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TABLE OF CANADIAN CASES

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UNDER the provisions of Consolidated Rule 211, Single Court Sittings for all the Divisions were to be held on Wednesday and Friday, and Chambers on Monday and Thursday in each week. The rule has been suspended until further notice. We observe, however, that the Judges of the Queen's Bench and Common Pleas Divisions, are taking steps in the direction of the suspended rule, by holding Court and Chambers on different days. This is a great convenience to practitioners, and we hope that the Judges may at their next meeting see their way clear to carry out the policy of the Judicature Act in assimilating the practice in the Common Law and Chancery Divisions, by bringing rule 211 into operation.

APROPOS of the recent appointments of Q.C.s, we have heard of a rather good story, which may give the Minister of Justice some further idea of his recent lists. We should be very grateful to him if the only objection to some of his favourites was that they never held a brief. A day or two after the recent appointments were announced, a solemn-visaged junior barrister appeared in the chambers of one of the new appointees with a brief in a County Court action, which he requested his friend to take; he declined it on the ground that he was too busy, and suggested that the solemn-faced visitor should take it himself, but he could not do it. "Why not, was it a difficult case?" "No, it was quite an easy one." "Was it a bad case?" "No, it was on the contrary quite a simple one, and sure to succeed." "Well, why on earth don't you take it yourself," said the gentleman about to walk in "silk attire." "Well, the fact is," said he of the solemn visage, "I don't care to ruin my chances of a silk gown by appearing in court."

SOME years ago the Law Society placed around part of the grounds connected with Osgoode Hall a handsome and costly iron fence. We are sorry to notice that this handsome and costly piece of work is gradually but surely rotting away from very gross and culpable neglect. A careful examination will show that many ornamental pieces of which it is composed, have been broken or rusted away, and that it is in lamentable need of repair, and a coat of paint. In the recent construction of asphalt walks we observe too that the gates of this fence have been embedded in the asphalt, a proceeding the wisdom of which we venture to doubt. It is true that in the ordinary state of affairs it is unnecessary to close

the gates, but should there ever hereafter be an occasion when it would be desirable to do so, as in the case of an *emeute*, all possibility of so doing is prevented. We do not know whether it is the Law Society or the Ontario Government, that is now charged with the care of the fence, but whoever has the responsibility seems at present to be neglecting the duty.

THE last Primary Examination of the Law Society was held on the 14th instant. In future, applicants for admission into the Society must be graduates in arts of any British University, or produce certificates of having passed the junior matriculation in any of the Universities of this Province. The Society is now building an addition for the benefit of the students, to the rear of the East wing of Osgoode Hall, and adjoining Examination Hall. The lower storey is to be used as a hat and cloak room. The second storey, on the level with the main floor will be used as a reading room, and the upper storey is to be divided into two consultation rooms, for the use of the profession. The cost will be a little over $2,000. The consultation rooms will supply a long felt want, and will enable the Librarian to enforce the regulations for the use of the library for the purposes for which it is intended, for reading and reference. It is now open at nights from 7 to 10.30. The attendance is not very large, averaging about ten each evening.

THE CROWN A CONSTITUENT PART OF THE PROVINCIAL LEGISLATURES.

It must be evident to every reader of the celebrated Queen's Counsel case of *Lenoir* v. *Ritchie*, 3 S.C.R. 575 (decided in 1879), that some of the learned judges of our Supreme Court who promulgated the heresy that the Crown formed no constituent part of the Legislature, had not fully considered the judgment of Lord Chancellor Cairns in *Theberge* v. *Landry*, 2 App. Cas. 102 (decided in 1876), in which the power of the Provincial Legislature of Quebec to legislate respecting the prerogative of the Crown was expressly reviewed. If the Crown formed no constituent part of the Provincial Legislature it must follow that none of its legislative acts could touch or in any way affect the prerogative; and it would, therefore, have been a waste of judicial time and learning for the Privy Council to have elaborated a judgment on that question. Not only did the Lord Chancellor review the question as to how far the prerogative was affected by the Provincial Act under appeal, but he committed the Judicial Committee of the Privy Council to a judgment which expressly declared the Provincial Statute to be "an Act which is assented to on the part of the Crown, *and to which the Crown is, therefore, a party*" (p. 108).

The Lord Chancellor's statement of the law would be meaningless, or illogical, unless the Judicial Committee had decided that the Crown formed a constituent part of the legislative authority of the province; and that the Lieutenant-

Governor was the Queen's representative in assenting to the Act "on the part of the Crown."

The judgment of the Privy Council is in harmony with the common law respecting the legislative prerogative of the Crown. "There is no Act of Parliament," says Sir Edward Coke, "but must have the Royal Assent of the King:" 4 Co. Inst. 24. "The Sovereign," says Sir William Blackstone, "is a constituent part of the supreme legislative power:" 1 Bl. Com. 261. "The making of statutes is by the King with the assent of Parliament:" Bacon's Abr. tit. Prerogative 487. "The King has the prerogative of giving his assent, as it is called, to such bills as his subjects, legally convened, may present to him, that is, of giving them the force and sanction of a law:" *Ibid.* 489.

In addition to the Crown's ordinary executive prerogatives, the sovereign, on the conquest and cession of Canada, acquired the prerogative power of legislation, which may be exercised in respect of conquered colonies with or without the assistance of the Imperial Parliament: 2 Peere Williams, 75. But on the grant of a representative assembly with the power of making laws, this separate prerogative could only be exercised with the advice and consent of the newly-created legislative authority: *Chapman* v. *Hall*, Cowper 204.

The Constitutional Acts of 1791 and 1840, which created the legislative powers over what are now Ontario and Quebec, and authorized them to make laws with reference to the classes of subjects, some of which are now within the legislative authority of the provinces, expressly provided that the Provincial laws of Upper and Lower Canada should be made by "His Majesty," and those of Canada by "Her Majesty," by and with the advice and consent of the other legislative bodies created by the Acts.

The Constitutional Act of 1791 (31 Geo. III. c. 31), after providing that there should be a Legislative Council and Assembly in each of the Provinces of Upper and Lower Canada, enacted that, "In each of the said provinces respectively, His Majesty, his heirs or successors, shall have power during the continuance of this Act, by and with the advice and consent of the Legislative Council and Assembly of such Provinces respectively to make laws for the peace, welfare, and good government thereof" (s. 2).

The Imperial Act further authorized the enactment of special laws on the following classes of subjects now within the legislative authority of the Provinces, viz.: Elections (ss. 15, 16, 18, 23 and 25); Courts of Civil Jurisdiction (s. 34); Tithes (s. 35); Clergy Reserves and Rectories (ss. 41 and 42); and Tenure of Lands in Free and Common Socage (s. 43). And it provided that, in each case, the legislation should be by an "Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors."

The Union Act of 1840 (3 and 4 Vic. c. 35) repealed only so much of the Act of 1791 as related to the Legislative Council and Assembly, and the making of laws by the Provinces; united them into one Province; and provided that within the united Province "Her Majesty shall have power by and with the advice and consent of the Legislative Council and Assembly to make laws for the peace, welfare, and good government of the Province of Canada." The Act describes the new

legislative authority as "the Legislature of the Province of Canada," and uses the term, "Act of the Legislature of the Province of Canada" (ss. 23, 24, 28, etc.), which, by s. 61, is defined to mean "An Act of Her Majesty, her heirs or successors, enacted by Her Majesty, or by the Governor, on behalf of Her Majesty, with the advice and consent of the Legislative Council and Assembly of the Province of Canada."

It will be seen that the two Imperial Acts above cited expressly made the Crown a constituent part of the former Provincial Legislatures.

Such were the constitutional provisions respecting the legislative prerogative of the Crown, in what is now Ontario, when the B.N.A. Act was passed. By that Act two legislative bodies were established, one the Parliament of Canada, "consisting of the Queen, an Upper House styled the Senate, and the House of Commons;" the other, the Provincial Legislatures, which, in Ontario, was described as consisting of the Lieutenant-Governor and the Legislative Assembly. And it has been from this short description of the legislative authority of the Province that some learned judges have contended in *obiter dicta* that the Crown is no constituent part of the Provincial Legislature.

There are three answers to this contention: (1) The common law of the prerogative of the Crown in legislation; (2) The prior Imperial legislation which distinctly affirmed and made that prerogative of the Crown essential in Provincial legislation; (3) The express continuation of that prerogative in provincial legislation by the B.N.A. Act. We have already amplified the propositions referred to in first and second of these answers, and shall now proceed to consider the third.

The B.N.A. Act by s. 129 continued the Imperial and Provincial laws then in force in the provinces in these words: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia and New Brunswick, at the Union . . . . . shall continue in *Ontario*, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by, or exist under, Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective province, according to the authority of the Parliament or of that Legislature under this Act."

It will be noticed that the only repeal of the then existing laws is contained in the words, "Except as otherwise provided by this Act;" so that where the B.N.A. Act did not "otherwise provide," the prior Imperial and Provincial laws were continued and retained their legislative power. There is nothing in the B.N.A. Act taking away the prerogative of the Crown, or its power of legislation, as given by the prior Imperial Acts over the territory or the classes of subjects assigned to the provinces. On the contrary it must be conceded that the legal effect of the 129th section is to re-enact in the new Provinces of Ontario and Quebec so much of the provisions of the Union Act of 1840, as made and recognized the Crown a constituent part of the legislative power of old Canada. And turning to the Provincial Acts enacted under these Imperial Acts one, C.S.C. c. 5, was

"in force in Canada" and was likewise made applicable to Ontario and Quebec, and which enacted that the following words, indicating the authority by which Provincial Statutes were passed, should continue to be used: "Her Majesty by and with the advice and consent" of the other legislative bodies, enacts, etc.

We have already shown that it is one of the prerogatives of the Crown to enact all laws by and with the advice and consent of the other legislative bodies, especially the laws which may be classed as regal or supreme, such as relate to the property and civil rights of the subjects of the Crown; the establishment of superior courts of civil and criminal jurisdiction; the right of eminent domain; the establishment of local or municipal authorities with powers of taxation; and to the general executive government of the province. And this legislative prerogative of the Crown, as well as those which are classed as executive prerogatives, it is well known cannot be taken from the Crown unless by express words, or by terms which make the inference irresistible. In giving judgment on the Quebec Election Act in *Theberge* v. *Landry* (*supra*) the Lord Chancellor, referring to the contention that the Act did not take away any prerogative right of the Crown. because the Crown and the prerogative of the Crown were not specially or particularly mentioned in the Act, said: "Their lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often as has been held before, that *in any case where the prerogative of the Crown has existed* precise words must be shown to take away that prerogative."

Not only did the Privy Council in that case affirm that the Crown was a constituent part of the Provincial Legislature, but in *Hodge* v. *Reg.* 9 App. Cas. 117, the same judicial body thus described the jurisdiction and powers of the Legislature of Ontario:

"When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province, and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers, not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by s. 92, as the Imperial Parliament in the plentitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme and has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have had under like circumstances."

