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Mr. A. B. Aylesworth, K.C., of the Ontario Bar, has been selected to fill the place on the Alaska Boundary Commission rendered vacant by the lamented death of Mr. Justice Armour. This appointment may look forward to Mr. Aylesworth taking a seat on the Supreme Court Bench, and it would have added weight to his influence on the Commission had he occupied that position at the time of his appointment; but however that may be, the appointment is an excellent one. Next after the counsel chosen to represent Canada, Mr. Christopher Robinson, K C., no man at the Bar could be found more competent to express his views with clearness, force and felicity than Mr. Aylesworth. While regretting that such a man as Mr. Justice Armour, holding the high position he did, cannot represent us, the interests of the Dominion are safe in the hands of Mr. Aylesworth so far as his sphere of duty extends.

During Vacation the business in Chambers at Osgoode Hall, Toronto, within the jurisdiction of the Master in Chambers is required to be taken by him and the Master-in-Ordinary, the Master-in-Chambers and the Registrars of the High Court. The present Junior Registrar of the High Court is neither a solicitor nor a member of the Bar. His brother, who is an Official Referee, is also under Rule 43 competent to sit in Chambers, and also is neither a solicitor nor a barrister. Without intending any reflection on either of these gentlemen who are excellent officers in their respective departments, and with due respect to the powers that be, we cannot help thinking it is a serious mistake to empower persons having no legal training, beyond what is picked up in the public service at Osgoode Hall, to sit in a quasi judicial character.

MR. JUSTICE ARMOUR.

On the 11th instant at the residence of his son, Dr. Donald Armour, in London, England, there died one of the most striking personalities that the legal profession in Canada has produced.

Born May 4th, 1830, the son of an Anglican Clergyman in the Township of Otonabee, John Douglas Armour was head boy at Upper Canada College, Gold Medalist in Classics of Toronto University and a very successful and widely-known Counsel, although practising in a country town.

For more than a quarter of a century he was upon the Bench, being successively a puisne Judge and Chief Justice of the Queen's Bench, Chief Justice of Ontario and a Justice of the Supreme Court of Canada. At the time of his death he was one of the Canadian representatives upon the international tribunal to enquire into the Alaska Boundary.

During all this time his reputation as a jurist had steadily grown, and in recent years he was looked upon as the most eminent member of the Bench in Canada, and the feeling of the loss sustained by his country both in its highest court and in connection with the Alaska Boundary dispute will be universal.

A man of great natural ability, with a commanding presence, his profound knowledge of the principles of law, coupled with an astonishing memory for cases, and that insight into human nature and appreciation of the fitness of things called common sense, made him a great judge. He had also the gift of expressing himself in the clearest manner and in forceful language.

Rugged in mind and temperament and not over polite or particularly careful of the susceptibilities of either counsel, suitors or witnesses, and not over tolerant of other people's opinions, he sometimes gave offence; but lawyers who practised before him always knew that he was quite content that they should fight as strongly as he did; and, whatever view of a case he took, they always had the satisfaction of knowing that he understood the points that were being urged, even if he did not agree with them, or tried to cut short prolix counsel.

A hater of cant and shams and absolutely devoid of any ex cathedra airs, with a strong desire to get at the marrow of a case and a thorough contempt for legal technicalities, he nevertheless possessed certain prejudices which in the opinion of some

practitioners somewhat marred his usefulness as a judge. He was not a lover of corporations and they sometimes thought they fared badly at his hands, his views being largely in sympathy with those of what Abraham Lincoln called the common people.

He inspired strong feelings of affection among his intimate friends and amongst all great respect for his undoubted ability and the fact that he could be neither coaxed nor bullied into swerving from what he thought the right course. Canada is the poorer by his death and we can hardly see how his place can be adequately filled, either on the bench or in the important international matter which was engaging his attention at the time of his death.

Mr. Armour was called to the bar in 1853, having commenced his studies with his brother, the late Mr. Robert Armour, whose son, E. Douglas Armour, K.C., has taken a distinguished place at the bar of Ontario, and is the author of our best treatises on the law of real property. He was subsequently in the office of the Honourable P. M. M. S. Vankoughnet, afterwards Chancellor of Upper Canada. In March, 1858, he was appointed County Attorney for Northumberland and Durham. In 1867 he was made Q.C., and in 1871 elected a Bencher of the Law Society. On November 30, 1877, the Hon. Edward Blake being then Minister of Justice, Mr. Armour was appointed a Judge of the Court of Queen's Bench; becoming Chief Justice of that court ten years afterwards, on the recommendation of Sir John A. Macdonald. In July, 1900, he succeeded Sir George Burton as Chief Justice of Ontario, and in November, 1902, was called to the Supreme Court of Canada.

THE ONTARIO LORD'S DAY ACT.

The distribution of legislative power which the British North America Act makes between the Dominion and Provincial legislatures must inevitably from time to time give rise to doubt as to the precise limits of the authority of the respective parliaments. Such a doubt has arisen recently in reference to the Ontario Lord's Day Act as it now stands in the Revised Statutes of Ontario, and the question of the validity of the Act was recently submitted to the Court of Appeal.

The majority of that Court sustained the Act as it stands in R.S.O. (1897), c. 246. The late Chief Justice Armour, however

dissented from his colleagues, being of the opinion that the additions to the original Act of Upper Canada as it stood at the time confederation took effect, were ultra vires of the Ontario Legislature inasmuch as these amendments in effect dealt with criminal matters, and therefore went beyond the powers of the Provincial Legislature. This view has, it appears, been adopted by the Judicial Committee of the Privy Council, and the decision of the Ontario Court of Appeal affirming the validity of the Act in its present shape has consequently been reversed. This reversal, however we take it, can only render invalid those additions which the Ontario Legislature has from time to time made to the Act as originally passed by the former legislature of Canada prior to confederation. Assuming this to be correct the word "farmer" inserted by 59 Vict., c. 62 (O.), must be eliminated from the present R.S.O. (1897), c. 246, s. 1. Sec. 7, prohibiting Sunday excursions by steamboats or railways added by 48 Vict., c. 44, ss. 1-7, must be also stricken out; and also s. 8 against operating street railways on Sunday, which was added by 60 Vict., c. 14, s. 95.

By s. 129 of the B. N. A. Act, all existing laws in force in Canada at the time the Act came into force were continued in force in Ontario. If the additions to the Act then in force, which the Ontario Legislature had subsequently assumed to make, exceeded its powers then the statute in its original form stands, and only the assumed additions fall to the ground. The fact that the original Act was assumed to be repealed in 1877 at the first consolidation of the Ontario Statutes after confederation cannot make any difference because, according to the view of the Judicial Committee, the subject matter of the original Act being beyond the jurisdiction of the local legislature to enact, it was equally incapable of repealing it. The repeal of statutes on the consolidation of the statutes in 1877 was moreover declared to take effect only so far as the Acts and parts of Acts were within the legislative authority of the Legislature of Ontario. See R.S.O. (1887), page liii, s. 6, and ib., p. 2,271, sched. A. The operative Act would therefore now appear to be C.S.U.C., c. 104.

The vacancy in the County Court Judgeship of Haldimand, caused by the death of Judge McMillan, has been filled by the appointment of Charles Wesley Colter, K.C., of the town of Cayuga, formerly County Crown Attorney. The latter position has been filled by Mr. Murphy. An objection was taken to this appointment on the ground that he did not come within the meaning of the Act which requires that a County Attorney shall be "a Barrister-at-law of at least three years' standing at the bar." Mr. Murphy comes well within the letter of the law, but it is claimed he was not eligible by reason of his not being in active practice, occupying the position of jailer of the county. We understand that there is no objection to his fitness in other respects, and probably what he does not know he will soon learn.

The Lord Chancellor of England occasionally gets off a good thing. He recently fell foul of counsel for using the word "practical." Lord Halsbury interrupted him as follows: "'Practical?'—I always distrust that word 'practical,' whenever anybody says a thing is *practically* so and so, I know it is *not* so and so." The word "practically" has been in common use both by counsel and judges. It may possibly be less used hereafter now that the Lord Chancellor has given it a "black eye." This use of the above word brings to mind the old and curious doctrine of constructive crimes, now obsolete. In *R.* v. *Serne and Golafinch*, 16 Cox C.C. 31, Stephen, J., said "The phrase '*constructive* murder' has no legal meaning whatever. There was either wilful murder, according to the plain meaning of the term, or there was no murder at all." This remark is somewhat appropriate to the use of the word "practically." This use of such a word is of no force one way or the other, but points rather to an attempt, excusable possibly under certain circumstances from a layman's point of view, to avoid a necessary logical deduction.

The development of mobocracy known as Lynch law unhappily prevails in some civilized countries where law and order should and might be maintained by the duly constituted authorities. The conditions under which it might properly be evoked have been well portrayed by Owen Wister in "The Virginian;" for circumstances occasionally arise where the administration of that sort of justice

might be excused. One certainly cannot feel much righteous indignation at the action of some citizens in a western town who recently horsewhipped a man who had established in the centre of the residential part of their town a house of ill-fame against the expressed wishes of the people therein. The delinquent, sore in mind and body, appealed to a judge for the punishment of the lynchers, but failed to receive much comfort as that official remarked "As far as I can see the only criminal in this case is the complaining witness who has behaved in a way degrading to any one who calls himself a man and deserves more punishment than this act of just resentment on the part of the citizens." He accordingly discharged the prisoners, partly on the ground that the offence complained of by the citizens was always one hard to prove, and very generally the only possible remedy was such a one as was taken on this occasion.

