Canada Law Journal.

VOL. XXXVII. MARCH 15, 1901. NO. 6.

Beginning with the new century a change will take place in the mode of issuing the Ontario reports. The cases, which, up to the present time, have been divided among the various series known as Ontario Appeal Reports, Ontario Reports, Ontario Election Cases and Ontario Practice Reports are now to appear in a single series, known as "The Ontario Law Reports" (O.L.R.), and this will begin with the cases decided after the first day of the present year. In form, the new series will be slightly larger than heretofore, and will be of the same size and general style as the English Law Reports. The position of matters here is not quite the same as in England. In the Province of Ontario the divisions of the High Court are merely an arrangement for the convenience of the judges in the disposal of cases. In England, law and equity are not as yet in the same state of fusion as in this country, and it is natural, therefore, that in England law and equity cases should appear in distinct volumes, and even there the report of a case in appeal from a Queen's Bench Division or a Chancery Division, as the case may be, appears in the same series which contains the report of the original judgment. Decisions on matters of practice also appear there in the series devoted to the particular division to which the case belongs. We presume that the Editor-in-chief will now divide the duties of the reporting staff without reference to former distinctions. This new plan is, we think, a decided improvement, and will be more convenient to those using the reports.

LAW SOCIETY OF UPPER CANADA.

The election of Benchers of the Law Society of Upper Canada takes place on the 4th day of April next. Under the statute the votes are to be given by closed voting papers in the form given in the Schedule of the Act (R.S.O. p. 1688), and are to be delivered to the Secretary of the Society on the first Wednesday of April "or during the Monday and Tuesday immediately preceding. Any voting papers received by the said Secretary by post during the said days or during the preceding week shall be deeme

delivered to him." The Secretary is to send to each member of the Bar a blank form of voting paper. Another section provides that the Secretary shall send with the voting paper a list of the persons then Benchers, ex officio and otherwise.

It may be a convenience to some to have the above list before them, but there are objections to the provision which are worthy of note, and many members of the profession have expressed their opinion that it ought to be repealed. We know of no reason why the names of present benchers should in effect be suggested for re-election, which is what the list amounts to. If it is desirable to give suggestions as to who would be proper men to appoint, it would be much better to do it by having nominations made previous to the time of election and a list of such nominations sent voters for consideration.

The trust reposed in the profession at large is a responsible one, and their choice should be exercised free from anything which might hamper a free expression of opinion. Many of the present benchers deserve the votes of their brethren. There are, however, some whom it would be just as well to leave off, and especially any who were placed there five years ago, not so much because they possessed the confidence of their brethren, but as the result of a persistent canvass. Naturally names which are placed before the voters have a better chance of election than others to whom attention is not called, and who, perhaps, may be much better qualified and much more desirable for the position. The above list is, in fact, though not in intention, a canvassing agent for the re-election of the present Benchers. It would be much better if the members of the Society should in selecting their list of names think the matter out and exercise their unbiased judgment, rather than to a large extent follow, as is practically the case, the lead that is thus given to them. In making these observations we do not desire to cast the slightest reflection upon the present list as a whole; but, with many others, we think that some other system should be adopted which would better express the mind of the profession as to who should represent them in Convocation.

There are again those who think that it is not desirable that the Bench should remain with so little new blood from time to time, also that if there is any honour in the position the honour should go round. There will always be a sufficient number of

the older hands on deck to see that the ship does not suffer until the new men learn the ropes. There are many, therefore, who, with the above thoughts in mind, will decline to accept any suggestion which might be given by the printed names sent to them by the Secretary of the Society as required by statute as of any more value or interest than the suggestion of any other name in any other way. It does not follow that because a man has been a Bencher for five, ten or fifteen years he ought to be one for five years more.

As to the responsibility we have spoken of, voters doubtless will appreciate the thought that every member of the Bench should, as far as possible, come up to the true ideal of a representative of our honourable profession—whose word can be relied upon under all circumstances, and not given to sharp practice or "tricks that are vain" in the conduct of business, either in the office or in Court—who has himself, and desires to see in others, that esprit de corps, without which the high character of the Bar cannot well be maintained, and without which it cannot have the influence it ought to command for the proper protection of our rights—and, to conclude, who are in sympathy with the needs of their brethren, and especially of practitioners outside the large cities, for these are they who specially need all the protection and support that the Society can give them.

Many of the present Benchers possess these desirable qualifications, but there are many not now on the Bench who do so also, and some of whom we shall expect to see elected next month. Such for example as Mr. Nicol Kingsmill, K.C., Mr. E. F. B. Johnston, K.C., and others whose names will occur to our readers as men who ought to be, but who are not on the present list. The various County Law Associations will suggest men in their own localities for whom it would be well to vote. The more one thinks of it the clearer it becomes that some system of nomination should be adopted. Good names which ought to be before the profession for consideration will, as a result, be overlooked.

Many complaints are being made by those who find themselves disfranchised as voters by reason of their barrister's fees not having been paid at the date when the lists of voters for Benchers was made up. Doubtless these person were negligent in not thinking of this at the right time; but surely it would have been a simple matter for the

Secretary to have sent post cards to those in arrears reminding them of that fact. Busy men often do forget little personal matters of this kind, but they have a right to complain that such a severe penalty should be inflicted. It is usual in other business institutions for some official to keep track of such matters. Last year notices were given as to when fees were due. This year, when an election takes place, no such notice was given; and this failure was doubtless largely the cause of the disfranchisement complained of.

UNLICENSED CONVEYANCERS.

We publish elsewhere (post p. 190) a letter which deals at considerable length with this subject. We are glad to have the information therein contained. It shews at least that the chairman of, and the Committee of Benchers who had the matter in charge have devoted to the subject much time and careful thought.

We are not unaware of the difficulties of the position, which are emphasized in Mr. Strathy's communication. They are not to be denied or minimized, but are they insurmountable? Is it not possible that in some way justice may be done in the premises? We do not think we ought to abandon the attempt to obtain it. We owe it to ourselves and we owe it to the public not to do so. It is true that we have to fight against a silly popular prejudice as well as against the political influence of a class of many of whom it may truly be said that their self-sufficiency is only equalled by their ignorance of the subjects they assume to deal with. It is true that this ignorance often brings grist to the legal mill. This, however, is one of the reasons why they should not be permitted by the Government to thus injuriously affect the public. For every reason the Government should throw reasonable protection around those who, at great expenditure of time and money, seek to qualify themselves to properly serve the public in all matters affecting the dealing with property and civil rights.

The difficulty, it is said, is to get the Government to take the action which, from our point of view at least, justice demands. In these days of keen political competition, votes being what each political party seeks for, it is necessary to refer to that phase of the case. But surely if the legal profession were to pull together they could exercise a much more powerful political influence than those

who are now allowed to trespass upon our rights, and who, instead of eking out a scanty subsistence by amateur conveyancing, should devote themselves to some such pursuit as their education may fit them for.

If we are right in this supposition, the simple question arises, how is this latent force to be called into action and brought to bear in the proper quarter? There may be many opinions how this may best be done; and we admit the difficulties of the position. But they certainly cannot be met by doing nothing. The Committee heretofore spoken of has done excellent work so far as it went, but seems to have dropped it at a point where a step further would have been desirable. We notice that nothing is said in Mr. Strathy's letter as to whether the Attorney-General was interviewed by the Benchers on the subject. We understand he was not. Possibly after considering the replies received from the profession it was not thought wise to do so, or there may have been some other good reason. But might it not be said that the Attorney-General is not to blame if the matter has not been definitely brought before him? If it had, it certainly would have been his duty, as head of the profession, to consider the matter, and, as we think, to take such action to protect the interests of his brethren as might seem proper—some such protection, for example, as is freely accorded to the medical profession, and to which we are as much entitled as they are. We must at present leave the matter at this point, and shall hope to hear from some of our readers who have devoted time and thought to this matter, and who may be able, as Mr. Strathy suggests, to make some practical suggestion likely to commend itself to our Provincial House.

