The Canada Law Journal.

VOL. XXV. APRIL 16, 1889. No. 7.

A SPECIAL sitting of the Divisional Court of the Chancery Division has been appointed to be held in the month of June, commencing on the 10th of that month.

HEREAFTER, in the Chancery Division, all appeals from Reports may be set down for hearing in Court on Thursdays, and appeals from Orders will continue to be set down for hearing on Monday in Chambers.

IN *Fox* v. *The Hamilton Provident and Land Society and Seabra Beaman*, it appeared that the defendant Society had obtained a judgment and execution against the present plaintiff Fox, and the defendant Beaman, for a debt which was owing by the plaintiff Fox to the Society, and for which the defendant Beaman was surety. The defendant Beaman, on judgment and execution being obtained against him and the plaintiff Fox, paid the amount of the claim to the Society and took an assignment, and then proceeded to enforce the execution against the defendant Fox. This action was brought by the plaintiff Fox, who alleged that before the assignment to the defendant Beaman, he had made an arrangement with the Society whereby the Society agreed to extend the time for payment, and he claimed damages and an injunction against the defendants for proceeding under execution. Statement of claim was delivered to the two defendants. The defendant Beaman put in his defence in the ordinary course, but no defence was ever filed by the Society. The plaintiff discontinued wholly against the Society whereupon the defendant Beaman moved to set aside the discontinuance. In support of the motion, it was contended that under Consolidated Rule 641, the plaintiff could not discontinue against one defendant without the leave of a Court or a Judge: *Carlisle* v. *Belfast*, 10 L.R. 36 (Ireland C.L.S.). The Master in Chambers set aside the notice of discontinuance upon the ground that the plaintiff was not entitled under the practice to discontinue against one defendant without leave, and ordered the plaintiff to pay the cost of the application in any event.

IN *Reg. ex rel Stonehouse* v. *Hill*, an appeal was made to the Master in Chambers by the relator under Con. Rule 854, pending the taxation of costs by

one of the taxing officers at Toronto. The question was as to the scale upon which the costs of the successful relator of a *quo warranto* proceeding respecting a controverted municipal election were to be taxed. The respondent contended that the old tariff of Michaelmas Term, 35 Vict., still applied to such proceedings, The relator contended that the old tariff had been superseded, and, the *quo warranto* proceeding having been instituted in the High Court, that the costs must be on the scale of that court. Sec. 208 of the Municipal Act, R.S.O., ch. 184, provides, *inter alia*, that the Judges of the High Court may by rules regulate the practice respecting costs of such proceedings; and that all existing rules shall remain in force until rescinded. By Con. Rule 1,217, the table of costs set forth in the tariff A appended to the rules, shall be that according to which all costs in civil actions in the High Court shall be taxed. By Con. Rule 4 the interpretation clauses of the Judicature Act shall apply to these rules. By sub-sec. 3 of sec. 2 of the Judicature Act, R.S.O., chap. 44, "action" shall include suit, and shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court. Con. Rules 1,038 to 1,044 prescribe the manner of commencing and carrying on *quo warranto* proceedings in respect of controverted municipal elections. The Masters in Chambers held that this proceeding was an action within the meaning of the rules, and that the costs should be taxed according to tariff A, that is, the tariff of costs in actions in the High Court.

SIR WILLIAM BUELL RICHARDS.

THE death of Sir William Richards on the 26th January last, removed from amongst us a man whose eminent public services had established for himself a lasting claim to public regard. He was emphatically a man of the people, gifted with strong common sense and firmness of purpose, and endowed with a virile intellect. It is not surprising, therefore, that such a man, in a country such as this had no difficulty in attaining on his merits a commanding position in the public service of his country. He was descended from an United Empire Loyalist stock of English origin, his father being a man of remarkable natural ability and force of character, and well known in Brockville, where he exerted considerable political influence.

Sir William Richards was born in 1814, and had attained the ripe old age of seventy-four at the time of his death. He studied law at Brockville under, we believe, the late Mr. Justice Sherwood, and in 1837 was called to the Bar, and commenced the practice of his profession in his native town, where he speedily attained considerable distinction as an advocate. Eleven years later we find him a candidate for parliamentary honors, and succeeding in carrying the County of Leeds in the Reform interest by a majority of sixty votes, against the then Grand Master of the Orange Society, the late Ogle R. Gowan. In 1849

he was elected a Bencher of the Law Society. He was, from the outset of his parliamentary career, a supporter of the late Hon. Robert Baldwin, for whom and whose political principles he always maintained the greatest respect. In the Hincks-Morin administration, which was formed on the retirement of Mr. Baldwin from public life in 1851, Mr. Richards held the office of Attorney-General for Upper Canada until the 22nd June, 1853, when, at the comparatively early age of thirty-nine, he was appointed to a puisne judgeship in the Court of Common Pleas in the place of the Hon. R. B. Sullivan, deceased. This office he held until 1863, when he was advanced to the Chief Justiceship in succession to Chief Justice Draper, who had been transferred to the Queen's Bench. After five-and-a-half years' tenure of this office, on the 12th November, 1868, he was appointed to the Chief Justiceship of the Queen's Bench, in which post he was also the successor of Chief Justice Draper, who had been created Chief Justice of the Court of Appeal. He remained at the head of the Queen's Bench until 8th October, 1875, when, on the establishment of the Supreme Court of Canada, his recognized ability as the head of the judiciary of the Province of Ontario led to his being chosen to fill the important and responsible position of Chief Justice of that Court. Shortly afterwards, in 1877, in recognition of his long and distinguished judicial career, he received the honor of knighthood. He had been Chief Justice of the Supreme Court little over three years, when his health, which had been seriously affected for many years past by repeated attacks of asthma, became so undermined that he found it impossible to continue in the discharge of his onerous duties, and in January, 1879, he resigned his position, after a service of a quarter of a century upon the Bench, and sought in the retirement of private life a well earned rest from his labors. After his withdrawal from the Bench Sir William Richards took no part whatever in public affairs.

He died at Ottawa, surrounded by his children—his wife, a daughter of Mr. John Muirhead, of Brantford, having pre-deceased him many years.

Sir William Richards was remarkable for the simplicity of his manners and the entire absence of ostentation. He was singularly frank and courteous to all who practised before him and though at times he was prone to be a little brusque in his manners, his brusqueness was always good-natured and never gave offence. He had no love for technicalities, and was always prone to ignore rather than give effect to them. His judgments were remarkable for vigorous thought, devoid of all attempts at rhetorical flourishes, and went straight to the pith and marrow of the case. His broad mental grasp of the cases submitted to his judgment, coupled with his well known honesty of purpose and mastery of the principles of law, gave both to suitors and the profession an almost unlimited confidence in his decisions, which few other judges have been so fortunate as to secure. As an instance of the forcible, though somewhat homely, character of his wit, it may be remembered that on one occasion he is said to have gravely inquired of a learned counsel, who had been strenuously arguing before him in support of a certain proposition, and then almost in the very next case had, owing to the exigencies of his brief, been constrained to argue dead against what

he had a moment before been contending: "Mr. ——, did you ever try to chew sawdust and whistle at the same time?"

He was, both as a judge and as a man, a Canadian of whom Canadians may well be proud, and will be remembered in our history as one of the giants of his time.

COMMENTS ON CURRENT ENGLISH DECISIONS.

COMPANY—BANK—POWER OF MEETINGS—PENSION—DECEASED OFFICER.

The short point determined by North J., in *Henderson* v. *Bank of Australasia*, 40 Chy. D. 170, was simply this, that a resolution by a general meeting of proprietors of a bank authorizing the directors to pay a half yearly pension for five years for the benefit of the family of a deceased officer of the bank, was *intra vires* of the company, and could not be interfered with at the instance of any objecting proprietor; adopting the reasoning of Bowen, L.J., in *Hampson* v. *Price's Patent Candle Co.* 45 L.J. Chy. 437, he came to the conclusion that in such cases the payments must not only be *bona fide*, but must also be such as are reasonably incident to the business of the company,—in short that "the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."

MORTGAGE—PRIORITY—NEGLIGENCE—OMISSION TO OBTAIN TITLE-DEEDS—POSTPONEMENT OF FIRST EQUITABLE MORTGAGE TO SECOND.

Farrand v. *Yorkshire Banking Co.*, 40 Chy. D. 182, is a case which emphasizes the difference which exists in law as to the effect of negligence upon the rights of legal and equitable mortgagees. This was a contest for priority between two equitable mortgagees. The first mortgage in point of date was in respect of an advance made by the plaintiff to the mortgagor to enable him to purchase a property, on the understanding that upon the purchase being completed the title deeds would be handed over to the plaintiff. The mortgagor, however, neglected to hand over the deeds as agreed, but deposited them with the defendants, by way of equitable mortgage, to secure advances, and the defendants retained them for twenty-two years and subsequently obtained a conveyance of the legal estate, without notice of the plaintiff's prior advance. North, J., held that under these circumstances the defendants were entitled to priority, and that as between two equitable mortgagees, negligence, such as omission to obtain possession of the title deeds, is sufficient to postpone an equitable mortgage prior in point of time; and that it is not necessary, as between equitable mortgagees, as it is in the case of legal mortgagees, that the negligence should amount to fraud.

MEMBER OF PARLIAMENT—PRIVILEGE FROM ARREST.

In re Gent, Gent-Davis v. *Harris*, 40 Chy. D. 190, a question arose whether

a member of Parliament who had been a receiver in a cause, and who, after he had been discharged from receiver, had been ordered to pay over funds which he had received as receiver, was liable to attachment: and it was held by North, J., that the attachment for breach of such an order was of a punitive character, and therefore not subject to privilege of Parliament, and it was also held that a person who owes money come to his hands as receiver, is in a fiduciary capacity.

GUARDIANSHIP OF INFANT ACT (49 & 50 VICT. c.27)—(R.S.O. c. 137, s. 1)—RIGHTS OF MOTHER AS GUARDIAN—RELIGIOUS EDUCATION OF INFANT.

In re Scanlon, 40 Chy. D. 200, is a decision of Sterling, J., and shows that the recent *Guardianship of Infants Act* (49 and 50 Vict., c. 27) (in R.S.O. c. 137, s. 1), has made no change in the law as regards the general rule which requires that infants shall be brought up in the religion of their deceased father. In this case the deceased father was a member of the Church of England, and the surviving mother was a Roman Catholic. The Court, under the second section of the Act, appointed two Protestants to act as co-guardians with the mother, and directed that the children should be brought up as members of the Church of England.

Correspondence.

NOTARIES PUBLIC OF ONTARIO.

