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The practice indulged in by some judges of cross-examining witnesses too much is alluded to in the English *Law Times*. The writer says: "The judges, especially the very young and the very old, sin in this way because it is their nature so to do." We would remark that human nature appears to be much the same in Ontario as it is in England.

In the same publication appears a letter from an Irish solicitor calling attention to the legal business, and the loss sustained by successful suitors incidental to the practice of judges taking upon themselves to measure the costs of motions, instead of permitting these costs to be taxed in the ordinary way, and very properly remarks that it is not only a grievance, but a very powerful deterrent to the enforcement of rights by the remedies prescribed by law; adding, that a fresh point is given to Dean Swift's celebrated sarcasm, that a man was hopelessly ruined in whose favour, as a litigant, judgment had been pronounced "with costs."

The Canadian Annual Digest for 1897 is now ready for delivery to its subscribers; and from such an examination as we have been able to give it before going to press with the present number, we are of opinion that the standard of excellence that marked the issue for 1896 has been maintained throughout the present work. We observe that the editors, Messrs. Masters and Morse, have extended the scope of their labours in this issue for 1897 by digesting a large number of cases that are published in the CANADA LAW JOURNAL, the Canadian Law Times, and La Revue de Jurisprudence

which do not appear elsewhere. This new feature will meet with the approval of the profession at large. In announcing the first issue of this work, we expressed the view that the enterprise would commend itself to the profession as filling a great want under legal conditions as they exist in this country, and the hearty encouragement accorded the work has demonstrated that we were not mistaken.

BRITISH COLUMBIA BENCH.

The British Columbia Bar is permeated with a feeling of indignation at the suggested appointment of a barrister from another province to the Chief Justiceship of their Supreme Court bench. As a matter of abstract justice such a proposal is one which it is hard to defend, inasmuch as appointments in other provinces are secured to the provincial Bars, and the many barristers of high standing practising in the province at the Pacific coast have, therefore, no opportunity for advancement by way of transfer to a judgeship elsewhere. With so many able lawyers there it is utterly inexcusable to pass over the boundary to another jurisdiction to fill any judicial position, and it is always better that an appointee to the bench should be one who has by long practice and experience under the procedure of the province familiarized himself therewith.

It may also be doubted whether an appointment such as is suggested is constitutional. The Province of British Columbia entered Confederation in 1871, under an agreement that so much of the British North America Act as was not expressly excluded by the terms of the agreement should apply to that province as fully as if it had been one of the original parties.

Section 97 of the British North America Act is as follows: "Until the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and the procedure in the courts of those provinces, are made uniform, the judges of the courts of those provinces appointed by the Governor-

General shall be selected fr a the respective Bars of those provinces." This section is followed by another, which expressly provides, without any contingency, that the judges of the courts of Quebec, the only other party to the original federation, shall be selected from the Bar of that province. The laws and procedure are by no means uniform in any of the provinces, but the uniformity intended is probably that respecting which provision is made by section 94.

A similar question arose in 1872 on the refusal of assent to a bill passed by the Manitoba Legislature for the establishment of the Law Society of Manitoba, when it was considered that section 97 of the British North America Act applied to that province, and that the power should not be granted to the then existing Bar to admit to practice such persons only as might be thought fit by the representative association. The reason then given was that it would be an attempt to further restrict the Ottawa Government in their selection of judges, already limited to the Manitoba Bar, by reading section 94 into their agreement of federation, as it is submitted it should now be applied to the agreement with British Columbia.

Whatever may be the strictly legal aspect of the question, it is to be hoped that Mr. Laurier's Government will see its way to the appointment, as Chief Justice of British Columbia, either the fittest of those now on the Supreme Court Bench of that province, or some member of their Bar, of which there are several well qualified for the position. In any event it is most sincerely to be hoped that the selection may be made without reference to political considerations. The country demands and should have the best available men for such positions, no matter what political party they belong to, and the leader who is strong and fearless enough to comply with this demand will deserve well of his country.

OUR FEDERAL CONSTITUTION.

At various periods in the history of Europe, from the earliest records down to the present time, under the most varying conditions, and with varying success, attempts have been made to combine the maximum of strength in the central government with the maximum of freedom in the control of local affairs by local authorities. And what has been attempted in Europe has also been attempted in the offshoots of European nations in different parts of the world. The problem which the founders of the North American republic essayed to solve is the same which confronted the founders of the commonwealth of Rome in the earliest periods of its history, and in neither case can the solution be said to have been altogether satisfactory. The Swiss Federation was the work of statesmen in the Middle Ages, and we in Canada have only just completed a task of a similar character. In Australia and South Africa plans are being laid for federated governments, and these confederations will in time form the basis of the still greater confederation embracing not only the parent state but its colonial possessions all over the world.

That a subject of such great historical as well as political interest, and on which such vast practical issues depend, should be the theme of discussion in the press and on the platform, as well as of mature consideration by those charged with judicial functions and by writers able to give it the time and thought which its importance demands, was naturally to be expected. In Dr. Bourinot's "Federal Government in Canada," published in 1889, we have an historical sketch of the events which led up to Confederation, and of the principal features of the Constitution established by the British North America Act. In the work on parliamentary procedure and parliamentary government under the provisions of that Act by the same author, and in the great constitutional work of Dr. Todd, we have very full information as to the principles laid down in that Act, and the methods of constitutional procedure based upon them. Mr. J. R. Cartwright's collection of cases under the B.N.A. Act give the leading decisions of the courts

upon various points of law which at different times have arisen; and we recently noticed Mr. Gerald Wheeler's voluminous collection of statutes affecting the subject of Canadian Confederation and our relation to the Mother Country, commencing with the British North America Act, to which are added the decisions of the Judicial Committee of the Privy Council bearing on the subject.

We have now before us a work of a somewhat different character from any of the foregoing, entitled "Legislative Power in Canada," by Mr. A. H. F. Lefroy, M.A., (Oxon.) barrister-at-law, which comes most appropriately to complete the literature on this subject.

Mr. Lefroy's primary aim in writing this book is, as stated in the preface, "to extract from the reported decisions on the B. N. A. Act all that is to be found therein of general application upon the law governing the distribution of legislative power between the Dominion Parliament and the various Provincial Legislatures of Canada." Proceeding inductively the author formulates the results arrived at in a series of general propositions, giving the authorities upon which they rest, as well as any decisions which appear to be at variance with them. In an introductory chapter he contends that the Federal constitution of Canada is similar in principle to that of the United Kingdom, and then goes on to compare the distribution of legislative power between Congress and the Legislature of the several States, with that between the Dominion Parliament and the Provincial Legislatures.

The leading propositions as stated in this book are sixty-eight in number. The following is a brief summary of the most important: The B. N. A. Act is the sole charter by which the rights of the Dominion and Provinces respectively can be determined, and from which alone each derive their powers. The prerogative of the Crown runs to the same extent in the colonies as in England, and is not lessened by the B. N. A. Act, and the Lieut.-Governors of Provinces are as much the representatives of Her Majesty for Provincial purposes as the Governor-General is for Dominion. The Crown is a party to and bound by Dominion and Provincial

statutes so far as they are intra vires, but no consent of the Crown can render valid an Act otherwise ultra vires. All powers of legislation given by B. N. A. Act are subject to the sovereign authority of the Imperial Parliament, and the Federal Parliament cannot amend the B. N. A. Act. But neither Dominion nor Provincial Parliaments exercise their power as delegates of the Imperial Parliament, but, within the limits of the powers conferred, are supreme, and the exercise of that power is not controlled by consideration for private rights. The Parliament of Canada cannot, under colour of general legislation, deal with what are Provincial matters only, nor can Provincial Parliaments, upon pretence of dealing with local matters specially within its jurisdiction, really legislate upon matters assigned to Dominion legislation. Nor can the Dominion Parliament legislate upon Provincial matters by enacting them for the whole Dominion, nor can a Provincial Parliament deal with a Dominion matter by limiting the enactment to its own Province. The character of a law is not affected by any incidental effect it may have upon other matters. The Dominion Parliament can, in matters within its sphere, impose duties upon any subject whether officials of Provincial Courts or otherwise, or upon existing Provincial Courts. In all matters not exclusively assigned to Provincial legislation, such legislation, if conflicting with Dominion legislation, must yield to it. But Provincial Legislatures may legislate in aid of Dominion legislation. The Dominion Parliament can alone incorporate companies with power to do business throughout the Dominion, but only subject to Provincial law. Provincial Legislatures have no powers beyond those given by B. N. A. Act.

