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THE Bench of the Province of Quebec has suffered a great loss in the death, last week, of Sir Francis Godschall Johnson, Kt., Chief Justice of the Superior Court of Lower Canada. The late Chief Justice was born in England on January 1st, 1817, but was educated in France. From 1855 to 1858, he was Recorder at Fort Garry. From thence he went to Montreal, where he acted as Crown Prosecutor for the District of Montreal, and from this stepping-stone to the Bench he was appointed judge of the Superior Court, subsequently becoming its Chief Justice. Chief Justice Johnson was known as a brilliant speaker, and a master of the English and French languages. It is said that his successor will probably be Sir Napoleon Casault, of Quebec.

IT is much to be regretted that the efforts of those members of the profession who desire to centralize the business of the courts so as to keep in their own centres has met with undeserved success. Sittings of the High Court of Justice are, after January 1st next, to be held at Ottawa and London one day in each week, except during vacation, for the hearing of causes disposable by a single judge. It is a curious commentary upon political parties in this Province that this radical change should, to a large extent, have been forced upon the conservative Premier of a so-called Reform government by the persistent efforts of the radical leaders of a so-called Conservative opposition. Of course such a change suits the *vox populi*, but it is, we venture to assert, entirely opposed to the sober, matured thought of those who look only at the general good. It may not be of much importance that two judges should be inconvenienced by a weekly

tramp to the two ends of the Province; but it is of some consequence, apart from the general arguments against decentralization, that the time of the judges should be wasted for the sake of keeping a few dollars in the pockets of counsel in Ottawa and London. The new system will cause a direct loss of three days of judicial time every week in travelling alone; for we see no reason why a judge should be required to travel by night to Ottawa and back, and then work all day. Again, where is this new departure to stop? Why should the profession in these two cities be the only favoured ones? Why not also Hamilton, Brockville, Kingston, Belleville, Peterboro, Barrie, Sarnia, Windsor, St. Thomas, etc., etc.? Why should not a judge be every week at every county town? There should be no favouritism, no monopolies. This is a free country. The people pay for the judges; why should not all have a fair share of them, even if these servants of the people do have to rush wildly about the country with their judicial robes flying in the wind, in a vain effort to bring justice to every man's door? By and by, we shall have a Rule of Court providing that counsel and witnesses shall attend at various specified railway stations, ready to jump on the "judicial express," their cases to be heard as the train flies on to the next stopping place. Of course, being now judicial "drummers," this peripatetic court would be entitled to reduced railway fares, to be paid by a grateful and admiring country—accident policies thrown in.

THE following observations taken from a recent issue of the *Times* anent the Judicial Committee are not inappropriate at this juncture. We commend them to the attention of those who may desire to know what is thought of that august body by such a good authority as the Thunderer:—"To Englishmen of sluggish imagination, no more wholesome discipline can be commended than an occasional glance at the proceedings of the Judicial Committee of the Privy Council. No more picturesque tribunal exists upon this earth than this assemblage of staid lawyers met together in a dull room in Whitehall to tender their 'humble advice' to Her Majesty. Perhaps the fact is best realized at a distance, for, although the court has its own quaint observances, it must be owned that the sittings are not particu-

larly impressive to the eye. But the most casual acquaintance with the history of the Privy Council fills the mind with memories dating back to the dawn of our national story, whilst the records of its routine business comprise minute discussions on the religions and the superstitions, the laws, institutions, domestic habits, manners, customs, and antiquities of scores of different races and tribes, with civilizations ranging from primitive savagery to complicated systems elaborated by generations of saints and sages, and sanctioned by immemorial time. The evolution which has resulted in making this particular development of the council of Plantagenet kings the supreme arbiter of questions of canon law such as popes and synods would have disputed about in the days of Becket; of questions of the old French laws transplanted across the Atlantic under the proudest of the Bourbons; of the Roman law which the Dutch took with them to the Cape; of the most venerable and sacred of the holy books of the Hindus; and of the teachings of the Prophet to scores of millions of the devout adherents of Brahmanism and of Islam—is, indeed, a process to wonder at. The Judicial Committee is the legal heart and head of the British Empire. The Queen in Council is the Cæsar to whom all the subjects of that empire, from the hill tribes of the Himalayas to the Red Indians beyond the Rocky Mountains, from mighty potentates contending for the succession to a principality to poor fishermen claiming the right to gather bait, may appeal. Men come to her from the uttermost ends of the earth for justice, and tell the innermost history of their private lives before her appointed tribunal. The case which the court had to determine on Saturday came from Cyprus, and turned upon the question whether the *status* of the natural children of a Roman Catholic father who had married an orthodox Greek, and purported to legitimate his children by such marriage, was to be regulated by canon law or by Mahomedan law. The questions incidentally discussed go back to the days of the lower empire, and the early middle ages, while the actual decision largely rests upon the view taken by the committee of the past history of the island, and of the ordinary position of Christians living under Mahomedan domination."

PROVINCIAL LEGISLATION OF 1894.

Some important laws and amendments have been added to the long list of Ontario's statutory enactments by the work of the session which has just completed its labours. Several of them are apparently simple; but, on closer examination, they are found to be far-reaching in their effects.

Let us commence with the Act to amend the Registry Act, 1893. By reducing the fee for registering a mortgage a great reduction will be made, amounting to about twelve per cent. on the gross income of nearly every registrar in the Province. Owing to the numerous clauses which have been added from time to time by loan companies and others to the ordinary short form, the cost of registering these instruments has been materially increased, until the average fee for registering mortgages, in Toronto, for instance, is $2.55, or even more. By the amendment now in force, if the mortgagee or his solicitor writes on the back of the mortgage, "not to be registered in full," the document shall not be copied, but simply entered in the abstract index and receiving book, and the fee for registering in such a case shall be one dollar. That this is a wise provision, and entirely in the interest of the public, no one can dispute. The fees for mortgages are always paid by those least able to afford it—the borrowers—and any relief, however small, in the individual case, is of importance. It is, perhaps, worthy of remark that the fact of the mortgage not being copied takes away a safeguard against fraud, which may work harmfully. Several cases have occurred, we are credibly informed, where a fraudulent mortgagee has made an alteration in the duplicate mortgage in the registry as well as the one in his own possession. The chances of detection would be much less under the new system, where the only check would be the short entry in the abstract book.

The important element, however, is the reduction of registrars' incomes. About one-third of the instruments registered are mortgages. In each of the Toronto offices, this would make about 1,700 mortgages during the year 1893. The cost of copying each mortgage is roughly estimated at forty cents. The total fee is $2.55. This leaves $2.15 to the registrar, so that the Act takes away $1.15 profit to the registrar on every mortgage. This makes the aggregate loss nearly $2,000 a year to each office.

One-half of this formerly went to the city under the rebate clause. The registrar loses the other half, and the Government the percentage on the net income by the amount by which it is reduced. As the ordinary staff has to be kept up for general work, the expenses remain the same as formerly, except the small outlay for copying. Even the most exacting economist, Patron or otherwise, could not reasonably expect a more effective means of reducing the revenue of these officials, if such reduction is deemed desirable. This will be somewhat made up by the increased allowance for searching original mortgages instead of the copies, but even then the reduction will be large in many offices.

Another measure which will have the effect of curtailing fees, and so reducing the incomes of the large agency firms in Toronto, is that providing for sittings of the High Court at London and Ottawa. A High Court judge is required to be in attendance at least one day of each week at these places to hear and dispose of all proceedings which may be heard and disposed of before a single judge in court, or by a judge in Chambers, but not business within the jurisdiction of the Master in Chambers or local judge. Provision is made for keeping an agency book at each of those cities, and doubtless many country solicitors will avail themselves of the opportunity of what may be thought a more speedy way of disposing of business. So far as this enactment tends towards decentralization, it is an evil, which the profession will some day realize more fully than at present. The above provisions do not come into effect until January next.

The June sittings of the High Court for York are abolished for this year, and also for future years, unless the judges deem it necessary to appoint a day for that purpose. This will, of course, depend on the state of business. The system of practically holding a continuous court here has rendered this step expedient, although, so far, it has not succeeded in clearing off the jury list. A number of jury cases entered for the last jury sittings are standing until the September court.

To those judges who believe in the doctrine of opening courts at daylight, the amendment limiting the time on the opening day to one o'clock in the afternoon will prove somewhat of an obstacle in the way of carrying out their wishes. In many of the outer counties, it is impossible for jurors and witnesses to reach the county town by ten or eleven o'clock in the morning,

unless they leave their homes the day before, for which no allowance could be made, and the new provision, enabling them to arrive at the court and leave their homes on the same day, seems to be a reasonable one.

In regard to executions, several changes have been made. In Division Court matters, an execution in cases of $40, or over, may be issued by the clerk of the Division Court against the lands of the debtor, directed to the sheriff of the county wherein the debtor's lands are situated. This will save all the unnecessary delay and expense attendant on the issuing of transcripts, making them County Court judgments, and issuing executions thereon. The execution against goods must, however, be first returned *nulla bona* to the Division Court bailiff. In the event of the title to land, or the validity of any devise, bequest, or limitation under a will or settlement coming in question in a suit in the Division Court, otherwise within its jurisdiction, the action shall not be dismissed, but may be removed to the High Court by *certiorari* on the usual terms.

A change has been made as to writs of execution. Whilst not an advocate of sweeping reductions in fees, by which the profession might be unreasonably deprived of a portion of their hard-earned incomes, THE LAW JOURNAL is always willing to admit the justice of a proper economy. From and after the 1st January, 1895, one writ against both goods and lands will be issued, instead of separate writs, as heretofore, and such writ is to "remain in force for a period of three years without renewal." We presume this period runs from the date of the writ, or renewal, as the case may be; possibly, it may have been intended that all writs at present in the hands of a sheriff shall remain in force for three years from the passing of the Act. Perhaps it was intended by the very careless and obscure wording of this section to provide work for the profession in interpreting it, and thus give some solatium for taking away fees on renewals, if, indeed, a writ can now be renewed. If it is intended to do away with the renewal of writs, it would, we suppose, be necessary to return to the old practice of alias or pluries writs.

