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MORTGAGE ACTIONS—PARTIES.

In the recent case of *Blong* v. *Fitzgerald*, 15 P.R. 467, Rose, J., has decided that the wife of a mortgagor is not only a proper party, as was held in *Building & Loan Association* v. *Carswell*, 8 P.R. 73, and *Ayerst* v. *McClean*, 14 P.R. 15, but is now a necessary party to an action for foreclosure of the mortgage in order to bind her by the judgment in the action. If this decision is sound, it may have a rather far-reaching effect, as it practically casts a doubt on the efficacy of foreclosure proceedings which have been carried on without making the wife of the mortgagor a party. Before the 42 Vict., c. 22 (O.), which restricted the effect of a bar of dower in a mortgage, it was well settled that the wife of a mortgagor who had not barred her dower was not a necessary, nor even a proper, party to a suit brought by the mortgagee for the foreclosure of the equity of redemption, or for a sale of the mortgage property: *Moffat* v. *Thomson*, 3 Gr. 111; *Davidson* v. *Boyes*, 6 P.R. 27; and even after that Act it was held by Proudfoot, J., that the wife of a mortgagor could not maintain an action to redeem, after a final order of foreclosure had been obtained in an action against her husband, even though she was no party to the action: *Casner* v. *Haight*, 6 O.R. 451. In *Ayerst* v. *McClean*, *supra*, the learned Chancellor, although holding, as we have seen, that the wife is a proper party, expressly abstained from pronouncing any opinion as to whether or not a foreclosure of the husband alone would extinguish the dower of his wife. (See 14 P.R., at p. 16.) We have, therefore, now, two conflicting decisions of judges of co-ordinate jurisdiction, the one holding that a wife is not bound, and the other holding that she

is bound, by a judgment of foreclosure against her husband in an action to which she is not a party.

In view of this difference of opinion, it may perhaps be useful to consider which of the two opinions is probably correct; and in order to do so, it is necessary to bear in mind the state of the law prior to the 42 Vict., c. 22. Before that Act, we think it was quite clear that an absolute bar of dower in a mortgage was, in fact, an absolute bar, as far as the mortgagee and those claiming under him were concerned. But even before the Act, she had, notwitstanding the bar of dower in the mortgage, still a possible right of dower in the equity of redemption which remained vested in her husband, provided he died entitled to it; but if by sale or foreclosure his equity of redemption were divested before his death, that had the effect of depriving his wife of all dower in such equity. It is, therefore, easy to see that, prior to that statute, a wife of a mortgagor who had barred her dower in a mortgage was not a necessary party to the suit of the mortgagee for foreclosure or sale, because, so far as her dower in the legal estate was concerned, it was effectually barred by the mortgage, and her right to dower in the equity depended altogether on her husband dying entitled to it, which he could not do if it were divested by sale or foreclosure in his lifetime.

The 42 Vict., c. 22, did not pretend to interfere with the rights of the mortgagee; it only assumes to give the mortgagor's wife dower in any surplus which might be realized, in the event of a sale of the mortgaged property, after satisfying the claim of the mortgagee. Very shortly after the passing of the Act, it was held by Galt, J., that, notwithstanding the Act, a mortgagor might still defeat his wife's right to any share of such surplus by a voluntary sale of his equity of redemption: *Calvert* v. *Black*, 8 P.R. 255; but we think it may well be doubted whether that was a correct interpretation of the statute. We believe that it was this very mischief that the statute was intended to remedy, but it is possible that it has failed to carry out that intention. The decision was dissented from by Armour, C.J., in *Pratt* v. *Bunnell*, 21 O.R., at p. 2.

But though the wife of a mortgagor undoubtedly has a right, under the statute, to dower in the amount which may represent the value of the equity of redemption when realized, it is another thing to say that she is also entitled to redeem the mortgage.

Can it be said that full effect is given to the mortgage if, notwithstanding the bar of dower contained in it, a new equity of redemption is held to be created in the wife, which did not previously exist, and the foreclosure of which would necessarily involve a mortgagee in extra expense? We are disposed to think that such an interpretation involves a stretching of the Act beyond its letter, and also beyond its intention. On the other hand, there is no doubt that the interest which the Act undoubtedly gave the wife might be seriously prejudiced and impaired if she had not the right of redemption which Rose, J., has decided that she has.

It is somewhat strange that we have not before this had the law on this point settled by some appellate tribunal. Until then, at all events, it will be safer for practitioners in all cases to make the wife of a mortgagor a party to any action for foreclosure or sale of the mortgaged property. And it also behooves solicitors investigating titles acquired under sale or foreclosure judgments to see that the wives of mortgagors were duly made parties. It is possible, however, that defects in such proceedings arising from the neglect to serve the wife are now cured by the Judicature Act (R.S.O., c. 44), s. 53, s-s. 10, so far as subsequent purchasers are concerned.

RULES OF COURT SINCE CONSOLIDATION.

Since the promulgation of the Consolidated Rules of 1888, other Rules have been passed from time to time, and which have, we believe, not heretofore been collected. There are also certain regulations for the conduct of business in the offices of the court, which have been approved by the judges; some of these have not been printed, and are inaccessible to the profession.

We first find certain regulations made on the 26th of February, 1891. These were agreed upon by the Registrars of the three Divisions for the purpose of securing uniformity of procedure in the various offices, and were approved by the Judges, and are as follows:

Regulations for securing uniformity of practice.

"(1) All judgments to be given out after entry; all judgments to be entered in the office where the appearance is required to be entered.

(2) All orders to be charged for as special, except such as are issued on præcipe, and the fees payable on such special orders to be as set out in the tariff, namely, twenty cents by statute, and twenty cents a folio up to six folios, and no more than six folios to be charged for, exclusive of charge for entering.

(3) On giving out any papers to parties entitled thereto in pursuance of an order or otherwise, no search to be charged. Order and receipt to be charged for as separate filings.

(4) Certificates for registration to be issued on filing a proper præcipe and production of original or office copy of order or judgment; no copy of order or judgment need be filed.

(5) Copying ordered from any office, when the pressure of business in such office will not allow of such copying being done therein in sufficient time, is to be done in the office of the Clerk of Records and Writs (see Order in Council, dated April 3rd, 1884); all copying to be paid for in stamps at the rate of ten cents per folio.

(6) All forms to be used in the offices of the Registrars and Clerk of Records and Writs to be furnished by the Clerk of the Process.

(7) Affidavits filed on applications before judgment clerks in actions in Q.B. or C.P. Divisions to be forwarded by them to the officer in whose office the action is pending.

(8) Rule 28 (*d*) is to be acted on as though the Registrar of the Chancery Division or the assistant Registrar was named therein, as well as the Clerk of Assize.

(9) Amendments under Rules 424 and 444 to be made on filing præcipe only.

(10) The Registrars of the High Court of Justice for Ontario, pursuant to Rule 450 of the Judicature Act for Ontario, hereby prescribe that all rolls (judgments) and records, written or printed (either by typewriter or otherwise), shall be of the length and width of a half sheet of foolscap paper, and shall be folded in half, lengthwise; and it is recommended that all records for trial shall be enclosed or covered by a full sheet of foolscap, or other covering of the same size.

(11) Rule 545. All appeals to a Judge in Chambers in Q.B. and C.P. Divisions to be set down with the Clerk in Chambers, and a fee of fifty cents paid therefor. (See now Rule 2, of Feb. 17, 1894, *infra.*)

(12) Præcipe orders under Rule 622 may be issued at any time by the officer with whom the pleadings have been filed, except for the purpose of issuing execution under Rule 886, in which case special leave is necessary; such orders to be entered in full under Rule 744.

(13) Rule 1226. Orders for delivery of bills of costs to be granted as of course."

Regulations in reference to Dominion Election Petitions.

December 19th, 1891.

"The judges who tried the petition will certify to the accuracy of the account of the reporter. The reporter will then apply to a judge of the court in which the petition was filed and the deposit made, who will, by his fiat or order, direct payment of the account out of the deposit.

