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The vacancy in the Ontario Bench is still unfilled, to the inconvenience of litigants and thereby throwing an undue pressure of work on the other judges. It is high time that an appointment was made. We have been told that it may be expected shortly, as the Dominion elections will soon be over, which remark to some would seem to convey more than meets the ear. From a political standpoint there may be a good reason for the delay; but that is not a satisfactory excuse from other points of view.

Some of our contemporaries amuse themselves with foreshadowing appointments of this or that man, based on conjectures as to his religious proclivities. We are sorry to see such ideas prevalent inasmuch as they tend to create the impression that those in authority are justified in making appointments on such grounds, instead of those of personal and professional fitness for the office. To appoint a man a judge because he happens to belong to a particular creed, apart from the question of his personal and professional fitness for the office, is an abuse of power, a prostitution of the office, and a gross injustice to the community.

A valued correspondent from Hamilton, in a letter which we publish in this number (post p. 630), calls attention to a very important matter, and one which we have already referred to in these columns. He very properly characterizes sec. 606, sub-s. 3, of the Municipal Act, as a most iniquitous provision. How it ever came on the statute books is a marvel. It should at once be amended. We are glad to know that the attention of the Municipal Committee was called to this matter last session, and it was very nearly struck out on that occasion, but coming up at the close, there was not time to give it sufficient consideration. We trust that some member will make a point of seeing to this next session; though very possibly after what was said about it in committee, the Government may have a clause drafted to make necessary amendments, possibly in the direction suggested by Mr. Farmer.

We have much pleasure in publishing in another place a letter from the Police Magistrate of the city of Toronto in answer to our remarks on page 517 ante. The personal matters referred to in the discussion are of no special interest. If we have, as we are told, made some mistakes in unimportant matters, we are glad to be corrected. Many of our readers know the facts and can be the judges. Our object was to repudiate as most unfair and injurious wholesale charges of wrongdoing against the profession. We now understand, from the letter, that the strictures we referred to were not meant to convey the meaning that we, with other members of the profession, took from them.

Preliminaries having been thus disposed of entirely to his satisfaction the gallant Colonel proceeds to draw a vivid picture, (with poetic licenses) of the long drawn out agonies of a law suit, from the time when the reckless, not to say wicked, lawyer sets the machinery of the Courts in motion until the time when the paupered client dies of a broken heart. He also very properly gives his views as to the best way of reforming the abuses in the administration of justice which lead to such unhappy results, and speaks of two possibilities in that connection. One is, that the State should look after all litigation, hiring lawyers at fixed salaries to assist the judges. As an alternative proposition, he throws out a hint as to the propriety of deciding disputes by the tossing of a copper. The first suggestion is not original, and reads like a chapter intended for a revised edition of Bellamy's "Looking backward." The idea, however, of organizing a "Copper-tossing Bureau" is quite novel, and worthy of consideration as being both simple and economical. It would, moreover, appeal to the gambling spirit of the age. We should be glad if our correspondent would elaborate this idea a little. Parliament will soon meet, and the matter might be introduced. It would at least produce a discussion quite as interesting and useful as many of those which now occupy the time of our law-makers.

The *Albany Law Journal* notes a recent decision of the Supreme Court of Minnesota in *Cunningham* v. *Cunningham*, as to the meaning of the words "in the presence of the testator" in connection with the execution of a will. It appears after the paper had been signed it was taken into an adjoining room where the witnesses affixed their signatures at a table about ten feet from the testator.

The door was open, and he could have seen the table had he stepped forward two or three feet, but he did not do so. The will was immediately taken back to the testator, the signatures of the witnesses were pointed out to him, and he looked over the paper and pronounced it correct. The Supreme Court, in holding that there had been substantial and satisfactory compliance with the statute, took occasion to say that the courts have often placed themselves in absurd and inconsistent positions in construing the words referred to; that in the case at bar the signing took place within the sound of the testator's voice; that he knew what was being done, and that when the signatures of the attesting witnesses were pointed out to him he took the instrument in his own hands, looked over it and pronounced it satisfactory, which made the whole proceeding a single and entire transaction, and formed a sufficient compliance with the statute.

THE HOME-COMING.

Oh! may that day with whitest stone be marked,
When at their country's call her sons came forth,
And at her feet their lives and fortunes laid,
Her honor to defend; that debt to pay
Which every faithful man to country owes.
Alas! by some that debt is fully paid
Who their devotion, with their life-blood, sealed.
Oh! gallant hearts, oh! brave and faithful sons!
Your death is not in vain but shall inspire,
In ages yet to come, the martial fire,
And deeds of valour oft again incite.
And ye who from the toil and stress of war
Have safe returned, we welcome to your homes,
And to our hearts we take you with delight.

CONTRACTS IN RESTRAINT OF TRADE.

The elasticity of the common law to adapt itself to the altered circumstances of commercial expansion finds striking illustration in cases of what are technically known as contracts in restraint of trade.

In the reign of Henry V., in the early part of the fifteenth century, it will be seen by reference to the Year Books, it was even then old and settled law, founded upon public policy for the good of the realm, that contracts which had the effect of limiting the skill or handicraft of the industrial classes, or which tended to favour monopolies and exclusive privileges, were void. The reason of the rule was, such contracts were inimical to the public weal, in consequence of depriving the public of the services of such as were skilled in employments beneficial to the state. The tendency of such contracts, likewise, was to prevent competition and enhance prices. A case occurred in the 2nd Henry V., found in the Year Book of that date, in which damages were sought for breach of a bond with a condition that a man should not exercise his craft of a dyer for the period of six months, within a certain town. Mr. Justice Hall, who tried the case, angered at such a violation of the law, with an oath announced, "If the plaintiff were present in court, to prison he should go until he made fine to the king, because he had dared to restrain the liberty of the subject." Two principles from the first seemed to antagonize each other. One holding the state should not be deprived of the talent, skill and labour of any of its members by any contract he might enter into. The other, that courts should not lightly interfere with freedom of contract, which when freely entered into should, as far as possible, be held sacred. It has justly been said, freedom of trade and inviolability of contract are alike favourites of public policy. There has long been a constant effort to harmonize those conflicting principles. The hard and fast rule of earlier cases of contract in restraint of trade has gradually relaxed with the ever changing phases of commercial intercourse, and seeks, while protecting the rights of the contracting parties, to conform to modern views and ideas of public policy.

In 1621 an exception was grafted upon this old established maxim of the common law. The defendant in *Broad* v. *Jollyfe*, Croke, 17 Jac. p. 596, was a mercer, who kept shop at Newport, Isle of Wight. In consideration plaintiff would buy all the wares

in his shop, he agreed he would not any longer keep a shop in Newport. Plaintiff recovered damages on breach of his agreement. The court held, on motion in arrest of judgment, that one upon a valuable consideration might restrain himself from using his trade in a particular place.

In 1711, the great leading case of *Mitchell* v. *Reynolds* 1 William Peare Williams, p. 181, re-affirmed this principle o. distinction between limited and general restraint, and settled the further question, which had long been a subject of controversy in the courts, that it mattered not whether the agreement was or was not under seal. In this case the defendant bound himself by his bond under the penalty of £50 not to exercise the trade of a baker in the parish of St. Andrews, Holborn, for the term of five years. The judgment of the court was, the plaintiff ought to have judgment for breach of the bond. In an exhaustive judgment, in which all the cases were carefully weighed and considered, the Chief Justice, Lord Macclesfield, decided, that all restraints of trade, if nothing more appeared, were bad; but if the restraint were only particular in respect to the time or place, and sufficient consideration was given to the party restrained, such contract was good and valid in law. From this time forward, for more than a century, the courts with great uniformity held that contracts in general restraint of trade were void; while those in partial restraint thereof were valid, provided they were supported by a sufficient consideration.

Chief Justice Best, in *Homer* v. *Ashford* (1825), 3 Bingham, p. 322, thus clearly defines the old rule and the first leading exception: "The law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person imposing such a restraint on himself. But it may often happen (and the present case is a strong instance of it) that individual interest, and general convenience, render engagements not to carry on trade or to act in a profession in a particular place proper. . . . For partial restraints, however, there must be some consideration, otherwise they are impolitic and oppressive. What amounts to an adequate consideration is to be decided by the courts of justice."

Just here it may not be amiss to indicate the meaning of these

terms as defined by the judges. According to Bowen, L.J.:—"Contracts in general restraint of trade may be defined as those by which a person restrains himself from all exercise of his trade in any part of England. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade." According to C. J. Parker:—"A partial restraint of trade is one in which there is some limitation in respect of person, place or of the mode or manner in which a trade is carried on."

