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TABLE OF CASES REPORTED AND NOTED IN THIS VOLUME.

TABLE OF CASES

NOTED IN DIGEST OF ENGLISH LAW REPORTS.

TABLE OF TITLES

CONTAINED IN DIGEST OF ENGLISH LAW REPORTS.

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4. Fri.
5. Sat.
6. SUN..*Epiphany.* Christmas vacation in Chancery ends.
7. Mon...Municipal Elections held. Heir and Devisee Sittings begin. Co. Court Term begins.
8. Tues..Sittings of Assize, Hamilton—Galt, J.
9. Wed.
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Canada Law Journal.

Toronto, January, 1878.

Our expectation that the Chancery side of the question, on the subject of the fusion of Law and Equity, discussed recently by "Q. C." would be strongly supported has not been disappointed. "Equity," and "Humble Stuff" come to the rescue and seem eager for the fray, saying to the man of silk: "Now, gallant Saxon, hold thine own." Belonging, as he does, to that exalted order, we leave him for the present to fight his own battle. The matter must, however, be argued on both sides on its merits, without reference to motives or prejudices. It is too important to be dwarfed or mystified by side issues.

The *Solicitors' Journal* draws attention to the fact that the "plaintiff in person" is fast becoming a serious nuisance in the Courts. Among other notorious instances, there is the case of Miss Sheddon, who occupied in her address before the House of Lords twenty-two days. Among the lesser offenders are classed Mr. Leonards Edmunds, who sued Mr. Gladstone and subpœnaed him as a witness; Mr. Jacobs who first sued Mr. Justice Mellor for false imprisonment, and next Mr. Justice Brett for libel; Mr. Cobbett who sued Mr. Justice Lindley for refusing a habeas corpus in the Tichborne case, and Mr. Henwood, who sued Mr. Childers for libel.

We publish in this issue a contribution to the Law of Real Property from the pen of Mr. Leith, Q.C., in relation to the distress clause in mortgages. It will be remembered that the judgment in Appeal, in the case of *Royal*

Canadian Bank v. *Kelly*, was prepared by the late learned Chief Justice of that Court, and delivered by him in 1870 (see 22 C. P. 283). This judgment was unfortunately lost shortly afterwards, and much inconvenience has been the result. Mr. Leith has, however, added another to the many obligations the profession are under to him in that important branch of the law on which he is such a high authority, by supplying the loss as far as possible, and by adding some useful observations and suggestions of his own.

In *Sweeny* v. *Sweeny*, I. R. 10 C. L. 375 is decided a point in the law of landlord and tenant which has been long *in dubio*. A tenant from year to year of a farm died intestate. For some time no letters of administration were obtained, and the widow meanwhile remained in possession. The majority of the Court held that a notice to quit could be validly served on the widow, on the ground of the inconvenience which would result if such a notice under the circumstances could not be effectively served on the person in actual possession.

We have before now alluded to a mania which is prevalent in this country, of passing over men of age and experience, and giving legal appointments (we are not now alluding to judicial appointments), to young men with the avowed object of giving them a helping hand in their profession. We are glad to say that we are not singular in our views. The *Law Times*, we notice, falls foul of something similar in England. It appears that Lord Justice Thesiger, when at the bar, was the Attorney-General to the Prince of Wales. His successor is a junior barrister, called in November, 1866. The writer having evidently in his memory Mr. Thesiger's appointment to the Bench, thus comments:—"Youth seems at present to be no disqualification, but rather a recommendation for legal appointments. . . . The Heir Apparent ought to be careful not to make ridiculous appointments, but rather to surround himself with officers who will give dignity and importance to the offices which they hold." The Calcutta correspondent of the *Times* states that the appointment of a very young barrister to the position of Legal Secretary to the Government of India was received with great indignation, and has been cancelled. It would appear, therefore, that the malady is not local—neither, however, is public opinion on such matters local.

LAW STUDENTS AND ARTICLED CLERKS.

We propose hereafter to devote a portion of our space, and if necessary from time to time to "enlarge our borders," to make space for the discussion of matters of interest to students-at-law and articled clerks. Our columns have, of course, always been open to them, and have been freely used, but possibly they will feel more comfortable if, so to speak, they have a room to themselves. The bashfulness of youth is proverbial, and, speaking from experience, this is a marked feature of those who are to be our future Chief Justices and Chancellors.

It has been for some time a rule strictly enforced, that the examination questions are not to be made public. We have brought before the proper authorities the propriety of changing this rule, and are glad to announce that the Legal Education Committee of the Law Society, with a praiseworthy desire to give all possible facilities to students and articled

clerks in their studies, have acceded to our request to allow us to publish the former questions of the several examiners at the examinations for call, fitness, and fourth year scholarships. We are sure that this will be appreciated by the parties concerned. If properly applied, a consideration of all questions, fairly and clearly propounded, cannot fail to be of much assistance to students in their reading.

We shall be glad to hear from our young friends on any subject of interest to them. In the meantime, we begin our part by publishing, under an appropriate heading, the questions put at the last examination for certificates of fitness. Next month we propose to publish further papers, giving a certain portion at intervals.

THE SUPREME COURT.

It was our unpleasant duty last year to allude to the discreditable manner in which the work of reporting the cases in this court has been done. We shall hope shortly to see a marked improvement.

A correspondent in the same number called attention to the long leave of absence granted to a learned judge from Ontario, at a time when it was important in the public interests that he should be in Ottawa. We are glad to notice in the daily papers that he does not, at present at least, intend to avail himself of the leave. There are still some matters in relation to this most important tribunal which seem to us to invite discussion.

Complaints have been freely made that there has been undue delay in giving judgments in cases argued in the Supreme Court. We are not in possession of data sufficiently definite or accurate to enable us to say to what extent these complaints are warranted. But we can speak positively of one case, *The Queen* v. *Severn*, in which an important question was raised as to the jurisdiction of the Ontario Legislature to pass an Act to impose a license fee on brewers carrying on a wholesale business, and licensed under the Revenue Acts of the Dominion Parliament,—heard at the last June Sessions of the Supreme Court, and not yet disposed of. The collection of the license fees is delayed, and the business position of an important trade unsettled, in consequence of this delay. It may, in fact, be said that the question in dispute in *The Queen* v. *Severn* has been standing for judgment since the June Sessions of 1876, when the case of *The Queen* v. *Taylor* was argued on appeal from the Court of Error and Appeal for Ontario. In the latter case the same question was raised, and the whole case was fully argued. The Court then took the objection that they had no jurisdiction to hear any case in which judgment had been argued previous to the 11th January, 1876, the date of the proclamation calling into exercise the judicial functions of the Court. Both parties to the appeal were anxious to have the principal question settled, but the Court felt themselves debarred from entertaining it, and the appeal was quashed on the objection raised by the Court. Judgment quashing the appeal was delivered in June, 1877, and the case of *The Queen* v. *Severn* was prepared by consent, and set down and argued the June Sessions, 1877, since which time, as before mentioned, it has been standing for judgment. Many other important cases between private parties were argued at the same Sessions, in none of which, except the *Charlevois Election case*, has judgment been given.

When it is considered that the Court has the most ample powers of adjournment, and of convening a sessions it is hardly too much to say that the delay which has occurred in delivering judg-

ment in the cases argued has affected to a great extent the usefulness of the Court, and has been a serious prejudice to suitors and the public. There should be no greater difficulty in disposing of the business than is experienced by the courts of first resort and the Court of Appeal for Ontario. At present, the Court holds but two sessions in the year for the hearing and determining appeals. It is true that the Court may adjourn any session, or may be specially convened, but there is no compulsion about it. This must occasionally cause delays. It certainly would accelerate business if there were four sessions in the year—that is, one in April and one in October in addition to the two now held, in January and June.

