Canada Law Journal.

VOL. XXII. SEPTEMBER 1, 1886. No. 15.

DIARY FOR SEPTEMBER.

1. Wed....Barristers' examinations, Long vac. in H. C. J. ends.
2. Thur ..Sittings of Div. Ct. Ch. Div. H C. J. begin.
3. Fri.....Sir Edward Coke died 1634 æt. 82.
5. Sun.....*11th Sunday after Trinity.*
6. Mon....Trinity term of Law Society begins.
7. Tues....Sittings of Court of Appeal begin.
9. Thur...Revolted American Prov. first called "the U. S." 1776.
12. Sun.....*12th Sunday after Trinity.*
13. Mon....Battle of Quebec and death of Gen. Wolfe 1759.
14. Tues...Duke of Wellington died 1852. Sir J. S. Copley (aftw. Lord Lyndhurst) app. Master of the Rolls, 1826.

TORONTO, SEPTEMBER 1, 1886.

THE case of *Re X.* (a solicitor), 54 L. T. N. S., 634, ought to serve as a warning to solicitors in preparing conditions and particulars of sale. The solicitor in question, being instructed to sell certain property for a client, inserted in the particulars a statement that an arrangement had been made for a license to convert the property in question into shops. No definite arrangement had in fact been made. One of the conditions of sale stipulated that the purchaser should be deemed to purchase with full knowledge of the terms of the offer to grant such license, and that the vendor would not be bound in any way to carry out such terms or obtain such license. The purchaser objected to carry out the sale on the ground of the untrue statement in the particulars. By the advice of counsel an application was then made under the Vendors and Purchasers Act to compel the purchaser to complete, on the ground that his objection was precluded by the condition of sale. The judge of first instance decided in favour of the vendor, but on appeal his decision was reversed, and it was held that the condition could not get rid of the positive statement in the particulars. The sale consequently fell through. Upon a taxation of costs between the vendor and his solicitor the costs of the abortive attempt at a sale and of the proceedings under the Vendors and Purchasers Act were all disallowed by the taxing master, and on appeal Bacon, V.C., affirmed the disallowance.

WE have before us the report of a special committee on the establishment of a department of law in connection with Cornell University, with a preliminary announcement of the action of the trustees in establishing such a department.

The report takes up and deals in an able and exhaustive manner with the subject before us under the following heads:—

"Importance of Education in the Law;" "Are Provisions for Legal Education already ample?" "As to whether a Legal Education, wholly or in part in a Law School, is better than such an Education secured exclusively in a private office;" "As to whether the Establishment of a Law School is compatible with the fundamental laws of the University;" "As to whether larger results would be likely to follow the expenditure necessary for a Law School than would follow an expenditure of the same amount in any other way;" "The financial requirements of a Law School."

That part of the report of most interest to us is as to whether a legal education in part or wholly in a Law School is better than such an education secured exclusively in law offices. The report on this subject uotes the language of the com-

mittee of the American Bar Association, which in 1881 gave the gist of the opinions communicated to them by some of the best men in the profession in the United States in the following words:—

"There is little if any dispute as to the relative merit of education by means of law schools, and that to be got by mere practical training or apprenticeship as an attorney's clerk. Without disparagement of mere practical advantages the verdict of the best informed is in favour of the schools. The benefits which they offer are easily suggested, and are of the most superior kind. They afford a student an acquaintance with general principles, difficult, if not impossible, to be otherwise attained; they serve to remove difficulties which are inherent in scientific and technical phraseology; and they, as a necessary consequence, furnish the student with the means for clear conception, and accurate and precise expression. They familiarize him with leading cases, and the application of them in discussion. They give him the valuable habit of attention, teach him familiar maxims, and offer him the priceless opportunities which result from contact and generous emulation. They lead him readily to survey law as a science, and imbue him with the principles of ethics as its true foundation."

The report before us then takes up the parable, as follows:—

"In addition to these statements in regard to the positive advantages of the kind of instruction afforded by a good law school attention is called to the fact that many a young man who has plodded his solitary way through Blackstone and Kent, in the office of some busy lawyer, who seldom has time to speak to him except to ask him to do an errand or copy a paper, has no adequate equipment for the modern requirements of the profession. If this be regarded as an extreme case it will have to be admitted that even the best advantages of an education in a law office are greatly reinforced by a systematic course of study in a law school.

"On this same subject there are some striking statements in the Inaugural Lecture of Mr. Girand B. Finch, the new Law Lecturer at Cambridge in England. The subject of Mr. Finch's Inaugural Lecture was: 'Legal Education; its Aim and Method.' One passage in his address may well be quoted:

"'During my stay in Boston last spring, men engaged in legal practice spoke to me of the great value of law teaching at Harvard University. Mr. Sidney Bartlett, the father of the Massachusetts Bar, told me that the three years' course at Harvard was equal to seven years' work in an office. Mr. Justice Oliver Wendell Holmes, Jr., and Dr. Eliot, President of the University, spoke to the same effect. Dr. Eliot related with pardonable pride, that at the recent dinner of old Harvard men, a prominent young advocate had declared that when he was a student, he had often heard it said that the course at Harvard was equal to ten years of actual work; that he was then incredulous; but that after being in practice for ten years he came to know it as a fact.'

"It seems to us that there is no answer that will counterbalance evidence of this kind, although it is doubtless a fact that in studying in an office a student acquires a certain readiness in what may be called the 'technique' of the law that cannot be acquired very well in connection with a law school. The force of this objection—surely not very strong in itself—is entirely broken by the fact that any student of aptitude is likely to have ample time to acquire such details in the first years of his practice in the profession. Even if that were not the case, the objection would be fairly met by recommending that a portion of the time of study before admission to the Bar be spent in an attorney's office, as is now required in this State. The objection can in no way disturb the overwhelming advantage of such scientific training as can only be obtained where scientific instruction is given. To suppose that any education can be as well gained at haphazard, as at a school where effort is made to impart instruction in the most approved manner, is to suppose what, on the face of it, is nothing less than an absurdity."

It is hard to get over this reasoning and testimony. Feeling the force of it one turns naturally to the discussion for ourselves of the same question as is answered by this report for the American Bar:

"Are provisions for legal education already ample?" This question is local, and there would be little use in quoting the views of this committee on that part of the subject. We need, however, scarcely go into this matter at much length, for i must be admitted that we have made but little progress in Canada in this respect. It is, we think, to the University of Toronto, and not to the Law Society, that we must look for aid in this matter. An effort in the direction of a Law School was once made by our Society, but the result, so far as it went, was not a success. Some thought the undertaking too large; others complained that it was not used or appreciated; whilst others thought that success would probably have been obtained by perseverance. The fact is the student requires the quiet training of the school as well as the busy practice of an office, and these two things cannot be had at the same time. The subject is an important one and well worthy of attention, and we shall gladly find space for the views of those who may feel disposed to enlarge upon it.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

McDONALD (Defendant) Appellant, and McPHERSON (Plaintiff), Respondent.

Bill of lading—Assignment of—Property in goods under—Stoppage in transitu—Replevin.

Appeal from the Supreme Court of Nova Scotia.

H. of Souris, P.E.I., carried on the business of lobster packing, sending his goods to M., of Halifax, N.S., who supplied him with tin plates, etc. They had dealt in this way for several years when, in 1882, H. shipped 180 cases of beef viâ Pictou and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Pictou to the freight agent of the I. C. R. or his assigns, the freight to be payable at Halifax; M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptance. H. drew on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded to Pictou, and the agent there telegraphed to the agent at Halifax to hold them. McM. applied to the agent at Halifax for the goods and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent,

Held (affirming the judgment of the court below, HENRY, J., dissenting), that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them than to forward them to their destination, and could not authorize the agent at Halifax to retain them.

