadays from either the virtuous or depraved, all we have to say to the management of the *Bag* is that if they wish to retain their *clientèle* on this side of the boundary line, it behooves them to see that he never again sullies their reputable pages with matter of this kind. It is certainly neither witty nor wise, and we doubt very much if even their American patrons will consider such coarse nonsense worth paying for.

As to Professor Browne himself, we want him to straightway leave a land whose people, by the *Green Bag's* own confession, are "having plenty of trouble"; and concerning a man's chances in the principal city of which a book written by one of their own sociologists, and fresh from the press, has this to say: "If he is a man of parts and energy, or rises

above the condition of a manual laborer into that of a liquor-dealer or small contractor, he finds himself impeded or helped at every step by 'pulls.' If he wants a small place in the public service he must have a 'pull.' If he wants a Government contract, he must have a 'pull.' Whether he wants to get his just rights under it, or to escape punishment for fraud or bad work in the execution of it, he must have a 'pull." In the ward in which he lives he never comes across any sign of moral right or moral wrong, human or Divine justice. All he learns of the ways of Providence in the government of the city is that the man with the most 'pulls' gets what he wants, and that the man with no 'pulls' goes to the wall. Every experience of the municipality satisfies him that he is living in a world of favor and not of law." (Godkin's Problems of Modern Democracy, p. 144.) We counsel Mr. Browne to shake off the dust of a nation so ruled and ruined by a coterie of fellows of the baser sort that one who is given to plainness of speech might be tempted to remark that it exemplifies the truth of Talleyrand's saying that "Democracy is an aristocracy of blackguards"! We ask him to come over to Canada, whose national character is as pure as the air of her prairies, whose political institutions are as firmly based as her golden-bowelled mountains, and whose laws are as perfect as her climate—*almost!* As Lot of old fled from the destruction of Sodom, so we adjure the pure-minded Mr. Browne to come out of the borders of the wicked and doomed United States of America, and pitch his tent in this domain of ours, which flows with milk and honey, and whose self-respecting people are destined to possess the whole of the land of North America in a generation or two. Let his three wise cronies of Gotham be allowed to go to sea in a bowl, if they wish, until the tyranny of destruction be over-past; but let him have sense enough to come into Canada when it begins to rain over there, and so save his lungs from inhaling the brimstone. We entreat the Professor to renounce his kinship with a race so callous to his perpetual babble about his literary and professional endowments (and we think he is as great a poet as he is a lawyer!) that they

leave him out of their "Century Cyclopœdia of Names," and yet give immortality therein to Mr. Silas Wegg, who was not only not a lawyer, but who certainly had no higher poetic gifts than the Professor, and was a perfidious Briton into the bargain. We cordially invite him to invade our territory with his omni-erudite mind, his "quips and cranks and wanton wiles," and his nice little book on parol evidence—which lawyers should know more about than they do. (The dull ones may not see the import of this last remark, but the Professor will understand it, appreciate it, and quote it in cold type some day, mayhap!) We beg of him to settle right down here and become naturalized, so that we can feel that he is actually our own Irving, and in order that we may take him in the arms of our esteem, so to speak, and squeeze him "real hard," as they say in *Amurriker*. All this will we do to Mr. Browne, and more, if he will honor us by consenting to become a Canadian. For when he, in the fulness of time, is smitten with the "killing frost" that does not come, as many of our frosts do, from the icy steppes of the Dakotas or the blizzard-swept streets of New York city, but from

> "—the Acheronian fen,
> To the undoing of all things mortal,"

we will build a joss-house to his memory wherein we will store all his legal productions, safe from the rude hands of busy lawyers, but accessible to those who have leisure for brown-study. When may we expect the genial Professor over this way?

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Those who have read Robert Louis Stevenson's *œuvre posthume* "Weir of Hermiston" will be interested in Mr. Francis Watt's sketch of the hero's father—Braxfield, the "Hanging Judge"—published in a recent number of the *New Review*; and if they were attracted by the pleasant little rôle played by Lord Monboddo in the story, and desire to learn more about this eccentric judge and savant, they should read what Mr. F. P. Walton has to say about him in the October number of the *Juridical Review*. Stevenson takes liberties

with both of these judicial personages,—Braxfield being made to appear just a little more brutal than he was in the flesh, while Monboddo is indued with a sweetness of disposition far more abounding than Dr. Samuel Johnston at least would have accredited him with. Mr. Watt avers that many of the extraordinary stories told about the "Hanging Judge" are apocryphal. We may also mention, by the way, that the Lord Advocate for Scotland not long ago wrote a letter to Mr. Sidney Colvin, Stevenson's literary executor, pointing out that it would have been impossible for the Lord Justice General to preside at the criminal trial suggested in "Weir of Hermiston," because at that time the office was merely an honorary and political one. As to poor Monboddo and his twelve mortal (for they pre-deceased him!) volumes on "metapheesicks" and philology, who is not sorry for him? He thought he had a message to deliver to the world, but he took so long to say his say thereanent, that people went to sleep over it, and he never had electricity enough about him to shock them into consciousness again.

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Judging from the abundance of fault-finding indulged in by the organs of the Bar against the Judiciary in England, what Anacharsis said of Greece in the age of Solon might be applied with exceeding aptness to the "right little, tight little Island" of these end-of-the-century days, viz:—"That he was surprised to find that here wise men pleaded causes, and fools determined them." Yet we are old-fashioned enough to entertain an ineradicable respect for the ability of the English Bench, and to believe that not all the legal wisdom in the country perches itself upon the foreheads of the members of the Bar.

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A firm of publishers in Philadelphia advertise the issue of a book by them called "Everybody's Pocket Lawyer." And yet there are people who talk about the insuperable difficulties of codification! We have heard of lawyers who are fond of getting into everybody's pocket, but then they are in no

sense the giants of the profession. Fancy what an awful course of banting such obese old chaps as Fitzherbert and Coke, Blackstone and Comyn, and Bacon and Chitty would have to undergo in order to accomplish the exploit of getting into one's pocket! "Everybody's Pocket Lawyer" is good. What other marvels has the end of the century in store for us?

CHARLES MORSE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

VENDOR AND PURCHASER—CONTRACT—VENDOR'S NAME—AGENT OF VENDOR—UNDISCLOSED PRINCIPAL—STATUTE OF FRAUDS (29 CHAS. 2, C. 3), S. 4.

Filby v. *Hounsell*, (1896) 2 Ch. 737, is another addition to the legion of cases which have been brought to elucidate that famous fount of litigation called the Statute of Frauds. A house was offered for sale by auction; the particulars and conditions of sale did not disclose the vendor's name, the sale proved abortive, and subsequently the defendant wrote to the auctioneers offering to purchase the house for £350, and stated that if the offer was accepted, he would "sign contract on auction particulars." The auctioneers replied by letter, stating on behalf of their client (naming her) that they accepted the offer "subject to contract as agreed. We enclose draft contract." The draft was identical with the contract embodied in the conditions of sale and indorsement, except that the draft stated the vendor's name; the defendant never signed it, and afterwards repudiated the contract, and set up the Statute of Frauds as a defence to the action for specific performance. Romer, J., decided that the defendant's offer having contained the names of the auctioneers, who were the agents of the plaintiff, she was, as their undisclosed principal, entitled to the benefit of it, and that the disclosure of her name in the acceptance of the offer did not vary the

offer, and that a simple acceptance of the offer without any disclosure of her name by the auctioneers would have been sufficient under the statute to entitle her to the benefit of, and to enforce the contract. The words "subject to contract as agreed," were held not to make the acceptance conditional. The signing of the contract was a mere form, which was not necessary to the making of the contract, which was concluded on the letter of the defendant making the offer, being accepted by the auctioneers; and specific performance was accordingly decreed.

