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THE *Canadian Law Times* for June contains a criticism of the decision of Mr. Justice Killam in the case of *Stover* v. *Marchand*, noted in the current volume of THE LAW JOURNAL at page 325. The writer of that article seems to think that the decisions in the cases of *Jamieson* v. *Harker*, 18 U.C.R. 590, and *Dowsett* v. *Cox*, 18 U.C.R. 594, would apply, and, as the Crown patent for the land in question had not issued until 1887, the Statute of Limitations would not have begun to run against the plaintiff until that date. The cases, however, seem to be distinguishable, for in both the Ontario cases the plaintiffs relied upon their patents, and were very properly held to have acquired the rights of the Crown as existing at the dates of the patents, and such rights were, of course, free from any claims arising out of the possession of any other parties; but in *Stover* v. *Marchand* the patent was to the defendants, and the plaintiff did not derive title under it, but under mortgage from the defendants' ancestor. The plaintiff relied upon the recitals in the patent to show that the deceased was entitled to the land when he gave the mortgage, and, therefore, that the defendants were estopped from setting up title in themselves under the patent as against the mortgage, and from denying that the deceased was the owner of the property at the time of the mortgage. The patent recited that the deceased had made a claim to the land, and that his claim had been investigated by the Department, and that he had been found duly entitled to the land, and that the grantees (the defendants) were respectively the widow and children, and the patent was issued to them as such. It would seem, therefore, notwithstanding the Ontario cases cited, that Mr. Justice Killam's decision can be supported.

THE Manitoba School question is the subject of much interest throughout the Dominion at the present time. There is one minor feature of it which may be worth referring to. Section 93, subsection 3, of the British North America Act, and the similar provision incorporated in the Manitoba Act on which this case turns, constitute an exception to the general scheme of the constitution of the Dominion, which aims at giving the Provinces complete and untrammelled control over their local affairs. It is an attempt practically to make the people of the whole Dominion, as represented in the Federal Parliament, the arbiters n matters of education between the majority and minority of any Province, and a very clumsy attempt it is. The rough-and-ready plan of lumping Roman Catholics together on the one hand, and all Protestants on the other, may be a convenient mode of dividing Her Majesty's Canadian subjects, and if all Protestants were united in their views on the subject of education there might be some reason and justice in this classification, but it is notorious that they are not. "Equality is equity" is a good maxim, but under the section in question there is no equality and no equity; certain privileges of appeal are given to Roman Catholics if they happen to be in the minority and conceive themselves prejudiced; but the like privilege of appeal is not given to any other religious body that may be similarly affected and similarly aggrieved. The special favour shown to Roman Catholics by this enactment is manifest in the litigation which has taken place in reference to it. The members of the Church of England in Manitoba took the same ground as the Roman Catholics in opposing the School Act of 1890 (see *Logan* v. *City of Winnipeg*, 1892, A.C. 445), as interfering with their denominational schools; they failed, as did the Roman Catholics in *Barrett's* case, but *they* had no appeal to the Governor-General in Council for redress, such as is given by the Act to Roman Catholics. "Justice to all, favour to none," should be the principle of all our legislation, but it has been plainly violated in this enactment. The question naturally suggests itself, why should exceptional privileges be given to Roman Catholics, which are denied to other classes of Her Majesty's subjects in the Dominion? We fail to understand why, if it is right to give Roman Catholics the privilege of claiming remedial legislation, it should not also be given to members of the Church of England, or Presbyterians, or Methodists, or any other religious denomination.

GEMS OF LAW FROM INDIA'S CORAL STRAND.

"If a Brahmin voluntarily eats onions or garlic, the magistrate shall banish such Brahmin from the kingdom." A code of laws that is thus mindful of the purity of breath of the Four Hundred is one which is assuredly worthy of grave consideration when the Patron is to bring back the days of innocency again. The same code enacts that "if a man, having at first begun a trifling conversation with a woman, afterwards increases and prolongs such conversation, the magistrate shall fine him"; "if a man speaks reproachfully of his mother-in-law or father-in-law, the magistrate shall fine him"; "if a man speaks reproachfully of any country, as, 'That country is most particularly bad,' the magistrate shall fine him." And the fines inflicted for those offences were not liquidated by a few silver coins, but required "puns of cowries" to satisfy them.

It took eighty cowries to make a pun, and 3,840 of them to make a rupee, in Bengal, in the old days. Now, in Siam, 6,400 of these half-inch-long shells, white and straw-coloured without and blue within, are worth about one shilling and sixpence. Do not let us sneer at this currency. In 1644, taxes might be paid in New England in beef, pork, or grain, hides, tallow, or dry fish, whalebones, cattle, or boards; in one town, even in milk-pails. In Delaware, in 1679, there was a suit about a debt payable in "pompkins." In Pennsylvania, produce of all kinds was a legal tender, and, in Massachusetts, musket-balls were current at "a farthing apiece."

These Indian laws are contained in "A code of Gentoo laws, or ordinations of the Pundits, from a Persian translation, made from the original, written in the Sanscrit language." The translation, we are told by Warren Hastings, was made with great ability, diligence, and fidelity by Mr. Nathaniel Brassey Halhed, and was published in 1776. As we find among the compilers of this pootee such names as Ram Gopant Neeayalunkar and Sirree Keisub Terkalungar, and as they quote from such works as Dherum Ruttenteeka and Dayadhe-Karee-Kerm-Shungerah, one can have no reasonable doubt of the correctness of the law as given. What authority this code has in these days we leave to the decision of the practitioner in India. Meanwhile let us delve a little deeper among these curious laws and rules. First,

let us premise that the word Gentoo means mankind, and included, originally, not only those inhabitants of Hindustan who profess the Brahminical religion, but the whole of the natives of that land. Now, by English statutes, it seems to be used in contradistinction to the word Mohammedan, when speaking of the people of Bengal.

The laws regulating the division of inheritable property are laid down with the utmost precision. Our Act with respect to the devolution of estates is simplicity itself compared with these rules and regulations. What is to be done in cases of the most complex relations and distant degrees of affinity is dealt with by the legislator with as much dexterity as one of his native jugglers shows in keeping up half a dozen balls at once. We are told that, if a man dies, or renounces the world, or for any offence is expelled from his tribe, his relations and kindred, or is desirous to give up his property, all his possessions, be they land, or money, or effects, or cattle, or birds, go to his son; if there be several sons, they all shall receive equal shares; if the son be dead, it goes to the grandson's son. Failing a descendant, the wife takes; if no wife, then the daughter or her descendant; failing all these, we are informed, clearly and distinctly, who of the collaterals is to take, until we find that, "if there be no grandfather's grandfather's father's brother's grandson, the property goes to the grandfather's grandfather's grandfather's daughter's son; if there be but one grandfather's grandfather's grandfather's daughter's son, he shall obtain the whole; if there are several grandfather's grandfather's grandfather's daughter's sons, they shall all receive equal shares." (What a comfort it must have been to a dying man to know all was so clearly settled! The lawyers in Charles' day who prepared the Statute of Distributions were short-sighted when placed beside the learned Pundits of Bengal.) But, alas! there might be no relation or connection at all; then the property of a layman went to the magistrate, while that of a Brahmin went to him who had taught the deceased the necessary incantations; if no teacher, then to the dead man's pupil; failing pupil, then to fellow-student with whom the deceased learned the scriptures; if there was none such, then to the learned Brahmin of the village.

These last provisions remind us that Maine shows that similar literary rights existed in the early days in Ireland. The old

Brehon schoolmaster was a literary foster-father to his pupil, whom he taught gratuitously; but having thus taught him gratuitously, the law—Irish-like—gave him a claim upon the student's property through life (Early History of Institutions, p. 242).