The year 1837 marked another important exception to the old common law rule, for in this year it was held by the Court of Exchequer Chambers, on error from the Court of King's Bench, in the case of *Hitchcock* v. *Coker*, 6 A. & E. p. 438, that the court would not enter into the question whether the consideration was equal in value to the restraint agreed to by the defendant. Up to this time courts had been astute in enquiry as to the adequacy of the consideration, holding the covenant or agreement void, if a sufficient consideration had not been established. This case has justly been called a landmark in the law. The following extract from the considered judgment of Tindal, C.J., which contains a valuable epitome of general principles on the question, is well worthy of careful perusal: "But, if by adequacy of consideration, more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the court, in every particular case, which it has no means whatever to execute. . . . It is enough, as it appears to us, that there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value." This case, in addition to deciding that adequacy of consideration was not essential to support a contract in restraint of trade, also decided that the covenant or agreement would not be void, merely on the ground it was unlimited as to time.

Public policy, it would seem, for some time, had been setting in the direction of the utmost possible limit of freedom of contract. While many judges favoured this view, others were disposed to hasten slowly, and from time to time did not fail to put up a cautionary signal, and in a warning way refer to the well-known dictum of Mr Justice Burrough:—"That public policy is a very

unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law": *Richardson* v. *Mellish*, 2 Bing. 229.

From 1711, the time of the decision of *Mitchel* v. *Reynolds*, down to 1840, it was uniformly held, that contracts in restraint of trade generally were void; while those limited as to place or persons were regarded as valid and duly enforced. In 1840 by a decision in the Court of Chancery, *Whittaker* v. *Howe*, 3 Beavan, p. 383, the old rule was subjected to further exceptions. In this case, Lord Langdale, Master of the Rolls, entirely ignored the rule as to the necessity for a limit of space and held an agreement of a solicitor, for valuable consideration, not to practice as a solicitor in any part of Great Britain for twenty years valid, and granted an interlocutory injunction to restrain a breach of the agreement. According to the definition already given such a restraint would be general. Lord Langdale held the question turned upon the fact whether the restraint intended to be imposed on the defendant was reasonable. This judgment, however, was subjected to criticism by Lord Justice Bowen in *The Maxim Nordenfelt case* hereafter referred to. His Lordship thus referred to it:—"The covenant was not a covenant in partial but in general restraint of trade; and the restraint of trade being a general one, the court had nothing to do with the reasonableness of the transaction."

Notwithstanding this decision of Lord Langdale, some judges still held tenaciously to a hard and fast rule as to the necessity of a limit of space for the validity of the contract. While others as firmly contended, that in every such case, the crucial test was, whether the restraint imposed was larger than was reasonably required for the protection of the covenantee or contractee. In other words, that the validity or invalidity of the contract turned upon the reasonableness of the restraint and its sufficiency to protect the rights of the contractee.

Leather Cloth Co. v. *Lorsont* (1869) 9 Equity, p. 345, is the leading authority on restraint as to a limit of space in the case of a sale of a trade secret. The facts briefly summarized were as follows: Defendant sold to plaintiffs certain patent rights and secret processes for the manufacture of leather cloth, and in consideration of said purchase covenanted that he would not carry on in any part of Europe any manufactory having for its object the sale of products which were the subjects of such patent rights, and would

not communicate the processes of such manufacture. The defendant having violated his agreement a bill was filed against him for an injunction. Notwithstanding there was no limit, either of time or space, (the limit of Europe being equivalent to an unlimited covenant) it was held the restriction imposed was not greater than was necessary for the protection of the covenantees, and the contract was therefore valid.

Ten years later this decision was followed and approved by Mr. Justice Fry in his able judgment, in the celebrated case of *Rousillon* v. *Rousillon* (1880) 14 Ch. D. p. 351. Lindley, L.J., thus refers to this judgment, in *The Maxim Nordenfelt case*. "In *Rousillon* v. *Rousillon*, Lord Justice Fry, in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord Justice James in *Leather Cloth Co.* v. *Lorsont*, and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating." The following extract from the judgment of Mr. Justice Fry, in the case referred to, will indicate its scope and purport:—"But then it is said that, over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract being in its terms unlimited as to space, and therefore extending to the whole of England and Wales, must be void. Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local. If this rule existed it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule if it existed would apply in two classes of cases. It would apply where the want of a limitation of space was unreasonable, and also where it was reasonable. Now in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the

universality of the prohibition was reasonable, that is, it would only operate where it ought not. For the existence of such a rule I should require clear authority."

The judgment of Fry, L.J., was subjected to criticism by L. J. Cotton in *Davies* v. *Davies* (1887) L.R. 37 C.D. p. 359. At page 386 he thus refers to it:—"I refer to the case which was decided by Lord Justice Fry. I think undoubtedly he used expressions which shewed that he took a somewhat wider view than I do of the law—a lower view perhaps I may say without disrespect. In that case of *Rousillon* v. *Rousillon* there was the limit of time which might have made the covenant a limited one and not a general covenant in absolute restraint of trade; and if so, it comes within what I think is now the true rule, that where there is a limited covenant you have to consider how far, having regard to the particular circumstances of the case, the limit is a reasonable one. About that case I say no more after what I have said on the cases generally."

Mr. Justice Chitty, in *Badische Anilin* and *Soda Fabrik* v. *Schott* (1892) 3 C.D. p. 447, when granting an injunction restraining the defendants from entering into any business similar to that carried on by the plaintiff, and from starting any business of that kind themselves, said, he considered the decision in *Rousillon* v. *Rousillon* to be a binding one, and also that he thought that decision was right. On the next question of the reasonableness or unreasonableness of the restraint as to the limit of space, regarding which so many "jarring opinions" prevail, his lordship made the following pertinent remarks:—"The improvements in the means of communication which have taken place in recent times by reason of railways, steamships, postal facilities, the telegraph and the telephone, are, I think, within the scope of the enquiry, and bear particularly on the question of space; they are almost more or less in proportion to the greater or lesser area within which the trade sought to be protected is carried on and to the varying nature of the trade itself. . . . What might in former ages have been considered an unreasonable restriction would not necessarily be so held in the altered circumstances of the present time."

From the great leading case of *Mitchell* v. *Reynolds* down to 1894 there had been jarring and divided opinions among the judges; some holding with Bowen, Lord Justice, to a hard and fast rule, that if the covenant or agreement of restraint were unlimited as to

space, it was, apart from its reasonableness, invalid; others holding with Lord Justice Fry, that the only test by which to determine the validity or invalidity of the covenant or agreement in restraint of trade, given for valuable consideration, was its reasonableness for the protection of the trade or business of the covenanter or contractor. Finally the question was set at rest by the decision of the House of Lords, on appeal, in the case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894) L.R.; A.C. p. 535. This case affirmed the decision of the Court of Appeal (1893) 1 Ch. p. 630, that the covenant, though unrestricted as to space, was not wider than necessary for the protection of the company, and that it was therefore valid and might be enforced by injunction.

Lord Watson, in the course of his able judgment, said:—"When the series of cases, from the earliest to the present time, are carefully considered, I think they will be found to record the history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other. In my opinion it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the courts. I do not think that, between the courts of common law and equity, there has been much, if any real difference of opinion. But I am bound to say that the language used by equity judges is on the whole more in consonance with the commercial policy of the country than some of the favourite dicta of the common law courts. I purposely say some of the dicta, because I find in the opinions of many common law judges of the highest eminence a clear and liberal recognition of the wider views of policy, which have influenced your lordships in the decision of this appeal."

Lord Morris thus succinctly epitomizes the findings of the Court of Appeal in this important case:—"My lords, I entirely concur in the judgment and the reason for it given by the Lord Chancellor. But I desire to express my opinion that, without going through the numerous cases which have been so exhaustively dealt with in the Court of Appeal and by your lordships, the weight of authority up to the present time is with the proposition that general restraints of trade were necessarily void. It appears, however, to me that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether

in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered prima facie void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself; but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time and space must always be a most important factor in the consideration of reasonableness though not per se a decisive test."

It would seem the crucial test, in each case, has been reduced to this, whether the restraint is greater than necessary for the reasonable protection of the contractee. The reasonableness or unreasonableness of the contract and its sufficiency to protect the rights of the contractor is a question of law, and is decided by the court and not by the jury. See *Mallon* v. *May*, 11 M. & W. p. 652.

It is by tracing back to its source we are enabled to see how progressive has been the science of the law, and by what slow, yet constant progress, it has evolved the admirable system it now presents, and justifies the truth of the maxim—that what is not reason is not law. Such a research also exemplifies the force of the aphorism—Melius est petere fontes quam sectari rivulos.

SILAS ALWARD.

St. John, N.B.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

APPROPRIATION OF PAYMENTS - BANKING ACCOUNT—FOLLOWING FUND—RULE IN CLAYTON'S CASE—CLIENT'S SECURITIES DEPOSITED TO SECURE BROKER'S INDEBTEDNESS.