Each of the propositions laid down is discussed and supported in the light of decided cases and of the judgments and dicta of the courts, and we may here say that the author has done his work excellently well. The book gives the reader and the student a comprehensive, intelligent and most admirable epitome of the existing law upon all constitutional questions which have arisen, and is a guide as to questions which may arise under the construction of

the British North America Act, or of the proper distribution of power between the Dominion and Provincial Legislatures.

In the chapter upon the distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures, which is one of the most important and interesting from a constitutional point of view, the writer finds an opportunity of contrasting our constitution with that of the United States. In order to avoid what seemed to be the weak point of the latter the framers of the B.N.A. Act exactly reversed the source of power. In the union of the United States of America the concession of power came from below, and the several States, or the people at large, were supreme in every matter not specially given to the central authority. In the B.N.A. Act the power comes from above, and the central authority, viz: the Dominion Parliament, retains all power not specially assigned to the Provinces, and within the limits of the Act, exhausts the whole range of legislative power. In the United States there is a residuum of power not given either to Congress or to the State Legislatures, and which can only be exercised by the people through amendments to their constitution. In Canada the whole legislative power being in the hands of Parliament that power can be wielded by the people directly through their representatives. In other words, with us the people are not only trusted with power, but are trusted with the power of using it.

In the question of dealing with vested interests and private rights there is also an important difference between our constitution and that of the United States. In the latter the courts have gone so far in preserving the inviolability of contracts and vested rights as to override most necessary legislation, and to protect corporations in exactions contrary to the general interest of the public at large. Hence the system of "government by injunction" of which we hear so many complaints. Under our constitution the interest of the public is, or ought to be, supreme, and if private rights, vested interests or contracts interfere with public interests, Parliament has full power to control them. This power may, of

course, be abused, but the abuse in our case has not arisen. In the other it has attained very alarming proportions.

In laying down the works above referred to we do so with very satisfactory ideas as to the working of the Constitution of 1867.

W. E. O'BRIEN.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CRIMINAL LAW — MALICIOUS INJURY TO PROPERTY — TRESPASS ON GRASS FIELD — MALICIOUS INJURIES TO PROPERTY ACT, 1861 (24 & 25 VICT., C. 97), S. 52—(CR. CODE, 511).

In *Gayford* v. *Choulcr* (1898) 1 Q.B. 316, a case was stated by a magistrate. The defendant walked across a grass field of the respondent, after notice to desist, and injured the grass to the extent of 6d., and it was held by Day and Lawrance, JJ., that this constituted a malicious injury to property, for which the appellant could properly be convicted; see Cr. Code, s. 511.

SOLICITOR—MISCONDUCT—EVIDENCE—APPLICATION TO STRIKE OFF THE ROLLS —ORDER OF COLONIAL COURT.

In re a Solicitor (1898) 1 Q.B. 331. This was an application made by the Incorporated Law Society to strike a solicitor off the rolls, on the ground that the solicitor in question had been a solicitor of a Colonial Court, and had been struck off the rolls of the Colonial Court for misconduct. The only evidence produced of the alleged misconduct was an affidavit that the Colonial Court had made an order striking him off the rolls for professional misconduct. The solicitor, although notified, did not appear, but the Court (Wright and Darling, JJ.) considered that the evidence of the alleged misconduct was insufficient to warrant the granting of the order asked.

PRACTICE—JOINDER OF DEFENDANTS—JOINT AND SEPARATE CAUSES OF ACTION AGAINST DEFENDANTS, JOINDER OF—ORD. XVI., R. 5; ORD. XVIII., R R. 1, 8—(ONT. RULES, 186, 187, 232-7).

Gower v. *Couldridge* (1898) 1 Q.B. 349, is the converse of the case of *Smurthwaite* v. *Hannay* (1894) A.C. 494, and brings up the question whether it is open under the Rules for a plaintiff to join joint and separate claims against defendants in the same action. In this case the plaintiff sued several defendants for damages for a tort alleged to have been committed by them, and also for damages for a separate tort committed by some of them. Following *Sadler* v. *The Great Western Railway* (1896) A.C. 450, the Court of Appeal (Chitty and Collins, L.JJ.) held that this could not be done. Although the amendment effected in the former Rule 300, by the present Con. Rule 185, may have the effect of enabling several plaintiffs having separate rights of action arising out of the same transaction or occurrence to join in one action; yet no corresponding amendment having been made in Rule 186, it would seem that this case would govern its construction.

PRINCIPAL AND AGENT—BROKER — INDEMNITY — STOCK EXCHANGE — WRONGFUL SALE BY BROKER—PURCHASE FOR DELIVERY AT A FUTURE DAY.

Ellis v. *Pond* (1898) 1 Q.B. 426, is a somewhat complicated case, but the facts appear to be as follows: The plaintiff, as a broker for the defendant, was authorized to purchase shares on the stock exchange for delivery on Nov. 26. In pursuance of this contract, he contracted for the purchase of two blocks of shares, one of £105,000 and another of £45,000. By subsequent agreement with the defendant it was arranged that the £105,000 lot should be taken up and paid for before the 26th Nov., and this was done partly with plaintiff's own money, and partly with a sum received by him from the defendant. Fearing a loss, and the defendant being unable to advance a sum necessary to cover possible loss, the plaintiff, without the defendant's consent, on the 19th Nov. sold off the whole lot of stock, both that which he had paid for and that which he had contracted to buy, and realized therefor less per share than could have been obtained had the sale been postponed

until the 26th Nov. The transaction having resulted in a loss, the action was brought for indemnity against such loss, and was tried by Mathew, J., with a jury, and the jury found that the sale on the 19th was wrongful, and that more could have been realized had it been postponed until the 26th. On this finding, Mathew, J., gave judgment for the plaintiff for the amount of the loss sustained on the whole transaction, less the difference between the amount actually realized and what the jury found would have been realized had the sale taken place on 26th Nov. But the majority of the Court of Appeal (Smith and Collins, L.JJ.) held that the plaintiff was entitled to no indemnity in respect of the £45,000, because as to that lot there had been no performance of the contract for purchase of the shares as between the plaintiff and defendant, and no default on the part of the defendant to take up and pay for these shares on the 26th Nov., they having been sold by the plaintiff without authority seven days before. Rigby, L.J., however, dissented and was of opinion that the defendant was also liable for the difference between the amount at which the £45,000 lot had been purchased and the amount realized therefor, notwithstanding the premature sale thereof by the plaintiff.

PROBATE—SEVERAL WILLS—REVOCATION—WILL MADE IN EXECUTION OF LIMITED POWER OF APPOINTMENT.

Cadell v. *Wilcocks* (1898) P. 21 was a probate action in which difficulties arose owing to the testatrix having executed three wills. She had been left by her father a sum of £4,000 for her life, with power of appointment thereof by will among her children. By the first will, made in 1890, she left one of her daughters "the sum of £4,000, being the sum left to me by the will of my father," and also disposed of her residuary estate; by a second will, made in 1894, she left the same daughter £4,000, and the residue of her property to the same daughter and one of her sons; and by the third will, in 1895, she left all her property to the same daughter. It will thus be seen that neither the second nor third will were sufficient to effect a valid execution of the power. The President, Sir

F. H. Jeune, thought the case governed by the principle stated in Williams on executors, 9th ed., p. 138, and approved by Lord Penzance in *Lemage* v. *Goodban*, 1 P. & D. 57, viz.—that the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter will expressly or in effect revoke the former, or the two be incapable of standing together; and if the subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then the latter instrument will revoke the former as to those parts only where they are inconsistent. He therefore held that the third revoked the second will, but neither had totally revoked the first, and he therefore admitted the first and third to probate. Notwithstanding some conflict of authority the learned judge expresses the opinion that if there had been any general words of revocation in either the second or third will, they would have effectually revoked the first will altogether, including the execution of the power contained in it.