COMPANY—BORROWING—IRREGULARITY—NOTICE, CONSTRUCTIVE—COMMON OFFICER OF TWO COMPANIES.

In re Hampshire Land Company, (1896) 2 Ch. 743, Williams, J., was called on to decide whether the knowledge of an irregularity in the proceedings of a joint stock company relative to the authority given to the directors thereof to borrow money, which the secretary possessed, could be imputed to another company, which lent the money, and of which the same person was also the secretary. The irregularity consisted in this—The power of the directors to borrow was limited to a certain amount, beyond which they might not go without the consent of a general meeting of the shareholders. A general meeting gave the required consent, but the notice calling the meeting had omitted to state, as required by the regulations of the company, that the object of the meeting was to authorize the directors to borrow beyond the specified limit. Williams, J., came to the conclusion that the lending company could not be deemed to have had notice of this irregularity, merely by reason of the knowledge of their secretary acquired as secretary of the borrowing company. Such knowledge he considers cannot be imputed, where it is of a matter concerning which the common officer is guilty of either a fraud or breach of duty, as it cannot be reasonably presumed that any officer would communicate his own default as an officer of the one company, to the other company, of which he is also an officer.

COMPANY—WINDING-UP—"SURPLUS ASSETS," MEANING OF.

In re New Transvaal Co., (1896) 2 Ch. 750, the single point

in question was the proper meaning of the words "surplus assets" in the articles of association of a joint stock company. The articles in question inter alia provided that if the company shall be wound-up one-fifth of the surplus assets (if any) shall belong to and be divided among the holders of founders' shares, and the remaining four-fifths of such surplus assets shall belong to and be divided among the holders of ordinary shares in proportion to the amount of capital paid up on the shares held by them. By another article it was provided that the profits in each year should be applied towards the payment of a dividend of eight per cent. on the amount paid up on the ordinary shares, and any surplus was to be divided on the following proportion, viz.: one-fifth among the holders of founders' shares, and the other four-fifths among the holders of ordinary shares in proportion to the amounts from time to time paid up thereon. It was contended by the holders of founders' shares that "surplus assets" meant surplus after paying the debts and out-standing liabilities only. The ordinary shareholders on the other hand claimed that the words meant the surplus left not only after payment of the debts and liabilities, but also after recouping the shareholders the amount of capital which they had contributed. Williams, J., adopted the latter view.

COMPANY—WINDING UP—CONTRIBUTORY—ESTOPPEL—CERTIFICATION ON SHARES—SHARES NOT PAID UP, CERTIFIED TO BE PAID UP.

In *Re Concessions Trust* (1896) 2 Ch. 757, a shareholder who had been placed on the list of contributories of a company being wound up, applied to have his name struck out, or placed on the list of holders of paid up shares. The shares in respect of which the applicant was placed on the list of contributories, were not in fact paid up, but the applicant had purchased them in the ordinary course of business, and a certificate had been issued to him as holder thereof, on which was indorsed a certification by the secretary of the company, the effect of which was that the proper certificates had been produced to him, showing the title of the transferror to the shares in question, which Williams, J., held to be tantamount

to a certificate that the shares were paid up, which estopped the company, and the liquidator, from now claiming that they were not paid up.

MISREPRESENTATION AS TO CREDIT OF THIRD PERSON—PLEADING—MERCANTILE AMENDMENT ACT, 1856, (SCOTLAND) (19 & 20 VICT., C. 60) S. 6 – (R. S. O. C. 123, S. 7.)

Clydesdale Bank v. *Paton*, (1896) App. Cas. 381, is a decision of the House of Lords on an appeal from a Scotch Court, in which the Scotch Mercantile Amendment Act (19 & 20 Vict., c. 60), s. 6, which is in somewhat similar terms to R. S. O. c. 123, s. 7, was involved. The plaintiffs (Paton) alleged that the defendants' (the Clydesdale Bank's) agent, knowing that a firm of Douglas, Reid & Co., who were customers of the defendants, were insolvent, conceived the fraudulent design of inducing the plaintiffs to accept bills of exchange for the firm of Douglas, Reid & Co. in order that the defendants might apply them pro tanto in reducing the firm's indebtedness to the defendants. And in pursuance of this fraudulent scheme, Douglas, Reid & Co. applied to the plaintiffs for accommodation and referred them to the defendants' agent. He falsely represented to the plaintiffs orally (1) that the firm of Douglas Reid & Co. were in thoroughly sound condition financially, and only required temporary accommodation; (2) that the sum due by them to the defendants was very trifling; (3) and that they had made up the losses they had sustained through another company, and (4) and that no portion of the plaintiffs' acceptances would be applied in extinction of the debt due to the bank; and in reliance on these assurances the plaintiffs did accept bills for Douglas, Reid & Co. which were applied to the credit of that firm's account with the defendants. That Douglas, Reid & Co. were afterwards sequestrated and the plaintiffs had to pay the bills. The question seems to have been raised by a proceeding in the nature of a demurrer to what, in English law, would be called the plaintiffs' statement of claim. The plaintiffs in effect contended that the case was taken out of the statute which requires all representations as to credit, etc., to be made in writing, by reason of the alleged fraudulent

purpose for which the representations were made, but all the learned Lords (Lords Halsbury, L.C., and Watson, Morris, Herschell and Davey) were agreed that the statute could not be so limited. It seems, however, to have been considered that if it had been alleged that the defendants after the bills had been accepted had refused to let the firm of Douglas, Reid & Co. to draw against the proceeds, that a cause of action might have been disclosed on the fourth representation, but although the plaintiffs were offered an opportunity to amend after this point had been suggested, the amendment which they proposed to make only alleged that the bank in the result obtained and the plaintiffs lost the amount of their acceptances. The judgment of the House, therefore, stripped of Scotch legal phraseology, was that the action should be dismissed with costs. The Lord Chancellor, we notice, gives expression to a regret which he feels at the decadence of the science of pleading under the modern English practice. He says: "By the precision of Scotch pleading there is still a necessity to set out the real cause of action which is capable of definite and precise statement, which I regret to say is no longer the case in English pleadings."

DEED—TESTING CLAUSE—QUALIFIED EXECUTION OF DEED—SOLICITOR—NEGLIGENCE.