In *Mutton* v. *Peat* (1900) 2 Ch. 79, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) have reversed the decision of Byrne, J., (1899) 2 Ch. 556 (noted ante p. 51), but they do so because they arrived at a different conclusion as to the facts. The facts as found by the Court of Appeal were that the stock brokers had two accounts with their bankers, a current and a loan account. They failed, and at the time of their failure there was a balance of £1362 10s. to their credit on the current account, and a debit of £7500 on the loan account. The brokers had deposited with the bankers, as security for their general indebtedness, bonds and securities of their clients, without their knowledge or consent, but the bankers received them believing them to be the property of the brokers and without notice of the true owners' rights. Byrne, J., held that the deposit was made merely as security for the loan account, but the Court of Appeal found that it was made to secure the general indebtedness. Two days before the failure, one Parker, who was a client of the brokers, had sent them £790 4s. 6d. for investment, which was paid into the brokers' current account and formed part of the £1362 10s. standing to their credit on that account. The securities realized sufficient to pay off the £7500 and left a balance over, out of which Parker claimed to be paid the £790 4s. 6d. Byrne, J., held, that, owing to the way the accounts had been kept by the bankers, there had been no appropriation of the £1362 10s., to the payment of the balance due on the loan account and there was consequently a balance due to the credit of the current account applicable to recouping Parker the sum of £790 4s. 6d., but the Court of Appeal differed from this, and held that the two accounts must be treated as one account, and that it was the duty of the bank to apply the £1362 10s.

in reduction of the loan account, and that the balance of the proceeds of the securities which remained in their hands belonged to the owners of the deposited securities, and that Parker had no equity as against them to be repaid the amount of his cheque out of the £1362 10s.

MARRIAGE SETTLEMENT—AGREEMENT FOR SETTLEMENT BY INFANT—REPUDIATION—RATIFICATION—MARRIAGE WITH FOREIGNER—CHANGE OF DOMICIL BY MARRIAGE.

Viditz v. *O'Hagan* (1900) 2 Ch. 87, is also a decision of the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) reversing the judgment of Cozens-Hardy, J., (1899) 2 Ch. 569 (noted ante p. 52). It will be seen by reference to that note that the judgment of the Court below proceeded on the ground that according to English law the settlement in question, although made by an infant, was voidable only on her repudiating it within a reasonable time after attaining her majority. The Court of Appeal, however, have come to the conclusion that the settlor having acquired an Austrian domicil by her marriage, the settlement was governed by Austrian law, under which a husband and wife have the right to revoke their marriage settlement notwithstanding the birth of issue and acts of ratification, and that therefore the wife never could ratify the settlement so as to deprive herself of the right of revoking it. The Court of Appeal therefore held that the wife was not bound by the marriage articles, or the settlement made in pursuance thereof, having validly revoked the same under Austrian law by a notarial act.

TENANT FOR LIFE—REMAINDERMAN—TRUST FOR CONVERSION—DISCRETION TO POSTPONE CONVERSION—OMMISSION TO CONVERT—INCOME.

Rowlls v. *Bebb* (1900) 2 Ch. 107, was a contest between a tenant for life and a remainderman. Property was given by will in trust for conversion and investment and to hold the investments on trust for a tenant for life and remainderman, with a discretionary power to the trustees to postpone the conversion, and a provision that until conversion the income was to go to the tenant for life. The trustees, as a matter of fact, postponed the conversion of a certain reversionary interest, but not, as the Court of Appeal found, in the exercise of the discretion. This reversionary interest having fallen into possession and, having been realized, in

adjusting the rights of the tenant for life and remainderman in the proceeds, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) held that the fund must be apportioned between the tenant for life and remainderman on the principle laid down *In re Chesterfield* (1883) 24 Ch. D. 643.

UNDUE INFLUENCE—HUSBAND AND WIFE—SOLICITOR AND CLIENT—INDEPENDENT ADVICE.

In *Barron* v. *Willis* (1900) 2 Ch. 121, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) have reversed the decision of Cozens-Hardy, J. (1899), 2 Ch. 578 (noted ante p. 54) That learned Judge held that the relation of husband and wife is not one to which the doctrine of *Huguenin* v *Basely*, 14 Ves 273, applies, and he upheld a deed made by a married woman to her prejudice, varying a settlement, without any independent advice, and acting only on the advice of the husband's solicitor. The Court of Appeal, without discussing that point, held that there was a confidential relationship between the wife and the husband's solicitor, and that, notwithstanding that he fairly explained the effect of the deed to her, and recommended her to obtain the advice of an independent solicitor, she was, nevertheless, entitled to have it set aside as obtained by undue influence, on the ground that it had not been explained to her that she was under no obligation to execute it, and that it was adverse to her interests, and that she ought not to execute it without independent advice; and the Court of Appeal further held that it was the duty of the solicitor not only to explain the deed to the wife, but to take care that she did not execute it without having independent advice as to her position and rights.

LIGHT—OBSTRUCTION—INJUNCTION—REBUILDING—USER—INTERRUPTION—ABANDONMENT.

Smith v. *Baxter* (1900) 2 Ch. 138, deals with a question as to ancient lights, and is deserving of notice notwithstanding that such rights can no longer be acquired, inasmuch as rights already acquired are not affected by R.S.O. c. 133, s. 36. The plaintiffs in the action claimed to have acquired the rights in question under a lease for 21 years, dated Sept. 29, 1892. On the site of the demised premises formerly stood five small houses which were in existence more than 20 years before the commencement of the

action. They were pulled down in 1891 and new buildings erected, and the plaintiffs claimed the light in question in respect of windows in the new buildings, which corresponded to windows in the old ones. None of the lights had been preserved in entirety in the same place in the new buildings but substantial portions of all the new windows coincided with the windows of the old building. It, however, appeared that as to two windows in the new building the plaintiffs had boarded them up for more than twelve months before action, and as to a third, shelving had been placed before it, but that, notwithstanding the shelving, a substantial quantity of useful light passed into the building. It was contended by the defendants that the erection of the boarding and shelving against these windows constituted an "interruption," but Sterling, J., who tried the action, negatived that contention, and held that an "interruption" of enjoyment of an easement of light to be within the Act must be an adverse obstruction and not a mere discontinuance of user: but he held that the question of whether the alleged right had been enjoyed for a period of twenty years was one of fact to be determined on the circumstances of each case; and he held that, although non user would not be sufficient to establish an abandonment of a right actually acquired, it might nevertheless be sufficient to prevent the acquisition of the right, and, as to the windows boarded over, he held that there had not been an enjoyment for a sufficient period to give the plaintiff a prescriptive right to the light to those windows, although admitting that the use of shutters or other temporary obstructions would not have that effect. He, however, held that the erection of the shelving did not entirely exclude the light and as to that window the plaintiff had made out his case.

COMPANY—DEBENTURE—ASSIGNEE OF DEBENTURE TRANSFER—CROSS CLAIM BY COMPANY AGAINST TRANSFEROR—REGISTRATION OF TRANSFER.

In re Goy, Farmer v. *Goy* (1902) 149, is a decision of Stirling, J. The facts were that after a joint stock company had entered upon a voluntary winding up, and a liquidator had been appointed, and a judgment given in a debenture holders' action against the company, one, Robey, became transferee of certain debentures by way of security for a loan to one Chandler who had been a director of the company, and the conditions of the debentures provided that transfers of debentures would be registered on

production and proof of identity and payment of a fee, and that the principal and interest of the debentures would then be paid to the transferee without regard to any equities between the company and the original or any intermediate holder. After Robey had taken his transfer it was discovered that Chandler had been guilty of misfeasance, and he was ordered to pay the liquidator a sum of money in respect thereof. Robey, who had no notice of any cross claim by the company against Chandler, sent in his transfer for registration, but the liquidator declined to register it and claimed to deduct Chandler's debt to the company from the amount due on the debenture. Stirling, J., held that he had no such right, and that Robey was entitled to be registered as transferee and that such right was not affected by the winding up, or by the judgment, and that consequently Robey must be paid, without deduction, any dividend payable in respect of the debentures so transferred to him.

LANDLORD AND TENANT—LEASE—FORFEITURE—NOTICE OF BREACH—COVENANT TO BUILD—COVENANT TO REPAIR—CONTINUING BREACH—CONVEYANCING AND LAW OF PROPERTY ACT, 1881, (44 & 45 VICT. c. 41) s. 14—(R.S.O. c. 170 s. 13).

In *Jacob* v. *Down* (1900) 2 Ch. 156, the plaintiff sought to recover possession of certain demised premises on the ground of forfeiture for breach of covenant to build. The lease contained a covenant to build within twelve months, and also to keep in repair the buildings so to be erected. After the expiry of the twelve months the plaintiff accepted a quarter's rent, and subsequently gave notice of forfeiture by reason of the breach of covenant to build, but the notice made no reference to the covenant to repair. Stirling, J., tried the action and held that the covenant to build was broken once for all at the expiration of the twelve months, and was not a continuing covenant, and that the subsequent acceptance of rent was a waiver of the breach; that the covenant to repair was a continuing covenant, and implied an obligation to erect the buildings, and there was a continuing breach of it, but inasmuch as the notice under the Conveyancing Act, (see R.S.O. c. 170, s. 14) omitted to refer to any breach of the covenant to repair, the notice was insufficient and the action could not be maintained. How a covenant to repair can be broken when there is nothing in existence to repair, is hard to understand.

