Canada Law Journal.

VOL. XXXIV. JULY 25, 1898. NO. 13.

LONG VACATION.

FROM TWO POINTS OF VIEW.

I. THE "BRIEFED."

Go, boy, and lock the office door—
Ye minions cease vexation;
A truce to clients rich and poor,
Heigho, 'tis Long Vacation!

I'm off to sail the heaving main
Loud with War's ululation;
But neither Uncle Sam nor Spain
Shall spoil my Long Vacation.

What matter if old Ocean's song
Brings gastric perturbation?
My liver on the *Continong*
Will have its Long Vacation!

And when September's cooling breeze
Revives my land and nation
Back, with keen appetite for fees,
I'll come from Long Vacation.

So, boy, go lock the office door—
Ye minions cease vexation;
A truce to clients rich and poor,
Heigho, 'tis Long Vacation!

II. THE BRIEFLESS.

Hail, thou Long Vacation,
Welcomest cessation
From exacerbation
Born of exploitation
Of a daily ration
For my briefless life!
Whilst thy reign extendeth
Money-Bags, he lendeth—
Recking not of strife
Till the "Briefed" returneth
With a zeal that burneth
For small debtors' gore.
Then, with writs abounding,
Bailiffs will be sounding
Knocks upon my door;
Bidding me awaken
To the unmistaken
Fact, thy reign is o'er!

CHARLES MORSE.

Mr. E. R. Cameron, of London, Barrister-at-Law, has been appointed Registrar of the Supreme Court in the place of Mr. Robert Cassels, Q.C., deceased.

We publish in another place a full report of the finding of the Judicial Committee of the Privy Council on the "Fisheries case," which decides many important questions in reference to Dominion and Provincial rights connected with rivers, lakes, harbors, fisheries, navigation, etc. This report will be read with interest at the present time, and is given to our readers in advance of the report which will appear in due course in the English Law Reports.

On the 25th June last the fifth seat in the Court of Appeal was filled by the appointment of Mr. James Frederick Lister, Q.C., of Sarnia. Having been for many years an active politician, and perhaps better known in that field than at Osgoode Hall, the appointment was criticised adversely by one portion of the lay press, and defended by the other, the persistency of some of his friends rather unhappily reminding one of the motto "Qui s'excuse s'accuse." It is not necessary for us to take part in that discussion. Suffice it to say that, whilst there are strong arguments against appointing active partisans to the Bench, it is a fact that many who have been so appointed have made excellent judges, and it would be ex-

tremely difficult in this country to work under such limitations. Although Mr. Lister may not have occupied that prominent position at the Bar which theoretically ought to be (but for many years has not been) a prerequisite for promotion to the Bench, his reputation is such that there is every reason to anticipate that he will make a useful member of the Court of Appeal. No one can safely prophesy in such matters. The profession have often been disappointed in some of those from whom much was expected, and agreeably surprised at the judicial capacity displayed by others, little thought of at the time of their appointment. Of one thing we are sure, and that is that Mr. Justice Lister will industriously, conscientiously and with unswerving integrity of purpose, devote his whole energies to the faithful discharge of the responsible duties of his office.

Judging from what appears in the daily papers it would look very much as though the tactics too often followed by the detective force are to be repeated in the Napanee bank robbery case. It would be well for these officers to remember that the labours of the counsel in the Clara Ford case were rendered very much easier by the lengthy and most objectionable private examination, before trial, to which the prisoner was subjected. It would be well for them also to remember the observations of the Court in *Reg.* v. *Day*, 20 O.R. 208, and the scathing remarks of Chief Justice Meredith in the Allison case on the same subject. Another feature of the Napanee case was the refusal of the sheriff to allow counsel for the prisoners to consult with their clients. The matter is, doubtless, one of discretion with the Crown until the case comes before the magistrate, when the prisoners have a right to the assistance of counsel; but, in view of the French "sweat box" system now in vogue, it is very necessary that prisoners should have the benefit of consultation with their counsel before being subjected to that process. A refusal to give them this privilege might properly be characterized as outrageous, except under very peculiar circumstances. Accused persons may be perfectly innocent, and yet statements made by them

might be used and twisted by unscrupulous detectives to supplement weak points in the prosecution, and so convictions be obtained which the facts of the case would not warrant.

EXEMPTIONS FROM DISTRESS.

We have received communications from several of our subscribers, criticising the judgments in *Harris* v. *Canada Permanent L. & S. Co.*, ante p. 39, and *Shannon* v. *O'Brien*, ante p. 421, dealing with a monthly tenant's right to exemption under R.S.O., c. 170, s. 30.

The statute in question has certainly been a heavy strain upon professional thinking machines. The two learned County Court Judges who gave the judgments in the cases above referred to, have done their best to settle the question, and their opinions are entitled to very great respect. The result, however, does not appear to have been entirely satisfactory, certainly not from the landlord's point of view: and even from an academic standpoint there appears to us to be grave doubt whether a correct conclusion has been arrived at.

The section in question relates to the exemption of goods from distress, and is as follows:

(1) The goods and chattels exempt from seizure under execution, shall not be liable to seizure by distress by a landlord for rent in respect of a tenancy created after the first day of October, 1887, *except as hereinafter provided.*

(2) In case of a monthly tenancy the said exemptions shall only apply to two months' arrears of rent.

(3) The person claiming such exemption shall select and point out the goods and chattels as to which he claims exemption.

It is the second sub-section which appears to be difficult to understand. Reading it as we would read any other document, the meaning would appear to be that in the case of a monthly tenant he is only to be entitled to claim such exemption of his goods from distress in respect of two months' rent, and if he is in arrear beyond that amount he is

not as regards the excess to be entitled to claim any exemption. That, it is submitted, is the fair meaning of the words; but in the judicial crucible they have been submitted to tests which have virtually evacuated them of all meaning, and as the learned senior Judge of the County Court of York is compelled to confess, ante, p. 41: "Rather than guess at its meaning (i.e., the proviso in sub-section 2) it is better to say that the words have no meaning at all;" which is virtually the conclusion at which he arrives; and his reasoning is followed and adopted by the learned senior Judge of the County Court of Wentworth.

With much deference, however, we do not think that the course adopted by these learned judges is the better one. All language used in legal documents involves a certain amount of guessing as to its meaning, but it is only where the meaning is clearly so ambiguous and doubtful as to be incomprehensible, that a judge can properly refuse to give any meaning at all to a statute.

The first sub-section clearly contemplates that there are to be some cases or circumstances in which the exemptions cannot be claimed, for it concludes with the words "except as hereinafter provided." But the learned Judge of the County Court of York criticises the words of the proviso, such "exemptions shall only apply to two months' arrears of rent" in this way, he says the exemption spoken of in the first sub-section "does not apply to rent, but to goods. There is no such thing as an exemption applying to arrears of rent." This seems to be somewhat hypercritical. It is true, the language used in this statute, as in many others, may not be as critically exact as it might be, still, in spite of the learned judge's criticism, it seems reasonably plain. Exemptions, it is true, in one sense do not apply to rent, but to goods, yet it is obvious that the exemptions apply to the goods in respect of the claim to levy rent; and that, it appears to us, is clearly what is meant.

The learned judge refuses to give that effect to the words because it would cut down the previous right of the tenant to claim the exemption in respect of all rent in arrear, which,

we may say, it was clearly the intention of the amendment to do. He asks, does the clause mean that a tenant can claim for his goods exemption only when he is exactly two months in arrears with his rent; that if he be only one month in arrear, or three months in arrear, he can claim no exemption at all?" We do not think any such construction would be correct. The sub-section says: "In case of a monthly tenancy the said exemptions shall only apply to two months' arrears of rent." The fair reading of which we submit is that in respect of two months' rent or less, the exemptions can be claimed, but not for any excess beyond two months' rent. Although the learned judge suggests many alternative meanings of this sub-section 2, he does not refer to this, which seems to us to be the true one.

As to the learned judge's introductory remarks on the assumed harshness of the common law, which enabled a landlord to seize, with few exceptions, all of his tenant's goods, to satisfy his rent, it must be remembered that landlords are in an entirely different position to other creditors, and the common law very wisely and reasonably gave them special remedies for enforcing their claims. A tenant gets into possession, and in spite of his landlord's wish often remains in possession without paying rent. The landlord may stipulate for rent in advance, but such stipulations can only be enforced with difficulty and a rigour which few landlords would care to employ, and the experience of most landlords is that such stipulations are easily overcome by designing tenants, and if attempted to be enforced expense is incurred which in most cases is not recoverable from the tenant. We think there has been of late a great deal too much sympathy extended to the tenant, and far too little to the landlord, who frequently has to mourn dilapidated premises and loss of rent as the result of the indulgence he has extended to an ungrateful tenant, and we venture therefore to criticise rather freely decisions which tend unduly to deprive landlords of a right which we believe the legislature intended to give them.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—DELAY—DEPOSIT, LIEN FOR—STATUTE OF LIMITATIONS.

Levy v. *Stogdon* (1898) 1 Chy. 478, is a somewhat curious case. In April, 1886, Sir John Sebright contracted to sell to one Keays a contingent reversionary interest in £20,000 odd of Consols free from incumbrances, for £3,550. Keays paid £100 as a deposit. There were existing incumbrances which Sebright undertook to pay off, but did not. Sept. 25th, 1886, was fixed for completion, when the balance of the purchase money was to be paid, and in case of delay the purchaser was to pay interest at 5 per cent. Sebright subsequently became bankrupt, and he and his trustee in bankruptcy executed an assignment of all his property to one Baker, who subsequently mortgaged the reversionary interest above mentioned; Keays interest under his contract subsequently became vested in one Birch. The contingent interest having come into possession, Birch now claimed specific performance of his contract, or a lien on the fund for his deposit and interest. The claim to specific performance was resisted on the ground of laches on the part of the purchaser, and this defence, Stirling, J., held was entitled to prevail—but as regarded the claim to a lien for the deposit and interest he held that by virtue of the contract the vendor became trustee of the fund for the purchaser for the amount of his deposit, and that no Statute of Limitations applied to the case, nor any by analogy on which the Court ought to act, and he therefore held that to that extent Birch's claim must succeed.

