Canada Law Journal.

VOL. XXXV. APRIL 15, 1899. NO. 8.

Sir Arthur Charles, formerly one of the judges of the Queen's Bench, and twenty-five years ago a leader in the Ecclesiastical Courts, has been appointed Dean of Arches, in succession to Lord Penzance, who has lately resigned. The appointment of Lord Chief Justice Russell and Lord Justice Collins on the Venezuelan Boundary Commission has not met with much favour in England. The Chief Justice, at least, cannot, it is urged, be spared from his proper judicial work, and the attention of the Government has been called to the matter. The name of Lord Macnaghten has been suggested as having qualifications for the post which in some respects may be equal to, or possibly surpass, even those of Lord Russell.

LEGAL EDUCATION.

The subject of legal education is of continuous interest in every province of the Dominion. It is dealt with from time to time by those in authority, who, after much consideration and some changes, rest from their labours in the fond hope that the matter has at last been satisfactorily settled. So far, however, such expectations have not been realized, and much time and money have been thrown away. We here speak with special reference to Ontario, for much more has been attempted in that Province than in any other part of the Dominion, except possibly in the Province of Nova Scotia, which has for many years had an excellent law school at Dalhousie University, where the labours and influence of such a man as Prof. Weldon cannot but have left their mark for good on the young men of that Province. As to results there we should like to hear from some of our readers down by the sea.

As far as Ontario is concerned, although Mr. Hoyles has done his part of the work with careful industry and much acceptance, the results, though beneficial along a certain line, have, on the whole, not been satisfactory, and as to part, at least, of the necessary education of those entering upon the legal profession, they

can only be characterized as disastrous. There must surely be something wrong when a student, having received a certificate of fitness to practice as a solicitor, is, speaking generally, compelled to acknowledge that he is so ignorant of the simplest practical details of a solicitor's business as to be useless either to any client that he may have, or to any practitioner who may venture to employ him in his office. As an illustration of this, we may refer to some cases which have come under our personal observation: A graduate of a university, a barrister and solicitor of some months' standing, was engaged at a small salary in a Toronto office. Having been given a paper to serve, with instructions to get an admission of service, he asked the office boy what an admission of service meant, and what form he should use. Another barrister and solicitor, also a university graduate, recently applied to the writer for a position in his office so that he might learn something of the duties which the Law Society had solemnly declared he was already fitted to perform. He asked no salary, as he said he could be of no assistance, explaining that all he had acquired at the Law School was a little theoretical knowledge which he could have learned better by studying at home, and that as to practice, he knew nothing whatever about it, having had no teaching or experience, being unable to get any whilst under articles. In fact, it is recognized—at least, by city practitioners—that law students under the present system are, for some reason or another, ornamental rather than useful in an office. Many reasons will occur to our readers why this must be so. The whole situation is summed up in the remark of another practitioner doing a large business, who said that, as matters stand at present, he would not be bothered with a student attending the Law School, and that he had frequently refused to take them into his office, being an encumbrance rather than otherwise. We cannot think that the students are alone at fault in all this. They are much the same to-day as they were twenty years ago.

It is well that these difficulties and deficiencies should be recognized and faced, and if possible obviated, and it is with this in view that we have called attention to the matter. We have already received various communications on the subject. In one of these the complaint is made that the present members of the profession are required to provide funds for educating men to enter already overcrowded ranks, and the writer thinks that those who

want to join now should bear all the expense. We are not prepared to take this view in its entirety, though there is a germ of truth in it. Another dilates upon the undue attention that is paid to the science and theory of the law, whilst students are left in woeful ignorance of its practice; an intimate acquaintance with the latter is as essential as a competent knowledge of the former, and he suggests something after the fashion of a modern business college. Another correspondent in speaking of the necessity for some change makes a suggestion referring the matter as follows :— "I am one residing outside the City of Toronto who believes in the benefits to be conferred upon the law student by the existence of the Law School, and the personal attendance on lectures. But by compelling the attendance for three years on lectures, the tendency, undoubtedly, is to turn out members of the profession (especially students who are graduates) without the experience of office work that a practitioner should have. Is not the remedy to increase the number of lectures per day, and so shorten the time per annum of compulsory attendance on lectures? The present system delivers to the student only one lecture, morning and afternoon, for four days a week, from October to April, or May. Why could not the Law School, like any other teaching body, (i.e. a college in connection with a university) double or treble this number of lectures per day, and also deliver some five or six days per week? In this manner the same quantum of work could be accomplished in less than half to one-third of the time. The result would be to allow the balance of each of the three years to be devoted to office practice."

There are those who do not hesitate to express the opinion that unless some change is made, it would be better to abolish the school, and spend the large sum of money which is required for its maintenance in other ways. A well-known member of the profession recently remarked, that if we look for those who are most useful, or best instructed, both in the theory and practice of law, the majority of them will not be found amongst those who have received their education in a modern Law School. Our readers are as well able to judge of the truth of this as we are.

By a recent amendment of the constitution of the State of South Dakota, it is provided that, whenever five per cent. of the

voters sign a petition, asking for the enactment of a statute embodying a certain principle, the legislature shall at once submit a statute to the people at a special election, and also that, on the petition of the same number of voters, any law which the legislature may already have enacted must be submitted to the people, such law to become inoperative if a majority cast their votes against it. The simultaneous adoption both of the initiative and of the referendum in regard to ordinary legislation, is certainly a very drastic innovation. There are, however, some considerations which seem to justify the anticipation that the practical effects of the new provision may be less serious than might, at first sight, be supposed. In the first place, it would seem that the machinery thus provided for legislating directly by the people is not likely to be put into operation except where the principle which it is proposed to embody in a law is susceptible of being expressed in very simple terms, and is a fit subject-matter for acceptance or rejection by a plain affirmative or negative. Any kind of legislation which must necessarily be shaped by mutual compromise following upon discussion between persons who have an opportunity for a free interchange of views, will, we fancy, continue to be recognized as the appropriate domain of a representative body. Then, again, it should be remembered that the American commonwealth have long been familiar with the operation of the referendum in ascertaining the wishes of the people in cases where changes of their organic laws are in question. As Professor Bryce pithily puts it: "A State constitution is really nothing but a law made directly by the people voting at the polls upon a draft submitted to them." Am. Comm., vol. 2, p. 33. Another important fact should also be noted, viz., that these organic laws, to use the words of the same author, "deal with a variety of topics which in Europe would be left to the ordinary action of the legislature or of administrative authorities; and it pursues these topics into a minute detail hardly to be looked for in a fundamental instrument" (Am. Comm., vol. 2, p. 34). Manifestly, therefore, the effect of such a constitutional provision as that which has just been adopted in South Dakota has been largely discounted in advance.

An American writer of repute, Mr. Russell Lowell, has argued strenuously against the expediency of the referendum, taking the position that it must tend to obliterate that distinction between organic and ordinary statutes which is considered to be the

principal safeguard against hasty and mischievous legislation by the representatives of the people. There does not seem to be much real force in this objection, for the distinction thus emphasized must always exist as long as the organic statutes continue, as we may fairly suppose will be the case, to be susceptible of enactment only in cases where they receive the support of a proportion of the voters largely exceeding that bare majority which is required for the passage of an ordinary statute.

Correspondence.

THE LANGUAGE OF LEGISLATION.

To the Editor of the Canada Law Journal.

DEAR SIR,—

"In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to arrears of rent due during the period of one year last previous to, *and for three months following*, the execution of such assignment, and from thence so long as the assignee shall retain possession of the premises leased." R. S. O., c. 170, sec. 34, s.-s. .

Laymen have laughed at legal phraseology, with its numberless "saids," "aforesaids," "hereinbefores," and "hereinafters," but, of late the loudest complaints are from the profession, Bench and Bar, because of the loose language which, recently to an aggravating degree, has characterized Acts of the Legislature. These observations are provoked by a perusal of the report of the case of *Langley* v. *Meir*, 34 C.L.J. 467 ; 25 A.R. 372 in which the hitherto prevailing construction of the section of the Act above quoted is materially altered.