An amendment has been made to the 531st section of the Consolidated Municipal Amendment Act, 1892, which, although intended to stop a number of speculative actions against municipal corporations, will likely give rise, for a time at least, to

increased litigation. It provides "that no municipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice, upon the sidewalks, unless in case of *gross* negligence by the corporation." The draftsman clearly did not comprehend the effect of the term thus imported into the section. A reference to some of the English cases shows that there is no virtue in the word "gross," as applied to negligence. Rolfe, B., in *Wilson* v. *Brett*, 11 M. & W. 113, says that *gross* negligence is the same thing as negligence, with the addition of a vituperative epithet. In *Hinton* v. *Dibbin*, 2 Q.B., at p. 661, Lord Denman says "it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists." And, in *Fitzgerald* v. *Grand Trunk R.W. Co.*, 4 A.R., p. 623, the late Chief Justice Moss states the law to be "that the courts are now resolved to ignore mere verbal distinctions between different degrees of negligence as defining the true measure of liability." There is another case bearing on this point which may be read with interest—*Grill* v. *General Iron Screw Colliery Co.*, 35 L.J. C.P. 324, reported also in L.R. 1 C.P. 600. See also L.R. 8 Q.B. 57. This being the law, it is conceived that the mere use of the word "gross" in the statute cannot give any different meaning to the word "negligence" than the one it now has; but the question will likely come before the courts in one of the numerous cases always cropping up for trial in Toronto.

By c. 21 more liberal powers are given over property for the maintenance of infant children in cases where there is a gift-over in the event of there being no children to take under a power, or where the tenant for life or other person has power to dispose of the property in favour of persons other than the children.

Accounts need not now be passed in the Surrogate Court within the eighteen months by an executor or administrator where the estate is under $1,000, unless at the instance of some person beneficially or otherwise interested. Estates over $1,000 are placed in the same position until after next session, Surrogate Rule 19 being suspended. Surrogate fees on estates between $400 and $1,000 are reduced to one-half.

In order to provide against a recurrence of the difficulty which arose in *Pierce* v. *The Canada Permanent Loan and Savings Co.*, 24 O.R. 426, a short Act has been passed which provides that the mortgagee shall be protected to the full amount of his mort-

gage moneys, although part thereof is not advanced to the mortgagor at the date of a subsequent mortgage on the same property, if the first mortgagee had not actual notice of the second mortgage when he advanced the balance of the money, and registration of the second mortgage shall not constitute actual notice. The Act only applies to transactions occurring after the passing of the Act.

It is now made law (c. 41) that "any married woman, under twenty-one years of age, who is of sound mind, may bar her dower in any land or hereditaments by joining with her husband in a deed or conveyance thereof to a purchaser for value or a mortgagee, in which a release or bar of dower is contained, and she may, in like manner, release her dower to any person to whom such lands or hereditaments have been previously conveyed." The words "to a purchaser for value or a mortgagee" were not in the bill as introduced by the Attorney-General; and we fail to see any sufficient reason for their insertion. Would a person taking title under the above circumstances require to obtain evidence as to whether the vendee was a purchaser for value? This might be inconvenient, and cause delay and expense. Must her husband be a party in the second case above referred to? And what is the meaning of "in like manner"? It seems to us that it would have been much simpler and would save litigation to provide that any woman under the age of twenty-one, entitled to dower, could bar the same in the same way, and as completely, as if she were of full age.

The Landlord and Tenant Act, R.S.O., c. 143, is amended by allowing the interest of the tenant in any goods in his possession under a contract to purchase, or by which he may become the owner thereof, to be seized under a distress for rent.

Provision is made for a barrister of ten years' standing becoming a solicitor, and *vice versa*, on payment of the fees, and without passing an examination. Many solicitors have already taken advantage of this section to become "statute-made barristers." Practitioners in either branch for five years, and less than ten years, must still pass the examinations, but are relieved from attendance at the Law School.

A sensible provision is made for enabling the holder of a benefit certificate in a benefit society to have the interest and rights of the beneficiary forfeited and annulled where the latter is leading a criminal or an immoral life.

Two Acts have been passed which may or may not be important, according to the use that may be made of them. One is the creation of a Chamber of Arbitration by the Toronto Board of Trade for the settlement of disputes generally, without confining it to Board of Trade matters; and the other, the Council of Conciliation, intended as a remedy for the amicable adjustment of difficulties between labour and capital. It is to be regretted that the machinery provided is not more simple. This journal has, on more than one occasion in the past, advocated a scheme of this nature; but it may be expected that, as between the two remedies now before litigants, the one provided through the ordinary channel of the courts is preferable, and will continue to be utilized.

The law of newspaper libel is dealt with at some length, and to this we may refer more particularly on some future occasion.

For the session immediately preceding a general election, or what is known as the "penitential session," there is good reason for congratulating the Legislature on the amount of remedial legislation which will be found in the statutes of 1894.

Acts which in their nature are matters of policy, such as the Separate School Ballot Act, are not included in this review of sessional work.

THE DITCHES AND WATERCOURSES ACT.

[COMMUNICATED.]

The session of the Ontario Legislature for this year has been more than usually fruitful in strictly legal enactments, and changes have been made in some branches of the law which will prove of a somewhat comprehensive character. The old and well-beaten highway of municipal law was almost deserted by the country's representatives, but as a sort of equitable compensation, and a parting shot at the legislative term which closed on the 5th of May, the wisdom of the Assembly concentrated itself on the ever fresh and interesting subject of Ditches and Watercourses. No less than eighteen pages of the *Ontario Gazette* "special" are taken up with a consolidation, amendment, substitution, and repeal of prior laws on the matter, except those relating to municipal or government drainage work, and the Act passed in the 53rd year of Her Majesty, and the amendment thereto.

This effort of the expiring term appeals to one in a sympathetic way. When all other subjects of legislation are exhausted, when the weary, and sometimes wearisome, representatives have probed every other enactment to the bottom, and when there is nothing else on which the legislator can operate, and pose as a statesman before the admiring eyes of his wondering constituents, he turns with all the fondness of a mother for her child to the perennial Ditch and Watercourse, and there finds a congenial theme, and one worthy the aspirations and genius of the greatest minds of the Province, of which his mind is always the most prominent. To most readers, this enactment will prove as interesting as the most sensational novel. Even in the usually prosaic interpretation clauses we find poetic fancies. It is said in the opening sections of this Act that "engineer" shall mean civil engineer, that "owner" shall mean an owner, and that a "ditch" shall mean a drain. This is really sublime! And so on throughout the Act we find erudition and the very refinement of phraseology rampant, if we may use the expression. The classic spade and pick-axe stand out in bold relief, and one might easily fancy that he stood knee-deep in mud and water, hewing out a track through the rear field of some ancestral farm to join the great drain in the tenth concession, as he reads the brilliant paragraphs and romantic episodes contained in this now, let us hope, final masterpiece. The engineer takes a solemn oath of office before he is admitted to the mystic lodge of Ditchers and Watercoursers. He becomes a sort of Grand Templar of the Ancient Order of Drainers. Then, under solemn form, the man who dares to make a ditch must provide it with an outlet. Think of that grave responsibility! This long-felt want must not be "cribbed, cabbined, and confined," although its capacity is limited modestly to seven lots. What is home without a mother? and, *ergo*, what is a ditch without an outlet?

The sacred line of liability of co-owners is marked at seventy-five rods, but this, by special dispensation of the grand council, may be extended twenty-five rods further, if the ditch falls in pleasant places anywhere east of the historic county of Frontenac. Some further swearing is done, but the engineer, having exhausted his vocabulary, the function devolves upon the owner, who, as we have seen, is graphically declared by the Act to mean the—owner. If the rural birds in their little ditches do not agree, the duty of

peacemaker falls upon the unfortunate engineer, who must, by the Act, be a *civil* engineer, and give no impudence to the farmer or Patron. Then come the mysteries of appeals—a sort of third degree amongst the members of the order, at which the county judge officiates, and pronounces the ultimatum. He is a sort of czar, for he may deprive the poor engineer of all his fees, and send him to the last ditch of starvation. This is not all. If the engineer has been guilty of "ways that are dark," not only does he lose his fees, but he may be the recipient of numerous writs against him by any of the parties to the proceedings.

The old ditches must not be neglected. Their memory must not be allowed to become a thing of the past. They are to be kept green and be decked with posies; otherwise terrible calamities will happen to the owners of these worn-out, decrepit old ditches which are helplessly lying loose around the farm, perhaps fit only for the poor-house. The crowning charm of the Act, however, is the provision for reconsideration. The gallant knight at the head of provincial affairs often takes important matters into his consideration, but except in the delicate subject of drains there is no instance on record of reconsideration being allowed. This is doubtless owing to the greater importance of ditches as state affairs, and the only surprising part of it is that another portfolio has not been added to the cabinet in order that the patronage of ditches should be carefully and wisely exercised.

Then come the drainage laws, consolidated, and, of course, amended, filling nearly forty pages of the *Gazette* with most valuable and delightful vacation literature. Want of space prevents further comments, but the beautiful sections and rounded periods which roam quite promiscuously in fancy over the whole forty pages can be equalled only by the eloquence of the pending campaign. And these are not the ordinary vulgar drains of everyday life, not the nasty, odorous, typhoid storehouses of Toronto, but the sweet and wholesome township aqueducts, rivalling those famous in the history of ancient Rome. Think of holding biennial sessions after these massive works of legislation! Life is too short even to give our readers more than a glimpse of their grandeur; and now that the cap-sheaf has been placed on these monuments of wisdom it is to be hoped it will not be taken off for many sessions for the purpose of adding further stories to an erection already much too large for all practical purposes.

CURRENT ENGLISH CASES.

The Law Reports for April comprise (1894) 1 Q.B., pp. 533-670; (1894) P., pp. 105-151; and (1894) 1 Ch., pp. 449-598.