"The reporters' charges, in the opinion of the judges present, should be taxed to the successful party, as part of his costs of the cause, and should be treated as 'actual disbursements in respect of evidence taxable in ordinary actions between party and party,' within the meaning of s-s. 4 of s. 52 of the Controverted Elections Act, as amended by the Act of 1891."

Regulations respecting form of orders on appeal.

October 6th, 1893.

"In drawing up orders made upon appeals from reports, the grounds of appeal allowed shall be set forth or stated in substance, but not the grounds disallowed.

"Where there is a reference back as to any ground of appeal, the same is to be set forth in the order."

Regulations respecting distribution of work in various Divisions.

February 17th, 1894.

"(1) The Registrar of the Chancery Division is to be relieved of the duty of sitting in the weekly court, but, in addition to the other duties now performed by him, he is to settle the minutes of all judgments in the Queen's Bench and Commor Pleas Divisions pronounced at the trial of non-jury actions in Toronto whereby any equitable relief is awarded, and all such judgments shall be authenticated by his signature.

(2) The Assistant Registrar is to be relieved of the duty of attending the sittings for the trial of actions, and, in lieu thereof,

he is to act as clerk of the weekly court for all the Divisions, and is to settle and sign, or authenticate by his signature, all orders and judgments pronounced thereat.

(3) The clerk in the Queen's Bench Division is to be relieved of his duty of sitting in the weekly court, and, in lieu thereof, he is to act as clerk of the court for the trial of non-jury actions in Toronto, in addition to his other duties.

(4) In the case of one officer acting for another who is necessarily absent, the signature of the acting officer shall be sufficient for all purposes.

(5) The Clerk of Records and Writs is to transmit the records as they may be required to the clerk of the court for the trial of non-jury actions, who, at the conclusion of the trial, is to return the same, with all exhibits relating thereto, to the Clerk of Records and Writs, who shall forward the records and exhibits in actions in the Queen's Bench and Common Pleas Divisions to the Registrars of these Divisions respectively; and a record is to be kept by the Clerk of Records and Writs of his dealings with all such records and exhibits.

(6) The practice as to entering orders and judgments in court in the Chancery Division shall be observed in the case of the like orders and judgments in court in the other Divisions."

Rules of Supreme Court of Judicature.

On February 13th, 1892, a subsection (*a*) was added to Rule 1218, as follows: "The fee of thirty cents, payable in stamps, shall not be received or taken (*a*) in respect of payments into court upon mortgages or securities held by the accountant; or (*b*) in respect of payments out of court where the amount is ten dollars or less."

The following subsection was added to Rule 146 on October 21st, 1893: "146 (*a*) After the 1st of October, 1893, interest is to be credited on moneys paid into court only after the same have been in court for fifteen days."

November 4th, 1893.

"It is ordered that Rule 1170 be amended by striking out the proviso, and substituting therefor the following proviso after the word 'Equity,' in the seventh line:

"'Provided that, where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made

at the trial, the Judge before whom the action or issue is tried, in his discretion, orders otherwise.'

"It is ordered that Rule 1172 be amended by striking out the words 'or court' in the fourth line thereof."

Then follow the Rules passed on December 29th, 1893, which have already appeared, *ante* p. 70.

February 17th, 1894.

"(1) All non-jury cases in any of the Divisions of the High Court which are to be tried in Toronto are to be entered for trial with the Clerk of Records and Writs, with whom the record shall be left, as prescribed by Rule 664.

(2) Rule 545 is hereby amended by striking out the words 'Clerk of Records and Writs,' and inserting, in lieu thereof, the words, 'Clerk in Chambers.'

(3) All papers relating to proceedings in the weekly court in all Divisions are to be filed with the Clerk of Records and Writs not later than the day preceding that upon which they are intended to be tried."

We would suggest that where a new Rule of practice is made, it should be numbered, and follow consecutively the Consolidated Rules. This would greatly simplify a reference to any Rule, which must now be referred to by citing the date upon which the Rule was passed.

CURRENT ENGLISH CASES.

The Law Reports for January comprise (1894) 1 Q.B., pp. 1-13 ; (1894) P., pp. 1-14 ; and (1894) 1 Ch., pp. 1-72.

PARTNERSHIP—JUDGMENT AGAINST FIRM—INFANT PARTNER.

In re Beauchamp, (1894) 1 Q.B. 1, although a bankruptcy case, deserves attention as casting a sidelight on the case of *Harris* v. *Beauchamp*, (1893) 2 Q.B. 534, noted *ante* p. 19. Certain judgment creditors of a firm, of which one of the partners was an infant, having obtained a receiving order in bankruptcy against the firm, the infant partner appealed from the order on the ground that he was not personally bound by the judgment recovered against the firm, and could not commit an act of bankruptcy. The Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) gave effect to this contention and set aside the order, on the ground that to support a receiving order against a firm

each of the partners must have committed an act of bankruptcy, and that the infant partner had not committed any such act.

MORTGAGE—ASSIGNEE OF EQUITY OF REDEMPTION—PAYMENT OF INTEREST BY ASSIGNEE—PRIVITY OF CONTRACT.

In re Errington, (1894) 1 Q.B. 11, which is another bankruptcy case, is also deserving of notice as bearing on a question frequently raised in our own courts in such cases as *Clarkson* v. *Scott*, 25 Gr. 373; *Aldous* v. *Hicks*, 21 O.R. 95; *Frontenac L. & S. Society* v. *Hysop*, 21 O.R. 577; *British Canadian Loan Co.* v. *Tear*, 23 O.R. 664. In the present case, a mortgagor having assigned his equity of redemption, the assignee paid interest on the mortgage to the assignee of the mortgage from time to time, and when sued for arrears he suffered judgment by default. Being afterwards adjudged a bankrupt, the assignee of the mortgage claimed to prove against his estate for further years of interest, the original mortgagor having absconded; but it was held by Williams and Kennedy, JJ., that there was no privity of contract between the assignee of the equity of redemption and the transferee of the mortgage, and therefore there was no personal liability on the part of the assignee of the equity of redemption to pay interest on the mortgage, and the claim was therefore rejected.

CONTRACT TO INSURE PAYMENT OF SUM DEPOSITED WITH BANK—INSURANCE—SURETYSHIP—STATUTORY DISCHARGE OF DEBTOR, EFFECT OF, AS AGAINST INSURER.

Dane v. *The Mortgage Insurance Corporation*, (1894) 1 Q.B. 54, was an action to enforce a somewhat peculiar contract. By an instrument purporting to be a "policy of insurance," the defendants assured the plaintiff the payment of a sum of money deposited by her in a bank in Australia. The bank made default in payment of the sum so deposited, and subsequently, by an arrangement between the bank and its creditors—to which, however, the plaintiff did not assent, but which was binding on her, and was carried out under the provisions of a statute and the sanction of a colonial court—the bank was wound up, and a new bank was constituted, and the creditors became entitled thereby to certain rights against the new bank in satisfaction of their debts. The defendants contended that this arrangement had the effect of releasing them from liability, and that the new arrangement amounted to an accord and satisfaction. The Court of

Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) agreed with the Divisional Court (Pollock, B., and Kennedy, J.) that the defendants remained liable, notwithstanding the arrangement. The Court of Appeal was not, however, unanimous as to what was the real nature of the defendant's contract. The Master of the Rolls and Lopes, L.J., inclined to the opinion that it was one of insurance, and that the defendants' contract being one of indemnity they would be entitled to be subrogated to the rights of the plaintiff against the bank under the scheme of arrangement. But Kay, L.J., was of opinion that it was immaterial whether the contract was one of insurance or suretyship; for even assuming it to be the latter, the arrangement under which the bank was discharged under the statute was not an accord and satisfaction, and did not defeat the plaintiff's right of action under the contract which had vested on the bank's default.

PHARMACY—SALE OF POISON—MEDICINE CONTAINING POISON IN INFINITESIMAL QUANTITIES—31 & 32 VICT., C. 121, S. 15—(R.S.O., C. 151, S. 24).

