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The result of the vote of the profession for the Benchers of the Law Society of Upper Canada has resulted as follows: H. H. Strathy, 940; Chas. Moss, 931; B. M. Britton, 887; Wm. Douglas, 882; Hon. A. S. Hardy, 879; Christopher Robinson, 864; D. B. Maclennan, 852; John Idington, 838; Dr. Hoskin, 836; Colin Macdougall, 835; B. B. Osler, 819; D. Guthrie, 804; M. O'Gara, 801; Geo. C. Gibbons, 797; R. Bayly, 766; A, B. Aylesworth, 730; J. V. Teetzel, 716; A. Bruce, 715; Geo. H. Watson, 700; Wm. Kerr, 681; A. H. Clarke, 669; George F. Shepley, 666; John Bell, 657; Edward Martin, 635; D'Alton McCarthy, 621; C. H. Ritchie, 609; W. R. Riddell, 582; W. D. Hogg, 579; E. B. Edwards, 578; Æmelius Irving, 572. Thirty in all composing the new Bench. Those who came next were: John A. Barron, 567; Z. A. Lash, 552; Walter Barwick, 521; W. B. McMurrich, 518; W. H. McFadden, 507; Geo. Kappele, 465, and J. K. Kerr, 460.

It will be noticed that the names are largely the same as they were during the past five years. We cannot say that we are disappointed in this. It may be said in general terms that those who took charge of the work during the last term of office did their work well and with much devotion to their duties. If work were to be rewarded according to services rendered, the Treasurer of the Law Society, Mr. Irving, would have been at the head, instead of the foot of the list. We are glad, however, that he *is* on the list, and that in all probability he will retain the position which he has now occupied for several years. The profession naturally knew very little of the time he devoted to the work of the Law Society, and the deep interest he took in it. The same may be said in a

degree of several others who are on the list, as well as of Mr. Barwick, who has been left off the list possibly because a cry was raised against having too many taken out of one firm.

We congratulate Mr. Strathy upon the mark of confidence bestowed upon him by his brethren in putting him at the head of the list. It will be regretted that the following efficient Benchers are not on the present list: Messrs. Lash, Barwick, MacKelcan and J. K. Kerr. We presume some of them may hereafter appear on the list as vacancies occur.

THE APPLICATION OF THE STATUTE OF LIMITATIONS TO CLAIMS BETWEEN PARTNERS.

Since the decision of the Supreme Court in *Toothe* v. *Kittredge*, 24 S.C.R. 287, two English decisions have been published bearing on the same point, namely, the applicability of the Statute of Limitations as a defence as between co-partners.

In *Toothe* v. *Kittredge*, the action was brought by a judgment creditor of one of two partners to have the partnership accounts taken and the share of the debtor realized for the payment of the plaintiffs' claim. A reference was directed to take the partnership accounts, and upon this reference the other partner claimed that in the course of the partnership business he signed notes, which his co-partner, the judgment debtor, endorsed and got discounted for the purposes of the partnership business, but that the latter had charged him a much larger sum for interest on these transactions than he had actually paid, and he claimed a large sum to be due by reason of this overcharge. The Master held that as these transactions had taken place nearly twenty years before, the partner making the claim was barred by the Statute of Limitations. It appears by the judgment of the Chief Justice that the partnership was never formally wound up, but it was substantially so, as far back as 1883, when the debts were paid equally by the partners, but there was no division of the assets.

Upon this state of facts the Ontario Court of Appeal

affirmed the Divisional Court in holding that as the partnership had never been formally wound up, the Statute of Limitations did not apply. This decision the Supreme Court reversed, holding that as Kittredge had access to the books wherein the alleged excessive charges were entered, it must be assumed that he inspected them before paying the debts in equal shares, and agreeing to a division of what assets remained, and that this constituted evidence of acquiescence on his part in the charges now objected to. But the learned Chief Justice, who delivered the judgment of the Court, also says, "I entertain a strong opinion that the Master was right as to the acquiescence, *and also as to the Statute of Limitations*": citing *Noyes* v. *Crawley*, 10 Ch. D. 31.

The general rule on the subject is thus stated in Lindley on Partnership, 6th Ed., p. 512: "So long as a partnership is subsisting and each partner is exercising his rights and enjoying his own property, the statute has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statutes begin to run": citing *Knox* v. *Gye*, L.R. 5 H.L. 656. In *Miller* v. *Miller*, 8 Eq. 499, a partnership business had been discontinued more than six years before the suit was commenced, but there had been no dissolution, and it was held by Stuart, V.C., that the Statute of Limitations was no bar to the plaintiff's right to an account. *Noyes* v. *Crawley*, 10 Ch. D. 31, to which the learned Chief Justice of the Supreme Court refers, was also a suit for an account, but in that case the partnership business came to a final termination in 1861, and the defendant admitted £787 to be due to the plaintiff, but no subsequent acknowledgment had been given by the defendant, and it was held that as the suit was not commenced until 1878, the statute barred the plaintiff's right. It does not appear that there had been an actual dissolution in 1861, but there was the further fact which did not exist in *Miller* v. *Miller*, of the stating of an account and the admission of a balance to be due by one partner to the other—to which the payment of the debts in equal shares in *Toothe* v. *Kittredge* appears to have been deemed

equivalent. But notwithstanding the payment of the debts in equal shares, would it not still be open to a partner to claim that any discrepancies or over-charges in the accounts should be adjusted on the division of the assets? If so, then it is not quite clear why the mere payment of the debts in equal shares should be considered necessarily to involve any presumption of an admission of the accuracy of the accounts.

There was, however, in *Toothe* v. *Kittredge*, a further element which weighed with the Supreme Court, and that was the fact that the partners were brothers-in-law, and the alleged over-charge was not set up between the partners themselves, but between one partner and the judgment creditor of the co-partner, and, as seems to have been inferred, for the purpose of defeating the creditors' claim. This circumstance seems to have led the Court to doubt the bona fides of the claim, and inclined it to regard the evidence as establishing acquiescence, which possibly it would not have done had the question arisen strictly between the partners themselves.

In *Betjemann* v. *Betjemann* (1895), 2 Ch. 474, the action was brought for an account by the executrix of a deceased partner under the following circumstances: A father and his two sons had carried on business in partnership, which commenced in 1856 under a verbal agreement. One of the sons married in 1870, from which time it was continued under a new agreement until the father died in 1886, after which date the sons continued the business until the death of one of them in 1893; there having been no settlement of accounts between the partners, the executrix of the partner who died in 1893 brought action for an account from 1886 to 1893; the defendant claimed that the account should be taken from 1870, to which claim the plaintiff set up the Statute of Limitations. The defendant claimed and proved that the plaintiffs' testator had misappropriated the funds of the partnership under circumstances amounting to a concealed fraud, and the Court of Appeal (Lindley Lopes and Rigby, L.JJ.) held that the Statute of Limitations was no bar to the defendants' claim, to have the accounts taken from 1870, or even from 1856, if he desired it, and that even assuming that the statute

applied it was ousted by the doctrine of concealed fraud. They also held, and this point is deserving of attention in connection with the case of *Toothe* v. *Kittredge*, that the fact that the fraud might have been discovered if the partnership books had been investigated, was not an answer to the application of the doctrine of concealed fraud in a case of this kind, unless the complaining partner wilfully shut his eyes, and did not choose to avail himself of the means of knowledge at hand. As Lindley, L. J., rather pointedly puts it, "What right has a partner to say, 'you had no right to trust me; you are bound to look at the books and see that I am not cheating you.' Such a doctrine as that is unfounded." Had the contention in *Toothe* v. *Kittredge* arisen between the partners themselves, it is quite possible, therefore, that the mere existence of entries in the books to which the complaining partner had access, would have been no bar to his right to an account, even after twenty years, unless it could be shown that he had suspicion that the accounts were not accurate, and deliberately refused to avail himself of the means of knowledge within his power for ascertaining the truth.

Steamship Pongola, 73 L.T. 512, is the other recent English case to which we referred. This was an action in the Admiralty Division, and was a suit for an account by the owners of certain shares of the steamship Pongola against the defendants, who were the managing owners, in which the plaintiffs claimed to have an account taken of certain brokerage moneys, commissions, rebates, discounts, and other moneys alleged to have been received and improperly detained by the defendants during the period from 1879 to the bringing of the action in 1895. The ship had been employed continuously during that period in voyages to Africa out and home, and voyage accounts had been rendered at the end of each voyage. It was contended by the defendants that each voyage must be treated as a separate adventure, and that the co-owners were a *quasi* partnership for each voyage, and when the voyage ended the partnership for that occasion also ended, and that the Statute of Limitations was applicable. Jeune,

P.P.D., however, determined that there was in effect a continuous partnership between the co-owners, and that the rule as to partnership accounts applied, and that they might be gone into without any limit of time, and that the Statute of Limitations did not apply as long as the partnership was continuous.

There seems to be no doubt that when a partnership has been dissolved, or has otherwise come to an end, that then the Statute of Limitations begins to run, and may in the course of time be a bar to an action for an account. More difficulty, however, arises in cases such as *Toothe* v. *Kittredge*, where, though the business of the partnership has come to an end, there has nevertheless been no settlement of accounts, and the partnership is still *de jure* existing. In such cases a Court of Equity may, as was pointed out by Stuart, V.C., in *Miller* v. *Miller*, *supra*, find evidence of acquiescence or other circumstances which, even though the Statute of Limitations be not applicable, might make it inequitable in the exercise of a sound judicial discretion to grant relief.

GEO. S. HOLMESTED.

CAUSERIE.

"If I chance to talk a little while forgive me."
– *Henry VIII., Act I. Scene 4.*

Du Maurier's Trilby has at length planted her bare and beautiful foot in the halls of justice, and while she was created too late to go down to posterity in the annals of the Court of *Piepoudre*, yet the greater honour is accorded to this pedigerous being of finding immortality in the reports of the Court of Appeal. In *Holt & Co.* v. *Saunders, Green & Co.*, decided on the 16th of March, the plaintiffs brought action to restrain defendants from infringing their trade-mark, which consisted of the word "Trilby" in ordinary type, and was registered in class 38 for aprons, gloves, etc. The defendants applied to rectify the register by striking off this mark, and North, J., allowed the motion, being of opinion that sub-sections (*a*) and (*b*) were the only sub-sections of sec. 64 of the Patents, etc., Act, of 1888, which dealt with names, and

that, as "Trilby" did not come within either of those clauses, it should be expunged from the register. The plaintiffs then went up to the Court of Appeal, and that Court (consisting of Lindley, Kay and A. L. Smith, L.JJ.,—Kay, L.J., dissenting), allowed the appeal. Kay, L.J., states, in the course of his dissentient opinion, that this was the first time such a question came before the Court under section 64 of the Act, although it was the practice of the office to put names like this on the register. With all deference to the learned Judges who sat in the Court of Appeal it must strike the ordinary lay mind as somewhat farcical to hear them solemnly deliberating over Trilby's legal status in this wise: (Lindley, L.J.) "'Trilby' is clearly a word within sub-section (*c*) unless it is the name of an individual within (*a*), and I am not prepared to hold it within (*a*). . . . No doubt the registration of such a name as 'Trilby' would give rise to troublesome questions if a person of that name should hereafter make his (*sic!*) appearance and wish to carry on business under his own name, or to register his name printed in some distinctive manner under clause (*a*)." [*Quære*, would Svengali find Trilby's trade ventures more profitable than her vocal exploits?] . . . (Kay, L.J.) "Now, unquestionably 'Trilby' is a name. Otherwise it has no meaning whatever. Is it the name of an individual? . . . On the whole my opinion is that it is a 'name of an individual.' . . . If this were not so I should think it was an 'invented word.'" (A. L. Smith, L.J.) "That the name 'Trilby' is a word I do not doubt. . . . Is it, then, a word having reference to the character or quality of the goods, or is it a geographical name. I agree with North, J., in this, and I say it is neither."