An English newspaper recently stated that a Judge outside his Court is only a private gentleman, implying that a Judge can do no business except in Court or possibly at his office. An exchange says, however, that on several occasions Judges have exercised judicial functions with some curious surroundings. Mr. Justice Stephen was once hailed while driving in a cab and successfully applied to for an injunction; Mr. Justice Hawkins made the like order while strolling on Brighton pier; and Mr. Justice Wright did the same in a railway carriage. The oddest instance, however, was that of Shadwell, V.C., when, in the Long Vacation, he gave an interim injunction in an urgent matter while enjoying a swim.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MUNICIPALITY—HIGHWAY—DANGEROUS LOCALITY—REMOVAL OF PROTECTING FENCE—MISFEASANCE.

Whyler v. *The Brigham R.D. Council* (1901) 1 Q.B. 45, was an action brought against the defendants a highway authority, to recover damages for the death of the plaintiff's husband, alleged to have been caused by the wrongful act of the defendants. The deceased was driving along a road and by accident drove into a ditch and was drowned. At the point of the road where the accident took place a fence had been formerly erected to protect the public using the highway which was dangerous owing to its liability to be flooded by a stream that ran by the side of the road. The stream had been diverted, but the ditch which had been formerly the bed of the stream was left and was liable to be filled in time of flood, and the water then flooded over the road. After the diversion of the stream and the fence having fallen out of repair, the defendants acting on the report of their manager, that it was no longer necessary, had it removed, and ordered the erection of a short length at each end. After the old fence had been removed and before the erection of the new fence, the road was flooded, and the deceased coming along the road drove into the ditch and was drowned. The jury found that the removal of the fence in the way it was done, was inconsistent with a proper regard for the safety of persons using the road, and judgment was given by Wills, J., who tried the case, for the plaintiffs, which was affirmed by the Court of Appeal (Smith, M.R. and Collins and Stirling, L.JJ.). It was argued that the act of the defendants was one of nonfeasance, for which no action would lie; but the Court of Appeal held the pulling down of the old fence was an act of misfeasance.

PARTNERSHIP—CONTRACT WITH PARTNERSHIP—PARTNER, DEATH OF.

In *Philips* v. *Alhambra Palace Co.* (1901) 1 Q.B. 59, the question involved is the effect of the death of a partner upon a contract

made with the partnership. The partnership was formed for carrying on a music hall under the name of the Alhambra Co. The plaintiffs were a troupe of performers, who entered into a contract with the company to give certain performances at the company's music hall. The plaintiffs had no knowledge of how the company was composed. After the making of the contract and before the time for its performance arrived, one of the partners died, and the defendants contended that his death put an end to the contract. The action was brought against the surviving partners and the executors of the deceased partner, to recover the amount payable under the contract, the partnership having been dissolved and the music hall sold by mortgagees under power of sale. Judgment was given at the trial in favour of the plaintiffs against the surviving partners, but dismissing the action against the executors of the deceased partner. On appeal by the other defendants to the Divisional Court (Lord Alverstone, C.J., and Kennedy, J.), the judgment was affirmed. The sale by the mortgagees was held to be no excuse for non performance by the defendants, and the death of one of the partners was also held not to put an end to the contract, because it was not one which depended upon the personal conduct of the deceased partner.

PRACTICE—COSTS, SCALE OF—ACTION "WHICH SHOULD HAVE BEEN COMMENCED IN A COUNTY COURT"—(ONT. RULE 1132).

In *Solomon* v. *Mulliner & The M.C.S. Co.* (1900) 1 Q.B. 76, a short point of practice is determined. The plaintiffs had commenced an action of tort in the High Court, claiming damages £100; they ultimately accepted £2 paid into court in satisfaction. They claimed costs on the High Court scale, but the Taxing Officer, affirmed by Day, J., held they were only entitled to County Court costs, and this decision was affirmed by the Court of Appeal (Smith, M.R., and Collins, L.J.), on the ground that, judged by the result, the action was one which "should have been commenced in the County Court," notwithstanding that the plaintiffs had claimed a sum beyond the jurisdiction of that court. The same reasoning would seem to apply to the construction of the Ont. Rules, but for *Babcock* v. *Standish*, 19 P.R. 195, where it was held that Ont. Rule 1132 does not apply where the plaintiff accepts money out of court in satisfaction of his claim, even though the amount accepted be within the jurisdiction of an inferior court.

PRACTICE—COUNTY COURT—GARNISHEE SUMMONS—ATTACHMENT OF DEBT—BALANCE IN HANDS OF GARNISHEE.

In *Yates* v. *Terry* (1901) 1 Q.B. 102, a Divisional Court (Lawrance and Kennedy, JJ.) held that the Rule laid down in *Rogers* v *Whitely* (1892) A.C. 118 (noted ante vol. 28, p. 397), that a garnishee order in the usual form issued from a High Court, binds the whole debt attached, and not merely sufficient of it to satisfy the claim of the attaching creditor, applies also to garnishee orders issued from a County Court.

PRACTICE—ARBITRATION—ARBITRATOR FUNCTUS OFFICIO—POWER TO REMIT TO ARBITRATOR WHO IS FUNCTUS OFFICIO—ARBITRATION ACT 1889 (52 & 53 VICT., C. 49) S. 10—(R.S.O. C. 62, S. 11).

In re Stringer & Riley (1901) 1 Q.B. 105, a motion was made to set aside an award under the following circumstances. A submission was made of matters in dispute to arbitration. The submission incorporated the provisions of the Arbitration Act 1889 (see R.S.O. c. 62). Each party appointed an arbitrator and the arbitrators appointed an umpire. On July 12 the umpire heard evidence and also heard the two arbitrators on the matters in dispute, but by agreement neither of the parties were represented before him. On July 28 the umpire informed the parties that he had made his award. One of the parties took up the award, when it was found that it did not deal with the matters in dispute. The umpire thereupon destroyed it and made a new award, and upon motion made to set aside this second award, it was held by a Divisional Court (Lord Alverstone, C.J., and Kennedy, J.) that the second award was bad because made after the umpire was functus officio, but held, notwithstanding this, the matter might properly, under s. 10 of the Arbitration Act, (R.S.O. c. 62, s 11) be submitted to the umpire for reconsideration so that he might make an award that would be binding on the parties.

PRACTICE—INTERLOCUTORY ORDER—LEAVE TO APPEAL—LIBERTY OF SUBJECT.

In *Bowden* v. *Boxall* (1901) 1 Ch. 1, an appeal was brought from an interlocutory order dismissing an application to commit the defendant for an alleged breach of an undertaking. It was objected that no appeal lay without leave, but the plaintiff contended that no leave was necessary, because the liberty of the subject was in question. The Court of Appeal (Rigby, Williams

and Romer, L.JJ.) held that the liberty of the subject was not in question, and that leave to appeal was therefore necessary.

ADMINISTRATION—CREDITORS - PRIORITIES—VOLUNTARY DEBT.

In re Whitaker, Whitaker v. *Palmer* (1900) 2 Ch. 9, the decision of Cozens-Hardy, J. (1900), 2 Ch. 676 (noted ante p. 144) has been affirmed by the Court of Appeal (Rigby, Williams and Romer, L. JJ.).

MARRIAGE SETTLEMENT—MISTAKE—RECTIFICATION NON EXECUTION OF POWER—DEATH OF DONEE OF POWER—PAROL EVIDENCE—STATUTE OF FRAUDS (29 CAR. 2, C. 3) S. 4.

Johnson v. *Bragge* (1901) 1 Ch. 28. This was a suit to rectify a mistake in a marriage settlement, after the death of the husband, on the ground that the settlement did not contain an execution by the husband of a power of appointment in favour of the wife, in accordance with an arrangement alleged to have been entered into between the parties prior to the marriage. The plaintiff was the wife, and the defendants were the trustees and the children of the marriage, or persons claiming under them. The defendants set up that under the Statute of Frauds, s. 4. parol evidence of the alleged mistake was inadmissible, and secondly, that the court could not aid the non execution of a power as distinguished from an imperfect execution, after the death of the donee. The alleged mistake was clearly proved by parol testimony of the plaintiff and others, and that it was due to the mistake of the solicitor who drew the settlement. Cozens-Hardy, J., who tried the case, held that the Statute of Frauds was no defence, because the action was not one seeking "to charge any person upon any agreement made upon consideration of marriage," and that the authorities had established that parol evidence is admissible to rebut an equity or to prove fraud, mistake or accident. The second ground of defence he held to be equally untenable because as soon as the instrument is reformed in accordance with the real intention of the parties no further deed or conveyance would be necessary, but the instrument itself would be a perfectly valid appointment.

