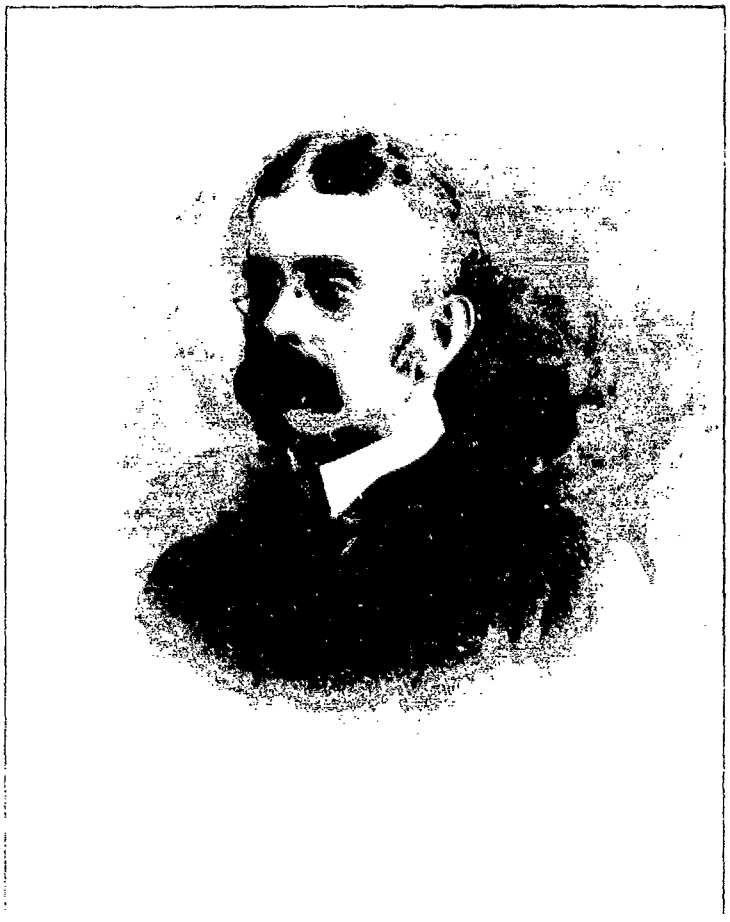

R. L. BORDEN Q.C. M.P.

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ROBERT L. BORDEN, Q.C., M.P.

Robert Laird Borden was born at Grand Pre, Nova Scotia, on the 25th of June, 1854, and is the eldest son of Andrew Borden, Esq, and his wife, Eunice Laird. His forefathers lived in New England. His great-grandfather on the maternal side was John Lothrop, the law partner of Pierrepont Edwards, whose firm conducted an extensive business at New Haven, Conn., before the Revolutionary War. On his father's side he is of United Empire Loyalist stock.

Mr. Borden began at a very early age to attend the Acacia Villa Academy at Horton in his native county, and when only fourteen years of age was appointed one of the teachers of that well-known educational establishment, and shortly afterwards became professor in the Glenwood Institute, New Jersey. Returning to Nova Scotia, he began the study of law in 1874 in the office of Messrs. Weatherbe and Graham, Halifax, and was called to the Bar in 1878. The gentlemen with whom he studied law, both of whom are now judges of the Supreme Court of Nova Scotia, declare that as a student Mr. Borden was already distinguished for those qualities which contributed so largely to his success as a practitioner, namely, great industry, careful attention to every detail of his work, and a firm grasp of legal principles.

A few months subsequent to his admission to the Bar he was offered a partnership by Mr. J. P. Chipman, of Kentville, now a County Court Judge for the midland district of Nova Scotia, and under the firm name of Chipman and Borden they carried on a large and lucrative practice at Kentville down to the year 1882. Upon the appointment in that year of the late Sir John Thompson as Judge of the Supreme Court the firm of Thompson, Graham & Tupper, became the firm of Graham, Tupper & Borden, Mr. Borden having joined as junior partner. Further changes occurred in the firm by the accession of Sir Charles Hibbert Tupper to the Cabinet of Sir John A. Macdonald and the subsequent appointment of Mr. Graham to be Judge in equity for

the Province of Nova Scotia, whereby Mr. Borden became senior member of the firm under the style of Borden, Ritchie, Parker and Chisholm.

Mr. Borden is now, and has been for several years past, President of the Nova Scotia Barristers' Society, and as such has taken great care in framing and watching legislation affecting his profession. Since 1882 he has been engaged in almost every important case that has arisen in Nova Scotia. He was counsel for the Dominion Government in the well-known case of *The Queen* v. *The David J. Adams*, which arose out of the enforcement of the treaty of 1818 and the seizure of the above-mentioned American fishing schooner for infraction of the provisions of the treaty. Mr. Borden was retained as counsel by the Government of Nova Scotia in the well-known constitutional case of *Thomas* v. *Haliburton*, and he has several times argued appeals before the Judicial Committee of Her Majesty's Privy Council, one of the most important appeals argued by him being that of *The Municipality of the County of Pictou* v. *Geldert* (1893) A.C. 524, a case which overruled previous decisions of the Supreme Court of Canada and established the principle that municipalities are liable for injuries from mis-feasance, but not for injuries resulting from non-feasance, on their public highways.

Mr. Borden has attained his present position as head of the Bar of Nova Scotia by hard, unremitting and conscientious work. To the smallest and most unimportant matter intrusted to him he gives as careful attention as he does to a matter involving large interests. He goes to a trial with every detail thoroughly prepared, knowing how he must prove every fact on his own side and keenly attack the case of his opponents. If genius be, as Carlyle once defined it, the capacity for taking infinite pains, then Mr. Borden does not fall far short of being a genius.

To wide and accurate knowledge of the law, fertility of resource and firmness of purpose, Mr. Borden unites a dignified and courteous manner which wins for him the friendship as well as the confidence of his clientile. In Court he is respectful to a degree to the Bench, the opposing counsel and the witnesses, and under no amount of provocation will he permit his good temper to forsake him.

Mr. Borden first entered public life in 1896 when he was nominated as one of the Conservative candidates for Halifax

County, for which he now sits, and was returned at the head of the poll. He has already taken a prominent place in Parliament and is consulted by the leaders of his party in all important matters coming up for consideration. Notwithstanding his devotion to his professional and Parliamentary work, Mr. Borden finds time for the cultivation of his literary tastes, and is well read in the best English literature. This is noticeable in all his arguments and speeches, for there is a style and finish to his work that shews that all his reading is not confined to the law reports. In September, 1889, he married Laura, youngest daughter of the late T. H. Bond, Esq., of Halifax.

The vacancy caused by the death of Lord Justice Chitty has been filled by the elevation of Mr. Justice Romer to the Court of Appeal. Mr. H. H. Cozens-Hardy, Q.C., succeeds Mr. Justice Romer as the Judge of the High Court. These appointments have been received with much favor by the profession in England. Mr. Justice Romer is said to be one of the quickest judicial workers in England, and Mr. Cozens-Hardy was the leader of the Chancery Bar at the time of his elevation to the Bench. His appointment was due solely to his professional standing, as he has been a consistent opponent of the present Conservative Government, and congratulations are expressed that a leader of the Bar should patriotically have accepted his present position when he might reasonably have expected some day to go at one step, like Lord Davey and Sir John Rigby, to the Court of Appeal.

INSOLVENCY LEGISLATION.

If there is one thing more than another which tends to create dissatisfaction amongst the mercantile community with the machinery of the law, it is the inability of the Courts to cope with the all-too-prevalent methods employed by dishonest traders to evade payment of their debts. The basis of credit as applied to the ordinary transactions between the manufacturer and the wholesaler, and between the wholesaler and the retailer, upon which goods are supplied in the usual course of trade, is essentially different from that which underlies non-commercial transactions;

and it is as essential for the administration of justice in matters of commerce that this difference should be recognized, as it was in the past when the "law merchant" became engrafted upon the common law. Without "credit" the whole commercial system would collapse, and trade would be paralysed. It is therefore expedient, as well as just, that mercantile credit should be encouraged and protected. The only way in which an effectual remedy can be applied in Canada is by the passing of a bankruptcy law by the Federal Parliament. Such legislation should be based upon the principle that the property of an insolvent trader belongs to his creditors, and that upon proof of his insolvent condition it should be removable from the insolvent's control, whether or not the term of credit on which the insolvent purchased has expired or has been renewed to a future date.

It is true that much has been done towards providing for the pro rata division of a debtor's property by provincial Acts, with which our readers are familiar; but these, because of the limited jurisdiction of the provinces in such matters, of necessity, fall short of compelling a debtor to make an assignment, or to deliver up his estate for equitable distribution, however hopeless his financial embarrassment may be.

