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The Commission to whom was given power to frame, revise and consolidate the rules of practice of the High Court and Court of Appeal for Ontario, under the Law Courts Act of last session, is now engaged in the task of revision and consolidation. We trust they will give due weight to the suggestions made by the Committee of the York Law Association appointed to deal with matters of practice. It will not be denied that the members of this Committee have special familiarity with the practical working out of the rules, a remark which certainly is not applicable to very many of those on the Commission, and this without the least disparagement to their learning and ability. The work of that Committee was brought to the attention of the Attorney-General, and it would have added strength to the Commission, and been much more satisfactory to the profession, if some of its members had been placed upon the Commission. It is probable that the consolidation will come into force shortly after the next session of the Local Legislature.

The series of law reports known as "The Reports," which has been in existence for the past four years, has come to an untimely end. It started with a good deal of *eclat*, and the fact that Sir Frederick Pollock was originally the head of the Council of Supervision, which controlled the publication, gave a fillip to the enterprise; but that learned gentleman having not only withdrawn from the editorship in 1894, but having also transferred his services to the series of reports published by the Council of Law Reporting, has proved disastrous to the competing concern, which, having gone up like a rocket, has now come down somewhat like the stick. The fate of

this attempt at competition with the Law Reports will probably prove a deterrent to any further endeavours in that direction. It would be hard to find any set of reports that would suit the critical ideas of all men. Even under the present distinguished editorship of the Law Reports we have sometimes ventured to doubt the wisdom of the selection of some of the cases that have appeared, still on the whole, we think that the Law Reports are, generally speaking, as good and as well edited as could reasonably be expected. During the past year the cases in Chancery only occupy two volumes instead of three, as has been usual for some years past. But it is not the multiplication of cases, so much as the careful selection of those which are reported, which is the real desideratum.

JUDGMENT BY CONSENT.

The estoppel worked by a judgment of a Court of record has two operations: (1) As a memorial simply, the record of the judgment has a conclusive effect against all the world in the respects following, viz.: that the proceedings it narrates actually transpired, and when; that the parties it names participated in the litigation, and that the judgment stated was pronounced. (2) So far as the record purports to declare rights and duties, it imports absolute verity as between the parties to the record and their privies in all collateral proceedings.

The record itself and the judgment it embodies may, in a direct proceeding for that purpose, be impeached, altered or varied on the grounds of fraud, mutual mistake or surprise, and probably also on the ground of the incompetency of the parties. The attack may be either, firstly, on the acts of the parties themselves, or some of them, in relation to the presentation of the case to the Court for trial, in which case the application for relief is directly to the Court which pronounced the judgment; or secondly, on the correctness of the exercise of the judicial mind in adjudicating on the facts presented—in this case the Court which pronounced the judgment is functus

officio, and the application must be to an appellate tribunal. In the first case a different state of facts is presented for a new adjudication, and in the second case a new adjudication on the same facts is asked for from the appellate court.

The principle of res judicata is thus stated in Bigelow on Estoppel: "An issue, once determined by a court of competent jurisdiction, may be relied on as an effectual bar to any further dispute upon the same matter, whether by parties to the litigation or those who, termed privies, claim under them; this conclusiveness including of course as well the law as the facts involved in the case." Does this principle apply to a judgment pronounced, in which is registered by the court the agreement of the parties, the judicial mind not having been called on to consider or decide any of the questions involved?

If such a judgment be complained of by any party, how is he to seek his remedy? There can be no appeal because the court is not responsible for the findings of the judgment; there has been no adjudication in respect of which an appellate court can be called upon to act. The authorities well establish this: Daniell's Chy. Practice, 4th ed., 875, 1427; *Webb* v. *Webb*, 3 Swanst. 658; *Smith* v. *Turner*, 1 Vern. 274; Ont. Jud. Act, sec. 65, Holmested & Langton, 74.

The proceeding in England to vary or set aside a consent judgment must now be by action as it was formerly by original bill: Smith's Chy. Prac., 6th ed., 480; *Bradish* v. *Gee*, Amb. 229; *Webb* v. *Webb*, ubi sup.; *Davenport* v. *Stafford*, 8 Beav. 503, 523; *Flower* v. *Lloyd*, 6 Chy. Div., 297; *Meadows* v. *Duchess of Kingston*, Amb., 756; *Patch* v. *Ward*, 3 Chy. App., 203; *Emeris* v. *Woodword*, 43 Chy. Div., 185.

In Ontario, Consolidated Rule 782 says: "Any party entitled * * to impeach a judgment or order on the ground of fraud, is to proceed by petition in the cause," etc. This rule would seem to embrace the case of the impeachment of a consent judgment on the ground of fraud. There is no rule similar to this in the English practice. It is, however, submitted that this rule does not apply to a case where for discovery, for the examination of witnesses, and the bringing in of parties (not parties to the original judgment), the machinery of an action

is required to present the matter complained of properly before the court. This was held by the Chancellor in *Delap* v. *Charlebois*, affirming the Master in Chambers, January 10th, 1893, but not reported. Except when this rule would apply, the Ontario practice would follow that of England.

There is no opening for a complaint against the Court in the case of a judgment by consent. The answer to the complainant is at once his own agreement, of which the record, till successfully impeached, is conclusive evidence. It is the agreement of the parties which must be reached by the complainant. Does then the mere act of the Court in registering the agreement of the parties in a judgment make that agreement more conclusive upon the parties than the record of the presentation of the facts to the Court in a contested case?

Does the act of the Court make the conclusions of the agreement res judicatæ?

These are the crucial questions in relation to the conclusiveness of consent judgments.

If the record in a contested case may be varied on the grounds stated, by parity of reasoning the consent or agreement, which in the record of a consent judgment takes the place of the presentation of facts in a contested case, should be open to similar proceedings. In the one case the consent or agreement is an intermediate step (by which the parties have determined their contest) standing between the contested facts and the Court, while in the other case the facts themselves are presented to the Court for adjudication where an agreement cannot be had; in short, the parties by agreement in the one case do that which in the other is left to the Court.

The estoppel by record, and the estoppel in pais by the agreement before it is registered in a judgment of the Court, are respectively effectual for the same purpose. The estoppel is co-extensive with the judgment or with the agreement, as the case may be, adapting itself always to the mutations, which, as a consequence of proper proceedings, may take place in the judgment or agreement out of which the estoppel arises. When the judgment or the agreement is set aside the estoppel

is of course at an end. The estoppel by judgment is alone by virtue of the existence of the record of the judgment. The record proves the exercise of the judicial mind (or a statutory judgment by default), or it proves an agreement of the parties. The estoppel exists independently of the question as to whether or not there has been an exercise of the judicial mind. The fact of there having been an exercise of the judicial mind, as we have seen, affects the forum of the proceedings to be employed to get rid of or vary the judgment which is the foundation of the estoppel, but is not essential to create the estoppel by the judgment. That "res judicata" and "estoppel" are not convertible terms, and that there must be an exercise of the judicial mind to create "res judicata," would seem to be obvious propositions. The term "res judicata" seems after all to be merely descriptive of one means (even if it be the most usual means) by which a judgment may be founded.

It is submitted therefore that a judgment embodying an agreement of the parties does not import "res judicata," that such a judgment is no more conclusive upon the parties than the agreement on which it was based was before judgment, and that such a judgment may be varied or set aside for the same reasons as would be sufficient to enable the Court to vary or set aside the agreement as an agreement.

The authorities on the subject are not very numerous. The chief among them may be profitably referred to here.

In *Jenkins* v. *Robertson*, L.R. 1 Sc. App. 17, the facts were that in a previous action (allowed by the Scotch law to have the rights of certain persons to a right of way declared), the then plaintiffs had compromised the action, and judgment by consent in accordance with the terms agreed to by the parties had been entered. The plaintiff Jenkins, one of the claimants of the right of way, not a party to the previous proceeding, asserted that the judgment having been by consent did not import the principle of "res judicata" in respect of the right claimed so as to estop him, though not a party, and that not having been a party to it he was not estopped by it by reason of the consent of others. The House of Lords sus-

tained these contentions, holding that a decree "obtained by arrangement between the parties, the Court bestowing no judicial examination on the merits of the question, can never be res judicata." Had the previous action been fought out, in the opinion of the Court the matter in question would have been res judicata by the judgment, and from the nature of the action would have determined the rights as against the whole world, including the plaintiff. Had the plaintiff been a party to the consent judgment, he would have been bound by it as a consenting party, and in either case there would have been an estoppel by the judgment, but as it was not fought out, and the plaintiff was no party to it, no estoppel on the plaintiff was worked by the judgment: see also Chand on Res Judicata, s. 58, p. 125; Black on Judgments, 705-6.

The estoppel is confined to the matters necessarily involved in the consent given or the adjudication which has been had. We find, therefore, such cases as *Goucher* v. *Clayton*, 11 Jur. N.S. 107, where, in an action to restrain infringement of a patent, it was shown that in a previous action for the same purpose between the same parties before an issue was raised, the defendants confessed judgment, and took a license from the plaintiff patentee for a limited time. This judgment the plaintiff contended estopped the defendants from denying the validity of the patent. Sir W. Page Wood, V.C., held otherwise on the ground that there had been no pleadings and no issue raised.

In the case of a judgment by default the rule in England seems to be that the defendant is only precluded by such a judgment from afterwards denying the averments in the statement of claim and the facts thereby actually put in issue: *Howlett* v. *Tarte*, 10 C.B. N.S., 813.

In the case of *In re South American and Mexican Co. ex parte Bank of England*, 8 R. 691; 1894, W.N. 147, affirmed by C.A. in 1895, 1 Ch. 37, it appeared that a judgment had been consented to in a previous proceeding to recover an instalment of money payable under an agreement, which judgment proceeded on the ground that the agreement under which the money was payable was valid. In the proceeding to recover

further moneys under the same agreement, the Court held that the parties to the consent judgment were thereby estopped from disputing the validity of the agreement, The proposition is laid down that "a judgment by consent of parties operates an estoppel inter partes as much as if the case had been fought out. It makes no difference that the Court has not exercised its mind on the matters in controversy." It would seem to be the fair meaning of this language that "although a consent judgment does not import 'res judicata' it is, nevertheless, an estoppel." The case of *Jenkins* v. *Robertson* is referred to in the opinion of the Court, and very properly, it is submitted, distinguished on the ground of the want of authority on the part of the consenting parties in the previous proceeding referred to in that case to represent the plaintiff in the second action. An estoppel is worked by consent though judgment not entered: *Davis* v. *Davis*, 13 Ch. Div. 861.

The setting aside or variation of a consent judgment it seems may be had on such material as would enable the Court to set aside or vary an agreement between the parties: *Attorney-General* v. *Tomline*, 7 Ch. Div. 388; Black on Judgments, 320. A consent order was set aside on this ground in the case of *Huddersfield Banking Company* v. *Lister* (1895), 2 Ch. 273.

The case of *The Bellcairn*, L.R. 10 P.D. 161, was not a case proceeding upon any different ground. In that case there had been a judgment by consent dismissing an action regularly pronounced and entered. Subsequently the parties, without going before the Court, went before the Registrar, who had no jurisdiction in the matter, and by consent took an order setting aside that judgment, There was no other proceeding to set it aside or impeach it; the Court treated the Registrar's order as a nullity, holding that to set aside a consent judgment, as in the case of any other judgment, even with the consent of the parties, the facts must be before the Court who pronounced it, or some other Court of the same jurisdiction, and that the facts of the case were not such as would have induced the Court to set aside the judgment then in question.

Inasmuch as agreements, in addition to other grounds of

impeachment, may be absolutely void or be voidable only as to the parties, or some of them, by reason of the incapacity to contract affecting the party personally, or in relation to some of the objects embraced in the agreement, the question naturally arises: Is the validity of a judgment affected by the legal incapacity of the parties to contract?

Infants and lunatics are so protected in the practice of the Courts, by means of the official guardian, that a judgment in their cases could not be regularly pronounced without the formalities necessary to make it conclusive having been complied with. It is, however, submitted as a general proposition that where the capacity to contract by law is wanting, or does not extend to the subject involved so that there could be no valid agreement, there can be no valid judgment. The Court cannot by its judgment do that which it is the function of the Legislature alone to accomplish.