The professional mind, versed in the niceties of statutory construction, will discern much wisdom in this apparent verbal jugglery—recognize in it, indeed, a structure of "Words well bedded in good Logic-mortar," as Herr Teufelsdröckh would say. But whether the Judges have written themselves down wisely or not too well, it is quite certain that Mr. Du Maurier's piece of decadent fiction has received some gratuitous advertising in a very unusual channel.

Mr. Justice Romer in the recent case of *Ainsworth* v. *Wilding*, (W.N., March 14th, 1896, p. 30) lays down the rule that where judgment has been taken by consent, compromising an action and has been passed and entered, the Court has no jurisdiction to set aside the judgment on motion in the same action on the ground that the consent of the applicant was given under a mistake; and he held the proper proceeding in such a matter is to bring a separate action to set aside the consent judgment. *Apropos* in general of motions to the Court to set aside judgments formally entered up after trial, and for rehearing, it would seem that under the English Judicature Acts and rules there is clearly no jurisdiction to grant the same upon any grounds. See *re Suffield*, etc., 20 Q.B.D. 697; *re St. Nazaire Co.*, 12 Ch. D. 88; and *Glasier* v. *Rolls*, 62 L.T. 305.

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The people of the United States will find very little authority to support their proposed recognition of the belligerent status of the insurgents in Cuba. In the treatise of their own eminent jurist, Wheaton, on the principles of International Law, they will discover much to confound them. At page 38 of the third English edition of this work we find the following exposition of the doctrine appertaining to this matter: "Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government de facto as a society entitled to the rights of war against its enemy; or may espouse the cause of the party which they may believe to have justice on its side. In the first case, the foreign State fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other." In an editorial addition to the original text at p. 40, we find it stated that "When a rebellion has assumed such proportions that it may, without abuse of language, be called

a war, *and when it is carried on by some species of organized government or authority*, in full possession of the territory where it claims to exercise authority, neutral States may then recognize such revolted government as a belligerent." Tested by the requirements of this doctrine, the situation in Cuba affords no justification or excuse for the proposed action of the government of the United States. Not only have the rebels not set up any "species of organized government or authority" in the island, but we think there is much to be said against dignifying the sporadic and desultory engagements between the loyal troops and the tatterdemalion cohorts of Gomez with the title of War, even as it is understood in intertropical climes. True, the insurrection has been of long standing; but we know of no principle of prescription in International Law which gives irresponsible insurgents a right to recognition as belligerents after the expiry of any fixed period of persistence in revolt. The Cuban case presents no such features as that of the Southern States of America when Great Britain recognized their belligerency in 1861. In the latter case there was not only a de facto government "in full possession of the territory where it claimed to exercise authority," but also an organized army and navy, prepared to vindicate the sovereign rights and dignity of that government *a l'outrance*.

If it were any other nation than our chivalrous, lofty-minded, and unselfish cousins across the border, which was making the welkin ring with windy declamation about the international duty of interference in behalf of the disaffected Cubans, one would be inclined to exclaim with Sir Toby Belch:—

"Excellent! I smell a device."

CHARLES MORSE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

The Law Reports for March comprise (1896) 1 Q.B. pp. 137-252; (1896) P. pp. 65-94; (1896) 1 Ch. pp. 197-350; and (1896) A. C. pp. 1-94.

COPYRIGHT—INJUNCTION—PROPERTY IN UNPUBLISHED INFORMATION—PROCURING BREACH OF CONTRACT—DAMAGES.

Exchange Telegraph Co. v. *Gregory*, (1896) 1 Q.B. 147, was an action to restrain a defendant from fraudulently procuring or publishing news, collected by the plaintiffs for the benefit of their customers. By an arrangement with the Committee of the Stock Exchange the plaintiffs, in consideration of payments made to the Committee, acquired the sole privilege of obtaining the quotations in stocks and shares from the floor of the Stock Exchange. Information as to the buying and selling price of stocks and shares, with the time of each quotation, was gathered by the plaintiffs, and from time to time during the day supplied to their subscribers. Each subscriber, by the terms of his contract with the plaintiffs, agreed that the information so supplied should not be sold or communicated by him to non-subscribers. The information was also published by the plaintiffs in a newspaper which was duly registered. The defendant, who was not a subscriber, procured the above-mentioned information from a person who was a subscriber, and posted it up on boards and other places in his office as soon as it arrived from his informant. Mathew, J., who tried the action, awarded the plaintiffs an injunction restraining the defendant from printing or multiplying copies or colorable imitations of the plaintiffs' copyright information as published in the newspaper. Also from obtaining such information and communicating the same to persons frequenting his office, and also from inducing the plaintiffs' subscribers to break their contracts with the plaintiffs, by supplying him with the information in question. The

Court of Appeal (Lord Esher, M.R., and Kay and Rigby, L.JJ.) had no difficulty in affirming the judgment, and in doing so, held that it was not necessary for the plaintiff, in order to maintain an action against the defendant for inducing the plaintiffs' customers to break their contracts to prove any specific damages, as it was a reasonable and natural inference that the act complained of in this case must of necessity result in damage to the plaintiffs.

CRUELTY TO ANIMALS—TAME SEA GULL—CRUELTY TO ANIMALS ACT, 1849 (12 & 13 VICT., C. 92) SS. 2, 29—CRUELTY TO ANIMALS ACT, 1854 (17 & 18 VICT., C, 60) S. 3; (CR. CODE, S. 512).

Yates v. *Higgins*, (1896) 1 Q.B. 166, seems to be a case which it was almost superfluous to report. After the cases of *Aplin* v. *Porritt*, (1892) 2 Q.B. 57, and *Harper* v. *Marcks*, (1894) 2 Q.B. 319, in which it was held that the Acts relating to cruelty to animals (see Cr. Code s. 512) only apply to domestic animals, and do not extend to wild animals kept in captivity, it would seem hopeless to expect that the Court would be able to hold that, notwithstanding those decisions, they did apply to a tame sea gull. Nevertheless, the attempt was made, and the argument was mainly based on the case of *Colam* v. *Pagett*, 12 Q.B.D. 66, where it was held that linnets kept in captivity and trained as decoy birds for the purpose of bird-catching, were "domestic animals" within the meaning of the Acts. The only evidence of the domestication of the sea gull was that it was kept by the defendant in a field with one of its wings pinioned, that it would go to her when called and would feed from her hand, and was used by the defendant with two other birds in her business as a photographer—how, it does not appear, presumably as mere stage properties. The Court distinguished this case from *Colam* v. *Pagett* because there the birds had been trained to perform a useful service, which could not be correctly asserted of the sea gull in the present case.

NEGLIGENCE—RAILWAY COMPANY—LEVEL CROSSING—GATE-KEEPER'S DUTY—CONTRIBUTORY NEGLIGENCE—LORD CAMPBELL'S ACT—(R.S.O., C. 135.)

Smith v. *South Eastern Ry.* (1896), 1 Q.B. 178, was an action brought under Lord Campbell's Act (see R.S.O., c. 135),

by the plaintiff to recover damages for the death of her husband, who had been killed by one of the defendants' trains under the following circumstances: The defendants' line crossed a highway on the level. Near the crossing was a gate-keeper's lodge, where a servant of the defendants was stationed, whose duty was to attend to the gates at the crossing, and whenever a train was approaching to stand by the rails, and if the line was clear exhibit a white flag by day, or a white light by night. The deceased, who lived near the crossing, between 8 and 9 o'clock on a dark but clear December night, called at the gate-keeper's lodge to inquire whether his wife was there, and found the gate-keeper sitting in his lodge reading. Being told that his wife was not there he left the lodge. Though a train had been signalled, the gate-keeper gave him no warning, and did not go out to signal the train. The deceased attempted to cross the line and was killed by a passing train. There was evidence to show that the train carried lights which were visible by anyone about to cross the line at the level crossing, for about 600 yards or more. The engine driver whistled ten seconds before the train passed over the crossing, which it did at the rate of 35 or 40 miles an hour. The engine driver testified that when approaching the crossing he saw the light on the carriage gates, but did not see any hand signal by the gate-keeper. The question argued was whether on this evidence the Judge at the trial ought to have withdrawn the case from the jury. It was contended by the defendants' counsel that the evidence was consistent with the deceased having come to his death through his own negligence, and that there was no evidence of negligence by the defendants causing his death, and that the onus was on the plaintiff to show that the death was occasioned by the defendants, and the plaintiff had failed to discharge the onus. The Court of Appeal, (Lord Esher, M.R., and Lopes and Kay, L.JJ.) were, however, unanimous that there was sufficient prima facie evidence of negligence by the defendants to warrant the Judge in submitting the case to a jury. The fact that the gate-keeper was found by the deceased sitting in his lodge reading, was

held to be sufficient to raise the inference that the deceased was not unreasonably thrown off his guard and led to suppose that there was no danger in crossing the line when he did, without looking out for a train. And Lord Esher is of opinion that it was immaterial whether the gatekeeper's duty was to the general public or only to the railway company. In a note to the report are printed the judgments delivered in the Court of Appeal in *Wakelin* v. *London & S. W. Ry.*, subsequently affirmed by the House of Lords (12 App. Cas. 41). These judgments are important on the question of evidence in actions of this kind, and particularly that of the late Lord Justice Bowen.

CRIMINAL LAW—EXTRADITION—SURRENDER OF BRITISH SUBJECTS—EXTRADITION TREATY WITH BELGIUM—EXTRADITION ACT, 1870 (33 & 34 VICT., C. 52) SEC. 6—R.S.C., C. 142).

In re Galwey, (1896) 1 Q.B. 230, was an application by the Belgian Government for the extradition of a criminal. The criminal in question was a British subject, and by the terms of the extradition treaty with Belgium it is expressly provided that "in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization." By the Extradition Act of 1870, sec. 6, it is provided that "where this Act applies in the case of any foreign state, every fugitive criminal of that state, who is in, or suspected of being in any part of Her Majesty's dominions . . shall be liable to be apprehended and surrendered in manner provided by this Act." It was contended on behalf of the prisoner that he could not be surrendered except after express consent by the British Government to the extradition. But the Court (Lord Russell, C.J., and Wright and Kennedy, JJ.), held that although the British Government was not forced to surrender a British subject, yet as the Attorney-General appeared on the application and expressed the desire that the prisoner in this case should be surrendered, that was sufficient, and that the above-mentioned stipulation in the treaty furnished no ground for refusing extradition, and that it was not necessary that it should be

shown that the agreement to surrender was the result of negotiations between the respective governments, and of an express consent by the British Government.

FACTORY ACT (41 & 42 VICT., C. 16), S. 9 (R.S.O., C. 208, S. 15, S-S. 2)—CHILDREN OPERATIVES—CLEANING MACHINERY.

Pearson v. *The Belgian Mills Co.* (1896), 1 Q.B. 244, was a case stated by magistrates. The complaint was laid under the Factory Act (41 & 42 Vict., c. 16), s. 9, for permitting a child to clean machinery while in motion. The Act provides, sec. 9, "a child shall not be allowed to clean any part of the machinery in a factory while the same is in motion by the aid of steam, water, or other mechanical power." The question was whether this prohibition extended merely to the part cleaned, or whether it prohibited the cleaning of a stationary part of the machine while any part of it was in motion. Thi question was answered in the affirmative by the Court of Appeal (Lindley and Kay, L.JJ.). Kay, L.J., says: "The statute means that, when *all* the parts of a machine which do move are moving, then no child shall be allowed to clean any part of that machine." But for "all" we think the words "any of" should be substituted. R.S.O., c. 208, sec. 15, s-s. 2, provides that "no machinery, other than steam engines, shall be cleaned while in motion, if the inspector so direct by written notice."

PROBATE—PRACTICE—TWO WILLS, ONE DEALING WITH ENGLISH, AND THE OTHER WITH FOREIGN PROPERTY.