The chapter on "Assault" shows that the lawyers were most decidedly respecters of persons, and that they took cognizance of preparations to do as well as the deeds themselves. The penalty for an assault, by a man of superior caste and of superior abilities, upon another varies greatly from that inflicted for an exactly similar assault by a man of equal caste and of equal abilities, or by one of an inferior caste and of inferior abilities, or by one of an inferior caste and of superior abilities, or of equal caste with superior abilities, or of superior caste and equal abilities. In such cases the man of the superior caste got off with the lightest penalty. It was quite the contrary in Scotland, when Mary Stuart was Queen, and her parliament was trying to repress the using "of abominable oaths and detestable execrations"; there the baron was fined twelvepence —the craftsman or servant only one penny. (1 Feb., 1551.) The pundits discriminated between assaults below the waistband, and assaults between that and the neck, and those above the neck. Little was left to the discretion of the magistrate as to the fine to be imposed; almost every imaginable contingency is provided for; for instance, if two persons, being of equal caste, are mutually prepared to strike each other with their fists, the magistrate shall fine each of them ten puns of cowries; if they strike each other, the fine is to be twenty puns. But, if two persons of equal caste are mutually prepared to kick each other, the magistrate shall fine each of them twenty puns of cowries; if they do kick, he shall fine each forty puns. It was deemed an assault for a man of an inferior caste proudly to affect an equality with a man of superior caste and travel by his side on the road, or sit or sleep upon the same carpet with him. The magistrates were respected in those days, for if a criminal, on his crime being discovered, should beat or ill-use the justice, the offender was thrust through with an iron spit and roasted at the fire. These provisions as to assault are akin to those in force in Siam. We read in the Kathu Phra Aijakan, "A man who strikes another with a blank book shall be fined as though he struck him with his hand; but if the assault is committed with a book of the classics, the offender shall be

fined twice as much as he would have to pay for assaulting with a stick." (Encyclopædia Britannica, vol. xxi., Siam.)

As a rule, the Gentoo owner of an animal that trespassed upon another's land, and destroyed the crops thereon, had to compensate the owner thereof and was also liable to a fine. The amount of the fine varied according to the nature of the trespassing animal--that for a cow was more than that for a sheep or goat, that for a camel (that 'umpy, lumpy, 'umming bird, which is a devil an' a ostrich an' a orphan-child in one, as Rudyard Kipling says) far more than that for a cow, and that for a horse or buffalo more still. If the owner had a keeper employed to watch the animals, then the latter and not the owner had to pay the penalties. If a magistrate's horse or elephant should eat the crop, nothing was said about it. Nor was the owner or keeper amenable if the cow or other animal was blind or lame; nor if a cow, being frightened at seeing an army, or by a thunderstorm, or any other accident, should run away and eat up another's crop; and if a weasel, or a mouse, or a rat, or a mule, should eat the crop of any person, the owner or keeper of these animals was not liable. It was mercifully provided that if, while a keeper, or the owner himself, was tending kine, buffaloes, or such kind of animals, he was stricken by lightning, or bitten by a serpent, or fell down from a tree, or was carried off by a tiger, and then the cattle, or other animals, should escape and eat the crop on any person's ground, neither the keeper (nor the owner) was amenable.

The readers of the laws of Howel the Good will remember with what particularity he provides for the payment for damage to the crops of another; even the owner of a cat caught mousing in a flax garden had to pay for its injuries.

Apropos of serpents, it was the law that if a man, by violence, threw into another person's house a snake, or any other animal of that kind, whose bite or sting is mortal, the magistrate should fine him five hundred puns of cowries, and make him throw away the snake with his own hand. India in those old days was not the home of sportsmen, for if one killed a goat the magistrate cut off one of his hands and one of his feet; if a man killed a fish he was fined ten puns of cowries; if he knocked a mosquito off his nose, and, in so doing, killed it, he could be cited before the magistrate and fined eighty cowries; if, to prevent a

friend being carried off by a tiger, he slew the beast, the magistrate claimed three puns of cowries; should he even destroy a serpent, or a cat, or a weasel, if it were not one of the most prized, the magistrate could fine him three puns of cowries; if it were of the best species, the fine was twelve puns. (By the way, among the ancient Welsh a common cat was worth four legal pence; but the value of a cat that guarded the king's barn was thus ascertained: its head was put downwards on a clean, even floor, with its tail lifted upwards, and thus suspended whilst wheat was poured about it, and that was its worth; if the corn could not be had, a milch sheep, with her lamb and its wool, was the value. (Dim. Code, B. II., c. 31.) Fortunately, a professional butcher was not amenable to such fines.

Space will not permit us to comment upon the Gentoo laws anent women, except on two points. If a wife committed a fault she might be scourged with a lash, or with a bamboo twig, upon any part of her body where no dangerous hurt is likely to happen; but if the husband scourged her beyond such limitations he had to suffer the punishment of a thief. (The laws of France, England, and Wales permitted such correction in the good old times. Legouvé, p. 138. The Lawes Resolutions of Women's Rights, 1632: Anon. Welsh Laws, Bk.V., ch. 2.) If a man hauled a woman by the hair, the magistrate could fine him twenty puns of cowries. In the United States, not long since, a woman got a divorce because her husband cut off her bangs by force; and, *per contra*, a man got a divorce because his wife pulled him out of bed by the whiskers. (Wright's Report, pp. 175, 177.)

Theft of animals was severely punished; a thief who took an elephant, or a horse, excellent in all respects, was liable to have cut off his hand, his foot, his buttock, and be deprived of life. If the elephant or horse was of small account, only one foot and one hand of the transgressor went.

The medical profession was regulated by this enactment: "If a physician, unskilled in the art of physic, causes any one to take a medicine, or, skilled in his profession, he gives not to a sick man the remedy proper for his disorder, in that case, if he hath administered his physic to a man of a superior caste, the magistrate shall fine him one thousand puns of cowries; if he hath given it to a man of an inferior caste, he shall fine him five hundred puns of cowries."

The study of sacred literature by men of the lowest class was checked by these two laws: If a man of the Sooder (lowest order) reads the Beids of the Shaster (the most sacred of their scriptures), or the Pooran (the historical scriptures), to a Brahmin, a Chehteree, or a Bice, then the magistrate shall heat some bitter oil and pour it into the aforesaid Sooder's mouth; and if a Sooder listens to the Beids of the Shaster, then the oil, heated as before, shall be poured into his ears, and tin and wax shall be melted together, and the orifice of his ears shall be stopped up therewith. If a Sooder gets by heart the Beids of the Shaster, the magistrate shall put him to death. According to the laws of Menu, the forgetting the texts of the scripture by one entitled to learn them was a crime nearly equal to that of drinking spirits; and drinking spirits was a crime of the highest degree, like killing a Brahmin. (Sir Wm. Jones, Vol. III., c. 11, ss. 55, 57.)

R. V. ROGERS.

CURRENT ENGLISH CASES.

The Law Reports for June comprise (1895) 1 Q.B., pp. 769-948; (1895) P., pp. 177-219; (1895) 2 Ch., pp. 1-135; and (1895) A.C., pp. 117-327.

CRIMINAL LAW—PERJURY—MATERIAL STATEMENT—EVIDENCE AFFECTING CREDIT OF WITNESS.

In *The Queen* v. *Baker*, (1895) 1 Q.B. 797; 15 R. May 380, the question for the decision of the court for Crown cases reserved was whether a person indicted for perjury could be convicted on proof of false statements made by him as a witness in a cause as to matters merely affecting his credit, and the question was unanimously answered in the affirmative by the court (Lord Russell, C.J., and Hawkins, Cave, Grantham, and Lawrance, JJ.). In this case the defendant had been charged with selling liquor without a license, and he had falsely sworn that when previously charged with a similar offence he had not authorized a plea of guilty to be put in, and that such plea had been put in without his authority and against his will.

LANDLOR AND TENANT—SUB-LEASE—IMPLIED COVENANT FOR QUIET ENJOYMENT—DURATION OF COVENANT.

In *Baynes* v. *Lloyd*, (1895) 1 Q.B. 820; 15 R. June 233, an interesting point in the law of landlord and tenant is discussed,

The defendants, being entitled to an unexpired lease of eight and one-half years, by a sub-lease, which did not contain the word "demise," let the premises to the plaintiff for the term of ten and one-half years, acting under mistake and in good faith. The sub-lease contained no express covenants for title or quiet enjoyment; at the expiration of eight and a half years the plaintiffs were evicted by the defendants' landlord, and the plaintiffs then brought the present action for breach of an implied covenant for title and for quiet enjoyment. Lord Russell, C.J., held that, in the absence of the word "demise" in the sub-lease, there was no implied covenant for title as distinguished from a covenant for quiet enjoyment; and that, although there was an implied covenant for quiet enjoyment, yet that such covenant only inured during the continuance of the interest which the defendant actually had in the premises, namely, the eight and a half years, and, therefore, that the plaintiff's action failed.