VENDOR AND PURCHASER—MISDESCRIPTION—CONDITION EXCLUDING COMPENSATION—SPECIFIC PERFORMANCE—POSSESSORY TITLE—RESCISSION.

Jacobs v. *Revell* (1900) 2 Ch. 858, was an action by a purchaser to rescind a contract for the sale of land on the ground of material

misdescription, in which the vendor counterclaimed for specific performance. The property offered for sale was stated to border on a lake and to contain 5 ac. 26 p. The conditions stated the property is believed and shall be taken to be correctly described as to quantity and otherwise, and went on to provide that in the event of any misdescription being discovered the purchaser was not to be entitled to compensation in respect thereof. The only part of the property the vendor shewed a good title contained only 4 ac. and 3 roods. Another part of the property offered for sale bordered on the lake, and as to this only a possessory title was offered for less than forty years. Buckley, J., held that the authorities established that it was only to small and comparatively trifling defects that the clause excluding compensation applied, that here there was a material misdescription, and the purchaser was not getting what he had purchased and was not bound to accept less than a forty years' title to the part to which a possessory title was offered. The plaintiff's claim to rescission and refund of his deposit was therefore allowed and the defendant's claim for specific performance dismissed.

VENDOR AND PURCHASER—TITLE—ADVERSE RIGHTS—NOTICE OF POSSESSION.

Hunt v. *Luck* (1901) 1 Ch. 45, was an action by the plaintiff impeaching a conveyance of lands to one Gilbert made by her deceased husband Dr. Hunt, of whose estate she was the real representative under his will on the ground of the fraud of Gilbert. The defendants were the representatives of Gilbert and certain mortgagees to whom he had mortgaged the land. As against the mortgagees the question arose how far they were affected with notice of the infirmity of Gilbert's title. Gilbert was the agent of the deceased Dr. Hunt, and had, received the rents of the land and paid them over to Dr. Hunt up to the time of his death, notwithstanding the alleged deed to him, and was so doing when the mortgages were made. The plaintiff contended that the mortgagees were guilty of negligence, and that if they had made proper inquiries of the tenants of the land they would have learned that Dr. Hunt was really the owner of the land. It appeared that the rents were collected by one Woodrow, who by arrangement with Dr. Hunt remitted them to Gilbert, who paid them to Dr. Hunt. The mortgagees had notice that Woodrow collected the rents, but did not ascertain on whose behalf he was receiving them. The

mortgagees claimed to be purchasers for value without notice of Gilbert's alleged frauds. After observing that the doctrine of constructive notice which imputes to a man knowledge which he does not in fact possess is one which the courts of late years have been unwilling to extend, Farwell, J. came to the conclusion that a purchaser is not bound to inquire of a tenant in possession to whom he pays his rents, and that the tenant's possession is only notice of the tenant's own rights, but is not notice of the rights of the person through whom the tenant claims, and that therefore the mortgagees were not affected with notice of Dr. Hunt's title, and as to them he dismissed the action.

LANDLORD AND TENANT—LEASE—UNDER LEASE—CONDITIONAL COVENANT FOR RENEWAL OF UNDER LEASE—PERSONAL COVENANT—COVENANT RUNNING WITH THE LAND—ASSIGNEE OF REVERSION—32 HEN. 8, C. 34, S. 2—PERPETUITY.

Muller v. *Trafford* (1901) 1 Ch. 54, is a decision of Farwell, J. on a question of real property law. One Morgan, being the owner of the fee of certain lands, made a lease for eighty years to one Reid; Reid underlet to Austin for sixty-two years less ten days, and Austin in 1851 underlet to Fisher for fifty-two years less twenty days, the fifty-two years being the unexpired residue of the original term. Austin in his lease to Fisher covenanted that if he Austin obtained an extension of the lease, not from his immediate lessor but, from Morgan, he, his executors, administrators or assigns would grant a new lease to Fisher, his executors, administrators or assigns for the term acquired from Morgan, including the unexpired term thereby granted. Austin died, having bequeathed his leaseholds in question, and the legatees assigned them to the defendant Trafford, subject to the under lease to Fisher. In 1899 Trafford obtained from Morgan's assignee (upon the surrender of his existing term) a new lease of the premises for fifty years, subject to the existing under leases. The plaintiffs were assignees of Fisher's under lease, and claimed against Trafford specific performance of the covenant of Austin to grant a new lease. The defendant contended that Austin's covenant was personal and not binding on him, that the covenant did not run with the reversion but was collateral to it, and that the defendant was not the assign of Austin, and if he was he parted with the reversion by the surrender, and there was no breach of the covenant

while the reversion was in him. That the covenant was not a covenant for renewal, and it was bad because it offended against the rule against perpetuity. Farwell, J., upheld the contention, first that the covenant was conditional on Austin himself obtaining the new lease, and did not cover the case of his assigns obtaining it. He was also of opinion that though if it had been a covenant for renewal it would run with the land and not be subject to the rule against perpetuity, yet that the covenant was not one for renewal, and that Austin at the time he entered into it had not such a reversion as could possibly be bound by the covenant, and therefore the benefit of the covenant did not pass to Fisher's assigns under 32 Hen. 8, c. 34, s. 2, because it was clear that the contract did not contemplate in its terms any dealing with the reversion then vested in Austin, but some new estate to be acquired from a third party. He decided to follow *Brereton* v. *Tuohey*, 8 Ir. C.L.R. 190, where it was held that a covenant for perpetual renewal, entered into by a person holding a limited interest in lands, does not bind the estate beyond that interest, and therefore if the assignee of the covenantor acquire the inheritance, it is not bound by the covenant. The action was accordingly dismissed.

MORTGAGE—CHOSE IN ACTION - SHARES IN COMPANY—IMPLIED POWER OF SALE —COSTS.

Deverges v. *Sandeman* (1901) 1 Ch. 70. This was an action to redeem certain shares of a joint stock company, and, in the alternative, for damages for an alleged wrongful sale thereof by the defendants. The shares in question were shares to an allotment of which the plaintiff became entitled as being the holder of certain other shares of the same company. The defendants, who were the plaintiff's brokers, notified him of his right to an allotment of the shares in question and demanded a remittance to take up the allotment. The plaintiff replied that he was unable to remit, and the defendants then obtained an allotment of the shares to themselves (the other shares of the plaintiff, in respect to which they had become entitled to this further allotment, having been registered by the plaintiff in the name of the defendants). The plaintiff never having paid anything for the shares thus allotted, the defendants, about five or six months after they had obtained the allotment, sold them, believing themselves to be absolutely entitled thereto. They now submitted to account for the proceeds as

mortgagees. Farwell, J., held that the defendants, having a legal title to the shares, had an implied power of sale after a reasonable time, and that a reasonable time for payment had been given before the sale in question took place. The defendants, having originally set up by their defence that they were absolutely entitled to the shares, were ordered to pay the costs down to the time they abandoned that defence, the other costs of the action the plaintiff was ordered to pay.

BUILDING SOCIETY—INFANT—MORTGAGE BY INFANT TO SECURE LOAN TO PURCHASE PROPERTY—REPUDIATION.

