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IT was not a matter of surprise to hear that the seat rendered vacant by the death of Sir W. J. Ritchie had been filled by the appointment of Mr. Justice Strong, the senior puisne judge of the Supreme Court. The name of Sir John Thompson had been mentioned in connection with the position. He had a right to it, and had he thought proper to take it there would have been none to question the wisdom and propriety of the appointment. He would have done honor to the high position, and both the bar and the public would have joined in hearty congratulations. Failing him, however, the appointment that has been made is the natural one, and will meet with general approval; for not only is Mr. Strong entitled to it by seniority, but his legal attainments and intellectual capacity are of a high order. The position is in many ways a most difficult one, and to fill it with advantage to suitors, to the convenience of the Bar, and with a necessary regard to the peculiar composition of the court requires attributes which are not often found in one man. We trust we may be able to congratulate the new Chief upon his success in these respects, as we now congratulate him upon his promotion.

A STATUTE with an enacting clause of two lines (55 Vict., c. 32, Ont.), provides that "The Law Society of Ontario may, in its discretion, make rules providing for the admission of women to practise as solicitors." This the Society at first refused to do. But the matter was, as our readers are aware, again brought to their attention. The Attorney-General of Ontario was the important factor on this occasion, both by his personal influence and by shadowy suggestions that the Legislature might take the matter up and pass an Act which the Society would consider more distasteful than the rule which they were asked to swallow. The rule was carried by a vote of twelve to eleven, and so women can now claim admission to the ranks.

Whatever may be thought of this question on general grounds it certainly would occur to most thinking men that, whilst the Society ought to be consulted, it is really a question of general policy for the Government of the day to act upon, and it should not throw that responsibility on the profession. Notwithstanding this vote, we venture to say that a large majority both of the profession and Benchers are opposed to the change, and yet those who ought to have decided upon the question of policy can now say that we have opened the door to the ladies of our own free will. It might have been better for those who are not in sympathy with the change, but who nevertheless voted for it, to have acted more on principle and less on the supposed expediency of the case. However, it is perhaps a matter of but little consequence. There is not much harm

likely to result, and not many are likely to take advantage of the privilege. We shall be delighted to welcome those of our legal "sistren" who may join us. They will, of course, understand that the story of the lady who had been attending a women's rights convention applies to them. This lady entered a car filled with men, and looked daggers because no one offered to rise and give her a seat. An old "hayseed," more plucky than the rest, asked, "Be you one of them women's rights women?" Upon receiving a decisive answer in the affirmative, he settled himself comfortably in his corner and observed encouragingly, "Well, then, stand up for your rights like a man!"

WITNESSES AND EVIDENCE.

An impression has extensively prevailed and that not among laymen only, that, since the last session of Parliament, persons charged with offences might be called as witnesses. An examination of the statutes then passed will show, of course, that this is not the case. The misapprehension arose, no doubt, from the fact that a bill to that effect was introduced by the Minister of Justice, but afterwards withdrawn—for the present, it was understood. So that we may expect to see a similar measure proposed next session; one which, we hope, will be unclogged with some of the conditions appearing in the last bill—conditions which, we thought, showed too anxious a desire for the protection of the criminal.

The subject is one that admits of an immense deal to be said on either side, and opens up a question almost as large as that of the abolition of the grand jury. Some of the most conservative of our legislators and judges would seal the mouth of every person charged with or suspected of an offence, and not permit it to be opened again till after the verdict at his trial. They are of the opinion that every such person is not of the same mental calibre as the prisoner (an Irishman, of course) who, upon being asked whether he was guilty or not, replied, "How can I tell, till I hear the evidence?" And here we cannot help recalling the many disputes and altercations we have been witness to in courts of criminal justice as to the admissibility as evidence of statements made by the prisoner, in the course of which very diverse views have been expressed by different judges.

Very old practitioners will remember when the law, as laid down in *Regina* v. *Drew*, prevailed, until disapproved of by the Court of Criminal Appeal. To us of the present day, it appears that the desire to prevent the accused committing himself must have been very strong, when his statements, made in the face of a warning not to say anything to prejudice himself, would not be admitted in evidence, even when there was no shadow of a pretence that any inducement was held out to make a statement. We can, however, without much trouble, lay our finger upon the recorded utterances of some of our judges here (some of them still on the Bench) against the impropriety of receiving in evidence against a prisoner any statement made to, say, a constable, even though that officer denied that anything in the shape of an inducement to make the statement had been held out by him.

We are not now going to enter upon any enquiry as to what the law on this head, as laid down by our highest court of appeal, is; but merely to draw attention to the strong contrast between the criminal procedure in England and that prevailing amongst some of her continental neighbours. It may be that the feeling excited in the breasts of Englishmen by seeing the almost inquisitorial proceedings in the case of an accused person across the Channel has produced a possibly too strong reaction. Where the preliminary procedure there, in such a case, would tend to indicate as a maxim, that "Every accused person is presumed to be guilty till he is proved innocent," our maxim is that such a person is presumed to be innocent till he is proved guilty. But the reaction is evidently too violent; for, if this maxim is to be followed literally, keeping a man in close confinement previous to his trial is an outrage upon an innocent man, and this without regard to the fact whether he is afterwards found guilty or not.

While the records show that there have been cases (very few, indeed, in comparison with the number of the accused) where an innocent person has asserted his guilt, with the hope that the punishment awarded to such an offence will be lightened in his case by reason of his having made a confession; yet may not those who seek to guard against the possibility of such a case be in danger of, to some extent, forgetting the principle upon which these statements are received? Might it not be well to consider whether the presumption that a person will not make an untrue statement against his own interest is not, at least, as strong as that a person will accuse himself of a crime he has not committed while he believes that punishment, to some degree, will be the result?

Sometimes a curious anomaly is the result of the general rule that no admission can be given in evidence, if any inducement is held out to make it. Take, for instance, the case of a prosecutor telling the accused it will be better for him to confess, and thereupon the latter does confess, at the same time surrendering some of the stolen property, saying that it is all that is left of it. The statement must be rejected in conformity with the rule.

It might be well to consider whether, after all, it might not be proper to look equally at the advancement of justice and the protection of the accused—to permit all the *res gestæ*, as it were, to go to the jury, including all statements by the prisoner, and let these statements be commented on by counsel on both sides. As it is now, a jury, who see that the Crown proposes to give in evidence certain statements of the prisoner, and hear all the arguments, *pro* and *con*, about it, must necessarily come to the conclusion that the prisoner said *something*, but which *something* they must not hear, and this *may* have some influence with them, though unknown to themselves. It may have been something unimportant, or which could easily have been explained; but still prisoner's counsel, in ignorance of what the statement was, dare not risk its admission as evidence. Besides which, the judge could—and would, of course—always caution the jury as to the weight to be attached to such statements under certain circumstances, especially where there was nothing shown to make it probable they were true; *au contraire*, where there was corroboration, so to call it, as when (in the case above referred to) the prisoner surrendered the stolen property.