Referring to the subject of Lynch law in the United States in connection with the negro question one naturally asks why there should be any more necessity for it in that country than, for example, in Jamaica where the negro population is much greater in proportion. The explanation is simple. In the latter country British justice prevails, and though this is sometimes slow, it is always sure; and there is no tampering with justice in favour of the criminal which is one of the complaints made by the press in the South. As to the horrible outrages perpetrated by those who there take the law into their own hands, it does not seem to occur to them that these acts of persecution and horror must in the natural order of things solidify and strengthen the persecuted race.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

STATUTE OF LIMITATIONS—MORTGAGE OF REVERSIONARY INTEREST IN PROCEEDS OF SALE OF LAND—COVENANT IN MORTGAGE DEED—"MONEY CHARGED ON LAND"—REAL PROPERTY LIMITATION ACT 1874 (37 & 38 VICT., C. 57) S. 8—(R.S.O. C. 133, S. 23.)

Kirkland v. *Peatfield* (1903), 1 K.B. 756, is another case following *Sulton* v. *Sutton*, 22 Ch. D. 511, and *Re Frisby* (1899), 43 Ch. D. 156, in which the English Courts have placed a different construction to that of our Ontario Courts on corresponding sections of the Real Property Limitation Act. In England, as in Ontario, the ordinary period of limitation for bringing an action on a covenant is twenty years. In England, as in Ontario, the period of limitation for bringing actions to recover money charged on land was shortened in England to twelve and in Ontario to ten years. In England it has been held that the shortened period of limitation applies to actions on covenants for the payment of money secured on land. In Ontario, on the other hand, it has been held that the shortened period merely applies to actions to recover money out of land, but not to the personal remedy on the covenant, which is still twenty years whether the money payable under the covenant be charged on land or not: see *Allan* v. *McTavish*, 2 A.R. 278; *Boice* v. *O'Loane*, 3 A.R. 167; *McMahon* v. *Spence*, 13 A.R. 430. In the present case it was contended that the previous decisions did not apply because the mortgage in which the covenant was contained was a mortgage of a reversionary interest in the proceeds of land directed to be sold, and was therefor a mortgage of personalty. Wright, J., however, held that the mortgage was in effect a mortgage of land, and that the twelve-year limitation applied, and the fact that the mortgage was of a reversionary interest made no difference.

CORPORATION—CONTRACT NOT UNDER SEAL—EXECUTED CONSIDERATION—CONTRACT TO PAY IMPLIED FROM ACCEPTANCE OF BENEFIT.

Lawford v. *The Billericay Council* (1903), 1 K.B., 772, is one of that class of cases which determines that a corporation may in

certain circumstances, be liable under a contract though not under seal. In this case the purposes for which the defendant corporation existed were such that it was necessary that work should be done and goods supplied to carry those purposes into effect, and work was done and goods supplied pursuant to the order of the corporation through its officers, and the work and goods were accepted by the corporation, and it was held by Darling, J., that the consideration was executed, and there was an implied contract on the part of the corporation to pay therefor, and the absence of a contract under seal was no answer to an action brought for the price of the work done and goods supplied.

BICYCLE—TOLL—"SLEDGE OR DRAG, OR SUCH LIKE CARRIAGE."

In *Smith* v. *Kynnersley* (1903), 1 K.B. 788, the Court of Appeal (Williams and Mathew, L.JJ.) were asked to say that a bicycle came within the category of "a sledge or drag, or such like carriage," in respect of which the defendants were entitled to charge a toll of six pence for passing over a bridge. The Court of Appeal, however, were unable to do so, and held that Wright, J., was right in saying that a bicycle was not ejusdem generis as the vehicles specified.

MARINE INSURANCE — CONSTRUCTIVE TOTAL LOSS—VALUE OF WRECK WHETHER TO BE ADDED TO COST OF REPAIR IN ESTIMATING LOSS.

Angel v. *Merchants' Marine Insurance Co.* (1903), 1 K.B. 811, was an action on a policy of marine insurance. The ship was valued at £23,000, and that sum in case of loss was to be taken to be its repaired value. The vessel was wrecked. The value of the wreck was £7,000. It was saved and repaired and the cost of the repairs amounted to £22,559. The plaintiff contended that as the difference between this sum and the £23,000 was less than £7,000, the value of the wreck, he was entitled to recover for a constructive total loss. Bingham, J., decided against this construction, and the Court of Appeal (Williams, Stirling, and Mathew, L.JJ.) dismissed an appeal from his decision. Williams, L.J., however, comes to that conclusion principally on the ground that the contention of the plaintiff was not properly taken, or supported by evidence as to the value of the wreck. Stirling, L.J., while not denying that in some cases the value of the wreck might properly be taken into account, concluded at all events

in this case it ought not; and Mathew, L.J., alone decides fairly and squarely "that in determining whether a ship can be repaired, the assured is not entitled to add the damaged value of the ship to the cost of repairs."

PRACTICE—ACTION AGAINST FIRM—EXECUTION AGAINST PERSON AS MEMBER OF A FIRM—ISSUE TO DETERMINE WHETHER ALLEGED PARTNER LIABLE TO EXECUTION—FORM OF ISSUE—RULE 648h—(ONT. RULE 228.)

In *Davis* v. *Hyman* (1903), 1 K.B. 854, the plaintiff recovered a judgment against a firm and then applied under Rule 648h (Ont. Rule 228) for leave to issue execution against a person whom he claimed to be a partner of the defendant firm; the motion being resisted, the master directed an issue to determine whether the alleged partner "was, or had held himself out as, a partner in the defendant firm." Phillimore, J., on appeal varied the form of the issue by directing it be whether the alleged partner "was at the date when the bill of exchange sued on was given, or at the date when the goods were supplied, a member of the defendant firm." The Court of Appeal (Williams, Stirling, and Mathew, L.JJ.) however, on appeal from Phillimore, J., set aside his order and restored that of the master.

SUITOR IN PERSON—COUNSEL.

Re Solicitor (1903) 1 K.B. 857, may be referred to as another instance in which the English Courts in the exercise of their discretion decline to hear a suitor in person. In this case a Mr. Trueman made a complaint of misconduct against a solicitor. Under a statute the complaint was referred for investigation and report to the Law Society. The Society reported that the charge was not made out. The statute provided that notwithstanding such a report that any person who, but for the Act, might have been entitled to apply to the Court to strike a solicitor off the rolls, may so apply, though the Law Society is of opinion that the charge is not made out. On the presentation of the report to the Court Mr. Trueman appeared in person and claimed to be heard in support of his charges, but the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.) held that the practice of the court was not to entertain applications against solicitors by suitors in person, and refused to hear him, and declined to adjourn the matter to enable him to instruct counsel.

GAMING—COMMON GAMING HOUSE—SHOP CONTAINING AUTOMATIC GAMBLING MACHINE—GAMING HOUSE ACT, 1854, (17 & 18 VICT., C. 38) S. 4—(CR. CODE, S. 196.)

In *Fielding* v. *Turner* (1903) 1 K.B. 867, a case was stated by justices. The defendant was convcited of keeping a common gaming house. The facts proved being that he kept a shop in which was kept a nickel-in-the-slot machine which was operated by persons frequenting the shop by putting a penny in the machine and pressing a spring, and according to the amount of pressure applied the money was either returned or a ticket was produced entitling the operator to two penny worth of goods sold in the shop, or the money was retained without any value being given therefor. And it was proved that men and boys had frequented the shop, and had won and lost money by means of the machine. The Divisional Court (Lord Alverstone, C.J., and Wills, and Channell, JJ.) affirmed the conviction.

LANDLORD AND TENANT—LEASE—AGREEMENT BY LESSEE TO PAY "OUTGOINGS"—ORDER BY SANITARY AUTHORITY TO RECONSTRUCT DRAINS.

Stockdale v. *Ascherberg* (1903), 1 K.B. 873, was a suit by landlord against tenant. The demise was for three years and the lessee agreed to pay all 'outgoings' during the term. During the tenancy the landlord in compliance with an order from the sanitary authority re-constructed the drains of the demised premises, and now claimed to recover the costs of so doing from the tenant, and Wright, J., held that this was an 'outgoing' within the meaning of the agreement.

COMMON CARRIER—DAMAGE TO GOODS IN COURSE OF CARRIAGE—INHERENT DEFECT IN GOODS—CARRIERS, LIABILITY OF.

In *Lister* v. *Lancashire & Yorkshire Ry.* (1903), 1 K.B. 878, the plaintiff sought to recover from the defendants as common carriers damages resulting to an engine which the plaintiff had delivered to the defendants for carriage. The engine in question was on wheels and fitted with shafts to allow it to be drawn by horses. The defendants were drawing it by their horses to their railway station, when, owing to its rotten condition (unknown both to the plaintiff and defendants), one of the shafts broke, the horses ran away and overturned the engine, occasioning the damage complained of. The County Court Judge who tried the action found

that there was no negligence on the part of the plaintiff, and that the defective condition of the shaft would not have caused the injury but for the strain put upon it by the defendants' own act, and therefore that they were liable. The Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.) were, however, able to take a more reasonable view of the case, viz.: That the engine was being drawn as the plaintiff intended it should be drawn to the defendants' station, and that the damage was caused by the inherent defect in the thing carried, and the carriers were therefore not responsible.