In *Pharmaceutical Society* v. *Delve*, (1894) 1 Q.B. 71, the defendant was sued for a penalty for selling poison contrary to the provisions of the Pharmacy Act (see R.S.O., c. 151, s. 24). The evidence showed that that the defendant had sold a medicine called "Licoricine," in which a trace of morphine was found, upon analysis, equal to about one-fiftieth of a grain per ounce. The Divisional Court (Charles and Wright, JJ.) agreed with the County Court judge before whom the case was tried that the sale of such a minute quantity was not an offence within the meaning of the Act, and the action was accordingly dismissed.

ADULTERATION—SALE OF FOOD AND DRUGS ACT, 1875 (38 & 39 VICT., C. 63), SS. 6, 25—(53 VICT., C. 26, S. 9 (D.))—CONTRACT TO SUPPLY GOODS IN INSTALMENTS.

Laidlaw v. *Wilson*, (1894) 1 Q.B. 74, was a case stated by justices. The defendants were prosecuted for selling adulterated lard, and they sought to escape liability on the ground that they had purchased the lard as pure lard, and with a written warranty to that effect, and had no reason to believe when they sold it that it was not pure (see 53 Vict., c. 26, s. 9 (D.)). The evidence showed that the lard in question had been part of a quantity purchased by the defendants and delivered to them under a

written contract in the following terms: "We have this day sold to you three tons Kilvert's pure lard, for delivery to end of January, 1893"; and that the defendants had delivered it to the plaintiff in the same state as they had received it, and without any reason to believe that it was otherwise than pure. Under this state of facts, the Divisional Court (Charles and Wright, JJ.) held that the defendants were exonerated from liability.

PRINCIPAL AND AGENT—AGENT ENTRUSTED WITH GOODS, SALE BY—AGENT EXCEEDING AUTHORITY.

Biggs v. *Evans*, (1894) 1 Q.B. 88, seems to show that the powers of an agent entrusted with goods are very much narrower under the Imperial Factor's Act (6 Geo. IV., c. 94) than they are under R.S.O., c. 128. In that case, the plaintiff entrusted to an agent a valuable chattel, on the terms that it should not be sold to any person, nor at any price, without the plaintiff's authority, and that the cheque received in payment should be handed to the plaintiff intact, the plaintiff agreeing to pay the agent a commission in the event of a sale. The agent sold the chattel, without the plaintiff's authority, to the defendant for £200, which was satisfied by the defendant giving to a judgment creditor of the agent a diamond worth £120, and £50 cash, in satisfaction of his judgment of £170 against the agent, and by paying the agent the remaining £30 in cash. The action was brought to recover possession of the chattel, notwithstanding the sale; and it was held by Wills, J., that the plaintiff was entitled to succeed, on the ground that the agent had exceeded his authority, and that the sale was not protected by the Factors' Act (6 Geo. IV., c. 94, s. 4), because it was not a sale in the ordinary course of business. We may observe that under R.S.O., c. 128, s. 2, an agent entrusted with the possession of goods is to be deemed the owner thereof for the purposes of making a sale thereof, and there is no limitation in the Act as to sales being made by the agent in the ordinary course of business.

BAILMENT—RESTAURANT KEEPER, LIABILITY OF, FOR SAFE KEEPING OF CUSTOMER'S COAT.

Ultzen v. *Nicols*, (1894) 1 Q.B. 92, was an action brought by the plaintiff to recover the value of a coat lost under the following circumstances. The defendant was the keeper of a restaur-

ant, and the plaintiff entered his premises to dine. A waiter took his overcoat from him, without being requested to do so, and hung it on a hook behind the plaintiff, and while the plaintiff was dining the coat disappeared. Charles and Wright, JJ., held that on this evidence the plaintiff was entitled to recover the value of his coat, on the ground that it established negligence on the part of the defendant as bailee of the coat. It was argued that the evidence did not establish a bailment. Charles, J., thought that, on the evidence, the jury might properly find that there was a bailment; but Wright, J., was of opinion that that point was not open, because it had not been taken at the trial.

EXECUTION CREDITOR—INTERPLEADER—PAYMENT INTO COURT OF VALUE OF GOODS BY CLAIMANT—SECOND SEIZURE OF SAME GOODS—ESTOPPEL.

In *Haddow* v. *Morton*, (1894) 1 Q.B. 95, certain goods seized in execution were claimed by a third party, who, under the provisions of a statute, paid the value of the goods into court to abide the result of the adjudication upon his claim. An interpleader issue was tried, and resulted in favour of the execution creditor, to whom the money in court was thereupon paid; this being insufficient to satisfy his claim in full, he directed the sheriff to make a second seizure of the goods, whereupon the former claimant again claimed them, and a second interpleader issue was directed, when it was held by Charles and Wright, JJ., that the execution creditor was estopped, by taking the money out of court, from thereafter disputing that, as against himself, the claimant was the owner of the goods. The reasoning of the court does not appear to be logically conclusive, although it may be considered, on the whole, that the result arrived at is fair and just.

JURISDICTION—"CAUSE OF ACTION."

Northey Stone Co. v. *Gidney*, (1894) 1 Q.B. 99, was an application for a prohibition to the judge of an inferior court on the ground that he had no jurisdiction to entertain the claim. Under a statute, the court of the district in which the cause of action in whole or in part arose was entitled to entertain the claim. The action was for goods sold and delivered, and it appeared the contract was made in Essex, but the payment of the price was to be made in Bath. The Court of Appeal (Lord

Esher, M.R., and Lopes and Kay, L.JJ.) affirmed the decision of Charles and Wright, JJ., that the Bath court had jurisdiction, as the default in payment constituted part of the cause of action.

ARBITRATION—MISCONDUCT OF ARBITRATORS—AWARD.

Bache v. *Billingham*, (1894) 1 Q.B. 107, in effect decides that a *de facto* award, although it may be voidable on the ground of the misconduct of the arbitrators, cannot be treated as a nullity, but that it is valid and binding until it is set aside. The facts of the case were that a statute relating to a friendly society provided that disputes in regard to the claims of members should be settled by arbitration, and that if no decision should be made on a dispute within forty days after the application for a reference to arbitration the member might apply to a court of summary jurisdiction. A dispute having arisen, and been referred to arbitration, the arbitrators, within the forty days, made an award; but the arbitrators had been guilty of misconduct by hearing evidence in the absence of one of the parties. Without moving to set aside the award, the member whose claim was in dispute took proceedings in a court of summary jurisdiction; but the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) held (overruling Pollock, B., and Kennedy, J.) that, until the award had been set aside, the court of summary jurisdiction could not entertain the claim.

LANDLORD AND TENANT—DISTRESS—ENTRY BY GETTING OVER WALL INTO YARD.

Long v. *Clarke*, (1894) 1 Q.B. 119, was an action to recover damage for trespass to the plaintiff's goods. The plaintiff was the owner of certain chattels under a bill of sale, and had put a man in possession thereof. The defendant Clarke, as landlord of the premises in which the goods were, instructed his co-defendant, Hawkins, to distrain on the goods for rent in arrear, who, being unable to get into the house by the front door, scaled the wall of the back yard, and entered the house through an open window, and levied the distress. The question was whether this mode of entry made the distress illegal, and the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) agreed with Collins, J., that it did not. It may be well to notice that doubt is cast on the correctness of the report of *Scott* v. *Buckley*, 16 L.T.N.S. 573.

INJUNCTION—BREACH OF CONTRACT—THEATRICAL ENGAGEMENT—STIPULATION AGAINST ACTING ELSEWHERE.

In *Grimston* v. *Cunningham*, (1894) 1 Q.B. 125, the plaintiff, a theatrical manager, sought to restrain the defendant from acting elsewhere than in the plaintiff's company, in violation of a contract to that effect. The defendant alleged that the plaintiff, subsequent to the making of the contract, had verbally promised that the defendant should be given certain parts, and had not kept his promise; but the court (Wills and Wright, JJ.) held that in the absence of any circumstances showing want of good faith on the plaintiff's part the alleged verbal promise could not be considered in construing the contract, and that the allotting of parts to the defendant was no part of the consideration; and that as the plaintiff had not failed to carry out his part of the contract, he was entitled to an injunction restraining the defendant from violating his agreement not to act elsewhere.

