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If legal journals in Canada were to discuss our judges and their peculiarities and weaknesses in the free and easy and disrespectful manner that is becoming the habit of journals, both legal and lay, in England, there would soon be "wigs on the green" at Osgoode Hall. One lay journal starts a crusade against a "Senile Bench," and suggests the prompt removal of such eminent men as Lord Esher, Lord Justice Lindley and Mr. Justice Mathew, and to replace them with younger men. Another writer makes a savage attack on a County Court judge of high standing. In these days of democracy and growing license anything that detracts from the dignity of the Bench and a wholesome respect for the administration of the law is to be deprecated.

In reference to the case of *Baker* v. *Ambrose*, (1896) 2 Q.B. 372, noted ante, p. 704, a correspondent has kindly directed our attention to the recent case of *Canada Permanent L. & S. Co.* v. *Todd*, 22 A. R. 515, where a similar question was before the Court of Appeal for Ontario, and that court determined that an affidavit of a chattel mortgage, sworn before a commissioner employed in the office of the solicitor of the mortgagee, was valid. The matter seems to have been summarily dealt with in the course of the argument, by Osler, J.A., only, the other members of the Court not expressing any opinion, but apparently concurring in what he said. Counsel for the appellant relied on the Con. Rule 613, and *Vernon* v. *Cooke*, (1879) W. N. 132, and Osler, J.A., says: "That Rule applies only to proceedings in an action," and he goes on to say that *Vernon* v. *Cooke* was reversed. (See 49 L.J., Q.B. 767.)

A note of a somewhat novel case appears in a recent number of the *Central Law Journal*, decided in the State of Georgia in *Atlanta Street R. W. Co.* v. *Keeny*. A passenger tendered to a conductor in payment of his fare a coin of unusual appearance, but still a genuine coin of the United States. The conductor pronounced it a counterfeit and ejected the passenger. It was contended on the part of the railway company that if the coin tendered, though genuine, was so rare or of such appearance as to make it doubtful whether it was genuine, the conductor had a right to refuse it if he really believed it was not genuine. But the Court held that a genuine silver coin of the United States, even though unlike those in common use, was nevertheless a legal tender, and a passenger ejected for refusal to make payment otherwise than by tendering such a coin was entitled to an action for damages, and the fact that the conductor declined to receive a coin of this character because he, in good faith, believed it was a counterfeit, would not relieve the railroad company from liability.

The same journal discusses the question as to whether a bicycle is ordinary baggage within the meaning of the law governing common carriers. This particular question, from the nature of things, could not have come up for decision until recently. The only case directly in point, so far as we are aware, is cited by our contemporary (vol. 43, p. 377), and was decided in the Circuit Court of St. Louis. The judge held that the bicycle in question was baggage, and that a railway company is bound to carry it (if within statutory limit as to weight) as personal baggage, without extra compensation. The reasons given for the judgment were that the bicycle is a machine or vehicle in very common use among a large class of people for health, recreation and locomotion; that the plaintiff belonged to this class which is usually denominated wheelsmen or bicycle riders, and that it is the use or custom for such generally to make trips on railroads, taking their bicycles with them for the purpose of using them at the end

of their journey, for health, recreation or locomotion. A bicycle is in fact one of those things which a traveller takes with him for his own personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey.

FUNCTIONS OF JUDGE AND JURY IN NEGLIGENCE ACTIONS.

Owing to some conflict of judicial opinion, and the tendency towards dicta in negligence actions, solicitors as well as counsel experience grave difficulty in advising on the rights of plaintiffs, and the chances of reaching a jury. One might naturally suppose that some well defined rule could be adopted which would govern all cases, but (doubtless due to the fact that because in no two cases are the circumstances exactly alike), it is clear that such a rule could not reasonably be universal in its application. Lately, judges are coming more closely together in their rulings as to what cases shall and what shall not go to a jury, and it is with a view of ascertaining the general principle which brings this about, that this article is written. A plain statement will be more useful than a technical discussion, and in order to arrive at a practical conclusion, the simplest method will be adopted.

In any action of negligence, it must be apparent on the authorities that it is the province of the judge to determine at the close of the plaintiffs' case, whether or not there is any evidence of negligence on the part of the defendant. If there is none, in his opinion, the same rule which applies to all cases must apply, and a non-suit will be ordered. If, in his view of the facts, there is some evidence of negligence, the case goes to the jury, limited by the consideration as to whether such negligence was the cause of the injury complained of. In other words, the negligence of the defendant must be relevant to and connected with the issue. This is the elementary stage.

Then comes the second question: Was the plaintiff him-

self guilty of contributory negligence? If the judge thinks there are facts in support of this contention, and there is no evidence of the defendant's negligence, a non-suit will be directed, as it is manifest the plaintiff could not recover under such circumstances. If there is negligence proved against the defendant, and contributory negligence on the part of the plaintiff shown either by himself or his witnesses, the defence is called upon, and the whole case will be submitted to the jury.

To determine under what circumstances cases of negligence will be left to a jury, a review of some of the more important of the later authorities may be consulted with advantage. Indeed, it is only by taking apt extracts from the judgments in such cases, that one can obtain anything like a fair idea of the position of the law in regard to such matters, and the principles enunciated by high authority will be found much more useful to the reader than all the comments made by a writer not speaking with binding force. A summary of the law on the point in question, therefore, properly follows this general introduction.

The first case calling for special attention is *Gee* v. *Metropolitan R. C.*, L.R. 8 Q.B. 161, decided in 1873.

The plaintiff got up from his seat and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station; the pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evidence as to the construction of the door and its fastenings. Held, that there was evidence, and the jury having found for the plaintiff, the verdict ought to stand.

Per Blackburn, J., at p. 166: "Then was the plaintiff conducting himself in such a way as amounted to want of ordinary care? As to that, I can only say it was a question for the jury, and they were right in the verdict they have found."

Per Kelly, C.B., at p. 168: "If there is evidence of negligence on the part of the defendants, and of contributory negligence on the part of the plaintiff, that must always be a question for the jury, and it is not a case for a non-suit."

And at p. 170: "I am of opinion that there was evidence for the jury to consider whether the defendants' servants had not, when this train left the station from whence it started on its journey, failed to see that the door was properly fastened in the ordinary manner in which such railway carriage doors are fastened, there was evidence to go the jury that they failed in the performance of that duty . . . . here was evidence that this door was not properly fastened; for if it had been, it would not have flown open upon the degree of pressure that was applied to it by the plaintiff; and therefore there was evidence to go to the jury, upon which they were justified in finding that there was negligence on the part of the defendants."

Per Martin, B.: "It seems to me that you cannot shut out from the consideration of the jury whether or not a man may not do wrong, and know that he is doing wrong, in putting his head or hand out of the window."

Then follows in 1874, *Jackson* v. *The Metropolitan Railway Company*, L. R. 10 C. P. 49. The facts of this case were these: The plaintiff was a passenger on the defendant company's car; the car entered an overcrowded station, with an insufficient staff of porters to control the conduct of the people there assembled; the carriage had an excessive number of passengers in it, and more attempting to intrude, whereby those who were lawfully seated therein were placed at a disadvantage; a porter slammed the door just as the train was entering the tunnel, and the hand of the plaintiff, in consequence, as he swore, of the inconveniently crowded state of the carriage, was crushed in the hinge.

Per Brett, J.: "If the court think that there is any evidence upon which the jury might reasonably act, they cannot set aside the verdict as being against the weight of evidence. . . . There being evidence, then, which it was proper to submit to the jury, and they having found for the plaintiff, even though I myself might have entertained a different opinion, I do not feel myself at liberty to interfere with this finding."

In 1878, the case of *Dublin W. W. Ry. Co.* v. *Slattery*, L.R.

3 App. Cases, 1155, was decided by the House of Lords. Where there is conflicting evidence on a question of fact, whatever may the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury. (It was a rule of the railway company that the express train should always sound a whistle on approaching the station, and the conflicting evidence in this case was as to the sounding of the whistle.)

Held, that this was a case which was properly left to the jury, for that where there was contradictory evidence of facts, the jurors and not the judge must decide upon them.

Dissenting, Lords Hatherly, Coleridge and Blackburn, who thought that where there was not, in the first instance uncontradicted evidence to establish the right of a plaintiff to a verdict, the judge might direct a non-suit, or a verdict for the defendant, and that there was here enough to show, even on the undisputed facts, that the mischief had been the result of S.'s own negligence, and that a non-suit or a verdict for the defendants ought to have been directed.

Per Lord Cairns, L.C.: "If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company that caused his death. This would be an example of what was spoken of in this House in the case of *Jackson* v. *Metropolitan Ry. Co.*, 3 App. Cases 193, an incuria, but not an incuria dans locum injuriæ. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man who rushed, with his eyes open, on his own destruction." (Lord Cairns goes on to speak of the facts in the present case and continues), "Now I cannot say that these considerations ought to have been withdrawn from the jury. I think they ought to have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of the deceased

was the causa causans of the accident. . . . The question is whether the evidence being such as I have described, the judge ought to have taken the case out of the hands of the jury in the first instance. I am not aware of any authority for this being done, and none of the cases cited in the course of the argument can in my opinion be looked on as an authority for such a course." (After expressing dissatisfaction at the result of this litigation, his Lordship goes on to state): "But I cannot seek to prevent this by proposing to your Lordships, on the only part of the case which is brought for your determination, to do what it appears to me would seriously encroach upon the legitimate province of a jury."

Per Lord Penzance. "The proof of the defendant's negligence is upon the plaintiff, the proof of contributory negligence lies upon the defendants: Upon either of these issues it is competent to the judge to say negatively that there is not sufficient to go to the jury; but it is no more competent to him to declare affirmatively that one of them is proved than the other. In fact, there is no case that I am aware of, and certainly none was cited relating either to actions of this kind or any other form of action, in which the facts and the proper conclusions of facts to be drawn from them being in dispute, the judge has been entitled to tell the jury that they were bound to find the issue proved."

Per Lord O'Hagan, on the questions of negligence and contributory negligence. "As questions of fact they were proper to be submitted to the jury; and the learned judge who tried the cause was bound, in my opinion, so to submi. them." . . . "I have no doubt, notwithstanding the conflict of judicial opinion, that the judge was not at liberty to direct, whatever may have been, in his opinion, the preponderance of proof on the one side or the other." . . . As to contributory negligence, "The circumstances establishing such negligence, and the inferences to be drawn from them, were equally and exclusively for the consideration of the jury. It was for the jury to find the facts, and to draw the inferences of fact, and the judge would in my mind, have transcended his jurisdiction in finding the former or making the latter." .

. . "I do not acknowledge the force of the reasoning which would convert an issue in fact into an issue in law, merely because there seems to be a complete preponderance of evidence upon the one side, or because there is no evidence on the other. In such circumstances the judge may speak strongly, and point out plainly what is the duty of the jurymen; and if they ignorantly or perversely disregard his counsel, and find without evidence or against evidence, the injured party has his remedy, and the law is prompt to rectify the wrong."

A later case decided in 1883 is *Davey* v. *London & South Western Ry. Co.*, 12 Q.B.D. 70. This was an action brought against a railway company for injuries received in crossing their tracks. The plaintiff admitted that before crossing he looked one way along the the track but did not look the other, and that if he had done so he must have seen the engine approaching. The engine driver did not whistle. The plaintiff was non-suited at the trial.

Held, per Brett, M. R., and Brown, L. J. (Baggallay, J., dissenting), that the non-suit was right, as although there was evidence of negligence on the part of the defendants, yet upon the undisputed facts of the case the plaintiff had shown that the accident was solely caused by his omission to use the care which any reasonable man would have used.

Per Brett, M.R., at p. 72-3: "Therefore it seems to me clear that without the assistance of the jury, one must come to the conclusion that the plaintiff, according to his own showing, was guilty of a want of reasonable care, which was one of the causes of the accident. . . . Under these circumstances the learned judge at the trial was in my opinion justified in not leaving the case to the jury."

Per Bowen, L.J., at p. 76: "It seems to me to be important to draw the line clearly between the functions of the judge and the functions of the jury. It is not because facts are admitted that it is therefore for the judge to say what the decision upon them should be. If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of

the judge to let the jury decide between such conflicting views. . . . The plaintiff has to make out that there has been some default or neglect on the part of the defendants, which was the causa causans of the accident."

And at p. 78, "I wish to say that in *Dublin, Wicklow & W. Ry.* v .*Slattery*, 3 Ap. Cas., 1155, the question for the House of Lords was whether the learned judge at the trial should have non-suited or not, and that the question divided itself into two parts: first, whether there was evidence of negligence in the railway company to go to the jury, and secondly, whether, even assuming there was such, that was negligence which could have caused the accident, or whether there was not some clear contributory negligence on the part of the plaintiff as rendered it impossible for a reasonable man to suppose the accident was caused by anyone except the plaintiff himself."

One of the latest and most important cases is *Smith* v. *S. E. Ry. Co.*, (1896), 1 Q.B. 178, decided about a year ago.