WILL—DEVISE OF REAL ESTATE—CONDITION THAT DEVISEE SHOULD TAKE TESTATOR'S NAME—DEATH OF DEVISEE BEFORE ESTATE FALLS INTO POSSESSION—NON-PERFORMANCE OF CONDITION.

In re Greenwood, Goodhart v. *Woodhead* (1903), 1 Ch. 749. The Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) have been unable to agree with the decision of Joyce, J., (1902), 2 Ch. 198 (noted ante vol. 38, p. 670). Property was devised in remainder to one Newsome on condition of his taking the testator's name. The tenant for life was still alive, but Newsome, the devisee in remainder, had died intestate, and had never taken the testator's name. Joyce, J., held that the devise to him failed. The Court of Appeal, however, came to the conclusion that the condition of taking the testator's name was a condition subsequent, *i.e.*, only to take effect on Newsome becoming entitled in possession, and that as he had, by the act of God, been unable to perform it, the estate would, on the death of the tenant for life, vest in his legal personal representative freed from the condition.

PRACTICE—MUNICIPAL CORPORATION—BUILDING BY-LAW—INFRINGEMENT—PARTIES—ATTORNEY-GENERAL.

Davenport v. *Tozer* (1903), 1 Ch. 759, may be briefly noticed, as the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) affirm a decision of Joyce, J., (1902), 2 Ch. 182, to the effect that an action to restrain an alleged infringement of a municipal by-law relating to building of houses fronting on the public streets of the municipality must be brought in the name of the Attorney-General, and the municipal authority alone cannot maintain the action.

COMPANY—DIRECTOR—PROSPECTUS—NON-DISCLOSURE IN PROSPECTUS OF MATERIAL CONTRACT—COMPANIES' ACT, 1867 (30 & 31 VICT., C. 131) S. 38—(2 Ed. 7, C. 15 D.)

In *Watts* v. *Bucknall* (1903), 1 Ch. 766, the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) affirmed the judgment of Byrne, J., (1902), 2 Ch. 628, noted ante p. 66.

LIEN—EQUITABLE CHARGE ON LAND—INTEREST ON CHARGE—REAL PROPERTY LIMITATION ACT 1833 (3 & 4 W. 4, C. 27) S. 40—(R.S.O. C. 133, S. 23.)

In re Drax, Saville v. *Drax* (1903) 1 Ch. 781, is a somewhat extraordinary case as instancing how long a charge on land may be kept alive notwithstanding the Statute of Limitations. In 1823, under an order of the Court, the committee of a lunatic was authorized to purchase on behalf of the lunatic a freehold estate, and the order went on to declare that the purchase money was to form "a lien on the purchased estate in trust for the lunatic, his executors and administrators." The land was accordingly purchased and conveyed to trustees for the lunatic and the conveyance declared the lien as provided by the order; both order and conveyance were silent as to interest on the purchase money. The lunatic died intestate in 1828, leaving a married sister his sole heir and next of kin. She took out administration to his estate, and died in 1853, when her husband became tenant by the curtesy of the purchased estate, and continued in enjoyment thereof till his death in 1887. After his wife's death he took out administration both to her estate and that of the lunatic. The husband's representatives now brought the action against the persons who, on his death, had become entitled to the purchased estate, to enforce the lien for the purchase money and interest. It was contended that the charge was barred by the Statute of Limitations, and that it had merged in the freehold in the lunatic's lifetime, or when his sister became entitled, and that, in any case, no interest was chargeable because both the order and conveyance were silent as to interest. Joyce, J., who tried the action, refused to give effect to any of these contentions. As regards the question of merger he held that it was clear from the order that it was intended to create a charge in favour of the persons who should become entitled to the lunatic's personal estate as against those on whom the reality should devolve, and that there was therefore no merger in the life

of the lunatic, that on his death the charge vested in his sister as administratrix of his estate until her death, and then in her husband as administrator, de bonis non of the lunatic, that in both cases the charge and the right to the enjoyment of the freehold were held in different rights and there was therefore no merger. He also held that interest was chargeable though nothing was said about it, and that as the hand to pay was also the hand to receive the interest during the husband's possession, that prevented the statute from running against the charge, which was therefore held to be enforceable with interest from the date of the husband's death, notwithstanding the lapse of 79 years from the date of its creation, and with this conclusion the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) agreed.

LANDLORD AND TENANT—LEASE—COVENANT FOR QUIET ENJOYMENT—ASSIGNMENT OF REVERSION—SUBSEQUENT PURCHASE OF ADJOINING PROPERTY BY ASSIGNEE OF LESSOR—BREACH OF COVENANT.

Davis v. *Town Properties Corporation* (1902), 1 Ch. 797, is one of those cases which illustrate the temerity of suitors or their advisers. The defendants were assignees of the reversion of a lease, which contained a covenant for quiet enjoyment on the part of the lessor and his assigns. While owners of the reversion, the defendants purchased adjoining property on which they erected buildings alleged by the plaintiff (the lessee) to be a breach of the covenant for quiet enjoyment in the lease. Byrne, J., held that this was no breach of the covenant (1902), 2 Ch., 635 (noted ante p. 100) and the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) agree with him.

LANDLORD AND TENANT—COVENANT TO YIELD UP PREMISES—CONSTRUCTION—TRADE FIXTURES—GENERAL WORDS—EJUSDEM GENERIS

In *Lambourn* v. *McLellan* (1903), 1 Ch. 806, the point to be decided was whether a covenant by a tenant to yield up the demised premises on the determination of the term, "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stones, marble and other chimney pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, poles, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures and things which there were, or at any time during the term, should be fixed, fastened, or belong

to the demised premises or any part thereof"—included tenant's fixtures used in carrying on the tenant's business as a boot and shoe manufacturer. Kekewich, J., held that it did, by reason of the general words used therein.

CONFLICT OF LAWS—BRITISH SUBJECT DYING ABROAD—DOMICIL AS AFFECTING SUCCESSION TO MOVEABLES.

In re Johnson, Roberts v. *The Attorney-General* (1903), 1 Ch. 821, a British subject whose domicil of origin was Malta, subsequently acquired a domicil of choice in the Grand Duchy of Baden, where she died, leaving a will which, however, did not effectually dispose of all her personal property, some of which was in England and some in Baden. By the law of Germany no attention is paid to domicil in the distribution of moveables of a foreigner dying in Baden who had not been naturalized, but the same are distributable according to the law of the country of which the deceased was a subject. But the law of the British Empire not being uniform, the question arose whether the law of England or the law of Malta applied. Farwell, J., came to the conclusion that the law of the domicil of origin of the testatrix applied and therefore that the undisposed of residue of personalty devolved on the persons entitled according to the law of Malta.

MERGER—LEASE—MORTGAGE BY UNDER LEASE—SUBSEQUENT PURCHASE OF FEE BY LESSEE.

In *Capital & Counties Bank* v. *Rhodes* (1903), 1 Ch. 631, the principal question discussed was whether a term had merged in a reversion in fee which had been conveyed to the lessee after he had mortgaged the term by way of under lease. The Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) held that there was no merger. The facts of the case were somewhat complicated, but appear to have been briefly, as follows: Rhodes was lessee of a term of 99 years, which he mortgaged to one Flower by way of under lease. Rhodes then purchased the reversion in fee which was conveyed to him and he then reconveyed the estate and the reversion in the under lease to the plaintiffs by way of mortgage to secure part of the purchase money. The mortgage having fallen into default, the plaintiffs demanded the rent payable under the lease of Flower, which, being refused, they brought the action to enforce the security by foreclosure or sale, and for recovery of pos-

session, as against both Rhodes and Flower. Kekewich, J., held that the plaintiffs claimed under Rhodes, and that as Rhodes could not by purchasing the reversion, defeat his security to Flower, so neither could the plaintiffs enforce their security as against Flower. The Court of Appeal, however, decided that as the lease was not merged but still subsisting, the plaintiffs as mortgagees of the reversion of the under lease were entitled to recover possession as against both Rhodes and Flower, and were entitled to enforce their security as against both of them. The case is also deserving of attention for the discussion it contains as to the effect of registration under the English Land Transfer Act.

EASEMENT—IMPLIED GRANT—DEROGATION FROM GRANT—LIGHT—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., C. 41) S. 6, SUB-S. 2—(R.S.O. C. 119, S. 12).

Quicke v. *Chapman* (1903), 1 Ch. 659, was an action to restrain the defendant from interfering with the access of light to the plaintiff's house. The defendant was a builder and had entered into a building agreement whereby he agreed to build a house on land, and after it was built he was to be entitled to a lease of the land on which it was erected. The lease was to be in a specified form and to contain a provision declaring that the lessors should have power to erect buildings on the adjoining land whether they affected the light enjoyed by the lessee or not. The defendant built the house and obtained a lease therefor in the specified form, and subsequently sold the house and transferred the lease to the plaintiff. He afterwards, under the same agreement, erected on the adjoining lot another house which when completed obstructed the plaintiff's lights. It was expressly provided by the building agreement that nothing therein contained should operate as an actual demise of the land to the defendant, and the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) held, overruling Kekewich, J., that at the time when the defendant transferred the lease of the plaintiff's house he had not, under the building agreement, such an interest in the adjoining lot as would enable him to make an express grant of an easement of light over it, and that consequently no such grant could be implied, and that the provisions of s. 6, sub-s. 2 of the Conveyancing Act, 1881, (R.S.O. c. 119, s. 12), that a conveyance of land with houses shall operate to convey (inter alia) all lights appertaining to the land as enjoyed therewith

applies only to such lights as the grantor could by express words convey, and does not operate to convey an easement of light which he has no power to grant expressly.