TRUSTEE—RETAINER OF TRUST PROPERTY TILL ARREARS DUE BY SETTLOR PAID —ASSIGNEE OF SETTLOR—COVENANT BY SETTLOR.

In re Weston, Davies v. *Tugart* (1900) 2 Ch. 164, is a case in which the rights of trustees under a deed of separation were in question. By the deed certain leaseholds were vested in the trustees in trust to pay the rents to the wife for life, and then to sell and hold the proceeds for the husband. The husband covenanted with the trustees to make up the wife's income to £300 a year. The deed contained a proviso for its determination in the event of the wife seeking to resume cohabitation, but it contained no covenant on her part to live separate. The husband paid nothing under the covenant and in 1898 was adjudicated bankrupt, and the trustees proved against his estate for the arrears then due, but there were further arrears since that date. On the wife's death the husband's assignee in bankruptcy claimed the leaseholds. The trustees contended that they were entitled to retain them until the arrears due under the husband's covenant were paid, and Stirling, J., upheld the contention and gave judgment in their favour.

WILL—"TESTAMENTARY EXPENSES," WHAT INCLUDED IN.

In re Clemow, Yeo v. *Clemow* (1900) 2 Ch. 182. The short point here determined by Kekewich, J., is the meaning of a direction contained in a will to pay "the testamentary expenses" of some third person. He held that it extended to (1) the costs and expenses of obtaining the letters of administration to, and administering the estate of such third person; (2) the costs of one of the next of kin who had brought an action in the Probate Division contesting an alleged will in which the Court, though pronouncing against the alleged will, made no order as to costs; and, (3) the estate duty payable in respect of the personal property of such third person.

WILL—CONSTRUCTION—SPECIFIC DEVISE—RESIDUARY GIFT—GIFT OF "ALL OTHER MY FREEHOLD MESSUAGES AND TENEMENTS"—LAPSED DEVISE—WILLS ACT (1 VICT. C. 26) S. 25 (R.S.O. C. 128, S. 27).

In *Re Mason, Ogden* v. *Mason* (1900) 2 Ch. 196, a question was raised which depended on the construction of a will, whereby the testator devised his freehold shop at Wimbledon to his son, and then devised to the plaintiffs "all other my freehold messuages

and tenements at Wimbledon and elsewhere." The devise to the son having failed by reason of his being a witness to the will, the plaintiffs claimed that the freehold shop passed to them under the gift to them. Kekewich, J., was at first inclined to hold in favour of the plaintiffs, but on examination of the authorities he came to the conclusion that, according to *Springett* v. *Jennings* (1871) L.R. 6 Ch. 333, the devise to the plaintiffs could not be construed as a residuary devise under the Wills Act (1 Vict. c. 26) s. 25, (R.S.O. c. 128, s. 27), so as to entitle the plaintiffs to the property, which was the subject of the lapsed devise to the son, on the ground that the word "freehold," even though in fact there were no copyholds belonging to the testator, restricted the devise and prevented it being a universal residuary devise, and he therefore held that the heir was entitled.

VENDOR AND PURCHASER—UNWILLING PURCHASER—QUALIFIED COVENANT AGAINST ASSIGNMENT—LESSOR'S CONSENT—UNREASONABLE REFUSAL OF CONSENT TO ASSIGN.

In re Marshall & Salt (1900) 2 Ch. 203, was an application, by purchasers, under the Vendors' and Purchasers' Act, asking for a declaration that a marketable title to the property contracted to be sold had not been made out. The property sold was a leasehold public house; the lease contained a covenant against assigning without the consent of the lessor, but such consent was not to be unreasonably withheld in the case of a respectable and responsible tenant. The lease contained a clause empowering the lessor to re-enter in default of the observance and performance of any of the covenants in the lease. The purchasers were brewers and the lessor refused to consent to an assignment on the ground that he wished the house to remain a free house. The vendor contended that the refusal of the lessor to consent was unreasonable and that, in consequence, the assignment could be validly made without his consent. He refused, however, to indemnify the purchasers. Under these circumstances Byrne, J., held that the purchasers could not be required to accept the title and he ordered the deposit to be returned with interest, and the vendor to pay the purchasers' costs of investigating the title.

MORTGAGEE—POWER OF SALE—INJUNCTION—CO-DEFENDANTS—INDEMNITY.

In *Born* v. *Turner* (1900) 2 Ch. 211, the plaintiff claimed an injunction to restrain interference with his light. The plaintiff

was a purchaser from a mortgagee at a sale under a power of sale contained in the mortgage, of part of the mortgaged property, and the question was whether a mortgagee could, in the exercise of his power, give to the purchaser an implied easement of light over the unsold portion, and Byrne, J., held that he could. The action was against an adjoining owner and his builder, and the builder severed in his defence from his employer and appeared separately at the trial, when an injunction was granted with costs against the adjoining owner, and Byrne, J., held that the builder was entitled to complete indemnity from his co-defendant, and to an order for the payment of his solicitor and client costs by his co-defendant. Although R.S.O. c. 133, s. 36 abolishes the right to acquire in Ontario a right to the use of light by prescription, it probably will be found not to interfere with its acquisition by implied grant as in this case.

PARTNERSHIP—GOODWILL—SALE OF BUSINESS—SOLICITING CUSTOMERS.

In *Gillingham* v. *Beddow* (1900) 2 Ch. 242, the plaintiff and defendant had formerly been in partnership. Under the articles the plaintiff had bought out the defendant; the articles provided that the outgoing partner might set up a similar business in the neighbourhood. The defendant had not only set up a similar business, but had also solicited the customers of the former partnership to deal with him, and it was to restrain this solicitation that the action was brought. Cozens-Hardy, J., granted the injunction asked, holding the case to be governed by *Trego* v. *Hunt* (1896) A.C. 7 (noted ante vol. 32, p. 315).

PATENT—INFRINGMENT—INJUNCTION—DAMAGES—ALTERNATIVE RELIEF.

Saccharin Corporation v. *Quincey* (1900) 2 Ch. 246, was an action to restrain the infringement of three patents for inventions, and, in the alternative, for damages. The article in question was exclusively manufactured abroad, and the only evidence of infringment adduced was that of an expert who testified that the plaintiff's patents related to three separate and distinct modes of producing the article in question, and that it was not possible to tell, from an examination of any parcel, under which particular patent process it was produced, but that it must have been produced under one or other of the three covered by the plaintiff's patents. Cozens-Hardy, J., held that this evidence was insufficient

to found an injunction, inasmuch as it failed to establish which patent had been infringed, but he held that as the plaintiff's patents covered every possible mode of producing the article in question, they are entitled to the alternative relief of damages, as the nature and extent of the wrong done to the plaintiffs did not depend upon the particular patent infringed; and an inquiry was directed, without mentioning either of the patents, to ascertain what damages the plaintiffs had sustained by the defendant's use of the patented article.

COSTS—TRANSLATIONS OF FOREIGN DOCUMENTS.

In re Bowes, Strathmore v. *Vane* (1900) 2 Ch. 251, Cozens-Hardy, J., here held that a solicitor was entitled to be allowed, in an administration proceeding, for the costs of translations of foreign documents, required in the course of the litigation, made by a clerk in his office, by himself, and by a lady under his supervision, although no payment had been made by the solicitor for the same—overruling the taxing officer to whom the matter was referred back to fix the quantum.

CONFLICT OF LAWS—FOREIGN MARRIAGE OF FRENCHMAN AND ENGLISHWOMAN—VALIDITY OF MARRIAGE—CONSULAR MARRIAGE ACT, 1849 (12 & 13 VICT. C. 68)—FOREIGN MARRIAGE ACT, 1892 (55 & 56 VICT. C. 23).

In *Hay* v. *Northcote* (1900) 2 Ch. 262, the validity of a foreign marriage between a Frenchman and Englishwoman was in question. The marriage had been performed before the British Consul at Bordeaux and was in accordance with the Consular Marriage Act, 1849, which is re-enacted by the Foreign Marriage Act, 1892. A French tribunal had, in the lifetime of both parties, declared the marriage a nullity, and the parties had therefore lived apart. The husband having died, the representatives of the wife's father, who had made a post-nuptial settlement on his daughter, claimed to have it declared that the settlement was void by reason of the alleged nullity of the marriage; but Farwell, J., was of opinion that notwithstanding the decision of the French Court the marriage was valid and binding on the parties under English law.

PRINCIPAL AND AGENT—INSTRUCTIONS TO SELL REALTY—AUTHORITY TO SIGN CONTRACT—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.

In *Rosenbaum* v. *Belson* (1900) 2 Ch. 267, Buckley, J., determined that where one gives another written authority to sell real

estate and agrees to pay a commission on the sale, there is an implied authority also given the agent to sign the contract of sale on behalf of the vendor.

COMPANY—DIRECTORS—QUORUM—ARTICLES OF ASSOCIATION.