In the Criminal Code, to come into force on the 1st of July next year, will be found several new provisions respecting "Evidence," upon which we may, later on, make some comments. In the meantime, we await further legislation on the subject we have first touched on, feeling sure that Sir John Thompson, now Premier as well as Minister of Justice, will not fail to keep abreast of the demand for all possible improvements in the due administration of justice.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(Law Reports for November—*Continued.*)

COMPANY—WINDING UP—SURPLUS ASSETS, HOW DISTRIBUTABLE—SHARES OF UNEQUAL AMOUNT.

In re Wakefield Rolling Stock Co. (1892), 3 Ch. 165, Williams, J., was called upon to fix the principle on which the surplus assets of a company were distributable. The original capital of the company consisted of £150,000 in £1 shares, of which 30,000 (all that were issued) were fully paid up. By special resolutions, the capital was afterwards divided into 30,000 £1 shares and 24,000 £5 shares. Only £1 was called for on the £5 shares, but the directors were empowered to receive the full amount of such shares, and on these advanced moneys interest was payable to the shareholders. Several £5 shareholders had paid up in full. The surplus which remained after winding up the company was less than the total of the called up capital, including the advances paid by the £5 shareholders. Williams, J., held that the surplus must be distributed as follows: (1) In repayment to the £5 shareholders of the advances over £1 per share, with interest up to payment. (2) In payment to the £1 shareholders of 16s. per share, so as to put them in the position of the £5 shareholders who had only paid 20 per cent. of the amount of their shares. (3) In payment to the £5 and £1 shareholders *pro rata*, treating each £5 shareholder as if he were holder of five £1 shares.

ARBITRATION—SPECIAL CASE, POWER OF COURT TO ORDER STATEMENT OF—AWARD MADE AFTER, BUT BEFORE NOTICE OF, ORDER NISI TO STATE A CASE.

The Tabernacle Permanent Building Society v. *Knight* (1892), A.C. 298, is a decision of the House of Lords, in which two points are decided, viz., (1) that s. 19 of the Arbitration Act, 1889, which provides that an arbitrator shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of a reference, applies to arbitrations under the Building Societies Act, 1874; and (2) that when an order nisi to state a case was granted, and later on the same day, before notice of the order, the arbitrators made and signed their award, the jurisdiction of the court was not thereby ousted, but that the order nisi might nevertheless be made absolute.

HABEAS CORPUS—APPEAL FROM ORDER FOR ISSUE OF WRIT OF HABEAS CORPUS—ISSUE OF WRIT AGAINST PERSON WHO HAS NO LONGER THE CUSTODY OF THE PERSON DETAINED—IMPOSSIBILITY OF OBEYING WRIT.

Barnardo v. *Ford* (1892), A.C. 326, was an appeal by Dr. Barnardo from an order directing the issue of a writ of *habeas corpus* requiring him to produce a

child named Harry Gossage, who had been placed in his charge, as the manager of a charitable institution, on the ground that he had parted with the custody of the boy before the order was made, and it was impossible to comply with the writ. It was contended by the respondents that the order was not appealable under the Judicature Act, s. 19, but this objection was overruled; but on the main question the appeal was dismissed, and the judgment of the Court of Appeal, 24 Q.B.D. 283 (noted *ante* vol. 26, p. 167), affirmed, on the ground that the respondent was entitled to require a return to be made to the writ, in order that the facts under which the appellant had parted with the custody of the child might be more fully investigated. Lord Halsbury, C., and Lords Watson, Herschell, and Hannen, however, disapproved of the statement of the law as laid down in *Regina* v. *Barnardo*, 23 Q.B.D. 205, to the effect that if the custody of the person alleged to be detained has been illegally parted with before the issue of the writ, it is no answer to the writ. Lord Herschell says at p. 339: "To use it (*i.e.*, the writ of *habeas corpus*) as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it, strikes me at present as being a use of the writ unknown to the law, and not warranted by it."

WILL—CONSTRUCTION—GIFT OF INCOME—LIFE ESTATE—GIFT OVER—DEATH WITHOUT LEAVING CHILDREN—IMPLIED GIFT TO CHILDREN—RESIDUARY GIFT.

Scale v. *Rawlins* (1892), A.C. 342, was an appeal from the Court of Appeal, 45 Ch.D. 299. The only point raised on the appeal was as to the construction of the will of a testator, who gave three freehold houses to his nephews S. and W. upon trust to pay the rents to his niece during her life, and after her decease, "she leaving no child or children," he gave one of the houses to S. and the other two to W. After making other bequests, the testator gave his residuary estate to S. and W. equally. The niece died leaving children, and the House of Lords (Lord Halsbury, C., and Lords Watson, Herschell, Macnaghten, Morris, and Hannen) unanimously affirmed the Court of Appeal in holding that there was no implied gift of the houses to the children of the deceased niece, but that they passed under the residuary gift to S. and W. equally.

PATENT—INFRINGEMENT—PRIOR PUBLICATION—PRIOR PUBLIC USER.

The Anglo-American Brush Electric Light Corporation v. *King* (1892), A.C. 367, was an appeal from the Court of Session in Scotland. The action was brought by King to set aside a patent for making dynamo-electric machines on the ground of a prior publication, contained in a specification for an earlier patent. The case turned upon whether the specification in the earlier patent was sufficient to disclose the invention; and the House of Lords (Lord Halsbury, C., and Lords Watson, Herschell, Macnaghten and Field), affirmed the Court of Session, that the proper test was whether the description in the specification of the earlier patent was sufficient to disclose to men of science and employers of labour information which would enable them to understand the invention, and give a workman specific directions for the making of the machine, and that applying that test there had been such prior publication.

COLONIAL JUDGE—POWER OF GOVERNOR OF COLONY TO APPOINT JUDGE—STATUTORY LIMITATION OF POWER TO APPOINT JUDGES—SALARY.

Buckley v. *Edwards* (1892), A.C. 387, is an appeal from the Supreme Court of New Zealand, and although it turns on the construction of colonial statutes may nevertheless be noted here as, to a certain extent, establishing a principle of general application. By an Act of New Zealand, the governor of New Zealand is empowered to appoint judges of the Supreme Court; but the Privy Council hold that this power is subject to an implied limitation, that no appointment can be made until an ascertained salary is payable to the appointee at the time of his appointment, and, where the legislature has not provided a salary, there is no power to appoint a judge.

27 ELIZ. C. 4—VOLUNTARY GIFT TO CHARITY - SUBSEQUENT CONVEYANCE FOR VALUE.

Ramsay v. *Gilchrist* (1892), A.C. 412, in which the Privy Council affirmed the judgment of the Supreme Court of New South Wales, has already been referred to (see *ante* p. 418). Suffice it to say here that the case decides that a voluntary gift to a charity is not fraudulent under 27 Eliz., c. 4, and cannot be avoided by a subsequent conveyance by the grantor for value.