LIMITATIONS, STATUTE OF—21 JAC. 1, C. 16—4 & 5 ANNE, C. 16, S. 19—(R.S.O., C. 60, S. 5)—INTERNATIONAL LAW—AMBASSADOR, IMMUNITIES AND PRIVILEGES OF—ABSENCE BEYOND SEAS—SERVICE OF WRIT OUT OF JURISDICTION—ORD. XI. (ONT. RULE 271).

In *Musurus* v. *Gadban*, (1894) 1 Q.B. 533, the plaintiff sued as executor of Musurus Pacha to recover certain bonds in the hands of the defendants. The defendants counterclaimed for a debt due by Musurus Pacha. The plaintiff set up that the debt was barred by the Statute of Limitations (21 Jac. 1, c. 16). It was admitted that Musurus Pacha was Turkish ambassador to England from 1856 until December 7, 1885, being in the same month succeeded in office by Rustum Pacha. The debt for which the defendants counterclaimed was incurred while Musurus Pacha was ambassador. He continued to reside in England from 7th December, 1885, until February, 1886, when he left England for Turkey, where he resided until his death in 1890. No action was brought or writ issued in respect of the counterclaim. Two questions were discussed. First, as to the rights and liabilities of an ambassador, and how long his immunity from suit lasts; and, second, as to the effect of Ord. xi. (Ont. Rule 271), giving power to sue a defendant residing out of the jurisdiction, on the Statute of Limitations, 4 & 5 Anne, c. 16, s. 19 (R.S.O., c. 60, s. 5), which virtually saves the right of a plaintiff against a defendant who is out of the jurisdiction when the cause of action accrues until his return within the jurisdiction. As to the first point, Wright and Lawrance, JJ., determined that an ambassador's immunity from suit continues for a reasonable period after he has presented his letters of recall, and that in the present case the period from 7th of December, 1885, to February, 1886, was not an unreasonable period to enable the ambassador to wind up his affairs in England, and that he was not deprived of the immunity from suit by reason of his successor having been appointed. They therefore held that the Statute of Limitations did not begin to run, as against his creditors, during that period. On the second point they were also agreed that the provisions in the Rules enabling a plaintiff to sue a defendant resident out of

the jurisdiction, did not have the effect of superseding the provisions of the statute of Anne (see R.S.O., c. 60, s. 5), and that the claim of the defendants was therefore not barred.

CRIMINAL LAW—EMBEZZLEMENT—THEFT—ILLEGAL ASSOCIATION—THEFT BY CO-OWNER—31 & 32 VICT., C. 116, S. 1—(CRIMINAL CODE, S. 311).

In *The Queen* v. *Tankard*, (1894) 1 Q.B. 548, a case was reserved on the point whether a person who was a member of an association which was illegal under the Companies Act, 1862, for want of registration could be convicted of embezzlement of the funds of the association under 31 & 32 Vict., c. 116, s. 1 (see Criminal Code, s. 311). Lord Coleridge, C.J., and Mathew, Grantham, Lawrance, and Collins, JJ., answered the question in the affirmative. Notwithstanding that the association had not conformed to the law, Lord Coleridge said: "It would be a very strong thing to hold that an association not expressly sanctioned by law, yet not criminal, is incapable of holding any property at all." We may here note that the Canadian Criminal Code appears to have virtually abolished the technical distinction which formerly existed between theft and embezzlement, and all such crimes are classed in the Code under "Theft."

PROHIBITION—WANT OF JURISDICTION APPEARING ON THE FACE OF THE PROCEEDINGS—ACQUIESCENCE.

Farquharson v. *Morgan*, (1894) 1 Q.B. 552, may be noted for the fact that therein the Court of Appeal (Lord Halsbury, and Lopes and Davey, L.JJ.) reaffirmed the well-settled principle that where on an application for a prohibition it manifestly appears on the face of the proceedings that the inferior court has no jurisdiction, a prohibition must be awarded *ex debito justitiæ*, even though the applicant may have acquiesced in the exercise of jurisdiction by the inferior court; though it seems it is otherwise, and in the discretion of the court, where the want of jurisdiction is latent, and depends on some fact within the knowledge of the applicant which he has neglected to bring to the attention of the inferior court, and where he has delayed moving for a prohibition.

INTERPLEADER—PAYMENT OF MONEY INTO COURT BY CLAIMANT TO ABIDE ISSUE—MONEY PAID OUT TO EXECUTION CREDITOR—ESTOPPEL.

In *Haddow* v. *Morton*, (1894) 1 Q.B. 565, the Court of Appeal (Lord Esher, M.R., and Lopes and Davey, L.JJ.) have affirmed the judgment of Charles and Wright, JJ. (noted *ante* p. 123).

LIQUOR LICENSE ACT—PERMITTING DRUNKENNESS ON PREMISES—IGNORANCE OF LICENSED PERSON—LICENSING ACT, 1872 (35 & 36 VICT., C. 94), S. 13—(R.S.O., C. 194, S. 73).

Somerset v. *Wade*, (1894) 1 Q.B. 574, was a case stated by magistrates. The defendant, a licensed person, was charged with permitting drunkenness on his premises, in contravention of the License Act, 1872 (35 & 36 Vict., c. 13), s. 1 (see R.S.O., c. 194, s. 73). It appeared that a woman was, in fact, drunk on the defendant's premises, but that the defendant did not know that she was drunk, and the information was therefore dismissed; and, as Mathew and Collins, JJ., held, rightly so.

DISTRESS—DAM. FEASANT—DISTRESS, HOW FAR A BAR TO ACTION FOR DAMAGES.

Boden v. *Roscoe*, (1894) 1 Q.B. 608, was an action to recover damages caused by the defendant's pony entering the plaintiff's premises and kicking his filly and trampling his grass. The plaintiff distrained the pony damage *feasant*, and still held it in his possession. The County Court judge before whom the action was tried was of opinion that an animal could only be distrained damage *feasant* for injury to the freehold or ps; and that, therefore, the fact that the plaintiff still retained possession of the pony was no bar to his action so far as he claimed to recover for damages to his filly. But Mathew and Cave, JJ., were of opinion that this view of the law was wrong, and that a distress damage *feasant* may be made for all damage done; and therefore that, so long as the plaintiff held the distress, he could not sue for any damage whatever done by the pony, and the action was therefore dismissed.

COMPANY—SALE OF UNDERTAKING—CALL—DEATH OF SHAREHOLDER—NOTICE OF CALL WHEN SHAREHOLDER IS DEAD—EXECUTORS.

New Zealand Gold Co. v. *Peacock*, (1894) 1 Q.B. 622, was an action by a liquidator to recover the amount of a call on stock. The defendants were executors of the deceased shareholder, and resisted payment, on the ground that the call was alleged to have been made *ultra vires*, and also on the ground that there had not been proper notice of the call. The articles of association empowered the company to sell its undertaking to any other similar company. The company, acting under this provision, sold their undertaking to another company, and, in accordance with the terms of sale, called up their unpaid capital and paid the

amount to the purchasing company. The defendants contended that the sale of the "undertaking" did not authorize the calling in and transfer of unpaid capital; but Kennedy, J., held that it did, and the Court of Appeal (Lindley, Smith, and Davey, L.JJ.) affirmed his decision. The articles of association also provided that fourteen days' notice of calls should be served on the members personally or through the post-office, addressed to the member at his registered address. No provision was made for notice in case of the death of a shareholder. After the defendants' testator had died, a call was made and notice sent through the post-office to his registered address; this notice was subsequently returned to the company marked "Gone away." The Court of Appeal agreed with Kennedy, J., that, notwithstanding the shareholder's death, the notice was sufficient, and the defendants were liable to pay the call out of the assets of their testator.

PRACTICE—COSTS—COSTS OF FORMER TRIAL ORDERED TO ABIDE "RESULT OF NEW TRIAL"—"RESULT," MEANING OF—RECOVERY OF NOMINAL DAMAGES—CERTIFICATE FOR COSTS REFUSED.

In *Brotherton* v. *Metropolitan District Ry.*, (1894) 1 Q.B. 666, a new trial had been granted, and the costs of the former trial were ordered to abide the result of the new trial. At the new trial the plaintiff succeeded in recovering a farthing damages, and the judge refused to certify for costs. The plaintiff contended that he was, nevertheless, entitled to tax the costs of the former trial; but the Court of Appeal (Lord Esher, M.R., and Lopes and Davey, L.JJ.) were agreed that the "result" meant the result as to costs, and, therefore, that the plaintiff was not entitled to the costs of the first trial.

PRACTICE—WRIT—SPECIAL INDORSEMENT—PAYMENT OF PART OF CLAIM AFTER WRIT ISSUED—JUDGMENT, ON DEFAULT OF APPEARANCE, SIGNED FOR MORE THAN IS THEN DUE—ORD. XIII., r. 3.

Hughes v. *Justin*, (1894) 1 Q.B. 667, is another practice case. The writ was specially indorsed. Before service of the writ the defendant paid the amount claimed by the writ except the costs; he did not appear in the action, and the plaintiff signed judgment for the full amount indorsed, with costs. The plaintiff issued execution for the costs only. The defendant paid the sheriff, and then applied to set aside the judgment and execution. The Court of Appeal (Lord Esher, M.R., and Lopes and Davey, L.JJ.)

held that the judgment was irregular, and should have been entered for the costs only. They therefore set aside the judgment and execution with costs, less the costs to which the plaintiff was entitled up to signing judgment, but not the costs of the judgment, as it was irregular.

PRACTICE—COSTS—EXPROPRIATION OF LANDS—COSTS OF PAYMENT OUT OF PURCHASE MONEY—JURISDICTION AS TO COSTS—ORD. LXV., R. 1 (ONT. RULE 1170)—SUPREME COURT OF JUDICATURE ACT, 1890 (53 & 54 VICT., C. 47), S. 5.

In re Fisher, (1894) 1 Ch. 450, the Court of Appeal (Lindley, Kay, and Smith, L.JJ.) held that, although Ord. lxv., r. 1 (Ont. Rule 1170), did not confer any jurisdiction on the High Court to award costs in cases in which it had not previously jurisdiction to do so, yet that the Judicature Act of 1890, s. 5, had done so, and enabled the court to award costs of payment out of purchase money for lands expropriated under a special Act, though formerly the court had no jurisdiction to award such costs. The section referred to is as follows: "5. Subject to the Supreme Court of Judicature Act, and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." There appears to be no similar provision in Ontario. See, however, the recent Act as to costs of proceedings before a judge as a *persona designata*, 56 Vict., c. 13, s. 5 (O.).