Since the publication of the Chancellor's judgment (Feb. 7th, 1896) in *Clarke* v. *Reid*, 27 O. R. 618, assignees have supposed that they were following the correct interpretation of the legislation of 1895, being 50 Vict. c. 26, s. 3 (now R. S. O. c. 170, s. 34, s.-s. 1), in allowing and paying to landlords, as a preferential claim a bonus of three months' rent in addition to the arrears (if any) due for the twelve months immediately preceding the date of the assignment.

The three months' allowance was considered to be in the nature of an indemnity justly allowable to a landlord as compen-

sation for possible loss accruing to him, because of the legislation by which his tenant is enabled to turn the premises over to a stranger, in the guise of a trustee for the creditors of the insolvent tenant. Such possession of premises by an assignee is certainly detrimental to the goodwill attaching to premises in which business has been carried on successfully. The construction adopted by Chancellor Boyd was, at all events, reasonable and simple. In fact, the Court of Appeal rather find fault with the Chancellor's treatment of the point as being too simple, and Burton, C. J. and Maclennan, J., indicate that *Clarke* v. *Reid*, was decided without due regard to the inexact language employed to convey the meaning of the Legislature. Perhaps the conclusions arrived at in *Clarke* v. *Reid*, are attributable to the atmosphere which pervades the much canvassed weekly Courts out of Toronto, where expedition is perhaps of more moment than elucidation. However that may be, until the legislators tackle the case of *Langley* v. *Meir*, landlords lose all compensation for the invasion of their premises by unattorning tenants in the guise of assignees clothed with statutory powers under R.S.O. c. 147.

Chancellor Boyd, Osler, J.A. and Falconbridge, J., are on record in favour of the view that the three months' rent clause is a beneficial provision in the landlord's favour, while Burton, C. J. and Maclennan, J. A., give effect to the ingenious argument of the assignee's counsel in the case referred to, namely that the preferential lien for the three months following the date of the assignment can be recognized only in those cases where, by the terms of the lease, such three months' rent is payable in advance, or as Mr. Justice Maclennan puts it "the preferential lien depends on the right to distrain upon the assigned goods," and the right to distrain would of course depend upon the terms of the lease. Osler, J. A., seems to indicate that, in his view, the statute defines the exact limits of the preferential lien to be the amount owed for rent in respect of the year previous to the assignment, and, in addition thereto, three months more; the latter, however, coupled with the condition that the assignee may enjoy the use of the premises during that three months. It will be noticed that the clause is susceptible of widely different meanings according as you read it "arrears of" rent for three months following, or "rent" for three months following, the latter certainly being free from the taint of Hibernianism that characterizes the other reading. Then again do

the words "from thence" refer to the immediate context "the execution of such assignment," or to the preceding clause "and for three months following?" If the three months' rent is to be treated as a bonus or beneficial provision, one would think the latter view right, i. e., as put by Chancellor Boyd "so long after the three months as he shall retain possession."

Magann v. *Ferguson*, 29 O. R. 235, which was argued on March 8th, 1898, before Meredith, C. J. (a few days before the argument in *Langley* v. *Meir*), expressly decides what Maclennan, J. A., suggests on page 386, namely, "that a landlord has no preferential claim for rent against an insolvent's estate, if there be no distrainable goods on the premises at the time of the assignment." This case, however, was not cited on the argument in *Langley* v. *Meir*, not having been at that time reported. *Tew* v. *Toronto Loan and Savings Company*, decided by Ferguson, J. on 14th Dec., 1898 (ante p. 112), tends to preserve to the landlord extensive preferential rights, rather than to lessen them. In that case the lease provided for payment of rent quarterly in advance, with an accelerating clause adding a further quarter's rent in case of an assignment, together with the current year's taxes. The landlord was held entitled to a preferential lien for three quarters' rent, as well as the taxes for the current year.

In *Lazier* v. *Henderson*, 34 C. L. J. 698 (Oct. 8, 1898), Falconbridge, J., and Street, J., paraphrased the clause in s. 34, quoted as "arrears of rent becoming due during the three months following the execution of such assignment," and, to entitle the landlord to his preferential claim for rent, it was held to be essential that there should be upon the demised premises goods which were subject to distress at the time the assignment was made. The lease in this case provided for payment of rent quarterly in advance, with an accelerating clause by which the current quarter's rent and the next succeeding quarter's rent and current year's taxes should become due and payable in the event of an assignment being made. The landlord was held entitled to a preferential lien for the quarter during which the assignment occurred and the following quarter, the latter, however, because of the statutory provision, with the above construction, rather than by virtue of the accelerating clause of the lease. The accelerating clause may have been held to be ineffectual because of the provision connected therewith, that the term should be forfeited and void in consequence of the assignment. *Lazier* v. *Henderson* therefore seems to support the view that the

clause was intended to afford the landlord compensation or indemnification for the invasion of his rights, consequent upon an assignment by his tenant, so that at least three months' bonus of rent should be assured to landlords.

It is no doubt easier to criticize than to create, and while not forgetting Lord Bramwell's words in *Netherseal Colliery Co.*, v. *Boarne*, 14 App. Cas. 237, "I dislike finding fault with statutes. There is nothing so difficult to draft;" shall we not emphasize the language of Osler, J. A., in alluding to this enactment as a "statute, which is not happily expressed, and no construction which may be placed upon it seems free from difficulty?"

This difficulty may be illustrated by propounding a stated case: A tenant in possession of premises under a lease for five years; term beginning Jan. 1st, 1898; rent reserved $400 per annum, payable half-yearly in advance; accelerating clause, in case of an assignment for benefit of creditors, providing for an additional half year's rent becoming due and payable, together with current year's taxes, computed on previous year's rate; tenant having paid no rent assigns on 2nd January, 1899; for what amount is the landlord of the premises entitled to a preferential lien?

(1) The landlord's solicitor will contend for $800 and taxes for year 1899, citing *Tew* v. *Toronto Loan Co.*

(2) The assignor's solicitor will contend for $600 and 1899 taxes, with three months' right of occupation, citing *Lazier* v. *Henderson.*

(3) The assignee's solicitor will contend for $600 and 1899 taxes and rent at rate of $400 per annum for so long as assignee retains possession, citing *Clarke* v. *Reid* and *Lazier* v. *Henderson.*

(4) The largest creditor's solicitor will contend for $500 coupled with right of assignee to use the premises without further rent charge until 1st April, 1899, citing Osler, J.A., in *Langley* v. *Meir.*

(5) Another creditor's solicitor will contend for $500 plus rent from 2nd Jan., 1899, until assignee vacates, citing *Clarke* v. *Reid.*

It would surely not be doing too great violence to the relationship of landlord and tenant to amend the clause so as to make it clear that either of the last two contentions should prevail, and provide also for a proportionate part of the current year's taxes being a preferred claim if the lease stipulates for payment of taxes by the tenant.

Cobourg. FRANK M. FIELD.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

EMPLOYER AND WORKMAN—ACCIDENT TO WORKMAN "ARISING OUT OF AND IN COURSE OF THE EMPLOYMENT."

Lowe v. *Pearson* (1899) 1 Q.B. 261, was an action brought under the English Workmen's Compensation Act, 1897, in which the sole question was whether the accident, in respect of which the action was brought, arose "out of, or in the course of the plaintiff's employment." The plaintiff was a boy employed in a pottery, and his duty was to make clay balls and hand them to a workman working at a machine, and he was forbidden to interfere in any way with the machinery. While the workman was temporarily absent, he, contrary to the orders of his employer, attempted to clean the machine and was injured. The Court of Appeal (Smith, Rigby, and Collins, L.JJ.) reversed the decision of the judge of a County Court who had held that the accident had arisen out of the plaintiff's employment, and held that the employer was not liable for the injury sustained by the plaintiff while transgressing his orders in meddling with the machine.