In re Bank of Syria (1900) 2 Ch. 272, was a winding-up proceeding in which the validity of a security given by the directors of the company was in question. By the articles of association it was provided, inter alia, that the number of the members of the council of administration (which was invested with power to conduct the affairs of the company) should not be less than three, also, that the continuing council might act notwithstanding any vacancy, and also, that the council might determine the quorum necessary for the transaction of business. The members of the council became reduced to two. It was alleged, but not proved, that the quorum had been fixed at three. The transaction whereby the security in question was given was entered into by two of the directors only. Wright, J., held that even if the quorum had been fixed at three, yet under the article empowering the continuing council to act notwithstanding any vacancy, the transaction was binding on the company, the transferee having no notice of any irregularity.

Mr. Edward Dicey in an interesting article contributed to the *Fortnightly Review* on the late Lord Russell, refers to an incident which may be repeated for the comfort of any of the younger members of the profession, who may be placed in similar circumstances. He says, the Chief once told him that the keenest disappointment of his life was his failure to obtain a post in the gift of the Liverpool municipality, to which he felt he had a strong claim on his own merits. He added, however, what he thought a calamity at the time was really the greatest stroke of luck which had ever happened to him. "If," he said, "I had been elected, I should have lived and died an obscure stipendiary official in a provincial city; as it is——" and here he left the sentence unfinished. Others besides the eminent Chief Justice have been thankful that they have been disappointed in obtaining some position which would not have given them an opportunity to shew the stuff that was in them.

Correspondence.

MUNICIPAL LAW AMENDMENT.

To the Editor of the CANADA LAW JOURNAL.

SIR,—Is it not time that some united action were taken by the profession to have an amendment made to sub.-s. 3 of s. 606 of the Municipal Act regarding the giving of notice of accident? In my humble opinion it is a most iniquitous provision and very often bears very ' ly in deserving cases.

When a person is badly injured through the want of repair of a public street or road it is generally several weeks and sometimes months before he is out of the doctor's care. He is ignorant of the seven or thirty days' notice, as the case may be, and does not think of consulting a lawyer until he is able to be about again. The consequence is that though the accident happened through no fault of his own but owing entirely to the gross negligence of the corporation he has no redress. Would it not be infinitely more fair to have a provision such as that in the Workman's Compensation for Injuries Act, viz.: that the notice of injury must be given within twelve weeks, and the action commenced within six months from the occurrence of the accident or in case of death within twelve months from the time of death, and that in case of death the want of such notice shall be no bar if the judge shall be of the opinion that there was reasonable excuse for such want of notice. In my limited experience a number of cases have come to my notice where no compensation for severe injuries could be obtained simply because no notice as required by the Act had been given.

I believe that the solicitor for a municipal corporation not more than 100 miles from Hamilton was instrumental in getting the Act limiting the time for giving the notice of accident as it now stands through the Legislature, and it might be interesting to hear his views from the corporation standpoint.

Could not the County Law Association co-operate in having an amendment of this unjust provision made? I would like to hear from other readers of your journal.

Yours truly,

Hamilton, October 25. JOHN G. FARMER.

[We concur. See remarks on p. 609 ante.—ED. C.L.J.]

LAW REFORM.

To the Editor of the CANADA LAW JOURNAL.

SIR,—I find in your issue of the 1st inst., an article commenting on some remarks made by me in reference to our system of administering law. I have taken no notice of abusive letters from one or two lawyers, but when your journal, the organ of the profession, has taken up the matter, I ask permission in your columns to correct some errors into which you have fallen, and to place my views clearly, so that there may be no misunderstanding. I will deal first with the errors.

You say that I accused the solicitor of misappropriating money; that I made wholesale charges of wrong-doing against the profession as a class, and that I charged it with being a degraded thing. In reply I say that I did not make charges against the profession, but against the system of the administration of civil justice. This system has been in use, with constant attempts to amend it, for hundreds of years, so that the present members of the profession only follow the practice and traditions of centuries. I hold that the system is wrong, and that it should be reformed. Slavery was a wrong handed down for many generations, yet a man might have denounced the institution, without being charged with reflecting upon the character of the slave owners, who were born under it. Slavery has been reformed out of existence in all civilized countries, and when the public fully appreciate the wrong of the present method of administering law, a change may be made to remedy it, and this could be done without injustice to the present members of the profession. That I attacked the profession instead of the system is your first error.

The next is your statement that the costs in the Police Court are enormously greater in proportion than in any civil court. This statement cannot be true. There are practically no costs in the Police Court except when put on as a punishment. When a fine of one dollar and costs is inflicted it is done to make the punishment, the payment of the four dollars. I could just as well make the fine four dollars without costs, for when the circumstances require a less severe punishment the fine is usually two dollars without costs. In wages cases there are practically no costs unless I impose them simply as a punishment. The majority are settled without any costs, and poor employees are never asked to deposit

one cent to have their cases tried. I am positive that there is no court in Canada where the citizens can have their difficulties settled at less expense than in the Toronto Police Court.

You intimate that I am highly paid, and do less work than any other judge, and that my assistant does half the work. These are also errors. I did not ask for the position of Police Magistrate. An offer was cabled to me to England. I accepted it at the request of Sir Oliver Mowat. My salary was to be $4,000 a year. That was twenty-three years ago. The work has increased enormously since then, but my salary is still $4,000. My assistant sits three afternoons a week to try the by-law cases. I try more cases than any judge in Canada. I have to hold court to try indictable and other serious offences every day except Sundays and public holidays. The judges, who do not sit every day, get two months' holidays every summer, and ten or fifteen days at Christmas. I never get a day without having to pay an assistant to do my work, whether I am well or ill. I know of no official in Canada who, in this respect is treated as I am, who has no holidays, and who can never be absent one day, even through illness, without paying out of his own pocket for some one to do his work. About 1,400 indictable cases come before me each year. About ninety-five per cent. elect to be tried by me; each case that goes to the higher court costs the country from $50 to $100.

Having now corrected these errors, I will state my views in reference to the administration of civil justice. The State has taken upon itself the duty of settling disputes between citizens. This is an absolute necessity unless we relapse into barbarism, where no man would have any rights unless he was able to defend them by force. The State having taken upon itself this duty, and having the power of organized government to enforce anything it undertakes, it follows that the individual citizen is at the mercy of the system which the State devises, and is helpless in its hands. I hold therefore that when a man is a peaceable citizen, obeying the laws, paying his taxes, and conforming to the rules of organized society, that he is entitled if he gets into any difficulty or dispute with a neighbour, which they cannot settle between themselves, to be able to appeal to the State to see that justice is done, and I feel that this duty should be performed at the least possible expense to the individual.

Now what is the usual course under the present system? Two

neighbours in a business transaction have a dispute or a misunderstanding. It often happens that there is a good deal to be said on both sides. The differences, however, are irreconcilable, and the citizens have to appeal to the State to decide. One citizen goes to his lawyer, lays the whole case before him naturally with his own colouring, and gets an opinion on the law. The counsel knows well that no one can positively tell what is the law, but probably gives an opinion that his client has a good case, and one that is worth fighting in the courts. A letter is written to the other side or a writ is served, and the defendant goes to his lawyer for advice. The lawyer hears the defendant's statement, looks up precedents, and advises him to defend the case, although he also knows that there is no certainty as to the law. The case is now fairly started and the costs begin to roll up. Motions of all kinds can be made—to set aside appearance, for security for costs, for particulars of statement of claim, or defence, to strike out statement of claim or defence, for better and further affidavit on production, to compel attendance of witnesses, and so on; then the examination for discovery, and other examinations, conducted at great length, and with tiresome reiteration and repetition all taken down in shorthand, all extended in full, all rolling up heavy expense. Then after all these motions and filings of affidavits, and examinations upon them, and attendance, and drafts and engrossings, etc., the case at last comes before a jury. Technicalities of law are brought up, and discussed and overruled and reserved. Then witnesses are examined again with the same reiteration and repetition all again taken down in shorthand. Objections are raised to questions. These are also argued, and the objection sustained or overruled, with points again reserved. These things all tending to confuse the minds of the jury as to the real merits of the case, which are often to be found on both sides. Then follow long arguments of counsel, then the judge's charge, then the objections to the judge's charge, the reserving of more points, with the result that the jury will probably give the verdict one way, while the judge has reserved law points to settle whether the decision should not be the other.

The case may then come up before the full court, and the points of law concerning which (if the law is the great science our profession claim it to be) there should be no question, have to be decided. Three judges, supposed to be experts, impartial, upright men, who have devoted their lives to the study of the law, sit for hours and

listen to the same arguments on the same evidence, with the same precedents quoted, under the same magnetic influence and ability of the counsel on both sides, without the slightest reason apparent why they should differ, if there is anything in our boasted science of law, and at the end of it all two of the judges will decide one way and one the other.

Then an appeal is taken to the Court of Appeal, and the same thing happens, only the judges of this court are supposed to be still more highly trained experts, and here also two may decide one way and three the other on exactly the same facts and arguments. Then follows an appeal to the Supreme Court, where the same old story is told with the result possibly that three will decide one way, and two the other. Lastly comes the Judicial Committee of the Privy Council, and then a final decision is made one way or the other, but apt to be the nearest right, because they have no appeal above them, and do not trouble themselves nearly so much about precedents as about justice.