Some remedy should also be afforded whereby the trader who has by misfortune become insolvent, and has dealt fairly and honestly with his creditors, could obtain a discharge from his trade liabilities on the surrender of his assets. As the law now stands any one creditor may retain his claim for the balance due him after taking a dividend from the winding-up of the debtor's affairs, and, by obtaining judgment and execution therefor, prevent the debtor from resuming business at least, in his own name, although the other creditors were willing to release him. The debtor is thus driven to means flavouring of trickery and deception in order to re-establish his means of livelihood. Uniformity of procedure in the various provinces in regard to insolvent estates would do much to encourage the growth of inter-provincial trade as well as to develop confidence in foreign countries.

With regard to Canadian commercial laws. The Bankruptcy Act of England has been found to be a very satisfactory measure, and might well be used as a basis for a Canadian statute, with such variations as our special conditions may demand; for example, creditors should be allowed to choose for themselves the person

who is to superintend the liquidation of the estate, without restriction to a special class of officials, such as existed under the Canadian Insolvency Act of 1875.

We have reason to think that there is a strong feeling not only amongst the mercantile classes, but in the profession, that the time has come for the passing of a bankruptcy Act for Canada. We therefore invite discussion of the subject.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CHARITY—GIFT FOR POLITICAL, RELIGIOUS AND SOCIAL PURPOSES—MORTMAIN.

In re Scotcroft, Ormrod v. *Wilkinson* (1898) 2 Ch. 638, tested the validity of a devise of a parcel of land and premises, used as a village club and reading room, to the vicar of the parish for the time being, "to be maintained for the furtherance of Conservative principles, and religious and mental improvement, and to be kept free from intoxicants and dancing." It was contended that a gift for the furtherance of Conservative principles was not a good charitable gift; but Stirling, J., was of opinion that the gift was not merely to advance Conservative principles, but that it might be considered a gift for the furtherance of religious and mental improvement in accordance with Conservative principles, and that the limitation as to Conservative principles did not prevent the gift from being a perfectly good charitable gift, as it would undoubtedly have been if the gift were for religious and mental improvement alone. The devise was therefore upheld; and the time for effecting a sale of the property under The Mortmain and Charitable Uses Act, 1891 (see R.S.O., c. 112), was extended.

SUBROGATION—DEBENTURES—OVERDRAFT TO PAY INTEREST—BANKER AND CUSTOMER.

In re Wrexham M. & C. Q. Ry. Co. (1898) 2 Ch. 663. In this case a bold but unsuccessful attempt was made to extend the principle of subrogation under the following circumstances: A

railway company, being liable on debentures issued by it under its statutory powers, was permitted by its bankers to overdraw its account to a large amount for the purpose of paying interest on the debentures. The bank had no knowledge, when allowing the overdraft, that, as the fact was, proceedings were pending at the suit of creditors of the company. In these proceedings judgment was recovered for a large sum, and a receiver was appointed. The present proceedings were instituted by the bank claiming to be subrogated to the rights of the debenture holders in respect of the interest on the debentures paid out of the overdraft. Romer, J., characterized it as "an extraordinary application," and held that under the circumstances the bank was not entitled to be subrogated to the rights of the debenture holders in respect of the interest so paid out of the overdraft. His decision has since been affirmed by the Court of Appeal.

RENT—RESERVED FOR USE OF WAY—REVERSIONER—PERSONAL REPRESENTATIVE.

In *Hastings* v. *North Eastern Ry.* (1898) 2 Ch. 674, the plaintiff claimed as owner of the reversion to recover certain rents payable under a lease for 1000 years of a right of way granted by the plaintiff's predecessor in title to the defendant company. The rent was to be calculated on the quantity of coal carried, not only over the land devised, but over any part of the defendants' railway. The defendants contended that the right to recover this rent passed to the lessor's personal representative, but Byrne, J., held that the plaintiff as owner of the reversion in the demised premises was entitled to recover, notwithstanding that some of the rent reserved was payable in respect of coal not carried over any part of the demised premises.

CONDITIONAL PAYMENT—ASSIGNMENT OF DEBTS AND SECURITIES THEREFOR—EFFECT OF GIVING NEGOTIABLE INSTRUMENT FOR DEBT.

Hadley v. *Hadley* (1898) 2 Ch. 680, is a somewhat curious case. The action was brought to recover damages in respect of the sale of certain debts alleged to be sold to the plaintiff, which the defendant had subsequently collected. The agreement of sale included "all book and other debts due to the vendor . . . and the full benefit of all securities for such debts." The fact was, at the time of this agreement the defendant had in his possession cheques and bills of exchange which had been received by him

from customers in payment or satisfaction of their debts, and the question at issue was whether the debts in respect of which these cheques and bills had been given, passed under the assignment. Byrne, J. held that they did not, as the giving of the cheques and bills was in effect a conditional payment thereof, and the cheques and bills did not constitute "securities" for the debts within the meaning of the agreement of sale, and that the securities referred to were those held for debts which had not been at the date of the agreement conditionally paid. But he was of opinion if the cheques and bills had not been duly met the debts for which they were given would have revived and passed under the agreement which seems curious.

WINDING UP – ACTION COMMENCED BEFORE LIQUIDATION ADOPTED BY LIQUIDATOR – COSTS.

In re London Drapery Stores (1898) 2 Ch. 684, Wright, J., held that where an action, commenced by a company before winding-up proceedings, is subsequently adopted by the liquidator of such company, and the action fails, the successful litigant is entitled to be paid his whole costs out of the assets of the company, and not merely those incurred subsequent to the winding-up proceedings.

STATUTE CONSTRUCTION EJUSDEM GENERIS.

In re Stockport Schools (1898) 2 Ch. 687, may be here briefly noted for the fact that the decision of Stirling, J., on the construction of a statute, (noted ante vol. 34, p. 624), in which he applied the ejusdem generis rule, was upheld by the Court of Appeal (Lindley, M.R., and Chitty and Collins, L.JJ.)

ADULTERATION – MILK – LIABILITY OF INNOCENT VENDOR FOR ADULTERATION OF MILK IN TRANSIT – SALE OF FOOD AND DRUGS ACT (38 & 39 VICT., C. 63), S. 6 – (R.S.C., C. 107, S. 15).

In *Parker* v. *Alder* (1899) 1 Q.B. 20, Divisional Court (Lord Russell, C.J., and Wills, J.) have followed and somewhat extended the doctrine of *Brown* v. *Foot*, 66 L.T. 649, as to the liability of an innocent vendor of goods for the improper adulteration thereof by a third party before delivery to a purchaser. In *Brown* v. *Foot* the adulteration was by a servant without the consent of the master, and the master was held liable. In the present case, the vendor was held liable for milk which was tampered with by the addition of water while on transit by rail. By his contract he was to deliver the milk to the vendee at a railway terminus in London.

It was delivered in the country to the railway company in a pure condition, and it was contended that the vendor was not liable for anything which took place in course of transit, as the delivery to the vendee was complete on the delivery to the railway; but the Court held that the contract governed, and the fact that the milk was adulterated when it reached its destination was sufficient to fix the vendor with liability therefor, although they conceded that, if the convicting magistrate should be satisfied that the vendor was in no way party to the fraud, a nominal penalty might be inflicted; or, if the offence should appear to be of a trifling character, he would be justified, under the Summary Jurisdiction Act, 1879, in refusing to impose any punishment at all.

BILL OF LADING—"DEFECTS LATENT ON BEGINNING OF VOYAGE OR OTHERWISE."

In *Waikato* v. *New Zealand* (1899) 1 Q.B. 56, the Court of Appeal (Smith, Rigby and Collins, L. JJ.) have affirmed the decision of Bigham, J. (1898) 1 Q.B. 645 (noted *ante* vol. 34, p. 404), holding that an exception in a bill of lading of "defects latent at beginning of voyage or otherwise" does not cover defects patent at the beginning of the voyage. The words "or otherwise," Rigby, L.J. points out, refer, according to plain grammatical construction to the immediately antecedent words "on beginning of voyage," and he thought they might reasonably refer to latent defects which only come into practical operation after the commencement of the voyage. The other two judges regarded the words "or otherwise" at any rate as too ambiguous to warrant their being held to include any patent defects.

INFRINGEMENT OF STATUTE—PUBLIC BODY—INFORMATION—INJUNCTION TO RESTRAIN BREACH OF STATUTORY DUTY—RAILWAY COMPANY—CROSSING.