PRACTICE—NOTICE OF TRIAL—TERMS, IMPOSITION OF.

Baxter v. *Holdsworth* (1899) 1 Q.B. 266, turns on a rule of practice of which in Ontario we have no duplicate, namely, that relating to the summons for directions, and yet the point involved may be, incidentally, useful to remember. The defendant not being in any way in default, or liable to be put on terms, was, on a summons for directions, ordered to take notice of trial at a period less than ten days before the commission day of the assizes, subject to a proviso that the trial should not come on for trial until ten days should elapse from the giving of the notice. The defendant contended that he could not be required to accept notice of trial for less than ten days before the commission day of the assizes, but the Court of Appeal (Smith, Rigby, and Collins, L.JJ.) though of opinion that the defendant, being in no default, could not be required to accept less than ten days' notice of trial, yet held that there was nothing in the Rules to prevent a judge upon a summons for direc-

tions from saying that the defendant shall accept a ten days' notice of trial, for a day other than the first day of the sittings. It is, however, possible, that in Ontario, such an order could not be made, except probably where the case is to be tried at the Toronto non-jury sittings: See Ont. Rule 542, as to require a defendant not in default in other cases, to accept a notice of trial for a day other than the first day of the sittings, would probably be regarded as unwarranted by the Ont. Rules. See Ont. Rule 538 (*d*).

CRIMINAL LAW—MANSLAUGHTER—PARENT NEGLECTING TO PROVIDE MEDICAL AID FOR HIS CHILD—RELIGIOUS OBJECTION TO MEDICAL AID—WILFUL NEGLECT—THE PREVENTION OF CRUELTY TO CHILDREN ACT, 1894 (57 & 58 VICT., C. 41), S. 1.

In *The Queen* v. *Senior* (1899) 1 Q.B. 283, the defendant was convicted under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict., c. 41) of manslaughter for neglecting to provide medical aid for his infant child. He belonged to a sect which objected to the calling in of medical aid, and to the use of medicine, and he had wilfully and deliberately abstained from providing medical aid and medicine for his infant child, but in other respects he had done all he could in the best interests of his child. Medical aid would have prolonged, and probably saved, the child's life, and the defendant had the means to procure medical aid. On a case stated by Wills, J., the Court for Crown cases reserved (Lord Russell, C.J., and Day, Wills, Grantham, Lawrance and Wright, JJ.) unanimously held that the defendant was rightly convicted of manslaughter, as having, by his wilful neglect, caused or accelerated the death of his child, and that his conscientious convictions as to the impropriety of availing himself of medical aid afforded no excuse in law, and the conviction was affirmed, and Lord Russell, C.J., states that he is not satisfied that the evidence would not justify a conviction at common law.

COMPANY—WINDING UP—FULLY PAID SHARES TAKEN IN PAYMENT OF DEBT—CREDITOR—FAILURE OF CONSIDERATION.

In re Railway Time Tables Co. (1899) 1 Ch. 108. In this case a creditor of a company for a sum partly secured by debentures of the company, and partly unsecured, surrendered the debentures upon the terms of receiving from the company new debentures and paid up shares to cover the total amount due. The shares

were issued and registered in the name of a trustee for the creditor. In the winding up, the shares to the amount of the unsecured debt were held to be unpaid, and the trustee was placed on the list of contributories. Whereupon the trustee took an assignment of the original unsecured debt, and claimed to prove therefor. This claim was disallowed by Kekewich, J., but the Court of Appeal, (Lindley, M.R., and Chitty and Williams, L.J.J.) held that he was entitled to prove the claim. As Lindley, M.R., puts it, it was a case of failure of consideration, the creditor had agreed to accept fully paid up shares for his debt, but, in the result, he did not get what he had bargained for, and to that extent the consideration for which he had agreed to release his debt failed. The creditor's claim for interest was disallowed, and as a consequence he was refused costs.

MORTGAGE—BY PARTNERS TO SECURE PARTNERSHIP DEBT——DEVISEE OF LAND SUBJECT TO MORTGAGE FOR PARTNERSHIP DEBT—LOCKE KING'S ACT (17 & 18 VICT., C. 113)—(R.S.O. C. 128, S. 37.)

In re Ritson, Ritson v. *Ritson* (1899) 1 Ch. 128, discusses whether a devisee of land subject to a mortgage given by the devisor to secure a partnership debt, takes cum onere under the provisions of Locke King's Act (17 & 18 Vict., c. 113), from which R.S.O. c. 128, s. 37 is derived, or whether he is entitled to have the mortgage discharged out of the partnership assets where they are sufficient. Romer, J., held that in such a case the Act does not apply, and that the devisee is entitled to have the mortgage paid off out of the partnership assets, and the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.J.J.) affirmed his decision, on the ground that the case is not one "between the different persons claiming through or under the deceased."

MORTGAGE—PRIORITY—FURTHER ADVANCES AFTER NOTICE OF SUBSEQUENT INCUMBRANCE—MORTGAGE OF EQUITABLE INTEREST, NOTICE TO TRUSTEE—LIMITATION OVER IN EVENT OF ALIENATION BY CESTUI QUE TRUST.

In *West* v. *Williams* (1899) 1 Ch. 132, the Court of Appeal (Lindley, M.R. and Chitty, and Williams, L.J.J.) reversed the decision of Kekewich, J. (1898) 1 Ch. 488, (noted ante, vol. 34, p. 443). In our former note the facts were pretty fully set out, and on reference to that note, it will be seen that three points were involved, viz.: (1) A question as to priority between two mort-

gages ; (2) a question of priority between a mortgage and a subsequent settlement by the mortgagor ; and (3) a question as to the effect of a limitation over in a settlement in the event of the settlor alienating his life estate in the settled estate, he having, at the time of the settlement, already executed a mortgage. Kekewich, J., it may be remembered, held that, where a subsequent incumbrancer who is entitled to priority over a mortgage prior in date, makes further advances to his mortgagee in pursuance of a covenant contained in his mortgage, after he has acquired notice of the first mortgage, he is entitled to tack such subsequent advances to his mortgage, notwithstanding they were made after notice. The Court of Appeal held that this was erroneous, and that such advances could not be tacked to the prejudice of the first mortgagee, notwithstanding they were made pursuant to a covenant. With regard to this point, Lindley, M.R., says that a covenant to make further advances is released whenever the mortgagor is prevented from giving the agreed security therefor. As soon as the second mortgagee acquired notice of the first mortgage therefore he was exonerated from his obligation to make further advances. On the question of the priority of the settlement over the first mortgagee the decision of Kekewich, J., was also held to be erroneous, because the settlement as against the first mortgagee must be deemed to have been voluntary, notwithstanding it was made in pursuance of an agreement with the second mortgagee. The conclusion of Kekewich, J., that the limitation over in the settlement, in the event of the settlor alienating his life estate, took effect immediately on the execution of the settlement, on the ground that the settlor had previously executed a mortgage of his interest, was also reversed

COMPANY—DISQUALIFICATION OF DIRECTOR—"PLACE OF PROFIT."

In *Astley* v. *New Tivoli* (1899) 1 Ch. 151, a very simple question is involved. By the articles of association of a limited company, it was provided that the office of director should be vacated "if he accepts or holds any office or place of profit under the company, except that of managing director." A director was appointed as trustee of a deed of trust made to secure debentures of the company, and was nominated and paid by the company. It was held that such appointment was "a place of profit" under the company, within the meaning of the articles, and that the trustee was disqualified from further acting as a director.

ASSIGNMENT OF EQUITABLE INTEREST—NOTICE TO EXISTING TRUSTEES OF ASSIGNMENT—CHANGE OF TRUSTEES.

In re Wasdale, Brittin v. *Patridge* (1899) 1 Ch. 163, Stirling, J., determines that where an assignee of an equitable revisionary interest in a fund in the hands of trustees gives notice of his assignment to the trustees for the time being at the date of the notice, he is under no obligation, for the purpose of preserving his priority, to give any further notice on a subsequent change in the personnel of the trustees by death or otherwise.