Blair v. *Assets Co.*, (1896) A.C. 409, although a case in which some peculiarities of Scotch law are involved, is nevertheless one which is instructive even to English lawyers. The action was brought by a company which occupied the position of liquidators of a bank against a firm of writers to the Signet (who in Scotland discharge the duties which in England are performed by solicitors). The ground of the action was alleged negligence on the part of the defendants, who were called on to report on the financial position of certain shareholders of the bank, among whom was one Campbell. This man had executed an ante nuptial marriage settlement, in the body of which he expressly renounced all claim to his intended wife's estate; at the time of executing the settlement, however, he claimed that the settlement was

not intended to deprive him of the right to the income of his wife's estate, and the lawyers who had prepared the settlement promised Campbell that they would apply to the intended wife, and if she consented the clause should be inserted in the settlement. The intended wife had previously executed the settlement, but gave a memorandum in writing approving of the proposed alteration, and without any re-execution by either party, the lawyers inserted in the testing clause of the instrument a clause stating that it was declared that the husband's renunciation should not extend to the income of the wife's estate. This settlement was submitted to the defendants, and they, in effect, advised that Campbell had no right in the wife's estate; that at the time this advice was given there was a decision of a Scotch Court of first instance, that attempted additions or alterations to the body of an instrument inserted in the testing clause of an instrument could not affect its construction and were inoperative; but when the case was before the House of Lords, although no decision was given by the House on that point, one of the Lords had expressed the opinion that the decision of the Scotch Court on that point was erroneous, and it was contended that the defendants were negligent in not advising that the addition to the testing clause was valid, and therefore that Compbell was entitled to the income of his wife's estate. The House of Lords (Lord Halsbury, L.C., and Watson, Herschell, Shand and Davey) were unanimous that the attempted alteration of the contents of the body of the settlement by the addition in the testing clause was inoperative; but on the point of negligence Lords Watson and Herschell express the opinion that even if it had been found that the Scotch decision impeached was in fact erroneous, there would have been no negligence on the part of the defendants. The peculiar Scotch law which permits of a testing clause being inserted in the deed, at almost any length of time after its execution, differs of course from English law: but the question of the attempted alteration of the terms of a deed by additions made by a party to his signature when executing the deed, has in a recent English case been considered inoperative, as

being in effect an alteration of the terms of the deed, and of no force unless assented to by all parties to the deed, and re-executed by them after such alteration: *Ellesmere Brewery Co.* v. *Cooper*, (1896) 1 Q. B. 75, noted ante, vol. 32, p. 107; and on the other hand, an addition to a signature was held by the Privy Council in *Exchange Bank* v. *Blethen*, 10 App. Cas. 293, not to affect the deed, nor to nullify the execution of the deed by the party making such addition.

PRACTICE—PARTIES—DEFENDANTS—JOINDER OF SEPARATE CAUSES OF ACTION—CLAIM FOR DAMAGES—ORD. XVI. R. 4.

In *Sadler* v. *The Great Western Railway*, (1896) A.C. 450 the House of Lords (Lords Halsbury, L.C., and Watson, Herschell, Shand and Davey) unanimously affirms the judgment of the Court of Appeal (1895) 2 Q.B. 688 (noted ante, vol. 32, p. 103). The action was brought by a plaintiff against two railway companies, on the ground that they obstructed the plaintiff's business by permitting their carts and vans to assemble in, and block up, the highway and footway leading to the plaintiff's premises. The plaintiff claimed damages, and an injunction against each of the defendants. One of the companies applied to be struck out as defendants, and the Court of Appeal held they were improperly joined, and this decision is now affirmed, and the decision is a natural sequel to the case of *Smurthwaite* v. *Hannay*, 1894, A.C. 494 (noted ante (vol. 31, p. 154), in which the joinder of plaintiffs having separate and distinct causes of action was also held to be inadmissible. Their lordships intimate the opinion, though they do not expressly decide, that even if the action had been limited to a claim for an injunction, the defendants could not have been joined. See, however, the recent case of *Bennett* v. *McIlwraith*, 75 L. T. 145.

COMPANY—SHAREHOLDER—PAYMENT OF SHARES IN ADVANCE OF CALLS—INTEREST ON SUMS ADVANCED—PAYMENT OF INTEREST OUT OF CAPITAL—COMPANIES' ACT, 1862, 1ST SCHED., S. 7—(R.S.C., C. 119, S. 40.)

In *Lock* v. *Queensland Investment Co.*, (1896) A.C. 461, the House of Lords (Lords Halsbury, L.C., McNaghten, Morris and Shand) affirms the judgment of the Court of Appeal,

(1896) 1 Ch. 397, noted ante, vol. 32, p. 397, holding that a provision in the articles of association of a joint stock company, providing for the payment of interest out of capital, on sums paid in respect of shares in advance of calls, was valid and intra vires, and that such interest could not be regarded as in the nature of a dividend, but was rather to be regarded as interest paid in respect of a debt.

THE MORAL WARRANT OF THE LAW.

A CHRISTMAS-EVE VISION.

I never remember so fine a Christmas-eve as that of 189—. The weather was ideal. The streets were carpeted with snow of that samite-like texture characteristic of early winter. The full moon was riding in a cloudless sky; while the keen, dry air was so surcharged with exhilarating properties that one wanted to cry aloud with the very joy of inhaling it. Nature at large was fully alive to the responsibilities of the season, and, as a lonely and ruminative bachelor, I found it interesting after dinner to watch, from a coign of vantage in the Club window, the various manifestations by my fellow-men of how absolutely they were swayed by the beneficent influences abroad in the land.

Just as the throng . . merry passers-by was beginning to diminish, and I was awakening to a sense of my solitariness, a voice broke in upon my reveries, with: "Who is that in the window? O it's you, Willoughby!" And then the voice proceeded, in ironical tones, to recite:—

> "A lawyer art thou? draw not nigh!
> Go carry to some fitter place
> The keenness of that practised eye,
> The hardness of that sallow face!"

"O, indeed," continued the voice, which I now knew to be that of my loquacious friend Tredgold, "I am not slandering you at all! What have you lawyers to do with the celebration of *any* Christian festival, much less that of Christmas, which calls for the exercise of virtues which all of you smother when you don your black gowns. You remember who it was who said: Woe unto you lawyers!'"

"Tredgold," I replied, "you are a fool; but I shall not answer you according to your folly. To meet with any man in these omniscient days who thinks that the denunciation you have just quoted was aimed at secular lawyers is enough to freeze one into silence!"

A couple of my acquaintances who had just entered the room laughed at this, and Tredgold said: "Ah, well, old man, don't get excited over it. Come and have a glass of wine with us; and if you don't want us to regard you as indulging in the symbolism of Christmas-eve love and good-will by so doing,

why pour a libation to whatever deity you lawyers affect in the pagan pantheon! 'Chacun à son goût,' you know; that's my motto!"

Disdaining further reply to Tredgold's banter, I joined his little group around the table, and drank the Christmas cup with all the formalities peculiar to the Club. Thereafter I chatted with my friends pleasantly until the clock struck ten, when some one who lived in the direction of my lodgings asked me if I were going along, and I left the Club with him. During the walk homeward my companion, who was an intelligent mercantile man, referred to Tredgold's chaff at the expense of my profession, and remarked how singular it was that in these days of enlightenment the old-time prejudice against the moral standards of the law was still so wide-spread. "People seem to think, he said, "that lawyers are *un*necessary evils!"

I suppose it was the genius of the season rather more than anything else that caused me to ponder over the subject after I had bidden my companion a "merry Christmas," and turned into my lodgings. But certain it is that when I had thrown fresh coal upon the fire, lighted my pipe, and ensconced myself in my favorite chair, I found my mind busy, to the exclusion of everything else, in exploiting a question which I fondly imagined I had solved to the satisfaction of my conscience some time during the first year of my service as an articled clerk, namely, "*Is the Law a great and ennobling profession?*" Many a time before that I had wondered whether it really had a *raison d'être* in the social and moral needs of mankind, or if it were not merely an organized medium for the furtherance of oppression, deceit and all uncharitableness.