PRACTICE—CRIMINAL CASES—LEAVE TO APPEAL TO PRIVY COUNCIL.

In *Ex parte Deeming* (1892), A.C. 422, the Privy Council lay down the rule that they will not advise Her Majesty to grant leave to appeal to the Judicial Committee in criminal cases where it is not even suggested or surmised that substantial or grave injustice has been done either through a disregard of forms of legal process, or by some violation of the principles of natural justice. We may note that this was a murder case, in which the prisoner had been found guilty and sentenced to death.

HUSBAND AND WIFE—CUSTODY OF CHILDREN—DRUNKENNESS OF HUSBAND—FALSE ACCUSATIONS BY HUSBAND AGAINST WIFE'S MORAL CHARACTER.

Smart v. *Smart* (1892), A.C. 425, is an appeal from the Ontario Court of Appeal affirming a judgment of Ferguson, J., as to the sufficiency of a return to a writ of *habeas corpus*, and also upon an application for the custody of children made by a husband against his wife. It appeared that the wife had twice left him on account of his drunken habits, and that in the course of the proceedings he had made very gross and (as Ferguson, J., found) unfounded charges against his wife, affecting her moral character, in answer to questions put to him on his cross-examination by his wife's counsel, and which charges were of such an injurious nature that she could not be expected to live with him again; that the wife had ample means, and that the husband had only a narrow income. The Privy Council therefore held that the courts below had exercised a sound discretion in discharging the writ of *habeas corpus*, and remanding the children to the custody of their mother.

PRIORITY OF PROVINCIAL GOVERNMENT OVER OTHER SIMPLE CONTRACT CREDITORS—PREROGATIVE OF CROWN.

In *Maritime Bank* v. *Receiver-General of New Brunswick* (1892), A.C. 437, the Judicial Committee of the Privy Council affirm the judgment of the Supreme Court of Canada, holding that the Provincial Government of New Brunswick, by virtue of the royal prerogative, is entitled to priority of payment of simple contract debts in priority to other simple contract creditors of the debtor. As to Ontario, see observation of Armour, C.J., *Attorney-General* v. *Clarkson*, 15 O.R. 632, at p. 639. This case decides that the connection between the Crown and Province is not severed by the B.N.A. Act, but that the same connection exists between the Crown and the various Provinces as between the Crown and the Dominion; and consequently all prerogative rights affecting matters under the control of Provincial Governments may be claimed and exercised by such governments on behalf of the Crown; and the Lieutenant-Governors of the Provinces are as much representatives "of Her Majesty for all purposes of the Provincial Government as the Governor-General himself is for all purposes of the Dominion Government."

MANITOBA SCHOOLS ACT, 1890, VALIDITY OF.

In *Winnipeg* v. *Barrett* (1892), A.C. 445, the Judicial Committee uphold the validity of the Manitoba School Act, 1890, abolishing the denominational system of public education in that Province. This case has been so much canvassed and discussed that further reference to it here seems unnecessary.

FRAUD—NEW ISSUE AS TO NEGLIGENCE CANNOT BE RAISED IN APPEAL.

Connecticut Fire Ins. Co. v. *Kavanagh* (1892), A.C. 473, was an action brought by the insurance company against the defendant, who had acted as their agent, charging that the defendant had fraudulently transferred an insurance in his books after a fire had occurred from another company of which he was also agent to the plaintiff company. At the trial, the plaintiffs failed to prove the charges of fraud and deceit. On appeal to the Privy Council, the plaintiffs contended that the evidence disclosed such negligence on the part of the defendant as would make him liable to indemnify the plaintiffs against the loss they had incurred under the policy in question. But the Judicial Committee was of opinion as fraud was the essence of the plaintiffs' claim that the evidence of the defendant directed to that issue could not be regarded as conclusive against him as regarded the charge of negligence, or as being all that he could have brought forward to rebut such a charge, and that therefore it was not open to the plaintiffs to take that ground on appeal, although it might have been otherwise if the question had been raised at the trial.

WIDOW'S RIGHT OF ACTION FOR CAUSING DEATH OF HER HUSBAND—QUEBEC CODE, S. 1056—(R.S.O., C. 135, SS. 3, 5).

Robinson v. *Canadian Pacific Ry. Co.* (1892), A.C. 481, was an appeal from the Supreme Court of Canada. The action was brought under s. 1056 of the Quebec Code by a widow to recover for damages for causing the death of her husband. The injury from which the deceased ultimately died was sustained on Aug. 27,

1882; his death did not take place until Nov. 15, 1883. At the time of his death his right of action was barred, and the question which the Privy Council had to determine was whether under the circumstances the widow could maintain the action. This depended on whether the right of action in the widow was a separate and distinct right of action from that to which her deceased husband was entitled. Their Lordships came to the conclusion that the causes of action were distinct, and that the widow was entitled to sue, although her husband at the time of his death was barred by the Statute of Limitations. The judgment of the Supreme Court was reversed. In *White* v. *Parker*, 16 S.C.R. 699, which is very briefly reported, the Supreme Court held that an action brought by a deceased person to recover damages for injuries which resulted in his death could not be revived by his representatives entitled to sue under Lord Campbell's Act (see R.S.O., c. 135), because the causes of action were distinct; but in the late case of *Wood* v. *Gray*, 93 L.T. 103, the House of Lords have determined that where a person had commenced such an action, and died before the action was brought to trial, his representatives entitled under Lord Campbell's Act cannot bring a new action under that Act in respect of the same matter; and we should infer, though that is not stated, that their only remedy is to revive the action commenced by the deceased, which our Supreme Court has held, as we have seen, cannot be done.

PREROGATIVE—INTERFERENCE WITH PRIVATE RIGHTS—TREATIES—ACTS OF STATE.

In *Walker* v. *Baird* (1892), A.C. 491, an important point of constitutional law is considered by the Privy Council. It will be remembered that the action was brought against a captain of the Royal Navy by a person engaged in the lobster fishery in Newfoundland, for an alleged wrongful interference by the defendant with the plaintiff's rights of property. The defendant set up that the acts in question were done in pursuance of orders received from the Lords Commissioners of the Admiralty by command of Her Majesty for the purpose of putting in force an agreement embodied in a *modus vivendi*, which, as an act of State and public policy, had been by Her Majesty entered into with the Government of France, and the defendant contended that the alleged trespass, being an act of State and involving the construction of treaties and of the *modus vivendi*, could not be inquired into in a court of law; but the Privy Council, without determining how far, if at all, private rights can be interfered with by treaties with foreign powers, or otherwise than by an Act of the legislature, was nevertheless of opinion that the court below was correct in deciding that, as between the Queen's subjects, the court had jurisdiction to inquire into the matter, and that the question of the validity, interpretation, and effect of all instruments and evidences of title and authority affecting the matter in dispute rest, in the first place, in the courts of competent jurisdiction within which the cause of action arises.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [Oct. 10.

MCDOUGALL *v.* CAMERON.

BICKFORD *v.* CAMERON.

