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Mr. Charles H. Masters, Chief Reporter of the Supreme Court of Canada, and one of the editors of the Canadian Annual Digest, has been created a Q.C. by the Government of New Brunswick. Mr. Masters is favorably known to the profession throughout Canada, and we congratulate him upon receiving this new dignity.

Cicero has given to the profession of the law much sage advice; but, with the thermometer bobbing up amongst the "nineties" as we write, the sagacity of the following observation overshadows, in our opinion, that of all his other apothegms: "Homines quamvis in turbidis rebus sint, tamen, si modo homines sunt, interdum animis relaxantur"—which we take dog-day license to translate so:—

> Men, be what it may Work's perturbation,
> If they be men, take periods of vacation.

The unusual torridity of the weather in England this summer has had a most demoralizing effect upon some of our contemporaries over there. The *Law Times* of July 15 printed some sarcastic verses upon the appointment of the new Chancery Judge which ought to have made the Dog-star blush as red as Mars. We confess that we are guilty of exploits in doggerel ourselves at times, but we are simply "not in it" with our dignified contemporary in this department of legal literature.

Messrs. Butterworth & Co, law publishers, of 7 Fleet Street, London, inform us that during the demolition and re-erection of No. 7 Fleet Street they have moved to temporary premises facing the east entrance of the Law Courts, their new address being 12 Bell Yard, Temple Bar, W.C., where all letters should be sent for the present.

CONSTRUCTION OF WILLS.

In re *Waller; White* v. *Scoles*, 47 W. R. 563.

"What's in a name?"
Romeo and Juliet.

"To the daughters surviving my late friend I. S.,
And unmarried, I'm legacies giving."
"I. S." had no issue, and to help on the mess
When the testator died, *he* was living!
"Now list to the wisdom of LINDLEY, M. R.
(Determined the gifts should not lapse):
"To find the right "I. S." one needn't go far
"Though his name may be other, perhaps!
"When Earth's busy scene the testator quitted
"The description "I. S. my late friend"
"To none of the dead could be fitted.
"As to "I. S." who's quick, may heaven forfend
"That :' 's priest at our hands should be wed or be
"Or be else than the legatees' brother. [dead,
"'Twas John J., their papa, in the testator's head.
Not "Ignatius," nor anyone other."

Judgment accordingly.

ENFORCEMENT OF FOREIGN JUDGMENTS IN AMERICAN COURTS.

One result of the more extended range of commercial operations within recent years is the increasing attention necessarily bestowed upon the ancillary powers of courts of justice, or their jurisdiction in giving effect to the decrees of other tribunals. Nowhere else have the legal principles governing this branch of law been subjected to more careful study or more thoroughly elaborated than in the Federal and State Courts throughout the United States; for it must be borne in mind that the States of the American Union are, as regards the proceedings of their Courts, foreign to each other; and that the law of one State is, within the jurisdiction of another, foreign law, to be proved as a fact of which judicial notice is not taken. The provisions of Article IV. of the Federal

Constitution, however, requiring that full faith and credit shall be accorded by each State to the judicial proceedings of every other State, establish a difference between suits brought upon them and suits brought upon judgments or adjudications of the tribunals of foreign countries; for with regard to the latter their recognition and enforcement by American Courts are based upon principles of international comity alone. The remarks which follow are confined to a brief consideration of cases bearing upon the action to enforce, in an American Court, a foreign (not American) judgment in personam in contract, and have no reference to judgments in rem, or in tort, or upon a penalty, or affecting status.

In the State (as opposed to the Federal) Courts throughout the principal States it may be broadly laid down that such judgments, if rendered by Courts possessed of jurisdiction to render them, are binding and conclusive upon the parties to them and are not re-examinable upon the merits. This rule prevails in New York, and is believed to follow the English rule. The earlier cases both in England and America, pronounced at a time when the law bearing upon the whole subject was undergoing formation, will hardly repay any careful consideration. The former doctrine of comity as the ground of enforcement has given way in some degree to the more practical one which is applied to domestic judgments, viz: that a litigant who has had a fair opportunity to try his cause before a competent tribunal and has availed himself of it should acquiesce in the result, and should not resort to another court: sit finis litium. But this statement of the law is subject to many qualifications. The important fact—the very foundation stone upon which is based all authority to uphold the foreign judgment—is jurisdiction in the Court rendering the judgment which has been defined to be the power to adjudge concerning the general questions involved in a suit or proceeding and is of course not dependent upon the facts in question, nor upon the ultimate existence of a good cause of action.

The judgment sought to be enforced is always open to impeachment for want of jurisdiction over either the subject matter or the parties. Even the strict provisions of the Constitution declaring that full faith and credit shall be given in each State to the judicial proceedings of every other State, and of the Acts of Congress which declare that the judgments of State Courts shall have the same faith and credit in other States as they have in the

State where they were rendered, (R.S., U.S. p. 170, sec. 905), have repeatedly been held not to preclude an enquiry into the jurisdiction of the Court in which the original judgment was rendered, nor into the right of that State to exercise authority over the parties or subject matter, nor an inquiry whether the judgment is founded on or is impeachable for fraud, or is responsive to the issues disclosed by the pleadings; and this is so notwithstanding direct recitals in the record. These principles govern in the case of all foreign judgments.

In the case of the judgments of superior Courts of Record, the presumption will be in favor of jurisdiction. This is in accordance with the old rule that inferior Courts must show their jurisdiction when this is questioned, whereas jurisdiction is presumed of a Court of general jurisdiction. But this presumption arises only in respect to jurisdictional facts concerning which the record is silent: it has no place where evidence is disclosed or an averment made; *Galpin* v. *Page*, 18 Wallace, 350. When it affirmatively appears that any essential step was omitted, the presumption in favor of jurisdiction is destroyed, and a presumption against jurisdiction at once arises.

In a suit upon a judgment record, it is always open to the defendant to dispute the jurisdiction of the Court rendering the judgment. The ground of objection may appear upon the face of the record, as if a Court of the United States should assume to render a decree of divorce; or as if the record should recite that defendant was a non-resident served by publication only, possessed of no property within the jurisdiction and who did not appear to a personal action. These or similar facts may also be established by independent evidence as a defence. By like testimony, the recital of jurisdictional facts in the record itself, if untrue, or fraudulently inserted, may be shown to be unauthorized. Even direct recitals do not bar the right to attack the jurisdiction; *Kerr* v. *Kerr*, 41 N.Y. 272; *Ferguson* v. *Crawford*, 70 N.Y. 257; *Thorn* v. *Salmonson*, 37 Kans. 441. In personal actions, no jurisdiction can be supported over non-resident foreigners upon anything short of actual personal service, (or notice given), within the territorial limits of the forum, or full voluntary appearance of the defendant there. Such a judgment, if entered upon constructive service, is void; although personal service may be effective, if made when defendant is only temporarily within the jurisdiction: *Welch* v. *Sykes*, 44

Am. Dec. 689. But authority conferred upon plaintiff by bond to confess judgment is not sufficient unless strictly followed: *Grover* v. *Radcliffe*, 137 U.S. 287.

An exception exists in the case of a foreigner resident within the jurisdiction, against whom a valid and enforceable judgment may be secured upon service which would not be sufficient in the case of a non-resident foreigner. This doctrine cannot yet be said to be generally settled in the United States, although approved in a few cases: *Hunt* v. *Hunt*, 72 N.Y. 218 (as to status in divorce); *Cassidy* v. *Leech*, 53 How. 108; *Huntley* v. *Baker*, 33 Hun 578; *Shepard* v. *Wright*, 35 Hun 445; *Burton* v. *Burton*, 45 Hun 70; *Demeli* v. *Demeli*, 120 N.Y. 495; *Rigney* v. *Rigney*, 127 N.Y. 413. The latest case is *Ouseley* v. *Lehigh Valley Trust Co.*, 84 Fed. Rep. 602 (1897). The person sought to be charged with the judgment must have been a resident subject or citizen of the country at the time the proceedings were taken, although then absent; and such proceedings must be strictly in conformity withthe law of the domicile. The principle is adopted from English law, following *Douglas* v. *Forrest*, 4 Bing. 686; *Becquet* v. *McCarthy*, 2 Barn. & Ad. 951; and the more recent cases, *Bank of Australia* v. *Nias*, 16 Q.B. 717; *Bank of Australia* v. *Harding*, 9 C.B. 661; *Copin* v. *Anderson*, L.R. 9 Ex. 345; *Schisby* v. *Westenholz*, L.R. 6 Q.B. 155. Jurisdiction may be acquired over an absent foreign defendant by his consent, testified by his general appearance in the action. Such voluntary submission will confer jurisdiction over the person, although jurisdiction of the subject matter cannot be conferred. A general appearance is always held equivalent to personal service of process; *Jones* v. *Jones*, 108 N.Y. 425. But an appearance may be so limited as to confer no jurisdiction; *Ogdensburg* v. *Vermont*, 16 Abb. Pr. 249; *Graham* v. *Spencer*, 14 Fed. Rep. 603. If objection to the jurisdiction is promptly made, the fact that it is overruled and that defendant answers over and goes to trial upon the merits will not work to his prejudice: *Steamship Co.* v. *Ferguson*, 106 U.S. 118, overruling *Hubbard* v. *American Ins Co.*, 70 Fed. Rep. 808. A Court cannot acquire jurisdiction over a person by deciding that it has jurisdiction. Nor will an appeal from the Court of first instance be deemed a waiver of the objection: *Matthews* v. *Tufts*, 87 N.Y. 568. The acceptance of a copy of a subpoena outside the State, accompanied by a written and signed admission by defendant of "due personal service" of a subpoena to answer has been held

sufficient, on the ground that a party may waive service of process by any act clearly evidencing an intention to do so; but this is doubtful law, and it is reasonably clear that a bare admission of service would be of no value: *Jones* v. *Merrill*, 71 N.W.R. 838; *Cheney* v. *Harding*, 31 N.W.R. 255; *Machine Co.* v. *Marble*, 20 Fed. Rep. 117; *Ex parte Schollenberger*, 96 U.S. 369; *Graham* v. *Spencer*, 14 Fed. Rep. 606; *Scott* v. *Noble*, 72 Penna. St. 115. But see *Butterworth* v. *Hill*, 114 U.S. 130.