CONTRACT—BREACH OF CONTRACT—DAMAGES—REMOTENESS.

In *Mowbray* v. *Merryweather*, (1895) 1 Q.B. 857, the plaintiffs were a firm of stevedores who contracted to unload a vessel, the defendant agreeing to supply all necessary tackle. The defendant supplied a defective chain, which occasioned an injury to one of the plaintiffs' servants; the plaintiffs, with reasonable care, might have discovered the defect. The servant sued the plaintiffs under the Employers' Liability Act (see 55 Vict., c. 30 (O.)), and the plaintiffs settled his claim by paying him £125, which they now sought to recover against the defendant. Charles, J., held that the plaintiffs were entitled to succeed, and that the damages were not too remote. He distinguished the case from *Kiddle* v. *Lovett*, 16 Q.B.D. 605, because in that case the plaintiffs had voluntarily settled the claim of the workman for which they were not legally liable.

RAILWAY—PASSENGER—TICKET, CONDITION ON—FORFEITURE OF TICKET.

Great Northern Railway Co. v. *Palmer*, (1895) 1 Q.B. 862; 15 R. April 348, was a lawsuit about one shilling, and is an instance of the way in which great railway corporations will litigate what, to the ordinary man, appears to be the most trivial question. The "great principle" at stake was whether a passenger who purchases a cheap excursion ticket between two named points,

subject to a condition that it is forfeitable and the full fare chargeable if used for any other station, is, nevertheless, entitled to use it up to the point named, and then continue his journey to a point beyond, paying only the ordinary fare in addition for such extra distance. The defendant did not appear, and the court (Wills and Wright, JJ.) decided the point against her, at the same time expressing considerable doubt whether the condition, which was in small print on the back of the ticket, and referred to by the words, "See back," which were inconspicuously printed on the face of the ticket, was sufficiently brought to the defendant's notice; but the point not being open, they were unable to decide it.

DEFAMATION—LIBEL—PRIVILEGED OCCASION.

Andrews v. *Nott*, (1895) 1 Q.B. 888; 15 R. June 154, was an action for libel, brought by the plaintiffs against the defendant, the head constable of a town. The libel complained of consisted of certain statements made in a certain report which he was required by the bench of magistrates to make concerning applicants for tavern licenses. The plaintiffs had carried on a tavern, and were applicants for a renewal of their license and the defendant had in his report stated that his objections to their license being renewed were that they permitted improper behaviour between their barmaids and men frequenting the house, and that the plaintiffs were not fit and proper persons to hold a license. The action was tried by Lawrance, J., who held that the publications of the libel complained of were privileged, and, as no actual malice was proved, the action would not lie. And this decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.).

PRACTICE—COSTS—TORT, OR CONTRACT—ACTION FOR PERSONAL INJURY TO RAILWAY PASSENGER.

In *Kelly* v. *Metropolitan Ry. Co.*, (1895) 1 Q.B. 944; 14 R. June 167, the question which was under consideration in *Taylor* v. *Manchester & Sheffield Ry.*, (1895) 1 Q.B. 134 (noted *ante* p. 161), was again before the court. The action was brought by the plaintiff, a passenger on the defendants' railway, to recover damages for a personal injury sustained through the negligence of the defendants' servants. It was considered by Day, J., that, in

the former case, the Court of Appeal had laid down the rule that, where the negligence of the servant causing the injury was one of omission, the action was founded on contract, and that it was only in case of misfeasance that it could be regarded as founded on tort; but the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) repudiated this interpretation of their former decision, and held that in such actions, where the negligence complained of constitutes a breach of duty, it is immaterial whether that negligence arise from either omission or commission, the action is, in both cases, founded in tort. Smith, L.J., thus explains the distinction between the effect of nonfeasance and misfeasance in such actions: "If the cause of complaint be for an act of omission or nonfeasance, *which, without proof of a contract to do what has been left undone, would not give rise to any cause of action* (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendant be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort."

PROBATE—WILL—CODICILS—IMPLIED REVOCATION—SUBSTITUTED OR CUMULATIVE LEGACIES.

Chichester v. *Quatrefages*, (1895) P. 186; 11 R. May 83, is the only case in the Probate Division which seems to call for notice here. The plaintiffs, who were the executors named in the will of E. J. Eyre, claimed probate of the will, and the second codicil thereto, and the exclusion from probate of the first codicil, contending that the second was intended in substitution for the first. The first codicil was made in the lifetime of the testator's wife, and by it he made a provision for her, gave directions for his burial and monument, and bequeathed pecuniary and specific legacies. After his wife's death, the testator took a draft of the first codicil, and altered it in order to make the second codicil. The second codicil referred to the will, but not to the first codicil of which it was a repetition, except that it contained dispositions consequent on the death of the testator's wife, and one legacy was increased after this codicil had been engrossed. There was no external evidence of the testator's intention as to the two codicils. The fact that certain specific gifts of chattels made by the first codicil were repeated in the second afforded,

however, a clear indication that the testator intended the second codicil to be a substitute for the first, and Jeune, P.P.D., so held, and granted probate of the will and second codicil only, as prayed.

COMPANY—RECEIVER AND MANAGER, RIGHT OF, TO INDEMNITY—DEBENTURE-HOLDERS—MONEY ADVANCED BY CREDITORS OF COMPANY TO COMPLETE CONTRACTS—PRIORITY.

In *Strapp* v. *Bull*, (1895) 2 Ch. 1, a joint stock company had been directed to be wound up. Certain contracts entered into by the company were then uncompleted, and by an arrangement agreed to between the debenture-holders and unsecured creditors of the company, which was embodied in a consent order made in the winding up, certain moneys were advanced by some of the debenture-holders and unsecured creditors to enable the outstanding contracts of the company to be completed, and receivers and managers were appointed to carry out the contracts. It was agreed that these advances were to be a first charge on the assets of the company in priority to the debentures, and that the unsecured creditors who made the advances were to become second debenture-holders. The contracts were carried out, but in completing them the receivers and managers expended considerable further sums over and above the moneys advanced, and in respect of which they claimed to be indemnified out of the assets of the company in priority to the advances made by the debenture-holders and creditors, and also in priority to the debentures. Williams, J., refused to give them this relief, but the Court of Appeal (Lord Halsbury, and Lindley and Smith, L.JJ.) held that they were entitled to it.

PRACTICE—SERVICE OUT OF JURISDICTION—ORDER FOR ADMINISTRATION—ORD. XVI., R. 40 (ONT. RULE 322)—ORD., JANUARY 10, 1894 (ONT. RULE 1309).

In re Cliff, Edwards v. *Brown*, (1895) 1 Ch. 21; 13 R. May 215, serves to show that it is not in this Province only that the Rules of Court are sometimes improvidently passed. The English Rules of 1883, providing for service out of the jurisdiction, only applied to writs of summons. In November, 1893, they were amended so as to authorize service of an originating summons, and an administration judgment or order out of the jurisdiction, but in January, 1894, these amendments were ill-advisedly annulled, and, as this case shows, the power to serve an admin-

istration order on a party interested who is out of the jurisdiction, under Ord. xv., r. 40 (Ont. Rule 322), was thereby withdrawn. It would seem that Ont. Rule 1309, which follows in the same line as the English Rule of 1894, is open to the same objection, and appears to need an amendment of subsection 7 so as to include therein judgments and orders among the proceedings authorized to be served out of the jurisdiction. Although it is held that there is no power to allow service of an administration order on a person out of the jurisdiction, yet the Court of Appeal (Lindley and Smith, L.JJ.) lay it down that the person having the carriage of the proceedings may notify the absent party by letter of the proceedings, and, if he does not choose to intervene, the court will proceed to administer and distribute the fund in his absence.

COPYRIGHT—PERIODICAL—NAMES OF PROBABLE WINNING HORSES - INFRINGEMENT OF COPYRIGHT.