In the goods of Murray (1896), P. 65, the testator had left two wills, one dealing exclusively with his property in England, and the other exclusively with his property in America. Different executors were named in each will. Difficulty having been found in proving the will relating to the American property in the American Court, owing to the inability to trace the witnesses to its execution, the American executor joined with the executors of the English will to have the American will admitted to probate in England as part of the English will. The American will provided that after realizing so much of his American property as was necessary for the pay-

ment of debts there, and the legacies given by that will, that the residue of his American property should be realized under the direction of the executors of the English will, and the proceeds remitted to them. Barnes, J., was of opinion that the wills were intended by the deceased to be two separate and independent documents, and that the American was not incorporated by the English will, and therefore that it could not be included in the probate of the English will.

PRACTICE—EVIDENCE—PHOTOGRAPH.

In *Frith* v. *Frith* (1896), p. 74, which was a divorce suit, the petitioner offered as proof of the adultery of his wife, the respondent, the evidence of a witness and his wife, who proved that a man and woman had lived in their house as Mr. and Mrs. Plaice, and who identified the woman as the same person whose photograph was shown to them, which the petitioner identified as the portrait of his wife. Barnes, J., refused to act on this evidence, and adjourned the hearing in order that the witnesses might point out to some one who knew the respondent, the woman who had lived with them as Mrs. Plaice.

TRUSTEE—BREACH OF TRUST—SOLICITOR—AGENT—CONSTRUCTIVE TRUSTEE—PARTNER OF SOLICITOR, LIABILITY OF.

In *Mara* v. *Browne*, (1896) 1 Ch. 199, the Court of Appeal (Lord Herschell and Smith and Rigby, L.JJ.) reversed the decision of North, J., (1895) 2 Ch. 69 (noted *ante* vol. 31, p. 436), but several points discussed before North, J., are not noticed by the Court of Appeal, as on the main point, as to the liability of the defendants as constructive trustees, the decision was reversed, and as a consequence the other questions depending thereon ceased to be important. In our former note of this case we referred to the facts at some length. It is now only necessary to say that so far as they were material to the decision they were briefly as follows. Hugh Browne and Arthur Browne were solicitors carrying on business in partnership. Hugh Browne was employed by the beneficiaries of a marriage settlement, to get the trust funds out of the hands of one of the trustees whose solvency was doubtful, and to pro-

cure the appointment of new trustees. He succeeded in obtaining possession of the fund, which was paid into a bank to the joint credit of this trustee and one of the proposed new trustees. Before the new trustees were actually appointed certain investments were made on the advice and through the instrumentality of Hugh Browne; these investments were made *bona fide*, but were, in fact, a breach of trust. Cheques were drawn on the trust fund and the amounts paid into Hugh Browne's private banking account, and were then by him advanced to the different mortgagors as buildings on their properties progressed. North, J., held that Hugh Browne had become a constructive trustee, and that he and his co-defendant were liable to make good the loss resulting from the investments thus made. The Court of Appeal considered that Hugh Browne had acted merely as a solicitor for the *de facto* trustees, and that neither he nor his brother were liable as constructive trustees.

TRUSTEE—DISCLAIMER.

In *Re Lord & Fullerton* (1896) 1 Ch. 228, it is somewhat singular to find that the point has come up for the first time for decision, as to whether or not it is competent for a trustee to disclaim in part the trust property. The application was one under the Vendors and Purchasers' Act, and the point submitted for the opinion of the Court arose in this way. A testator having real and personal property in England and abroad, left his residuary estate to trustees in trust for sale. One of the trustees, who was resident abroad, disclaimed the trusts of the will, except as to the property abroad. The remaining trustees having sold land in England, the purchaser claimed that the absent trustee was a necessary party to the conveyance. The Deputy-Chancellor of Lancaster overruled the contention, but the Court of Appeal (Lindley, Smith and Rigby, L.JJ.) unanimously reversed his decision, holding that it is quite incompetent for a trustee to disclaim in part; his disclaimer to be effectual must extend to all the trust estate.

VENDOR AND PURCHASER—PURCHASE MONEY—INTEREST—CONDITIONS OF SALE—WILFUL DEFAULT.

In re Strafford & Maples (1896) 1 Ch. 235, although

mainly turning on the Settled Land Act, involves incidentally a point which may be usefully noticed here. By conditions of sale it was provided that "if from any cause whatever, other than the wilful default of the vendor," the purchase should not be completed by the appointed day the purchase money should bear interest. The completion having been delayed by reason of the vendor being unable to obtain the concurrence of necessary parties, Kekewich, J., held that this constituted "wilful default" of the vendor, so as to disentitle him to interest during the delay so occasioned, following *In re Hetling & Merton* (1893), 3 Ch. 269.

POWER—RELEASE OF POWER—TENANT FOR LIFE—DONEE OF POWER DERIVING BENEFIT BY HIS RELEASE OF THE POWER.

In re Jones, Smith v. *Jones*, (1896) 1 Ch. 250, a father, tenant for life under his marriage settlement, had an exclusive power to appoint the settled estate in favor of his daughter or her issue, and in default of appointment, on his death the estate went to the daughter absolutely. The father released the power of appointment, and shortly afterwards joined his daughter in mortgaging the estate for £10,000, the whole of which was paid and used by him for his own purposes. The father was subsequently adjudicated bankrupt. The trustees of the settlement having sold the settled estate for £16,500, now applied to the Court to decide whether the release of the power executed by the father was valid, and whether the proceeds should be applied in payment of the mortgage and the balance of £6,500 to the daughter. Chitty, J., was of opinion that there is no duty imposed on the donee of a limited power to make an appointment, and that there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power he must do so *bona fide* for the benefit of the object or objects of the power, and not corruptly for his own personal benefit; but he was of opinion that the donee was at liberty to say that he would make no appointment at all, even though his doing so might enable him to obtain a benefit he could not otherwise have got.

CORRESPONDENCE.

INVADERS OF THE PROFESSION.

To the Editor of the Canada Law Journal.

DEAR SIR,—I notice in a recent issue of your journal a letter under the caption "Invaders of the Profession." Your correspondent has not overdrawn the picture. He complains of "these invaders" carrying on numerous businesses at once. I think we have up here the champion all-round mechanic of the Province, who among other side lines acts in the following:—(1) Division Court clerk; (2) Crown Lands agent, with salary of $500; (3) Notary public (or solicitor) to the Ontario Bank; (4) Counsellor-at-law and general conveyancer, also making periodical trips to adjoining settlements in company with bailiff, looking up trade, etc.; (5) Commissioner in H.C.J.; (6) Issuer of marriage licenses; (7) Fire, life, and accident insurance agent; (8) Real estate broker; (9) Appraiser for Canada Permanent Loan Company; (10) Money broker and financial agent—and last but not least, as if to carry out the "tout ensemble," his wife is a practising doctor. It cannot be said that this party is not a "useful member of society." I think your correspondent puts the whole matter in a nutshell when he suggests the cancellation of the commissioner's and the notary public certificates—herein lies the whole root of the evil—for what can otherwise be consistently done, with the Government constantly issuing commissions "to have, use and exercise the power of drawing, passing, keeping and issuing all deeds, etc., etc." (vide notarial commission) to every one who chooses to apply therefor on recommendation of party friends? Were these commissions cancelled, except to lawyers, the whole evil I feel satisfied would soon of itself die out, as the profession would have the whip-hand of the situation.

I always understood that it was not the province of Division Court clerks and bailiffs to practice as solicitors, etc., but such is the case here.

If the profession does nothing in the matter, outsiders certainly will not. The motto ought to be, "The Lord helps those who help themselves."

BARRISTER.

Sudbury, Ont.

[We cannot begin to publish all the letters we receive on this subject. The evil is one that needs no further comment. Our brethren in the country especially are treated most unfairly, and we trust that the Benchers will see what can be done in the direction of the very sensible suggestion referred to by our correspondent. As to the Division Court clerk above spoken of, he should be at once disciplined by his Judge, or the Inspector, who would doubtless take the matter up upon any overt act being brought to his attention. We recently had the pleasure of assisting to "bring to time" a similar offender. The Judge took the matter up at once and put an end to the "depredations" of an officer of his Court, who apologized amply and promised never to do it again.—ED. C.L.J.]

SALES BY MORTGAGEES.—The rules of equity as between mortgagor and mortgagee have been slowly modified in favor of the latter, and not without reason. Originally, no doubt, the theory was that the mortgagee was more or less of an usurious oppressor, grinding the faces of the poor, and a man against whom equity would give as much relief as possible. The fact at the present day, of course, is that the mortgagee, being only too thankful if he can find a safe investment for his money with a reasonable rate of interest, is in the position of the man who receives, rather than grants, a favor in respect of the mortgage transaction. To this fact may, perhaps, be attributed the increasing disposition of the Courts to facilitate the exercise by a mortgagee of his power of sale. The strictness of the old rule is illustrated by the remark attributed to Lord Eldon that the mortgagee is a trustee for the mortgagor in the exercise of his power. It was afterwards decided that if the power is exercised bona fide the validity of the sale is not affected by the fact that its terms are disadvantageous to the mortgagor. In other words, the mortgagee is not bound to obtain the best terms he can, having regard to the mortgagor's interest. And the Court of Appeal has recently held that a sale to one of several mortgagors at a sum representing the amount due on the mortgage for principal, interest, and costs—so as to leave no surplus whatever—is good if made bona fide.—*Law Journal (Eng.)*

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario] [Feb. 18.

AGRICULTURAL INS. CO. *v.* SARGENT.

Suretyship—Principal and surety—Continuing security—Appropriation of payments—Imputation of payment—Reference to take accounts.

J. H. S. was a local agent for an insurance company, and collected premiums on policies secured through his agency, remitting moneys thus received to the branch office at Toronto from time to time. On 1st January, 1890, he was behind in his remittances to the amount of $1,250, and afterwards became further in arrears, until on the 15th October, 1890, one W. S. joined him in a note for the $1,250 for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that might be given, in which it was declared that payment of the note or renewals, or any part thereof, was to be considered as a payment upon the mortgage. The company charged J. H. S. with the balance then in arrears, which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J. H. S. with premiums, etc., and the notes which they retired from time to time as they became due, and crediting moneys received from J. H. S. in the ordinary course of their business, the note and its various renewals being also credited in this general account as cash. W. S. died on 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account. On 31st July, 1893, J. H. S. owed on this account a balance of $1,926, which included $1,098 accrued since 1st January, 1890, and after he had been credited with general payments there remained due at the time of trial $1,009. The note W. S. signed on 15th October, 1890, was payable four months after date with interest at 7 per cent., and the mortgage was expressed to be payable in four equal annual instalments, of $312.50 each, with interest at 6 per cent. on unpaid principal.

Held, that the giving of the accommodation notes without reference to the amount secured had not the effect of releasing the surety as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was prima facie an admission that at the respective dates of renewal at least the amounts mentioned therein were still due upon the security of the mortgage; that in the absence of evidence of such intention it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be eo instanti extinguished by entries of credit in the general account, which included the debt secured by the mortgage; and that there being some evidence that the moneys credited in the

general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in Clayton's case as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account would not apply.

Held, also, reversing the judgment dismissing the plaintiffs' action in the courts below, that under the circumstances disclosed the proper course would have been to order accounts to be taken upon a reference to the Master.

Appeal allowed with costs.

Holman, for the appellants.

Watson, Q.C., for the respondent.

Ontario] [Feb. 18.

CANADIAN PACIFIC RY. CO. *v.* TOWNSHIP OF CHATHAM.

Municipal law—Special assessments—Drainage powers of Council as to additional necessary works— Ultra vires resolutions—Executed contract.