MORTGAGE OF REAL AND PERSONAL PROPERTY—RIGHT OF REDEMPTION BARRED AS TO PART OF MORTGAGED PROPERTY—REDEMPTION—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT., C. 57), S. 7—(R.S.O., C. 133, S. 19.)

Charter v. *Watson* (1899) 1 Ch. 175, raises what Kekewich, J., considers to be a novel question, and one which one would have thought had been covered by decision, but one on which no authority could be found. The facts of the case were simple: Land and a policy of life insurance for £100 had been together mortgaged to secure a debt of £350 and interest. The equity of redemption in the lands was barred under the Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57), s. 7, (see R.S.O., c. 133, s. 19.) and the action was brought to redeem the policy only. Kekewich, J., held that the land and policy constituted one indivisible security, and that, as the right to redeem the land was barred, the right to redeem the policy was also barred. In connection with this case, *Hall* v. *Heward*, 32 Ch. D. 430, may be referred to.

SUBROGATION—RAILWAY COMPANY—DEBENTURE STOCK—OVERDRAWN BANKER'S ACCOUNT.

In re Wrexham, M. & C. Q. Ry. Co. (1899) 1 Ch. 205, the application reported (1898) 2 Ch. 663, (noted ante, p. 181,) was renewed on facts not then before the Court. It was now shown that the company had issued two classes of debentures, one of which, Class A, was entitled to priority over another class, Class B. The applicants, the bankers of the company, whose account had been overdrawn, claimed that as to so much of the money overdrawn as had been applied in payment of the interest on the debentures of class A, the bank was entitled to be subrogated to, and stand in the place of such debenture holders, in respect of the interest so

paid them, in priority to the debenture holders of Class B; but Romer, J, adhered to his former decision that the claim could not be sustained, as the overdraft had been made without any bargain for security.

PLEADING—WILL—ACTION TO SET ASIDE WILL ON GROUND OF INSANITY OF TESTATOR—SUFFICIENCY OF ALLEGATIONS IN LAW.

Hope v. *Campbell* (1899) A. C. 1, was an appeal from the Scotch Court of Session. The question involved was one simply of pleading. The action was brought to set aside the will of a deceased person on the ground of the mental incompetency of the testator. The plaintiffs charged in their pleadings that the testator was "subject to insane delusions," and that "he believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communications on various occasions." The pleadings further alleged that these insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will. These allegations were considered by the Court of Session not to make out any case for trial, and the pleading was consequently held bad for irrelevancy. The House of Lords (Lords Watson, Shand, and Davey), however, held that this decision was erroneous, and that the pleading was sufficient. Lord Davey dissented. It was conceded by all of their Lordships that, according to the law of Scotland, the same strictness of construction is not to be applied to a pleading as was formerly customary under the English law in regard to demurrers, but the case may, nevertheless, be regarded as establishing that such allegations would be sufficient in pleadings, where the present English system of law prevails. Lord Davey considered that the allegations amounted to no more than an averment that the testator conscientiously believed that the Divine Spirit spoke to him through his conscience, and his action was directed by what he conceived to be the Divine command so conveyed. He very justly adds: "You may call this an insane delusion, if you will: but it is a delusion (if it be one) which has been shared by the

greatest benefactors of the human race, who, in obedience to such a call or command (as they have believed), have devoted their lives to mitigating the misery of the world and endeavouring to raise mankind to a higher life and a better conception of their duties on earth." As we have already pointed out, however, at this stage of the case it was merely a question of pleading, and it by no means follows that the case of the plaintiff will succeed, unless the evidence should prove very much stronger in effect than the allegations in the pleading.

WILL—CONSTRUCTION—GIFT OVER—PERIOD OF VESTING—ISSUE.

Hickling v. *Fair* (1899) A. C. 15, was an appeal in another Scotch case, but it deals with a question arising on the construction of a will, in which the law of Scotland is in accordance with the law of England. By the will in question the testator bequeathed to his three daughters, in equal shares, the life-rent of a sum of £36,000. In the event of a daughter dying, leaving issue, the testator directed £12,000, being one-third of the said sum of £36,000, to be divided equally amongst such issue; but in the event of a daughter dying without issue, the interest she would have been entitled to was to be divided between the surviving daughters, or paid to the last surviving daughter, during their lives or life; and the share of the capital of £36,000, which would have been divisible between the issue (if any) of a deceased daughter leaving issue was directed to be divided between the issue of the surviving daughters or daughter leaving issue. There was no disposition of the fund in the event of none of the daughters leaving issue. The testator died in 1865, leaving his three daughters surviving. One of the daughters died in 1895. Four children were born of her marriage, two of whom predeceased her, and the question was whether the representatives of the two latter children were entitled to a share of the capital to which their parent had been entitled to the income of. This depended on the question when the interest of those entitled in remainder on the death of the life-tenant vested. The majority of the House of Lords (Lords Halsbury, L.C., and Shand and Davey) were of opinion that the children of the daughters who were in esse at the death of the testator took vested interests, and that consequently the representatives of the two deceased children of the deceased

daughter, who had predeceased her, were entitled to an equal share with the children who survived her in the capital of the fund. Lords Watson and Herschell, however, dissented.

COMPANY—SIMILARITY OF NAME—INJUNCTION.

In *The North Cheshire & M. B. Co.* v. *The Manchester Brewery Co.* (1899) A. C. 83, the House of Lords (Lords Halsbury, L.C., and Watson and Shand) have unanimously affirmed the decision of the Court of Appeal (1898) 1 Ch. 539, (noted ante, vol. 34, p. 558.) The plaintiffs, The Manchester Brewery Co., had carried on business under that name for many years. The defendants bought an old business called "The North Cheshire Brewery Co.," and then (without intending to deceive) got themselves incorporated and registered under the name "The North Cheshire and Manchester Brewery Company, Limited." Their Lordships agreed with the Court below that, as a matter of fact, the latter name was calculated to deceive, and that the plaintiffs were entitled to an injunction to restrain its use by the defendants.

CONTRACT BY COMPANY—ULTRA VIRES—CONSENT JUDGMENT, EFFECT OF—ESTOPPEL—TERMS ON WHICH CONTRACT WILL BE SET ASIDE—RELIEF—MISJOINDER OF PARTIES.

Great N. West. Ry. v. *Charlebois* (1899) 1 A.C. 114, is the case known in Ontario as *Delap* v. *Charlebois*, in which the decisions of the various courts through which the case has passed on the way to the Judicial Committee of the Privy Council are chiefly remarkable for the diversity of judicial opinion which they disclose. The action was brought to set aside a judgment, obtained by Charlebois by consent, against the Great North-Western Ry. Co., which judgment was founded on a contract alleged to be fraudulent and ultra vires of the Railway Co. The Chancellor of Ontario, who tried the action, held that the contract on which the judgment was founded, which was one for the construction of the road for the plaintiff company, was void, on the ground that part of the price agreed to be paid was made up of claims other than for construction, and directed that the judgment should be reduced by the amount of these claims, and also by the value of the contract work not completed by Charlebois, the contractor, who had recovered the judgment impeached. He also held that certain bonds of the company had been validly pledged to the plaintiff Delap, and Mansfield, for advances for the construction of the road.