The case of *Chilton* v. *Progress Co.*, (1895) 2 Ch. 29, was an action to restrain an alleged infringement of copyright. The plaintiff, who published a weekly periodical, under the title of "One Horse Selections," printed in this periodical a list of the horses he expected to win at races in the ensuing week. The defendants published each day at race meetings a sheet or card giving, under the title of "The Specials, One Horse Finals," a list of horses which the plaintiff and other sporting authorities had published as likely to win on that particular day, with the names of those who had selected them. The Court of Appeal agreed with Kekewich, J., that the plaintiff's announcement of the names of probable winning horses was not in the nature of a literary composition which could be protected under the Copyright Acts, and that the defendants had not infringed the copyright in the plaintiff's periodical. The law of copyright is being gradually elucidated, and it is satisfactory to know that as a tailors' scale for cutting out garments is not a literary composition, so neither is the name of a horse, even though it indicate the vaticination of some knowing turf prophet.

Correspondence.

AMENDMENTS IN PROCEDURE.

To the Editor of THE CANADA LAW JOURNAL :

SIR,—I have read, with a good deal of interest, the communication of Mr. McClive, in your journal of June 15, as to recent changes in practice in the direction of lessening law costs, and suggesting other changes having the same object in view.

Whilst I do not quite agree with all of Mr. McClive's suggestions, yet there are some well worthy of consideration, especially those referring to production of documents and the proceedings now necessary to obtain production, and the filing and service of affidavits on production, etc. The present practice of taking out an order, and service of same, and of notice of filing, should be abolished; and so also of notice of filing affidavits in all matters and proceedings in practice where motions are heard and disposed of upon affidavits. A very large reduction in costs could be effected by a change in these particulars.

I do not agree with Mr. McClive's suggestion to a return to the former practice of revision of bills of costs at Toronto in defended actions. If a party to any such action desire a revision, then it would be quite proper to allow it. There should be no unnecessary step or proceeding required in the practice, and every step taken to simplify it and reduce needless expense in the prosecution and defence of actions should be welcomed by the profession as well as by litigants.

Yours, etc.,

Sarnia, June 29. JOSHUA ADAMS.

Reviews and Notices of Books.

Minutes of the Simcoe District Municipal Council, 1843 to 1847. Barrie: S. Wesley. 1895.

The efforts of His Honour Judge Ardagh to collect and so preserve for future reference much interesting information connected with matters magisterial and municipal in his county will, we hope, incite others to follow his example.

The unpretending volume before us consists of over 400 pages, which contain, in addition to the "Minutes of the Simcoe

District Municipal Council from 1843 to 1847," a number of appendices which disclose much of interest to those interested in the early settlement of this Province.

District Councils throughout the Province were established in 1842. The Home District Council for that year was composed, in part, of representatives from the County of Simcoe, which at that time formed part of that district. In the following year (1843), the County of Simcoe was set apart as a district, and thenceforth had its own municipal council at Barrie.

The wardens were from 1842 to 1846 appointed by the Crown, and the first warden for the Simcoe district was Captain Jacob Æmilius Irving, formerly of the 13th Light Dragoons, and father of the present Treasurer of the Law Society. The first judge of the District Court was James Robert Gowan (now Senator Gowan), who had been practising law in Toronto in partnership with Hon. James Small, afterwards district judge at London.

Previous to the year 1842 the Chairman of the Quarter Sessions and of the Board of Magistrates for the district either personally, or in conjunction with the rest of the justices of the peace as a board, performed many of the functions subsequently delegated to the District Judge and the District Council. To this position, in 1831, was appointed a retired army officer, Colonel O'Brien, whose eldest son, under the same title, still lives in the old homestead built at Shanty Bay, which, by the way, was laid out as a village before Barrie, the present county town, was thought of.

In those days justice was necessarily of a rough-and-ready sort, but not unsuited to the circumstances of those primitive times, and not without their amusing incidents. For example, in the midst of a solemn trial of a prisoner for some criminal offence at the Chairman's house, it was rumoured that one of his hounds had treed a bear. The court adjourned, loaded its rifle, and, assisted by prosecutor, prisoner, and witnesses, shot and skinned the bear, and then resumed the trial. We cannot record the verdict, but it may be imagined that, if found guilty, the prisoner was let off more easily than was bruin.

The volume before us in its "Preliminary" gives an item of intelligence which is also illustrative of the times, showing an impecuniosity which some of our present municipalities will arrive at if councils are not a little less reckless. The then treasurer, Samuel Richardson, in concluding a letter to Mr. Billings, treasurer for the Home District, written on December 16, 1842, uses these words: "Want of public and private funds prevents me paying the postage at present." But it must be remembered that the postage at that time, on an ordinary letter, between Toronto and Barrie, was 4½d., and 11d. to Kingston.

DIARY FOR JULY.

1. Monday.....Dominion Day. Long vacation begins.
2. Tuesday .....County Court and Surrogate Sittings, except in York. Heir and Devisee Sittings begin.
3. Wednesday....Quebec founded, 1604.
5. Friday.....Battle of Chippewa, 1814.
6. Saturday.....Duke of York married, 1893.
7. Sunday.....*4th Sunday after Trinity.* Col. Simcoe, Lieut.-Gov. of Ontario, 1792.
9. Tuesday .....Importation of slaves into Canada prohibited, 1793.
10. Wednesday....Christopher Columbus born, 1447.
11. Thursday .....Battle of Black Rock, 1812.
12. Friday.....Battle of The Boyne, 1690.
13. Saturday.....Sir John B. Robinson, 7th C.J. of Q.B., 1829.
14. Sunday.....*5th Sunday after Trinity.*
15. Monday.....Manitoba entered Confederation, 1870.
19. Friday.....Quebec capitulates to the British, 1629.
20. Saturday.....British Columbia entered Confederation, 1871.
21. Sunday.....*6th Sunday after Trinity.*
22. Monday.....W. H. Draper, 9th C.J. of Q.B., 1863; W. B. Richards, 3rd C.J. of C.P., 1863.
23. Tuesday .....Union of Upper and Lower Canada, 1840.
24. Wednesday....Battle of Lundy's Lane, 1814.
25. Thursday .....St. James. Canada discovered by Cartier, 1534.
28. Sunday.....*7th Sunday after Trinity.*
29. Monday.....Wm. Osgoode, 1st C.J. of Q.B., 1792. First Atlantic cable laid, 1866.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [March 11.

TOWNSHIP OF OSGOODE *v.* YORK

Municipal law—Ditches and Watercourses Act, R.S.O. (1887), c. 220—Owner of land—Meaning of term owner.

By s. 6 (*a*) of the Ditches and Watercourses Act, R.S.O. (1887), c. 220, any owner of land to be benefited thereby may file a requisition with the clerk of a municipality for a drain, provided he has obtained "the assent in writing thereto of (including himself) a majority of the owners affected or interested." C., who was in occupation of land by permission of his father, who had the legal title therein, filed a requisition for a drain through said land and a number of other lots, among them being lots of which Y. was assessed as owner. Before the proceedings were begun by C., however, Y. had conveyed portions of his land to his two sons. Permission for the drain having been granted, and an award having been made by an engineer and confirmed by the judge, Y. and his sons brought an action to have the construction of the drain prohibited on the ground that the assent of the majority of owners had not been obtained. It was admitted that if C. was an owner under the Act, and the sons of Y. were not, there was a majority.

Held, affirming the decision of the Court of Appeal (21 Ont. App. R. 168), which had reversed the judgment of the Divisional Court (24 O.R. 12), that the assessment roll was not the test of ownership under the statute; that an owner therein meant the holder of a real and substantial interest; that C., a mere tenant at will, was not an owner; and that the two sons of Y. were, having the title in fee of a part of the land affected or interested.

Quære: C., who filed the requisition, not being an owner, would the proceedings have been valid if there had been a sufficient majority without him, or must the person instituting the proceedings be, in all cases, an owner under the statute?

Appeal dismissed with costs.

Henderson and *MacCracken* for the appellants.

O'Gara, Q.C., and *MacTavish*, Q.C., for the respondents.

Ontario.] [March 11.

MICHIGAN CENTRAL R.W. CO. *v.* WEALLEANS.

Railway company—Lease of road to foreign company—Statutory authority.