Solicitor—Action for costs—Set-off—Mutuality—Appeal—Jurisdiction.

A firm of solicitors brought an action against certain clients on a bill of costs, to which action it was sought to set off a sum of money received by one of the solicitors from one of the clients for special services. The taxing officer allowed the set-off, but his decision was reversed on appeal.

Held, affirming the judgment of the Court of Appeal for Ontario, that assuming the court had jurisdiction to entertain the appeal, which was doubtful, the client was not entitled to set-off in an action by a firm, a sum paid to one of its members, the debts not being mutual; moreover, the money being paid to one of the solicitors for special services, and not for services covered by the retainer to the firm, it could not be set off.

Held, per TASCHEREAU, J., that the appeal was not from a final judgment within the meaning of the Supreme Court Act, and there was no jurisdiction to entertain it.

Appeal dismissed with costs.

Riddell & Nesbitt for appellants.

Ritchie, Q.C., for respondents.

WESTERN ASSURANCE CO. *v.* ONTARIO COAL CO.

Marine insurance—General average—Insurance on hull—Abandonment—Attempt to save vessel and cargo—Expense incurred—Liability of cargo to contribute—Average bond.

A schooner loaded with coal was stranded in Humber Bay near Toronto, and abandoned. The hull was insured, but not the cargo, and notice of abandonment was given to the underwriters, who secured the services of an experienced wrecker and a wrecking expedition, and attempted to save the vessel. It was considered advisable, and the best course in the interest of the owners of the cargo as well as the underwriters, to attempt to save the vessel and cargo together. Owing to stress of weather, operations could not be begun for some days after the expedition was ready, and when the wreckers got to work a portion of the coal was taken out and attempts made to save the vessel, but without success, and she had to be abandoned. Before any of the cargo was delivered, the owners and the underwriters executed an average bond, by which, after a recital of the loss of the schooner, they respectively bound themselves to pay the losses and expenses incurred according to their respective shares in the vessel, her earnings as freight and her cargo, and that such losses and expenses should be stated and apportioned in accordance with the established laws and usage of the Province in similar cases by a named adjuster.

The adjuster apportioned the loss between the underwriters, as owners of the material saved, and the owners of the cargo, making the amount due from the latter $2314, and an action was brought against them on the average bond to recover the same. The sum of $557 was paid into court, and liability beyond that amount was denied.

Held, affirming the judgment of the Court of Appeal (19 A.R. 41), of the Queen's Bench Division (20 O.R. 295), and of BOYD, C. (19 O.R. 462), that the average bond only obliged the owners of the cargo to pay what should be legally due according to the law of general average; that the cargo and the vessel were never in that common peril which gives the right to claim for general average; and that the sum paid into court was sufficient to cover the cost which would have been incurred in saving the cargo by itself, and the underwriters were not entitled to recover more.

Appeal dismissed with costs.

Osler, Q.C., and *Chrysler*, Q.C., for appellants.

Delamere, Q.C., for respondents.

HARRIS *v.* ROBINSON.

Contract—Specific performance—Time—Extension—Waiver—Rescission.

H. made an offer to R. for exchange of properties on specified terms, the matter to be closed within ten days if possible. R. accepted the offer. He had not, at the time, the title to

the property he proposed to transfer, but had an agreement for the sale of it with one S., who had a similar agreement with the holder of the title. Several interviews took place between the parties and their solicitors, both before and after the ten days elapsed, and the registry office was visited, where it was found that the contract which formed the title of S. was not registered, and also that there was an annuity charged against the lands which R. was to transfer. These matters were pointed out to S., who took no active steps to remove them. Finally a letter was sent by H. to R.'s solicitor, informing him that unless something were done in regard to the proposed change by the following morning the agreement would be considered null and void. After this letter was written, R. took proceedings to enforce his agreement with S., and obtained a decree declaring his title to the property he proposed to transfer to H. a valid title, and he then brought a suit against H. for specific performance of the agreement for exchange. This suit was tried before ARMOUR, C.J., who dismissed the action, holding that time was of the essence of the contract. His judgment was reversed by the Divisional Court, and on further appeal to the Court of Appeal the judges were equally divided in opinion, and the decision of the Divisional Court stood.

Held, reversing the decision of the Court of Appeal (19 A.R. 134) and of the Divisional Court (21 O.R. 43), TASCHEREAU, J., dissenting, that the action could not be maintained; that as the evidence established that R. had no title whatever, at the date of the agreement, to the land he proposed to transfer to H., the latter was not bound to give reasonable notice of intention to rescind, as he would have been if the title had been imperfect merely; that the letter to R.'s solicitor put an end to the contract; and, independently of any rescission, the conduct of R. was such as to disentitle him to relief by way of specific performance.

Held, further, affirming in this respect the judgment of the courts below, that time was originally of the essence of the contract, but H. had waived the necessity to adhere to the time specified by negotiating as to the title after it had expired.

Appeal allowed with costs.

Reeve, Q.C., for the appellant.

Hodgins and *Coatsworth* for the respondent.

Quebec.] [Oct. 6.

TREMBLAY *v.* BERNIER.

Notarial Code—R.S.Q., Art. 3871—Board of Notaries—Disciplinary powers—Prohibition.

When a charge derogatory to the honour of the profession of notary is made against a notary under the provisions of the Notarial Code, R.S.Q., Art. 3871, which amounts to a crime or felony, the Board of Notaries has jurisdiction to investigate it without waiting for the sentence of a court of criminal jurisdiction.

Appeal dismissed with costs.

Belcourt, Q.C., for the appellant.

Fremont and *Languedoc*, for the respondents.

[Oct. 10.

PARADIS *v.* BOSSÉ.

Proceedings before Exchequer and Supreme Courts of Canada—Solicitor's costs—Quantum meruit — Parol evidence — Art. 3597, R.S.Q.

In proceedings before the Exchequer and Supreme Courts, there being no tariff as between attorney and client, an attorney has the right to establish the *quantum meruit* of his services by oral evidence in an action for his costs.

Appeal dismissed with costs.

Belcourt and *MacKay* for appellant.

Casgrain, Q.C., for respondent.

O'SHAUGNESSY *v.* BALL.

36 Vict., c. 81 (P.Q.)—Booms—Proprietary rights — Replevin — (Revendication) — Estoppel by conduct.

O'S., claiming to be the legal depositary, and T. McC., claiming to be the usufructuary of certain booms, chains, and anchors in the Nicolet River under 36 Vict., c. 81, and which G.B., being in possession of the same for several years under certain deeds and agreements from T. McC., had stored in a shed for the winter, brought an action *en revendication* to replevy the same, and for $5000 damages.

Held, affirming the judgment of the court below, that O'S. and T. McC. were not entitled to the possession as alleged, and that they were precluded by their conduct and acquiescence from disturbing G.B.'s possession. See *Ball v. McCaffrey*, 20 S.C.R. 317.

Appeal dismissed with costs.