Can a corporation, in respect of matters admittedly ultra vires of the corporation, be parties to a valid judgment dealing with such matters? Can a corporation by consenting to a judgment conclude itself in respect of such matters? If such a consent be given can the corporation itself come into Court to impeach the judgment? The second and third, at least, if not all of these questions are directly in issue in the case of *Delap* v. *Charlebois* (the corporation being one of the plaintiffs) now pending for judgment upon the appeal to the Supreme Court. The questions appear never to have been decided before this case.

In Brice on Ultra Vires, at page 625 (note), it is stated that such a consent judgment has been decided to be void, citing the case of *Re New Zealand Native Land Company*, 6 N.Z.L.R., S.C. (1888), page 549. But on investigation of this case, it does not sustain Mr. Brice's note. The point was not up for decision and was not decided in that case. In *Delap* v. *Charlebois* the decisions on the point, so far, are those of the Chancellor and the Court of Appeal. The Chancellor in his judgment says: "The company created by Act of Parliament has no right to spend a penny of its money except in the manner provided by the Act. It follows from that, if the act

is beyond the power of the company to do or ratify, no judgment obtained by the consent of the company treating it as authority can remove the invalidity, for the virtue of such judgment rests merely on the agreement of the parties, and the incapacity to do the act involves the incapacity to consent that it be treated as valid. I think, therefore, that the judgment by consent forms no obstacle to the plaintiffs if the transaction impeached is inherently ultra vires." In the Court of Appeal, Hagarty, C.J.O., and Osler, J.A., sustained the Chancellor's judgment. Burton and Maclennan, JJ.A., while not adjudicating upon this point, differed on other grounds. Hagarty, C.J.O., says: "It is pressed on us that this judgment puts an end to all questions as to the legality of the arrangement. * * * We have not to deal with a decree affirming all such matters as intra vires, no such question being in issue. We have merely to decide whether a judgment submitted or agreed to by the company to do things wholly beyond their power necessarily validates their acts and creates an estoppel or matter of record against them. If this be the case a very easy method could always be devised to enable directors of the company wholly to do unlawful acts, and then to agree to judgment against them to make such acts valid and insure their performance without challenge. *I draw no distinction here because it was a consent decree.*"

If the question of ultra vires had been raised in the action, and an adjudication had taken place upon it, the consequence would have been, in the light of the cases we have referred to, that no reversal or variation of the judgment could take place, except by an appeal. It would necessarily involve the correctness of the adjudication arrived at, which, as we have seen, could not be attacked in any other way. How it might be were the question raised between parties not bound by the judgment, opens a large field for discussion, which, perhaps, may be dealt with at some future day.

FRANK ARNOLDI.

CAUSERIE.

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

An English jury recently decided that it is libellous, under certain circumstances, to call a man an Arab. In the case of *Howard* v. *Dulau* (unreported), the plaintiff, an hotel-keeper at Jaffa, sought to recover damages from the proprietors of "Baedeker's Guides" because (1) he had been called by them (in their "Palestine and Syria Handbook for Travellers") an Arab; (2) that his hotel was styled a second-class one; and (3) travellers were cautioned by defendants to *bargain with him*. According to the note of the case in the *Law Magazine and Review* for November, 1895, the plaintiff objected to the term "Arab" because "it means an outcast, an uncivilized man, a semi-savage, a man who does not know how to manage an hotel, a man who lives in the deserts"; and he hinted that "the Bedouins are recruited from unsuccessful innkeepers!" On the contrary, he represented himself as a British-born subject of Maltese parentage, and "a first-class hotel proprietor and tourist contractor." The jury were of opinion that it was libellous to style such a person as the plaintiff an Arab, and held that the defendant's description of his hostlery was inaccurate and derogatory to the plaintiff's business. They awarded him £50 damages. No doubt Mr. Justice Ameer Ali, the strenuous apologist for Mohammedanism in the *Nineteenth Century*, will find in this verdict another slur upon his Prophet in the mouth of the brutal Saxon!

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A recent number of the *Canadian Gazette*, in commenting upon an attempt by the owner of the sealing schooner *Shelby* (seized for a violation of the Behring Sea Award Act, 1894), to turn the edge of the sword of Justice by sending Chief Justice Davie, Local Judge of the British Columbia Admiralty District, twenty-five dollars, has this to say: "'Every man has his price,' but fancy a Chief Justice for £5!" Now, mayhap, the owner of the saucy *Shelby* is a profound student of

all ways and means of getting at the *Seal*, and had in mind the method in vogue in the halcyon days of Lord Chancellor Bacon! If so, and he remembered that one of the parties in the case of *Hody* v. *Hody* "fetched" the Lord High Chancellor of England with a sum of £50 (see Cobbett's State Trials, vol. ii., p. 1106), it was not, perhaps, irrational for him to think £5 an adequate *argumentum ad crumenam* for a colonial Chief Justice. If so, he, doubtless, emerged from gaol, after his week's confinement for contempt of court, a confirmed *laudator temporis acti!*

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I do not know whether the advocates of the Baconian theory in relation to the authorship of the Shakespearian plays, who made so much ado in the literary world a short time ago, have ever perused "The Humble Confession and Submission of Me the Lord Chancellor," to be found in the volume of the State Trials above referred to; but scanty support for the opinion of Mr. Ignatius Donnelly, et al., that it was "the all-compassionate Bacon whose paramount interest was in humanity; whose whole life was avowedly and admittedly devoted to 'the relief of the human estate,'" rather than the "vagabond play-actor," who created the immortal characters of Hamlet, Miranda, Cordelia, Lear, etc., is to be had in this unique historical document. Space only permits me to make one or two extracts from it, as follows: "As to the second article of the charge, viz., 'He received from Edward Egerton £400'—I confess and declare that soon after my first coming to the Seal, being a time when I was *presented by many*, the £400 mentioned in the said charge was delivered to me in a purse, and, as I now call to mind, from Mr. Edward Egerton; but, as far as I can remember, it was expressed by them that brought it that it was for favors past, and not in respect of favors to come!" As to the third article of the charge, viz,. "In a cause between the Lady Wharton and the co-heirs of Sir Francis Willoughby, he received of the Lady Wharton £310'—I confess and declare that I did receive of the Lady Wharton, at two several times, as I remember, in gold £200 and 100 pieces, and this was certainly *pendente lite*. But (he naively adds) I had a

vehement suspicion that there was some shuffling between Mr. Shute and the Registrar in entering some orders, which afterwards I did distaste." Now these transactions may reveal a mind "devoted to the relief of the human estate," but it is the human estate of Francis Bacon only. Verily, official corruption in these *fin de siecle* times pales its insignificant fires before the mercenary exploits of my Lord Verulam!

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In its Abstract of *Recent* (the italics are ours) Decisions a late number of the *Albany Law Journal* has the following:—

"*Frauds, Statute of—Contract*—The value of work and labor supplied under a contract void by the statute of frauds, is recoverable upon the theory that a benefit has been received, from which springs an implied undertaking to pay the value of such work and labor: *Baker* v. *Henderson* (N.J.), 32 Atl. Rep. 700." We have always understood that the prime object of the department of the *Albany Law Journal* from which the above excerpt is taken is to keep busy lawyers posted in current case-law, involving either the exposition of new doctrine or some modification of long-settled principles, and that it was not intended to constitute an asylum, so to speak, for veteran rules of law with which every practitioner may reasonably be expected to be familiar. This being conceded, it strikes us that such a case as the above ought to have found no place there. The principle enunciated in this case has been recognized in England, certainly since the case of *Mavor* v. *Payne*, 3 Bing. 285, was decided in 1825, and was approved by the Supreme Court of New York in 1826 in the case of *Burlingame* v. *Burlingame*, 7 Cowen 92, and affirmed in the same Court in the case of *Shute* v. *Dorr*, decided in 1830 (5 Wend. 204). That it has long been regarded as law generally in America seems obvious from an article on quantum meruit in 20 Central L. J. 328.

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In these end-of-the-century days when the irreverent have declared that the material of which the Bench is composed is only common clay, when judgments seem only written to be derided, and the exercise of the right of appeal has become a

sort of forensic pastime, how happy that Judge would be who could adopt Lord Hardwicke's boast when leaving the wool-sack, and say; "Whilst I presided in my court (20 years), I never had one of my decisions reversed, and but three of them appealed against."

* * * * * * *

If for nothing else, Lord Chief Justice Holt deserves to be forever remembered in forensic annals for his intrepid assertion, in the celebrated case of *Ashby* v. *White*, of the freedom of the Courts of Justice from Parliamentary interference. When Ashby brought his action in the Queen's Bench against the returning officers, etc., of the borough of Aylesbury for not receiving his vote, the House of Commons was scandalized that a court should presume to exercise jurisdiction over a matter which concerned an election to that body, and ordered all the parties concerned therein, including the attorneys and counsel, to be taken into custody. The Chief Justice was also ordered to attend the House, but he proudly disregarded the summons. Thereupon the Speaker was directed to proceed with the mace to the Court of Queen's Bench and command his attendance upon the House. When the Speaker had announced his mission, the doughty Chief Justice scornfully eyed him for a moment and then replied: "Mr. Speaker, if you do not depart from this Court, I will commit you *though you had the whole House of Commons in your belly!*" Queen Anne found it necessary to prorogue Parliament in order to put an end to the dispute.

Ottawa. CHARLES MORSE

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

The concluding numbers of the Law Reports for December include, besides the indices, (1895) 2 Q.B. pp. 669-739.

SOLICITOR AND CLIENT—GIFT BY CLIENT TO WIFE OF SOLICITOR—UNDUE INFLUENCE, PRESUMPTION OF—INDEPENDENT ADVICE, ABSENCE OF.

Liles v. *Terry*, (1895) 2 Q.B. 679, is a case which deserves the attention of solicitors, as emphasizing the caution necessary to be observed in transactions between themselves and clients, having for their object any benefit to themselves or wives. In this case the plaintiff brought an action to set aside a deed made under the following circumstances: The male defendant was a solicitor, and his wife (and co-defendant) was a niece of the plaintiff, and, without any independent advice, the plaintiff had made a conveyance to the male defendant of certain leasehold premises, in trust for the plaintiff for her own life, and, after her death, in trust for the female defendant. The plaintiff failed to establish that any undue influence had been in fact exerted to induce her to execute the deed, but the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) were of opinion that there is an inflexible rule of equity, that undue influence must be presumed in such a case, where either a solicitor or his wife profits by a conveyance made by the client, and that this is a presumption of law which cannot be rebutted by any evidence. Where the solicitor himself derives a benefit, there is ample authority, and in arriving at the conclusion that the same rule applies where his wife is benefited, the Court follow the case of *Goddard* v. *Carlisle*, 9 Price 169. The decision of Charles, J., in favor of the defendants was therefore reversed. In vol. 25, ante, pp. 98, 137, will be found an article dealing with this subject, and containing a review of some of the cases bearing upon it.

PRACTICE—PARTIES—NUISANCE—INJUNCTION—DAMAGES—DISTINCT CAUSES OF ACTION—JOINDER OF DEFENDANTS—ORD. XVI., R. 4 (ONT. RULES, 301, 324).

Sadler v. *Great Western Ry. Co.*, (1895) 2 Q.B. 688; 14 R. Dec. 150, was an action by the plaintiff against two railway companies which had parcel offices adjoining the plaintiff's shop, complaining that they caused their carts to stand on the highway in front of their respective offices for an unreasonable length of time, so as to obstruct the plaintiff's customers from reaching his premises, and causing him thereby a loss of custom and special inconvenience, and claiming damages and an injunction. One of the companies applied to stay the action, unless the claim was amended by striking out the name of the other company as a defendant, and this application was granted. On appeal to the Court of Appeal (Smith and Rigby, L.JJ.), the Court was divided in opinion. Smith, L.J., thought the order was right as regarded the claim for damages, on the ground that the defendants were separate tort feasors, and could not as such be joined as defendants, whatever might have been the case had the plaintiff claimed an injunction only. Rigby, L.J., on the other hand, thought that as the plaintiff claimed an injunction the two defendants were properly joined, and that the mere fact of the plaintiff having also claimed damages, as to which he might not succeed, ought not to interfere with his proceeding for the injunction, which was the principal relief sought. Inasmuch, however, as the case is a mere record of a judicial conflict of opinion, we are inclined to think a judicious editor might well have consigned it to limbo, instead of printing it in the Reports.