Thurston v. *Nottingham Perm. Building Society* (1901) 1 Ch. 88, was an action brought by the plaintiff to set aside a mortgage made by her to the defendants on the ground that she was an infant when she made it, and that under the Infants' Relief Act, 1874 (37 & 38 Vict., c. 42), it was void. It appeared that the plaintiff had applied to the defendants to borrow money to purchase land and to complete certain buildings on it. The application was granted, the money lent, the land purchased and the mortgage in question given to the defendants to secure their advance. Joyce, J., (his first appearance, by the way, in the reports as a judge) held that even if the plaintiff was not enabled by the Building Societies Act to make the mortgage, a point which he did not determine, it was nevertheless clear that the purchase of the land and the giving of the mortgage was all one transaction, and it was impossible for her to retain the land free from the defendants' charge thereon for the purchase money therefor advanced by them, and he dismissed the action, giving the defendants leave to add their costs to their security.

VENDOR AND PURCHASER—CONDITIONS OF SALE—MISTAKE IN CONDITIONS VERBALLY CORRECTED BY AUCTIONEER—COMPENSATION—SPECIFIC PERFORMANCE.

In re Hare & O'More (1901) 1 Ch. 93, was an application under the Vendors' and Purchasers' Act. Two parcels each consisting of several houses were offered for sale. The houses in parcel A being described as similar to those in parcel B. The purchaser inspected a house in parcel B, and subsequently attended the sale and purchased parcel A, on the faith as he said of the description that they were similar to those in parcel B, whereas it turned out

that they were different in material respects, for which he claimed compensation. The vendor alleged that before putting up parcel A the auctioneer made a verbal statement correcting the mistake, this statement the court found was clearly and distinctly made, but it was not proved that the purchaser actually heard it. Joyce, J. held that under these circumstances the purchaser was not entitled to specific performance with compensation, and, as the purchaser did not wish to complete without compensation, the contract was ordered to be rescinded, and the vendor ordered to return the deposit with interest and to pay the costs of investigating the title down to the time he was presented with the statement of the auctioneer.

COMPANY—SHAREHOLDER—WINDING UP—DISCONTINUANCE BY LIQUIDATOR OF ACTION FOR CALLS—COSTS.

In re United Service Association (1901) 1 Ch. 97, Wright, J., held that when, at the time winding up proceedings are instituted, a pending action for calls is discontinued by the liquidator and proceedings taken by him under the Winding up Act enforcing payment by such shareholder, if the costs of the action are not paid by the liquidator, the shareholder is entitled to set them off against any sum recovered against him by the liquidator, but he is not entitled to a stay of the proceedings by the liquidator until such costs are paid.

Correspondence.

UNLICENSED CONVEYANCERS.

The Editor THE CANADA LAW JOURNAL.

SIR,—I have noticed from time to time various editorial and other notices in THE CANADA LAW JOURNAL in reference to the much debated, and to the profession (the country members especially) important question "the unlicensed conveyancer." There have also appeared in your journal and other publications letters from many members of the profession upon the same subject. My attention has been again called to this matter by the editorial remarks in your issue of the 15th ult., and, though I am not convinced that it is in the interest of the profession to have this matter brought into the prominence that a discus-

sion of it, even in a purely legal publication involves, I think it desirable, when one of the prominent organs of the profession assumes that the Benchers have made no effort to aid their professional brethren in the matter referred to, that some idea, though necessarily a very imperfect one, should be given of what has been done by the bench.

As far back as 1881, a committee, of which the present Mr. Justice Moss was chairman, took up this question and endeavoured to find a solution of the difficulty, but after much trouble, diligent enquiry, and anxious consideration, was unable to recommend any course that would give the desired relief.

I was not aware of what had been done, and shortly after I had the honour of being elected a Bencher in 1891, being convinced of the hardship under which the profession laboured, because of the inroads made by the unlicensed conveyancer upon what was properly legal business, I brought the matter before Convocation; the question received the *fullest* consideration from the other members of the bench, and a strong and representative committee was at once appointed of which I was named chairman. This committee immediately took steps to gain information from the various law associations and other likely sources, and on the 17th day of November, 1891, made the following interim report:

"Your committee finds that the matter referred to was considered by a committee appointed for that purpose in May, 1881, at which time much information was collected and various reports by such committee presented to the bench, of all of which your committee has had the benefit.

"Your committee is strongly of opinion that there are ample grounds for the complaints made, and believes that the members of the profession (especially those practising in the country) are entitled to protection in some form against the competition of persons outside the profession, who, without having been at any expense to qualify themselves for the work, or paid any fees to government or law society, prepare deeds and documents of various kinds, and do other work strictly within the province of members of the profession.

"A number of suggestions have been made to your committee, the following of which appear to be the most worthy of consideration:—

"1. Amend the Registry Act by enacting that every solicitor who draws any deed, mortgage, assignment, or instrument of any kind (except a will) affecting any interest in land in Ontario, shall endorse thereon the name of himself or of the firm of which he is a member, and such solicitor or firm shall be liable for any negligence that may occur in the preparation of such deed or other document. Further that no deed or other document (except a will) affecting any interest in land in Ontario shall be registered in any registry office unless and until the same has endorsed thereon the name of a practising solicitor or firm of solicitors in Ontario.

"2. That there be legislation confining the work of conveyancing to notaries public, or enacting that no deed shall be recorded unless and until it has attached to the same, the certificate of a notary public certifying that the same appeared to be duly executed and proved.

"3. That there be legislation for the purpose of incorporating or licensing conveyancers, by which all persons who have heretofore acted as conveyancers be granted a conveyancer's certificate or license upon application therefor within six months, and on payment of a reasonable fee, followed by an annual fee thereafter, and that all other persons desiring to act or practise as conveyancers, be required to pass an examination before such persons as the judges of the High Court may or shall direct, and to pay an annual fee.

"Your committee having duly considered these and other suggestions, is of opinion that the one numbered three is, viewing the prospect of legislation in the direction proposed, and the other circumstances surrounding this question, the only one likely to receive consideration from the Legislature (the only body who can regulate the subject) and your committee would therefore suggest that a committee be appointed to interview the Attorney-General, place the question before him and urge that legislation of the character last suggested be passed.

"Your committee has ascertained that acts cognate in character to that suggested, are in force in Ireland and Manitoba, and therefore ventures to think that if the matter is fairly placed before the Attorney-General it will receive his best consideration, and be followed by legislative action calculated to afford relief to the profession.

"Your committee annexes to this report copies of the Imperial Act (27 Vict., c. 8) and Manitoba Act, 1881, c. 25, above referred to."

A copy of this report was sent to the secretary of each county law association and to each county judge and county attorney throughout the province, and they were asked to bring the matter before the members of the profession and obtain from them as general an opinion as possible as to the merits of the three schemes proposed.

The committee also through the courtesy of THE CANADA LAW JOURNAL and *Canadian Law Times* had an editorial memorandum inserted in each of these periodicals stating that the question was being considered by Convocation, and asking that the profession send in suggestions to the chairman or vice-chairman in reference to same as soon as possible. Comparatively few answers or suggestions from the profession were received, and when the question came again before Convocation at the half-yearly meeting on the 29th day of December, 1891, the committee found it necessary to ask that its duties be continued until further information could be elicited.

With this object in view the following letter was on the 6th of January, 1892, sent to the secretaries of the various law associations, county judges and county attorneys :

"BARRIE, Ont., Jan. 6, 1892.