PROBATE—PRESUMPTION OF DEATH—PRACTICE—AFFIDAVIT OF APPLICANT.

In the goods of Hurlston (1898) P. 27. Barnes, J. here held that where, on an application for probate, the applicant seeks to rely on a presumption of death of the testator, who has disappeared, his affidavit should contain a statement of belief that the death occurred at the alleged date.

INSURANCE—CONSTRUCTION OF POLICY—PERIL OF "FIRE AND ALL OTHER LOSSES AND MISFORTUNES"—EJUSDEM GENERIS.

The "Knight of St. Michael" (1898) P. 30, was a special case stated by the parties for the construction of a policy of marine insurance on freight, which covered losses by fire and "all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the subject matter of the insurance or any part thereof." The vessel was loaded with coals, and before it had completed its voyage the coals became overheated, and to avoid the risk of spontaneous combustion and loss of the ship and cargo by fire, on the recommendation of surveyors, the larger portion of the cargo was discharged and sold, entailing a consequent loss of

freight. Barnes, J., held that the loss thus occasioned was *ejusdem generis* with the perils of fire specifically insured against, and that the insurers were consequently liable to make good the loss of freight.

LUNATIC — FOREIGN CURATOR — TRANSFER OF ENGLISH STOCKS TO FOREIGN CURATOR, WHEN ORDERED.

In re Knight (1898) 1 Ch. 257. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.), determined that, notwithstanding a statute which provides that where any stock is vested in a person residing out of the jurisdiction of the High Court, the Judge in Lunacy, on proof that such person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof according to the law of the place where he is residing, may order such stock to be transferred into the name of the person so appointed as the judge thinks fit. The Court has still a discretion to exercise in ordering stock under such circumstances to be transferred to the foreign curator of a lunatic, and that it should be satisfied, before such order is made, that such transfer is necessary for the maintenance of the lunatic, or that for some other sufficient reason the transfer is necessary.

COMPANY - DEBENTURE — PROSPECTUS - PROVISION FOR REDEMPTION - SINKING FUND.

In re Chicago & N. W. Granaries Co. (1898) 1 Ch. 263, was an action brought by debenture holders of a limited company to enforce an alleged stipulation providing for the redemption of the debentures within a period of seventeen years. The debentures provided that the company should carry to the credit of a sinking fund in each year £2,500, which should be applied in redeeming at a specific premium on January 1 and July 1 in each year, so many of the debentures issued as the sum at the credit of the sinking fund should suffice to pay off, the debentures so to be redeemed to be determined by lot. The prospectus previously issued, however, on which the plaintiffs also relied, which invited subscriptions for the debentures, stated that they were to be redeemable in seven-

teen years by half yearly drawings on January 1 and July 1 in each year by the application of a sinking fund of £5,000 per annum. The company had carried out the terms of the debentures and had applied £2,500 only to the sinking fund, and had from time to time redeemed debentures to the amount of the sinking fund, but the plaintiffs claimed that the whole of the debentures were, under the prospectus, redeemable in seventeen years, and that in order to effect their redemption within that period it was necessary for the company to appropriate to the sinking fund, in addition to the £2,500 per annum, the interest which would have been earned by the debentures redeemed; but North, J., was of opinion that the debentures alone could be looked at as constituting the contract between the parties, and that the stipulation therein contained as to redemption was in effect a mere notice that the debentures were liable to be redeemed as therein provided, but not to a contract to redeem all the debentures within the seventeen years.

SOLICITOR—COSTS—SOLICITORS' ACT, 1874 (37 & 38 VICT., C. 68), S. 12 (1)—PRACTICING WITHOUT A CERTIFICATE—(R.S.O. C. 174, SS. 2, 19, 22-24).

In re Sweeting (1898), 1 Ch. 268. North, J., here holds that under the English Solicitors' Act, 1874, s. 12 (1), a solicitor cannot tax fees for business done by him while practising without his annual certificate. It is doubtful whether this would be an authority under the Ontario Act (R.S.O. c. 174). That Act (s. 2) prevents a person from recovering costs for business done as a solicitor without being "admitted and enrolled," but ss. 19, 22-24 which impose penalties for practising without an annual certificate, do not expressly provide that fees for business done by a solicitor practising without a certificate shall not be recoverable. A liability to pay a penalty to the Law Society and to be suspended from practice seem to be the only penalties imposed by the Act, and in the absence of an express prohibition forbidding his recovering his fees there seems to be nothing to prevent their recovery.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] WASHINGTON *v.* GRAND TRUNK RY. CO. [Dec. 9, 1897.

Railways—Construction of statute—51 Vict., c. 29, s. 262 (D.)—Railway crossings—Packing railway frogs, wing-rails, etc.—Negligence.

The proviso of the fourth sub-section of section 262 of "The Railway Act" (51 Vict., c. 29 (D.)) does not apply to the fillings referred to in the third sub-section and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails of switches during the winter months.

Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183) reversed. Appeal allowed with costs.

Staunton, for appellant. *McCarthy*, Q.C., for respondents.

Ontario.] HAGGERT *v.* BRAMPTON. [Dec. 9, 1897.

Mortgage—Trade fixtures—Chattels—Tools and machinery of a "going concern"—Constructive annexation—Mortgagor and mortgagee.

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed, but in a manner appropriate to their use, and showing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became parts of the realty. Appeal dismissed without costs.

Aylesworth, Q.C., and *Justin*, for appellant. *Blain* and *D. O. Cameron*, for respondents.

Quebec.] COWANS *v.* MARSHALL. [Dec. 9, 1897.

Negligence—Master and servant—Common fault—Jury trial—Assignment of facts—Arts. 353 and 314 C.C.P.—Art. 427 C.P.Q.—Inconsistent findings—Misdirection—New trial—Pleading.

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts

sufficient to show the breach of a duty owed him by the defendant and inconsistent with due diligence on the part of the defendant, and that the injuries were thereby occasioned, and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the explosion, a verdict for the plaintiff cannot be sustained, and a new trial should be granted. Appeal allowed with costs. New trial granted without costs.

Lajoie, for appellants. *Trenholme*, Q.C. and *Ryan*, for respondent.

Quebec.] GLENGOIL STEAMSHIP CO. *v.* PILKINGTON. [Dec. 9, 1897.

Maritime law—Affreightment—Carriers—Charter party—Privity of contract—Negligence—Stowage—Fragile goods—Bill of lading—Condition—Notice—Arts. 1674, 1675, 1676 C.C.—Contract against liability for fault of servants—Arts. 2383 (8); 2390; 2409; 2413; 2424; 2427 C.C.

The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master of liability upon contracts of affreightment during such voyage where exclusive control and navigation of the ship are left with the master, mariners and other servants of the owners and the contract had been made with them only.

The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse shipowners from liability for damage caused through improper or insufficient stowage.

A condition in a bill of lading, providing that the shipowners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents is not contrary to public policy nor prohibited by law in the Province of Quebec.

Where a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling, or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect or error in judgment of the pilot, master, mariners or other servants of the shipowners; nor for breakage or any other damage arising from the nature of the goods shipped," such provisions applied only to loss or damage resulting from acts done during the carriage of the goods and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage.

Appeal dismissed without costs.

Atwater, Q.C., and *Duclos* for appellants. *Macmaster*, Q.C. (*Farquhar Maclennan* with him) for the respondents.

Province of Ontario.

COURT OF APPEAL.

[March 10.

BIRELY *v.* TORONTO, HAMILTON & BUFFALO R.W. CO.

Railways—Expropriation—Award—Appeal—51 Vict., c. 29, s. 161 (D.).

Under s. 161 of Dominion Railway Act, 51 Vict., c. 29 (D.), an appeal lies in this Province by either party from an award of compensation exceeding $400, either to the Court of Appeal or to the High Court of Justice, but if an appeal is taken to the latter tribunal no further appeal lies by either party to the Court of Appeal.

Aylesworth, Q.C., for plaintiffs. *D'Arcy Tate*, for defendants.

From Armour, C.J.] WEBSTER *v.* CHICKMORE. [March 15.

Assignments and preferences—Pressure.

Where a preferential security is attacked within sixty days, pressure is of no avail to rebut the presumption of invalidity. Judgment of ARMOUR, C.J., reversed. BURTON, C.J.O., dissenting.