COVENANTS FOR TITLE—DEFECT IN TITLE APPEARING ON FACE OF CONVEYANCE.

Page v. *Midland Ry. Co.*, (1894) 1 Ch. 11, is an important decision, which will possibly set at rest some doubts expressed by conveyancers as to whether a covenant for title can be enforced against the covenantor in respect of a defect in the title disclosed on the face of the deed in which the covenant is contained. According to the decision of Malins, V.C., in 1868, in *Hunt* v. *White*, 16 W.R. 478, a covenant for title does not, unless so expressed, extend to such defects. It seems, however, that this case has not got into the text-books, although doubts are expressed in Dart. V. & P., 6th ed., vol. ii., p. 857, also in a note of Butler in Co. Litt., 384 *a*, and also in Bythewood's Conveyancing, 3rd ed., vol. ix., p. 381, as to whether such covenants extend to defects of which the covenantee has notice. The Court of Appeal (Lindley, Smith, and Davey, L.JJ.), however, have conceived themselves not to be bound by this view of the question, and have felt themselves free to decide it "on sound principles of construction," and, doing so, have come to the conclusion that *Hunt* v. *White* was wrongly decided, and that the doubts of conveyancers are not well founded, and that a covenant for title extends to defects of title disclosed on the face of the deed in which the covenant is contained, unless otherwise expressly restricted. In this case the covenantor claimed title under a

will which was recited in the conveyance, and which showed that by the terms of the will the covenantor was a tenant for life, and that her children were entitled in remainder as tenants in common in fee of the land conveyed. She covenanted that, notwithstanding any act of the testator or herself, she had the right to convey. The purchase money was paid to her. The representatives of a deceased child of the covenantor subsequently established their right to an undivided one-third of the land; and the question was whether the covenant for title extended to this defect, and the court held that it did.

PRACTICE—COMMISSION TO TAKE EVIDENCE ABROAD—DISCRETION AS TO GRANTING COMMISSION.

In *Ross* v. *Woodford*, (1894) 1 Ch. 38, an application was made on behalf of the defendants for a commission to take the evidence of themselves and their witnesses, in South Africa, which was strenuously opposed by the plaintiff. Chitty, J., granted the application, being of opinion that the application of a defendant should be more favourably entertained than that of a plaintiff who chooses his own forum; and notwithstanding the importance of the judge seeing the demeanour of witnesses, yet such considerations would have to give way to the balance of convenience, which in this case was in favour of the defendants' application, as to have refused it would practically have precluded them from making this defence.

Reviews and Notices of Books.

Digest of Cases determined by the Supreme Court of Canada from the organization of the Court in 1875 to May 1st, 1893. By Robert Cassels, Esq., one of Her Majesty's Counsel and Registrar of the Court. Toronto: The Carswell Company (Ltd.), Law Publishers, 1893.

The profession are indebted to Mr. Cassels for this collection of cases determined in the Supreme Court, being those reported in Volumes 1 to 21, both inclusive, of the official reports of the Court, as well as the unreported cases decided during that period.

From the nature of things, there are many subjects in this Digest of no interest to the Ontario practitioner (referring, of

course, to the cases on appeal from the courts in the Province of Quebec), but it will be a valuable addition to the libraries of the Bar throughout the Dominion.

The compiler has not followed what has been the usual plan hitherto in digest-making. He gives the cases under the various subjects in order of time, rather than grouping them under appropriate headings. Whilst this shows the march of decision, so to speak, it would, in our view, have been better to have followed the system adopted in this country in the various digests of Robinson & Harrison, Harrison & O'Brien, and Robinson & Joseph. No improvement could, we think, be made upon the last-named compilation, either as to mechanical arrangement or as to the comprehensive mode of treating the mass of cases therein noted.

We have no doubt Mr. Cassels' book will have a ready sale; and, when a new edition is required, he will, we trust, conform to the mode of arrangement and system adopted in the Ontario Digests. This is the more necessary for the convenience of practitioners, as they naturally get into a habit in their search for information.

The compilers of Robinson & Joseph's Digest found it necessary on many occasions to re-write, alter, and add headnotes of cases, so as to give as much uniformity as possible, and make the information given more complete. This could be done with advantage in some instances in the reports of cases in the Supreme Court.

Whilst we feel it our duty to make these comments and suggestions, we gladly acknowledge the help (as, doubtless, have others) of the volume before us. Every care has been taken to ensure excellence in the typographical department.

Proceedings of Law Societies.

COUNTY OF CARLETON LAW ASSOCIATION.

ANNUAL REPORT FOR THE YEAR 1893.

GENTLEMEN,—The Trustees, in presenting their sixth annual Report, have much pleasure in reporting the continued success of the association.

The number of members on the roll at the date of the last Report was fifty-one. Two members have since died, one has ceased to reside here, seven have been removed from the roll for non-payment of fees, and eight new members have been added. The present membership is forty-nine. The annual fees paid during the year amount to $245, of which $35 was received on account of fees in arrears. In addition thereto, $290 has been received from the Law Society of Upper Canada, and $71.43 from the Ontario Government. A balance of $161.31 remains in the Treasurer's hands after having paid all the expenses of the association, and having expended $318.25 in the purchase of additional books for the library.

The schedule hereto annexed contains a list of the books at present in the library, and also shows those added during the year, the total number of books being 1,212, and the additions, excluding the current Reports, sixty-one. The value of the library, excluding those books presented to the association, is about $3,025.

The Trustees regret to report the death of three of its members: Mr. Robert Lees, Q.C., the first president of this association; Mr. C. H. Pinhey, and Mr. A. J. Christie, Q.C., a Bencher of the Law Society of Ontario. For the vacancy created by the death of Mr. Christie, the association recommended the appointment of Mr. M. O'Gara, Q.C., a member of this association. The recommendation was acted upon by the Law Society, and Mr. O'Gara appointed.

The association also passed a resolution and forwarded it to the Law Society, suggesting that the Supreme Court Reports should be furnished free of charge to members of the profession, or that the yearly fees now charged against each practitioner should be reduced. The Law Society have since offered to supply these Reports to practitioners on payment of the sum of $1.50 in addition to the annual fees. This amount is somewhat less than the subscription price.

The subject of securing the weekly sitting of a High Court Judge at Ottawa and London, for the purpose of hearing such motions and appeals as can only be heard by a judge of the High Court, received considerable attention during the past year. A deputation from the association

attended on the Attorney-General of Ontario, and correspondence has been had with the Minister of Justice touching questions which have arisen in the course of the proceedings, and your Trustees are pleased to report that the Law Association in the western part of the Province will join this association in endeavouring to secure the legislation necessary to give effect to the scheme.

A circular was addressed to each member of the profession in Eastern Ontario for the purpose of eliciting his views on the formation of an Eastern Bar Association somewhat upon the lines of the Western Ontario Bar Association. Favourable replies were received, and no doubt the proposal will result in some such organization at an early date.

During the year Mr. Jas. Fleming, Inspector of Legal Offices, examined the library and books of the association, and he expressed himself as pleased with everything in connection therewith.

The particulars required by the by-laws accompany this Report, as follows:

(1) The names of the members of the association.

(2) A list of the books contained in the library.

(3) A list of the books added to the library during the year.

(4) A detailed statement of the assets and liabilities of the association at the date of the Report, and of the receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the report of the auditors will be submitted to you for approval.

J. A. GEMMILL,
President.

R. E. GEMMELL,
Secretary.

DIARY FOR MARCH.