While it is recognized that each State or foreign country has a right to establish the formalities necessary to constitute proper notice to a defendant within its jurisdiction of the institution of proceedings in its Courts against him, this being a matter of procedure, or affecting the status of its citizens: *Harryman* v. *Roberts*, 52 Md. 64; *Williams* v. *Williams*, 130 N.Y. 198; yet the service or notification required for the enforcement of the judgment must be such as is reasonable and fairly calculated to bring home to the defendant timely notice that the proceedings have been begun. It has even been held that publication under a State statute which substituted publication of a summons in place of personal service for a defendant within the jurisdiction and readily found was not "due process of law" and hence unconstitutional; *Bardwell* v. *Collins*, 9 L.R.A. 152; 44 Minn. 97. The practice established by the State itself, however slipshod and little calculated to afford the defendant that complete, fair and timely notice of proceedings which the common sense of reasonable men would deem him entitled to, may well bind the citizens of that State: *Sim* v. *Frank*, 25 Ill. 125; but it is another matter when the aid of a tribunal outside its jurisdiction is demanded to compel the enforcement of the judgment recovered: *Jardine* v. *Reichardt*, 10 Vroom, 165. Before the decision of the leading case of *Pennoyer* v. *Neff*, 95 U.S. 120, a large amount of uncertainty prevailed regarding the legal right of the enforcing Court to declare the service insufficient, based principally upon a strict construction of the Federal Constitution and statutes. This will be found indicated in such cases as *Huntly* v. *Baker*, 33 Hun. 578; *Thouvenia* v. *Roderiguez*, 24 Tex. 468; *Rudford* v. *Kirkpatrick*, 13 Ark. 33, and others; cc *Eliot* v. *McCormick*, 3 N.E.Rep. 871.

Pennoyer v. *Neff* determined that a personal judgment rendered by a State Court in an action upon a money demand against a non-resident who was served by publication of the summons but

who did not appear, is without any validity ; that in such an action process from the tribunals of one State cannot run into another State and summon a party there domiciled to respond to proceedings against him ; that publication of process or of notice within the State in which the tribunal sits cannot create any greater obligations upon him to appear ; and that process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability. The distinction is made, however, between personal actions and actions in rem, or quasi in rem, where property within the State is brought under the control of the Court and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest in it. It is of course well established that a State having within its territory property of a non-resident may hold and appropriate this property to satisfy claims of its citizens against him, and its tribunals may enquire into his obligations to the extent necessary to control the disposition of that property.

To sum up, therefore, in order to acquire jurisdiction over a non-resident, a Court must certify (a) property of the non-resident within its jurisdiction and actually attached under its process : *Pennoyer* v. *Neff, supra* ; or (b) that defendant is duly served with process within the State ; or (c) that defendant has voluntarily appeared and thus submitted to the jurisdiction. So rigid, however, is the requirement of personal or sufficient service of process within the jurisdiction, that in actions in rem or quasi in rem, where such requirement is wanting, the Court cannot go farther and award a money judgment ; *Cloyd* v. *Trotter*, 118 Ill. 392. Where attachment is granted, no general execution can be issued for any balance unpaid after the attached property is exhausted ; *Bissell* v. *Briggs*, 9 Mass. 462 ; nor could the costs in that proceeding be collected of defendant out of any property other than that attached in the suit ; *Cooper* v. *Reynolds*, 10 Wall. 308. No suit can be maintained on such a judgment in the same Court or in any other ; nor can it be used in any proceeding not affecting the attached property ; *Freeman* v. *Alderson*, 119 U.S. 185. The attachment must precede the judgment. It is thus seen that such a judgment is a proceeding strictly in rem : if the appropriation of the debtor's effects is made, it is protected, but only to the extent of the property attached : if no property is attached, the

judgment has no validity, and cannot constitute the basis of a new action. These principles obtain in both Federal and State Courts. In cases of joint liability, the jurisdiction cannot be extended by reason of the fact that some one or more of those jointly liable chance to reside or be within the State. There is no legal efficacy in the joint liability of several debtors which can give an actual or constructive jurisdiction over the persons of those outside of the jurisdiction; *Hoag* v. *Lamont*, 60 N.Y. 96. The plaintiff must recover against all defendants or none; Freeman on Judg. sec. 439. So claims against a partnership where the partners reside in different jurisdictions have given rise to embarrassing questions. The difficulty is to obtain a jurisdiction over both or all partners, since jurisdiction over one alone has been held not available as a basis for an action to enforce a judgment obtained in such jurisdiction against the defendant of whom the foreign Court did not have jurisdiction—even so far as to affect joint or partnership property; *Hoffman* v. *Wight*, 1 App. Div. R. (N.Y.) 516. In this case plaintiff sued Wight and Newell in Jersey, as co-partners and recovered judgment on contract for a partnership indebtedness. Newell was served with process within the State, but Wight was a non-resident and was in no way brought within the jurisdiction. The judgment entered was in personam and recited that Wight was not served. Upon a subsequent suit brought on this judgment in New York, it was held that the utmost that could be claimed for the judgment was that, as to partnership property in New Jersey, it might be considered a quasi judgment in rem affecting only property levied on in that State; but that while it bound Newell individually, it could not form the basis of an action in New York State against Wight, nor could it bind joint or partnership property of Newell and Wight in the latter State. The opinion appears to recognize a species of judgments which may be called local, which have no force or validity outside the State where they are rendered, and cannot be made the basis of an action outside of that jurisdiction as against parties not rendered amenable to them.

The facts shown in *D'Arcey* v. *Ketchum*, 11 How. 165, were as follows: Ketchum sued Gossip and D'Arcey in a Louisiana Court as joint debtors on a judgment recovered in New York in 1846. D'Arcey was a resident of Louisiana, and had not been served with process in New York. A statute of New York was proven

which provided that, where joint debtors were sued and one was brought into Court on process, the latter should answer to the plaintiff, and if the plaintiff had judgment against him, the judgment and execution thereon might be had not only against the party brought into Court, but also against the other joint debtors named in the original process, in the same manner as if they had all been brought into Court by virtue of such process; but it should not be lawful to issue any such execution against the body or against the sole property of any person not brought into Court. The matter came before the Supreme Court of the United States in error to the Louisiana Court. The effect of the statute was declared to be that in New York the judgment was valid and binding on an absent defendant as prima facie evidence of the debt, but reserved to him the right to enter into the merits when sued upon it and show that he ought not to have been charged; but that the New York judgment had no force or vigor beyond the local jurisdiction.

In *Goldy* v. *Morning News*, 156 U.S. 518, the Supreme Court again comment upon *D'Arcey* v. *Ketchum* and upon the subsequent case of *Hall* v. *Lansing*, 91 U.S. 160, and affirm the view that a judgment rendered in one State against two partners jointly after notice served upon one of them only under a statute of the State which provides that such service shall be sufficient to authorize a judgment against both, is of no force or effect in a Court of another State or in a Court of the United States against the partner who was not served with process. But in *Chesley* v. *Morton*, 9 App. Div. Rep. (N.Y.) 416, it was held that, while such an action was not maintainable as an action of debt, yet it might be maintained where the prayer was for a receiver and there was an allegation of partnership assets within the jurisdiction.

Prior to the decision of *Hilton* v. *Guyott*, 159 U.S. 113, in 1895, it was the settled law of the State of New York, and of other States, that a foreign judgment is conclusive upon the merits, and can be impeached only by proof that the Courts rendering it had no jurisdiction of the subject matter or of the person of the defendant, or that it was procured by fraud; *Dunstan* v. *Higgins*, 138 N.Y. 74. In the former case, however, the Supreme Court of the United States, by a divided bench, held that a United States Court may enquire into the merits of and may refuse to enforce the decisions of the tribunals of a country which itself refuses to

enforce American judgments without, at least, an investigation into merits; founding its opinion upon a jealous construction of comity or reciprocal international courtesy. This decision follows the present rule of most continental countries, which was formerly the rule in England.

Ritchie v. *Mullen*, 159 U.S. 235, and *Erie* v. *McHenry*, 17 Fed. Rep. 414, will serve to indicate that the judgments of English and Colonial Courts would not, however, be affected by the principle laid down in *Hilton* v. *Guyott*. As a fact they are treated, in all American Courts, substantially as domestic judgments.

WM. SETON GORDON.

NEW YORK.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

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TRUSTEE—BREACH OF TRUST—RIGHT TO INVEST—IMPROPER INVESTMENT—INTEREST.

In *re Barclay*, *Barclay* v. *Andrew* (1899) 1 Ch. 674, may be briefly referred to for the fact, that in an administration suit, in which a trustee was found guilty of a breach of trust in neglecting to make investment of the trust funds, they were charged with interest at 3 per cent. with annual rests on the balances in their hands, and in ascertaining such balances trust funds improperly invested were to be treated as remaining in their hands.

WILL—CONSTRUCTION—"MONEY"—MEANING OF "ANY MONEY THAT MAY BE IN MY POSSESSION"—REVERSIONARY INTEREST IN PERSONALTY.

In *re Egan*, *Mills* v. *Penton* (1899) 1 Ch. 688, the novel question whether a reversionary interest in personalty could pass under a bequest of 'money' was the nut which Stirling, J., had to crack. The testatrix died in 1892 and by her will, after certain bequests of stock, made the following bequest: "Any money not mentioned in the aforesaid bequests that may be in my possession at my death after payment of my debts, funeral and testamentary expenses, I give absolutely" to one Penton. She

then proceeded to make specific gifts of certain chattels such as books, plate, furniture, etc. After death the testatrix was entitled to certain reversionary interests in personal estate which did not fall into possession until 1897, and the question to be determined was whether these interests passed under the bequest to Penton. It was claimed that they could not pass as 'money,' and that there was an intestacy as to this property. Sterling, J., was of opinion that 'money' remaining after payment of debts and funeral and testamentary expenses, means the general residuary personal estate of the testator, and as such included the reversionary interests, and that the words 'in my possession' were not to be construed in a strict legal sense as distinguishing property in actual possession from that held in reversion, and that Penton therefore was entitled to such reversionary interests under the bequest in his favour.