Then what happens? One man wins and the other loses, neither being altogether in the right, neither altogether in the wrong, but one gets everything, the other loses everything, his own costs and his opponent's taxable costs, while the successful man is heavily punished in his solicitor and client costs, and in the mental worry, loss of time etc. The total costs in a case like this would probably amount to thousands of dollars, if not tens of thousands, and might have been as satisfactorily settled without expense, and with just as much certainty if the parties had tossed a copper to decide it at the start. It must be remembered that a man once in the law cannot avoid this. If a poor man is fighting a rich man or a rich corporation, he must absolutely give up his right to have the case decided or run the risk of ruin.

It was against this system that I based my remarks, and expressed my hope that some day the people through their Parliament would be able to reform it. I think that the State should legislate so that the judges should decide disputes quickly and simply, without formalities, and without regard to anything except the absolute justice in each case, that there should be only one appeal which should be final, that musty precedents, perhaps the mistakes of men gone by, should not be worshipped or followed to create injustice. If the State did this, did away with all fees of every kind, and hired the lawyers at fixed salaries to assist the judges in bringing forward

evidence, there is no occasion why disputes could not be settled in one tenth of the time, and at one twentieth the expense now incurred.

Yours etc.,

Toronto. GEORGE T. DENISON.

[As our readers are lawyers as well as ourselves, we do not propose further to discuss the matter except in the few remarks made on a previous page, ante p. 610.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

ADMIRALTY DISTRICT OF PRINCE EDWARD ISLAND.

Sullivan, Local Judge.] [May 18.

BRINE v. STEAMSHIP "TIBER."

Collision—Steamer and sailing vessel—Arts. 20, 22, 23 and 25.

The J.M., a sailing vessel, was proceeding in the day time, out of Charlottetown harbour by tacking, according to the usual course of navigation. The T., a steamship, was on her way into the harbour. When the T. was first seen by the J. M. the latter was on a course of W. S. W., standing across the harbour, towards, and to the northward and eastward of Rocky Point black buoy. From that time until a collision occurred between the two vessels, they were in full view of each other. While the J. M. was under way on the starboard tack and going about three knots an hour, the T. was coming straight up the harbour at nearly full speed. The latter did not change her course nor execute any manœuvre nor make any attempt by slackening speed or stopping or reversing to keep out of the way of the J. M. The bow of the T. struck the J. M. on the starboard side aft of the forerigging and nearly amidships, cutting her almost through from her hatches to her keel, and causing her to become a total wreck.

Held, that the T. had infringed the provisions of Arts. 20, 22, 23 and 25 of the rules for preventing collisions at sea and was responsible for the collision.

A. Peters, Q.C., and *McLean*, Q.C., for plaintiff. *Hazard*, Q.C., and *Morson*, Q.C., for defendant.

Burbidge, J.] BRIGHAM v. THE QUEEN. [June 7.

Grant of ferry — Breach of — Subsequent lease to railway companies— Damages—Liability of crown.

The Crown having granted to the suppliant certain ferry rights over the Ottawa River between the cities of Ottawa and Hull, subsequently leased certain property to two railway companies to be used for the construction of a bridge across the said river between the said cities and also gave permission or license to the Ottawa Electric Railway Company to extend its track over certain property belonging to the Dominion Government on the Hull side of the river to enable the latter to make closer connection with the Hull Electric Company. The suppliant claimed that such leases and license enabled the said companies to divert traffic from his ferry, and constituted a breach of his ferry grant for which the Crown was liable.

Held, that the granting of said leases and license did not constitute a breach of any contract arising out of the grant of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. *Windsor and Annapolis Railway Co.* v. *The Queen*, 10 S.C.R. 335; 11 App. Cas. 607 and *Hopkins* v. *Great Northern Railway Co.*, 2 Q.B.D. 224, referred to.

Semble, that if the said leases and license prejudiced the rights acquired by the suppliant under his ferry grant he would be entitled to a writ of scire facias to repeal them.

H. Aylen, Q.C., for suppliant. *Solicitor-General* and *E. L. Newcombe*, Q.C., for respondent.

Burbidge, J.] THE QUEEN v. HARWOOD. [June 11.

Expropriation of land for canal purposes—Damage to remaining lands— Access—Undertaking to give right of way—52 Vict. c. 38, s. 3—Effect of in estimating damages — Future damages — Agreement as to— Increased value by reason of public work.

Defendants owned a certain property situated in the counties of Vaudreuil and Soulanges, a portion of which was taken by the Crown for the purpose of the Soulanges Canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under the provisions of 52 Vict. c. 38, s. 3, filed an undertaking to build and maintain a suitable road or right of way across its property for the use of the defendants. The evidence shewed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the Court assessed damages for past deprivation only.

2. It having been agreed between the parties in this case that the question of damages which might possibly arise in the future from any flooding of the defendants' lands should not be dealt with in the present

action, the Court took cognizance of such agreement in pronouncing judgment.

3. In respect to the lands taken the Court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. *Stebbing* v. *The Metropolitan Board of Works*, L.R. 6 Q.B. 37, and *Paint* v. *The Queen*, 2 Ex. C.R. 149; 18 S.C.R. 718, followed.

A. Globensky, for plaintiff. *C. A. Harwood*, for defendants.

Burbidge, J.] LAROSE v. THE QUEEN. [June 11.

Exchequer Court Act, s. 16 (c)—Rifle range—"Public work"—Injury to person.

The suppliant was wounded by a bullet fired, during target practice, from the rifle range at Cote St. Luc in the District of Montreal. He filed a petition of right claiming damages for the injury he thereby sustained.

Held, that the rifle range was not a "public work" within the meaning of clause (c) of s. 16 of The Exchequer Court Act (50-51 Vict. c. 16), and that the Crown was not liable. *City of Quebec* v. *The Queen*, 24 S.C.R. 448 referred to.

Charbonneau and *Pettier*, for suppliant. *E. L. Newcombe*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] BOGARDUS v. WELLINGTON. [Sept. 22.

Statute of Limitations—Sale of goods—Warranty—Fraud.

The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, giving a warranty that they were "No. 1 peaches, warranted true to name":

Held, that this was a warranty that the trees were of the varieties contracted for, not that the fruit would be of those varieties; that the trees not being of the varieties contracted for the warranty was broken at the time of sale; and that in the absence of fraud an action for damages for its breach brought more than six years after the sale was barred, although until the trees came into bearing shortly before the action it was impossible to tell that they were not of the varieties contracted for.

Judgment of ROBERTSON, J., reversed.

Ritchie, Q.C., and *E. C. Ryckman*, for appellant. *Lynch-Staunton*, Q.C., and *J. H. Ingersoll*, for respondent.

From Armour, C.J.] STROUD *v.* WILEY. [Sept. 29.

Partnership—Purchase of partner's interest by co-partners—Errors in statements—Fraud.

In order to avoid a dissolution of partnership and a winding up of the business the interest of a partner in the partnerships' assets was purchased by his co-partners for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shown in the last yearly balance sheet, which was based upon statements prepared under the supervision of this partner. More than two months after the transaction the plaintiffs brought this action alleging that part of the stock-in-trade had been over-valued in the statement and claiming repayment of part of the purchase money:—

Held, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items, but that apart from this as the statements had been prepared in good faith and in accordance with the uniform usage of the business the defendant was not liable.

Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., and *L. F. Stephens*, for appellant. *Robinson*, Q.C., for respondents.

From Divisional Court.] [Sept. 29.

FERGUSON *v.* GALT PUBLIC SCHOOL BOARD.

Master and servant—Negligence—Common employment—Workmen's compensation for Injuries Act—Superintendence—Defects in ways.

The plaintiff was a laborer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendance of a foreman who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the foot of the outer face of the wall the mason and the plaintiff made a gangway, of planks which had been used in the scaffolding, from the top of the wall to the adjacent building and thence to the ground, and while the plaintiff was walking on the gangway with a load of mortar an insecurely fastened plank gave way and he was injured:—

Held, that the defendants were not liable at common law, the mason and the plaintiff being fellow-workmen exercising their own judgment as to the proper means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened.

Held, also, that there was no liability under the Workmen's Compensation Act for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the

Act, or constructed by a person having, in regard to it, superintendence entrusted to him.

Judgment of a Divisional Court reversed.

Lount, Q.C., and *W. D. Card*, for appellants.

A. Munro Grier, for respondent.

From Boyd, C.] IN RE ALLEN AND NASMITH. [Oct. 10.

Landlord and Tenant—Lease—Covenant—Renewal—Rent.

A lease of land, upon which there were no buildings except an old shed, contained a covenant by the lessor to grant at the expiration of the term if requested "another lease" to the lessee "for the further term of twenty-one years" at such rent as might be agreed on or fixed by arbitration, "such renewed lease to contain a like covenant for renewal":—

Held, that the rent for the renewal term should be based upon the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term. *Van Brocklin* v. *Brantford* (1861), 20 U.C.R. 347; affirmed in appeal, 26th June, 1862 followed.