1. Tuesday.....St. David.
4. Sunday.....*4th Sunday in Lent.*
5. Monday.....York changed to Toronto, 1834.
6. Tuesday.....Court of Appeal sits. General Sessions and County Court Jury Sittings for Trial in York.
10. Saturday.....Prince of Wales married, 1863.
11. Sunday.....*5th Sunday in Lent.*
13. Tuesday.....Lord Mansfield born, 1704.
16. Friday.....Queen Victoria made Empress of India, 1876.
17. Saturday.....St. Patrick. Sir John Robinson, C.J. Court of Appeal, 1862.
18. Sunday.....*6th Sunday in Lent.* Arch. McLean, 8th C.J. of Q.B.
19. Monday.....P.M.S. VanKoughnet, 2nd Chancellor of U.C., 1862.
23. Friday.....Good Friday. Sir George Arthur, Lieut.-Gov. of U.C., 1838.
25. Sunday.....*Easter Sunday.*
26. Monday.....Easter Monday. Bank of England incorporated, 1694.
28. Wednesday..Canada ceded to France, 1632.
30. Friday.....B.N.A. Act assented to, 1867. Lord Metcalf, Gov.-Gen., 1843.
31 Saturday.....Slave trade abolished by Great Britain, 1807.

Notes of Canadian Cases.

NOTE.—We are instructed to say that in the case of *McNamee* v. *Toronto*, noted *ante* p. 105, the word "not" should precede the word "disqualify" in the head note.—ED. C.L.J.

SUPREME COURT OF CANADA.

Ontario.] [Nov. 20, 1893.

NEELON *v.* THOROLD.

Company—Stock in—Payment by holders of shares—Appropriation by directors—Formal resolution.

N., a director and shareholder of a railway company, agreed to lend $100,000 to the company, taking as security, among other things, 168 shares of their stock held by B., who owned altogether 188 shares of $50 each, and had paid thereon $3,750, or about 40 per cent. of their value. Before the agreement was consummated, it was found that B. was unable to pay the balance due on said 188 shares, and at a meeting of the directors of the company it was proposed, and decided, to appropriate the sum paid by B. to 75 of his 188 shares, making that number paid up, and offer them to N. in lieu of the 168. N. agreed to this, and B. signed a transfer to N. of 75 paid-up shares, and retained the balance as stock on which nothing was paid. There was no formal resolution of the board of directors authorizing the said appropriation of B.'s payment.

Judgment creditors of the railway company issued writs of execution on their judgment, which was returned *nulla bona*. They then brought an action

against N. for the amount due on their executions, claiming that the $3,750 paid by B. could not legally be appropriated as it was by the directors, but was paid on the whole 188 shares, and N. therefore held the 75 shares as stock on which only 40 per cent. was paid, and the remaining 60 per cent. was still due to the company. The judge trying the action found as facts that N. took the 75 shares believing that they were fully paid up, and relying on the representations of the proper officer of the company to that effect; that if he had had any doubt about it he would not have received them, nor advanced his money; and that he had a general knowledge of what had taken place at the meeting of the board of directors. A judgment in favour of N. was affirmed by the Divisional Court, but reversed by the Court of Appeal on the ground that the want of a formal resolution authorizing the appropriation made the action of the board invalid.

Held, reversing the decision of the Court of Appeal (18 A.R. 658), and restoring that of the Divisional Court (20 O.R. 86), that as it appeared from the books of the company that the sum paid by B. was not paid on, nor appropriated to, any particular shares, the directors could, with B.'s consent, re-appropriate it to the 75 shares; that the rights of creditors were not prejudiced, as B. was still liable on the balance of his stock; that the matter was not one between the whole body of shareholders and the directors, but only between N. and the company; that the want of a formal resolution by the directors authorizing the re-appropriation was a mere irregularity which could not affect the rights of a third party contracting with the company; and that it made no difference that such third party was himself a director of the company, and had knowledge of all that had been done.

Appeal allowed with costs.

W. Cassels, Q.C., and Cox for the appellant.

Collier for the respondents.

Ontario.] [Nov. 20, 1893.

O'GARA *v.* UNION BANK OF CANADA.

Surety—Interference with rights of surety—Discharge.

The Union Bank agreed to discount the paper of A. S. & Co., railway contractors, endorsed by O'G. as surety, to enable them to carry on a railway contract for the Atlantic & Northwest Railway Co. O'G. endorsed the notes on an understanding of agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all moneys to the bank was, in consequence, executed. After several estimates had been thus paid to the bank, it was found that the work was not progressing favourably, and the railway company then, without the assent of O'G., but with the assent of the contractors and the bank, guaranteed certain debts, and made large payments directly to the creditors of the contractors, other than the bank, for moneys subsequently earned by the contractors. In October, 1888, the bank, also without the assent of O'G., applied for and got possession of a cheque of $15,000 accepted by the bank, and held by the company as security for due performance of the contract, and signed a release to the railway company "for all

payments heretofore made by the company for labour employed on said contract, and for material and supplies which went into the work." The contract, under certain circumstances, gave the right to the company to employ men and additional workmen, etc., as they might think proper, but did not give the right to guarantee contractors' debts, or pay for provisions and food, etc., due by the contractors, and which was done without the assent of O'G.

Held, that the payments for supplies and provisions made by the company for which the bank signed a release without O'G.'s assent were not authorized by the contract, and were such a variation of the rights of O'G. as surety as to discharge him.

TASCHEREAU and GWYNNE, J.J., dissenting.

Appeal allowed with costs.

D. McCarthy, Q.C., and *A. Ferguson*, Q.C., for the appellant.

Meredith, Q.C., and *Chrysler*, Q.C., for the respondents.

Ontario.] [Nov. 20, 1893.

WEBB *v.* MARSH.

Title to land—Crown grant—Conveyance by grantee out of possession—Disseizin—Statute of Maintenance, 32 Hen. VIII., c. 9—Conveyance to wife of person in possession—Assent by husband—Statute of Limitations.

In 1828 land in Upper Canada was granted by the Crown to King's College. In 1841 King's College conveyed to G. In 1849 G. conveyed to the wife of M., who had been in possession of the land for some years before the deed to G. in 1841. In an action by the successors in title of M.'s wife to recover possession, the defendants, claiming through M., alleged that the deed from King's College to G. in 1841 was void under the Statute of Maintenance, being made by a person not in possession of the land, and that G. had, therefore, nothing to convey to M.'s wife in 1849. They also pleaded the Statute of Limitations, claiming that M., in 1849, had been in possession more than twenty years.

Held, affirming the decision of the Court of Appeal (19 A.R. 564), and of the Divisional Court (21 O.R. 281), that defendants had failed to prove continuous possession by M. for twenty years prior to the conveyance to his wife in 1849; that if he had entered before the grant from the Crown the Statute of Maintenance would not have avoided the conveyance by the grantee; that for that statute to operate disseizin of the grantor must be established, and the Crown could not be disseized, so the original entry not having been tortious it would not become so against the grantee from the Crown without a new entry; that though M. entered while the title was in King's College, and was in possession when the college conveyed to G., such conveyance was not absolutely void, but, at the most, was only void as against M.; and that M., having executed the conveyance to his wife, must be taken to have assented thereto, and such assent and M.'s subsequent acts created an estoppel against him, and took the case out of the Statute of Maintenance.

Appeal dismissed with costs.

Riddell and *Webb* for the appellants.

Roaf for the respondents.

Nova Scotia.] [Nov 20, 1893.

BROOKFIELD *v.* BROWN ET AL.

Practice—Parties to action—Mortgagees out of possession—Owner of equity of redemption—Effect of transfer of interest.

The first mortgagee of property on which there were two other mortgages foreclosed. Two days before the sale under foreclosure, B., the second mortgagee, with an agent's assistance, entered the mortgaged premises and removed the personal property therefrom, and certain fixtures attached to the freehold. The sale took place, and realized enough to pay off the first two mortgages. On the same day the purchaser at the sale received a deed from the sheriff, an assignment of the third mortgage and a conveyance of the equity of redemption. Some little time after an action was brought against B. and his agent for trespass and injury to the mortgaged property, in which action the first and third mortgagees, the original owner of the equity of redemption, and the purchaser at the sale were joined as plaintiffs.

Held, affirming the decision of the Supreme Court of Nova Scotia (24 N.S. Rep. 476), GWYNNE, J., dissenting, that the owner of the equity at the time of the trespass was the only one of the plaintiffs who could maintain the action; that the first mortgagee could not after his mortgage had been satisfied by the proceeds of the sale; that the third mortgagee had no *locus standi*, having parted with his interest before action brought; and that the purchaser at the sale, who was also assignee of the third mortgage and equity of redemption, could not sue, having had no interest when the trespass was committed.