MORTGAGOR AND MORTGAGEE—FURTHER ADVANCES—SUBSEQUENT INCUMBRANCES—MORTGAGE OF EQUITABLE INTEREST—NOTICE TO TRUSTEE—LIMITATION OVER IN EVENT OF ALIENATION BY CESTUI QUE TRUST.

The facts of *West* v. *Williams* (1898) 1 Ch. 488, are a little complicated, but are substantially as follows: Walter Williams under his father's will was entitled to an equitable

estate for life; this interest on 24th Dec., 1895, he mortgaged to the plaintiff, the plaintiff agreeing not to give notice to the trustees until 24th Dec., 1896. On April 2, 1896, Walter Williams made a mortgage in favour of P. A. Williams and another, to secure £2,297, and further advances agreed to be made to the mortgagor, and by a settlement of even date, in which after reciting the giving of the mortgage last mentioned, and that except as thereinbefore recited the settlor had not otherwise incumbered his life interest, he thereby assigned the same to trustees in trust for himself for life, "or until he should assign charge or incumber, or affect to assign, charge or incumber the same or any part thereof," and after the determination of his life estate for the settlor's wife and children. The action was brought to enforce the plaintiff's mortgage, of which notice was not given to the trustees of the fund until after the execution of the settlement above referred to. The priority of the P. A. Williams mortgage was conceded by the plaintiff, except as to advances made after notice of the plaintiff's mortgage, and two questions were raised, first as to the effect of subsequent advances made in pursuance of an agreement contained in the prior mortgage; and secondly, whether the limitation over on the alienation by Walter Williams was affected by his alienation to the plaintiff made prior to the settlement,—in other words, whether the limitation over had a retrospective operation. Kekewich, J., held that it had, and consequently that the plaintiff's right as mortgagee had been completely cut out by the subsequent settlement executed by his mortgagor; which seems a somewhat singular result; and he also held that the subsequent advances made under the agreement in the P. A. Williams mortgage after notice of the plaintiff's mortgage, were, even if the plaintiff's mortgage were a subsisting security, entitled to priority over it. He distinguishes the case from *Hopkinson* v. *Rolt*, 9 H. L. C. 514, on the ground that in that case there was no obligation on the part of the mortgagee to make the subsequent advances; and his decision on the effect of the settlement is based on *Manning* v. *Chambers*, 1 D. G. & Sm 282; and *Seymour* v. *Lucas*, 1 Dr. & Sm. 177.

SETTLEMENT—POWER OF APPOINTMENT—REMOTENESS—APPOINTMENT TO DAUGHTERS "WHO SHALL HEREAFTER MARRY."

In re Gage, Hill v. *Gage* (1898) 1 Ch. 498, an appointment of a fund was made under a power, in favour of the appointees, three unmarried daughters "who should thereafter marry," and also provided that so long as these daughters remained unmarried, the income of the residue of the fund should be paid to them equally, and in case "one or two only of them should marry" (which happened), then after the death or marriage of such last one as should be last living and unmarried, the capital of the residue should be paid to four other children, and such of the three daughters as should marry, equally. Kekewich, J., held that the ultimate gift over of the fund was void for remoteness, also that the appointment in favour of the three daughters who should marry was void for the same reason: but that the appointment of the income of the residue of the fund to the three unmarried daughters was a valid appointment of one-third to each daughter, as long as she was living and unmarried.

CONTINGENT REMAINDER—INTERMEDIATE RENTS BEFORE VESTING—LEGAL AND EQUITABLE LIMITATIONS.

In re Averill, Salsbury v. *Buckle* (1898) 1 Ch. 523, is an illustration of the maxim that equity follows the law. In this case a testator by his will dated in 1878, devised real property to the use of trustees in fee, upon trust for his daughter Annie for life, and after her death for her children, who being sons should attain 21, or, being daughters, should attain that age or marry, as tenants in common. Annie died in 1885 leaving six children, all infants under 21, and unmarried. The eldest child having attained 21 in March, 1897, it became necessary to determine what was the proper disposition of the rents; and Romer, J., held that the eldest child was entitled to the whole of the rents until the next child attained a vested interest, each child being admitted to share therein as he or she attained a vested interest, in the same way as if the limitations had been legal.

ARBITRATION—AWARD—EXPROPRIATION OF LANDS BY RAILWAY—FINALITY OF AWARD.

Caledonian Ry. Co. v. *Turcan* (1898) A. C. 256, is a decision of the House of Lords in a Scotch case. The appellants gave notice to treat for certain lands required for their railway,—a question arose whether the part they wished to take could be severed from the rest of the parcel without material detriment. This question was submitted to arbitration pursuant to statutory provisions in that behalf: before the arbitrator the railway company offered to allow access to the remainder of the respondent's property, under a bridge to be erected over the portion proposed to be taken by them. The arbitrator found that the portion proposed to be taken could not be severed without detriment to the remainder, and awarded compensation upon the assumption that the railway was bound to take the whole premises. The action was brought to recover the compensation awarded, and the railway set up that the arbitrator had erred in rejecting their offer of access: but the House of Lords affirmed the decision of the Scotch Court of Session, holding that whether the arbitrator had erred or not was immaterial, as, until set aside by proper process, his award was final and conclusive on both parties, and could not be reviewed by the Court.

DEBENTURES—AGREEMENT TO ADVANCE MONEY ON—COMPANY—BREACH OF CONTRACT TO LEND MONEY—SPECIFIC PERFORMANCE—DAMAGES.

The South African Territories v. *Wallington* (1898) A.C. 309, was an action by a joint stock company to specifically enforce an agreement to lend money on the security of its debentures; the decision of the Court of Appeal (1897), 1 Q.B. 692, is noted ante, vol. 33 p. 619. The House of Lords (Lords Halsbury, L.C., Watson, Herschell, Macnaghten and Morris) have now affirmed the decision, holding that such an agreement cannot be specifically enforced, and that the plaintiffs could only recover such damages as they had actually sustained by reason of the breach of the contract, and as no such damages were proved the appeal of the plaintiffs was dismissed with costs.

MERGER - MORTGAGE—PURCHASE OF EQUITY OF REDEMPTION - PAYMENT OF PRIOR MORTGAGE BY PURCHASER OF EQUITY.

In *Liquidation Estates Purchase Co.* v. *Willoughby* (1898) A.C. 321, the equitable doctrine of merger of securities is considered; the trend of the modern cases on this subject has been in the direction that merger of an incumbrance is altogether a question of intention, and where there is no explicit evidence of intention, then merger of an incumbrance will not be presumed to have taken place, unless it is for the benefit of the party paying off the incumbrance; this view has now practically received the sanction of the House of Lords (Lords Halsbury, L.C., Herschell, Macnaghten and Morris), they having reversed the judgment of the Court of Appeal (1896) 1 Ch. 726 (noted ante, vol. 32, p. 541). This agrees with *Hart* v. *McQuesten*, 22 Gr. 133, and other cases on this subject in the Ontario Courts.

LEASE—LIABILITY FOR BREACH AFTER DEATH OF COVENANTOR—DEVISEE OF REVERSION—GENERAL ESTATE OF COVENANTOR.

In *Eccles* v. *Mills* (1898) A. C. 360, a deceased lessor had made a covenant i a lease to finish laying down 1,000 acres, part of the land demised, with grass within a year. The lease also contained a subsequent declaration that "there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto." The testator died without having performed the covenant as to the grass, and by his will he specifically devised the reversion in the demised premises. Judgment was recovered against his executors for damages for breach of the covenant as to the grass, and the contest in the present case was whether such damages should be borne by the general estate of the testator, or by the specific devisees of the demised premises. The Supreme Court of New Zealand held that the devisees of the reversion must bear the burthen, but the Judicial Committee of the Privy Council (the Lord Chancellor, and Lords Watson, Hobhouse, Macnaghten, Morris, Shand, Davey, and Sir R. Couch) reversed this decision, holding that the covenant did not run with the reversion, and that it was not incident to the relationship of landlord and tenant, and liability

therefor properly fell on the general estate. And they moreover expressed the opinion that even if the covenant did run with the reversion it was not a charge thereon, and as between the general estate and specific devisee, even in that view, the former was primarily liable for the payment of the damages, as the covenant was a liability incurred not as incident to the relation of landlord and tenant, but as preparatory thereto. The following passage at p. 371 gives the rationale of the judgment. "It would seem that the nature of the obligation in each particular case must determine the question. If it is in its nature incident to the relation of landlord and tenant, it would only be fair that the burthen should be borne by the devisee as between him and the testator's estate, falling on him as landlord, whether the agreement bears a seal or not. . . . On the other hand, if the covenant is not in its nature incident to the relation of landlord and tenant—if the thing to be done is something preparatory to the complete establishment of that relation, it would seem to be fair and in accordance with the probable wishes of the testator, that the burthen of the covenant unperformed by him in his lifetime should be borne by his estate rather than his specific devisees. In the present case the object of the covenant was to insure the premises being put in a condition fit for the occupation of the tenant, under the lease. "Such a covenant is intended to be performed forthwith, not to remain attendant on the lease during its currency. In its nature it seems very different from a covenant by the landlord to keep buildings on the demised land in repair, or to pay for unexhausted improvements at the end of the lease."

CONTESTED ELECTIONS.