CHEQUE—NEGOTIABLE INSTRUMENT—"FICTITIOUS OR NON-EXISTING PERSON"—IGNORANCE OF DRAWERS—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61), SEC. 7, S.-S. 3: SEC. 73; (53 VICT., C. 33, D., SEC. 7, S.-S. 3: SEC. 72).

In *Cluston* v. *Attenborough*, (1895) 2 Q.B. 707, a drawer of a cheque, through the fraud of his clerk, made it payable to a person represented to be entitled to the same in payment for work alleged to have been done. The payee was, in fact, a fictitious non-existing person, and the work had not, in fact, been done. The fraudulent clerk endorsed it in the name of

the payee, and negotiated it with the defendant, who gave value for it in good faith. The cheque having been duly honored, and paid by the plaintiff's banker, the present action was brought to recover the money, as having been paid under a mistake of fact. But the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) agreed with Wills, J., that the payee was none the less a fictitious and non-existing person within the meaning of the Bills of Exchange Act, sec. 7, sub-sec. 3, because the plaintiff supposed when he signed the cheque that it was in favor of an existing person, and consequently that the cheque was, in effect, payable to bearer, and the defendants, as bona fide holders, were entitled to the money they had received in respect of it, and that the action must therefore fail.

The January numbers of the Law Reports comprise (1896) 1 Q.B. pp. 1-99; (1896) P. pp. 1-34, and (1896) 1 Ch. pp. 1-107.

CRIMINAL LAW—PROCURING COMMISSION OF ACT OF GROSS INDECENCY—"ANOTHER MALE PERSON"—CRIMINAL LAW AMENDMENT ACT, 1885 (48 & 49 VICT., C. 69) S. 11—(CR. CODE, S. 178).

In the *Queen* v. *Jones*, (1896) 1 Q.B. 4, a case was stated by Wills, J., on the point whether under the English Act above referred to, which is in similar terms to the Cr. Code, sec. 178, a prisoner indicted for procuring the commission by another of an act of gross indecency with "another male person," could be convicted where the act in question was proved to have been procured to be committed with the prisoner himself. The Court (Lord Russell, C.J., and Mathew, Williams, Wright and Bruce, JJ.) unanimously answered the question affirmatively. Another point was whether the fact that one of the prisoners who was charged with having committed the offence had been acquitted, prevented the other prisoner, who was charged with procuring an indecent offence to be committed, from being convicted; but, inasmuch as it did not necessarily appear that the offence of which one of the prisoners had been acquitted was the same offence with that which the other was charged to have procured the commission of, this point was also decided against the prisoner.

BILL OF EXCHANGE—FORGED INDORSEMENT—PAYMENT BY DRAWEE TO BONA FIDE HOLDER—RIGHT TO RECOVER MONEY PAID BY MISTAKE.

In *The London and River Plate Bank* v. *The Bank of Liverpool*, (1896) 1 Q.B. 7, the plaintiffs were the drawees of a bill of exchange, and the action was brought to compel the defendants to refund the amount of the bill, of which they were bona fide holders, on the ground that it had been discovered after payment, that the indorsement of the original payee was a forgery. The discovery of the forgery was not made until a long time after payment, and it was held by Mathew, J., that the money could not be recovered. He says: "If the mistake is discovered at once, it may be that the money can be recovered back; but if it be not, and the money is paid in good faith, and received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that the money once paid cannot be recovered back"; and he considers that the delay of a day even, might be fatal to the right to recover it back.

PRACTICE—SERVICE OF WRIT OUT OF JURISDICTION—AGREEMENT BY PERSON OUT OF JURISDICTION THAT HE MAY BE SUED WITHIN THE JURISDICTION—ORD. XI., R. 1 (*e*)—ONT. RULE 271 (*e*)—JURISDICTION CANNOT BE CONFERRED BY CONSENT.

In *The British Wagon Co.* v. *Gray*, (1896) 1 Q.B. 35, the plaintiffs appealed from an order of Mathew, J., refusing leave to serve the writ in Scotland on the defendant. The action was brought in respect of a cause of action not within the provisions of the Rules authorizing service out of the jurisdiction; but the defendant, who was ordinarily resident in Scotland, had expressly agreed that the contract in question should in all respects be construed and carried into effect according to the law of England, and for the purposes thereof the defendant thereby submitted to the jurisdiction of the High Court of Justice of England. But the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) dismissed the appeal, holding that the consent of the defendant could not give the Court jurisdiction contrary to the provisions of Ord. xi., r. 1 (*e*) (Ont. Rule 271 (*e*).) The Court of Appeal did not think that the contract did, in fact, amount to a consent to be sued in England, but even if it did, the Court could not act upon any

such agreement. The case seems to affirm the general principle that the consent of parties cannot give a Court jurisdiction which it does not otherwise possess.

PRACTICE—TRIAL WITHOUT A JURY—RE-HEARING IN COURT OF APPEAL—DECISION OF JUDGE ON FACTS.

In *Colonial Securities Trust Co.* v. *Massey*, (1896) 1 Q.B. 38, the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) enunciate the rule which governs the practice of that Court in the hearing of appeals. In cases tried by a Judge without a jury, Lord Esher, M.R., and Lopes, L.J., are of opinion that the same rule should be followed as used to prevail in the case of re-hearings in the Court of Chancery, and that the finding of the Judge appealed from on any question, should be taken as prima facie correct, and that the onus should rest on the appellant to make out clearly that it is wrong, and where the matter is left in doubt, the decision of the Judge at the trial ought not to be disturbed. Kay, L.J., however, thought that the Court of Appeal ought to try the case and give its independent judgment on the facts, as well as the law, but he concedes that in a doubtful case the judgment of the Court below on the facts is entitled to great weight. A writer in the *English Law Times* of 14th Dec. last seems to think that the theory of the supposed infallibility of Judges' findings on questions of fact, has received a somewhat rude shock by the decision of the House of Lords in *McLeod* v. *Cammell*, 73 L.T. N.S., 634, where, on a pure question of fact, viz., "whether or not the evidence established that an engine-driver and fireman, or one of them, was in charge or control of a train," the House reversed the decision of the Court of Appeal itself, there being eight Judges in favor of the view which ultimately prevailed, as against five who were of the contrary opinion.

PRACTICE—ORDER FOR PAYMENT OF COSTS, ACTION UPON—SOLICITOR—APPLICATION TO STRIKE OFF ROLLS—ORD. XLII., R. 24—(ONT. RULE 866).

Godfrey v. *George*, (1896) 1 Q.B. 48, was an action brought upon an order of the Court for payment of costs, made upon an application to strike the defendant (who was a solicitor) off

the rolls. There had been an unsuccessful application to attach him for disobedience of the order. It was argued on the part of the defendant that Ord. xlii., r. 24 (Ont. Rule 866) which enables orders to be enforced in the same way as judgments, only applies to orders made in actions, and not to orders made in the exercise of the disciplinary jurisdiction of the Court over one of its officers, and that the application to attach operated as a bar to civil proceedings; but the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) were of opinion that such orders stand on the same footing as orders made in action, and that the unsuccessful motion to attach was no bar to the actions, and that the action was maintainable, and they affirmed the judgment of Wright, J., in favor of the plaintiff.

PRINCIPAL AND SURETY—CO-SURETIES—CONTRIBUTION—MATERIAL ALTERATION OF INSTRUMENT OF SURETYSHIP—NON-EXECUTION OF SURETYSHIP INSTRUMENT BY ONE OF SEVERAL SURETIES—DISCHARGE OF SURETY.

Ellesmere Brewery Co. v. *Cooper*, (1896) 1 Q.B. 75, is rather an important decision on a point relating to the law of principal and surety. By an instrument of suretyship, it was provided that four persons should become bound as co-sureties, the liability of two of them being fixed at £50 each, and that of the other two at £25 each. One of those whose liability was fixed at £50, after the other three had executed the instrument, executed it himself, but appended to his signature "£25 only." The action was brought to enforce the instrument against the principal and the four sureties. The sureties contended they were not liable, on the ground that as to the first three who executed, there had been a material alteration in the instrument by reason of the qualification made to the signature of the other surety, and as to him, it was contended that he was discharged, because he only executed the document on the faith of the others being also bound, and if they were discharged, so was he. Lord Russell, C.J., and Cave, J., affirmed the judgment of the Judge of a County Court, dismissing the action: on the ground that the qualified execution of the bond by the fourth surety amounted to a material alter-

ation, and the instrument not having been re-executed, nor the alteration assented to by the others, neither he nor they were bound by it. In connection with this case it may be useful to refer to *Exchange Bank* v. *Blethen*, 10 App. Cas. 293, where a qualified execution of an assignment for the benefit of creditors was held to be effectual, notwithstanding the qualification appended to the signature.

CORRESPONDENCE.

INVADERS OF THE PROFESSION.

To the Editor of the Canada Law Journal.

SIR,—As you have invited discussion of legal matters, grievances or otherwise, I therefore attempt to draw attention to a matter which is really of vital importance to the profession, I mean the question of conveyancing by others than solicitors. This matter has been aired time and again in your journal, but no remedy has been attempted, except as regards Surrogate Court practice, and even that is a dismal failure, and matters have now come to such a state that if not shortly remedied it will be too late It has no doubt puzzled a great many people what is to become of the hundreds of lawyers let loose every year from law schools, and some have asked what is to become of those who have been practising for years, as the outlook is even dark for them.

It is simply scandalous to read of the number of lawyers who have lately been guilty of misappropriation of trust funds, and of the number who are daily before the Law Society for misconduct, and doubtless there are cases we do not hear of. Why do solicitors who are not barristers advertise glaringly as barristers? Why do solicitors allow conveyancers to do Surrogate Court work and sign for them, dividing the fees? Why in fact do solicitors do all sorts of questionable acts which bring disgrace upon the profession? Is there no relation of cause and effect in these matters? What

between political appointments and the struggle for an honest existence, handicapped by country conveyancers who are also private bankers, insurance agents, Division Court clerks, members of the Local Legislature, school teachers and tallow chandlers, it seems impossible, in many cases, to obtain a decent living by honest practice.

I would ask what right these invaders have to carry on two or three or half-a-dozen businesses at once, while solicitors are limited to one. The latter cannot keep private banks (for more reasons than one), be insurance agents, etc., and so it is apparently considered by some more dignified to appropriate a client's funds, or swindle and bluff him out of his cash, rather than live honestly by such degrading work. No wonder solicitors are disgusted with having to compete with pedagogues and cut rates—but then they cannot live decently and be honest. There are hundreds of these cases in Ontario, and will be hundreds more if something is not done at once. The one great remedy is the total prohibition of unlicensed conveyancers. Partial restriction is worse than useless, as seen since their restriction in Surrogate work, which they carry on the same as formerly, and I defy any ordinary country solicitor to secure the requirement for his profession, and rely on his practice alone for his living. The profit of litigation is eaten up by counsel and agent's fees, to say nothing of library expenses, Law Society fees, etc. His income must depend largely on the other branch, viz., conveyancing, and here he has every chance to starve. The temptation to do things which should never even be thought of by a member of an honorable profession is dangerously strong. But he must do these things, or else starve, or give up his profession, after years of study and expense; and give it up to benefit those who can live without it, who were never brought up to it and have been to no expense concerning it, but who must not be offended, as their votes are legion. It is hard for solicitors to keep their Enrolment Oath: "To act honorably and justly in all their dealings, and to do nothing unbecoming a member of so honorable a profession."