The Court of Appeal for Ontario was equally divided as to the question of the contract being ultra vires, but a majority of that court held that the bonds had not been validly pledged to Delap, on the ground that the pledge was given for an antecedent debt. In the Supreme Court, four of the judges, while agreeing with the Chancellor's finding of fact, and agreeing that the contract on which Charlebois' judgment was founded was ultra vires, yet came to the conclusion that the judgment created an estoppel, which prevented any objection being now taken to the contract on which it was founded, notwithstanding the judgment had been obtained by consent, and they also agreed that the bonds had been invalidly pledged. They, however, disallowed a sum directed by the consent judgment to be paid by the company to one Codd, for commission. Gwynne, J., who differed from the majority, thought the impeached judgment should be reduced by a further sum of $43,000, and also thought that the question of the validity of the pledge of the bonds was not properly before the court for decision. The Judicial Committee (Lords Hobhouse, Macnaghten and Morris, Sir Richard Couch and Sir Henry Villiers), after all this conflict of opinion, have come to the conclusion that the original contract was ultra vires in so far as it provided for the payment of claims other than those properly payable for construction, and that the consent judgment founded thereon was also void, in this respect reversing the Supreme Court, and affirming the judgment of the Chancellor, and they directed that the contract and judgment should be set aside on the terms of the company submitting to pay to Charlebois the balance due to him for construction on a quantum meruit, to be secured by bonds of the company, to be taken by Charlebois, subject to the claims of his sub-contractors, and others, who had contracted with him on the faith of the validity of the judgment, and without notice of the illegalities of the contract. The committee were also of opinion that the question raised as between the plaintiff Delap and his co-plaintiff Mansfield ought not to have been raised in this action, and that the judgment of the court should be confined to the issues between the company and the defendant.

CARRIAGE OF GOODS—RAILWAY COMPANY—OWNER'S RISK NOTE—DELAY—CONSTRUCTION.

Mallet v. *Great Eastern Ry. Co.* (1899) 1 Q.B. 309, disposes of a neat little point on the construction of a contract for the carriage

of goods, made with the plaintiff by the defendant railway company. By the terms of the contract the goods were to be carried by a specified route, and the plaintiff in consideration of being charged a reduced rate, relieved the defendants "from all liability for (inter alia) delay . . . . except upon proof that such . . . . delay arose from the wilful misconduct of the servants of the company." By mistake the defendant's servants forwarded the goods by a different route from that specified, and in consequence they were delayed in transit, and the plaintiff suffered damage. The action was in the County Court, where judgment went against the plaintiff. On appeal to a Divisional Court (Day and Lawrance, JJ.) this decision was reversed, on the ground that the delay referred to in the contract, was a delay arising in the performance of the contract, whereas the delay in question was due to the non-performance of the contract, by reason of sending the goods by a different route from that stipulated.

PRINCIPAL AND SURETY.—CO-SURETIES—CO SURETY GIVING TIME TO PRINCIPAL CONTRIBUTION.

In *Greenwood* v. *Francis* (1899) 1 Q B. 312, one or two questions on the law of principal and surety are discussed. The action was by sureties against their co-surety for contribution. The plaintiffs and defendant were directors of a company, and gave their joint and several bond for the purpose of guaranteeing the payment of a debt of the company, and it was provided by the bond that the plaintiff and defendant, though sureties for the company, should be liable on the bond to the obligors as principals, so that they should not be released by time being given to the company or its assigns, or by any other forbearance, act or omission by the obligees or their assigns, or by any other matter or thing whereby the obligors, or any of them, could be so released but for that provision. The plaintiffs were compelled to pay the amount of the bond, and the mortgage was transferred and the bond assigned to them. The plaintiffs, without the defendant's assent, subsequently entered into an agreement with a new company, who became the purchasers of the good-will and stock-in-trade of the first-mentioned company, that they would not for a certain time enforce the mortgage against the new company. The defendant contended that by the plaintiffs thus giving time to the new company he was released, but the Court of Appeal (Smith, Rigby and Collins, L.JJ.,) agreed

with Day, J., who tried the case, that having regard to the provisions of the bond, the agreement with the new company afforded no defence to the plaintiffs' action The question whether, in any case, a surety can be released from liability to contribution by reason of his co-surety giving time to the principal is referred to but not decided. Smith, L.J., says, at p. 320: "I have never before heard of defences which would be defences by a surety against a principal creditor being attempted to be set up in a case of sureties suing a co-surety for contribution, and no authority has been cited to show that this can be done."

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ont. | WEST *v.* BENJAMIN. [Dec. 14, 1898.

Partnership—Accounts—Stated and settled account—Estoppel—Managing partner.

One of the two partners constituting a firm had the sole management and control of its affairs, the other lacking business capacity. The managing partner at intervals presented statements of the business to his co-partner who signed them on being assured of their correctness, and in 1891 mutual releases of all claims and demands were executed by each, based on the statements so furnished by the active partner. In an action against the latter to have these releases set aside and the accounts re-opened, it was found at the trial, on the evidence of an accountant who had examined the books of the firm, that a large loss would result to the plaintiff if the accounts were maintained as settled, and he referred it to a master to take the accounts. On appeal from his judgment the reference was restricted to certain specified items.

Held, reversing the judgment of the Court of Appeal and restoring that of the trial judge, but varying it so as to make the inquiry begin at a date beyond which the plaintiff did not desire to go, that all it was necessary to establish in order to set aside the releases pleaded and to open the accounts was that in the accounts as settled there were such errors or mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed

Aylesworth, Q.C., and *Madden*, for appellant. *Clute*, Q.C., and *Masten*, for respondent.

Ont.] McGREGOR *v.* TOWNSHIP OF HARWICH. [March 22.

Municipal corporation—Negligence—Obstruction of road—Statutory officer—Liability for acts of.

M. and his wife were driving along a public highway when the carriage came on a lot of gravel piled on the road and was upset, throwing Mrs. M. out and seriously injuring her. In an action against the municipal corporation for damages, it was proved that statutory labour had been performed on the road where the accident occurred, and that gravel had been hauled to and dumped there for the purpose. The work was done under the superintendence of the pathmaster, who was appointed by the council, under the Municipal Act. There was no direct evidence as to who dumped the gravel which caused the accident, but witnesses connected with the work swore that none had been hauled there except what was required for the statutory labour.

Held, affirming the judgment of the Court of Appeal, that in the absence of evidence that it had been dumped there by orders of the council, or of some person for whose acts the council was responsible, the plaintiff could not recover.

Per STRONG, C.J.—Quære: Would the corporation be responsible for the acts of a statutory officer like the pathmaster, or of a ratepayer performing statute labour?

Gundy, for appellant. *Wilson*, Q.C., for respondent.

Exch. Court.] QUEEN *v.* OGILVIE. [Feb. 2.

Debtor and creditor—Appropriation of payments—Error in appropriation—Arts. 1160, 1161 C.C.

A bank borrowed from the Dominion Government two sums of $100,000 each, giving deposit receipts therefor respectively numbered 323 and 329. Having asked for a further loan of a like amount it was refused, but afterwards the loan was made, on O., one of the directors of the Bank, becoming personally responsible for re-payment, and the receipt for such last loan was numbered 346. The Government having demanded payment of $50,000 on account, that sum was transferred in the bank books to the general account of the Government and a letter from the President to the Finance Department stated this had been done, enclosed another receipt numbered 358 for $50,000 on special deposit, and concluded: "Please return deposit receipt No. 323—$100,000 now in your possession." Subsequently $50,000 more was paid and a return of receipt no. 358 requested. The bank having failed, the Government took proceedings against O. on his guarantee for the last loan made to recover the balance after crediting said payments, and dividends received. The defence to these proceedings was that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the

guaranteed loan, and that the President had instructed the accountant so to apply the two sums of $50,000 paid, but he had ommitted to do so. The trial judge gave effect to this objection and dismissed the information of the Crown.

Held, reversing the judgment of the Exchequer Court (6 Ex. C.R. 21), TASCHEREAU and GIROUARD, JJ., dissenting, that as the evidence showed that the President knew what the accountant had done and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within Art. 1160 C.C. no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so the bank could not now annul the imputation made by the accountant, unless the government could be restored to the position it would have been in if no imputation at all had been made which was impossible, as the Government would then have had an option which could not now be exercised.

Fitzpatrick, Q.C., and *Newcombe*, Q.C., Deputy Minister of Justice, for appellant. *Hall*, Q.C., and *Hogg*, Q.C., for respondent.

Ont.] KNIGHTS OF MACCABEES *v.* HILLIKER. [Feb. 22.