EXECUTORS—LIABILITY OF EXECUTOR FOR DEFAULT OF CO-EXECUTOR—PUTTING ASSETS INTO SOLE CONTROL OF CO-EXECUTOR.

In re Gasquoine, Gasquoine v. *Gasquoine*, (1894) 1 Ch. 470, it became necessary to consider the rule laid down in *Candler* v. *Tillett*, 22 Bev. 257, where it was held that an executor is liable for the default of his co-executor, where he does any act by which the co-executor obtains sole possession of the assets of the estate. In the present case the testator's estate was entitled to a large amount of American railway bonds, which it became necessary to sell. They were issued payable to bearer, but the holder could register them, after which they could be transferred only by entry on the books of the company, but the owner could

unregister them so as to make them again payable to bearer. The bonds were registered in the name of the testator, and the executor could have sold them as registered bonds, or unregister them and then sell. It was proved that the former course was extremely unusual. James, one of the executors, was a stockbroker, and had been the testator's broker, and he was authorized by the will to charge for business done by him as a stockbroker for the estate. The other executors, for the purpose of the sale, unregistered the bonds, and placed them in the hands of James for sale. He sold them from time to time, and paid considerable sums into a bank to the credit of the testator's estate; but he ultimately absconded, having misappropriated a considerable part of the proceeds. The action was brought by the testator's children, seeking to make all the executors answerable for the loss; but the Court of Appeal (Lindley, Kay, and Smith, L.JJ.) affirmed the decision of Kekewich, J., that the co-executors were not liable, on the ground that the placing of the bonds in the hands of James for sale could not be regarded as an *unnecessary* act, and that the rule laid down by Lord Romilly in *Candler* v. *Tillett* must be qualified to that extent Another point in the case was whether there had been any undue delay in calling James to account. The bonds were placed in his control in July, 1890. Down to November, James had paid into the estate £12,000; he had then, in fact, sold all of the bonds, and misappropriated about £9,000. One of the executors applied to him in April, 1891, for information about the sales, and was told that he hoped to get the matter closed before the end of June. He absconded in May, 1891, having up to that time been in good standing, and carrying on a large business as a stockbroker. The Court of Appeal agreed with Kekewich, J., that the executors, having no reason to distrust James, had not been guilty of negligence so as to make them liable for the loss.

MARRIAGE SETTLEMENT—CONSTRUCTION—WIFE'S PROPERTY—ULTIMATE TRUST FOR NEXT OF KIN OF WIFE—"DIE WITHOUT HAVING BEEN MARRIED," MEANING OF.

Stoddart v. *Saville*, (1894) 1 Ch. 480, was an action for the construction of a marriage settlement, whereby a fund, the property of the wife, was assigned to trustees upon trust to dispose of the same as the wife should, in writing, direct, and, in default, to pay the income to her for life, and after her death for such persons

as she should appoint, and in default of appointment for such persons as, under the statute of distribution of intestates' estates, would, on her death, have been entitled thereto if she had died possessed thereof intestate, "and without having been married." The wife made no appointment, and died leaving one child of the marriage. The contest was whether the nephews and nieces, or the child, of the deceased lady had the right to the fund. The whole difficulty arose from the words "without having been married," and the decisions on that point were conflicting; the weight of authority, however, appears to be in favour of the view that those words in a marriage settlement have not the effect of excluding the wife's issue, and Chitty, J., so decided, holding that the words are satisfied by excluding the husband, and he declined to follow the decision of Jessel, M.R., in *Emmins* v. *Bradford*, 13 Ch.D. 493, to the contrary. Notice of appeal was given, but the case was subsequently compromised.

WILL—CONSTRUCTION—DEMONSTRATIVE OR SPECIFIC LEGACY.

In re Pratt, Pratt v. *Pratt*, (1894) 1 Ch. 491, a testatrix who died beneficially entitled to a sum of £1800 of 2¾ consols by her will bequeathed two legacies of £800 each, and one of £700, "invested in 2½ consols," she having, in fact, no consols answering to that description. The question was whether these legacies were specific or demonstrative legacies. North, J., upon the merits of the case, and also on the authorities was of the opinion that what the testatrix must be deemed to have intended to do was to apportion the consols she actually held, and that the legacies were specific.

PRACTICE—ORDER FOR PAYMENT OF MONEY INTO COURT—ADMISSION BY DEFENDANT—ORD. XXXII., R. 6—(ONT. RULE 756).

In re Beeny, Ffrench v. *Sproston*, (1894) 1 Ch. 499, it is only necessary to refer to for the purpose of pointing out that the English Rule, Ord. xxxii., r. 6, is wider in its terms than the analogous Ont. Rule 756. In this case it was held by North, J., that a plaintiff suing for an account against a trustee was entitled to move under the English Rule to compel the defendant to pay the trust fund which, before action, he had verbally admitted to be in his hands into court, such admission not being denied.

Such a motion would not appear to be possible under Ont. Rule 756, as under that Rule the admission must be found either in the pleadings or in the examination of the party.

SOLICITOR AND CLIENT—COSTS—TAXATION BETWEEN SOLICITOR AND CLIENT—ABORTIVE ORDER OF COURSE—RIGHT TO ISSUE SECOND ORDER OF COURSE.

In re Taylor, (1894) 1 Ch. 503, on 24th October, 1893, a client obtained a common order to tax his solicitors' bill of costs delivered on 10th May, 1893, and also another bill alleged to have been delivered 27th October, 1892. The taxing officer decided that the alleged bill of 27th October, 1892, was not a bill of costs, but merely a list of disbursements, and as the order directed him to tax two bills he declined to act at all on the order. Subsequently, the solicitor applied to tax his costs of this abortive order, which the Master declined to do, because the order fixed a time for him to make his report, which had expired; but he intimated that it would be fair for the client to pay the solicitors £2 2s. for the costs, which the client's solicitors agreed to do; but before their offer was accepted they issued a second order of course to tax the bill of 10th May. On motion of the solicitors this was held by North, J., to be irregular, on the ground that after the first order had become abortive the client was not entitled to issue a second order of course, but ought to have made a special application, which would not have been granted except on the terms of paying the solicitors' costs of the first order. He, however, refused to discharge the second order, but directed the Master to tax the bill, and also to tax the solicitors' costs of the former proceedings, and of the motion, and bring them into the account.

PARTITION—PARTY WALL—TRESPASS—MANDATORY INJUNCTION—REVERSIONER.

In *Mayfair Property Co.* v. *Johnston*, (1894) 1 Ch. 508, two points are discussed. The plaintiffs and defendants were tenants in common of a party wall which divided the gardens at the rear of their respective houses. The plaintiffs pulled down part of the wall, and subsequently re-erected a wall in its place as part of the wall of a new house which they erected on their premises. The defendants brought an action to restrain them from so doing, and thereupon the plaintiffs brought the present action for partition of the party wall. North, J., held that the plaintiffs were entitled to a partition of the wall, which he decreed to be made vertically

and longitudinally through its centre, notwithstanding that the defendants objected to the partition. In rebuilding the wall the plaintiffs had encroached upon the defendants' land some inches in making the foundations. The defendants claimed a mandatory injunction to compel the plaintiffs to remove the stone and material which encroached on their land, but North, J., declined to grant the injunction, because to do so would require the plaintiffs to enter the land of the defendants, which was in the possession of their tenant, who was not a party, and also because the stone and other material had become the defendants' property, which they could deal with as they pleased; but he held that the defendants were entitled to damages for the trespass, which he fixed at £15, as being the probable cost of removing the encroachment. One other point arose in the case, and that was, whether the defendants, who were the reversioners in fee, were entitled to sue for the trespass, their tenant not complaining; and North, J., held that they were, because the injury was of a permanent nature.

PARTNERSHIP—ACTION FOR DISSOLUTION AND RETURN OF PREMIUM—ARBITRATION, AGREEMENT FOR—STAYING PROCEEDINGS.

Belfild v. *Bourne*, (1894) 1 Ch. 521, was an action by a partner for dissolution of the partnership and a return of the premium paid by him. The articles provided for a reference to arbitration in case of difference as to the construction of the articles, "or as to any division, act, or thing to be made or done in pursuance thereof, or to any other matter or thing relating to the said partnership or affairs thereof," but there was no express provision for any reference as to the return of the premium. The defendant applied to stay the proceedings, and to refer the matters in difference to arbitration, and Stirling, J., made the order, holding that, under the articles, the arbitrators would have power to award a dissolution, and, as a necessary incident, the proper terms on which it should take place, including, if necessary, the return of the premium.

COMPANY—DIRECTOR—QUALIFICATION—IMPLIED AGREEMENT TO TAKE SHARES—ESTOPPEL.

In re Printing, Telegraph & Construction Co., (1894) 1 Ch. 528, an application was made by a director of a company to remove his name from the register in respect of certain shares which had

been allotted to him, which, he contended, he had never agreed to take. The articles of the company provided that the directors should be allowed one month from the first general allotment of shares in which to acquire their qualification; and that the office of director was to be vacated if he failed to acquire the requisite number of shares. The applicant signed the memorandum of association for one share, which was not a sufficient qualification for a director; he was appointed a first director, and attended several board meetings, but never applied for his qualification shares. At the first general allotment, however, without his knowledge, his qualification shares were allotted to him, and he was placed on the register in respect of them. He ceased to act as a director at the expiration of the month, and as soon as he heard that his name had been placed on the register he requested to have it removed, which the company refused to do, and claimed payment of the shares so allotted. Stirling, J., held that the applicant was not bound to take the shares, and that there was no implied agreement on his part to do so; and that in order to fix a director with liability in respect of his qualification shares on the basis of an implied agreement, he must have acted as a director at a time when he could not properly so act without possessing the qualification.

COMPANY—SIMILARITY OF NAME—RIGHT OF FOREIGN COMPANY TO TRADE IN ENGLAND UNDER ITS CORPORATE NAME—INJUNCTION.