[COMMUNICATED.]

The attempt made some years ago to secure a better method of dealing with contested elections than that afforded by Parliamentary committees has been productive of abuses almost as flagrant as those which prevailed under the latter system. Political influence was potent in the committees to prevent anything like a judicial decision being arrived at. The same sort of influence now prevents the case from ever coming to trial, and the greater the need for enquiry the more likely it is that no enquiry will be held. If A or one side has been guilty of such acts of corruption as would inevitably void his election, and B on the other side has been equally guilty, a simple way to avoid damaging exposures, destructive of the reputation of party managers, and injurious to the trade of professional politicians would be to "saw off," as the phrase goes, the one against the other, and let both go scot free, and so by previous arrangement the petition is dropped altogether; or, if it has not been practicable to avoid the case being set down for trial, counsel for the petitioner is instructed to tell the court that no evidence has been found to sustain the charge set forth in the petition, and that therefore he desires the case to be withdrawn. The judges cannot compel the petitioner, who is generally a man of straw, to proceed against his will. They have no means of arriving at the true facts of the case, unless some elector intervenes to take up the abandoned suit, and so the solemn farce proceeds with the inevitable result of bringing the whole affair into contempt, from which the court itself cannot altogether escape.

The proceedings in connection with the recent elections in the Province of Ontario disclose a condition of things which should not be allowed to continue as they are, unless the people are content to forfeit all claim for political integrity. Out of about ninety contested elections nearly seventy-seven protests were filed, of which about thirty have been set down for trial, it being the general belief that the "sawing off" process will dispose of the rest. It is evident, therefore, that either the electorate are hopelessly corrupt, or else that our method of dealing with corrupt practices is worse than useless. No one will believe that in seventy constituencies in Ontario corrupt practices prevailed to such an extent as to call for the intervention of the courts, though, as already pointed out, the fact that nearly forty out of the seventy petitions have been practically dropped is no proof that such practices have not prevailed to a greater extent than is at all to our credit. It would be interesting to ascertain in how many cases the contestants would themselves have put up the deposit, and made themselves liable for the costs of fighting the petition, if no outside interference had taken place. Those who framed the legislation which placed the trial of contested elections in the hands of the judges instead of a partisan committee certainly never contemplated the possibility of their action being the means of placing a fresh weapon at the disposal of party managers, who appear, in zeal for their party, to lose sight of what is due to the country. Either the filing of petitions was necessary in consequence of prevailing

corruption, in which case they should not have been withdrawn, or the allegations contained in them are a libel upon the electors, in which case they should not have been filed. Nor can party leaders any more than party managers escape responsibility for this condition of affairs.

It is said as to the recent Ontario elections that the reason why a number of these petitions were filed was because the opponents of the Government had now taken the ground that election constables have no right to vote. This right has been exercised for many years without question, and the contention against it has not much merit, and the arguments in favour of the practice seem to be unassailable. But, after all, this only introduces us to another symptom of the disease to which we are calling attention, for we find a corresponding number of petitions filed on the Government side. It would only be reasonable that the latter should be in an equally good position when the turn comes for a "saw-off."

Now as to the remedy for these evils. The first and most effective would be for the leaders of parties to set their faces against any active interference in such matters, and allow those personally interested to fight their own battles, in which case the amount of the deposit, and subsequent liabilities, would be a sufficient deterrent against vexatious proceedings. Secondly, as that clause of the statutes, both Provincial and Dominion, which leaves the withdrawal of the petition at the discretion of the judge, is really inoperative against abuse, there being no means by which the judge can tell whether the withdrawal is the result of collusion, or of a corrupt arrangement between the parties, enact that the deposit shall be absolutely forfeited to the Crown unless, within a reasonable time, the case is not only brought to trial but proceeded with until the judge is satisfied as to the decision which ought to be arrived at. Some better remedy may be suggested by those conversant with the trial of controverted elections, but that some remedy should be found for such an abuse of the functions of the Courts as has recently arisen must be apparent to all who have any regard for purity of election, or respect for the law. Possibly a more effective remedy than those suggested might be to require a petitioner with his petition to file a statement, particularizing some definite acts of corruption, or stating other reasons for voiding the election, to be vouched for by the oath of the petitioner, but even this would be attended with practical difficulties.

The field which is opened up for discussion is a broad one, and a full consideration would introduce matters political, which a law journal might not care to take up, but the above is given as food for thought.

REPORTS AND NOTES OF CASES

Privy Council—England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA *v.* ATTORNEYS-GENERAL FOR ONTARIO, QUEBEC AND NOVA SCOTIA.

(THE FISHERIES CASE.)

Before the Lord Chancellor, Lords Herschell, Watson, Macnaghten, Morris, Shand and Davey, and Sir Henry DeVilliers.

Constitutional law—Dominion and Provincial rights—B. N. Act, s. 91—R.S.C. chaps. 92 and 95—R.S.O. c. 24—Rivers and streams—Harbours—Fisheries.

Appeal from the judgment of the Supreme Court of Canada, reported in 26 S.C.R. 444.

Held, 1. There is no presumption that because legislative jurisdiction is vested in the Dominion, proprietary rights are therefore transferred to the Dominion.

2. The beds of rivers and other waters, whether navigable or not, except public harbours, are vested in the Crown in right of the provinces in which the same are situate.

3. Public harbours belong to the Dominion.

4. The B.N.A. Act, s. 91, does not convey to the Dominion any proprietary rights in relation to fisheries, but the Dominion has power to impose a tax by way of license as a condition of the right to fish.

5. Sec. 4 of R.S.C. c. 95, is ultra vires, and sec. 47 of R.S.O. c. 24, is intra vires.

6. The enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Parliament, and is ultra vires of a Provincial legislature.

7. The provinces may declare the conditions upon which fishery leases or licenses may be granted, and may deal with proprietary rights in fisheries.

8. R.S.C. c. 92, is intra vires.

[LONDON, June, 1898

The Governor-General of Canada by Order in Council referred to the Supreme Court of Canada various questions relating to the property, rights and legislative jurisdiction of the Dominion of Canada and the Provinces respectively in relation to rivers, lakes, harbours, navigation, fisheries and other cognate subjects. These questions were as follows:

1. Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several Provinces, and not granted before Confederation, become under the British North America Act the property of the Dominion, or the property of the Province in which the same respectively are situate, and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly

and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

2. Is the Act of the Dominion Parliament, R.S.O. c. 92, intituled "An Act respecting certain works constructed in or over navigable waters," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

3. If not, in case the bed and banks of a lake or navigable river belong to a Province, and the Province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

4. In case the bed of a public harbour or any portion of the bed of a public harbour at the time of Confederation had not been granted by the Crown, has the Province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

5. Had riparian proprietors before Confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

6. Has the Dominion Parliament jurisdiction to authorize the giving by lease, license or otherwise, to lessees, licensees or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

7. Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, license or otherwise, to lessees, licensees or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

8. Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the Provinces respectively under the British North America Act, if any such are so assigned?

9. If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction for the purpose of Provincial revenue or otherwise to require the Dominion lessee, licensee or other grantee to take out a Provincial license also?

10. Has the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any, and which of such several sections, or any and what parts thereof respectively?

11. Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, so far as

these respectively relate to fishing in waters, the beds of which do not belong to the Dominion, and are not Indian lands?

12. If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid or from the rights incident to the ownership by the Provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers and the like?

13. Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chapter 24, intituled "An Act respecting the sale and management of Public Lands," and sections 5 to 13, both inclusive, and sections 19 and 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any, and which of such several sections, or any and what parts thereof respectively?

14. Had the Legislature of Quebec jurisdiction to enact sections 1,375 to 1,378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

15. Has a Province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and otherwise to regulate and protect fisheries within the Province, subject to, and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence.

16. Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work or erection in, or filling up of navigable waters?

17. Had the riparian proprietors before Confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

The Supreme Court having answered some of the questions adversely to the Dominion and some adversely to the provinces, both parties appealed.

C. Robinson, Q.C., *R. B. Haldane*, Q.C., and *D. B. McTavish*, Q.C., for the Dominion *Edward Blake*, Q.C., *Emelius Irving*, Q.C., and *J. M. Clark*, for the Province of Ontario. *Coward* and *Cannon*, for the Province of Quebec. *J. W. Longley*, Q.C., and *Coward*, for Nova Scotia.

The judgment of their Lordships was delivered by

The LORD CHANCELLOR.—Before approaching the particular questions submitted their Lordships think it well to advert to certain general considerations which must be steadily kept in view, and which appear to have been lost sight of in some of the arguments presented to their Lordships.

It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same. The answer

therefore to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject matter is conferred on the Dominion legislature, for example affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the Provinces remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada. With these preliminary observations their Lordships proceed to consider the questions submitted to them.

The first of these is whether the beds of all lakes, rivers, public harbours and other waters, or any, and which of them, situate within the territorial limits of the several provinces, and not granted before confederation, became under the British North American Act the property of the Dominion.

It is necessary to deal with the several subject matters referred to, separately, though the answer as to each of them depends mainly on the construction of the third schedule to the British North America Act. By the 108th section of that Act it is provided that the public works and property of each province enumerated in the schedule shall be the property of Canada. That schedule is headed "Provincial Public Works and Property to be the Property of Canada," and contains an enumeration of various subjects numbered 1 to 10. The 5th of these is "Rivers and Lake Improvements." The word "Rivers" obviously applies to nothing which was not vested in the province. It is contended on behalf of the Dominion that under the words quoted, the whole of the rivers so vested were transferred from the province to the Dominion. It is contended on the other hand that nothing more was transferred than the improvements of the provincial rivers, that is to say only public works which had been effected and not the entire beds of the rivers. If the words used had been "river and lake improvements," or if the word "lake" had been in the plural "lakes," there could have been no doubt that the improvements only were transferred. Cogent arguments were adduced in support of each of the rival constructions; upon the whole their Lordships after careful consideration have arrived at the conclusion that the Court below was right and that the improvements only were transferred to the Dominion. There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions. It is to be observed that rivers and lake improvements are coupled together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were

transferred and only the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and the provincial rights respectively. Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion, but every one of these reasons seems equally applicable to lakes. The construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their Lordships feel justified therefore in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the legislature.