COMPANY—WINDING UP—CONTRIBUTORY—FULLY PAID SHARES—GIFT OF SHARES—ULTRA VIRES.

In re Innes & Co. (1903), 1 Ch. 674, was an application by a liquidator of a joint stock company against the directors for a declaration that they were liable as contributories in respect of certain shares allotted to them as fully paid up, but without consideration. The company was formed by six ship owners for the purpose of buying certain patent rights, and for carrying on the business of working them. It was agreed that the purchase price to be paid to the patentees should be £6,000, half to be paid in cash, and the balance in shares; that the capital should consist of £25,000, divided into 2,500 shares of £10 each, which was to be distributed as follows: The six ship owners were to take 50 shares a piece for raising £3,000 to be paid to the vendors; 320 shares were to be allotted to the vendors for the balance of their purchase money. Each of the six ship owners were to take 300 fully paid shares for his own benefit and 100 shares were to be placed in the joint names of three of the ship owners who were directors of the company to be applied in rewarding persons who should bring business to the company. The company was incorporated, the only shareholders being the vendors and the six ship owners, and in order to carry out the arrangement above referred to an agreement was entered into between the vendors and the six ship owners whereby the vendors purported to sell the business and patent rights to the company for £25,000, as to £3,000 in cash, and as to £22,000 by the allottment to the vendors or their nominees of 2,200 fully paid shares, and this agreement was duly registered. The shares were allotted on the nomination of the vendors in accordance with the original agreement, and it was held by Kekewich, J., that the agreement between the company and the vendors was a sham, and that the shares were allotted not in pursuance of that agreement, but under the prior agreement between the vendors and the six ship owners, and that the allottment of the 1,900 shares was made without consideration, and the allottees were liable for the full amount of the shares allotted to them respectively.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] THE KING *v.* GOSSELIN. [April 20.

Criminal law—Evidence—Husband and wife—Competency of witness—"Communication"—Construction of statute—Privilege—Directions by legal adviser—Practice—Reference to Hansard debates—Method of interpretation.

Under the provisions of the Canada Evidence Act, 1893, the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused, but may also be compelled to testify. MILLS, J., dissenting.

Evidence by the wife of the person accused of acts performed by her under directions of his counsel, sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. MILLS, J., dissenting.

Per GIROUARD, J., dissenting: The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be de verbo, de facto or de corpore. Sexual intercourse is such a communication and in the case under appeal neither the evidence by the accused that blood-stains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition ought to have been received.

Per MILLS, J., dissenting: Under the provisions of the Canada Evidence Act, 1893, and its amendments, the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.

Per TASCHEREAU, C.J.; The report of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute.

Appeal dismissed with costs.

Gibsone and *E. Roy*, for appellant. *Cannon*, K.C., for respondent.

Que.] ST. LAURENT *v.* MERCIER. [April 29.

Mining law—Overlapping claim—Renewal of application—Re-staking.

In August, 1899, M. staked and received a grant for a placer claim which included part of an existing creek claim staked previously by W.

In 1900 M. applied for and obtained a renewal of his license embracing the identical ground staked by him in the previous year, and at the time such renewal was applied for W,'s creek claim had lapsed. In March, 1901, S. staked a bench claim embracing the lands in W.'s expired location, which had been overlapsed by M.'s claim, as being unoccupied Crown land.

Held, affirming the judgment appealed from, DAVIES and ARMOUR, JJ., dissenting, that although M.'s original staking of the ground in dispute was invalid, yet as W.'s claim had lapsed at the time of the application for a renewal grant in 1900, M. having been continuously in possession of the whole location as staked by him, his stakes still standing and the limits of his area well known, his application for the renewal gave him a valid entry without the formalities of re-staking and applying anew for the original area located by him, and, following the rule laid down in *Osborne* v. *Morgan*, 13 App. Cas. 227, S. could not interfere with M.'s possession.

Appeal dismissed with costs.

Lorne McDougall, for appellant. *J. A. Ritchie*, for respondent.

[April 29, June 8.

IN RE REPRESENTATION OF THE HOUSE OF COMMONS.

Constitutional law—B. N. A. Act, 1867, s. 51—Aggregate population of Canada.

In determining the number of representatives to which Ontario, Nova Scotia and New Brunswick are respectively entitled after each decennial census the words "aggregate population of Canada" in sub-s. 4 of s. 51 of the B.N.A., 1867, mean the whole population of Canada, including that of provinces which have been admitted subsequent to the passing of the Act.

Prince Edward Island on admission to the union became subject to the provisions of s. 51, and its representation is liable to be re adjusted thereunder after each census.

Æmilius Irving, K.C., for Ontario. *Pugsley*, K.C., and *Allen*, K.C., for New Brunswick. *Longley*, K.C., and *McDonald*, for Nova Scotia. *Cannon*, K.C., for Quebec. *Fitzpatrick*, K.C., and *Newcombe*, K.C., for the Dominion. *Aylesworth*, K.C., *Peters*, K.C., and *Williams*, for Prince Edward Island.

N.S.] LOVITT *v.* ATTORNEY-GENERAL OF NOVA SCOTIA. [May 5.

Succession duties—Property exempt—Sale under will—Duty on proceeds.

Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L., by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted

into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death and the Attorney-General claimed succession duty on the whole estate.

Held, affirming the judgment appealed against (35 N.S. Rep. 223), SEDGEWICK and MILLS, JJ., dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were.

Appeal dismissed with costs.

W. B. A. Ritchie, K.C., for appellant. *A. A. Mackay*, for respondent.

Ont.] OTTAWA *v.* CANADA ATLANTIC R.W. Co. [May 5.
OTTAWA *v.* MONTREAL AND OTTAWA R.W. Co.

Railway—Highway crossing—Compensation to municipality—Terminus "at or near" point named.

Authority to a company to build a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road. A charter authorized construction of a railway from Vaudreuil to a point at or near Ottawa passing through the counties of Vaudreuil, Prescott and Russell.

Held, that if it were necessary the railway could pass through Carlton County though it was not named.

Held, also, that in this Act the words "at or near the City of Ottawa" meant "in or near" said city.

Judgment of the Court of Appeal (4 O.L.R. 56) affirming the judgment at the trial (2 O.L.R. 336) affirmed.

Appeal dismissed with costs.

Aylesworth, K.C., and *McVeity*, for appellant. *Chrysler*, K.C., and *Nesbitt*, K.C., and *Curle* for respondents.

N.S.] BENTLEY *v.* PEPPARD. [June 2.

Title to land—Possession—Statute of Limitations.

In 1822 M. obtained a grant of land from the Crown and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years when he removed to a place a few miles distant after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896 the descendants of the younger children of M. gave a deed of this land to B., who proceeded to cut timber from it. In an action of trespass by P.,

Held, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870 which had ripened into a title. If not the deed to his sons in 1870 gave them exclusive possession and if they had not a perfect title then they had twenty years after in 1890.

Appeal dismissed with costs.

Roscoe, K.C.. for appellant. *Borden*, K.C., and *Gourley*, K.C., for respondent.

N.S.] PORTER *v.* PELTON. [June 2.

Contract under seal—Undisclosed principal—Partnership—Amendment.

P. sold mining areas and was paid part of the price. The purchaser signed an agreement under seal that he would organize a company to work the areas and give P. stock for the balance at the market price. H. organized a company which received a deed of the land and did some work, but finally ceased operations. Only a small part of the stock was sold and none was given to P. who took action against the purchaser, H. claiming that the latter was a partner of the purchaser and that the agreement was signed on behalf of both. The purchaser did not defend the action.

Held, that no action could lie against H. on the agreement under seal not signed by him even if it was for his benefit and a seal was not necessary.

The Court refused to interfere with the discretion of the Court below in refusing an amendment to the statement of claim.

Appeal dismissed with costs.

Russell, K.C., and *Wade*, K.C., for appellant. *Newcombe*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

From Falconbridge, C.J.K.B.] [June 20, 1901.

BALFOUR *v.* TORONTO RAILWAY CO.

Street railways—Negligence—Car running backwards—Jury—Answers to questions.

The plaintiff was injured by a waggon in which he was being driven being struck by an electric car of the defendants which was running backwards in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the

northerly end of the car and no special precautions were being observed. The jury were asked, by the judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed ;

Held, that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded and was not merely a specific finding in answer to a question.

Per ARMOUR, C.J.O.—Questions to the jury must be in writing.

Per OSLER, J.A.—While it is more convenient that questions to the jury should be in writing, the judge is not bound to adopt that course.

Judgment of Falconbridge, C.J., affirmed.

Jas. Bicknell, for appellants. *McGregor* and *East*, for respondents.

From Divisional Court.] [April 14.

IN RE CARTRIGHT PUBLIC SCHOOL TRUSTEES AND TOWNSHIP OF CARTWRIGHT.

Public schools—Selection of school site—Trustees—Ratepayers difference—Award—Invalidy—Mandamus—Estoppell.