The plaintiff's husband was run over and killed by a train of the defendants. It was held in an action by the plaintiff under Lord Campbell's Act, to recover damages in respect of her husband's death, that there was upon the facts evi dence to go to the jury of negligence on the part of the defendants by which, and not by any negligence on his own part, the death of the husband was caused, and therefore the judge at the trial was right in not withdrawing the case from the jury.

Per Lord Esher, M.R., at p. 182: "The question in this case seems to reduce itself to this: Could the judge properly have directed the jury as a matter of law that negligence on the part of the deceased was proved? It is an admitted proposition of law that, if there is no evidence of some material fact which forms an essential part of the plaintiff's case, then the judge is bound to withdraw the case from the jury."

Per Lopes, L.J., at p. 186: . . . . "The case strikes me in this way. The deceased appears to have known the crossing and the practice then with regard to the signalling of trains. Was it not a question for the jury whether the

deceased, finding that the signalman remained sitting in his lodge and was making no attempt to signal any train, might not reasonably have supposed that he could safely cross the rails without taking the precaution of looking up and down the line or listening for the whistle of a train? On consideration I have come to the conclusion that on this question there was evidence for the jury, and if I had been trying the case, I do not think I could have withdrawn it from the jury."

Per Kay, L.J., at p. 188: "I think there was evidence for the jury of negligence on the defendants' part . . . . I venture to say with all respect to those who hold a different opinion, that as long as we have trials by jury, and jurors are judges of the facts, it should be a very exceptional case in which the judge could so weigh the facts and say that their weight on the one side and the other was exactly equal. The House of Lords seems to consider there might be such cases."

The judgment in *Wakelin* v. *London & S. W. Ry. Co.*, 12 App. Cas. 41, is appended to the case above reported for the benefit of the profession.

In our own courts, there is the important case of *Morrow* v. *C. P. R.*, 21 A. R. 149, decided in 1895, wherein it was decided that where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and though the judge may rule negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either is proved. The question of proof is for the jury.

The plaintiff was run into while crossing the defendants' line, and was severely injured, his horse killed and wagon broken. He charged many acts of negligence: not ringing the bell, not sounding the whistle, etc., etc., which the defendants denied, and not in terms pleading contributory negligence.

Per Burton, J.A., at p. 152: "Whether the evidence be strong or weak, or in the opinion of the judge incredible, it is equally the province of the jury to decide upon it, and as has been said by a learned judge, the judge would be arrogating to himself, if he were on that account, on the trial of a

question of fact, to withdraw the evidence from the jury, and decide on it himself. . . . He might hold in a proper case that there is no evidence for the jury of contributory negligence, but the moment that the question arises as to whether the injury resulted from the negligence of the defendants or the plaintiff, or in other words, the moment it appears that the facts and the proper inferences from the facts are in dispute, it becomes a question for the jury.

Per Osler, J.A., at p. 153: "But as there was a jury, it was their province to decide the question, arising upon disputed facts, whether the defendants were guilty of negligence causing the accident, and the further question arising in the same way, whether the plaintiff was guilty of contributory negligence."

His Lordship, after referring to *Brown* v. *G. W. R.*, 1 Times L.R. 406 and 614, and *Wright* v. *Midland*, *Ib.* 406, 412, goes on to say: "As regards the Davey case, the Master of the Rolls in both the cases just cited, says, 'If it pleases anybody to hear it, I have doubted, ever since I gave that judgment whether my brother Baggallay and my brother Manisty were not more right than we were (i.e. himself and L. J. Bowen), I have doubted whether even in that case we ought to have taken it from the jury."

These cases contain the important principles affecting this branch of the law. The distinction drawn between the functions of judge and jury is in many instances exceedingly fine, and it is not surprising that a judge sitting at nisi prius with a long docket ahead, and often without opportunity or means of giving the question careful consideration, should occasionally find his opinion reversed by an appellate Court. However clearly the law may be stated, there must be an element of uncertainty in non-suiting the plaintiff. This is apparent when we consider the somewhat anomalous position in which these actions are placed as regards the respective functions of the judge and jury. The judge has power to non-suit on the ground that there is no evidence of negligence to go to the jury. To decide this, he must necessarily be the judge of what is negligence before he can give an opinion

that none exists, and yet the ordinary question submitted to the jury is, "Was the defendant guilty of negligence causing the plaintiff's injury?" The judge on a non-suit says, "there is no evidence of negligence." Is not this, after all, essentially the question for the jury? The question of negligence being one of degree, the tribunal that draws the line in the first instance must determine a negative, but in order to do so, it strikes one forcibly that the affirmative must be relatively considered before a negative conclusion can be reached.

There must be some criterion as to what is or is not negligence, and by that criterion the judge determines whether there is any evidence of negligence. Much will depend on what his mind adopts as negligence or the test of it. This is an affirmative act, and this would seem to be within the province of the jury. To the jury, the evidence may clearly establish the wrongful act or omission on the part of the defendant It should be for them to decide. They are surely the judges of what constitutes negligence in fact. But the doctrine contained in the cases leaves it to the judge to fix his standard of what is negligence in fact, and also places on him the responsibility of saying the evidence does not fall within the lines of the standard and therefore is not evidence of negligence at all.

This is not the ordinary case of no evidence and the plaintiff being non-suited in consequence. The action of negligence is peculiar and exceptional. It is impossible to distinguish the evidence from the negligence, because the negligence must be an inherent element of the facts proved. The question then is, "Do these facts show negligence?" This, one would think, ought to be a jury question, but the judge has the power to put the question another way, "Is there any evidence of negligence?" and applying his judgment to the facts before him, may say there is none and thus determine the case.

E. F. B. JOHNSTON.

CAUSERIE.

Conversation is the work-shop and laboratory of the student.
EMERSON: "Society and Solitude."

Beyond a doubt the most important law-book published in England during the current year is Professor Dicey's work on the Conflict of Laws. ("A Digest of the Law of England with reference to the Conflict of Laws." By A. V. Dicey, Q.C., B.C.L. With Notes of American Cases, by John Bassett Moore. London: Stevens & Sons, Ltd.) Those who are acquainted with the merits of the learned author's earlier work on Domicil, will discover in his latest venture no reason to reconsider their good opinion of his ability as a maker of books. They will be, moreover, pleased to find that while the new book is something more, it is in relation to Domicil a revised edition of the former work. In traversing the whole territory of Private International Law (we beg Dr. Holland's pardon for using this objectionable phrase!), Professor Dicey follows the method adopted in his earlier work, and presents the principles of his subject in the form of systematically arranged Rules and Exceptions, elucidating them, when he deems it necessary, by comment and illustration. This is a feature of the work which, to our mind, makes it an invaluable one for the purposes of the student. Instead of being obliged to laboriously 'beat the bush' of case-law for himself in order to find the doctrine (if, peradventure, he may so find it at all!), here he has it picked out and crystallized for him in limine; and having the principle intelligently fixed in his mind, he may go forward with the aid of comment and illustration to a clear apprehension of its relation to particular cases. Parenthetically, we may here observe that the mere mention of the business of trying to evolve the cardinal principles of this branch of jurisprudence from the weltering mass of English decisions, conjures up such a nightmare of agonizing personal reminiscences, that we almost regret having touched upon the theme. What pains were ours in endeavoring to fix in our mind the principal criteria of the animus manendi as indicated in *Udny* v. *Udny!* How we were

'sicklied o'er with the pale cast of thought' in our futile effort to reconcile the decisions in *Vanquelin* v. *Bouard*, and *Castrique* v. *Imrie*, as to what constitutes a foreign "proper Court," or "Court of competent jurisdiction," the judgment whereof will be held valid in England!

In addition to compiling a book which will prove of the utmost usefulness to students and teachers of the law, Professor Dicey has placed the whole professsion under a debt of gratitude to him in presenting it with a treatise which exhibits the maximum amount of dogmatic treatment that a branch of the common law as yet so indeterminate as this is susceptible of; and, on the other hand, sets forth the whole body of case-law, together with a discussion and analysis thereof as unique as it is enlightened. Mr. Moore's contribution, in the shape of "Notes of American Cases," also appears to be carefully done. Next in value to that portion of the work which treats of Domicil, we presume to place chapters 8, 10, 17 and 28, which deal with the subject of Bankruptcy, and note 10 of the Appendix, which discusses the theoretical basis of certain rules he formulates in relation thereto. This part of Professor Dicey's work and Professor Jitta's "La Codification du Droit International de la Faillite," published last year, we venture to designate as the most important contributions of the past decade to the literature of this branch of juristic science.

The attempt to mould judge-made law into coherency and scientific exactness is at all times a task of extraordinary difficulty; to do so in the department which Professor Dicey has made the subject of his labors is superlatively arduous. That his undertaking has been attended with so large a measure of success is a source of gratification to those who for a long time have recognized and appreciated his singular ability as a jurist.

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With further reference to Professor Dicey's book, and as all illustration of how amiable an entente may be maintained where two learned doctors disagree, we would direct our readers' attention, first, to the passages in the book where the

author dissents from certain positions taken by Dr. Westlake in his treatise on "Private International Law;" then to Professor Dicey's Preface, where he makes a general statement concerning such disagreement; and finally to Dr. Westlake's criticism of the former's book, and its doctrine, in the October number of the Law Quarterly. Such an unswerving adherence to the rule of noblesse oblige is as cheering as it is rare.

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Mr. Crackanthorpe, in his valuable paper on the "Uses of Legal History," read before the American Bar Association in August last, touches upon the evident disinclination of Sir Frederick Pollock and Dr. Maitland to concede in their "History of English Law," that the Roman law was at any time introduced into England as a dominant system of jurisprudence; and he proceeds, very amiably and adroitly, to point out from their own admissions how paramount was its influence in that country at various epochs, reaching from the eighth or ninth century to the reign of Henry III., when a large proportion of its principles became woven into the web of the Common Law, chiefly through the instrumentality of Bracton. Besides these admissions (to be found in the Introduction, pp. xxxi. to xxxv.; in Chap. III. at pp. 55, 56, 72, 78, 80, 87; and in Chaps. IV., V., VI., and VII., passim) in Messrs. Pollock & Maitland's History which make to the contrary of their contention, we would direct attention to the following statement by Dr. Maitland, extra such work, namely, in his essay on "Legal History," in Traill's "Social England," p. 173. Speaking of the social progress of the Saxon period he says, "As a matter of fact we had not to work out our own civilization; we could adopt results already attained in the ancient world. For example, we did not invent the art of writing, we adopted it; we did not invent our alphabet, we took the Roman. And so again—to come nearer to our law—we borrowed or inherited from the old world the written legal document, the written conveyance, the will. The written conveyance was introduced along with Christianity. . . . From the days of Æthelbert onwards English law was under the influence of so much of the Roman law as

had worked itself into the tradition of the Catholic Church."

It is not to be doubted that the law of Rome was the paramount and only system of law in Britain while it was a portion of the Roman Empire. Messrs. Pollock and Maitland seem to argue ("Hist. Eng. Law," p. 2) from the fact that Justinian's Corpus Juris was not known in Britain before the Roman legions had been withdrawn—that, therefore, no definite streams from the fount of the Roman law could have found lodgment in the country. But this would overlook the fact that there was a complete system of law in Rome long before Justinian codified it. Moreover, Selden tells us that Ulpian and Paulus themselves held legal offices in Britain prior to its evacuation by the Romans; and Dion Cassius says that Papinian, the celebrated juris-consult, once presided in the forum of York. It might also be mentioned that Mr. F. T. Richards, in his paper on "Roman Britain" in Traill's "Social England," p. 24, hints at the possibility of young British lawyers being trained at the great school of Augustodunum in Gaul. (See also Tacitus: Ann. Lib. xii. c. 32; Savigny: Gesch. des Rom. Rechts im Mitt. vol. iii. § 35, et seq.; and "The Roman Law in England," by J. E. Leonard, in 1 South., L.R. 433.)

We submit with deference that the weight of authority is against Messrs. Pollock and Maitland's postulate that, to use Mr. Crackanthorpe's characterization of it, "at no time was Roman law introduced into England first-hand on any appreciable scale."

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While women were not denied the privilege of pleading their own causes in the courts of Imperial Rome, they were expressly prohibited from appearing as advocates for others. The origin of this disability is a sad one, and shows at least that there was some traditional ground for the modern barrister's aversion to opening the door of his profession to the more voluble sex. Valerius Maximus tells us that there was a certain lady named Cafrania, wife of a Senator, who was addicted to verbal onslaughts of so violent a character upon a certain Prætor whenever she appeared before him, that in

self-defence and in the interests of justice he made an edict forbidding all females from pleading for others in the courts of Rome. Valerius calls this disbarred lady the most shocking names, which we deem it prudent not to translate. This prætorial inhibition found its way into the Pandects, where the reason for its promulgation is also stated in language quite as denunciatory of the embargoed Cafrania as that above referred to. (See Dig. 3, 1, § 1, in Galisset's "Corpus Juris Civilis"). It would seem, however, that notwithstanding this ban upon female pleaders, the study of the law was regarded as a becoming pursuit by educated women in the reign of Justinian. Testimony of this fact is to be had in the following epigram by Agathias upon the death of his sister Eugenia, translated by Lord Neaves in his notes to the fourth edition of Lord Mackenzie's "Roman Law":—

> "Blooming in beauty and in song before,
> *Skilled in the splendid truths of legal lore,*
> Here hid in earth Eugenia's seen no more.
> Venus, the Muse, and Themis, at her tomb,
> Cut their fair locks, in sorrow for her doom."