The Attorney-General v. *London and North Western Ry. Co.* (1899) 1 Q.B. 72, was an action instituted by the Attorney-General on the relation of a municipal body, to restrain the defendant railway company from permitting their trains to cross a highway on a level crossing at a higher rate of speed than four miles an hour. The statute empowering the railway company to cross the highway at the point in question expressly required that all trains should slacken their speed, and not cross at any greater rate than four miles an hour. The defendants at the trial resisted the granting of an injunction on the ground that the plaintiff failed to shew any injury to the public by reason of the defendants not having

complied with the statutory requirement as to speed, but Bruce, J., who tried the action, was of opinion, that it was not incumbent on the informant to make any such case, and that it was sufficient to shew that the defendants were disregarding the statute to entitle the plaintiff to an injunction, which was accordingly granted.

FALSE PRETENCES—CRIMINAL LAW—EVIDENCE OF SUBSEQUENT FRAUDS—PRISONER'S RIGHT TO GIVE EVIDENCE ON HIS OWN BEHALF—GRAND JURY.

Queen v. *Rhodes* (1899) 1 Q B. 77, was a case in which the defendant was prosecuted for obtaining eggs by false pretences. At the trial evidence was given to shew that the prisoner had falsely represented, by advertisements in newspapers, that he was carrying on a dairyman's business. Evidence was also admitted to shew that subsequent to obtaining the goods in question, he obtained eggs from other persons by means of similar advertisements. The question as to the admissibility of the latter evidence was reserved for the opinion of the Court for Crown cases reserved (Lord Russell, C.J., and Wills, Wright, Bruce and Darling, JJ.), who held that the evidence was rightly received. The point was also reserved whether a prisoner is—under the recent Criminal Evidence Act, 61 & 62 Vict, ch. 36, which enables an accused person to give evidence on his own behalf—entitled to give evidence on his own behalf before the grand jury, and the Court held that the accused is not so entitled. The English Act differs from the similar Canadian Act (56 Vict., c. 31, D), in that it does not forbid comment by the Court on the failure of a prisoner to offer himself as a witness. Some of the English judges, we see, have taken a curious view of the new Act, and have actually added to the sentence of a prisoner found guilty, because, in their opinion, the prisoner in giving his evidence had committed perjury; this has very justly provoked adverse comment, as inflicting on the convict a punishment for an offence for which he has not been tried.

LIBEL—DISPARAGEMENT OF RIVAL TRADERS' GOODS—CAUSE OF ACTION—INJUNCTION—RULE 288—(ONT. RULE 261).

Hubbock v. *Wilkinson* (1899) 1 Q.B. 86, was an action to restrain the defendants from publishing in China and Japan circulars alleged to contain untrue statements as to an alleged comparative test of the plaintiffs' and defendants' goods, and a

statement that in the result the defendants' goods were found to be equal to, or superior to the plaintiffs', whereas the plaintiffs alleged their goods were superior to the defendants'. The defendants moved, under Rule 288, (Ont. Rule 261), to strike out the statement of claiming, as shewing no cause of action. Kennedy, J., dismissed the application, but the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.,) held that the case came within the principle laid down in *White* v. *Mellin* (1895) A C. 154 (noted ante vol. 31, p. 439), and that the question of motive could not be inquired into when the defendants were not exceeding their legal rights, and the action was dismissed. In two recent Ontario cases before the Divisional Court (C.P.D.) viz.: *Sims* v. *London*, and *Sims* v. *Kingston*, it was considered to be inexpedient that objections in law going to the root of a statement of claim or defence should be disposed of on a motion to strike out the pleading because no appeal lay to the Court of Appeal from the Divisional Court in such cases.

BAILMENT—GRATUITOUS LOAN OF CHATTEL—DEFECT IN CHATTEL LENT—KNOWLEDGE OF DEFECT BY LENDER—INJURY TO BORROWER OF CHATTEL FROM DEFECT THEREIN—LENDER OF CHATTEL, LIABILITY OF FOR DEFECT IN CHATTEL.

Coughlin v. *Gillison* (1899) 1 Q.B. 145, was an action brought by the gratuitous bailee of a chattel (a steam engine) to recover damages from the lender for damages occasioned to the plaintiff by a defect in the chattel. Hawkins, J., who tried the action, dismissed it on the ground that there was no evidence that the defendant knew of the defect which occasioned the injury to the plaintiff. On appeal, the plaintiff's counsel endeavoured to obtain a reversal of this decision, relying on the statement of Pothier as to the civil law on this point, but the Court of Appeal (Smith, Rigby and Collins, L.JJ.,) were of opinion that, in such an action, according to the ruling of the Court of Queen's Bench in *Blakeman* v. *Bristol & Exeter Ry.*, 8 E. & B. 1035, it is absolutely essential for the plaintiff to bring home to the defendant knowledge of the defect.

LEASE—SUB-LESSEE OF ASSIGNEE, LIABILITY OF, TO ORIGINAL LESSEE—RENT—PAYMENT OF RENT BY LESSEE—RIGHT OF LESSEE TO INDEMNITY BY SUB-LESSEE—MONEY PAID.

Bonner v. *Tottenham & E. P. I. Building Society* (1899) 1 Q.B. 161, draws very sharply the distinction between the status of

an assignee of a lease and a sub-lessee as regards their liability for the rent reserved by the original lease. In this case the plaintiff was a lessee of certain premises, he assigned the lease to one Price. Price subsequently sub-let the premises to the defendants by way of mortgage. The mortgage contained a proviso that on default the mortgagees might enter into possession, or receipt of the rents and profits, and demise or sell the premises, and out of the moneys so received by them the mortgagees should first pay the rent reserved by the original lease. The defendants entered into possession, but did not pay the rent which accrued due under the original lease while they were in possession. The plaintiffs having been compelled to pay such rent, brought this action to recover from the defendants the sum so paid; but Channell, J., who tried the action, held that as there was no privity of contract or estate between the plaintiff and defendants, the latter were not liable, and he therefore dismissed the action; and with this judgment the Court of Appeal (Smith, Rigby, and Williams, L.JJ.) agreed. Williams, L.J., however, suggests that the plaintiffs might be entitled to require the trustee in bankruptcy of Price, on proper terms, to take proceedings to compel the defendants to apply any moneys received by them from the premises in payment of the rent reserved by the original lease in accordance with the proviso in their mortgage to that effect.

FOREIGN CORPORATION—CARRYING ON BUSINESS IN ENGLAND—SERVICE OF WRIT—RULE 55—(CON. RULE 159.)

In La Bourgogne (1899) P. 1., was an application to set aside the service of the writ of summons. The defendants were a French company, owners of a line of steamers, including one trading between French and English ports, and having their principal place of business in Paris. They also leased and paid the rent of premises in London, where applications for rent and passage could be made to the defendants' agent. They agreed with the agent to pay income tax and exclusive expenses of the office, but the agent paid the staff, and was remunerated for his services by a commission on freight and passage money. The agent also acted for two other companies whose names were exhibited at the office. The writ was served on the agent under Rule 55 (see Con. Rule 159). Jeune. P,P.D., dismissed the application, and his decision was affirmed by the Court of Appeal (Smith and Collins, L.JJ.),

holding that the defendants carried on business in England within the meaning of the Rule.

WILL — PROBATE — ORLITERATION — WORDS OF WILL BEFORE ALTERATION WHETHER "APPARENT"—WILLS ACT (1 VICT., C. 26) S. 21—(R.S.O. C. 128, S. 23.)

In the goods of Brasier (1899) P. 36, a will was presented for probate in which an unattested alteration had been made by erasure, over which certain words were written. An expert in handwriting testified that the words which had been erased could be deciphered by the aid of a powerful magnifying glass. The surviving attesting witness being unable to say whether the alteration had been made when the will was executed the Court (Barnes, J.), ordered probate to issue of the will with the words originally written to be substituted for those which had been written over them. See R.S.O. c. 128, s. 23.

ADMINISTRATION—ESCHEAT—LAND TRANSFER ACT, 1897 (60 & 61 VICT. C. 65) S. 1 (R.S.O. C. 127, S. 4.)

In the goods of Hartley (1899) P. 41, was an application by the solicitor for the Treasury for administration of a bastard intestate. The applicant claimed that the letters of administration should be confined to the personal estate, because the realty had escheated to the Crown, and therefore did not devolve on the administrator under the Land Transfer Act, 1897, (see R.S.O. c. 127,s. 4), because the Crown was not bound by that Act, and Jeune, P.P.D., gave effect to this contention, and limited the administration as asked.

SPECIFIC PERFORMANCE—SALE OF REVERSION - DELAY.