INJUNCTION—RESTRAINING IMITATION OF PLAINTIFF'S TRADE MARK—MISREPRESENTATION BY PLAINTIFF.

In *Sen Sen Co.* v. *Britten* (1899) 1 Ch. 692, the plaintiff company applied for an injunction to restrain the defendant from selling their goods in packages resembling those of the plaintiff company, and the point was raised by the defendants whether the use of the words "Sen Sen trade mark" on the plaintiffs' goods was not such a misrepresentation as disentitled them to any relief, because, although the words "Sen Sen" had been registered as a trade mark in America, they had not been so registered in England, and it was contended that to describe these as a trade mark was a representation that they had been so registered, and was an offence under the Patents Designs and Trade Marks Act 1883, s. 105. Sterling, J., however, refused to give effect to this construction, being of opinion that the words "trade mark" do not necessarily mean that it is a registered trade mark, because the right to a trade mark may be acquired by user without registration, and that registration was only necessary in order to entitle the owner to sue to restrain its infringement, and the offence provided for by the Act is not affixing a trade mark, but describing a trade mark so affixed as registered when in fact it is not. He therefore held on the preliminary point that the use of the words 'trade mark' did not *per se* amount to any representation of registration, and that the plaintiffs were not on that account debarred from making the application for an injunction.

ANCIENT LIGHTS—PRESCRIPTION—GREEN HOUSE—BUILDING—PRESCRIPTION ACT 1832 (2 & 3 W. 4, c. 71, s. 3—(R.S.O. c. 133, s. 35.)

Clifford v. *Hold* (1899) 1 Ch. 698, was an action to restrain interference with ancient lights, and the building in respect of which they were claimed was used as a green house, and the point was raised whether ancient lights could be claimed in respect of a building of that description. Kekewich, J., decided the point in the affirmative and granted the injunction. See R.S.O. c. 133, s. 36, which permits the acquisition by prescription of rights of that kind in the future. Rights to light previously acquired are however not interfered with.

WILL—CONSTRUCTION—"ISSUE"—SEVERAL GIFTS IN WHICH ISSUE RESTRICTED TO CHILDREN—GIFT TO ISSUE WITHOUT RESTRICTION.

In *re Birks, Kenyon* v. *Birks* (1899) 1 Ch. 703, was another case involving the construction of a will. In this instance the testator had given twelve distinct legacies with gifts over to the issue of the legatees dying in the testator's lifetime, in all except the eleventh legacy, the gifts over were qualified by words restricting the class of issue entitled to take to children. In the eleventh legacy there were no such restrictive words, and the question was whether there was any canon of construction which rendered it necessary to construe the word "issue" in the eleventh legacy in the same way as it must be construed in the other legacies. In other words, whether this was within the rule which requires the same words to be construed in the same way throughout a will. Kekewich, J. held that the rule did not apply, and that following in *re Warren's Trusts* (1884) 26 Ch. D. 208, he was bound to construe the word "issue" in the eleventh legacy to mean issue generally, and not merely children.

INFANT—PAYMENT OUT OF COURT OF INFANT'S MONEY—INFANT DOMICILED ABROAD—FOREIGN LAW—FOREIGN GUARDIAN OF INFANT.

In *re Chatard* (1899) 1 Ch. 712, was an application made by the father of infants, entitled absolutely to money in court, for the payment of the money to him as legal guardian of the infants. The infants and their father were French subjects, and by the law of France was entitled to receive and give discharges for all moneys coming to the infants during their minority. Kekewich, J., nevertheless refused to order the money to be paid to the father unless evidence should be adduced showing that it was necessary in the interest of the infants that it should be paid out, and as no such

evidence was forthcoming he refused the application, and directed the moneys to be carried to the separate account of each infant and the income accumulated.

INFANTS—MAINTENANCE—EDUCATION—GUARDIAN—MOTHER OF INFANTS LIVING IN ADULTERY—TRUST FOR MAINTENANCE OF INFANT—BREACH OF TRUST.

In *re G.* (1899) 1 Ch. 719, it is laid down by Kekewich, J., that a trustee of a trust for the maintenance, education, or bringing up of infants, violates his trust if he suffers the infants to reside with their widowed mother while she is living in adultery with a married man. Two of the infants aged respectively twenty and nineteen were fully aware of all the circumstances, and were strongly opposed to any interference with their home, and all the children were on extremely affectionate terms with their mother and her paramour, the latter of whom they treated as their step-father. The trust was to pay the income of the trust fund to the mother during widowhood, "she maintaining, educating and bringing up" the infants; and in holding that the infants could not properly be left with their mother, the learned judge nevertheless held that a part of the income, which amounted in all to £417 per annum, should still be paid to the mother for her own maintenance.

MORTGAGE OF REVERSION—TENANT FOR LIFE AND REMAINDERMAN—WASTE—INTEREST—FORECLOSURE—REDEMPTION—REAL PROPERTY LIMITATION ACT 1874 (37 & 38 VICT. C. 57), SS. 1, 2, (R.S.O. C. 133, S. 4, (10)—DAMAGES—LIMITATION ACT 1623 (21 JAC. I C. 16)—RETAINER.

Dingle v. *Coppen* (1899) 1 Ch. 726, was an action for foreclosure of a mortgage of a reversionary interest, and the defendant counterclaimed for damages for waste committed by the mortgagee who was also tenant for life of the mortgaged property, subject to an obligation to keep it in repair. Some important questions are involved. The mortgage of the reversionary interest was made in 1882 to the tenant for life, who was and continued in possession of the property in question until her death in 1897. No payment had ever been made on account of either principal or interest secured by the mortgage. The plaintiffs were the executors of the deceased mortgagee and tenant for life. It was conceded by the defendant that the plaintiff's action for foreclosure was an action to recover land, and, as such, the Real Property Limitation Act (37 & 38 Vic. c. 57) (see R.S.O. c. 133 s. 4 (10)) did not begin to run against the plaintiffs until the remainder fell into possession in 1897, and there-

fore that the plaintiffs were entitled to judgment for foreclosure in default of payment of the principal money and interest for six years prior to date of the writ; the defendant, however, claimed that the plaintiffs were liable for waste committed by the deceased tenant for life, but it was objected by the plaintiffs that after a judgment of foreclosure the defendant had no interest in the property, and that such a claim could only be set up accompanied by an offer to redeem, and that relief could only be given to a mortgagor coming to redeem on the terms of his paying the principal and all arrears of interest, which in such a case were not limited to six years' arrears before action. The contention of the plaintiffs was upheld by Byrne, J. The case therefore emphasizes the difference between a foreclosure action and an action to redeem as regards the arrears of interest recoverable by a mortgagee. While in the former he may, under the Real Property Limitation Act, be limited to six years' arrears, in the latter the mortgagor may have to pay as the price of redemption the full amount of arrears actually due. The damages assessed against the plaintiffs in respect of the waste committed by the testatrix, it was held, might be set off per tanto against the principal and interest due under the mortgage, but a debt due to their testatrix by the defendant for money lent without security, which was statute barred, it was held, could not be tacked to the mortgage debt or set off against the damages, nor could the plaintiffs retain the damages in discharge of such statute barred loan.

MORTGAGE—CLOG ON EQUITY OF REDEMPTION—NOTICE TO PAY PRINCIPAL—WITHDRAWAL OF NOTICE TO PAY—ACCUMULATION OF PAYMENT ON DEFAULT.

Santley v. *Wilde* (1899) 1 Ch. 747, is a case which shows that notwithstanding what has been said in the recent case of *Biggs* v. *Hoddinott* (1898) 2 Ch. 307 (noted *ante* vol. 34, p. 773), the old rule as to the invalidity of agreements between mortgagee and mortgagor amounting to a clog on the right of redemption, has still some practical efficacy. In the present case the mortgagor was a sub-lessee of a theatre with an option to purchase within a limited time the reversion of the said lease for £2,000. The mortgagee agreed to advance the money to purchase the reversion, on the terms of the loan being repaid with 6 per cent. interest and secured by a legal mortgage, which was also to provide for the payment of the mortgagee of one-third of the net profits of the theatre. The

mortgage was accordingly executed by way of assignment of the lease for the whole term, less one day, and contained a covenant by the mortgagor for repayment of the £2,000 by twenty quarterly payments, the payment of the last of which if duly made would be four years before the end of the mortgaged term; and also a covenant to pay one-third of the net profits of the theatre rental during the whole of the mortgagor's term. It was held by Byrne, J., that the stipulation for the payment of one-third of the rental profit of the theatre in addition to the principal and interest was invalid, and that the mortgagor might redeem without paying it, and that the mortgagee could not recover it under the covenant. He also held that the mortgagee having, on default of some of the instalments, given the mortgagee notice to pay off the principal, he could not withdraw such notice without the mortgagor's consent.

WILL—GIFT TO ATTESTING WITNESS OF WILL—SOLICITOR—PROFIT COSTS—REPUBLICATION—WILLS ACT 1837 (1 VICT. C. 26) S. 15—R.S.O. C. 128, S. 17.)

In *re Trotter*, *Trotter* v. *Trotter* (1899) 1 Ch. 764, it was held by Byrne, J., that though, under the Wills Act, 1837 (1 Vict. c. 26) s. 15, a gift to an attesting witness, in this case a right to a solicitor to charge profit costs for business transacted by him as one of the executors appointed by the will, is utterly null and void, it may nevertheless be rendered valid, if the will is republished by a codicil, referring to the will, but not attested by the legatee, and that this benefit will not be lost by the legatee by his subsequently attesting another codicil.

COMPANY—WINDING UP—RECISSION OF CONTRACT TO TAKE SHARES—PROCEEDINGS COMMENCED BEFORE PETITION AND WINDING UP ORDER.