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As there is authority to show that women once pleaded before the Roman courts, so we have it on record that they used to sit in the Anglo-Saxon Witenagemot or Parliament. Gurdon ("Hist. of Parl.") tells us that in Wightred's great Council at Beconceld, held in the year 964, the Abbesses sat and deliberated with the Witas, and five of them signed the decrees of that Council, along with the king, bishops and nobles. Even so late as the reigns of Henry III. and Edward I., Abbesses were summoned to Parliament. The right of ladies of quality to sit was still recognized in the reign of Edward III., when the Countesses of Norfolk, Ormond, March, Pembroke, Oxford and Athole were summoned "ad colloquium et tractatum" by their proxies. Why *by their proxies*, we wonder? What was the reason of the change in the summons? We believe there was no Hansard when these estimable ladies "sat and deliberated," but if there was we should not have liked to have been a member of the staff.

CHARLES MORSE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

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The Law Reports for November comprise: (1896) 2 Q.B., pp. 389-412; (1896) P. pp. 253-287; (1896) 2 Ch., pp. 597-762; and (1896) A.C., pp. 381-624.

None of the cases in the Queen's Bench or Probate Divisions seem to call for any notice here.

TRADE MARK—"FANCY WORD."

In re Trade Mark "Bovril," (1896) 2 Ch. 660, was an application by a rival trader to expunge the word "Bovril" from the register of trade marks, on the ground that it was not a "fancy word," but as applied to articles derived from beef it was descriptive, and as to articles not so derived it was deceptive. It appeared that one Johnston in 1886 registered the word as a trade mark for substances used as food, or as ingredients in food, and that he had invented the word, and had never used it prior to registration. He subsequently made over his business and trade mark to a limited company. The best known of the articles sold under this mark was a fluid extract of beef, which was marked "Fluid Beef, Brand Bovril," but it having become extensively known by the public as "Bovril," the company adopted the name and described it as "Bovril" in their advertisements. The Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) affirmed the decision of Kekewich, J., refusing the application, being of opinion that at the time the word was registered as a trade mark it was a "fancy word not in common use," and therefore properly registrable as a trade mark, and that it was not a descriptive word, for although "Bov" might suggest the idea of an ox, the word as a whole would not at that time convey any meaning; "to be a good fancy word it must be obviously meaningless as applied to the article in question," says Lopes, L.J., p. 608.

PRACTICE—COMMISSION—EXAMINATION OF WITNESSES ABROAD—LETTERS OF REQUEST.

In *Ehrmann* v. *Ehrmann* (1896) 2 Ch. 611, Stirling, J., granted an order for a commission and letters of request to the German Courts to take the evidence of certain witnesses, unless the defendant would make certain admissions. The action was for the dissolution of a partnership on the ground that the defendant had bribed certain carriers in England to give him the names of persons to whom they carried goods on behalf of certain German merchants, in order to enable the travellers of the partnership to apply to such persons for their custom, which conduct it was alleged had had the effect of bringing the firm into disrepute. The books of the carriers which covered the period in question had been destroyed, and the evidence sought by means of the commission was merely of a corroborative nature, and the Court of Appeal (Lindley and Lopes, L.JJ.) considered that a commission ought not to be issued merely for the taking of such evidence. Lopes, L.J., says, "I think that in order to justify the issue of a commission it ought to be clearly made out that the evidence abroad which it is sought to obtain is material, and directly material, to the case in hand—not merely evidence which incidentally might be useful."

CHARITY—WILL—OPTION TO INVEST ON GOVERNMENT OR REAL SECURITIES—EXERCISE OF OPTION—BEQUEST TO CHARITY IN REMAINDER.

In re Hamilton, Cadogan v. *Fitzroy*, (1896) 2 Ch. 617, a testatrix had bequeathed the residue of her pure personal estate upon trust to convert it into money, and invest the proceeds in government and real securities, and pay the income to her daughter for life, and on her death to apply the capital for the benefit of certain charities. The trustees exercised the option of investing part of the fund in real securities during the lifetime of the tenant for life, and it remained so invested at her death, and the question Kekewich, J., was called on to decide was whether their exercise of the option in that way had the effect of invalidating the bequest in favor of the charities as to so much of the fund as had been thus

invested: he held that it had; but the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) disagreed with him and reversed his decision, and although there was no authority exactly covering the point, the Court had no difficulty in determining that on principle a trustee cannot be deemed to have a power to defeat the bequests of his testator by the exercise of a mere option to invest in a particular way the fund bequeathed. *Re Corcoran*, 62 L.J., Chy. 267, on which Kekewich, J., relied, was held to be clearly distinguishable, as there the gift at the death of a tenant for life, was of the securities in which the fund might then be invested, "or so much thereof as might by law be so applied," and the testator there clearly contemplated that part of the fund might not then be applicable to charity.

TRUSTEE—CESTUI QUE TRUST—BREACH OF TRUST—BREACH OF DUTY BY TRUSTEE —ANNUITY, OMISSION TO FORM FUND FOR—ANNUITANT ACTION BY, FOR ACCOUNT —TRUSTEE ACT, 1888 (51 & 52 VICT., C. 59), SEC. 8, S—S. 1 (*a*) (*b*)—(54 VICT., CH. 19 (O.), SEC. 13, S-S. 1 (*a*) (*b* —STATUTE OF LIMITATIONS.

How v. *Winterton*, (1896) 2 Ch. 626, is an interesting exposition of the Trustee Act, 1888, from which the Ontario Act, 54 Vict., ch. 19, sec. 13, is derived. The action was brought by an annuitant against the trustee of a will which provided that during a term of fourteen years the trustee was to receive certain rents, and after the payment of certain annuities was to accumulate the surplus and invest the same, and upon such accumulations the plaintiff's annuity was charged as well as upon the devised estates. Instead of accumulating the surplus as directed by the will, the defendant applied the same, without any fraudulent intent, in keeping down the interest on incumbrances and in necessary repairs. The 14 years expired on 20th May, 1889, the plaintiff's annuity fell into arrear in November, 1894, and on 9th August, 1895, she commenced this action, claiming an account from the death of the testator. The defendant set up the Statute of Limitations as a defence, relying on the Trustee Act, 1888, sec. 8 (54 Vict., ch. 19 (O.), sec. 13, s-s 1 (*a*) (*b*)), but he admitted that within six years prior to the action he had rents in his hands which he ought to have accumulated and invested.

Kekewich, J., held that the Act applied notwithstanding the action was only for an account, and precluded the account being carried back further than six years before the issue of the writ. His decision was affirmed by the Court of Appeal. (Lindley, Lopes and Rigby, L.JJ.) Lindley, L.J., says of sec. 8 (sec. 13 of the Ontario Act) at p. 640, "it is cumbrously worded, and it is difficult to grasp the idea which underlies it: but the short effect of sec. 8 appears to me to be that, except in three specified cases (namely, fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use), a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitations as if actions and suits for breaches of trust were enumerated in them." If clause (*a*) of s-s. 1 were to be literally construed it would, as he points out, be really deprived of all meaning.

COMPANY—SHAREHOLDER—UNDERWRITING CONTRACT—AUTHORITY TO APPLY FOR SHARES—AUTHORITY COUPLED WITH AN INTEREST—REVOCATION OF AUTHORITY.

In re Harman's Empress Gold Co., (1896) 2 Ch. 643, was an application by a person to whom shares had been allotted in a joint stock company under the following circumstances, to have his name removed from the register of shareholders. One Phillips was the promoter of the company, formed for the purpose of purchasing from him and working a mining property, for which he was to be paid out of the capital subscribed. Prior to the incorporation of the company, Carmichael, the applicant, agreed with Phillips in consideration of a commission to subscribe for 1,000 shares in the company to be formed, such number to be reduced according to the number of shares taken by the public. Carmichael further agreed that the agreement and application should be irrevocable, and notwithstanding any repudiation by him, Phillips should have authority to apply for, and the company power to allot, the shares to Carmichael. This offer was accepted by Phillips. Subsequently the company was incorporated, and the subscription list was advertised to open on March 27th, and close on March

30th. On 27th March, Carmichael, who had applied for 1,000 shares, stopped the cheque given for the deposit, and on the 30th wrote to Phillips and the secretary of the company repudiating the agreement. Phillips, however, on 2nd April, applied on behalf of Carmichael for 980 shares, which in the event was the number he was bound to take, and they were allotted to him, and his name placed on the register in respect of them. The Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) agreed with Stirling. J., that he had been rightly placed on the register, that the authority given to Phillips being coupled with an interest and being given for a valuable consideration, was irrevocable.

PRACTICE—PARTIES—ADDING PLAINTIFF WITHOUT AUTHORITY—"CONSENT IN WRITING"—STAYING PROCEEDINGS—COSTS—SOLICITOR ACTING WITHOUT AUTHORITY, LIABILITY OF—ORD. XVI., R. 11.—(ONT. RULE 324 (*b*).)

In *Fricker* v. *Van Grutten*, (1896) 2 Ch. 649, a motion was made by a person whose name had been added as a plaintiff upon the written consent of his solicitors, signed in his presence, but without his "own written consent"—to strike out his name from the writ and all subsequent proceedings. Kekewich, J., had held that the consent of the solicitors was sufficient to bind the applicant, and refused the motion; but the Court of Appeal (Lindley, Lopes and Rigby. L.JJ.) unanimously reversed his decision, and not only ordered the name of the applicant to be struck out, and stayed all proceedings in his name, but ordered the solicitors who had taken the proceedings in his name to pay his costs, as between solicitor and client, and also the costs of the adverse party which the applicant had been ordered to pay, together with all the costs of the application. The Court of Appeal have thus determined that nothing but the written consent of the party to be added, signed by himself, will be a sufficient compliance with Ord. xvi., r. 11 (Ont. Rule 324 *b*).

FRIENDLY SOCIETY—DISSOLUTION OF SOCIETY BY DEATH OF ITS MEMBERS—FAILURE OF OBJECTS—SURPLUS FUNDS OF DEFUNCT SOCIETY—CY-PRES—BONA VACANTIA—RESULTING TRUST.

Cunnack v. *Edwards*, (1896) 2 Ch. 679, is a decision on appeal from Chitty, J., (1895) 1 Ch. 489, noted ante, vol. 31,

p. 300, in which the Court of Appeal (Lord Halsbury, L.C., Smith and Rigby, L.JJ.) have resolved that the surplus assets of a friendly society, which has become defunct by reason of the death of all its members, are not the subject of a resulting trust in favor of the legal personal representatives of the deceased members of the society, as Chitty, J., had held; and which, as we formerly pointed out, would probably have resulted in the whole fund being consumed in costs, in the effort to find out who were the several parties entitled to participate,—but that they are bona vacantia, and as such pass to the Crown. (See *In re Buck, Bruty v. Mckey, post p.* 757.)

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—SEPARATE USE—MARRIED WOMEN'S PROPERTY ACT, 1882 (45 & 46 VICT., ch. 75)—R.S.O., ch. 132, sec. 20.

In re Lumley, (1896) 2 Ch. 690, is another decision on a point of married women's property law due to the indefatigable pertinacity of our old friend, Mr. Hood Barrs. In the present case he appealed from an order of North, J., refusing to appoint a receiver by way of equitable execution, of the rents and profits of certain real estates of a Mrs. Cathcart, against whom he had obtained orders for the payment of costs. The estates in question had, by an ante-nuptial settlement, made in 1887, been limited to the use of Mrs. Cathcart in fee until the marriage, and thereafter to her use during her life, "without impeachment of waste, and without power of anticipation." The orders sought to be thus enforced were dated respectively, Nov. 4th, 1893; Dec. 9th, 1893; June 27th, 1894, and Aug. 2nd, 1894. The rents of which a receiver was sought accrued due March 25th, 1896. It was contended that as the property was not limited to the separate use of Mrs. Cathcart, the restraint on anticipation was invalid, but the Court of Appeal (Lindley and Lopes, L.JJ.) upheld the order of North, J., being of opinion that a restraint against anticipation may be validly made in respect of property which, though not expressly settled to the separate use of a married woman, nevertheless becomes her separate estate under the Married Women's Property Act, 1882, (R.S.O., ch. 132).

PRACTICE—CROWN, ACTION ON BEHALF OF—INTERLOCUTORY INJUNCTION—UNDERTAKING AS TO DAMAGES—ATTORNEY-GENERAL.