In *Terry* v. *Hogden*, (1899) 1 Ch. 5, an appeal was brought from the judgment of Stirling, J. (1898) 1 Ch. 478, (noted ante vol. 34, p.443). It may be remembered that the proceedings were instituted to compel the specific performance of a contract made in 1886 for the purchase of a reversionary interest in a fund, a deposit had been paid, but no steps had been taken to carry out, or compel the carrying out of the contract by the purchaser for about ten years, when the reversion having fallen into possesion, the present proceedings were instituted. Stirling, J. refused specific performance, on the ground of delay, but held that the purchaser had a lien on the fund for his deposit and interest; this decision the Court of Appeal (Lindley, M.R. and Chitty and Williams, L.J.J.) have now affirmed.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT OF CANADA.

Ontario.] GRAND TRUNK RAILWAY *v.* RAINVILLE. [Nov. 21, 1898.

Negligence--Findings of jury—Evidence—Concurrent findings of courts appealed from.

In an action against a railway company for damages in consequence of plaintiff's property being destroyed by fire alleged to be caused by sparks from an engine of the company, the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiff's property which, in case of emission of sparks or cinders would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiff's property. A verdict against the company was sustained by the Court of Appeal.

Held, affirming the judgment of the latter Court, 25 Ont. App. 242 and following *Senesac* v. *Central Vermont Railway Co.*, 26 S.C.R. 64; *George Matthews Co.* v. *Bouchard*, 28 S.C.R. 580, that the jury having found that the accumulation of rubbish along the railway property caused the damage, of which there was some evidence, and the finding having been affirmed by the trial court and Court of Appeal, it should not be disturbed by a second Appellate Court.

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

Ex. Court.] QUEEN *v.* WOODBURN. [Nov. 21, 1898.

Contract—Public work—Formation of contract—Ratification—Breach.

On Nov. 22nd, 1879, the Government of Canada entered into a contract with C. by which the latter undertook to do all the Government binding for five years from said date. The contract was executed under the authority of 32 & 33 Vict., c. 7, s. 6, and, on Nov. 25th, 1879, was assigned to W., who performed all the work sent to him up to Dec. 5th, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's Printer, as follows: "I am directed by the Honourable the Secretary of State to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution under the same rates and conditions as under the contract which

has just expired." W. performed the work for two years under authority of this letter, and then brought an action for the profits he would have had on work given to other parties during the seven years.

Held, that the letter of the Queen's Printer did not constitute a contract binding on the Crown; that the statute authorising such contract was not directory, but limited the power of the Queen's Printer to make a contract except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's Printer; and that he could not recover in respect of the work done after the original contract had expired.

On Oct. 30th, 1886, an Order-in-Council was passed which recited the execution and assignment of the original contract, the execution of the work by W. after it expired, and the recommendation of the Secretary of State that a formal contract should be entered into extending the original to Dec. 1st, 1887, and then authorised the Secretary of State to enter into such formal contract with W., but subject to the condition that the Government should waive all claims for damages by reason of non-execution or imperfect execution of the work, and that W. should waive all claims to damages because of the execution of binding work by other parties, up to the date of said extension. W. refused to accept the extension on such terms.

Held, that W. could not rely on the Order-in-Council as a ratification of the contract formed by the letter of the Queen's Printer; that the element of consensus enters as much into aratification of a contract as into the contract itself; and W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it.

After an appeal from the final judgment of the Exchequer Court was lodged in the Supreme Court, the Crown obtained leave to appeal from an order of reference to ascertain the amount of the suppliant's damages.

Held, that the judge of the Exchequer Court had authority to allow the appeal and it was properly before the Supreme Court.

Newcombe, Q.C., for appellant. *Hogg*, Q.C., and *Sinclair*, for respondent.

British Columbia.] COLE *v.* POPE. [Dec. 14, 1898.

Contract—Rescission—Innocent misrepresentation—Common error—Sale of land—Failure of consideration.

An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation.

But where by error of both parties and without fraud or deceit, there has been a complete failure of consideration a court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud.

Clute, Q.C., for appellant. *Lewis* and *Hamilton*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Meredith, J.] ROBINSON *v.* PURDOM. [Jan. 24.

Easement—Right of way—Limited grant—Colourable user.

A right of way granted for the benefit of a specific lot cannot be used by the owner of that lot generally, apart from his ownership and use of the lot.

Judgment of MEREDITH, J., affirmed.

T. H. Purdom, for the appellant. *D. J. Donahue*, for the respondent.

Osler, J.A.] SHERLOCK *v.* POWELL. [Feb. 22.

Security for costs—Appeal—Court of Appeal—R.S.O. c. 153, s. 39 (2)—Rule 826.

Rule 826 is applicable to an appeal under sec. 39 (2) of the Mechanics Lien Act, R.S.O. c. 153, by the respondent in the Court below from the order of a Divisional Court reversing the judgment upon the trial of a mechanic's lien action, where the amount in question is more than $100 and not more than $200; and, therefore, security for the costs of such an appeal must be given, unless otherwise ordered.

Starr, for the plaintiff. *Aylesworth*, Q.C., for the defendant.

Osler, J.A.] SMALL *v* HENDERSON. [Feb. 23.

Security for costs — Application for, after judgment — Appeal to Court of Appeal.

Where the judgment of the High Court is against a defendant, and he is appealing to the Court of Appeal, he is not entitled to an order requiring the plaintiff to give security for costs.

Where the defendants would have been entitled to such an order at the commencement of the action, but did not take it because they feared that it would be set aside owing to plaintiff, though resident out of the jurisdiction, owning property within it, an application after judgment, upon the ground that the plaintiff had ceased to own property within the jurisdiction, was refused by a judge of the Court of Appeal. *Exchange Bank v. Barnes*, 11 P.R. 11, followed.

James Bicknell, for the defendants. *J. G. Hay*, for the plaintiff.

HIGH COURT OF JUSTICE.

Boyd, C.] IN RE SOLICITORS. [Jan. 30.

Solicitor—Bill of costs—Payment—Delivery—Equivalent—Examining dockets.

Where no bill of costs has been delivered by a solicitor to his client, there cannot be payment within the meaning of s. 49 of the Solicitor's Act, R.S.O., c. 174, which refers to the payment of a delivered bill. And where one of the solicitors and their client, according to the solicitor's evidence, together examined the items in the solicitor's dockets, which amount to over $1,500, and the solicitor explained that certain entries had not been made which would amount to $300, and the client paid the solicitors $1,500 in full settlement :—

Held, that this was not equivalent to the delivery of a bill and payment after consideration.

W. H. Blake, for the solicitors. *Kelmer*, for the client.

Boyd, C., Moss, J.A.] SILVERTHORN *v.* GLAZEBROOK. [Feb. 2.

Mortgage—Consolidation—Derivative mortgage—Redemption.

The plaintiff sought to consolidate securities as against the defendant which were held by him, first, as legal mortgagee of land of which the defendant was the owner of the equity of redemption, and secondly as derivative mortgagee under a security mortgaged by the defendant to him.

Held, that he had a right to do so, for the doctrine of consolidation is applicable wherever at the date when redemption is sought two mortgages are united in one hand and redeemable by the same person.

O'Brian, for the plaintiff. *Mills*, for the defendant.

Meredith, C.J.] IN RE WHITTY. [Feb. 21.

Will—Gift—Mistake in name of donee—Validity—Declaration—Originating notice—Rule 938.

A testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, and Maria Cummins.

Held, that the gift took effect in favour of Maria Cummins.

Held, also, that a declaration to that effect could properly be made upon an originating notice under Rule 938.

In re Sherlock, 18 P.R. 6, followed.

Heggie, for executors and adult next of kin of testator. *A. McKechnie*, for Maria Cummins. *F. W. Harcourt*, for official guardian.

Meredith, C.J., Rose, J., MacMahon, J.] [Jan. 10.

IN RE CANADIAN NIAGARA POWER CO.

Contract—Dependent or independent covenants—License—Forfeiture.

To determine whether covenants or agreements are dependent or independent, they are to be construed according to the intent and meaning of the parties, to be collected from the instrument, and to the circumstances legally admissible in evidence with reference to which it is to be construed. Where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract. *Graves* v. *Legge*, 9 Ex. at p. 716; *Beltini* v. *Gye*, 1 Q.B.D. 183; and *Gladholm* v. *Hayes*, 2 M. & G. 257, referred to.