Ryckman and *C. W. Kerr* for appellant. *Clarke*, Q.C., for respondents.

From MacMahon, J.] YELLAND *v.* YELLAND. [March 15.

Benefit society—Certificate—Change in rules.

A certificate issued by a benefit society providing for payment to the member's "next of kin," is not affected by a subsequent change of the rules of the society omitting "next of kin" by that name, from the classes of persons to whom certificates may be made payable. Judgment of MACMAHON, J., affirmed.

Watson, Q.C., and *Moore*, for appellants. *Poussette*, Q.C., for respondents.

From Court of Revision.] [March 15.

IN RE TORONTO RAILWAY COMPANY ASSESSMENT.

Assessment—Street Railway—Rails, poles and wires—Highways.

The rails, poles and wires, of the Toronto Railway Company, used by them in operating their electric railway and laid and erected in and upon the public highways of the city of Toronto are subject to assessment under the Consolidated Assessment Act, 1892, 55 Vict., c. 48 (O). BURTON, C.J.O., dissenting.

Fleming v. *Toronto Street R. W. Co.*, 37 U.C.R. 116, has been overruled by *Consumers Gas Co.* v. *Toronto*, 27 S.C.R. 453.

Robinson, Q.C., and *Fullerton*, Q.C., for city of Toronto. *McCarthy*, Q.C., and *Laidlaw*, Q.C., for Toronto Railway Company.

From Street, J.] FISHER *v.* FISHER. [March 15.

Life insurance—Construction of policy—Designation of beneficiary—R.S.O. (1887), c. 136.

An application for life insurance stated that the insurance money was to be paid to the applicant's wife, and the policy as issued provided that the insurance money should, upon the death of the assured, be paid to his wife, or such other beneficiary or beneficiaries as he might in his lifetime have designated in writing endorsed on the policy, and in default of any such designation to his legal personal representatives.

Held, OSLER, J.A., dissenting, that the policy came within the Act to secure to wives and children the benefit of life assurance, R.S.O. (1887), c. 136, and was not affected by an absolute assignment, endorsed upon it, by the assured to a creditor. Judgment of STREET, J., 28 O.R., 459, reversed.

McCarthy, Q.C., and *W. J. McWhinney*, for appellant. *Aylesworth*, Q.C., for respondent.

From Ferguson, J.] ST. DENNIS *v.* SCHULTZ. [March 15.

Malicious prosecution—Reasonable and probable cause—Advice of counsel.

That the prosecution in question was instituted on the advice of counsel is not sufficient to protect the prosecutor if he does not exercise reasonable care to ascertain and lay before counsel the facts in reference to the alleged offence. Absence of reasonable and probable cause for the prosecution is not by itself sufficient to impose liability; malice must exist, and the question of malice must be left to the jury. Judgment of FERGUSON, J., reversed.

M. K. Cowan, for appellant. *W. H. P. Clement*, for respondent.

From Armour, C.J.] [March 14.

LONG *v.* ANCIENT ORDER OF UNITED WORKMEN.

Life insurance—Benefit society—"Renewed contract"—55 Vict., c. 39, s. 33 (O.).

It is not a renewal of a contract of insurance within the meaning of 55 Vict., c. 39, s. 33 (O.), but a revival of the original contract, when after default in payment of assessments and consequent suspension of rights, a member of a benefit society pays the assessments, and, pursuant to the rules of the society, becomes ipso facto re-instated. Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., and *Totten*, Q.C., for appellants. *Staunton* for respondent.

From Armour, C. J.] HILL *v.* BROADFOOT. [March 15.

Deed—Description—Appurtenances—R.S.O. (1877), c. 102, s. 4.

The general words in the Short Forms of Conveyances Act, R.S.O. (1877), c. 102, s. 4, will not pass lands and buildings not embraced in the specific description, merely because the lands and buildings have been held, used, occupied and enjoyed with the property specifically described by metes and bounds. Judgment of ARMOUR, C.J., affirmed.

Riddell, for appellant. *Staunton* and *Lazier* for respondent.

From Falconbridge, J.] SMITH *v.* ONDERDONK. [March 15.

Hire of chattels—Contract—Sub-contract—Defect—Damages.

A contractor for the excavation of a railway tunnel, who, pursuant to the terms of a sub-contract, supplies to a sub-contractor a locomotive for use in the work, is not liable in damages to one of the sub-contractor's workmen for injuries sustained by reason of a defect in the locomotive, that defect being a patent one, and the sub-contractor having accepted the defective locomotive without objection. Judgment of FALCONBRIDGE, J., reversed.

Crerar, Q.C., and *D. W. Saunders*, for appellants. *W. Nesbitt*, for respondent.

TATE *v.* NATURAL GAS AND OIL CO. [April 1.

Parties—Addition of—Rule 206 (3)—Amendment—Alternative claim—Rule 192—Company—President—Contract.

A motion by the defendants and the Ontario Natural Gas Company for leave to appeal from the order of a Divisional Court, ante 194, allowing the plaintiff to add the latter company and an individual as parties defendant, was refused, the court agreeing with the opinion of MEREDITH, C.J., in the Divisional Court.

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

HIGH COURT OF JUSTICE.

Divisional Court.] HENDERSON *v.* TOWNSHIP OF YARMOUTH. [Dec. 10, 1897.

Municipal corporations—Tiles placed on side of highway—Accident—Negligence.

On the side of a township road, there was a fill of about fourteen feet, with railings on either side, and for the purpose of repairing a culvert, which ran through the fill, a quantity of tiles, of a large size, and of a light gray colour, were piled on the side of the highway in a slight hollow behind the railing, having some planks thrown over them, and a board nailed between the two boards forming the railing, so as to further hide the tiles from view.

Held, that this did not constitute evidence of negligence on the defendants' part so as to render them liable for injuries sustained by the plaintiff by reason of the horse which he was driving becoming frightened at the tiles and running away.

J. A. Robinson, for plaintiff. *Glenn*, for defendants.

Divisional Court.] BEATTY *v.* HOLMES. [Feb. 10.

Division Court—Jurisdiction—Insolvent—Sale of quantity of goods and distribution of, amongst certain creditors—Recovery in Division Court by assignee in insolvency.

Where within sixty days of the making of an assignment for the benefit of creditors the insolvent transferred to a person in trust for certain of his

creditors a quantity of butter, which was sold, realizing $1,800, and the proceeds distributed amongst such creditors in proportion to their claims, whereby they acquired a preference, the Division Court has jurisdiction to entertain an action brought therein by the assignee for the benefit of creditors, to recover the amount received by one of such creditors, being his share of such proceeds, and which was in itself of an amount within the competence of such court.

Aylesworth, Q.C., for plaintiff. *D. L. McCarthy* for defendant.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 10.

FARQUHARSON *v.* IMPERIAL OIL CO.

Riparian owners—Soil of stream—Dams—R.S.O. 1887, c. 120, s. 1—"Other obstruction."

The owner of the soil on both sides of a running stream, whether navigable or not, is prima facie the owner of the soil which forms the bed of the stream; and the owner of the soil on each side is in the same manner owner of the soil of the bed up to the centre of the stream, and dams constructed by such owners or with their consent over their parts of the stream are not wrongfully erected.

The words "any other obstruction" above stated do not comprehend the erection of dams, but only other obstructions of a like kind with felling trees. *Aylesworth*, Q.C., and *A. E. Shaunessey* for appeal. *Osler*, Q.C., contra.

Meredith, C.J., Rose, J., MacMahon, J.] [Feb. 14.

SMITH *v.* HAYES.

Machinery—Injury by, of child—Allurement to child—Knowledge of defendant—Trespass—Evidence.

Plaintiff, a child of five years of age, was injured by a horse-power used by defendant to hoist grain into his warehouse. The machine was on a lot unfenced on one side, leased by him, adjoining his warehouse, about thirty feet from the highway.

Held, that as the evidence did not show that the machine was being worked in such proximity to the highway as to endanger the safety of persons using the highway, or that it was so situated as to attract or allure children, or any knowledge in the defendant that children were in the habit of frequenting the place, or any intention on his part to injure; and as the plaintiff had no right to be where he received the injury, he could not recover. *Finlay* v. *Mis-campbell* (1890), 20 O.R. 29, followed, and judgment of Meredith, J., sustained.