M. Honan for appellants.

P. N. Martel for respondent.

EMERALD PHOSPHATE CO. *v.* ANGLO-CONTINENTAL GUANO WORK CO.

Mining lands—Bornage—Injunction—Appeal—Jurisdiction—R.S.C., c. 9.

In a case of a dispute between adjoining proprietors of mining lands, where an encroachment is complained of and it appears that the limits of the respective properties have not been legally determined by a *bornage*, the Court of Queen's Bench (appeal side) held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*.

On appeal to the Supreme Court of Canada,

Held, that as the matter in controversy did not put in issue any title to land where the rights in future might be bound, the case was not appealable. R.S.C., c. 139, s. 29 (*b*).

Appeal quashed with costs.

Laflamme, Q.C., and *Cross*, for the appellant.

McCarthy, Q.C., and *Foran*, for the respondent.

BAPTIST *v.* BAPTIST.

Appeal—Final judgment—Action en reprise d'instance—Art. 439, C.C.P.—R.S.C., c. 135, ss. 2, 24, 28.

In an action brought to set aside a deed of assignment, the plaintiff died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will dated 17th January, 1885. The respondent replied that this last will was null and void, and upon that issue the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court, declared null and void the will of 17th January, 1885, and held the continuance of the original suit by respondent to be admitted. On appeal to the Supreme Court, the respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment; and it was

Held, that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit, and therefore appealable to this court. R.S.C., c. 135, s. 2 & 28. *Shaw* v. *St. Louis* (8 S.C.R. 385) followed.

Motion refused with costs.

Lafleur for motion.

Stuart, Q.C., *contra*.

[Nov. 2.

THE RICHELIEU ELECTION CASE.

Election petition—Status of petitioner—Preliminary objection—Lists of voters—Dominion Elections Act—R.S.C., c. 8, ss. 30 (b) 31, 33, 41, 54, 58, & 65—The Electoral Franchise Act—R.S.C., c. 5, s. 3.

Held, affirming the decision of GILL, J., where the petitioner's status in an election petition is objected to by preliminary objection, the evidence of his being entitled to petition against the return of the respondent being susceptible of easy proof by the production of the voters' list actually used, or a copy thereof certified by the Clerk in Chancery, R.S.C., c. 8, ss 41, 58 & 65; R.S.C., c. 5, s. 52, the production at the *enquête* of a copy certified by the revising officer of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at said election, is insufficient proof. GWYNNE and PATTERSON, JJ., dissenting.

Appeal dismissed with costs.

Morgan and *Gemmill* for appellant.

Belcourt and *Plamondon* for respondent.

[Nov. 3.

COUTURE *v.* BOUCHARD.

Supreme and Exchequer Courts Amending Act, 1891—54-55 Vict., c. 25, s. 3—Appeal from Court of Review—Case standing over for judgment—Amount necessary for right of appeal—Arts. 1178 & 1178 (a) C.C.P.

The action in this cause was for $2006, and the case was argued and taken *en delibéré* by the Supreme Court sitting in review on the 30th September, 1891, the day on which the Act 54-55 Vict., c. 25, s. 3, giving a right of appeal from the Superior Court in review to the Supreme Court of Canada, was sanctioned, and the judgment appealed from was rendered a month later. On appeal to the Supreme Court of Canada.

Held, per STRONG, FOURNIER, and TASCHEREAU, JJ., that the respondent's right could not be prejudiced by the delay of the court, and under the ruling of *Hurtubise* v. *Desmarteau* (19 Can. S.C.R. 562) the case was not appealable.

Per GWYNNE and PATTERSON, JJ.: That the case did not come within the words of s. 3, c. 25, 54-55 Vict., inasmuch as the judgment being for less than £500 sterling was not a judgment

which the appellant had a right of appeal to the Privy Council in England. Arts. 1178 & 1178 (*a*) C.C.P.

Appeal quashed with costs.

T. C. Casgrain, Q.C., for motion.

Pelletier, contra.

GREAT EASTERN RAILWAY *v.* LAMBE.

Opposition afin de charge—Pledge—Art. 4 & 5 C.C.—Agreement—Effect of—Arts. 1977, 2015, and 2094 C.C.

The respondent obtained against the Montreal & Sorel Railway Co. a judgment for the sum of $675 and costs, and having caused a writ of *venditioni exponas* to issue against the railway property of the Montreal & Sorel Railway, the appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition *afin de charge* for the sum of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company was entered into between the Montreal & Sorel Railway and the appellant company, and stated, amongst other things, that "the Montreal & Sorel Railway Co. was burthened with debts, and had neither money nor credit to place the road in running order," etc. The amount claimed for disbursements, etc., was over $35,000. The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *afin de charge*. On appeal to the Supreme Court, the respondent moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy, and was insufficient in amount to give jurisdiction to the court. The court, without deciding the question of jurisdiction, heard the appeal on the merits, and it was

Held, (1) that such an agreement must be deemed in law to have been made with intent to defraud, and was void as to the anterior creditors of the Montreal & Sorel Railway Co.

(2) That as the alleged deed of pledge affected immovable property, and had not been registered, it was void against the anterior creditors of the Montreal & Sorel Railway Co. (Arts. 1977, 2015, and 2094 C.C.).

(3) That Art. 419 C.C. does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledger's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an opposition *afin de conserver* to be paid out of the proceeds of the judicial sale (Art. 1972 C.C.).

Appeal dismissed with costs.

Louergan for appellant.

Choquette for respondent.

Nova Scotia]. [Oct. 10.

SMITH *v.* MCLEAN.

Bill of sale—Affidavit of bona fides—Adherence to statutory form—Description of deponent—R.S.N.S., 5th ser., c. 94, ss. 4 & 11.

By R.S.N.S., 5th ser., c. 92, s. 4, every bill of sale executed in Nova Scotia must be accompanied by an affidavit by the grantor that it is given in good faith, etc., and by s. 11 such affidavit shall be as nearly as may be in the form given in schedules to the Act. The prescribed form begins as follows: "I, A.B., of . . . . in the county of . . . . (occupation) make oath and say." In an affidavit accompanying a bill of sale given under this Act, the occupation of the deponent was not stated.

Held, per STRONG, GWYNNE, and PATTERSON, JJ., that as the affidavit referred in terms to the bill of sale itself, in which the occupation of the grantor was mentioned, the statute was complied with, and the instrument was valid.

Per TASCHEREAU, J.: The onus was on the persons attacking the bill of sale to prove, by direct evidence, that the deponent had no occupation, which they had failed to do.

The judgment of the Supreme Court of Nova Scotia was reversed.

Appeal allowed with costs.

Whitman for the appellants.

Silver for the respondent.

BRITISH-AMERICAN ASSURANCE CO. *v.* LAW.

Marine insurance—Insurable interest—Insurance on advances—Construction of policy.