"DEAR SIR,—The secretary of the Law Society about a month ago sent you, by instructions of the bench, a copy of the report of the Committee on Unlicensed Conveyancers, in order that before such report was considered, the views of the profession thereon might be had. I have, as chairman of that committee, received a number of letters from individual members of the profession, and resolutions passed by several of the county law associations. The majority of these are more or less adverse to the suggestion made by the committee in its report, though all of them recognize that some legislative action is necessary to prevent the evil complained of, and a number make suggestions somewhat similar to those laid before the committee at the time it made its report. When the subject came before Convocation at the semi-annual meeting on the 29th ult., and on previous occasions, several of the Benchers who were in a position to know, stated that there was not the slightest prospect of obtaining legislation which would have for its plain object the protection of the profession against outside conveyancers; and if anything of that kind were attempted, it would probably make an opening for legislation of quite an opposite character, and to the decided and permanent injury of the profession, and the result of Mr. Deacon's efforts in reference to Division Court agents, was cited as an example. This statement is no doubt correct. Under these circumstances, and in view of the opinions expressed as already stated, and the objection strongly urged against giving conveyancers a professional status, I was compelled, when formally moving the adoption of the report, to ask that the further discussion of the matter might stand until the next meeting of the bench, intending to again place the whole matter before the profession and let the situation be fairly considered in all its aspects. I may say that while I have the strongest objection to the giving a status to these non-professional scribes, it appears to be clear that so long as the Legislature is composed as at present, the only course open is the one suggested in the report, with possibly some slight modifications as to the liability of such persons for the work done by them, etc. Now the question arises, shall we adopt the course suggested in the report, *no other course being open*, or shall we abandon any effort to relieve the profession from the inroads of these men rather than give the latter a status, or risk legislation adverse to the profession? I regret that it is necessary to have this matter again brought before the members of the profession, but the importance of the question must be my excuse, if one is necessary. I therefore hope that you will at once bring the matter before the profession in your county, and that an expression of opinion from each county bar or law association, in reference thereto, will be sent to me not later than the 25th inst., as upon that will probably depend the action of Convocation. I believe that the only courses open are, either adopt the report or let the matter drop. Convocation is fully alive to the importance of this question to the members of the profession, especially in country places, but nothing can be done except the Provincial Legislature chooses to act in the matter, and it is because we cannot look for much, if any, aid from that body that the difficulty exists; what Convocation can do, I feel sure will be done."

"Yours truly,

"H. H. STRATHY,

"*Chairman Committee Unlicensed Conveyancers.*'

To this letter I received a number of replies from law associations, from county bars in counties where no associations existed, and from individual members of the profession.

I do not think it would be in the interests of the profession that these replies should be published, but I have tabulated the result of same, and, if the enquiries are not too numerous, can give such result to any member of the profession who desires to know it.

The result howeve. was that the committee, after giving the whole question the fullest and most anxious consideration, was compelled to report to Convocation, that "Your committee finds that no aid can be accorded to the profession except by means of legislation in the Provincial Parliament, and the committee is met with a difficulty at present insuperable by reason of the apparent feelings of such a large proportion of the members of the Legislature, and the strong influence now used by the unlicensed conveyancer through the province. Your committee would therefore suggest that the members of the profession should in their respective localities use their influence, which is generally large, to induce their representatives to see that justice is done, and obtain from them, if possible, some pledge that the interests of the profession should receive the fair consideration of the House."

I regret that this letter is necessarily so long, but I think that justice to the bench, who have been so frequently accused of taking no interest in this matter, excuses its publication. I would only add, that if any member of the profession can suggest a *practical* solution of the difficulty in the form of an enactment *likely to pass the Provincial House*, I am satisfied that Convocation will use such influence and power as it may possess to have such measure become law.

Yours etc.,

H. H. STRATHY.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, J. A.] FAHEY *v.* JEPHCOTT. [Feb. 21

Security for costs—Dispensing with Court of Appeal—Poverty of appellant—Infancy—Divisional Court.

Security for costs of an appeal to the Court of Appeal was dispensed with, under the power given by Rule 826, where the appellant was an infant suing by her next friend and unable by reason of poverty to give or procure security, the circumstances being that her action had been dismissed by the judge at the trial, following a reported decision of a Divisional Court, with which the appellant would be met if she appealed to a Divisional Court, which she was at liberty to do without giving security.

Waldron, for appellant. *Dewart*, K.C., for respondent.

Moss, J. A.] DOWNEY *v.* STIRTON. [Feb. 21

Leave to appeal—Judgment of Divisional Court—Special circumstances—Defamation—Misdirection—Evidence—Damages—Discretion.

Motion by the defendant for leave to appeal from an order of a Divisional Court (ante) affirming the judgment of FALCONBRIDGE, C. J., upon the verdict of a jury awarding the plaintiff $100 damage in an action for libel. The libel complained of was contained in a letter written by the defendant, and published in certain newspapers. As part of his defence the defendant alleged that, before the publication of his letter, the plaintiff wrote two articles, one published in two newspapers before the letter was published, and the other in one newspaper afterwards. For these articles the action of *Stirton* v. *Gummer*, the defendant being the proprietor of the newspapers, was instituted, and a verdict was found by a jury for $500. After the trial of that action, and before a new trial was directed by a Divisional Court (31 O.R. 227), the verdict in this action was obtained. At the trial of this action the plaintiff was examined, and stated that the defendant had got $500 damages in respect of one of the articles, and his evidence was not objected to, and the trial judge referred to it in his charge. On motion to the Divisional Court it was objected that leave to amend should have been given, and another article written some months after the defendant's letter should also have been admitted in evidence, and that the trial judge was in error in refusing to admit it, and referring to the case of *Stirton* v. *Gummer*. The Divisional Court unanimously held against the

latter objection, and a majority of the members agreed with the former ruling.

Held, that the defendant had failed to shew such special circumstances as must be shewn in a case of this nature. The verdict was small, and the jury seemed to have arrived at it upon a charge to which the only exception now urged was the above, and, if the judge erred in not passing over any reference to the Gummer case, there was nothing to shew that any substantial wrong was occasioned by it. On the other ground the weight of authority was against the proposition that a defendant in a libel action may set up in mitigation of damages acts and doings of the plaintiff arising long after the alleged libel, and not having reference to it. Here, however, the matter was to some extent one of the exercise of discretion by the trial judge, and leave to appeal against that ought only to be given in exceptional cases. Motion refused.

Riddell, K.C., for defendant. *J. J. Drew*, for plaintiff.

Maclennan, J. A.] BODINE *v.* HOWE. [Feb. 22

Appeal—Extension of time for—Application to opposite solicitor—Unreasonable refusal—Costs—Rules 799, 801.

Rules 799 and 801, prescribing the times for filing and serving notice of appeal and serving the appeal case, enable the appellant, whenever necessary, to obtain further time from the court or judge; and that being so, the solicitor requiring further time should, in general, before applying to the Court, apply to the solicitor for the respondent, explaining the occasion for it, and the latter ought, in every proper case, to grant the request; any other course of conduct only occasions unnecessary and useless costs.

And where application for an extension was made to the solicitor, and, in the opinion of the judge who heard a motion to extend the time, unreasonably refused, an order was made extending the time and staying execution, without costs to the respondent.

R. U. Macpherson, for appellant. *Hellmuth*, for respondent.

HIGH COURT OF JUSTICE.

Falconbridge, C.J., Street, J.] [Jan. 14

PHILLIPS *v.* THE GRAND TRUNK RAILWAY CO.

Railways—Walking between rails—Negligence.

Plaintiff was walking between the rails of the defendants' tracks in a station yard, and was run down and injured by a reversed engine and tender.

Held, that even if the defendants were guilty of negligence in not giving notice that the engine and tender were in motion, as there was a

space between the tracks in the yard where the plaintiff would have been safe, he was guilty of negligence in walking between the rails, and could not recover.

Callender v. *Carleton Iron Co.* (1893) 9 Times L.R. 646; and (1894) 10 Times L.R. 366, followed. Judgment of MEREDITH, J., affirmed.

W. J. Elliott, for the appeal. *W. Nesbitt*, Q.C., and *H. E. Rose*, contra.

Meredith, C.J., Falconbridge, C.J.] [Jan. 15

MCPHERSON *v.* TRUSTEES S.S. No. 7, USBORNE.

Public schools—Agreement with teacher—Dismissal—Seal—Validity—R.S.O. c. 292, s. 19.

Semble, where public school trustees had entered into an agreement for securing the services of a teacher, and had directed the officer who had the custody of the seal to affix it, and both parties had for two years acted on it as a binding agreement, the fact that the seal had not been actually affixed would not invalidate the agreement.

Where such an agreement is entered into with the intention that it shall supersede a previous agreement of a like character entered into between the trustees and the same teacher, if the second never becomes operative, the first agreement will remain in force and govern the relations between the teacher and the trustees.