After the construction of certain drainage works under the provisions of of the Municipal Act, R.S.O., ch. 184, s-s. 569 & 576, which benefited lands in an adjoining township, it was found necessary to construct a culvert under the line of the Canadian Pacific Railway in order to carry off the water brought down by the drain and prevent damages by the flooding of adjacent lands. By contract under seal entered into by plaintiffs and defendants, the plaintiff agreed to construct and did construct the needful culvert at a cost of over $200. On its completion the works were accepted and used by the municipal corporation, certain officials of the corporation having assured the plaintiffs that should the funds provided under the original by-law for the construction of the drainage works prove insufficient, the necessary amendments would be made under sec. 573 of the Municipal Act, and the additional sum so required obtained. The municipal council passed resolutions approving of the work and paid sums on account, but did not pass a new by-law or make any report or fresh assessment respecting the contract with the plaintiffs or the works executed thereunder.

Held, reversing the decision of the Court of Appeal (22 A. R. 330) and of the Divisional Court (25 O.R. 465), TASCHEREAU, J., dissenting, that as the works done by the plaintiffs under the agreement were absolutely necessary to the efficient completion of the drainage works contemplated by the original by-law, the case came within the provisions of the 573rd section of the Municipal Act, R.S.O., c. 184, and the contract under which it had been executed was binding upon the defendants.

Held, (TASCHEREAU, J.,) dissenting, that the plaintiffs were guilty of laches in neglecting to ascertain whether the corporation was acting intra vires before entering upon their contract, and that it would be contrary to the policy of the statute to grant them a recovery which would be so largely in excess of the expenditure contemplated by the original by-law.

Appeal dismissed with costs.

Moss, Q.C., and *MacMurchy*, for appellants.

Wilson, Q.C., and *Pegley*, Q.C., for respondents.

Ontario.] [Feb. 18.

ROOKER *v.* HOOFSTETTER.

Mortgage—Agreement to charge lands—Statute of Frauds—Registry.

The owner of an equity of redemption in mortgaged land, called the Christopher farm, signed a memorandum as follows: "I agree to charge the east half of lot No. 19 in the seventh concession of Loughborough, with the payment of two mortgages held by G. M. G. and Mrs. R. respectively, upon the Christopher farm . . amounting to $750 . . and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said Christopher mortgages."

Held, affirming the decision of Court of Appeal (22 A. R. 175), that this instrument created a charge upon the east half of lot 19 in favor of the mortgagees named therein.

This agreement was registered and the east half of lot 19 was afterwards mortgaged to another person. In a suit by one of the mortgagees of the Christopher farm for a declaration that she was entitled to a lien or charge on the other lot, it was contended that the solicitor who proved the execution of the document for registry as subscribing witness, was not such, but that the agreement was in the form of a letter addressed to him.

Held, affirming the judgment of the Court of Appeal, that as the agreement was actually registered, the subsequent mortgagee could not take advantage of an irregularity in the proof, the registration not being an absolute nullity.

Held, per Taschereau, J., that if there was no proof of attestation, the Registry Act required a certificate of execution from a County Court Judge, and it must be presumed that such certificate was given before registry.

Appeal dismissed with costs.

Smythe, Q.C., for the appellant.

Langton, Q.C., for the respondent.

Ontario.] [Feb. 18.

NEELON *v.* CITY OF TORONTO AND LENNOX.

Contract—Inconsistent conditions—Dismissal of contractor—Architect's powers—Arbitrator—Disqualification—Probable bias—Evidence, rejection of—Judge's discretion as to order of evidence.

A contract for the construction of a public work contained the following clause: "In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors, and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: "In case the

works, from the want of sufficient or proper workmen or materials, are not proceeding with all the necessary despatch, then the architect may give ten days notice to do what is necessary, and upon the contractors failure to do so, the architect shall have the power at his discretion (with the consent in writing of the Court House Committee, or Commission, as the case may be), without process or suit at law, to take the work, or any part thereof mentioned in such notice, out of the hands of the contractor."

Held, (SEDGEWICK and GIROUARD, JJ., dissenting) that this last clause was inconsistent with the above clause of the contract and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the committee.

At the trial the plaintiff tendered evidence to show that the architect had acted maliciously in the rejection of materials, but the trial judge required proof to be first adduced tending to show that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question of malice on the part of the architect. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for defendants.

Held, that this ruling did not constitute a rejection of evidence, but was merely a direction as to the marshalling of evidence, and within the discretion of the trial judge.

Appeal dismissed with costs.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for appellant.

McCarthy, Q.C., and *Fullerton*, Q.C., for respondent, city of Toronto.

Nesbitt and *Grier*, for respondent, Lennox.

Ontario] [Feb. 18.

ISBISTER *v.* RAY.

Partnership—Note made by firm—Representation as to members—Judgment against firm—Action on against reputed partner—Agreement as to liability.

An action was brought against the firm of M., I. & Co., as makers, and against J. I. as indorser of a promissory note. Judgment went by default against the firm, but the action failed as to J. I., it being held that an agreement established on the trial by which the holders of the note admitted that it was indorsed for their accommodation, and agreed that the indorsee was not to be liable, was a conclusive answer. An action was afterwards brought on the judgment against the firm to recover from J. I. as a member thereof, and also on several promissory notes made by the said M., I. & Co.

Held, affirming the decision of the Court of Appeal (22 A. R. 12), which reversed the judgment of the Divisional Court (24 O.R. 497), as to the action on the judgment, but affirmed it on the other claim, that J. I. having succeeded in the former action on the ground that it had been agreed that he was not to be liable in any way on the note, there in suit, the judgment on such former action was a conclusive answer to the present.

Held, further, that as to the other notes sued on, J. I. having, when the notes

were made, held himself out to the payees as a member of the firm of M., I. & Co. (the makers), he was liable as a maker, though he might not, as a matter of fact, have been a partner at the time.

Appeal dismissed with costs.

McCarthy, Q.C., and *Code*, for the appellant.

Aylesworth, Q.C., and *Cameron*, for the respondents.

Nova Scotia.] [Feb. 18.

CLARK *v.* PHINNEY.

Executors—License to sell real estate—Petition to revoke—Judgment on—Res judicata—Estoppel.

Judgment creditors of devisees under a will presented a petition to the Probate Court to revoke a license granted to the executor to sell the real estate of the testator for payment of his debts. The petition was refused by the Probate Court, and the judgment refusing it affirmed by the Supreme Court of Nova Scotia. The executor sold the land under the license, and a part of the purchase money was paid to the judgment creditors, who, still claiming the license to be null, issued execution against the lands so sold, and the purchaser from the executor brought an action to establish the title thereto.

Held, affirming the decision of the Supreme Court of N.S. (27 N.S. Rep. 384) that in this action the judgment creditors could not attack the license on grounds which were, or might have been taken on the petition to revoke, and the judgment on said petition was res judicata against them.

Held, further, that the creditors by accepting a portion of the purchase money on the sale, knowing the source from which it came, had elected to treat the license as valid, and were estopped from attacking it in this proceeding.

Appeal dismissed with costs.

Roscoe, for the appellants.

J. J. Ritchie, Q.C., for the respondent.

Nova Scotia.] [Feb. 18.

NOVA SCOTIA MARINE INS. CO. *v.* CHURCHILL.

Marine insurance— Repair of ship—Constructive total loss—Notice of abandonment—Sale by master—Necessity for sale.

The schooner "Knight Templar," insured by a time policy, sailed from Turk's Island, W. I., bound for Nova Scotia. Having sprung a leak she put back to Turk's Island and was beached. A survey was held and the surveyors recommended that the cargo be taken out to get at the leak. Two days later another survey resulted in finding her leaking three inches per hour, and two days after again she was making six inches, and the master was advised, if she could not be hove out, to put in ballast and take her to a port for repairs. She was then taken round to an anchorage where she remained some weeks, and after being surveyed again, was stripped, beached and sold at auction. The owners first heard of her having been disabled after the sale, and they sent to the underwriters a full account of the whole proceedings.

In an action for the insurance tried with a special jury all the findings were in favor of the assured, one of them being that the schooner could have been repaired if cost were not considered, but that it would cost much more than she was worth. A verdict was given against the underwriters.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that if the vessel could have been repaired, even at a cost far exceeding her value, there was not even a constructive total loss, unless notice of abandonment was given, but

Held, further, that as it appeared that instructions could not be received from the owners inside of four weeks, the expense of keeping the schooner safely, the danger of her being driven ashore, and the probability that she would greatly deteriorate in value during the delay, justified the master in selling on his own responsibility, and the sale excused the giving of notice.

Appeal dismissed with costs.

Macdonald, for the appellant.

Ritchie, for the respondent.

Prince Edward Island.] [Feb. 18.

MAYHEW *v.* STONE.

Administrator—Payment of doubtful claim by—Death of administrator—Administration de bonis non—Recovery back of amount paid—Unadministered asset.

Mayhew married a widow with a daughter, Stone, thirteen years old, who afterwards lived with him as one of his own family. Mayhew died intestate, but had previously provided well for his own children. His widow took out letters of administration and advertised for presentation of claims against the estate. Stone presented a claim of $1,000 for services performed for deceased, and administratrix consulted her solicitor and others, who advised her to pay it, which she did, and a month after she died. An administrator de bonis non, was appointed, who filed a bill in equity to have Stone declared a trustee for the estate of $1,000, and ordered to transfer it to the estate. On the hearing Stone gave evidence of a claim for payment for services made by her on deceased in his life-time, and a promise by him to provide for her at his death. The Master of the Rolls granted the decree as prayed for in the bill, but his judgment was reversed by the Court of Appeal in Equity on the ground that Stone was entitled to recover on quantum meruit the value of her services to deceased, according to the terms of the agreement to which she testified, and following *McGugan* v. *Smith*, 21 S.C.R. 263, and *Murdoch* v. *West*, 24 S.C.R. 305. On appeal from that decision,

Held, that the claim of Stone having been made bonâ fide, and paid by the adminstratrix under competent advice, the money, even if paid under a mistake in law, could not be recovered back by the estate as an unadministered asset.

Appeal dismissed with costs.

Stewart, Q.C., for the appellant.

Davies, Q.C., for the respondent.

Province of Ontario.

COURT OF APPEAL.

From Rose, J.] [March 10.

TIERNAN *v.* PEOPLE'S LIFE INSURANCE CO.

Insurance—Life insurance—Payment of premium—Agent's authority.

An agent of an insurance company has no power to bind the company by giving a policy-holder a receipt for the amount of a premium as payment for services alleged to have been rendered by the policy-holder to the company, the policy on its face providing that payment of the premium in cash to the company was necessary.

Judgment of ROSE, J., 26 O.R. 596, affirmed.

Osler, Q.C., and *J. B. Jackson*, for the appellant.

W. H. Hunter, for the respondents.

From Armour, C.J.] [March 10.

WANLESS *v.* LANCASHIRE INSURANCE CO.

Insurance—Fire insurance—Variation from statutory conditions—Co-insurance.

A provision in a fire insurance policy that "the assured shall maintain insurance on the property covered by this policy of not less than seventy-five per cent. of the actual cash value thereof, and that failing so to do the assured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her or their proportion of any loss," is a condition and not a mere direction as to the mode of ascertaining the amount of the loss, and it is void if not printed in accordance with the provisions of the Act.

Judgment of ARMOUR, C.J., affirmed.

Lash, Q.C., for the appellants, the British America Assurance Co.

McCarthy, Q.C., and *F. Ford*, for the respondents, the Lancashire Insurance Co.

Watson, Q.C., for the respondents, the plaintiffs.

From Street, J.] [March 10.

ITTER *v.* HOWE.

Church—Trust—Alteration in constitution—Change in doctrine.

The civil courts will deal with questions of church doctrine and beliefs, only in so far as it becomes necessary so to do to determine civil rights. Where a dispute arises as to which of two bodies represents a particular church in trust for which property has been granted, a question of ecclesiastical identity arises, and those who claim that the trust has been violated must show that their opponents have so far departed from the fundamental principles of the church in question, as to be in effect no longer members thereof.

A provision that "no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands," is not violated by mere alterations in expression or fuller and clearer statements of doctrine.