Poets sing of "dark, insidious men lengthening simple

justice into trade." Now that it has become a "trade," why should *we* not combine it with others, and issue marriage licenses, etc., that we may not be forced to remain single on that account at any rate. In your 1st of November issue you say: "We should be glad if some beneficent fairy would restore the business of the country so as to give the half-starving solicitors throughout the cities and country some work to do." Apparently everyone recognizes that something should be done, and I am sure if conveyancing were limited to solicitors no other fairy would be necessary, at least as regards country practitioners. The cancellation of the commissioners' and notary public certificates, except to lawyers, would to a great extent effect the desired object. The County Law Associations should take the matter up, and propose some feasible plan, and have it adopted.

F. E.

[Our correspondent puts the case strongly; but, look at it as we may, "there is more truth than poetry" in what he says.—Ed. C.L.J.

TO

HON. JOHN HAWKINS HAGARTY,

CHIEF JUSTICE OF ONTARIO,

On the completion of his fortieth year on the Bench.

Hail to the Chief! whose venerable form
Erect is found still steadfast at the helm,
His eye still keen to guide the ship of Law,
And steer its course with wisdom and with skill,
Unto that harbour where alone is found
Truth! the prime source of justice and of right.
May he at length, when storms of life are past,
And all its raging billows sunk to rest,
Find calm and peace as shades of night draw on,
Rich in the wealth of honor and respect,
The worthy mead of honest work well done,
And meet reward of life so nobly spent.
And may he, when life's sun shall sink
With radiant glory in the west,
Behold at last THE OBJECT of his quest.

DIARY FOR FEBRUARY.

1 Saturday ......Sir Edward Coke born, 1552.
2 Sunday ....*Septuagesima Sunday.*
3 Monday........Law Society of U. C. Convocation meets.
4 Tuesday ....Weekly Court at London and Ottawa.
6 Thursday.......W. H. Draper, 2nd C. J. of C. P., 1856.
9 Sunday ....*Sexagesima Sunday.* Union of Upper and Lower Canada.
10 Monday........Canada ceded to Great Britain, 1763.
11 Tuesday ....T. Robertson, J. Ch. D., 1887. Weekly Court at Ottawa.
14 Friday ....Toronto Un'ity burned, 1890. Weekly Court at London.
16 Sunday ....*Quinquagesima Sunday.*
17 Monday........Weekly Court at Ottawa.
18 Tuesday ....Supreme Court of Canada sits. Robt. Sedgewick, J. of S.C., 1893.
19 Wednesday ....Ash Wednesday.
21 Friday ....Weekly Court at London.
23 Sunday ....*First Sunday in Lent.*
25 Tuesday ....Weekly Court at London.
27 Thursday... ...Sir John Colborne, Administrator, 1838.
28 Friday ....Indian Mutiny began, 1857. Weekly Court at Ottawa.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Quebec.] [Dec. 9, 1895.

NORTH BRITISH AND MERCANTILE INS. CO. *v.* TOURVILLE.

Insurance against fire—Condition of policy—Fraudulent statement—Forfeiture by—Proof of fraud—Presumption—Assignment of policy—Fraud of assignor—Appeal—Reversal on questions of fact.

In an action on an insurance policy by an assignee the company pleaded that the insured, in his application for insurance on his lumber, had materially exaggerated the quantity and value of the lumber mentioned in such application, and thereby obtained excessive insurance on said goods, and that after the loss he had falsely and fraudulently exaggerated the amount thereof, whereby the policy was forfeited under a condition therein that it should be forfeited if the claim was in any respect fraudulent. On the trial of the action there was no direct evidence of fraud, but a strong presumption was raised that the insured could not have had nor lost the quantity of lumber claimed for. The trial judge help that fraud had not been established, and gave judgment for the plaintiffs, which was affirmed by the Court of Queen's Bench.

Held, reversing the judgment of the Court of Queen's Bench, that direct proof of the fraud was not essential ; it was sufficient that it had been clearly established by presumption or inference or by circumstantial evidence.

Held further, that fraud by the insured having been established, his assignees could not recover.

If a sufficiently clear case is made out the Court will allow an appeal on mere questions of fact against the concurrent findings of two courts below. The rule to the contrary may also be departed from where the action was not tried by a jury ; the trial judge did not hear the witnesses, but gave judgment on written depositions ; the judges of the intermediate Court of Appeal were not unanimous, and the majority expressed great doubts in adopting the findings of the trial judge ; it did not appear that the non-production by plaintiff of material documents was taken into consideration ; and the intermediate Court gave weight to a piece of undoubtedly illegal evidence. Appeal allowed with costs.

Trenholme, Q.C., and *Lafleur*, for the appellant.

Beique, Q.C., and Geoffrion, Q.C., for the respondents.

Province of Ontario.

COURT OF APPEAL.

From D. C. NORTHUMBERLAND & DURHAM.] [Dec. 21, 1895.

COONEY *v.* SHEPPARD.

Husband and wife—Employment in which husband has no proprietary interest —R.S.O., c. 132, sec. 5—"Proprietary interest" in sec. 5 of R.S.O., c. 132, means "interest as an owner," or "legal right or title."

OSLER, J. A.—When a married woman rents a farm and employs her husband to work it, he has no "proprietary interest" in the grain raised thereon. and it is not liable to seizure by his creditors.

Judgment of the Second Division Court of Northumberland and Durham affirmed.

W. R. Riddell, for the appellant.

Aylesworth, Q.C., for the respondent.

From D. C. GREY.] [Dec. 31, 1895.

WRIGHT *v.* HOLLINGSHEAD.

Execution—Exemptions—Chattel ordinarily used in the debtor's occupation.

OSLER, J. A.—Tools and implements ordinarily used in the execution debtor's occupation are no longer exempt from seizure when he changes that occupation to one in which the tools and implements in question are not ordinarily used.

An execution creditor was held entitled, therefore, to garnish the price of a baker's wagon sold by the execution debtor a few days after he had abandoned the occupation of baker and had entered upon the occupation of laundryman.

Judgment of the First Division Court of Grey reversed.

W. A. Bishop, for the appellant.

H. B. Spotton, for the respondent.

From Q.B.D.] [Jan. 14.

ARGLES *v.* MCMATH.

Landlord and tenant—Fixtures—Short Forms of Leases Act, R S.O., c. 106—Forfeiture.

A tenant may remove from the demised premises such articles, commonly known as trade fixtures, as are brought on the demised premises by him for the purposes of his business, even though they are fastened to the building provided, however, the removal can be effected without substantial injury, and the covenant in the Short Forms of Leases Act, R.S.O., c. 106, to leave the, premises in repair, does not restrict this right.

Where the determination of a lease depends upon an uncertain event, such as an election to forfeit upon the making of an assignment for the benefit of creditors, a reasonable time for the removal of trade fixtures must be allowed.

Judgment of the Queen's Bench Division, 26 O.R. 224, affirmed.

W. Macdonald, for the appellant.

Shepley, Q.C., for the respondent.

From C.P.D.] [Jan 14.

MEHARG *v.* LUMBERS.

Bankruptcy and insolvency—Assignments and preferences—Assignment of book debts—Account—R.S O., c. 124, sec. 8.

When an assignment of book debts is set aside as a preference in an action by an assignee for the benefit of creditors, the preferred creditor must pay to the assignee moneys collected under the preferential security before the attack upon it.

Judgment of the Common Pleas Division affirmed.

Moss, Q.C., for the appellant.

Shepley, Q.C., for the respondent.

From C.P.D.] [Jan. 14.

HANES *v.* BURNHAM.

Defamation—Slander—Privilege—Malice—Post Office inspector—Notice of action.

A statement by a post office inspector when investigating complaints as to lost letters, to the sureties of the postmaster, that the postmaster's wife has stolen the letters in question and has given him a written confession of her guilt, is prima facie privileged, because of the financial interest of the sureties in the investigation, but such a statement to a partner of one of the sureties is not protected.

The facts that the plaintiff at the trial denies having stolen the letters and having made any confession, and that the inspector does not produce the alleged confession or in any way account for it, is some evidence that he made the accusation, knowing it to be untrue, and therefore malicious, so as to displace the prima facie case of privilege.

A post office inspector is not entitled to notice of action to recover damages for defamatory statements made by him.

Judgment of the Common Pleas Division, 26 O.R. 528, affirmed.
F. E. Hodgins, for the appellant.
G. Lynch-Staunton, and *J. G. Farmer*, for the respondent.

From C.P.D.] [Jan. 14.

JONES *v.* GODSON.

Arbitration and award—Arbitrator's fees—Penalty—R S.O., c. 53, sec. 29.

An arbitrator is not brought within the punitive provisions of sec. 29 of R.S.O., c. 53, when the payment of the alleged excessive fees is made by cheque to an agent who has authority to accept money only, and the arbitrator refuses to take the cheque.

Per MACLENNAN, J. A. The person desiring to take up the award may either have the fees taxed and then tender the amount, or he may pay the amount demanded and bring action for the penalty, which is a sum equal to treble the excess demanded and not equal to treble the whole amount of the fees demanded.

Judgment of the Common Pleas Division, 25 O.R. 444, affirmed.
W. R. Smyth, for the appellant.
W. Nesbitt, and *A. Munro Grier*, for the respondents.

From C.P.D.] [Jan. 14.

COBBAN *v.* THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Negligence—Release—Reduced rate—51 Vict., c. 29, sec. 246 (D.) —Trial—Findings of jury.

A railway company is liable for damages to goods resulting from negligence, even though the shippers of the goods agree, in consideration of the allowance of a reduced rate of freight, not to hold the company liable.

Vogel v. *Grand Trunk Railway Company*, 11 S.C.R. 612, followed.

Where the jury find negligence, and then define the negligence to consist in doing certain acts, the Court, if there is some evidence of negligence in other respects, may in their discretion order a new trial, although there is no evidence to support the specific findings.

Judgment of the Common Pleas Division, 26 O.R. 732, affirmed.
W. Nesbitt and *A. MacMurchy*, for the appellants.
Thomson, Q.C., and *J. B. Holden*, for the respondents.
Fullerton, Q.C., for third parties.

From Chan. Div.] [Jan. 14.

MANLEY *v.* LONDON LOAN COMPANY.

Mortgage—Payment of prior encumbrance—Interest—Assignment of mortgage—Purchaser of equity of redemption.

When a loan is effected for the purpose of paying off encumbrances, one of which, at a lower rate of interest than the new mortgage, is not due, and the prior mortgagee refuses to accept prepayment, the new mortgagee cannot treat

that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, but must, until the prior mortgage is paid, charge as against the mortgagor only the interest actually paid to the prior mortgagee.

An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and mortgagee, and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot therefor in such a case as this, charge the mortgagor with the increased rate.

The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the mortgagor and himself, does not make him liable to pay that sum to the mortgagees.

Judgment of the Chancery Division affirmed.

Gibbons, Q.C., for the appellants.

W. H. Blake, for the respondent.

From Chan. Div.] [Jan. 14.

THE BRIDGEWATER CHEESE FACTORY COMPANY *v.* MURPHY.

Company—Bills of exchange and promissory notes—Discount by president.

Where the president of an incorporated company made a promissory note in the company name without authority, and discounted it with the company's bankers, paying the proceeds by cheques in the company name to creditors of the company whose claims should have been paid by him out of moneys which he had previously misappropriated, the bankers, who took in good faith, were held entitled to charge the amount of the note, when it fell due, against the company's account.

Judgment of the Chancery Division, 26 O.R. 327, affirmed, BURTON, J.A., dissenting.

McCarthy, Q.C., *E. Guss Porter*, and *W. Cross*, for the appellants.

Moss, Q.C., *S. Masson*, and *D. E. K. Stewart*, for the respondents.

From C.C. Middlesex.] [Jan. 14.

CONNOLLY *v.* COON.

Landlord and tenant—Lease—Breach by tenant—Damages.

When a tenant leaves the demised premises before the expiration of the term, paying rent up to the time of leaving and notifying the landlord that he does not intend to keep the premises any longer or pay any more rent, the landlord cannot at once recover the whole rent for the unexpired portion of the term. He must either consent to the tenant's departure and treat the term as surrendered, or must treat the term as subsisting and sue for future gales of rent as they fall due.