Judgment of BOYD, C., 31 O.R. 335, affirmed.

Aylesworth, Q.C., for appellant. *A. J. Russell-Snow*, for respondent.

HIGH COURT OF JUSTICE.

Boyd. C., Ferguson, J., Meredith, J.] [Oct. 8.

HILL *v.* INGERSOLL AND PORT BURWELL GRAVEL ROAD CO.

Contract—Road company—Implied covenant—Corporate seal.

An agreement in writing signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows,—"I"—the plaintiff—"have this day agreed with" the defendants "to furnish good gravel and deliver the same in the centre of the road bed . . . and the company agree to pay me at the rate of $2.40 per cord . . . And it is further agreed that my tolls . . shall be free during the full term of this agreement. And it is further agreed that in consideration of this agreement and for the sum of $1 . . I do . . discharge all claims I hold against the company . . . . And it is further agreed that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good. . . ."

Held, that an agreement on the part of the defendants that they would take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to

supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement.

Held, also, per FERGUSON, J., that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal.

Judgment of ARMOUR, C.J., affirmed.

F. A. Anglin, for plaintiff. *Riddell*, Q.C., and *V. Sinclair*, for defendants.

Boyd, C., Ferguson, J., Meredith, J.] [Oct. 8.

FOSTER *v.* IVEY.

Mortgage—Covenant of mortgagor—Enforcement—Dealings between mortgagee and assignee of equity.

The relations which exist among mortgagee, mortgagor and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety and principal debtor.

Aldous v. *Hicks*, 21 O. R. 95, approved.

Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen.

So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights.

Mathers v. *Helliwell*, 10 Gr. 173, explained.

Dictum of MACLENNAN, J. A., in *Trust and Loan Co.* v. *McKenzie*, 23 A. R. 167, dissented from.

Barber v. *McCuaig*, 24 A. R. 493, 29 S.C.R. 126, followed.

D. W. Saunders and *Cattanach*, for plaintiff. *Hellmuth*, for defendant.

Boyd, C.] IN RE RYAN. [Oct 8.

Administration order—Discretion to refuse—Rules 946, 954—Fund—Savings deposit—Survivorship.

There is now a discretion under Rules 946 and 954, in dealing with applications for administration orders, and the judge or officer is not obliged to grant a summary order unless it appears that some good result will follow.

Order refused where the widow of an intestate was clearly entitled to a fund which was the only matter in dispute.

Where a husband deposited money with a savings company and caused an account to be opened in the names of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscriminately :—

Held, that she was entitled as survivor to the whole fund.

W. T. J. Lee, for applicants. *Home Smith*, for widow.

Meredith, C. J.] GIBSON *v.* NELSON. [Oct. 10.

Notice of trial—Close of pleadings—Rule 262.

A reply delivered by the plaintiff joining issue upon the statement of defence and further alleging that the facts set forth in the defence were no answer to the claim :—

Held, a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of Rule 262 ; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular.

D. L. McCarthy, for plaintiff. *J. H. Moss*, for defendant.

Boyd, C.] LANGLEY *v.* VANALLEN. [Oct. 24.

Assignments and preferences—Secret agreement—Onus—Voluntary payments—Attack on — Assignee for creditor — Particular creditors — Privity.

In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment under the terms of an alleged secret agreement :

Held, that the onus of proof was on the plaintiffs.

Held, also, that the payments not being procured by unjust oppression or extortion on the part of the plaintiff, but being voluntary, the assignee could not recover.

Review of English cases on this point.

Nor could the other plaintiffs, not being the whole body of creditors, recover, even when using the name of the assignee as plaintiff by virtue of an order under R.S.O. c. 147 ; and no privity such as would give a right of action was established between the creditor plaintiffs and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, prior to the alleged secret agreement.

George Kerr, for plaintiffs. *Staunton*, Q.C., for defendants.

Boyd, C.] JONES *v.* LINDE BRITISH REFRIGERATION CO. [Oct. 24.

Master and servant—Secret profits in service—Costs—Jus tertii.

Profits acquired by the servant or agent in the course of or in connection with his service or agency fall to the master or principal.

The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position of adviser to influence the purchase by the meat company of a new plant from the defendants, who had promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company.

Held, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants.

The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs.

Riddell, Q.C., for plaintiff. *H. S. Osler*, for defendants.

FIFTH DIVISION COURT, STORMONT, DUNDAS AND GLENGARRY.

TUTTLE *v.* MCDONALD.

Justice of the peace—Fees of—R.S.O. 1897, c. 95, s. 2.

Held, that there is no provision for fees to a magistrate or a constable under the tariffs in R S.O. 1897, c. 95 or s. 81 of Crim. Code for any proceedings which do not come within the summary jurisdiction of justices.

[Cornwall, Aug. 18. O'REILLY, Co.J.

The defendant, a justice of the peace for the above united counties, demanded and received from the plaintiff $9.50 alleged to be due as his own costs and the costs of his constable acting in the matter of a search warrant issued under s. 569 of the Criminal Code, to recover stolen goods, and of a search warrant issued under the same sec., sub-s. *b*, to recover a case of dynamite, in relation to which an indictable offence was sworn to have been committed, contrary to the provisions of s. 101 of the Criminal Code, and also of an unsuccessful prosecution under said s. 101.

The plaintiff now sought to recover the said sum of $9.50 from the defendant, who retained same on the plea that he was entitled to $3.00 of said amount to his own use for services as justice of the peace, in above matters, and to $6.50 alleged to have been paid by him to said constable as the latter's fees in the same matter, and the plaintiff asked to recover said sum of $9.50 as money had and received for his use and benefit by the defendant. Notice of action was delivered to the defendant, under R.S.O.

1897, c. 88, s. 14, and he consented, in writing, to have the action tried at the ensuing sittings of said court to be held at Morrisburg, on 21st June, last. At the hearing the particulars required to be proved by R.S.O. 1897, c. 88, s. 19, were all admitted. The above statement of facts was also admitted.

R. F. Lyle, for plaintiff. *C. F. Bradfield*, for defendant.

O'REILLY, Co. J., held that the defendant had no right to the $9.50 or to any part of it. The defendant could only justify charging fees for himself or the constable in either of these proceedings, under the tariff given in R.S.O. 1897, c. 95 or under the tariff in s. 871 of the Criminal Code, 1892, as amended. These tariffs apply strictly to offences coming within the summary jurisdiction of justices. There is in neither tariff any provision for fees in connection with the issuing or executing of search warrants. Petit larceny was a felony and simple larceny was a felony (after the distinction between grand and petit larceny was abolished) and it so remained until the distinction between felony and misdemeanor was abolished. The offence under s. 101 of the Code was a felony prior to the passing of the Criminal Code (see R.S.C. c. 105, s. 5). In England the expenses in connection with prosecutions for felony were made payable out of county rates by 25 Geo. II., c. 36. In this province the costs of the prosecution in cases of felony, when not otherwise provided by law, are to be paid out of the county funds: R.S.O. 1897, c. 102, s. 2, and the fees for serving and executing search warrants are given in the tariff for constables in the schedule to R.S.O. c. 101 as amended. [The learned judge concluded his judgment as follows:] It can hardly be argued that a man who swears to an information to lead a search warrant for the recovery of stolen property, is securing services in the nature of a civil remedy for his own benefit. He is taking a necessary step, if he is acting in a bona fide manner (as we must presume he is) to convict a man whom he believes to have committed a crime, which until recently was a felony. I am not aware of any decision to the effect that the prosecution of a felon or any necessary step or proceeding in the prosecution of a felon, has been held to be a service in the nature of a civil remedy for the benefit of a private individual, and I cannot here so find. By the ancient common law of England, it was an offence for justices of the peace to accept anything "for their office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute." I cannot find that the $3.00 taken by the defendant for his own use, were fees accustomed, i.e. sanctioned by ancient usage, or costs limited by statute, and I am afraid that if the ancient common law in this regard were still in force in Canada, that the taking of the $3.00 in this case, might bring defendant within its provisions. The amount taken for the constable is said to have been paid over to him, and I have no doubt has been, but I consider that the defendant was acting unlawfully in taking the $9.50, and I consider that it would be highly improper for me, by joining the constable as a defendant, to recognize in any way the alleged bargain between the

plaintiff and defendant, by which the plaintiff is said to have agreed to pay costs not lawfully chargeable before the defendant would consent to put the machinery of the criminal law in motion. It is contrary to the policy of the law that justices of peace should be allowed to make such bargains, and it would be a very shocking thing to allow them to prevail in a court of law. The defendant must as best he can, deal with the constable, but the plaintiff cannot be here considered as having any privity with the constable, and I give judgment against the defendant for $9.50 and costs to be paid in fifteen days.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] QUEEN *v.* QUINN. [Feb. 14.

Theft—Conviction of minor under age of 16—Form of convictions—Not necessary to state age or religion—Cr. Code s. 820—Words "shall be good and effective to all intents and purposes."