Where such an agreement is valid on its face and has been acted upon for several years, the onus of proving invalidity by reason of anything for which s. 19 of the Public School Act, R.S.O. c. 292, s. 19 (which enacts that no proceeding of a rural school corporation shall be valid or binding unless adopted at a meeting at which at least two trustees are present, except as stated in that section) provides not having been done, rests upon the trustees: and *semble*, the absence of a formal minute of the proceedings of the meeting at which the first agreement was signed would not be fatal to its validity.

J. B. Clarke, Q.C., for appellants. *Garrow*, Q.C., for respondent.

Ferguson, J.] MCCOSH *v.* BARTON. [Jan. 17

Fixtures—Moulding patterns—"Plant"—Temporary absence from factory—Made parcel of realty by mortgage.

Plaintiff was mortgagee of an electro plating factory under a mortgage which contained, after the description of the land, the following clause: "Together with all the plant and machinery at present in use in the said factory situate upon the said land, which said plant and machinery are and are hereby declared to be part and parcel of the real estate."

Held, that moulding patterns were part of the "plant," and the evidence shewing that they were necessary to the carrying on of the business of the factory, and that, notwithstanding some of them were not on the land at the time the mortgage was executed, having been sent, as there was no moulding room in the factory, to other establishments for the temporary purpose of having moulding done for the factory, after which they would be returned. The factory was their home, and following *The Canada Permanent Loan and Savings Co.* v. *The Traders Bank* (1898) 29 O.R. 479, that the patterns were by the terms of the mortgage made parcel of the realty, and the plaintiff was entitled to recover their value from the mortgagor and a purchaser from him.

Wilkes, Q.C., and *J. Gordon Smith*, for plaintiff. *W. C. Livingston*, for defendant Barton. *Harley*, Q.C., for defendant C. Rehder. *F. W. Casey*, for defendants Fresh and J. F. Rehder.

Boyd, C., Robertson, J.] [Feb. 5

SAWYER & MASSEY COMPANY *v.* ROBERTSON.

Sale of goods—Destruction by fire—Risk of purchasers.

The plaintiffs, carrying on business at Hamilton, sold to the defendant an engine and stone crusher by agreement in writing of October 10, 1899, which called for delivery of the goods to the defendant "at ——— Station, Ottawa." It also provided that property should remain in the vendors till full payment of the purchase money. At the time the crusher was in the open at the C.A.R. station, Ottawa, and the engine under cover in a warehouse at the C.P.R. station, Ottawa. On October 18, 1899, certain additional parts required for the machines, and covered by the contract, were shipped by the plaintiffs from Hamilton. On October 23, the defendant telegraphed cancelling the sale, which the plaintiffs refused to agree to. The defendant never took possession of the machines, and refused to sign notes tendered for the purchase money as called for by the agreement, whereupon this action was commenced on January 15, 1900. Afterwards the plaintiffs, upon notice to the defendant, removed the crusher from the C.A.R. station and put it with the engine in the warehouse at the C.P.R. station, and both engine and crusher were destroyed in the Ottawa fire in April, 1900. The defendant had seen where the machines were on October 9, 1899. The plaintiffs' agent had several times urged the defendant, after he had cancelled the agreement, to come and take the goods.

Held, that the plaintiffs were entitled to recover on the contract for the full purchase money.

Watson, K.C., and *Kirwan Martin*, for plaintiffs. *W. Wyld*, for the defendant.

Boyd, C., Robertson, J.] RENNIE *v.* QUEBEC BANK. [Feb. 11

Chose in action—Assignment of—Notice to debtor—Necessity for—R.S.O. 1887, c. 122, ss. 6-12—Ib. 1897, c. 51, s. 58 (5).

Whatever may be the case in transactions coming under R.S.O. 1897, c. 51, s. 58 (5), in reference to the assignment of choses in action, under the prior law as found in R.S.O. 1887, c. 122, ss. 6-12, relating to the same subject, notice of the assignment to the debtor was not needed to vest a right of action in the assignee or in any way to perfect the transfer as between assignor and assignee, nor as between assignee and debtor, but only in order to protect the assignee against further assignments by the assignor or against any right of set-off, and to secure the debtor against possible claims by other persons. A chose in action is not bound by execution put in the sheriff's hands, but only by seizure thereunder.

The question whether an assignment of a chose in action to a bank is contrary to the provisions of the Bank Act cannot be discussed by a separate creditor not suing on behalf of all, but seeking preferential payment out of the securities assigned and held by the bank for a valid debt.

Norris, for plaintiff. *Aylesworth*, K.C., for Quebec Bank.

Boyd, C., Ferguson, J., Robertson, J.] [Feb. 19

PEGG *v.* INDEPENDENT ORDER OF FORESTERS.

Mortgage—Creation of tenancy—Special clause—Covenant for quiet enjoyment—Repugnancy—Tenancy at will—Right to distrain—Assignment of equity of redemption—Assent of mortgagees—Liability of assignee for rent—Sale of distress—Absence of appraisement—Damages.

A mortgage made by the plaintiff to the defendants secured $36,000 and interest at five per cent., payable by instalments, this rate of interest to be paid both before and after maturity. It had the usual statutory covenants, and this special provision: "Provided that in default of the payment of the interest hereby secured the principal shall become payable. Provided that until default of payment the mortgagor shall have quiet possession of the said lands Provided that so long as the mortgagor his heirs executors administrators or assigns shall remain in possession of the said lands then he or they shall hold the same by tenancy at will under the said mortgagees their successors or assigns at an annual rent equal to the said yearly interest and payable at the times set forth for the payment of the said interest any such rent collected to be applied towards satisfaction of said interest and that if the tenancy be determined at any time the rent accrued up to that period shall be payable forthwith for the purpose of enforcing remedies for the collection thereof." This formed one sentence in the mortgage, and had no stops throughout.

Held, that it contained no repugnancy or inconsistency: *Trust and Loan Co.* v. *Lawrason*, 10 S.C.R. 679, distinguished.

The mortgagor, remaining in possession upon the execution of the mortgage, had the right, under the provision for quiet possession until default, to enjoy the premises, but for no determinate period, and his tenancy thereunder was a tenancy at will, and such provision was therefore not inconsistent with an express tenancy at will at a half-yearly rent.

There being a tenancy at will at a fixed rent, there was, as incident to it, the right to distrain, and the covenant for quiet enjoyment must be read as subject to such right: *Doe d. Dixie* v. *Davies*, 7 Ex. 89, followed.

After the mortgagor had made default, his continuance in possession was still as tenant at will.

After default, the mortgagor, at the instance of the mortgagees, assigned his equity of redemption to his wife, and she took possession and agreed to apply the proceeds of the land to the payment of the mortgage.

Held, that this operated as a new tenancy at will with the wife, who became liable for the payment of the rent as the assign of her husband with the assent of the mortgagees, and her goods were therefore distrainable for rent. So the goods of the husband might also be distrained, as it was a case of real tenancy.

Held, however, that the defendants were liable for selling the distress without appraisement or valuation; and the measure of damages was the real value of what was sold, minus the rent due.

C. H. Porter, for plaintiff. *J. Bicknell*, for defendants.

Boyd, C., Ferguson, J.] GILLIE *v.* YOUNG. [Feb. 23

Life insurance—Foreign benefit society—Registration as friendly society—Certificate—Beneficiary—Change by will—Contract of insurance—Rules of society—Conflict with Ontario Insurance Act.

"The Catholic Order of Foresters" were incorporated in the State of Illinois, and had branches in Ontario, and in 1892 became registered as a friendly society in Ontario under the provisions of the Insurance Corporations Act, 1892, and had since kept their registry in force as a friendly society, and had not at any time been registered as an insurance company. A member of one of the Ontario branches was the holder of a certificate of the society whereby they promised to pay to the defendant, a brother of the holder, $1,000 upon satisfactory proof of his death. The holder was resident in Ontario, the application for the certificate was made in Ontario, and the certificate was delivered in Ontario. The holder made a will whereby he bequeathed the certificate to the wife of one of the plaintiffs, naming the plaintiffs executors.