Agreement under seal, dated April 2, 1892, between the Commissioners for the Queen Victoria Niagara Falls Park and the above named company, recited that the company had applied to the commissioners for the right to take water from the Niagara River at a point or points in the park, in order to generate electricity and pneumatic power for transmission beyond the park, and witnessed inter alia, as follows:—(1.) That for the purpose recited the commissioners granted to the company a license irrevocable, save as thereinafter limited, to take water, etc. (4.) That the license granted was for the term of twenty years from May 1, 1892, at a fixed rental; proviso for a re-entry and termination of the term upon the rent becoming in arrears for three months. (9.) That the commissioners should not grant to any other person any right to use the waters of the river within the park so long as the agreement was in force, nor should the commissioners themselves use the water to generate power except for the purposes of the park, save as regards the exceptions contained in par. 12. (10.) The company undertake to begin the works hereby licensed to be constructed by them on or before May 1, 1897; and to have proceeded so far with the said works on or before the 1st of November, 1898, that they will have completed water connections for the development of 25,000 horse power, and have actually ready for use, supply and transmission 10,000 developed horse-power by the said last mentioned day. (12.) That the company might agree to supply electricity, etc. (13.) If the company should at any time or times continuously neglect for the space of one year effectually to generate electricity or pneumatic power, as hereby agreed by the company, unless hindered by unavoidable accident, the Lieutenant-Governor in Council may then and from thenceforth declare this agreement, the liberties, licenses, powers, and authorities thereby granted, and every one of them, to be forfeited, and thenceforth the same shall cease and determine and be utterly void and of no effect whatever. The company failed to proceed with the works on or before the 1st November, 1898, so as to comply with par. 10, not having been hindered by unavoidable accident.

Held, 1. The agreement was not by reason of such failure determined, void, and of no effect, nor could it be so declared by the park commissioners.

2. The Lieutenant-Governor in Council, or the commissioners, could not, by reason of the non-generation of electricity by the 1st November, 1898, or by reason of the failure of the company to proceed, declare the agreement forfeited.

3. The Government and the commissioners were not relieved from the agreement contained in par. 9.

Per MEREDITH, C.J.—Par. 10 is to be treated as a promise or covenant, and not as a condition, (1) because of its form; (2) because the stipulation does not go to the root of the consideration, and is therefore a subsidiary promise rather than a vital one; (3) because the agreement contains an express provision for forfeiture, in certain events, par. 13.

Semble, that a breach of the undertaking in par. 10 is within the provisions of par. 13.

Irving, Q.C., and *Lash*, Q.C., for the Crown and Park Commissioners. *Wallace Nesbitt* and *Monro Grier*, for the company.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 8.

HOWELL LITHOGRAPHIC CO. *v.* BRETHOUR.

Company—Corporate name—"Limited"—Abbreviation in contract—Liability of directors—Right of action—Vested right—Statutes—"Stay' clause—Retroactivity.

Appeal by the defendants from the judgment of the County Court of Wentworth in favour of the plaintiffs for the recovery of $160.50 from the defendants, who were the five directors of the Burford Canning Co., an incorporated company. The claim arose upon a bill of exchange drawn by the plaintiffs upon the Burford Canning Co. for the price of work done, which was, on its face, addressed to "The Burford Canning Co.," and accepted by the drawees by the signature, "The Burford Canning Co., Ltd." The acceptance was given a few days after the Royal assent had been given to the Ontario Act, 60 Vict., ch. 28, sec. 22 of which provided that in the case of contracts by limited liability companies the word "Limited" should be written or printed in full, a previous statute, 52 Vict., c. 26, ss. 2 and 3, having made the directors liable for the amounts due upon such contracts where the word "Limited" did not appear. The writ of summons in this action was issued on the very day on which the Royal assent was given to the Act 61 Vict., c. 19, s. 4 of which suspended the operation of the Act of the previous session.

Held, 1. The use of the abbreviation "Ltd." was not a compliance with 52 Vict., c. 26, s. 2, which required the word "Limited" to be distinctly written or printed after the name of the company.

2. The address to "The Burford Canning Co." in the draft was the first place in which the name of the company appeared in the contract, but that the fact of its having been so written there by the plaintiffs did not dis-

entitle them to recover. If the company chose to execute a contract containing that description of their corporate name, they must be taken to have done so with the knowledge that they were at the same time making the contract personally binding upon their directors.

3. No stay was created by 61 Vict., c. 19, s. 4, of any action but one brought under 60 Vict., c. 28, s. 22 (1), and the corresponding section of the revision of 1897, so that, upon this view of the effect of 52 Vict., c. 20, s. 2, the plaintiffs were entitled to recover. If, however, the use of the contraction "Ltd." was a compliance with the last-mentioned section, the plaintiffs were still entitled to recover, because the contract was made some days after the passing of 60 Vict., c. 28, s. 22, which required the unabbreviated word "Limited" to be used; and the plaintiffs, upon the execution of the contract by the Burford Canning Co., Limited, became and remained entitled to look to the directors personally, and had a vested right of action, with which the "stay" clause, s. 4, of 61 Vict., c. 19, could not interfere, there being nothing in it which required the Court to hold it to be retrospective. Appeal dismissed with costs.

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

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

IN RE FARMERS' LOAN AND SAVINGS COMPANY.

DEBENTURE HOLDERS' CASE.

Company—Winding-up—Creditors — Priorities — Debenture holders—Depositors—Power to pledge assets—Directors — Form of debenture—Charge—Nature and extent of.

This company being in liquidation under the Dominion Winding-up Act, a claim was made on behalf of holders of the company's debentures that they were entitled to a charge on the assets of the company in priority to depositors. The company was formed on Oct. 19, 1871, under C.S.U.C., c. 53, which consolidated the original Building Societies Act, 9 Vict., c. 90, with the Acts amending it. By s. 38 the right of a society formed under it to borrow money, if authorized by its rules to do so, was recognized. Subsequent legislation (e.g., 37 Vict., c. 50 (D) and R.S.O., 1877, c. 164), too, had practically converted what were originally building societies into loan companies, and had conferred largely increased borrowing powers upon them. By rule 7 of the company, passed under the authority of s. 2, the directors were authorized to borrow money for the use and on the assets of the company, to receive money on deposit, and to "loan" or invest such money either on mortgage on real estate or in any other way they might think best for the interests of the institution.

Held, that this company was invested with the power to borrow money for its purposes, and to give securiety upon its assets for the payment of the money borrowed. *Murray* v. *Scott*, 9 App. Cas. 519, followed. And

this power to pledge the a was one which might be delegated to the directors under C.S. ., c. 53, s. 5. The debentures upon which the claimants relied were headed "Land Mortgage Debenture," and contained a promise by the president and directors to pay to the person named a certain sum at a particular time and place, with interest, and were signed by the president and secretary, under whose signatures were the following words: "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada.

Held, that these instruments created a charge upon the property of the company.

Per ROSE and MACMAHON, JJ., that such charge was upon the capital and assets of the company invested in mortgages on approved real estate situate in the Dominion of Canada at the date of the winding-up order.

Per MEREDITH, C.J., that the charge was such as entitled the debenture holders to be paid out of the assets of the company in priority to the depositors and other creditors.

Ruling of the Master in Ordinary reversed on appeal.

J. T. Small and *R. B. Henderson*, for the appellants, certain of the debenture holders. *Wallace Nesbitt*, *C. W. Beatty* and *Glyn Osler* for other debenture holders. *W. N. Miller*, Q.C., for Dominion Bank. *J. K. Kerr*, Q.C., and *W. Macdonald* for certain of the depositors. *W. M. Douglas* and *F. B. Osler* for liquidator.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 15.

LINDSAY *v.* ROBERTSON.

Landlord and tenant—Creation of new term by overholding—Delivery of keys—Continued occupation of part of premises—Use and occupation—Evidence of value.

Down to the 12th February, 1898, the defendants were tenants to the plaintiff at $1,000 a year, payable quarterly, of the whole of the plaintiff's premises, including a single room which was occupied at the time of the commencement of the tenancy by a person who continued in occupation and paid rent to the defendants, for a term which expired on the 12th February, 1898, but which the defendants had the right to renew for the further term of two years. Before the expiration of the term the defendants notified the plaintiff that they did not intend to exercise their option, and her solicitors advertised for, but were not successful in finding, a new tenant. The defendants, within two or three days after the 12th February, sent the keys of the premises to the plaintiff, who returned them at once. The occupant of the single room continued in possession thereafter.

Held, that the defendants should not, by reason of their not having delivered up the keys at the expiration of their term, or by reason of the continued occupation of the single room, be taken to have exercised the option of keeping the premises for the extended period of two years.

Held, however, that the defendants were liable for use and occupation, upon the principle of the decision in *Harding* v. *Crethorn*, 1 Esp 57.