Held, also, that whether or not a legal title to the goods passed to McM., the position of the agent in retaining the goods was simply

that of a wrong-doer, and McM. had such an equitable interest in such goods and right to the possession thereof, as would prevent the agent from withholding them.

Appeal dismissed with costs.

Henry, Q.C., for appellant.

Graham, Q.C., for respondent.

LONDON AND CANADIAN LOAN COMPANY, SIDNEY S. HAMILTON and ROBERT B. HAMILTON (by original writ) (Defendants), Appellants, v. GEORGE WARIN and JAMES WARIN (Plaintiffs), Defendants.

Navigation—Interference with—Public navigable waters—Water lots—Crown grant—Easement—Trespass.

An appeal from the Court of Appeal for Ontario.

W. was lessee, under lease from the city of Toronto, of certain water lots held by the city under patent from the Crown, granted in 1840, the lease to W. being given by authority of the said patent and of certain public statutes respecting the construction of the esplanade, which formed the northern boundary of said water lots.

Held (affirming the judgment of the court below), that such lease gave to W. a right to build as he chose upon the said lots, subject to any regulations which the city had power to impose, and doing so to interfere with the right of the public to navigate the waters.

Held, also, that the said waters being navigable parts of the Bay of Toronto, no private easement could be acquired therein while they remained open for navigation.

Appeal dismissed with costs.

Arnoldi, for appellants.

Christopher Robinson, Q.C., and *T. P. Galt*, for respondents.

RE STANDARD FIRE INSURANCE CO., (Caston's case).

Joint Stock Co.—Contributories—Subscription for stock.

On appeal from the Court of Appeal for Ontario.

The Act of Incorporation of a Joint Stock Co., provided "that no subscription for stock should be legal or valid until ten per cent. should have been actually and *bona fide* paid thereon."

C. gave to the manager of the Co. a power of attorney to subscribe for him ten shares in the Co., the power of attorney containing these words, "and I herewith enclose ten per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof." The ten per cent. was not, in fact, enclosed, but the amount was placed to the credit of C. in the books of the Co., and the certificate of stock issued to him, which he held for several years.

The Co. having failed, proceedings were taken to have C. placed on the list of contributories, in which proceedings he gave evidence to the effect that the sum to his credit was for professional services to the Co., he having been appointed a local solicitor, and there had been an arrangement that his stock was to be paid for by such services.

Held (affirming the judgment of the court below, HENRY, J., dissenting) that C. was rightly placed on the list of contributories.

Appeal dismissed with costs.

A. C. Galt, for appellant.

Bain, Q.C., for respondent.

CANADA SOUTHERN RY. CO. (Defendants), Appellants, v. CLOUSE (Plaintiff), Respondent.

Farm crossing—Liability of railway company to provide—Agreement with agent of company—14 & 15 Vict. cap. 51, sec. 13—Substitution of "at" for "and" by Consolidated Statutes of Canada, cap. 66, sec. 13.

On appeal from the Court of Appeal for Ontario.

The C. S. R. Co., having taken for the purposes of their railway the lands of C., made a verbal agreement with C. through their agent T. for the purchase of such lands, for which they agreed to pay $662, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines;

and that such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid.

The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding, and for an injunction.

Held (RITCHIE, C.J., and FOURNIER, J., dissenting), that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not therefore compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimation of its value and of the value of the farm.

Held, also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location and number of said crossings to be determined on a reference to the Master of the Court below. *Brown* v. *The Toronto and Nipissing Ry. Co.*, 26 U. C. C. P. 206, overruled.

Semble, the substitution of the word "at" in sec. 13 of cap. 66 of the Consolidated Statutes of Canada for the word "and" in sec. 13 of cap. 51 of 14 & 15 Vict. is the mere correction of an error, and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect.

Appeal allowed with costs.

Cattanach, for appellants.

McCarthy, Q.C., and *Robb*, for respondent.

CANADA SOUTHERN RY. CO. (Defendants), Appellants, v. ERWIN (Plaintiff), Respondent.

Farm crossing—Agreement for cattle pass—Construction of—Liability of railway company to maintain—Substitution of solid embankment for trestle bridge.

In negotiating for the sale of lands taken by the Canada Southern Railway Company for the purposes of their railway, the agent of the company signed a written agreement with the owner, which contained a clause to the effect that such owner should have "liberty to remove for his own use all buildings on the said right of way, and that in the event of their being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle, the company will so construct their fence to each side thereof, as not to impede the passage thereunder."

Held (reversing the judgment of the court below, RITCHIE, C.J., dissenting), that under this agreement the only obligation on the company was to maintain a cattle pass so long as the trestle bridge was in existence, and did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor, without providing a pass under such embankment.

Appeal allowed with costs.

Cattanach, for appellants.

McCarthy, Q.C., and *Robb*, for respondent.

WINDSOR HOTEL COMPANY v. CROSS.

Promise to pay a cessionnaire without reserve—Garant—Compensation, plea of—Interest, agreement as to.

On the 28th June, 1877, the appellants entered into an agreement before Hunter, N. P., by which, without any reserve they acknowledged to owe and promised to pay certain sums of money (amongst others) to one Mrs. L., transferee of one of the vendors of the property upon which the appellants company's hotel is now built, and who had sold with warranty. Subsequently Mrs. L., on the 15th June, 1880, by notarial deed, transferred to the respondent the balance payable to her, and the transfer was duly signified to the company. In 1883, the respondent sued the ap-

pellants for $2231.37, the balance then due her and the interest under said deeds. To this action the appellants pleaded, *inter alia*, that interest was due from 1st July, 1881 only, the parties having agreed to waive the right to exact interest until the net revenue of the hotel should be sufficient to pay the annual liability for interest, insurance, etc., which was the case only from the 1st July, 1881, and that they were entitled to oppose in compensation a larger sum paid to the Corporation of Montreal for assessment imposed under 42 and 43 Vict. cap. 53 (P. Q.), which statute was passed after the purchase. To this the respondent replied that the appellants had accepted Mrs. L. as a new creditor delegated to receive payment, and had waived all pretension or grounds which they might have set up against their vendors, and that all assessments imposed or attempted to be imposed prior to 42 and 43 Vict. cap. 53, were null and void and had been so declared.

The Superior Court held that the compensation pleaded had taken place, and dismissed the respondent's action.

On appeal, this judgment was reversed by the Court of Queen's Bench for the following, amongst other reasons, that neither the respondent nor her *auteur* Mrs. L. were *garants* of the company, and that the respondent was entitled to be paid, notwithstanding any claim the said company might have against their vendors under the warranty stipulated in their deed of sale. On appeal to the Supreme Court of Canada,

Held, that the above reason given by the Court of Queen's Bench was sufficient to dismiss the appellants' plea of compensation.

Held, also (on cross appeal, affirming the judgment of the court below), that interest should only be charged since 1st July, 1881.

Appeal dismissed with costs, and cross appeal dismissed with costs.

Pagnuelo, Q.C., for appellants.

Geoffrion, Q.C., for respondents.

JAMES FLANAGAN AND JOANNA FLANAGAN (Defendants), Appellants, and JOHN DOE on demise of R. ELLIOTT, ET AL. (Plaintiffs), Respondents.

Assessment on real estate—In name of occupier—Description as to persons and property—Con. Stat. (N. B.), ch. 100, sec. 16—Several assessments in one warrant—Illegal assessment in.

On appeal from the Supreme Court of New Brunswick.

The Consolidated Statutes of New Brunswick, sec. 16 of ch. 100 Con. Stat. of New Brunswick, and relating to rates and taxes, provides that "real estate, where the assessors cannot obtain the names of the occupier or person having ostensible control, but under such description as to persons and property . . . as shall be sufficient to indicate the property assessed, and the character in which the person is assessed."

J. G., the owner of real estate in Westmoreland County, N. B., died, leaving a widow who administered to his estate and resided on the property. The property was assessed for several years in the name of the estate of T. G., and in 1878 it was assessed in the name of "Widow G."