A policy of marine insurance on the barque Lizzie Perry was issued by the British American Assurance Co. to W. L. & Co., managing owners of the vessel. The first part of the policy read as

follows: "L. & Co., on account of owners, loss, if any, payable to L. & Co., do make insurance and cause to be insured, lost or not lost, the sum of $2000, on advances upon the body tackle," etc. The policy was on a printed form, but the words "on advances" were inserted in writing. The remainder of the instrument was applicable to insurance on a ship only.

To an action on this policy the defence was that it only insured advances by the owners, which were not a proper subject of insurance, and the policy was, therefore, void. It was shown that L. & Co. had expended considerable money in repairs on the vessel.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the rule *ut res magis valeat quam pereat* required the policy to be construed, if possible, so as to make it a valid instrument, and this could be done either by striking out the words "on advances" as surplusage, or treating them as being a mere immaterial reference to the inducement which led the owners to insure the ship.

Appeal dismissed with costs.

Henry, Q.C., for appellants.

Borden, Q.C., for respondents.

CROWE *v.* ADAMS.

Sheriff—Action against—Trespass or trover for seizing goods — Justification — Necessity to show judgment— Title to goods — Married Woman's Property Act (R.S.N.S., 5th ser., c., 74).

A sheriff having seized goods under execution against Donald A., the wife of the execution debtor brought an action against him for trespass by such seizure, alleging that the goods seized were her separate property, under the Married Woman's Property Act (R.S.N.S., 5th ser., c. 74), and claiming also that the execution was void, as her husband's name was Daniel, and not Donald. On the trial the sheriff, under his plea of justification, put in evidence the writ of execution, but did not prove the judgment on which it issued. The jury found that the plaintiff's right to the goods seized, whatever it was, was acquired from her husband after marriage, which would not make it her separate property under the Act; they also found that the husband was well known by both names of Daniel and Donald. The trial judge held that the plea of justification was not proved by the production of the execution, but that proof of the judgment was necessary, and he gave judgment for the plaintiff, which was affirmed by the full court.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the action could not be maintained; that a sheriff sued in trespass or trover for taking or converting goods seized under execution can justify under the execution without showing the judgment: *Hannon* v. *McLean* (3 S.C.R. 706) followed; and that by the findings of the jury the goods seized must be considered to belong to the husband, which is a complete answer to the action.

Appeal allowed with costs.

Newcombe for the appellant.

Borden, Q.C., for the respondent.

CHANDLER ELECTRIC CO. *v.* FULLER.

Negligence—Manufacture of electricity—Discharge of steam—Damage to adjoining property.

F. was owner of a warehouse in the city of Halifax used for storing iron, and had occupied the same for some twenty years. In 1889 the Chandler Electric Co. established a station for generating electricity on the adjoining premises. Attached to the engine used by the company in said business was a condenser which passed through the floor of their premises and discharged into the dock below at a distance of some twenty feet from said warehouse. In March, 1889, the warehouse was found to be full of steam, which fact was communicated to the officers of the company who stated that they could not understand how it could have been caused by their engine. The steam continued to enter the warehouse, injuring the iron therein, and in 1890 an action was commenced by F. against the company for such damage. The company contended, as a defence to the action, that they were using the latest and best improvements in machinery for their business, and that they operated the same in a proper manner, and without negligence; that the injury, if caused by their engine, was due to the defective state of the plaintiff's premises; and that they were acting in pursuance of statutory powers contained in their act of incorporation, and were therefore exempt from liability. At the trial judgment was given against the company and on appeal to the full court the judges were equally divided.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the act causing the injury violated the rule which does not permit a person, even on his own land, to do an act which, lawful in itself, yet necessarily causes injury to another, and, especially as the injury continued after notice to the company, the plaintiffs were entitled to recover damages therefor.

F. H. Bell for the appellants.

Newcombe for the respondents.

New Brunswick.] [Oct. 10.

BUCK *v.* KNOWLTON.

Marine insurance—Application to agent—Neglect to forward—Liability of agent for—Privity of contract—Negligence—Trover.

B., wishing to insure his vessel, went to a firm of insurance brokers at St. John, N.B., to whom he gave an app' cation for $800 insurance at 11 per cent. on a valuation of $2500. The brokers sent the application by a clerk to K., the agent at St. John for an underwriter's company in Portland, Me., requesting a policy from his company. K. informed the clerk that he would not forward the application unless the valuation was put at $3000, or the premium raised to 12 per cent. This was never acceded to by the brokers, and two days after K. forwarded an application to his company putting the valuation at $3000, and on the following day the vessel was burnt. The policy was sent to K., but recalled by telegram before it was delivered to B. or to the brokers, and was returned to the company. B. brought an action against K. claiming damages for negligence in not forwarding the application in proper time, with a count in trover for conversion of the policy.

Held, affirming the decision of the Supreme Court of New Brunswick, that as K. never forwarded, nor undertook to forward, the application signed by the brokers on B.'s behalf he owed no duty to B., and could not be liable for any negligence.

Held, further, that as the policy issued never ceased to be the property of the company, and was nothing more than an escrow in the hands of K, no action would lie against K. for its conversion.

Appeal dismissed with costs.

Palmer, Q.C., for appellants.

McLeod, Q.C., for respondent.

VAUGHAN *v.* RICHARDSON.

Marine insurance—Charter party—Disbursements—Difference in freight—Guarantee of part owner—Consideration — Misrepresentation—Pleading—Evidence.

V., part owner and managing owner of the ship *Eurydice*, chartered her to R. for a voyage from Savannah to Liverpool; the charterer was to pay a lump sum for freight and the master to sign bills of lading at any rate of freight without prejudice to the charter party; if the actual freight exceeded the sum payable by the charter, the master of the ship was to give bills for the difference to R., payable ten days after the arrival of the ship at Liverpool, and the disbursements were to be secured by similar bills. When the ship was loaded it was found that the difference in freight was in favour of R., and by arrangement with the son of V., the managing owner, who held a power of attorney to act as his agent, the master drew two bills of exchange on the agents of the ship at Liverpool, one for the amount of the disbursements, and the other for the difference in freight; each in favour of R., and payable sixty days after sight.

The bills were accepted by the agents, but were not paid at maturity, and notice of dishonour was given to V., who, on receiving it, sent another of his sons to the solicitors who held the bills for collection. This son stated to the solicitors that his father would like the matter to be held over until he could communicate with the other owners, which was acceded to, and an agreement was drawn up, in the form of a letter to the solicitors, requesting them to delay proceedings on the bill for disbursements until the ship arrived at St. John, N.B. (where V. lived), and guaranteeing immediate payment, on her arrival, of that bill, with cost of protest, etc., and also of the bill for difference in freight. This agreement was taken to V., who signed it, and it was returned to the solicitors. When the ship arrived V. paid the draft for disbursements, but refused to pay the other, on the ground that he had supposed that they were both for disbursements, and that the solicitors had so stated to his son when the agreement was prepared. An action was then brought against V. on his guarantee to pay the draft for difference in freight, to which he pleaded that he had been induced to sign the same by fraud and misrepresentation.