To the Editor of THE CANADA LAW JOURNAL:

Dear Sir,—Complaints are made that the Notaries of Ontario take no oath of office. The Lieutenant-Governor appoints as Notaries persons possessed of certain qualifications. A Commission issues, worded as follows:—"I have appointed, and do hereby appoint him, the said Geoffrey Quilldriver, to be a Notary Public in and for the Province of Ontario. To have, use and exercise the power of drawing, passing, keeping and issuing all deeds, contracts, charter parties and other mercantile transactions; and also to attest all commercial instruments that may be brought before him for public protestation." The fee of $8 is paid. The appointment is gazetted in the Official Gazette—and the new Notary Public is left to make the most of his important privileges. But he is not sworn to do his duty.

Let us consider whether there is a just cause for complaint in leaving our Notaries unsworn; whether an oath should be imposed; and what should be the form of that oath.

The only outward and visible inconvenience in a Notary Public for Ontario not being sworn, is that always found by those living under laws and customs different from those of their near and intimate neighbors. The word "sworn," for instance, has to be struck out wherever it occurs in the Notarial Certificates prepared in other countries and provinces and sent to Ontario for completion or execution.

According to the Revised Statutes of the State of New York, vol. 1, page 368, section 24, 7th edition, the following is the oath or affirmation required of a Notary Public before entering on the duties of his office, viz :—"I do solemnly swear (or "affirm" as the case may be) that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of Notary Public to the best of my ability."

In the State of Pennsylvania the oath of a Notary runs as follows :—"You do swear that you will well and faithfully perform the duties of your office of Notary Public, and that you will support the constitution of the commonwealth of Pennsylvania." (Dunlap's Forms, p. 116.)

In the Province of Quebec :—"Before commencing to practise, every Notary must take the oaths of office and allegiance before a judge of the Superior Court, a certificate whereof is entered on his commission." Article 3831, Revised Statutes of Quebec, 1888.

In France, the *Organisation du Notariat*, 1866, declares :—"*Le Notaire n'aura le droit d'exercer qu'a compter du jour ou il aura prêté serment.*" (Section 48.)

In England, by 6 & 7 Vict., chap. 90, section 7 (1843), it was enacted that "every person to be admitted and enrolled a public Notary shall, before a faculty is granted to him authorising him to practise as such, *in addition to the oaths of allegiance and supremacy*, make oath before the master of the faculties, his surrogate or other proper officer, in substance and to the effect following :—"I. A. B., do swear that I will faithfully exercise the office of a Public Notary; I will faithfully make contracts or instruments for or between any party or parties requiring the same, and I will not add or diminish anything without the knowledge and consent of such party or parties, that may alter the substance of the fact; I will not make or attest any act, contract or instrument in which I shall know there is violence or fraud; and in all things I will act uprightly and justly in the business of a Public Notary, according to the best of my skill and ability. So help me God."

In addition to this oath the oaths of allegiance and supremacy were required, except in certain cases where another form of oath was substituted by Act of Parliament.

This continued to be the law until the year 1874, when 6 & 7 Vict., c. 90, s. 7, was amended by the Statute Law Revision Act, No. 2, of 37 & 38 Vict., c. 96, which repealed the words "in addition to the oaths of allegiance and supremacy."

The answer to the query whether an oath should be imposed on Ontario Notaries is answered practically we think by the custom of the countries we have named—the commercial centres of the world.

"An oath is a reverent appeal to God, in corroboration of what one says, invoking, according as his declaration is sincere or deceptive, the divine blessing or punishment in another life." (Abbott's Dictionary, verbo Oath.)

The use of oaths is defended by the following reasons :—"Oaths are required

from persons elected to public offices, because it is presumed that persons under the obligation of an oath will be more likely to act conscientiously." (Young's U. S. Citizen's Manual.) "Politicians and moralists have placed much reliance on oaths as a practical security." (Ency. Britannica.) "The oath is an institution established as a precaution against the inconstance or unfaithfulness of man." (Bouvier, American Law.)

As to the form and matter of the oath or oaths Mr. Mowat should impose upon his Notarial subjects, he should certainly, for the welfare of his Province re-enact the provisions of the Imperial Act, 6 & 7 Vict., chap. 90, s. 7, and make the law of Ontario in this matter correspond to the law of England between 1843 and 1874. This would compel the Notaries of Ontario to take an oath of office, the oath of allegiance and the oath of supremacy.

In these days of Jesuitism, Socialism, Fenianism and disloyalty to the constitution, it would be a wise and statesmanlike precaution to make every Canadian declare "that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this Dominion."

It may be said that this last oath would exclude some men. Well, be it so, for who can safely trust that Notary who has been taught to believe or who has been and is being taught by teachers who believe, "That it is no deadly sin to steal, or privately against his will and without his knowledge, to take a thing, from him who is ready to give it if he were asked, but will not endure to have it taken without asking," (*Emanuel Sa, aphorisms, verbo Furtum.*) "That it is not theft privately to take a thing that is not great from our Father," (same authority.) "That he who sees an innocent punished for what himself hath done, he in the meantime who did it, holding his peace, is not bound to restitution," (*Emanuel Sa, aphorisms, verbo Restitutio.*) "To detract from our neighbor's fame before a conscientious, silent and a good man, is no deadly sin," (*Antonin Diana, verbo Detractio, num.* 5.)

A NOTARY PUBLIC.

Reviews and Notices of Books.

Digest of the Reported Cases in the Supreme Court of New Brunswick from 1879 to 1886, with Digest of the Cases in the Supreme Court of Canada decided on Appeal from the Supreme Court of New Brunswick, a continuation of Stephens' Digest. By JAMES G. STEPHENS, ESQ., Q. C., County Court Judge. Toronto: Carswell & Co.

We are in receipt of this book, which seems to be carefully prepared. We notice, however, a rather long list of errata, which should be avoided. The typographical execution is very good.

Digest of Insurance Cases, embracing the Decisions of the Supreme and Circuit Courts of the United States and the Supreme Courts of the various States and Foreign Countries upon Disputed Points in Fire, Life, Marine, Accident, and Assessment Insurance, and Fraternal Benefit Orders, together with a Reference to Annotated Insurance Cases in Editorials in Law Journals on Insurance cases for the year ending October 1st, 1888. By JOHN A. FINCH. Indianapolis: Rough Notes Publishing Company.

This publication is of value to the profession, and will be more so if continued with regularity. One would hardly suppose that all the cases contained in the reports referred to in the title page could be included in a volume of 100 pages. We presume, however, that it is as stated. An index at the end of the volume gives the arrangement of the subjects, and an appendix gives the Law Periodical from which the cases are taken.

The Lives of the Judges of Upper Canada from 1791 to the Present Time. By DAVID B. READ, Q.C., Historian of the County of York Law Association. Toronto: Rowsell & Hutchison.

We can readily believe that, as the author says in the opening sentence of the preface, writing the lives of the Judges have been to him a work of love as well as of duty. Our author's well-known interest in the early history of the Province led him to publish sketches of the lives of some half-dozen of the early Judges in *The Magazine of Western History* and the accounts thus begun readily expanded into the present handsome volume. It is fortunate that the labor of recording so many interesting and valuable facts as are contained in the work before us, fell to the lot of one to whom it was so congenial, and whose experience and patient industry so well qualified him for it.

The introductory chapter deals with the period from the Conquest to the Constitutional Act, and narrates the changes that were made in the law and its administration during that time. But it is with the lives of successive Judges in their judicial capacity, and as public men influencing the progress of the Province, that the book has mostly to do. Of the Judges as men in private life little is said. A natural curiosity based on that human sympathy which leads everybody to take an interest in his fellow-beings, would cause most readers to wish that the occasional glimpses furnished them of the man beneath the Judge's robes had been more numerous. The array of facts collected and arranged here, relating to the early days of the Province, and to some of those most active in giving form to its institutions and guiding its course, is a valuable contribution to our historical knowledge. Few Canadians can read this book without making extensive additions to their knowledge of the history of the most important Province of their country. We venture the opinion, however, that many lay readers would willingly forego some few of the many accounts of important trials in which

one and another of the Judges took part, either judicially or as counsel before their elevation to the bench, if their place had been supplied by characteristic ancedotes such as occasionally crop out. The book would not be complete without the chapter on "The Law Society and Osgoode Hall," a chapter which turns one's thoughts back to the older days when legal studies were in their infancy in Ontario. The concluding chapter gives some enjoyable reminiscences of incidents which go to show that the legal mind is not deficient in the keen perception of the ridiculous, nor slow in giving expression to the humorous.

Notes on Exchanges and Legal Scrap Book.

A NEW LEGAL PUBLICATION.—A welcome exchange is *The Green Bag*, in its own words described "as a useless but entertaining magazine for lawyers." It does not intend to give facts of a kind that will be available in working up cases or deciding knotty points of law, but it seeks rather to give information of a more general character, which is but none the less interesting on that account. "It offers a little toothsome literary cake and jam, to offset the heavy bread and the over-cooked meats of the legal table." Number 3 of Volume I., lately received, may be taken as a fair specimen of the numbers already issued. It contains, amongst other articles, a Sketch of the Life of Chief Justice Shaw, of Massachussetts, and portrait; an Account of a Visit to some English Prisons; a full description of the Law School of the University of Pennsylvania, with portraits of its six Professors; Causes Célèbres, iii.; the Mystery of the Rue de Vaugirard; the Temple; Gossip of an old French Lawyer; Old Inns of Court Customs; and the Editorial Department. Our new friend is published at Boston. We venture to predict that it will become a general favorite.

DIARY FOR APRIL.

1. Mon ....County Court Sittings for Motions begin.
2. Tue ....County Court Non-Jury Sittings, except in York.
6. Sat.....County Court Sittings for Motions end
7. Sun ....*5th Sunday in Lent. Passion Sunday.*
14. Sun ....*6th Sunday in Lent. Palm Sunday.*
15. Mon ....County Court Non-Jury Sittings in York.
19. Fr .....Good Friday.
20. Sat.....Last day for Primary Notices.
21. Sun ....*Easter Sunday.*
22. Mon ....Easter Monday.
23. Tue ....St. George's Day.
25. Thu ....St. Mark.
28. Sun ....*1st Sunday after Easter. Low Sunday.*
30. Tue ....Primary Examination.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[March 18.

O'BRIEN *v.* THE QUEEN.

Appeal—Contempt of Court—Discretion—Jurisdiction—Constructive contempt—Interference with a judicial proceeding—Proceedings for contempt—Locus standi—Punishment—Infliction of costs.

An appeal will lie to the Supreme Court of Canada from the judgment of a Provincial Court in a case of constructive contempt. Such a decision is not an order made in the exercise of the judicial discretion of the Court making it, from which, by sec. 27 of the Supreme and Exchequer Courts Act, no appeal shall lie. TASCHEREAU, J. *hesitante.*

Such an appeal will lie though no sentence was pronounced against the party in contempt, but he was found guilty and ordered to pay the costs of the proceedings.