Judgment of the County Court of Middlesex reversed.

Magee, Q.C., for the appellant.

Rowell, for the respondent.

From BOYD, C.] [Jan. 14.

THOMPSON *v.* SMITH.

Will—Construction—"My lawful heirs."

The general rule that where a testator devises property to his "heirs" the heirs are to be ascertained at the time of his death, is not affected by the fact that in the will specific provision is made for the person answering that description.

Where, therefore, a testator, after a gift to his wife and only child for their joint lives and to the survivor for life, directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs," the child was held entitled to take the residue.

Re Ford, Patten v. *Sparks*, 72 L.T.N.S. 5, applied.

Judgment of BOYD, C., 25 O.R. 652, reversed.

Moss, Q.C., and *MacTavish*, Q.C., for the appellant

Wyld, for the respondents.

From ARMOUR, C.J.] [Jan. 14

PAVEY *v.* DAVIDSON.

Mortgage of foreign land—Action—Fraudulent conveyance.

Where all parties reside in this Province, an action can be maintained in this Province, by a creditor, to have a mortgagee of foreign land declared a trustee, for the debtor, of the moneys secured by the mortgage.

Judgment of ARMOUR, C.J., reversed, OSLER, J.A., dissenting.

Gibbons, Q.C., for the appellants.

Purdom, and *Francis Love*, for the respondents.

From MEREDITH, C.J.] [Jan. 14.

JANES *v.* O'KEEFE.

Landlord and tenant—Lease—License—Covenant to pay taxes—Assessmeut and taxes.

A lease made in pursuance of the Short Forms Act of specifically described premises, contained a provision that the lessee might at any time erect a building or extension over a lane described as being "north of the premises hereby demised," the building or extension to be at least nine feet above the ground, and the lessee covenanted to pay all taxes "to be charged upon the demised premises, or upon the said lessor on account thereof." The lease also contained a provision that if the lessors elected not to renew the lease, they were to pay for the buildings which should at that time be erected "on the lands and premises hereby demised and over the said lane."

Held, per HAGGARTY, C.J.O., and BURTON, J.A., affirming the judgment of MEREDITH, C.J., 26 O.R. 489, that the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane.

Per OSLER, and MACLENNAN, J.J.A., that the right to build was part of the subject matter passing by the lease, and that the lessee was liable to pay the taxes assessable against the portion of the building over the lane.

Held, also, however, that this was at all events a question of assessment, and that although the lessor had been assessed in respect of the lane for its full value as vacant land, and the lessee had been assessed in respect of the extension as merely so much bricks and mortar, the lessor could not recover any portion of the taxes paid by him, the apportionment of the assessment being altogether a matter for the Assessment Department; BURTON, J.A., expressing no opinion on this point.

McCarthy, Q.C., *Johnston*, Q.C., and *N. F. Davidson*, for the appellant.

Moss, Q.C., and *W. H. Lockhart Gordon*, for the respondents.

From ROBERTSON, J.] [Jan. 14.

LONG *v.* CARTER.

Bankruptcy and insolvency—Assignments and preferences—Principal and agent—Trust.

When an agent purchases goods for his principal with money supplied by the principal, there is a trust impressed upon the goods in the principal's favor, and this trust is enforcible against the agent's assignee for the benefit of the creditors, even though the agent has, while purchasing for the principal, also purchased goods of the same kind for himself, and has not set aside specific portions of the goods to answer the principal's claim.

Harris v. *Truman*, 9 Q.B.D. 264, applied.

Judgment of ROBERTSON, J., affirmed.

Gibbons, Q.C., for the appellant.

Crerar, Q.C., for the respondents.

From ROBERTSON, J.] [Jan. 14.

TRUST AND LOAN COMPANY *v.* MCKENZIE.

Mortgage—Owner of equity of redemption—Extension of time for payment —Increase in rate of interest.

An agreement between the mortgagee and the purchaser of the mortgaged premises for an extension of time for payment of the mortgage, in consideration of payment of interest at an increased rate, with a reservation of remedies against the mortgagor, does not operate as a release of the liability of the mortgagor upon his covenant. He is not a mere surety, and if his right of redemption is not affected, or the value of the mortgaged property impaired, he cannot complain.

Judgment of ROBERTSON, J., reversed.

Marsh, Q.C., for the appellants.

Fish, for the respondent.

From STREET, J.] [Jan. 14.

MACTAVISH *v.* ROGERS.

Bankruptcy and insolvency—Assignments and preferences—Action by creditor in assignee's name—R.S.O., ch. 124, sec. 7.

If a preferential security is successfully attacked by a creditor suing under order of the Court in the name of the assignee for the benefit of creditors, he can recover no more than his own claim and costs.

A creditor cannot, after obtaining such an order, increase the amount that he can recover by acquiring the claims of other creditors who have not been willing to consent to the proposed proceedings.

Judgment of STREET, J., varied.

Shepley, Q.C., for the appellant.

Watson, Q.C., and *Smoke*, for the respondents.

From STREET, J.] [Jan. 14.

IN RE HODGINS AND TORONTO.

Municipal corporations—Sidewalks—55 Vict., c. 42, sec. 623 b, (O)

Publication of an advertisement in a public newspaper having a large circulation in the municipality stating that the corporation intend to construct sidewalks in certain named districts, is not sufficient notice to a property owner affected by the proposed work.

The procedure to be observed in passing by-laws for the construction of sidewalks considered.

Judgment of STREET, J., 26 O.R., 480, affirmed.

Fullerton, Q.C., and *Caswell*, for the appellants.

F. E. Hodgins, for the respondent.

From MACMAHON, J.] [Jan. 14.

SMITH *v.* WALKERVILLE MALLEABLE IRON CO.

Company—Share certificates—Estoppel—R.S.O., c. 157, sec. 52.

A Company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R.S.O., c. 157, issued a certificate stating that a certain shareholder was entitled to twenty-two shares of the capital stock, as he in fact at the time was. The shares were not numbered or identified, but the certificate was numbered and contained the words, "Transferable only on the books of the company in person, or by attorney on the surrender of this certificate." The shareholder assigned the shares to the plaintiff for value, and gave the certificate to him with an assignment endorsed thereon. The plaintiff gave no notice to the company and did not apply to be registered as a shareholder until several months had elapsed, and in the meantime the shareholder executed another transfer of the shares for value to an innocent transferee, who was registered by the company as the holder of the shares without production of the certificate.

Held, that the transfer to the plaintiff, in view of the provisions of section 52 of the Joint Stock Companies Letters Patent Act, R.S.O., c. 157, conferred upon him a mere equitable title, which was cut out by the subsequent transfer,

and that while the company might have insisted upon production of the certificate, they are not bound to do so, and were not estopped from denying the plaintiff's right to the shares.

Judgment of MACMAHON, J., reversed, HAGARTY, C.J.O., dissenting.

Lash, *Q.C.*, for the appellants.

Hanna, for the respondent.

From Q.B.D.] [Jan. 14.

MOLSONS BANK *v.* COOPER.

Collateral security—Suspense account—Bank—Estoppel—Execution—Creditors' Relief Act.

A mercantile firm obtained a line of credit from a bank, "to be secured by collections deposited," and made in favor of the bank a number of notes to cover the amount of the advance. They deposited with the bank customers' notes to an amount nearly equal to the advance, and from time to time withdrew notes that fell due and deposited others. They suspended payment, and the bank obtained several judgments against them on such of their notes as were due, and issued executions. The sheriff realized under these and other executions and prepared to make a distribution under the Creditors' Relief Act. The defendants then made an application to compel the bank to credit on the judgments, moneys collected by it upon the customers' notes, and an issue was directed in which it was held that the bank was entitled, by virtue of the agreement entered into, to hold these moneys in suspense as security against any ultimate loss, and was, therefore, not bound to give credit. Then the bank brought an action on other notes that had matured, having at the time a larger sum in the suspense account than the amount for which action was brought. At this time the sheriff expected to pay a further dividend under the Creditors' Relief Act.

Held, per HAGARTY, C.J.O,, and BURTON, J.A., that the bank was entitled to judgment for the full amount of the claim, and was not bound to appropriate the moneys collected to that particular portion of the debt.

Held, also, per HAGARTY, C.J.O., and OSLER, J.A., that at all events the judgment in the issue was conclusive upon this question.

In the result the judgment of the Queen's Bench Division, 26 O.R. 575, was reversed, MACLENNAN, J.A., dissenting.

Shepley, Q.C., for the appellants.

Foy, Q.C., and *J. S. Denison*, for the respondents.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Divisional Court.] [Dec. 14, 1895.

REGINA *v.* COURSEY.

Public Health Act—Conviction under schedule—Issue of distress warrant—Prohibition.

Under a conviction made under sec. 4 of the schedule or by-law appended for Public Health Act, R.S.O., c. 205, the convicting magistrate issued a distress warrant under which the defendant's goods were seized.

Held, that the issue of the distress warrant was a ministerial and not a judicial act, and therefore a writ of prohibition to the magistrate would not lie.

Judgment of ROSE, J., 26 O.R. reversed.

Aylesworth, Q.C., for the magistrates.

Shepley, Q.C., contra.

Divisional Court.] [Dec. 14, 1895.

LARKIN *v.* GARDINER.

Sale of land—Agreement—Option.

A parcel of land having been placed in a land agent's hands for sale, the defendant went to him and offered to purchase it at a less sum than the agent was authorized to sell, whereupon the agent said he would submit the offer to the plaintiff, and procured the defendant to sign a form of agreement for the sale and purchase of the land, which was taken by the agent to the plaintiff, who then signed same, but before the defendant was notified thereof, he gave notice to the agent, withdrawing his offer.

Held that the instrument, though in form an agreement, was in substance a mere offer, and as defendant had withdrawn before he was notified of its acceptance, there was no completed agreement.

Arnold, for the plaintiff.

Bicknell, for the defendant.

Divisional Court.] [Dec. 14, 1895.

REGINA *v.* WOODYATT.

Certiorari—Magistrate—Notice to—Contempt—Attachment.

Where, after the issue of a writ of certiorari for the removal of a conviction made by a magistrate for the purpose of quashing it, which, though served on the Clerk of the Peace, did not come to the magistrate's notice or knowledge, who enforced the conviction by issue of a distress warrant.

Held, that the magistrate could not be held to be guilty of contempt, so as to justify a writ of attachment being issued against him.

McCulloch, for the applicant.

Wilkes, Q.C., contra.

Divisional Court.] [Dec. 14, 1895.

REGINA *v.* FLEMING.

Police magistrate—Ratepayer of city to which fine payable—Paid by salary—Disqualification.

Section 419 (*a*) of the Municipal Act, 1892, which provides that magistrates should not be disqualified from acting as such by reason of the fine or penalty, or part thereof, going to the municipality of which he was a ratepayer, includes a police magistrate.

Where a police magistrate appointed under R.S.O., c. 172, is paid a salary instead of fees, such salary being in no way dependent on any fines

which he might impose, he has no pecuniary interest in the fines, and so is not thereby disqualified.

Semble, that there was no disqualification here at common law.

McCulloch, for the plaintiff.

Wilkes, Q.C., contra.

Divisional Court.] [Dec. 14, 1895.

HOBSON *v.* SHANNON.

Garnishee—New trial—Division Court Act, sec. 145.

The provisions of section 145 of the Division Court Act as to a new trial, do not apply to a garnishee, so as to put him on the same footing as a plaintiff or defendant in an action.

Re McLean v. *McLeod*, 5 P.R., 467, followed.

Re Tipling v. *Cole*, 21 O.R., 276, distinguished.

Raney ,for the appeal.

Cartwright, contra.

Divisional Court.] [Dec. 14, 1895.

MOUNTCASTLE *v.* NORWICH UNION.

Insurance—Agent—Delegation of authority.