Now, oddly enough, I have always found the coals of my grate-fire most helpful to me in reaching a right conclusion in matters of difficulty—my mind, by some process which I could not begin to explain, enduing their sensuous elements of form and colour with certain logical values, which give me the cognition of truth or untruth in much the same way as the coals themselves manifest to me that the fire is either alive or dead. But to-night the coals seemed to have lost their ratiocinative cunning; and, for what appeared to me a long time, I saw nothing upon the glowing surface of the fire but the question that was troubling me: *Is the Law a great and ennobling profession?* Presently, however, I became sensible of a strange and delightful odor pervading the room; and gradually I saw the inscription on the coals fade away with the flame itself, while the fire-place slowly increased in size until it assumed the proportions of a magnificent ancient temple, the roof of which was supported by a series of mighty columns having capitals wonderfully carven into the semblance of bulls' heads and shoulders, between which the beams of the roof rested. The walls of the building were composed of brickwork, lined on the inside with large and beautiful slabs of alabaster full of sculptured figures in bas-relief, and mysterious inscriptions. I saw that the main part of the temple was filled by a strange Aryan people, evidently gathered for a religious observance of some importance. Several priests were in the ceremonial space of the temple, at the south end of which burned a fire of sandal-wood in a vase-like vessel, upon which one of the priests, from time to time, threw *boi*, or incense, which exhaled the grateful odor I had some time before become sensible of. The ceremonial furniture of the temple was of the rarest work.

manship and materials; while the ritual practised by the priests inevitably appealed to the æsthetic side of one's nature. But I was mostly attracted by the literary and ethical beauty of certain passages from their religious scriptures, as recited from time to time in a musical voice by the chief officiating priest. After listening to several recitations in praise of their deity and the cardinal virtues, my intensest interest was aroused by the following :—

"Ye sons of Hêchad—aspa Spitama! to you I will speak; because you distinguish right from wrong. By means of your actions, the truth contained in the ancient commandments of Ahura has been founded!"

Had this not some bearing on the question which was agitating me? Was it not indeed a tribute by the most archaic civilization that we know of to the moral value of the labours of the founders and expounders of positive Law?

Again the thaumaturgic influences that held me in their spell proceeded to act. The temple faded from my view, and in its place arose the beautiful groves and smiling gardens of the Academy. Plato—the "Supreme Thinker," the grandest figure in Greek philosophy—was there, conversing with his pupils. I shall never forget the simple majesty of his bearing, or the sweet amiability of his answers to those who questioned him. "Mankind," he said, "must have laws and conform to them, or their life would be as bad as that of the most savage beast . . . . For if a man were born so divinely gifted that he could naturally apprehend the truth, he would have no need of laws to rule over him; for there is no law or order which is above knowledge, nor can mind, without impiety, be deemed the subject or slave of any man, but rather the lord of all. I speak of mind, true and free, and in harmony with nature. But then there is no such mind anywhere, or at least not much; and therefore we must choose law and order, which is the second best" . . . . Once more I heard him speak, and it was to give utterance to this splendid truth: "Is not Justice noble, which has been the civilizer of humanity? *How then can the advocate of Justice be other than noble?*"

And here I had the answer of Hellenic culture to my question.

But again the scene is changed. Now it is Rome under the dictatorship of Cæsar. In the library of an unpretentious house in a quiet quarter of the city—equally remote from the place of his great forensic achievements and the Senatorial halls where machinations against the ambitious Dictator were fast gathering to a bloody head—I behold the greatest Advocate, and one of the clearest intellects, the world has ever known, seated, and busy with *stilus* and *tabulæ*. As he pauses for a moment in his writing, I glance over his shoulder and read :—"Law is the highest reason implanted in Nature, which commands those things which ought to be done and prohibits the reverse . . . . The highest law was born in all the ages before any law was written or the State was formed. . . . . Law did not then begin to be when it was put into writing, but when it arose, that is to say, at the same moment with the mind of God."

This was the answer republican Rome vouchsafed to my all-absorbing question.

Once more the scene was changed. Now I am viewing the study of a quiet country rectory in the foremost period of intellectual England. I see a

small company of men, whose names are set as jewels in the pure gold of English literature, listening to one of their compeers reading from a manuscript. I strain my ear to catch the words that fall from his lips. They are these :

"Of Law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world. All things in Heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power. Both angels and men, and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy."

I was now beginning to feel that my doubt had been resolved, but the mysterious power that was operating within me had yet to present a supreme and final test.

Before my vision there appeared a picture of a fertile hill-side rising gently from the blue waters of the Lake of Tiberias. There, surrounded by His disciples, is seated the Divine Man, who, during His earthly sojourn, repeatedly showed by His own example the moral propriety and efficacy of obedience to the supreme civil authority. He is instructing His chosen band of followers in the matters in which all men must busy themselves if they wish to inherit eternal life ; and it is interesting to observe the zeal with which they drink in the meaning of his clear and simple teaching. Anon, I seem to hear Him utter the wonderful words of the Golden Rule, that thenceforth was to lie at the base of every enduring system of positive Law : "Whatsoever ye would that men should do unto you, do ye even so to them ; for this is the Law and the Prophets !"

Thus was my question finally answered.

While I awoke to the consciousness of external things there fell upon my ear the sound of Cathedral bells ; and, as I listened, their chimes moulded themselves into the joyous music of "Hark, the Herald Angels Sing !"

CHARLES MORSE.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] [Dec. 9, 1896.

NIAGARA DISTRICT FRUIT GROWERS' CO. *v.* WALKER.

Principal and surety—Guarantee bond—Fidelity of principal—Principal's defa. .t—Duty of creditor to disclose.

W. was appointed in 1891, by instrument in writing, agent of a company to sell its fruit, giving a bond with sureties conditioned for the faithful discharge of his duties, and prompt return of monies collected on sales. At the end of the year, the bond was given up and a new bond executed by W. and the same sureties for the next year's business, and the same course was pursued for three years more. W. was in arrears to the company every year, and represented that it was due to slow collections, although by the terms of his appointment he could only sell for cash. The arrears were always made good by W. giving an indorsed note which the company accepted. At the end of 1894 the company discovered that the default had not been caused by slow collections, but that W. had received monies which were not remitted. An action was brought against the sureties for the balance due on that year's business.

Held, reversing the judgment of the Court of Appeal (23 A. R. 681), that the appointment of W. as agent for each of the four years was an independent appointment; that the position of the sureties for 1894 was the same as if other persons had been sureties in the preceding years; and that the company was under no obligation to disclose to the persons signing the bond for 1894 the default of the preceding year, nor was the non-disclosure a representation that W. had punctually performed his undertakings in respect of such previous employment.

Moss, Q.C., and *Meyer*, for appellants.

Armour, Q.C., for respondents.

Ontario.] [Dec. 9, 1896.

FARWELL & GLENDON *v.* JAMIESON.

Landlord and tenant—Construction of statute—R. S. O. (1887), c. 143, s. 28—Holding "under" tenant—Estoppel.

By sec, 28 of The Landlord and Tenant Act (R. S. O., 1887, c. 143), only the property of the tenant or person liable for the rent shall be distrained upon The word "tenant" in the Act includes a sub-tenant, assignees of a tenant, and a person in actual occupation under or with consent of the tenant. A property under lease was assigned by way of mortgage, and the mortgagees took possession and gave the keys to a house agent so that he could show the premises with a view of letting them. The house agent, without any author-

ity so to do, let into possession a firm of dealers in pianos, and the stock they placed in the premises was distrained upon for arrears of rent under the original lease.