With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the third schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour," on which public works had been executed, became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court in arriving at the same conclusion founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green*, 6 S.C.R. 707, where it was held that the foreshore between high and low watermark on the margin of the harbour became the property of the Dominion as part of the harbour.

Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "Public Harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would in their judgment be likely to prove misleading and dangerous. It must depend, to some extent at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green*, 6 S.C.R. 707 that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water mark being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If for example it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt form part of the harbour, but there are other cases in which, in their Lordships' opinion it would be equally clear that it did not form part of it.

Their Lordships pass now to the questions relating to fisheries and fishing rights. Their Lordships are of opinion that the ninety-first section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the

heading "Sea Coast and Inland Fisheries" in section ninety-one. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively, remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which was admitted the Dominion legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is left entirely to the Dominion legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected. If, however, the legislature purports to confer upon others proprietary rights, where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by section ninety-one. If the contrary were held it would follow that the Dominion might practically transfer to itself property which has by the British North America Act been left to the provinces, and not vested in it.

In addition, however, to the legislative power conferred by the twelfth item of section ninety-one, the fourth item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of license as a condition of the right to fish. It is true that by virtue of s. 92 the provincial legislature may impose the obligation to obtain a license, in order to raise a revenue for provincial purposes, but this cannot in their Lordships' opinion derogate from the taxing power of the Dominion Parliament to which they have already called attention. Their Lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter, and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislatures concerned.

It follows from what has been said that in so far as section 4 of the Revised Statutes of Canada, chapter 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion, but to the Provinces, it was not within the jurisdiction of the Dominion Parliament to pass it. This was the only section of the Act which was impeached in the course of the argument, but the subsidiary provisions in so far as they are

intended to enforce a right which it was not competent for the Dominion to confer, would of course fall with the principal enactment.

Their Lordships think that the legislature of Ontario had jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chapter 24, except in so far as it relates to land in the harbours and canals, if any of the latter be included in the words "other navigable waters of Ontario." The reasons for this opinion have been already stated when dealing with the questions in whom the beds of harbours, rivers and lakes were vested.

The sections of the Ontario Act of 1892, entitled "An Act for the protection of the Provincial Fisheries," which are in question, consist almost exclusively of provisions relating to the manner of fishing in provincial waters. Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion Parliament. The question is whether they can be the subject of provincial legislation also, in so far as it is not inconsistent with the Dominion legislation.

By section 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the legislatures of the province, "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" it is declared that (notwithstanding anything in the Act) "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next thereinafter enumerated." The 12th of them is "Sea Coast and Inland Fisheries."

The earlier part of this section, read in connection with the words beginning "and for greater certainty," appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in section 91 is not within the legislative competence of the provincial legislature under section 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in section 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever therefore a matter is within one of these specified classes legislation in relation to it by a provincial legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the Judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of section 91, and in particular to the word "exclusively." It would authorize for example the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.

It is true that this Board held in the case of *The Attorney-General of Canada* v. *The Attorney-General of Ontario* that a law passed by a provincial legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and civil rights," although it

was of such a nature that it would be a suitable ancillary provision to a brankruptcy law. But the ground of this decision was that the law in question did not fall within the class "Bankruptcy and Insolvency" in the sense in which those words were used in section 91.

For these reasons their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion legislature, and is not within the legislative powers of provincial legislatures.

But whilst in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of provincial legislatures is incompetent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it would be properly treated as falling under the heading "Property and civil rights" within section 92, and not as in the class "Fisheries" within the meaning of section 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein appear proper subject for provincial legislation, either under class 5 of section 92." "The management and sale of public lands" or under the class "Property and civil rights." Such legislation deals directly with property, its disposal and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "Fisheries" as that word is used in section 92.

The various provisions of the Ontario Act of 1892 were not minutely discussed before their Lordships, nor have they the information before them which would enable them to give a definite and certain answer as to every one of the sections in question. The views however which they have expressed, and the dividing line they have indicated will they apprehend afford the means of determining upon the validity of any particular provision or the limits within which its operation may be upheld, for it is to be observed that section 1 of the Act limits its operation to "fishing in waters and to waters over or in respect of which the legislature of this province has authority to legislate for the purpose of this Act." Secs. 1375, 1376, and the 1st sub. s. of 1377 of the Revised Statutes of Quebec afford good illustrations of legislation such as their Lordships regard as within the functions of a provincial legislature.

Their Lordships entertain no doubt that the Dominion Parliament had jurisdiction to pass the Act intituled "An act respecting certain "works constructed in or over navigable waters." It is in their opinion clearly legislation relating to "navigation."

Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors.

Dominion of Canada.

SUPREME COURT.

Ontario.] McKENZIE *v.* BUILDING & LOAN ASSOCIATION. [May 6.

Mortgage—Leasehold—Assignment of equity of redemption—Acquisition by assignee of reversion—Priority.

The assignee of a term, who takes the assignment subject to a mortgage and afterwards acquires the reversion cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. *Emett* v. *Quinn*, 7 O. A. R. 306, distinguished. Judgment of the Court of Appeal, 24 O. A. R. 599, affirmed. Appeal dismissed with costs.

Armour, Q.C., and *Saunders* for appellant. *Scott*, Q.C., and *Alan Cassels* for respondents.

Ontario.] MILLER *v.* HAMILTON POLICE FUND. [May 14.

Benefit society—Rules—Construction—Suspension of payment.

In 1889 the Police force of Hamilton established a benefit fund to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, and to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, and one of the rules provided as follows :—"No money to be drawn from the fund for any purpose whatever until it reach the sum of eight thousand ($8,000) dollars."

Held, that in case of a member of the force dying before the fund reached the said sum, the gratuity to his family was merely suspended, and was payable as soon as the amount was realized. Appeal allowed with costs.

Watson, Q.C., for appellant. *Teetzel*, Q.C., for respondents.

Ontario.] BAIN *v.* ANDERSON [May 14.

Master and servant—Contract of hiring—Duration of service—Evidence—Dismissal—Notice—Assuming jurisdiction.

Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case.

A business having been sold, the foreman, who was engaged by the year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain, his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the month was a re-engagement for another year on the same terms.

Held, affirming the judgment of the Court of Appeal (24 O. A. 296, which reversed that of Meredith, C.J. at the trial, 27 O. R. 369), that as it appeared that the foreman knew that the business before the sale had been losing money and could not be kept going without reduction of expenses and salaries; as he had been informed that the contracts with the employees had not been assumed by the purchaser; and as upon his own evidence there was no hiring for any definite period, but merely a temporary arrangement until the purchaser should have time to consider the changes to be made—the foreman had no claim for damages and his action was rightly dismissed.

Where the jurisdiction of the Supreme Court to entertain an appeal is doubtful, the Court may assume jurisdiction when it has been decided that the appeal on the merits must be dismissed. *Braid* v. *Great Western Railway Co.*, 1 Moo. P. C. N. S. 101 followed.

By 60-61 Vict., c. 34, s. 1, s.-s. (c), no appeal lies from judgments of the Court of Appeal for Ontario unless the amount in controversy *in the appeal* exceeds $1,000, and by sub-s. (f), it is the amount demanded and not that recovered which determines the anount in controversy.

Held, per TASCHEREAU, J., that to reconcile these two subsections, par. (f) should probably be read as if it meant the amount demanded upon the appeal. To read it as meaning the amount demanded in the action, which is the construction the court has put upon R.S.C. c. 135, s. 29 (2) relating to appeals from Quebec, would seem to be contrary to the intention of Parliament.

Laberge v. *Equitable Ins. Co.*, 24 S.C.R. 59, distinguished. Appeal dismissed with costs.

Gibbons, Q.C., for appellant. *S. H. Blake*, Q.C. and *Osler*, Q.C., for respondents.

Ontario.] OSTROM *v.* SILLS. [May 14.

Adjoining proprietors of land—Different levels—Injury by surface water—Easement.

Ostrom and Sills were adjoining proprietors of land in the village of Frankfort, Ont., that of Ostrom being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of Sills, and a culvert was made connecting with it. In 1887 Sills erected a building on his land, and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backing up on the land of Ostrom, who brought an action against Sills for the damage caused thereby.

Held, that Sills having the right to cut off the part of the culvert which projected over his land, was not liable to Ostrom for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain. Appeal dismissed with costs.

C. J. Holman and *E. Gus Porter*, for appellants. *Clute*, Q.C., and *Williams*, for respondents.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] WEST HURON PROVINCIAL ELECTION. [March 26.

Ballots—Recount—Ballot initialed by ballot clerk instead of D.R.O.—Mutilated ballot—Words written on ballot—Presumption.

Cross appeals by the candidates, J. T. Garrow and Joseph Beck, from the decision of the Judge of the County Court of the County of Huron, on a recount held before him.

Held, 1. A ballot will not be rejected because it is initialed by the poll clerk, instead of by the deputy returning officer, when the whole number of ballots, as counted, agree with the number of names of persons marked in the poll book as having received ballots, the handwriting of the initials corresponding with the handwriting of the signature of the poll clerk.

2. A ballot, from which a strip, having the official number upon it, which is an integral part of the ballot, is torn off and missing, will be presumed to be mutilated by the voter, and the vote cannot be counted.