Where the constitution of a church provides that there shall be no alteration therein, "unless by request of two-thirds of the whole society," alterations initiated by the governing body and assented to by two-thirds of those of the members who have voted thereon, all members having been asked to vote, are valid. No previous request is necessary, nor is it necessary to have the assent of two-thirds of all the members.

Judgment of STREET, J., reversed.

Robinson, Q.C., and *W. H. P. Clement*, for the appellants.

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

From Q.B.D.] [March 10.

JOURNAL PRINTING CO. *v.* MACLEAN.

Defamation—Libel—Incorporated company — Damages — Evidence— Miscarriage—New trial—Estoppel.

An action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of their business.

South Hetton Coal Co. v. *North Eastern News Association*, (1894) 1 Q.B. 133, followed.

Journal Printing Co. v. *MacLean*, 25 O.R. 509, approved.

If the judgment of a Divisional Court directing a new trial is not appealed against, the questions determined by it cannot be re-opened upon an appeal from the judgment at the second trial.

It is proper to ask witnesses in a libel action who, in their opinion, is aimed at by the libel in question.

It is not proper in such an action to ask a witness whether in his opinion the alleged libel is likely to cause injury to the plaintiffs' business, but the Court refused to interfere because of the admission of that opinion, where in the charge to the jury special stress was laid on the fact that they were to form their own opinion as to the damages, and the damages allowed were small.

Judgment of the Queen's Bench Division affirmed.

McCarthy, Q.C., and *Stuart Henderson*, for the appellant.

Aylesworth, Q.C., and *G. F. Henderson*, for the respondents.

From Robertson, J.] [March 10.

THOMSON *v.* HUGGINS.

Chose in action—Equitable assignment—Building contract—Default—Bills of exchange and promissory notes.

The contractor for a building gave to the plaintiff, a lumber merchant, the following order: "On completion of contract on building now in course of erection, pay to the order of (plaintiff) $400, value received, and charge to account of (contractor)," and the defendant accepted thus: "Accepted, payable at Niagara Falls, Ont., as payment for lumber used in my building." After this the defendant paid to the contractor more than $400. The contractor made default before the completion of the building, when more than

$400 of the contract price had yet to be earned, and the defendant completed the building, the cost being more than the contract price.

Held, reversing the judgment of ROBERTSON, J., that this was not a bill of exchange because the time for payment was not fixed, nor an equitable assignment, because the fund out of which payment was to be made was not specified, but was merely a promise to pay upon the completion of the contract by the contractor or some one on his behalf, and that by reason of his default no liability arose.

E. E. A. Du Vernet and *J. E. Jones*, for the appellant.

Watson, Q.C., and *S. F. Washington*, for the respondent.

From Chy. D.] [March 10.

GARLAND *v.* CITY OF TORONTO

Master and servant—Workmen's Compensation for Injuries Act, 1892—"Superintendence"—55 Vict., c. 30, sec. 2, s-s. 1 (O.).

No implied right of superintendence within the meaning of section 2 (1) of the Workmen's Compensation for Injuries Act, 1892, 55 Vict., c. 30 (O.), arises from length of service or skill, and the employer is not liable where one workman, presuming on greater length of service or skill, directs his fellow workman to do certain work with insufficient appliances, and injury results.

Judgment of the Chancery Division reversed.

Fullerton, Q.C., for the appellants.

W. J. Clark, for the respondent.

From MacMahon, J.] [March 10.

BECHERER *v.* ASHER.

Principal and agent—Sale of goods—Undisclosed principal.

Where undisclosed principals, carrying on a wholesale business, employ an agent to carry on a retail business in his own name but for their benefit, and sell their goods, they are not liable for the price of goods of the same kind purchased by the agent from other persons without their knowledge.

Watteau v. *Fenwick*, (1893) 1 Q.B. 346, considered.

Judgment of MACMAHON, J., reversed.

Moss, Q.C., and *B. N. Davis*, for the appellants.

E. E. A. DuVernet, and *J. E. Jones*, for the respondents.

From Boyd, C.] [March 10.

COMMISSIONERS, ETC., NIAGARA FALLS PARK *v.* HOWARD.

Crown lands—Ordnance lands—Chain reserve along Niagara River.

The "chain reserve" along the bank of the Niagara River, and the slope between the top of the bank and the water's edge, were not set apart for military or ordnance purposes, and did not pass to the Dominion Government as "Ordnance lands."

Judgment of BOYD, C., 23 O.R., 1, affirmed.

Robinson, Q.C., and *W. P. Torrance*, for the appellants.

Irving, Q.C., and *Moss*, Q.C., for the respondents.

From Meredith, J.] [March 10.

STEPHENS *v.* BOISSEAU.

Bankruptcy and insolvency—Assignments and preferences—Surplus proceeds of sale of mortgaged goods.

The application by a chattel mortgagee of the surplus proceeds of sale of the goods in question in satisfaction of an unsecured debt due by the mortgagor to him, is not a preference within the meaning of the Assignments Act.

Judgment of MEREDITH, J., reversed.

G. Kappele, and *J. Bicknell*, for the appellant.

Gibbons, Q.C., for the respondent.

From Q.B.D.] [March 10.

IN RE SOLICITOR.

Solicitor—Taxation of bill—Appeal—Rules 848-851, 1226 (d), 1230, 1231.

Upon an appeal by the solicitor from the decision of the Queen's Bench Division, 16 P.R. 423, upon an appeal from the taxation of his bill of costs against his client, under the common order for taxation, the Court was divided in opinion as to one of the grounds of appeal, viz., that the appeal was not properly before the Court below.

Held, per HAGARTY, C.J.O., that whether the appeal was or was not regularly before the Court below, it had jurisdiction to interfere to prevent a gross abuse. *In re Johnston*, 15 App. Cas. 205, followed.

Per OSLER, J. A., that where what is sought by the appeal is the review of certain items of a solicitor's bill of costs against his client, the appeal is as from a Master's report under Rules 848-850; and this is the effect of Rule 1226 (d).

Per BURTON and MACLENNAN, JJ.A., that such an appeal is regulated by the same Rules and practice as apply to an appeal from a taxation of costs between party and party; and the provisions of Rules 1230 and 1231, not having been complied with, an appeal could not be taken under Rule 851.

Tremeear, for the appellant.

W. E. Middleton, for the respondent.

Osler, J.A.] [March 17.

MOLSONS BANK *v.* COOPER.

Appeal bond—Condition—Affidavit of execution—Affidavit of justification.

The condition of a bond filed by the defendants as security for the costs of an appeal to the Supreme Court of Canada, was that if the defendants "shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then this obligation shall be void; otherwise to remain in full force and effect."

Held, (1) that the bond was not irregular.

(2) The affidavit of execution of such a bond need not be entitled in the cause.

(3) A surety in such a bond, when justifying in the sum sworn to "over and above what will pay all my just debts," need not add "and every other sum for which I am now bail."

J. S. Denison, for the defendants.

W. E. Middleton, for the plaintiffs.

HIGH COURT OF JUSTICE.

BOYD, C., ROSE, J., ROBERTSON, J. [Feb. 18.

CARROLL *v.* BEARD.

Landlord and tenant—Distress—Conditional sale of goods—Lien—Interest of tenant—Statutes—Repeal—Substitution.

An agreement upon the sale of certain machinery and other goods contained a provision that until the balance of the purchase money should be fully paid, the vendor should have a lien on the goods for such balance, as and for and by way of a vendor's lien, and that no actual delivery of such property should be made, nor should possession be parted with until such balance and interest should be fully paid. After the sale the vendee took possession of the goods, and subsequently, on the 1st April, 1890, with the assent of the vendor, who surrendered a former lease, the defendants leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question.

Held, that the stipulation in the agreement for a vendor's lien was inappropriate and inconsistent, and must be read out as mere surplusage; and so, reading the agreement, the transaction was one of conditional sale, and under 57 V., c. 43, only the interest of the tenant in the goods could be distrained on.

Held also, that Act 57 Vict., c. 43, which repeals s. 28, s-s. 1, of R.S.O. c. 143, and substitutes a new section therefor, applies to leases made on or after 1st October, 1887, to which the repealed section, by sec. 42, applied.

Moss, Q.C., for the plaintiffs.

Arnoldi, Q.C., for the defendants.

DIVISIONAL COURT.] [Feb. 19.

KINNARD *v.* TEWSLEY.

Promissory note—Discounted for holder on his guaranteeing same by signing name under makers'—Surety.

Where a promissory note commencing "I promise to pay," etc., and signed by two persons as makers, was afterwards discounted by the plaintiff for the defendant, the holder thereof, the money being paid to defendant on his agreeing to become surety for the payment of the note, defendant signing his name under that of the makers'.

Held, that the defendant's liability being that of a surety he was liable to

the plaintiff on the note, his liability not being affected by the manner in which the note was signed.

Swayze, for the plaintiff.

F. E. Hodgins, for defendant Dodge.

J. F. Macdonald, for defendants, the Tewsleys.

DIVISIONAL COURT, CHY. D.] [March 3.

TOWNSHIP OF MOORE *v.* COUNTY OF HURON.

Statutes—Repeal of Act—Exception—Interpretation Act—Con. Mun. Act, 1892, 55 Vict., c. 42, sec. 533a (O.)—57 Vict., c. 50, sec. 14 (O.)—R.S.O., c. 1.

Section 14 of the Municipal Amendment Act, 1894, 57 Vict., c. 50 (O.) must be read with sec. 8, sub-secs. 43 and 48 of the Interpretation Act, R.S.O., c. 1, so that rights of action acquired at the passing of the said Act of 1894 are not affected thereby.

On the 29th April, 1893, a township corporation obtained an award against a county corporation under sec. 533a (O.) of the Consolidated Municipal Act, 1892, for part of the cost and maintenance of certain bridges. An appeal against the award was successively made to a Judge, and to the Court of Appeal, the appeals being dismissed, but while appeal was before the Court of Appeal, the 57 Vict., c. 50 (O.), was passed.

Held, that the award was not a pending award at the date of the passage of the said Act, 57 Vict., c. 50 (O.)

The plaintiffs were held entitled, notwithstanding the repeal of sec. 533a (O.), to recover the amount expended on the said bridges; but varying the judgment of the learned Judge at the trial, by allowing, not merely the amount expended up to the date of the passing of the 57 Vict., but the township's proportion of the amount actually expended.

Aylesworth, Q.C., and *Dickenson*, for the plaintiffs.

Garrow, Q.C., for the defendants.

ARMOUR, C.J., STREET, J.
FALCONBRIDGE, J. } [March 3.

MILLER *v.* GERTH.

Particulars—Slander.

In an action of slander the defendant has a right to the fullest particulars the plaintiff can furnish as to the place where, the time when, and the person to whom the words alleged were uttered; and also to full particulars of the names of the persons who have ceased business dealings with the plaintiff on account of the slander.

Shifty and uncertain particulars, such as are rendered meaningless and evasive by saying "among others" and "some of the persons," are to be discouraged.

The plaintiff is bound to give definite information, so far as he can, and to stop there: if further information comes to his knowledge, he can obtain leave to amend.

The defendant is entitled to particulars of slanderous statements alleged merely as matters showing express malice or in aggravation of damages.

W. N. Ferguson, for the plaintiff.

F. A. Anglin, for the defendant.

MEREDITH, C. J., ROSE, J., STREET, J. March 16.

TODD *v.* RUSNELL.

Divisional Court—Appeal to—Stay of proceedings—Rule 799, A (1484).

A Divisional Court has jurisdiction to allow an appeal from the judgment of a trial Judge, to be set down upon short notice of motion, and such setting down will operate as a stay of proceedings in the action.

J. W. McCullough, for the plaintiff.

A. H. Marsh, Q.C., for the defendant.

MACMAHON, J.] [Sept. 24, 1895.

MULHOLLAND *v.* MISENER.

Discovery—Examination of party—Criminal conversation—R.S.O., c. 61, sec. 7.