In *re General Railway Syndicate* (1899) 1 Ch. 770. The rule laid down by Lord Cairns, L.C. in *Kent* v. *Freehold Land Co.* (1868) L R. 3 Ch. 493, to the effect that an action by a shareholder of a joint stock company to rescind a contract to take shares, and to be relieved from the liability on such shares, must be commenced before the filing of a petition to wind up such company, was again under consideration. In the present case the company had commenced an action for calls against the shareholders and in that action an application for a summary judgment was made, and on such application the shareholder by affidavit set up that he was induced to take the shares in question by misrepresentation, and

stated his intention to counter-claim for rescission on that ground, and an order was made giving him leave to defend, but subsequently, before any counter claim was delivered, a petition was presented and the winding up order made, and it was held by Wright, J., that the case was within the rule above referred to, and that it was now too late for the shareholder to obtain the relief he claimed.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Que.] PRICE *v.* ROY. [May 30.

Negligence—Volunteer—Common fault—Division of damages.

P. was proprietor of certain lumber mills and a bridge leading to them across the River Batiscan. The bridge being threatened with destruction by spring floods, the mill foreman called for volunteers to attempt to save it by undertaking manifestly dangerous work in loading one of the piers with stone. While the work was in progress the bridge was carried away by the force of the waters and one of the volunteers was drowned. In an action by the widow for damages,

Held, Gwynne, J., dissenting, that the maxim "volenti non fit injuria" did not apply, as the case was one in which both the mill owner and deceased were to blame and, that, being a case of common fault, the damages should be divided according to the jurisprudence of the Province of Quebec.

Stuart, Q.C., and *Olivier*, for appellant. *R. S. Cooke*, for respondent.

Que.] GASTONGUAY *v.* SAVOIE. [June 5.

Insolvency—Purchase of estate by inspector—Mandate—Trusts.

An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto, and cannot be allowed to become purchaser, on his own account, of any part of the estate of the insolvent. *Davis* v. *Kerr*, 17 Can. S.C.R. 235, followed. Appeal allowed with costs.

Fitzpatrick, Q.C., and *Crepeau*, for appellant. *Geoffrion*, Q.C., *Cote* and *Methot*, for respondents.

N.S.] ZWICKER *v.* ZWICKER. [June 5.

Deed—Delivery—Retention by grantor—Presumption—Rebuttal.

The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as take effect as a duly executed instrument.

The evidence in favor of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that, while it professed to dispose of such property immediately, the grantor retained the possession and enjoyment of it until his death.

Judgment of Supreme Court of Nova Scotia (31 N.S. Rep. 333) reversed. Appeal allowed with costs.

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

B.C.] ARCHIBALD *v.* MCNERHANIE. [June 5

Contract — Partnership — Dealing in land — Statute of frauds — British Columbia Mineral Act.

Secs. 50 and 51 of the Mineral Act of 1896 (B.C.) which prohibit any person dealing in a mineral claim who does not hold a free miner's certificate does not prevent a partner in a claim not holding a certificate from recovering his share of the proceeds of a sale thereof by his co-partner.

A partnership may be formed by a parol agreement, notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. Judgment of the Supreme Court of British Columbia (6 B.C. Rep. 260) affirmed, Gwynne and Sedgewick, JJ., dissenting.

Robinson, Q.C., for appellant. *S. H. Blake*, Q.C., and *Latchford*, for respondent.

N.S.] WILLIAMS *v.* BARTLING. [June 5.

Negligence—Matters of fact—Finding of jury.

W. was working on a vessel in port, when a boom had to be taken out of the crutch in which it rested and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced, which the master undertook to do. When the boom was taken out it fell to the deck and W. was injured. In an action against the owners for damages the jury found that the fall of the boom was owing to the said rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants.

Held, affirming the Judgment of the Supreme Court of Nova Scotia (30 N.S. Rep. 548) Gwynne, J., dissenting, that the first part of the finding did not necessarily mean that the rigging had never been secured, or that, if secured originally, it had become insecure by negligence of defendants,

and the jury having negatived negligence, their finding should not be ignored.

W. B. A. Ritchie, Q.C., and *King*, Q.C., for appellants.
Drysdale, Q.C., for respondents.

N.S.] ATLAS ASSURANCE CO. *v.* BROWNELL. [June 5.

Fire insurance—Condition in policy—Time limit for submitting particulars of loss—Condition precedent—Waiver—Authority of agent.

A condition in a policy of insurance against fire provided that the assured "is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits."

Held, 1. following *Employers' Liability Assurance Corporation* v. *Taylor* (29 Can. S.C.R. 104) that compliance with this condition was a condition precedent to an action on the policy.

Held, 2. A person not an officer of the insurance company, appointed to investigate the loss and report thereon to the company, was not an agent of the latter having authority to waive compliance with such condition, and if he had such authority he could not, after the fifteen days had expired, extend the time without express authority from his principal.

Held, 3. Compliance with the condition could not in any case be waived unless such waiver was clearly expressed in writing signed by the comany's manager in Montreal as required by another condition in the policy.

Drysdale, Q.C., and *Currie*, Q.C., for appellants. *Dickie*, Q.C., and *Congdon*, for respondent.

N.S.] ZWICKER *v.* FEINDEL. [June 5.

Sale of land—Misrepresentation of Vendor—Estoppel—Counterclaim—Reformation of deed—Amendment of pleadings.

In an action of trespass to land the defendants by counterclaim alleged that the locus was intended to be included in a purchase by them from the plaintiff but that owing to the plaintiff having stated that the boundary of the lot to be purchased was a certain pine tree which was not the boundary the defendants were misled, and they asked that the deed be reformed so as to contain the piece on which the alleged trespass occurred. The Supreme Court of Nova Scotia held that plaintiff had wilfully deceived defendants as to the boundary, but as the counterclaim did not allege fraud the deed could not be reformed, but defendants should be left to their remedy by action.

Held, reversing such judgment (31 N.S.Rep. 232) that, under R.S.N.S. 5 ser. c. 104, the court below could have amended the counterclaim by inserting the necessary allegation, and the Supreme Court of Canada could likewise amend it under 43 Vic. c. 34 (ss. 63 to 65 R.S.C. c. 135).

Held, also, that plaintiff was estopped from claiming the locus as his property.

W. B. A. Ritchie, Q.C., and *McLean*, Q.C., for appellants. *Newcombe*, Q.C., and *Wade*, Q.C., for respondent.

N.S.] BURRIS *v.* RHIND. [June 5.

Conveyance—Duress—Undue pressure—Trust property.

The owner of land having died intestate, leaving several children, one of them W.R. received from the others a deed conveying to him the entire title in the land in consideration of his paying all debts against the intestate estate and those of a deceased brother. Subsequently W.R. borrowed money from his sister and gave her a deed of the land, on learning which, B., a creditor of W.R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a re-conveyance of the land to him and then gave a mortgage to B. The re-conveyance not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she had taken legal advice in the meantime and destroyed the deed. B. then brought an action against W.R. and his sister to have the deed to the latter set aside and his mortgage declared a lien on the land.

Held, affirming the judgment of the Supreme Court of Nova Scotia (30 N.S. Rep. 405) that the sister of W.R. was entitled to a first lien on the land for the money lent to her brother; that the deed of re-conveyance to W.R. had been obtained by undue influence and pressure and should be set aside and B. should not be allowed to set it up.

B. claiming to be a creditor of the father and deceased brother of the defendants wished to enforce the provision in the deed to W.R. by his brothers and sister for payment of the debts of the father and brother.

Held, that this relief was not asked in the action, and, if it had been, the said provision was a mere contract between the parties to the deed of which a third party could not call for execution, no trust having been created for the creditors of the deceased father and brother.

Sedgewick and *Congdon*, for appellant. *Drysdale*, Q.C., for respondent.

Ontario.] GREEN *v.* WARD. [June 5.

Construction of deed—Partition—Charge upon lands.

A deed for the partition of land held in common contained a conveyance of a portion thereof to M.W. for certain considerations therein recited, of which one was the condition that she should procure from her minor children, upon their coming of age, the necessary quitclaim deeds for the release of their interests in another portion of the land in question apportioned and conveyed to her co-parceners, and the amount of certain

payments of money then made for the purpose of effectuating the partition was by the deed of partition declared to remain a lien upon the portion of the land thereby conveyed to M.W. until such quitclaims should have been obtained and delivered to her said co-parceners.

Held, that the said recital was sufficient to charge that portion of the land so conveyed to M.W. with the amount of the said payments of money as security for the due execution and delivery of the quitclaims in conformity with the condition stipulated in the deed of partition. Appeal dismissed with costs.

Gundy, for the appellants. *John A. Robinson*, for the respondent.

Ontario.] WOLFF *v.* SPARKS. [June 5.

Construction of statute—14 & 15 V., c. 6 (Ont.)—Will—Devise to heirs.

The Ontario Act, 14 & 15 V., c. 6, abolishing the law of primogeniture in the province, placed no legislative interpretation upon the word "heirs." Therefore, where a will made after it was in force devised property on certain contingencies to "the heirs" of a person named, such heirs were all the brothers and sisters of said person and not his eldest brother only. Judgment of the Court of Appeal for Ontario (25 Ont. App. R. 326) affirmed. Appeal dismissed with costs.

O'Gara, Q.C., and *Wild*, for the appellant. *A. E. Fripp*, for the respondent.

Quebec.] CITY OF MONTREAL *v.* CADIEUX. [June 5.

Appeal—Evidence—Concurrent findings on questions of fact—Reversal on appeal.

Although there may be concurrent findings on questions of fact in both courts below, the Supreme Court of Canada will, upon appeal, interfere with their decision where it clearly appears that a gross injustice has been occasioned to the appellant and there is evidence sufficient to justify findings to the contrary.

TASCHEREAU, J., dissented, holding that as there had been concurrent findings in both courts below, supported by the evidence, an appellate court ought not to interfere.

Atwater, Q.C., and *Ethier*, Q.C., for appellant. *Beaudin*, Q.C., for respondent.

Ontario.] [June 5.

LONDON ASSURANCE CO. *v.* GREAT NORTHERN TRANSIT CO.

A policy issued in 1895 insured against fire the hull of the S. S. Baltic, including engines, etc., "whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building." The Baltic was

laid up in 1893 and was never afterwards sent to sea. In 1896 she was destroyed by fire.