Aylesworth, Q.C., for motion. *J. B. Jackson*, contra.

Divisional Court.] REGINA *v.* FITZGERALD. [Feb. 14.

Conviction—Order nisi to quash—Death of prosecutor after—Effect of.

Where, after an order nisi had been obtained to quash a conviction, but before service thereof, the prosecutor died, but service had been effected on the magistrates, the court held that, notwithstanding such death, they might deal with the matter, and they made the order absolute, quashing the conviction.

Douglas Armour for applicant. No one contra.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 27.

SMITH *v.* SMITH.

Parent and child—Farm agreement—Maintenance of parents—Consideration—Definite contract—Evidence—Change of parent's intention.

When a child seeks to enforce an agreement that if he remains with a parent, and works the farm and provides for his declining years, the parent will bestow the farm on him, courts will require that the agreement be established by the clearest evidence, and a certain and definite contract for a valuable consideration proved, or the parent will be entitled to change his views and the disposition of the property, in case of his own altered circumstances or want of filial conduct on the part of the child. Judgment of ROSE, J., reversed.

G. W. Wells, Q.C., for appeal. *Riddell* and *W. E. Kelly*, contra.

Divisional Court.] SAUNDERS *v.* CITY OF TORONTO. [March 1.

Municipal corporations—Carters employed to remove street sweepings—Master and servant—Negligence—Liability.

In an action brought against a city for injuries sustained by the plaintiff by being run down, while riding a bicycle along one of the streets, by a licensed carter employed in removing to a dumping ground street sweepings which were placed in piles on the side of the street. He owned the horse and cart he was driving, but was hired by the department having charge of this work, and received his orders from their foreman, which were, where to get the stuff and where to dump it, and to go and return by the shortest route, and for failure to carry out his orders he was subject to dismissal. He worked all day, consisting of nine hours, and was paid 28 cents per hour. He had been occasionally hired in the spring and fall of the year, when this work required to be done, and had been at work off and on during this particular season, and for two weeks constantly prior to the accident happening. A city by-law was proved which provided that the committee which had charge of this work might provide such scavenger carts as they might deem necessary, each cart to be supplied with one horse and the necessary appurtenances, and controlled by one man, the man and cart to be under the charge of the officers of the department whose duty it was to see to the cleaning of the lanes and streets.

Held, that the relationship of master and servant existed between the city and the carter at the time the accident occurred, and a non-suit entered at the trial was set aside and a new trial directed.

Cash, for the plaintiff. *Fullerton*, Q.C., for defendants.

Meredith, C.J.] MAGANN *v.* FERGUSON. [March 8.

Assignment for creditors—Liquidated claim—Double value of land—4 Geo. II., c. 28, s. 1—Right to rent.

Damages against an overholding tenant under 4 Geo. II., c. 28, s. 1, at the rate of double the yearly value of the land, do not constitute a liquidated

claim, and the landlord cannot rank on an estate in the hands of an assignee for creditors in respect to them, even after he has recovered judgment therefor.

Grant v. *West* (1896), 23 A.R. 533, followed.

A. C. Macdonell for the plaintiff. *W. W. Rowell* for the defendant.

MacMahon, J.] ROBERTS *v.* COUGHLIN. [March 23

Security for costs—Infant plaintiff out of jurisdiction—Next friend.

An infant, residing out of the jurisdiction, brought an action for administration, by her mother, who resided in the jurisdiction, but was without substance, as next friend.

Held, that the plaintiff could not be required to furnish security for costs.

Magee, Q.C., for plaintiff. *Woods*, Q.C., for defendants.

Street, J.] CAMPBELL *v.* FARLEY. [March 25.

Parties—Claim against partnership—Administratrix of deceased partner—Concurrent administration proceedings—Action against surviving partner—Indemnity—Relief over—Third party procedure.

At law, as well as in equity, before the Judicature Act, a partnership debt was, in strictness, joint and not several, and upon the death of one partner the only liability existing at law was that of the surviving partner; the estate of the deceased partner being only made available through the equities existing in favour of the surviving partner, which the partnership creditors were allowed to make use of; and the Act has not converted into a joint and several debt that which had theretofore been merely joint. *Kendall* v. *Hamilton*, 4 App. Cas. 504, and *In re Hodgson*, 31 Ch. D. 177, followed.

In an action by creditors of a partnership against the surviving partner and the administratrix of the estate of the deceased partner, the name of the administratrix was struck out, leaving the creditors to pursue their remedy against the estate in a proceeding pending for its administration, and to proceed concurrently with the action against the surviving partner.

Held, also, that a claim of the surviving partner against the estate of the deceased for indemnity or relief over and in respect of the plaintiffs' claim, must be made in the administration proceedings and not in the action under the third party procedure.

Held, further, that the right of the surviving partner against the administratrix, in her personal capacity, to recover upon a mortgage given by her as a security to him against his liability to the plaintiffs, was neither a right to indemnity nor to relief over, because it was a right which might be enforced before he was damnified, there being no reference on the face of instrument to the liability asserted by the plaintiffs; and, therefore, she could not be brought in as a third party.

J. H. Moss for plaintiffs. *Tremeear* for defendant Farley. *W. E. Middleton* for defendant MacDonald.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] JORDAN *v.* MCDONALD. [March 8.

Constable—Arrest under warrant not indorsed for service out of jurisdiction — Evidence—Vindictive damages—Error in instructions to jury—Crim. Code, ss. 25, 242, 552.

Plaintiff claimed damages for an alleged unlawful assault by defendant with the assistance of others in the city of Halifax, and his arrest and detention in jail. The defence was that plaintiff had been guilty of the offence of assaulting, cutting and wounding one P., a policeman of the town of W., while in the discharge of his duty, and that the assault and imprisonment complained of were committed in arresting plaintiff under a warrant issued by the stipendiary magistrate of the town of W. for his apprehension to answer such charge. At the time of the arrest the warrant had not been endorsed by any magistrate having jurisdiction in the county of Halifax so as to enable an arrest to be made under it in such county. The jury having returned a verdict in plaintiff's favor for $250 damages, defendant applied for a new trial.

The Criminal Code, s. 25, provides that "If any offence for which the offender may be arrested without warrant has been committed, anyone who, on reasonable and probable grounds, believes that any person is guilty of that offence, is justified in arresting him without warrant, whether such person is guilty or not."

Held, 1. The words "may be" in this section refer to the provisions of the code which authorize arrest without warrant, including s 242, under which a person not a peace officer is enabled to arrest without warrant a person who, on reasonable grounds, he believes is guilty of the offence of unlawfully wounding, where such offence has in fact been committed, s. 242 being one of the "following sections" referred to in s. 552.

2. Defendant in making the arrest in the county of Halifax, under a warrant not endorsed for execution in that county, could not be regarded as a peace officer, and therefore was a person within the meaning of s. 242.

3. It was open to defendant to contend that the arrest was made outside of and independent of the warrant, and to show that at the time the arrest was made he was aware that plaintiff had committed the offence of unlawfully wounding.

4. If defendant could not justify under the warrant by reason of the absence of the necessary endorsement, but the circumstances were such as to justify him in making the arrest without a warrant, he had "good authority" for so doing.

Evidence was tendered to show that plaintiff had to the knowledge of defendant been guilty of the offence of unlawfully wounding P., a constable of the town of W., while in the discharge of his duty, and that he had been for sometime evading arrest, and that there was reason to fear that if he was not arrested at the time he was he would escape.

Held, 1. The trial judge erred in excluding this evidence from the consideration of the jury.

2. He erred in failing to instruct the jury not to give vindictive damages unless they were of the opinion that defendant was influenced by ill-will or malice, or had acted in bad faith, or was guilty of some oppression or misconduct towards plaintiff in connection with the arrest.

3. If defendant thought he was acting as an officer at the time he made the arrest and had reasonable grounds for entertaining that view, and was entitled to protection to the same extent as if he were an officer.

4. Evidence of the assault committed by plaintiff, which was a necessary element of defendant's case was improperly excluded.