3. A ballot with the word "vote" written after the candidate's name, disallowed.

4. A ballot with the word "Jos." written before Beck, the candidate's name, disallowed.

5. A ballot marked for the candidate Beck, but having the words "for Beck" written on the back of the ballot, disallowed.

In reference to the last three cases, above mentioned, the learned Judge said; "There is nothing to show that the writing was not placed on the back or front of the ballot by the voter himself. The presumption is that it is his writing. The whole subject of ballot marking is well worthy of examination by the full Court of Appeal, with the view of laying down some clear principle. The course of decision in this country has, however, been to disallow ballots marked as above. I refer to the *North Victoria Case*, H.E.C. 681, where it is said: 'The voter besides putting the cross for the respondent, has written the respondent's name in full. That is certainly bad, for by that writing the voter may be identified. I cannot say; it may not have been put there for that purpose,' and the same principle is applied in *Woodward* v. *Sarsons*, L.R. 10 C.P. 733. The handwriting of the voter would, in many instances, even if found in a single word or part of a word, furnish a very potent means of identifying him."

Aylesworth, Q.C., for Garrow. *Wallace Nesbitt*, *Masten* and *W. D. McPherson*, for Beck.

Maclennan, J.A.] WEST ELGIN PROVINCIAL ELECTION. [April 12.

Ballots—Recount—Mutilated ballot—Ballot marked for both candidates—Words written on ballot—Ballot marked in wrong place—Imperfect cross—Spoiled ballots.

There was a recount of votes by the Judge of the County Court of the

County of Elgin, from which both candidates (McNish and McDiarmid) appealed.

MACLENNAN, J. A. :—The form of ballot used was identical with that in the schedule of the Election Act, except that a scroll about one-eighth of an inch wide was used instead of the plain lines running from left to right in the form. The upright lines separating the numbers from the names were thin, plain lines, similar to those in the form, and bore the same colours as the names of candidates respectively. Fifteen of these twenty ballots were marked in the division containing McDiarmid's number, to the left of the line separating the numbers from the name, and the other five were similarly marked in the division containing MacNish's number. They were all counted by the learned judge, and his decision is objected to on behalf of MacNish. The ground of objection is that, not being marked in the division containing the name, they are void, as not complying with s. 103 of the Act, which directs that the cross be placed by the voter on the right hand side, opposite the name of the candidate for whom he desires to vote, or at any other place within the division which contains the name of such a candidate.

The question does not concern the right to vote, but only the proper method of doing so. The legislature has given certain directions for marking the ballot. They are intended for all classes of voters, including some who are not accustomed to the use of paper and pencil and some who are dull and unintelligent, and yet who have as good a right to vote as the most intelligent. Therefore, if a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act according to any fair and reasonable construction of it, the vote ought to be allowed. I think that is the result of the authorities, both here and in England : *Cirencester*, 4 O'M. & H. 196 ; *Woodward* v. *Sarsons*, L.R. 10 C.P. 733 ; *Thornbury*, 16 Q.B.D. 739 ; *Phillips* v. *Goff*, 17 Q.B.D. 805 ; *North Victoria*, H.E.C. at p. 680 ; *Bothwell*, 8 S C.R. 676.

In the present case the question is whether twenty persons who had an undoubted right to vote, and who desired and intended and endeavoured to do so, have nevertheless failed in their attempt. There are two methods of marking the ballot allowed by s. 103. The cross may be placed at the right-hand side, opposite to the name of the candidate intended to be voted for, or it may be placed in any other place within the division containing his name. These are really not two alternative methods, because the second method includes the first. Are these ballots marked within the division containing a candidate's name? If we say, looking at the ballot which was here used, that the name of the candidate is in one division and his number in another, then these marks are not in the division containing the name, but in that containing the number. But I think it clear that these are not the divisions intended by the statute. The dividing line between the name and the number is not essential. There is no need whatever for a separating line between a candidate's name and his number, and the ballot would be perfectly good without it. Section 69, sub-sec. 2, requires the names to be arranged alphabetically on the ballot, and sub-sec. 3 directs the number and name of each to be printed in ink of different

colours. Therefore, the number is something belonging to the candidate, and not something distinct. There is no direction where the number is to be placed, and it might be placed anywhere near the name, before or after it, or above or under it. It is different with the names of the candidates. They must be separated from each other. Each must have a separate part of the ballot paper for itself, and must therefore be in a separate division. Accordingly, we find the form in the schedule divided by lines drawn from right to left, with as many divieions as there are candidates. I think these are the divisions intended by the statute, and that the divisions containing the numbers are mere subdivisions of the divisions containing the names. In other words, it is the same division of the ballot paper which contains each candidate's name and number. It would be a strange construction of the statute which would hold that, on a ballot from which the immaterial and useless upright lines were omitted, a cross near the number or even to the left of it would be good, as it clearly would be, but that on a ballot containing those lines a cross so placed would be bad ; and yet, a ballot in either form would be good, and might be used with propriety in either election. I think a construction leading to such a result ought not to be adopted, if it can be avoided. In my opinion, there is a very plain sense in which, notwithstanding the upright line, the space containing the number may be regarded as a part of the division of the ballot containing the candidate's name, and therefore I am bound to hold that it is so, and to affirm the validity of ballots marked within that space. I therefore think that the learned judge's decision was quite right, and that those twenty votes were properly allowed and counted by him.

There is another ballot, No. 117, which was rejected both by the deputy returning officer and by the learned judge, presumably on account of having a considerable portion of the blank part on the right-hand side removed, a section of equal width from top to bottom, and about three-tenths of the whole width of the original paper. The part removed had none of the printed matter of the ballot upon it, except perhaps a portion of the lines from left to right separating the names of the candidates. In other respects this ballot is perfect, and properly marked for McDiarmid. The argument which was strongly urged against its allowance was that the voter might carry away with him the part removed, and use it to show that he had voted for McDiarmid. I have hesitated a great deal over this ballot, but, upon the whole, I do not think there is anything in the Act requiring me to reject it. Section 112 (3) requires ballots to be rejected on which anything in addition to the printed number and the deputy returning officer's name or initials is written or marked, by which the voter can be identified. There is nothing of that kind here, and I do not feel at liberty to extend the language of the legislature so as to include such a case as this within the prohibition, and thereby to disfranchise the voter, who has in every respect marked his ballot distinctly and properly : In *Thornbury*, 16 Q.B.D. at p. 753. Section 103 requires the voter to mark and to fold and to return to the deputy returning officer the very ballot paper which has been given to him, and by s. 105 no person who has received one is to take it away out of the polling place. It might be argued that he is required to return the whole ballot paper, and not merely a part of it, and that the prohibi-

tion of taking it away extends to every part of the paper. It may perhaps be inferred from the fact that the deputy returning officer refused to count the vote, that he did so because he knew he had not given out any ballot paper so much smaller than all the others as this, and therefore that it was the voter who had torn or cut a piece off it. But for that, it would be an assumption that there had been any part removed, or, if there had, that it had been done by the voter, or that it had not been in that condition when given to him. It is still a perfect ballot, properly marked, and it is only by comparison with the other ballot papers that the inference can be drawn that any part of it had been removed. Now, section 109 seems to be very material to this question. That provides for the case of a voter spoiling his paper, and it is only when it has been dealt with so "that it cannot be conveniently used as a ballot paper" that it is spoiled, and ought to be delivered up and a new one procured. This voter may by inadvertence have marked it wrong in the first place, and, immediately perceiving that, may have torn or cut off the margin on which he had placed his mark. He then finds that it can still be conveniently used as a ballot paper, and he does make use of it. I think s. 109 warrants the conclusion that he might do so. This ballot is not like that which was before my brother Osler in the *West Huron* case, in which a part was torn off, and which was disallowed by him. In that case the part torn off was an essential part of the ballot paper, namely, that on which the printed number had been. I think the proper conclusion is that this ballot ought not to have been rejected, and ought to be counted for McDiarmid.

Nine ballots were questioned as having other marks thereon besides the cross. No. 3484 was well marked for McDiarmid, whose name was uppermost on the paper, and there were, besides the proper mark, two other small crosses near the upper margin of the paper, outside of the line. It was disallowed by the learned judge, but I think that was wrong, and that it should be allowed for McDiarmid. Nos. 3945 and 4858 were both marked for McDiarmid, but there was a straight stroke on MacNish's division. The learned judge disallowed them, but, I think, wrongly. They should be allowed for McDiarmid. No. 5350 was well marked for MacNish, but in McDiarmid's field there was also a cross, but carefully obliterated with a pencil. I think it was rightly allowed for MacNish by the learned judge. Nos. 6564 and 7735 were allowed, the first for McDiarmid and the other for MacNish, and I think rightly. No. 8508 was well marked for McDiarmid, but with two obscure lines opposite to MacNish's name, lying very close together, almost coincident. It was counted by the deputy returning officer, but rejected by the learned judge. I cannot say the lines do not cross each other, and therefore I cannot disturb his finding. No. 8491 is like the last in every respect, and was rejected both by the deputy returning officer and the learned judge. I cannot say they were wrong.

Four ballots were questioned for having names or initials upon them other than those of the deputy returning officer. No. 1306 has the name MacNish on the face, in pencil, in that candidate's division, as well as a proper cross. It was rejected by the learned judge. I think it should have been allowed. I am unable to see how the voter could (not, might possibly) thereby

be identified: *Cirencester*, 4 O'M. & H. 196, per Hawkins, J. No. 7369 was well marked for MacNish, but had the words "Mr. MacNish, West Elgin," in pencil, on the back. I think it was properly allowed by the learned judge. No. 7509 was properly marked for MacNish, and had the initials "D.F." on the back as well as those of the deputy returning officer. It was allowed by both the deputy returning officer and the learned judge, and I think rightly. No. 7582 was properly marked for McDiarmid, but had the name "John Cains," in pencil, on the back, besides the initials of the deputy returning officer. It was rejected both by the deputy returning officer and the learned judge. It may have been because there was a voter of that name on the list. I cannot say it was not rightly rejected.