Held (affirming the judgment of the court below), that the last named assessment was illegal, as not comprising such description of persons and property as would be sufficient to indicate the property assessed and the character in which the person was assessed.

When a warrant for the collection for a single sum for rates for several years included the amount of an assessment which did not appear to be either against the owner or the occupier of the property,

Held (affirming the judgment of the court below), that the inclusion of such assessment would vitiate the warrant.

Appeal dismissed with costs.

Borden, for appellants.

R. Barry Smith, for respondents

TROOP and LEWIS (Plaintiffs), Appellants v. MERCHANTS' MARINE INSURANCE CO. (Defendants), Respondents.

Marine Insurance—Insurance on freight—Constructive total loss—Abandonment—Repairs by underwriters.

On appeal from the Supreme Court of Nova Scotia.

A vessel proceeding on a voyage rom Arecibo to Acquim and thence for New York, encountered heavy weather, was dismasted and towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master of the vessel, under advice from the owners, abandoned her to such agent and refused to assist in repairing the damage and complete the voyage. The agent had the vessel repaired and brought her to New York with the cargo. On an action to recover the insurance on the freight,

Held (reversing the judgment of the court below), that there being a constructive loss of the ship, the action of the underwriters in making the repairs and earning the freight would not prevent the assured from recovering.

Appeal allowed with costs.

Graham, Q.C., for appellants.

Henry, Q.C., for respondents.

CANADA ATLANTIC RAILWAY CO. and LONSLEY (Plaintiffs), Appellants, v. CITY OF OTTAWA (Defendants), Respondents.

Municipal corporation—By-law—36 Vict. c. 48 Ont.—Bonus to railway—Vote of ratepayers on by-law for—Premature consideration of by-law—Error in copy submitted to ratepayers—Signing and sealing by-law—To be passed by same council.

On appeal from the Court of Appeal for Ontario.

A by-law was submitted to the council of the city of O. under 36 Vict. c. 48, for the purpose of granting a bonus to a railway then in course of construction, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the provision of the statute, such by-law was to be taken into consideration by the council after one month from its first publication on the 24th September, 1873. The vote of the ratepayers was in favour of the by-law, and on October 20th a motion was made in the council that it be read a second and third time, which was carried, and the by-law passed. The mayor of the council, however, refused to sign it on the ground that its consideration was premature, and on November 27th the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before the council that such by-law be read a second and third time, which motion was, on this occasion, carried. At this meeting a copy only of the by-law was before the council, the original having been mislaid, and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original. In 1883 an action was brought against the corporation of the city of O. for the delivery of debentures provided for by the city by-law, in which suit the question of the validity of the whole proceedings was raised.

Held (affirming the judgment of the court below),

1. That the vote of November 20th, 1873, was premature, and not in conformity with the provisions of sec. 231 of the Municipal Act, and that the mayor properly refused to sign it, and that without such signature the by-law was invalid under sec. 226.

2. That the council had power to consider this by-law on November 5th, 1873, and the matter was then disposed of.

3. That the proceedings of April 7th, 1874, were void for two reasons—one that the by-law was not considered by the council to which it was first submitted as provided by sec. 236, which is to be construed as meaning the council elected for the year and not the same corporation; and the other reason is that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates.

Semble, that the functions of a municipality in considering a by-law after it has been voted

on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favourable vote.

Appeal dismissed with costs.

McCarthy, Q.C., *O'Gara*, Q.C., and *Gormully*, for appellants.

MacTavish, for respondents.

QUEEN'S BENCH DIVISION.

BAKER v. ATKINSON ET AL.

Determination of lease by forfeiture—Right to distrain—8 Anne ch. 14, sec. 6, 7—Money paid—Right to recover back—Provision for a year's rent payable on assignment for creditors—Validity of.

Defendants in 1881, by indenture under the Short Forms Act, leased certain premises to O. for ten years, at a yearly rent payable quarterly in advance, with a covenant that if the lease should be taken in execution, or if the lessees should make any assignment for the benefit of creditors, the lease should immediately become forfeited and void, and the next ensuing one year's rent should be at once due and payable. There was also a proviso for re-entry on nonpayment of rent or seizure in forfeiture of the term for any of the causes aforesaid. In August, 1883, O. assigned to B. as trustee for the benefit of creditors, who went into possession, whereupon defendants distrained for six months' rent then in arrear, and one year's rent payable in consequence of the assignment. Three executions were soon after placed in the sheriff's hands, and the solicitors for the plaintiffs under the first and third executions paid the rent claimed to prevent the sale of the goods by defendants and B., though not admitting defendants' right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitors.

Held, that the distress was illegal, for the Statute of Anne, ch. 14, sec. 6, applies only to cases where the tenancy has been determined by lapse of time, and not by forfeiture, and that the plaintiff B. was entitled to recover the amount received by defendants

Taylor v. *Lang*, 10 O. R. 248, not followed.

Per ARMOUR, J.—The year's rent became due only by virtue of the forfeiture. The distress was an unequivocal act, indicating the intention to forfeit, and evidence of such an intention previously formed, so that before the distress defendants had elected to treat the term as forfeited, and having done so, their right to distrain was at an end. Moreover they had not distrained during the possession of the tenant from whom the rent became due, and even if defendants had a right to distrain, the provision making one year's rent payable was fraudulent as against creditors. *Quære*, *per* WILSON, C.J., as to this latter point.

Per ARMOUR, J.—The execution creditors for whom the money was paid in order to enable the sheriff to seize under these executions might also recover, WILSON, C.J., doubting.

Moss, Q.C., for plaintiffs.

Robinson, Q.C., and *Atkinson*, Q.C., contra.

Galt, J.]

REGINA v. MARSHALL.

Hawkers and peddlers—Con. Mun. Act, 1883, sec. 495, sub-sec. 3, as amended by 48 Vict. chap. 40 (O.)—Conviction under county by-law—Meaning of word "agents" in amending Act.

Held, that under 48 Vict. chap. 40, sec. 1 (O.), amending sub-sec. 3 of sec. 495 of the Con. Mun. Act, 1883, a member of a firm carrying and exposing samples, or making sales of tea, etc., is not within the restriction preventing "agents for persons not resident within the county" from so doing, and is not such an agent

Galt, J.]

REGINA v. BASSETT.

Hawkers and peddlers—Con. Mun. Act, 1883, sec. 495, sub-sec. 3, as amended by 48 Vict. chap. 40 (O.)—Conviction under county by-law—Exposing samples of cloth and soliciting orders for clothing Meaning of term "dry goods" in amended Act.

Held, that under 48 Vict. chap. 40, sec. 1 (O.) amending sub-sec. 3 of sec. 495 of the Con. Mun. Act, 1883, it is no offence to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from such cloth, and to be then delivered to the persons giving such orders.

Held, also, that the term "dry goods" in the amended Act does not include clothing ordered to be manufactured from cloths, samples of which are exposed with a view to solicit orders for such clothing

CHANCERY DIVISION.

Boyd, C.] [June 3.

SWEET ET AL. v. PLATT ET AL.

Will—Devise—Limitation to offspring—Life estate of ancestor—Misrepresentation—Execution of deed without consideration.