By s. 31 of the Public Schools Act, R.S.O., 1897, c. 292, the trustees of every rural school section shall have power to select a site for a new school house or to agree upon the change of sight for an existing school house, and shall forthwith call a special meeting of the rate-payers of the section to consider the site selected. By sub-s. 2, in case a majority of the rate-payers present at such special meeting differ as to the suitability of the sight selected by the trustees, each party shall choose an arbitrator, etc.

Held, that it is only in case of a difference between the trustees, on the one hand, and a majority of the rate-payers at a special meeting, on the other hand, as to a school site *selected* by the trustees, that an arbitration is to be had.

And where a majority of the rate-payers at a special meeting voted in favour of a change of school site, without any selection of site having been made first by the the trustees ;

Held, that there was no foundation for an arbitration, and that an award made by arbitrators appointed in the manner perscribed by sub-s. 2, whether such award was or was not valid on its face, was an absolute void proceeding, and no answer to a motion by the trustees for a mandamus to the township corporation requiring them to pass a by-law for the issue of debentures to provide funds for the purchase of a school site and the erection of a school house, in pursuance of the vote of the rate-payers.

Quære, whether the award was valid on its face, inasmuch it did not shew a difference between the trustees and the rate-payers.

Held, also that there could be no estoppel against the applicants, or waiver of the public right.

Judgment of Divisional Court, 4 O.L.R. 272, affirmed.

Aylesworth, K.C., for appellants. *Riddell*, K.C., for respondents.

C. C. R.] REX *v.* KARN. [April, 14.

Criminal law—Advertising medicine intended to prevent conception—Evidence to support conviction—Functions of judge and jury—Acquittal—New trial—Crown case reserved—Appeal.

The defendant was tried upon an indictment for that he did unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise, and have for sale, a certain medicine, drug, or article, described, intended, or represented as a means of preventing conception, or causing abortion or miscarriage, contrary to the Criminal Code, s. 179 (c).

The evidence for the Crown shewed that the defendant conducted a large business in various proprietory medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the defendant and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets; and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved. In the "directions" there was this statement: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets."

The judge at the trial directed an acquittal, reserving a case for the Crown upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned.

Held, that the jury could have legitimately inferred from the language used that the tablets were thereby represented as a means of preventing conception, and therefore it would have been right to have left the case to the jury; and a conviction might have been supported. It is for the judge to determine whether a document is capable of bearing the meaning assigned to it, and for the jury to say whether, under the circumstances, it has that meaning or not. The Court declined to direct a new trial.

Per OSLER, J.A., Where there has been an acquittal, the trial judge should leave the prosecutor to apply for leave to appeal, rather than reserve a case.

Cartwright, K.C., for the Crown. *Du Vernet* for defendant.

C. C. R.] REX *v.* JAMES. [April 14

Criminal law—Keeping common gaming houses—"Gain"—Payment for refreshments—Profit—Misdirection—Acquittal of defendant—Crown case reserved—New trial.

The defendant was indicted for keeping a common gaming house, contrary to ss. 196 (a) and 198 of Criminal Code. The former defines a common gaming as a house, room, or place kept by any person for gain to which persons resort for the purpose of playing at any game of chance. The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing "poker". Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of the room. The "rake-off" did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night's play.

Held, that "gain" may be derived indirectly as well as directly; that by what the defendant allowed be done in the room mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, and so he might be found to have kept the room for gain, though the gain was confined to the profits on cigars which he sold to the players. The question of what is a keeping for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players.

The direction of the Judge at the trial to the jury, upon which the defendant was acquitted, was found to be wrong, upon a case reserved for the Crown, but the Court declined to order a new trial.

Per OSLER, J.A.: A case should not be reserved at the instance of the prosecutor after an acquittal.

Cartwright, K.C., for the Crown. *Robinette*, K.C., for defendant

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C. C. R.] REX. *v.* WOODS. [April 14.

Criminal law—Bigamy—Defence—Dissolution of former marriage—Decree of foreign court—Validity—Domicile.

Upon an indictment of the defendant for bigamy the defence was that she had been divorced from her husband by the decree of a foreign court.

Held, that the marriage being a Canadian one, and the domicile of both parties being in Canada, and not having been changed, although they both resided for a short time in the foreign country previous to the making of the decree, the marriage was not dissolved, and the defence failed.

Magurn v. *Magurn*, 3 O.R. 570, 11 A.R., 178, and *Lemesurier* v. *Lemesurier*, (1895) A.C. 517, followed.

Per OSLER, J.A.—The Court of Appeal should not be asked, by a reserved case, to solve questions in which the validity of a conviction does not necessarily depend.

Robinette, K.C., for the prisoner. *Cartwright*, K.C., for the Crown.

Britton, J.] RE THE ONTARIO POWER CO. AND HEWSON. [May 11.

Statute law—Incorporating company—"Works for the general benefit of Canada"—Objects of company—Recital in preamble—Construction of Act—Expropriation of land.

A company was incorporated by a Dominion statute which recited that "it is desirable for the general advantage of Canada that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland Rivers with the object of promoting manufacturing industries and inducing the establishment of manufacturies in Canada and other businesses" and "that the contemplated works (by the Act) will interfere with the navigation of the Welland River."

The Act gave power to the company "to construct and operate a canal and hydraulic tunnel from a point in the Welland River to a point in the Niagara River; to contract with any bridge company having a bridge across the Niagara River to carry wires across and connect them with any electric light or other company in the United States; and make certain sections of the Railway Act (then R.S.C., c. 109) applicable to the same as if specially set out as well as R.S.C., c. 92, relating to works in navigable waters.

Held, 1. Considering the object of the Act, the subject matter dealt with, how the corporate powers were to be exercised it was not necessary that there should be an express declaration by the Parliament of Canada that the works were for the general advantage of Canada. But,

2. Even if it were necessary that there should be such a declaration the preamble in the Act stating that it was for the general advantage of Canada, that the natural water supply of the Niagara and Welland Rivers should be utilized for factories and "businesses" in Canada; that a company should be formed to utilize that water; and the company being created the works so to be made are declared to be for the general advantage of Canada, the preamble shews the intention of Parliament to give the power, the reason why, and that reason is a parliamentary declaration.

3. The Act giving the company the powers of a railway gave the power to expropriate lands.

Subsequent legislation considered.

Walter Cassels, K.C., and *F. W. Hill*, for the company. *H. S. Osler*, K.C., for the landowner.

HIGH COURT OF JUSTICE.

Britton, J.] TAGGART *v.* BENNETT [May, 11.

Interlocutory order — Varying minutes—Con. Rule 625, sub.-s. 2—Appeal—County Judge certifying papers.

An order by County Court Judge dismissing an application to vary minutes under Con. Rule 625, sub.-s. 2, is an interlocutory and not a final order.

But, the fact that there may be no appeal from such an order is no reason why the judge should not certify the papers, the question whether or not there is an appeal from such an order is for the Court appealed to, and such certificate should as a rule be given upon request: the judges duty being ministerial only.

Bartram, for the motion. *Flock*, for the judge.

Master in Chambers.] [June 6.

JOHNSTON *v.* LONDON AND PARIS EXCHANGE.

Evidence—Discovery—Production—Action for penalties.

It is improper in an action to recover penalties under the Extra Provincial Corporations Act, 63 Vict., c. 24 (O.), to issue the usual pracipe order for production of documents by the defendants. Such an order having been issued it was held that the defendants were not bound to file an affidavit and claim privilege, but were entitled to have the order set aside.

George Bell, for plaintiff. *Beaumont*, for defendants.

Trial of actions—Street, J.] [June 20.

McMILLAN *v.* ORILLIA EXPORT LUMBER CO.

Chose in action—Assignment of—Notice to debtor—Judicature Act—Sufficiency of.

One Hurdle to whom defendants owed $184.98, being $124.80 for oak lumber, and $60.13 for basswood lumber, assigned his claim to the plaintiff. The only notice which plaintiff gave the defendants of this assignment stated that he had an order from Hurdle for the amount due, in respect to a purchase of oak lumber bought by the defendants' agent. At the same time an account of Hurdle's against the defendants in the matter went to shew that as above stated only $124.80 was due for oak lumber, while the balance, $60.13, was for basswood lumber. The plaintiff drew on the defendants for the amount and defendants refused to accept the draft on the ground that they had no order from Hurdle to pay the $184.93. Thereupon the present action was brought.

Held, that though there was sufficient to put defendants upon inquiry in the notice they received, as to an assignment to plaintiff of the money due by them to Hurdle, yet it was not sufficiently clear and express to entitle plaintiff to sue under the section of the Judicature Act relating to assignments of choses in action, being ambiguous enough to justify them in asking plaintiff whether the assignment covered the oak lumber only or the basswood as well as the oak.

The statute requires the notice to be express notice in writing, and there should be nothing equivocable about it, nothing to put the debtor in doubt whether the whole debt or only a part of it has been assigned. The notice here fell short of this requirement.

Titus, for plaintiff.

Falconbridge, C.J., Street, J., Britton, J.] [June 27.

LINTS *v.* LINTS.

Benefit society—Altering beneficiary — Privileged beneficiary — Statutory restrictions.

The application for a benefit certificate in the Independent Order of Foresters designated in his application which was expressly made part of the certificate, his mother as his beneficiary, adding however the following qualification, "reserving to myself the power of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the order." Some years afterwards the insured made application under the rules of the order to change the beneficiary from his mother to a woman who was living with him as his wife but was not married to him. This was permissible under the rules of the order, but not under the provision of R.S.O. 1897. c. 203, s. 151, sub-s. 3, inasmuch as the intended transferee was not a privileged beneficiary within the statute, which forbids the diversion of a benefit from a beneficiary of the privileged class, such as the insured's mother, to a beneficiary not belonging to that class.