Motion for new trial allowed with costs.

W. E. Roscoe, Q.C., for appellant. *R. L. Borden*, Q.C., for respondent.

Full Court.] STRONG *v.* BENT. [March 8.

Statute of frauds—Verbal contract of hiring not to be performed within year—Substituted contract not covered by statement of claim—Parol evidence to supplement letter—New trial.

In Sept., 1896, plaintiff and defendant entered into a verbal agreement for the hiring of plaintiff by defendant for a year, the period of hiring to commence at a future date not then determined. Plaintiff commenced working for defendant on the 2nd or 3rd Nov. following, and was dismissed in the month of May, 1897, on the ground that he had done business in other goods and for other firms, contrary to his agreement with defendant. On the trial evidence was given to show that after the hiring in November a reorganization of the defendant firm took place, and that a new agreement was made under which plaintiff performed services for defendant, for which he was entitled to recover.

Held, reversing the judgment of the County Court judge with costs, that plaintiff could not recover either on the original contract, for non-compliance with the statute of frauds, it not being a contract to be performed within a year, or upon the substituted contract of which evidence was given, as he had not declared upon such a contract in his statement of claim or given defendant notice that he intended to set up such a claim. And that a letter from defendant, which was relied upon as taking the case out of the statute, could not be supplemented by parol evidence.

Per MEAGHER, J.—The statement of claim was sufficient to cover a claim for a yearly hiring under the alleged substituted agreement, and that the case should be sent back for a new trial, on this point, to determine whether in point of fact such agreement had been made.

H. W. C. Boak for appellant. *H. Mellish* for respondent.

Full Court.] BANQUE D'ACHELAGA *v.* MARITIME RY. NEWS CO. [March 8.

Partner—Costs of appeal taken by co-partners—O. 40, R. 10.—Execution.

The defendants, B., D. and C., did business as co-partners under the name and style of the Maritime Railway News Co. In an action at the suit of

plaintiff, C. and D. were served, and appeared and defended the action, but B., who was not known at the time to be a member of the firm, was not served, and swore that he did not know, until after the termination of the proceedings, of the nature of the action, or of the steps taken by his co-partners to defend it. Judgment having been given for plaintiff, C. and D. appealed. The appeal was dismissed with costs. After the costs connected with the trial and appeal had been incurred plaintiff discovered that B. was a member of the firm, and took steps under O. 40, R. 10, to have execution against him on the judgment recovered against the firm, and also the costs incurred in connection with the appeal and not included in that judgment. The application was heard before Graham, E.J., who made the order applied for. From this the defendant B. appealed.

Held, dismissing the appeal, that B. was liable not only for the costs of the original action and judgment, but for the costs of the appeal taken by his co-partners C. and D., and that his only remedy was against his co-partners in winding-up the partnership.

C. H. Cahan for plaintiff. *W. B. A. Ritchie*, Q.C. for defendant.

Full Court.] BARROWMAN *v.* FADER. [March 8.

Sale of land—Covenant to pay taxes—Demand before action—Provision of Halifax city charter as to time at which taxes become due—Act allowing a discount if paid promptly.

Plaintiff and defendants entered into an agreement for the sale by plaintiff to defendants of a lot of land for a sum of money payable in instalments extending over a period of four years. The agreement contained a clause providing that until the completion of the purchase defendants should have the possession of the land and should be entitled to receive all the rents and profits, and should pay all rates and taxes of every kind levied or assessed on the land. Ten days after the making of the agreement an assessment was made for taxes which became due and payable on the 1st May following, and for which plaintiff became liable to be sued by the city of Halifax, and to have his property levied upon by warrant for the recovery of the taxes at any time after the 31st May, prior to which time the taxes constituted a lien on the property.

Held, 1. The situation so far as regarded plaintiff's rights and liabilities, was the same as if the covenant to be performed on the part of defendants had reference to a mortgage to mature on the 31st May, and that plaintiff was entitled to recover.

2. Payment of the rates and taxes by defendants formed part of the consideration for the contract whereby they were permitted to enter into possession and to receive the rents and profits.

3. As there was an absolute covenant on the part of the defendants to pay, plaintiff was not required to make a demand before bringing his action.

By the Acts of 1897, c. 44, s. 22, the city collector was authorized to allow a discount of two per cent. to all persons paying their taxes on or before the 31st day of July of the year in which such taxes fell due.

Held, that this did not affect the provisions of the city charter (Acts of 1891, c. 58, s. 362) under which all rates and taxes become due the 31st day of May in each year, or postpone the time of payment.

A. Whitman, for appellant. *C. P. Fullerton*, for respondent.

Full Court.] McINTYRE *v.* MCKINNON. [March 8.

Deed — Description — Construction, "In front of"—Evidence — Control.

Trespass to land. Defendants replied upon deed from L. of a lot of land, approximately triangular in shape, being parcel of a larger lot of land conveyed to L. by V. J. S. and wife, and described as being "on the south shore of Gabarus Bay, in the county of Cape Breton, and bounded as follows: that is to say, by a line beginning at the shore at a stake . . . and thence running south . . . to a general rear line, etc." The front line of the triangular lot was a road running across L.'s land near the shore; one of the side lines was uniform with one of the side lines of the land conveyed to L., while the third or remaining line ran obliquely across it. The deed relied upon by the defendants, in addition to the land included within the three sides of the triangle and conveyed by the deed, contained the words "together with the land in front of the said lot to high water mark."

Held, that the words "in front of" were to be read in their ordinary sense, and the front line of the triangle being of the length of 176 feet, the land "in front" and intended to be conveyed, would necessarily be of the same width, and not of the width that would result from extending the oblique line of the triangle to high water mark.

The trial judge admitted in evidence an agreement made between the defendant M. and one S., and also evidence of acts done upon the ground by M. and S. in pursuance of the agreement, which evidence was introduced for the purpose of controlling in favour of M. the description in the deed from L.

Held, that none of the evidence so received was admissible, the transactions relied upon having taken place about two years prior to the date of the deed from V. J. S. to L.

J. A. Chisholm for appellant. *H. Mellish* for respondent.

Townshend, J., at Chambers.] [March 18.

IN RE KINNEAR TRUSTS, JONES *v.* SMYTHE.

Trust estate—Income during infancy—Disposal of estate on cêstui que trust attaining full age.

K., on 2nd January, 1879, made a trust deed of certain securities "upon trust to collect, get in and receive the interest and dividends, and to pay the same to his wife B. K. for her own use until the younger of his two children, B. E. K. and T. C. K., should attain the age of twenty-one years; and upon such attaining, upon trust to hold the said assigned securities to and for the sole and absolute use and benefit of the said B. E. K. and T. C. K. equally, share and share alike, and of the survivor of them, in case of the death of either of them, free from the control, debts or liabilities of any husband or

husbands of them or either of them. And likewise to pay over to them or the survivor free from such control, debts and liabilities as aforesaid, all the aforesaid interest and dividends equally, or in case of death, all to the survivor. Provided, in the event of the said B. E. K. and T. C. K. dying, leaving children, then, and in such case upon trust, to transfer and assign the said securities unto such children or child, as the case may be, in such manner that such children or child shall and may stand in the place of, and receive the share, proportion and interest of and in the premises of his, her or their respective deceased parent, or of the survivor, as the case may be." T. C. K. died in February, 1892, and E. K. died in September, 1882. T. C. K. was younger than B. E. K.; B. E. K. was 21 in 1896, and married H. H. S. After making the trust deed the settlor died, having made a will.

Held, that the income during infancy of B. E. S. went to the executrix of E. K.: *Laxton* v. *Eedle*, 19 Beav. 321; and that on B. E. S. attaining age of 21 years she became entitled to the corpus absolutely: *Home* v. *Pillans*, 2 M. & K. 15, *Clarke* v. *Henry*, L. R. 11 Eq. 221, 6 Ch. 588; *In re Dowling's trusts*, 14 Eq. 463.

W. B. A. Ritchie, Q.C., for trustees. *C. S. Harrington*, Q.C., for residuary legatees under will. *R. E. Harris*, Q.C., *C. H. Cahan* and *H. McInnes*, for B. E. S. *H. B. Stairs*, representing unborn children of B. E. S.