It may be noticed that the constitution of the Legislatures of Nova Scotia and New Brunswick was continued by the B.N.A. Act as it existed at the Union; and no one has contended that prior to Confederation the Crown formed no constituent part of their Legislatures. There was, therefore, in the prior Provincial Constitutions of the separate provinces, a recognition of the legislative function of the Crown, and it may have been considered appropriate when establishing a new legislative body for the collective provinces as a united Dominion, to

name the Crown as a constituent part of the new legislative authority then called into existence as the Parliament of the Dominion of Canada.

By s. 90 of the B.N.A. Act, s. 56 is altered and made applicable to the provinces, and may be read as follows: "Where the Lieutenant-Governor assents to a Bill in the Governor-General's name, he shall by the first convenient opportunity send an authentic copy of the Act to the Governor-General; and if the Governor-General-in-Council within one year after the receipt thereof by the Governor-General thinks fit to disallow the Act, such disallowance (with a certificate of the Governor-General of the day on which the Act was received by him) being signified by the Lieutenant-Governor, by speech or message [to each of the Houses of the Parliament], or by proclamation, shall annul the Act from and after the day of such signification."

This suggests the question: If the Lieutenant-Governor is a constituent part of the Provincial Legislature why should he assent to a bill "in the Governor-General's name," for in no part of the B.N.A. Act is the Governor-General made a constituent part of a Provincial Legislature? This reference to the Governor-General must obviously be read by the interpretation which the B.N.A. Act gives in s. 10: "The provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the time being of Canada, or other the Chief Executive Officer or Administrator for the time being, *carrying on the Government of Canada on behalf and in the name of the Queen*, by whatever title he is designated."

Reading these two sections together it would appear that when the Lieutenant-Governor assents to a Bill he does so in the name of the Governor-General as "carrying on the Government of Canada on behalf and *in the name of the Queen*." The Governor-General by the Confederation Act has only delegated or representative functions in legislation; so that it must follow that the Lieutenant-Governor's assent to provincial legislation must, therefore, be "in the name of the Queen;" and that the legislative prerogative of the Crown in the Provincial Legislatures has not been abrogated by the B.N.A. Act.

Since the above was written we learn that a late judgment of the Supreme Court has affirmed by a majority of Judges that the Crown forms a part of the executive government of the provinces; but as we have not yet seen the text of the judgment delivered, we are unable to say how far the arguments we have advanced as to the legislative prerogative are in harmony with the opinions of the majority of the Court on the executive prerogative of the Crown in the Provinces.

Our argument may be closed by an extract from a recognized text book on Constitutional Law: "No Acts of Colonial Legislatures have force until they have received either the assent of the Governor in the Queen's name, or the Royal assent when reserved and transmitted for consideration:" Cox's British Commonwealth, 525.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for December comprise 23 Q.B.D., pp. 489-632; 14 P.D., pp. 175-9; 42 Chy.D., pp. 321-696; and 14 App. Cas., pp. 337-664.

MUNICIPAL CORPORATION—CONTRACT OF, HOW FAR BINDING ON—APPLICATION OF RATES—IMPOSITION OF RATES—ULTRA VIRES.

In *The Attorney-General* v. *Newcastle*, 23 Q.B.D., 492, several important principles of law relating to municipal corporations are laid down by the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) In the first place we may deduce from this case, that the power of a municipality to levy rates is strictly limited by the terms of the statute by which that power is conferred; and that where rates are authorized to be levied for a specified purpose, they cannot legally be applied to any other purpose; that where the surplus rates are authorized to be expended in a particular way, rates may not legally be levied for the purpose of creating a surplus; that when a municipal corporation has entered into a contract absolutely and unconditionally to pay a sum of money, it must nevertheless be treated as binding on the corporation only so far as it can legally bind itself to pay, and no further; that payments which are authorized by statute to be made out of one fund, cannot by the unconditional contract of the corporation be made payable out of any other, even though judgment be recovered against the corporation on such a contract; that a municipal corporation may be restrained by injunction from applying the rates levied to other purposes than those to which by statute they are authorized to be applied.

NEGLIGENCE—MASTER AND SERVANT—COMMON EMPLOYMENT—CONTRACTOR AND SUB-CONTRACTOR.

Johnson v. *Lindsay*, 23 Q.B.D., 508, is one of the few cases in which the spectacle is presented of a division of opinion among the learned Judges of the Court of Appeal. The action was brought to recover damages for the negligence of the defendant's servant under the following circumstances: Higgs & Hill, by whom the plaintiff was employed as a workman, contracted for the whole work of improving and altering certain dwelling houses, under the supervision of an architect. A certain portion of this work was of a special and definite kind, viz., the laying of a fire-proof roofing, and was to be done under a special clause in the contract by a person to be selected by the architect. Higgs & Hill were to pay the person so employed, and were to allow the use of their scaffolding and to provide any needful attendants for the carrying out of the work, and to work with him as might be necessary for the due despatch of the work; and the work was to be carried out in accordance with a specification to be forwarded by the architect to Higgs & Hill. The architect secured the defendants to do the roofing, and it was in consequence of the negligence of a servant of theirs that the plaintiff was injured. Cotton and Lopes, L.JJ., were of opinion that the defendants were sub-contractors of Higgs & Hill, and that, therefore, they and their workmen must be taken to have been in the employ of Higgs & Hill; that the man who caused the injury was, therefore, under a common master, and

engaged in a common employment, and, therefore, the action could not be maintained. But Fry, L.J., considered that the defendants were independent contractors; but even if they were sub-contractors their workmen were not in the service of Higgs & Hill, and that the man who caused the injury was not under a common master with the plaintiff, although they were engaged in a common employment, and, therefore, in his opinion, the defendants were liable.

PRACTICE—SERVICE OF WRIT—FOREIGN CORPORATION CARRYING ON BUSINESS IN ENGLAND—ORD. 9, R. 8 (ONT. RULES 267, 268).

In *Haggin* v. *Comptoir D'Escompte de Paris*, 23 Q.B.D., 519, the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.) held, following *Newby* v. *Van Oppen*, L. R., 7 Q.B., 293, that a foreign corporation carrying on business in England is liable to be sued in an English Court, and may be served with a writ of summons in the same manner as an English corporation aggregate; and that service of the writ on the head officer at the place of business in England of a foreign corporation was good service on corporation under Ord. 9, r. 8 (See Ont. Rules 267, 268.)

PRACTICE—SERVICE OF WRIT—FOREIGN PARTNERSHIP CARRYING ON BUSINESS IN ENGLAND—ORD. 9, R. 6

On the authority of the last case an attempt was made in *Russell* v. *Cambefort*, 23 Q.B.D., 526, to induce the Court of Appeal to uphold the service of a writ of summons made on the manager of the business of a foreign partnership carried on in England, as good service on the firm; but this the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) declined to do. The Court distinguished the two cases on the ground that while a foreign corporation may be said to reside in a country where it carries on business, the members of a private partnership cannot be considered as resident in the country simply because they carry on business in it. The decision in *O'Neil* v. *Clason*, 46 L.J.Q.B., 191, was overruled, and the decision of Field and Cave, JJ., refusing to set aside the service of a writ so made, was reversed.

MUNICIPAL OFFICER—ACCEPTANCE OF FEE OR REWARD UNDER COLOUR OF OFFICE—ALLOWANCE IN ADDITION TO SALARY.

Edwards v. *Salmon*, 23 Q.B.D., 531, was an action to recover a penalty on the ground that the defendant, being a municipal officer, had contravened a statute by accepting under colour of his office a fee or reward in addition to his salary. The facts were that the council of a borough, being also the local sanitary authority under the Public Health Act, appointed the defendant, a solicitor and the town clerk of the borough, to be clerk to the sanitary authority; and by a resolution of the council the defendant's salary was fixed at a certain sum, "to include all legal charges except for contentious business matters, travelling expenses and payments out of pocket." Subsequently the council, as local sanitary authority, promoted a sewage scheme, which had not been contemplated when the defendant's salary was fixed, and in connection with this scheme the defendant did work, partly in respect of contentious and partly in respect of non-conten-

tious business. On the completion of the sewage works the council passed a resolution that the defendant be paid a sum of money for his services in connection with the scheme, which was duly paid, and which was the payment impeached. The Court of Appeal (Lord Halsbury, L.C., Lord Esher, M.R., and Lindley, L.J.) affirmed the judgment of Pollock, B., dismissing the action.

BILL OF SALE—CHATTELS—DESCRIPTION—AFTER ACQUIRED PROPERTY.

Perhaps the only points of interest here, in *Carpenter* v. *Deen*, 23 Q.B.D. 566, are those relating to the sufficiency of the description of chattels in a bill of sale. The chattels were described in a schedule annexed to the bill of sale in question, as "twenty-one milch cows" on a farm belonging to the grantor, "and all goods, chattels, and effects in or upon the premises, belonging to" the grantor. After the execution of the bill of sale the grantor sold several of the cows referred to in the bill of sale, and bought others. It was held by the Court of Appeal (Cotton, Fry and Lopes L.JJ.) affirming a judgment of Charles, J., that there being no covenant express, or implied, affecting after acquired property, the bill of sale did not extend to any of the stock brought on to the farm after the date of the bill of sale; and further (reversing Charles J.) Lopes, L.J., dissenting, that the description "twenty-one milch cows" was not sufficiently specific to satisfy the requirements of the Bills of Sales Act, 1878.

CONSPIRACY—COMBINATION OF SHIP OWNERS TO KEEP UP FREIGHT—ENGROSSING PARTICULAR TRADE—EXCLUDING RIVAL TRADERS FROM COMBINATION.

The *Mogul Steamship Co.* v. *McGregor*, 23 Q.B.D. 598, is an appeal from the decision of Lord Coleridge, C.J., 21 Q.B.D. 544, noted *ante* Vol. 25, p. 10. It may be remembered that the action was brought to recover damages on the grounds that the defendants, who were ship owners, engaged in the China trade, had combined together with a view of keeping up a monopoly of the trade, from a certain Chinese port, and offered to merchants and shippers in China who shipped their goods exclusively in vessels belonging to the defendants a rebate of 5% on all freights paid by them, and the defendants offered to furnish steamers, when necessary, to underbid any competing vessels, which should come in to the port in question. The plaintiffs, who were rival ship owners, were excluded from association, and in consequence of such exclusion claimed to have suffered damage. Lord Coleridge, C.J., not without some doubt, dismissed the action, and his decision has now been affirmed by the Court of Appeal (Bowen and Fry, L.JJ.; Lord Esher, M.R., dissenting), on the ground that the association, having been formed for keeping the trade in their own hands, and not from any personal malice or ill-will to the plaintiffs, was not unlawful. With Lord Coleridge, C.J., doubting, and Lord Esher dissenting, it would be unsafe to predict what will be the ultimate issue of the action in the House of Lords.