Held, that notwithstanding the original designation of beneficiary was declared to be subject to the by-laws of the society, which in effect made the designation revocable, the power to revoke the designation and divert the benefit to another, could be exercised only within the limits laid down by the statute.

Warren, for plaintiff. *R. U. Macpherson*, for defendant.

Street, J., Britton, J.] STEWART *v.* GUIBORD. [June 29.

Action on foreign judgments—Declaratory judgment—Consequential relief —Claim against Government—Statute of limitations.

Appeal from judgment of MEREDITH, C.J. The plaintiff claimed against the defendant, Lallemand, upon certain judgments recovered in

Quebec of which judgments he was assignee. He also asked a declaration that a certain claim against the Dominion Government held by the other defendant, Guibord, was held by him merely as trustee for Lallemand, and that the latter was the true beneficial owner of it.

Held, 1. Inasmuch as the plaintiff suing in this province on the Quebec judgments was only in the position of a simple contract creditor, —and not of a judgment creditor,—he was not entitled to the declaration asked because the reasons which prevent the owner of a mere simple contract debt not reduced to judgment from taking garnishee proceedings or proceedings for equitable execution, prevent his having any locus standi to obtain the preliminary relief of a declaration that the debt which he desires to seize is due to his debtor. Moreover, the claim as to which the declaration was sought being against the Government, no consequential relief was or could be asked, and this being so, the authorities seem clearly against the right of the plaintiff to obtain a mere declaration.

2. Though the Quebec judgments were recovered on October 10th, 1893, and this action not begun till May 29th, 1902, and being in this province merely simple contract debts, the judgments would, under ordinary circumstances, be barred at the end of six years, yet, since at the time of recovery of judgment, Lallemand was domiciled and resident in Quebec, and had never been in this Province since then, the plaintiff's remedy on them was saved by R.S.O. 1897, c. 324, s. 40.

Glyn Osler, for plaintiff. *Middleton*, for defendants.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] GOULD *v.* BRITT. [Feb. 20.

Practice — Security for costs — Plaintiff resident out of the jurisdiction — Plaintiff a judgment creditor of the defendant.

Where plaintiff, a resident out of the jurisdiction, had a judgment in the St. John County Court against the defendant for $67.75, which was defeated by certain conveyances made by the defendant, brought a suit to have the same set aside as fraudulent and void, he was ordered to give security for costs.

G. H. V. Belyea, for plaintiff. *J. J. Porter*, for defendant.

Barker, J.] CUSHING SULPHIDE CO. *v.* CUSHING. [May 24.

Practice — Discovery of documents — Identification — Description in affidavit.

Where discovery of documents is made, it is not enough to make them

up in sealed bundles marked A and B, but the documents must be identified by a mark or number and so described in the affidavit.

Pugsley, K.C., and *Barnhill*, for the defendant. *A. H. Harrington*, K.C., for the plaintiffs.

Barker, J.] [June 18.

CUSHING SULPHITE FIBRE CO. *v.* CUSHING (No. 3).

Practice—Discovery—Non-materiality—Production.

Where discovery, as distinguished from production for the purpose of inspection, of documents is sought, an affidavit of such document must be given, though their production when applied for could be successfully opposed on the ground of immateriality.

A. H. Harrington, K.C., for the application. *Pugsley*, K.C., (*L. A. Currey*, K.C., and *Barnhill*, with him) contra.

Barker, J.] [June 18.

CUSHING SULPHITE FIBRE CO. *v.* CUSHING (No. 4).

Practice—Production of documents abroad—Inspection.

Documents within the jurisdiction of the court will not be ordered to be produced before a commissioner for taking evidence abroad, except in very special circumstances.

Where inspection of documents had been given by consent an application to the court for further inspection was granted, and the court declined to give effect as too technical to an objection that a demand in writing for inspection had not been made prior to the application to the court.

Pugsley, K.C., (*L. A. Currey*, K.C., and *A. P. Barnhill* with him) for application. *A. H. Harrington*, K.C., contra.

Barker, J.] FAIRWEATHER *v.* ROBERTSON.

Easement—Right of way—Agreement—Evidence—User.

Plaintiff claimed a right of way over a private road of several hundred feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised in part by defendant's land, sold by defendant's predecessor in title B. under a conveyance reserving to the grantees the use in common of the road. The evidence of plaintiff's predecessor in title K. was that shortly after the sale of these lots, he moved back on his land his farm house and fence to widen the entrance of the private road at its junction with the highway under an agreement with B., consumed in, as he believed, by the owner of the lot that he, K.,

should have for so doing a right of way with them over the road. B. denied that an agreement was concluded, or that the matter ever proceeded beyond negotiation, and his evidence was corroborated by H., a former owner of the lots, and by drafts of an agreement containing alterations indicating that the parties were merely in treaty and providing for the maintenance of the road by K. in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K. of the part of his land to be used for widening the entrance. This conveyance was never made, and the land was included in the conveyance from K. to the plaintiff. The road had been used from the time of the alleged agreement by K. and plaintiff in connection with the farm house until it is torn down, situate about two hundred feet from the public highway, and the plaintiff had used, but not without interruption, the road for about 15 years for a considerable part of its length shortly after the date of the alleged agreement, fences with gates, crossing the road at separate points were erected by H. without objection by K.

Held, that plaintiff's bill for an injunction to restrain defendant from obstructing plaintiff in the use of the road should be dismissed.

C. J. Coster, for plaintiff. *A. H. Hannington*, K.C., and *M. G. Teed*, K.C., for defendant Robertson. *A. O. Earle*, K.C., for defendant Lloyd.

Province of Nova Scotia.

SUPREME COURT.

Full Court]. BROWN *v.* DOOLEY. [April 7.

Partition—Defence of Statute of limitations—Not available to persons acting in fiduciary capacity.

An action for partition of land was resisted by the heirs, etc., of D. on the ground that she had acquired title by exclusive possession against the other tenants in common. The trial judge found and the evidence supported such finding that D. acted throughout in a fiduciary capacity as administratrix for the benefit of her father's estate and those interested in it.

Held, 1. It was not open to a person in the position of D. to avail herself of the Statute of limitations.

2. As plaintiffs believed D. was acting within her rights as administratrix there was nothing in their conduct that would operate as a bar to the relief sought on the ground of acquiescence.

3. The acts of D. which were relied upon as giving her an exclusive title were perfectly consistent with the rights of plaintiffs as tenants in common.

W. B. A. Ritchie, K.C., for appellants. *H McInnes*, *T. S. Rogers*, and *C. J. Burchell*, for respondents.

Full Court.] CAMPBELL *v.* DICKIE. [April 11.

Conveying logs down river—Injury to riparian proprietor—Plea of vis major—Misdirection.

In an action claiming damages for injuries occasioned to plaintiff's land by logs which defendant had neglected to confine within his boom and which were suffered to be driven up and down stream by the tide, the trial judge instructed the jury that in assessing damages they were not restricted to the actual damage referred to in the statute (R.S.N.S., c. 95, s. 17), but at the same time the amount allowed ought to be reasonable.

Held, that the jury should have been told at the same time that the actual damage was as a rule the measure in common law actions of this kind; but as the amount awarded by the jury was small and as there was evidence to support it, the misdirection, if any, occasioned no substantial wrong or miscarriage and was therefore within O. XXXVII., r. 6.

Quære, whether defendant could escape liability by employing a contractor to bring down his logs, when, in the ordinary course of things, they would necessarily come in contact with plaintiff's land.

Semble, that he could not.

In respect to a portion of the damage done defendant relied upon a plea of vis major.

Held, 1. This was not a defence unless defendant could show that the damage would equally have happened if he had done his duty.

2. In this case the excuse was insufficient, a larger quantity of logs having been brought down the stream in the expectation that before the high tides came a sufficient quantity could be sawed to enable the remainder to be confined within the boom, and the high tides having occurred two or three days earlier than defendant expected, as the result of which the logs not confined in the boom were carried up the stream and stranded on plaintiff's land.

R. E. Harris, K.C., and *H. McKenzie*, for appellant. *F. A. Lawrence*, K.C., and *Robertson*, for respondents.

Full Court.] MCKAY *v.* CAMPBELL. [April 11.

Collections Act—Disqualification of commissioner—Prohibition will not lie.

Plaintiff who had recovered a judgment against defendant in the Supreme Court initiated proceedings under the Collections Act, R.S.N.S.,

c. 182, for the examination of defendant before D., a commissioner. Defendant's solicitor appeared before D. and objected to his proceeding with the examination on the ground that as solicitor for another creditor of defendant he had such an interest in the result of the examination as to disqualify him from acting. Subsequently a writ of prohibition was issued from the Supreme Court to restrain D. from acting or proceeding with the examination. On appeal from the order allowing the writ,

Held, affirming the order of the judge in this particular that D. was disqualified. But that as a commissioner acting under the provisions of the Collections Act does not constitute a distinct court the writ was improperly allowed, and that for this reason the appeal must prevail, but without costs.

W. W. Fulton, for appellant. *T. R. Robertson*, for respondent.

Full Court.] BOORSTEIN *v.* MOFFATT. [April 11.

Statute of frauds—Promise to be answerable for the debt of another—Form of action—Pleading.