Townshend, J., in Chambers.] IN RE SCOTNEY. [March 15.

Will—Construction of—Condition precedent—Vested legacy.

Testator died in 1890; by his will he directed his executors to convert estate into money and hold it invested during lifetime of testator's wife, and at her death to divide same equally amongst certain named of his children, of whom Frederick was one, and one S. S., his grandson. Then followed a provision as follows: "The legacy to my son Frederick is upon condition that he transfers to my executors the property which I conveyed to him in 1870," and "the legacy to my grandson S. S. is upon the condition that he lives to the age of twenty-five years, and if he be not of that age at the death of my wife, my executors shall retain his share until he arrives at such age and then pay the same over to him. . . . That in the event of the condition annexed to the devise to my son Frederick and my grandson S. S. not being fulfilled or performed, I direct my executors to divide the share or shares of those in default amongst the other named devisees."

Frederick, in 1891, was requested by the executors to make the conveyance, but neglected to do so. He died unmarried and intestate in Jan., 1897. Testator's widow died in Nov., 1897. The grandson S. S., though alive, reached the age of twenty-three only. After the death of Frederick, at request of the executors, the heirs of Frederick Scotney conveyed his lands to the executors.

Held, that the legacy to Frederick was made upon a condition precedent which he was bound to perform, and the gift over to the other devisees took effect as he did not do so, and the conveyance after his death did not fulfil the condition to enable the parties to take as heirs at law.

Held, also, that the legacy to S. S. was not a vested one, and should he die before he reached twenty-five years of age the devisees over and not his estate would be entitled.

Cases discussed—*In re Hodges' Legacy*, 16 Eq. 92; *Davis* v. *Angel*, 4 De G. F. & J. 524; *Simpson* v. *Vickers*, 14 Vesey 341; *Davis* v. *Thomas* 1 Russ. & M. 506.

W. B. A. Ritchie, Q.C., for executors. *H. McInnes* for creditors of Frederick Scotney. *W. R. M. Hauten* for legatee S. S. *J. F. Frame* for devisees over.

Full Court] BARROWMAN *v.* FADER. [May 8.

Taxation of costs—Notice—Time for giving—O. 63, R. 13.

Under O. 63, R. 13, before taxing costs, the party taxing is required to give one day's notice to the opposite party. Under O. 63, R. 13, before taxing costs accruing in Halifax, "one day's notice . . . shall be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor, etc."

Held, that the words "one day" are not to be read as meaning "one clear day," and

Semble, that notice given at any time up to seven o'clock of the evening of the day before the day for which the notice is given would be sufficient

A. Whitman for plaintiff. *C. P. Fullerton* for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Dubuc, J.] DAY *v.* RUTLEDGE. [March 11

Tax sales—Mortgagor and mortgagee—Mortgagor's wife cannot cut out mortgage by buying at the tax sale—Assignee of tax purchaser acquires no better title than assignor.

The defendant and his wife (to bar her dower) executed a mortgage of his farm to plaintiff to secure $3,000. In May, 1893, the farm was sold for arrears of taxes amounting to $48, and purchased by Mrs. Rutledge in her own name, and the tax sale certificate was handed to her. In the summer of the same year in response to a letter from Mrs. Rutledge, a brother of the plaintiff came from Ontario to see the Rutledges about it, and stayed about two weeks at their house. At this time a new mortgage was executed by Rutledge and his wife (to bar her dower as before) in favor of the plaintiff, as a substitute for the former one, but no mention was made to the plaintiff's brother of the tax sale which had been made; and the judge found as a fact that Rutledge and his wife had formed a scheme to defraud the plaintiff and get title to the farm free from the mortgage. In December of the same year the tax sale certificate was assigned to a person who had advanced the money to enable Mrs. Rut-

ledge to make the purchase. This person in May, 1895, assigned the certificate to the defendant Lawlor for $75, and a few days afterwards a tax sale deed of the land was issued by the municipality to Lawlor. The Rutledges continued to live on the property up to the time of the action. It was shown that Rutledge was present when the negotiations for the sale of the certificate to Lawlor took place, and Lawlor leased the property to a cousin of O. G. Rutledge, an unmarried young man, who lived with him.

This action was brought for the foreclosure of the mortgage and to have it declared that Lawlor holds the land in trust for the mortgagor. The mortgage contained the usual covenants by the mortgagor for payment of the mortgage money and taxes and performance of statute labor.

Held, following numerous decisions in the courts of the United States, that the mortgagor, who has a duty to pay taxes, cannot, after neglecting such duty, purchase at a tax sale and acquire a valid title which would defeat the claim of the mortgagee.

Held, also, following Blackwell on Tax Title, 572, and *Warner* v. *Broquet*, 39 Pac. R. 922, that a wife cannot obtain a valid tax title to her husband's real estate by the purchase thereof at a tax sale, if she is under any obligation, legal or moral, to pay the taxes, and that in the circumstances appearing in the case Mrs. Rutledge was under at least a moral obligation to pay the taxes, and had been guilty of fraudulent concealment of the fact of her purchase when the plaintiff's brother was at her house; and that the facts showed that she had taken part in a fraudulent scheme to defeat and cut out the plaintiff's mortgage.

Held, also, that, although there was no evidence to show that he had purchased the certificate to assist the Rutledges in defeating the plaintiff's mortgage, the assignee Lawlor could claim no better or higher rights under the tax sale than the original purchaser had acquired. Blackwell on Tax Title, 633, and *Manning* v. *Bonnard*, 54 N.W.R. 439, followed. Lawlor knew that there was a mortgage on the land when it had been purchased at the tax sale by the wife of the mortgagor, and he must have known from the presence of Rutledge when he made his bargain for the certificate that Rutledge, or his wife, or both, were still interested in the land.

Delaration that Lawlor holds the land in trust for Rutledge and his wife and the usual foreclosure decree made with costs. Lawlor to have a lien for the full amount of the tax sale purchase money and any sums subsequently paid by him for taxes with interest.

Culver, Q.C., and *Mulock*, Q.C., for plaintiff. *Ewart*, Q.C., and *Wilson* for defendants.

Taylor, C.J.] PHILLIPPS v. PROUT. [March 11.

Mortgagor and mortgagee — Accounts in the Master's office — Subsequent incumbrancer — Bonus or special commission on mortgage loan, when allowed.

This was an appeal by a subsequent incumbrancer from the report of the Master on taking of the account of the plaintiff's claim under a mortgage given by the defendant.

Held, 1. Where the party brought into the Master's office under notice provided for by Rule 117, Queen's Bench Act, 1895, takes no steps to have the decree varied or set aside, he cannot afterwards object to the plaintiff's right to a decree of foreclosure.

2. Where the plaintiff has served a party with such notice to come in and prove his claim as a subsequent incumbrancer, he cannot afterwards raise an objection that the party so served has no lien on the land.

3. A mortgagee in bringing his accounts into the Master's office should charge himself with the net proceeds only of any rents or profits received by him out of the mortgaged premises, leaving the incumbrancer to surcharge if he considers the mortgagor entitled to a larger credit.

4. Where, in the negotiations for a loan to be secured by mortgage, the mortgagee stipulates for a bonus or special commission or other charge in consideration of advancing the money, in addition to the interest, he may retain it if he deducts the amount at the time from the loan and only advances the balance, or in case the amount is afterwards paid and settled: *Potter* v. *Edwards*, 26 L.J. Ch. 468; *Mainland* v. *Upjohn*, 41 Ch. D. 126. But otherwise such bonus or special advantage cannot be recovered or allowed in equity: *James* v. *Kerr*, 40 Ch. D. 524; *Eyre* v. *Wynn-McKenzie* (1894), 1 Ch. 218, and *Field* v. Hopkins, 44 Ch. D. 524.

5. Where the mortgagee in his account has charged himself with the gross proceeds of crops raised on the mortgaged premises, he is entitled to deduct from that the expenses of raising and marketing.

Howell, Q. C., and *D. A. Macdonald* for plaintiff. *Culver*, Q.C., for the incumbrancer.

Dubuc, J.] CASE *v.* BARTLETT. [March 11.

Registry Act, R.S.M., c. 135, s. 68—Judgment, registration of—Priority of unregistered instrument—Judgments Act, R.S.M., c. 80, s. 5.