Attorney-General v. *Albany Hotel Co.*, (1896) 2 Ch. 696, was an action brought on behalf of the Crown in which the plaintiff applied for an interlocutory injunction, and the question was raised whether the practice of the Court requiring the applicant to give an undertaking as to damages could properly be extended to the Crown. North, J., after a careful resume of several unreported cases, came to the conclusion that the Crown could not be called on to undertake as to damages, and in this view the Court of Appeal (Lindley and Lopes, L.JJ.) concurred.

WILL—CONSTRUCTION—GIFT TO A CLASS ON ATTAINING 21—PROVISION FOR MAINTENANCE—VESTING.

In re Wintle, Tucker v. *Wintle*, (1896) 2 Ch. 711, North, J., was called upon to decide a point on which there were previous conflicting decisions. The question arose upon the construction of a will whereby a testator devised and bequeathed his residuary estate to his children upon their respectively attaining the age of 21: the will also contained a provision enabling the trustees to apply the whole or such part as they should think fit of the annual income of the share or presumtive share of any of the class during their minority for their maintenance. It was contended on behalf of the representatives of some of the children who had died before attaining 21, that the provision authorizing the application of the income for the maintenance of the deceased children had the effect of causing their interest to vest, although they did not attain 21. *Fox* v. *Fox*, L.R. 19 Eq. 286, a decision of the late Sir Geo. Jessel, M.R., was relied on in support of this contention, but North, J., found that it was opposed to the decision of Hall, V.C., in *Dewar* v. *Brooke*, 14 Ch. D. 529, and he considered the latter case the preferable authority, and followed it. It would seem from this case that if the testator had given the whole income for maintenance absolutely, and without any discretion to the trustees, to apply a part only, the case would have been different and the shares would in that event be deemed to be vested.

WILL—REAL ESTATE—GIFTS AMONG PERSONS SUI JURIS—CHARGE OF DEBTS AND LEGACIES—POWER OF SALE—VENDOR AND PURCHASER—TITLE.

In re Dowson and Fowke, (1896) 2 Ch. 720, is an illustration of the propriety of the rule made by the former Court of Chancery of Ontario, directing all applications under the Vendors and Purchasers' Act to be made in Court. In England a different rule prevails, and such applications may be made in Chambers, with the result, as in this case, that a judge in court may be called on to reverse his own order made in chambers, and find himself compelled to grant the application. The question at issue arose upon a sale made by the executors of a will which, after charging debts and legacies upon the testator's real estate, devised the residue to four persons who were sui juris. The will empowered the trustees to sell his real estate at such times as they should deem expedient, and hold the proceeds subject to the trusts of the will. Part of the residuary estate having been sold by the trustees, the purchaser objected that the trustees had no power to sell, or at all events that the four residuary devisees should be required to concur in the sale and be parties to the conveyance. In Chambers, Kekewich, J., considered that the trustees could not make a good title without the concurrence of the four residuary devisees; but when he got into Court and heard the matter more fully argued, he came to the conclusion that he was wrong in so holding, and that the fact of there being a charge of debts and legacies was sufficient to entitle the trustees to sell (as between themselves and the purchaser) without the concurrence of the devisees, and he therefore reversed his former order, "and for the benefit of the purchaser, and that he may have no difficulty hereafter, and for his satisfaction in order that he may have a good title," he ordered him to pay the costs, both in Court and in Chambers.

FRIENDLY SOCIETY—POVERTY—CHARITY—FAILURE OF OBJECTS—CHARITABLE LEGACY—LAPSE—CY-PRES

In re Buck, Bruty v. *Mckey*, (1896) 2 Ch. 727, has some features of resemblance to the case of *Cunnack* v. *Edwards*, noted ante p. 755, but which Kekewich, J., thought was distinguish-

able from that case. In 1800 a friendly society was established to provide by subscriptions, contributions and fines and an "invested fund" for the relief, by means of annuities, of members, their widows and children, if in distressed circumstances, or suffering from any infimity. By the will of a testator who died in 1893, a legacy of £500 was bequeathed to the society for the purposes thereof. At that time there were only three annuitants living, being widows of deceased members, and there was only one member remaining, who was also the sole surviving trustee of the "invested fund," which was amply sufficient to provide for the three annuities. Subsequently two of the three annuitants died, and the executors of the testator's estate then applied to the Court, on notice to the surviving annuitant and the trustee, to obtain the opinion of the Court as to whether under the circumstances the society was entitled to the legacy. Kekewich, J., held that the society was a "charity" within *Commissioners* v. *Pemsel*, (1891) A.C., 531 (noted ante vol. 28, p. 107) and that it was a charity existing at the testator's death, and therefore the legacy had not elapsed; and that the legacy not being required for the remaining annuity, was applicable cy-pres. In *Cunnack* v. *Edwards* the Court proceeded on the ground that the society in question in that case was merely in effect a mutual insurance company, and that there poverty was not a necessary ingredient in determining the right of a person to participate in its benefits; but in the present case, the fact that the claims of the beneficiaries depended on their being in "distressed circumstances," constituted a point distinguishing the two cases, and which enabled him to say that the society in this case was a "charity."

We extract the following from Mr. Irving Browne's "Easy Chair" in the November number of the *Green Bag*:

"A critic who is just right!—'Modesty is what ails me,' said Artemus Ward, and the Chairman is generally too modest to reproduce the kind things said to him by his editorial and professional brethren, but really the March wind from Canada

never has blown to him anything else so grateful as the following from Mr. Charles Morse's 'Causerie,' in the March number of the CANADA LAW JOURNAL, which has just come to his notice. He accepts it, Horace and all, very gratefully; 'The Boston University Law School is to be congratulated upon having secured the services of Mr. Irving Browne as one of its lecturers. Mr. Browne's scholarly ability as an editor and treatise-writer has won for him a distinguished reputation both at home and abroad, while his witty productions in legal verse have a rare charm for those who delight to blend the strong waters of case-law with the nectar of Helicon. The latest honor conferred upon him prompts us to hurl a bit of Horatian philosophy at him and say:

> 'Mediocribus esse poetis
> Non homines, non di, non concessere columnæ!'"

The decision of the New York Court of Appeals in *Re Whiting*, is of interest as affecting securities owned by foreigners domiciled out of the State represented by certificates or bonds deposited or held for safe keeping in New York State. The decedent Whiting was domiciled in Rhode Island and died there, leaving bonds and stock certificates of both foreign and domestic corporation in a safe deposit box in the State. The majority of the Court were of opinion that these were to be regarded as tangible chattels treated by business men as property for all practical purposes, and being physically within the State, constituted property subject to the succession tax. Mr. Justice Gray delivered a strong dissenting opinion concurred in by Haight, J., from which the following is extracted: "If depositories and depositaries in the State are availed of by a non-resident for the temporary custody of his bonds, can it be said that he has placed his property in the debt within the dominion of this State? Clearly not. The bond is not property as distinguished from the debt in evidence. It may be destroyed and the creditor loses no right to recover the debt. The State has no jurisdiction over a right of succession which accrues under the laws of the foreign State. That is something in which this State has no interest, and with which it is not concerned."

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Privy Council Reference.] [OCT. 18.

IN RE PROVINCIAL FISHERIES.

Canadian waters—Property in beds of public harbors—Erections in navigable waters—Interference with navigation—Right of fishing—Power to grant—Riparian proprietors—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation—R.S.O. (1887), ch. 24, sec. 47—55 Vict., ch. 10, secs. 5 to 13, 19 and 21 (O.)—R.S.Q., Arts. 1375 to 1378.

The beds of public harbors not granted before Confederation are the property of the Dominion of Canada. *Holman* v. *Green* (6 Can. S.C.R. 707) followed. The beds of all other waters, without any distinction between the various classes, belong to the respective provinces in which they are situate.

Per GWYNNE, J.—The beds of great lakes and rivers forming the boundary between Canada and the United States, or between two provinces, rivers navigable above tide waters, rivers to the extent to which tide waters reach, Dominion sea coasts and provincial lakes, and rivers not granted before Confederation are subject to the jurisdiction and control of the Dominion Parliament so far as required for creating future harbors, erecting beacons or other public works for the benefit of Canada, under B.N.A. Act, sec. 92, item 10, and for the administration of the fisheries.

R. S. C., ch. 92, "An Act respecting certain works constructed in or over navigable rivers," is intra vires of the Dominion Parliament.

Per STRONG, C.J., and KING, J.—A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee may build thereon subject to compliance with R S.O., ch. 92, and to his obtaining an Order-in-Council from the Dominion Government authorizing the work, provided it does not interfere with the navigation of such lake or river.

Riparian proprietors before Confederation had an exclusive right of fishing in non-navigable, and in navigable, non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. The right of fishing is an incident of the property in the soil. *Robertson* v. *The Queen*, 6 S.C.R. 52, followed.

The Dominion Parliament cannot authorize the giving by lease, license or otherwise, the right of fishing in non-navigable waters, nor in navigable water the beds and banks of which are assigned to the provinces under the B.N.A. Act The legislative authority of Parliament under sec. 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries, under which it may require that no person shall fish in public waters

without a license from the Department of Marine and Fisheries, and may impose fees for such license and prohibit all fishing without it, and prohibit particular classes, such as foreigners, unconditionally from fishing. The license so required will, however. be merely personal, conferring qualification, and can give no exclusive right to fish in a particular locality.

The rule that riparian proprietors own ad medium filum aquae does not apply in case of the great lakes or navigable rivers. Where beds of such rivers have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide.

A provincial government may grant the bed of lakes and navigable non-tidal rivers as to which the restrictions in Magna Charta do not apply. Such grant will carry with it the right of fishing unless the same is reserved, or such right may be granted without the bed.

The provisions of Magna Charta are in force in the provinces of Canada (except Quebec), and restrict the right of either the Dominion or Province to grant the beds of, or fishing rights in, tidal waters.

Sec. 4 and other portions of R.S.C. ch. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are ultra vires. GWYNNE, J., contra.

Notwithstanding the provisions of Magna Charta, the Dominion Parliament can grant the exclusive right to fish in public harbors, and in waters in unsurrendered Indian lands: B.N.A. Act, sec. 91, item 4.

Per GWYNNE, J.: Provincial legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by B.N.A. Act, sec. 91, item 12, including the grant of leases or licenses for exclusive fishing.

Per STRONG, C.J., TASCHEREAU, KING and GIROUARD, JJ.: R.S.C. ch. 24, sec. 47, and secs. 5 to 13 inclusive, 19 and 21 of the Ontario Act of 1892, are intra vires.

Per STRONG and KING, JJ.: They are intra vires, but may be superseded by Dominion legislation on the same subject.

R.S.Q. Arts. 1375 to 1378 inclusive are intra vires.

Per GWYNNE, J: R.S.O. ch. 24, sec. 47, is ultra vires so far as it assumes to authorize the sale of land covered with water within public harbors. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R.S.Q. Arts 1375 to 1378, are valid if passed in aid of a Dominion Act for protection of fisheries. If not, they are ultra vires.

Robinson, Q.C., and *Lefroy*, for Dominion of Canada.

Æmilius Irving, Q.C., *S. H. Blake*, Q.C., and *Clark*, for Province of Ontario.

Casgrain, Q.C., Atty.-Gen. for Quebec.

Longley, Q.C., Atty.-Gen., for Nova Scotia.

Irving, Q.C., and *Clark*, for British Columbia.

Quebec.] [Nov. 5.

TURCOTTE *v.* DANSEREAU.

Appeal—Final judgment—Judicial proceeding—T.S.C. c. 135, sec. 29—54 & 55 Vict., ch. 25, sec. 4—Controversy—Action on promissory note—Bills of Exchange Act, 1890.

In an action on promissory notes amounting with interest to the time of issuing the will to $1,997.92, the conclusions of the declaration asked for judgment for principal and interest from that date until payment. Judgment was entered by default for over $2,000 in October, 1889. In April, 1892, the defendant filed an opposition to vacate the judgment and setting up exceptions and pleas to the action. The opposition was dismissed by the Superior Court and Court of Queen's Bench, and an appeal having been taken to the Supreme Court the respondent moved to quash it for want of jurisdiction.

Held, that the opposition was a "judicial proceeding" under sec. 29 of the Supreme and Exchequer Courts Act, and subject to appeal to this Court; that the amount in controversy on such appeal was the amount due on the judgment attacked by the opposition at the date of the decision of the Court of Queen's Bench dismissing it: and as that amount was over $2,000 the appeal would lie.

Motion to quash refused with costs.

Lajoie, for the motion.

Languedoc, Q.C., contra.

New Brunswick.] [Nov. 5.

TORROP *v.* IMPERIAL INSURANCE CO.

Fire insurance—Condition in policy—Breach—Change of interest—Chattel mortgage—Waiver of forfeiture—Powers of agent.