J. P. by his will provided as follows: "I give and devise to my brother D. P. the . . on which he resides . . to hold the same to the said D. P. for and during his natural life, and after the death of the said D. P. I give and devise the said . to H. P., second son of said D. P. to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring him surviving then I give and devise the same to such of his offspring as the said H. P. shall appoint and in case of no appointment being made by the said H. P. in his lifetime, then I devise the same equally to the children of the said H. P. in fee, and in case the said H. P. shall die without lawful offspring or during his father's lifetime, then I give and devise the same to . . ." D. P. and H. P., by conveyances and mortgages, dealt with the land as if they were the owners in fee. After several mortgages to one J. E., who was H. P.'s solicitor, were registered against it, and after D. P.'s death, J. E., having assured H. P. that his (J. E.'s) title to the land was perfectly good, and that H. P.'s children had no interest in it, persuaded H. P., as a matter of form, to execute the power of appointment in favour of L. S., one of his children, and to obtain from L. S. and her husband, without their knowing of the execution of the power of appointment, and on making the same representation and without consideration, a quit claim deed of all their interest in the land. In an action by L. S. and her husband, on discovering their interest, to have the quit claim deed delivered up to be cancelled, and to have it declared that the conveyances and mortgages made by D. P. and H. P. only bound their life estates, it was

Held, that only a life estate was given to H. P. and not an estate in fee tail. If "offspring" is read as "children," or construed as meaning "issue," the devise falls within the rule that where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, their ancestor takes for life only. Here to the children or issue, in default of appointment, is given expressly an estate "*in fee*," and it is distributed to them "*equally*."

Held, also, that untrue representations were made which induced the execution of the power of appointment, and the transfer of the estate thereunder without consideration, and that the instruments subsequent to the deed of appointment did not affect the fee simple of the land, and that the operation of the mortgages should be limited to the life estate of H. P. in the land.

Foster, Q.C., and *Clark*, for plaintiffs.

Moss, Q.C., for the defendants the executors.

Edmunston, for Catharine E. Platt.

Boyd, C.] [June 5.

VERMILYEA v. CANNIFF.

Patent—Assignment of territory—Defence of others manufacturing—Absence of fraud, warranty and misrepresentation in the bargain—Plaintiffs' rights.

The plaintiffs, V. and P., being the patentees of a certain article, by memorandum in writing under seal, assigned all their interest in the patent to C. the defendant, for a certain district or territory in consideration of certain royalties and sums of money therein agreed to be paid by C.

In an action to recover the consideration, in which the evidence of C. went to show that he knew before the first year after the making of the contract had expired that others were manufacturing the patented article, but he did not complain or repudiate the transaction or refuse to pay or offer to reassign or require the alleged infringers to desist, or call upon the patentees to vindicate their patent, and that he had a profitable user of the invention to a substantial extent,

Held, that in the absence of fraud or warranty, or representations which induced the bargain, and were falsified in the result, such a contract is simply for the purchase of an interest in an existing patent. No assumption arises, and no implication is to be made that the patent is indefeasible: *Smith* v. *Neale*, 2 C. B. N. S. 85 and *Hall* v. *Conder*, commented on. *Hayne* v. *Maltby*, 3 T. R. 438, and *Saxton* v. *Dodge*, 37 Barb (N.Y.) 84, distinguished. The plaintiffs were, therefore, entitled to judgment.

Clute and *Williams*, for plaintiffs.

Cassels, Q.C., and *Burdett*, for defendant.

Boyd, C.] [June 11.

WORTS v. WORTS.

Will—Power to make advances—Discretion—Board of executors and trustees—Binding majority.

J. G. W., by his will, provided for the payment of annuities out of his estate for a period of ten years after his death, and then proceeded as follows:—"The residue of the income arising from my said estate to increase and accumulate for the said period of ten years. . . . I empower my trustees to make such advances from time to time to . . . as they (my trustees) in their discretion may deem advisable out of the principal or income of the share of such . . . ;" and by a codicil further provided "that the power to make advances in the eleventh clause of my will shall be limited to income only, and there shall be no power to make any such advance out of the principal."

Held, that the trustees had power to make advances without ascertaining the reason therefor, and that such advances were restricted to the accumulated income of the estate, but that each year's advances were not restricted to the accumulated surplus income of that year.

The will also declared "that any act done . . . by a majority of my trustees shall be deemed . . . the act . . . of all my trustees . . . and shall be binding upon all of them, and upon all persons claiming under this my will . . . and that my said trustees shall form a board, of whom W. H. B. shall be chairman . . . and each of my said trustees shall have one vote, with the exception of W. H. B., who shall have two votes, one equal with the other trustees . . . and another, or casting vote, whenever, by his first vote, the votes . . . are equal in number."

Held, that a majority of the whole board should bind the minority, and all persons claiming under the will.

Lash, Q.C., for the plaintiffs, the executors and trustees.

Robinson, Q.C., *Moss*, Q.C., and *Bain*, Q.C., for the beneficiaries.

J. K. Kerr, Q.C., and *Davidson*, for the infants.

Proudfoot, J.] [June 16.

PARTLO v. TODD.

Trade Mark and Design Act of 1879—Action to restrain infringement of registered trade mark—Prior user—Definition of trade mark.

In an action to restrain the infringement of a trade mark registered under the Trade Mark and Design Act of 1879,

Held, following *McCall* v. *Theal*, 28 Gr. 48, that prior user can be given in evidence to invalidate the trade mark.

Held, also, that the words "gold leaf," used in the plaintiff's trade mark distinguished the flour made by the plaintiff from that made by any other person, and as such was a proper subject of a trade mark within the language of section 8 of the Act.

Held, also, on the evidence that "Gold Leaf" was a common brand for patent flour in use before the registration of the plaintiff's trade mark, and that the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and that there must be judgment for the defendant with costs.

Cassels, Q.C., and *Jackson*, for the plaintiff.

Moss, Q.C., and *G. W. H. Ball*, for the defendants.

June 16

MILLETTE v. SABOURIN.

Deed subject to condition of maintenance—Place of maintenance—Refusal of covenantee to leave premises conveyed—Broken condition—Forfeiture.

H. S., by deed dated November 4th, 1863, granted his farm and some chattels to his son T. S. in consideration of $300, subject to be defeated and rendered null and void upon the nonperformance of the said party of the second part of the following condition or any part thereof, viz.:—The said party of the second part covenants to feed, clothe, support and maintain the said party of the first part . . . during the term of his natural life . . . T. S., having fulfilled the condition during his lifetime, died on October 5th, 1885, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house and have him provided for there or to allow him to go to her brother's house in the

same way, both of which offers were declined; and as no maintenance was provided for him by her at the farm he treated the condition as broken, and brought an action of ejectment and recovered judgment, and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance.

In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was

Held (affirming the judgment of ARMOUR, J., PROUDFOOT, J., dissenting), that the grantor was not bound to accept the offers made, and that the conditions of the deed were broken and the land forfeited.

Per ARMOUR, J., at the trial.—The deed must be construed as being made upon condition, and as being defeated and rendered void by the nonperformance of the covenant, the effect of the covenant is that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor or his representatives might require him to go, and he was justified in refusing to accept the offers made.

Per BOYD, C.—The parent who for value purchases the right to support from his son has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the court ought to respect these in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead, such as should induce the court to disregard the general rule. The result is that the conditions of the deed were broken and the land forfeited.

Per PROUDFOOT, J.—The life interest of H. S. was not reserved out of the land; it rested solely on the condition with probably an equitable charge on the land. The condition is to maintain without specification of place; it imposes no personal obligation on the grantee, it may be fulfilled by any one having an interest in the property, and may be performed wherever the grantee or his representative might reasonably offer.

Per FERGUSON, J.—It was a condition annexed to the estate granted, the proper effect of which was that if broken the title would go to the grantor or those claiming from him the reversion in the lands. The grantor was not bound to accept the offer that was made and there was a breach of the condition, the effect of which was to revert the estate.

Shepley, for the plaintiff.
Moss, Q.C., for the defendant.

Ferguson, J.] [June 29.

KENNEDY ET AL. v. THE CORPORATION OF THE CITY OF TORONTO ET AL.

Patent subject to condition—Trust—Crown's rights—Private Act—Provincial Legislature—Ordnance lands—Intra vires—Interpretations.