Held, reversing the judgment of the Court of Appeal (25 Ont. App. Rep. 393) that the policy never attached; that the steamship was only insured while employed on inland waters during the navagation season or laid up in safety during the winter months.

Held also, that the above stipulation was not a condition but rather a description of the subject matter of the insurance and did not come within section 115 of the Ontario Insurance Act relating to variations from statutory conditions. Appeal dismissed with costs.

Nesbitt and *McKay*, for appellant. *Osler*, Q.C., and *W. M. Douglas*, for respondent.

Ontario.

COURT OF APPEAL.

From Rose, J.] [June 29.

BICKNELL *v.* GRAND TRUNK RAILWAY COMPANY.

Railway — Connecting Lines—Negligence—Passenger—Cattle Drover—Free Pass.

A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only "on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants:—"

Held, that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries suffered by him in a collision caused by their servants' negligence. *Hall* v. *North Eastern R. W. Co.*, 10 Q. B. D. 437, applied. Judgment of ROSE, J., reversed.

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

From Rose, J.] WINN *v.* SNIDER. [June 29.

Sale of Goods—Bills of Sale—Subsequent Purchaser.

A purchaser of goods who neglects to comply with the provisions of the Bills of Sale Act cannot invoke the provisions of the Act as against a subsequent purchaser in good faith, and the latter, even though he also has not complied with the provisions of the Act, obtains priority. Judgment of ROSE, J., affirmed.

E. E. A. DuVernet, for appellant. *J. C. Haight*, for respondent.

From McMahon, J.] SMALL *v.* HENDERSON. [June 29.

Bankruptcy and Insolvency—Assignments and Preferences—Composition—Fraud—Bills of Exchange and Promissory Notes—Endorsement.

An insolvent made a compromise with his creditors, borrowing from his wife the money to pay them. She borrowed the money from one of his creditors, agreeing to pay a bonus of a large amount and giving to the creditor for his composition payment and the bonus her promissory notes endorsed by her husband, with a mortgage on her real estate, and a chattel mortgage on his stock as collateral security. The creditors signed the composition agreement, nothing being said about the bonus to the other creditors, who knew, however, that some arrangement had been made with this creditor for the supply of the necessary funds. The insolvent, after carrying on business for some time and incurring further liabilities, made an assignment for the benefit of his creditors.

Held, that the transaction with the wife was valid and not a fraud on the composition and that the creditor was entitled to rank upon the notes as far as this question was concerned. Judgment of MCMAHON, J., affirmed, MOSS, and LISTER, JJ. A., dissenting.

But the notes in question having been made by the insolvent's wife, payable to the creditor's order, and having been endorsed by the insolvent before they were handed to the creditor :—

Held, on objection taken in this Court, that the insolvent was not liable as endorser and that the creditor could not rank on his estate.

G. Kappele, and *J. Bicknell*, for appellants. *Clute*, Q.C., and *J. G. Hay*, for respondents.

From Divisional Court.] [June 29.

FRASER *v.* LONDON STREET RAILWAY COMPANY.

Street Railways—Negligence—Damages—New Trial.

An appeal by the defendants from the judgment of a Divisional Court in the plaintiff's favor, reported 29 O. R. 411, and a cross-appeal by the plaintiff from that judgment in so far as it reduced the damages awarded to him at the trial, were argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 11th of May, 1899.

Hellmuth, for defendants. *Aylesworth*, Q.C., and *A. Stuart*, for the respondent.

At the conclusion of the argument the appeal was dismissed with costs, and on the 29th of June, 1899, the cross-appeal was dismissed without costs, the Court expressing no opinion as to the power of the Court below to make the alternative order for payment into Court of the amount of the judgment, and for a medical examination of the plaintiff at the end of a year.

From Divisional Court.] [June 29.

CASTON *v.* CITY OF TORONTO.

Assessment and taxes—Failure to distrain—Enforcing payment in a subsequent year.

Where during all the time the roll is in the collector's hands there are goods and chattels available to answer the taxes but the collector fails to distrain, the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor.

The provisions of section 135 of R. S. O. (1887) c. 193, (R. S. O., c. 224, s. 147), requiring the collector to state the reason for his failure to collect taxes and to furnish a duplicate of his account to the clerk are imperative, and if they are not observed the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor. Judgment of a Divisional Court, 30 O. R. 16, affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for appellants. *Clute*, Q.C., and *J. W. McCullough*, for respondent.

From Meredith, J.] [June 29.

TYTLER *v.* CANADIAN PACIFIC RAILWAY COMPANY.

Action—Jurisdiction—Canadian Pacific Railway Company—Negligence in another Province—Service of writ.

The personal representative appointed in this Province of a person killed in British Columbia through the negligence there of servants of the Canadian Pacific Railway Company may bring an action in this Province against the Company to recover damages, and may serve the writ on the defendants in this Province in accordance with the provisions of Consolidated Rules 159 and 160. Judgment of MEREDITH, J., 29 O. R. 654, affirmed.

Robinson, Q.C., *Aylesworth*, Q.C., and *MacMurchy*, for appellants. *Tytler*, for respondent.

From Divisional Court.] [June 29.

IN RE LEAK AND THE CITY OF TORONTO.

Municipal corporations—Arbitration and award—Lands injuriously affected—Compensation—Damages—Interest.

Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award. Judgment of a Divisional Court, 29 O. R. 635, reversed.

Fullerton, Q.C., and *W. C. Chisholm*, for appellants. *Du Vernet*, for respondent.

From Divisional Court.] WILSON *v.* MANES. [June 29.

Municipal elections—Returning officer—Refusal to give ballot paper to voter—"Wilful Act"—Absence of malice or negligence—Consolidated Municipal Act, 1892, s. 168.

A returning officer at a municipal election refuses at his peril to give a ballot paper to a person claiming the right to vote, and if that person is in fact entitled to vote the returning officer's refusal is a wilful act within the meaning of 168 of Consolidated Municipal Act, 1892, and renders him liable to the voter for the statutory penalty without proof of malice or negligence. Judgment of a Divisional Court, 28 O. R. 419, affirmed, MACLENNAN, J. A., dissenting on the ground that on the evidence there was no refusal of the ballot paper.

Aylesworth, Q.C., for respondent.

From Divisional Court.] SMITH *v.* SMITH. June 29.

Contract—Specific performance—Parent and child—Agreement to compensate—Improvements.

An appeal by the defendant from the judgment of a Divisional Court, reported 29 O. R. 309, was argued before Burton, C. J. O., Osler, Maclennan, Moss, and Lister, JJ. A., on the 9th of May, 1899, and on the 29th of June, 1899, was dismissed with costs, the Court agreeing with the reasons for judgment given in the Court below.

W. R. Riddell, for appellant. *Wells*, Q.C., for respondent.

From McMahon, J.] [June 29.

MCDONALD *v.* LAKE SIMCOE ICE COMPANY.

Ice—Water and water courses—Constitutional law—Public harbour.

The plaintiff was the owner of a lot bounded by the water's edge of Lake Simcoe and also of the adjoining lot covered by the waters of that lake there not being in the patent of either lot any special reservation of right of access to the shore:

Held, that he was entitled to the ice which formed upon the water lot and had the right to cut and make use of it for his profit; that no other person was entitled to cut and remove the ice except in the bona fide and advantageous exercise of the public easement of navigation; and that the defendants were not exercising that easement when they cut channels through the plaintiff's ice in which to float to the shore blocks of ice cut by them beyond the limits of the plaintiff's water lot. Judgment of MACMAHON, J., 29 O. R. 247, reversed, OSLER, J. A., dissenting.

Held, also, OSLER, J. A., expressing no opinion, that the locus in quo, a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground and

little shelter except from wind off the land, was not a public harbor within the meaning of the British North America Act, and that the plaintiff's grant from the Province was valid.

William Macdonald, for appellant, and *R. U. McPherson*, and *G. C. Campbell*, for respondents.

From Falconbridge, J.] [June 29.

DUNN *v.* PRESCOTT ELEVATOR COMPANY.

Warehouseman—Negligence—Damages—New trial.

In an action against the owners of a grain elevator to recover damages for alleged negligence in the care of grain one of the grounds of negligence found by the jury was that the grain had been taken into the elevator from the vessel while rain was falling and that the vessel's hatches had not been protected

Held, that the responsibility of the defendants did not commence till the grain was delivered to them; that therefore there was no duty cast upon them to protect the grain during the process of unloading; and a general assessment of damages having been made upon this and other grounds of negligence, a new trial was ordered. Judgment of FALCONBRIDGE, J., reversed.

Osler, Q.C., and *French*, Q.C., for appellants. *Leitch*, Q.C., and *D. W. Saunders*, for respondent.

From Divisional Court.] DALTON *v.* ASHFIELD. [June 29.

Ditches and Watercourses Act—Failure to comply with award—Action—Purchaser from party to award.

No action lies to recover damages because of failure to comply with an award made under the Ditches and Watercourses Act; the remedy, if any, being under the Act itself. The purchaser of land from an owner who was a party to proceedings under the Act is entitled to enforce the award. Judgment of a Divisional Court reversed.

Garrow, Q.C., for appellants. *Shepley*, Q.C., for respondent.

From Divisional Court.] SHERLOCK *v.* POWELL. [June 29.

Contract—Partial performance—Quantum meruit.

Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum, as the work is done and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a quantum meruit. Judgment of a Divisional Court affirmed.

J. R. L. Starr, for appellant. *Aylesworth*, Q.C., for respondent.

HIGH COURT OF JUSTICE.

Armour, C.J., Falconbridge, J., Street, J.] [June 19.

RICE *v.* RICE.

Husband and wife—Wife's income handed to husband—Gift of inferred - Fraudulent conveyance—Consideration for—Evidence.