CONFLICT OF LAWS—LEX LOCI CONTRACTUS—INTENTION OF PARTIES—CLAUSE IN CONTRACT VOID BY LAW OF THE COUNTRY OF THE CONTRACT—SHIP—BILL OF LADING—LAW OF THE FLAG.

In re Missouri Steamship Co., 42 Chy.D. 321, a somewhat novel point in the law of contracts was raised. A contract was made by the claimant, a citizen of

the United States, at Boston, Mass., with a British Company of ship-owners, to carry cattle from Boston to England, in a British ship. The contract contained a clause that the company should not be liable for the negligence of the master or crew of the ship. Such a clause is invalid according to the law of Massachusetts, as being against public policy. The cattle were lost in consequence of the negligence of the master and crew, and the shipper claimed against the company for the loss. The question therefore was whether the clause in the contract, which was void, according to the law of Massachusetts, could nevertheless be relied on in an English court as a defence to the action. Chitty, J., held that it could; and the Court of Appeal (Lord Halsbury, L.C., and Cotton and Fry, L.JJ.) affirmed his decision, on the ground that from the circumstances surrounding the contract, it being a contract with an English Company, to carry goods in a British ship, and the bills of lading being in English form, it must be presumed that the parties intended to be bound by the English law.

COMPANY—WINDING UP—ARREARS OF RENT CHARGE—LAND IN POSSESSION OF LIQUIDATORS.

In re Blackburn Benefit Building Society, 42 Chy.D. 343, is an appeal from a decision of the Vice-Chancellor of Lancaster, disallowing a claim for arrears of rent charge, preferred against a company in course of being wound up. At the time of the winding-up order, the company was in possession of land as mortgagees, the land being subject to a rent charge created by deed. The liquidators for some time paid the rent charge, but finding the annual value of the property was not equal to the rent charge, they obtained from the court leave to get rid of the property, and thereupon gave notice to the tenant in occupation of the land, and to the owner of the rent charge, that they repudiated the land. The owner of the rent charge claimed the right to prove in the winding up, for arrears which had accrued since the repudiation. But the Court of Appeal (Lord Esher, M.R., and Cotton and Fry, L.JJ.) held that the liability of the company for the rent charge arose not out of contract, but out of privity of estate, and that upon repudiation of the estate by the liquidators the liability ceased; and they therefore affirmed the decision of the Vice-Chancellor.

TRUSTEE—INVESTMENT OF TRUST MONEY—NEGLIGENCE—LIABILITY OF TRUSTEE FOR IMPROPER INVESTMENT—APPEAL—SERVICE ON THIRD PARTY.

In re Solmon Priest v. *Uppleby*, 42 Chy.D. 351, the Court of Appeal (Lord Esher, M.R., and Cotton and Fry, L.JJ.) determined that where a trustee negligently invests the trust moneys in a security authorized by a trust, but of insufficient value, upon the appointment of new trustees in his place, the new trustees are entitled to realise the security without notice to the trustee who made the investment, and that the latter is liable for the deficiency. On this point overruling Kekewich, J., who was of opinion that in such a case the trustee who made the investment is entitled to the option of taking the security, and that it having been realized without notice to him he was relieved from liability. In the appeal a question of practice arose. The defendant took the preliminary objection that the plaintiff had not served third parties from whom the defendant

claimed indemnity with notice of the appeal. The majority of Court of Appeal (Lord Esher, M.R., and Fry, L.J.) held that the plaintiff was not obliged to do this, but that it was the duty of the defendant to apply to the court for leave to serve the third parties with notice; from this, however, Cotton, L.J., dissented, being of the opinion that as the third parties had obtained leave to appear at the trial, the plaintiff should have notified them of the appeal.

PRACTICE—ADVERSE PARTY CALLED AS A WITNESS—RIGHT TO CROSS-EXAMINE.

In *Price* v. *Manning*, 42 Chy.D. 372, a party to the action called his opponent as a witness, and then on re-examination proposed to cross-examine him as an hostile witness, this Kay, J., refused to allow; and on appeal, Cotton, Fry, and Lopes, L.JJ., held that it was in the discretion of the judge at the trial to permit it or not, according as it should appear to him, whether or not the witness showed himself so hostile as to justify his cross-examination.

VENDOR AND PURCHASER—CONDITIONS OF SALE—RIGHT TO RESCIND—UNWILLINGNESS TO COMPLY WITH REQUISITIONS.

In re Starr Bowkett Building Society and Sibun, 42 Chy.D. 375, was an application under the Vendor and Purchaser's Act, in which the question was as to the right of the vendors to rescind the contract. The land had been sold subject to a condition that if the purchaser should "make any objection to, or requisition on, the title" which the vendors should be "unable or unwilling to remove or comply with," the vendors might, by notice in writing, cancel the contract. Requisitions were sent in, and thereupon the vendors, who were trustees passed a resolution that as some of the requisitions could not be complied with, and others would cause great trouble and expense, notice should be given to rescind the contract, and notice was given accordingly. Chitty, J., held that the vendors were not bound to state their reasons for rescinding, and though the word "unwilling" ought to be interpreted "reasonably unwilling," yet on a general statement by the vendors that the rescision was *bona fide*, and in the absence of any evidence of caprice or *mala fides*, the Court ought not to infer that the vendors were acting unreasonably, the vendors were justified therefore in rescinding, and the contract had been annulled; and this decision was affirmed by the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.)

INJUNCTION—PAST INFRINGEMENT OF PATENT—INTENTION TO INFRINGE.

Proctor v. *Bailey*, 42 Chy.D. 390, is one of those cases which shows that an injunction is not to be granted to restrain an infringement of patent, unless there is really a foundation for believing that an infringement is contemplated. In this case, one Bennis set up four machines in the defendant's premises, in August, 1882, to be taken and paid for if they worked satisfactorily. They were used until April, 1883, when the defendant, being dissatisfied with them, took them down, and laid them in his yard, and called on Bennis to take them away, and never used them again. Bennis did not remove them till January, 1885. In March, 1887, Proctor (the plaintiff in the present case), who had obtained judgment

against Bennis, that the latter's machines were an infringement of Proctor's patent, claimed royalties from the defendant, and the defendant replied that he could satisfy himself by calling at his mill that the defendant was using neither the plaintiff's nor Bennis' machines. Further correspondence took place, the defendant denying all liability, and alleging that he had not bought the machines from Bennis, who had set them up on trial, and as they did not work well had to take them down, and that the defendant was not using and did not intend using any machine infringing the plaintiff's patent. In January, 1888, the plaintiff brought his action, claiming an injunction, and claiming damages. The defendant defence denied infringement, and stated that if he ever had used machines infringing the patent he had long since, as the plaintiff knew, discontinued doing so, and did not threaten or intend to use any apparatus infringing the patent. The Vice-Chancellor on these facts granted an injunction and an inquiry as to damages, but on appeal the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) were of opinion that though the defendant had infringed it was not to be inferred from the circumstances that the defendant had any intention to infringe the patent again, and therefore the injunction ought not to have been granted, and, as the County Palatine Court had only the old jurisdiction of the Court of Chancery, damages could not be given ; but the defendant was refused his costs except of the appeal, on the ground that he had not before action given full information.

COMPANY—WINDING UP—DEBENTURE HOLDERS—RECEIVER APPOINTED BY DEBENTURE HOLDERS—DISCRETION OF COURT.

In re Pound, 42 Chy.D. 402, the debenture holders of a company in process of being wound up, under the powers contained in their debenture deed, appointed a receiver to manage and dispose of the undertaking and property of the company, and applied to the Court for an order empowering the receiver to take possession of the property of the company, notwithstanding the appointment of a liquidator in the winding up proceedings. Kay, J., refused the application, but the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) were of opinion that the Court ought not to interfere with the right of the debenture holders to a receiver under their deed, and gave leave to the receiver appointed by them to take possession, but without prejudice to any question as to the powers of the receiver, other than the power to take possession and sell the property.

SOLICITOR AND CLIENT—COSTS—TAXATION BETWEEN SOLICITOR AND CLIENT—LIEN.

Curwen v. *Milburn*, 42 Chy.D. 424, was an action by a client against his solicitor to recover possession of documents on which the solicitor claimed a lien for costs. Prior to action the plaintiff's solicitors wrote to the defendant saying "our client only requires you to deliver particulars of any unsettled bill of costs you may have against him." After action brought an order was made for the delivery of bills, and a reference for taxation was directed. Liberty was given to the plaintiff to pay £350 into Court, and upon doing so his documents were to be given up. On the taxation the taxing officer struck off certain items

(without considering their propriety) on the ground that having regard to their dates they were barred by the Statute of Limitations. On an application to review the taxation, North, J., held that the letter of the plaintiff's solicitors amounted to a sufficient acknowledgment to take the case out of the statute, and therefore the items ought not to have been struck out; and on appeal the Court of Appeal, without considering that question, were of opinion that the object of the order for taxation was to ascertain the amount of costs for which the defendant had a lien, and in that view also the taxing officer was wrong.

COMPANY—PROSPECTUS—FRAUD—DECEIT.

Glasier v. *Rolls*, 42 Chy.D. 436, was an action similar to *Peek* v. *Derry*, or *Peek* v. *Gurney*, in which the plaintiffs claimed to recover damages against a director for alleged misstatements in the prospectus of a company, by reason of which they were induced to become shareholders. The defendant was the principal partner in a trading firm which was converted into a limited company, and the prospectus issued with his knowledge and concurrence described him as managing director, but with a note stating that he would not join the board until the transfer of the business to the company had been completed. The prospectus stated that the profits previously realized had been 17% on the capital employed in it. This would be true if capital employed did not include the business premises, or only included their value less the mortgages thereon, but was grossly untrue if the whole value of the business premises was taken as part of the capital. Kekewich, J., held the defendant liable, but the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) thought there was not evidence of any dishonesty in making the representation, and that therefore although it were untrue, under the decision in *Peek* v. *Gurney*, 14 App. Cas. 337, in the House of Lords, the action would not lie.

PATENT—EXCLUSIVE LICENSE FOR LIMITED TIME AND AREA—LICENSEE'S RIGHT TO SUE IN HIS OWN NAME.

In *Heap* v. *Hartley*, 42 Chy.D. 461, the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) held on appeal from the Vice-Chancellor of Lancaster, that an exclusive licensee for a limited time and area of a patented article is not entitled to sue in his own name without joining the patentee, in order to restrain the user by a defendant, within the licensed district of any of the patented articles bought by him outside of the district, because the license was merely a permission to do lawfully what would otherwise be unlawful, and was not equivalent to a grant.

PRACTICE—STAYING EXECUTION UNDER JUDGMENT.

Tuck v. *Southern Counties' Bank*, 42 Chy.D. 473, need only be noticed for the point of practice it contains. Kay, J., having laid it down therein that an application to stay execution under a judgment, unless it is made immediately after the judgment has been pronounced, must be supported by an affidavit showing the special circumstances on which the applicant relies.

Proceedings of Law Societies.

HAMILTON LAW ASSOCIATION.