Held, *per* GWYNNE, J., that the third mortgagee, who was in actual possession when the tort was committed, was the only person damnified; that he was not estopped by having consented to the sale under chattel mortgage of the personal property on the mortgaged premises to B., one of the trespassers; and that the tort-feasors could not claim such estoppel even though the amount recovered from them, added to the sum received on assignment of his interest, should exceed his mortgage debt.

Appeal dismissed with costs.

Ross, Q.C., for the appellants.

Borden, Q.C., for the respondents.

Quebec.] [Oct. 23, 1893.

KINGHORN *v.* LARNE.

Opposition afin de conserver on proceeds of a judgment for $1,129—Amount in dispute—Right to appeal—R.S.C., c. 135, s. 29.

K. (plaintiff) contested an *opposition afin de conserver* for $24,000 filed by L. on the proceeds of a sale of property upon the execution by K., against H. & Co., of a judgment obtained by K. against H. & Co. for $1,129. The Superior Court dismissed L.'s opposition, but on appeal the Court of Queen's Bench (appeal side) maintained the opposition, and ordered that L. be collocated *au marc la livre* on the sum of $930, being the amount of the proceeds of the sale.

Held, that the pecuniary interest of K., appealing from the judgment of the Court of Queen's Bench (appeal side), being under $2,000, the case was not appealable under R.S.C., c.135, s. 29. *Gendron* v. *McDougall* (Cassel's Digest, 2nd ed., 429) followed.

Held, also, that s. 3 of 54 & 55 Vict., c. 25, providing for an appeal where the amount demanded is $2,000 or over, has no application to the present case.

Appeal quashed with costs.

Belcourt for the appellant.

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

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

FERGUSON, J.] [Jan. 8.

SCARTH *v.* ONTARIO POWER AND FLAT CO.

Landlord and tenant—Fixtures—Machinery—Removal of—Provisions of lease—Chattels—Forfeiture of term—Action to recover possession of goods—Evidence of detention.

Where a trade fixture is attached to the freehold, it becomes part of the freehold, subject to the right of the tenant to remove it if he does so in proper time; in the meantime, it remains part of the freehold.

Meux v. *Jacobs*, L.R. 7 H.L., at pp. 490, 491, followed.

But where the parties have made a special contract, they have defined and made a law for themselves on the subject.

Davey v. *Lewis*, 18 U.C.R., at p. 30, followed.

In a lease dated in July, 1890, there was a provision that the lessees might during the term erect machinery upon the demised premises, which should be the property of the lessees and removable by them, but not so as to injure the building, etc. The lessees affixed machinery to the building demised, and afterwards, in April, 1892, made an assignment for the benefit of creditors. The lessors elected to forfeit under a clause in the lease, but they permitted M.G., a purchaser of the machinery from the lessees' assignee, to remain in possession, paying rent, until December, 1892, when she ceased, leaving the machinery on the premises. The defendants became the purchasers of the freehold by virtue of a sale under the power in a mortgage in July, 1892, but the lease had come to an end before their title commenced. The plaintiffs claimed the machinery under a chattel mortgage made by M.G. on the 25th April, 1892, and a subsequent assignment from her of the whole of her interest therein, and in March, 1893, they brought this action to obtain possession.

Held, that the machinery was, owing to the provision in the lease, chattels, and the property of the lessees, and continued to be so until they made the

assignment, when it passed as chattels to their assignee, who transferred it as chattels to M.G., and she to the plaintiffs; that the forfeiture of the term did not affect the right to the property, nor the right to remove it; that nothing had taken place to defeat that right, and the plaintiffs were in good time to exercise it.

The defendants, being in possession of the machinery, and being asked for it by the plaintiffs, asserted title in themselves, and warned the plaintiffs that if proceedings were taken they would set up such title.

Held, that a wrongful detention of the goods was shown, and this action therefore lay.

Moss, Q.C., and *A. W. Anglin* for the plaintiffs.

McCarthy, Q.C., and *H. S. Osler* for the defendants.

FERGUSON, J.] [Jan. 27.

IN RE KERR *v.* SMITH.

Prohibition—Division Court—Action upon order in High Court for payment of costs—Judgment—Rules 866, 934.

Prohibition granted to restrain the enforcement of a judgment in a Division Court in an action brought upon an order of a judge in an action in the High Court ordering the defendant in the Division Court action to pay certain costs of an interlocutory motion.

Notwithstanding the broad provisions of Rule 934, an order of the court or of a judge is not for all purposes and to all intents a judgment; and no debt exists by virtue of such an order as was sued on here.

Rule 866 means that an order may be enforced in the action or matter in which it is, as a judgment may be enforced, and does not extend to the sustaining of an independent action upon the order.

E. D. Armour, Q.C., for the plaintiff.

W. H. Blake for the defendant.

FERGUSON, J.] [Nov. 16, 1893.

TENUTE *v.* WALSH.

Devolution of Estates Act—R.S.O., c. 108, s. 9—54 Vict., c. 18, s. 2—Powers of executor—Exchange of lands—Contract—Specific performance.

An executor or administrator cannot, having regard to R.S.O., c. 108, s. 9, and 54 Vict., c. 18, s. 2, make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.

And the court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shown that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted.

Costs withheld from the defendant because he had misled the plaintiff as

to his power to make the exchange, and declined to perform his contract on grounds, some of which were untenable, and also alleged fraud, which he failed to prove.

T. W. Howard for the plaintiff

A. W. Burk for the defendant.

Chy. Div'l Court.] [Feb. 15.

BENNETT *v.* EMPIRE PRINTING AND PUBLISHING CO.

Security for costs—Libel—Newspaper—R.S.O., c. 57, s. 9—Criminal charge—Discretion—Appeal.

The legislation in R.S.O., c. 57, s. 9, as to security for costs in actions for libel contained in newspapers, is unique, and the intention is to protect newspapers reasonably well conducted, with a view to the information of the public.

In a newspaper article published by the defendants the plaintiff was referred to as an "unmitigated scoundrel," and it was stated that he had endeavoured to ruin his wife by inciting another person to commit adultery with her.

Held, that this did not involve a criminal charge within the meaning of s. 9 (*a*).

The defendants did not contend that the grounds of action were trivial or frivolous; and it was conceded by the plaintiff that he had not sufficient property to answer the costs of the action.

The manager of the defendants swore to a belief in the substantial truth of what was published, and that it was so published in good faith, and without malice or ill-will towards the plaintiff.

Held, that, under these circumstances, an appeal from the discretion of a Judge in Chambers in reversing a referee's decision and ordering security for costs should not prevail.

W. Stewart for the plaintiff.

H. Cassels for the defendants.

STREET, J.] [Feb. 23.

BANK OF BRITISH NORTH AMERICA *v.* HUGHES.

Writ of summons—Amendment—Time for appearance—Service—Judgment for default—Irregularity.

A writ of summons issued for service out of the jurisdiction required an appearance thereto to be entered within eight weeks after service, inclusive of the day of service. The plaintiffs obtained an order shortening the time for appearance to ten days, not specifying whether inclusive or exclusive of the day of service, and amended the writ under the order by merely substituting "ten days" for "eight weeks." The writ as amended was served, and the order with it, on the 27th January. On the 6th February following judgment was signed for default of appearance.

Held, that the judgment was irregular; for the writ was not amended in accordance with the order, and the latter must govern; and according to its

terms, having regard to Rule 474, the ten days were to be reckoned exclusively of the day of service, and the defendants had the whole of the 6th February to appear.

L. G. McCarthy for the plaintiffs.

D. W. Saunders for the defendant Atkinson.

Chancery Division.

Div'l Court.] [Jan. 22.

RE BAJUS.

Benevolent societies—Insurance money—Claimed by different parties—Paymen into court—O.J.A., s. 53, s-s. 5.

On an application by a benevolent society for leave to pay insurance money into court claimed by different parties, it was

Held, (reversing FERGUSON, J.) that subsection 5 of section 53 of the Judicature Act extended the benefit of the Acts for the relief of trustees to such cases, and that the society was entitled to pay the money in.