It is rather too soon to express an opinion; but, so far as we can judge, another improvement might be effected by having fixed sittings of the Exchequer Court, at Toronto, Ottawa, Quebec, Halifax and Fredericton, for the trial and hearing of causes, with some provision for the filing of pleadings, etc., with Deputy-Registrars in those cities. This would be a convenience to the profession, and if the business of the Court increases, as it eventually must, something of this nature will certainly be desirable. At present, however, the Court has scarcely enough work to do to keep the rust away. It is generally admitted that a busy man does his work better and more quickly than an idle man. It would be well, therefore, that all revenue cases should be brought in this Court, which is the appropriate forum, and not sent to overworked Provincial Courts.

There yet remains another matter connected with the administration of justice in the Supreme Court, to which we feel compelled to call attention, and that is the provision of the Act which says that the Judges "shall reside at the City of Ottawa, or within five miles thereof." This may seem at first blush an unnecessary interference with the "liberty of the subject;" and it may be urged with some plausibility that it would be as well for judges to reside in the larger cities, the seats of law and learning in the different Provinces from which they have been drawn, and thereby keep up more efficiently their knowledge of the varying laws of these places; and, moreover, prevent the necessity for those appointed to the Supreme Court of breaking up their homes and emigrating to Ottawa; a necessity which might, in certain cases, prevent some excellent men from going on that Bench. Whilst there is some force in this argument, we cannot shut our eyes to the fact that centralization is essential to the making of good lawyers and satisfactory judges. Decentralization, such as is the practice in Lower Canada, has worked most injurious results, as all admit. It is, moreover, absolutely necessary in a Court of Appeal, that its judges should have every opportunity of conferring with each other on the various points arising in cases before them in all their details. It is not satisfactory that they should hear the arguments together, and then separate and prepare their judgments without that attrition of mind so necessary to a full elucidation of difficulties. A view might strike one, which, if communicated to his brethren, might clear up a doubt, which would otherwise result in a dissenting opinion, or possibly a majority opinion might result the other way if the different views of the judges were communicated to each other, and carefully argued between them. What is wanted in a Court of final resort is not a series of long judgments from each member of the Court, each having gone off on his own tack, leaving it to the reader to find out as best he may the points wherein they agree,

thereby to ascertain what the law is; but a well-considered, fully-discussed judgment, stating clearly, with sufficient reasons, what the opinion of the Court as a whole is upon the point of law submitted. For these and other reasons, we conceive there was much wisdom in making the enactment alluded to. There is a rule, however, that law-makers should not be law breakers; and in the same way a judge ought not wilfully to bring himself into judgment. It so happens that Mr. Justice Taschereau resides not "in Ottawa, or within five miles thereof," but in the City of Quebec. During the two-and-a-half years' existence of the Court he has failed to comply with the law; and, so far as the public know, no notice has been taken of this fact by the Government. We understand that the learned judge only comes to Ottawa to attend the sessions, and leaves immediately after. We know of no reason why he should not comply with the law, as do the other judges. It may be inconvenient for him, but he knew the law when he accepted office.

It is of the most vital importance that there should not be even a shadow of complaint as to the mode of conducting business in the Supreme Court of the Dominion, or as to the conduct of any person holding the most responsible office of a judge thereof. We, therefore, make no apology for drawing attention to the matters alluded to in the foregoing remarks.

THE REVISED STATUTES OF ONTARIO.

If the times have any faithful signs, one of the most legible is the nearness of a radical reform in the English judicial system. That the substitute for a system, which the Poet Laureate has branded as

> "————the lawless science of our law
> That endless myriad of precedent,
> That wilderness of single instances,"

still withstands the attacks made upon it, is due to the very ungainliness of its dimensions, which prevents a blow from reaching a vital part. Some of its most cherished principles have been pronounced to be anachronisms and puerilities. Unwieldy, chaotic, incoherent, are some of the mildest epithets which have been bestowed upon the form in which it is enclosed; and the latest reforms in England seem only to have brought to light the further iniquity of defectiveness in administration. Some have held the opinion that the evil has been allowed to go so far that a remedy is hopeless, and should not be attempted. The progress of late years, however, in the Revised Edition of the Statutes, seems to have raised the hopes of jurists with regard to the possibility of a consolidation of the Statute law. The advance, though something has been gained, is as yet scarcely more than from chaos without an index to chaos with one. The Revised Edition is not even a Digest with the Statutes on each subject in juxtaposition, but it is merely a reprint of the Statutes which are in force, in chronological order.

In Ontario, we are somewhat better off. Our Common Law is founded on that of England, and is therefore open to the same reproaches. Mr. Mowat's Administration of Justice Acts have worked many much needed reforms, and our Statute law has not been allowed to accumulate for much more than twenty years without some sort of Revision.

The Revised Statutes of Ontario, which came into force on the 31st of December last, are the latest instance of a legislative retrospect before taking a fresh start. We cannot welcome them too warmly. Our statutes have indeed

been a tatterdemalion garb of shred and patches, and few beyond the profession, have any idea of the difficulties attending the collection of the law upon any particular part from a series of statutes ranging over even twenty years, under our system of piecemeal legislation. Each year there are added to the already too-loaded shelves of the lawyer, a volume from the Legislature of Ontario, and another from the Dominion Parliament, each containing in juxtaposition, seldom the result of any systematic arrangement, enactments upon every conceivable subject, not more than a quarter of which have any extensive or permanent application to the community at large. The few which are of that character are by spasmodic legislative efforts mutilated by repealing clauses, or, by way of amendment, receive excrescences, which in their turn are subjected to like treatment, until what actually remains in force cannot be ascertained with any degree of certainty, even by the trained professional man, and has to be worked out at the expense of the first unlucky suitor whose case comes before the Courts.

The benefits are therefore obvious of a publication which collects the scraps and fragments of living law scattered through a long series of volumes, divests them of all repetitions and superfluous verbage, expresses them in simple and popular phraseology, and arranges them in logical order as a consistent whole. This is what has been attempted, and we think with great success, in the Revised Statutes.

The task of the consolidator is not an easy one. It is not to recast the law into what he conceives it ought to be; but to weave into what will express the law as it is materials which are often unequal and inharmonious, and which, nevertheless, he must alter as little as possible. To combine into one Act enactments of different dates, and the work of different minds, without assimilating their language, would result in confusion, which, besides its inelegance, might be productive of uncertainty as to the meaning of the enactment, since difference of language in the same Act should indicate a difference of meaning. In re-casting, however, where consolidation cannot be otherwise properly effected, the greatest care should be taken that the true spirit of the enactment is reproduced. A believer in the capacity of an Ontario Legislature might add, that this is especially so where, as has been the case with the Revised Statutes, the consolidation is not afterwards subjected, clause by clause, to the scrutiny of the House of Assembly; but for our part, we should much prefer to have the statutes direct from the Commissioners.