The Trustees beg to present their tenth annual report, being for the year 1889.

The number of members at the date of the last report was 69, four new members have been added, namely: John G. Gauld, Stuart Livingstone, E. H. Ambrose, and W. S. McBrayne, and the present membership is 70.

The annual fees to the amount of $325 have been paid.

The number of volumes in the Library is about 2171, of which, 200 were added during the year. The following periodicals are received, namely:

The Law Times (English)
The "Times" Law Reports.
The Solicitors' Journal.
The Albany Law Journal.
THE CANADA LAW JOURNAL.
The Canadian Law Times.

The Treasurer's report is submitted herewith, giving a detailed statement of the receipts and expenditure, and of the assets and liabilities of the Association, and the same is also in the form required by the Law Society.

The Trustees have much pleasure in announcing that they have completed the English Reports, by the purchase of the Admiralty and Ecclesiastical Reports and the addition of some other needed volumes; these are now on the shelves, and your Association has a Library second only to that at Osgoode Hall, and will hereafter be able to devote more funds to the purchase of Text Books from time to time, and of such other books as may seem useful.

The report of the Inspector of County Libraries was most favourable, so far as your Association was concerned, and much credit is due to Miss Counsell, the Librarian, for the manner in which she has discharged her duties.

The Law School is now in active operation, and appears to be working well. No definite opinion can be formed at present of the results which will be attained, but it should receive the support of the whole profession in its endeavor to provide for the better training of those who wish to join our ranks.

We would recommend that a committee on Legislation be appointed for the coming year; the Bills of Exchange Act will, it is understood, be again introduced in the Dominion House, and other Legislation may be expected in the Provincial Legislature and the attention of the Profession might be beneficially directed towards such Bills as are from time to time brought before Parliament in which they are more particularly interested, we have no doubt, that if the Associations throughout the country considered legislation more carefully, it would result in fewer amendments being made to the existing Law.

No action has yet been taken to carry out the suggestion of the Joint

Committee of Law Associations that application to strike out a Jury Notice shall be determined before the action is entered for trial.

The complete fusion of Law and Equity is hampered by the distribution of business in Court and Chambers, and the continued existence of separate sittings at Osgoode Hall, for the transaction of the matters belonging to the several divisions; greater unity of practice would be attained, if all business could be disposed of by any Judge without reference to the particular division in which the action is brought.

The Devolution of Estates Act has a much wider scope than was at first supposed, and it is suggested that authority should be conferred on the proper officers in the outer counties, to act in these matters without the intervention of the Official Guardian and so as to dispense with the necessity of any application to the Court at Toronto, in what is at most an administration proceeding. Your Trustees consider these matters of vital importance to the Profession, and would suggest the desirability of legislation to carry them into effect. No doubt, with the co-operation of the Associations throughout the country, much might be effected.

EDWARD MARTIN,
President.

E. E. KITTSON,
Secretary.

Hamilton, 2nd January, 1890.

Reviews and Notices of Books.

The History of Canada. By WILLIAM KINGSFORD, LL. D. Vol. III. With Maps. Toronto: Rowsell & Hutchison. London: Trubner & Co., 1889.

We have been favored with copy of the work, of which the title forms the heading of this article, and though our journal is not a literary review, nor the work in question a legal essay or report, it is one so deeply interesting to all Canadians, and to lawyers certainly not less than others, as a record of events which have made Canada what it is, that we feel bound to call the attention of our readers to it, and to give such brief account of it as we did of the two volumes which preceded it.

We were at first rather disappointed to find that this volume does not bring the history down to the conquest; but Mr. Kingsford in his brief and modest preface, explains that he not only found it impossible to fulfil his intention of bringing it down to that period, but also, that although the capture of Quebec might be virtually considered the termination of French rule in Canada, yet the events between that capture and the final cession of the country, under the treaty of Paris, in February, 1763, formed so important a part of its history that his work could not have been considered complete unless it included them; and that an account of these events and those prior to the conquest and not included in the present volume, would of themselves fill a fourth, on which he is now occupied, and which he hopes to publish in September, 1890. Among the

events so referred to are Levis' attack on Quebec, with Murray's defeat in May, and the capitulation of Montreal in September, 1760, followed in 1763 by the treaty of Paris, while among the subjects indispensable to the completion of his work and included with others in the present volume, are the history of Hudson Bay up to its cession under the treaty of Utrecht; a summary account of the settlement of Louisiana in its relationship to Canada; and the events in Acadia after its cession under the treaty of Utrecht, including the creation of the Province of Nova Scotia, and the foundation of the city of Halifax; the capture and subsequent restoration of Louisburg; the capture of Port Royal (now Annapolis); the fruitless expedition of the Duc d' Anville; the suffering and surprise of the New England troops by Coulon de Villiers in Acadia; De la Verendrye's explorations; the character of de la Galissouiere; de Celoron's expedition up the Ohio; the founding of Ogdensburg, by Picquet; the character and intrigues of LeLoutre; the Marquis Duquesne's expedition to the Ohio; Braddock's expedition against Fort Duquesne, his defeat and death; Dieskau's expedition on the west side of Lake Champlain; the extraordinary ecelesiastical quarrel at Quebec in 1727; the state of Canada and Canadian society in 1755-6.

This volume contains 578 pages, divided into 5 books, each again divided into chapters. It is very handsomely and clearly printed, the type and paper are good; and it is altogether got up in the best modern style. It has a very full table of contents; four small but very useful maps; many explanatory notes, and full references to the authorities for the statements of fact, and in many cases, citation of important passages from documents referred to. There is no verbal index to persons and events, but Mr. Kingsford promises that a very full one shall be given with the fourth volume to it, and the three preceding it. Its style is clear without attempts at oratorical flourishes and effects; and we hold with respect to this volume, the same conviction of the author's conscientious fidelity, care and labour in collecting and verifying the facts he relates, the impartiality of the inferences he draws from them, and his characterizations of the personages whose acts he records, which we have expressed as to the preceding volumes, and as an instance of his fairness, we give his character of Rasle, a Jesuit of the Jesuits, a body for whom Mr. Kingsford has as little love as we have:

"In spite of Rasle's persevering hostility to New England and his never-ceasing attempts to embroil England and France in war, for a small extent of border territory which to-day is but imperfectly settled, he demands our sympathy from the high qualities he possessed. Had he been placed in a wider field of action where his energy could have been exercised, and by experience and contact with the world he could have learned to overcome his prejudices, he might have been remembered in history by the side of Richelieu, Mazarin or Alberoni. Great powers always command respect, especially when allied with those brilliant traits of character which impress us by their physical, rather than by their moral, force. To Rasle's high ability he added unfaltering courage and self-reliance; and it was by no means in disaccord with his character that he refused to give or take quarter. In his young years he had been an earnest

student of polite literature. At the Jesuit's College he had been distinguished by great application. He was an elegant Latin scholar throughout his life, and he had been a missionary for many years, living with savages, he retained these tastes. He had obtained a perfect knowledge of Abenaki, and had attempted to give it some grammatical form. He had taught several of his people to read and write, and he delighted to correspond in their own language with them. He is said even to have written Indian poetry. He knew the Dutch language to speak it; English only imperfectly. He had a hatred of everything English, the people, their language, their protestantism, their mode of life; and accordingly his manners were often offensive. There was no deceit on his part in his enmity, it was openly expressed; and Rasle by the side of a ruffian like Le Loutre appears a saint."

The covert designs intended by the French to be accomplished through the Indians, and Rasle's intrigues for that purpose, are narrated at length.

Mr. Kingsford is English, and of course wishes to give the English view of some matters upon which he thinks existing histories have created erroneous impressions, and the first two chapters of this volume are devoted to a defence of the English claim to the discovery and right of possession of Hudson's Bay. He says, and appears to us to prove, that nothing can be more clear than the English claim to the discovery of and settlement on these northern waters. The northern part of America being discovered in 1497, by Sebastian Cabot, under a commission from Henry VII, and Hudson having in 1610, by authority of James I, taken possession of the bay and straits that bear his name; and he then cites his authorities and states at length his reasons for the opinion he expresses.

Another and more important matter, since it affects England's reputation for justice and humanity, is the account he gives of the deportation of the inhabitants of a certain portion of Acadia, in 1755, on which the American poet, Longfellow, has founded his pathetic and beautiful poem, Evangeline, which does not directly reproach the English authorities with harshness or cruelty, but yet leaves the impression that the proceeding which was aided by the New England colonists, and cannot have been disapproved by them, had something of cruelty and tyranny in it. In England it was looked upon as an act of painful necessity, a duty unwillingly undertaken, and performed with as much care to prevent unnecessary suffering as possible. Families were not separated, and were allowed to carry with them all their portable effects, for which room could be found in the vessels which carried them. They had brought the suffering upon themselves. For forty years, says Mr. Kingsford, the country had belonged to England, and all its inhabitants over forty years of age had been born British subjects. They had been repeatedly asked to take the oath of allegiance, and had refused, sometimes with insolence, and had on every possible occasion joined the French and Indians in their savage attacks on the English colonists and their property. Every Acadian was a spy to give intelligence to the enemy, and their removal was a painful but unavoidable act of self-defence. We request any doubting reader to peruse Mr. Kingsford's statement of the case in chapter VI, of Book VIII.

The time covered by this volume, extends from 1726 to 1756, and embraces the administration of the several governors of Canada during that period, viz.—Le Marquis Beauharnois, Le Marquis de la Jouquierc, Le Marquis Duquesne, and Le Marquis de Vaudreuil, and portions of the reigns of Louis XIV, and Louis XV, in France, and George I, and George II, in England.

It is impossible in the limited space allowed us to give any idea of the amount of information and detail in the volume before us, containing as it does a very full account of a most important part of the struggle between France and England for the possession of the northern part of America. The period embraced has been called the heroic age of Canada, and it was so as regards daring, hardihood and adventurous spirit, but it was not the age of Chivalry, or generous rivalry in arms, but that of "savage unrelenting, murderous war," between two nations who had been rivals from the time of the battles of Hastings, Cressy, and Agincourt, adopting as allies, the Indian savage, and forced by such alliance into permitting, if not adopting, all the abominations of Indian warfare. The book before us is crowded with details of such warfare, midnight attacks on villages, the murder of their inhabitants and destruction of their property, the carrying off of women and children into life slavery, and the torture of prisoners, sometimes with the consent of Christian allies, and sometimes in spite of them. The attack and destruction of Deerfield, and the reprisal on Norridgewock being specimens of the manner in which the contest between two great Christian peoples was conducted in America. Mr. Kingsford believes, and we are most willing to believe with him, that the worst things were not done on the English side, but there were Indians on both sides, and the Christian victors were sometimes forced to shut their eyes while their allies indulged in the pleasure of burning a few captives. This was called *la petite guerre*. Up to the time when the narrative closes, the fortunes of the French seem to be in the ascendant; they had destroyed Oswego, defeated Braddock, and extended their holdings on Lakes Champlain and Ontario, and the Ohio, and had gone down the Mississippi to New Orleans, round the English Colonies . . . their reinforcements from France, their despotic form of government and the military character of their people giving them a decided advantage over the democratic and separate governments, and the mercantile and agricultural habits of the English colonists; so that but for the coming into power of the first Pitt, and his energetic policy and action, they might possibly have carried into effect their cherished idea of driving the English into the sea, or at any rate of confining them to the Atlantic seaboard. But Pitt came to the helm of state, and sent Wolfe, and roused the latent energies of the English colonists, and it was not long before the aspect of affairs was changed, and Canada became an English Province.