A fire insurance policy on a spool factory and machinery, contained a condition providing that if "the said property shall be sold or conveyed, or the interest of the parties therein changed," the policy would be void.

Held, affirming the decision of the Supreme Court of New Brunswick, that a chattel mortgage of the property executed by the assured was a "change of interest" within the meaning of said condition, and forfeited the policy.

Held, further, that an agent whose powers were limited to receiving applications to be forwarded to the head office, and collecting the first premiums on delivery of the policy when issued, had no authority to waive the forfeiture caused by the breach of said condition.

Appeal dismissed with costs.

McLean, for the appellant.

Pugsley, Q.C., and *Hanington*, Q.C., for the respondents.

EXCHEQUER COURT OF CANADA.

CONNOLLY *v.* OWNERS OF "DRACONA."

Maritime law—Salvage—Contract for services—Enforcement of same.

If an agreement for salvage services was just and reasonable when entered into, it will not be set aside because something has happened subsequently, or some contingency, of which one party or the other has taken the risk, has occurred to make it more onerous on one or the other than was anticipated when it was entered into.

The *Strathgarry*, (1895) Prob. 264, referred to.

[OTTAWA, Oct. 27 BURBIDGE, J.

Appeal from a judgment of the Local Judge for the Quebec Admiralty District. (Reported in 5 Ex. C. R. 146.)

The respondents claimed $2,387.50 from the appellants in respect to two agreements entered into between the master of the steamship "Dracona" and the agent of the respondents, who were the owners of the steam-tug "Eureka." The "Dracona" went ashore on a reef near Pointe Jaune, in the River St. Lawrence, on the 14th August, 1895. Next day, while the master of the "Dracona" was awaiting assistance from Quebec, the tug "Eureka" came to the steamer and offered assistance. The agent of the respondents, Weir, demanded $1,000 for standing by until four o'clock next day. The captain of the steamer, Baxter, refused to accede to this offer, and then Weir intimated that unless that was agreed upon the tug would not remain, as there was other work she could get of a profitable nature. While negotiations were going on another steamer of the line the "Dracona" belonged to, the "Avalona," came in sight, and the captain of the latter was taken on board of her by the tug. After consultation with the captain of the "Avalona," the master of the "Dracona" agreed with the agent of the tug to pay her $350 a day to stand by and to tow the "Dracona" off if possible, the service to continue until the vessel was towed off or condemned. The agreement, although dated of the 15th August, the day on which the terms were agreed upon, was not drawn up until four days afterwards, when it was signed by the master of the "Dracona," without any protest or objection.

A. H. Cook, for the appellants (defendants).

C. A. Pentland, Q.C., for the respondents (plaintiffs).

BURBIDGE, J.: The questions to be decided are: Should the agreement of August 15th be upheld? And if not, What amount should be allowed to the plaintiffs for the services rendered? Is the amount tendered sufficient.

Now, apart from the agreement and what was contemplated by the parties when they made it, and having regard only to services actually rendered, it seems to be clear from the evidence that the amount tendered would be sufficient to compensate the plaintiffs for such services. But because that may be so, it does not follow that the agreement may be disregarded. In coming to the conclusion that two hundred dollars per day would have compensated the "Eureka" for what she did, one judges after the event, and naturally looks at the service actually performed, and at the length of it. But in determining the

question as to whether such an agreement is to be upheld or not, one must look at the service contemplated by the parties at the time, and the circumstances under which the agreement was entered into. If the agreement was just and reasonable when entered into, it will be enforced and will not be disregarded or set aside because something has happened subsequently, or some contingency of which one party or the other has taken the risk, has occurred to make it more onerous on one or the other than was anticipated when it was entered into: *The True Blue*, 2 Wm. Rob. 176; *The Resultatet*, 17 Jurist, 353; *The Jonge Andries*, Swa. 226; *The Cato*, 35 L.J.N.S. Ad. 116; *The Waverly*, L.R. 3 Ad. & E. 369; and *The Strathgarry*, L.R. 1895, Prob. 264.

Where the parties have made an agreement the Court will enforce it, unless it is manifestly unfair and unjust, but if it be manifestly unfair and unjust the Court will disregard it and decree what is fair and just. That, it was said by Brett, L.J., delivering the judgment of the Court of Appeal in *Ayerblom* v. *Price*, 7 Q.B.D. 129, is the great fundamental rule, and in order to apply it to particular instances, the Court will consider what fair and reasonable persons in the position of the parties would do, or ought to have done under the circumstances. The rule is of course applicable to both parties to such agreements. Where salvors, or persons claiming salvage compensation, have sought to disregard agreements which they had made, and to recover, as salvage, larger sums than they had bargained for, they have been told that such agreements ought to be respected if they had been fairly entered into, and are not clearly unjust or inequitable: *The Mulgrave*, 2 Hagg. 77; *The British Empire*, 6 Jurist, 608; *The Betsey*, 2 Wm. Rob., 167; *The True Blue*, 2 Wm. Rob., 176; *The Repulse*, 2 Wm. Rob., 396; *The Henry*, 15 Jurist, 183; *The Resultatet*, 17 Jurist, 353; *The Jonge Andries*, Swa. 226; *The Firefly*, Swa., 240; *Bondies* v. *Sherwood*, 22 Howard, 214; *The Cato*, 35 L.J.N.S. Ad. 116; *The Canova*, L.R. 1 Ad. & E., 54; *The Waverly*, L.R. 3 Ad. & E., 369; *The Solway Prince*, L.R. 1896, Prob. 120.

In the same way and on like grounds agreements made by the masters of vessels in distress have been upheld against the contentions of the owners, that they should be relieved from such agreements: *The Helen and George*, Swa. 368; *The Arthur*, 6 L. T. N. S., 556; *The Prinz Heinrich*, L. R. 13 P. D., 31; and *The Strathgarry*, L. R. 1895, Prob. 264.

The instances in which agreements have been set aside in favor of salvors or persons claiming salvage compensation, are not numerous. That has been done, however, where some material fact has been concealed by the master of the vessel; *The Kingalock*, 1 Spinks, 213, or where the service has been rendered by one who was ignorant of its value, and the amount agreed upon has manifestly been inadequate: *Silver Bullion*, 2 Spinks, 70; *The Phantom*, L.R. 1 Ad. & E., 58; or where the agreement was clearly inequitable: *The Enchantress*, 1 Lush., 93; 30 L.J.N.S., 15.

In general, however, the cases in which such agreements have been disregarded are cases in which some advantage has been taken of the master to extort from him terms that are not fair and just. It rarely happens that the master of a vessel in distress and need of assistance is on equal terms with those offering to aid him. Sometimes in such cases he is compelled to accede

to unreasonable demands by threats openly made to leave him unless he agrees to the terms offered to him. At other times, although no such threat is openly made, he is subject to a like and equally effective compulsion to agree to terms that are unfair and unjust, because of the circumstances in which he finds himself. Again, he may recklessly or through ungrounded fears accede to demands manifestly exorbitant. In all such cases the agreement will be disregarded: *The Theodore*, Swa. 351; *The America*, 2 Stuart Ad. R. 214; *The Medina*, L.R. 1 P.D. 272, and on appeal 2 P.D. 5; *The Silesia* L.R. 5 P.D. 177; *The Ismir*, 14 Q.L.R. 353; *The Mark Lane*, L.R. 15 P.D. 135; and *The Rialto*, L.R. 1891, Prob. 175.

The same rules are followed in the Courts of the United States. Where such agreements are fairly made, no advantage being taken of ignorance or distress, they are to be upheld: *The Independence*, 2 Curtis, 350; *The J. G. Paint*, 1 Benedict, 545.

But while Courts of Admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain, they will not tolerate the doctrine that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit: *Post* v. *Jones*, 19 Howard, 160; *The Emulous*, 1 Sumner, 207; see also *The Brothers*, Bee's Ad. R. 136; *The Nancy*, Bee's Ad. R. 139; *The Jenny Lind*, 1 Newberry, 443; *The Wexford*, 6 Benedict, 119; *Two hundred*, etc., 7 Benedict, 343; *The Homely*, 8 Benedict, 495; *The C. & C. Brooks*, 17 Fed. R. 548; *The Young American*, 20 Fed. R. 926; *The Tennasserim*, 47 Fed. R. 119; *The Don Carlos*, 47 Fed. R. 746; *The Jessomene*, 47 Fed. R. 903; *The Sirius*, 15 U.S. App. R. 181.

United States courts have perhaps been more ready than English courts to disregard such agreements, and that tendency finds expression occasionally in the terms in which the rules applicable to such cases are laid down. English courts do not lightly encroach upon the old rule of the Admiralty Court, that where there is an agreement made by competent persons, and there is no misrepresentation of facts, the agreement ought to be upheld unless there is something very strong to show that it is inequitable: Per Brett, J.A., in *The Medina*, L.R. 2 P.D., 7.

[Here the learned judge recited the facts in extenso.]

Looking at the agreement from the standpoint of the parties to it, at the time they entered into it, and having regard to the services that they had in contemplation then, the agreement cannot, it seems to me, be said to be unjust or unreasonable. The rate agreed upon was, it is true, considerably higher than that usually charged for a suitable tug sent from Quebec to the assistance of vessels in like situations of peril, but in such cases the tug is paid for the service from the time she leaves Quebec until she returns, and that makes a great difference. A tug plying on the lower St. Lawrence would not, it seems, be justified in charging upon a vessel which she takes under her care, the full expenses incurred while she was so plying: *The Graces*, 2 Wm. Rob., 294. Yet the fact that she has incurred such expenses, and is on hand ready to lend such assistance, and that extra expense would necessarily be incurred in pro-

curing a tug to render a like service, ought, it seems to me, to be taken into account in such cases as this. If, on the one hand, the tug ought not to take an undue advantage of the fact that she is at hand ready to perform the required service, she ought not, on the other hand, to be deprived of all the benefit resulting from that circumstance. Where the actual service may not continue for more than three or four days' a rate of three hundred and fifty dollars per day may in reality be quite as reasonable as one of two hundred dollars for that time, and three or four days additional occupied in going to and coming from the place where the service is to be performed.

I agree with the learned Judge of the Quebec Admiralty District that the agreement in question in this case ought to be upheld, and I dismiss the appeal, with costs.

Province of Ontario.

COURT OF APPEAL.

From MACMAHON J.] [Nov. 7.

(BOYD, C., ROBERTSON, J., AND MEREDITH, J.)

BADAMS *v.* CITY OF TORONTO.

Municipal corporations—Negligence—Defect in sidewalk beyond line of highway.

A sidewalk put down by the defendants extended beyond the true line of the highway and up to the outside wall of a shop, the owner of which cut the sidewalk and let into it a grating for the purpose of lighting his cellar. The grating was not guarded, and no notice was given to the public that it and part of the sidewalk was upon private property. The plaintiff stepped upon the grating, which was in a defective condition, and was injured.

Held, per BOYD, C., and ROBERTSON, J., that it was a question for the jury whether the danger was so close to the highway as to render travel unsafe, and whether the defendants had reasonable notice of the danger.

Per MEREDITH, J.: A corporation cannot escape liability by showing merely that the injury happened at a point which, on actual survey, is found to be without the true lines of the highway, though until then supposed to be and treated as if within them. The defendants, having constructed a somewhat costly sidewalk, in effect thereby said, this is part of the public highway which we are bound to keep in repair and which we set apart for the use of pedestrians.

W. R. Riddell and *D. Urquhart*, for the plaintiffs.

Robinson, Q.C., and *W. C. Chisholm*, for the defendants.

BOYD, C., ROBERTSON, J. } [Nov. 7.
MEREDITH, J. }

MARTIN *v.* SAMPSON.

Chattel mortgage—Affidavit of bona fides—Money not actually advanced.

The affidavit of bona fides attached to a chattel mortgage, duly executed and filed, stated that the mortgagor was justly and truly indebted to the mort-

gagee in a named sum. A loan was made in good faith upon the security of the chattel mortgage, but the money was not paid over for five days after the affidavit was made.

In an action by the assignee for the benefit of creditors of the mortgagor under a subsequent assignment, to set aside the mortgage :—

Held, reversing the judgment of MacMahon, J., 27 O. R. 545, that the mortgage was valid.

Per BOYD, C., and ROBERTSON, J.—The truth or untruth of the affidavit is important only as bearing on the question of fraud or mala fides. The untruth of the affidavit, if it is formally in conformity with the statute, gives no ground for avoiding the instrument. It would require some express legislative provision to the effect that a false affidavit should per se vitiate the security.

Per MEREDITH, J.—The affidavit of bona fides was literally true, the effect of the covenant to pay contained in the mortgage being to create a present legal indebtedness.

H. Cassels, for the appellant.

J. J. Scott, for the respondent Martin.

H. Brock, for the respondent Angus.

From DIVISIONAL COURT.] [Nov. 10.

GUROFSKI *v.* HARRIS.

Assignments and Preferences—"Creditor"—Fraudulent Conveyance—Action for tort.