Held, reversing the judgment of the Court of Appeal (23 A. R. 517), and of the Divisional Court (27 O. R. 141), that the said property was not liable to seizure; that it could only be liable as property of persons in occupation "under" the assignees of the tenant, and these persons were not so in occupation; and that though in an action of ejectment or trespass they might be estopped from denying that they held under the assignees, that would not bring them within the terms of the Act; they must hold under the tenant in point of fact.

Appeal allowed with costs.

Laidlaw, Q.C., for the appellant.

Kilmer, for the respondent.

Ontario.] [Dec. 9, 1896.

COOPER *v.* MOLSONS BANK.

Debtor and creditor—Collateral security—Proceeds received by creditor—Appropriation—Res judicata.

C. had a line of discount with a bank on terms of depositing customers' notes as collateral, and having failed, owing a large amount for discount, about three-fourths of which was secured as agreed, the bank sued and obtained judgment on his notes discounted as they matured. C. then claiming the right to have the amounts realized from the collaterals credited to him, obtained from the Divisional Court an order directing the trial of an issue upon the question whether, before or since the recovery of said judgments, the bank had received any payments which ought to be applied in or towards satisfaction thereof, and if so, when and to what extent. The bank, while admitting the receipt of a considerable portion of the collaterals, claimed the right to exhaust all other means of obtaining payment of its debt before crediting the money so received, and the decision on the trial of the issue was that no money had been received which it was bound to apply in satisfaction of the judgments. After the last of the discounted notes had matured the bank sued C. on them, and the question of applying the proceeds of the collaterals was again raised, it being contended that, at all events after all the debt had matured, the bank was bound to appropriate. It was again decided in favor of the bank, not only on the question of law, but also on the ground that it was res judicata by the decision on the issue.

Held, reversing the judgment of the Court of Appeal (23 A. R. 146), that the matter was not res judicata; that, under the Judicature Act, res judicata as a defence, or reply to a counterclaim, must be specially pleaded; and if not, as the questions in litigation in the action were not identical with those involved in the issue, though depending on the same principle of law, the decision might be binding on inferior tribunals and courts of co-ordinate jurisdiction, but would not be binding as res judicata on courts of appellate jurisdiction.

Held, further, that though the bank was not obliged so long as the collat

erals remained in its possession uncollected, to give any credit in respect of them, when it received payment of such collaterals, or any part of them, it operated at once as a payment of the principal debt.

Appeal allowed with costs.

Foy, Q.C., for the appellants.

Shepley, Q.C., for the respondent.

Province of Ontario.

COURT OF APPEAL.

From BOYD, C.] [Nov. 24, 1896.

FROWDE *v.* PARRISH.

This was an appeal by the defendants from the judgment of Boyd, C., reported 37 O. R. 526, vol. 32, p. 454, and was argued before BURTON, OSLER and MACLENNAN, JJ.A.

T. W. Howard, for the appellants.

Maclaren, Q.C., for the respondent.

At the conclusion of the argument the Court dismissed the appeal with costs, agreeing with the judgment below.

HIGH COURT OF JUSTICE.

BOYD, C., MEREDITH, J.] [Nov. 3, 1896.

REGINA *v.* LORRAINE.

Criminal law—Conviction—Lotteries—Art association—"Property"—Pictures—Part value in money—Criminal code.

The defendant was convicted by a Police Magistrate for that he did "unlawfully sell and barter a certain card and ticket for advancing, selling and otherwise disposing of certain property: to wit, pictures or one half the stated value of each picture in money, by lots, tickets and modes of chance."

Held, that "property" in sub-section (b) of section 205 of the Code, is not to be read "specific property," and that the essence of that enactment lies in the disposal of *any* property by any mode of chance.

Held also, that there was evidence to show that money might be had instead of pictures by the winning tickets, and that destroyed the privilege in favor of works of art under sub-section 6 (c), and even if the Society reserved an option as to giving cash, that only added to the precariousness of the whole transaction and constituted another chance, and the conviction was upheld.

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

Anglin, for the defendant.

MASTER IN CHAMBERS.] [Nov. 3, 1896.

IN RE BENFIELD AND STEVENS.

Interpleader — Jurisdiction — Foreign claimants — Fund payable in foreign country.

Under an agreement with respect to a mining property in this Province, a certain royalty was payable in a foreign country to foreigners residing therein, by a person also residing therein, but was claimed by another person in the jurisdiction.

Held, upon an application for an interpleader order, that the Court had no power to direct foreigners to come within its jurisdiction to defend their right to the fund.

W. E. Raney, for the applicant.

J. Bicknell, for the claimants Stevens and others.

W. H. Biggar, for the claimant Richardson.

BOYD, C., ROBERTSON, J., MEREDITH, J. [Nov. 7, 1896.

SPEERS *v.* SPEERS.

Surrogate courts—Vacancy of senior county judgeship—Junior judge—Delivery of judgment by subsequent to appointment of new senior judge.

Where a Junior County Judge has heard the evidence and tried an issue in a Surrogate Court while the office of Senior County Judge was vacant, no request from the new Senior Judge when appointed is needed to enable him to fulfil the judicial responsibility undertaken by him of not only hearing but determining the contest, and no invervention by the new Judge is necessary to give him jurisdiction to the end; and his judgment delivered after the appointment of the new Senior Judge was upheld.

Osler, Q.C., for the appeal.

Garrow, Q.C., contra.

ARMOUR, C.J., FALCONBRIDGE, J.] [Nov. 9, 1896.

REGINA *v.* MCMILLAN.

By-law—Early closing—Excepted times.

On a motion to quash a conviction under a by-law providing for the closing of shops for the sale of watches and jewelry at a certain hour every day "excepting Saturdays, the days immediately preceding public holidays, the days during which the Central Canada Exhibition Association is being held, and the last two weeks of the month of December," on the ground that the by-law was invalid for uncertainty.

Held, that the by-law was valid.

W. H. P. Clement, for the motion.

H. M. Mowat, contra.

BOYD, C., FERGUSON, J., ROBERTSON, J. [Nov. 17, 1896.

PAYNE *v.* CAUGHILL.

Way—Public road—Municipal corporation—Power to lease to private person.

Prior to the 13th May, 1851, the London and Port Stanley road belonged to the Government of Canada as one of the public works. On that day the Government, by an order-in-council or proclamation, issued under the authority of 12 Vict. c. 5, and 13 & 14 Vict. c. 14, granted the road, for valuable consideration, to the County of Middlesex. The part of the road lying within the limits of the County of Elgin afterwards fell into the hands of the corporation of that municipality, who, on the 16th February, 1857, leased it to the defendants' predecessor, or assignor for the term of 199 years.

Held, that the county corporation had the power to sell or lease the road to any such grantee, or lessee, as is mentioned in the above statutes, and the further power to let to farm the tolls on the road, but had not the power to lease or sell the road, or any part of it, to a private person; and, therefore, the defendants had no title to the road and were not justified in obstructing it by bars and exacting tolls upon it.

James A. McLean, for the plaintiff.

Laidlaw, Q.C., and *J. Bicknell*, for the defendants.

BOYD, C.] [Nov. 21, 1896.

GUNDRY *v.* JOHNSTON.