Notes on Exchanges and Legal Scrap Book.

In the recent English case of *Gardner* v. *Bygrave*, which was an action of assault and battery brought by a pupil against his schoolmaster for caning him on the hand, Mr. Justice Mathew made a joke which the *Saturday Review* regards as a "shining instance of how the tedium of legal proceedings may be profitably relieved, and the principles of law aptly illustrated by a really ready and witty observation." It was admitted on all hands that assuming caning on the hands to be a proper mode of punishment, the caning in question was a good and lawful one. The plaintiff's counsel, in an argument of a distinctly *a posteriori* character, contended that the lawfulness of caning on the hand depended on the occupation of the boy when out of school, and that the defendant ought to have inquired into the plaintiff's employment. "If he worked with his hands, such a punishment might seriously interfere with his occupation. Punishment might be inflicted elsewhere"—whereupon the court asked—"What if his occupation were sedentary?"

It was ultimately decided that caning on the hand, when properly done and for a proper reason is lawful.—*Harvard Law Review.*

TRADE COMBINATIONS.—*The Mogul Steamship Co.* v. *McGregor*, L.R.23 Q.B.D., 598, embodies an act of judicial legislation far more important than most statutes.

For the Mogul case determines that *X*, *Y*, and *Z*, independent shipowners, may lawfully form a combination, called a conference, to gain for themselves a monopoly of the tea trade at Hankow, and to drive away all competition from that port. It further decides that, for the purpose of obtaining this monopoly, the members of the conference may agree, *inter alia*, (1) to grant a rebate to persons employing exclusively the ships of the conference whilst refusing it to any one who employs a non-conference ship, and (2) in case any non-conference steamer should attempt to load cargoes at Hankow, then to send as many conference ships as may be needed to underbid the independent steamer, without any regard to profit.

The decision, moreover, of the Court in favour of *X*, *Y*, and *Z* rests on the broad principle that "competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or [other distinct illegalities] gives rise to no cause of action at Common Law" (see judgment of Bowen, L.J., p. 620), and, what is even more important, that any form of competition which would not be unlawful on the part of an individual does not become unlawful because it is carried out by a combination of individuals acting in concert.

The importance of the principle thus laid down admits of no denial. That much may be urged in its favour, both on grounds of law and of expediency (and in the kind of matter with which the Mogul case deals the questions of law and policy cannot be really kept apart), will be denied by no man who has studied the masterly judgment of Lord Justice Bowen.

The basis of the reasoning by which his judgment is supported is that com-

petition is the essence of trade, and that it is vain and inexpedient for the judges to attempt to decide what may be "reasonable" and what "unreasonable" competition. That all the Courts can look to is whether the particular acts complained of by *A* who suffers from the competition of *X*, *Y*, and *Z*, are in themselves wrongful, as, for example, fraudulent, and whether the motive with which the acts are done is the carrying on of trade, or the gratification of spite. It is not, in his opinion (and in this view Fry, L.J., coincides), the province of the judges "to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy," or, as we infer, with considerations of public expediency.

It is, however, of consequence to note the considerations which may make a critic, whatever his own views, desire that the Mogul case, and the principles on which it rests, should be considered by the House of Lords. The dissenting judgment of Lord Esher deserves the most careful attention. Partly from that judgment, and partly from the judgments of the majority of the Court, it is easy to perceive several points which may be urged against the decision of the Court of Appeal.

1. It admits of the gravest doubt whether that judgment be really supported by authority. It is difficult to reconcile with it such cases as *Hilton* v. *Eckersley*, 6 E. & B. 47, or Sir William Erle's admittedly powerful statement of the law contained in his work on the Law of Trades Unions.

2. The notion that acts, e.g. of competition, which would be lawful if done for the sake of defeating *A* as a trader, become unlawful if done from ill-will to *A*, a notion which appears to be countenanced by Lord Justice Bowen, introduces into the law a subtle, and possibly perilous, refinement. No doubt "express malice" is already known to the law. But it is known as something which is very troublesome to deal with.

3. It is difficult to see why, if the judges can determine that an agreement is unreasonable when called upon to enforce it, they cannot pronounce upon its reasonableness when called upon to say whether it be an agreement which ought not to have been made.

4. The admission that "certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several" (see judgment of Bowen, L.J., p. 616), shakes the force of a great deal of the argument in favour of the defendants in the Mogul case. For that argument really consists in showing that each of the acts done or contemplated by the defendants would have been innocent or lawful if done by a single person, and, it may be suggested, overlooks the distinction between the "coincident" and the "concerted" action of several persons.

5. It is difficult to see on what ground the agreement should be held unenforceable by law, and yet not held unlawful.

We are far from asserting that the decision is wrong. But it is of such wide scope and such great moment that criticism seems not only legitimate but desirable, at all events until the House of Lords has spoken.—*Law Quarterly Review.*

Correspondence.

THE JUDGMENT SUMMONS CLAUSES OF THE DIVISION COURT ACTS.

To the Editor of THE CANADA LAW JOURNAL:

As your JOURNAL is considered by lawyers a standard authority on the construction of Division Court law, and one in which I have years ago frequently written, please favour me with your views as to the proper construction of the two following clauses, which are in my opinion not legally carried out by some judges :—

Section 186, under old Act—under Revised Statutes, sec. 244, p. 595 : "Any person imprisoned under the Act who has satisfied the debt or demand or any *instalment* thereof *payable, and the costs* remaining due at the time of the order of imprisonment being made, together with the *costs of obtaining the order* and all *subsequent costs*, shall, upon the *certificate of the Clerk of the Court* or by *leave of the Judge of the Court* in which the order of imprisonment was made, be discharged out of custody."

1. Now the question is, is not the payment of the instalment due, and costs, a condition precedent to, or a necessary qualification of the power to discharge, either under the Clerk's certificate or the Judge's order—or has either the Clerk a right to give his certificate, or the Judge the right to discharge the prisoner of their own motion, without the plaintiff's knowledge or consent? 2. Is there any distinction between the power of the Clerk and the Judge; or can the latter of his mere will—*ipse dixit—nolens volens* as to the plaintiff, and without his knowledge, take upon himself to discharge a debtor in goal under an executed warrant without the payments named?

Secondly. Section 245 of the revised Acts as to the power of the Judge cannot apply as to the abuse clause, as it presumes the act there mentioned to be done in open court. It says the Judge "before whom the summons is heard may rescind," etc. Now as to the sec. 245, some Judges take it upon themselves to construe this section as giving them as it were a "legal *carte blanche*" to do just as they please, in or *out of Court*, without any notice to the creditor who is interested.

1. Do you think this "legal *carte blanche* construction" correct, or does not the law contemplate that the plaintiff should be present to object, or re-examine his debtor, or is the Judge supposed to do as he pleases in the absence of the creditor? 2. Does not the section mean that the "think fit" "rescind or alter" is done on the hearing of same after summons in Court, or at least on notice to the creditor of some kind. The latter I think ought to be done in all cases, even if not heard in Court; yet I think the meaning is a proceeding in Court.

Will you please give me and many others interested your opinion on these two sections, and oblige.

Toronto, Dec. 2, 1889. CHARLES DURAND.

The questions put by our correspondent open up rather a wide field for debate.

Were we to ask the opinions of the several Judges in the Province on these points, no two of them might possibly exactly agree.

In the Division Court a good deal of "natural justice" must necessarily be administered, and a judge is justified in his endeavour to deal equitably with each particular case, so long as he does not override the well-known laws of the land, as laid down either by statute or by decisions of the higher courts.

It is well established that there is now no imprisonment for debt in this Province; and where a judgment debtor has been committed to gaol, under the provisions of sec. 240 of the D.C. Act, such commitment is not (in theory at least) for non-payment of money ordered to be paid, but for fraud, for contempt in disobeying the process of the Court, or for disobedience to the order of the Court when it was in his power to comply with the order.

While a Judge sitting in a criminal court and having passed the sentence of of the law has no power to remit or alter a sentence duly recorded, at least after the sittings of that particular court have closed; yet, while sitting in that court he has power to remit any imprisonment ordered for contempt, and *a fortiori* he has the power after the defendant has purged himself of such contempt.

We do not look at the imprisonment of a judgment debtor to be something done at the instance of or for the benefit of the particular creditor who may happen to put the law in motion, any more than a prosecution for felony is undertaken on behalf of the person upon or towards whom the act involving the felony has been committed. Were it so, it is quite possible that the criminal prosecution might be a bar to any civil remedy on the part of the injured person.

When the executive is called upon to extend the clemency of the crown towards a convicted criminal, it is not thought necessary to give the whilom prosecutor an opportunity of showing cause to the contrary. The crime was one against "the peace of the Queen, her crown and dignity."

On the same principle it might be argued that when it is considered that the commitment of a judgment debtor under the circumstances mentioned is not intended to be for the benefit of his creditor (though indeed it often turns out to be so), there is no reason why the creditor should have notice of an application to remit the sentence of imprisonment. On the other hand, the circumstances of the case may be such as to raise a suspicion that the application was not of a *bona fide* character, or that the statements upon which it was based were of questionable veracity, or that an order would be in some way unfair to the creditor. In cases like these the Judge might well refuse to act without having all parties before him.

It is well known that in many cases of imprisonment for contempt, the persons committed have languished in prison for most unreasonable periods. To prevent such a thing happening in any of our Division Courts, the power of the Judge is limited as to the period of commitment, and a further enactment has also been passed for the benefit of judgment debtors. This section is really as much, or more so, for the creditor's benefit as for his debtor's, for it holds

out an inducement to the latter to pay the debt, while his continued imprisonment will in no way benefit his creditor's pocket, though it may gratify his feelings.

We quite agree with Mr. Durand as to the principle involved, that when anything is to be done which touches the rights or standing of the judgment creditor, he should have full notice beforehand. But he ought to be the last to deprecate anything which imposes further costs or trouble upon him. Payment by the debtor after he has been imprisoned places the creditor in the same position as if the order for payment had been promptly obeyed in the first instance; and certainly, if this had been done, the creditor would not have been in a position to ask any further order against him without a fresh summons being taken out against him.

We think the section in question deprives the Judge or any one else of the right to oppose or refuse the debtor's discharge if he has complied with the conditions necessary to it. But, while the debtor has thus a right to his discharge where he has complied with the order, it does not follow that the Judge has not the power to order his discharge at any time, if he is satisfied that his previous order ought to be rescinded, and that without notice to the creditor. If the Court is satisfied that the contempt is purged, there seems to be no necessity for allowing the creditor to have a "say" in the matter.