Certain ordnance lands vested in the Crown were in 1858 patented to the Corporation of the city of Toronto with the following clause in the patent "Provided always, and this grant is subject to the following conditions, viz: that (the land) . . shall be dedicated by the said (corporation), and by them maintained for the purposes of a public park, for the use, benefit and recreation of the inhabitants of the said city of Toronto for all time to come . ." The Corporation of Toronto in 1876 obtained from the Ontario Legislature an Act empowering them to lease, sell, *or otherwise dispose of* "the said land, and one of their committees transferred it to another to use as a cattle market, receiving a yearly rent therefor, which they applied to a park fund as provided by the Act giving the power to sell, etc."

In an action by a ratepayer to prevent the land being used as a cattle market, and more money being spent on it for that purpose, in which it was contended that the land was granted upon a condition under which the Crown might retake it, and that the Act of the Provincial Legislature was so *ultra vires* in dealing with it, it was

Held, on demurrer that the words in the patent "Provided always, and this grant is subject to the following conditions," did not create a *condition* annexed to the estate granted, but a trust was created the same as if the words used had been "upon the following trust," and that by the grant the grantors parted with all their estate and interest; that the matter came within sub-sec. 13 of sec. 92, B. N. A. Act, "Property and civil rights in the Province" and the Provincial Legislature was the proper one to legislate on the subject, and the Act was not *ultra vires*.

Held, also, that the words "otherwise dispose of," when read with the rest of the Act, covered the mode of using the property adopted, viz., as a cattle market, and the demurrer was allowed with costs.

C. Robinson, Q.C., and *McWilliams*, for the demurrer.

McCarthy, Q.C., and *Maclaren*, contra.

Johnson, for the Attorney-General of Ontario.

COMMON PLEAS DIVISION.

Divisional Court.] [June, 1886.

TOMLINSON v. MORRIS.

Sale of goods—Warranty—Written notice—Waiver.

By a written agreement the defendant sold a threshing machine to the plaintiff at a named price, the right of possession to be in the plaintiff until default, but until payment the right of property to be in the defendants, with a warranty by the defendants that, with good management, the machine would do good work, and was superior to any other machine made in Canada in its adaptation for separating and saving grain from straw with less waste, etc.; and that if, upon starting the machine, the plaintiff should intelligently follow the printed hints, rules and directions of the managers, and, if so doing, were unable to operate it well, written notice stating wherein it failed to satisfy the warranty was to be given by him to the defendants, and a reasonable time allowed to get to it and remedy the defect, unless of such a nature that the defendants could advise by letter; and if the defendants were not able to make it operate well, etc., and the fault was in the machine, they were to take it back and refund the payments made, or remedy the defective part. No printed hints, etc., were given. The defendants had, on the plaintiff's complaint, attended and made alterations in the machine, after which the plaintiff used the machine, but subsequently sent it back to the defendants, because, he said, it did not comply with the warranty, but, as defendants understood, to be repaired. No written notice, as required by the warranty, was given.

Held, that in the absence of the printed hints, etc., the parties must be deemed to have dispensed therewith; that to avail himself of the warranty the plaintiff should have given the written notice; and that the attendance to make the alterations was not, under the circumstances, a waiver of such notice; but, in any event, was a question for the jury.

Hardy, Q.C., for the plaintiff.

Robertson, Q.C., for the defendant.

CORPORATION OF ST. VINCENT v. GREENFIELD.

By-law to open road allowance—Necessity to show boundaries—Statute labour—Evidence of performance of.

A by-law to establish a road allowance must, on its face, show the boundaries of the road, or refer to some document wherein they are defined, and the intention of the framers of the by-law cannot be ascertained by the aid of extrinsic evidence.

The by-law in this case to establish a road on the blind line between two concessions in the defendant's township, was, by reason of such omission, held defective.

Held, also, that on the evidence set out in the case, the road in question had not become a public highway by reason of statute labour having been performed thereon.

Creasor, Q.C., for the plaintiffs.

A. Frost, for the defendant.

COSTELLO v. HUNTER.

Husband and wife—Breach of promise of marriage—Corroboratory evidence—Statute of limitations.

In an action for breach of promise of marriage, the plaintiff stated that the defendant promised to marry her in the fall of 1873, but that when that time arrived he excused his doing so because he said he had not his house built, and that he could not marry until he had a suitable house. The plaintiff told him she was willing to live in a shanty, and he then said he would not marry until he could keep plaintiff. The house was built in the summer of 1878. No definite promise was proved after the fall of 1873, but the plaintiff and defendant kept up friendly relations until 1884, when the defendant married another

woman, and this action was brought. The defendant denied the promise. In his examination before the trial he admitted visiting the plaintiff, and of talking to her of marriage, but he said it was not of their marriage but that of other persons; that when he visited her she was alone and he kissed her. In corroboration of the plaintiff's evidence a witness stated that in the fall of 1882 he had a conversation with plaintiff who, referring to some girls who visited his house, said he was not going to marry those who wanted his house, but the girl who wanted him; and on witness saying he supposed this was the plaintiff, the defendant answered "yes." The witness stated that in the next spring or the one following after that, he had a further conversation with defendant, when defendant said he was either going to rent or sell his house or get married, when witness said that he supposed plaintiff and defendant would soon make the match, to which the defendant made no reply.

Held, that the action was not maintainable.

Per CAMERON, C.J.—The promise stated by the plaintiff was sufficiently corroborated, but the action was barred by the statute of limitations.

Per GALT, J.—Without expressing any dissent from the opinion of CAMERON, C.J., on the statute of limitations, the plaintiff's evidence was not sufficiently corroborated.

Per ROSE, J.—The action was barred by the statute of limitations.

Tetzel, for the plaintiff.

Falconbridge, Q.C., and *Gwyn*, for the defendant.

ARDAGH v. THE CORPORATION OF THE CITY OF TORONTO.

Contract—Written certificates—Necessity for—Final certificate.

The plaintiff entered into a contract with the defendants to construct a cedar block roadway, etc., according to plans and specifications, and to the directions and satisfaction of the city engineer, etc. Payments to be made monthly at the rates mentioned in the tender during the progress of the work, upon the engineer's certificate and the chairman of the committee, according to the provisions of the By-law No. 1107, relative to corporation contracts, which were incorporated with the contract. No money was to become due or payable on the contract until such certificate was granted, and a drawback of 15 per cent. of the amount appearing by any contract to be due was to be retained by the corporation for six months from the date of the final certificate showing the satisfactory completion of the work. The provisions of the by-law were that no contractor, etc., should be paid the compensation allowed him (unless otherwise provided for by the contract) or any part thereof, unless at the time of paying the same he should present to the Treasurer a certificate from the engineer, etc., stating that he had examined, measured, and computed the work, and that the same was completed, or that the payment demanded was due on such work; and also stating what the work was on which such money was due. Also that every account before being paid should be certified by the city engineer, and by the committee under whose authority the work was done; and that the treasurer should not pay such accounts unless furnished with the two certificates. By the specifications the engineer was to be the sole judge of the quantity and quality of the work done, and his decision was to be final and conclusive as against the contractor; that monthly payments up to 85 per cent. of the work done should be made in the first week of the following month on the measurement of the engineer, such certificates to be binding only as to progress, and in no way to affect the final certificate, which should only be given on the whole work being completed and measured up, and at the expiration of six months when a certificate for the balance should be issued by the engineer. In an action to recover an alleged balance due under the contract,

Held, that to entitle the plaintiff to recover the amount due under the contract on the completion of the work, he must produce a written certificate thereof, and that an oral certificate was not sufficient; and the evidence set out in the case showed that no final certificate, as required, had been issued.

Leant, Q.C., and *Pearson*, for the plaintiff.

Robertson, Q.C., and *J. B. Clarke*, for the defendants.

PALMBY v. MCCLEARY.

Seduction—Evidence—Excessive damages.