A wife having property settled for her separate use is entitled to deal with the money as she pleases. If she directly authorizes it to be paid to her husband he is entitled to receive it and she cannot recall it, and if they so live together and deal with her separate income as to show they must have agreed it should come to his hands (for their joint purposes), that would be evidence of a direction on her part that he should receive it, and her tacit assent to his receiving it constitutes an effectual gift: *Caton* v. *Rideout*, (1849) 1 MacN. & G. 599, and *Edward* v. *Cheyne* (1888) 13 App. Cas. 385 cited. There is a great difference between the receipt of the income of a wife's separate property by her husband and of the corpus. In the latter case the onus of proof of a gift lies upon the husband and must be clearly established or he will be held to be a trustee for her. In the former the onus lies upon the wife, save, perhaps, as to the last year's income, and she must establish conclusively that he received the income as a loan. *Alexander* v. *Barnhill* (1888) 21 L.R. Ir. 511 cited.

In an action by a judgment creditor to set aside a conveyance from a husband to wife in which it was set up that the annual income of the wife received from her father and his estate and handed over to the husband and used by him with his other moneys during a peried of twenty-seven years of married life was handed to him on each occasion as a loan.

Held, that the evidence of both defendants without corroboration did not support the allegation of the loan and the conveyance was set aside. Judgment of MEREDITH, J., reversed.

Aylesworth, Q.C., and *Mickle* for the appeal. *Johnston*, Q.C., and *Heighington*, contra.

Boyd, C., Ferguson, J., Robertson, J.] [June 20.

NIAGARA FALLS PARK AND RIVER R. W. Co. *v.* TOWN OF NIAGARA FALLS.

Assessment and taxes—Railway Co.—Right of way—License to use—Assessment of possession—55 Vict. c. 96 (o).

A license to use is a liberty to occupy and a precarious occupation is quite sufficient.

The plaintiffs having a license to use a right of way through the Queen Victoria Niagara Falls Park for their electric railway under an agreement confirmed by 55 Vict. c. 96 (o).

Held, that there was an actual, visible, continuous, and exclusive

possession of the roadway for the profitable use and operation of the railway for a term and that the Company was liable to taxation for the roadbed as an occupant is assessed in respect of property; but the property itself being in the Crown or held by the public was exempt and could not be sold to make good the tax. Judgment of the County Court of York reversed.

C. A. Masten, for the appeal. *H. S. Osler*, contra.

Boyd, C., Ferguson, J., Robertson, J.] [June 20.

GARLAND MANUFACTURING CO. *v.* NORTHUMBERLAND PAPER AND ELECTRIC CO., LIMITED.

Lessor and lessee—Verbal agreement—Occupation by a company—Holding over—Want of corporate seal—Contract executed and executory—Tenant from year to year—Lease or license—Use and occupation—Rent.

There is a broad and well marked distinction between contracts executed and contracts executory in the case of corporations, and where a contract is executory a corporation cannot be held bound by the Court unless the contract is made in pursuance of its charter or is under its corporate seal. The defendant company had occupied certain premises under a verbal agreement—paid rent for a year, continued in possession afterwards for a short time, and then went out paying rent for the time they were actually in possession.

Held, that as there was no lease under seal the Company were not liable as tenants from year to year, but only for use and occupation while actually in possession. *Finlay* v. *Bristol and Exeter R. W. Co.* (1852) 7 Ex. 409 discussed and followed. Judgment of the County Court of the County of York reversed.

Thomson, Q.C., for the appeal. *Watson*, Q.C., contra.

Boyd, C., Robertson, J.] REGINA *v.* GRAHAM. [June 22.

Criminal law—Evidence—Rape—Statement of prosecutrix.

On a charge of rape it was sought to give in evidence statements made by the prosecutrix on the day following the alleged assault to a police inspector who called upon her in reference to the matter.

Held, that the evidence was inadmissible. The statements were not uttered as the unstudied outcome of the feelings of the woman, nor as speedily after the occasion as could reasonably be expected.

Robinette and J. M. Godfrey, for the prisoner. *Cartwright*, Q.C., for the Crown.

Trials of Actions—McMahon, J.] [June 29.

POLSON *v.* TOWN OF OWEN SOUND.

Municipal corporations—By-laws—Exemption from taxation—Manufacturing establishment.

Held, that R.S.O., c. 184, s. 366, giving municipal councils power to exempt manufacturing establishments from taxation, could not authorize such exemption when such establishments cease under liquidation to carry on business, and a by-law authorizing exemption under the statute would thereupon cease to be operative.

Moss, for plaintiff. *Hatton*, for defendants.

Meredith, C.J., Rose, J.] [July 7.

ANNIE BENNER *v.* EDMONDS.

Libel—Privilege—Protection of interests—Excessive language—Evidence—Admissibility—Publication—Receipt of letter—Further publication—Non-direction—Damages.

The defendant received a letter from the solicitor of the plaintiff's mother, complaining of statements circulated by the defendant which had caused the mother and her family, and particularly her daughter (the plaintiff), annoyance, and threatening to begin an action for slander unless a retraction were signed and costs paid. This letter was not answered by the defendant, but the threatened action having been brought, the defendant wrote a letter, not to the solicitors but to their client, with the avowed purpose of preventing her from proceeding with her action. In that letter he referred to the plaintiff and said he saw her drive her father out of the house and pelt him with sticks of wood, and asked the mother if she thought it would add to her daughter's character to have this and much more published in Court and in newspapers.

Held, in an action for libel based upon this letter, that it did not come within the rule, as to "statements necessary to protect the defendant's interests" so as to make the occasion privileged; and even if it did, the privilege was destroyed by the excess of the language.

Evidence was given by a woman who said that she saw the defendant's letter in the hands of the plaintiff's mother within twenty minutes after its receipt, and that she read it aloud in the presence of the plaintiff and her mother and several other persons. There was also evidence to show that the letter had been posted and given out by the postmaster to the plaintiff's mother.

Held, that had the evidence of the woman been offered in order to fix the defendant with liability for what was done as a further publication of the letter, it would not have been admissible, but it was admissible in order to prove publication by the defendant, which was denied, as it showed that the letter was in the possession of the person to whom it was addressed

shortly after it was posted by the defendant, and therefore was evidence of the receipt of it by her. It may not have been necessary to give the evidence, but the plaintiff had the right to do so.

Held, also, that it was not a ground for interfering with the verdict of the jury in favor of the plaintiff that the trial judge refused to tell the jury that the defendant was not responsible for the further publication of the letter made by the plaintiff or her mother, the jury not having been invited to increase the damages by reason of publication to others, and the damages awarded not being excessive.

Lazier, for defendant. *Logie*, for plaintiff.

Meredith, C.J., Rose, J.] [July 7.

ARNOLD *v.* VAN TUYL.

Appeal—County Court—Order for security for costs—Interlocutory order—R.S.O., c. 55, s. 52 (1)—Security for costs of appeal—Stay of appeal—Rule 825.

In an action in a County Court, after judgment therein dismissing the action with costs and notice of appeal therefrom to the High Court given by the plaintiffs, an order was made by the Judge of the County Court, upon the application of the defendants, requiring the plaintiffs, within four weeks, to give security for the costs of the action in addition to security already given, staying proceedings in the meantime, and directing that, in default of security being given within the time limited, the action should be dismissed with costs.

Held, that this order was not in its nature final, but merely interlocutory, within the meaning of s. 52 (1) of the County Courts Act, R.S.O., c. 55, and no appeal lay therefrom.

Held, also, that the provision of Rule 825, that no security for costs shall be required on a motion or appeal to a Divisional Court, applies to County Court appeals; and it must be assumed that the security ordered was not intended to extend to the costs of the appeal to the High Court from the judgment dismissing the action, nor the stay to the appeal itself.

R. McKay, for plaintiffs. *C. J. Holman*, for defendants.

Meredith, C.J., Rose, J.] [July 7.

JANE BENNER *v.* EDMONDS.

Settlement of action—Setting aside—Counsel—Solicitor—Costs.

Where counsel, acting upon the instructions of the plaintiff's solicitor, effected a compromise of the action not authorized by the plaintiff and contrary to the express instructions given by her to the solicitor, the compromise was set aside and the plaintiff allowed to proceed to trial, but, as the plaintiff and defendant were innocent parties, without costs to either against the other. *Stokes* v. *Latham*, 4 Times L.R. 305, followed.

Logie, for plaintiff. *Lazier* for defendant.

Meredith, C.J., Rose, J.] [July 11.

DAVIDSON *v.* GARRETT.

Coroner—Direction to surgeons to hold post-mortem examination—No jury impanelled—County Crown Attorney—Consent in writing—R.S.O., c. 97, s. 12 (2)—Construction—Imperative or directory—Damages.

The wife of the plaintiff had died suddenly, and a question arose as to whether the plaintiff could obtain a certificate of death so as to permit the interment of the body. The defendants—three practising physicians and surgeons—acting under a verbal direction from a coroner for the city where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making, and made there a post-mortem examination of the dead body. The coroner had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but the warrant was afterwards withdrawn without the knowledge of the defendants. By s. 12 (2) of the Act respecting coroners, R.S.O., c. 97, "in no case shall any Coroner direct a post-mortem examination to be made without the consent in writing of the County Crown Attorney unless an inquest is actually held;" but no consent was given in this case. The action was in trespass quare clausumm fregit, and the cutting and mutilating of the body were alleged in aggravation of damages.

Held, that the coroner, having had authority to hold an inquest upon the body, and having determined that it should be held, and having begun his proceedings, had power to summon medical witnesses to attend the inquest and to direct them to hold a post-mortem.

Held, also, that no rule of law exists which forbids the making of the post-mortem before the impanelling of the jury; that is a matter of procedure in the discretion of the coroner.

Held, also, that the meaning of s. 12 (2) is that the coroner should not without the required consent direct a post-mortem examination for the purpose of determining whether an inquest should be held, but only where the coroner was determined to hold an inquest and gives the direction as part of the proceedings incident to it; but if the provision should be read differently, it was at all events merely directory, and did not render an act done by a surgeon in good faith, under the direction of a coroner, unlawful because the coroner had neglected to obtain the prescribed consent, where the Act would be lawful if the consent had been obtained.

Semble, also, that if the verdict for the plaintiff had been allowed to stand, the amount of damages assessed, $600, was excessive.