Next, as to sec. 243. It does seem to us that before any further order is made, as is there permitted, the creditor should have some notice of the application. We believe the practice adopted by some Judges is this: Where facts brought to the notice of the Judge shew that it would be inequitable or unnecessarily harsh to allow the existing order to continue in force, he directs either that both parties appear before him in Chambers, or he stays his first order till the next sitting of the Court, when all parties appear and are heard.

Our opinion, then, briefly is this: As to sec. 244, (1) the payment therein mentioned is a necessary condition precedent to the debtor's discharge, and such payment gives him an absolute right thereto; but we think, whether the discharge takes place under the Clerk's certificate or by the order of the Judge, no notice to the creditor is required. (2) There seems to be no distinction between the power of the Clerk and that of the Judge. We would infer that the Clerk has no right to give his certificate unless payment has been made to him as such Clerk. If it has not been made to him, then it would appear to be necessary to apply to the Judge, who would, no doubt, in the absence of the creditor, require to be perfectly satisfied as to the debtor having complied with the order made against him.

Next as to sec. 245. Where the Judge has made an order against the debtor at the instance of his creditor, it would appear to be only right to give the latter an opportunity to be heard before altering the terms of that order, except, indeed, where the commitment is one for contempt of court only. But the hearing of such an application need not necessarily be at a regular sitting of the court.

ED. C.L.J.

DIARY FOR JANUARY.

1. Wed.....*New Year's Day.*
3. Fri.....Lord Eldon died 1838, aged 87.
4. Sat.....Chief Justice Moss died at Nice, 1881.
5. Sun.....*Second Sunday after Christmas.*
6. Mon.....Epiphany. Last day for notices for Primary Exams.
7. Tues.....Toronto Assizes Criminal side. Christmas Vacation ends.
8. Wed.....Hamilton Assizes; London Assizes.
12. Sun.....*First Sunday after Epiphany.* Sir Charles Bagot, G. G., 1842.
13. Mon.....County Court Sittings for motions begin. Surrogate Court Sittings.
14. Tues.....Primary Exam. Court of Appeal Sittings. Toronto Assizes Civil side.
16. Thurs....Admission of Graduates and Matriculants.
18. Sat.....Last day for filing papers and fees. County Court Sittings for motions end.
19. Sun.....*Second Sunday after Epiphany.*
21. Tues.....1st Intermediate Examination. Lord Bacon born 1561.
23. Thurs....2nd Intermediate Examination.
26. Sun.....*Third Sunday after Epiphany.* Sir W. B. Richards died, æt. 75.
28. Tues.....Solicitors' Examination.
29. Wed.....Barristers' Examination.
31. Fri.....Earl of Elgin, G. G. 1847.

Reports.

ONTARIO.

HIGH COURT OF JUSTICE.

(Reported for THE CANADA LAW JOURNAL.)

RE CENTRAL BANK. THE LIQUIDATORS' CASE.

Winding Up Act—R.S.C. c. 129, Remuneration of Liquidators.

Liquidators are officers of the Courts, and in determining their remuneration, the policy of our Parliaments in not sanctioning as high a rate of salary or remuneration as is allowed by private commercial corporations should be recognized.

The Courts have fixed no hard and fast rate of remuneration for the services of liquidators, but exercise a discretion in dealing with each case according to the amount involved and the responsibility incurred.

Where the amount collected in this liquidation was large, two rates of remuneration were allowed to the liquidators, viz.: three per cent. on moneys collected after pressure, and where special efforts had to be made; and one and a quarter per cent. on debts paid at maturity or collected without much effort on the part of the liquidators.

This was an application on behalf of the liquidators to fix the amount of their remuneration for their services in winding up the affairs of the insolvent Bank.

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

J. K. Kerr, Q.C., and *E. D. Armour* for certain creditors.

MR. HODGINS, Q.C., MASTER IN ORDINARY:—In disposing of the question of the remuneration of the liquidators of the Central Bank I am without a precedent to guide me, and without evidence of the commercial value of such services as they have rendered in the responsible work of winding up the affairs of this bank. A responsibility, therefore, is thrown upon me without the relief which precedent or fact might lighten, and I have no guide but a conscientious sense of what is just and reasonable for the onerous work and services of these liquidators.

Fortunately in exercising judicial supervision over their duties I have acquired a personal knowledge of the business capacity displayed by them in dealing with the disastrous and tangled financial affairs of this unfortunate bank, so I am to some extent able to form a fair estimate of the value of their services, and which, in the earlier proceedings of this winding up warranted my casting upon them a larger responsibility than the Act prescribes in ordinary cases. This extension of their responsibility was in the interest of the creditors, and has largely reduced the legal and other expenses of the liquidation, while it has increased their personal peril and responsibility as liquidators.

The successful winding up of an insolvent institution like this bank required as liquidators men having the qualities of integrity and firmness, as well as the qualifications of business capacity, industry and tact, and whose honesty of purpose and fearlessness of character would deter the financially dishonest or careless debtor from attempting to overreach or to evade the payment of just debts.

The liquidation in this case has been unusually rapid, and, as a consequence, beneficial to the creditors, in that two dividends of 33⅓ per cent. have been paid out, and circulation redeemed, in all amounting to $957,580.10 within eleven months of the appointment of the liquidators. These results may be referred to as indicating how far the creditors have been successful in securing the services of men possessing qualifications similar to those I have indicated. For such services creditors must be expected, and, I have no doubt, are willing, to pay what is fair and reasonable.

Undoubtedly, men will always be found who would gladly take offices or positions of trust even if the salary or remuneration was but a pittance, though their abilities or qualifications would prevent their competing with any degree of success with others better qualified and of a

higher cost. Such men would rarely bring qualifications or usefulness to the office or position taken ; while their want of efficiency would be an element of weakness and danger to the service or duty in which they were employed.

In dealing with this remuneration of the liquidators I have been reminded that they are public officers of our courts. There is imported into this reminder the duty of recognizing the policy of our Parliaments in determining the compensation to be given to public officers entrusted with large responsibilities. That policy seems to indicate that Parliament should provide the minimum of remuneration for the maximum of ability, efficiency and responsibility. The policy of our private corporations and commercial firms adopts, I believe, a more just and fair rule, and recognizes the duty of paying liberally for similar qualifications. Even the judiciary which decides most important and weighty questions affecting the lives and personal liberty, and rights of property of our people, as well as the validity or invalidity of Acts of our Parliament and Legislatures receives less by one-half of the compensation paid to some of the solicitors and to many of the managers of our commercial corporations.

And yet it is a principle of sound and healthy policy that the public or the State should control the best talent and most thorough qualifications for their responsible services or offices. This appears to be a recognized principle which governs individuals in their private affairs, for experience proves to them that their financial safety and their business interests, rest on such a policy ; and I think it goes as a trite saying that whatever is right and true in the administration of individual affairs or business, may be applied as a safe rule of national policy in the administration of public affairs.

Recognizing, therefore, the policy of our Legislatures in thus indicating the rate of compensation for public officers and judical functionaries, I find myself unable to adopt in fixing the liquidators' remuneration, the scale of compensation for financial services and responsibilities adopted by our great monetary or commercial institutions. Had the liquidators been the officers of such institutions they might reasonably have expected more liberal remuneration for the financial services they have rendered to the court and the creditors than, for the reasons assigned, I feel warranted in allowing them.

The Winding Up Act prescribes that the liquidators shall be paid such salaries or remuneration, by way of percentage or otherwise, as the court directs; and I assume this means what the Ontario Trustee Act (R.S.O., 1887, chap. 110, sec. 38) has expressed in fuller words, as a fair and reasonable allowance for their care, pains and trouble, and their time expended in and about the trust estate.

In arguing the question of a salary or percentage, counsel referred to the more prolonged and unfinished liquidation proceedings affecting the Exchange Bank at Montreal, which was ordered to be wound up on November 23, 1883, and under which proceedings it is stated that a monthly salary of $300 each is being paid to its three liquidators. The policy of expeditiously and efficiently winding up this bank, which, in the public interest, has been kept in view by this tribunal, has been loyally sustained by the efforts of the liquidators, and for that reason I think a percentage on the amounts realized instead of a salary will be the most equitable rate of remunerative for both liquidators and creditors.

Our statutes delegate to the courts the duty of fixing a proper remuneration ; and the courts, in executing this duty, have fixed no hard and fast rate of compensation, but have allowed themselves a wise latitude in dealing with each case according to the amount involved and the responsibility incurred.

As stated by Vankoughnet, C., in *Chisholm* v. *Barnard*, 10 Gr. 479; "Five per cent. commission on moneys passing through the hands of executors or trustees may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in and a great deal of labor, anxiety and time spent in managing an estate, where 5 per cent, would be a very insufficient allowance." And in the case of *Thompson* v. *Freeman*, 15 Gr. 384, where the amount involved was above $300,000, Spragge, V. C., after consultation with Chancellor Vankoughnet, said : "If the sums had been one-fourth or one-tenth what they have been, the percentage would have been only 5 per cent.; when it is counted by a good many thousand dollars per year and in the aggregate, by hundreds of thousands, the same scale of compensation becomes excessive."

In that case the local Master had allowed 5

per cent., but on appeal the court reduced the rate to 3 per cent. on investments over $600, the learned Judge adding: "This is a larger percentage than is allowed to sheriffs, and in the case of so large an estate as this, it is, I think, sufficient remuneration."

The repealed Insolvent Act of 1875 allowed to each assignee a percentage ranging from one and a quarter per cent. to five per cent., and a similiar rate has been fixed by the Ontario Joint Stock Companies Winding Up Act (R.S. O., 1887, chap. 183, sec. 21), as the remuneration of the one liquidator provided for by that Act.

In the Dominion Act, under which these proceedings are taken, Parliament has seen fit to require the business of winding up the affairs of an Insolvent Bank to be by three liquidators, although I believe in many of our banks and monetary institutions the executive management is usually placed in the hands of two officers, the president and general manager. This provision of the Act requiring three chief executive officers may, I think, be considered more as an incidental than an absolute factor in determining the question of their remuneration. The rules under the English Act prescribe a separate remuneration for each liquidator.

After a full and anxious review and consideration of all matters connected with this expeditious and so far successful winding up, I think justice will be done to both liquidators and creditors by adopting two percentage rates as the basis of the remuneration: One, the lowest rate authorized by the Insolvent Act of 1875, viz.,one and a quarter per cent., and the other the lowest rate sanctioned by the court in *Thompson v. Freeman*, viz., three per cent.

It might be urged that under the authority of the latter case, I would be warranted in allowing three per cent. on all moneys collected by the liquidators; but as the allowance is a compensation for trouble, as well as responsibility, and as the statute gives the liquidators the supervision and approval of the court in executing many of their duties, they may reasonably submit, as to the least troublesome of their collections, to the lowest percentage rate authorized by a statute on an analogous subject.