H. was elected Mayor of Toronto and was unseated by a Master in Chambers on proceedings in the nature of a *quo warranto* instituted for the purpose, the Master holding that the property qualification of H., who had qualified in respect to property of his wife, was insufficient. Notice of appeal was given, but a declaratory Act having been passed by the Ontario Legislature removing such disqualification, such notice was countermanded and the appeal abandoned. In the meantime O'B., solicitor for H., had written a letter to a newspaper in Toronto in which the following expressions occurred, after the statment of the fact that the qualification condemned had always been held sufficient and had never before been questioned:

"Chief Justice Richards, probably the best authority on such matters in Canada, had held in 1871 that under such circumstances the husband had the right we contend for in the present case. This decision has never been over-ruled, is consistent with common sense and with the universally accepted opinion on the subject.

"You may naturally ask: Why then was the decision the other way? This question I am unable to answer. The delivered judgment affords no answer. The arguments addressed were simply ignored, and the authority relied on by us, so far from being explained or distinguished, was not even referred to. This is eminently unsatisfactory to both the profession and the public—an officer of the Court over-ruling the judgment of a Chief Justice who, above all others in our land, was skilled in matters of municipal law."

Proceedings were instituted by the original relator in the proceedings to unseat H. to have O'B. committed for contempt. The notice of abandonment of the appeal had been given before such proceedings were begun.

Held, 1. That the appeal being abandoned the *quo warranto* proceedings were at an end, and the relator had no *locus standi* in such proceedings to enable him to charge O'B. with contempt in interfering with the judicial proceeding. In such case only the Court could institute or instigate the proceedings.

2. That the publication complained of was only a fair criticism of a judicial proceeding which any person is privileged to make.

3. That the infliction of costs was a punishment for the alleged contempt in the nature of a fine, so that the appeal was not one for costs only.

Appeal allowed.

S. H. Blake, Q.C., for the appellant.

Bain, Q.C., for the respondent.

[March 18.

CITY OF LONDON *v.* GOLDSMITH.

Municipality — Construction of street crossing —Elevation above the sidewalks—Injury to person crossing—Liability of municipality for.

G. brought an action against the city of

L. for damages caused by striking her foot against a street crossing in said city and falling, whereby she was hurt. The principal ground on which negligence was based was that the crossing was elevated some three or four inches above the level of the street, which rendered accidents of the kind in question more likely to occur. The jury gave G. a verdict with $500 damages, which the Divisional Court and the Court of Appeal, the latter Court being equally divided, affirmed. On appeal to the Supreme Court of Canada,—

Held, reversing the judgment of the Court of Appeal (14 Ont. App. R.), Strong and Fournier, JJ., dissenting, that the fact of the street crossing being higher than the street did not make the city liable.

Appeal allowed.

W. R. Meredith, Q.C., for the appellants.

R. M. Meredith and *Love*, for the respondent.

[March 18.

KINGSTON & PEMBROKE RAILWAY *v.* MURPHY.

Ry. Co—Expropriation of land — Description in map or plan filed—42 Vic., ch. 9.

No land can be taken for the line of a railway as originally located, or for any deviation therefrom, at any point therein, until the provisions as to places and surveys prescribed as to the original line (by 42 Vic., ch. 9, Railway Act of 1879) are complied with as to every such deviation.

Therefore, where a road had been completed and the company, having obtained additional powers from Parliament as to land they could hold in K., sought to expropriate the land of M., which was not on the map or plan originally registered.

Held, affirming the judgment of the Court of Appeal for Ontario, that they were not entitled to such expropriation.

Appeal dismissed.

Christopher Robinson, Q. C., and *Cattanach*, for the appellant.

S. H. Blake, Q.C., and *Britton*, Q.C., for the respondents.

[March 18.

ELLIS *v.* BAIRD.

Appeal—Contempt of Court—Final judgment—Practice.

E. was served with a rule issued by the Supreme Court of New Brunswick, calling upon him to show cause why a writ of attachment should not issue against him, or he be committed for contempt of Court in publishing certain articles in a newspaper. On the return of the rule, after argument, it was made absolute and a writ of attachment was issued. E. appealed from the judgment making the rule absolute, and by the case on appeal it appeared that the practice in such cases in New Brunswick is that the writ of attachment is issued only in order to bring the party into Court, when he may be ordered to answer interrogatories by which he may purge his contempt, and if he fails to do so the Court may pronounce sentence; but no sentence can be pronounced until the party is brought before the Court on the writ of attachment.

The counsel for the respondent moved to quash the appeal for want of jurisdiction.

Held, that the judgment appealed from was not a final judgment from which an appeal would lie to the Supreme Court of Canada under sec. 24 (a) of the Supreme and Exchequer Courts Act, R.S.C., c. 135.

Appeal quashed without costs.

L. H. Davies, Q.C., for appellant.

L. A. Currie, for respondent.

[March 18.

WINCHESTER *v.* BUSBY.

Trover—Conversion—Bill of lading—Refusal to deliver cargo—Pre-payment of freight—Expenses of storage.

W. was master of a vessel carrying a cargo of coal for B. On arrival W. refused to deliver the coal unless the freight was pre-paid, which B. refused, offering to pay freight ton by ton as delivered. The agent of the owners then caused the coal to be stored, on which the whole freight was tendered by B. and the coal demanded, which the agent refused unless the expenses of the storage were paid. In an action of trover against W.,

Held, affirming the judgment of the Court below, GWYNNE, J. dissenting, that there was a conversion of the coal for which B. could recover in trover.

Held, per PATTERSON, J., that B. had a right of action, but not against the master of

the vessel, and that the appeal should be allowed on that ground.

Appeal dismissed with costs.

Weldon, Q.C., for the appellant.

W. Pugsley and *C. A. Palmer*, for the respondent.

[March 18.

NEW BRUNSWICK RY. CO. *v.* VANWART.

Railway Co—Negligence—Duty of company—Contributory negligence.

V. was at a siding of the N. B. Ry. with a pair of spirited horses. He was told that a train was approaching and endeavored to unhitch the horses, but before he could do so the train came along, the horses took fright and ran away, and V. was dragged on the track where he was killed. There was no notice of the approach of the train by whistle or ringing of a bell, and the company not coming under the general Railway Act, were not bound to give such warning. The train was the ordinary freight and was proceeding at its usual rate of speed.

Held, reversing the judgment of the Court below, that the facts presented did not show such negligence by the servants of the company as would make them liable in damages for V.'s death.

Held, also, that if the company were liable the father of the deceased would have had reasonable expectation of future pecuniary benefit from the life of his son, and would be entitled to share in the damages.

Appeal allowed and non-suit ordered.

C. W. Weldon, Q.C., for the appellants.

J. A. Vanwart, for the respondent.

[March 18

THE QUEEN *v.* CHESLEY.

V., a government official, requested C. to sign a bond as surety for the faithful discharge of his duty as such official. C. having agreed to do so, V. produced a blank form of bond and C. signed his name to it and to an affidavit of justification and acknowledged to a third party that he had executed such bond. The third party made an affidavit of the execution before a magistrate, who gave a certificate of its due execution before him. The bond, which had been filled out for the sum of $2000, was then sent to Ottawa to be registered as the statute requires.

In an action on the bond against C. on default by V., C. claimed that the amount of the bond was represented to him to be $500 or $1000, that there was no seal on it when he signed it, that he had not sworn to the affidavit of justification, and that the magistrate should not have given the certificate he did. The Court below held, affirming the judgment of the trial judge, that C. was estopped from denying the execution of the deed, but as his action was not the proximate cause of the acceptance of the bond by the Government, but that the false certificate given by the magistrate was, the Crown could not recover. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Court below, that the making of the bond was the real cause of its acceptance and the defendant being estopped, the Crown was entitled to judgment.

Appeal allowed.

R. L. Borden, for the appellant.

Harrington, Q.C., for the respondent.

[March 18

WALLACE *v.* SOUTHER.

A promissory note made payable to John Souther & Son was sued on by John Souther & Co.

Held, that it being clear by the evidence that the plaintiffs were the persons designated as payees, they could recover.

It was no objection to the validity of a promissory note that it is for payment of a certain sum in currency. Currency must be held to mean "United States Currency" particularly when the note is payable in the United States.

If a note was insufficiently stamped the double duty may be affixed as soon as the defect comes to the actual knowledge of the holder. The statute does not intend that implied knowledge should govern it.

The appellant claimed that he was only a surety for his co-defendant, and that he was discharged by time being given to the principal to pay the note.

Held, that the fact of time being so given being negatived by the evidence, it was im-

material whether appellant was principal or surety.

Appeal dismissed with costs.

T. J. Wallace, appellant in person.

Arthur Drysdale, for the respondent.

[March 18.

CONFEDERATION LIFE ASSOCIATION *v.* O'DONNELL.

Life insurance—Policy—Memo on margin—Want of countersignature—Effect of—Admissibility of evidence.

A policy of life insurance sued on had in the margin the following memo: "This policy is not valid unless countersigned by..... agent at.....countersigned this..... day of..... Agent."

This memo. was not filled up, and the policy was not, in fact, countersigned by the agent. Evidence was given of the payment of the premium, and rebutting evidence by the company that it had never been paid. The jury found that the premium was paid and the policy delivered to the deceased insured as a completed instrument, and a verdict was entered for the plaintiff and affirmed by the Supreme Court of Nova Scotia.

Held, affirming the judgment of the Court below, Sir W. J. Ritchie, C.J., and Gwynne, J., dissenting, that the necessity of countersigning by the agent was not a condition precedent to the validity of the policy, and the jury having found that the premium was paid their verdict should stand.

The judgment on the former appeals in this case was, on this point, substantially adhered to. See 10 Can. S.C.R. 92, and 13 Can. S.C.R. 218.

Appeal dismissed with costs.

S. H. Blake, Q.C., *J. Beaty*, Q.C., and *Borden*, for the appellants.

Weldon, Q.C., and *Lyons*, for the respondent.

[March 18.

TUPPER *v.* ANNAND.

Contract — Mining land — Speculation in — Agreement with third party—Renewal of—Effect.

T. being in Newfoundland, discovered a mine of pyrites, and on returning to Nova Scotia he proposed to A. that they should buy it on speculation. A. agreed and advanced money towards paying T.'s expenses in going to Newfoundland to secure the title. T. made the second journey and obtained an agreement of purchase from the owner of the mine for a limited time, but, failing to effect a sale within that time, the agreement lapsed. It was renewed, however, some two or three times, A. continuing to advance money for expenses. Finally T. effected a sale of the mine at a profit, and had the necessary transfers made for the purpose, keeping the matter of the sale a secret from A. On an action by A. for his share of the profit under the original agreement,

Held, affirming the judgment of the Court below, that the sale related back, as between T. and A., to the date of the first agreement and A. could recover.