In an action against defendants, M. and G., for work done and materials provided by plaintiff for defendants, at defendants' request, the evidence shewed that the defendant, G., entered into a contract with the defendant, M., for the building of a house and that the defendant, M., employed plaintiff to do the work of painting and glazing. M. failed to make payments to plaintiff as agreed and plaintiff thereupon went to G. who told him to go ahead and he would see him paid.

Held, 1. As there was no evidence to shew that the defendant, M., was to be discharged, the promise made by the defendant, G., was within the 4th section of the Statute of Frauds, and, not having been made in writing, could not be enforced.

2. In view of the form of action there was no necessity for pleading the statute, and that M. having offered no defence, judgment was rightly given in favour of defendant, G.

J. A. Chisholm, for appellant.

Full Court.] LEFURGEY *v.* HARRINGTON. [April 11.

Statute of Limitations—Amount credited by sheriff on execution—Held not a payment by or on behalf of debtor—Ex parte order for execution—Held to confer no new right—Necessity for notice.

At a sale of lands under execution the lands sold were bid in by the judgment creditor and the amount of the bid credited on the execution by the sheriff on account of the judgment debt.

Held, 1. This was not a payment by or on behalf of the debtor to take the case out of the statute of limitations.

2. An order for the issue of a writ of execution made by a judge of the court, ex parte, during the currency of the period of twenty years from the recovery of the judgment, the judgment debtor having died out of the province intestate, and no administrators having been appointed, conferred no new right upon defendant sufficient to keep the judgment alive and unbarred by the statute.

3. To obtain a new right against anyone defendant must have given notice, which he could have done either by applying as a creditor to have administrators appointed or by notifying the heirs.

H. McInnes, K.C., for plaintiff. *W. B. A. Ritchie*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Killam, C.J.] REX *v.* RIDEHAUGH. [May 5.

Criminal Code, ss. 785, 786—Summary trials of indictable offences—Common assault—Magistrate's clerk addressing the accused for the magistrate—Habeas corpus—Amending conviction.

Application for a habeas corpus for discharge of prisoner sentenced by the police magistrate of the City of Winnipeg to one year's imprisonment for common assault. The principal objections to the proceedings were as follows: That the magistrate had no jurisdiction to impose more than two month's imprisonment under s. 265 of the Criminal Code; that, before proceeding to summarily try the prisoner under s. 786 of the Code, the magistrate had not personally addressed her in the words prescribed by that section or informed her that she had a right to elect to be tried by a jury; and that the warrant of commitment was defective in containing the figures "1902" instead of "1903," and the word "him" instead of "her."

Held, 1. Sec. 785 of the Code, as re-enacted by 63 & 64 Vict., c. 46, gives to the police magistrate of a city power to impose the same punishment for a common assault as could be imposed upon a person convicted on an indictment.

2. The magistrate may ask the question provided for by s. 786 of the Code through the mouth of his clerk.

3. The errors in the warrant of commitment were not sufficient ground for the issue of a habeas corpus since a new and correct warrant might be substituted.

Application dismissed.

Patterson, for the Crown. *Bonnar*, for prisoner

Full Court.] MILLER *v.* CAMPBELL. [May 23.

Injunction—Damage to building caused by blasting operations on adjoining land—Evidence in reply going to strengthen the original case—Non-disclosure of material facts on application for injunction—Offer to accept bond to secure damages, effect of—Costs.

Appeal from an order for an interlocutory injunction at the suit of the owners of a substantial and valuable building restraining the defendant Alsip, the contractor employed by the other defendants who were engaged in the erection of a warehouse on land adjoining the plaintiff's building, until the hearing of the action, from blasting out the frozen earth in the process of excavating for the foundation in such a manner as to injure the plaintiff's building. The order further required the plaintiffs to abide by such order as the Court should make as to the damages suffered by the contractor by reason of the injunction or its continuance. The plaintiffs had previously obtained an interim injunction ex parte for a limited period absolutely restraining the defendants from blasting with blasting powder or other explosive substance of a similar nature in connection with the excavations on the land mentioned, and the order appealed from was made on the plaintiff's motion to continue that injunction. The affidavits filed on behalf of the plaintiffs tended to show that the blasting operations in question caused such a vibration or shaking of the plaintiff's building as to weaken it, and, if continued, to permanently injure it and threaten its destruction in whole or part. In reply to the affidavits filed on behalf of the defendants, the plaintiffs filed further affidavits containing statements not strictly in reply, but going merely to strengthen their original case; but an opportunity was given the defendants to answer the affidavits in reply.

Held, 1. The judge had a discretion to permit the evidence objected to which should not be interfered with on appeal.

Defendants objected that plaintiffs, on obtaining the ex parte interim injunction, had failed to disclose material facts known to them, and claimed that on that account the interim injunction should have been specifically discharged and the plaintiffs ordered to pay costs, and made that one of the grounds of the present appeal; but the Court declined to accept that view.

2. On the merits as disclosed in the affidavits, although there was no visible injury to the plaintiff's building, yet the evidence was such that a judge might not unreasonably come to the conclusion that the blasting operations in question, if continued, would almost certainly cause a permanent injury to the structure, and that the injunction should not be dissolved before the hearing. The general principles applicable to such a case are those laid down in *Fletcher* v. *Bealey*, 28 Ch. D. 688, and *Attorney General* v. *Corporation of Manchester*, (1893) 2 Ch. 87, for quia timet actions.

3. It is not necessary that each member of the Court should on such an appeal determine individually whether he would or would not have

granted the injunction, as the order was in a large measure one of discretion with which an Appellate Court would not lightly interfere, especially as the order appealed from enjoined upon the contracter nothing but what was his duty without an injunction.

4. Notwithstanding the case of *Wood* v. *Sutcliffe*, 2 Sim., N.S. 168, an offer or suggestion on the part of the plaintiffs, before commencing the action, to accept a bond to secure them against damages, even if distinctly proved, would not necessarily preclude them from claiming an injunction afterwards, though it would be a fact to be taken into consideration in determining whether a remedy by action for damages would not be adequate.

Appeal dismissed with costs to be paid by defendant Alsip upon the final disposition of the action in any event of the action.

Aikins, K.C., and *Pitblado*, for plaintiff. *Tupper*, K.C., and *Minty*, for defendant.

Full Court] CAMPBELL *v.* MCKINNON. [May 23.

Landlord and tenant—Execution creditor—Grain grown on farm leased to execution debtor—R.S.M. 1902, c. 11, s. 39.

Appeal from a judgment of a County Court in favour of an execution creditor as against the claimant of a quantity of grain seized in stack unthreshed. The claimant let the execution debtor the farm on which the grain had been grown by an indenture reserving as rent "the—— share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth." The lease also provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes, and to repay advances and other indebtedness; that the lessee, immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, conditions, provisos and agreements therein contained should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sum retained for taxes, advances, etc. The grain in question had, until its seizure under the plaintiff's execution, remained on the farm in the possession of the lessee. The claimant claimed it as owner under the terms of the lease and not for rent

Held, 1. The lease did not operate to prevent the lessee from ever having any property in the grain to be grown. Prima facie the legal ownership of it would be in the lessee until delivery at the elevator for the lessor, as there was nothing to indicate that the lessee was to cultivate the farm as the servant, agent, bailee or other instrument of the lessor.

2. Even if the legal ownership of the grain was to be in the lessor, it was still, as to two-thirds, held for the benefit of the lessee, subject to the lessor's charge for the taxes, advances, etc., and the lessee had an equitable interest in it, and the lessor's lien or charge sought to be secured to him by the lease was void under s. 39 of The Bills of Sale and Chattel Mortgage Act, now Chapter II. of R.S.M., 1902, as being a charge upon crops to be grown in the future.

3. The interest of the lessee in the grain, whether legal or only equitable, was subject under s. 182 of the County Courts Act, R.S.M., 1902, c. 38, to seizure and sale under the plaintiff's execution, and that the claimant's interest could not prevail over that of the plaintiff.

Appeal dismissed with costs.

Howell, K.C., for plaintiff. *Wilson*, for claimant.

Killam, C.J.] [June 11.

IN RE HOUGHTON AND MUNICIPALITY OF ARGYLE

Liquor License Act—Local option by-law—Application to quash for defects in proceedings.

Application to quash a local option by-law of the rural municipality of Argyle passed in 1889 under the Liquor License Act then in force on the following grounds: (1) That the by-law had not been signed by the Reeve; (2) That the by-law fixing the day, hours and places for taking the vote had not been signed by the Reeve or sealed with the corporate seal; (3) That the notice of the by-law and of the intention to take the vote thereon had not been published for the prescribed period. Sec. 428 of The Municipal Act, R.S.M., (1902) c. 116, provides that an application to quash a by-law of a municipality shall not be entertained after one year from the passing of the by-law, "except in the case of a by-law requiring the assent of the electors or ratepayers where the by-law has not been submitted to or has not received the assent of the electors or ratepayers."

Held, that this enactment means a submission in fact and an assent in fact as ascertained by a submission in fact, without reference to the validity of the formalities attending the submission, and as the alleged by-law was actually submitted to a vote of the electors and received their assent and stood without objection for over thirteen years, the application to quash could not now be entertained. Application dismissed.

T. S. Ewart, for applicant. *A. J. Andrews*, for municipality.

Province of British Columbia.

SUPREME COURT.