In *Saunders* v. *The Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537, the plaintiff was the registered public officer of the Sun Life Assurance Co., an English company which had carried on business in England for more than eighty years. The defendants were an incorporated Canadian company doing business *bona fide* in England for ten years past; and the action was brought to restrain the defendants from carrying on business in England in their corporate name, or in any name similar to that of the company represented by the plaintiff, or to restrain them from dropping the words "of Canada" from their title. On a motion for an interloctury injunction, Stirling, J., while holding that the defendants had a perfect right to use their corporate name in doing business in England, yet, under the circumstances, he was of opinion that they were not justified in doing business in the name of "The Sun," or "the Sun Life."

dissociated from the words " of Canada," and, on the defendants undertaking to refrain from so doing, he adjourned the motion to the trial.

MARRIED WOMAN—SEPARATE ESTATE ACQUIRED AFTER CONTRACT—MARRIED WOMEN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S. 1, S-SS. 3, 4; S. 4—(R.S.O., C. 132, S. 3, S-SS. 2, 3, 4; S. 6).

In re Ann, Wilson v. *Ann*, (1894) 1 Ch. 549, is a decision of Kekewich, J., on a point arising under the Married Women's Property Act, 1882, which seems to be rather more favourable to creditors than the ordinary run of decisions under that Act. It appears, however, opposed in principle to some of the decisions of the Court of Appeal, to which we shall presently refer. At the same time, we are inclined to believe it correctly carries out the real intention of the Act. The facts of the case were that a married woman, not having any separate estate at the time, incurred certain debts; subsequently, she acquired a general power of appointment in respect of certain property, and the short question was (the married woman having died) whether such property was liable to satisfy the debts incurred before she acquired the power. Kekewich, J., held that it was. The statute of 1882 was no doubt intended to get over the defect in the previous statute, which was held only to enable a married woman to contract so as to bind the separate property which she had at the date of the contract, and which she still had when the action was brought, and not any after-acquired separate estate: *Pike* v. *Fitzgibbon*, 17 Ch.D. 454. The Act of 1882 expressly makes after-acquired property liable (see R.S.O., c. 132, s. 3, s-s 4); but, since that Act, it has been repeatedly held that in order to enable a married woman to contract at all she must, at the time of the contract, have some separate estate of a substantial character: *Braunstein* v. *Lewis*, 65 L.T.N.S. 449; *Stogdon* v. *Lee*, (1891) 1 Q.B. 661; *Palliser* v. *Gurney*, 19 Q.B.D. 519; *Moore* v. *Jackson*, 16 App. R. 431. Assuming these cases to have been well decided, it would seem to follow that the debts in question, being contracted whilst the married woman had no separate estate, were not liabilities for which her after-acquired separate estate would be liable; and as s. 4 (R.S.O., c. 132, s. 6) only makes property as to which the married woman exercises a general power of

appointment by her will liable "in the same manner as her separate estate is made liable," it would seem to follow that as separate estate acquired after the contracting of the debts would not have been liable, so neither would the property as to which she subsequently acquired the power of appointment. However, as we have said, the decision of Kekewich, J., is the other way.

SOLICITOR—LIEN OF SOLICITOR—COSTS—TRUSTEES—MARRIAGE SETTLEMENT.

In re Lawrance, Bowker v. *Austin*, (1894) 1 Ch. 556, a solicitor who had been employed by the husband to draw a marriage settlement, after its execution, claimed a lien on the settlement for the costs of drawing it, as against the trustees; but it was held by Kekewich, J., that as against them the solicitor had no lien on the deed, and was bound to deliver it up to them on request, and he refused to order the trustees to pay the solicitor's costs out of the trust estate.

Notes and Selections.

LORD HANNEN.—It may not be too late to give some extracts from an obituary notice, in our English namesake, of this eminent judge, who, as our readers are aware, died on the 26th March last: "As an advocate, all that he aimed at was lucidity, and this quality his speeches preserved in a remarkable manner. While on the Bench he cultivated, with success, a more ornate style of speech. His judgments and summings-up were frequently models of pure and graceful English, and were notable for the number of apt illustrations they contained, and in the felicity of his phrases could be recognized the scholar as well as the judge. For five years Mr. Hannen was junior counsel to the Treasury. He was raised to the Bench in 1868. For four years he sat in the Queen's Bench, where he distinguished himself by the versatility of his learning and the independence of his judgment. In 1872 he became judge of the Probate and Divorce Court. Three years later he was appointed President of the Probate, Divorce, and Admiralty Division. During the sixteen years he held this office he proved himself to be almost the ideal judge for such a tribunal. It will, however, be his extra-judicial

labours which will keep his memory alive longest. The laborious task he began in 1888, as President of the Parnell Commission, and which he performed in a manner in every way worthy of the 'great occasion,' will give his name an enduring place in the records of our time. Throughout the one hundred and twenty-nine days covered by the inquiry the judgment and bearing of Sir James Hannen were never disputed by the keenest partisan, while the industry and care with which he penned the greater part of the report received a universal tribute of praise. Not less valuable was the service he rendered the country on the Behring Sea Fisheries Commission, the satisfactory settlement of the difficult questions being largely due to his skill in tactics and charming manner. It is a somewhat remarkable coincidence that on the day on which Lord Hannen died Sir Charles Russell moved the first reading of the Behring Sea Bill in the House of Commons, and that within a few hours of his decease Major Le Caron, who played so prominent a part as a witness in the Parnell inquiry, died. He was appointed a Lord of Appeal in 1891, and retired in the 'long vacation' of last year. His experience and learning eminently fitted him to sit in the Final Court of Appeal, and one or two of the judgments he delivered displayed his great powers of keen reasoning and lucid exposition, but his opportunities were not numerous enough to enable him to show the full extent of his attainments."

DIARY FOR JUNE.

1. Friday.....Convocation meets. First Parliament in Toronto, 1797.
3. Sunday.....*2nd Sunday after Trinity.*
4. Monday.....Lord Eldon born, 1751.
5. Tuesday.....Battle of Stoney Creek, 1813.
6. Wednesday. .Sir John A. Macdonald died, 1891.
8. Friday.....First Parliament at Ottawa, 1866.
10. Sunday.....*3rd Sunday after Trinity.*
11. Monday.....County Court sittings for motions in York. Lord Stanley (Earl Derby), Gov.-Gen., 1888.
15. Friday.....Magna Charta signed, 1215.
16. Saturday.....Battle of Quatre Bras, 1815.
17. Sunday.....*4th Sunday after Trinity.*
18. Monday.....Battle of Waterloo, 1815.
20. Wednesday...Ascension of Queen Victoria, 1837.
21. Thursday.....Proclamation of Queen Victoria. Longest day.
24. Sunday.....*5th Sunday after Trinity.* St. John Baptist.
25. Monday.....Sir M. C. Cameron died, 1887.
26. Tuesday.....Convocation meets.
28. Thursday.....Coronation of Queen Victoria, 1838.
29. Friday.....St. Peter.
30. Saturday.....Jesuits expelled from France, 1880.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [Feb. 20.

VIRGO *v.* CITY OF TORONTO.

Municipal corporation—By-law—Power to "license, regulate, and govern" trade—Partial prohibition—Discrimination—Repugnancy.

By a by-law of the city of Toronto, hawkers, petty chapmen, and other small traders were prohibited from pursuing their respective callings on certain streets comprising the principal business part of the city, and covering an area of about ten miles.

Held, that the authority given to municipal councils by s. 495 (3) of the Municipal Act to license, regulate, and govern trades did not empower the city council to pass this by-law, which was, therefore, *ultra vires*. Judgment of the Court of Appeal (20 A.R. 435) reversed, FOURNIER and TASCHEREAU, JJ., dissenting.

A by-law of the city council provided that hawkers and peddlers of fish, etc., and smallwares that could be carried in a hand basket, should not be required to take out a license.

Held, that a subsequent by-law fixing the license fee for hawkers and peddlers of fish was not void for repugnancy. Judgment of the Court of Appeal affirmed, GWYNNE and SEDGEWICK, JJ., dissenting.

DuVernet for the appellants.

Mowat for the respondents.

Quebec.] [Feb. 20.

THE QUEEN *v.* CIMON.

Petition of right— 46 Vict., c. 27 (P.Q.) — Contract — Final certificate of engineer—Extras—Practice as to plea in bar not set up.

A contract entered into between Her Majesty the Queen in right of the Province of Quebec and F. X. Cimon, Esq., for the construction of three of the Departmental buildings at Quebec contained the usual clauses that the balance of the contract price was not payable until a final certificate by the engineer in charge was delivered showing the total amount of work done and materials furnished, and the cost of extras and the reduction in the contract price upon any alterations. There was a clause providing for the final decision by the Commissioner of Public Works in matters in dispute upon the taking over or settling for the works. The Commissioner of Public Works, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge, by his final certificate, declared that a balance of $31.36 was due upon the contract price, and $42.84 upon extras.

The suppliants, by their petition of right, claimed, *inter alia*, $70,000 due on extras. The Crown pleaded general denial and payment.

The Superior Court granted the suppliants $74.20, the amount declared to be due under the final certificate of the engineer. On appeal, the Court of Queen's Bench for Lower Canada (appeal side) increased the amount to $13,198.77, interest and costs.

Held, reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court, that the suppliants are bound by the final certificate given by the engineer under the terms of the contract.

Per FOURNIER and TASCHEREAU, JJ., dissenting, that as the final certificate had not been set up in the pleadings as a bar to the action, and that there was an admission of record by the Crown that the contractor was entitled to 20 per cent. commission on extras ordered and received, the evidence fully justified the finding of the Court of Queen's Bench that the commission of 20 per cent. was still due and unpaid on $65,837.09 of said extra work.

Appeal allowed with costs.

G. Stuart, Q.C., for the appellant.

G. Amyot, Q.C., for the respondent.

Nova Scotia.] [Feb. 20

NIXON *v.* THE QUEEN INSURANCE CO.

Fire insurance—Condition of policy—Particular account of loss—Failure to furnish—Finding of jury—Evidence.