Held, that the Order were legally entitled to do business in Ontario; that the certificate in question was a "contract of insurance" within the

meaning of the Ontario Insurance Act, R.S.O. c. 203; that the rules of the Order, so far as they were inconsistent with the provisions of the Act, were modified and controlled by such provisions; and therefore the benefits of the certificate passed by virtue of the will to the legatee, although the rules of the Order provided that no will should be permitted to control: *In re Harrison*, 31 O.R. 314, followed.

Kilmer, for plaintiffs. *Watson*, K.C., for defendant.

Boyd, C., Ferguson, J.] [Feb. 25

SHARP *v.* GRAND TRUNK R.W. Co.

Security for costs—Nominal plaintiff—Administrator—Fatal Accident Act, R.S.O. c. 166.

An administrator appointed for the purpose of bringing an action for the benefit of another under s. 3 of the Fatal Accident Act, R.S.O. c. 166, is not a mere nominal plaintiff bringing such action for the benefit of somebody else, in the sense of the rule which entitles a defendant to security for costs upon shewing that such nominal plaintiff is also insolvent.

So *held* by MEREDITH, C.J. (dubitante), and by a Divisional Court, in a case where, if the action had been brought in the name of the person beneficially entitled, he would have been required to give security for costs, because out of the jurisdiction, which gave ground for suspecting that the actual plaintiff was put forward for the purpose of enabling the person beneficially interested to escape liability.

L. G. McCarthy, for defendants. *Heighington*, for plaintiff.

Meredith, C.J.] CLARKE *v.* RUTHERFORD. [March 1

Discovery—Examination for—Second trial—Rule 439.

A party to an action may be orally examined before the trial touching the matter in question: Rule 439.

Held, that a trial which has proved abortive by the disagreement of the jury or by the granting of a new trial, is not a trial within the meaning of the Rule: *Leitch* v. *Grand Trunk R.W. Co.*, 12 P.R. 541, 671; 13 P.R. 369, considered.

Where the defendant had not been examined before the first trial, and the judgment thereupon had been set aside and a new trial ordered, the plaintiff was allowed to examine the defendant before the second trial.

Semble, that if there had been an examination of the defendant before the first trial, a second examination might be an abuse of the process of the court.

Strachan Johnston, for plaintiff. *L. G. McCarthy*, for defendant.

Province of New Brunswick.

SUPREME COURT.

En Banc.] EX PARTE BOUDREAU. [Feb. 22

Commissioner of sewers—Election—Relationship of poll clerk—Interest and bias.

The court discharged a rule nisi for a quo warranto against D. D. B. to shew by what authority he held the office of commissioner of sewers of Boudreau Marsh.

The grounds upon which the rule nisi was granted were that the election poll clerk was disqualified from acting on the ground of relationship, interest and bias.

W. B. Chandler, K.C., in support of the rule. *J. D. Phinney*, K.C., contra.

En Banc.] EX PARTE DUFFY. [Feb. 22

Information for assault causing bodily harm—Conviction for common assault, after hearing conducted as preliminary examination—Certiorari.

An information was laid charging the applicant with an assault causing actual bodily harm. A warrant having been issued, and the applicant arrested, the magistrate conducted the hearing as a preliminary examination under the provisions of part 45 of the Criminal Code, binding over all the witnesses to give evidence in a superior court, and at the conclusion of the examination of the witnesses for the prosecution addressing the defendant as provided by s. 591. Then after hearing evidence in behalf of the defendant, the magistrate, without objection by the defendant or his counsel, convicted the defendant of a common assault and fined him.

Held, on motion to make absolute a rule nisi for certiorari, that the conviction was bad. Rule absolute.

W. B. Chandler, K.C., in support of rule. *J. D. Phinney*, K.C. contra.

En Banc.] DIBBLEE *v.* FRY. [Feb. 22

Court stenographer—Privilege—Limit bond—Assignment—Holiday.

A court stenographer, confined in the gaol limits, who goes beyond the limits to attend a court as official stenographer, is guilty of a breach of his limit bond in so doing.

Where an action was brought on a limit bond on the same day on which the bond was assigned,

Held, that it was not necessary to prove that the bond was assigned before the issue of the writ. That will be presumed to be done first, which ought to be so. In any case the assignment of the bond is only a matter of form, and may be made at any time.

Thanksgiving Day is a legal holiday within the meaning of the words of s. 54 of the Act 52 Vict., c. 27: "Provided that when Christmas Day or New Year's Day or any other legal holiday shall fall upon Thursday, the said court shall be held on the Friday in such week," and where a summons, returnable on Thursday, Nov. 17, was not served two clear days before the return day as provided by s. 72 of the said Act, the cause was properly heard and determined on Friday, Nov. 25, being "the court day next after the return of the process," within the meaning of the said last mentioned section. Verdict for plaintiff confirmed.

H. H. Pickett and *A. A. Wilson*, K.C., for plaintiff. *W. B. Wallace*, K.C., for defendant.

En Banc.] CRUISE *v.* CITY OF MONCTON. [Feb 22

Local board of health—No authority to bind the corporation of the city or town for which it is constituted.

The plaintiff, a duly registered physician and surgeon, was employed by the local board of health of the city of Moncton, to perform certain services in connection with the out-break of small-pox in that city, and, having failed to get his bill paid, brought an action against the city corporation for the recovery thereof. The board of health was constituted under the Provincial Board of Health Act.

Held, on demurrer to defendant's pleas, that the board of health had no authority in law to create a liability on the city corporation. Judgment for defendant on demurrer.

Harvey Atkinson, for plaintiff. *W. B. Chandler*, K.C., for defendant.

En Banc.] MELLON *v.* MUNICIPALITY OF KINGS. [Feb. 22

Supreme Court Act, s. 373—Costs on entry of nolle prosequi.

A judge has no power under s. 373 of the Supreme Court Act to make a certificate depriving of their costs defendants against whom a nolle prosequi had been entered. It is only one or more of several defendants for whom a verdict passes on a trial, whom a judge can deprive of his or their costs by certifying that there was reasonable cause for making such person or persons defendant or defendants. Certificate rescinded with costs.

Stockton, K.C., for plaintiff. *A. S. White*, K.C., for defendants.

En Banc.] MCALLISTER *v.* REID. [Feb. 22

Dominion election—Special circumstances of difficulty in effecting service of petition—Order extending time for service.

A petition under the Dominion Controverted Elections Act was filed against respondent's return on December 17 last. On December 22 the petitioner's attorney at St. John mailed—registered—to the petitioner's address at Campbellton a copy of the petition and accompanying papers with directions to hand them to the sheriff for service. The petitioner was absent from home at the time and his attention was not called to the arrival of the registered letter until Dec. 27, when he received it from the post-office. As this was the last of the ten days allowed by s. 10 of the Act, for service, and it was impossible on account of the respondent living some thirty-six miles distant to effect service that day, the petitioner wired to his solicitor in St. John, who on affidavit of the facts applied for and obtained from a judge on the same day an order extending the time for service.

Held, that the circumstances were such as to justify he judge making the order under s. 10 of the Act.

Rule to rescind the order and remove the petition from the files of the court refused.

J. B. M. Baxter and *Stockton*, K.C., for petitioner. *Earle*, K.C., and *Pugsley*, K.C., for respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] BLAKIE *v.* MCLENNAN. [Feb. 4

Sale of land—Action by unpaid vendor against sheriff for logs cut on the land seized under execution against vendee—Conditions of sale—Parol evidence excluded as varying written contract.

Plaintiff sold to S. a property known as the Mill Farm, containing a quantity of woodland, for the sum of $8,500, under an agreement in writing by which S. agreed to pay a portion of the purchase money on the execution of the agreement and the balance in yearly instalments, with interest subject to the condition that if S. failed to pay any of the instalments with interest as agreed the payments made would be forfeited and plaintiff would be at liberty to resume possession, and subject to the further condition that S. would not cut more than a specified quantity of lumber in any one year. In an action of replevin brought by plaintiff against the defendant sheriff, who had levied upon a quantity of lumber on the premises under executions issued at the suit of creditors of S., plaintiff tendered evidence to shew that all lumber cut by S. was to be sold and the proceeds, after

deducting certain disbursements, paid to plaintiff on account of the purchase money, and that the title to the land and the lumber was to remain in plaintiff until the payments agreed to be made by S. were completed.