The higher rate will therefore be allowed on all moneys collected by them after pressure, and where special efforts had to be made for the realization of the assets of the bank. The lower rate will be allowed on debts and interest paid at maturity or without much effort and on debentures sold by the liquidators. The liquidators will therefore recast the accounts, and bring in statements showing their receipts under the above heads.

The claim respecting the $203,915 taken over from Mr. Campbell cannot be considered on this application, but may be dealt with when adjusting their allowance with Mr. Campbell, or on the final winding up of their liquidation.

COUNTY OF YORK.

(Reported for THE CANADA LAW JOURNAL.)

THORNLEY *v.* REILLY.

Liquor License Act R.S.O. (1887) Cap. 194, Sec. 125. Notice not to deliver intoxicating liquor to a person in the habit of drinking intoxicating liquor to excess—Notice, by whom to be given—Time within which action must be brought—Interpretation Act, sec. 8, sub-sec. 39.

The provision in the Liquor License Act R.S.O., (1887) cap. 194, sec. 125, enabling the person aggrieved to require the Inspector to give the notice, required under the above section, does not confine the remedy by personal action to cases only in which the Inspector's services have been requested and in which he has acted. The six months within which the action for damages must be brought under the said section are to be computed from the time of the sale, and not from the date of service of notice.

[TORONTO, Nov. 1, 1889.

The plaintiff, a married woman, brought an action against the defendant, a licensed hotelkeeper in the City of Toronto, alleging that her husband William Thornley had, as the defendant well knew, the habit of drinking intoxicating liquor to excess; th t before the commencement of the action she gave to the defendant notice in writing, signed by her, not to deliver to her said husband any intoxicating liquors. The said notice was given pursuant to Section 125 of Chapter 194, of R. S. O. (1887), and was served upon the defendant by one Atkinson on the 12th of July, 1888. The writ of summons was issued on the 6th March, 1889. The defendant contended that the requirements of the said section had not been complied with, and that to entitle the plaintiff to succeed in the

action the notice given to the defendant must be given by the Inspector of Licenses for the City of Toronto, or that, at all events, the plaintiff must request the Inspector to give a notice, which, if he refuses to do, would possibly enable her to give the notice herself. The case was tried before Macdougall, Co.J., with a Jury, on the 11th September, 1889, when a verdict was rendered in favor of the plaintiff and damages assessed at the sum of $100. The question whether the notice required by the above section had been given was reserved, and after argument judgment was given for the plaintiff for $100 and costs.

MACDOUGALL, CO. J.—In this case I have carefully considered the clause in the R.S.O., c. 191, s. 125. In the earlier part of the section two methods of giving the notice required are indicated, either by the party injured or by the Inspector. This requiring the Inspector to serve the notice is an amendment of the original Act, and seems to have been adopted, possibly with the view that a notice served by the Inspector would carry with it some official authority, and receive more attention from the liquor vendor, and thus prevent the mischief that the statute aimed at. It was quite manifestly, in my opinion, not intended as a clause to narrow or limit the beneficial effect of the section, but rather to widen it. It gives the aggrieved party the right to demand official action, and from a quarter likely to be respected by the liquor vendor. That portion of the section which follows, and prescribes the consequence of disobeying the notice, differs from section 90 of chapter 181, R. S. O. 1877.

Section 90 of the Act of 1877, gave only the person giving the notice the right of action for damages, as for a personal wrong: section 125 of chapter 194 R.S.O. 1887, gives something more. It prescribes, first, a penalty not exceeding $50, to be recovered on conviction; and apparently, in addition to this remedy, the same redress to the person "requiring the notice to be given"—the right of action as for a personal wrong given under the statute of 1877. The whole contention turns upon the words "the person requiring the notice to be given."

It is contended that section 125, under the last consolidated Act, contemplates two methods of redress: First, if the person aggrieved gives the notice, and there has been a breach of the notice, he or she can proceed before a magistrate, and, upon conviction, the liquor vendor is liable to a penalty not exceeding $50. Second, if the person aggrieved requires the Inspector to give the notice—and there has been a breach of the notice—he or she can sue for damages in an action as for a personal wrong, and recover not less than $20 or more than $500. I must say that applying the canon of construction to this amended clause, set forth in sub-section 39 of section 8 of the Interpretation Act, that "every Act and every provision or enactment thereof shall be deemed remedial whether its immediate purport be to direct the doings of anything which the Legislature deems to be for the public good, or to prevent and punish the doing of anything which it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act," etc. I cannot think the contention above set forth should prevail.

Mr. Justice Burton in *Northcote* v. *Brunker*, 14 App. at p. 372, expressed the opinion that that portion of this section, which gives a right of action for damages, is not a penal provision. The liability here is not imposed upon the defendant by way of punishment, but for the purpose of compensating the plaintiff. It is also well put by that learned Judge, that "all statutes whether penal or not are now, as a matter of fact, construed by the same rules." "Penal provisions like all others are to be fairly construed according to the legislative intent as expressed in the enactment, the Courts, refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction, or equitable construction, to exonerate parties clearly within their scope."

The provision enabling the person aggrieved to require the Inspector to give the notice, does not, in my opinion, confine the remedy by personal action to cases only in which the Inspector's services are requested, and in which he has acted. The expression, "the person requiring the notice to be given may in an action," etc., recover from the person notified, etc., means no more, in my judgment, than if the words had been "the person giving the notice." It does not say "the person requiring the notice to be given by the Inspector." I think any doubt that has arisen from the amendment of

this clause of the Liquor Act may be traced to a very common source of difficulty ; the practice of our legislators to pitchfork an amendment into the middle of a section of a statute, without much regard to clearness of expression in the language used, or its harmony or logical connection with the existing language of section sought to be altered or amended.

In this case, however, I feel reasonably clear that the amendment made in section 90 of chapter 181, R.S.O., 1887, and the language used for that purpose, has not had the effect of restricting the aggrieved person's right of action to cases only where the notice has been given by the Inspector. Such a narrow construction would tend, in my opinion, to defeat the object of the Act, and is neither a fair or reasonable meaning to be attached to the words used in the section as it now stands in the Revised Statutes of 1887.

I also overrule the objection that the action is too late. The six months limit means within six months from the sale, and not six months from the date of service of notice.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [Oct. 8, '89.

FRANK *v.* THE CORPORATION OF THE TOWNSHIP OF HARWICH.

Right of way—Road along lake shore—User and dedication—Cul de sac road ending at navigable water.

Uninterrupted user of a roadway along the edge of an unoccupied and uninclosed farm bordering on a lake upon the bed of sand formed there by the waters of the lake for a sufficient length of time will give a right of way, and the building of two piers across the same on the sides of a passage made by the breaking through of a small inland lake will not affect the right of way, as the roadway terminates at the channel made by the piers on navigable water, which is itself a natural highway.

The Queen v. *The Inhabitants of East Mark*, 11 Q.B., at p. 882, quoted.

The judgment of Falconbridge, J., affirmed.

Moss, Q.C., and *Macbeth*, for the appeal.

Matthew Wilson, contra.

Div'l Ct.] [Dec. 21, '89.

In re HIBBITT *v.* SCHILBROTH.

Prohibition—Division Court—Substitutional service of summons—Defendant out of Ontario—R.S.O., c. 51, s. 100.

At the time of the issue of the summons in a Division Court plaint the defendant was in Ontario, but she left without its having been served upon her, and an order was made after she had left for substitutional service.

In the material upon which she supported a motion for prohibition she did not negative the existence of such facts as would give jurisdiction to make an order for substitutional service, and from her own affidavit it was to be inferred that the summons had come to her knowledge.

Held, that, as the Judge in the Division Court had jurisdiction under s. 100 of R.S.O., c. 51, as amended by 51 V., c. 10, s. 1, to order substitutional service if certain facts were made to appear, and as the defendant was subject to the summons at the time it was issued, it was for the Judge to determine whether the facts necessary to give jurisdiction appeared, and his determination could not be reviewed by the High Court.

Schoff, for the plaintiff.

John Greer, for the defendant.

Chancery Division.

BOYD, C.] [Nov. 30, '89.

TRADERS' BANK *v.* BROWN MANUFACTURING CO.

Hire receipt—Default—Resumption of possession—Right to enter on premises.

Where one sold machinery to another upon the terms expressed in a hire receipt that "The title of and right to the possession of the above mentioned property, wherever it may be, shall remain vested in the said vendor, and subject to his order until paid for in full,"

Held, the vendor or his assigns had the legal right (the purchase money being in arrear and unpaid), to enter upon the premises in order to resume actual possession of the machinery, giving notice and using all care in so doing, but that it would be illegal for him to take possession by force, and an injunction might properly issue to restrain acts of force on the behalf of the vendor, but only on the terms that the vendee be likewise enjoined from using force to interfere with the rights of the vendor, but the vendor should first give such security as is usual on replevin before taking possession of the machinery.

Lash, Q.C., and *Lefroy*, for the plaintiffs.
Hoyles, for the defendants.

BOYD, C.] [Dec. 5, '89.

TOWNSLEY *v.* BALDWIN.

Mechanics Lien—Action by sub-contractor—Demurrer—Necessity of averment that something is due to the contractor.

Demurrer to statement of claim in an action by a sub-contractor to enforce a mechanic's lien, upon the ground that there was no averment that anything was due from the land owner to the contractor.

Held, that the demurrer should be allowed. If no amount is owing from the owner to the contractor there is no lien in favour of the sub-contractor.

Dr. Snelling, for the plaintiff.
J. F. Edgar, for the defendant Adams.

BOYD, C.] [Dec. 18, 1889.

RE MCCAULEY AND CITY OF TORONTO.

Municipal Corporations—Expropriation of land—Lands injuriously affected—Loss of good-will as ground for compensation.

Appeal from arbitrators' award.

Held, that though *Rickets' case*, L.R. 2, H.L. 175, decided that in a case where land is not compulsorily taken but only injuriously affected, injury resulting from diminution of good-will pertaining to business carried on upon the premises is not an element of compensation, yet it is well settled law that where the land itself upon which the trade is carried on is expropriated, damage to the good-will may be a proper subject of compensation; and since here the whole of the appellant's land on which he had conducted his business for some twelve years, had been taken, the evidence tendered as to loss sustained by injury to his good-will is admissible, and its effect should have been considered by the arbitrators, and for this purpose the award must be remitted to them.

Lash, Q.C., for the appeal.
Biggar and *Worrell* contra.

BOYD, C.] [Dec. 19, '89.

ROUTLEY *v.* HARRIS.

Slander—Charging offence punishable by imprisonment—Crime—Malicious injury to property—R.S.C., c. 168, s. 26, 27, 58, 59.