Life insurance — Benefit association — Non-payment of assessments — Forfeiture — Waiver — Pleading.

H., a member of a benefit insurance association holding a certificate for $3,000, died while under suspension for non-payment of two monthly assessments. His widow brought an action for the amount of the certificate alleging that the forfeiture was waived for several reasons, namely, that deceased had no notice of the call for the assessments; that he was entitled to notice that he was in arrears; that he had been illegally suspended; and that the local tent of the order had been suspended during the period covered by the unpaid assessments and therefore payment was impossible. The trial judge refused to non-suit and gave judgment in favour of the widow for the amount claimed, which judgment was affirmed by an equal division of the Court of Appeal.

Held, reversing the judgment of the Court of Appeal, that the waiver not having been pleaded it could not be relied on by the plaintiff as an answer to the plea of non payment and if it could the facts relied on were no answer.

Patterson, for appellants. *Ball*, Q.C., and *Ba''* for respondents.

Province of Ontario.

COURT OF APPEAL.

From Armour, J.] [March 16.

GOOD *v.* TORONTO, HAMILTON AND BUFFALO R. W. CO.

Contract—Conditions—Reference to engineer.

The rule that a contractor is bound by a condition in his contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as, and is supposed by the contractor to be, the engineer of a third person. Judgment of ARMOUR, C.J., affirmed.

Osler, Q.C., and *D'Arcy Tate* for the appellants. *Aylesworth*, Q.C., and *S. F. Washington* for respondents.

From Drainage Referee]. [March 16.

YOUNG *v.* TUCKER.

Water and watercourses—Drainage—Cultivation of land.

While the owner of land has an undoubted right to drain it in the ordinary course of husbandry he must take care that any water collected by his drains is carried to a sufficient outlet, and if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into it, he is liable in damages to a person whose land is flooded by water overflowing from that pond. Judgment of Drainage Referee reversed.

Aylesworth, Q.C., and *F. W. Kittermaster* for appellant. *A. Weir* for respondent.

From Boyd, C.] [March 16.

MORROW *v.* LANCASHIRE INSURANCE CO.

Insurance—Fire insurance—Mortgage—Cancellation of policy — Double insurance—Proofs of loss.

A policy of insurance covering the buildings on the mortgaged property and their contents assigned by the mortgagor to the mortgagees as collateral security cannot be cancelled by the insurance company at the request of the mortgagees without notice to the mortgagor.

Insurance effected by the mortgagees after the attempted cancellation does not affect the mortgagor's right of recovery on the policy effected by him.

Where the insurers repudiate liability on a policy they cannot object that proofs of loss have not been furnished. Judgment of BOYD, C., 29 O.R., 377, affirmed.

W. M. Douglas and *C. S. MacInnes* for appellants. *Geo. Wilkie* for respondent.

From Falconbridge, J.] [March 16.

JAMIESON *v.* LONDON AND CANADIAN LOAN COMPANY.

Landlord and tenant—Lease—Assignment—Mortgage—Discharge.

It having been held in a former action between the parties (27 S.C.R., 435) that the defendants were, under the assignment of lease by way of mortgage there in question, assignees of the term and liable on the covenants in the lease contained, it was now

Held that they were entitled to execute a statutory discharge of the mortgage and thus put an end to their liability, the assignment to them having been made to the lessor's knowledge for a limited purpose. Judgment of FALCONBRIDGE, J., reversed.

Robinson, Q.C., and *Arnoldi*, Q.C., for appellants. *Aylesworth*, Q.C., and *W. C. Irving* for respondent.

From Street, J.] [March 16.

STRATFORD GAS COMPANY *v.* CITY OF STRATFORD.

Contract—Impossibility—Damages.

No action lies for the non-performance of a contract which on its face is impossible of performance.

Where therefore a contract was made for the electric lighting of a city for a named number of nights before a fixed date at a fixed rate per light per night and there were not as many as the named number of nights before that date, the city was held not liable to pay at the contract rate for the difference in number between the named number and the actual number. Judgment of STREET, J., affirmed.

Woods, Q.C., for appellants. *Idington*, Q.C., for respondents.

GORDON *v.* UNION BANK OF CANADA.

Bankruptcy and insolvency—Assignments and preferences—Payment of money—Cheque.

A trader in insolvent circumstances sold his stock-in-trade in good faith and directed the purchaser to pay as part of the purchase money a debt due by the trader to his bankers, who held as collateral security a chattel mortgage on the stock-in-trade. The purchaser had an account with the same bankers and gave to them a cheque on themselves for the amount of their claim, there being funds at his credit to meet the cheque.

Held, that this was a payment of money to a creditor and not a realization of a security, and that the bankers were not liable in a creditor's action to account for the amount received.

Davidson v. *Fraser*, (1896) 23 A.R. 439, 28 S.C.R. 272, distinguished on the ground that the cheque never was the property of, or under the control of, the insolvent.

Judgment of ARMOUR, C.J., affirmed.

Watson, Q.C., and *A. C. MacMaster* for appellants. *Dyce Saunders* for respondents.

Osler, J. A.] [March 20.

JAMIESON *v.* LONDON AND CANADIAN L. & A. CO.

Appeal bond—Defect in form—Uncertainty—Disallowance.

A bond filed as security for costs of an appeal to the Supreme Court of Canada stated that the sureties were jointly and severally held and jointly bound, instead of firmly bound, and "we bind ourselves and each of us by himself," instead of binds himself.

Held, that it must be disallowed. It was uncertain whether it could be properly construed as a joint and several bond; and the respondents' rights ought not to be left in a state of uncertainty.

The bond followed the form in Cassels' Practice of the Supreme Court of Canada, 2nd ed., p. 220, which should be corrected.

W. H. Irving for the plaintiff. *Arnoldi*, Q.C., for the defendants.

Maclennan, J. A.] THURESSON *v.* THURESSON. [April 10.

Appeal—Time—Extension—Security for costs—Dispensing with—Poverty of appellants—Ejectment—Claim for improvements—Mesne profits Mortgage.

Motion by the defendants for an order extending the time for appealing to this Court from the order of a Divisional Court, reversing the judgment at the trial, and ordering judgment to be entered for the plaintiffs for possession of land with costs, and also dispensing with security for costs, of the proposed appeal. The defendants served notice of appeal one day late.

Held, that the circumstances disclosed made the delay excusable, and an extension of time should be granted.

The defendants sought to have security dispensed with on the ground that they had no means or money or resources, other than the land in question, and they were unable to get any persons to become sureties, and also on the ground that they had expended $500 upon the land in the way of improvements, in the belief that the land was their own, whereby the value had been enhanced to that extent.

Held, that the first ground was no reason for dispensing with security, but the other ground was one to which, in a proper case, effect ought to be given. In this case, however, there were two difficulties in the way: (1) That if the plaintiffs should uphold their judgment they would be entitled to mesne profits since 1892, as against the improvements, which had only been made in the last two or three years: and (2) that the defendants had mortgaged the land for the money laid out in improvements, and the lien, if any, was that of the mortgagee.

Order made extending the time for appealing and dismissing the other part of the motion, with costs to the plaintiffs in any event of the appeal.

Aylesworth, Q.C., for the plaintiffs. *Armour*, Q. C., for defendants.

HIGH COURT OF JUSTICE.

Falconbridge, J.] RE MCLEAN *v.* OSGOODE. [Feb. 15.

Division Courts—Jurisdiction—Notice disputing—Extending time for—Mandamus.

A Division Court judge has no power after the expiry of the time limited by s. 205 of the Division Courts Act, R.S.O. c. 60, for the giving of notice of intention to contest the jurisdiction of the court to grant leave to file a notice disputing it.

Winnett, for the primary creditor. *Mulkern*, for the primary debtor and garnishee.

Meredith, C.J., McMahon, J.] [Feb. 18.

MEEHAN *v.* PEARS.