Bankruptcy and insolvency—Assignment for benefit of creditors—Composition arrangement—Distinction—R. S. O. c. 124, s. 13—Penalty.

A trader, being unable to pay his debts as they matured, executed an instrument in writing headed "Memo. of agreement," by which he transferred to the defendant all his estate, and directed him to submit to the creditors an offer of seventy-five cents on the dollar upon their claims, to sell the estate, pay the percentage to the creditors out of the proceeds of the sale, and pay the residue to the debtor. It was recited in the instrument that the object was to realize seventy-five cents on the dollar, and thus enable the debtor to get a discharge. By the last clause it was declared that the transfer was under R. S. O. c. 124 and amendments. The creditors agreed to accept the percentage offered, and the sale and realization of the assets went forward on that condition, although in the outcome much less was obtained out of the estate.

At the trial of an action under s. 13 of R. S. O. c. 124, for penalties for not publishing notice of and not registering this instrument, evidence was given by its draftsman that it was intended to recite in the last clause that the transfer was not under R. S. O. c. 124 and amendments, but the word "not" was omitted by mistake.

Held, that, regarded as a whole, the instrument was an arrangement by way of composition rather than an absolute assignment under the Act; and so regarded, the last clause was nugatory, if not insensible, and its true explanation was supplied by the evidence of the draftsman; and the instrument was therefore not an assignment for the benefit of creditors under the Act, and s. 13 did not apply to it.

Garrow, Q.C., and *Dancey*, for the plaintiff.

Watson, Q.C., for the defendant.

FALCONBRIDGE, J.] [Dec. 11, 1896.

IN RE UNDERHILL—FOX *v.* SLEEMAN.

Administration order—Jurisdiction of Local Master—Summary application—Action.

An appeal by the defendant from an order of the Local Master at Guelph for the administration of the estate of William Underhill, deceased, made upon the summary application of the plaintiffs, who alleged that they were the next of kin of the deceased, being children of a deceased brother. The deceased by his will gave all his estate to his wife, who pre-deceased him, and the defendant, his adopted daughter, obtained from the Surrogate Court letters of administration with the will annexed. The application for the administration order was opposed by the defendant.

Held, having regard to Rules 30, 138, 972, that the Local Master had no jurisdiction to entertain an opposed application for an administration order; and that it was a proper case in which to direct that an action for administration should be brought.

Moss, Q.C., for the defendant.

W. M. Douglas, for the plaintiffs.

BOYD, C., FERGUSON, J., ROBERTSON, J. [Dec. 12, 1896.

CAMPAU *v.* RANDALL

Notice of trial—Irregularity—Close of pleadings—Order staying proceedings—Chambers motion—Reference to trial judge—Order—Judgment—Appeal.

On the 21st March, 1896, the defendant appeared, delivered a defence, and issued and served an order for security for costs, which imposed a stay of proceedings. On the 2nd October, 1896, the plaintiff complied with the order by filing a bond, and on the 3rd October gave notice of trial.

Held, that the notice of trial was irregular, the pleadings not being closed when it was given.

A motion made in Chambers by the defendant to set aside the notice of a trial was referred to the judge at the trial, who dismissed it. The defendant thereupon withdrew, and the action was tried in his absence, and judgment given for the plaintiff.

Held, that the judge when disposing of the motion was sitting and acting as a judge of Assize, and that this and the trial of the cause might properly be deemed one proceeding; and one appeal, comprehending all, was sufficient.

Wallace Nesbitt, for the plaintiffs.

L. G. McCarthy, for the defendant.

STREET, J.] [Dec. 14, 1896.

IN RE RYAN—RYAN *v.* SUTHERLAND.

Affidavit—Notary—Seal.

Where an affidavit is sworn before a notary public in Ontario, it is not necessary to its reception as evidence that the notary should affix his official seal.

W. E. Middleton, for the plaintiff.

COUNTY COURT, COUNTY OF YORK.

FISKEN *v.* STEWART.

Statute of Limitations—Payment by assignee of debtor—Payment by delivery of goods.

The payment of a dividend by an assignee for benefit of creditors, is not such a payment as takes the case out of the operation of the Statute of Limitations.

Money received by the holder of a note from the maker within six years from the commencement of an action therefor, in payment of goods given before that period by the maker, as security for the note, is not a payment within the meaning of the statute.

[TORONTO, Nov. 13, 1896, MCDOUGALL, Co. J.

In this case the plaintiff held a note, made by one Silcox, and endorsed by the defendant. The defendant assigned to an assignee for the benefit of his creditors. The assignee realized on the estate and declared a dividend, the plaintiff receiving his proportion. More than six years after the maturity of the note, but within six years from the time the dividend was paid, the plaintiff sued the defendant for the balance due on the note.

More than six years before the commencement of this action the maker of the note delivered to the plaintiff goods on account of the note, and as collateral to it. Some of these goods were sold by the plaintiff within the six years, and the proceeds credited on the note.

The defendant pleaded the Statute of Limitations. In answer to this the plaintiff set up as payments on account the matters above set forth, which he claimed took the case out of the statute, and moved for judgment.

R. E. Kingsford, for plaintiff.

D. Henderson, for defendant.

MCDOUGALL, Co. J.: I am of opinion that this motion for judgment should be dismissed with costs. The Statute of Limitations applies.

This payment by the assignee is not a payment which takes the case out of the statute. The assignee in making such payment was not the agent of the defendant, possessing any express or implied power to make any promise on the part of the debtor as to future payments. The payment which gives an indebtedness a fresh starting point, under the provision of the Statute of Limitations, only does so if it can be inferred from the circumstances attending the payment, that the debtor expressly or by implication promises to pay the balance. This implication does not arise where the payment is made by an assignee or trustee: *Davies* v. *Edwards*, 7 Exch. 21; *Ex parte Topping*, 34 L. J. Bank. 44, and many other cases. It makes no difference whether the assignment is voluntary or involuntary: *Finley* v. *Bonsor*, 2 Scott, 399.

Again it is urged that the present assignment is void under R.S.O. 124, but the plaintiff has accepted a dividend thereunder, and is estopped by that circumstance from disputing its validity: *Beamer* v. *Oliver*, 10 A. R. 656.

Again it is said that a payment has been made on account by the maker of the note, one Silcox, by the delivery of goods. This is answered by the fact that such delivery was made more than six years before the commencement of this action. It is true that the plaintiff realized some monies from time to time within six years by the sale of portions of these goods, but that

was his act, and not the act of the defendant or the maker. In his affidavit the defendant swears the goods were delivered as collateral security; the realization thereupon and the crediting the amounts was his own act, and cannot be attributed to the defendant or the maker of the note.

Motion dismissed with costs.

Province of Quebec.

COURT OF REVIEW.

TAIT, A.C J., TASCHEREAU and DAVIDSON, JJ. [June 27, 1896.

CLEARIHUE *v.* ST. LAWRENCE & ADIRONDACK RY. Co.

Railway company—Railway Act, 1888, c. 29, s. 170—Purchase by company of land covered by mortgage—Recourse by mortgagee against company.

This was an action brought by the plaintiff as mortgagee of certain lands purchased by the company from the mortgagor, and the price of which the company did not pay into court as it was allowed to do under the Railway Act, 1888, c. 29, s. 170. The plaintiff asked for a declaration that the land was still subject to the mortgage, and the defendants contended that under the Railway Act the mortgage (hypothèque) had ceased to exist, and that the recourse of the plaintiff was only against the purchase price of the portion of land so taken, and not against the land itself.