This was an appeal by the plaintiff from the judgment of a Divisional Court (Boyd, C., and Robertson and MacMahon, JJ.,) reported 27 O.R. 201, and was argued before HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A., on the 23rd and 24th of September, 1896.

The appeal dismissed with costs, the Court agreeing with the judgment appealed from.

F. E. Titus, and *S. H. Bradford*, for the appellant.

Watson, Q.C., for the respondent.

From DIVISIONAL COURT.] [Nov. 10.

FLEMING *v.* EDWARDS.

Fraudulent conveyance—Voluntary conveyance—Grantor's intention to embark in business.

A voluntary conveyance of part of his estate by a retired and successful hotel keeper to his wife, made at a time when he was in solvent circumstances but was, after some months of idleness, about to take up the hotel keeping business again, was upheld as against subsequent creditors, the grantor's subsequent insolvency being caused by loss by fire.

Judgment of the Divisional Court reversed.

Robinson, Q.C., and *C. J. Holman*, for the appellant

F. J. Travers, and *J. A. Mills*, for the respondent.

From ROBERTSON, J.] [Nov. 10.

JOHNSTON *v.* DOMINION GRANGE MUTUAL FIRE INS. CO.

Insurance—Fire insurance—Change material to the risk.

A provision in a policy of fire insurance permitting the insured to use "for the purpose of threshing the crops on the premises a steam thresher with an efficient spark arrester," does not by inference prohibit the use of a steam engine in connection with a machine for crushing grain.

The use of a steam engine on one occasion in connection with a machine for crushing grain is not a change material to the risk within the meaning of the statutory condition. That condition refers to some structural alteration in the premises or habitual or permanent alteration in the nature of the work or business carried on.

Judgment of ROBERTSON, J., affirmed.

Aylesworth, Q.C., for the appellants.

Shepley, Q.C., for the respondents.

From MEREDITH, J.] [Nov. 10.

MAY *v.* LOGIE.

Will—Construction—Ambiguity—Elliptical sentence.

This was an appeal by the plaintiff from the judgment of Meredith, J., reported 27 O. R. 501, and was argued before Hagarty, C.J.O., Burton, Osler and Maclennan, JJ.A., on the 22nd and 23rd of September, 1896.

A testator, after declaring the will in question to be his last will, and after revoking all previous wills, proceeded thus: "It is my will that as to all my estate, both real and personal, my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will."

Held, affirming the judgment of MEREDITH, J., that the intention to devise his property to his wife could be fairly gathered from this language of the testator.

J. A. Donovan, for the appellant.

W. Mortimer Clark, Q.C., and *Shepley*, Q.C., for the respondents.

From BOYD, J.] [Nov. 10.

CAVANAGH *v.* PARK.

Master and servant—Workmen's Compensation for Injuries Act—Notice of action—Notice of objection thereto—Pleading—55 Vict., ch. 30, sec. 14

The provisions of sec. 14 of the Workmen's Compensation for Injuries Act, 55 Vict., ch. 30 (O.) are not complied with by alleging in the statement of defence that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection if he intends to press it.

Judgment of BOYD, C., affirmed.

H. D. Gamble, and *H. L. Dunn*, for the appellant.

Pegley, Q.C., for the respondent.

From ROBERTSON, J.] [Nov. 10.

GRIMES *v.* MILLER.

Arrest—Malicious prosecution—Trespass—Justice of the Peace—Damages.

A complainant who in good faith lays an information for an offence unknown to the law before a magistrate, who thereupon without jurisdiction commits the accused to gaol, is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution.

There was evidence upon which the jury might have reasonably found that the complainant before laying the information assisted in arresting the plaintiff. The case was left to the jury, by Robertson, J., as one of trespass and malicious prosecution, and they found a general verdict in the plaintiff's favor for $200 damages.

Held (HAGARTY, C.J.O., dissenting), that there must be a new trial.

F. E. Titus and *S. H. Bradford*, for the appellant.

E. E. A. DuVernet and *F. McMichael*, for the respondent.

From MACMAHON, J.] [Nov. 10.

MCCAUSLAND *v.* HILL.

Covenant—Restraint of trade—Company—Abandonment of corporate powers—Covenant between intending shareholders—Right of shareholders to enforce after incorporation.

A covenant by a merchant carrying on a general business throughout the Dominion of Canada in all kinds of glass not to be "in any way directly or indirectly engaged, concerned or interested in the business of buying, selling or dealing in clear plate class" in the Dominion of Canada for twenty years, made for adequate consideration upon the formation by himself and other dealers in glass of a company to deal in clear plate glass in the Dominion of Canada, is good.

Acting as agent or traveller for a firm dealing in clear plate glass in the Dominion of Canada is a breach of the covenant.

An agreement by a company incorporated under the Dominion Joint Stock Companies Letters Patent Act for the purpose of manufacturing, importing and dealing generally in mouldings, picture frames, mirrors, plate glass, sheet glass, etc., etc., for the sale of its stock of plate glass to a company to be formed with a covenant not to compete in the plate glass business with that company for twenty years, is valid, and is not an ultra vires abandonment of its powers.

One party to an agreement made between a number of dealers in plate glass for the formation of a company to take over the plate glass business of each of them, each dealer covenanting not to compete with the new company when formed, may be restrained by the other parties to it from breach of the covenant, even after the formation of the new company, the parties complaining being at the time of the action shareholders in that company. HAGARTY, C.J.O., dissenting on this point.

Judgment of MACMAHON, J., affirmed.

Biggs, Q.C., and *Lewis*, Q.C., for the appellant.

Ritchie, Q.C., and *Ludwig*, for the respondents.

[Nov. 10.

IN RE QUEEN'S COUNSEL.

Constitutional law—Appointment of Queen's Counsel.

The Lieutenant-Governor in Council has the right to appoint members of the Bar of Ontario to be Her Majesty's Counsel, and to give these persons the right of pre-audience in the Courts of the Province.

Per BURTON, J.A.: The Lieutenant-Governor-in-Council has the exclusive right to make such appointments.

Irving, Q.C., for the Attorney-General of Ontario.

H. J. Scott, Q.C., for the Attorney-General of Canada.

Practice.] Nov. 20.

JOHNSTON *v.* CONSUMERS' GAS CO. OF TORONTO.

Amendment—Adding plaintiff—Attorney-General—Final judgment.

A motion made by the plaintiffs after the judgment of this Court, 23 A.R. 566, for leave to amend by adding the Attorney-General as a party plaintiff in order to meet the difficulty raised by the judgment that the plaintiffs had no locus standi, was refused, upon the ground that such an amendment could not be made after final judgment.

Moss, Q.C., and *J. MacGregor*, for the plaintiffs.

McCarthy, Q.C., and *W. N. Miller*, Q.C., for the defendants.

HIGH COURT OF JUSTICE.

BOYD, C., ROBERTSON, J., MEREDITH, J. [Sept. 22.

KERVIN *v.* CANADIAN COTTON MILLS CO.

Negligence—Workman's death—How occasioned—Evidence—Jury.

In an action against a manufacturing company for damages for the death of an employee, the evidence showed that two large wheels 45 feet apart were placed partly in a trench in the floor of the basement of a mill for the purpose of driving a wide belt, and revolved at the rate of about 220 times a minute.

The deceased was employed to oil the bearings and see that they did not heat. His dead body was found much injured close to one of them; but there was no evidence of how he had met his death. The wheels were not guarded by fencing; but there was evidence that the deceased had on previous occasions crossed the trench on two planks placed there between the upper and lower moving belt.

Held, (MEREDITH, J., dissenting), that there was evidence proper to be submitted to the jury.

Per MEREDITH, J.: No matter how gross the negligence no action lies unless it was the cause of the injury. There was no direct proof, it was but conjecture, possibilities and probabilities, upon which a guess not a reasonable conclusion from evidence could be based. The jury are not at liberty to guess;

a verdict supported entirely upon mere surmise cannot stand. The case ought not to have been left to them.

McCarthy, Q.C., and *Pringle*, for the appellants.

Maclennan, Q.C., and *Aylesworth*, Q.C., contra.

STREET, J., Jury Sittings. [Oct. 10.

CERRI *v.* ANCIENT ORDER OF FORESTERS.

Insurance—Benefit society—Misrepresentation as to age—Good faith—52 Vict., ch. 32, sec. 6.

Case tried at Toronto Jury Sittings.

The Ontario Insurance Amendment Act, 1889, 52 Vict., ch. 32, applies to benefit societies ; and where one was admitted to the defendant's order on the strength of a representation as to age, which was false, but made in good faith, and without any intention to deceive :—

Held that by virtue of 52 Vict., ch. 32, sec. 6, the contract of insurance was not avoided thereby.

If the true age of the deceased had been stated, he could not have been admitted to the order, and therefore could not have effected any insurance.

Held, nevertheless, being a member in good standing at the time of his death, and his membership not having been attacked in his lifetime, his certificate of insurance was not avoided by this fact.

G. G. Mills and *A. Mills*, for the plaintiff.

Aylesworth, Q.C., for the defendant.

[Oct. 12.

FERGUSON, J.]

HALL *v.* SCHOOL TRUSTEES FOR SECTION 2, STISTED.

Public Schools—Accommodation—"A Barnardo boy"—Guardianship

Plaintiff was an inmate of one of Dr. Barnardo's Homes, and was placed with one S., his next friend in this action, under an undertaking in writing reciting that he was under the guardianship of the manager of said home in which S., in consideration of a monthly payment, engaged with the manager to receive him as one of his family, to provide food, clothing, etc., and secure his regular attendance at school, etc., etc.

In an action to compel the school board of the school section in which plaintiff resided with S., to allow him to attend the school and if necessary provide accommodation for him, it was

Held, that S. was not plaintiff's guardian.

Quære, whether the Barnardo Home or the Manager had power to appoint a guardian to plaintiff.

Held also, that the school accommodation being exhausted by children whose parents or guardians resided in the school section, the defendants were not bound to provide aecommodation for the plaintiff.

E. Coatsworth, for the plaintiff.

Shepley, Q.C., for the defendants.

BOYD, C.,
MEREDITH, J. } [Nov. 2.

RUSTIN *v.* BRADLEY.

County Court—Jurisdiction—Small legacy charged on land—59 Vict., ch. 19, sec. 3, sub sec. 13 (O.).

In an action to recover a legacy of $5, charged on land brought in a County Court,

Held, that a County Court had jurisdiction under sub-sec. 13 of sec. 3 of 59 Vict., ch. 19 (O.), as the plaintiff was seeking equitable relief.

Judgment of the County Court of York varied.

T. Hislop, for the appeal.

D. C. Ross, contra.

ARMOUR, C.J.,
FALCONBRIDGE, J. } [Nov. 9.

TRUSTS CORPORATION OF ONTARIO *v.* CLUE.

Married woman—Separate estate—Liability.

A married woman who had no other means was entrusted by her husband with all his wages, and made all the purchases of furniture, etc., for the house, also a piano, and she borrowed money on a promissory note made by her and her husband, which was used to pay off a mortgage on the furniture, which had been signed by her.

In an action on the note it was

Held, that she had separate estate and was liable. Judgment of the County Court of Bruce reversed.

Aylesworth, Q.C., for the appeal.

Riddell, contra.

STREET, J.] [Nov. 9.

CAMPBELL *v.* WHELER.

Costs—Discretion—Judicial officer—Appeal—Interference—Rule 1170 (a).

The Court will not interfere with the discretion exercised as to costs, unless the judge whose order is appealed from has proceeded upon some erroneous principle of law or upon some misapprehension of the facts of the case.

Young v. *Thomas*, (1892) 2 Ch. 134, followed.

It is not intended by Rule 1170 (a) that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from.

A. G. Murray, for the plaintiff.

W. J. Elliott, for the defendants.

STREET, J. [Nov. 12.

MCKINNON *v.* CROWE.

Judgment debtor—Examination of—Order for—Judgment for costs—Interpleader proceedings—Motion to commit—Rules 926, 932, 1360—Concealment of property.

A person who was a judgment debtor in respect only of the costs of interpleader proceedings was examined as a judgment debtor under an order made

by a judge, in presence of her counsel, after argument. Upon a motion to commit her under Rule 932, upon the ground that it appeared from her examination that she had concealed or made away with her property to defeat or defraud the plaintiff, it was objected on her behalf that Rule 1360, substituted for 926, which gives a judgment creditor, for costs only, a right to examine his debtor, does not apply to interpleader proceedings.

Held, that the objection should have been urged upon the application for the order for examination, and was not now open.

The judgment debtor upon hearing that judgment had gone, or was about to go against her, turned all the property she had into money, and sent it to a friend in a foreign country, where it remained, and upon her examination she refused or professed to be unable to give any information as to where it was. After she had had ample opportunity to become aware of her position, but had done nothing towards satisfying the plaintiff's claim, an order was made for her committal to gaol for three months, and for payment by her of the costs of the motion.

Aylesworth, Q.C., for the plaintiff.