In an action for seduction the only evidence was that of the plaintiff, the father of the seduced girl, and the defendant. The plaintiff stated that the defendant admitted he had seduced the girl, and asked what the case could be settled for, when plaintiff said $500. The defendant said that he was not the father of the child, and had not made any such admission, but admitted having asked what the case could be settled for, but did so only out of curiosity. The jury found for the plaintiff with $750 damages.

Held, that there was sufficient evidence to go to the jury: and that the damages under the circumstances were not excessive.

Bartram, of London, for the plaintiff.

Meredith, Q.C., contra.

SCOUGALL v. STAPLETON.

Malicious prosecution—Evidence—Taking legal advice, stating whole facts—Magistrate consulting County Attorney—Admissibility of evidence—Judge's charge—Depositions.

In an action for malicious prosecution it appeared that plaintiff's father sold a buggy to B. for $115, to be made in two payments of $58 and $57 respectively, and until paid the title and right of property were to remain in the vendor. Before the purchase money was paid B. sold the buggy to defendant, a livery stable keeper. The plaintiff's father on hearing of this, directed the plaintiff to go and take it from defendant, which plaintiff did, informing those at defendant's place that plaintiff could be seen at a hotel he named. The defendant on his return went and saw the plaintiff, when the plaintiff told him he was acting under instructions from his father, who claimed to be the owner of the buggy, but notwithstanding defendant caused plaintiff to be arrested for larceny, and he was committed for trial, and was subsequently tried and acquitted. The defendant set up that before causing the arrest he consulted a lawyer, but the jury found that plaintiff did not give a full and true account of the case. The jury found for the plaintiff.

Held, on the evidence, the verdict would not be interfered with.

Evidence was offered that the magistrate, against whom there was no charge, had before acting consulted the county attorney, which was rejected.

Held, that the rejection was proper.

An objection was taken to the judge's charge as being adverse: but *held* not tenable.

At the close of the defence the plaintiff's counsel, without objection, put in the defendant's depositions before trial. The plaintiff's counsel in addressing the jury read a portion thereof; and the learned judge in his charge read other portions.

Held, there would be no objection to the learned judge reading such other portions, and they were properly in evidence.

Nesbitt, for the plaintiff.

G. T. Blackstock, contra.

VANMERE v. FAREWELL.

Surgeon—Malpractice—Evidence—Interfering with jury—Rejection of evidence.

Action against a medical man for malpractice, the alleged malpractice consisting in applying what was called the primary bandage; and if this was good surgery, that it was applied too tightly and allowed to remain too long, whereby the arm sloughed, etc. The jury found for the defendant.

Held, on the evidence the verdict could not be interfered with.

A medical man called by the defendant stated that from the evidence given by the defendant and the evidence throughout the case, he could not say that the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to show that from what defendant stated at the trial the treatment was bad surgery.

Held, inadmissible.

The defendant, in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give defendant the benefit of any doubt.

Held, not sufficient to justify the court in interfering with the verdict.

Robertson, Q.C., for the plaintiff.

Osler, Q.C., and *Teetzel*, contra

POLSON v. DEGEER.

Property passing—Engine and boiler—Illegal detention.

An engine, boiler and other machinery were shipped to the defendant E. under a written order to ship same to his address as per price agreed on—$875—$225 to be allowed for E.'s portable engine and boiler, and $635 to be paid on shipment; but if not settled for in cash or notes within twenty days the whole amount to become due. The order not to be countermanded and until payment the machinery to be at E.'s risk, which he was to insure, and on demand assign policy to the plaintiff, and the title to machinery was not to pass out of plaintiff, E. agreeing not to sell or remove same without the plaintiff's consent in writing. On default of payment he could enter and take machinery, and E. agreed to deliver same to plaintiff in like good order and condition as received—save ordinary wear and tear—and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased by defendant D. to E.'s wife for one year from 11th March, 1881, and which premises D. agreed to sell to E. E.'s wife died on 23rd October, 1883, and by her will appointed E., her executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E., by deed dated 27th April, 1885, remised and released to D. all the right, title and interest in the premises, as well of himself as also as executor, together with the mill built thereon, with the boiler and engine and all fixed and movable machinery; and on the same day D. leased the said premises, mill and machinery to E. for one year. After the execution of this lease D. mortgaged the land, mill and machinery to the defendants, the F. Loan Society. The defendant E. never paid any cash, but gave his promissory note at three months which was renewed from time to time, but ultimately, E. having failed to pay same, the plaintiff demanded the machinery when D. notified plaintiff not to remove same, as also did the society. In an action against E., D. and the F. Society,

Held, that the effect of the transaction was that the property in the machinery was in the plaintiff, and that he was entitled thereto; and that there was an illegal detention by defendants amounting to a conversion; and that unless the defendants allowed the plaintiff to remove the machinery the plaintiff was to recover the $650 with interest.

Reeve, Q.C., for the motion.

Echlin and *Hands*, contra.

ROAN v. KRONSTEIN.

Lease for life—Statute of limitations.

In ejectment the following agreement was proved: "It is hereby agreed between R. and Mrs. H. that the line as surveyed between the lots of the above parties on Cherry Street by Mr. B. is correct; but that the said Mrs. H. be permitted to occupy her house during her life and not be compelled to remove the same, notwithstanding a portion of it is on the land of said R.; but that after the death of the said Mrs. H. said R. may claim the whole of his said lot; and that in the meantime said R. shall occupy his said lot up to the said line in rear of the said house."

Held, that the agreement must be construed as a demise, or lease to Mrs. H. for life of that portion of the lot 12 covered by the house, and not merely a license to occupy same, so that the right of entry thereto of the plaintiff, who claimed under R., did not accrue until Mrs. H.'s death, and therefore plaintiff having brought his action within ten years of Mrs. H.'s death was not barred by the statute of limitations.

Carscallen, for the plaintiff.

Robertson, Q.C., for the defendants.

REGINA v. ANDREWS.

Criminal law—Evidence, admissibility of—Corroborative evidence.

The prisoner was indicted for unlawfully using an instrument on one J. L., with intent to procure her miscarriage. J. L. was called for the prosecution to prove the charge, and in cross-examination she stated that she had not told H. A., H. R. and M. T. that before the prisoner had operated on her she had been operated on for the purpose of procuring a miscarriage by Dr. E. H. A., H. R. and M.

T. were called for the defence, and swore that J. L. had so stated to them. Dr. B. was then called by the Crown, and he swore that he had not operated on J. L. as sta ..

Held, that the evidence of Dr. B. was admissible.

Held, also, that the omission of the learned judge at the trial to tell the jury that the evidence of an accomplice ought to be corroborated does not entitle the prisoner to have the conviction reversed; and in this case there was no necessity for the caution, as there was abundance of corroborative evidence.

Osler, Q.C., for the prisoner.

McMahon, Q.C., for the Crown.

Wilson, C.J.]

ADAMS v. CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Necessarily raising sidewalk—Premises injuriously affected thereby—Arbitration—Compensation—Action.

Where the corporation of the city of Toronto, in the exercise of its corporate powers, necessarily raised the sidewalk in front of the plaintiff's premises, whereby, as was alleged, the plaintiff's premises were injuriously affected.

Held, on demurrer, that this was not the subject of an action, but for compensation under the arbitration clauses of the Consolidated Municipal Act, 1883.

C. Durand, for the plaintiff.

W. A. Foster, for the defendants

Wilson, C.J.]

IN RE O'MEARA AND CORPORATION OF OTTAWA.