Held, upon demurrer to a statement of claim, that any defamatory charge referable to wrong-doing under the 26th and 58th sections of the Act relating to malicious injuries to property, R.S.O., c. 168, would be actionable without special damage, inasmuch as those sections impose the penalty of imprisonment for the offences therein provided for, but that if such defamation imputed wrong-doing under the 27th or 59th sections of that Act, that special damage must be alleged in as much as those sections merely impose a fine upon persons liable under them.

Aylesworth, for the demurrer.
Folingsbee, contra.

BOYD, C.] [Dec. 19, 1889.

DAWSON *v.* FRASER.

Will — Construction — Maintenance — Vested interest—Death of party entitled to maintenance.

When a will gave the rents of the testator's farm for the support and maintenance of "the family now at home," and directed that the said rents should be so applied till the youngest surviving child came of age, and it appeared that one of the children so entitled to a share of the rents had died although the youngest surviving child had not yet come of age,

Held, that the share of the deceased child in the rents devolved upon her personal representatives.

The distinction is marked in the cases between those where a provision is made for maintenance of indefinite duration and those where the duration is defined by the testator. In the former case the provision will not be carried beyond the life of the beneficiary, in the latter it

goes on for a prescribed period notwithstanding the death of the beneficiary, because to avoid an intestacy the Court will adjudge it to the representatives of the deceased.

Full Court.] [Dec. 23, '89.

SWITZER *v.* LAIDMAN.

Libel and Slander—Pleading—Admission—Justification—Mitigation of damages.

Action for slander, wherein it was charged that in April, the defendant said to A. that the plaintiff had entered her mother's house three or four times, and had stolen, in all, about three or four hundred dollars.

The defendant, in her statement of defence, pleaded that the plaintiff "admitted and confessed to A. K. that it was he who had taken the money."

The trial Judge refused to allow evidence to be given in support of the above plea, insisting that the defendant, if she wished to give such evidence, must enter a formal plea of justification.

Held, that the above ruling was right, but that objection should have been made to the pleading, either by demurrer or by application to strike it out as embarrassing, and there ought to be a new trial with leave to replead or amend the pleadings. The defendant could only set up the matters in question above pleaded in mitigation of damages, by adding thereto on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been made by the plaintiff to A. K., although she honestly believed it to be true at the time she repeated the words complained of.

Carscallen, for the plaintiff.

Staunton, for the defendant.

Full Court.] [Dec. 23, '89.

RYAN *v.* MCCONNELL.

Bills and Notes—Notes as collateral security—Laches of creditors—Release of principal debtor—Necessity of proving actual injury.

Where promissory notes of third persons were turned over by the defendant without endorsement as collateral security for a debt due by him to the plaintiff, and the plaintiff now sued the defendant for the amount of the debt, and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for the payment of the collateral notes,

Held, that if the defendant had been injured by such laches, and to the extent of which he had been injured, he should be exonerated from payment, but not otherwise; and the trial Judge had pushed the law too far against the plaintiff in holding that having found the laches as a matter of fact it was a conclusion of law that detriment had followed to the defendant.

Haverson, for the plaintiff.

Mills, for the defendant.

Practice.

Q. B. Div'l Ct.] [Dec. 21, '89.

TRUAX *v.* DIXON.

Costs—Scale of—Action by sub-contractors to enforce mechanics' lien—Amounts in question—Investigating of accounts—Jurisdiction of County Court and Division Court—R.S.O., c. 126, s. 28—Right of defendant land-owner to set-off of costs—Action tried without a jury—Powers of taxing officer—Amendment of judgment.

The plaintiffs, sub-contractors, in an action brought in the High Court to enforce a mechanics' lien, claimed against the contractor $245.29, and recovered $284.54. They claimed a lien on the land for the amount due them, but upon the investigation of accounts to the extent of upwards of $1,700, between the contractor and the land-owner, it was found that the latter owed only $63.79, and the plaintiffs' lien was limited to this amount.

Held, upon an appeal from taxation of costs, that the contractor could not have sued the land-owner in the Division Court to recover the balance of $63.79, but must have proceeded in the County Court, and the plaintiffs, suing upon the same claim, were therefore entitled to County Court costs, and as the plaintiffs' claim was also beyond the jurisdiction of the Division Court, upon any construction of s. 28 of the Mechanics' Lien Act, R.S.O., c. 126, the plaintiffs could not have brought their action in the Division Court.

Held, also that, as the plaintiffs could not have hoped to establish a case which would have entitled them to High Court costs, the defendant land-owner should be allowed a set-off of the excess of his costs incurred in the High Court over what he would have incurred in the

County Court, but as the action was tried without a jury and rule 1172 did not apply, the taxing officer had no power to allow this set-off without the direction of the Court, and the judgment of the Court was amended so as to meet the case.

Aylesworth, for plaintiffs.

D. W. Saunders, for defendant George Dixon.

Q. B. Div'l Ct.] [Dec. 21, '89.

CARTY *v.* CITY OF LONDON.

Costs—Taxation—Evidence taken de bene esse—Attendance of medical man on examination—Service of subpoenas by solicitor—Rules 254, 1212, 1217—Tariff A., items 16, 17.

1. An order was obtained by the plaintiff, who sued for damages for bodily injuries sustained, for his own examination *de bene esse* before the trial. The order provided that after the conclusion of the plaintiff's examination he should submit to a personal examination by medical men on behalf of the defendants, and that the defendants might afterwards continue their cross-examination of the plaintiff, and that the examination might be given in evidence at the trial "provided the defendants had been able to continue and complete their cross-examination of the plaintiff after the said medical examination." The plaintiff was examined and partly cross-examined under this order, and was examined by the medical men, but his cross-examination was never completed. The plaintiff was not examined as a witness at the trial; the depositions taken were offered in evidence, but were rejected as inadmissible under the terms of the order. The plaintiff succeeded in the action.

Held, under the circumstances of the case, that the examination of the plaintiff *de bene esse*, was a proper and reasonable proceeding, and as the failure to complete it was through no fault of the plaintiff or his solicitor, and as it was not without use to the defendants, the costs of it should have been taxed to the plaintiff as part of the costs of the action.

Banfort v. Ashburnham, 13 C.B.N.S., 598; 32 L.J.N.S.C.P., 97; 7 L.T.N.S., 710; 11 W.R., 267; 9 Jur., 822, followed.

2. The plaintiff's own physician attended on him during the examination *de bene esse*, and was called as a witness at the trial, when he stated what his charges for attendance on the plaintiff would amount to.

Held, that, there being nothing to shew that he did not include in his statement the charge for attendance at the examination, they must be taken to have been included in the verdict, and could not be taxed to the plaintiff as part of the costs of the action.

3. *Held*, Armour, C.J., *dubitante*, having regard to rules 254, 1212, 1217, and items 16 and 17 of Tariff A., that the plaintiff was not entitled to tax anything for costs of service by his solicitor of writs of subpoena. Decision of Galt, C.J., varied.

G. W. Marsh, for plaintiff.

Flock, for defendants London Street Railway Company.

Swabey, for defendants City of London.

Street, J.] [Dec. 26, '89.

IN RE RYAN *v.* SIMONTON.

Evidence—Ex parte certificate of County Judge

No certificate of a judicial officer of proceedings had before him can properly be settled, where it is intended to be used as evidence unless in the presence of, or at least on notice to, all the parties concerned.

Aylesworth, for plaintiff.

W. M. Douglas, for defendant.

STREET, J.] [Dec. 26, '89.

ST. LOUIS *v.* O'CALLAGAN.

Writ of summons—Renewal of after expiry—Powers of local Judge—Certificate of lis pendens—Issue of before action—Adding parties—Statement of claim—Amendment.

Where a certificate of *lis pendens* purporting to be issued in this action was by an error of an officer of the Court issued before the action was begun, an order was made in the action so declaring and directing that it be set aside on that ground.

Held, also, that a local Judge has jurisdiction by the combined effect of rules 328 and 485 to make an order for the renewal of a writ of summons, even at a time when such writ has actually expired.

Re Jones, Eyre v. Cox, 46 L.J.N.S., Ch. 316, followed.

And where a local Judge, in 1887, and again in 1889, made orders renewing a writ of sum-

mons issued in 1886, and such orders were not appealed against,

Held, that the writ must be treated as having been properly renewed by such orders.

But where a new defendant was added in 1889, to an action begun in 1886,

Held, that the statement of claim should shew on its face the date at which such defendant was made a party, and an amendment was ordered.

Hoyles, for defendant Hyland.

W. H. P. Clement, for plaintiff.

C. P. Div'l Ct.] [Dec. 26, '89.

CANADA COTTON CO. *v.* PARMALEE.

Attachment of debts—Rule 935—Unadjusted insurance moneys—Locus standi of garnishees—Appeal—Garnishees out of Ontario.

Held, reversing the decision of Falconbridge, J., 13 P.R. 26, that moneys due or owing from an insurance company to a policy holder, are garnishable under the enlarged provisions of rule 935.

Webb v. *Stenton*, 11 Q.B.D. 518, and *Stuart* v. *Grough*, 15 A.R. 299, considered.

Held, also, affirming Falconbridge, J., that the garnishees had the right to appeal against an order directing the trial of an issue between the judgment creditors and a claimant of the moneys attached.

Held, lastly, that the garnishees, being a foreign corporation, were not "within Ontario," and therefore not subject to provisions of rule 935.

D. W. Saunders, for plaintiffs.

Aylesworth, for the garnishees.

Q. B. Div'l Ct.] [Dec. 21, '89.

PORT ROWAN & LAKE SHORE R. W. CO. *v.* SOUTH NORFOLK R. W. CO.

Costs—Security for—Action for the benefit of another—Non-existent corporation—Issue on pleadings.

An application for an order for security for costs was made on the ground that the plaintiffs had no corporate existence, and that their name was being used by one C., who was insolvent.

Held, upon the evidence that there was nothing to warrant the conclusion that this action was really brought for the benefit of any other than the plaintiffs.

Held, also, that the question whether the plaintiffs had or had not ceased to be an existing corporation, having been raised upon the pleadings, could not be raised and determined on an application for security for costs.

An order made in Chambers for security for costs was set aside.

Masten, for plaintiffs.

W. M. Douglas, for defendants.

Miscellaneous.

INDUSTRIAL SCHOOLS ACT, R.S.O.

FORM OF ORDER OF DETENTION UNDER.

The following form under the above Act was lately settled by Dartnell, J.J., County of Ontario.

In the matter of A. B., a child under the age of fourteen years, and in the matter of the Industrial Schools Act.

Upon the application of C. D. of ———, and upon reading the evidence taken under oath by me, of the said C. A. and of E. L., filed in the office of the Clerk of the Peace for the County of ———; the said child having also been produced before me, and the evidence aforesaid having been taken in his presence:

And it appearing to me that the said child is a resident of the County of ———, and comes within the descriptions now numbered (1, 3, 4, etc., as the case may be) in section seven of the said Act:

I find that it is expedient and proper to deal with the said child under the said Act. And I do order his detention for the period of ——— years in the "Victoria Industrial School" in the village of Mimico.

Given under my hand and seal this day of —

G. H. D., *Judge.*