C., defendant's local agent, and T. were in the habit of assisting each other in business, and had discussed entering into partnership, though none had been formed. On T. bringing a risk on a mill property to C., C. told T. that as he was better versed in this kind of property, then he (C.) was to inspect it himself, giving him a blank form of application and interim receipt, and telling him if he found the risk a good one, to take the insurance and issue the receipt in the names of C. and T. T. thereupon inspected the property, and being of the opinion that the risk was a good one, signed the receipt as suggested. Subsequently he informed C. of the circumstances, who thereupon wrote to the head office, enclosing the application, and advising the acceptance of the risk, and requesting the general agent, if the risk was not accepted, to wire him, but instead of doing so, the general agent wrote, but in the meantime the property was destroyed by fire.

Held, that C. had no power to delegate his authority, and therefore no liability was imposed on the company.

Summer v. *Commercial Union Ins. Co.*, 6 S.C.R. 19, followed.

The American authorities and *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav. 377, remarked on as being opposed to this decision.

T. J. Blain, for the plaintiff.

McKay, contra.

Divisional Court.] [Dec. 14, 1895.

SHAVER *v.* COTTON.

Company—Action against stock holders—Winding-up Acts.

The plaintiff, on March 30th, 1892, recovered judgment against a company incorporated by letters patent under the Joint Stock Companies Letters Patent Act, upon which a fi. fa. goods was issued, and returned nulla bona, and on April 3rd a winding-up order was issued under R. S. O. c. 29, and

52 Vict., c. 32 (D). Subsequently plaintiff brought an action by way of scire facias against defendant, a shareholder in the company, to recover amount of their judgment out of his unpaid stock. At the trial, on the liquidator being added as a co-plaintiff, within a week, judgment was to be entered for the plaintiff, but in case of failure to do so, the action was to be dismissed with costs ; and by a supplementary judgment, the liquidator not having been added, the action was dismissed, but this was to be without prejudice to any winding-up proceedings ; but on appeal to the Divisional Court, judgment was directed to be entered for the plaintiff.

Remarks as to the difference between Imperial Companies Act, 1862, and our Winding up Acts as to stay of proceedings.

Titus, for the plaintiff.

Raney, for the defendant.

REGINA *v.* OSBORNE.

ARMOUR, C.J., FALCONBRIDGE, J.
STREET, J. [Dec. 21, 1895.

Gaming—Betting—Place therefor—Telegraph office—Conviction—55 & 56 Vict., c. 29, crim. code, secs. 197, 198.

A bank, a telegraph office and another office were simultaneously opened in a town. Parties deposited money in the bank and took receipts therefor, which receipts were taken to the telegraph office, where information as to certain races being run in the United States was furnished, and instructions were sent by telegraph without charge to one B, to place or bet the money represented by the receipts on the races, and if the horses upon which the bets were made won, the party depositing the money was paid at the third office under instructions by telegraph from B.

Held, that the defendant who kept the telegraph office and sent the messages was properly convicted for keeping a common betting house, under sections 197 & 198 of the Code.

John R. Cartwright, Q.C., for the Attorney-General.

Riddell, for the defendant.

Divisional Court] [Dec. 31, 1895.

FARWELL ET AL. *v.* JAMESON.

Landlord and tenant—Distress for rent—R.S.O., c. 143, sec. 28, s. s. 3.

The defendant was the owner of certain premises which he leased to one A., who assigned his lease to the L. & C. Company, which company employed an agent to obtain tenants. Plaintiffs, under an arrangement with the agent, not specifically assented to by the company, obtained the keys, took possession and stored certain pianos there, which were distrained upon and sold by the defendant for rent in arrear.

In an action for illegal distress it was

Held, (affirming the judgment of ARMOUR, C.J.) that the plaintiffs were in "under" the tenant the L. & C. Company, within the meaning of R.S.O., c. 143, sec. 28, s.s. 3, and that they could not recover.

Laidlaw, Q.C., for the appeal.

Kilmer, contra.

Chancery Division.

MEREDITH, J.] [Nov. 26, 1895.

RE CANADA COAL CO.—DALTON'S CLAIM.

Landlord and tenant—Lease—New arrangement of rent—Effect of—Applicable provisions of old lease.

The company were tenants of D. as assignees of a lease in writing containing the provision for the acceleration of six months rent in case the tenant became insolvent.

Before the expiry of the lease an arrangement was made between the company and the landlord for a reduction of the rent, nothing being said as to the other terms of the lease.

On the company being put into liquidation, it was

Held, reversing the Master in Ordinary, that the arrangement made imported the terms of the old lease if applicable, and as this term was applicable and usual, the landlord was entitled to prove for the six months rent.

Shepley, Q.C., for the landlord.

Biggs, Q.C., for the liquidator.

FALCONBRIDGE, J.] [Dec. 30, 1895.

GARING ET AL. *v.* HUNT & CLARIS.

Mechanics lien—Leased premises—Repairs by lesssee—Interest of lessor—"Owner"—Scenic artist—"Mechanic"—"Laborer," etc.—Scenes part of freehold.

C. leased an opera house to H. by lease in writing providing for certain repairs to be done by H. and paid for out of the rent.

H. employed plaintiffs, two scenic artists to paint scenes, &c., who claimed a lien on the premises.

Held, that C. was not an "owner," whose interest may be charged within the meaning of R.S.O., c. 126, sec. 2.

Semble, a scenic artist is not a "mechanic, laborer or other person, who performs labor, &c.," under sec. 6 (1) of the Act.

Quære, whether movable scenery and flying stages are part of the freehold.

C. F. Maxwell, for the plaintiff.

J. A. Robinson, for the defendant Claris.

ROBERTSON, J.] [Dec. 31, 1895.

BELL *v.* GOLDING.

Sale of land—Registered plan—Lane—Sale according to plan—Right to use of lane.

One Marshall, owning a plot of land in Brampton, divided by a plan into five lots and a lane, which lane ran around the west and south sides of lot 4, terminating at the east limit of lot 5, which lay to the west of lot 4. He registered this plan in 1868, and in 1869 he sold to Clarke lots 1, 4 and 5, "together with the lane bordering on said lot 4 as shown by said plan," and in the same year Clarke similarly conveyed the said three lots, together with the said lane, to the defendant. In 1871 the defendant conveyed lot 5 to Dawson, from whom by

various mesne conveyances the plaintiff claimed title to the same, the plaintiff's deed being in 1871, and all the conveyances described the lots as being according to the plan. Neither Marshall nor Clarke, up to the time that he conveyed to the defendant, ever used the lane as a way, and in 1887, the defendant erected a building across the northerly end of the lane and also a stable on the southwest corner of lot 4 and extending across the westerly end of the lane.

Held, that the defendant having by the conveyance from Clarke become the owner of lots 1, 4 and 5, together with the lane as laid out on the plan and having afterwards conveyed lot 5 as laid out on the plan, this amounted to an adoption by him of the plan and the grant by him to Dawson, his grantee, of all ways, rights, etc., appertaining to the lot, amongst which was the lane, and Dawson's title was now in the plaintiff, who therefore had a private right to use the lane, and an order must go as asked, requiring the defendant to remove all buildings, obstructions placed by him on the lane.

McFadden and *Graham*, for the plaintiff.

Blain and *Mahaffy*, for the defendant.

Divisional Court.

MEREDITH, C.J.
ROSE, J. [Jan. 11.

WESTERN BANK *v.* COURTEMANCHE.

Mortgage—Insurance pursuant to covenant—Assignment of mortgage—Equitable assignee of insurance money.

Courtemanche sold certain goods to Dyson & Gillespie, part of the purchase money being secured by promissory notes made by Dyson to the order of Gillespie and endorsed by Gillespie, and also by a chattel mortgage on the goods executed by Dyson, to whom by arrangement between the parties they had been transferred by bill of sale by Courtemanche. This chattel mortgage contained a covenant to insure for the benefit of Courtemanche and his assigns, and insurance was accordingly taken out which was duly assigned to the mortgagee. Courtemanche discounted the notes with the plaintiffs and assigned the chattel mortgage to the plaintiffs, but he did not transfer the insurance. The insurance policy expired and the firm of Dyson & Gillespie, who kept an account with the plaintiffs, renewed it, but it did not appear that the renewal policy was assigned to Courtemanche or the loss made payable to him. Afterwards a fire occurred, the loss being adjusted at $1,600, and Dyson & Gillespie assigned to the plaintiffs the said insurance moneys as security for their indebtedness and the money was duly paid to the plaintiffs. Dyson told the plaintiffs to apply the moneys on the notes above mentioned and the plaintiffs did so, but Gillespie afterwards objecting on the ground that the money should have been applied on the firm account, and that the plaintiffs had no right to apply it on the notes without the authority of the firm, the plaintiffs transferred the moneys to the firm account, which then left a balance to the credit of that account, which was subsequently withdrawn, and now sued Courtemanche on the notes, or rather on renewals of them.

Held, that the plaintiffs could not recover for they were not only entitled,

but bound to apply the insurance money received by them in payment of the notes to which, as between Dyson, Gillespie and Courtemanche, it was primarily applicable, Dyson having acted for the firm when he covenanted to insure the goods in the chattel mortgage for the benefit of Courtemanche as mortgagee, and Courtemanche being equitable assignee of the policy under which the money was paid, and which was a renewal of that which had been affected in accordance with the covenant, and entitled to have the money applied in payment of the notes, and the plaintiffs having taken the insurance moneys as assignees thereof of Dyson & Gillespie, subject to the equitable rights of Courtemanche, of which they had notice.

Hewson, for the plaintiff.

O'Connell, for the defendant.

Cameron, for the third party.

BOYD, C.] [Jan. 22.

LONGBOTTOM *v.* CITY OF TORONTO.

Pleading—Notice under 57 Vict., c. 50, sec. 13 (O)—Want or insufficiency of—Enquiry by Judge—Defendant's prejudice.

The want or insufficiency of the notice under 57 Vict., c. 50, sec. 13 (O) is no bar to an action if the Judge is of opinion there was reasonable excuse or that the defendant was not prejudiced.

Held that it is proper practice for the defendant to set up want of notice in case the statement of claim is silent on the point, and then the Judge can go into the circumstances (if any), excusing the want or insufficiency, and as this was not done in this case and the Judge could not say that the defendants were prejudiced, a motion for judgment in favor of the defendants was refused.

A. M. Denovan, for the plaintiff.

H. L. Drayton, for the defendants.

BOYD, C.] [Jan. 22.

REGINA *v.* ROSE.

Criminal law—Prior and subsequent enactments to same offence—Conviction under prior—55 Vict. c. 42, secs. 167 and 210 (O)—Habeas Corpus.

The very essence cf criminal law is that it should be certain in its sanctions and so plainly expressed as to be intelligible to the sense of ordinary persons.

On a habeas corpus, where a party was convicted of the offence of applying for a ballot paper in the name of another person, under sec. 167 (e) of 55 Vict., c. 42 (O.)

Held, that in view of sec. 210, s. s. 2, of the same Act, which could not be reconciled with sec. 167, as cumulative punishments for the one offence, or, as standing as alternative punishment for the one offence at the option of the magistrate, the conviction was illegal and the defendant should be discharged.

Robinson v. *Emerson*, 4 H. & C. 352, and *Michell* v. *Brown*, 1 *Ell. & Ell.* at page 275, cited and followed.

Murphy, Q.C., for the defendant.

John Cartwright, Q.C., for the Attorney-General.

Practice.

MEREDITH, J.] [Oct. 23, 1895.

HEMING *v.* WOODYATT.

Action against a J.P. and constables—Security for costs—Right of constables to —53 Vict. (Ont.,) c. 23—R.S.O. 1887, c. 73.

This was an action of trespass for assault and false imprisonment brought jointly against the Police Magistrate for the City of Brantford, the Chief Constable, and two inferior police officers thereof. All four defendants applied for security for costs on the authority of 53 Vict., c. 23, which provides that "in case an action or other legal proceeding is brought against a Police Magistrate or other Justice of the Peace in respect of any cause of action to which the provisions of the Act to protect Justices of the Peace and others from vexatious actions is applicable, the defendants may at any time after the service of the writ, apply to the Court or to a Judge for security for costs." The act referred to is R.S.O., c. 73.