Held, where a portion of a piece of land subject to a mortgage is acquired by a railway company by amicable purchase, and the company does not deposit the price, the mortgagee has the ordinary recourse against the company as holder (détenteur) of the land, but only to the extent of the value of the land so acquired.

Judgment of GILL, J, confirmed.

White, Duclos, O'Halloran and *Buchanan*, for plaintiff.

A. E. Merrill, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Bench.] [Dec. 19, 1896.

THE QUEEN *v.* MCDONALD.

Habeas Corpus—Motion for refused—Jurisdiction of convicting magistrate—Burden on party attacking where jurisdiction is prima facie shown—Judicial notice.

By the Acts of 1895, c. 89, s. 1, the municipality of the County of Pictou was created a police division. By the acts of 1895, c. 3, s. 1 the municipality of the County of Pictou was defined to be what at that time was known as the

County of Pictou. By s. 2, all cities or incorporated towns were cut out of this area, and the term county was defined as that part of the county or district within the territorial jurisdiction of the County Council. In the schedule to the Act "Hopewell" was described as polling section No. 17, and entitled to return two municipal councillors to the Municipal Council of the Municipality of Pictou.

Defendant was committed to the Pictou county jail on a warrant signed by the stipendiary magistrate for the municipality, the offence for which he was convicted being stated as having been committed at Hopewell in the County of Pictou.

Held, refusing an application for a writ of *habeas corpus*, that c. 3 of the Acts of 1895, read as a whole, sufficiently showed jurisdiction in the convicting magistrate.

Held, also, that jurisdiction being *prima facie* shown, it was incumbent upon the applicant to show that there was some other part of the county called "Hopewell" which was not within the polling district.

Held, also, that the matter was a public one affecting the government of the county of which the Court would take judicial notice.

C. Sidney Harrington, Q.C., and *W. B. A. Ritchie*, Q.C., in support of application.

H. Mellish, contra.

Province of New Brunswick.

SUPREME COURT.

Full Court.] [Mich. Term, Dec. 12, 1896.

ALEXANDER *v.* MCALLISTER.

Dominion Controverted Elections Act—Preliminary objections to petition—Election Court Rule.

The failure to file with the Clerk of the Supreme Court for the petitioner a copy of the preliminary objections to the petition (R.S.C., c. 9, s. 12; N.B. General Rules of the Election Court, Easter Term, 1887, s. 12) is waived by the respondent taking subsequent proceedings before raising the question; but in any case it is no more than an irregularity that may be cured, and the respondent was allowed to file such copy nunc pro tunc.

The affidavit of a petitioner is sufficient, though it did not set out his reasons for his belief of the facts sworn to therein.

The fact that the petitioner himself had been guilty of corrupt practices does not preclude him from being a petitioner, or prejudice the petition.

If petitioner's affidavit in support of petition has not been read over by him or to him, and he is ignorant of its contents, it cannot be heard, and the petition must be dismissed.

Pugsley, Q.C., and *McLatchey*, for the petitioner.

Currey, for respondent.

Full Court.] [Mich. Term, Dec. 12, 1896.

REGINA *v.* SIVEWRIGHT.

Prerogative of Crown—Priority of Crown—Debt.

A bondsman to the Crown on behalf of the Secretary-treasurer of a municipality, after the execution of the bond, gave a mortgage upon his real estate. The mortgage was taken in good faith and for valuable consideration. He also incurred debts in the usual course of his business, and judgments were entered up against him, after the issue of a writ of extent upon the bond by the Crown and before judgment was obtained thereon. Upon default made by the Secretary-treasurer a suit by writ of extent was commenced by the Crown on the bond.

Held, that the real estate of the defendant bondsman was liable and bound from the date of the execution of the bond and in priority to the mortgage, and that his personal estate was liable from the time the writ of extent was issued in priority to judgments obtained after its issue.

White, Solicitor-General, for the Crown.

Pugsley, Q.C., and *G. G. Gilbert, Jr.*, for the mortgagee.

C. J. Coster, for creditors.

Full Court.] [Mich. Term, Dec. 12, 1896

EX PARTE WRIGHT.

Criminal Code, s. 540—Constitutionality—Jurisdiction of County Court.

This was an application for the discharge of the prisoner, who was committed for trial last July on the charge of attempting to carnally know a girl under 14, on the ground that he was entitled to trial at the October session of the York County Court, at which the judge declined to try him, holding that the County Court has no jurisdiction under s. 540 of the Criminal Code to try the offence of attempted rape. For the prisoner it was argued, and the Court so held, that the section is ultra vires the Dominion Parliament, being contrary to s. 91, sub-sec. 27, and s. 92, sub-sec. 14 of the B. N. A. Act, and that being such it did not repeal s. 62 of c. 51, Con. Stat., N.B., conferring criminal jurisdiction upon County Courts, except as to capital offences.

O. S. Crockett, for the prisioner.

White, Solicitor-General, for the Crown.

CIRCUIT COURT.

McLEOD, J.] [Dec. 3, 1896.

MCGAFFIGAN *v.* PULLMAN PALACE CAR CO.

Negligence—Measure of damage.

This was an action in which the plaintiff claimed damages for injuries received through a cold contracted on a car owned and managed by the defendants, on the night and morning of February 28th and 29th, 1892, and the case was founded on alleged acts of negligence on the part of the defendant in allowing the heater to be let out, or to become unfit to heat the car.

Held, the damages, if any, should be for the result of an ordinary cold. If the plaintiff contracted a cold in February, 1892, the defendants would only be liable for the direct and immediate results of that cold. If, after taking such a cold, a man should go on and contract other colds and should continue to go on so that the results would be a great loss to him, the defendants would not be liable to the full extent of that loss, and if plaintiff was in such a state of health that he could not travel without taking cold, the defendants are not liable.

Verdict for defendants.

Quigley, Q.C., and *D. Mullin*, for plaintiff.

H. H. McLean, for defendants.

DIVORCE COURT.

VAN WART, J.] [Nov. 21, 1896.

CURRIE *v.* CURRIE.

Alimony pendente lite—Jurisdiction—Amendment.

The plaintiff denied the right of the defendant to either suit-money or alimony pendente lite, on the ground that the reasons for formerly granting such allowances no longer exist, owing to the passing of 58 Vict., c. 24, and that the plaintiff is not in a position to do more than support himself and child.

VAN WART, J.—I do not know of any case since the Court of Divorce and Matrimonial Causes was established in this province, in which the right of the wife to alimony pendente lite or suit-money has been disputed. The question seems to have been simply as to the amount to be allowed.

The Court was established by Act 23 Vict., c. 27, in substitution for the "Court of Governor-in-Council," established by 31 Geo. III., c. 5. Section 10 of the first named Act provides that: "The practice and proceedings of the said court shall be conformable as near as may be to the practice of the Ecclesiastical Court in England prior to the Act of Parliament made and passed in 1857, intituled 'An Act to amend the law relating to Divorce and Matrimonial Causes in England,' subject, however, to the provisions of this Act, and the existing rules, orders and practice as now established in the Court of Governor and Council in this province." This section is substantially re-enacted by Con. Stat., c. 50, s. 3, and in the law now existing in this province.