In 1882 the Canada Southern Railway Company, by written agreement, leased a portion of its road to the Michigan Central for a term of twenty-one years. While the latter company was using the road sparks from an engine set fire to and destroyed property of W., who brought an action against the two companies for the value of the property so destroyed. An insurance company who had paid the amount of a policy held by W. on the property so destroyed was joined as a plaintiff. At the trial plaintiffs were nonsuited in favour of both defendants, it being admitted that the fire was not caused by negligence, and the Divisional Court sustained such nonsuit, holding also that the insurance company had no *locus standi*. On further appeal the Court of Appeal dismissed an appeal by the insurance company, and by the plaintiff as against the Canada Southern Railway Company, but allowed the plaintiff's appeal as against the Michigan Central, holding that the Canada Southern Railway Company had statutory authority to make traffic arrangements only with a foreign company, and could not give the latter running powers over its road. The Michigan Central then appealed to the Supreme Court.

Held, reversing the decision of the Court of Appeal (21 Ont. App. R. 297), that under 35 Vict., c. 48, s. 9 (An Act relating to the Canada Southern Railway Company), and s. 60 of the Railway Act of 1879, the Canada Southern Railway Company could lawfully lease its road to a foreign company, and the injury to W.'s property having occurred without any negligence on the part of the officers or servants of the Michigan Central, which was lawfully in possession of the road of the Canada Southern Railway Company under said agreement, the Michigan Central was not liable for such injury.

Appeal allowed with costs.

Saunders for the appellants.

Moss, Q.C., for the respondent.

Ontario.] [March 11.

TOOTH *v.* KITTREDGE.

Statute of Limitations—Partnership dealings — Laches and acquiescence—Interest in partnership lands.

A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands, the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands, and to take an account of the dealings between J. and K. In the Master's office K. claimed that in the course of the partnership business he signed notes which J. endorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a large sum to be due him from J. for such overcharge. The Master held that as these transactions had taken place nearly twenty years before, K. was precluded by the Statute of Limitations and by laches and acquiescence from setting up such a claim. His report was overruled by the Divisional Court and Court of Appeal on the ground that the matter being one between partners, and the partnership affairs never having been formally wound up, the statute did not apply.

Held, reversing the decision of the Court of Appeal, and restoring the Master's report, that K.'s claim could not be entertained; that there was, if not absolute evidence, at least a presumption of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners considering their relationship and the apparent concert between them.

Appeal allowed with costs.

Gibbons, Q.C., for the appellant.

Fraser for the respondent.

Ontario.] [March 11.

TOWN OF CORNWALL *v.* DEROCHE.

Municipal corporation—Negligence—Repair of street—Accumulation of ice—Defective sidewalk.

D. brought an action for damages against the corporation of the town of C. for injuries sustained by falling on a sidewalk where ice had formed, and been allowed to remain for a length of time.

Held, GWYNNE, J., dissenting, that as the evidence at the trial of the action showed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it, whereby the ice causing the accident was formed, the corporation was liable.

Held, per TASCHEREAU, J.: Allowing the ice to form and remain on the street was a breach of the statutory duty to keep the streets in repair, for which the corporation was liable.

21 Ont. App. R. 279, and 23 O. R. 355, affirmed.

Appeal dismissed with costs.

McCarthy, Q.C., and *Leitch*, Q.C., for the appellants.

Moss, Q.C., for the respondent.

Ontario.] [March 11.

HEADFORD *v.* MCCLARY MNFG. CO.

Negligence—Workman in factory—Evidence—Questions of fact—Interference with on appeal.

W., a workman in a factory, to get to the room where he worked, had to pass through a narrow passage, and at a certain point to turn to the left, while the passage was continued in a straight line to an elevator. In going to his work at an early hour one morning, he inadvertently walked straight along the passage and fell into the well of the elevator, which was undergoing repairs. Workmen engaged in making such repairs were present at the time, with one o whom W. collided at the opening, but a bar that was usually placed across tne front of the shaft was down. In an action against his employers in consequence of such accident,

Held, affirming the decision of the Court of Appeal (21 Ont. App. R. 164), and of the Divisional Court (23 O.R. 335), STRONG, C.J., *hesitante*, that there was no evidence of negligence of the defendants to which the accident could be attributed, and W. was properly nonsuited at the trial.

Held, per STRONG, C.J., that, though the case might properly have been left to the jury, as the judgment of nonsuit was affirmed by two courts, it should not be interfered with.

Appeal dismissed with costs.

Gibbons, Q.C., for the appellant.

Jesbitt and *Grier* for the respondent.

Nova Scotia.] [Jan. 15.

WRAYTON *v.* NAYLOR.

Sale of land—Sale by auction—Agreement as to title—Breach of—Determination of contract.

W. bought property at auction, signing on purchase a memorandum, by which he agreed to pay 10 per cent. of the price down, and the balance on delivery of the deed. The auctioneer's receipt for the 10 per cent. so paid stated that the sale was on the understanding that a good title in fee simple, clear of all incumbrances up to the first of the ensuing month, was to be given to W. After the date so specified W., not having been tendered a deed which he would accept, caused the vendor to be notified that he considered the sale off, and demanded repayment of his deposit, in reply to which the vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that W. was aware that there was a mortgage on it, and had made arrangements to assume it; that a deed of the equity of redemption had been tendered to W., and that he was required to complete his purchase. In an action against the vendor and auctioneer for recovery of the amount deposited by W.,

Held, reversing the decision of the Supreme Court of Nova Scotia (26 N.S. Rep. 472), that the vendor had repudiated the agreement evidenced by the memo. signed by W. and the said receipt, and that W., being entitled to a

title in fee clear of incumbrances, was not bound to accept the equity of redemption, but could consider the contract determined and recover his deposit.

Appeal allowed with costs.

Harris, Q.C., for the appellant.

Borden, Q.C., for the respondents.

Nova Scotia.] [March 11.

MURDOCH *v.* WEST.

Contract—Specific performance—Agreement to perform services—Relationship of parties.

M., on his father's death at the age of three years, went to live with his grandfather W., who sent him to school until he was sixteen years old, and then took him into his store, where he continued as the sole clerk for eight or nine years, when W. died, and M. died a few days later. Both having died intestate, the administratrix of M.'s estate brought an action against the representatives of W. for the value of such services rendered by M., and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he (W.) died without having made a will M. would have good wages, and, if he made a will, he would leave the business and some other property to M.

Held, reversing the decision of the Supreme Court of Nova Scotia (25 N.S Rep. 172), GWYNNE, J., dissenting, that there was sufficient evidence of an agreement between M. and W. that the services of the latter were not to be gratuitous, but were to be remunerated by payment of wages, or a gift by will, to overcome the presumption to the contrary arising from the fact that W. stood *in loco parentis* towards M. There having been no gift by will, the estate of W. was, therefore, liable for the value of the services as estimated by the jury. *McGugan* v. *Smith* (21 Can. S.C.R. 263) followed.

Appeal allowed with costs.

Ross, Q.C., for the appellant.

Borden, Q.C., for the respondent.

ONTARIO.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Q.B. Div.] [June 25.

KEACHIE *v.* CITY OF TORONTO.

Municipal corporations—Damages—Ways.

A municipal corporation is not responsible in damages to a person who is injured in endeavouring to cross in daylight a plainly visible shallow trench, properly and necessarily in the street at the time, the person injured being,

moreover, familiar with the locality, and knowing that there is close at hand a safe passageway across the trench.

Judgment of the Queen's Bench Division reversed.

J. B. Clarke, Q.C., for the appellants.

W. R. Riddell for the respondent.

W. Nesbitt and *J. Tytler* for the third party.

Q.B. Div.] [June 25.

CANADA LANDED NATIONAL INVESTMENT CO. *v.* SHAVER.

Mortgage—Covenant—Purchaser of equity of redemption.

The purchaser of land subject to a mortgage does not *ipso facto* become personally liable to the mortgagee for the amount of the mortgage. In other words, the burden of a covenant to pay mortgage moneys does not run with the mortgaged lands.

Judgment of the Queen's Bench Division affirmed.

McCarthy, Q.C., and *A. Hoskin*, Q.C., for the appellants.

Moss, Q.C., and *F. E. Titus* for the respondent.