A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, etc., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire, and in lieu of the required account he delivered to the agent of the insurers an affidavit, in

which, after stating the general character of the property insured, he swore that his invoice book had been burned, and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of, and found the loss to be between $3,000 and $4,000.

An action on the policy was defended on the ground of non-compliance with said condition. On the trial, the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, etc. (as in the conditions), were not answered. The trial judge gave judgment in favour of N., which the court *en banc* reversed, and ordered judgment to be entered for the company.

Held, affirming the decision of the court *en banc*, that as the evidence conclusively showed that N., with the assistance of his clerk, should have made a tolerably correct list of the goods lost, the condition was not compiled with.

Held, further, that as under the evidence the jury could not have answered the questions they refused to answer in favour of N., a new trial was unnecessary, and judgment was properly entered for the company.

Appeal dismissed with costs.

Borden, Q.C., for the appellant.

Harrington, Q.C., and *Mellish* for the respondents.

Nova Scotia.] [Feb. 20.

PARKS *v.* CAHOON.

Title to land—Disseizin—Adverse possession—Paper title—Joint possession—Statute of Limitations.

A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's County, N.S., of which the grantor had been in possession up to 1850, when C. entered upon the portion in Lunenburg County, which he occupied until his death in 1888. The grantee under the deed never entered upon any part of the land, and in 1866 he conveyed the whole to a son of C., then about 24 years old, who had resided with C. from the time he took possession. Both deeds were registered in Queen's. The son shortly after married, and went to live on the Queen's County portion. He died in 1872, and his widow, after living with C. for a time, married P. and went back to Queen's County. P. worked on the Lunenburg land with C. for a few years, when a dispute arose, and he left. C. afterwards, by an intermediate deed, conveyed the land in Lunenburg County to his wife.

On one occasion P. sent a cow upon the land in Lunenburg County, which was driven off, and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C.'s widow for such entry, the title to the land was not traced back beyond the deed executed in 1856.

Held, affirming the decision of the Supreme Court of Nova Scotia, that C.'s son not having a clear documentary title, his possession of the land was limited

to such part as was proved to be in his actual possession, and in that of those claiming through him; that neither he nor his successors in title ever had actual possession of the land in Lunenburg County; and that the possession of C. was never interfered with by the deeds executed, and, having continued for more than twenty years, he had a title to the land in Lunenburg County by prescription.

Appeal dismissed with costs.

McInnes for the appellant.

Borden, Q.C., for the respondent.

Nova Scotia.] [Feb. 20.

FRASER *v.* FAIRBANKS.

Sale of land—Sale subject to mortgage—Indemnity of vendor—Special agreement—Purchaser trustee for third party.

L.F. agreed in writing to sell land to C.F. and others, subject to mortgages thereon, C.F. to hold same in trust to pay half the proceeds to L.F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated, and L.F. became a member, receiving stock as part of the consideration for his transfer. C.F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against L.F. to recover interest due on a mortgage against the property, C.F. was brought in as third party to indemnify L.F., his vendor, against a judgment in said action.

Held, reversing the decision of the Supreme Court of Nova Scotia, TASCHEREAU and KING, JJ., dissenting, that from the evidence it appeared that the original agreement contemplated the sale being to the company and not to C.F., and the latter was not liable to indemnify the vendor.

Appeal allowed with costs.

Borden, Q.C., for the appellant.

Harris, Q.C., for the respondent.

Nova Scotia.] [Feb. 20.

SALTERIO *v.* CITY OF LONDON FIRE INSURANCE CO.

Fire insurance—Condition against assigning policy—Breach of condition.

A condition in a policy of insurance against fire provided that if the policy or any interest therein should be assigned, parted with, or in any way incumbered, the assurance should be absolutely void, unless the consent of the company thereto was obtained and endorsed on the policy. S., the insured under said policy, assigned by way of chattel mortgage all the property insured and all policies of insurance thereon, and all renewals thereof, to a creditor. At the time of such assignment S. had other insurance on said property, the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the mortgage of the policy by S. without such consent made it void, and he could not recover the amount insured in case of loss.

Appeal dismissed with costs.

Harrington, Q.C., for the appellant.

Newcombe, Q.C., for the respondents.

Nova Scotia.] [Feb. 20.

MORSE *v.* PHINNEY.

Chattel mortgage—Affidavit of bona fides—Compliance with statutory form—R.S.N.S., 5th ser., c. 92, s. 4.

By R.S.N.S., 5th ser., c. 92, s. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides* "as nearly as may be" in the form given in a schedule to the Act. The form of the jurat to such affidavit in the schedule is: "Sworn to at . . . in the county of . . . . this . . . day of . . . A.D. . . . . Before me . . . a commissioner," etc.

Held, reversing the judgment of the Supreme Court of Nova Scotia GWYNNE, J., dissenting, that where the jurat to an affidavit was "sworn to at Middleton, this 6th day of July, 1891," etc., without naming the county, the mortgage is void, notwithstanding the affidavit was headed "in the County of Annapolis," and that the defect was not cured by c. 1 s. 11, of the same series, providing that where forms are prescribed slight deviations from forms, not affecting the substance nor calculated to mislead, shall not vitiate them. *Archibald* v. *Hubley* (18 S.C.R. 116) followed; *Smith* v. *McLean* (21 S.C.R. 355) distinguished.

Appeal allowed with costs.

Borden, Q.C., for the appellant.

Harrington, Q.C., for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [May 21.

HURDMAN *v.* CANADA ATLANTIC R.W. CO.

Negligence—Railways—Licenses—Volenti non fit injuria—Loan of engine and crew—Evidence of.

In an action under Lord Campbell's Act for damages arising from the death of a servant of a lumber company, who was engaged in counting lumber in a car of the defendants' in the lumber company's yard, caused by his being squeezed between two piles of lumber, owing, as the jury found, to the negli-

gence of the defendants' servants in charge of an engine in giving the car too strong a push,

Held, (1) that, assuming knowledge on the part of the crew of the engine of the position of the deceased in the car, it would be a negligent act to propel the car so rapidly against another as to be likely to injure him, and, there being a conflict of evidence as to the rate of speed, the case could not have been withdrawn from the jury.

(2) That the knowledge of the crew that the deceased was in the car, and of the probable consequences to him of the work in which they were engaged, if done without due care, imposed upon them a duty, whether he was there as a mere licensee or otherwise, to use the care necessary to avoid causing that injury.

Batchelor v. *Fortescue*, 11 Q.B.D. 474, distinguished.

(3) The finding of the jury that the deceased voluntarily accepted the risks of shunting did not entitle the defendants to judgment; he voluntarily accepted the risks of shunting, but did not give the defendants leave to run the risk of killing him by doing their shunting negligently.

Smith v. *Baker*, (1891) A.C. 325, applied and followed.

(4) Upon the evidence, there was no loan to the lumber company, by the defendants, of the engine and its crew, and the fact that the latter were acting under the direction of the servants of the lumber company in moving such cars as they were told to move did not make them the servants of the lumber company.

Cameron v. *Nystrom*, (1893) A.C. 308, followed.

McCarthy, Q.C., and *Kidd* for the plaintiff.

Wallace Nesbitt for the defendants.

FERGUSON, J.] [March 27.

CONFEDERATION LIFE ASSOCIATION *v.* TOWNSHIP OF HOWARD.

Municipal corporation—Drainage—Void by-law—Debenture issued under—Action on—Estoppel—Money had and received.

In an action to recover the amount of a debenture issued by the defendants pursuant to their by-law No. 16 of 1893, passed for the levying of a special rate upon a particular locality for the purpose of cleaning out and repairing a drain,

Held, following *Alexander* v. *Township of Howard*, 14 O.R. 22, and *Re Clarke* v. *Township of Howard*, 16 A.R. 72, that the by-law was void, the defendants having no power to pass a by-law for such a purpose.

The debenture was silent as to the purposes for which it was issued, but referred to the by-law under which it was issued, which disclosed the purposes. There was no representation by the defendants that it was good.

Held, that although the plaintiffs were innocent holders and had paid the full value of the debenture they could not recover upon it, because the defendants had no power to make the contract professedly made by it.

Webb v. *Commsssioners of Herne Bay*, L.R. 5 Q.B. 642, distinguished.

Marsh v. *Fulton County*, 10 Wallace S.C.U.S 676, specially referred to.

Held, however, that as the defendants were bound to keep the drain in repair and to pay for repairs out of their general funds, and as they had received the price of the debenture directly from the plaintiffs and had the full benefit of it, without giving any consideration, the plaintiffs were entitled to recover their money, as money received by the defendants.

J. C. Hamilton and *Snow* for the plaintiffs.

M. Wilson, Q.C., and *E. Bell* for the defendants.

ROSE, J.] [May 16.

BELL *v.* TOWNSHIP OF BROOKE.

Drainage—Municipal corporations—Drain on line between townships—Maintenance and repair—R.S.O., c. 184, s. 586—Liability for damage by overflow.

Action for damages for bringing water upon the plaintiff's land by means of a drain constructed by the defendants. The work was commenced in 1874, and completed in the autumn of 1875. The drain was constructed for the purpose of relieving lands in the township of Brooke, and was dug along the concession line between the twelfth and thirteenth concessions until it reached the town line between Brooke and Enniskillen, where it was turned at right angles, in a southerly direction, along and upon the town line until it found an outlet. So much of it as was on the town line was not in either township, but, in the opinion of the engineer, it benefited lands in Enniskillen, and contribution was exacted from the residents of that township whose lands were benefited. No authority was given to the township to dig the drain on the town line, or to bring water thereon.

Held, that the duty of maintenance and repair of the portion of the drain on the town line could not be charged upon the township of Enniskillen, but that s. 586 of the Municipal Act, R.S.O., c. 184, should be so read as to provide for maintenance and repair by the township of Brooke.

Held, upon the evidence, that by reason of the drain more water was brought upon the town line at certain seasons than was carried away, and some of it came upon the plaintiff's premises.