Johnston, Q.C., for defendants. *Robinette* and *J. M. Godfrey*, for plaintiff.

Maclennan, J.A.,] [July 13.

WINTERMUTE *v.* BROTHERHOOD OF RAILWAY TRAINMEN.

Appeal—Court of Appeal—Stay of proceedings—Removal of—Security for costs—Rules 826, 827.

Upon an appeal to the Court of Appeal, upon security for costs being allowed, in general the proceedings ought to be stayed; but if it is made to appear in any case that the respondent may suffer injustice by his execution being stayed, then the stay may be removed, upon terms which may be just to both parties; Rules 826, 827.

The plaintiff recovered a money judgment against the defendants, a benevolent society incorporated in a foreign country, but having members in Ontario who paid dues and assessments which were transmitted abroad. The defendants launched an appeal from the judgment to the Court of Appeal, and gave security for the costs thereof. Upon an application by the plaintiff to remove the stay of proceedings upon the judgment imposed by virtue of the security being given, the defendant's secretary-treasurer, by his affidavit, admitted that they had no assets in Ontario, but said that they were advised that they had good grounds for the appeal, but, if it should fail, that the plaintiff's claim would be paid; and this was not contradicted.

Held, that the dues and assessments of members in Ontario being voluntary payments, could not be reached by a receiver or by attachment; and there was no prejudice or injustice that the plaintiff was likely to suffer by the stay, as he already had security for costs, and the delay would be compensated by interest on the judgment, if the appeal should be unsuccessful.

Boyd v. *Dominion Cold Storage Co.*, 17 P.R. 545, distinguished.

Held, also, that the costs of the unsuccessful motion should be paid by the applicant; there was no rule that costs of such a motion should go to the successful party upon the appeal.

F. E. Hodgins, for plaintiff. *J. H. Moss*, for defendants.

Meredith, C.J.] [July 14th.

HILLS *v.* UNION LOAN AND SAVINGS CO.

Discovery—Inspection of Buildings—Occupation of Tenants—Rule 571.

Rule 571, though not so limited in express terms, must be construed so as to be confined to cases in which that of which inspection is sought is in the possession, custody, or control of the party against whom the order is desired.

The plaintiff sued for damages for breaches of the covenants to repair and to leave the premises in good repair, contained in a lease from her to the defendants' assignor, for which she claimed that the defendants were answerable. The defendants were mortgagees of the lease, and had not themselves been in the actual occupation of the premises. At the time of

the action the buildings and premises in question were not in the occupation of the plaintiff, but in that of her tenants.

Held, that an order for inspection by the defendants should not be made.

H. D. Gamble, for plaintiff.

Meredith, C. J.] [July 18th.

GUNN *v.* HARPER.

Action—Jurisdiction—Redemption—Foreign Lands—Constructive Trustees—Limitations of Actions.

Action to have it declared that a conveyance of lands out of Ontario made in 1878 by the plaintiff to one of the defendants, though absolute in form, was in equity a mortgage, and for redemption. The grantee in 1883 made an absolute conveyance of the lands to the other defendants. All the parties resided in Ontario.

Semble, that had the plaintiff's grantee not conveyed to others, and the action been against him alone, it would have lain; but,

Held, that the Court had no power to declare the other defendants constructive trustees of foreign lands; and also that their defence of the Statute of Limitations raised a question of title, the determination of which involved the application of the law of the foreign country.

G. M. Macdonnell, Q.C., and *J. M. Farrell*, for plaintiff. *F. King*, for defendant Gunn. *Whiting*, for other defendants.

Nova Scotia.

SUPREME COURT.

Full Court.] TOWNSHEND *v.* SMITH. [May 15.

Costs—Discretion of trial judge as to, in the matter of disputed accounts—O. 63—Reasons for withholding costs held to be reviewable on appeal.

In a suit tried without a jury by the judge of the County Court for district No. 4 the only question in dispute was the settlement of mutual accounts. The learned judge found certain items in favor of each party, the final result being judgment for defendant for the balance found in his favour. No costs were given to either party, 1st, on the ground of the disputed items, and 2nd, on the ground that plaintiff had ample reason for instituting the proceeding, having been led by defendant's conduct to believe that there was a balance due him.

Held, RITCHIE, J., and GRAHAM, E.J., dissenting, that the reasons of the trial judge for withholding costs were reviewable on appeal.

Held, also, that the case was one in which the ordinary rule should prevail, and that defendant having succeeded as to the balance of the account was entitled to his costs.

W. M. Christie, for appellant. *A. Drysdale*, Q.C., for respondent.

Full Court.] THE QUEEN *v.* DOHERTY. [May 15.

Canada Temperance Act—Conviction by stipendiary magistrate affirmed—Appearance of defendant by counsel under protest—Effect of in waiving defect in service—Use of words "costs of commitment" in conviction—Treated as surplusage—Remedy of defendant—Tender of amount due.

Defendant was summoned to appear before the stipendiary magistrate of the town of P. to answer a charge of having unlawfully kept for sale intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act. On the return day of the summons counsel for defendant appeared and took the objection that the service was insufficient, the constable by whom it was effected not being a constable for the municipality of the county of P. The constable was called and was cross-examined, under protest, by defendant's counsel who then retired, and the magistrate, after hearing the evidence as to the commission of the offence charged, adjourned the case from the 21st January, 1899, until the 27th of the same month, and on that date, defendant not appearing either personally or by counsel, convicted him, and adjudged that he pay the sum of $50, and also that he pay the informant his costs amounting to $4.10, such sums if not paid forthwith to be levied by distress of the goods and chattels of defendant, and in default of distress, that defendant be imprisoned for the space of 60 days, unless such sums and the costs and charges of said distress, and of the commitment, and of conveying defendant to jail were sooner paid.

Held, affirming the judgment of MEAGHER, J., refusing a writ of certiorari. (1) That the appearance by counsel cured the defect, if any, in the service. (2) That the fact of defendant's solicitor having left the court did not deprive the magistrate of the right to adjourn. (3) That the magistrate, having adjourned, had the power on the day to which the case was adjourned to convict in the absence of defendant. (4) That the use of the words "costs of commitment" in the conviction, while irregular, should be treated as mere surplusage. (5) That if an attempt were made to enforce the warrant of commitment, in respect to the costs of commitment, defendant's remedy would be to tender the amount due.

WEATHERBE, J., and GRAHAM, E.J., dissented.

W. B. A. Ritchie, Q.C., for appellant. *Drysdale*, Q.C., and *McInnes*, for respondent.

Full Court.] MUSGRAVE *v.* THE MANHEIM INSURANCE CO. [May 18.

Marine insurance—Policy on freight—Constructive total loss—Frustration of object of voyage by peril insured against.

Plaintiff, steamer, while on a voyage from Halifax to Havana with a cargo of fish and potatoes, was disabled by the breaking of her shaft, and towed into Hamilton, Bermuda. It was found impossible to repair the ship in time to enable her to carry the cargo forward, and at the request of the shippers the cargo was returned to them and brought back to Halifax. The ship was sold and towed to Philadelphia, where she was repaired, and plaintiff brought action against the defendant company to recover the amount insured upon freight to be earned.

The jury found, in answer to questions submitted to them, that the ship could not have been repaired at Bermuda in time to have carried the cargo forward to Havana without material deterioration of the cargo or its becoming worthless, and that the shaft was broken by perils of the sea.

Held, dismissing the appeal, that plaintiff was entitled to recover, the cargo being one that required to be carried forward to its destination without delay, and the object of the voyage having been wholly frustrated by a peril insured against. And that the venture having been made of no effect by a peril insured against, there was a constructive total loss of the freight.

R. C. Weldon, Q.C., and *R. E. Harris*, Q.C., for appellant.

R. L. Borden, Q.C., and *A. Drysdale*, Q.C., for respondent.

Graham, E.J.] RYAN *v.* CALDWELL. [June 19.

Action against mortgagor on covenant for balance due after crediting amount of sale—Right to redeem.

Action by mortgagees against mortgagor on the covenant for payment in the mortgage for the balance due after crediting the amount for which the property was sold under foreclosure. The mortgagor had conveyed away his equity of redemption before the foreclosure, and was not made a party to the foreclosure action. The plaintiff bid in the premises at the foreclosure sale for less than was due on the mortgage, and subsequently re-sold them, and the property was now owned by a third party.

Held, 1. The case is distinguishable from *Kenny* v. *Chisholm*, 7 R. & G. 497, on the ground that the defendant was not a party to the foreclosure proceedings, and that defendant being sued on the covenant had regained the right to redeem. *Kinnard* v. *Trollop*, 39 Ch. D. 636; Robbins on Mortgages 962.

Held, 2. Plaintiff could only recover upon re-conveying the mortgaged property to the defendant, and accounting for the rents and profits since she purchased at the foreclosure sale, and if she failed to re-convey the

land on tender of the amount ascertained to be due, judgment should be entered for the defendant with costs; and if the defendant failed to redeem then the plaintiff should have judgment for the amount due upon re-conveying the land to the defendant.

Held, 3. Plaintiff should, if she desired, have a strict foreclosure barring the defendant's equity of redemption without reconveying the land.

Drysdale, Q.C., and *Fulton* for plaintiff. *Harris*, Q.C., for defendant.

New Brunswick.

SUPREME COURT.

Full Court.] EX PARTE BLACK. [June 10.

Garnishee—Attaching Order against Legacy—Assignment—Fraudulent Conveyance.

The applicant, a judgment creditor of T. E. M., who was legatee under the will of C. M., obtained an attaching order against moneys in the hands of E. M., executor of the will, which attaching order the judge of the County Court subsequently rescinded on the ground that the judgment creditor had assigned his estate to his father. The judgment creditor claimed, and offered evidence tending to shew, that the assignment was fraudulent.

Held, on a motion to make absolute an order nisi for certiorari to remove the rescinding order, that nothing could be attached except what the debtor could himself dispose of, and, though the assignment was fraudulent, yet, as it was good between the parties, it was good against a judgment creditor seeking to attach.

F. St. J. Bliss, in support of rule. *R. W. McLellan*, contra.

Full Court.] BELL *v.* BELL. [June 9.