Appeal dismissed with costs.

W. B. Ross, for appellants.

G. H. Fielding, for respondent.

[March 18.

O'CONNOR *v.* MERCHANTS MARINE INSURANCE CO.

Marine Insurance—Policy—Perils of the seas—Barratry—Loss by—Construction of policy.

In a marine policy insuring against loss by 'perils of the seas," there was no mention of barratry. The vessel being lost it was found, in an action on the policy, that such loss was caused by the barratrous act of the master in causing holes to be bored by which the vessel was sunk.

Held, STRONG, J., dissenting, that this loss was not occasioned by "perils of the seas," and the fact of barratry not being expressly excepted in the policy, would not entitle the insured to recover.

Appeal dismissed with costs.

McMaster, Q.C., and *W. B. Ross*, for appellant.

MacCoy, Q.C., for respondents.

[March 18.

WHITMAN *v.* UNION BANK OF HALIFAX.

Assignment in trust for creditors—Preference—Liability of assignee—Limitation of—Release of debtor—Resulting trust—13 Eliz. c. 5.

A deed by C. assigning all his property to

W. in trust for the benefit of creditors, provided that six creditors should first be paid in full; that if sufficient assets remained for the purpose twenty-four other creditors should next be paid in full; that the balance, if any, should be distributed ratably among all the creditors not so preferred, and the surplus returned to the debtor. The deed provided for a release and discharge by the executing creditors of their respective claims against the debtor, and this provision, "that the party of the second part (the trustee W.), his executors or administrators shall not be liable or accountable for more money or effects than he shall receive, nor for any loss or damages which may happen in reference to the said trusts, unless it shall arise by or through his own wilful neglect." In a suit by an unpreferred creditor for a large amount to have the deed set aside,

Held, affirming the judgment of the Court below, GWYNNE and PATTERSON, JJ. dissenting, that the deed was one which it was unreasonable to expect creditors to become parties to, and was void under the statute 13 Eliz. c. 5, as tending to defeat and delay creditors in the recovery of their claims and as containing a resulting trust in favor of the debtor.

Appeal dismissed with costs.

Harrington, Q.C., for appellant.

R. L. Borden and *W. B. Ritchie*, for the respondent.

[March 18.

MUTUAL RELIEF SOCIETY OF NOVA SCOTIA *v.* WEBSTER.

Life Insurance—Mutual company—Bond of membership — Warranty — Concealment of facts—Misstatement.

On an application for insurance in a mutual assessment insurance society, the applicant declared and warranted that if in any of the answers there should be any untruth, evasion or concealment of facts, any bond granted on such application should be null and void. In an action against the company on a bond so issued, it was shown that the insured had misstated the date of his birth, giving the 19th instead of the 23rd of February, 1835, as such date, that he had given a slight attack of apoplexy as the only disease with which he had been afflicted, and the company contended that it was, in fact, a severe attack; that he had stated that he was in "perfect health" at the date of the application, which was claimed to be untrue; that he had suppressed the fact of his being subject to severe bleeding at the nose; and that the attack of apoplexy which he had admitted occurred five years before the application, when the fact was that it had occurred within four years. The trial judge found that the misstatement as to date of birth was immaterial, as it could not have increased the number of years on which the premiums were calculated; that the attack of apoplexy was a slight, not a severe attack; that the applicant was in "good" if not "perfect" health when the application was made; that the bleeding at the nose to which the insured was subject was not a disease, and not dangerous to his health; but that the misstatement as to the time of the occurrence of the attack was material and on this last issue he found for the society, and on all the others for the plaintiff. The Court *in banc* reversed this decision and gave judgment for the plaintiff on all the issues, holding that as to the issue found by the trial judge for the society, there was a variance between the plea and the application which prevented the society from taking advantage of the misstatement. On appeal to the Supreme Court of Canada:

Held (GWYNNE and PATTERSON, JJ. dissenting), that the decision of the Court *in banc* was right and should be affirmed.

Appeal dismissed with costs.

Bingay, Q.C., and *Borden*, for the appellant.

Harrington, Q.C., and *Gormully*, for the respondent.

[March 18.

TRAINOR *v.* THE BLACK DIAMOND S. S. CO.

Bill of lading — Exceptions — Construction — Improper stowage—Negligence — Liability of ship owner.

A bill of lading acknowledged the receipt on board a steamer of the defendant company of a number of packages of fresh meat shipped in good order and condition, and which the defendants undertook to deliver in like good order and condition at the Port of St. John's, Newfoundland, subject to the following exceptions among others, in respect of which the defendants would not be

liable for damage: "Loss or damage arising from sweating, decay, stowage, or from any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or other persons in the service of the ship, or for whose acts the ship owner is liable (or otherwise howsoever)." (Naming them.)

Held, per STRONG, TASCHEREAU and GWYNNE, JJ., that the words "whether arising from the negligence, default or error in judgment of the pilot," etc., applies as well to the exceptions which precede as to those which follow them, and would relieve the defendants from liability for damage by stowage s arising. RITCHIE, C.J. and FOURNIER, J., contra.

The damage to the meat shipped was occasioned by its being taken on board during a heavy rain, stowed in uncovered hatchways, and the men stowing it trampled upon it with muddy boots and spit tobacco juice upon it.

Held, affirming the judgment of the Supreme Court of Prince Edward Island, RITCHIE, C.J. and FOURNIER, J., dissenting, that the loss arose from stowage arising from the negligence of persons for whose acts the ship owners were liable, and the defendants were relieved by the exceptions in the bill of lading.

Appeal dismissed with costs.

L. H. Davies, Q.C., and *Morson*, for appellant.

Fred. Peters, for respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[March 19.

CLARKSON *v.* THE ATTORNEY-GENERAL OF CANADA.

Crown—Customs duties—Assignment for the benefit of creditors—Preference of Crown over suojects—Writ of extent—R.S.O., c. 94.

On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors. At the time of this assignment there was due by B. a large sum for duty on coal that had been previously imported by B. and sold. The Crown claimed payment from the plaintiff as assignee of B. of the amount due for duties in priority to the payment of the claims of the general creditors of the estate.

Held, affirming the judgment of ARMOUR, C.J., reported 15 O.R. 532, that the Crown was not entitled to payment in priority to the general creditors of the estate, but that having come in under the assignment the Crown was bound by the terms of the assignment, and could take only rateably and proportionately with the other creditors.

By an agreement entered into before action, the Crown was placed in the same position as if a writ of extent had been issued by the Crown against B. on the 19th day of February, 1887, for the recovery of the duty payable by B.

Held, in this also, affirming the judgment of ARMOUR, C.J., that a writ of extent so issued would have availed the Crown nothing as far as any property covered by the assignment was concerned.

Robinson, Q.C., for the appellant.

Lash, Q.C., for the respondent.

Re McDONAGH & JEPHSON.

An error crept into the note of *Re McDonagh & Jephson* in our last number. The proceeds of sale were directed to be divided among creditors (2), (3) and (4), and not among (2) and (3) only, as reported *ante*. p. 185.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [Feb. 4.

ATKINSON *v.* GRAND TRUNK RAILWAY CO'Y.

Railways—Negligence—Accident—Proximate cause—Impact.

The plaintiffs, husband and wife, sued for damages for injuries sustained by the wife, charging the defendants with negligence in using their railway in shunting cars, etc., and in not notifying and protecting the public at crossings.

The wife was being driven in a cutter by her son along a street which crossed three tracks of the defendants, and when the cutter was thirty feet away a "silent" car passed along one of the tracks. The son pulled the horse up suddenly, with the effect of throwing the mother out of the cutter and so producing the injury complained of.

The jury found that the defendants were guilty of negligence, and that the son by his driving contributed to the accident.

Held, that, upon the evidence, the finding of contributory negligence could not be interfered with; and that the injury was too remote a consequence to be attributed to the negligence of the defendants. It was not necessary to consider whether actual impact was indispensable.

Lount, Q.C., for plaintiffs.

Osler, Q.C., for defendants.

Div'l Ct.] [Feb. 4.

COUNTIES OF LEEDS AND GRENVILLE *v.* TOWN OF BROCKVILLE.

Canada Temperance Act—Application of fines—49 V. c. 48, s. 2—Construction of orders-in-council—County and town.

The Canada Temperance Act came into force in the united counties of L. and G. on 1st May, 1886. On 2nd June, 1886, the Parliament of Canada passed the Act 49 V., c. 48, s. 2 of which provided that the Governor-in-Council might from time to time direct that any fine, etc., which would otherwise belong to the crown for the public uses of Canada, should be paid "to any provincial, municipal or local authority which, wholly or in part, bore the expenses of administering the law under which such fine, etc., was enforced, or that the same should be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration."

On 29th September, 1886, an order-in-council was passed directing that all fines, etc., recovered or enforced under the Canada Temperance Act within *any city or county* which had adopted the Act, which would otherwise belong to the Crown for the public uses of Canada, should be paid to the treasurer of the city or county, as the case might be, for the purposes of the Act.

On the 15th November, 1886, a second order-in-council was passed directing that the first should be cancelled, and that all fines, etc., recovered or enforced under the Act within *any city or county or any incorporated town separated for municipal purposes* from the county, should be paid to the treasurer of the city, incorporated town, or county, as the case might be, for the purposes of the Act.

The town of B. was at the time the Act was brought into force an incorporated town separated from the counties of L. and G. for municipal purposes; and between the dates of the two orders-in-council the police magistrate of the town paid to the treasurer of the counties $750, the amount of fines recovered and enforced by him for violations of the Canada Temperance Act within the town.

Held, STREET, J., dissenting, that, in the absence of any application by the treasurer of the counties of the moneys so paid to him, the town of B. was entitled to recover it from the counties. The passing of the second order-in-council was a complete revocation of the first, and the second was retroactive in the sense that it provided for the application of all fines, etc., theretofore recovered or enforced.

Per STREET, J.—The first order-in-council operated as a gift from the Crown to the municipality, with an intimation added as to the purpose to which it was expected the gift would be applied, but carrying with it no legal obligation that it should be applied in any particular manner. It was a complete gift; the money was finally at home, so far as the Crown was concerned, when the municipality received it, and the revocation of the order could not revoke a complete transaction, nor retract that which had been actually done under it.

Shepley, for the plaintiffs.

Fraser, Q.C., and *Aylesworth*, for defendants.

Div'l Ct.] [Feb. 4.

WILLS *v.* CARMAN.

Libel—Question for jury—New trial—Misdirection—Objection at trial—Pleading—Fair comment—Admissibility of evidence of truth of matters commented upon.

In actions of libel new trials are not granted merely on the ground that the verdict is against evidence and the weight of evidence. It is

for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it.