On the trial of the action, it was held that the son who acted for V. at Savannah under a power of attorney had at first refused to sanction the drawing of the bill for difference in freight, but finally agreed to it on receiving a letter stating the circumstances and what the draft was for, which letter, as he stated in giving evidence, he had sent to V., but it was not produced. The son who had called upon the solicitors swore that they had told him that both bills where for disbursements, and had so stated to his father. In this he was contradicted by V. himself, who said in his evidence that his son had told him that the larger bill was for disbursements, and the smaller for difference in freight. His counsel contended, on moving against the verdict in favour of R., that he was incapacitated by age and infirmity from giving reliable evidence.

It was admitted by counsel for V. that any misrepresentation made by the solicitors as to the nature of the drafts was an innocent misrepresentation only, not made with intent to deceive. A verdict was given for the plaintiff, which the full court sustained.

Held, affirming the judgment of the Supreme Court of New Brunswick (28 N.B. Rep. 364), that the verdict should stand; that the defence of misrepresentation set up at the trial was not open to the defendant under the plea of fraud, and should have been distinctly pleaded; that no application to amend by adding such a plea having being made at the trial, it could not be entertained now, in view of the length of time the case had been in litigation and the delays that had taken place; that even if the defence were available nothing could be gained by ordering a new trial, as no jury could help finding for the plaintiff under the evidence given by the defendant himself, which would have to be read to the jury, the defendant having died since the trial.

Appeal dismissed with costs.

Barker, Q.C., and *Palmer*, Q.C., for appellants.

Hasen and *Currey* for respondents.

British Columbia.] [Oct. 19.

EDMONDS *v.* TIERNAN.

Mechanics' lien — Suspension — Waiver — Taking promissory note for amount.

T. was building a house under contract, and E. supplied him with material, taking a promissory note for $1100, the amount of his account. The note was discounted, but dishonoured at maturity, and E. took it up and filed a mechanics' lien against the property which T. had been building. Prior to this the owner had paid T. $500, and afterwards—but when was not certain—he paid $600 more. In an action by E. to enforce his lien,

Held, affirming the judgment of the Supreme Court of British Columbia, that E. had waived his lien by taking the note, which suspended the lien during its currency; and there being nothing in the Lien Act to show that, being once abandoned, it could be revived again, even assuming that only part of the amount had been paid to T. before the lien was filed, it would be absolutely gone.

Appeal dismissed with costs.

Cassidy for the appellant.

Chrysler, Q.C., for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Nov. 28.

IN RE THOMPSON *v.* HAY.

Prohibition—Division Court—Territorial jurisdiction—R.S.O., c. 51, s. 87; 52 Vict., c. 12, s. 5—Application to transfer cause—Trial of question raised by notice disputing jurisdiction—Refusal of judge to try.

Where the judge presiding at the trial of an action in a Division Court declines to try the question of the jurisdiction of the Division Court raised by a notice disputing the jurisdiction, he may be prohibited.

Such question is to be tried at the time and place of the trial of the action; and the defendant is no way bound by anything contained in R.S.O., c. 51, s. 87, as amended by 52 Vict., c. 12, s. 5, to apply for an order transferring the action to a Division Court having jurisdiction over it, or to apply to the judge at any other time or place for the trial of the question so raised.

In re Watson v. *Woolverton*, 9 C.L.T. Occ. N. 480, distinguished.

Per FALCONBRIDGE, J., dissenting: The defendant, before coming to the High Court for prohibition, is bound to apply to the county judge somewhere, either at or before the trial, to transfer the cause; and in this case he did not so apply.

Shepley, Q.C., for the plaintiff.

G. W. Marsh for the defendant.

FALCONBRIDGE, J.] [Dec. 5.

MURRAY *v.* MACDONALD.

Life insurance — Policy — Construction of — Money payable to "children" — Representative of deceased child.

By a policy of life insurance, the insurers agreed to pay the amount of the insurance within ninety days after notice and proof of the death of the insured to the wife of the insured, or her legal representatives; or, if she should not then be living, to her children, or to their guardian, if under age. The wife predeceased the insured. Two of her children predeceased her, one of them leaving a child.

Held, that only the children who survived the wife were entitled to share in the insurance moneys payable under the policy.

Bain, Q.C., for the plaintiffs.

Marsh, Q.C., for the defendant.

Chancery Division.

BOYD, C.] [Oct. 4.

RE MCDOWELL AND THE CORPORATION OF THE TOWN OF PALMERSTON.

Legislative Assembly—Powers of, to change ownership of land—Necessity for intervention as to burial ground—48 Vict., c. 92 (O.).

The legislature has power, as far as abstract competence is concerned, to change the ownership of land in the province without making any compensation. The intervention of the legislature is necessary to change the distinctive character of a burial ground or the site of the graves. The provisions in 48 Vict., c. 92 (O.), providing that the costs of legislation and re-interment should be charged against the compensation to be allowed to the original owner of the land were just, and should be charged against the value of the land.

A. M. Clark for the motion.

Guthrie, Q.C., and *Hoyles*, Q.C., *contra.*

STREET, J.] [Nov. 15.

SKLITZKY *v.* CRANSTON.

Plan—Streets on—Sale of lots by—Highways—Township lot—Right of way on streets—Right of action—R.S.O., c. 152, s. 62—Costs.

A street laid out through a township lot where no village exists is a private street, even though lots are sold facing on it, until the township council adopts it as a public highway, or until the public, by travelling on it, accepts the dedication offered; and s. 62 of R.S.O., c. 152, applies only to *incorporated* villages.

A purchaser of a lot on a registered plan of a township lot acquires against his vendor a private right to use the streets on the plan, subject to the right of the public to make them highways.

The plaintiff having brought this action to restrain the fencing-in of certain streets, one of which was found by the trial judge to be a highway, and, not having shown any special or peculiar damage not shared in by the public, was

Held not to be entitled to maintain the action as to that street, and was ordered to pay the costs of that part of the action.

Held, also, as to other streets on the plan not found to be highways, that the plaintiff was not necessarily entitled to a roadway over every part of the streets, but to such a width as might be necessary for his reasonable enjoyment of it.

Held, also, that as there was no immediate or serious damage to be apprehended from the maintenance of fences on the streets it was unnecessary to apply for an interim injunction, which was obtained, and that the plaintiff must pay the costs of it.

J. P. Mabee and *J. L. Darling* for the plaintiff.

Garrow, Q.C., and *G. G. McPherson* for the defendant.

FERGUSON, J.] [Nov. 17.

MITCHELL *v.* MCMURRICH.

Action for damages for wrongful issue of a writ in a civil action—Malice—Special damage—Demurrer.

Held, on demurrer to a statement of claim in an action for damages for the wrongful issue of a writ of summons in a civil action in the name of a third person, that

(1) The statement that the writ was issued

"wrongfully and unlawfully and without instructions" was not a sufficient allegation of malice and want of probable cause to support the action.