We have had the privilege of seeing the advance sheets of their work, and so far as we can judge from the glance we have been able to bestow upon them, we believe they will stand the test we have mentioned. Entire remodelling of clauses does not seem to be of very frequent occurrence, and where it has been deemed necessary, has been done with marked advantage, and with a care and precision which seems to leave nothing to be desired. One section we may cite in a recent Act (36 Vict., cap. 26, sec. 1), which we have long regarded as a marvel of involution, and which is scarcely recognisable in its new dress (Rev. Stat. c. 134). Throughout, we observe, that a rule contained in the Interpretation Act, viz: that the law is to be considered as always speaking, has been observed in the Revised Acts, which are expressed in the present tense, whether present or passing events, or past or future contingencies are being referred to. This change was introduced into the Consolidation of 1859, except in regard

to the Acts relating to Real Property. In those Acts little innovation in any respect was attempted, and amongst other things left unaltered was the promiscuous use of the auxiliary "shall." Its appropriate use to express an authoritative command, is familiar to us in the "Thou shalt not" of the Mosaic decalogue. The Consolidators of 1877 have, and rightly as we think, extended this change of language to the Real Property Acts.

As directed by an Act of last Session, the legislation of that year has been incorporated in the Revision, so that the preceding eighteen years of statute law contained in twenty-one volumes, have become a dead letter so far as regards the public general statutes with which the Provincial Legislature has any power to deal. That little or no reference will require to be made to the old statutes, will be seen from a glance at the very useful Appendix C to the Revised Statutes. In that table is given a list of the Acts and parts of Acts not consolidated, and the greater number of those have not been consolidated by reason of their relating to matters which are clearly within the cognizance of the Dominion Parliament, or in respect to which the power of legislation is doubtful or has been doubted. Isolated sections, forming part of the criminal law and having no very extensive operation, form the major part of the clauses enumerated in this list; but there are a few provisions such as those of C. S. C., cap. 57; and C. S. U. C., cap. 42, relating to bills of exchange and promissory notes, which might have been usefully printed in full, as a supplement to the Revised Statutes; indeed, a third volume which would include the whole of the enactments mentioned in Appendix C, would not be a very costly addition to the Revision, when compared with its value as a compendious substitute for the twenty-one volumes, scattered through which, the enactments there referred to, are at present only to be found.

In the arrangement of the Revised Statutes, the grooves in which legislation has run, and sub-divisions already tolerably familiar to those who have most to refer to the statutes, seem to have been more considered than the production of a strictly scientific system of classification, which would address itself only to the jurisprudent. For example, legislation in Ontario in regard to trustees and executors, has been, as a general rule, made more or less in connection with the subject of wills; consequently, the Acts relating to wills, and to trustees and executors, have been placed side by side, and under Title VII, relating to the law of property; although a jurist would probably have placed the chapter respecting trustees and executors under Title X, relating to the laws affecting special classes of persons. So also under Municipal matters, Title XII, will be found a great variety of subjects, some of which, might perhaps more appropriately be classed under other heads.

The plan adopted, was, we think, the wise one. A consolidation of statutes must necessarily, from the nature of the Statute Law, contain only a fragment of the general law, and is not susceptible of a scientific arrangement which would place under each head the whole of the subjects scientifically appropriate there, without repeating any part of them under any other head.

Such a self-consistent and harmonious unity can only be expected from a Code which embraces the whole law on the particular subject treated of. That arrangement of the Revised Statutes which would suit the ordinary intelligent reader quite as well as the legislator or professional lawyer, was therefore obviously the best.

To say that the work has been well done, is to say that no more has been done than was to be expected from the persons to whom the work was entrusted; but the necessarily numerous judicial duties of some of the members of the Commission, must have often prevented their giving that continuous attention to the work which it demanded. The assistance, however, given by them, and in particular by Mr. Justice Patterson. Vice-Chancellor Blake, and Mr. Justice Strong, before his removal to Ottawa, has, we believe, been very considerable; nor in this connection do we desire to overlook the services of the other Commissioners, whose names have already been given.

The first consolidation after the formation of the Dominion, and the distribution of the legislative power by the British North America Act, 1867, would necessarily be attended with the gravest difficulties, and in view of this fact, and looking at the dimensions of the volumes before us, we think it extremely creditable to those engaged in the work, that it has been completed as soon as it has. In spite of his multifarious public duties as Attorney-General, Mr. Mowat has, we have good reason to state, found time to give an immense amount of personal attention and supervision to the work, as well in matters of detail as in general questions, and in every way facilitated the labours of those engaged in the preparation of the volume. His Honour Judge Gowan, with his usual energy and unflagging application, has also given much time to the work. His experience on the preparation of the Consolidated Statutes, and in the Consolidation of the Criminal Law, to say nothing of his ability and aptitude in the preparation of Acts of Parliament, was, we are told, of the greatest benefit. But whilst giving due credit to those who thus gratuitously lent their aid, it is scarcely necessary to say that if the right man had not been found to take charge of the whole, and devote himself exclusively to the work in all its details, their assistance would have been of little practical use. We are satisfied that the right man was found in Mr. Thomas Langton, Barrister-at-Law, and we have much pleasure in stating what we know to be the opinion of at least several of the Commissioners, and we understand to be the opinion of all, that his services were invaluable. The volume is accompanied by a reasonably full and apparently well arranged index, the work, we believe, of Mr. R. E. Kingsford, Barrister-at-Law. We regret that it was not thought proper to bind the volumes more substantially. The present binding is so slight as to be almost useless for books of such constant reference.

DISTRESS CLAUSES IN MORTGAGES.

BY ALEX. LEITH, Q.C.

As the only one now at the Bar, of the counsel in the case of *Royal Canadian Bank* v. *Kelly*, I am frequently asked as to the grounds on which it was decided, the judgment in appeal having been lost. It has, therefore, occurred to me to give my recollection of them in the pages of the Law Journal and to refer briefly to the case as reported in 19 C. P. 196, 430 and 20 C. P. 519; and in appeal, 22 C. P. 279.

The case was one of replevin. The first and material avowry as set forth in 19 C. P. 196, is as follows:—

"That before the said time when, &c., one Dewey mortgaged to defendant Kelly certain lands, the mortgage containing a proviso for making the same void on payment of the amount secured by a day named, and covenant for payment, and also covenant for distress on default in payment in accordanc with the

terms of clause 15, of schedule 2, 27 & 28 Vic. ch. 31, with an averment that there were due $1,412.50 for interest, and that default had been made, and thereupon defendant Kelly distrained."

The avowry as above given does not set it forth fully as pleaded. Other important facts can be collected from the judgment, viz. : that in the covenant for payment, no day was named for payment of interest, except the one day named for payment of principal; that the distress was after default in the covenant, and was only for interest accrued due up to the day for payment of the principal. It is said to have been admitted on argument that the mortgage was drawn under the Act as to short forms of mortgages.

Clause 15, referred to in the avowry, is, "provided that the mortgagee may distrain for arrears of interest," which, under the corresponding lengthy form, amounts to this, viz. : that the mortgagee may distrain on the lands, and by distress warrant recover by way of rent reserved, as in case of a demise of the land, interest in arrear with cost of distress, as in like cases of distress for rent.

The avowry was demurred to on the ground, among others, that the distress clause did not authorize the taking goods of a stranger on the premises, but was a mere license to take the mortgagor's own goods.

Judgment was given for the demurrer; the learned judge who gave judgment, saying :—

"Upon the whole I have come to the conclusion that a clause in a mortgage that the mortgagor shall continue in possession, coupled with his occupation in pursuance of such clause, and coupled also with a covenant for distress, in the terms contained in this instrument, does create the relation of landlord and tenant at a fixed rent; that by the indenture of mortgage in this case, the tenancy created was until the day of re-payment of the principal for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises. I am, however, of opinion that the demurrers to these avowries must prevail; for in neither of these avowries is it alleged that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy in pursuance of such permission at the time of the distress, or at any time, which are matters as it appears to me necessary to be averred."