The plaintiff, in her pleadings, made no claim to recover for use and occupation; but the defendant's counsel, at the trial, waiving objection on this ground, proposed to offer evidence of the value of the premises, which was objected to by counsel for the plaintiff, and the objection sustained after a formal tender of the evidence.

Held, that the evidence was improperly rejected; no particular contract was to be inferred from the mere fact of a holding-over after the expiration of a term; the former rent would be some evidence of the value of the premises, but evidence which might be rebutted. Judgment of the County Court of Elgin reversed.

E. D. Armour, Q.C., for the appellants, the defendants. *W. K. Cameron*, for the plaintiff.

Street, J.] FLYNN *v.* COONEY. [Feb. 15.

Interpleader—Seizure by sheriff under execution—Landlord's claim for rent—Sheriff acting in interest of execution creditor—Delay—Order—Issue.

A sheriff, having in his hands a writ of fi. fa. against the defendant's goods, of the 23rd June, 1898, went into the hotel of which the defendant was the tenant, with the execution, and informed the defendant that he seized his furniture and effects. He then made a pencil memorandum of a number of articles stated to be in the house, first notifying the judgment debtor that everything was under seizure, and accepting his verbal undertaking to hold it for him. This course was pursued in accordance with instructions from the solicitor for the execution creditor, in order to endeavour to get the defendant to make payments on account of the execution. On the 8th August the landlords of the defendant put in a bailiff to seize the same furniture and effects for rent due on the 6th August. The bailiff spoke to the sheriff, who said that he would not undertake to sell the goods and pay the rent. Nothing further was done until the 6th October, 1898, when the landlords put another distress warrant into the bailiff's hands for rent since accrued. The sheriff was notified of this in writing on the 29th October, and on the 7th November, 1898, he swore to an affidavit upon which he applied for an interpleader order, and in which he stated that he had remained in possession from the 23rd June until the time of application. Being cross-examined, he said that he was holding on until the landlords put him out of the place.

Held, upon the evidence, that the sheriff had been acting throughout in the interest of the execution creditor as against the interest of the claimants,

and for this reason, as well as for his delay, was not entitled to an interpleader order.

Semble, that if an interpleader order were made, the issue would be as to whether there was a seizure by the sheriff, and if so, whether it was abandoned; and if there were a seizure continuing down to the time of the application, whether the rent due at the time of the seizure had been paid in full.

W. H. Blake for claimants. *J. M. Clark* for sheriff. *F. C. Cooke* for execution creditor.

Boyd, C., Moss, J.A.] [Feb. 21.

PEOPLE'S LOAN AND DEPOSIT CO. *v.* DALE.

Indigent debtor—Discharge from custody—Examination—"Satisfactory," meaning of—Affidavits—Appeal.

The expression in s. 9 of the Indigent Debtors' Act, R.S.O. c. 81, "if the matter thereof is deemed satisfactory—" referring to the examination of the debtor means, "if he fully and credibly gives the information called for by viva voce questions." The object of the statute and the examination is to test the verity of the statement that the debtor has not wherewith to pay—that he is in fact an indigent debtor—and if he fully and fairly discloses his dealings with his property so as to make it appear that his affidavit is correct, and that he has in truth no means in his possession or under his control to pay any part of the claim, then he should be discharged from custody, even though he may have fraudulently disposed of his property, and although his manner of dealing therewith may have been unsatisfactory for that reason.

Wallis v. *Harper*, 3 P.R. 50., *Hesketh* v. *Ward*, 4 C.L.J. 176, and *Foster* v. *Vanwormer*, 12 P.R. 597, followed.

Held, also, that affidavits could be looked at upon a motion for discharge of the defendant, to supplement the examination, but only as an indulgence where filed after the appeal was launched.

Wallace Nesbitt, and *Tytler*, for defendant. *Aylesworth*, Q.C., and *J. H. Moss*, for plaintiffs.

Falconbridge, J.] IN RE CAMPBELL. [Feb. 24.

Infant—Maintenance—Contingent interest—Life insurance.

An order was made for payment, out of a fund in Court to which an infant was contingently entitled, of an allowance for his maintenance, upon security being given by way of life insurance for the benefit of those who would be entitled upon the death of the infant under full age. *Re Arbuckle* 14 W.R. 585, followed.

Clute, Q.C., for applicant. *J. Hoskin*, Q.C., for infant.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 25.

MCINTYRE *v.* SILCOX.

Life insurance—Benefit of children—Alteration of apportionment by will—Gift to others and to grandchildren—Validity of, as against creditors—Cancellation and re-issue of policies.

Judgment of Meredith, J., 29 O.R. 593, 34 C.L.J. 632, affirmed.

J. A. Robinson, for the appellant. *T. W. Crothers*, for the respondents.

Boyd, C., Ferguson, J., Robertson, J.] [Mar. 1

REGINA *v.* MOUNT.

Liquor License Act—Conviction under—Sale to inebriate—Order forbidding—Requisites of—R.S.O. c. 245, s. 124.

The defendant, a licensed tavern keeper in the city of C., in the county of K., was convicted under s. 124 of the Liquor License Act, R.S.O. c. 245, of selling liquor at a specified time and place to a certain person, "knowing that the sale of liquor to the said J. H., a drunkard, was prohibited by an order in open court," made by the convicting magistrate.

Upon this conviction being removed by *certiorari* the "order" returned was a memorandum signed by the magistrate, running thus: "I make an order forbidding any licensed person giving liquor to J. H., in the county of K., for one year."

It did not appear where, and in what circumstances, this was made; whether in open court; whether after summons to J. H.; whether excessive use of liquor by him was proved or admitted, or not.

Held, that the conviction was bad, and there was nothing in the evidence by which it could be amended.

Semble, ROBERTSON, J., dissenting, that if there were a proper order brought to the knowledge of the defendant, there would be a violation of the law in making a sale to the inebriate, though the liquor was given to and actually drunk by other persons on the licensed premises.

Haverson, for the defendant. *M. Wilson*, Q.C., for the complainant.

Street, J.] IN RE SOLICITOR. [Mar. 2.

Solicitor—Taxation of costs against client—Scale of costs—Ascertainment of amount—Solicitor's knowledge of facts.

A deposit receipt for $180 was issued by a chartered bank in 1877 in favour of a person who died in 1879. After the death the sister of the deceased, who claimed to be the transferee of the deposit receipt, presented it to the bank, with a signature purporting to be that of the deceased indorsed upon it. Upon the surrender of this document, the bank issued a new receipt for the same amount, also in favour of the deceased, and

delivered it to the sister, who supposed it was in her own name. The bank afterwards, and before any notice of a claim on behalf of the administratrix of the deceased's estate, paid the sister the amount of the second deposit receipt, upon being indemnified. The administratrix in 1893 brought an action against the bank wherein the writ of summons was indorsed with a claim for $355.60, being the amount of money in the hands of the bank belonging to her, or for an order for the delivery to the plaintiff of the second deposit receipt, or for an order declaring that the bank held the receipt, and the moneys secured thereby, as trustee for her. At the time of the issue of the writ the knowledge of the administratrix and of her solicitor was confined to the fact that the bank had issued a deposit receipt in favour of the deceased for $180 after she had been dead for several months, and that the sister had received the amount of it. The real claim, as developed at the trial, was upon the first deposit receipt, and the material contention was whether the indorsement was genuine or forged. The action was dismissed.

Held, that the solicitor who brought the action on behalf of the administratrix was entitled as against his client to costs on the scale of the High Court, as the fact that the real claim was upon the earlier receipt only was not known to either when the action was begun, and there was sufficient room for doubt whether a claim could be ascertained, after the death of the creditor, by the signature of the debtor, to warrant the bringing of the action in the High Court; and the plaintiff would probably have received a certificate for costs on the High Court scale had she succeeded in the action.

W. E. Middleton for the client. *F. A. Anglin* for the solicitor.

Street, J.] VENNARD *v.* TOWNSHIP OF BRUCE. [March 3.

Jury notice—Action against municipal corporation—Non-repair of bridge—R.S.O. c. 51, s. 104.

Appeal by the plaintiff from an order of a local judge striking out the plaintiff's jury notice as irregular and improper. The action was brought to recover damages for injuries sustained by the plaintiff by reason of the alleged negligence of the defendants in not keeping a certain bridge in repair. By s. 104 of the Jud. Act, R.S.O. c. 51, it is provided that "all actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads, or side-walks, shall be tried by a judge without a jury."

Held, having regard to the object of the enactment, that it applied to a part of a highway formed by a bridge. Appeal dismissed with costs to the defendant in any event.