Biggs, Q.C., for the judgment debtor.

ARMOUR, C.J., FALCONBRIDGE, J. [Nov. 13.

MCQUARRIE *v.* BRAND.

Evidence—Admissibility of promissory note—Parol understanding—Contract.

Defendant being indebted to F., gave her a note for the amount, F. agreeing if he supported a relative of hers during life and paid the interest on the note that when the death happened the note would be considered paid. The relative was supported by defendant for six years and died. F. died soon after and her executors brought action to recover the amount of the note.

Held, that the contract set up by the defendant was a contract independent of the note, and rested upon a separate, distinct and good consideration.

Held also, that oral evidence in support of it was admissible and did not vary the terms of the note, the contract having been completely performed, that evidence did not seek to vary the terms of the note, but to show that it was satisfied by performance of the defendant's contract, and the action was dismissed with costs.

Judgment of the County Court of Perth reversed.

W. N. Miller, Q.C., for plaintiffs.

C. A. Masten, for defendants.

ARMOUR, C.J., STREET, J. [Nov. 14

IN RE JENISON.

Water and watercourses—Water privilege—Owner of—Riparian proprietor—Use and improvement of privilege—R.S.O. c. 119.

The respondent was the owner of twelve and a half acres of land abutting on the chain reserved by the Crown for a common and public highway along

the Kaministiquia River, and had been granted a license to use the interest of the Crown in such chain reserve.

Held, that such ownership and license constituted him a riparian proprietor as to that part of the river flowing past the twelve and a half acres and the chain reserve.

Adjoining that part of the chain reserve lying between the twelve and a half acres and the river, was a water privilege, consisting of the fall in the river when in its natural state, as it passed along the chain reserve, and being the difference of level between the surface where the river first touches such portion of the chain reserve and the surface where it leaves it.

Held, that the respondent was the owner of such water privilege within the meaning of R.S.O. c. 119, and entitled to the benefit of that Act in respect thereof.

The respondent proposed to place his dam at the upper end of his water privilege, and it did not appear that he was the owner or legal occupant of any water privilege above the intended dam.

Held, that he was not a person desiring to use or improve a water privilege of which he was the owner or legal occupant, and was therefore not entitled to an order under the Act.

W. Cassels, Q.C., and *T. A. Gorham*, for the appellants.

Aylesworth, Q.C., for the respondent.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

MEREDITH, C.J., ROSE, J. [Nov. 16.

HARGRAVE *v.* ELLIOT.

Assignments and preferences—R.S.O., ch. 124, sec. 7—Creditor—Right of action—Fraudulent sale of assets of estate—Assignee.

Section 7 of the Assignments Act, R.S.O., ch. 124, applies only to transactions made or entered into by the insolvent; and a creditor of the insolvent has a right of action in his own name against the assignee to set aside a sale of the assets of the estate as fraudulent.

Kilmer and *W. H. Irving*, for the plaintiff.

Delamere, Q.C., for the defendant Elliot.

F. J. Travers and *Keyes*, for the defendant Barber.

BOYD, C. [Nov. 18.

ZAVITZ *v.* DODGE.

Costs—Taxation—Apportionment—Common defence by several defendants.

An action by a judgment creditor against three defendants, one of whom was the judgment debtor, to set aside a conveyance as fraudulent, was dismissed with costs, but with the direction that the costs of the judgment debtor should be set off against the judgment recovered by the plaintiff. There was a common defence by one solicitor for all three defendants, and no separate proceedings for the benefit of particular defendants.

Held, upon appeal from taxation, that a set-off of one-third of the whole costs taxed to the defendants should be allowed.

Re Colquhoun, 5 DeG. M. & G. 35, and *Clark* v. *Virgo*, 17 P.R. 260, followed.

Folinsbee, for the plaintiff.

Talbot Macbeth, for the defendants.

[Nov. 19.

ROSE, J.

HARRISON *v.* PRENTICE.

Seduction—Right of action—Service—Pregnancy—Costs.

In an action of seduction, it appeared that the connection took place while the plaintiff's daughter resided at service with the defendant, and there was no evidence of any possible loss of service by the father, and there was neither birth of a child nor pregnancy.

Held, that the father had no right of action either at common law or under the Act respecting seduction, R.S.O., ch. 58.

Kimball v. *Smith*, 5 U.C.R. 32, and *L'Esperance* v. *Duchene*, 7 U.C.R. 146, followed.

The jury having given a verdict for the plaintiff, and it appearing that shortly after the alleged connection, and while in the service of the defendant, her uncle, the daughter became with child by the defendant's son, the action was dismissed without costs.

E. G. Porter, for the plaintiff.

W. B. Northrup, for the defendant.

FOURTH DIVISION COURT, NORTHUMBERLAND AND DURHAM.

[Nov. 16.

KETCHUM, CO. J.] WOOD *v.* BRUNT.

Chattel mortgage—Affidavit of execution—Mortgagee taking possession—57 Vict., ch. 37, (O).

The affidavit of execution of a chattel mortgage, made after 1st January, 1895, (when The Bills of Sale and Chattel Mortgage Act, 1894, took effect) omitted to state, or "contain," the date of the execution of the mortgage, which, by sec. 2 of that Act, it is required to contain.

Held, a fatal defect, and made the mortgage absolutely null and void as against creditors, etc., under sec. 5.

The defendant (the mortgagee) took possession of the goods under his mortgage, rightfully as against the mortgagor, before the plaintiffs (execution creditors of the mortgagor) obtained their judgment upon which their execution issued, but after they became simple contract creditors.

Held, on the authority of *Clarkson* v. *McMaster*, 25 S.C.R. 96, that the taking possession did not make the mortgage valid as against the plaintiffs.

A. A. Smith, for plaintiffs.

R. R. Loscombe, for defendant.

Province of Quebec.

COURT OF QUEEN'S BENCH.

BABY, BOSSE, BLANCHET, HALL and WURTELE, JJ. [May 2.

BAIE DES CHALEURS RY. CO., ET AL, *v.* NANTEL, ET AL.

Railway company—Insolvency—Sequestration—Provincial statute (56 Vict., c. 36)—Dominion incorporation—Discontinuing construction of portion.

The Baie des Chaleurs Railway Company was incorporated by the legislature of the Province of Quebec, for the construction and operation of a line of railway between certain points. Subsequently, by Dominion statute, the railway was declared to be a work for the general advantage of Canada, and the company and its charter to be under the control of the Parliament of Canada. A portion of the line was actually constructed and operated, and subsidies were received from the province. About this time the Atlantic and Lake Superior Railway Company was incorporated by Dominion statute, with power to enter into agreements with—among others—the Baie des Chaleurs Company, and the Atlantic and Lake Superior Company next acquired the constructed portion of the Baie des Chaleurs Company's line. This sale was ratified by Dominion statute, with the stipulation that nothing in the sale or the Act should relieve the Baie des Chaleurs Company from any of its obligations. The Atlantic and Lake Superior Co. operated the line in question for a time, and then ceased.

By a provincial statute it is enacted that "when a railway company, subsidized by the province, has become insolvent, and has not complied with the requirements of its charter, as regards the commencement or completion of its works within the time specified, and does not continue, and has become incapable of continuing the undertaking or working of the road, etc.," the property of the company may be sequestrated and sold.

Held, 1. The provincial statute (56 Vict., c. 36, s. 2.), which provides for the sequestration and sale of the property of a railway company subsidized by the province, when such company is insolvent, or when it has not complied with its charter, or ceases to work its road, applies to a company under the legislative control of the Parliament of Canada.

2. The discontinuing to work a part of the company's line, which it had put in operation pending the construction of the rest of the line, gives a right of sequestration.

Judgment of PAGNUELO, J. (R.J.Q., 9 C. S., p. 47) confirmed, (HALL and WURTELE, JJ.), dissenting.

C A. Geoffrion, Q.C., and *J. N. Greenshields*, Q.C., for the appellants.

F. J. Bisaillon, Q.C., for the respondents.

NOTE.—This decision is at variance with the Ontario case of *Barbeau* v. *St. Catharines and Niagara Central Ry. Co.*, 15 O. R., 586. See also *Monkhouse* v. *G. T. R. Co.*, 8 A. R., 637; *Darling* v. *Midland R. Co.*, 11 P. R., 32; *Clegg* v. *G. T. R. Co.*, 10 O. R., 708; and 7 Revue Legale, 715.—ED. C.L.J.

[April 26.

PAGNEULO, J.]

WOOD *v.* ATLANTIC & NORTH-WEST RAILWAY CO.

Railway Act 1888—Expropriation under taxation of costs—Appeal from taxation—Interest on costs.

Held, 1. The taxation of a bill of costs by a Judge of the Superior Court in an expropriation proceeding under the Railway Act, 1888, is final and without appeal and fixes the amount due by the unsuccessful party; there can be no revision of this taxation, either upon appeal or by action brought to recover the amount, it being out of the power of the Court to reduce any part of the bill.

2. The taxation of a bill of costs only fixes the amount to be paid by the unsuccessful party, and contains no penalty; therefore the interest upon these costs runs only from the date of the action brought to recover them.

Weir & Hibbard, for the plaintiffs.

Abbotts, Campbell & Meredith, for the defendants.

Province of Nova Scotia.

SUPREME COURT.

[April 18.

Full Bench.]

ATTORNEY-GENERAL, EX REL., ETC., *v.* BERGEN, ET AL.

Railway company—Irregularities in organization—Right of Attorney-General to intervene to protect public interests—Procedure.

O. 1, R. 1, of the Supreme Court of Nova Scotia, provides that "All actions and suits, which previously to the first day of October, 1884, were commenced by writ, bill or information in the Supreme Court, shall be instituted in the said court by a proceeding to be called 'an action.'"

Held, that the word "information," as used in the rule, must be read in the same sense as the corresponding word in the English Rule (O. 1, R. 1), as referring exclusively to informations in Chancery, and that it would not cover an information in the nature of a quo warranto.

Defendants were the incorporators and provisional directors named in the Act of Incorporation of the South Shroe Railway Company, passed by the Legislature of Nova Scotia, April 30th, 1892 (Acts of 1892, ch. 130). The plaintiff, the Attorney-General of Nova Scotia, commenced proceedings by way of information, asking for an injunction to restrain defendants from making use of the name or exercising the powers of the company, and that defendants be ousted from the office of directors or officers of the company, and also, in the alternative, judgment forfeiting the charter of the company, on the grounds that the company, which was incorporated for the purpose of bringing about the construction of a line of railway, for the carriage of passengers, mails and freight, from Yarmouth to Shelburne, in the Province of Nova Scotia, a distance of about 70 miles, was never legally organized, that the

stock was not subscribed or paid up, and that the defendants, without right to do so, were proceeding with the construction of the railway in the name of the company.

Held, that the public had an interest in having the railway owned and operated by a body constituted and organized in conformity with the act of the legislature, for the purpose of securing the attainment of the objects in view, and that the Attorney-General had the right to maintain the action, and to succeed to the extent to which the public interests were involved.

Held, also, that the action brought by the Attorney-General in the interests of the public could proceed independently of the person named as relator.

W. B. A. Ritchie, Q.C., for plaintiff.
F. B. Wade, Q.C., for defendant.

MEAGHER, J.] [Nov. 6.

HAMILTON *v.* STEWIACKE VALLEY AND LANDSDOWN RY. CO.

Incorporated company—Execution against shareholders—Procedure in obtaining—Burden upon shareholders seeking to set up transfer of shares.

Plaintiffs having recovered judgment against the defendant company, now sought execution against a number of parties who were alleged to be shareholders. A preliminary objection that plaintiffs must proceed by scire facias, and could not obtain execution upon an application founded upon a notice of motion, was over-ruled. On the motion proceeding, it appeared that a number of the parties against whom execution was sought were admittedly shareholders in the company as originally constituted, but it was claimed on their behalf that they had ceased to be such, their shares having been transferred to others.

Held, that the burden was on the parties against whom execution was sought of showing not only that they had transferred their shares as claimed by them, but that the transferees were substituted for the original owners upon the books of the company.

Held also, there being a good deal of uncertainty about the matter, that defendants' rights should not be determined upon summary application, but that an issue should be ordered to determine the questions of the original subscription and transfer.

Held also, that an application to cross-examine one of the parties sought to be made liable, but who made affidavit that he had never been a shareholder, must be refused.

C. H. Cahan, for plaintiff.
H. McInnes, for defendant.

Province of New Brunswick.

SUPREME COURT.

FULL COURT.] [NOV. 13.

EX PARTE MICHAUD.

Certiorari—Magistrate—Bias.

Rule for certiorari to remove conviction under the Liquor License Act in Restigouche discharged. The chief ground urged in support of the motion was that one of the convicting magistrates held the office of liquor license inspector, although in an adjoining district.

Held, not evidence of bias, and no ground for reviewing the conviction.

MCLEOD, J., In Chambers. [Nov. 22.

Habeas Corpus—Voluntary imprisonment.