In an action for criminal conversation with the plaintiff's wife, the defendant cannot be compelled to submit to examination for discovery.

Construction of sec. 7, of R.S.O., c. 61, and difference between it and sec. 3 of the Imperial Act, 32 & 33 Vict., c. 68, pointed out.

McBrayne, for the plaintiff.

D'Arcy Tate, for the defendant.

BOYD, C.] [March 16.

TAYLOR *v.* NEIL.

Discovery—Examination of party—Criminal conversation—Alienation of affections—R.S.O., c. 61, sec. 7.

It is not in the power of the plaintiff to enforce the attendance or examination of the defendant as a witness or for discovery, where the proceeding is one instituted in consequence of adultery.

Mulholland v. *Misener*, ante, followed.

But where the action is of a compound character, and raises a distinct claim for damages on account of the alienation of affections and loss of the society of the plaintiff's wife, the defendant must submit to examination upon that branch of the case. Construction of sec. 7 of R.S.O., c. 61, and difference between it and sec. 3 of the Imperial Act, 32 & 33 Vict., c. 68, pointed out.

T. McPhillips, for the plaintiff.

T. G. Meredith, for the defendant.

BOYD, C.] [March 20.

KERR *v.* SMITH.

Will—Devise—Legacy—"Legal personal representatives"—Vested.

A testator devised land to executors and trustees upon trust to allow his wife to use and occupy it during her life, and after her death to sell and pay

the proceeds of part to his son, but if the legatee should die before his share or portion was paid over to him then to his legal personal representative.

The son conveyed his share to the plaintiff and died before his share was paid over.

Held, that the legacy vested in the son, by being given in the event of his death "as his share" to his executors and administrators, as "legal personal representatives," and that the plaintiff was entitled.

James Bicknell, for the plaintiff.

H. W. Mickle, for the next of kin.

W. L. Payne, for the executors.

BOYD, C.] [March 21.

IN RE ROSE.

Dower—Sum in gross—Devolution of Estates Act—Creditors.

Under the Devolution of Estates Act, land of an intestate was sold by the administrator, with the approval of the official guardian, and by consent of the widow, freed from her dower. The consent was upon the footing that the widow was to get out of the proceeds of the sale a sum in gross in lieu of dower. The estate was practically insolvent, and but little was left for the sustenance of the widow and children.

The creditors, after the sale, opposed the payment of a sum in gross.

Held, that, whatever might be the proper course in the case of a large estate where the family were left amply provided, the better practice in a case like this was to prefer the claim of the widow to a gross sum to that of creditors to have only annual payments on a funded capital, the residue of which should be distributed on the widow's death.

J. H. Moss, for the widow.

J. Hoskin, Q.C., for the infants.

T. W. Howard, for creditors.

MEREDITH, J.] [March 23.

CREDIT FONCIER FRANCO-CANADIAN *v.* LAWRIE.

Action on covenant—Deed not executed by defendant—Implied covenant.

The defendant Lawrie purchased certain lands subject to mortgages made to the assignor of the plaintiffs. The conveyance to Lawrie contained a covenact on her part by which she agreed to pay these mortgages, but she did not execute it. The plaintiffs obtained from the mortgagor, the grantor to Lawrie, an assignment of the above covenant, and brought this action upon it against the defendant Lawrie and the mortgagor.

Held, that no action could lie upon a covenant in a deed not executed by the alleged covenantor.

R. McKay, for the plaintiffs.

No one for the defendant.

MEREDITH, C.J.] [March 28.

IN RE KERR AND COUNTY OF LAMBTON.

Municipal corporations—County by-law—Guaranteeing debentures of town—Assent of electors—By-law of town—Time of passing—Form of by-law—Guaranty—Liability.

The assent of the electors is not required to make valid a by-law of the council of the county corporation, passed under sec. 511, s-s. 2, of the Consolidated Municipal Act, 1892, guaranteeing the debentures of a municipality within the county.

At the time such a county by-law was passed, the by-law of the minor municipality authorizing the issue of the debentures had not been finally passed, but had been provisionally adopted and had received the assent of the electors, in accordance with sec. 293, and the form that the guaranty of the county was to take was such that it could not actually be given until after the final passing of the by-law of the minor municipality.

Held, that under these circumstances, the county by-law was not prematurely passed.

The by-law in question enacted: 1. That the corporation do hereby guarantee the due payment of the debentures," etc. 2. That upon each debenture should be written "payment hereof guaranteed by the corporation of the county," etc. 3. That the warden and clerk should sign and seal such guarantee on each debenture. 4. That when so signed the corporation should be liable to the holders of the debentures and responsible for the due payment thereof.

Held, that the by-law did not impose upon the county corporation any greater liability than was authorized, viz., that of guarantors.

Aylesworth, Q.C., for the applicant.

Shepley, Q.C., for the corporation.

ROSE, J.] [March 27, 1895.

FORSYTH *v.* GODEN.

What amounts to an arrest?

The plaintiff and defendant had a disagreement on the London market. defendant telephoned for a policeman, who soon arrived, and said to the defendant, "Is this the man?" The constable after hearing both sides of the dispute, said to plaintiff, "You will have to come along with me to the police station." No other words were used, and no resistance offered. Plaintiff, defendant and policeman walked down together to the station, and talked the matter over there with the chief. No information was laid, and plaintiff was not further detained. The constable swore he did not arrest plaintiff. As to this

ROSE, J., ruled that that was a question of law; that if an officer, known

to be such, took charge of a man, and the man reasonably thought he was under arrest from the conduct of the officer, this is an arrest.

McEvoy and *Wilson*, for plaintiffs.

Gibbons, Q.C., and *Graydon*, for defendant.

DIVISION COURTS.

THIRD DIVISION COURT, DUNDAS AND GLENGARRY.

(Reported by John A. Chisholm, Barrister-at-Law.)

SHEETS *v.* COURT SIDNEY, CANADIAN ORDER OF FORESTERS.

Benefit societies—C. O. O. F.—Certificate of physician.

Certificates required by the constitutions of friendly societies on which sick benefits are paid must be furnished in strict accordance with the forms provided by the constitution. In this case the certificates on which the plaintiff relied merely certified to his illness, without stating that he was unable to follow his usual occupation.

[CORNWALL, March 6, 1896, CARMAN, J.J.

This was an action for sick benefits against the local court or branch of the Canadian Order of Foresters. Sec. 82 of the Constitution of the Canadian Order of Foresters defining, the duties of the Court Physician, requires inter alia, "it shall be the duty of the Court Physician to . . . sign the certificate necessary to enable (the claimant) to draw the sick benefits . . . The certificate of the Court Physician shall be in Form 'L' or equivalent thereto. Members of the Order employing other than the Court Physician shall present the certificate of the same, who in all cases must be a regularly qualified physician, and such certificate shall be accepted on the same conditions as if it were signed by the Court Physician."

The Court Physician gave plaintiff a certificate entitling him to three weeks sick benefits, believing him fully recovered. The physician was then absent for some weeks. Plaintiff alleged that he was not cured, but was ailing for several weeks longer, and sought to recover therefor on certificates of other physicians than the Court Physician, which, however, merely certified to his illness and did not state he was unable to follow his usual occupation.

R. A. Pringle, for plaintiff.

J. W. Liddell, for defendant, referred to *Essery* v. *Court Pride of the Dominion*, 2 O.R. 596.

CARMAN, J.J.—The wording of By-Law No. 19, of Court Sidney, is not the same as the wording of sec. 85 of the Constitution of the Canadian Order of Foresters. The Constitution says: "Every brother . . . in case of being disabled by sickness or accident from following his usual occupation or otherwise earning a livelihood . . . provided always that such illness has not been brought on by his own intemperance or immorality, shall be entitled to, etc."

By-Law No. 19, of Court Sidney, says: "Any member who from illness or accident is incapable of earning a livelihood, where such illness is not brought

on by his own intemperance or immorality, shall be entitled to receive a weekly allowance, etc."

The by-law of Court Sidney certainly limits sec. 85 of the Constitution.

Form "L" referred to in the Constitution, but not in By-Law No. 19, of Court Sidney, reads as follows :

"

Date 189 .

To Court No. C. O. F.

This certifies that I was called in to visit professionally on the day of , and I have attended him from that time to the present time, and I declare he was ill of , and unable to attend to his usual occupation. I declare him Court funds."

This certificate does not cover By-law No. 19 of Court Sidney. It was intended to cover sec. 85 of the Constitution, but it does not even do that, although it is declared by the Constitution to be sufficient. The certificate should state that the illness was or was not brought on by the claimant's own intemperance or immorality.

There is not a certificate filed covering the requirements of By-law No. 19 of Court Sidney, that is, not a certificate upon which the officers of the Court would be justified in paying out the money of the institution without further proof. If certificates for benefits are prepared by any other than the Court Physician, that other physician certainly ought to be more particular even than the Court physician in showing that the case is within the requirements of the By-law.

I must therefore hold that the certificates produced by the plaintiff are not sufficient, and upon the evidence of Dr. Alguire (the Court Physician) at the trial, it is clear that his certificate of Sept. 3rd, 1895, was intended by him, and was accepted and presented to the Court by plaintiff, as the end of his call upon the Court.

It is urged that any kind of a certificate will do where the doctor employed is not the Court Physician ; this I cannot subscribe to, but would rather feel inclined to hold to much greater particularity in showing that the case was within the requirements of the By-law if possible, than where the Court Physician was employed.

Judgment for the defendants.

Province of Nova Scotia.

SUPREME COURT.

EN BANC.] [March 14.

IN RE SMITH.

Grant of administration—Rival applicants for—Relation of property right and right to administration—Appointment of stranger.

The will of a testatrix provided that the interest of the deceased in her father's estate should be held by the executors or agents of that estate in trust for her infant children. It also contained a direction that the above interest

should be kept wholly separate from her husband. Both husband and the said executors became rival applicants for a grant of administration, and upon their failing to agree, the Judge of Probate appointed the Eastern Trust Co. administrator. On appeal from that order,

Held, that upon the well established principle of the Court of Probate that the right to administration followed the right of property, the executors of testatrix's father being trustees who represented beneficiaries exclusively entitled under the will, were prima facie the proper persons for appointment, and that in the absence of evidence of any default on their part as such trustees, there was no principle of law which would exclude them from administration of the estate.

That so far as appeared the appointment of the Eastern Trust Co. was unwarrantable. The mere fact that the contending applicants could not agree did not justify the appointment of a stranger; but that the Court had not the proper materials before it to determine who should be appointed administrator, and that the case should be remitted to the Judge of Probate to determine upon proper evidence, whether or not the said executors or some other person interested in the estate of the testatrix should receive a grant of administration before appointing a stranger.

Fullerton, for appellants.

Harris, Q.C., *McInnes*, and *J. A. Smith*, contra.

EN BANC] [March 14.

IN RE MCLELLAN.

Validity of will—Testamentary capacity—Upon what evidence determined—What considerations relevant.

The deceased testator, whilst lying ill and in a state of drowsiness or semi-coma, alternating with short intervals of clear consciousness, gave testamentary instructions to his agent, which the latter embodied in a will, and shortly afterwards the same was duly signed and executed. The main conflict in the evidence was not in respect of the facts, but was created by the opinions expressed by the attending physician and another witness in negative answer to comprehensive questions to the following effect: "Was the testator's mental condition such as would enable him intelligently to dispose of his estate." The Probate Court decided in favor of the will, and on appeal the principal contention against the validity of the will was that while admitting the testator's capacity to understand the meaning and effect of each of the testamentary dispositions taken by itself, his condition was such that he was incapable, by reason of stupor and exhaustion, of appreciating and dealing with the testamentary project as a whole and in its different bearings in respect of the value and extent of his property, and the various claims upon his regard.

Held, that having regard to the important consideration that the provisions of the will coincided with the feelings and intentions of the testator for a long time previous to his decease, and that he had given sufficient previous thought to the subject of the disposition of his estate to reduce in a large degree the

difficulty of making his will, even when his faculties had become impaired by disease, no sufficient reason appeared for disturbing the judgment of the Probate Court.