(2) The allegations that, by reason of the act complained of, the plaintiff was injured in his calling and occupation as a builder, and in his credit and reputation, and delayed in the performance of his contracts, and had to procure moneys at a higher rate of interest, and that other creditors were induced to take action against him, and in order to compromise and settle such actions he had to sacrifice his property, were not sufficient allegations of special damage.

E. D. Armour, Q.C., for the demurrer.

Swartout, contra.

Practice.

Q.B. Div'l Court.] [Nov. 21

COLEMAN *v.* CITY OF TORONTO.

Discovery—Examination of officer of municipal corporation—Medical health officer.

In an action for an injunction and damages in respect of the alleged insanitary condition of a certain bay into which the defendants drained part of their sewage, the plaintiffs sought to examine for discovery the medical health officer of the defendants, whose sole connection with the subject-matter of the action arose from his having made an examination of and a report to the local board of health upon the sanitary condition of the bay. The plaintiffs desired to cross-examine upon the report and to have its meaning explained.

Held, that, having regard to the kind of discovery which the plaintiffs desired to obtain from the medical health officer, he was not examinable as an officer of the defendants.

Decision of GALT, C.J., *ante* p. 575, 15 P.R. 27, affirmed.

R. Boultbee for the plaintiffs.

H. M. Mowat for the defendants.

BOYD, C.]

RE WARTMEN.

Will—Devise—Postponement of enjoyment—Vested interest—Present payment.

A testator directed the realization of his estate and the deposit of the proceeds in a bank until his youngest child should come of age, when they were to be divided among three named children. Two of the children attained 21, and sold and assigned all their interests to third parties. The estate was wound up except as to the division, and the purchasers applied to the court for an order for the payment to them of the two shares so assigned without waiting for the coming of age of the youngest child.

Held, that the two children who were of age had a vested interest absolute, which, under the rule laid down in *Curtis* v. *Lukin*, 5 Beav., at p. 155, warranted an order for the present payment.

Hoyles, Q.C., for the petitioners.

J. Hoskin, Q.C., official guardian for the infant.

THE MASTER IN CHAMBERS.] [Nov. 23.

EMERSON *v.* HUMPHRIES.

Interpleader — Writ of possession — Adverse claim—Right of sheriff to interplead—Rule 1141 (b)—Parties—Infant devisees—Executors—Mortgage action—Claim for possession of land.

In an action upon a mortgage made by a deceased person, who died in 1889, payment, foreclosure, and possession were claimed, and the executors were the only defendants. Judgment for possession, *inter alia*, was recovered, and a writ of possession placed in the sheriff's hands. The widow, who was one of the executors, and the infant children of the deceased mortgagor had an interest under the will in the mortgaged lands, and were in possession when the sheriff attempted to execute the writ. The infants, and the widow as their guardian, made a claim to the possession as against the writ, based on the ground of the infants not having been made parties to the action.

Held, that the sheriff, by virtue of Rule 1141 *(b)*, was entitled to interplead.

Held, that the action as regards the claim for possession was properly constituted; and the infants were bound by the judgment against the executors.

Keen v. *Codd*, 14 P.R. 182, distinguished.

R. J. MacLennan for the sheriff.

G. C. Campbell for the plaintiffs.

Ballantyne for the defendant.

F. W. Harcourt for the infant claimants.

Q.B. Div'l Court.] [Dec. 1.

BELLAMY *v.* CONNOLLY.

Lien—Solicitor's lien for costs—Settlement of action by parties—Order for costs—No fruits of litigation—Notice by solicitor to parties—Collusion.

The solicitor for the plaintiff in an action for slander gave notice to the plaintiff and defendant that if the action should be settled between them it must be settled in his office, in his presence, and with his knowledge and consent.

A settlement was arrived at before trial between the plaintiff and defendant, without the knowledge of the plaintiff's solicitor, by which the action was to be dropped and each party was to bear his own costs. At the same time, a settlement was also effected of a County Court action brought by the same plaintiff against the same defendant for the conversion of a mare and colt, valued by the defendant at $135, it being agreed that the defendant should pay an overdue note for $122, which he had indorsed for the accommodation of the plaintiff, and should keep the mare and colt as his own property, and that each party should pay his own costs.

The plaintiff's solicitor alleged that this action was fraudulently and collusively settled with a view of depriving him of his costs thereof, and obtained an order in Chambers requiring the defendant to pay him such costs.

Held, that the action was the plaintiff's action, and it was competent for him to settle it behind the back of the solicitor, notwithstanding the notice given; that the solicitor had no lien on the action, but could only have had a lien on the fruits, and, there being no fruits, there was no lien, and he was not entitled to invoke the equitable interference of the court; that there were no fruits of the County Court action, and, if there had been, they could not be said to be the fruits of this action, and, besides, the solicitor had not notified the defendant that he claimed a lien upon such fruits; that it was necessary for the solicitor to show clearly that there had been collusion with a view to defraud him of his costs, and, upon the evidence, it could not be fairly inferred that there was such collusion; and, therefore, the order in Chambers should be set aside.

Aylesworth, Q.C., for the plaintiff's solicitor.
Masten for the defendant.

MEREDITH, J.] [Dec. 6.

IN RE SOLICITOR.

Appeal—Certificate—Solicitor and client taxation of costs—Report—Court or Chambers.

The certificate of the result of a taxation of a solicitor's bill of costs at the instance of a client is a report, and, under Rules 848, 849, and 850, the appeal therefrom should be to a judge in court upon seven clear days' notice.

W. H. Blake for the solicitor.
J. B. Pattullo for the client.

ROSE, J.] [Dec. 10.

MALCOLM *v.* LEYS.

Costs—Scale of—Jurisdiction of County Court—Amount in controversy—Interest.

Where the plaintiffs in an action in the High Court of Justice to recover a sum for work and labour and materials, the amount not being liquidated or ascertained, recovered $197.01 for debt and $14.54 for interest from the issue of the writ of summons;

Held, that the amount recovered was not within the jurisdiction of the County Court, and the plaintiffs were entitled to costs on the scale of the High Court.

G. B. Gordon for the plaintiffs.
E. D. Armour, Q.C., for the defendant.

BOYD, C.] [Dec. 12.

MCARTHUR *v.* MICHIGAN CENTRAL R.W. CO.

Venue—Application to change—Refusal to interfere—Apportionment of costs by trial judge.

Having regard to the difficulty of deciding upon contradictory affidavits whether it is proper in any case to order a change of the place of trial, and to the unsatisfactory nature of the practice and the conflicting decisions upon the question of change of venue, it is better to refuse applications for change of venue, and to leave the trial judge to apportion the costs so as to do justice, if it appears to him that the expense has been increased by the plaintiff's choice of a place of trial.

Roberts v. *Jones* and *Willey* v. *Great Northern R.W. Co.* (1891) 2 Q.B. 194, followed.

Douglas Armour for the plaintiff.
D. W. Saunders for the defendants.

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