Municipal Act, 1883, *s.* 503, 497, *ss.* 4, 6—*By-law—Sale of fresh meat less than by quarter carcass—Restrictions, etc.—Reasonable accommodation.*

By section 503 of the Municipal Act, 1883, the council may, subject to the restrictions and exceptions contained in the six next preceding sections, pass by-laws as provided by the following sub-sections:—(1) For establishing markets; (2) for regulating markets, etc.; (3) for preventing or regulating the sale by retail in the public streets or vacant lots, etc., of any meat, etc.; (4) for preventing or regulating the buying and selling of articles or animals exposed for sale or marketed; (5) for regulating the place and manner of selling and weighing grain, meat, etc., and all other articles exposed for sale and the fees to be paid therefor, etc.; (6) for granting annually, or oftener, licenses for the sale of fresh meat in quantities less than by the quarter carcass, and for regulating such sale, and fixing and regulating the places where such sale shall be allowed, and for imposing a license fee . . and for preventing the sale of fresh meat in quantities less than by the quarter carcass, unless by a person holding a valid license, and in a place authorized by the council, etc. The restrictions and exceptions, so far as applicable, are those contained in sub-secs. 4 and 6 of sec. 497. Sub-sec. 4 applies to articles for sale brought into the municipality after 10 a.m., and upon which market fees are not to be imposed unless they are offered for sale on the market; and sub-sec. 6 applied to those persons who go to the market place before 9 a.m. between 1st April and 1st November, and 10 a.m. between 1st November and 1st April, with any article they may sell in the market place: and with regard to such persons that after these respective hours they shall not be compelled to remain on the market place, but may proceed to sell elsewhere on paying the market fees.

Held, that a by-law passed under sub-sec. 6, need not be made subject to such restrictions, etc., for the proper construction of the sections is that sec. 503 is made subject to such restrictions, so far as properly applicable, and that sub-sec. 6 is in the nature of an exception from these general restrictions, etc.

Semble, that the court might quash a by-law of this description when plainly insufficient accommodation is furnished, unless in the alternative the municipality should provide reasonably fit and full accommodation; but, as a rule, the municipality is the judge of its own business and affairs, and it is probably an extreme case in which the court would interfere.

Clement, for the plaintiff.

Maclennan, Q.C., for the defendant.

Cameron, C.J.]

HODGSON v. BOSANQUET.

Municipal corporation—Arbitration and compensation—Reference to county judge.

A portion of a drain constructed by a township corporation having been dug on the plaintiff's land, an arbitration was had under the Municipal Act to ascertain the compensation the plaintiff was entitled to by reason of the damage alleged to have been sustained by him: (1) for land taken for the drain; (2) for the throwing of earth on the land on the side of the drain: (3) for the building of bridges to cross the drain; and (4) the backing of water into the plaintiff's cellar. The arbitrators found that the plaintiff had not sustained any damage, and they made an award against him, imposing on him a large portion of the costs.

Held, by CAMERON, C.J., that the evidence sustained all the grounds of damage except the last, as to which the evidence was not very satisfactory. The learned judge was therefore of opinion that he could not ascertain the compensation himself, and so set aside the award, and intimated that unless the parties could agree on new arbitrators, he was disposed to direct a reference to the county judge.

Aylesworth, for the plaintiff.

Lash, Q.C., for the defendant.

Galt, J.]

REGINA v. HALPIN.

REGINA v. DALY.

Canada Temperance Act, 1878—Day of adoption of Act—Accused not bound to criminate himself.

On an application to quash a conviction under the Canada Temperance Act of 1878,

Held, that the adoption of the Act is on the day of polling.

Held, also, that under sec. 123 of the said Act, a person accused is not obliged to criminate himself.

Robinson, Q.C., and *G. T. Blackstock*, for the applicants.

Edwards (of Peterborough), contra.

Proudfoot, J.]

YOUNG v. PURVIS.

Will—Disposition of real and personal estate—Appointment of executors—Description of land—Maintenance—Charge on land—Infant executor—Devastavit.

A testator by his will directed his executors "hereinafter named" to pay his debts and funeral expenses, and then devised the residue as follows:—To his son David, lot 16, concession 7, N. H., real and personal property; the said David to pay to each of his daughters $500, namely: Janet, Mary and Agnes, in two years after his death; Margaret and Ellen at twenty-five, and Christina to remain on the farm, the said sum to be given her when she became of age. No executors were named. Parol evidence was admitted to show that the land mentioned was in the township of Morris; that "N. H." meant north half, and that it was the only land owned by testator. Parol evidence was also admitted to show that Christina, though spoken of as a minor, was twenty-three years old when the will was made, and that she was of delicate constitution and of weak mind.

Held, that there was an effectual disposition of the real and personal estate; that to a disposition of personal estate executors need not be expressly named, but may appear by implication; and that David would be executor according to the tenor; that, as to the land, the parol evidence, which was properly admissible, cleared up any ambiguity as to the description; and that the parol evidence showed that as regards the provision in favour of Christina she must be treated as an adult; and that the provision for her would include maintenance.

An infant, whether executor or executor *de son tort*, is not liable for a devastavit. Legacies directed to be paid out of a mixed residue are a charge on land.

Garrow, Q.C., for the plaintiff.

M. G. Cameron, for the defendant Purvis.

Malone, for the Toronto General Trusts Company.

Proudfoot, J.]

THE LONDON INSURANCE CO. v. LONDON.

Assessment — Income — Mutual Insurance Co.— Appeal to county judge—Finding.

The defendants assessed the plaintiffs for $590.52 on an alleged income of $26,000, being the balance of money received by the plaintiffs, a Mutual Insurance Company, for premiums, etc., after payment of the current year's losses and expenses. The plaintiffs contended that there was no income, for that the said balance, under the statutes relating to the plaintiffs, was to be applied in reduction of the assessments on the premium notes for the ensuing year, and they appealed to the Court of Revision, which confirmed the assessment. The plaintiffs then appealed to the county judge, who dismissed the appeal. The plaintiffs then paid the amount under protest, and brought this action to recover it back.

Held, that the decision of the county judge was final, and this action was therefore not maintainable.

E. R. Cameron, for the plaintiffs.

W. R. Meredith, Q.C., and *T. G. Meredith*, for the defendants.

CRAWFORD v. BUGG.

Landlord and tenant—Covenants not to assign or sublet, and for quiet enjoyment, and to repair, and to repair according to notice — Assigns named—Reasonable wear and tear, etc.—Covenant to use premises in tenantable manner—Action of waste—R. S. O., cap. 107, sec. 9.

On 19th May, 1870, E. made a lease of certain household premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E., who was merely a bare trustee for plaintiff, assigned the reversion to her. On 29th December, 1882, J. B. without plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rent from sub-tenants and paying the rent under the principal lease to plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was made under seal, and was in the ordinary printed form, and purported to be under the Short Form Act. The statutory covenants were prefaced by the words "and the said lessee for himself, his heirs, executors, administrators and assigns, covenants with the said lessor, his heirs, executors, administrators and assigns, in manner and form following, that is to say." Then followed the ordinary statutory covenants, except that after the covenant "to repair" were the words, "reasonable wear and tear and damage by fire and tempest excepted;" and after the covenant "not to assign or sub-let without leave," the additional covenant, "and not to carry on any business that shall be deemed a nuisance." The covenant not to assign was (except as to the additional words) in the language used in covenant seven, column two, of the Short Form of Leases Act.

Held, that the covenant not to assign or sublet, etc., did not include assigns, as they could not be held to be named; and the prefatory words to the covenant would have no contrary effect, and therefore J. B.'s assignment to C. B. was no breach thereof; and this was equally so as to sub-letting by using the premises as a tenement house; and also from the fact of the user having been open and notorious, both by P. and J. B., for some thirteen years, a license to do so must be presumed.

Quære, whether such covenant ran with the land. the authorities on the point being conflicting; but the county judge, to whom the case had been referred, having found that it did so run, a judge sitting in single court refused to interfere.

Held, also, that the covenant to repair ran with the land; that J. B.'s liability as assignee of the term ceased on his assignment to C. B., and he would only be liable for the breaches, if any, which occurred prior thereto; and the covenant must be read as subject to the words, "reasonable wear and tear," etc.