Held, therefore, that the defendants were liable, first, for bringing water upon the plaintiff's premises which would not have come there in ordinary course; secondly, for neglect of duty in not keeping the town line drain in repair, that is, for not deepening, extending, or widening it sufficiently to carry off the water which was brought down to the town line; and, thirdly, for bringing water to the town line without authority and not providing a sufficient drain to carry it away; and whether or not the drain when originally constructed was fit for the performance of its work was not material.

W. R. Meredith, Q.C., and *Moncrieff*, Q.C., for the plaintiff.

Osler, Q.C., and *Lister*, Q.C., for the defendants.

Chancery Division.

BOYD, C.] [April 18.

ROBERTS *v.* BANK OF TORONTO.

Artizan's lien—Manufacture of bricks on property of another person—Possession.

Where the plaintiff was employed to manufacture for another bricks in a brickyard belonging to the latter, and it appeared that possession of the brickyard was in the plaintiff for the purpose of his contract with the owners of the brickyard to manufacture the bricks, and that he remained and was in possession of the brick at the time of the seizure thereof by the sheriff under an execution against the owner of the brickyard, who immediately after such seizure had made an assignment for the benefit of creditors,

Held, that the plaintiff was entitled to a lien upon the bricks in priority to the execution and assignment for the benefit of creditors, and also in priority to the claim of a chattel mortgagee, though the mortgage covered brick in course of manufacture during its continuance.

Elgin Myers, Q.C., for the plaintiff.

Blackstock, Q.C., and *R. McKay* for the defendants.

BOYD, C.] [April 19.

CHURCH *v.* LINTON.

Copyright—Questions—Circulars—Forms—"Books and literary compositions"—Right to protection.

The plaintiff, being a proprietor of a school for the cure of stammering, had obtained copyrights for (1) "Applicant's Blank," a series of questions to be answered by entrants to the school; (2) "Information for Stammerers," an advertisement circular; (3) "Entrance Memorandum," an agreement to be signed by entrants; and (4) "Entrance Agreement," similar to No. 3, but more formal.

Held, that under copyright law comprehensiveness they might be reckoned as "books and literary compositions" within R.S.C., c. 62. The purely commercial or business character of a composition or compilation does not oust the right to protection if time, labour, and experience have been devoted to its production.

Griffin v. *Kingston & Pembroke R.W. Co.*, 17 O.R., at p. 665, dissented from.

Geo. Bell for the plaintiff.

Watson, Q.C., and *Bentley* for the defendants.

FERGUSON, J.] [April 26.

MILLSON *v.* SMALE.

Infant—Action brought in name of, without next friend—Motion to set aside proceedings after coming of age—Laches.

An infant was a part owner of a patent right, and engaged in business transactions with respect to it. Along with other part owners, he signed a

retainer to solicitors to take proceedings to stop the infringement of the patent, and the solicitors, not knowing that he was an infant, brought an action for that purpose, using his name as a plaintiff, without a next friend. The action was prosecuted for a time, with the result that the infringement ceased, but it was subsequently dismissed, with costs against the plaintiffs, for want of prosecution. More than a year after he became of age, he moved to set aside all proceedings in the action.

Held, that, under the circumstances mentioned, he was not entitled to relief on the ground of infancy.

Rowell for the plaintiff, Frank Wright.

Hoyles, Q.C., for Daniel McAlpine.

Tremeear for the solicitors.

FERGUSON, J.] [April 27.

IN RE BAIN AND LESLIE.

Will—Devise—Falsa demonstratio—Deed of release—Recital—Estoppel—Title to land—Statute of Limitations.

A testator by his will devised to his son G. "the property I may die possessed of in the village of M. · also lot 28 in the 10th concession of B." In the early part of the will he had used the words, "Wishing to dispose of my worldly property." The testator did not own lot 28, and the only land he did own in the 10th concession of I. was a part of lot 29. The will containe no residuary devise.

Upon a petition under the Vendor and Purchaser Act;

Held, that the part of lot 29 owned by the testator did not pass by the will to the son.

After the death of the testator all his children executed a deed of release to the executors of his will, containing a recital that the part of lot 29 owned by the testator was devised to the son G., and that he was then in possession.

Held, that there was no estoppel as among the members of the family, who together constituted one party to the deed.

Held, however, upon the evidence, that G. had acquired a good title to the lands in question by virtue of the Statute of Limitations.

Begue for the vendor.

G. W. Field for the purchaser.

Practice.

OSLER, J.A.] [May 8.

PICKERING *v.* TORONTO RAILWAY CO.

Appeal to Court of Appeal—Dismissal—Cross-appeal—Right to retain—Rule 821.

A proceeding under Rule 821 by way of cross-appeal, taken by the respondent to an appeal to the Court of Appeal, is a mere branch or offshoot of the main appeal; and if the respondent chooses to dismiss the main appeal for want of prosecution, he cannot retain such cross-appeal for any purpose.

The difference in the English practice pointed out.

The Beeswing, 10 P.D. 18, distinguished.

Semble, if a party does not wish his own objection to a judgment to be subject to the prosecution of his opponent's appeal, his only course is to launch an independent appeal by giving notice and security. Under ordinary circumstances the two appeals would be consolidated.

E. F. Blake for the plaintiff.

James Bicknell for the defendants.

MACMAHON, J.] [May 9.

MACKEY *v.* BIERRL.

Pleading—Demurrer—What constitutes—Striking out—Irregularity—Rules 388, 389.

To an action for wrongfully taking out of the possession of the plaintiff goods seized by him as a bailiff under process against the goods of an absconding debtor, the defendants set up a number of defences of fact, and also alleged that the statement of claim disclosed no cause of action, since it contained no allegation that the goods seized by the plaintiff were the property of the absconding debtor, and stated that the defendants set up the same rights as if they had demurred.

Held, that this was a demurrer, and, as it was pleaded along with defences, without an affidavit under Rule 388 or an order under Rule 389, it should be struck out as irregular.

Vandusen v. *Malcolm*, 4 C.L.T. 211, and *Snider* v. *Snider*, 11 P.R. 140, referred to.

The proper procedure for the plaintiff was to move to strike out the pleading, not to set it down as a demurrer.

L. F. Heyd for the plaintiff.

Higgins for the defendants.

OSLER, J.A.] [May 26.

GILMOUR *v.* MCPHAIL.

County Court appeal—Delay in setting down—Dismissal—Extending time—Lodging of appeal—Rule 836—R.S.O., c. 47, ss. 46, 51.

Section 46 of the County Courts Act, R.S.O., c. 47, providing that the County Court judge shall stay the proceedings for not more than thirty days to afford an appellant time to give security to enable him to appeal, and Rule 836, providing that a County Court appeal shall be set down for the first sittings which commences after the expiration of thirty days from the decision complained of, are to some extent in conflict. When the statute was amended by allowing the judge to stay proceedings for thirty days instead of ten, the Rule should have been altered so as to require the appeal to be set down for the first sittings after the expiration of so many days from the allowance of the security. But the court can always extend the time, on application, where the appeal

has been lodged, and will do so, as a matter of course, where there has been no wanton delay in giving the security within the time allowed by the County Court judge.

Until the proceedings in the court below have been sent up to the Court of Appeal by the County Court judge, as directed by s. 51 of the County Courts Act, the appeal is not lodged, and the court can neither dismiss it nor extend the time for setting it down for hearing.

Paul v. *Rutlidge*, *ante*, 323, commented on.

A. C. Macdonell for the appellant.

MacGregor for the respondent.

MANITOBA.

COURT OF QUEEN'S BENCH.

KILLAM, J.] [May 7.

SCHULTZ *v.* ALLOWAY.

Sale of land for taxes—Assessment—Injunction to restrain conveyance after sale for taxes.

The bill in this case was filed for the purpose of having a sale of the plaintiff's property on Main street, in the city of Winnipeg, for arrears of taxes amounting to over $9,000, set aside on the ground that the assessments were defective, and that they did not properly or sufficiently describe the plaintiff's land, and that the description given in the assessment notices included other property not claimed by the plaintiff. The bill also asked for an injunction to prevent the sale from being carried out by the city giving a conveyance of the land to the purchaser. At the hearing, counsel for the defendants demurred *ore tenus* on the following grounds: First, that as the bill alleges that there were no taxes in arrear and that the sale was a wholly void proceeding, it was not necessary to come to this court for relief; for if the proceedings were clearly void the plaintiff could not be injured, and an injunction should be refused.

Archibald v. *Youville*, 7 M.R. 473, relied on. The learned judge, however, held that inasmuch as the issue of a deed would, according to the statute 55 Vict., c. 26, s. 6, be evidence that there were taxes in arrear, an injunction ought not to be refused on this ground.

The second objection to the bill was founded on the provision of the Assessment Act, R.S.M., c. 101, s. 186. And it was contended that the bill should have contained an offer to pay the purchaser the amount paid by him at the sale, and subsequently for taxes, and otherwise.

As to this point, the learned judge held that the section did not apply where there were no legal arrears of taxes as the bill in this case alleged.

A further objection taken by the defendants was that the plaintiff ought to have applied to the city council to cancel the sale, and to have given the city an opportunity of considering whether or not it would do so, prior to the filing of the bill. His lordship thought this objection would have been good, but for

the answer put in by the city, which set up the validity of the sale, and showed that it would have been useless for the plaintiff to have applied to the council as suggested.

It was also urged that the plaintiff had a sufficient remedy at law by redeeming the land and then suing the city to recover back the money, but his lordship held that such a remedy would not be adequate under the circumstances.

The plaintiff had received notices of the assessments from year to year, and had never appealed therefrom; and although they may have in some respects described her land inaccurately, it was held that this was no ground for an injunction, whatever might be the effect at law. The description of the land in the advertisement of the sale was somewhat different from the description in the assessment notices, and it was admitted that the description in the advertisement set out correctly the plaintiff's land. At the trial a good deal of evidence was given for the purpose of showing that the north and south boundaries of the property in question as described were entirely different from the boundaries as laid out on the ground and occupied by the buildings; but his lordship, having reviewed the evidence, thought it was not sufficient to show that the boundaries were different as alleged, the onus being upon the plaintiff to prove this. The only proved discrepancy in the boundaries was on the eastern side of the property, where a slight error had evidently taken place; but the difference was at most three feet, and was unimportant otherwise.