When no objection is made at the trial to the Judge's charge the ground of misdirection is untenable on a motion for a new trial.

In this action of libel the defendant did not plead justification, but he said in his defence that the alleged libel was a fair comment upon matters of public and general interest.

Held, that he was entitled under this defence to show that the matters upon which he commented were true.

Lefroy v. *Burnside*, 4 L. R. Ireland 556; *Davis* v. *Shenstone*, 11 App. Case 187; and *Riordan* v. *Willcox*, 4 Times L. R. 475, referred to.

Dickson, Q.C., and *Burdett*, for plaintiff.

Clute, for defendant.

Div'l Ct.] [Feb. 4.

WELLS *v.* INDEPENDENT ORDER OF FORESTERS.

Insurance—Life—Benevolent society—Standing of deceased member—Re-instatement—Estoppel—Waiver—Costs.

W., who was a member of a subordinate court of the defendant society, died on the 6th May, 1884. His administratrix claimed in this action the amount of an endowment certificate upon his life, which was subject to a condition that the assured should at the time of his death be a member of the society in good standing. W. had not paid his assessment due 1st March, 1884, and by his failure to pay had become at once suspended by virtue of one of the by-laws of the society, and his name appeared in the minutes of a meeting held that month upon the list of suspended members. He had taken cold at Christmas, 1883, and by the end of February, 1884, it was apparent that he could not recover, and he never rallied up to the time of his death. Shortly before the 25th April, 1884, a sum sufficient to pay his assessments due 1st March, 1st April, and 1st May, was paid on his behalf to the financial secretary of the subordinate court. The conditions to be performed by a suspended member desirous of being reinstated after a suspension had been in force for thirty days, were, according to the by-laws, payment of arrears, passing medical examination, and being approved of by two-thirds vote of the subordinate court. It was not possible for W. to have complied with the second condition, and he did not attempt to do so.

Held, that the by-laws were binding upon W. and the plaintiff, and that he not having been reinstated in accordance therewith, was not a member in good standing at the time of his death.

It was contended, however, that the fact of the receipt of the arrears by the financial secretary, and certain other circumstances, showed a waiver or created an estoppel on the part of the defendants.

It appears that the financial secretary was not familiar with the by-laws and thought, and informed W. that he was restored to good standing by the payment of arrears; that he transmitted the assessments paid to the supreme secretary of the society, who received and retained them, but carried them to the credit of the subordinate court, instead of to the credit of W., because in his view the reinstatement was not completed; and that W. was reported reinstated by the subordinate court on 25th April, 1883. The financial secretary had the right under the by-laws to receive the arrears, but only as a first step towards reinstatement.

Held, that in view of the fact that W. was hopelessly ill when the supreme secretary acknowledged the receipt of the assessments, there was no ground for the contention that the defendants were estopped from denying that they accepted the money with the intention of keeping the policy alive and of waiving the medical examination; and that under all the circumstances there was neither the intention nor the authority on the part of the supreme secretary to waive the examination.

As the plaintiff had been led by the action of the supreme secretary and the officers of the court below to believe that her father had been reinstated, no costs were given against her.

Tremeear, for plaintiff.

J. A. McGillivray, for defendants.

Full Ct.] [March 7.

REGINA *v.* RYMAL.

Criminal law—False pretences—Contract to pay money—Giving promissory note instead of money—Valuable security.

The defendant by untrue representations

made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay $240 for seed wheat. The defendant also represented that he was the agent of H., whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his, H.'s, favor for the $240. The contract did not provide for the giving of a note, and when the representations were made the giving of a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered into the contract.

The defendant was indicted for that he by false pretences fraudulently induced the prosecutor to write his name upon a paper so that it might be afterwards dealt with as a valuable security, and upon a second count for by false pretences procuring the prosecutor to deliver to H. a certain valuable security.

Held, upon a case reserved, that the charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as where obtained or procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H., did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on the first count as being guilty of an offence under R. S. C., c. 164, s. 78; but

Held, that the note before it was delivered to H. was not a valuable security, but only a paper upon which the prosecutor had written his name so that it might be atterwards used and dealt with as a valuable security, and the conviction of the defendant upon the second count could not stand. *Rex. v. Danger, Dearsley & Bell*, 307, followed.

Farewell, for the Crown.

Dou for the defendants.

Common Pleas Division.

Divisional Court.] [Feb. 8.

ALLENBY *v.* MOORE, *et al.*

School trustee—Office vacated by non-residence—R.S.O. c. 225, s. 98, ss. 98 and ss. 106 and 246—Time of bringing action against board—Costs.

This was action for a mandamus to compel the defendants as remaining trustees of the Village School Board of London West, to declare vacant the seat of J. J., one of the trustees, and order a new election on the ground of his having ceased to be an actual resident in the village. Notice thereof was given by the plaintiff to the defendants on 23rd August, of their statutory duty to do so *forthwith*: R.S.O. cap. 225, sub-section 10, section 98, and sections 106 and 246. On 7th September the defendants met, but took no action. The plaintiff issued his writ on 11th September. The defence stated that they had fulfilled their statutory duty and claimed costs from the plaintiff. Subsequently defendants did order a new election, which took place in October, after the pleadings had closed. There was no dispute as to facts at the trial before MACMAHON, J., who dismissed the action with full costs, on the ground that it was brought too soon. On a motion to review the decision, the Full Court refused to interfere and dismissed the motion with costs.

W. H. Bartram, for plaintiff.

R. M. Meredith, for defendants

Divisional Court.]

REGINA *v.* CARDO.

Criminal law—Rape on daughter—Evidence of.

The defendant was indicted and convicted for committing a rape on his daughter. The learned judge left it to the jury to say whether, on the evidence, the act of connection was consummated through fear, or merely through solicitation.

Held, that the question was one of fact entirely for the jury, and could not have been withdrawn from them, there being ample evidence given to sustain the charge, and it was left to them with the proper direction in such a case.

N. Murphy, for prisoner.

Irving, Q.C., contra.

Divisional Court.]

FERGUSON *v.* ROBLIN.

Master and servant—Responsibility of master for act of servant—Joint wrong-doers.

The plaintiff's son, on the 31st July, 1886,

purchased from defendant R. an organ for $120, payable in 26 monthly instalments of $5 each, a lien receipt being signed by the son, stating that the property was to remain in R. until all the instalments were paid, and authorizing R. in case of default of payment of said instalments to resume possession of the organ, which the son agreed to deliver up to R. when required, R. and his agents and assigns to have full right and liberty to enter any house or premises which the organ might be in and remove same without resorting to any legal process. The organ was sent to the plaintiff's house with whom the son was living, and remained there until the 30th November, when, no instalments having been paid, said R. sent the other defendant, his bookkeeper, and two assistants, to plaintiff's house, with instructions to go and get the organ. The bookkeeper, taking the lien receipt as his authority, went to plaintiff's house, opened the house door and entered the hall, but on his attempting to open the door of the room where the organ was, the plaintiff's wife (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued and the plaintiff's wife was injured.

Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty and were within the general scope of his authority.

Held, also, that the judgment against both R. and the bookkeeper was maintainable, for it was recovered against them as joint wrongdoers.

J. Macgregor, for plaintiff.
Bigelow, for defendant.

Divisional Court.]

SHERWOOD *v.* CLINE.

County Court—Claim within jurisdiction of—Prohibition.

Where in an action in the County Court, judgment is given for a sum in itself within the jurisdiction of the Court, but which is the balance of a sum beyond the jurisdiction and which was arrived at, not by any settlement or statement of account between the parties, but on the ascertainment of a disputed account.

Held, this was the allowance of a claim beyond the jurisdiction of the Court, and a writ of prohibition was granted.

H. H. Strathy, for plaintiff.

ROSE, J.]

WILBERFORCE EDUCATIONAL INSTITUTE *v.* HOLDEN.

Corporation—Trustee, removal of—Dealing with trust funds—Necessity of making Atty.-Gen'l. a party.

In an action by a corporation for the removal of one of the trustees, who also acted as secretary, for alleged improper dealing with the corporate funds, judgment was given but without any finding of wilful misconduct, directing such trustee's removal, on the ground that so much doubt was cast upon his dealings with the trusts funds that it would not be proper to allow him to remain a member of the Board.

The action is maintainable without making the Attorney-General a party.

Moss, Q.C. *and Craddock*, for plaintiff.
Maclaren, for defendant.

Divisional Court.]

BOYD *v.* NASMITH.

Cheque—Marking good by bank—Effect of—Discharge of drawer.

The payees of a cheque drawn on the Central Bank took it between two and three o'clock of the day on which it was drawn, to the bank, and at the payee's request the cheque was marked good, the bank, in accordance with their custom, charging the amount of the cheque to the drawer's account. The payees, a few minutes before three o'clock, took the cheque and offered it as part of a deposit at another bank, but it was refused, and on the same day, about five o'clock, the Central Bank suspended payment. On the following day the payees presented the cheque at the Central Bank, but on account of the bank having suspended, payment was refused.

Held, that the drawers of the cheque were discharged from all liability thereon.

Mowat, Q. C., Attorney-General, for plff.
Maclaren, contra.

STREET, J.]

PECK *v.* CORPORATION OF AMELIASBURG.

Municipal Act—Power to take stock in Bridge Co.—Special Act—Special rate to be levied each year—Form of.

Held, that sub-sec. 2 of section 479 of the Municipal Act R.S.O., ch. 184, providing that the Council of a municipality may pass by-laws for taking stock, etc., in an incorporated company in respect of any bridge, etc., "under and subject to the respective statutes in that behalf," only authorizes the passing of by-laws to take such stock where in any special or general Act under which a bridge Company is incorporated, a provision is contained authorizing the Municipal Council to hold such stock, etc.

Where, therefore, the Act incorporating the Bay of Quinte Bridge Company, 50 and 51 Vic., ch. 97 (D.), did not profess to confer any power on the municipality to take stock, etc., in such company, no power was conferred under the Municipal Act to do so; and a by-law passed by the Municipal Council for such purpose was therefore held bad, and directed to be quashed.

The by-law, instead of, as required by sec. 340 of the Municipal Act, directing specific sums directed to be levied each year for the payment of the debt and interest to be so raised in each year by a special rate sufficient therefore, leaving the amount of the rate to be determined each year, directed that during the currency of the debentures a special rate of interest, so much on the dollar, specifying it over and above all other rates, should be levied and collected in each year.

Held, this also rendered the by-law bad.

A. H. Marsh, for plaintiff.

Watson, contra.

Divisional Court.]

WOOD *v.* MCPHERSON.

Jury—Challenge—Bias of jury—Change of venue.

At the trial of an action the defendant's counsel challenged a juryman for cause. On the learned judge stating that he did not think any cause was shown, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the juryman, but accepted the opinion of the learned judge, and the juryman remained on the jury.