Warren Totten, Q.C., for the society.

G. M. Macdonnell, Q.C., for a claimant.

STREET J.] [Feb. 5.

MULCAHY *v.* COLLINS ET AL.

Married woman—Separate estate—Contract respecting.

A married woman, having been informed by a relative that he had made his will in her favour, signed a promissory note three days after his death and before she had seen the will, and some weeks before it was proved.

The will gave her a vested interest in the property bequeathed.

Held, that she had sufficient knowledge of the existence of her interest to enable the court to decide that she contracted with respect to it.

W. Macdonald for the plaintiff.

W. H. Blake for the defendants.

BOYD, C.] [Oct. 27, 1893.

OSTROM ET AL. *v.* ALFORD ET AL.

Will—Devise to trustees of a church—Object of—Direction as to—Mixed fund—Derived from realty and personalty—Failure as to realty—How fund applied.

A testator by his will devised $500 to the trustees of a church "to be . . . used in the payment of any indebtedness on said church, and for such other purposes as they deem wise."

Held, that that meant outlay in connection with the church, such as repair and maintenance, or any obligation incurred for which the land was not liable, and following *Bunting* v. *Marriott*, 19 Beav. 163, the bequest was good.

But the will directed the bequest to be paid out of a mixed fund derived from the sale of land and personalty;

Held, so far as the real estate was concerned, the gift failed, and a direction was given as to how the fund was to be applied.

E. G. Porter for the plaintiffs.

W. B. Northrup for the residuary devisee.

F. T. Wallbridge for the trustees.

BOYD, C.] [Jan. 29.

RE STEPHENSON.

KINNEE *v.* MALLOY.

Executors—Surviving executor's executor—Blended fund—Transmission of, in trust—Vendor and purchaser.

When a testator directs a sale of both real and personal property, and the money to be divided, thus causing a blending of both for the purposes of sale and distribution, and names two executors, the death of one of them does not disqualify the survivor, in whom the whole executorial character vests, and the survivor can transmit the power to his executor, and thus preserve the chain of representation.

Quære in the case of land *simpliciter*.

W. Cook for the purchasers.

Hodge for the vendor.

Div'l Court.] [Jan. 22.

MOYLE *v.* EDMUNDS ET AL.

Guarantee—Construction of.

A guarantee in the following words, "I hereby become responsible to H. M. for payment for goods sold to F. E. for feed store situate . . . up to $400, was given at a time when the debt due by F.E. to H.M. was $280.85.

Held, (affirming the judgment of ARMOUR, C.J.,) that the guarantee covered the amount then due, and a further sum sufficient to make it up to $400.

Chalmers v. *Victors*, 18 L.T.N.S. 481, followed.

Alnutt v. *Ashenden*, 5 M. & G. 392, criticized.

Biggs, Q.C., for the appeal.

G. G. S. Lindsay, *contra*.

Div'l Court.] [Jan. 22.

ENTNER *v.* BENNEWEIS.

Seduction—During invalid father's lifetime—Action by mother—Service—Evidence.

In an action of seduction brought by a mother, evidence to show that the daughter was servant to her mother during the lifetime of the father, on account

of his being helpless from age or infirmity, and that the mother was really the head and support of the family, should not be admitted unless it can be further proved that the mother has separate estate in which was the common abode, or that by some transaction apart from the husband there was a condition of real service between her and her daughter. The common law right to the service is given to the father as the head of the family, and that relation is not changed because of his personal infirmity, as it is a legal result flowing from the family status. There is no divided right or co-ordinate power of control during the joint lives—all is in the father.

J. P. Maybee for the plaintiff.

G. G. McPherson for the defendant.

Div'l Court.] [Jan. 22.

RE DOMINION PROVIDENT BENEVOLENT AND ENDOWMENT ASSOCIATION.

Winding-up proceedings—Company or association—Security by interim receiver—Officer of the company—Power of Master to order punishment for non-compliance.

The Master has no authority under the provisions of 55 Vict., c. 39 (O.), to direct security to be given by an official as an officer of an association or company. Section 54, s-ss. 5 and 7, merely provide for the giving of security as an interim receiver, which may be made a condition of being retained in that office, but would not seem to be appropriately punished by imprisonment.

J. P. Maybee and *L. McCarthy* for the appeal.

G. G. McPherson and *W. H. Blake*, *contra*.

BOYD, C.] [Nov. 14, 1893.

HARTE *v.* THE ONTARIO EXPRESS AND TRANSPORTATION CO.

KIRK AND MARLING'S CASE.

Company—Shares—Assignment—Surrender—54 & 55 Vict., c. 110, s. 4 (D.).

By 54 & 55 Vict., c. 110, s. 4 (D.), power was given to any shareholder of the company to surrender his stock by notice in writing within a certain time.

A shareholder, desiring to surrender his stock, transferred it within the time by an ordinary assignment to the president in trust, both intending the transfer to operate as a surrender.

Held, a valid surrender.

J. B. Clarke, Q.C., for the president.

J. M. Clark for the shareholder.

Hoyles, Q.C., for the liquidator.

Practice.

GALT, C.J.] [Oct. 6, 1893.

BOLSTER *v.* WALKER.

Parties—Interpleader issue—Wife of judgment debtor, claimant.

On an application for an interpleader order where the claimant was the wife of the judgment debtor, and the goods seized were at the time of the seizure at the home of herself and husband;

Held, on appeal from the local judge, that the execution creditor should not be required to show that the goods are the goods of the execution debtor, but the onus is on the claimant to show property in herself, and the issue should be directed between the claimant as plaintiff and the execution creditor as defendant.

Scott (Robinson, O'Brien & Gibson) for the execution creditor.

A. D. MacIntyre for the claimant.

J. Dickinson for the sheriff.

ARMOUR, C.J.] [Feb. 5.

IN RE PARKER, PARKER *v.* PARKER.

Mortgage—Interest—R.S.C., c. 127, s. 7—Mortgage to secure part of purchase money—Special contract.

William John Moore, the purchaser of the lands in question in this administration proceeding, made a mortgage upon such lands to the accountant of the Supreme Court of Judicature for Ontario, dated April 14th, 1886, to secure the sum of $3,600, a part of his purchase money. The mortgage was for the benefit of the infant defendants. The mortgage deed provided for payment of interest and for payment of the principal by yearly instalments of $300 until the whole should be paid, the payments thus extending over a period of twelve years.

By s. 7 of R.S.C., c. 127, an Act respecting interest, it is provided as follows:

"Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, if, at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays to the person entitled to receive the money the amount due for principal money and interest to the time of payments, as calculated under the four sections next preceding, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable, or recoverable at any time thereafter on the principal money or interest due under the mortgage."

The mortgagor, taking advantage of this provision, at a time when the mortgage had still more than four years to run, paid into court all principal and interest due under the mortgage, together with three months' interest in

advance, and moved for an order directing the accountant to discharge the mortgage.

The Master in Chambers referred the motion to a judge, and it was argued before ARMOUR, C.J., in Chambers, on February 5th, 1894.

James Kerr for the applicant.

F. W. Harcourt, for the official guardian representing the infant defendants, contended that as the mortgage was for part of the purchase money, and was made in pursuance of a special agreement, which was to the advantage of the mortgagor, the section above quoted did not apply.

ARMOUR, C.J.: There is no such distinction in the statute as that sought to be drawn, and the applicants are entitled to have the mortgage discharged. The applicant must pay his own costs and those of the guardian.

C.P. Div'l Court.] [Feb. 8.

HOGABOOM *v.* GRUNDY.

Parties—Interpleader issue—Who should be plaintiff.

Where husband and wife live together in the same house, the husband being owner or tenant, and the sheriff, under an execution against the husband, seizes the household furniture, which is claimed by the wife as her own, the onus is on her, and she must be plaintiff in the issue directed where the sheriff interpleads.

A. D. Cartwright for the claimant.

Charles Millar for the execution creditor.

ARMOUR, C.J.] [Feb. 13.

JONES *v.* MILLER.