Q.B. Div.] [June 25.

EASTMURE *v.* CANADA ACCIDENT INSURANCE CO.

Master and servant—Rival employer—Clashing of interests—Dismissa..

To act as agent for a rival insurance company is a breach of an insurance agent's agreement "to fulfil conscientiously all the duties assigned to him and to act constantly for the best interests of (his employer)," and is sufficient justification for his dismissal.

Judgment of the Queen's Bench Division affirmed.

Osler, Q.C., for the appellants.

Cassels, Q.C., and *Bruce*, Q.C., for the respondents.

Chy. Div.] [June 25.

CHURCH *v.* CITY OF OTTAWA.

Damages—Inadequacy of—Negligence—New trial.

This was an appeal by the defendants from the judgment of the Chancery Division, reported 25 O.R. 298, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 31st of May, 1895.

Aylesworth, Q.C., for the appellants.

W. R. Riddell and *H. E. Rose* for the plaintiff.

G. E. Kidd for the third party.

June 25th, 1895. The appeal was dismissed with costs, the court, in view of the fact that a new trial had been ordered, not giving any reasons for judgment.

Chy. Div.] [June 25.

ADAMSON *v.* ROGERS.

Covenant—Lease—Improvements—"Buildings and erections"—Earth-filling

A covenant by the lessor in a lease of a parcel of land covered by water, to pay at the end of the term for "the buildings and erections that shall or may then be on the demised premises," does not bind him to pay for crib-work and filling-in done upon the parcel in question, by which it was raised to the level of the adjoining dry land, and made available as a site for warehouses.

Judgment of the Chancery Division reversed.

Robinson, Q.C., and *J. H. Macdonald*, Q.C., for the appellant.

Laidlaw, Q.C., for the respondent.

C.P. Div.] [June 25.

IN RE MCILMURRAY AND JENKINS.

Plans and surveys—Amendment of plan—Ways—Closing street—"Party concerned"—52 Vict., c. 20, s. 7 (O.).

All persons who buy lots according to a registered plan do not, *ipso facto*, become "parties concerned" within the meaning of section 7 of the Land Titles Act, 52 Vict., c. 20 (O.), in every street shown upon it. Whether they are "concerned" or not in having a particular street kept open is a question of fact, and, in the absence of any representation by the vendor that the street shall be kept open, a person owning a lot about four hundred yards away, and on the other side of a highway from the street in question, cannot object to its being closed.

Judgment of the Common Pleas Division affirmed.

J. Bicknell for the appellants.

R. U. McPherson and *A. G. Murray* for the respondents.

C.P. Div.] [June 25.

IN RE CORNELIUS F. MURPHY.

Extradition—False document—Forgery—Evidence.

The prisoner's brother opened a bank account in an assumed name, and made cheques from time to time thereon. Several of these cheques were paid, but the last one the prisoner cashed at his own bank, knowing that there were no funds to meet it.

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., that there was evidence from which it might reasonably be inferred that the opening of the account in the assumed name was part of a conspiracy between the prisoner and his brother to defraud, and that there was, therefore, the fraudulent uttering of a false document, which would constitute forgery.

Per BURTON and OSLER, JJ.A., that, as the account was a genuine one, and there was no false representation as to the maker of the cheque, the offence of forgery was not made out.

Held, also, *per* HAGARTY, C.J.O., and MACLENNAN, J.A., that it is not necessary to show in extradition proceedings that the prisoner is liable to conviction of the crime charged according to the law of the demanding country.

Per BURTON and OSLER, JJ.A., that it must be shown that the prisoner is liable to conviction for the crime charged according to the law of both countries.

In the result the judgment of the Common Pleas Division, 26 O.R. 163, was affirmed.

F. Fitzgerald for the appellant.

Bruce, Q.C., for the private prosecutor.

C.C. Bruce.] [June 25.

ROBERTSON *v.* BURRILL.

Statute of Limitations—Acknowledgment—Administration.

An acknowledgment of indebtedness by letter, written after the creditor's decease, to the person who is entitled to take out lettters of administration, and who does, after the receipt of the letter, take out letters of administration, is a sufficient acknowledgment within the Statute of Limitations.

Judgment of the County Court of Bruce affirmed, MACLENNAN, J.A., dissenting.

O'Connor, Q.C., for the appellant.

D. Robertson for the respondent.

C.C. Elgin.] [June 25.

CITY OF ST. THOMAS *v.* YEARSLEY.

Duress—Bond.

A bond to secure the payment of the cost of maintaining at an industrial school a boy convicted of larceny, given in consequence of the magistrate's statement that, in default, the boy would be sent to the reformatory, is void, this being in law duress.

Judgment of the County Court of Elgin reversed, HAGARTY, C.J.O., dissenting.

O. A. Howland and *T. W. Crothers* for the appellants.

N. Macdonald for the respondents.

C.C. York.]

ONTARIO INDUSTRIAL LOAN & INVESTMENT CO. *v.* O'DEA.

Landlord and tenant—Lease—Surrender.

Acts relied on as showing the acceptance by the landlord of the surrender of a lease, and as effecting a surrender by operation of law, must be such as are not consistent with the continuance of the term, and accepting the key, putting up a notice that the premises are "to let," and making some trifling repairs, are ambiguous acts which are not sufficient for this purpose.

Judgment of the County Court of York affirmed.

J. J. Warren for the appellants.

H. A. E. Kent for the respondents.

ARMOUR, C.J.] [June 25.

DUNLOP *v.* USBORNE FIRE INSURANCE CO.

Insurance—Fire insurance—Assignment of part of insured property—Breach of statutory conditions.

Where a policy of insurance covers buildings and chattels, and the land upon which the buildings stand is conveyed by deed without the consent of the insurers, in breach of the fourth statutory condition, the policy is voided *in toto*, and does not remain in force as to the chattels.

Samo v. *Gore District Fire Insurance Co.*, 2 S.C.R. 31, applied.

Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., and *W. C. Moscrip* for the appellants.

Garrow, Q.C., for the respondents.

STREET, J.] [June 25.

HENDERSON *v.* BANK OF HAMILTON.

Banks and banking—Special deposit—Action—Damages—Costs.

This was an appeal by the defendants from the judgment of STREET, J., reported 25 O.R. 641, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 6th of June, 1895.

J. J. Scott for the appellants.

L. G. McCarthy for the respondent.

The appeal was confined to the question of costs, the appellants contending that, as the total amount paid into court by them was more than the plaintiff was entitled to, they should not have been ordered to pay costs.

June 25th, 1895. The appeal was dismissed with costs, the majority of the Court (MACLENNAN, J.A., dissenting) holding that, having regard to the wording of the statement of defence, the moneys paid in must be dealt with as separate and distinct sums.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

FERGUSON, J.] [May 4.

PARKES *v.* THE TRUSTS CORPORATION OF ONTARIO ET AL.

Will—Executory devise—Happening of event—Becoming impossible—Vested estate—Who entitled.

A testator devised a farm to executors in trust for his grandson, with power to sell and apply the proceeds for his benefit; and if he died before attaining twenty-one, the executors were to transfer the land, or, if sold, the balance of the proceeds to his father (husband of a deceased daughter). The father died first, and the son died before attaining twenty-one, without issue, the land not having been sold.

Held, that the grandson took a vested estate in fee simple, subject to be devested on the happening of a certain event, and that as the happening of that event had become impossible by reason of the father's death his estate became absolute and his heirs were entitled.

E. P. McNeill for the testator's executrix.

Biggar, Q.C., for testator's surviving daughter.

Shepley, Q.C., for company administrators of the testator's grandson.

BOYD, C.] [July 2.

JOHNSON *v.* ALLEN.

Elections—Ontario Election Act, 55 Vict., c. 3, s. 186—Deputy returning officer —"Wilful misfeasance"—Penalty.

In an action against a deputy returning officer by a "person aggrieved," to recover a penalty under s. 186 of the Ontario Election Act, 55 Vict., c. 3, for an alleged wilful refusal to allow the plaintiff to vote;

Held, that the word "wilful" in the section means "perverse" or "malicious"; and, although the plaintiff was deprived of his vote by the refusal of the defendant to allow him to deposit a "straight" ballot, and there was thereby a contravention of the Act, yet, as the defendant honestly believed the plaintiff was not qualified, and believed in his own power to withhold the ballot, the action failed.