Held, that on a motion for a new trial, an objection to the juryman could not be entertained.

The action was tried at Brantford, and a new trial was moved for at a place other than Brantford, because that the jury there were biassed against defendant.

Held, that this formed no ground for a new trial.

Wallace Nesbitt, for plaintiff.

Ermatinger, Q.C., for defendant.

Divisional Court.]

FLANNIGAN *v.* CANADIAN PACIFIC RAILWAY.

Railways—Dry grass on side of track—Fire therefrom—Liability of company.

During the summer of 1888, which was a very dry one, little rain having fallen, and none for some time prior to the fire in question, fires also having been frequent in that section of the country, the defendants allowed brush and long dry grass, which had been growing for two or three years, to remain on the side of the track adjoining the plaintiff's farm, while they had, the day previous to the fire, for the protection of their own property on the other side of the track, burnt up the dry grass, etc., there.

A spark from the defendants' engine having set fire to the dry grass, etc., adjoining the plaintiff's land, the fire extended into the plaintiff's land, and destroyed his fences, growing crops, etc. In an action against defendants, therefore, the jury found for the plaintiff.

Held, that the case was properly submitted to the jury, and could not be interfered with.

R. W. Scott and *Watson*, for plaintiffs.

W. Nesbitt and *Kidd*, for defendants.

ROSE, J.]

THE HAMILTON PROVIDENT LOAN AND INVESTMENT CO. *v.* SMITH.

Mortgage—Sale by mortgagor subject to mortgage—Further mortgage by purchaser—Lien

of mortgagor on land for amount of mortgage.

The defendant mortgaged certain land to the plaintiffs, covenanting to pay the mortgage money, and then sold to S., who assumed payment of the mortgage as part of the purchase money. S. then gave a second mortgage to the plaintiffs; and then further mortgaged the land. Default having been made, the plaintiffs sued defendant to recover the amount of his mortgage, and prayed for judgment for the whole amount mortgaged; but neither sale nor foreclosure was asked.

Held, that the plaintiffs were entitled to judgment on the covenant against defendant for the amount of his mortgage, but that defendant was entitled to a lien on the land for the amount of the mortgage as between him and S., which S. had bound himself to pay; and leave was given to defendant to amend and bring the proper parties before the Court so as to enforce his lien.

Muir, for plaintiff.

Creasor, Q.C., for defendant.

Div'l Ct.]

LAMPMAN *v.* CORPORATION OF GAINSBOROUGH.

Executors and Administrators—Action within six months by person beneficially entitled through death of intestate—Municipal corporations—Evidence of negligence—Contributory negligence.

An action for damages by reason of the death of a person can be maintained under R.S.O. ch. 135, sec. 7, by the persons beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased.

The action in this case was for damages sustained through the death of deceased by reason of the alleged neglect of defendants in allowing a highway to be out of repair. At the place in question the highway was connected by a bridge crossing a creek which had overflowed and had covered the bridge and embankments on either side with water to the depth of from 4 to 6 inches. The deceased, who was driving along the highway with a horse and wagon, in attempting to cross the bridge was thrown out of the wagon into the creek and killed. There was evidence of negligence on the defendants' part; and though contributory negligence was set up, it was merely inferential from the way the wagon went over the bridge and the position the horse and wagon were in after the accident. The jury found for the plaintiff.

Held, under the circumstances the Court could not interfere.

German, for plaintiff.

J. K. Kerr, Q.C., and *Aylesworth*, for defendants.

Divisional Court.]

REGINA *v.* STEWART.

Medical practitioners—Practising medicine—Evidence of—Costs.

The defendant attended a couple of sick persons, for which he received payment, but he neither prescribed nor administered any medicine nor gave any advice, his treatment consisting of merely sitting still and fixing his eyes on the patient.

Held, that this was not a practising of medicine contrary to the provisions of R.S.O. ch. 148, sec. 45, and a conviction therefore was consequently quashed and with costs as against the private prosecutor, as it appeared that he had a pecuniary interest in the conviction.

Hamilton Cassels, for applicant.

Osler, Q.C., contra.

Divisional Court.]

THE MAIL PRINTING CO. *v.* DEVLIN, *et al.*

Contract—Election to sue one of two persons—Evidence of.

The defendant D., after some correspondence with plaintiffs as to an advertising contract for the Union Medicine Co., had an interview with plaintiffs as to entering into same. A contract had been drawn up by the plaintiffs in expectation that it would be made by the company, but on ascertaining that the company was not incorporated, it was at plaintiffs' request signed by D., and the entry in plaintiffs' books was "G. A. Devlin, Toronto Union Medicine advertising contract." The first and second payments were made by

D., but on the third payment coming due, stated his desire not to make it, as it might prejudice a claim he had against G., his partner, with whom he had a dispute about the partnership affairs, whereupon plaintiffs saw G., and on his stating that it was D's business to pay their accounts, the plaintiffs sued D., and moved for judgment under Rule 80, stating in their affidavit in support of the motion that "the claim was under an agreement made between the parties, etc.," and that "the defendant," etc., "was and still is justly and truly indebted to the plaintiffs in respect of the matters above set forth." D. put in an affidavit in answer, in consequence of which G. was made a party defendant, and the case proceeded to trial.

Held, that on the evidence the credit under the contract was given to D. alone; but even treating D. as agent for an undisclosed principal, namely for G. as one of the firm, and therefore that G. might be jointly liable with D., the plaintiffs were bound to elect whether they looked to D. or the firm, and that there was a binding election not to treat the firm as liable, but to rely on the individual liability of D.

J. B. Clarke, for plaintiffs.

H. J. Scott, Q.C., and *Macpherson*, for defendants.

STREET, J.]

PRITCHARD *v.* PRITCHARD.

Action to recover land—Right to counter-claim without leave—Joining in counter-claim other cause of action with claim for land—Right to O.J.A. Rule 341.

To an action to recover possession of land it is a good cause of counter-claim that defendant was induced by his solicitor's fraud to make two notes for $1,000 each, which were then overdue and in plaintiff's hands, who took them with knowledge of fraud, and praying that plaintiff might be restrained from negotiating or parting with them and that they should be delivered up to be cancelled; for the fact of the notes being overdue in plaintiff's hands had not the effect of destroying the right to have them delivered up.

Held, also, that in an action for the recovery of land, the defendant can counter-claim without leave; but that he cannot in his counter-claim without leave under Rule 341, join another cause of action with a claim for the recovery of land.

C. J. Holman, for plaintiff.

Howard, contra.

Divisional Court.]

HARKINS *v.* DONEY.

Libel—Article in newspaper—Evidence of authorship—Refusal to answer as to authorship—Claiming privilege against criminal proceedings—Effect of.

In this action the libel consisted of a letter published in a Boston, U.S., newspaper, claimed to have been written by defendant. The letter stated that it was written in answer to an anonymous letter dated September 15th, published in the same newspaper, which the writer stated he had seen the manuscript of, and in which was a clumsy attempt to make the writer believe it was written further off than Ottawa, and he had also seen the manuscript of a letter written by an Ottawa shoe dealer to a Boston firm, and that the handwriting of both was the same. The anonymous letter referred to a trip made by defendant to New Brunswick, which was also referred to in the letter in question. The letter in question also spoke of the writer of the anonymous letter as a person who had come to Ottawa and opened up a boot and shoe business, and stayed at the same hotel as the writer of the letter in question. The letter also spoke of a certain machine called the crescent heel plate machine as our machine. The letter had the defendant's name subscribed to it. The defendant at the trial refused to answer whether or not he was the writer of the letter in question, claiming privilege on the ground that it might criminate him, and the publisher, for the examination of whom a commission issued, refused to be examined for the like reason. The defendant, on his examination, stated that both he and plaintiff were boot and shoe dealers in Ottawa, that he was a subscriber and correspondent to this newspaper, that he had been on a trip to New Brunswick, and on his return saw an anonymous letter of 15th September in this newspaper, as also the manu-

script thereof, as well as the manuscript of a letter to a Boston firm, both apparently in the same handwriting. The plaintiff's counsel stated that, in addition to the above, he intended proving that when plaintiff came to Ottawa he stopped at the same hotel as defendant, that defendant was the sole agent and vendor of the crescent heel plate machine.

Held, that this was sufficient evidence to go to the jury of defendant being the author of the letter in question.

Quaere, whether the refusal to answer the direct question as to authorship or the claim of privilege against criminal proceedings afforded any evidence thereof by way of admission or estoppel or otherwise.

McVetty (of Ottawa), for plaintiff.

Aylesworth, contra.

Divisional Court.]

REGINA *v.* WINEGARNER, *et al.*

Criminal law—Inquisition—Statement of holding inquest—Presentment under oath—Sealing—Identification of body—Constable acting as juror and witness.

The caption to an inquisition finding the prisoner guilty of murder, stated that the inquest was held at H. and C., on the 11th and 15th days of January, in the 51st year of the reign of Her Majesty Victoria; and the inquisition to be "an inquisition indented taken for our Sovereign Lady the Queen, etc., in view of the body of an infant child of A. W. (one of the prisoners), then and there lying and upon the oath of (giving the names of the jurymen), good and lawful men of the country duly chosen and who being then and there duly sworn and charged to enquire for our said Lady the Queen when, where, how and by what means the said female child came to her death, do upon their oath say," etc.

Held, that the statement of the time of holding the inquest was sufficient; that it sufficiently appeared that the presentment was under oath, and that it need not be under seal; that there was a sufficient finding of the place where the alleged murder was committed and of identification of the child murdered with that of the body of which the view was had.

L., the constable to whom the coroner delivered the summons for the jury, was at the inquest sworn in as one of the jurymen and was also sworn as a witness, and G., a juryman, was also sworn as a witness.

Held, that the fact of L. being such constable did not preclude him from being on the jury, or did either of such positions preclude him giving evidence as a witness, and so also G. Y. was not precluded.

A. S. Jones, for the applicant.

Dymond, contra.

Divisional Court.]

REGINA *v.* EDGAR.

Canada Temperance Act—Conviction without trial and in defendant's absence—Quashing.

The defendant was summoned to appear before the police magistrate of Lambton, on the 14th April, at 10.30, at the council chamber in the village of Forest, for unlawfully selling liquor under the Canada Temperance Act. The defendant being anxious, as he stated, to prevent the attendance of a number of witnesses on his behalf, instructed C., who was in his employment, to go to Watford, where the police magistrate resided, and try to arrange the matter with him so as to avoid a trial or the recording of a conviction by paying to such police magistrate such sum as he should demand. On the 13th April, C. went and saw the police magistrate, and in reply to C.'s enquiry as to what it would cost to settle the case, the police magistrate stated $50, which C. paid. At the same time C. signed an indorsement on the information in defendant's name as his agent, which stated that the written information had been read over to the defendant by the police magistrate and that the defendant pleaded guilty to same. Both C. and defendant stated that C. had no authority from defendant to sign anything, and that C. said he signed the paper without reading it or its being read to him. On 14th April the police magistrate, without holding any Court or calling any witnesses in support of the charge, and without defendant being present, convicted him of the offence charged and fined him $50 and costs, drawing up a formal conviction, which was returned on the same day to the clerk of the peace. Subsequently the police magistrate returned another conviction for the same offence, reciting that the conviction was made on the 14th April at F., by defendant admitting

the charge, etc. The police magistrate, as defendant stated, was not in F. nor did he hold any court there on that day.