There were three cases of alleged imperfect and doubtful crosses. Of these 5867 and 7165 were, I think, rightly allowed for MacNish. The first was a sprawling sort of a cross, but a cross nevertheless. The other was a cross, one of the lines being indistinct at and for a very short distance on both sides of the intersection, but still quite visible. No. 6145 was an unusually large cross, the arms extending into McDiarmid's field, but the intersection wholly within McNish's division. It was rejected both by the deputy returning officer and the learned judge. I think it should have been counted for MacNish.

The remaining ballot is no. 8176. The learned judge thinks this ballot was found in the spoiled ballots' envelope, but he says that, looking at the ballot paper account and all the documents which were before him, he thinks it was placed in a wrong envelope by mistake, and he allowed it. It is well marked for McDiarmid, but it is like number 5350, mentioned above, in having a cross in MacNish's field with evident obliteration marks over it. I think the learned judge rightly allowed it, if it was not a spoiled ballot. I have no means of reviewing his conclusion that it was not a spoiled ballot, inasmuch as, this appeal being a limited one, the Act does not authorize the transmission to me of anything but the ballot papers which are the subject of appeal, together with a notice of appeal and a certificate of the learned judge's finding.

The result is that Mr. McDiarmid has a majority of one. No costs of the appeal.

E. F. B. Johnston, Q.C., and *Aylesworth*, Q.C., for Donald MacNish. *Wallace Nesbitt* and *T. W. Crothers*, for Finlay G. McDiarmid.

Maclennan, J.A.] SOUTH PERTH PROVINCIAL ELECTION. [March 26.

Ballots—Re-count—Ballot numbered by D.R.O.—Ballot marked in wrong place—Defective form of ballot—Ambiguity.

There was a re-count of votes before the Judge of the County Court of the County of Perth, from which two of the candidates (Moscrip and Monteith) appealed.

MACLENNAN, J.A.—The objection to the ballots cast at No. 3, Downie, and No. 4, Hibbert, was that a number had been placed on the back of each ballot by the deputy returning officer, in pencil. The learned judge disallowed the objection, and I think he was clearly right in doing so, inasmuch as s. 112

(3) expressly provides that "no word or mark written or made or omitted to be written or made by the deputy returning officer on a ballot paper shall void the same."

I have examined each one of the whole 112 ballots which were questioned, and specially passed upon by the learned judge, and I agree with his decision thereon in each case, and generally with his reasons, with the exception of 14 ballots allowed for Monteith, and with regard to which, with great respect, I have been unable to come to the same conclusion. I find myself obliged to come to the conclusion that all these ballots are either marked for the candidate Frame, or are void for uncertainty, and so cannot be counted for Monteith, as they have been by the learned judge. The difficulty is occasioned by a fault in the printing of the ballot papers. There were three candidates, Frame, Monteith, and Moscrip, and their names were arranged in alphabetical order, Monteith's being in the centre division. Frame chose black as his colour, Monteith, blue, and Moscrip, red; and it is said, and I suppose truly, that the ballot had to pass through the printing press at least three times. And in all these fourteen cases, Monteith's surname, that is, the one printed in large type, was placed either upon or above the line separating his division from Frame's, instead of being placed wholly within the division intended for it. The Christian name and surname, however, in smaller type, and the addition of each candidate, are wholly within his own division. In two of such cases, in which the cross was placed at the right hand of the large surname, but a little higher up than exactly opposite to it, the learned judge allowed the votes for Frame; but in the above fourteen cases, where the cross was very nearly opposite to the large name "Monteith," he allowed it, although in one case it was exactly on the dividing line, and in all the other cases wholly above it. His reason for doing so is that the voter, having placed his mark opposite to the candidate's name on the right hand side, has complied literally with the Act; and that would be so but for the other direction that it may be placed anywhere within the division containing the candidate's name. The difficulty is that one of Monteith's names is in, or partly in, Frame's division, and that persons intending to vote for the latter are told they may do so by placing their cross anywhere within the division containing the name. When the Legislature speaks of divisions containing the names, and when the form of ballot prescribed and used has lines upon it indicating such divisions, I think it cannot be said that the lines are immaterial, or that they may be disregarded. I think a voter intending to vote for Frame, and being told that he would be right if he put his mark anywhere in the division containing his name, might have marked his ballot exactly as any one of these fourteen which have been allowed for Monteith. There is one exception from that remark, namely, No. 5230, in which the cross is exactly upon the line, and may have been intended for either one or the other. The learned judge says the dividing line between Frame's division and Monteith's division must be conceived to be drawn immediately above the surname of the latter; but I think I cannot disregard the fact that there is an actual dividing line upon the ballot, separating the two divisions, and that every one of the votes in question may in fact have been intended for Frame, being within the division of the ballot containing his

name, notwithstanding that they are also at the right hand side, and opposite or nearly opposite to Monteith's name, and may have been intended for him. I think those fourteen ballots ought not to have been allowed and ought to be taken off Mr. Monteith's poll.

The learned judge has not in his certificate stated what he found the majority to be, or in whose favour it was, and I can do no more than to decide that the fourteen ballots above mentioned ought to have been rejected.

I think there should be no costs.

Idington, Q.C., for Moscrip. *Wallace Nesbitt* and *F. H. Thompson*, for Monteith.

From Falconbridge, J.] LANGLEY *v.* MEIR. [June 30.

Insolvency—Assignments and preferences—Landlord and tenant—Rent—Accelleration clause—58 Vict. c. 26, s. 3, sub-s. 1 (O.)—R.S.O. c. 170, s. 34, sub-s. 1.

The above enactment is a restrictive provision, and limits the landlord's lien, even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provisions. *Clarke* v. *Reid*, 27 O.R. 618, overruled. Judgment of FALCONBRIDGE, J., reversed.

Shepley, Q.C., for appellant. *W. Barwick*, for respondent.

From Rose, J.] SPARKS *v.* WOLFF. [June 30.

Will—Construction—Change in law—"Heirs"—14-15 Vict., c. 6—43 Vict. c. 14, s. 2 (O.).

A testator, who died on the 8th of November, 1867, by his will, made on the 15th of October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage, to his son, "should he be living at the happening of said contingencies," and if not then living "unto the heirs of the said (son)." The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887.

Held, that the Act abolishing heirship by primogeniture, 14-15 Vict. c. 6, applied, and that all the brothers and sisters of the son were his "heirs" and entitled to take under this device. *Tylee* v. *Deal*, 19 Gr. 101, and *Baldwin* v. *Kingstone*, 18 A.R. 63, distinguished. Judgment of ROSE, J., reversed.

Armour, Q.C., for appellant. *Osler*, Q.C., for respondent.

From Assessment Court.] [June 30.

IN RE CANADA LIFE ASSURANCE COMPANY AND CITY OF HAMILTON.

Assessment and taxes—Life insurance company—Reserve fund—Income—Divisible profits.

The net interest and dividends received by the Canada Life Assurance Company from investments of their reserve fund form part of their taxable income, though to the extent of ninety per cent. thereof divisible, pursuant to the terms of the company's special Act, as profits among participating policy holders, and not subject to the control or disposition of the company. Judgment of the Assessment Court affirmed.

Bruce, Q.C., for appellants. *Robinson*, Q.C., and *Mackelcan*, Q.C., for respondents.

From Assessment Court.] [June 30.

IN RE BELL TELEPHONE COMPANY AND CITY OF HAMILTON.

Assessment and taxes—Telephone company—Poles, wires, conduits and cables.

In assessing for purposes of taxation the poles, wires, conduits and cables of a telephone company the cost of construction or the value as part of a going concern is not the test; they must be valued, in the assessment division in which they happen to be, just as so much dead material to be taken in payment of a just debt from a solvent debtor. Judgment of the Assessment Court reversed.

Staunton and *Ambrose*, for appellants. *Mackelcan*, Q.C., for respondents.

Armour, C.J., Falconbridge, J., Street, J. [June 27.

KENNEDY *v.* BEAL.

Arbitration Act—Rule 652—Arbitrator selected by the parties.

Upon a proper construction of R.S.O., c. 62, ss. 12 and 35, Rule 652 does not apply in the case of an arbitration ordered by consent in Court, to an arbitrator selected and agreed on by the parties.

Robinson, Q.C., and *Ryckman*, for plaintiff. *Aylesworth*, Q.C., for defendants.

MacMahon, J.] LEGGATT *v.* BROWN. [June 27.

Contract—Consideration in part illegal—Stifling prosecution.

The manager of the business of an insolvent firm was arrested and imprisoned on a charge of having procured the firm, while in insolvent circumstances, to transfer certain of its property to another person with intent to defraud the creditors of the firm. After he had been released on bail an offer was made in writing by his wife and her son, to the creditors of the firm, to pay a certain percentage of their claims, in addition to the dividend to be paid by the estate of the firm, and to withdraw certain actions and procure the abandonment of certain claims, upon certain conditions set out in the offer, one of which was that any creditor accepting the offer, should not thereafter, directly or indirectly, institute or be a party to any action or proceeding against the husband in respect of any matter or thing in any wise connected with the affairs or business of the firm. This offer was accepted by the plaintiff and a number of the other creditors. After it was made, the husband was discharged from custody, the informant, one of the creditors, not appearing, and no evidence being offered in support of the charge. Promissory notes were afterwards made by the wife and her son in favour of the creditors for the stipulated percentage. In an action by one of the creditors upon some of the notes,

Held, that although not stated in express terms, one object of the defendants in making their offer was to procure the stifling of the prosecution of the charge made against the husband; that it was in accordance with the concluded agreement made by the defendants with the plaintiff and the other

creditors, that no evidence was offered on the pending charge, which was consequently dismissed; and that the notes sued upon, having been given upon the illegal agreement thus entered into, could not be enforced. *Rawlings* v. *Coal Consumers' Association*, 43 L.J.M.C. 111; *Windhill Local Board of Health* v. *Vint*, 45 Ch. D. 351, and *Jones* v. *Merionethshire Permanent Benefit Building Society* (1891) 2 Ch. 587, followed.