Lewis v. *Great Western R.W. Co.*, 3 Q.B.D. 195, followed.

Walton v. *Ap John*, 5 O.R. 65, distinguished.

F. H. Keefer for the plaintiff.

Watson, Q.C., and *Ware* for the defendant.

Chancery Division.

ROBERTSON, J.] [June 18.

IN RE CLARK AND PROVINCIAL PROVIDENT INSTITUTION.

Life insurance—Wives and children—Debt of assured to insurers—55 Vict., c. 39, s. 39.

An application by the institution for leave to pay into court the sum of $2,000, moneys arising from an insurance or benefit certificate upon the life of one Clark, deceased, a member of the institution, less $90.26, the amount of a note given by the insured in order to secure and stay the enforcement of a judgment against him on a debt due to the institution by the insured, not however for assessments on the policy. The moneys arising from the certificate were designated in favour of the wife and children of the assured.

F. E. Hodgins, for the applicants, relied on their by-law, No. 27, which provides that "any debt, dues, or demands contracted by a member, beneficiary or beneficiaries, with the institution, shall be a charge upon or warrant suspension of his certificate."

F. W. Harcourt, for the official guardian, representing the infant children of the insured, relied on 55 Vict., c. 39, s. 39.

ROBERTSON, J.: I think it clear that the Provincial Provident Institution has no power to make a by-law which will do away with the effect of s. 39 of 55 Vict., c. 39; in fact, without that section, I think it contrary to the spirit of the Act to secure to wives and children the benefit of life assurance, R.S.O. c. 136, to authorize anything on the part of the assured which will subvert or interfere with the amount payable under the policy for the benefit of the wife and children; the moneys payable under the policy in question do not belong to the estate of the assured, the assured having predeceased the beneficiaries. If the assurers have the right to deduct this debt which the assured contracted with them—the $90.26 note referred to—the assured could have encumbered the policy to the full amount thereof, thus frustrating the very object of the Act; to secure the amount to his wife and children. I therefore am of opinion that the institution must pay the whole amount secured by the policy into court, with costs of official guardian to him.

Common Pleas Division.

Div'l Court.] [June 29.

VILLAGE OF LONDON WEST *v.* LONDON GUARANTEE AND ACCIDENT CO.

Insurance—Employee's guarantee contract—Renewal—Ontario Insurance Corporations Act, 1892, s. 33, s-s. (2)—Condition—Misstatements—Materiality.

By a contract in writing, made in 1890, the defendants agreed to guarantee the plaintiffs against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter, in respect of which the defendants should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years, and gave receipts entitled "renewal receipts," in which the premiums were referred to as "renewal premiums."

Held, that the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1892, within the meaning of s. 33; and, upon the true construction of s-s. (2), could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for avoidance of such misstatements was not, in stated terms, limited to cases in which such misstatements were material to the contract.

E. R. Cameron for the plaintiffs.

J. Pearson and *W. R. Riddell* for the defendant.

Div'l Court.] [June 29.

HANES *v.* BURNHAM.

Slander—Privileged occasion—Interest—Duty—Belief—Express malice—Burden of proof—Evidence—Notice of action—Public officer.

The plaintiff, the wife of a postmaster, complained of certain defamatory words spoken by the defendant, an assistant post-office inspector, to the effect that she had taken money from letters and had given him a written confession of her guilt.

Held, (1) that as to statements made in the discharge of the defendant's official duty, to the plaintiff's husband as postmaster, and to two other persons as sureties for him, the occasions were privileged; but not so as to statements made to a partner of one of the sureties, who used the post-office, and to whose business premises the defendant contemplated removing it; for the defendant and the partner had no such common interest in the matter as justified the communication, nor was there any public, or moral, or social duty resting on the defendant which justified him in making it. Even had the evidence shown that the defendant honestly believed that such a duty rested upon him, or that there was such a common interest, if such belief were unfounded, the occasion would not have been privileged.

(2) Where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and the burden of proving this is on the plaintiff, who must adduce evidence upon which a jury might say that the defendant abused the occasion either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false.

And where the plaintiff in her evidence denied that she had made a confession to the defendant, but admitted that after her denial the defendant continued to assert to her, and appeared to believe, that she had made one;

Held, that there was evidence of malice in fact to go to the jury.

(3) The defendant was not entitled to notice of action as a public officer; the statutes requiring such notice applying only to actions brought for acts done.

Royal Aquarium Society v. *Parkinson*, (1892) 1 Q.B. 431, followed.

Murray v. *McSwiney*, L.R. 9 C.L. 545, distinguished.

Semble, also, that the statutes requiring notice of action cannot be invoked where the words spoken are defamatory and have been uttered with express malice.

Lynch-Staunton and *Farmer* for the plaintiff.

Ritchie, Q.C., and *F. E. Hodgins* for the defendant.

MEREDITH, C.J., and ROSE, J.] [June 29.

REGINA *v* HUGHES.

Justice of the peace—Jurisdiction—Trespass—Railway—Arrest—51 Vict., c. 29, s. 283.

Section 283 of the Railway Act of Canada, 51 Vict., c. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice.

A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested, but merely summoned.

Du Vernet for the defendant.

Aylesworth, Q.C., for the prosecutors.

Practice.

MEREDITH, J.] [Dec. 6, 1894.

CROOKS *v.* TOWNSHIP OF ELLICE.
HILES *v.* TOWNSHIP OF ELLICE.

Costs—Taxation—Drainage actions—Appeal—Reference to drainage referee—Costs awarded on appeal.

Where actions begun in the High Court were referred at the trial to the drainage referee, and upon appeal from his report an order was made by an appellate court for taxation and payment of costs of the actions;

Held, that they were not costs coming within the provisions of s. 24, s-s. (4), of the Drainage Trials Act, 1891, but were to be taxed in the usual way in which costs of actions are taxed, and subject to the same right of appeal.

W. M. Douglas and *J. P. Mabee* for the plaintiffs.

J. M. Clark and *J. H. Moss* for the defendants.

(See *Fewster* v. *Township of Raleigh*, *ante* p. 287.)

WINCHESTER, M.C.] [June 3.

BERTRAND *v.* PROULX.

Pleading—Striking out counterclaim—Rule 374—Terms.

The plaintiff, a dealer in hay, purchased a quantity of hay from the defendant. A cheque was given by the plaintiff to procure delivery of part of the hay. The cheque being dishonoured, the defendant instituted proceedings against the plaintiff for obtaining goods under false pretences, and at the hearing the plaintiff was discharged. This action was then brought for malicious prosecution, and the defendant counterclaimed for slander, alleging that the plaintiff had published that he, the defendant, had altered a draft given in payment for part of the hay, drawn in his favour by the plaintiff on a Montreal firm, from $100 to 160.

The plaintiff moved to strike out the counterclaim under Rule 374, citing *McLean* v. *Hamilton Street Railway*, 11 P.R. 193; *Central Bank* v. *Osborne*, 12 P.R. 160; *O'Dell* v. *Bennett*, 13 P.R. 10; *Lee* v. *Collyer*, W.N. 1876, p. 8; *Nicholson* v. *Jackson*, W.N. 1876, p. 38; *Naylor* v. *Farrar*, W.N. 1878, p. 187.

Held, (1) that the counterclaim must be struck out without prejudice to the defendant's right to bring a separate action for the claim set up in the counterclaim.

(2) That in the event of a new action being brought for the claim set up in the counterclaim no judgment be entered in this action without leave of the court or judge.

(3) That the costs of the counterclaim and of this application be disposed of by the judge at the trial of such new action, and in case such action be not brought, or not brought to trial, such costs to be to the plaintiff in any event of the cause.

Defries (Robinson, O'Brien & Gibson) for the plaintiff.

W. E. Middleton for the defendant.

Q.B. Div'l Court.] [June 13.

GRAHAM *v.* TEMPERANCE AND GENERAL LIFE INSURANCE COMPANY OF NORTH AMERICA.

Discovery—Action for account—Discretion—Preliminary trial of right to require account—Rule 655.