Divorce Hearing—Witness—Future Rewards and Punishment.

The judge of the Divorce Court refused to receive the evidence of a witness who was offered on behalf of the defendant, and who swore that, although he thought there was a God, he did not think there was any Hell, and would not say that he believed in future rewards and punishments.

Held, that the rejection of the witness was not improper.

Gregory, Q. C., in support of appeal. *Currey*, Q. C., and *A. H. Hanington*, Q. C., contra.

Full Bench.] MACPHERSON *v.* CALDER. [June 16.

County Court—Action against administratrix—Plea of Plene Administravit—Replication.

Held, that in an action against an administratrix in the County Court issue is not joined upon the plea pleaded, when the plea is one of plene administravit, and that in such a case before the defendant can have judgment quasi non-suit there must be a demand of replication, notwithstanding s-s. 4 of s. 40 of the County Court Act, 60 Vict., cap. 28, that "no similiter or joinder shall be necessary, but the cause shall be at issue upon the plea pleaded."

Van Wart, Q.C., for plaintiff. *Phinney*, Q.C., for defendant.

Full Bench.] HATHEWAY *v.* KINSMAN. [June 16.

Actions against non-residents, 60 Vict., c. 24, s. 48, judgment for cost without damages.

Three separate actions were brought against R. W. K., R. W. K. Co., (Ltd.) and R. A. B. on a promissory note to which they were parties. All three writs were specially endorsed for service out of the jurisdiction, R. A. B, after the service of the writs and before the entry of the cause against the present defendant, paid the note and costs of the suit against him, and the plaintiff subsequently signed a judgment for costs in the action against the present defendant. On a motion to set aside the judgment defendant relied on the concluding clause of s. 48 of the Supreme Court Act, 60 Vict., cap 24: "Provided always that the plaintiff shall be required to prove the amount of the debt or damages claimed by him in such action either before a jury on a writ of inquiry or before a judge according to the nature of the case, as the court or judge may direct, and the making of such proof shall be a condition precedent to his obtaining judgment."

Held, that plaintiff was entitled to judgment for costs.

Puddington, in support of the motion.

Full Bench.] PRICE *v.* WRIGHT. [June 16.

Tort—Bite by Dog—Damages—Remoteness—Scienter.

Held, in an action for damages for the injury of a girl child by the biting and scratching of a dog that a direction by the learned judge that in assessing damages the jury might consider the effect of the disfigurement on the girl's prospects of marriage was erroneous, the damages being too remote.

Held, also that a direction that the jury might take into consideration the defendant's financial standing and prospects in life was erroneous.

Held, also that one instance of the dog having previously bitten and

scratched to the knowledge of the defendant was sufficient proof of the scienter.

White, Atty. Genl. & L. Allison, for plaintiff. *Stockton*, Q. C., and *H. A. Powell*, Q. C., for defendant.

Full Bench.] EX PARTE TROOP. [June 16.

Bastardy—Judgment against bail—Recognizance—Enrollment.

No enrollment of the recognizance is necessary in the County Court to fix the bail in a bastardy case with liability. Rule discharged for certiorari to remove judgment on a scire facias against the bail.

Jones, in support of rule. *Currey*, Q. C., contra.

WELLON *v.* MUNICIPALITY OF KINGS.

Motion for judgment Quasi Non-Suit—Peremptory Undertaking Costs.

The court dismissed a motion for judgment quasi non-suit on the plaintiff giving a peremptory undertaking to bring the cause down to trial at the next circuit and directed that the costs be costs in the cause.

Stockton, Q. C., for plaintiff. *White, Atty. Genl.*, for defendant.

Manitoba.

QUEEN'S BENCH.

Killam, C. J.] MOIR *v.* PALMATIER. [June 23.

Vendor and purchaser—Landlord and tenant—Right of re-entry—Right to cancel agreement of sale—Waiver—Formal declaration of cancellation.

The plaintiff became tenant of a farm under a lease for 7 years at an annual rental of $400 payable on 10th of October each year. Contemporaneously with the lease an agreement of purchase of the property was entered into between the plaintiff and the lessor for the sum of $3,447, by which the latter agreed to accept as part payment of the purchase money all sums of money which should be paid by the plaintiff as rent under the lease, and the plaintiff covenanted, at the expiration of eight years from the date of the instrument, to pay the balance of the purchase money with interest. There was also the covenant of the vendor to convey upon payment, an option to the plaintiff to pay off the full amount and receive a conveyance at any time, and finally the following proviso:—"It is express-

ly understood and agreed that time is to be considered the essence of this agreement and unless the payments are punctually made, the said party of the first part shall at his option declare this agreement null and void, all payments made thereunder shall be forfeited and the said party of the first part shall be at liberty to re-sell the said land, the said party of the second part hereby agreeing to convey to the said party of the first part her interest in the same, when and as soon as such default occurs."

The lease contained a proviso for re-entry, in the statutory short form, for non-payment of rent, so that the right of re-entry could not be exercised until 15 days after default. The lessor afterwards conveyed the land in fee to the defendant, Palmatier, subject to the lease and agreement.

Default having occurred in payment of the rent due on the 10th of October, 1897, Palmatier leased the property to the defendant Mills who at once entered into possession.

Plaintiff brought this action for, amongst other things, specific performance by the defendant of the agreement of sale and to recover possession of the property under the lease, alleging acts shewing waiver of the right of re-entry and that defendant Palmatier had not formally declared the agreement of sale to be null and void, but on the contrary had proceeded with an attempt to enforce payment of the rent in arrear.

Held, 1. Only acts of waiver of the right to re-entry done after the 31st of October, when it first accrued, could have any effect as such, and none were proved.

2. If it had been shewn that defendant had persisted, after the 10th of October, in his attempt to collect the rent overdue, it would have constituted a waiver of the right to declare the agreement of sale null and void, but nothing of the kind, for which the defendant who was out of the Province ought to be held responsible, was shewn to have been done.

3. The making of the lease to Mills, his taking possession under it, and the other circumstances following the default and made known to the plaintiff were sufficient to constitute an exercise of the option to cancel the agreement of sale without the making of any formal declaration to the purchaser.

Culver, Q.C., and *Pitblado*, for plaintiff. *Ewart*, Q.C., *Hough*, Q.C., and *Huggard*, for defendants.

Full Court.] CITY OF WINNIPEG *v.* C. P. R. Co. [June 30.

"Municipal" taxes do not include "school" taxes.

Judgment of BAIN, J., noted and vol. 34, p. 706 affirmed with costs. DUBUC, J., dissenting.

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

Dubuc, J.] DOIDGE *v.* MINIMS. [July 5.

Prohibition to County Court—Judgment not delivered within period prescribed by R. S. M., c. 33, s. 130 as amended by s. 1 of c. 6 of 56 Vic. (M.)

Application for a writ of prohibition against a judgment of the County Court of Selkirk entered 11th January, 1899, in the decision then rendered in an action tried in August, 1898. Defendant resides in Ontario and notice of the judgment was at once given to her solicitor here. On 25th April an action was brought in an Ontario Division Court on the judgment in question and judgment thereon was recovered there on 17th May. Notice of the application for prohibition was not served until 20th May.

Held, that the provision requiring the judge to announce his decision within 60 days is a mere matter of procedure and the delivery of judgment afterwards is to be considered only an irregularity; that the proper remedy was to appeal against the judgment under the provisions of the County Courts Act; and that in the exercise of the discretion of the Court, under all the circumstances of this case, the writ of prohibition should be refused, more especially as defendant was not prejudiced by the delay in rendering judgment, and it was shewn that plaintiff did not intend to take any steps to enforce the judgment in this province.

Application dismissed with costs.

Heap, for plaintiff. *Hull*, for defendant.

British Columbia.

SUPREME COURT.

Full Court.] [June 27.

HOWAY *v.* DOMINION PERMANENT LOAN CO.

Practice—Stay of proceedings—Agreement to bring action in the Courts of Ontario—Arbitration Act, sec. 5—County Court Act, sec. 34—Waiver.

Action by shareholders in defendant Company for $584.72, alleged overpayment on a mortgage of shares.

Held, MARTIN, J., dissenting, that where a defendant under s. 34 of the County Court Act objects to an action being tried in the County Court and an order is made directing that the plaint stand as a writ and that an appearance be entered thereto in five days, he waives his right to object to the jurisdiction of the Court to try the action on the ground that the parties

have agreed that any action brought in respect of the cause of action sued upon shall be tried in another forum.

Appeal dismissed.

Davis, Q.C., and *Cowan*, for the appeal. *Wilson*, Q.C., and *Reid*, for respondents.

Martin, J.] TOWNEND *v.* GRAHAM. [April 13.

Purchase by instalments—Investigation of title during term of credit—Lis pendens—Cloud on title.

Action (tried at Nelson) to rescind an agreement for sale, dated July 18th, 1898, whereby the plaintiff agreed to sell and the defendant to purchase certain brewing premises in Grand Forks for $1,400, of which $300 were paid on execution, and the balance arranged to be paid in subsequent monthly instalments of $100 each. The agreement provided that on the defendant's paying the instalments in the time and manner mentioned, the plaintiff would convey or cause to be conveyed to the defendant, by a good and sufficient deed in fee simple, with the usual covenants of warranty and freed and discharged from all incumbrances, the said premises. At the time of the execution of the said agreement and of the refusal to pay the said instalment a lis pendens was registered against the property. On the ground that the vendor could not shew a good title, the purchaser (the defendant) refused to pay the first instalment which became due on the 18th of August, 1898, though otherwise ready and willing to do so, whereupon the action was commenced.

Held, that on a purchase of land, the balance of the purchase price for which is payable by instalments, the purchaser may require his vendor to shew a good title before parting with the first instalment.

A lis pendens registered against real estate is a cloud upon the title, and, as such, a person is entitled to have it removed from the Registry.

The mere fact that the purchaser made some improvements on the property does not constitute a waiver of his right of an inquiry as to title.

Bowes and *Wragge*, for plaintiff. *W. A. Macdonald*, Q.C., for defendant.