It will be observed that so much of the above language as relates to the creation of any tenancy between the parties is extra-judicial, for the judgment proceeded on the sole ground that the avowry showed no right in the mortgagor to continue in possession, nor that in fact he did so continue. The whole matter seems to have been gone into from the mortgage having been admitted in argument "to contain a clause providing for the mortgagor continuing in possession." So much of the judgment as referred to the creation of a *tenancy at will at an annual rent* after the day named for payment, was, as will be seen hereafter, over-ruled by the decision in Appeal.

The case came up again on an amended avowry in 19 C. P. 430.

The avowry, as reported, showed a mortgage to the defendant under the short form Act, with proviso for redemption of the land on payment of principal and interest on or before 1st February, 1867, with the distress clause, No. 15, as above, and the clause, No. 17, allowing mortgagor possession until default. It alleged that the mortgagor under that clause 17, entered and occupied at and after the taking the goods, and paid no interest; that defendant permitted the mortgagor so to occupy as his tenant; and that at the time of taking, and while mortgagor occupied, a large sum for

interest fell due, whereupon defendant avowed. These further facts appear to have been alleged in the avowry as gathered from the judgment and from the case on the same avowry in subsequent reports, viz: that the distress was for two years' interest, ensuing the date of the mortgage, which was the 23rd February, 1867. The distress was made therefore more than six months after 1st February, 1867, the day named for payment of both principal and interest, in payment of which default was made.

The avowry was demurred to; the grounds of demurrer were, among others, that the only tenancy created by the mortgage was up to 1st February, 1867, the day named for payment; that such tenancy was not at a rent; that even if it were, the distress for such rent could not be made more than six months after the end of the tenancy; that no further tenancy existed between the parties, or, if so, yet at no rent agreed on.

The judgment of the Court was based on the views expressed in the former report, and it was said:

"The occupation of the mortgagor under the terms and conditions of this mortgage, constituted, in my opinion, the relation of landlord and tenant between the mortgagor and mortgagee at a fixed rent, such rent being the interest named in the mortgage as the interest accruing on the principal sum received. That such was the intention of the parties appears to me to be the true construction to put upon the instrument as pleaded in the avowry. So long, then, as occupation continued in accordance with the will of the mortgagee, he has, in my opinion, the right to distrain for the interest secured by the mortgage, *by way of rent reserved*, and incident to that right is the right of distraining upon the property of third persons on the lands comprised in the mortgage. Assuming the tenancy created by the mortgage to have been for a determinate time until the day named for payment of principal and interest, the continuance of the occupation of the mortgagor, by the permission of the mortgagee, constituted the mortgagor a tenant thereafter, at the will of the mortgagee, and such tenancy must be held to be on the terms of distress contained in the mortgage."

The case came up next in 20 C. P. 519. The avowry was in this case as last referred to, but instead of a demurrer there was a plea that the mortgagor did not hold or continue to hold as tenant to the mortgagee, the avowant. It appeared that the mortgagee never executed the mortgage. At the trial the issue was found for the avowant on a ruling conformably to the view of the law, taken in the last reported case. This ruling was moved against and upheld on the authority of the former decision; it was also held that evidence of payment was not admissible upon that plea.

Finally the case came up in Appeal (22 C. P. 279) from this last decision in 20 C. P. 519.

The grounds of appeal, among others, were, that at the time of distress there was no tenancy at any rent; that there was no such tenancy created by the mortgage; that the tenancy, if any, created by the mortgage, had expired more than six months before the distress.

It must be borne in mind that the landlord (mortgagee) could not distrain under the Act of 8 Anne, cap. 14, but within six months after the end of the tenancy and during the possession of the tenant. The facts showed possession by the tenant. The judgment appealed from insisted on two tenancies; one created by the possessory clause till 1st January, 1867, when the principal and interest fell due, the other by the remaining thereafter in possession till the distress, as a tenancy at will; also that each tenancy was at a rent reserved as rent service equivalent to the interest. It must not be lost sight of either, that if there was *any* rent due for which the

mortgagor could have distrained, then he could have well avowed.

The following points arose on argument:

1st. Taking it to be clear, as indeed it was, that if the mortgagee had executed the mortgage, there would have been a good valid re-demise to the mortgagor till 1st January, 1867; what was the effect of his non-execution? It was deemed of importance by the appellants to make out that there was a tenancy created to 1st January, 1867, and not a tenancy at will at the outstart; for if it were a tenancy at will, then probably it would be held to continue such down to the time of distress; whereas, if held to be a tenancy for a term till 1st January, it left it open to the appellants to contend (as the Court afterwards held) that after 1st January, the mortgagor was an overholding tenant, and so not liable to any rent.

I read the judgment of the Court, given by Draper, C. J., and it distinctly recognised a tenancy created by the mortgage up to 1st January (indeed the judgments in the Court below recognised this); but I do not remember whether this was on the ground that the acceptance of the mortgage by the mortgagee might be regarded as evidence of valid demise by parol, or whether on the ground that, as contended in argument, the term was well executed in the mortgage under the Statute of Uses. If the latter, the mortgage would have operated as a conveyance to the mortgagee to the use of the mortgagor, till default, with a shifting use to the mortgagee after default.

2nd. Whether admitting a tenancy till 1st January, 1867, such tenancy was as a matter of *construction* of the mortgage *at a rent;* and whether the distress clause was not a mere collateral agreement licensing only seizure of goods of the licensor. 3rd. Admitting that, as a matter of construction, there was an intention to create a tenancy at a rent, whether the *reservation* of the rent was not bad, the covenant to pay interest being to pay, not to the heirs, but the executors, who were strangers to the reversion? The appellants on this insisted that such a covenant did not run with the land, but was a collateral covenant to pay a sum in gross; and that as the right under the distress clause did not arise except on non-performance of the covenant, the reservation was bad as being uncertain, conditional, and dependent on non-performance of a collateral matter to be performed in favour of strangers to the reversion.

As to the two last points I am unable to remember the judgment. The first of them is of great importance. The Court may or may not have decided these points; it was not necessary for them to do so, as they held, as I remember, that no rent became due after 1st January, and therefore the distress was invalid as being more than six months after that date, even supposing a rent were well reserved up to that date.

As a matter of opinion I should say as to those two questions, with great deference, that on the *construction* of the instrument there was no demise *at a rent, i.e.*, no rent reserved as rent service.

4th. Was there any tenancy at will after the 1st January, there being no evidence of assent or dissent by the mortgagee to continuance of possession? As to this I have a distinct recollection that it was held (Gwynne, J. diss.) that the mortgagor was a mere overholding tenant, and not tenant at will, and so not liable to any rent. Consequently, for the reason above stated, the distress was not warranted.

5th. If the mortgagor had been held to be tenant at will after January, or there had been evidence to show such a tenancy, would it have been at a rent equivalent to rate of interest, made payable before 1st January? The appellants contended that as, after 1st January, interest was not made payable at all, it could not be claimed as of right at any *certain* rate, but only to be given as damages, and therefore not well reserved as a rent certain. This point was not raised in the cases in the Court below, and on this alone, Gwynne, J. agreed to reverse the judgment. The other learned Judges on this point also held that no rent was payable.

The best mode of creating the position of landlord and tenant, giving a right to distrain on any goods (not exempt) on the premises for arrears of interest, would be by what is termed an Attornment clause. I subjoin such a clause, which may answer the purpose. The conveyancer, who desires to create any such position, will need exercise some little care. If a tenancy be created for a term certain, as, till the day named for payment of principal, and the default is then made, and the tenant continues in possession, then, by such mere fact, he, as decided in the above case, is a mere overholding tenant, and so not liable to any rent. To make him so liable there must be some evidence of a new tenancy at a rent.