Whenever discovery is sought in aid of an issue which must be determined at the hearing, the plaintiff is entitled to it to help him prove the issue; but where it is sought in aid of something which does not form part of what he must prove at the hearing, but is merely consequential to it, the right is not absolute, but discretional, until the plaintiff has established his fundamental right at the hearing.

Where the plaintiff claimed a declaration of the right of himself and all other persons insured in the temperance section of the defendant company to the profits earned by that section, payment thereof, and an account and apportionment thereof,

Held, that upon the mere statement of the plaintiff in pleading that he was the holder of a policy entitling him to share in certain profits of the company, and without any proof of the statement, the court, in its discretion, should not require the company to produce and lay open to him all their books of account and the papers relating to them; but it was a proper case in which to permit the defendants to apply, under Rule 655, for an order for a preliminary trial of the plaintiff's right to require an account, and to postpone discovery of the books until after such trial.

C. D. Scott for the plaintiff.

W. H. Blake for the defendants.

Q.B. Div'l Court.] [June 13.

WILLIAMS *v.* LEONARD.

Amendment—Rule 444—Hardship—Defence—Bills of Sale Act—Chattel mortgage—Description—Sufficiency.

Under Rule 444 an amendment should be allowed at any stage of the proceedings if it can be made without injustice to the other side; and there is no injustice if the other side can be compensated by costs.

Stewart v. *North Metropolitan Tramways Co.*, 16 Q.B.D. 556, applied and followed, notwithstanding the difference in the English Rule.

And, *semble*, a matter of mere hardship should not govern the question of granting or refusing an amendment.

And where, in an action to recover possession of a chattel, the defendants, who were subsequent *bonâ fide* purchasers for value without notice of the plaintiff's purchase, were at the trial refused liberty to amend their defence by setting up the provisions of the Bills of Sale Act, which amendment would have called for no additional evidence, a Divisional Court allowed it upon appeal.

Judgment of ROSE, J., reversed.

A chattel mortgage purported to transfer the goods described in the schedule, all of which were upon the premises of the mortgagor in a city, described by street and lot. The schedule described certain machinery upon

the premises, and added: "All machines . . . in course of construction, or which shall hereafter be in course of construction or completed . . . upon the premises . . . or which are now or shall be on any other premises in the said city." The machine in question was constructed upon premises other than those described in the mortgage, the mortgagors having removed their works after the mortgage was made.

Held, that it was not covered by the mortgage.

Horsfall v. *Boisseau*, 21 A.R. 663, distinguished.

Judgment of ROSE, J., upon this point affirmed.

McEvoy and *W. A. Wilson* for the plaintiff.

Gibbons, Q.C., for the defendants.

Court of Appeal.] [June 25.

CLOUSE *v.* COLEMAN.

Discovery—Bodily injury—Examination by medical practitioner—54 Vict., c. 11—Questions—Leave to appeal.

Leave to appeal from the decision of the Queen's Bench Divisional Court, *ante* p. 389, was refused, this court being of opinion that it was clearly right.

H. S. Osler for the plaintiff.

Arnoldi, Q.C., for the defendant.

MEREDITH, J.] [June 26.

MCLAREN *v.* WHITING.

Partnership—Receiver—Interim sale of assets.

Under special circumstances an order may be made, in an action for the dissolution and winding up of a partnership, for the sale of assets by the receiver before the trial.

And such an order was made where it was shown that the partnership was insolvent; that the value of the assets would be lessened if they were not disposed of at once; that, as to most of them, the present was the most advantageous time for disposing of them; that the creditors were pressing and likely to take legal proceedings; and that the mortgagees of some of the assets were proceeding to realize upon their securities.

R. B. Beaumont for the plaintiff.

C.P. Div'l Court.] [June 29.

PARKER *v.* MCILWAIN.

Attachment of debts—Rents—Ex parte orders—Rescission of—Application of mortgagee—"Party affected"—Suggestion of claim—Concealment—Rules 536, 935, 940, 944—Notice to tenants.

The plaintiff, having an unsatisfied judgment against the defendant in the High Court, obtained from the Master of Chambers, *ex parte*, two orders, under Rules 935 and 940, attaching as debts due to the defendant certain rents owing by his tenants, the garnishees, and summoning them to appear before a County Court judge to show cause why such rents should not be paid

over to the plaintiff. Upon the application of a company, mortgagees of the demised premises, who had served notice upon the garnishees to pay the rent to them, the Master made an order rescinding the attaching orders.

Held, that if the garnishees, upon the return of the summons, neglected to suggest to the court the claim of the company, as provided by Rule 944, they would not be protected by an order to pay to the plaintiff.

The Leader, L.R. 2 Ad. & Ec. 314, followed.

And, therefore, the company was not a "party affected" by the *ex parte* orders, within the meaning of Rule 536.

No fraud or imposition was practised upon the court in not informing the Master of the claim which might be set up by the garnishees or the company; it was a matter for hearing and adjudication before the County Court judge.

Quære: Whether the company had the right to have the rents paid to them simply by virtue of the notice served upon the tenants?

Towerson v. *Jackson*, 65 L.T.N.S. 332, specially referred to.

B. N. Davis and *J. E. Cook* for the plaintiff.

W. H. Lockhart Gordon for the company.

MANITOBA.

COURT OF QUEEN'S BENCH.

DUBUC, J.] [June 22.

BERTRAND *v.* HOOKER.

Fraudulent preference—Assignment in trust for creditors—Pleading—Assignment of chose in action.

The defendant being indebted to Mitchell & Gestur, they assigned the debt to Sigurdson Bros., and within a month Mitchell & Gestur made an assignment to the plaintiff under the Assignments Act for the benefit of their creditors. Plaintiff in this action sued defendant to recover the debt. Defendant pleaded the prior assignment to Sigurdson Bros. Plaintiff replied, setting up facts showing that the assignment to Sigurdson Bros. was void as a fraudulent preference; and defendant demurred to the replication.

Held, that the demurrer must be allowed because the assignment to Sigurdson Bros. could not be declared fraudulent and void in this action, as Sigurdson Bros. were not parties to it.

Monkman for the plaintiff.

Elliott for the defendant.

TAYLOR, C.J.] [July 3.

FLACK *v.* JEFFREY.

Mechanics' Lien Act—Owner—Statement of time within which work done—Priority of vendor's lien.

The plaintiffs did work on a house for defendant Jeffrey. The house was built upon land which Jeffrey had agreed to buy from defendant Fisher.

Jeffrey failed to make payment for the land to Fisher, and the latter took over Jeffrey's equity by accepting a release in consideration of $50 cash paid.

Held, that the plaintiffs were entitled to a lien or charge upon the interest or title of Jeffrey in the lands as it stood before the release given to Fisher, but that the lien or charge must be subordinate to Fisher's claim as vendor.

Objection was taken to the statement of claim attached to the lien as filed, counsel for defendant contending that it did not sufficiently state the time within which the work was done. The lien as filed stated that the work was commenced on a certain day, and that it was done on or before a certain other day.

Held, on the authority of *Truax* v. *Dixon*, 17 O.R. 366, and in view of the provision in s. 8, clause (*uu*), of the Interpretation Act, R.S.M., c. 78, that the statute was sufficiently complied with.

Elliott for the plaintiff.

Munson, Q.C., for the defendant.

DUBUC, J.] [July 4.

BERTRAND *v.* MAGNUSSON.

Exemptions—Actual residence or home of any person—Building used as dwelling and shop.

The defendant had made an assignment to the plaintiff for the benefit of his creditors of "all his personal property and real estate, credits and effects which may be seized and sold under execution," following the language of s. 3 of c. 7, R.S.M. At the date of the assignment he owned a building which was erected for the purpose of, and was used by him, as a retail shop and dwelling house combined, the dwelling being upstairs over the shop. The plaintiff contended that as the building was chiefly used for a shop, it would not be exempt under R.S.M., c. 53, s. 43, and sued defendant in ejectment.

Held, that as the value of the whole building and lot did not exceed $1,500, and as it was the actual residence and home of the defendant, it was exempt from seizure under execution, notwithstanding the use of a large part of it for a shop, and therefore defendant's title did not pass to the plaintiff.

Verdict entered for the defendant.

Elliott for the plaintiff.

Haggart, Q.C., for the defendant.