Section 68 of the Registry Act, R.S.M., c. 135, provides that priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument to the party claiming under the prior registration; and section 5 of the Judgments Act, R.S.M., c. 80, enacts that a certificate of judgment duly registered shall bind all interest or estate of the defendant in land situated within the district, the same as though the defendant had in writing under his hand and seal charged the land with the amount of the judgment.

Held, that notwithstanding these provisions a registered judgment creditor cannot claim priority over the grantee of an unregistered conveyance previously executed and delivered by the judgment debtor. *Wickham* v. *The New Brunswick Ry. Co.* L.R. 1 P.C. 64; *Whitworth* v. *Gaugain*, 3 Hare 415; *Eyre* v. *MacDowell*, 9 H.L. 618, followed. *Miller* v. *Duggan*, 21 S.C.R. 47, and *Stark* v. *Stevenson*, 7 M.R. 381, distinguished. *McMaster* v *Phipps*, 5 Gr. 253, not followed.

Mulock, Q.C., for plaintiff. *Howell*, Q.C., and *Mathers* for defendant.

Province of British Columbia.

SUPREME COURT.

Drake, J.] MACHIN *v.* PIERCY. [March.

Partition—Dower.

A judgment of partition of certain farming lands forming part of an intestate's estate having been made, a question arose upon settling the minutes as to whether the widow was entitled to dower in the coal supposed to lie under the partitioned lands.

On the authority of *Stoughton* v. *Leigh*, 11 Rev. R. 817, in which it was decided that though a widow is dowable of mines opened during her husband's lifetime, and in which he had an estate of inheritance during coverture, she is not dowable of unopened mines.

Held, that the widow had no right to dower in any unopened deposits of coal which might lie under the partitioned lands.

Drake and Irving, JJ.] PARKS *v.* PITTENDRIGH.

Mandamus—Small Debts Court—Interpretation of statute.

Appeal from the decision of MCCOLL, J., refusing an application for mandamus to defendant to issue execution upon a judgment which was rendered by a judge of the Supreme Court on an appeal from the Small Debts Court over which defendant Pittendrigh presided. The grounds for the application were that inasmuch as the Small Debts Act did not provide any practice for such a case, but did provide that "when anything necessary for carrying out the scope or any provision of this Act is omitted herein, the remedies, practice and procedure of the 'County Court's Act' and rules may be applied," and the rules under that Act, provided that in cases of appeal from the County Court, the judgment of the Supreme Court could be filed in the County Court and thereupon should be enforced in that court, the same procedure should be applicable for the Small Debts Court. The appeal by the provisions of the Small Debts Act lay to "a judge of the Supreme Court or to the nearest County Court," and the succeeding section provided that "on every such appeal the court to which the same is taken shall try and determine the question in dispute." The judgment was entitled "In the Supreme Court of British Columbia."

Held, that the appeal from the Small Debts Court was to the Supreme Court of British Columbia, and the judgment being in that court could be enforced according to the rules thereof, and therefore a mandamus would not lie to the stipendiary magistrate to proceed in the Small Debts Court.

Brydone-Jack, for the appellant.

Walkem, Drake, Irving, JJ.]

CANADIAN PACIFIC RAILWAY *v.* MCBRYAN.

Natural user of water—Overflow—Damage.

In this case the defendant relied upon his right to use his land in the natural course of user, unless in so doing he interfered with some right

created by law or contract. The plaintiffs claimed to have a right to enjoy their land free from invasion of filth or other matter coming from any artificial structure on land adjoining. The defendant put up on his own land an artificial erection, and by means thereof communicated upon his own land a quantity of water much larger than could or would have been collected if he had used his land in the natural way. He then raised his artificial structure some feet higher, and this subsequent raising caused damage to the plaintiffs. The plaintiffs showed that their own land was damaged, and claimed that the defendant was using his land in an unnatural way.

Held, that the defendant by erecting this dam for the purpose of accumulating water in the way he did was making an unusual or extraordinary use of his land and of the water. Having so collected this body of water by this extraordinary user, and having injuriously affected the plaintiffs' property, the defendant violated that rule of law which will not permit anyone, even on his own land, to do an act lawful in itself, which being done in that place, necessarily does damage to another. But for the defendant's act in accumulating water no mischief would have accrued, and he is liable for the resulting damage.

Davis, Q.C., for plaintiff. *Wilson*, Q.C., for defendant.

Walkem, J.] B. C. CANNING CO. *v.* CHU LAI. [March 19.

Practice—Arbitration—Commission to take evidence.

This was an action commenced by a writ of summons issued out of the Supreme Court, and the parties afterwards agreed to submit the matters in dispute to arbitration, and an arbitrator was appointed. After the evidence was all in, except that of one witness in California, the arbitration was adjourned in order that the plaintiffs might produce the witness before the arbitrator. The plaintiffs now applied for leave to issue a commission for the examination of the witness in California.

Held, that as the questions in dispute had been submitted to arbitration the court had no jurisdiction to make the order asked for. Summons dismissed with costs.

Moresby, for plaintiffs. *Luxton*, for defendants.

Walkem, J.] ALDOUS *v.* HALL MINES. [March 23.

Mineral Acts—Adverse claim—Affidavit verifying.

This action was tried in Nelson. In 1894 the plaintiff's husband located the mineral land in dispute in her name and as her agent; he also took out a mining license for her and has kept it renewed ever since. As her agent he now brings this adverse claim on an affidavit of verification made by himself. The affidavit was objected to, on the ground that it should have been made by the plaintiff herself.

Held, that according to sec. 14 of the Mineral Act of 1892, as amended by sec. 10 of the Mineral Act of 1893, an affidavit made by any person other than the one making the adverse claim is insufficient.

Section 2326 of the Revised Statutes of the United States and amendment of 26th April, 1882 compared. Claim dismissed with costs.

Wilson, Q.C., for plaintiff. *E. P. Davis*, Q.C., for defendants.

Book Reviews.

The Law of Legislative Power in Ca' da, by A. H. F. LEFROY, M.A., Oxon., of the Inner Temple, London, . Osgoode Hall, Toronto, barrister-at-law. Toronto: Toronto Law Book and Publishing Co., Ltd., 1898.

We refer to this valuable addition to our library in our editorial columns. We notice in the *Law Quarterly* a very complimentary review of Mr. Lefroy's book by Mr. A. V. Dicey, Q.C., than whom there is no higher authority on such a subject. We might notice in passing that Mr. Dicey questions the desirability of expending labour upon what is practically an annotated code, which is noteworthy in view of the fact that most of his works are built upon that principle.

The Law of Evidence, SIDNEY L. PHIPSON, M.A., of the Inner Temple barrister-at-law. London, Stevens & Haynes, Law Publishers, Temple Bar, 1898.

This is the second edition of Mr. Phipson's very excellent work. This book does not seem to be as well known in this country as it deserves, and we can safely say it improves on acquaintance. Mr. Phipson has a uniform method of arrangement, stating (1) the rules of evidence, (2) the principles upon which they are founded, (3) their various limitations, and (4) the illustrations to these rules, the illustrations being given in a more condensed type than the rest of the matter. The aim has been to present an exhaustive statement of the law of evidence in a relatively moderate compass—a most praiseworthy object, well carried out. The arrangement to this end is exceedingly good and the illustrations apt and accurate. It makes an excellent circuit companion. This edition increases by one-third the text and number of cases cited in the first edition, and the chapter on extrinsic evidence has been amplified and remodelled.

Powell's Principles and Practice of the Law of Evidence, by JOHN CUTLER, B.A., Q.C., and CHARLES F. CAGNEY, B.A., Middle Temple, barrister-at-law. London, Butterworth & Company, 7 Fleet St., Law Publishers, 1898.

This is now the seventh edition of this excellent and standard work. It is so well known and so highly thought of that it is unnecessary to enlarge upon it. The book before us, together with Mr. Phipson's work on Evidence, above alluded to, take a middle place between Sir James Stephens' Digest and the elaborate and bulky volumes of Taylor on Evidence. Over 160 new cases are cited in this edition, and the law has been brought down so as to cover all statutes and cases reported up to September 30th, 1897.