Assessment and taxes—Tenant paying taxes previously assessed against himself as owner—R.S.O. c. 224, s. 26.

The defendant was jointly assessed with his father and brother as owners of certain premises for the year 1897, although he had no interest in them, and subsequently became tenant to the plaintiff a mortgagee in possession under a lease for a term of five years from April 1st, 1898. After he entered into possession he paid the taxes under pressure of a warrant to a bailiff and deducted the amount from his rent. In an action for the balance of the rent by the lessor,

Held, that the taxes were not taxes recoverable from a previous occupant within the meaning of s. 26 of the Assessment Act, R.S.O. c. 224, and that it never was intended that he should be at liberty to deduct from his rent and compel his landlord to pay taxes for which he was himself primarily liable, and even if his assessment was improper, not having availed himself of his right of appeal, the assessment became conclusive as between him and the municipality and recoverable from him, and the fact of his afterwards becoming a tenant would not alter his rights.

W. E. Raney, for the appeal. *W. H. Irving*, contra.

Robertson, J.] LAZIER *v.* ROBERTSON. [March 3.

Marriage settlement—Terms of—Death of husband—"Children"—Death of one in mother's lifetime—Leaving issue—Who entitled on mother's death.

A marriage settlement conveyed certain land to trustees in trust to sell and convey as the husband and wife might appoint, and lay out and invest the money and pay the interest to the wife during life, and in case the husband survived the wife, and there was a child or children then surviving,

to pay the interest to the husband during life, and after the decease of both to divide the money equally among the children, and if there was only one child, to pay over the whole to such child, and in case of the death of the wife without issue to pay over the money to the husband, and in case the husband and wife did not make any appointment then in trust to support the contingent remainders thereafter limited and to pay the rents on the same trusts as the money. Two children were born: the husband died: one of the children attained twenty-one, married and died before his mother, leaving his sister and a daughter surviving. In an action in which the sister claimed the whole property,

Held, that the deceased son took a vested interest, although he died before the period for conveying, and that his daughter was entitled to her father's share.

E. G. Porter, for trustee. *Armour*, Q.C, for sister. *W. H. Blake*, for daughter.

Boyd, C.] TOWNER *v.* HIAWATHA COMPANY. [March 6.

Company—List of shareholders—Posting up—"Duplicate"—R.S.O. c. 191, s. 79.

Held, that where the list of shareholders transmitted to the Provincial Secretary showed a certain person as holding one thousand dollars' worth of stock, while in the list posted up in the head office of the company his name was deleted, the two lists were not duplicates within the meaning of R.S.O. c. 191, s. 79, and liability of penalty under that section had been incurred by the defendants.

Du Vernet, for plaintiff. *Cameron*, for defendant.

Meredith, C.J.] MURPHY *v.* PHŒNIX BRIDGE CO. [March 25.

Writ of summons—Service on foreign corporation—Business within Ontario—Servant—Agent—Rule 159.

Rule 159 provides that where a corporation is a party to a cause a writ of summons may be served on certain specified officers of such corporation, or of any branch or agency thereof in Ontario; "and every person who, within Ontario, transacts or carries on any of the business of, or any business for any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid, be deemed the agent thereof."

Held, that these latter words do not include every servant of a corporation doing any act, however trivial or unimportant, in the course of the business of the corporation, but have reference to acts done by one occupying a position analogous to that of agent, and having the charge or direction of the business which he transacts or carries on for the corporation.

A corporation engaged in building bridges, which were partly in Ontario, had a temporary office in Ontario, in which their foreman, and a man under his immediate direction and control and subject to dismissal by him, whose duty it was to keep the time of the men employed in the work and to pay their wages, attended to the office part of their duties. The corporation sent this man the money for the wages, and he deposited it in a bank in Ontario to his own credit, and he occasionally, under the direction of the foreman, paid out other moneys for the corporation. After the work had been suspended and the foreman had left, this man had been in Ontario, under directions from the corporation "to clean up everything," and while so there was served with the writ of summons in an action for negligence in the erection of one of the bridges outside of Ontario.

Held, that he was not a person who was to be deemed an agent of the corporation.

W. H. Blake, for the defendants, the Phœnix Bridge Company. *Mulkey*, for the plaintiff.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J.] [March 27.

THOMPSON *v.* PEARSON.

Costs—Scale of—Ascertainment of amount—County Courts Act, R.S.O. c. 55, s. 23, (2)—Contract.

The defendant employed the plaintiffs as his brokers to sell on his account 200 shares of stock at a named price, the plaintiffs undertaking that in event of loss the defendant's liability should not exceed $200. In an action upon this contract the plaintiffs recovered $200 and interest.

Held, FALCONBRIDGE, J., dissenting, that the amount of $200 recovered was ascertained by the act of the parties within the meaning of s. 23 (2) of the County Courts Act, R.S.O. c. 55, and therefore recoverable in a County Court.

Decision of MEREDITH, C.J., ante, p. 73, reversed.

J. H. Denton, for defendant. *R. McKay*, for plaintiffs.

Province of Manitoba.

QUEEN'S BENCH.

Dubuc, J.] FORREST *v.* G. N. W. C. R. Co. [March 8.

Contract—Corporation—Corporate seal.

The plaintiff was employed by the president of the defendant railway company to act as chief engineer during construction of the railway.

Held, that he was entitled to recover the amount agreed on for the services actually performed by him, and of which the company received the

benefit, although there was no contract under seal. *Bernardin* v. *North Dufferin*, 19 S.C.R. 581, followed.

Mathers for plaintiff. *Bradshaw* for defendant.

Dubuc, J.] CLAY *v.* GILL. [March 9.

Fraudulent assignment—Transfer of overdue promissory note—Payment by note—Parties.

Appeal from a County Court. The plaintiff's claim was for the amount of an account owing by defendant for goods supplied by Spratt & Co., who made an assignment on the 4th March, 1898, for the benefit of their creditors, the account having been with others sold and transferred by the assignee to the plaintiff March 19, 1898. Previous to the assignment for creditors, viz., on February 8, 1898, the sheriff had taken possession of Pratt & Co.'s store under an order for attachment issued under Rule 826 of the Queen's Bench Act, 1895. Defendant showed that he had given the manager of Spratt & Co. a promissory note for the amount of the account, dated 5th February, payable two months after date, and that this note was outstanding in the hands of a bank at the time of the trial; and he contended that the account against him had been thereby settled, also that the bank should be made a party to the action, as he was liable to it for the amount of the note. It appeared, however, that the note was ante-dated, having been actually given on February 9th, after the attachment, and that it was in the hands of Spratt & Co. until after its maturity.

Held, that defendant could not have been compelled to pay the note to Spratt & Co, if they had still held it, because they had no right to the money, neither was he liable to the bank which took it after maturity, and that plaintiff was entitled to a verdict.

Held, also, that it was not necessary to make the holder of the note a party to the action. *Bertrand* v. *Hooker*, 10 M.R. 445, not followed.

Ewart, Q.C., for plaintiff. *Bradshaw* for defendant.

Killam, J.] ORTON *v.* BRETT. [March 9.

Practice—Lost note—Indemnity—Bills of Exchange Act, 1890, s. 69—Costs—Reference to the Master.

Plaintiff's action, commenced before the Queen's Bench Act, 1895, was upon a promissory note made by defendant, and as the note had been lost, she had tendered a bond of herself and husband as indemnity, but there was no affidavit of justification by the surety. Defendant pleaded the loss of the note, and plaintiff moved to strike out the plea.

Held, that the indemnity tendered was clearly insufficient, and that the proper order to be made was that upon the plaintiff giving an indemnity to the satisfaction of the Master against the claims of any other person on the

note, the defendant should not further set up the loss of the note, and that the costs of the plea of loss and incident thereto, and of so much of the application as related to barring defendant from setting up such loss, and of settling and obtaining such indemnity, should be costs in the cause to defendant in any event.