It is, therefore, perhaps more to the interest of the mortgagee to constitute the mortgagor his tenant, either at will, or from year to year; the latter tenancy is to be preferred, as the former is defeasable by the death or alienation of either party with notice to the other, and consequently the rent is precarious. If a tenancy from year to year, or for a fixed term, as to the day for payment of principal, be created, care must be taken to introduce a clause enabling the mortgagor at any time after default to determine the tenancy, as otherwise, unless intent to the contrary were apparent on the mortgage, the ordinary right given to the mortgagee to enter might be over-ridden, and the mortgagor might, notwithstanding default by him, be entitled to the usual half-year's notice to quit, incident to a tenancy from year to year, before the tenancy could be determined; or, if the tenancy were for a fixed term, then to possession to the end of the term. If an Attornment clause, as above, creating a tenancy, be introduced, it will be unnecessary, perhaps, indeed improper, to insert the usual clause authorizing the mortgagor to retain possession till default.

In the above case there was but one day fixed for payment of principal and interest, and the possessory clause gave right to possession till default in payment. There was, therefore, no uncertainty as to the *terminus* or duration of the redemise, from which it could be contended that it was void. If the possessory clause had been, as is sometimes the case, that the mortgagor might retain possession till default *and notice* demanding payment, or other notice, then it would seem such clause would be void as a lease for a term, for the uncertainty as to when the notice might be given. It would seem also that where, as is usual, a mortgage appoints a day for payment of principal, and earlier days for payment of interest, with a proviso for possession to the mortgagor till default, there is no uncertainty as to the limit of the term to prevent its taking effect. The day named for payment of the principal is the terminus or limit beyond which it does not last as a term, though it may end sooner by non-payment of interest. This latter possibility, however, creates no uncertainty

as to the extreme terminus to vitiate the demise, as may be exemplified by the case of a demise to A for ninety-nine years, if he so long live, which is a valid demise.

The following is suggested (subject to remarks above made as to it) as an appropriate clause to create the position of landlord and tenant at a rent as rent service:—

"And the mortgagee leases to the mortgagor said lands until the said day of one thousand eight hundred and (or from year to year) undisturbed by the mortgagee or anyone claiming through or under him, he, the mortgagor, his executors, administrators or assigns, paying therefor in every year during the said term, on each and every of, and on the same days, as in the above proviso for redemption appointed for payment of interest, such rent or sum as equals in amount the amount of interest payable on such days respectively, according to said proviso, without any deduction.

And it is agreed that such payments, when made as aforesaid, shall respectively be taken and be in all respects in satisfaction and payment of the said interest then payable; provided always, and it is agreed, that in case any one or more of the covenants or agreements herein of the mortgagor be untrue or be unobserved or broken at any time, the mortgagee, his heirs or assigns, may enter on the said lands or any part thereof, in the name of the whole, without any prior demand or notice, and take and retain possession thereof, and determine the said lease."

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From C. C., Lincoln.] [Sept. 27.

In re Harper Wilson, an Insolvent.

Insolvent Act 1875, *sec.* 84—*Double proof.*

H. W. carried on business separately, and as a member of the firm of W. & S. The joint and several notes of W. & S. and H. W. were given to secure debts due by the firm—and shortly afterwards both W. S. and H. W. made assignments in insolvency,

Held (Moss, J. A.), reversing the decision of the County Court, that under section 84 of the Insolvent Act of 1875, the holder of these notes was entitled to prove against the partnership estate for his claim, less the amount at which he valued the separate liability of H. W., and the partnership creditors not having assumed this liability, against the estate of H. W. for the full amount of the debt.

The rule against double proof in such cases was impliedly repealed by the 60th sec. of the Insolvent Act of 1869, which contained the same provisions as the 84th section of the Insolvent Act of 1875.

Re Dodge v. *Budd*, 8 C. L. J. N. S., 50, commented on, and disapproved of.

Appeal allowed

From Q. B.] [Dec. 17.

O'Connor v. Dunn.

Evidence—Field Notes of deceased Surveyor—Admissibility of.

In order to prove the boundary between lots 3 and 4, notes of a survey made by a deceased surveyor, and entered in a book in which he kept a diary of matters private and professional, were tendered in evidence. The first entry which it was desired to read was as follows:—"6th June, 1877. Got Mr. A. to show me the stake between Nos. 2 and 4," &c. In another part of the book the following entry appeared:

D. Boulton, Esq.,	£2	16	3
At D. Boulton's		4	
	3	0	3 pd.

There was no evidence that at or about the time of the first entry Boulton had any interest in either lot 3 or 4, but it was sought to connect the two entries by proving that Boulton acquired title to lot 2 on the 23rd August, 1827, and to lot 3 on the 28th January. Surveyors were not under any obligation at that time to make notes of surveys, and it was not proved that the entry was made contemporaneously with the transaction.

Held, (Hagarty, C. J. C. P. Moss, C. J. A.

Burton, J. A., and Blake, V.C.), reversing the judgment of the Queen's Bench that the entry was not admissible as one made in the course of business, or in the performance of a quasi-public duty.

Held, also, that extrinsic evidence could not be given to connect the two entries, and that even if the second entry were admissible as an entry against interest, it did not make the note of the survey evidence, as it was not referred to in it, or necessary to explain it.

M. C. Cameron, Q.C. (*J. H. Ferguson* with him), for the appellants.

McCarthy, Q.C., for the respondent.

Appeal allowed.

From Chy.] [Dec. 17.

YATES v. GREAT WESTERN RAILWAY COMPANY.

Patent of Invention—Combination.

The bill was filed to restrain the infringement of a patent. The invention was described as an "improved chair for preventing bolts or nuts used in bracing or joining together iron rails from becoming loose or insecure." The specifications stated that this was accomplished by introducing the iron chair between the iron rails and the sleeper at the joints of the rails, and that the chair was constructed with a raised edge or lip extending over a part or the whole length of its surface, and that this lip was formed and made of a suitable shape and depth so as to be in constant contact with the heads or nuts of the bolts after they were placed in position and firmly screwed to the straps (fish-plates) and rails. It also stated, "It will be seen that the upper portion of the chair . . . forms a seat or check for receiving the sides of the nuts or heads of the bolts, and which will entirely prevent the bolts from working loose or dropping out of their places from the vibration of vehicles passing over rails or from other causes. The patentee claimed as his invention "the lipped chair in combination with the heads or nuts of bolts . . . for retaining and preventing the nuts from becoming loose." It was proved that the lipped chair, the fish-plate, and the bolt had all been used in combination before the issue of the patent; and although not so used for the purposes of the patent, still that result was attained when the nuts happened to be of a large size and came in contact with the lip.

Held, (Moss, C.J.A., Burton, J.A., and Blake, V.C.,—Patterson, J.A., dissenting) reversing the judgment of Spragge, C., that no matter how useful the contrivance might be, it could not be the subject of a patent, as it was wanting in the element of invention.

Bethune, Q.C., for the appellants.

Boyd, Q. C., and *Macmahon*, Q.C., for the respondent.

Appeal allowed.

From Chy.] [Dec. 17.

BILLINGTON v. THE PROVINCIAL INSURANCE COMPANY.

Fire Insurance—Non-disclosure of existing Insurances—Notice to Agent.