Held, that the evidence was not admissible as varying the written contract.

Held, further, that a bill of sale of the lumber made by S. to plaintiff while writs of execution, of which plaintiff failed to shew that she had not notice, were in the hands of the sheriff, was void, as made contrary to the provisions of the statute.

S. D. McLennan, and *F. T. Congdon*, for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Full Court.] TOBIN *v.* GANNON. [Feb. 4

Libel and slander—Action by solicitor—Evidence—Defence sustained—Privileged communication—Innuendo.

In an action by plaintiff claiming damages for certain words alleged to have been spoken by defendant of and concerning plaintiff in his capacity as a solicitor, whereby plaintiff was injured in his credit and reputation, the evidence at the trial shewed that the defendant in conversation with L. in reference to a case, asked L. who his solicitor was, and upon L. mentioning plaintiff, defendant said that if he had an honourable man like M. he might win his case. L. said that he would not change until he found some fault—that plaintiff always did honourably with him, whereupon defendant said that plaintiff was a dirty man. The words proved were different from those set out in the statement of claim, and the innuendo in the statement of claim was inapplicable. Leave was given to plaintiff on the trial to amend, but no amendment was made.

Held, setting aside with costs, including costs of trial, the verdict for plaintiff, that in the absence of evidence to shew how the words proved were spoken and understood, the Court could not frame an innuendo to conform to the evidence.

On the trial defendant called plaintiff as a witness, and plaintiff having admitted that he had collected a sum of money for a client which he failed to pay over, and that he had given a note for the amount collected which he had also failed to pay, and that a judgment had been obtained against him for the amount which was unpaid at the time of the trial,

Held 1. This evidence shewed conduct which was dishonourable to plaintiff as a solicitor, and fully justified the language used by defendant.

2. If the words proved were spoken and understood in the sense that plaintiff was not an honourable solicitor defendant had substantiated a good defence.

3. The communication was a privileged one, L. being a party who had an interest in knowing of it.

W. F. O'Connor, for appellant. *C. S. Harrington*, K.C., and *W. R. Tobin*, for respondent.

Full Court.] BLACK *v.* STEPHEN. [Feb. 4

Guarantee—Default of principal—Liability of sureties—Appropriation of payments—Time for making.

Plaintiffs sold to S. the personal property contained in the building known as the Queen Hotel, of which S. was to become lessee, for the sum of $11,000, S. undertaking to give to plaintiffs her promissory note for the sum of $3,000, to be paid in instalments during the first year of the tenancy and to give to plaintiffs a guarantee, signed by defendants, for the payment during the second year of the tenancy of the further sum of $3,000, payable at the same times and in the same amounts.

In compliance with the terms of this agreement S. gave plaintiffs a written guarantee, signed by defendants, for the payment of said sum of $3,000, containing a provision that it was to remain in force notwithstanding that S. might have forfeited her right to the said personal property under the conditions of any agreement or mortgage entered into between S. and the plaintiffs.

S. made default after having paid instalments amounting to the sum of $2,370, and plaintiffs thereupon took possession of the property covered by the agreement of sale, and disposed of the same for the sum of $6,500.

Plaintiffs deducted from the whole amount due under the agreement the proceeds of the sale of the personal property and charged defendants, under their guarantee, with the balance.

Held, affirming the judgment of RITCHIE, J., that the termination of the lease, on default by S., and the taking possession of the personal property by plaintiffs, had not the effect of releasing the sureties.

Held, also, that on default of S. to pay, defendants became liable at once, and nothing done afterwards but payment would extinguish the liability.

Per RITCHIE, J. (in the judgment appealed from). Plaintiffs had the right to make the appopriation as they did, and that they were not obliged to do so immediately, but could make the appropriation at any time before trial.

R. L. Borden, K.C., and *H. Mellish*, for appellants. *A. Drysdale*, K.C., for respondents.

Full Court.] TRAVIS *v.* WAY. [Feb. 4

Conditional sale—Payment of instalments—Remedy of vendor on vendee failing to pay.

A written agreement entered into between plaintiff and defendant for the purchase of an organ by defendant from plaintiff provided that the property in the organ should remain in the vendor until payment in full of the price, which was payable in instalments, but that the vendee, making the payments agreed upon when due, etc., should be entitled to the possession

and use of the property. It was further provided that if at any time before payment in full of the price the vendee should fail in the performance of the agreements on his part to be kept, etc., the vendor should be entitled to the immediate possession, and if the rent due or to become due under the agreement was not paid within thirty days all rights of the vendee should cease, and any money paid by him on account of the purchase should be retained by the vendor. The vendee failed to make any of the payments as required.

Held (per GRAHAM, E.J., WEATHERBE, J., concurring), that the provision in the agreement enabling the vendor to retake possession in default of payment was cumulative, and that the vendor not having done any act towards making an election that he would forfeit the agreement to pay, and take possession of the instrument, was entitled to the ordinary remedy on breach of the agreement to pay.

Per RITCHIE, J., MEAGHER, J., concurring. The agreement being one for the conditional sale of the organ, and no property passing until all the instalments had been paid, and the agreement providing that in the event of non-performance by the vendee of the conditions of sale, the payments made by him should be forfeited, and that the vendor could retake possession, the latter was the only remedy open to the vendor, and that he could not sue under it for non-payment of instalments.

D. McNeil, and *W. F. O'Connor*, for appellant. *F. F. Mathers*, for respondent.

Province of British Columbia.

SUPREME COURT.

Full Court.] BULLOCK *v.* COLLINS. [Jan. 17

Examination of judgment debtor—Incurring debt by fraud—R.S.B.C. 1897, c. 10, ss. 15, 16, 19.

Appeal from an order of DRAKE, J., committing defendant to goal for nine months.

Defendant received from plaintiff several sums of money, part of which were to be invested and part expended on plaintiff's farm. Defendant placed these moneys to his wife's credit, made no investment, kept no accounts, and could not account at all for a large portion although he said it had been expended on the farm. Before plaintiff got judgment, and while the action was pending, defendant allowed his wife and sister-in-law to get judgments against him.

Held, by the full court, reversing DRAKE, J., that the defendant had

not incurred the debt by fraud or false pretences within the meaning of s. 15 of the Arrest and Imprisonment for Debt Act.

An appeal lies direct from an order committing a debtor to gaol, and no preliminary motion to the judge for discharge is necessary.

Gregory, for appellant. *A. E. McPhillips*, Q.C., and *Barnard*, for respondent.

Full Court] JORDAN *v.* MCMILLAN: C.P.R. Co., GARNISHEE. [Jan. 21

Railway Co.—Service on—Whether by-law requiring service of papers to be at one place in British Columbia valid—County Court Order VIII., Rule 18.

Appeal from an order of FORIN, Co.J., setting aside service of a garnishee summons served at the company's office in Nelson. On the 12th February, 1894, the company passed and duly filed a by-law (No. 70) providing that on and after 1st May, 1895, the head office of the company in Vancouver be the place where service of process might be made upon the company in respect to any case of action arising within British Columbia. Order VIII., rule 18, of the County Court Rules provides that service may be effected on a railway company at a station or office in the County Court District.

Held, by the Full Court, that in an action against the Can. Pac. R.W. Co., service of process against the company must be affected at the company's office in Vancouver appointed pursuant to 44 Vict., c. 1, s. 9, following a former unreported decision in 1891 of *Hansen* v. *Can. Pac. R. W. Co.*

Davis, Q. C., for the company. *Wilson*, Q. C., and *Duff*, Q. C., for plaintiffs.

NOTE:—For contrary decision see *Tyler* v. *Can. Pac. R. W. Co.* (1899) 26 A. R. 467.—See also *Can. Pac. R.W. Co.* v. *Parish of Notre Dame de Bonsecours* [1899] A.C. 367.