Held, that there being no court held for the trial of the offence, and defendant not being present thereat in person or by attorney so as to make admission of guilt, and under the circumstances there should be no conviction for the offence charged, and the conviction was therefore quashed.

Aylesworth, for the applicant.

Delamere, contra.

Divisional Court.]

REGINA *v.* READ.

Quarter sessions—Appeal to, against conviction—Adjournment to following sessions—Endorsing on conviction—Necessity for.

An appeal from a conviction for malicious injury to property came on for hearing at the general sessions of the peace, when an adjournment was ordered to the next sessions. No order of adjournment was endorsed on the conviction, the clerk merely entering a minute of the order in his book. At the following session, the appeal was heard and the conviction ordered to be quashed. *Held*, that the provisions in s. 7 of R. S. C., c. 178, as to endorsing the order of adjournment on the conviction were not imperative, but directory merely, and therefore the omission to make the indorsement did not affect the validity of the order to quash.

Mackenzie, Q.C., for applicant.

No one contra.

Divisional Court.]

BYRNE *v.* CORPORATION OF ROCHESTER.

Municipal corporations—Drainage—Compensation—s. s. 591-2.

B. was the owner of certain lands in the defendant's township, and was a petitioner with others for the construction of a drain. After the drain had been made B. claimed that he had sustained damages thereby, and an arbitration was had under the Municipal Act, and B, was awarded damages, the arbitrators holding that it would be necessary for B. to construct a bridge so as to cross from one part of his farm to another, to put in and maintain flood gates; and also that he had been deprived of the use of about three and a half acres of his land.

Held, that the case came within s.s. 591, 592 of the Municipal Act, and that B. was entitled to the damages awarded him, which must be assessed on the lands liable to assessment for the drainage work.

Douglas, Q.C., for the plaintiff.

Meredith, Q.C., contra.

Divisional Court.]

REGINA *v.* MAYBEE.

Canada Temperance Act—Absence of defendant—Service on wife—Evidence of lapse of reasonable time between service and hearing.

A summons was issued for selling liquor under the Canada Temperance Act, which was served by leaving it with the defendant's wife at the defendant's hotel. The defendant not appearing at the time and place mentioned in the summons for the hearing, and on the constable proving on oath the manner in which the summons had been served, the police magistrate proceeded *ex parte* to hear and determine the case, and convicted defendant of the offence charged, and imposed a fine. It appeared that the defendant was absent in the States as a witness in a trial there. There was no evidence that the wife was informed by the constable of the purport of the summons, and the defendant stated he knew nothing of the matter until four or five days after the conviction had been made, when he received a letter from his wife stating that some magistrates' papers had been left for him at the hotel.

Held, that under s. 39 of R.S.C. c. 178, in such case there must be evidence before the magistrate that a reasonable time has elapsed between the service of the summons and the day appointed for the hearing, and there being no such evidence here, the magistrate acted without jurisdiction and the conviction must be quashed.

Barber, for the applicant.

Langton, contra.

Divisional Court.]

COLVIN *v.* MCKAY.

Libel—Privilege—Excess of—Evidence of malice.

The plaintiff had been defendant's treasurer

from May, 1882, to Feburary, 1887, when by reason of the auditors' report of alleged defalcations by him the plaintiff was dismissed from his office. The auditors' report showed two sums not accounted for, namely, $1,400 and $132.32. Subsequently a commissioner was appointed by the Lieutenant-Governor to examine into the matter, and after doing so he ascertained that as to the $1,400, this was a mistake of the auditors, and on December, 1887, he made his report stating that all the township moneys were accounted for by defendant with the exception of the $132.32, but having examined the plaintiff on oath at a meeting of the council at which defendant was present, the commissioner was satisfied with plaintiff's explanation as to $125 of this sum, namely that it was interest on moneys of his own deposited with the township funds and so stated at the time, and made an addition to his report also so stating. In February following, the plaintiff wrote to a newspaper, stating that he was ready to pay over to the township any moneys either the council auditors or commissioner could show he owed, whereupon the defendant wrote to the paper, stating that the commissioner, apart from the mixing of moneys, had found plaintiff indebted to the township in the sum of $125, and that the plaintiff had made several thousand dollars out of the township, and could therefore well afford to pay his shortage and still have some thousands to the good. In an action for libel,

Held, that although the matter discussed in the defendant's letter was one in which defendant was interested as a ratepayer and member of the council, and might give rise to questions of qualified privilege, still it was for the jury to say whether under the circumstances the language employed in the letter was within the privilege or whether it was in excess of what the occasion justified, and if in excess, they could properly draw the inference of malice.

In this case the jury having found for the plaintiff, the Court refused to interfere.

Lash, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

Divisional Court.]

BLAKE *v.* CANADIAN PACIFIC R.W. CO.

Railways—Negligence—Ringing bell or sounding whistle—Contributory negligence

In an action against defendants for an injury sustained by plaintiff by being run over by defendants' train at highway crossing, claiming that the statutory requirement as to ringing the bell or sounding the whistle had not been complied with,

Held, per ROSE and MACMAHON, JJ., that no negligence on defendants' part was shown, as the evidence disclosed that the statutory requirement had been complied with.

Per GALT, C. J., the plaintiff on the evidence was guilty of contributory negligence in not taking proper care in approaching the crossing.

Dr. Snelling, for the plaintiff.

G. T. Blackstock, for the defendants.

STREET J.]

HUNTINGDON *v.* ATTRILL.

Foreign judgment—Action for penalty.

The defendant was a shareholder and director of a joint stock company incorporated under the laws of the State of New York, having its head office in that State. The plaintiff, a creditor of the company for money loaned to the company, sued and recovered judgment against defendant for an alleged false certificate given by defendant while such director, as to the amount of paid up stock in the company, whereby as alleged the defendant, under certain statutes of the State of New York, became liable by way of penalty to all the debts of the company. In an action in this province on the judgment,

Held, that as the only cause of action which the plaintiff alleged was based on an offence committed by the defendant against the laws of New York State, and the only sum he sought to recover was the penalty fixed by the statute of the said State as the punishment for the offence, the judgment could not be recognized as creating a debt referable in this province.

Cattanach and *H. Symons*, for the plaintiff.

McCarthy, Q.C., and *A. R. Creelman*, for the defendant.

[FERGUSON, J.
Div'l Ct.

JAMES *v.* CITY OF LONDON INSURANCE CO.

Insurance—Over-valuation—Prior Insurance—Prior loss by fire—Ownership of goods—Warranty false and fraudulent representa-

tions—Removal of goods—Change of occupation—Proofs of loss—Sufficiency of—False swearing as to.

To a policy of insurance against fire on household furniture, etc., in a dwelling house at B., the defendants pleaded as a defence that by the application, which was made part of the policy, the plaintiff falsely and fraudulently represented as a warranty, amongst other things, that the furniture, etc., was of a named value; that there was no prior insurance, that the plaintiff had never sustained any loss by fire, and that plaintiff was the owner of the property destroyed, setting up a breach of a condition of policy.

The values of the furniture given in the application were proved to correspond with those contained in a book made up at the time the insurance was effected, which was shown not to be extravagant, and no goods were shown to have been afterwards removed. The prior insurance referred to was effected while plaintiff was residing at M., where she resided before moving to B., but on going to reside at B. the present insurance was taken out under the belief that by the removal a new insurance was necessary, and it did not appear that the prior insurance was then in force. There had been a prior loss by fire of about $10 through the overturning of an oil lamp or stove, thereby burning or injuring a piece of oilcloth, which being considered a small matter, was overlooked. While plaintiff was living at M. the furniture contained in the house occupied by her and her husband belonged to plaintiff. This was sold and the money derived therefrom received by the husband. Afterwards other furniture was purchased and again sold, the husband receiving the money. The husband also received certain moneys for plaintiff from the mother. Subsequently the furniture in question was purchased by the husband, and on the plaintiff moving to B. the furniture was taken there. The husband said that instead of paying back the money so received by him he had purchased the furniture for plaintiff, and both he and his wife said it was hers. There was no question as to the husband's solvency nor of any claim of creditors, and as to a marriage contract which was set up whereby the husband and wife were to have and enjoy their separate estates, the respective properties then or thereafter owned by them, no evidence was given as to its effect in the Province of Quebec or this province.

Held, that the contract contained no such warranty as alleged: and that the evidence failed to show any false and fraudulent representations as alleged; that though the statement as to previous loss by fire was technically untrue, it was in no sense false or fraudulent, and it was a question whether it came within the meaning of the condition, and that as regards the furniture it must be deemed to be the plaintiff's, though different considerations might arise had the husband been proved to have been insolvent, and the contention was with his creditors.

The defendants set up as a further defence that by a condition of the policy any change material to the risk, etc., avoided the policy, alleging the removal of part of the goods insured, and also a change of occupation and consequent increase of risk. The plaintiff having become ill, desired to consult the same medical practitioner who had attended her while at M., where she formerly resided, and for such purpose went with her children to her mother at M.—her husband remaining in the house—taking with her some little furniture and bed clothes. No claim was made for the property so removed, and the rest was not thereby affected.

Held, that this defence failed.

The defendants also set up as a further defence that by another condition proofs of loss must be made by assured, and that they could only be made by an agent of insured when insured's absence or inability to make them was satisfactorily accounted for, and that the loss should not be payable until sixty days after completion of proofs.

The evidence showed that the proofs were not furnished by plaintiff in consequence of her illness, and that they were furnished by plaintiff's husband through a power of attorney from the plaintiff suggested by defendants. Proofs were furnished by the husband together with the power of attorney on the 24th November, which defendants acknowledged on the 26th. On December 10th, defendants wrote requiring invoices and vouchers, and on December 16th the husband wrote sending all the invoices and vouchers he was able to give. This was acknowledged on the 16th November, and

further invoices and vouchers asked for. The proofs in themselves were good and sufficient. Action was not brought until after 14th January.

Held, that this defence also failed; that the insured's absence and inability to furnish proofs was satisfactorily accounted for, and that the sixty days had expired before action brought, that the proofs must be deemed to have been completed on the 14th December, that proofs otherwise good and sufficient should not be considered as incomplete by reason of the failure to produce the further invoices and vouchers, the condition which referred to proofs merely stating that they are to be produced "if required and practicable."