Held also, that the above comprehensive questions went far beyond the scope of those questions which might properly be put even to expert witnesses, inasmuch as such evidence if accepted would be conclusive both of the law and the facts.

W. B. Ross, Q.C., for appellants.

Laurence, Q.C., contra.

EN BANC.] [March 14.

SALTER *v.* ST. LAWRENCE LUMBER CO.

Winding up of foreign company—Attachment of assets—Power of liquidator to intervene—Quality of proof required of winding up proceedings and order of foreign Court.—O. 47, J. A.

Defendants were a foreign company and had offices in London, Quebec and New Brunswick, but no office or agent within the province, and did no business within the province of a regular or permanent character. Subsequently to an order of the Supreme Court of N.B. winding up the company under provisions of c. 129, R.S.C., and appointing liquidators (none of whom resided within the province), plaintiff attached and levied on certain assets of the company. Thereupon the liquidator moved to set aside the attachment and levy, and obtained an order accordingly. On appeal from that order it was contended (*a*) that the liquidator not being a party to the suit had no standing in the Court, and was not entitled to attack the proceedings; (*b*) that the winding-up order was not proved, not having been certified and sealed with the seal of the Court as required by the statute; (*c*) that the liquidator had not shown that he had authority from the Court to intervene in the action; (*d*) that since the liquidator's title was founded on liquidation he should have proved it distinctly.

Held, that as the functions of the directors ceased at the winding-up, the liquidator was the proper and only person who could intervene to conserve the assets of the company, and for such purpose it was not necessary that he should be a party to the suit;

That the motion to set aside attachment was not an attempt to enforce any order made by the N. B. Court (in which case the provision of sec. 85 regarding the mode of proving such order would have to be complied with), but to protect rights acquired under the winding-up procedings;

That on such a motion it was not necessary for the liquidator to do more than satisfy the Judge by reasonable proof—such proof as is customarily employed on interlocutory applications and motions founded on affidavit—that a winding-up order had been granted when made, and that liquidators had been appointed.

Held further, that the summary provisions of O. 47, J. A., did not apply to a foreign company which merely had a few isolated commercial transactions within the province, but conducted no regular or continuous business.

Drysdale, Q.C., for appellant.

Adams A. Mackay, for respondents.

TOWNSHEND, J. In Chambers. [March 21.

PROVO *v.* CAMERON.

Pleading as to damage—Embarrassing plea—Tender in action for unliquidated damages.

To allegations in the statement of claim of damages suffered and expense incurred, defendant put in a plea of denial. He also pleaded tender before action brought, the suit being one for unliquidated damages. On motion to set aside both pleas,

Held, that though the former plea putting damages in issue was unnecessary under O. 21, r. 4, J.A., it was not therefore necessarily embarassing, and there was nothing in the rules to prohibit such a plea ; but that the latter plea raising a defence of tender must be struck out.

Fulton, for motion.

Russel, Q.C., contra.

TOWNSHEND, J., In Chambers. [March 21.

IN RE MOOSELAND GOLD MINING CO.

Liquidation proceedings and restraining order—Leave to proceed on part of judgment creditor—Grounds of preference—How far substantial.

A levy having been made on the company's property on behalf of judgment creditors after a resolution to wind up had passed, the liquidator obtained an order under c. 80, sec. 50, R.S.N.S., restraining all further proceedings. The judgment creditors now applied for leave to proceed on the following grounds : (1) That the officers of the company, before the winding-up, had made false and deceptive statements of their intention to pay the said claim, thereby delaying the applicants in proceeding against them, and that when proceeded against they went into voluntary liquidation ; (2) that their lien had been obtained before the restraining order was made.

Held, that as the interests not alone of the company, but of all the creditors of the company were involved, the first reason assigned afforded no sufficient ground for allowing applicants a preference for their claim ; and as to the second the effect of the restraining order was to remove any lien they had obtained for the very purpose of preventing a preference.

Kenny, for application.

Mathers, contra.

Province of New Brunswick.

EQUITY COURT.

BARKER, J.] [March 17.

RODGERS *v.* SCHOOL TRUSTEES, ETC.

School law—Sectarian schools.

Teaching in a convent building does not make a school sectarian within the meaning of the N. B. School Law, which provides that the schools shall be non-sectarian. Nor does the fact that the school is taught by sisters of charity who wear the garb peculiar to their order ; nor that the teachers'

salaries go into the general fund of the order to which they belong; nor that the Catholic religion is taught before and after school hours; nor that the schools are closed on Roman Catholic holy days; nor all of these together.

A bill filed by one ratepayer on behalf of himself and others to restrain the defendants from conducting a public school in a particular way, and alleging that the way is sectarian, must have the Attorney-General's consent, and make him a party.

Skinner, Q.C., and *Fowler*, for the plaintiffs.

Currey, Q.C., and *Lawlor*, for the defendants.

BARKER, J.] [March 17.

JONES *v.* HUNTER.

Landlord and tenant—Lessor restrained from closing up alleyway incidental to leased premises.

The defendant leased a store, together with the cellar underneath, to A., who assigned the lease to plaintiff. The store had always been used as a retail liquor store, and the cellar for storing liquors. Behind the store there was a room also included in the lease. At the time the lease was given there was an alleyway running from the street along the side of the building to the yard in the rear. A door opened from this alleyway into the room in the rear of the shop, and a trap door also opened into the cellar, which had always been used for puting in coal, casks of ale, etc. The defendant commenced to build a house alongside the one containing the flat leased by defendant, taking in nearly all of the alleyway and practically closing the two doors opening off it. The plaintiff applied for an injunction to restrain the defendant from so closing the alleyway on the ground that these privileges were incidental to the lease, and also on the strength of the word "privileges," which was in the lease.

Injunction granted.

C. J. Coster, for plaintiff.

Gilbert, Q.C., for defendant.

PROBATE COURT.

TRUEMAN, J.] [March, 23.

IN RE CHUBB.

Succession Duties Act 1892—Devise to "A B, one of my executors."

Testatrix devised "to A B, one of my executors, $500, and to C. D., the other of my said executors, $500." The local government collected the succession duty on both these legacies on the ground that they were legacies to persons coming within the scope of the Act. An application was made to the Court for an order to have the government refund the money paid. The point involved was whether the devises to the executors were in lieu of commissions or not. If they were, the estate was not liable to succession duty on these amounts.

Held, that the devises to the executors were in lieu of commissions, and that the estate was not liable to succession duty on them.

Tilley, for the estate.

Blair, Attorney-General, for the Government.

Province of Prince Edward Island.

SUPREME COURT.

SULLIVAN, C. J.] [Feb. 17.

DAVIES *v.* MCINNIS.

Sheriff—Negligence in not levying—Notice of rent due landlord—Action brought before return of fi. fa.—Attornment—Verbal notice.

Plaintiff placed a fi. fa. in the hands of defendant as sheriff on 29th Nov., 1893, returnable 30th May, 1894. On 23rd May, 1894, the fi. fa. was renewed for one year. The Writ of Summons was issued April 18th, 1895.

At the trial it was proved that in the Spring of 1894 there were goods in the hands of the execution debtor which might have been seized, of which fact the sheriff had notice but did not seize. On the debtor's farm there was a mortgage, with an attornment clause and one year's rent, $200 (more than the value of the goods in question), was due and unpaid. The mortgagee gave defendant verbal notice that he would come in as landlord for rent if any levy were made.

For the defendant, it was contended that even if the sheriff had levied, the probability was that the mortgagee, as landlord, would have claimed as for rent in arrear, and there would not have been sufficient goods to realize this rent, and consequently plaintiff suffered no damage. Defendant also contended that this action should not have been commenced until the expiration of the year for which the fi. fa. had been renewed, citing *Moreland* v. *Leigh*, 1 Starkie 388.

Held, that the circumstances did not lead to the conclusion that the plaintiff would not have realized, had a levy been made, and that the damages in this case was the value of the goods upon which defendant might have levied, but did not.

Held, also, that the notice of the mortgagee, as landlord, not being in writing, was insufficient under the statutes of this Province.

On the point raised by defendant that the action was commenced too soon, the learned Chief Justice said: "In support of this contention reliance was placed on the case of *Moreland* v. *Leigh*, from which a general inference might be drawn that an action could not be commenced against a sheriff until after he had returned the writ. That case was decided at Nisi Prius in 1816, and is somewhat imperfectly and irregularly reported; but, as it is, it appears to me to be distinguishable from the present case in this, that it was an action for not having the amount of the levy at the return of the writ. It is cited in Atkinson's Sheriff Law as an authority for this proposition: that 'not returning a writ without other default, is not a cause of action.' It was cited without effect in *Jacobs* v. *Humphrey*, 3 L.J., Ex. 82; and *Mason* v. *Paynter*, 10 L.J., Q.B. 279; and in *Mullett* v. *Challis*, 20 L.J., Q.B. 161, it was cited by counsel but not followed by the Court. . . . In the present case the plaintiff having waited until after the return day named in the writ and until the lapse of nearly eleven months after the renewal of the writ, in all a period of nearly

seventeen months, it was not in my opinion necessary for him to delay in the commencement of this suit until the writ ceased to be in force; nor was it necessary for him to wait until the writ had been formally returned; his cause of action for negligence being complete irrespective of such return."

A. B. Warburton and *F. W. L. Moore*, for plaintiff.

D. A. McKinnon, for defendant.

COURT OF CHANCERY.

HODGSON, M. R., In Chambers. [Jan. 24.

KENNY *v.* WIGHTMAN.

Discovery—Partnership.

Stats. P.E.I., 47 Vict, c. 3, sec. 13, enacts that either party may at any time interrogate the other on any subject matters relevant to the dispute . . . . and the party interrogated shall be bound to answer them fully on affidavit. . . Exceptions to the interrogatories to be taken by summons within four days from delivery.

The Bill of Complaint alleged a loan to the defendant M., on the credit of the defendants as joint contractors, to pay the firm debts, and that though the sum was so lent without the knowledge or consent of defendant W., yet, since the money was used to pay debts against the defendants as joint contractors, plaintiff was entitled to stand in the shoes of the creditors of the partnership.

Defendant W. in his answer denied that he and M. were trading partners, and alleged that plaintiff advanced the money to M. to purchase a share in the profits.

Interrogatories were delivered by plaintiff to show that defendant W. had exhausted his credit and could not obtain more money; and with that object he was interrogated as to his private banking account in all the banks in which he did business. Defendant declined to answer these questions and did not take exceptions pursuant to above statute. Plaintiff had been employed on the work and had presented his account for wages to W., and had been paid, and he then said nothing about this advance or alleged any claim against W. therefor.

Held, that the plaintiff had no right to discovery of the state of W.'s banking accounts, at least until he had established a prima facie case, and had denied that the money advanced by him was not to purchase a share of the anticipated profits with M., as W. swore it was, but was for the purpose of paying the debts of the firm, as set forth in the Bill of Complaint, and that the defendant was not too late in taking objections.

The statute refers only to interrogatories exhibited irregularly, unreasonably or vexatiously, and not to irrelevant interrogatories, or where discovery of defendant's evidence is sought, and that in this case the proper course for the defendant was not to take exceptions but to refuse to answer them.

J. A. Mathieson, for complainant.

Davies and *Haszard*, for defendant W.

COUNTY COURT, KINGS COUNTY.

REDDIN, Co.J.]

CARLTON *v.* MCDONALD.

Trover—Estoppel—Lien note.

Trover for value of a horse. At the trial it was proved that the defendant had sold the horse to one Williams and had taken therefor a promissory note, retaining property in the horse until the note was paid in full. The plaintiff had, by the direction of Williams, paid a part of the price of the horse to the defendant, and although ignorant of the existence of the note, had enquired of the defendant before making such payment whether the defendant held a note from Williams. Whereupon the defendant explicitly and repeatedly denied holding any note whatever. Subsequently the plaintiff bought the horse from Williams, after which the defendant converted it to his own use.