The plaintiff applied to the defendants through one Suter, their local agent at Dundas, to effect an insurance on certain machinery for two months from the 6th of February, 1875. He signed the defendants' usual form of application, which contained an express agreement that it should form a part of the policy. In answer to the inquiry therein respecting other insurances, two existing policies were mentioned; but a third, which was in the Gore Mutual, was omitted, owing to the policy having been mislaid, and the plaintiff not remembering how much of it was on the machinery, and how much on the building in which the machinery was contained. The plaintiff was busy at the time, and wished Suter to wait until he could find it, as he was most anxious to have the amount inserted, but in order to facilitate the matter, Suter, through whom this policy had been effected as agent for the Gore, promised to ascertain the correct amount from a memorandum in his office, and fill it in before forwarding the application, or retain the application until he saw the plaintiff again. The application was, however, sent to the head office by Suter, without the omitted particulars, and was accepted by the board. No person connected with the Company had any knowledge of the insurance in the Gore Mutual except Suter. Suter's authority extended to renewing premiums and issuing interim receipts for policies. When the application was signed Suter gave the plaintiff an interim receipt for the premium, which stated, "that any existing assurances must be notified in writing at the issuing of this receipt, or this contract is void," and provided also that the policy should be subject

to the approval of the Directors, to whom power was reserved to cancel the risk within 30 days from the date of the receipt. In accordance with the practice of the defendants, where the risk only extended over a short period, instead of a formal policy, they issued a certificate which stated that the person was insured subject to all conditions of the defendants' policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy if required. The fire occurred after the 30 days, but within the two months. A policy was therefore issued, endorsed with their ordinary conditions, one of which was that notices of all previous insurances should be given to the defendants and endorsed on the policy, or otherwise acknowledged by them in writing at or before the time of making assurance thereon, or otherwise the policy should be of no effect. The Gore District assurance was not endorsed on the policy.

Held (Moss, C. J. A., Burton, J. A., and Blake, V. C.—Patterson, J. A., dissenting), reversing the judgment of Proudfoot, V. C., that the verbal notice to the agent was inoperative to bind the Company, and that the plaintiff was not entitled to recover.

B. B. Osler, Q.C., for the appellant.

Boyd, Q.C., and *C. Moss*, for the respondents.

Appeal allowed.

From Chy.] [Dec. 17.

STAVELY v. PERRY.

Accretions to Land—Highway.

By 10 Geo. IV., c. 2, the Cobourg Harbour Company were authorized "to construct a harbour at Cobourg, and also to erect all such needful moles, piers, wharves, buildings, and erections whatsoever, as should be useful and proper for the protection of the harbour and for the accommodation and convenience of vessels entering, lying, loading, and unloading within the same; and to alter and repair, amend and enlarge the same, as might be expedient," &c.

The plaintiff was the owner of a lot which extended to the water's edge of Lake Ontario, and fronted on a public highway called Division Street. Under the authority of the above Act the Company built a pier in front of Division Street. From time to time, earth dredged from the basin was deposited to the east of the wharf, and crib-work was placed on the outside to prevent it being washed away. On the additional land thus formed partly by accretion and partly by the action of those representing the harbour, the defendants built a storehouse and fence along the front of that part of the plaintiff's land which had accrued to him from alluvial deposits, and the plaintiffs filed a bill to compel the defendants, in whom the powers conferred on the Harbour Company had been vested, to remove the store house and fence, on the ground that this erection was on the highway, and that they prevented him from having access thereto from his land.

Held (Moss C. J. A., Burton, Patterson, J. J. A., and Blake, V. C.), reversing the decision of Proudfoot, V. C., that the formation in question was not part of the highway, but an artificial structure constructed for the harbour purposes under the authority of the Act, and that the plaintiff was not entitled to relief.

Held, also, that gradual accretions in front of a road allowance form part of the road allowance, just as similar deposits in front of a lot accrue to the benefit of the owner of the adjacent land.

Robinson, Q. C., and *Boyd*, Q. C., for the appellants.

Armour, Q. C., for the respondent.

Appeal allowed.

From C. C. York.] [Dec. 17.

BLACKBURN v. LAWSON.

Insolvency—Use and Occupation—Action for.

This was an action for the use and occupation of a store belonging to the plaintiff from the 1st April to the 1st July, 1875. On the 20th April the defendant made an assignment under the Insolvent Act of 1869. The assignee did not occupy the shop further than was necessary to remove the goods to another store which the defendant owned. On the 1st of May a deed of composition and discharge was executed, which directed the assignee to deliver up and convey the estate to the insolvent upon the due execution and confirmation thereof. The deed was confirmed on the 14th June, when the defendant was allowed to continue on his own account the business which since his assignment he had nominally conducted on account of the assignee, but no written reconveyance was ever made. It was proved that the assignee had given the defendant the key of the store as soon as the deed was executed: that people who wanted to see the store applied to him and were shown over it by his son: that the landlord's agent had recognised the

defendant as having the premises, by sending people who inquired about the place to the defendant as the person who had it to dispose of: that the defendant had claimed the fixtures in the shop as part of the assets that reverted back to him in consequenee of the deed of confirmation and had tried to dispose of them to an incoming tenant. The plaintiff resumed possession on the 1st of July, 1876.

Held (Moss, C.J.A., Burton and Patterson, J.J.A., and Galt, J.), reversing the judgment of the County Court that an action for use and occupation would lie against the defendant for the quarter's rent.

Semble, that the transfer was sufficient to reconvey the property.

H. J. Scott, for the appellant.

McMichael, Q.C., for the respondent.

Appeal allowed.

QUEEN'S BENCH.

IN BANCO.—MICHAELMAS TERM.

DECEMBER 28, 1877.

REGINA V. WILKINSON.

Criminal Information—New Trial, adding new ground not taken at the trial or in rule nisi.

After a trial of a criminal information for libel, in which defendant was found guilty, defendant obtained a rule *nisi* for a new trial for misdirection and rejection of evidence. Upon the argument, defendant's counsel wished to argue a ground of misdirection not taken at the trial or mentioned in the rule *nisi*. The court, after hearing counsel, allowed this ground to be argued as of favour and not as an amendment of the rule.

Bethune, Q.C., for the Crown.

McCarthy, Q.C., for defendant.

REGINA V. LAKE.

Certiorari—Identifying Magistrates.

On an application for a writ of *certiorari* to remove a conviction into this court, the affidavit of service on the magistrates did not identify the persons served as the justices who had made the conviction, further than that the persons served had the same names as the justices, and were described as "two of Her Majesty's Justices of, &c."

J. G. Scott, Q.C., for the Crown.

Ferguson, Q.C., for defendant.

RE REVELL V. THE COUNTY OF OXFORD.

County Assessment—Basis of.

The Assessment Act, 32 Vict., ch. 36, sec. 77, declares that the County, *in apportioning* a county rate among the different townships, &c., within the county, *shall*, in order that the same may be assessed equally on the whole ratable property of the county, make the amount of property returned on the assessment rolls of such townships, &c., or reported by the valuators as finally revised and equalized for the *preceding* year, the basis upon which the apportionment is made.

Where a County made an apportionment for 1877 upon the basis of the rolls for that year instead of those of 1876, *held*, that by-laws passed upon such equalization were illegal.

Held, also, that it is now proper to quash an illegal by-law.

Bethune, Q. C., for applicant.

Ball, Q. C., contra.

BENSON V. OTTAWA AGRICULTURAL INS. CO.

Fire Insurance—Agency—Concealment.

Held, that the non payment of a premium note had been waived by a defendants' writing the plaintiff's assignee (C. S., the insured) not to pay the premium note which had been mislaid.