The defendants further set up as a defence that there was, contrary to a condition of the policy, fraud and false swearing in the proofs of loss, but the evidence failed to establish it.

STREET, J.]

MURCHISON *v.* MURCHISON.

Marriage settlement—One of beneficiaries taking possession—Subsequent appointment as trustee—Title by possession.

On 25th July, 1853, J. M., by marriage settlement, conveyed with other property the Clyde hotel property in Toronto to trustees, to permit J.M. to receive the rents for his life, excepting a life annuity to his wife, and on his death subject to such annuity to pay annuities of £60 to each of his two daughters, S. M. and C. A. M., and subject thereto to divide the balance of the rents annually into three equal shares, and to apply one share to the support and education of the children of a deceased son, W. M. M.; another share to a son, R. D. M., and the third share to his daughter, F. E. C., with limitations over. On 27th March, 1860, by a chancery decree W. and O. were appointed trustees in the place of B. and P., and the trust estate was vested in them. J. M. died on 12th March, 1870. W. M. M.'s children all died in J. M.'s lifetime, and their said one-third share having thereby reverted to J. M., he disposed of same by his will. On May 10th, 1882, judgment of the High Court was pronounced, directing the removal of W., the surviving trustee, that an account be taken, and appointing R. D. M. and R. C. trustees; and also directing that all lands, etc., and all other assets, both real and personal, now vested in W. as such trustee, be vested in R. D. M. and R. C. upon the several trusts in the said settlement and will. On the death of J. M., R. D. M. had entered into possession of the Clyde Hotel property, and continued in such possession, receiving the rents to his own use without any question after the said judgment, and up to his death on 17th April, 1887. By his will and codicil, dated respectively 27th April, 1880, and 25th October, 1881, he devised to his executors his real estate, consisting of the Clyde Hotel property, upon trust, to pay the rents to his wife for life, and after her death to divide same equally among his children. In 1888, by three of his children, to have it declared that the Clyde Hotel was vested in R. C., the surviving trustee, under the trusts of the settlement, etc., and that an account should be taken.

Held, that the action could not be maintained, for that when R. D. M. took possession in 1870 he did not go in under the trustees, but adversely to them, and continued to so hold till his death; and the judgment of May, 1882, whereby R. D. M. was appointed one of the trustees, and trust estate vested in him could not be extended beyond its ordinary meaning so as to take away a property of which he had become the absolute owner and put it back into the trust estate.

Chancery Division.

ROBERTSON, J.] Jan. 25.

MALONE *v.* MALONE.

Dower—Demand—Damages—Parties—Costs—Devolution of Estates Act, R.S.O., 1887, c. 108.

M. M. made his will April 13th, 1888, devising his farm to his two sons; appointed the defendants executors, and died May 21st, 1888. In an action of dower by the widow of M. M. against the executors, in which they set up that the sons were the tenants of the freehold and should be made parties, it was

Held, that since the Devolution of Estates Act, R.S.O., 1887, c. 108, s. 4, the devisees were not necessary parties.

Held, also, that as no demand was made, although the plaintiff was entitled to judgment of *seisin*, it should be without costs, and as defendants were always ready and willing to assign the dower, plaintiff was not entitled to damages for detention.

Anglin, for the plaintiff.

Kappelle, for the defendants.

FERGUSON, J.] [Feb. 4.

Re ST. PHILLIP'S CHURCH AND THE GLASGOW & LONDON INSURANCE CO.

Insurance—Policy effected before R.S.O., 1887—Appraisement—Arbitration—Costs—R.S.O., 1877, c. 162; R.S.O., 1887, c. 167, s. 114.

St. Phillip's Church was insured with the Glasgow & London Insurance Co. under a three years' policy on November 14, 1885, and was destroyed by fire May 31st, 1888. The company admitted the loss, but asked the wardens to prove the damage, and an agreement for submission to appraisers was entered into by the wardens and the company, in which it was provided that "the award made by them (the appraisers), or any two of them, shall be binding upon both of said parties as to the amount of such damage to said insured property, but shall not determine any question touching the legal liability of said company," etc. Two of the appraisers joined in an award giving the wardens the full amount mentioned in the policy, and ordered the company to pay the costs of the reference and award. The company refused to pay any costs over and above half the arbitrators' fees.

Held [affirming the Master in Chambers], that R.S.O., 1887, c. 167, s. 114, was applicable to the policy in question, and that the Legislature intended by the use of the words "or otherwise in force in Ontario with respect to any property therein," that section to be applicable to all policies existing at the time the Act came into force, and that costs were properly awarded under sub-sec. 16 of that section.

Lockhart Gordon, for the churchwardens.

Geo. M. Rae, for the insurance company.

Div'l Ct.] [March 5.

MACDONELL *v.* BLAKE, *et al.*

Law Society—Retired judge—Ex officio bencher—R.S.O., 1877, c. 138, s. 4.

One who has been appointed a judge of one of the Superior Courts of Ontario, and has resigned before serving out fifteen years, and not being afflicted with some permanent infirmity disabling him from the due execution of his office, and resumed the active practice of his profession as a lawyer, is a retired judge within the meaning of R.S.O., 1877, c. 138, s. 4, so as to entitle him to act as an *ex officio* bencher of the Law Society.

James Reeve, for plaintiff.

Lount, Q.C., and *Reeve*, Q.C., for the Law Society.

H. Cassels, for defendant Blake.

Practice.

GALT, C.J.] March 27.

MACDONALD *v.* ANDERSON.

Reciver—Equitable execution—Rents—Restraint on anticipation.

Motion by the plaintiff for the appointment of a receiver to receive the rents of certain property held in trust for the defendant, a married woman, and the judgment debtor of the plaintiff. The property in question was vested in trustees to be held by them upon trust, at the request of the defendant, during her life: and afterwards, at their discretion, to sell the premises and to hold the moneys to arise from such sale upon trust to pay the income to the defendant during her life for her separate use independently of her present or any future husband, "and her receipts alone shall be sufficient discharges, and she shall not have power to deprive herself of any of the said principal money or of the income thereof by anticipation."

GALT, C.J.—It appears to me this case is concluded by the case of *Chapman* v. *Biggs*, 11 Q.B.D. 27. It is true, as argued by Mr. Shepley, that this application is for a receiver of the rents of the house, and that the house has not been sold; but if effect was given to such an argument the result might produce a serious loss and inconvenience to the defendant without in any degree benefiting the

plaintiff, as the defendant could at once request the trustee to sell the property.

Motion dismissed. No costs.

Shepley, for the plaintiff.

C. J. Holman, for the defendant.

GALT, C. J.] [March 28.

NELSON *v.* COCHRANE.

Parties—Action to charge annuity on land—Subsequent incumbrancer.

In an action for arrears of an annuity and to declare the same a charge on land, mortgagees of the land whose mortgage was subsequent to the will creating the charge and subject to the terms of it, were made defendants by the writ of summons; but on their own application immediately after delivery of statement of claim, their name was struck out with costs.

Masten, for the plaintiff.

E. B. Brown, for the Imperial Loan Company.

GALT, C. J.] [April 1.

In re ELLIOTT *v.* NORRIS.

Prohibition — Division Court — Territorial jurisdiction—Transcript to another Division Court after judgment.

A plaint was brought in the First Division Court of Middlesex upon a contract signed by the defendant, dated at London, to pay to the order of the plaintiffs at London, "$16 in wood delivered on the Hamilton & North Western Railway," which was not in Middlesex. The defendant resided in the County of Simcoe.

Held, that the Court in which the plaint was brought had no jurisdiction. The defendent filed a notice disputing the claim and the jurisdiction, but did not appear at the trial, and judgment was given against him. Subsequently a transcript of the judgment was transmitted to the Seventh Division Court of Simcoe.

Held, that the judgment did not thereby become a judgment of the Simcoe Court, and prohibition to the Middlesex Court was granted after such transmission.

J. B. Clarke, for plaintiffs.

T. M. Howard, for defendant.

FERGUSON, J.] [April 3.

CAMERON *v.* PHILLIPS.

Administrator ad litem—Rule 311—Security.

In a mortgage action in which foreclosure only was sought, it was stated that the lands were not equal in value to the mortgage debt. The mortgagor being dead and having left no estate whatever except the equity of redemption sought to be foreclosed, the executor named in the will of the mortgagor, which had not been offered for probate, was appointed administrator *ad litem* without security under Rule 311.

J. B. O'Brian, for the plaintiff.

BOYD, C.] [April 8.

HENDRICKS *v.* HENDRICKS,

Local master—Jurisdiction of—Rule 1187—Partition and administration—Taxed costs in lieu of commission.

Held, that a local master has no jurisdiction to make an order under Rule 1187, allowing the parties to an action or proceeding for administration and partition taxed costs instead of the commission provided for by the rule, "unless otherwise ordered by the Court or a Judge."

This was an action in which a judgment for partition and administration was pronounced by BOYD, C.

Held, that more especially in this case a local master had no power to interfere, for by ordering taxed costs instead of commission he was varying the judgment.

F. W. Harcourt, for the infant, defendants.

Langton, for the plaintiffs.

Hoyles and *W. H. Blake*, for the adult defendants.

BOYD, C.] [April 9.

HEATON *v.* MCKELLAR.

Joinder of parties—Action to set aside fraudulent conveyances—Several grantees.

Action by the plaintiff on behalf of himself and all other creditors of the defendant L., asking for judgment against L. upon two overdue promissory notes and seeking to obtain execution for such claim and also a previously recovered judgment against two several parcels of land, alleged to have been fraudulently con

veyed to the other two defendants respectively. A motion was made to strike out the name of one or other of the alleged fraudulent grantees as improperly joined in the same action.

Held, that it was possible under the present practice to combine two such causes of action, which, if well founded, had a common root in the fraudulent transfer, and that there would be no practical inconvenience in trying both on the same record. The motion was therefore refused.

Chaput v. *Robert*, 14 A. R. 354, remarks of OSLER, J., A., at pp. 361, 362, specially referred to.

Hoyles, for plaintiff.

Shepley, for defendant, McKellar.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, the affidavit attached to articles must state date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, for 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid B. V.
- Cæsar, B. G. d, I.) 33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

Mathematics.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

English.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

History and Geography.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy

and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography ; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition ; Smith's Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Government in Canada, 2nd edition ; the Ontario Judicature Act ; R.S.O. 1887, cap. 44 , the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles ; Taylor's Equity Jurisprudence ; Hawkins on Wills ; Smith's Mercantile Law ; Benjamin on Sales ; Smith on Contracts ; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theobald on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV. ; Dart on Vendors and Purchasers : Best on Evidence ; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.