Defendant was convicted before the Stipendiary Magistrate of the City of Halifax of the offence of stealing the sum of $30 and was sentenced to be imprisoned for the term of three years in the Halifax Industrial School, a reformatory for boys of the Protestant faith.

His discharge was sought upon habeas corpus on the grounds that the conviction did not shew that defendant was a Protestant or that he was under the age of 16 years.

Held, dismissing the application, that neither the age nor the religion of defendant had anything to do with the offence of which he was convicted, and that it was not necessary that they should be stated in the conviction.

The Code, s. 820, provides that "the justices before whom any party is summarily convicted of any offence hereinbefore mentioned may cause the conviction to be drawn up in the form U.U. in schedule one hereto, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes."

Held, that the intention no doubt was to dispense with recitals and averments in the particulars mentioned, and that the words "shall be good and effectual to all intents and purposes" might be regarded as the equivalent of a legislative declaration that it should not be necessary to refer in the conviction to the age of the party, or to the justice's opinion on that subject.

Held, that the power of determining the age or apparent age of the

party before him was given exclusively to the justices, and following *Rex* v. *Simpson*, 1 Str. 46, that it must be assumed that he exercised it.

Full Court.] WILSON v. WINDSOR FOUNDRY CO. [March 14.

Contract in writing—Receipt of parol evidence to vary or supplement—Burden of proof—Concluded agreement.

Plaintiffs who carried on business in Montreal as co-partners under the name of A. R. W. . . Co. brought an action against defendants to recover $350; price of an engine which defendants had ordered from them in writing, through plaintiff's agent W.

The order addressed to plaintiffs, and signed by defendants was in the following form:

"Please furnish one fifty horse power engine for which we agree to pay you $350, delivered in Halifax. Shipment to be made as soon as possible." The main defence set up to the action was that at the time defendants ordered the engine they supposed and were led to believe that they were dealing with a company carrying on business in Toronto under the name of A. R. W. & Co., Ltd., with which they had had previous dealings, and which at the time had in its possession a crusher belonging to defendants of the value of $780, which it was agreed was to be accepted in payment for machinery to be ordered by defendants. The learned trial judge found as a fact that the business carried on in Montreal was distinct from that carried on in Toronto, but that at the time the defendants gave the order in question they did so under the belief that they were contracting with the Toronto concern, and that there was everything in the surrounding circumstances to lead to the belief that the businesses carried on in Montreal and Toronto were one and the same, particularly the letter heads of the Toronto company which described the Montreal business as one of their branches. For these reasons the learned trial judge held that plaintiffs were bound by the bargain made by their agent W., and on the ground that it was not inconsistent with the written agreement to prove that payment was to be made in some other way than by cash, received evidence of the agreement relied upon by defendants as to the receipt of the crusher in the possession of the Toronto company in payment for the machine ordered.

Per MCDONALD, C.J., RITCHIE, J. concurring.

Held, that the evidence fully supported the finding of the trial judge that the acceptance of the crusher in payment for the engine ordered was a term of the contract between the parties.

Held, also, that the evidence of the agreement was properly received on the grounds stated by the learned trial judge in his judgment.

Per WEATHERBE, J., MEAGHER, J. concurring.

Held, that the order delivered by defendants to plaintiffs' agent being on its face a complete agreement, parol evidence was inadmissable to vary

its terms either as to the mode of payment or as to the parties with whom it was made.

Per WEATHERBE, J.

Held, that the proof of the written instrument signed by defendants threw the burden upon them of establishing their defence.

Per MEAGHER, J.

Held, that in the absence of evidence of the acceptance by defendants of the offer said to have been made by the Toronto company to accept the crusher in payment for machinery to be ordered, or the amount to be allowed therefor, there was no agreement concluded between the Toronto company and defendants which could be assumed by the plaintiffs.

W. E. Roscoe, Q.C., and *W. M. Christie* in support of appeal. *B. Russell*, Q.C., contra.

Province of Manitoba.

QUEEN'S BENCH.

Killam, C.J.] ROGERS *v.* CLARK. [Oct. 9.

Pleading—Action for malicious prosecution——Striking out paragraphs of defence as embarrassing—Queen's Bench Act, 1895, rules 280, 283, 293, 298, 301 and 318.

Application to strike out paragraphs of the defence in an action for malicious prosecution. The paragraphs objected to set up certain alleged facts and information given to the defendant tending to justify his belief in the plaintiff's guilt, and that the defendant had laid all the information received by him before the magistrate who issued the warrant, and before counsel who advised the commencement of the prosecution complained of, also that the plaintiff had been in possession of animals which he was accused of stealing, without shewing that it was recent possession. It was further alleged that certain facts were shewn by evidence taken upon the first charge without information from other sources had been received, without specifying these sources.

The objections relied on were that these facts and information and the advice of counsel and magistrate were only evidence of reasonable and probable cause which should not, under rule 298 of The Queen's Bench Act, 1895, be set out in detail; and that sufficient was not stated to shew reasonable and probable cause absolutely, as the information and inquiry may not have been sufficient to warrant belief of guilt, and the sources of the information were not stated.

Held, 1. That a simple traverse of the plaintiff's allegation of the want of reasonable and probable cause is sufficient in the statement of

defence without alleging the facts constituting reasonable and probable cause.

2. That the paragraphs objected to were calculated to make it doubtful whether the plaintiff could safely go to trial leaving the allegations contained in them upon the record, as the defendant had left it open for himself to prove other and distinct facts for the purposes of this defence, and that the plaintiff might be misled into asuming the allegations therein to be all that he had to meet, and for that reason they ought, under rule 318, to be struck out.

Application granted, costs to be costs in the cause to the plaintiff.

T. H. Metcalf, for plaintiff. *C. H. Campbell*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] KING *v.* BOULTBEE. [Sept. 10.

Practice—Garnishee proceedings—Order that money remain in court until new action commenced—Whether nullity or not.

Appeal from order of FORIN, Co. J. The action was commenced in the County Court of Rossland on 28th Oct., 1899, to recover $171, and a garnishing summons was also issued and served on the garnishee who, on 30th Oct., paid into court $173.70. On 17th Nov. an order was made setting aside all the proceedings but ordering that the moneys in court remain to abide the result of an action to be commenced forthwith in respect to the same cause of action. The order also provided that the question as to whether the moneys were attachable should be determined as of the date of the issue of the garnishing summons so set aside. The new action was commenced on 18th November.

On 21st Nov., the defendant assigned the moneys then in court, and on 14th Feb., 1900, a summons was taken out in the first action on behalf of the defendant and the assignee for the payment out of court of the moneys to the assignee. This summons was dismissed, and the defendant and the assignee appealed. The order of 17th November was not appealed.

Held, per MCCOLL, C.J., and WALKEM, J., dismissing the appeal, that the order of 17th Nov. was not a nullity, and as it was not appealed against it was valid. IRVING and MARTIN, JJ., dissenting. Appeal dismissed.

Duff, for appellants. *MacNeill*, Q.C., for respondent.

COUNTY COURT.

Martin, J.] DILLON *v.* SINCLAIR. [Oct. 13.

Small debts court—Jurisdiction of—Debt—Mechanics' lien.

Appeal to the County Court of Atlin from a decision of a magistrate of the small debts court in favour of the plaintiff in an action to enforce a mechanic's lien under ss. 26 and 27 of the Mechanics' Lien Act.

Held, that an action to enforce a mechanic's lien is not one of debt within the meaning of s. 2 of the Small Debts Act. Appeal allowed.

Sawers, for appellant. *Jenns* and *W. P. Grant*, for respondent.

Book Reviews.

Attachment of Debts: Receivers by way of Equitable Execution and Charging Orders on Stocks and Shares, by MICHAEL CABABE, of the Inner Temple, barrister-at-law. Third edition. London: Sweet & Maxwell, Ltd., 3 Chancery Lane, Law Publishers, 1900.

Mr. Cababe has evidently a practical and analytical turn of mind. He does his work well and gives to the profession a very useful little book. Practitioners in this country will find it an excellent summary of the law in England in connection with the matters above referred to. The appendix contains a number of forms of summonses, orders, affidavits, etc., some of which may well be adopted for use here.

The Living Age.—Boston, U.S.: This old friend comes with pleasant and continuous regularity. The number for October 27, is of especial interest. Japan and the new far East from the *National Review*, is very timely. Italian Anarchism; The old Golf and the new; Fishes and their meals, and the Employment of women will appeal to various classes of readers, whilst those who desire lighter literature in the way of fiction are also well supplied. We strongly recommend this publication to our readers as the best value for their money ($6 per annum) that we know of.

Flotsam and Jetsam.

U. S. DECISIONS.

COMMON CARRIERS.—The right of passengers to carry with them small packages of merchandise is held, in *Runyan* v. *Central R. Co.* (N.J.), 48 L.R.A. 744, to be one that is not given by the common-law contract of carriage and for which usage must not only be clear and explicit, but also something more than mere accommodation acquiesced in for a time by the carrier.