Held, also, that as part of the consideration for the agreement was illegal, the whole was bad. *Lound* v. *Grimwade*, 39 Ch. D. at p. 613, referred to.

George Kerr, for plaintiff. *J. E. O'Meara*, for defendant Patterson. *Wyld*, for defendants Altha Ann Brown and J. W. Baker. *Fripp*, for defendant, W. E. Brown.

Rose, J., MacMahon, J.] DANIELS *v.* DANIELS. [June 29.

Chattel mortgage—Renewal statement—Assignment between making and filing—R.S.O., c. 148, s. 18.

A chattel mortgage does not cease to be valid as against creditors, etc., if otherwise regularly renewed, because a renewal statement, made and verified by the mortgagee before an assignment by him of the mortgage, is not filed until after such assignment.

J. Bicknell and *A. Bicknell*, for plaintiff. *Brewster*, for defendant William Daniels. *S. C. Smoke*, for defendant Stockton.

HIGH COURT OF JUSTICE.

Rose J.] HAWKE *v.* O'NEILL. [June 16.

Jury notice—Striking out—Convenience—Judge in Chambers—Judge at trial

A jury notice should not be struck out by a Judge in Chambers, upon a motion made before the trial, simply upon the ground that the action can be more conveniently tried without a jury; that is a matter which should be left for the consideration of the Judge presiding when the action comes on for trial.

W. H. Wright, for plaintiff. *W. Davidson*, for defendant.

Meredith, C.J., Rose, J., McMahon, J. } ALLEN *v.* ONTARIO AND RAINY RIVER R.W. CO. [June 27.

Company—Contract made by director—Authorization—Informality—Sale of undertaking—Purchase money—Equitable charge upon.

The plaintiff was employed by one of the provisional directors of the defendant railway company to do certain work on behalf of the company in advertising and promoting its undertaking. The evidence established that this director was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking, and that he did this, from time to time, without any specific instructions from his co-directors at formal meetings of the board, everything being done in the most informal manner; but that they were fully cognizant of what he did, and

of his manner of doing it, and vested in him, either tacitly or by direct authorization, the right and authority to transact the business of the company.

Held, that the plaintiff was entitled to recover from the company the value of his work. *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869, followed. *Wood* v. *Ontario and Quebec R.W. Co.*, 24 C.P. 334, commented on.

The undertaking having been sold by the provisional directors, free of all liens and incumbrances, for a certain sum of money, which was paid to them, and a portion of which was paid into court under an order in another action; all the provisional directors being parties to this action, and two of them submitting to the order of the Court and being willing that the judgment debt should be paid out of the fund in Court, an order was made, notwithstanding that the purchasers were not parties, directing payment of the plaintiff's debt and costs, and of the costs of the two directors out of such fund.

W. R. Riddell, for plaintiff. *D. W. Saunders*, for defendant company. *S. H. Blake*, Q.C. and *H. M. Mowat*, for defendant Gorham. *D. L. McCarthy*, for defendants Burk and Dwyer.

Meredith, C.J., Rose, J.
McMahon, J. } WARREN v. VANNORMAN. [June 29.

Way—Right of—Prescription—Tenant—Slight deviations—Interruptions—Appeal—Admission of new evidence—Erection of gate across way.

The plaintiff, having omitted to give formal proof of his title at the trial, was allowed to supply it upon the appeal. Upon plaintiff's assent, the judgment was varied by awarding to the defendant leave to erect and maintain a gate across the end of the way in question. The decision of STREET, J., O.R. 84 affirmed on appeal. *Clendenan* v. *Flatchford*, 15 Q.R. 285, referred to.

Britton, Q.C., for defendant. *J. A. Hutchinson*, for plaintiff.

Meredith, C.J., Rose, J.
McMahon, J. } REGINA v. LYON [June 29.

Criminal law—Demanding property with menaces—Criminal Code, 1892, s. 404—Intent to steal—Evidence.

"Everyone is guilty of an indictable offence and liable to two years imprisonment who, with menaces demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it;" Criminal Code, 1892, s. 404. The defendant was convicted by a magistrate of an offence against this enactment. The evidence was that the defendant went, as agent for others, to the complainant's abode to collect a debt from him; that the defendant threatened the complainant that if the latter did not pay the debt, he would have him arrested; that the defendant demanded certain goods, part of which had been sold to the complainant by the defendant's principals, and on account of which the debt accrued, but upon which they had no lien or charge; and the complainant, as he swore, being frightened by the threats and conduct of the defendant, acquiesced in the demand for the goods, which the defendant took away. The defendant swore that he demand-

ed and took the goods as security for the debt which he was seeking to collect; but the complainant said nothing as to this.

Held, MEREDITH, C.J. dissenting, that there was no evidence of intent to steal, and the conviction should be quashed.

Parker, for the defendant. *Cartwright*, Q.C., for the Crown.

Province of New Brunswick.

SUPREME COURT.

Full Court.] QUEEN *v.* PHILLIPS. [June 15.

Peddlers' Act—Sewing machine agent not a peddler.

Defendant was convicted for peddling without a license. The evidence was that he opened a place of business at Sackville for the sale of Singer sewing machines, and that he drove about the adjoining country with a machine in his wagon, soliciting orders. It was also shown that he sold one machine on the road.

Held, that this was not peddling within the meaning of the Peddlers' Act. Conviction ordered to be quashed.

A. P. White, Attorney-General, for the crown. *M. G. Teed*, contra.

Full Court.] CRAWFORD *v.* CITY OF ST. JOHN. [June 1.

Civic voters' list—Neglect to put name on list.

The chamberlain of the city neglected to put plaintiff's name on the civic voters' list after he had paid his taxes, and plaintiff in consequence lost his vote.

Held, that the city was liable for the neglect.

G. A. Belyea and *A. A. Stockton*, Q.C., for plaintiff. *C. N. Skinner*, Q.C., for defendant.

Full Court.] YOUNG *v.* HUBBARD. [June 15.

Replevin—Defendant sued by initial—Bond.

Defendant was sued in replevin by the name of "C. Hubbard," and only one surety signed the plaintiffs' bond to the sheriff.

Held on appeal by defendant that both the writ and the bond were bad. Appeal allowed with costs.

M. G. Teed, in support of appeal. *W. Pugsley*, Q.C., contra.

Full Court.] DURHAM *v.* ST. CROIX SOAP CO. [June 1.

Guessing contest—Value of prize piano—Advertised price—Price obtained at auction.

Defendant offered by advertisement "an $800 Heintzman piano" at the St. John exhibition, to the person guessing nearest to the weight of a cake of soap. Plaintiff claimed she made the nearest guess and brought an action, in which she recovered a verdict for $300. The judges of the contest had passed

over plaintiff's guess, which was in fact the nearest, and decided to sell the piano at auction and divide the proceeds among three other persons, who had all three guessed another figure. At this auction the piano sold for $300 after plaintiff forbade the sale. This was the only evidence offered as to the value of the piano, excepting the defendants' advertisement describing the piano as above, and by which the latter, on cross-examination, said he meant it was worth $800. The trial judge assessed the damages at $300.

Rule to increase the damages refused. TUCK, C.J., dissenting.

E. P. Raymond and *G. D. Hazen*, in support of rule. *L. A. Currey*, Q.C., contra.

Full Court.] MACPHERSON *v.* SAMET. [June 15.

County Court appeal—Costs—Attachment.

An appeal had been allowed with costs from the decision of the York County Court setting aside a writ of capias and the service thereof. The plaintiff took out the clerk's allocation for the costs and served it upon the defendant with a demand for the costs.

Held, on a motion for attachment for non-payment of the costs, that plaintiff's remedy was under s. 75 of the County Court Act, which provides that the costs "shall be certified and form part of the judgment of the Court below."

Rule refused. But the Court intimated that it did not wish to be understood as holding that in no case could an attachment be granted for non-payment of the costs of a County Court appeal.

C. E. Duffy, in support of rule.

Full Court.] EX PARTE ISAAC SAMET. [June 15.

Two actions in different Courts on two promissory notes, both overdue when first action was brought.

A capias was issued against the applicant in the York County Court on a promissory note for $110, and a few days later another capias was issued at the suit of the same plaintiff, out of the City of Fredericton Civil Court, against him on a note for $53. Both notes were overdue and owned by the plaintiff when the first action was brought. An order nisi for a writ of prohibition was obtained to prohibit the City Court from proceeding in the second action on the ground that plaintiff could not split up his claim and bring them in different counts.

Held, that the applications could be so brought.

G. W. McCready, for application. *C. E. Duffy*, contra.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] REGINA *v.* CLOUTIER. [May 11.

Criminal Code, ss. 22, 552, sub-s. 2, 7—Arrest without warrant—Detention of prisoner.