Costs—Demurrer—Powers of Master in Chambers—Trial judge—Judge in court.

Where a demurrer has been left to be disposed of by the trial judge, and has not been so disposed of by him when giving judgment in the action, nor by a Divisional Court on appeal, he has still power to dispose of the costs of it, and any application for that purpose should be made to him; but if to another judge, it must be to a judge in court.

The Master in Chambers, having no jurisdiction to decide the demurrer, has none to determine the costs of it.

W. R. Smyth for the plaintiff.

W. R. Riddell for the defendants.

Chy. Div'l Court.] [Feb. 15.

WINNETT *v.* APPELBE.

Particulars—Slander—Names, times, and places.

In an action for slander, the statement of claim alleged that the defendant on a specified day spoke to C. and others the slanderous words alleged. In

answer to a demand for particulars, the plaintiff's solicitor wrote to the defendant's solicitor stating that he had given all the information the plaintiff had, the names of the others to whom the words were spoken not being known to him, and the plaintiff, when a motion for particulars was made, deposed on affidavit to the same facts.

An order of a Master requiring the plaintiff to furnish particulars of all the persons within his knowledge to whom, the places where, and the times when the words were spoken, was affirmed by a Judge in Chambers, but reversed by a Divisional Court.

Held, that the plaintiff having given all the information in his possession, and the defendant not having sworn that she could not plead without further particulars, or that she was ignorant of what occasion was complained of, it was useless and unnecessary to order the particulars.

Thornton v. *Capstock*, 9 P.R. 535, approved.

William Stewart for the plaintiff.

A. H. Marsh, Q.C., for the defendant.

Chy. Div'l Court.] [Feb. 15.

IN RE CENTRAL BANK OF CANADA.

WATSON'S CASE.

Judgment debtor—Re-examination of—Rule 936—Special grounds.

The order and decision of BOYD, C., 15 P.R. 427, affirmed on appeal.

W. R. Riddell for the appellant.

Pattullo for the respondent.

Q.B. Div'l Court.] [Feb. 15.

MERCHANTS NATIONAL BANK OF CHICAGO *v.* ONTARIO COAL CO.

Summary judgment—Rule 739—Promissory note—Incorporated company—Accommodation note—Presumption of value—Conditional leave to defend—Payment into court.

In an action upon a promissory note the only fact shown by the defendants, an incorporated company, as the basis of a defence, was that they made the note for the accommodation of one of their directors. They did not show that the plaintiffs were not holders for value in due course without notice; while the plaintiffs swore that the note was discounted before maturity in the usual course of their banking business; and it was admitted that one of the trustees for the defendants, who were insolvent, had offered to the plaintiffs the compromise of fifty cents on the dollar which the undoubted creditors were accepting.

Held, upon a motion for summary judgment under Rule 739, that the defence alleged was not founded upon any known facts, but was mere guesswork, and, unless the defendants paid into court a substantial portion of the plaintiffs' claim as a condition of being allowed to defend, the motion should be granted.

The presumption that value has been given may be done away with in the case of notes which have had their origin in actual fraud, but not in the case of notes made for the accommodation of others; and even where accommodation notes are made by an incorporated company, the onus of showing value is not shifted over to the plaintiffs.

Re Peru R.W. Co., L.R. 2 Ch. 617, followed.

Millard v. *Baddeley*, W.N. 1884, p. 98, and *Fuller* v. *Alexander*, 47 L.T.N.S. 443, distinguished.

Arnoldi, Q.C., for the plaintiffs.

A. H. Marsh, Q.C., for the defendants.

Chy. Div'l Court.] [Feb. 15.

ATWOOD *v.* ATWOOD.

Husband and wife—Interim alimony and disbursements—Separation deed—Agreement not to sue for alimony—Merits.

An appeal from the decision of BOYD, C., 15 P.R. 425, was dismissed by reason of a division of opinion of the judges composing a Divisional Court.

Per FERGUSON, J.: The order of the Chancellor was right.

Per MEREDITH, J.: The marriage being admitted, and need and refusal of support being proved, the plaintiff is *prima facie* entitled to interim alimony and disbursements; upon a motion, therefore, there ought not to be any adjudication upon any of the issues or questions to be tried between the parties; and if the motion cannot be refused without determining such issues or questions, or without prejudicing a trial of them, the order should be made, unless the action is frivolous or vexatious.

Mabee for the plaintiff.

W. H. Blake for the defendant.

Chy. Div'l Court.] [Feb. 15.

FARKER *v.* ODETTE.

Attachment of debts—Rule 935—Garnishee "within Ontario"—Foreign corporation—Debt due to two persons jointly.

A foreign corporation incorporated under the laws of one of the United States, and not shown to carry on one of the principal parts of its business in this Province, is not "within Ontario" within the meaning of Rule 935, and moneys in its possession cannot be attached to answer a judgment.

Canada Cotton Co. v. *Parmalee*, 13 P.R. 308, followed.

County of Wentworth v. *Smith*, 15 P.R. 372, distinguished.

A debt due to a judgment debtor jointly with another person cannot be attached.

Macdonald v. *Tacquah Gold Mines Co.*, 13 Q.B.D. 535, followed.

W. H. P Clement for the judgment creditor.

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

L. G. McCarthy for the garnishees.

Chy. Div'l Court.] [Feb. 23.

LAUDER *v.* DIDMON.

Jury notice—Striking out—Discretion—Judicature Act, R.S.O., c. 44, s. 80—Convenience—Exclusive jurisdiction of Court of Chancery—Injunction—Nuisance—Time for giving notice.

Since the passing of the Rules of 4th January, 1894, providing for the holding of separate jury and non-jury sittings for the trial of actions, it is desirable to have the question whether an action is to be tried with or without a jury settled at as early a stage as possible.

A Judge in Chambers has full discretion under s. 80 of the Judicature Act, R.S.O., c. 44, to order that an action shall be tried without a jury, and that discretion is not lightly to be interfered with.

And where a Judge in Chambers reversed an order of a local judge, and struck out a jury notice in an action for an injunction to abate a nuisance and for damages, his order was affirmed on appeal.

Held, per ROBERTSON, J., in Chambers, that the action was one within the exclusive jurisdiction of the Court of Chancery before the Administration of Justice Act, 1873, and could also be more conveniently tried without a jury.

Quære, also, *per* ROBERTSON, J., whether a defendant can properly give a jury notice before delivery of his statement of defence.

C. D. Scott for the plaintiff.

James Bicknell for the defendant.

Flotsam and Jetsam.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—If all the jokes perpetrated in Osgoode Hall could be raked out of its misty past, I don't doubt but that you would have humorous material with which to garnish your columns for years to come. One of these was related to me by the hero thereof, and is too good to be lost. The writer studied with the late Wm. W. S——, in his lifetime, of Perth, barrister and M.P.P., who, relating the story, laughed "consumedly" at the ridiculous mistake he had made.

The temporal power of the Popes is a thing of the past, but in the early days of many a graduate of Osgoode Hall it was a fact, the territory owning their sovereignty being known as "the States of the Church."

Mr. S. went up for his examination as a student-at-law somewhere about the year 1850. The Benchers then took the "exams" themselves, one of them being Sir John B. Robinson, who undertook to test Mr. S.'s acquaintance with ancient geography, and queried: "Mr. S., where was the River Styx situated?" This was a poser for Mr. S., whose knowledge of ancient geography was limited. He, however, made a shot at it: "In Italy, sir." Sir John—"In what part of Italy, Mr. S.?" Completely in the dark, Mr. S. made the following venture in reply: "In the States of the Church, sir." The Benchers looked at one another a moment, and then burst into uncontrollable laughter. The joke of one of the rivers of hell being located—of all places in the world—in "the States of the Church" tickled them immensely. The innocent and perplexed look of Mr. S., no doubt, added to their enjoyment.

Some cynical people, thinking of the sale of indulgences and the horrors of the Inquisition, might remark that Mr. S. hit nearer the bull's-eye than he thought of. Be this as it may, the joke, perhaps, gave its hero a lift, for he was passed.

Yours, etc.,

J. H. B.