The policy provided that "if any misrepresentation or concealment of facts has been made in the application, or if the applicant has mis-stated his interest in the property, or if he shall in any manner make any attempt to defraud this Company, the policy shall be void." The third plea averred that in the said application for insurance, C. S., (the insured,) concealed from the defendants that the premises were situate near and opposite to a blacksmith's shop, which was alleged to be a material fact.

The evidence shewed that defendants' agent measured the distance of the surrounding buildings, and instructed C. S.'s agent that it was not necessary to enter the blacksmith's shop. It was also provided that the Company's agent should be considered the agent of the insured for the purpose of filling up the application.

Held (Wilson, J., diss.), that the plaintiff was entitled to recover; that the omission of the blacksmith's shop was immaterial, and that there was no concealment.

Robinson, Q.C., for plaintiff.

J. K. Kerr, Q.C., contra.

RE MACE v. COUNTY OF FRONTENAC.

Temperance Act of 1864—Insufficient notice of polling.

Held, that the requirements of sec. 37 of the Temperance Act of 1864 as to giving notice of intended polling under this Act are imperative. Where, therefore, in several townships in a county the notices had been posted up too short a time, and in other townships the posting had been irregular, and where it was clear that but for these irregularities the result of the voting might have been different.

Held, that the by-law was invalid, and must be quashed.

Bethune, Q.C., for the applicant.
J. K. Kerr, Q.C., contra.

REGINA v. SUTTON.

Conviction—37 Vict. ch. 32. sec. 25—Joint Penalty.

A police magistrate having (1) convicted two persons jointly for an offence under 37 Vict. ch. 32, sec. 25, and (2) imposed a joint penalty upon them. *Held*, that the conviction was void for both reasons. *Held*, not a proper case for amendment.

J. G. Scott, Q.C., for the Crown.
Osler, for the defendant.

TYLEE v. HINTON.

Covenant—Mortgage—Payment of instalment—Staying proceedings.

Where in an action on a covenant in a mortgage, the defendant paid into Court the instalment then due, and interest and costs, and applied to stay proceedings, relying on Consol. Order 46 of the Court of Chancery, and under the general jurisdiction of that Court to relieve against a penalty,

Held (Wilson, J., dissenting), that Order 461 applied. Per Wilson, J., that the order applied only to foreclosure suits, and not to other actions in respect of the mortgage.

S. Richards, Q.C., for plaintiff.
Beaty, Q. C., for defendant.

STEINHOFF v. ROYAL CANADIAN INS. CO.

Marine Ins. Co.—"Barge,"—Average.

The policy was on the ship or *steam-barge* W. S. Ireland. It contained the following words: "This policy warranted by the assured to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge."

Held, that the vessel in question was not a barge within the meaning of the policy.

Deck loads on such vessels are subject of a general average.

General average discussed.

Atkinson, for plaintiff.
Robinson, Q.C., contra.

HAGARTY v. SQUIER.

Bills and Notes—Maker of note.

Plaintiff having settled with defendant the amount of a claim which plaintiff had on a policy in an Insurance Company of which the defendant was inspector, and which Company had since become insolvent, took from defendant a note for the amount of the claim, signed by defendant, he adding after his signature the word "Inspector."

Held that defendant was personally liable on the note to the plaintiff.

J. K. Kerr, Q.C., for plaintiff.
Huson W. Murray, contra.

ULRICH v. NATIONAL INS. CO.

Fire Insurance—Company incorporated by Dominion Legislature—How far bound by 39 Vict. ch. 24, O.

The defendants are incorporated by 38 Vict., ch. 84, and by sec. 2 they can make contracts of insurance with any person, &c., &c., and "upon such conditions as may be bargained and agreed upon or set forth by and between the Company and the insured." The Act also apparently incorporated the Company for other than provincial purposes. The eighth plea set up the failure of the plaintiff to comply with two conditions endorsed on the policy, (1) that all differences including liability should be settled by arbitration, &c., and (2) that no action, &c., should be brought till the amount of liability should be settled by arbitration. The replication to this plea set out that the policy was entered into and in force in Ontario after the 1st July, 1876, and as to property therein only, and that the conditions in the 8th plea were not in conformity with 39 Vict., ch. 24, O., nor were they in different coloured ink, and in conspicuous type, &c., &c., as required by that statute. There was also a demurrer to the 8th plea. A verdict was rendered for the plaintiff.

The defendants' contention was, that being incorporated under an Act of the Dominion legislature they were not bound by the Ontario Act referred to, though doing business in Ontario, and even if so bound there, can avail

themselves of the statutable conditions of the Ontario Act, and by condition 15 of that Act a settlement by arbitration is made a condition precedent.

Held, 1. That the power to incorporate Companies for other than Provincial purposes is a power impliedly given to the Dominion Legislature, but

2. That it is not necessary to the exercise of that power to do more than give the Company corporate existence, perpetual succession, and power to contract, and not to settle the terms of the contract.

3. That under B. N. A. Act, sec. 92, ss. 11, 13, and 16, the Ontario legislature had power to pass 39 Vict. ch. 24, O., and fix the form and terms of the contracts upon which insurance companies, wherever incorporated, might do business in Ontario.

4. That the conditions on the policy relied on in the 8th plea failed to comply with the Ontario Act, and could not prevail; that the condition 15 in the Ontario Act only referred to fixing the amount and not the liability of the Company, and so did not correspond with the condition on the policy, and was not a condition precedent to the right to sue, but collateral.

5. If condition 15 is read in connection with the policy which states payment is to be made after "the loss shall have been ascertained in accordance with the terms of the policy," then it would be a variation of the statutory conditions of 39 Vict., and so not before the Court, but if so read and before the Court, it would be unreasonable.

S. Richards, Q.C., for plaintiff.
Ferguson, Q.C., for defendants.

Clementson v. Grand Trunk R. W. Co.

Stoppage in transitu—Insufficient Notice.

W. P., in Hamilton, bought from plaintiffs in England 15 packages of goods, which were shipped at Liverpool, 8th November, 1876, by T. M. & Co., plaintiff's shipping agents, in whose name as consignors the bills of lading were made, W. P. being the consignee. On the 23rd November the way bill of the major part of the goods arrived at Hamilton, and on the same day M. P. & Co., creditors of W. P., obtained an endorsement to them of the bill of lading, and notified defendants on the 4th December. The plaintiffs' branch house at St. John, N. B., were telegraphed by W. P. (who had become insolvent), to detain the goods. The branch at St. John then immediately telegraphed to the defendants: "Do not deliver earthenware from our English house to W. P.; hold to our order. Clementson & Co." W. P. had a large number of other packages with defendants.

Held, that the notice to stop was insufficient, as it did not specify or identify the goods in question, and the plaintiffs' names did not appear in any bill of lading held by the defendants.

MacKelcan, Q.C., for plaintiff.
McMichael, Q.C., for defendants.

COMMON PLEAS.

IN BANCO. MICHAELMAS TERM.

November 19, 1877.

McDougall v. Waddell, Sheriff.

Priority of Executions—Division Courts Execution Growing Crops.

Held, in an action for a false return to a writ of *fi. fa.*, goods, that under section 266 of the C. L. P. Act, where a writ has issued against the goods of a party from a Superior Court, and a warrant of execution has issued against the goods of the same party from the Division Court, the right to the goods seized is to be determined by the priority of the time of the delivery of the writ or warrant to the sheriff or bailiff respectively, and not by the priority of seizure.

Held, also, that the right acquired by such prior delivery, which, in their case, was to the Division Court bailiff, was not under the circumstances of the case, defeated by his omission to endorse on the warrant, as required by the same section, the time of such delivery.

Held, also, that growing crops are seizable under a Division Court execution.