Held, on appeal from the Master in Chambers, reversing, in part, his decision, which required security to be given on the costs of all the defendants, that section of 53 Vict., c. 23, O., applies only to a case against a Justice of the Peace, and that the order, therefore, must be limited to the costs to be incurred by the Police Magistrate alone.

WINCHESTER, Master. In Chambers. } [Nov. 7, 1895.

HEMING *v.* WOODYATT.

Pleading—Not guilty by statute—Action against a J.P. and constables—R.S.O. 1887, c. 73—Con. Rule 418.

This was a joint action of trespass for assault and false imprisonment against the Police Magistrate, of the City of Brantford, the Chief Constable of said City and two inferior Police Constables. The action having been stayed as against the Police Magistrate under an order requiring security for costs to be given, the defendant constables pleaded "not guilty by statute" to the statement of claim, by inserting in the margin of their plea the words, "not guilty by statute, R.S.O., c. 73, sec. 4, and subsequent sections of said Act—Public Act."

The Rule which permits this plea to be raised is Rule 418 of the Judicature Act, and reads, "when a defendant pleads not guilty by statute, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the paragraph of the statement of defence containing the plea the words 'by statute,' together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose, were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise, otherwise the plea shall not be taken to have been pleaded by virtue of an Act of Parliament."

It was shown by plaintiff, and not contradicted, that many of the sections subsequent to sec. 4 of the statute claimed by him to have been improperly pleaded, were in no way applicable to the case of a defendant entitled to raise

this plea, and that there were several other sections, scattered here and there in the Act, that might fairly be regarded by the plaintiff as pointing to defences likely to be, or possible of being invoked by the defendants at the trial.

Held, that under the wording which was employed, the plea of not guilty by statute was insufficiently pleaded, and must be struck out, but with the right to the defendants to amend their plea within 7 days by indicating the sections intended to be relied on.

J. W. McCullough, for the plaintiff.

Douglas Armour, for defendants.

Court of Appeal.] [Jan. 14.

PARKER *v.* MCILWAIN.

Attachment of debts—Rents—Ex parte orders—Rescission of—Mortgagee—"Party affected"—Notice to tenants—Attornment—Assignment of rents.

Held, reversing the decision of the Common Pleas Divisional Court, 16 P.R. 555, that mortgagees who had served notice upon tenants of the mortgagor in occupation of the mortgaged premises to pay the rents to them; were "parties affected" by ex parte orders obtained by a judgment creditor of the mortgagor attaching such rents as debts, within the meaning of Rule 536.

And *semble*, per OSLER, J.A., that even without that rule, the practice would have warranted a substantive motion by a third party interested to discharge the attaching orders.

Held, also, that the attaching orders were properly set aside; for although the service of the notice upon the tenants was not in itself sufficient to cause the tenants to hold of the mortgagees, there was satisfactory evidence of an attornment by the tenants; and the notice was signed by the mortgagor under the words, "I approve of the above," which operated as an assignment of the rents to the mortgagees.

W. Cassels, Q.C., and *W. H. Lockhart Gordon*, for the appellants.

Aylesworth, Q.C., and *J. E. Cook*, for the respondent.

BOYD, C., STREET, J. }
MEREDITH, J. } Jan. 16.

CLARKSON *v.* DWAN.

Summary judgment—Writ of summons—Special endorsement—Goods sold—Promissory notes—Status of plaintiffs—Affidavits—Amendment—Compound judgment.

Since the Bills of Exchange Act, 1890, interest on an overdue promissory note may be specially endorsed for, and may be simply claimed as "interest," meaning interest at the statutory rate from maturity, which is now given as liquidated damages.

McVicar v. *McLaughlin*, 16 P.R. 450, followed.

It appeared by the writ of summons that one of the two plaintiffs sued as liquidator of a company, the other plaintiff being also a company.

Held, that an indorsement "for goods sold and delivered during the year 1894 to the defendant by the O. C. Co., whereof the plaintiff C. is liquidator:

$353," was a good, specially indorsed claim on the part of C.; and an endorsement on promissory notes made by defendant, giving dates, amounts, and times when payable, and adding "and assigned to the L. H. C. Co., one of the plaintiffs herein," was a good claim specially indorsed as to the L. H. C. Co., though the way in which that company became assignee was not detailed, there being no suggestion that they were not the legal holders.

Upon a motion for summary judgment under Rule 739, it appeared by affidavits that the plaintiff company were mortgagees of the claims, and the liquidator transferee, subject to the co-plaintiff's claims.

Held, that the affidavits showed that the special endorsement was not in conformity with the facts, and therefore failed to verify it, and no amendment could be permitted upon the motion ; nor could judgment be given, in accordance with the special endorsement, as to one part in favor of the liquidator, and as to the other in favor of the company.

MEREDITH, J., dissented.

A. R. Lewis, Q.C., for the plaintiffs.

F. A. Anglin, for the defendant.

ARMOUR, C.J., STREET, J., FALCONBRIDGE, J. [Jan. 22.

SMITH *v.* LOGAN.

Judgment—Appearance—Default—Tender—Notice.

On the day after the last day for appearance to a specially indorsed writ, the plaintiff's solicitor attended before the officer of the Court to enter judgment for default. The officer proceeded to enter it and was engaged in entering it, but the stamps had not been affixed, when the defendant's solicitor came in with an appearance, which he tendered to the officer, informing him what it was. The officer, however, disregarded the appearance, and completed the entry of the judgment.

Held, per ARMOUR, C.J., that the judgment was regular; for the officer, being seized of the business of entering the judgment, was not obliged to give it up to attend to the appearance.

Per FALCONBRIDGE, J., that the appearance, if received after the time limited, and without the notice required by Rule 281, would be something which the plaintiff's solicitor would not be bound to regard, if he had made search in due time and found no appearance.

Per STREET, J., that by the tender of the appearance in the presence of the plaintiff's solicitor, the officer was stayed in his right to enter judgment, and the judgment which he proceeded to enter was irregular ; and he could not proceed again to enter judgment, even if no notice of appearance were served, until the time for service, that is, the whole of the day of appearance, had expired.

Aylesworth, Q.C., for the plaintiffs.

W. H. Blake, for the defendant, Wilson.

(Leave to appeal granted 31st January, 1896.)

ARMOUR, C. J., STREET, J.
FALCONBRIDGE, J., } [Jan. 23.

WILMOTT *v.* MCFARLANE.

Jurisdiction—Appearance—Defence—Subject-matter of action.

An appeal by the plaintiff from an order of the Master in Chambers dismissing a motion by the plaintiff to strike out the defence of the defendant Caldwell, upon the ground that it was a plea to the jurisdiction, and that the defendant, having been served with process out of the jurisdiction, should have moved to set aside the service, and not having done so, but having entered an appearance, could not now object to the jurisdiction. The defendant's objection to the jurisdiction was not, however, based upon the ground that the case did not come within Rule 271, but upon the ground that the relief sought by the plaintiff, viz., priority as to certain assets in the hands of the defendant Caldwell in the Province of Quebec, could not be granted by an Ontario Court.

A. C. McMaster, for the plaintiff, cited *Boyle* v. *Sacker*, 39 Ch. D. 249; *Preston* v. *Lamont*, 1 Ex. D. 361; *Bell* v. *Villeneuve*, 16 P. R. 413.

W. M. Douglas, for the defendant Caldwell, contended that the appearance only admitted the jurisdiction of the Court over the defendant and not over the subject matter of the action, and pointed out that in such cases as *Henderson* v. *Bank of Hamilton*, 23 O. R. 327, 20 A. R. 646, the question of jurisdiction was raised by plea after appearance, and, although here the defendant resided and was served out of the jurisdiction, that did not affect the question.

Held, that under the circumstances mentioned, the question of jurisdiction could be raised by the defence, and that the appearance did not necessarily give the Court jurisdiction over the subject-matter of the action.

Appeal dismissed with costs.

ARMOUR, C. J., STREET, J.
FALCONBRIDGE, J. } [Jan. 31.

KOHLES *v.* COSTELLO.

Local Judge—Jurisdiction—Injunction—Rule 42 A (1419.)

An appeal by the defendant from an order of the local Judge of the County of Wellington, continuing till the trial an interlocutory injunction granted by him, restraining the defendant from trespassing upon certain lands. The appeal was based upon the ground, among others, that the local Judge had no jurisdiction, without the consent of all parties, to grant an injunction for more than eight days. The defendant did not consent to the local Judge entertaining the motion; but the solicitors for all parties resided in the County of Wellington, in which the action was brought.

Rule 42 A. (1419) provides that a local Judge may, in cases of emergency, grant an interlocutory injunction for a period not exceeding eight days; and sub-rule (*a*) that in any action in which a local Judge has granted an interlocutory injunction under the next preceding clause, *and in which all parties interested consent thereto*, the local Judge may hear, determine and dispose of any

motion to continue, vary, dissolve, or otherwise deal with the injunction ; (*b*) that any person affected may appeal to a Divisional Court ; and (*c*) that every local Judge shall, in actions brought in his own county, possess the like powers as a Judge of the High Court sitting in Court, with regard to hearing, determining, and disposing of the following proceedings and matters, viz. : (1) Motions for judgment and all other motions, matters, and applications (not including trials of actions) where all parties agree that the same shall be heard before such local Judge, or where the solicitors for all parties reside in such county.

Held, that the above special provision with regard to injunctions (*a*) excluded the application of the general provision (*c*) (1) ; and, therefore, although the solicitors for both parties resided in the local Judge's county, he had no jurisdiction to continue an injunction till the trial, unless with the consent of all parties.

The appeal was allowed with costs in Court and below.

Douglas Armour, for the defendant.

William Kingston, Q.C., for the plaintiff.

BOYD, C.] [Feb. 1.

ARMOUR *v.* MERCHANTS BANK OF CANADA.

Judgment—Petition to open up—New evidence—Forum—Rule 782.

An application to open up a judgment on the ground of newly discovered material evidence is provided for by Rule 782, and is properly made in Court to the Judge who tried the action, and is a proceeding in the cause.

F. A. Anglin for the plaintiff.

Shepley, Q.C., for the defendants.

SURROGATE COURT.

COUNTY OF ELGIN.

C. O. ERMATINGER, Q.C.
Acting Judge. [Jan. 14.

Re SAMUEL WILLIAMS AUDIT.

Executors—Payments by—Gift inter vivos—Donatio mortis causa—R.S.O. c. 110, sec. 31—Interest on legacy—Full age.

S. W. died January 9, 1894, having made his will, wherein he bequeathed all his estate to T. and L., his executors, who were to pay debts, certain legacies, and distribute the residue among the grandchildren living at death of deceased. T. and L. administered the estate and petitioned for an audit, etc. The residuary legatees appeared and opposed certain payments to J. W. and G. W., and payments of interest to the charitable legatees. The payments to J. W. and G. W. were founded on two notes, given by the testator to them shortly before his death. It was a question whether there was any consideration for the notes, but the testator insisted upon signing the notes, and as to one of

the notes said he would pay the money if he got better, and if not his executors would ; and there was this memo. at the foot of the other : "If this note is unpaid at my decease, my executors are requested to pay it." It was discussed, but was not thought necessary to decide, whether or not these notes were donationes mortis causa, or gifts inter vivos ; but it was

Held, that these notes having been paid by the executors, they were protected in such payment by R.S.O., c. 110, sec. 31, which provides that "it shall be lawful for my executors to pay any debts or claims upon any evidence that they may think sufficient," and that these notes were under the circumstances "claims" within the meaning of the statute.

The following authorities were referred to on this point : Lewin on Trusts, 8th Am. ed., 592 ; Williams on Executors, 9th ed., 1695-1698, 1740-1 ; and *Reg.* v. *Emery*, 5 Vesey, 144.

J. B. Davidson, for executors.

J. M. Glenn, for adult residuary legatees.

J. A. Kains, for infant residuary legatees.

Province of New Brunswick.

EQUITY COURT.

TUCK, J.] [Dec. 20, 1895.