A warrant having been issued for the arrest of Mrs. Quirke for non-payment of a fine, for breach of the Canada Temperance Act, her daughter disguised herself as her mother. The officer being deceived, arrested the daughter and lodged her in jail. A writ of habeas corpus having been obtained,

MacRae moved for the prisoner's discharge.

Otty, for sheriff, asked that those implicated in the arrest be exonerated from all liability therefor.

Order granted discharging prisoner and exonerating those implicated in her arrest.

MCLEOD, J. In Chambers. Nov. 25.

DOCKRILL *v.* RUSSELL.

Surrender in law—Tenancy from year to year—Notice to quit.

Review from St. John City Court.—This was an action to recover $75, being one quarter's rent of a shop on Union Street in the City of Saint John. About six weeks previous to May 1st, the defendant called on the plaintiff and informed him that he was going to move. About May 1st he again called and left the key in plaintiff's office, though the latter refused to receive it. The shop was afterwards advertised "to let" according to an agreement between the parties. Subsequently it was used for advertising purposes by an Opera House Company, of which the plaintiff was a director. The key was used to gain an entrance to the shop.

Palmer, Q. C: The facts show that there was a surrender in law. The tenancy was determined by the delivery of the key, the advertising of the premises "to let", and the putting up of theatrical posters: *Phene* v. *Popplewell*, 12 C.B.N.S., 334; *Hall* v. *Burgess*, 5 B. & C. 332, *Talbot* v. *Whittle*, 14 Mass. 177.

T. P. Regan for plaintiff. In absence of some special stipulation to the

contrary, a yearly tenancy must be determined by notice to quit: *Birchall* v. *Reid*, 35 U.C.R. 19, Cons. Stat. N.B., ch. 83, secs. 16, 19.

A letting at an annual rent constitutes a yearly tenancy which continues at the same rent, for a second year, if the tenant remains in possession, *McClenaghan v. Barker*, 1 U.C.Q.B. 26.

The plaintiff's attorney relied on *Ostler* v. *Henderson*, 2 Q.B.D. 575, as showing that the facts of the case did not constitute a surrender.

Held, that the facts of the case did not obviate the necessity of a notice to quit under 52 Vict. N.B., ch. 27, sec. 53, and on the question of surrender, that surrender is governed by the intention of the parties as to the letting of the premises: *Ostler* v. *Henderson*, 2 Q.B.D. 575. Judgment of Court below affirmed with costs.

EQUITY COURT

BARKER, J.] [Oct. 23.

LAUGHLAN *v.* PRESCOTT.

Practice—Interrogatories.

A party to an action when examined on interrogatories concerning relevant matters not within his personal knowledge, must answer as to his belief as well as to his information.

Palmer, Q.C., and *Montgomery*, for plaintiff.

Gilbert, Q.C., for defendant.

BARKER, J.] [Oct. 23.

BRADSHAW *v.* FOREIGN MISSION.

Practice—New trial.

Misdirection in an equity case tried with a jury gives no absolute right to a new trial, and where there was not only misdirection, but the improper rejection and improper admission of evidence, but in the opinion of the Court not affecting the jury, and the Court concurring in the jury's finding upon a review of the evidence, a new trial was refused.

Pugsley, Q.C., and *Stockton*, for the plaintiff.

Gilbert, Q.C., *Palmer*, Q.C., and *M. McDonald*, for the defendant.

Province of Prince Edward Island.

SUPREME COURT.

FULL COURT.] [Nov. 3

STERNS *v.* SMITH.

Affidavit for capias on debt—Construction

This is an appeal from the County Court of King's County, as to the construction of Schedule (D) of the County Courts Amendment Act, 1878, which is as follows:

"I, A.B., do swear that C D. is justly and truly indebted to me in the sum

of dollars for (here state cause of action) and that the said C.D. has parted with or assigned all his goods and chattels since the debt was contracted, or that I have been informed by of in the said Island (here insert residence and occupation of informant) and verily believe that the said C.D. is about to depart from this province to evade payment of his debts."

Sworn, etc.

In this case the appellant was arrested on an affidavit in the above form as far as the word "or."

The respondent contended that the words "to evade payment of his debts" should have been inserted after the word "contracted."

The Court decided that the words "to evade payment of his debts" were meant to be read in the atternative, and that a plaintiff to succeed in an action of this kind must not only allege that the defendant "has parted with all his goods and chattels since the debt was contracted," but that he must further allege that he did so "to evade payment of his debts.

Mathieson, for appellant.

Rattenbury, for respondent.

Province of Manitoba.

QUEEN'S BENCH.

[Nov. 5.

TAYLOR, C.J.]

STONEHOUSE *v.* MCGILLIVRAY.

Ejectment—Evidence—Re-organization of company—Non-suit—Judgment on merits—Rule 656.

This was an action for the recovery of the possession of land claimed by the plaintiff under a lease from the Canada North-West Land Company, Limited, dated 23rd March, 1896, which lease was put in and proved by the plaintiff. The plaintiff also produced a crown patent dated 1st May, 1891, granting the land in question to a company then existing and having the same name, which had been organized in England about the year 1882.

The company from which the plaintiff got his lease was incorporated by an Act of the Dominion Parliament passed in 1893 for the purpose of acquiring the business and property of the English company bearing the same name, but no evidence was furnished to show that the English company had transferred their assets and property to the Canadian company, and the Act of incorporation of the latter did not provide that the lands and property of the English company should vest in the Canadian company, or transfer to the latter any interest in or title to them.

Held, that in an action for the recovery of the possession of land brought under the Judicature Act, the plaintiff must rely solely on the strength of his own title, just as in the former action ejectment, and that the plaintiff had failed to show any title in the company from which he had obtained his lease.

In non-suiting the plaintiff the judge, however, directed under rule 656 of The Queen's Bench Act, 1895, that the non-suit should not have the effect of a judgment upon the merits for defendants.

Perdue and *McHarg*, for plaintiff.

Howell, Q.C., and *Machray*, for defendants.

TAYLOR, C.J.] [Nov. 5.

BANK OF MONTREAL *v.* CONDON.

Fraudulent conveyance—Queen's Bench Act, 1895, Rules 803 to 807—Bona fide purchaser—Garnishment.

In this case the plaintiffs, who had recovered a judgment in June, 1893, against the defendant, sought to realize their claim out of a parcel of land which had been purchased in 1892 in the name of the defendant's wife, alleging that the purchase was made with defendant's money, and to delay, hinder or defraud the plaintiffs. They accordingly moved under Rules 803 to 807 of the Queen's Bench Act, 1895, for an order for the sale of the land.

On the return of the motion it was shown that the land had been sold by the wife to one Burton, who had paid a portion of the purchase money and had entered into an agreement for the purchase.

The plaintiffs then served a notice of motion on Burton, calling on him to appear on a day named and state the nature and particulars of his claim to the land, and either maintain or relinquish the same. On this motion coming up for hearing, the plaintiffs claimed to be entitled to have an issue to try the question as to the alleged fraudulent disposition of the property between husband and wife, asking no relief in the meantime against Burton, but leaving it open for them to confirm the sale if it appeared that they were entitled to interfere.

Held, on appeal from the Referee, that after the agreement of sale neither defendant nor his wife had any interest in the land which could be sold under the Rules referred to, and that the purchaser could not be called upon under said Rules to defend his position, and that plaintiffs' only remedy under the circumstances would be under the garnishing provisions of the Queen's Bench Act.

A vendor's lien is not an interest in land: *Parke* v. *Riley*, 38 E. & A. 215; Parry on Trusts, section 238; Overton on Liens, section 612. It is only a remedy for a debt, and is neither a right of property, an estate in lands, nor a charge on the land.

Appeal dismissed with costs to Burton.

Munson, Q.C., for plaintiff.

Martin, for defendant.

Province of British Columbia.

SUPREME COURT.

McCREIGHT, WALKEM and DRAKE, JJ. FULL COURT. [Oct. 27.

SPENCER *v.* COWAN.

Practice—Appeal from one part of an order when appellant has already taken advantage of another part.

The appellant on 14th November, 1894 was arrested under a writ of ca. sa., the order for the issue of which was obtained on the plaintiff's filing affida-

vits showing that appellant was then about to leave the Province of British Columbia for San Francisco. Appellant at once applied to be discharged on the ground that at the time of his arrest he was not about to leave the Province, and on 16th November, 1894, Mr. Justice Crease made an order without costs that the defendant be discharged from custody "on the terms that no action be brought against the plaintiff or sheriff in respect of the arrest," and the defendant was thereupon released. Defendant appealed from so much of the order as imposed the term or condition that no action be brought on the ground that the learned Judge had no jurisdiction to impose said term.

Held, (McCREIGHT, J., dissenting) following *Wilcox* v. *Odden*, 15 C.B. N.S. 837, and *Hayward* v. *Duff*, 12 C.B. N.S. 364, that defendant having availed himself of part of the order granting his discharge, he could not afterwards be heard to complain of so much of it as restrained him from bringing an action.

Appeal dismissed with costs.

L. P. Duff, for plaintiff.

A. L. Belyea, for defendant.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[Nov. 10.

SCOTT, J.] REGINA *v.* McDONALD.

Criminal law—Evidence—Confession—Inducement.

The accused was charged with stealing a post letter from a post office box. The Crown proposed to put in evidence a confession made by the accused to a detective and an assistant post office inspector. It was shown in evidence that the confession had not been obtained until the inspector had stated to the accused "There is no use your denying it. You were seen taking the letters out of the box. You may as well tell us what you did with them, as have it brought out in a court of law."

It was admitted by the Crown that there was no evidence that accused was seen taking the letters.

Held, that a confession obtained by such means was not free and voluntary and therefore not admissable; that it was improper to make a false statement in order to obtain a confession, and that the statement "You may as well tell us, as have it brought out in a court of law," was equivalent to "If you don't tell us it will be brought out in a court of law," and such a threat made by a person in authority such as the inspector rendered any confession thereby obtained inadmissable.

A. L. Sifton, for the Crown.

J. R. Costigan, Q.C., and *P. J. Nolan*, for the accused.

FLOTSAM AND JETSAM

NEWSPAPERS NOT "TRUTH."—It was one of the delights of the late Lord Coleridge to profess ignorance of things supposed to be of common knowledge. In a newspaper libel action his lordship, in his most silvery tones, asked, "What is 'Truth'?" "It is a newspaper, my Lud," replied counsel. "Oh!" said his lordship, preserving his simplicity and splendid gravity; "isn't that an entirely new definition?"

WOMEN BARRISTERS.—Now that those of the gentle sex are permitted to practice in Ontario, it may not be amiss to refer to the remarks of a leading English daily anent a lady barrister who recently successfully defended a man tried for manslaughter at the Sessions Court at Poona, in India. The possibility is that the hallowed precincts of the English courts may be invaded, and pictures are drawn of the bad results: "At the bottom of the male objection to female lawyers is the idea that such competition is essentially unfair. Our judges, the lawyers argue, need to be guarded against themselves. They are, as a general rule, a highly susceptible body of men, who would find much difficulty in resisting their natural and chivalrous impulse to give judgment in favor of the side which employed the most engaging advocate. Even now, say those lawyers who have no fear of the penalties of contempt of court before their eyes, a pretty witness or a lady litigant with a winning manner can twist any judge on the Bench around her thumb. What would it be if the judges had a row of lady advocates in front of them? According to this opinion, the corollary of lady barristers must be female judges. Only persons of their own sex will be hard-hearted enough to decide fairly where ladies supply the arguments. Then, of course, in a court so constituted the male barrister would be an absurdity, and so would the male juryman. We have not yet got very near the moment when the ramparts of the Temple and Lincoln's Inn will have to be manned to keep the feminine invaders out: and counsel will certainly expect the Inns of Court to protect them from the danger when it does become menacing. Nor will their expectations be disappointed. A desperate resistance may be anticipated in this country, whatever may be the case at Poona; at the bare suggestion of women wig-wearers the Benchers may be counted on to tumble over each other on their way to line the last ditch—perhaps the one in Lincoln's Inn-gardens. The average legal mind shudders at the notion of a grave Queen's Counsel referring to "my learned junior, Miss Fogg," or of a judge reversing the decision of a "learned sister." Incidentally it may be noticed that the most successful lady barristers would certainly have to remain unmarried; the married female pleader, like the wedded curate, would be shorn of half the usual attractions. Then a new and becoming headgear would have to be devised in place of the hideous horse-hair wig; some bewitching structure of dainty curls, of the particular shade of gold fashionable at the moment. One advantage, if the Poona infection spreads, would arise from the fact that it would undoubtedly solve the jury question; instead of a reluctance to serve, susceptible gentlemen would compete with each other for a chance of getting into the jury-box and being appealed to by all the arts of feminine advocacy. For the same reason the arrival of the lady barrister might, perhaps, increase the volume of litigation; and, if so, the prejudices of the men now in possession of the Courts might in course of time disappear."

Analytical Index

Of the Contents of this Volume.