J. H. Moss, for plaintiff. *W. H. Blake*, for defendants.

Street, J.] DENISON v. WOODS. [March 3.

Costs—Taxation—Counsel fee on reference—Advising on evidence—Appeal and cross-appeal from report—Copy of evidence.

An action by an architect to recover $600 for professional services was by consent referred for trial to an official referee, who reported that the plaintiff should recover $397. The defendant had before action tendered $325, and had paid that amount into court with his defence. The defendant appealed from the report, and the plaintiff also appealed, but not until after the defendant's appeal had been set down. Both appeals were dismissed with costs. A further appeal by the defendant to the Court of Appeal was also dismissed.

Held, upon appeal from taxation of costs, that the plaintiff was entitled to tax a counsel fee upon the trial before the referee, the amount of which would not be reviewed, and also a fee for counsel advising on evidence. *Re Robinson*, 16 P.R. 423, distinguished.

Held, also, that the defendant was not entitled to tax as part of his costs of the plaintiff's appeal from the report the amount paid for a copy of the evidence taken before the referee, which was required by the defendant for his own appeal.

F. A. Anglin, for defendant. *W. E. Middleton*, for plaintiff.

Ferguson, J., Rose, J., Robertson, J.] [March 4.

CITY OF TORONTO *v.* CANADIAN PACIFIC R. W. CO.

Stay of proceedings—Action for rent—Pending reference as to title and other matters—Vendors and Purchasers Act—Scope of reference.

The plaintiffs having agreed to lease to the defendants a certain property known as the "alternative site," for successive terms of fifty years during all time then to come, at a fixed rental, an order was made, by consent, upon a petition by the defendants under the Vendors and Purchasers Act, R.S.O., c. 134, directing the plaintiffs to deliver to the petitioners an abstract of title of the property, "and that it be referred to J. S. C., referee; and that all matters as to time of delivery of the abstract, the sufficiency thereof, and all subsequent questions arising out of or connected with the title to the said site, and the carrying out of the said agreements respecting the making of title to and the conveying of the said alternative site, be from time to time determined by the said referee, including the costs of the said reference, subject to appeal." Pursuant to this order, an abstract was carried into the referee's office, and the title was accepted by the defendants, who had before this been and since continued in possession of the property. The terms of the lease not having been settled by the referee, and no rent having been paid by the defendants while the reference was still pending, this action was brought to recover the rent of the property from the time at which it was agreed the first term should begin.

By s. 4 of the Act, any question arising out of or connected with the

contract, excepting a question affecting the existence or validity of the contract may be the subject of adjudication.

Held, ROSE, J., dissenting, that the order directed a reference of all questions and matters arising out of the agreements and the carrying of them into effect; that the settlement and payment of the rent was one of the matters virtually, if not expressly, embraced in the reference; that it was a matter in respect of which an order might be made under s. 4; that the plaintiffs could not, without the leave of the Court, single out one of the matters so pending and bring and sustain a separate action in regard to it; and therefore this action should be perpetually stayed. *Frank* v. *Bosuett*, 2 My. & K. 618; *Bell* v. *O'Reilly*, 2 Sch. & Lef. 430, and *Prothero* v. *Phelps*, 25 L.J., Ch. 105, referred to.

Per ROSE, J., That the referee had power under the order to determine the question of title and the questions respecting the form and execution of the lease, and the enforcement of the payment of the rent and of the other provisions must be by action; but it would not be convenient to allow the action to proceed until the lease should be settled; and it should, therefore, be stayed until further order.

Robinson, Q.C., and *Fullerton*, Q.C., for plaintiffs. *E. D. Armour*, Q.C., and *Angus MacMurchy*, for defendants.

Province of Quebec.

SUPREME COURT OF CANADA.

Que.] GUERIN *v.* MANCHESTER FIRE ASS. CO. [Nov. 21, 1898.

Fire insurance—Conditions of policy—Notice—Proof of loss—Change in risk—Insurable interest—Mortgage clause—Arbitration—Condition precedent—Foreign statutory conditions—R.S.O. (1897) c. 203, s. 168—Transfer of mortgage—Assignment of rights under policy after loss—Signification of assignment—Arts. 1571, 2475, 2478, 2574, 2576, 2483 C.C.

A fire insurance policy provided by a mortgage clause that the insurance as to the interest of mortgagees should not be invalidated by neglect of the mortgagor or owner, nor by occupation of the premises for purposes more hazardous than permitted thereunder. The premises insured were at the date of the policy used as a dwelling house, and the policy was indorsed that "at the request of the assured" the loss, if any, should be payable to a mortgagee "as his interest might appear, subject to the conditions of the above mortgage clause." The premises insured were situated in the Province of Quebec, and the policy was subject to conditions taken from the Revised Statutes of Ontario and others, styled "Variations from Conditions." Four of the conditions in question were as follows:

"3. Any change material to the risk and within the control or knowledge of the Assured, shall avoid the policy as to the part affected thereby,

unless the change is promptly notified in writing to the Company, or its Local Agent; and the Company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the Assured shall, if he desires the continuance of the policy, forthwith pay to the Company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

4. If the property insured is assigned without a written permission endorsed thereon by an Agent of the Company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession, or by the operation of the law, or by reason of death."

Condition 13 provided for the usual notices and proofs and particulars of loss. Another condition stipulated that no payment should be made until thirty days after completion of proofs of loss, and one of the "variations" added a condition that no action "against the company for any claim under the policy should be sustainable until after an award fixing the amount of the claim," as therein provided.

Prior to the loss the mortgages were transferred to the plaintiff, but the policy was not transferred to him. After the loss happened the mortgagee assigned to the plaintiff all his right, title and interest in the policy and subrogated him in all rights against the company thereunder and authorised him to collect the claims arising from the loss. The evidence failed to show that the assignment had been signified upon the company, or that notice and proofs of loss or value of the premises destroyed had been made in form and effect as required by the conditions. It was shown however, that the occupation of the premises had been changed without the knowledge or consent of the company, and at the time of the loss that they were and for some time had been used as a tavern. In an action by the assignee to recover the amount of the insurance.

Held, that the policy had been avoided by the unauthorized change in the occupation of the insured premises, by the absence of interest in the mortgagee at the time of loss, by failure to give notice of the assignment, by failure to give notice and make proofs of loss and the value of the premises destroyed according to the terms of the policy, and that the action could not be maintained against the company in the absence of signification of the assignment of the claim as required by Art. 1571 of the Civil Code.

Held, also, that an award pursuant to the conditions of the policy fixing the amount of the claim was a condition precedent to any right of action thereunder against the company.

TASCHEREAU, J., dissented from that part of the opinion of the majority of the court which related to the failure of proofs and notice of loss, the unauthorized change in the premises, and the necessity of an award, and held that the mortgage clause rendered such failure and neglect ineffectual

as against the mortgagee's rights, but concurred in the judgment dismissing the appeal with costs on the ground that the mortgagee named in the indorsement had no insurable interest in the property insured at the time of the loss, and consequently had no rights under the policy and could assign no right of action to the plaintiff, his Lordship doubting, however, whether the courts of the Province of Quebec could have power to declare variations from the conditions imposed by the Ontario statute reasonable or unreasonable under the provisions of that statute Appeal dismissed with costs.

Rielle and *Madore* for appellant. *Martin* for respondents.

QUEBEC ADMIRALTY DISTRICT.

Routhier, L.J.] COORTY *v.* THE GEORGE L. COLWELL. [Nov. 30, 1898.

Maritime law—Necessaries supplied to foreign ship in foreign port—Owners domiciled out of Canada—International law—Commercial matter—Action in rem.

The Exchequer Court of Canada, under the provisions of 24 Vict., c. 10, s. 5, may entertain a suit against a foreign ship within its jurisdiction for necessaries supplied to such ship in a foreign port, not being the place where such ship is registered, when the owners of the ship are not domiciled in Canada. *Cory Bros.* v. *The Mecca* (*1895*) P.D. 95, followed.

2. Under the principles of International Law the courts of every country are competent, and ought not to refuse, to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters; and is declared in the provisions of Art. 14 C.C., P.L.C., and Arts. 27, 28 and 29, C.C.L.C.

Taschereau for plaintiff. *Pentland*, Q.C., for ship.

Nova Scotia.

SUPREME COURT.

Full Court.] HIGGINS *v.* CLISH. [Jan. 14.

Contract—Fraudulent representation—Sale of goods—Representations as to condition—Expression of opinion—Written guarantee.