JONES ET AL. *v.* RUSSELL.

Agreement—Construction of—Patent rights and improvements thereon.

An agreement was entered into between plaintiff and defendant whereby defendant assigned one-half interest in all patent rights, etc., obtained on a certain snow plough, together with all improvements which might thereafter be made upon said plough. The defendant afterwards patented a plough which he claimed to be a new one.

Held, that the agreement extended to the second plough.

The defendant was the inventor of a snow plough known as the "Eagle Wing" plough. Being in need of funds, he sold to plaintiff one-half interest in all patent rights which he might obtain on said plough, and also all improvements thereon. Defendant in 1884 patented the "Eagle Wing" plough, but he became dissatisfied with it, and built a plough which he called the "Wing Elevator Plough," which he also patented. The first patent is for alleged new and useful improvements in snow ploughs, and the second for alleged new and useful improvements in "railway wing snow ploughs." The plaintiffs contended that under the agreement they were entitled to one-half interest in the "Wing Elevator Plough," and the defendant denied this, saying it was in no way an improvement on the first.

The defendant claimed for the second plough, over and above the first :

1st. The one-piece chisel shape steel bit, cutting horizontally the width of the roadbed.

2nd. The steel flanges, each constructed to cut the ice, and to be firmly bolted to the outside grade timbers.

3rd. The link straps and grips to hold the saw tooth joints in connection with the back-bone, at the centre of grade timbers.

4th. The derrick posts with back stays and turn buckles and swinging gaff to support the wings carrying elevators.

5th. A solid bottom constructed of timber 5x12, on its edge, secured by iron bolts.

6th. The pockets, twenty-four inches deep, so constructed as to receive the wings carrying the elevators, thus cleaning bridge guards, target posts and all platforms, also the doors of the roundhouse.

7th. The swivel hatches on deck in rear of pilot house, to support the tops of the wings and to be adjusted from within the pilot house by five single shive blocks.

8th. On the truck frames, the double-bearing journals, one being on the inside of the wheel and one on the outside, thus enabling the forward truck to withstand a pressure of one hundred tons. Also pipe boxes, double housings, with curving wheels.

9th. The male and female double flange couplings, centre plates being safe to run without the ring pin.

10th. There is also a difference in the machinery constructed to carry wings and elevators.

While his claims for the first plough are: (1) Twelve-inch sponsing on the sides. (2) Oscillating power bar. (3) Circular socket joint.

Belyea, for defendant, contended the defendant's second plough was not an infringement of the first one; and, therefore, that the defendant was not accountable to the plaintiff.

Weldon, Q.C., and *McLean*, for the plaintiff, contended that it was a matter of construction of the agreement, and that the principle of infringement was not applicable.

Held, That the fair construction of the agreement was that the plaintiff was to have one undivided half in any patent the defendant might obtain for an improvement on the "Eagle Wing" snow plough, and, therefore, it was immaterial whether or not such patent was an infringement of a former one.

Decree for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

[Owing to the difficulty which our reporter has experienced in obtaining convenient access to written judgments of the Nova Scotia Court, en banc, we have so far been unable to furnish many notes of these decisions. We confidently expect that the difficulty will be shortly removed, and that henceforth we shall be able fully to carry out our intentions in this respect. We have received a number of Chamber cases, which, however, are too late for this issue, but will appear in our next.—ED. C. L. J.]

Province of Manitoba.

COURT OF QUEEN'S BENCH.

BAIN, J.] [Jan. 21.

GRUNDY *v.* MACDONALD.

County Court—New trial—Jurisdiction of County Court Judge—Setting aside judgment.

This was an appeal from an order of Walker, County Judge, setting aside a judgment entered in an action in the County Court of Selkirk, at the trial before Ardagh, County Judge, on 12th July, 1887, as against the defendant, J. R. Macdonald, for the amount of a note given by him for the price of a sewing machine bought from the plaintiff, and allowing him to amend his dispute note by setting up the plea of infancy.

The defendant alleged that at the trial in 1887, he notified the plaintiff that he would raise the plea of infancy, and that the suit was then settled verbally between the parties by the plaintiff agreeing to take back the sewing machine; aud that he, the defendant, never knew that judgment had been entered until plaintiff had recently revived the judgment and issued execution against him. Plaintiff denied that any such agreement had been made.

Held, that under section 224 of the County Courts Act, then in force, the County Court Judge had no jurisdiction to set aside a judgment, or entertain an application for a new trial, or rehearing, after six months from the date when the judgment or decision was pronounced or given, and that the appeal should be allowed with costs.

Culver, Q.C., for plaintiff.

West, for defendant.

KILLAM, J.] [Jan. 23.

LEADLAY *v.* MCGREGOR.

Life insurance—Mutual benefit society—Executors' claim to insurance money—Beneficiary entitled as against executors.

This was a special case submitted for the opinion of the Court, on the following admitted statement of facts. The plaintiffs were the executors of the will of Charles McGregor, deceased, who in his lifetime was a member of an unincorporated society known as the Order of Scottish Clans, which had a written constitution; one of its objects being stated to be to provide a bequeathment fund, from which a sum not exceeding $2,000 should be paid to the beneficiary upon the death of any member.

At the date of the admission of Charles McGregor as a member of the order, the constitution and the regulations of the society provided that the amount named in the certificate of membership should be paid over to the beneficiary designated on his bequeathment certificate, and that no member should assign his bequeathment certificate, nor should such assignment be recognized by any officer of the society, and that such assignment should be

void, and the bequeathment should be paid only to to the beneficiary designated by the member, or to the legal representative of such beneficiary. McGregor had named as his beneficiary his father, the defendant, whose name was accordingly inserted in the certificate.

After the date of the certificate and during the lifetime of the deceased, the bequeathment laws of the society were amended, so as to provide that at the death of a member in good standing, the amount of the bequeathment should be paid to the wife, affianced wife, or relative of, or person dependent upon, such member as designated in his bequeathment certificate.

By his last will and testament, bearing date 5th May, 1894, Charles McGregor appointed the plaintiffs as his executors and trustees, and directed that his life insurance money should be paid to his executors for the purpose of carrying out the trusts of the will ; and about the same time he also signed a memorandum indorsed on the bequeathment certificate revoking the former direction as to the payment of the insurance due at his death, and authorizing and directing such payment to be made to the plaintiffs, who sent it to the officers of the society in order to have the assignment in their favor recognized by the society. The latter, however, refused to recognize it on the ground that it was in contravention of the laws of the order, and returned it to the plaintiffs. Upon the death of Charles McGregor the society refused to pay the insurance money to the executors without the authority of the Court.

The special case stated that the plaintiffs are not, nor is either of them, the wife, affianced wife, or relative of, or person dependent on, Charles McGregor, or persons designated in the certificate.

Held, that the defendant, the beneficiary named in the certificate, was entitled to the money as against the executors of the will of the deceased.

In re William Phillips' Insurance, 23 Ch. D. 235, followed.

Haggart, Q C., for plaintiffs.

Tupper, Q.C., and *Phippen*, for defendant.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN RE H. C. TAYLOR ET AL.

Assessment—Income of advocate or solicitor.

Under the provision of the Municipal Act, which provides that all municipal taxes, etc., shall be levied equally upon the whole rateable property, "real, personal and income, of the municipality, according to the assessed value of such property and income," there can be no assessment of the income of a member of the legal profession, it being impossible to ascertain what his income may be (if any) during the forthcoming year.

[EDMONTON, October, 1895, SCOTT, J.

This was an appeal from Court of Revision of the Municipality of the Town of Edmonton.

The appellants were assessed for $1,500 on income as practising advocates,

and they contended at the Court of Revision and on the appeal that such income was not assessable in the North-West Territories. The sections of the municipal ordinance that were in question are fully quoted in the judgment.

S. S. Taylor, Q.C., for appellants.

N. D. Beck, Q.C., for the municipality.

SCOTT, J.—Section 1 of part 1 of the Municipal Ordinance provides that "all municipal, local or direct taxes or rates shall, where no other express provision has been made in this respect," be levied "equally upon the whole rateable property, real, personal and income, of the municipality, according to the assessed value of such property and income." No other provision is made as to the assessment and taxation of income, except that the income of a farmer derived from his farm, and the income of merchants, mechanics and other persons, derived from property liable to taxation, is exempt. It is not shown how the amount of the income is to be ascertained, or upon what it is to be based. It is admitted that the appellants in these cases are practising advocates, and doubtless the assessment is based on what would be considered their income from their profession during the present year, but I can find no authority, such as there is in Ontario, to base it upon the income derived by them during the preceding year. The income of a professional man fluctuates, and because he may have obtained certain profits for a portion of the time, up to the time of the assessment, it cannot reasonably be inferred that he will continue to make the same profits at the same rate during the remainder of the year, or even that the profit made by him up to the time of the assessment may not be swallowed up by losses made in his practice during the remainder of the year.

In *Lawless* v. *Sullivan*, 6 Appeal Cases 373, it was held that the word "income" in the New Brunswick Assessment Act, when applied to a commercial business, meant the balance of gain over loss, and that when no such gain has been made during the year there is no income or funds capable of being assessed; but it was contended by Mr. Beck, on behalf of the town, that there is a distinction between the income of advocates derived from their profession, and that derived from trade and commerce. Truly there may be such a distinction in some respects, but I do not see any reason why the income of an advocate should not be held to be the balance of gain in his practice, over the losses therein. In view of the fact that it is impossible to ascertain the amount of appellant's income for the year, I must hold that the assessment cannot stand. The assessment in respect of appellant's income will, therefore, be struck out.

PERSONALIA.

SIR HENRY PELLEW CREASE.

On the 17th of January last, the Bench and Bar of British Columbia said good-bye to Sir Henry Pellew Crease, on his retirement from the Bench of that Province; and he was congratulated on the honour of knighthood recently conferred upon him as a tribute to his long and faithful services. The Judges of the Supreme Court were present, as well as a large number of the Bar, and many friends of the retiring Judge. Chief Justice Davie, on behalf of the Bench, paid a graceful tribute to the services of Sir Henry during a judicial career of more than 25 years, and expressed a hope that he might live for many years in the enjoyment of his well-earned repose. The Attorney-General, on behalf of the Bar, voiced the feeling of the Bar and the people of the Province, expressing similar sentiments. The retiring Judge made a feeling reply.

In referring to this event, a leading paper in Victoria thus speaks of it: "Sir Henry P. Pellew Crease is one of the pioneers of British Columbia; he has witnessed the development of the Province from a mere trading post to a comparatively large and flourishing community, which promises in the not distant future to be still larger and more flourishing. He has done his share towards making this far Western Province peaceful and law-abiding. Its Bench, on which he has long occupied a seat, has been remarkable for its integrity and the courage, firmness and ability with which it has administered the laws of the land. The new Knight's ability as a judge has gained for him the respect of British Columbians generally, and his uniform courtesy, his geniality and his amiability secured for him hosts of friends in every part of the Province. Sir H. P. P. Crease carries with him in his retirement the esteem and the good wishes of all who have had the privilege of making his acquaintance in any capacity."

We would add our tribute to that of the Bench, Bar and Press of British Columbia. Sir Henry has always been a warm friend of this Journal, and we are indebted to him for many acts of courtesy and helpfulness. We would add, that whilst we may, speaking generally, congratulate the people of the various Provinces of the Dominion upon the ability and integrity of their Judges, not among the least favored is the Province of British Columbia.

Sir Henry Crease was born in 1823, in Cornwall, England, educated at Cambridge, and called to the Bar of the Middle Temple in 1849. In 1858 he went to the gold-fields of the West, and was the first practising Barrister and father of the Bar of Vancouver Island and British Columbia. After serving for some years as Attorney-General and as member of the Legislative Council, he was appointed, in 1870, senior Puisne Judge of the Supreme Court of British Columbia, whose Chief was then Sir Matthew Begbie. Like his Chief, he was strong in head and hand, but with a warm heart; and they were just the men for the position which they occupied in a country in which, at that time, prompt justice, rigorously enforced, was as necessary as sound law.