Held, also, that there could be no liability on the part of the defendants or executors of J. B., for breach of an implied covenant by themselves and J. B. to use the premises in a tenant-like manner, for there being a lease under seal, with express covenants, no such implied covenant would arise.

Held, also, that an action of waste would lie notwithstanding the express covenants to repair, but there must be what would constitute

waste—a mere breach of covenant, not amounting to waste, not being sufficient, but to maintain such action the plaintiff must have a vested interest in the reversion at the time waste is committed, so that the claim, if any, must be for waste committed after she acquired the reversion, and up to J. B.'s assignment; but there would be no liability here, for, as to J. B., it appeared his assignment was made more than a year prior to his decease; and the R. S. O. cap. 107, sec. 9, only applies to breaches committed by testator within six months prior to his decease; and that it was not necessary for the defendent to set this up as a defence, the onus being on the plaintiff to show that she came within the statute; and as to the executors, it appeared that they had no interest in the term, nor had they ever intermeddled with the property.

Held, also, that there was no breach of the covenant to repair according to notice, for here the notice was given to J. B. after he had parted with his interest in the term.

Held, also, that the evidence failed to disclose the date when the breaches, if any, occurred, and therefore, whether they were prior or subsequent to the assignment to J. B.; at all events they were such as came within the terms "reasonable wear and tear."

S. Richards, Q.C., and *Nelson*, for the plaintiff.

W. Macdonald, for the defendants.

IN RE SMITH AND CORPORATION OF PLYMPTON.

Arbitration and award—Consolidated Municipal Act, 1883—*Arbitration Clauses—By-law appointing arbitrator—Arbitrator refusing to act—Award by other two—Revoking arbitrators' authority—Appointment of third arbitrator by judge—Meeting of arbitrators within twenty days—Oath.*

A township by-law, after reciting that there was a difficulty with S. "from alleged damage rom water flowing from local drains known as the H. and S. drains," enacted that F. was appointed arbitrator for the township. The notice given by the reeve to S. was that "the corporation had elected that the claims made by you for damages to the east half of lot 11," etc., "on account of the construction of the drain from P. to the S. drain, or consequent thereon, shall be referred to arbitration." Before the parties had been heard on the merits, the plaintiff's arbitrator withdrew from the arbitration and refused to act; but the other two arbitrators, notwithstanding, proceeded with the reference and made an award.

Held, that the reference was wholly informal, the subject thereof not being properly defined; and though the notice given by the reeve to do so, would make the matter sufficiently clear, it did not affect S., for he never entered upon the arbitration, but repudiated the arbitrators authority at the first meeting of which he had notice; but, even if the reference was sufficient, the award was bad by reason of the two arbitrators proceeding alone, the Municipal Act requiring (in the absence of a special agreement to refer) that there shall be three arbitrators continuing to act from the time of their appointment until the award has been made, and enabling the County Court Judge to appoint another arbitrator in the place of one refusing or neglecting to act.

Quære, whether it is in the power of either party to the reference to revoke the authority of the arbitrators.

Semble, that the provision in the statute that the arbitrators must hold their first meeting within twenty days from the appointment of the last arbitrator is not imperative, but directory merely; and therefore an omission to hold such meeting within such time would not invalidate an award made within the month, as required by the Act.

Semble, also, that the County Judge may appoint the third arbitrator *ex parte*; although this is not desirable; and that the power to appoint does not depend on the disagreement of the two arbitrators, but on their failure to agree within the seven days limited therefor.

It was objected that the arbitrators had not taken oath required by the statute; but,

Semble, this objection was not tenable, as the oath they took was substantially the same as that required.

Aylesworth, for the plaintiff.

Lash, Q.C., for the defendants.

CORRESPONDENCE.

AN IRISH REPUBLIC.

To the Editor of the LAW JOURNAL:

SIR,—The establishment of an Irish republic is not at present within the range of "practical politics." At the same time there is no doubt that, in the minds of some discontented Irishmen, such a prospect is looked forward to as "a consummation devoutly to be wished." And certain Irishmen, who are not discontented, are tempted to sympathize with such aspirations, without perhaps sufficiently reflecting on the possible effect they might have, if carried out, on their own individual fortunes.

Few Irishmen could be found in Canada who have any reasonable ground for complaint as subjects of Her Majesty in this Dominion. They are subject to the same laws, and have the same rights and privileges as are possessed by their fellow-citizens of other races. But though Irishmen generally are contented with their lot here, some of them are sometimes prone to think that their native land might, in some way or other, be benefited if it could be delivered from its present connection with Great Britain. They assume that, in some way which has never y. en clearly defined, the laws enacted by the British Parliament are detrimental to the Irish, and they assume that if the government of Ireland were committed to the Irish themselves, legislation would take place more favourable to the interests of their native country.

I am inclined to think Irishmen in Canada, and other parts of the British Empire, who sympathize with these notions, assume that such an event as the establishment of an Irish republic, while conferring a benefit on their native land, would in nowise affect them individually, and that their own status as British subjects would, notwithstanding, remain as it is at present.

Perhaps it is as well that Irishmen, who are disposed to support such opinions, should be reminded that the consequences of the establishment of an Irish republic may possibly be a great deal farther-reaching in its effects than it is at present supposed.

A case recently decided by the English Court of Appeal appears, incidentally, to throw a flood of light on the legal consequences which would flow from this momentous change in the condition of Ireland. The case I refer to is the *Stepney Election Case*, which is reported in the last number of the English Law Reports, 17 Q. B. D. 54. In that case the court had to determine whether certain Hanoverians, born in Hanover while William IV. was King, continued to be British subjects after Her Majesty's accession to the throne of Great Britain. William IV., it may be remembered, was both King of England and King of Hanover. On his death, owing to the operation of the Salic law, his heir to the throne of England, being a female, could not succeed to the throne of Hanover, the succession to which, therefore, devolved on his brother, who was his nearest male heir, and consequently the sovereign of Great Britain ceased to be the sovereign of Hanover. So long as the kingdoms of Great Britain and Hanover were under the same sovereign, all persons born in Hanover were British subjects. The question the Court of Appeal had to determine was, as I have said, whether persons born in Hanover while its sovereign was also king of England, remained British subjects when it passed to the dominion of another sovereign. The Court of Appeal unanimously determined that they did not, and that it was incumbent on them to be naturalized before they could be entitled to the privileges of British subjects. Their right to vote at parliamentary elections, without being first naturalized, was therefore denied.

If the English Court of Appeal has correctly laid down the law, and allegiance follows the sovereign and cannot be divested by the mere election of the subject, it follows that if an Irish republic were established to-morrow, all Irishmen born in Ireland, who are resident in England, Canada, or any other part of the British dominions, would *ipso facto* become aliens in Great Britain and its dependencies, and would be deprived of the rights and privileges of British subjects, and before they could acquire these again would have to take out letters of naturalization no matter how much they might prefer to continue British subjects. This would lead to curious results. A good many of our public men would be suddenly put out of public life. Messrs. Curran, Anglin, Costigan, Senators Smith and O'Donohoe, and all other Irish-born men, would cease to be qualified to sit as members of parliament; judges, and all other officials of Irish birth, would cease to be qualified to hold office. In fact, every public office held by an Irish-born person in the British dominions would become vacant. Archbishop Lynch and Dr. Potts, and all other Irish-born persons, ecclesiastical and lay, would become aliens, and would cease to be qualified to vote at all public elections.

Should a war arise between Great Britain and the Irish Republic, all Irishmen captured fighting against Ireland would be liable to be treated as traitors and shot.

Are Irishmen in Canada, who are tempted to advocate the separation of Ireland from Great Britain, prepared for any such result? I think they are not; and, on the contrary, I think I have shown that they have individually a strong personal interest in maintaining British connection.

Yours, etc.,

CIVIS.