Then what was the practice in proceedings for divorce in the Eccclesiastical Court in reference to suit-money and alimony pendente lite prior to 1857, at which date the Ecclesiastical Court ceased to have jurisdiction in divorce matters?

In *Rice* v. *Shepherd*, 12 C.B. N.S., 332, Erle, C.J., says the wife pledges her husband's credit at the beginning of the suit, and I see nothing in the practice of the Divorce Court to take away the wife's common law right. The

right to apply for a taxation de die in diem is a concurrent or cumulative remedy and may well co-exist with the common law right to bring an action.

It is clear, therefore, that the courts do not recognize any distinction between a suit for a separation and a suit for the dissolution of the marriage in reference to the allowance of alimony pendente lite and suit-money. If the wife has the right to pledge her husband's credit for the costs of her defence, should her proctor be left to his remedy at law to recover his costs? The presumption of law is in favor of the wife's innocence. She is entitled to all the privileges, rights and benefits the law by virtue of her marriage confers upon her. Can anything be more necessary than the means to enable her to defend herself against a (presumably false) charge of adultery?

She might not be able to secure a solicitor willing to conduct her defence or prosecute her suit, and takes his chances of subsequently collecting his costs under a decree or by an action at law against her husband.

I think the wife is entitled to suit-money and alimony pendente lite, unless such right is taken away by 58 Vict., c. 24.

On the argument no particular part of the Act was referred to. I have carefully exar ied the Act and fail to find anything to interfere with the right of the wife to alimony pendente lite or suit-money where the wife has no means. It is unnecessary to consider what the practice has been or is as to alimony pendente lite where the wife has separate means. In this case admittedly the defendant has no means. The practice has been to allow suit money even when the wife has separate means. See *Brown* v. *Ackroyd*, 5 E. & B. 818; *Robertson* v. *Robertson* L.R, 6 P.D. 119; *Ex parte Chase*, 6 Allen 398, and *Ottaway* v. *Hamilton*, 3 C.P.D. 393, referred to.

Application was also made that the defendant have leave to file an amended answer charging the plaintiff with adultery. The affidavit does not disclose anything beyond an expectation that she may be able to prove such a charge. In an ordinary suit the affidavit would be wholly insufficient to warrant the allowance of such an amendment. In England where in fact the party proceeding for a divorce has been guilty of adultery and it has not been set up as a defence, even after a decree nisi has been obtained, the Queen's proctor may intervene and have the case re-opened, and evidence taken, and if the adultery is proved the divorce is refused. There are no such provisions in this province, and the decree is final in the first instance.

The Court should, therefore, be astute and exercise great care as far as possible that a divorce is not improperly granted. In a suit for the dissolution of a marriage, public policy demands that the decree should only be made when the applicant comes before the court with clean hands and establishes the adultery of the defendant by proof beyond a reasonable doubt. If both parties have been delinquent the court renders no assistance to either party. I think, therefore, independently of the question of individual rights which must be subservient at times to the public good on grounds of public policy, the amendment should be allowed.

COUNTY COURT.

FORBES, J.
In Chambers.

[Nov. 27, 1896.

BAILEY *v.* ROSS.

Practice—Examination of debtor under 59 Vict. c. 28—Effect of former examination under Con. Stat. c. 38—Agreement to pay by instalments—59 Vict. c. 28, not retroactive.

This was a hearing on a summons taken out by a judgment creditor under 59 Vict. c. 28, with a view to having the defendant, a judgment debtor, committed to jail for a year, on the grounds t' ıt the defendant had since the judgment had the means of paying the debt, but had refused to do so.

A preliminary objection was taken, supported by affidavit, that on a similar summons taken out under Con. Stat. of N.B., c. 38, in that some time previously a new agreement had been made, founded on a consideration that the defendant would pay and the plaintiff would accept payment of the debt by instalments.

Held, that by making a new agreement, with consideration therefor, the plaintiff had waived his right under the statute, and was therefore precluded from proceeding further on present summons.

Held, also that the proceeding should have been pressed, if pressed at all, under the act under which first summons had been taken out.

J. D. Hazen, Q.C., for plaintiffs.

A. P. Barnhill, for defendants.

Province of Manitoba.

QUEEN'S BENCH.

TAYLOR, C.J.]

[Nov. 17.

THE QUEEN *v.* BEALE.

Criminal procedure—Quashing conviction—Jurisdiction of single judge—Full Court.

Held, that an application to quash a conviction under section 337 of the Criminal Code by way of certiorari, must be made to the Full Court and not to a single judge, as the practice introduced by the Queen's Bench Act, 1895, is expressly provided not to apply to criminal procedure, *Re Boucher*, 4 A. R. 191; *Reg.* v. *McAuley*, 4 O. R. 643, followed.

Held, also that such an application must be made by summons or rule nisi, and not by notice of motion.

Held, also that in the rule for the certiorari the grounds for moving must be specified: Paley on Convictions (6th ed.), 457.

Motion dismissed with costs.

Elliot, for applicant.

Wilson and *Baker*, for magistrates.

Full Court.] [Dec. 2, 1896.

MASSEY-HARRIS CO. *v.* MCLAREN.

Appeal from County Court—Jurisdiction—Amount in question.

The plaintiffs, who had sued in a County Court to recover the sum of $55.43, recovered a judgment for $39.10, the defendant having been allowed the difference between these two amounts in respect of a counter claim against the plaintiffs for a breach of warranty. Defendant, being dissatisfied with the amount allowed him, appealed to the Full Court, when the language of section 315 of the "County Courts Act," as amended by the statute of 1896, chapter 3, came up for construction. That section provides that such an appeal shall be to a single judge where "the amount in question does not exceed the sum of $50," and to the Court in banc when it does exceed that amount.

Held, that "the amount in question" does not necessarily mean the amount of the plaintiff's claim, but that the correct course is to look at the judgment as it affects the interest of the party who is prejudiced by it, and who seeks to relieve himself from it by an appeal, and that the defendant's appeal should have been to a single judge because the amount adjudged against him, and in respect of which he sought relief, was under $50.

Appeal struck out with costs.

Allan v. *Pratt*, 13 A. C. 780, and *Monette* v. *Lefebvre*, 16 S.C.R. 387, followed.

W. A. MacDonald, Q.C., for plaintiff.

A. D. Cameron, for defendant.

Province of British Columbia.

SUPREME COURT.

McCREIGHT, DRAKE & MCCOLL, JJ.] [Dec. 7, 1896.

MCGREGOR ET AL. *v.* CRANE.

Practice—Judgment in default of defence—Demand for statement of claim—Rules 73 and 182 (b.)

This was an appeal from an order of Walkem, J., setting aside judgment signed in default of defence on the ground that the writ was not specially endorsed. The endorsement on the writ claimed $2,000.51 money received by defendant for the use of plaintiffs. The defendant entered an appearance on which was a memorandum demanding a statement of claim, but did not serve such a demand as is provided by Rule 182 (b).

Held, (without going into the question as to whether or not the writ was specially endorsed) following *Mason* v. *Mason*, 4 B. C. R. 172 that no demand for a statement of claim having been served, the judgment was regularly signed.

Order varied by defendant being allowed to defend on giving within 30 days security in the sum of $1,000 and paying the costs of entering judgment, and in case he does not, plaintiff's judgment to be restored. Costs of the appeal to be costs in the cause.

Frank Higgins, for plaintiff.

Lindley Crease, for defendant.