Held, that if the owner had conveyed the land by the description in the assessment rolls, the conveyance would have been effectual to transfer all of the plaintiff's land excepting a little on the eastern side, and that the assessment must be equally effectual to charge all the land which the court could see was clearly included in the description. The plaintiff had no absolute right to an injunction, and it should not be granted unless the conveyance to be given by the city would be inoperative to transfer the land assessed, and his lordship came to the conclusion that the conveyance would operate to transfer the land assessed, and therefore that the injunction should not be granted. The statement in Blackwell on Tax Titles, ss. 518 and 519: "When part of the land sold is liable to sale and the residue is not, the sale is void *in toto*";

Held, not to apply to a case like the present, and the two cases relied upon for the proposition, namely, *Hagel* v. *Foster*, 13 Pick 492, and *Moulton* v. *Blaisdell*, 24 M. 283, distinguished.

Bill dismissed with costs.

Ewart, Q.C., and *Phippen* for the plaintiff.

Howell, Q.C., and *Isaac Campbell*, Q.C., for the County of Winnipeg.

Aikins, Q.C., for the mortgagees.

TAYLOR, C.J.] [May 19

MACDONALD *v.* GREAT NORTH-WEST CENTRAL R.W. CO.

Sheriff's interpleader—Delay in application for—Defending action by claimant instead of applying for interpleader at once.

Appeal from the order of the referee dismissing a summons taken out by the sheriff of the Western Judicial District to add one Delap as a party to certain interpleader proceedings.

Under executions placed in his hands in these cases, the sheriff had seized a quantity of rolling stock and other property in the possession of the defendants, and upon receipt of certain claims thereto obtained on 2nd May, 1893, an interpleader order. Afterwards in July, 1893, Delap made a claim to be the owner of two engines and tenders, part of the property seized by the sheriff; and then in August the sheriff received notice that Delap and the Canadian Locomotive and Engine Company, "or one or other of them," claimed the same engines and tenders. The sheriff took no action on either of these claims.

On 21st February, 1894, the sheriff was served with a new notice by Delap, claiming that he was then the sole owner of the engines and tenders, and also a notice that the Locomotive and Engine Company abandoned any claim it might have in favour of Delap, and a demand for delivery of the chattels up to Delap was then made upon the sheriff. On the next day Delap issued a writ of summons against the sheriff, claiming the return of the engines and tenders and damages for their detention.

The sheriff appeared and defended this suit, and it proceeded to issue. On April 3rd following, the sheriff applied to amend the interpleader order by adding Delap as a claimant, but the referee dismissed the application on the ground of the sheriff's delay, and because he had defended the action brought by Delap to enforce his claim instead of coming promptly to the court for relief.

Held, on appeal from the referee, that a sheriff does not necessarily preclude himself from obtaining relief under the Interpleader Act, R.S.M., c. 77, s. 8, by appearing and pleading to the claimant's action, and that relief should not be refused to him, unless it appeared that other parties were prejudiced by the delay that had taken place, and, as this did not appear, the interpleader order was amended by adding Delap as a claimant upon the sheriff paying the costs of the action at law, and of the application in chambers, without costs of the appeal.

The following cases in equity where bills of interpleader were filed, viz., *Cornish* v. *Tanner*, 1 Y. & J. 333; *Hamilton* v. *Marks*, 5 D. & Sm. 638; *Jacobson* v. *Blackhurst*, 2 J. & H. 486, show that the analogy from equity is in favour of granting the relief asked for here, notwithstanding the objections urged.

Holt v. *Frost*, 3 H. & N. 821, followed.

Harris v. *York*, 8 M.R. 89, distinguished.

Order accordingly.

O. H. Clark for the sheriff.

Bradshaw for Delap.

Nugent for the plaintiff.

BAIN, J.] [May 22.

MAGEE *v.* SMITH.

Overholding Tenants' Act—Notice to quit—Acquiescence by tenant—"Vacate by 30th April," meaning of.

This was an application, under the Overholding Tenants' Act, for an order for possession of the premises, No. 489 Main Street, Winnipeg. The

premises were held on a monthly tenancy, expiring on the last day of the month. The landlord, on the 31st of March, mailed a notice to quit, directed to the tenant, in these words: "You will please vacate by 30th April, 1894." The tenant did not receive the notice till the 1st of April; but it was contended on the part of the landlord that by vacating three rooms out of four, and by acquiescence in the notice, the tenant had waived the strict requirements of a valid notice to quit, and should be estopped from objecting to the same.

Held, that the words "by 30th April" meant "not later than," or "as early as" the 30th April, and that the notice, even if given in sufficient time, would have been bad, as requiring the tenant to leave before the expiration of his term.

Held, also, that as the tenancy had not been determined by a valid notice to quit, the tenant could not be estopped by his apparent acquiescence in it, or by vacating a portion of the premises, from setting up that he still had a right to remain, and it could not be said that he was holding over without colour of right.

Cartwright v. *McPherson*, 20 U.C.C.P. 251, dissented from. *Doe d. Murrell* v. *Millward*, 3 M. & W. 328; *Russell* v. *Landsberg*, 7 Q.B. 638, where the tenants had given insufficient notices to quit, and had claimed that the landlords had verbally acquiesced in the notices, and in which the court held that the tenancies were nevertheless not put an end to, followed.

Application dismissed without costs.

Andrews for the landlord.

Hagel, Q.C., for the tenant.

Law Students' Department.

LAW SCHOOL EXAMINATIONS.

Third Year—May, 1894.

PRIVATE INTERNATIONAL LAW.

Examiner: W. D. Gwynne.

1. A man and woman domiciled in France are married in England without the consent of parents, which is required by French, but not by English law. Is the marriage valid in England? Explain.

2. Explain the law applicable to the inheritance to movable and immovable property in England as regards legitimacy.

3. Can an English court entertain an action for trespass to foreign land? Give your reasons.

4. Give the general rules governing the question of the jurisdiction of the English courts to grant a divorce.

5. What is meant by an English marriage? Has a foreign court jurisdiction to dissolve such a marriage? If so, in what case?

EVIDENCE.

Examiner: W. D. Gwynne.

1. Give after Best the advantages and disadvantages of presumptive evidence.

2. Distinguish between presumptions of law, of fact, and mixed presumptions. Give an example of each.

3. What are the infirmative hypotheses which attach to self-criminating evidence?

4. In what cases is a wife a competent and in what cases a compellable witness against her husband?

5. When may depositions taken in the preliminary investigation of a criminal offence be read in evidence at the trial of such person for another offence? Give an illustration.

6. In what cases is corroborative evidence required (*a*) in civil actions, and (*b*) in criminal proceedings?

PRACTICE.

Examiner: M. H. Ludwig.

1. What must a defendant show to bring a third party before the court?

2. If a plaintiff discontinues his action or is non-suited, or if his action is dismissed for want of prosecution, can he bring a second action for the same debt as was claimed in the first action?

3. When is a pleading demurrable?

4. Has the court power to grant relief to a mortgagor who makes default in the payment of an instalment of principal or interest, by reason of which the whole principal money becomes due and payable? Answer fully.

5. What defences must be specially pleaded?

6. If the plaintiff in an action dies, can the action be continued in the name of some other person? If so, what steps would you take to make such other person a party?

CONSTRUCTION OF STATUTES.

Examiner: John H. Moss.

1. In what way are statutes classified by their *object*, and what method of construction is applied to each class? To which class are all Dominion and Ontario Statutes assigned by the Interpretation Acts?

2. In what way may the legislature recognize or adopt the judicial interpretation of an enactment? Illustrate. Mention any exception to the rule in Canada.

3. "For certain purposes, express language is absolutely indispensable." What are the "purposes" referred to by the author? Mention any statutory provision upon this point in the Revised Statutes of Canada and Ontario.

4. (*a*) Explain how the authority of statutes may be enforced.

(*b*) What provisions for their enforcement are contained in the Revised Statutes of Canada and Ontario, and in the Criminal Code?

5. What are the rules governing the construction of by-laws made in pursuance of a statutory power?

6. To what extent is it proper to refer to the preamble of a statute for assistance in construing it?

CONTRACTS.

Examiner: M. H. Ludwig.

1. When will a written agreement within the Statute of Frauds be discharged by a subsequent inconsistent verbal agreement?

2. A. promises to marry B. on the 5th day of September, 1894. He married C. in December, 1893. C. died one month afterwards. B. commenced an action against A. for breach of promise of marriage in March, 1894. On the above facts, can B. sustain the action?

3. The holder of a bill of exchange had given the acceptor time to pay without the drawer's consent; the effect of which was to discharge the drawer. Subsequently the drawer, ignorant that in law he was discharged, promised to pay the bill. Is he liable on his promise? Give reasons.

4. A. untruly states the legal effect of a deed for the purpose of inducing B. to sign it. B. signed it upon the faith of the representation of A. without reading it. Can B. avoid the deed?

5. Can a married woman having no separate estate ratify a contract made before marriage by a person professing to act on her behalf, but having no authority to do so? Why?

6. A married woman owning separate estate entered into a contract in 1887. Her husband died in 1888, and shortly after the death of her husband she sold the property she had when she entered into the contract. Whilst a widow she received a bequest of $3,000. She married again in 1890. And after the second marriage she bought a house. In 1891, action was brought on the contract. The plaintiff proves the above facts. Is he entitled to judgment? If so, are any or all of above-mentioned assets liable to satisfy the judgment?

7. A., who had agreed to loan B. $1,000 on mortgage security, paid the $1,000 to his solicitor, with instructions to take the necessary steps to carry out the loan. After the mortgage was executed, the solicitor paid the $1,000 to the mortgagor. A. left the mortgage and all the title papers with his solicitor, and the mortgagor paid the interest regularly to the solicitor without objection from B., who paid it to A. When the principal fell due the mortgagor, after having satisfied himself that the mortgage and title deeds were still in the solicitor's possession, paid the solicitor $1,000, who misappropriated the money. Who must suffer the loss?