Action claiming the return of a sum of money paid to defendants as the price of an engine and boiler, and asking damages for alleged false and fraudulent representations as to the character and capacity of the engine and boiler. The jury found in plaintiffs' favour. The first complaint as to the insufficiency of the boiler was made five months after it was first used. Defendants did not categorically agree to warrant the qualities and capacities of the engine and boiler; but during a conversation as to their

character and the purposes for which they were required, the question was asked whether defendants would warrant them, and the answer was made that they would.

Held, that these words would only mean that the engine and boiler were good and sound, and reasonably fit for the purposes of an engine and boiler of the character and power stated, and not that defendants would warrant them to operate a grist mill and a shingle mill that they had never seen.

There was evidence that defendants agreed to let plaintiffs have the engine and boiler for a smaller amount than that at first demanded, and to give a written guarantee for the term of one year.

Held, that in a case where there was a conflict of evidence it was improbable that one undertaking collateral to the contract (the least important) would be reduced to writing and the other not, and that the giving of the written guarantee was a fact of the highest importance.

Held, also, that if the statements relied on by plaintiffs did not amount to a warranty they must be regarded as mere expression of opinion.

R. L. Borden, Q.C., and *H. A. Lovett*, for appellants. *F. A. Laurence*, Q.C., for respondents.

Full Court.] QUEEN *v.* SARAH SMITH. [Jan. 14.

Conviction for using profane language in street quashed because words complained of were not set out—Costs.

Defendant was convicted by the stipendary magistrate of the City of Halifax for that she "in said City of Halifax, . . . being in one of the public streets of the said City of Halifax, did openly use profane language." The words complained of and upon which the conviction was founded were not set out in the summons, information or conviction. The conviction having been brought up by writ of certiorari.

Held, following *Queen* v. *Bradlaugh*, 3 Q.B.D. 607, and other cases, that the conviction was bad and must be quashed, on the ground stated.

The motion for the certiorari was opposed by counsel acting for the stipendiary magistrate of the city, and the informant, one of the police of the city. The motion having been allowed with costs to be paid by the stipendiary magistrate and the informant, on appeal from that part of the order which awarded costs.

Held, dismissing the appeal, that as the stipendiary and the informant could have avoided all liability by not opposing the motion for the writ, and as the question of costs was in the discretion of the judge to whom the application was made, who in this case had followed the usual course by directing them to be paid by the unsuccessful party, there was no reason for reviewing his discretion.

Per MEAGHER, J.—The costs should be confined to the costs occasioned by opposing the motion at Chambers.

W. F. MacCoy, Q.C., for the Crown. *J. J. Power*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] GLINES *v.* CROSS. [Feb. 18.

Principal and agent—Commission of agent on sale of land.

Appeal from a County Court.—Defendant authorized the plaintiffs, who are real estate agents, to sell certain property of his for $14,400, and agreed to pay as commission in the event of sale 5 per cent. on the first $1,000, and 2½ per cent. on the balance. Plaintiffs then introduced to defendant an investor and shewed him the defendant's property and tried to effect a sale. The same person afterwards purchased the property from defendant for $14,000, but through another agent. The County Court Judge at the trial allowed the plaintiffs the full commission on $14,000; but afterwards, on an application under s. 308 of the County Courts Act, reduced the allowance by one-half. The plaintiffs appealed, and on the argument of the appeal, defendant contended that the plaintiffs were not entitled to anything.

Held, that, as defendant had not entered any formal appeal, it was not open to him to object to the verdict.

Held, also, that the County Court Judge has power, under s. 308 of the County Courts Act, R.S.M., c. 33, to reduce the verdict as he had done, and plaintiff's' appeal should be dismissed with costs.

McMeans, for plaintiffs. *Wilson*, for defendant.

Full Court.] WATSON MANUFACTURING CO. *v.* SAMPLE. [Feb. 9.

Statute of Limitations—Acknowledgment—Failure of consideration—Sale of goods—Rescission—Retaking possession on default in payment.

Appeal from County Court.—Defendant, March 24, 1888, gave an order for a binder to the plaintiff and agreed to pay $150 for it, giving two promissory notes of $75 each, the last of which fell due January, 1891. It was provided both in the order and in the notes that the property in the machine was not to pass to the defendant until payment of the price in full, and that on default in payment of either note the vendor should have the right to take possession of and sell the machine; the notes providing also as follows:—"The proceeds thereof to be applied on the amount unpaid of the purchase price." On default in payment of the first note the vendor retook the machine, sold it, and realized about enough to pay the first note. The notes were afterwards indorsed to the plaintiffs, and in 1893 they employed an agent to collect the amount of both. The agent wrote defendant a letter demanding payment, to which the defendant wrote in reply that the vendors had sold the machine for $70 or $75 before

the notes came due and continued:—"I cannot see that I owe the firm anything but the last note and interest on it."

Held, 1. The action of the vendors in retaking the machine and selling it, did not, under the terms of the agreement, operate as a rescission of the contract; and that there was no failure of consideration for the note sued on.

2. The acknowledgment contained in defendant's letter to the collection agent, warranted the inference of a promise to pay, and was sufficient, under 9 Geo. IV, c. 14, to take the case out of the Statute of Limitations although it was made to an agent of the plaintiffs and not to the original creditors.

Stamford Banking Co. v. *Smith* (1892) 1 Q.B. 765; *Green* v. *Humphreys*, 26 ch. D. 474; and *Tanner* v. *Smart*, B. & C. 603, followed.

Metcalfe and *E. E. Sharpe*, for plaintiffs. *Bradshaw*, for defendant.

Province of British Columbia.

SUPREME COURT.

Drake, J.] STODDART *v.* PRENTICE. [Dec. 15, 1898.

(Lillooet Election Case.)

Contempt of court—Observations in newspaper pending suit—Application to commit—Criminal Code, s. 290 et seq.—R.S.B.C. c. 56, s. 10.

Motion by respondent to commit W. H. Ellis and C. H. Lugrin, manager and editor of the *Victoria Daily Colonist*, for contempt of court, in writing, publishing and procuring to be published in the said newspaper in the issues of 22nd October, 17th and 22nd November, 1898, articles commenting upon the proceedings herein, and intended and calculated to scandalize the Court and to prejudice or interfere with the fair trial of the petition; and further, that the said comments were intended, by means of calumniating Mr. Justice Martin, to deter him from hearing or determining any questions arising herein and from determining the questions now pending before him for determination herein. On an application to dismiss the petition coming up before Mr. Justice Martin, he said that he would prefer some other judge to hear it, as he himself had taken an active part in the late Provincial election, but as counsel on both sides desired it and there being no other judge available he consented to hear the application.

The newspaper in commenting on the matter in an editorial said inter alia: "Judge Martin will have to devote his spare moments to schooling himself into forgetfulness of his political career." Then on 17th November, in an editorial it said: "Mr. Prentice was certain to lose his seat," and on

22nd November, "that the spectacle just presented of election cases being disposed of by a judge who was an active partizan in the recent contest is not edifying;" and "does not produce a good impression upon the public mind."

Sec. 7 of the Supreme Court Act of British Columbia provides that: "Any barrister of not less than ten years' standing, and who has been in actual practice at the Bar of the Court for ten years, shall be qualified to be appointed a judge of the Court."

The objection was taken that the appointment by the Dominion Government of Mr. Martin as a judge of Supreme Court was ultra vires of this section, as Mr. Martin was only called to the Bar in British Columbia on 30th July, 1894.

Held, 1. The Supreme Court has no power to decide the validity of the appointment of one of its members.

2. The Court has power summarily to commit for constructive contempt notwithstanding ss. 290, 292 and 293 of the Criminal Code; but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice.

3. A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case is a contempt of court.

4. A statement to the effect that a judge of the court, having taken an active part in a general election, would have to devote his spare moments to schooling himself into forgetfulness of his political career, is not a contempt.

5. A statement to the effect that the spectacle of such judge trying election cases is not edifying and that it does not produce a good impression in the public mind, is not a contempt.

6. A party to a suit has status to move to commit a stranger to the suit for constructive contempt, although no affidavit is filed by him or on his behalf, to the effect that the alleged contempt is calculated to prejudice him in his suit.

7. Any person may bring to the notice of the court any alleged contempt.

Duff, for the motion. *Hunter*, contra.

Irving, J.] CARROLL *v.* GOLDEN CACHE MINES CO. [Jan. 24.

Practice—Discovery—Cross-examination.

Summons to shew cause why the secretary of the defendant company should not attend at his own expense before the examiner on examination for discovery and answer certain questions, admittedly questions such as would only be allowed on cross-examination.

Held, that an examination for discovery must be conducted as an examination in chief and not as a cross-examination.

Davis, Q.C., for summons. *Wilson*, Q.C., contra.