Held, also, that under s. 69 of the Bills of Exchange Act, 1890, it was proper to refer to the Master the matter of the indemnity bond, although the words of the statute are that an indemnity "To the satisfaction of the court or a judge" is to be given. *Schoolbred* v. *Clarke*, 17 S.C.R. 265 followed.

McMeans for plaintiff. *Hough*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Martin, J.] SCHOMBERG *v.* HOLDEN. [Feb. 11.

Mineral Acts—Adverse claim—Affirmative evidence—B.C. Stat. 1898, c. 33, s. 11—Practice.

Adverse action under the Mineral Act and Amending Acts to establish plaintiff's title to the Black Prince mineral claim, the defendants having restaked the claim under the name of the Catardin, and applied for a certificate of improvements. The action was tried at Nelson before MARTIN, J. It was admitted that the plaintiff was a free miner, and that the Catardin claim which the plaintiff was attacking by these adverse proceedings occupied practically the same ground as the plaintiff's claim, the Black Prince. Counsel for the plaintiff put in a certified copy of the record showing priority of location and due record of the plaintiff's claim, and stated that, it being admitted by the defendant that the defendant's claim occupied the same ground as the plaintiff's, and that the plaintiff was a free miner, this would be the case.

W. A. Macdonald moved to dismiss the plaintiff's action on the ground that affirmative evidence of his title had not been established as required by s. 11 of the Mineral Act Amendment Act, 1898.

Bowes, in reply: The section relied upon does not apply in this case because the action was commenced prior to the passing of the statute. The plaintiff has made out such a case that if no evidence is offered on the part of the defendants the plaintiff would be entitled to judgment.

Held, that s. 11 of the Mineral Act Amendment Act, 1898, applies to all adverse proceedings including those commenced before the Act. By proving (1) his free miner's certificate, (2) prior location and due record, and (3) the overlapping of the claims in dispute, a prior locatee who is plaintiff in adverse proceedings makes out a prima facie case. Motion overruled.

Irving, J.] McGREGOR *v.* McGREGOR. [March 3.

Replevin—Whether it is an action for tort—Can husband maintain it against his wife—Married Woman's Property Act, R.S.B.C. 1897, c. 130, s. 13.

This was a replevin action, in which the husband sought to recover from his wife certain furniture admittedly the property of the wife. The defence was that such an action cannot be brought by a husband against his wife. By Married Women's Property Act, (R.S.B.C. 1897, c. 130, s. 3) "Every woman . . . . . shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

Held, that a replevin action is an action for a tort and therefore a husband cannot maintain it against his wife. Appeal dismissed.

Martin, Attorney-General, for appellant. *Hall*, for respondent.

Full Court.] [March 9.

SHORT *v.* FEDERATION BRAND SALMON CANNING CO.

Patent—Infringement—Venue—Practice—Company—Head office and place of business—R.S.C. 1886, c. 61, s. 30.

Appeal by plaintiff from an order of IRVING, J., changing the place of trial of the action, which was one for the infringement of a patent, from Vancouver to Victoria. The head office of the company was at Victoria. It had canneries at other places. The plaintiff complained that an infringement of his patent in respect of soldering cans took place at one of these places. The ground of the appeal was that the Patent Act, R.S.C. 1886, c. 61, relating to the issue of the writ and the place of trial of actions thereunder was satisfied by laying the venue at Vancouver.

Held, that in an action against a company for infringement of a patent the venue should be laid at the place of the registry which is nearest the head office of the company.

Martin, Attorney-General, for appellant. *Hall*, for respondent.

POWELL *v.* RUSKIN.

In this case, noted ante p 241, the decision was upheld on appeal, by MEREDITH, J., on the authority of an unreported decision by ARMOUR, C.J. In the last paragraph of the note on p. 241 the names plaintiff and defendant should be transposed.

Book Reviews.

The Canadian Annual Digest, 1898, by CHARLES H. MASTERS, barrister, Reporter of the Supreme Court; and CHARLES MORSE, barrister, Reporter of the Exchequer Court of Canada. Toronto: Canada Law Journal Company, 1899.

We have here the third volume of this new standard digest of Canadian cases. It was commenced in 1896, with some confidence that it would meet with encouragement. Time has proved that the compilers and publishers were right in their assumption of its need. Both these necessary parties for the production of a law book have done their part excellently well, and no expense has been spared in making the digest as complete and useful as possible. We notice that a selection of cases from the first volume of Canadian Criminal Cases appears in this issue.

The Law of Principal and Surety, by S. A. T. ROWLATT, M.A., late Fellow of King's College, Cambridge, barrister-at-law. London: Stevens & Haynes, law publishers, Bell Yard, Temple Bar, 1899.

The author is right in saying that the branch of law of which he treats is one which, from a practical as well as from a theoretical point of view, justifies separate treatment in a separate volume, as it possesses many interesting and important principles exclusively its own. The law is collected in a manner which indicates that the author has a clear conception of the problems to be solved. The subject is treated under the following heads—(1) Scope of the law of Principal and surety; (2) Consideration; (3) Statute of frauds; (4) Contract and effect of guarantees; (5) Misrepresentation and concealment; (6) The rights of a surety; (7) The release of the surety by dealings with the principal contract; (8) Laws of sureties and co-sureties; (9) Statute of limitations; (10) Bankruptcy. This book is not merely a digest of cases. The author is not afraid to state what he believes to be the result of them, and he has done his work with great intelligence. The index is full and complete and above the average in that respect.

Kelly's Draftsman, a collection of precedents and forms of conveyancing, third edition, by LEONARD H. WEST, LL.D., and WILLIAM AUSTIN, solicitors. London: Butterworth & Co., 7 Fleet Street, E.C.

This is the third edition of a useful book, valuable for the convenient arrangement, conciseness and correctness of its contents. Some of the forms which are new will be found useful in this country; some we have already in O'Brien's Conveyancer, and others are applicable only to English law. Nevertheless, the book will be a useful addition to any solicitor's library.

A Compendium of the Law of Torts, specially adapted for the use of students, by HUGH FRASER, M.A., LL.B., barrister-at-law. London: Sweet & Maxwell, 3 Chancery Lane; Reeves & Turner, 100 Chancery Lane, law publishers, 1899.

This fourth edition is a revision of the author's previous work. Additional information is given, but no alterations have been made in the plan of arrangement, the endeavour being to state propositions as concisely as possible and not to increase the number of pages. It is unnecessary to refer at length to a book which is so well known to students in England. The author has had exceptionally large experience in legal education, and is thoroughly familiar with the needs of students.

Popular Science Quarterly, edited by the Faculty of the Political Science of Columbia University. Ginn & Company, Tremont Place, Boston, U.S.A. London: Henry Frowde.

Though this exceedingly well-written and interesting magazine does not touch matters of pure law, every professional man desiring to keep abreast of the times should have an acquaintance with the best literature on the broader questions included in the term "Political Science." Much of this is to be found in this magazine. The number for December, 1898, contains articles on Imperialism, the Federal bankruptcy law, Land tenure in ancient India, a study of trade unionism, &c. The first number of 1899 treats, among other things, of the government of distant territory, the control of dependencies through protectorates having special reference to the changed attitude of the United States in regard to such matters. Prof. John Davidson commences an article on England and her Colonies, and Prof. Taussig contributes an article on the taxation of securities.

The Law relating to Building and Loan Associations, with forms and suggestions by WM. H. THORNTON and FRANK H. BLACKLEDGE, of the Indianapolis Bar. Albany, N.Y.: Ma[illegible] Bender, 1898.

This work claims to cover the whole range of Building and Loan Associations; and as there are said to be some 6,000 of these in operation in the United States, we have no doubt it will find a ready sale there, but it will not be of much use in this country.

A correspondent sends us another, and, as he thinks, an improved, version of the old rhyme embodying the English law of the road, referred to by Mr. Labatt, ante, p. 137; it runs as follows:

The law of the road is a paradox quite,
Come listen, it's not very long;
If you go to the left you're sure to go right,
If you go the right you'll go wrong.