Full Court.] NOBLE FIVE MINING CO. *v.* LAST CHANCE MINING CO. [Feb. 6

Mining Law—Extralateral rights—Trial—Adjournment of—Appeal Extension of time—Jurisdiction.

Appeal from an order of Drake, J. (on application to postpone trial) fixing a date (peremptory) for trial. This was an action by the owners of a mineral claim for an injunction restraining defendants who were the owners of adjoining mineral claims from running a tunnel from their claims on to the plaintiff's ground. The defendants claimed under Mineral Act of 1891, s. 31, the right to follow onto plaintiff's ground the vein of ore in question because the apex of the said vein was on the surface of their claim. Before going to trial the defendants wished to do development work in order that they might determine definitely the continuity of the vein in question, and they showed that it was impossible for them to do the work needed by the date fixed for the trial.

Held, allowing the appeal, that the defendants should not be forced on to trial without being given a fair opportunity of doing such development work as might be necessary to determine the position of the apex of the vein in question.

On this appeal the question of the Court's jurisdiction to extend the time limited for appeal after the time limited had once expired came up, and counsel for appellant wished to argue that the Court had such jurisdiction and that the decision in *Sung* v. *Lung* (1991) 8 B.C. 423 was wrong. The Court announced that if it became necessary to decide the point all the Judges would be summoned to hear argument.

(A decision on the point was not necessary so it was not argued.)

Bodwell, K.C. for appellant. *Luxton* for defendant.

Full Court.] Gold *v.* Ross. [April 27.

Landlord and tenant—Eviction—Surrender of term by operation of law.

Appeal from the judgment of Henderson Co., J. This was an action against an assignee for the benefit of creditors for a declaration that plaintiff was entitled to a privileged claim for rent against the assignor's estate under the Creditors' Trust Deeds Act, 1901, s. 54.

Plaintiff let a store to H. A. & Co. who afterwards executed an assignment for the benefit of creditors to defendant who did not take possession of the premises. Plaintiff on the third day after the assign-

ment, requested and obtained from H. A. & Co. the keys of the premises which she proceeded to clean up and repair, and she took down a sign board having on it the firm name of H. A. & Co. and painted the name out. Plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against the estate for rent accruing due after the assignment:

Held, affirming Henderson Co., J., who dismissed plaintiff's action, that there has been a surrender of the premises to the landlord by act and operation of law.

Phene v. *Popplewell* (1862), 12 C.B.N.S. 334, applied.

Harris, for appellant. *Boak*, for respondent.

Irving, J.] IN RE UNITED CANNERIES CO. [April 1.

Winding-up—Petition by shareholders—Insolvency.

Petition filed under R.S.C. 1886, c. 129, s. 8, as amended in 1899, by c. 43, s. 4, by certain shareholders for a winding-up order on the ground that the company is insolvent, the act shewing the insolvency being alleged to be the exhibiting by the company of a statement shewing its inability to meet its liabilities, the doing of which is by s. 5 (c.) of the Act made an act of insolvency.

Held, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders. Petition dismissed.

Charles Wilson, K.C., for petitioners. *Joseph Martin*, K.C., contra.

Courts and Practice.

AMENDMENTS TO RULES.

AT A MEETING OF THE SUPREME COURT OF JUDICATURE OF ONTARIO, held on Saturday, the 20th day of June, 1903;

Ordered that the following Amendments to the Rules be adopted, viz.:

1242. (47) Rule 47 is hereby repealed and the following substituted therefor:

47. (1) A local Judge of the High Court shall in actions brought and proceedings taken in his County, possess the like powers of a Judge in the High Court in Court or Chambers, for hearing, determining and disposing of the following proceedings and matters, that is to say:

(a) motions for judgment in undefended actions;

(b) motions for the appointment of receivers after judgment by way of equitable execution;

(c) application for leave to serve short notice of motion to be made before a Judge sitting in Court or in Chamb ers;

(d) motions for judgment and all other motions, matters and applications (except; (i) trials of actions; (ii) applications for taxed or increased costs under Rule 1146; and, (iii) motions for injunction other than those provided for by Rule 46) where all parties agree that the same shall be heard, determined or disposed of before such local Judge, or where the solicitors for all parties reside in his county.

Provided always that where an infant or lunatic or person of unsound mind is concerned in any such proceedings or matters the powers conferred by this Rule shall not be exercised in case of an infant without the consent of the Official Guardian, and in the case of a lunatic or person of unsound mind without the consent of his committee or guardian, and provided also the like consent shall be requisite in the case of applications for payment of money out of Court and for dispensing with the payment of money into Court where an infant, lunatic or person of unsound mind is concerned.

(2) No order for the payment of money out of Court, or for dispensing with the payment of money into court shall be acted upon unless a Judge of the High Court has manifested his approval thereof in manner provided by rule 414.

(3) The judgment or order of the local Judge in any of the proceedings or matters in this rule referred to shall be entered, signed, sealed and issued by the Deputy Clerk of the Crown, Deputy or Local Registrar of the County, as the case may require, and shall be and have the same force and effect and be enforceable in the same manner as a judgment or order of the High Court in the like case.

1243. (48) Rule 48 is hereby amended by substituting the letter (d) for the letter (c) in the second line.

1244. (139) Rule 139 is repealed and the following substituted therefor:

139. Where a plaintiff's claim is for or includes a debt or liquidated demand, the endorsement besides stating the nature of the claim shall state the amount claimed in respect of such debt or demand, and for costs respectively, and shall further state that upon payment thereof within the time allowed for appearance further proceedings will be stayed. Such statement may be according to Form No. 6. The defendant, notwithstanding that he makes such payment, may have the costs taxed, and if more than one-sixth be disallowed the plaintiff's solicitor shall pay the costs of taxation.

1245. Form No. 6 (Section 3 of the Appendix) is amended by striking out the figure 8 and leaving a blank space between the words "within" and "days" in the third line, and omitting the words between brackets.

1246. (162) Clause (e) of Rule 162 is hereby repealed and the following substituted therefor:

(e) The action is founded on a judgment or on a breach within Ontario of a contract wherever made which is to be performed within Ontario or on a tort committed therein.

1247. (300) Rule 300 is hereby repealed and the followfng substituted therefor:

300. A plaintiff may, without leave, amend his statement of claim, whether endorsed on the writ or not, once, either before the statement of defence has been delivered, or after it has been delivered and before the expiration of the time limited for reply, and before replying.

1248. (302) Rule 302 is hereby repealed and the following substituted therefor:

302. Where a plaintiff has amended his statement of claim under rule 300 the opposite party shall plead thereto or amend his pleading within the time he then has to plead, or within eight days from the delivery of the amendment, whichever shall last expire, and in case the opposite party has pleaded before the delivery of the amendment and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

1249. (414) Rule 414 is hereby amended by adding thereto the following subsection:

(2) An order dispensing with the payment of money into Court unless it is made by a Judge of the Supreme Court shall not be acted on unless or until a Judge of the High Court has manifested his approval thereof in manner provided by subsection 1.

1250 (439). Rule 439 is hereby repealed and the following substituted therefor:

Rule 439. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest and may be compelled to attend and testify in the same manner, upon the same terms and subject to the same rules of examination of a witness except as hereinafter provided.

439 (*a*) In the case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness except as hereinafter provided; but such examination shall not be used as evidence at the trial.

(2) After the examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order of the Court or a Judge.

439 (*b*) An examination shall not take place during the long vacation without an order of the Court or a Judge.

1251 (461). Subsection 2 and 3 of rule 461 are hereby repealed.

1252 (881). Rule 881 is hereby repealed, and the following substituted therefor:

881. Before the sale of lands under a writ of *fieri facias*, the Sheriff shall publish once, not less than three months and not more than four months preceding the sale, an advertisement of sale in *The Ontario Gazette*, specifying:

(*a*) The particular property to be sold;

(*b*) The name of the plaintiff and defendant;

(*c*) The time and place of the intended sale;

(*d*) The name of the debtor whose interest is to be sold;

and he shall in each week, for four weeks next preceding the sale, also publish such advertisement in a public newspaper of the County or District in which the lands lie; and he shall also for three months preceding the sale, put up and continue a notice of such sale in the office of the Clerk of the Peace, and on the door of the Court House or place in which the General Sessions of the Peace of the County or District is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day.

1253 (1146). Rule 1146 is hereby amended by adding thereto the following subsection:

(2) Where an order or judgment in any such action or proceeding by any form of words directs that the costs thereof be taxed, it shall be taken to mean the allowance of commission and disbursements, in accordance with subsection 1, unless it is otherwise expressly provided by the order or judgment, or unless the Court or a Judge of the High Court otherwise directs.

Ordered that the foregoing Rules shall come into force and take effect on and after the 2nd day of September next.

J. A. McANDREW,
Clerk.

Dated, Osgoode Hall, 27th June, 1903.

AT A MEETING OF THE SUPREME COURT OF JUDICATURE OF ONTARIO, held on Saturday, the 27th day of June, 1903;

Ordered that the following Rule be passed and added to Rule 406 as subsection 2.

1254 (406) (2) When money is required to be paid into Court to the credit of the Assurance Fund established under the Land Titles Act, the direction to receive the money, if the same is payable into a bank in Toronto, shall be obtained from the Master of Titles, and if payable into a bank outside of Toronto the direction shall be obtained from the proper Local Master of Titles.

J. A. McANDREW,
Clerk.

Dated, Osgoode Hall, 27th June 1903.