Held, that the defendant's denial, under the above circumstances, to the plaintiff that he held the note, did not estop him from producing it as evidence of his right of property in the horse.

Arthur Mellish, for plaintiff.

Mathieson, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

KILLAM, J.] [March 20.

OWENS *v.* BURGESS.

Fire—Damages—Negligence.

Plaintiff in this action sued the defendant for damages by fire occasioned by the use of the defendant's steam thresher in threshing wheat. The jury found that the defendant was not guilty of negligence.

Held, that where a person uses fire in his field in a customary way for the purposes of agriculture, or other industrial purposes, he is not liable for damage arising from the escape of the fire to other lands, unless the escape is due to his negligence, and that the plaintiff could not recover.

Pitblado, for plaintiff.

Mathers, for defendant.

KILLAM, J.] [March, 20.

CLEMONS *v.* ST. ANDREWS.

Sale of land for taxes—Damages against municipality—The Aseessment Act R.S.M., c. 101, s. 192—Right of action—Compensation.

This was an action commenced before the Queen's Bench Act, 1895, came into operation, to recover the value of land claimed to have been sold by the

defendants for taxes, when none were in arrear; the tax purchaser having afterwards obtained a certificate of title for the land under the Real Property Act.

By sec. 192 of the Assessment Act, R.S.M. c. 101, "In case any lands should be sold for arrears of taxes when no taxes are due thereon, the owner, in case the land cannot be recovered back by reason of its having been bought under the operation of the Real Property Act, shall be indemnified by the municipality for any loss or damages sustained by him on account of such sale of said lands; and the amount of such indemnity may be settled by agreement between the municipality and the person entitled thereto, or, if an agreement cannot be effected by arbitration, in a manner similar to that provided in the case of expropriation, except that the amount of the indemnity payable by the municipality shall be the amount which the arbitrators shall award, with twenty-five per cent. of the amount of such award added thereto." The declaration showed no agreement between the plaintiff and defendants as to the amount of indemnity, nor that any arbitration had been held to ascertain such amount.

Held, following the practice in England under the Land Clauses Consolidation Act, that the amount of the indemnity to be paid must first be settled in the manner pointed out by the statute before an action can be brought to recover it, and that the defendant's demurrer must be allowed. See Lloyd on Compensation p. 55; *Adams* v. *London and Blackwall Railway Co.*, 2 Mac. & G. 118; *Bruce* v. *Great Western Railway Co.*, 2 B. & S. 402, and *Pearsall* v. *The Brierley Hill Local Board*, 11 Q.B.D. 735.

Semble, if the municipality would not join in steps to determine the amount of indemnity by arbitration, the plaintiff could have applied for a mandamus to compel it to do so.

Elliot, for plaintiff.

Perdue, for defendant.

BAIN, J.] [March 25.

WATEROUS ENGINE WORKS CO. *v.* WILSON.

Contract—Retrospective legislation—Implied covenant—Lien on land.

This was a suit in which the plaintiffs claimed a lien on certain lands of the defendants for a balance of the price of an engine sold to them in 1885, under a written contract signed by the defendants under seal, by which they agreed to purchase the engine for a certain price and to give their promissory notes therefor, and that the notes should be a charge upon the lands in question.

It appeared that the parties had, subsequent to the making of the contract, agreed to substitute a second hand engine at a lower price for the one described in the contract; that there was no covenant or express promise to pay the money in the contract; and that the claim on the notes which had been given was barred by the Statute of Limitations. The defendants also raised the objection that the plaintiff company was not licensed under the

Foreign Corporations Act, 58 & 59 Vict., c. 4, s. 9, of which provides that no company or corporation, not incorporated under the provisions of the Statutes of Manitoba, and not having obtained a license under that Act, should be capable of taking, holding or acquiring any real estate within Manitoba.

Held, that this statute had no retrospective effect, and could not be construed so as to prevent the plaintiffs from realizing a charge on lands which they had acquired before it was passed.

Held also, that the contract being under seal and showing an intention to enter into an arrangement to pay the purchase money of the engine, the plaintiffs' right of action for money would not be barred until the expiration of ten years from the time it first accrued.

Decree for payment of the balance of the purchase money with a reference to the Master; also declaring that the plaintiffs are entitled to a lien on the lands described in the contract for the balance of the purchase money, and to a sale in default.

Ewart, Q.C., and *Sutherland*, for plaintiffs.

Clark, for defendants.

BAIN, J.] [March 28.

GAUDRY *v.* C. P. R. Co.

Fire—Ownership of hay cut on Dominion lands without permission—Possession.

Appeal from the County Court of St. Norbert. The plaintiff had cut and put up in stacks a quantity of hay on lands vested in the Crown, commonly known as a school section, without any lease, permission or authority from the Crown or any of its officers. He lived about four miles from the place where the hay stacks were, and there was nothing to show that he was in actual possession or exercised any control over it after it had been put up. This hay was burned by a fire which the plaintiff alleged was caused by the negligence of the servants of the defendants, and he sued in the County Court for the value of it, and obtained a verdict of a jury in his favor.

Held, that the plaintiff should have been non-suited in the County Court, as the hay was not his property, and was not in his possession in any sense at the time of the fire. If, notwithstanding want of property in goods, a plaintiff is in actual possession of them at the time, or if he has such use and control as the nature of the case permits, he may, in a proper case, recover damages as the result of any tortious or negligent conduct of another.

Verdict for plaintiff in the County Court set aside, and non-suit entered with costs.

Munson, Q.C., for the plaintiff.

Aikins, Q.C., and *Culver*, Q.C., for defendants.

North-West Territories.

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

RICHARDSON, J., In Chambers. [Jan. 10.

GLENN *v.* UNITED FIRE INSURANCE COMPANY.

Service on agent of corporation—"Judicature Ordinance," s. 31 (3)—Setting aside writ and service—Service of notice of discontinuance during stay of proceedings.

The writ of summons was served on one B. as agent of the defendant company, under sec. 31 (3) of "The Judicature Ordinance." Defendants filed affidavits showing that their head office was at Manchester, England; that on January 15th, 1895, they ceased to carry on business in Canada; that prior to that date G. & Co., of Winnipeg, had been defendants' agents for the North-west Territories; that B. was agent of G. & Co. for the sole purpose of receiving and forwarding applications for insurance, though he was also allowed to deliver interim receipts, and that the policies of the defendant company were issued at Montreal (where the loss was payable), and were countersigned by G. & Co. Upon these affidavits defendants obtained a summons to set aside the writ and service thereof, the summons containing a stay of proceedings until the disposition thereof. Plaintiff did not appear upon the return of the summons, but just prior thereto served a notice of discontinuance of the action.

Held, that as proceedings had been stayed until the disposition of the summons, the notice of discontinuance was of no effect; and that the service was not such as is authorized by sec. 31 (3) of "The Judicature Ordinance." Writ and service thereof set aside with costs.

Hamilton, Q.C., for applicants.

Rimmer, for plaintiff.

RICHARDSON, J.] [March 20.

QUEEN *v.* WALKER.

Stealing goods under seizure—Criminal Code, s. 306.

Prisoner and three others purchased goods from the W. M. Company, giving in part payment a receipt note, by the terms of which the ownership of the property remained in the company until payment of the note.

The evidence showed that the note was discounted by the company in the bank as an ordinary promissory note, and, not being met at maturity, the company paid it by substituting a renewal and had the original note returned to them.

The renewal note not being paid when due, the company sent out their bailiff, who seized the property under the original note. The prisoner, with assistance, retook the goods, and a charge was laid against him under sec. 306 of the Code.

On objection at trial that the original note being paid by the renewal, the property became vested in and the ownership passed to the makers, or, if not, the endorsement to the bank constituted an equitable assignment and the bank was the only party who could have legally made the seizure.

Objection sustained, and prisoner acquitted.

Secord, Q.C., for the Crown.

Mackenzie, for the prisoner.

RICHARDSON, J.
In Chambers. } [March 24.

ARNOLD *v.* BOURGEOIS, FOURINARD SCHOOL DISTRICT, GARNISHEE.

Garnishing party resident in another judicial district—"Judicature Ordinance," ss. 4, 368.

Plaintiff, having obtained judgment against defendant, served a Garnishee summons on the Fourinard School District, which is situated in another judicial district, i.e., Saskatchewan. Upon motion by plaintiff to strike out appearance entered by garnishees and for judgment against them, defendant and garnishees appeared and contended that as the garnished school district was in another judicial district, there was no jurisdiction to make the order asked for, relying on sec. 4 of the "Judicature Ordinance": "Suits shall be entered, and unless otherwise ordered, tried in the Court holden in the judicial district where the cause of action arose, or in which the defendant, or one of several defendants, resides or carries on business at the time the action is brought."

Held, that a School District is a "person" who can be garnished under sec. 368 of the "Judicature Ordinance," and that garnishee proceedings do not come under sec. 4 of same ordinance.

Order made striking out appearance entered by garnishees and for judgment for plaintiff against garnishees for amount of primary judgment and costs, but order not to issue till April 10th, and not then if meanwhile garnishees shall have complied with the ordinance and paid costs.

Robson, for plaintiff.

Secord, Q.C. for defendant.

Johnstone, for garnishee.

RICHARDSON, J.,
In Chambers. } March 24.

SIMPSON *v.* PHILLIPS, LATHAM, GARNISHEE.

Garnishee summons—Defective affidavit—"Judicature Ordinance," s. 368.

Plaintiff, having obtained judgment against defendant and garnished Latham, obtained a Chamber summons calling on defendant and garnishee to show cause why judgment should not be entered for plaintiff against garnishee for amount of primary judgment and costs.

Upon return of the summons, for garnishee and defendant it was con-

tended that the garnishee proceedings were irregular and should be set aside, as the affidavit on which the garnishee summons was issued did not state that the garnishee was within the jurisdiction of the Court, as required by sec. 368 of the "Judicature Ordinance": *French* v. *Martin*, 3 W.L.T.

Held, that the affidavit was sufficient, as it stated the garnishee to be "of the town of Moose Jaw," which is within the jurisdiction of the Court.

Gordon, for plaintiff.

Robson, for defendant and garnishee.

RICHARDSON, J., In Chambers. [March 24.

RE SKINNER.

Lost will—Proof of contents—Administration with will annexed—Judicature Ordinance, ss. 462, 463.

Deceased died at Belleville, Ont., in 1887, having made a will bequeathing all his property to his wife, but appointing no executor. Part of the property consisted of realty in above judicial district. The will was lost after death of testator.

Upon application on behalf of the wife for administration with will annexed, such application being supported by an affidavit of the testator's son proving the nature and contents of the will; that it was last in deponent's possession; that it had been executed in accordance with the law of Ontario, and that it was now lost.

Held, that under sec. 463 of the Judicature Ordinance, and on the authority of *Sugden* v. *Lord St. Leonard*, 1 P. Div., 154, administration of the contents of the lost will might issue.

R. Rimmer, for applicant.

A statute prohibiting employers from insisting that employees shall withdraw from or refrain from joining any trade union or labor union as a condition of employment, is held in *State* v. *Julow*, 29 L.R.A. 257, to be unconstitutional.

The validity of a statute authorizing school authorities to require vaccination of pupils as a condition of their attending school is sustained in *Bissel* v. *Davison*, 65 Conn. 183, 29 L.R.A. 251, as essentially a police regulation which violates no constitutional rights.

The right of municipal authorities of a city to destroy the private property of a citizen for the public good, without compensating him, unless the property is itself a nuisance endangering the public health or safety, is denied in *Savannah* v. *Mulligan* (Ga.) 29 L.R.A. 303; but it was held that bedding which had been used by a person who had scarlet fever was in fact a nuisance endangering the public health, the destruction of which was lawful and entitled the owner to no compensation.