The prisoner was arrested by the Chief of Police of Winnipeg, at the request of the Chief Constable of Montreal, contained in a telegram which charged him with having, with intent to defraud, by false pretences, at the city of Montreal in the province of Quebec, directly obtained from Doull & Gibson, of Montreal, goods capable of being stolen, of the value of $1,387. A writ of habeas corpus having been issued, the Chief of Police made his return on the day after the arrest, justifying the arrest and detention of the prisoner on two grounds: first, setting out positively that the prisoner had been guilty of the offence charged, and that he had arrested him without a warrant; second, that the prisoner had been charged with committing such offence, and that he, the Chief of Police, believed on reasonable and probable grounds that the offence had been committed by the prisoner, and so believing had arrested and was detaining him without a warrant.

Held, that under ss. 22, 552, sub-s. 2, of the Criminal Code, as amended by 58-59 Vict., c. 40, both clauses of the return were good; also that section 22 operates not merely to enable the officer to defend himself if proceeded against for the arrest, but authorizes the arrest and makes it lawful under the circumstances set up, and the section also applies not only where the arrest could be made by any person without a warrant, but also to cases in which a peace officer only may so arrest.

It was contended on behalf of the prisoner that even though lawfully arrested he was now being unlawfully detained, and paragraph (a) at the end of sub-s. 7 of s. 552, was relied upon.

Held, that the last mentioned paragraph, requiring a prisoner who has been apprehended to be brought before a Justice of the Peace before noon of the day following his arrest, only applies to the offences referred to in sub-s. 7.

The Court enlarged the application for three days, and allowed the prisoner to go on bail in the meantime, but before the expiration of the time, the prisoner was re-arrested and taken to Montreal under a warrant sent up from that city.

Tupper, Q.C., and *Phippen*, for prosecutor. *Howell*, Q.C., for prisoner.

Full Court.] ABELL *v.* CRAIG. [June 27.

Contract—Sale of goods—Condition precedent.

Appeal from the County Court of Glenboro. Defendant gave plaintiffs a written order for a second-hand horse power and threshing machine, "the same to be put in good running order . . . by putting in a set of cylinder spikes." The price was to be $250. After the acceptance of the order and the delivery of the machine, the set of cylinder spikes was put in, and plaintiffs'

agent made several attempts to put the machinery into good running order, but defendant claimed the condition was broken and returned the machine. Plaintiffs then sued for the price agreed on.

Held, affirming the Court below, that the condition of the sale was not satisfied by the putting in of the new spikes, but that plaintiffs were bound to put the machine into good running order, and that the appeal from the verdict of the County Court in favour of defendant should be dismissed with costs.

Howell, Q.C., for plaintiffs. *Pitblado*, for defendant.

Full Court.] REGINA *v.* BUCHANAN. [June 27.

Criminal Code, s. 645—Criminal procedure—Interpretation Act, R.S.C., c. 1, s. 7 (4)—"Shall"—Initialling names of witnesses on indictment—That party assaulted consented to fight immaterial.

Held, on a case reserved for the opinion of the Court,

(1) That the omission of the foreman of the Grand Jury to put his initials opposite the names of the Crown witnesses on the back of the bill of indictment, as required by s. 645 of the Criminal Code, 1892, is not fatal to the indictment, and that notwithstanding the language of the Interpretation Act, R.S C., c. 1, s. 7 (4), the word "shall" in that provision is not imperative in the sense that a failure to observe the direction will invalidate the proceedings. *O'Connell* v. *The Queen*, 11 C. & F. 155; *Queen* v. *Townsend*, 28 N.S. 468, followed.

(2) That the crime of assault may be committed, although the party assaulted may have consented to fight. *Regina* v. *Coney*, 8 Q.B.D 534, followed.

Conviction affirmed.

Full Court.] CASE *v.* BARTLETT. [June 27.

Registry Act, R.S.M., c. 135, ss. 68, 69, 72—Registered judgments—Unregistered prior charge—Priority—56 Vict. (M.), c. 17—57 Vict. (M.), c. 14.

Appeal from the order of DUBUC, J. noted ante p. 281, dismissing a motion by holders of certain registered judgments against the Master's order, making them subsequent incumbrancers in his office, and giving priority to the plaintiffs' unregistered agreement for a lien or charge on the defendant's land, for the price of machinery bought from the plaintiffs. The certificates of judgment had been registered after the execution and delivery of the machine agreement. By 56 Vict., c. 17, the document under which the plaintiffs claimed could not be registered, and by 57 Vict., c. 14, every document of the kind is made void as against any person claiming under a registered instrument, irrespective of any notice, actual or constructive.

Held, that notwithstanding these statutes and ss. 68, 69 and 72 of the Registry Act, the registration of the judgments bound only the interest or estate the debtor then had in the lands which was subject to the charge existing in favour of the plaintiffs, and that the Master was right in making the appellants subsequent incumbrancers. Appeal dismissed with costs.

Mulock, Q.C., for plaintiffs. *Howell*, Q.C., and *Mathers*, for judgment creditors.

Province of British Columbia.

SUPREME COURT.

Irving, J.] IN RE MCDONALD BROTHERS. [May 11.

Certiorari—Sufficiency of description in conviction.

Application for certiorari and to quash a conviction by the Police Magistrate of Vancouver for an infraction of a by-law which prohibited livery stable keepers from hiring conveyances to notoriously loose characters. The conviction was of McDonald (without any Christian name) for the offence recited to have been committed by McDonald Brothers. Joint and several offences were also recited as having been committed by McDonald Brothers. The fine inflicted was directed to be paid by McDonald Brothers.

Held, following *Regina* v. *Harrison*, 8 T.R. 508, that if the conviction is for several offences, each guilty person must be specifically named in the conviction, and the omission to set out the Christian name is fatal.

Macdonell, for McDonald Brothers. *Hammersley*, for City of Vancouver.

Irving, J.] COX *v.* CUNNINGHAM. [June 10.

Ca. re.—Arrest before judgment—Foreign debt.

The defendant in this case came from Nova Scotia, and was on his way to the Yukon with merchandise to sell there when he was arrested at Vancouver on a ca. re. at the instance of the plaintiff who resided in Nova Scotia. This was an application for his discharge on the ground that the Act providing for arrest by ca. re. did not contemplate the arrest, by a foreign creditor, of a foreigner merely passing through this country, and at least there was a discretion which should be exercised in the defendant's favour, inasmuch as the fact of his being a foreigner and only passing through the country rebutted the assumption ordinarily existing that he was leaving the country with intent to defraud creditors.

Held, that a foreigner under the above circumstances is in no different position from a resident debtor as regards his arrest under ca. re.

Russell, for plaintiff. *Macdonell*, for defendants.

NOTE.—The defendant was subsequent to judgment discharged from custody, he having shown on examination that he had no means to satisfy the debt and the statute providing for discharge in such a case.

McColl, J.] REGINA *v.* NICOL. [June 13.

Criminal libel—Time to apply for commission to take evidence of witnesses abroad.

On motion made on behalf of defendant upon close of the pleadings in which a plea of justification had been entered, motion was made at the trial on behalf of defendant for a commission to take evidence of witnesses in England in support of the plea of justification. It was objected on behalf of the Crown that as the parties had come down to trial the application was too late.

Held, that defendant was entitled to take every moment to consider

whether he would put in a plea of justification, and as the evidence proposed to be taken under the commission was only as to that plea which had just been entered, the application could not have been made before.

Chas. Wilson, Q.C., and *R. Cassidy*, for Crown. *A. Martin*, for defe'ant.

Walkem, J.] [June 18.

KLONDIKE RESEARCH SYNDICATE *v.* CONRADI WATERHOUSE.

Injunction—Specific performance.

The defendant company on 11th of March last contracted to convey the stern wheel steamer of the plaintiff syndicate from England to St. Michaels, Alaska, on the "S. S. Garonne." The plaintiffs, alleging that the owners were in treaty for sale of the "Garonne" to the U. S. Government, applied ex parte for an injunction to restrain the defendant company from transferring the steamer "Garonne" to any person previous to her voyage to St. Michaels. It appeared from the evidence that the stern wheel steamer then swung aboard the "Garonne" could not be trans-shipped, as there was no vessel available large enough to carry it; and the plaintiffs relied on it for their transport up the Yukon River. Injunction granted, restraining defendants from causing or permitting anything to be done in breach of the contract, and order made that the "Garonne" be restrained from clearing for any port outside British Columbia except St. Michaels.

E. V. Bodwell, for plaintiffs.

McColl, J.] CAMERON *v.* NELSON. [July 5.

Rev. Stats. B.C., 1897, c. 1, s. 70, sub-s. 20, and c. 144, s. 89—Expiry of prescribed time—Non-judicial day.

The Fire Limits by-law of the City of Nelson was published in the B. C. Gazette, on 22nd July, 1897. Sec. 89 of c. 144, R.S. B.C., 1897, provides that "No application to quash a by-law, order or resolution, in whole or in part, shall be entertained unless the application is made within one month after the promulgation of the by-law, or the passing of the order, or resolution, except in the case of a by-law requiring the assent of the electors or ratepayers, when the by-law has not been submitted to or has not received the assent of the electors. The last day of the month, August 22, fell on Sunday, and on August 23, the plaintiff, who was an elector of the city of Nelson, wishing to quash the by-law, applied to and obtained from the Supreme Court an order nisi, and on the return of the motion it was contended on behalf of the defendant that on the expiration of the one month the elector's statutory right was at an end. The plaintiff relied on R.S. B.C. 1897, c. 1, s. 10, sub-s. 20, which is as follows: "If the time limited by an Act for any proceeding or for the doing of anything under its provisions expires or falls upon a holiday, the time so limited shall extend to, and such thing may be done on the day next following, which is not a holiday."

Held, that the application was in time, and that c. 1, s. 10, sub-s. 20 is not confined to matters of procedure only.

Dechene v. *Montreal*, (1894), A.C. 640, considered.

E. V. Bodwell, for plaintiff. *A. S. Potts*, for defendant.