M. C. Cameron, Q. C., for the plaintiff.
Armour, Q. C., for the defendant.

Oliver et al v. Great Western Railway Company.

Principal and Agent—Railway Company—Shipping Receipt.

One C. was the defendants' freight agent at Chatham, and it was so mentioned in the printed notices given by the Company, naming certain places and agents where and to whom

goods could be delivered for carriage, and shipping receipts given. He was a member of the firm of B. & Co., to the knowledge of defendants, but not of the plaintiffs. C. gave a printed receipt or shipping note in the common form used by the defendants, which was filled in by him and signed by his direction by one of defendants' clerks, as was the universal custom at Chatham. The receipts acknowledged that defendants had received from B. & Co. 500 barrels of flour addressed to the plaintiffs to be sent by the defendants' railway. A draft was drawn by B. & Co. to their order on the plaintiffs, and was discounted by the Merchants' Bank on the faith of the shipping receipt which was attached, and was then sent by the bank to Montreal, and accepted by the plaintiffs also on the faith of the shipping note. No flour was ever received by the defendants, but the whole transaction was a fraud on C.'s part. In an action by the plaintiffs against the defendants to recover the amount of the draft,

Held (Hagarty, C. J., dissenting), that the defendants were not liable, for that C. in falsely and fraudulently giving the shipping receipt as for goods received by the company when none were received, was not transacting the business of the Company or acting within the scope of his authority as their freight agent.

Per Hagarty, C. J., that the Company who can only act by agents, notify the commercial world that at a named point, their agent C. is authorized to receive produce and give receipts therefor, and in the course of business money is raised from innocent discounters and consignees on the faith of the truthfulness of such receipts. That the defendants' contract was to employ competent and faithful agents, and to be responsible for their defaults and frauds.

Held, that the Act, 33 Vict. chap. 19, sec. 3, did not apply, as the receipt did not represent that the flour had been shipped on board the train and thereby as having been received to be forwarded.

Ferguson, Q. C., for the plaintiffs.
M. C. Cameron, Q. C., for the defendants.

DECEMBER 8, 1877.

JOHNSTON v. THE CANADA FARMERS' MUTUAL INSURANCE COMPANY.

Insurance Policy—Mis-statement in Description—Alteration—Secondary Evidence.

Action on a policy of insurance on certain buildings, averring a total loss by fire, and performance of conditions precedent. The defence set up by the second plea was that there was a breach of one of the conditions endorsed in the policy in its misstatement of a fact material to be known to the defendants, namely, that by the application, which was stated to be embodied in the policy, plaintiff stated that the buildings were occupied as a dry goods and grocery store, a butcher's shop and a waggon maker's shop. The third plea set up another condition, that, except with the defendant's consent in writing added to or endorsed on the policy, if the premises were altered, appropriated, applied or used for the purpose of carrying on or exercising therein any trade, business, or vocation, which, according to the by-laws and conditions, or class of hazards would increase the risk, then during such alteration, &c., the policy was to cease and be of no force or effect, averring the carrying on of other trades, &c., without such consent, whereby the policy ceased, &c.

Held, that the second plea was not proved as it appeared in the application that the premises were described as "dry goods, groceries," and not as "a dry goods and grocery store." Also that this and the third plea were bad in not stating that the matters therein complained of increased the risk, which it was proved that they did not do, in that defendants had charged the plaintiff a much higher rate than the highest of the rates mentioned in the table of rates for the objected trades; and on this ground also the alteration in the occupation was held not to be material.

Held, that the production of a form of policy similar to that furnished to the plaintiff and filled in from the application is sufficient secondary evidence of the policy.

Armour, Q.C., for the plaintiff.
Hector Cameron, Q.C., for the defendants.

DAVIS v. VANDICAR.

Trespars—Costs—Certificates.

Held, that the Act, 31 Vict. chap. 24, sec. 1, O., deprives a plaintiff of costs in all cases of trespass and trespass on the case, no matter what defence may be pleaded, and whether title be or be not alleged to be out of the plaintiff or in the defendant, when the verdict is under $8.00, and there is no certificate from the presiding judge.

In an action of trespass quare clausum fregit, where there was a plea that the land was not

the land of the plaintiff, a verdict was obtained for 1s. damages only, and there was no certificate for costs from the presiding judge. The master having refused to tax the plaintiff any costs, the plaintiff obtained a judge's order directing the taxation of full costs.

Held, that such order must be rescinded.

J. K. Kerr, Q.C., for the plaintiff.

D. B. Read, Q.C., for the defendant.

CHANCERY.

V. C. P.] [Dec. 12.

Burns v. Chamberlain.

Common Law Procedure Act—Arbitration—Appeal from Award—Practice—Statutes 39 Viet. ch. 28, and 40 Viet. ch. 80.

A reference was made to W. H. W., one of the local Masters of the Court, in his individual, not official, capacity; the order expressing the same to be by consent, and that the award to be made in pursuance thereof should be appealable in the same manner as a Master's report.

Held, notwithstanding such consent, that the award could not be appealed from, and could only be moved against for cause, in the same manner as the award of any of the other arbitrators; the statutes 39 Vict., ch. 20, and 40 Vict. ch. 80, not applying to suits in Chancery.

V. C. P.] [Dec. 12.

Wood v. The Hamilton and North-Western Railway Company.

Railway Company—Right of Way—Arbitration—Demurrer—Agent of Company—Solicitor of Company.

In treating with the owner of lands for the privilege of crossing the same by a Railway Company, or in proceedings before arbitrators appointed between the owner and the Company, the solicitor of the Company as such, is not qualified to enter into any special agreement binding the Company to construct and maintain a crossing, or that the Company will execute an agreement under seal covenanting to do so.

V. C. P.] [Dec. 12.

MacNabb v. McInnes.

Infant—Education—Presbyterian.

The mere fact that an infant was the child of parents belonging to the Presbyterian Church, and she, so far, had been brought up in the discipline of that body, is not of itself sufficient to warrant the reversal of the Master's ruling approving of her being placed and educated at a Seminary, the proprietress of which was a member of the Church of England, it being shown that means were provided for the regular attendance of pupils of the Presbyterian persuasion at that church, and the location of the school being such that it enabled the infant, who was of a delicate constitution, to have much more frequent intercourse with her friends and relatives, and there was the probability of a stricter personal supervision by the proprietress than at a public institution in another part of the country, which was in connection with the Presbyterian Church in Canada.

V. C. P.] [Dec. 12.

McDonell v. Reid.

Parties—Pleading—Demurrer—Interpleader.

The tendency of modern practice is to dispense with parties, where it can be done with safety: therefore, where in certain interpleader proceedings, one R. disclaimed any right to the proceeds of a sale under execution, and subsequently obtained possession of the property sold by means of a writ of replevin, but afterwards gave notice to the person holding the money that he claimed the proceeds of the sale, and forbade him paying back to purchaser, whereupon the latter filed a bill seeking to recover back the purchase money on the ground of an entire failure of consideration, to which he made R. a defendant, who demurred, as being not a necessary or proper party, the demurrer was allowed with costs, liberty being given to the plaintiff to amend, in order to make a better case, if so advised.

V. C. P.] [Dec. 12.

Armson v. Thompson.

Administration Suit—Claim of Widow in lieu of Life Estate.

Where land devised, subject to the payment of certain legacies, and to a life estate therein, is, after the death of the testator, sold at the instance of the mortgagee, the money remaining after payment of the mortgage debt will be treated in the same manner as if it were the land itself, and, if insufficient to pay all, the tenant for life and legatees will be paid ratably after the value of the life estate has been ascertained.