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A CORRESPONDENT rightly assumes that there must be a large amount of *personalia* of the Bench and Bar, and anecdotes and incidents of much interest, well worth preserving, connected with the traditions and current history of the Bar in the various Provinces, which is at present lying waste, and being forgotten and lost. He suggests that it would be well to garner them in a department of this journal. We concur, and shall be very glad to hear from any of our subscribers with such material as they can give us in this connection. It would be a congenial occupation for some of our readers during long vacation to put into concrete shape such stories of the past as may be floating nebulously in their minds.

AN old subscriber suggests "the propriety of discussing *Hollender* v. *Ffoulkes*, 16 P.R. 315, in which the defendant's appeal was dismissed with costs, bearing in mind that the question of waiver had not been broached in the argument before Mr. Justice Street, and that no application was ever made to extend the time." It hardly seems necessary to go into this matter at any great length. The Divisional Court, on the appeal from Judge Street's order, held that the order was *substantially right*, but that it was technically defective in not having expressly extended the time for putting in security, as well as allowing the bond. They varied the order in this respect, but ordered the defendant (appellant) to pay the costs, because he had substantially failed in his appeal.

WE see by the decision of the Chancellor *In re Gray*, 26 Ont. 355, that it has been held that an estate tail to which an infant

is entitled may be ordered to be sold under the provisions of R.S.O., c. 137, s. 3. This case, however, does not determine what the effect of the conveyance of the infant would be when made under the provisions of the Act; and we take it that it by no means follows, because the court may have power to order a sale, that it can also enable the infant to bar the entail. On the contrary, we should think it open to very serious doubt whether, under subsection 2 of section 3, the conveyance of the infant, even though made under the authority of the court, could have the effect of barring the entail. That subsection provides that "no sale, lease, or other disposition *shall be made against the provisions of a will or conveyance by which the estate has been devised or granted to the infant* for his use." When by a will or conveyance an estate tail only is vested in the infant, it would seem at least to be arguable that a conveyance by the infant cannot bar the entail; otherwise it would be a conveyance "against the provisions" of the will or conveyance, and, therefore, a conveyance which the infant cannot make. It is quite possible, therefore, that a conveyance by an infant tenant in tail would only have the effect of conveying the estate subject to the entail, and not the wider effect of a conveyance by an adult under R.S.O., c. 103, s. 3. At all events, we should think it would be prudent for a purchaser under any order authorizing such a conveyance by an infant tenant in tail to take the opinion of the court before accepting it as a sufficient bar of the entail.

It would appear that whether the infant could effectually bar the entail in the land sold or not, the purchase money derived from the sale of an estate tail would be subject to the same limitations as the land sold was subject to at the time of the sale; at least that seems to be the intent of R.S.O., c. 137, s. 8. This might raise an interesting question, how the estate tail in such purchase money could be subsequently barred by the infant on his attaining his majority.

MR. MCCLIVE'S letter, which will be found in another column, is deserving of the attention of the committee charged with the reconsolidation of the Rules. It may be that the committee has no power to do more than recast the Rules as they now stand, without additions or variations, except such as

are of a merely clerical character. But, though the committee may not itself be able to amend the present Rules, any suggestions which it may think fit to make would, no doubt, be very carefully considered, and possibly adopted by those in whom the power of making Rules is vested.

Mr. McClive's remarks on the abuses which have resulted from the general application of the old Chancery practice relating to discovery are but an echo of what has frequently fallen from the Bench. Theoretically, it is an excellent practice; practically, when kept within due bounds, it is highly beneficial to litigants; but, applied indiscriminately to all classes of cases, it has become a gross and flagrant abuse.

The judges have lately dealt with one branch of this practice, namely, that relating to the oral examination of parties for discovery, and Mr. McClive suggests that the other branch, namely, that relating to the production of documents, should be similarly dealt with, and in this suggestion we are inclined to agree; both branches appear to stand on the same footing, and should be subject to similar Rules.

We think there would be technical difficulties in the way of dispensing with orders to produce as he suggests. The disobedience of a notice to produce could hardly be punished in the same way as the disobedience of an order of the court; and before a party could be put in contempt an order would have to be obtained at some stage of the proceedings, and would, if not taken as at present, in many cases involve delay, which might be highly prejudicial.

With regard to Mr. McClive's proposal for the revision of the taxation of costs in all contested cases, we doubt whether that is practicable or desirable, although we admit there is much force in what he says on the point.

The fact of the matter is that no Rules can be devised which it will not be possible to abuse and pervert. For the proper working of any Rules of practice it must be assumed that some ordinary judgment and common sense will be exercised by practitioners, and that for their own interest, as well as that of their clients, they will refrain from running up costs out of all proportion to the matter in controversy.

Two or three cases have recently been before the courts where a deplorable lack of these qualities seems to have been

manifested. Unfortunately, the mode of payment, both of solicitors and some officials charged with quasi-judicial functions, is a direct incentive to the prolongation and multiplication of proceedings. If the fees of both were in some way regulated by the amount actually in controversy, we fancy a short cut would be very often found for attaining the end which is now reached only after a long and devious and unduly expensive journey.

We doubt whether any practical benefit would accrue from the adoption of the English practice of the originating summons. We have in a measure adopted a more beneficial procedure of that character whereby judgments for administration and partition may be obtained on notice of motion; or, in the case of enforcing mechanics' liens, by simply filing a statement claim. If any change is to be made in this direction, we think it should be the abolition of the writ of summons in all cases, and the substitution therefor of a statement of claim. The theory of the writ of summons is, we presume, that it is a mandate from the sovereign to the subject to appear in court as a preliminary to the sovereign doing justice, but we fail to see why all the practical benefit of a summons might not be just as effectively obtained by a notice to be indorsed on the statement of claim. In other words, the old Equity practice of bill and answer applied to all cases would, we believe, more effectually meet what Mr. McClive desires than the adoption of the originating summons.

BAGGAGE IN THE CUSTODY OF THE PASSENGER.

We copy from the *Central Law Journal* an article under the above caption from the pen of Mr. John D. Lawson, which contains a valuable collection of cases of especial interest at this season of the year, when the world is on the move, holiday-making, or rushing hither and thither, making up for lost time in the pleasant view of reviving trade. The authorities cited by the learned writer can be found by reference to the article which appears in the number of that journal for May 31st. He says:

"A common carrier of goods is not liable as an insurer for property of which he does not have the sole custody. This rule is well settled, and the same principle is frequently applied to the case of baggage, it being argued that when the passenger do

not deliver his effects to the carrier and surrender his control, during the time of the journey to him, the latter should not be held to the extraordinary liability of a common carrier.

Nevertheless it does not follow that in every case where the baggage is taken into or placed at his request in the vehicle in which he is riding, in order that he may have the use of it during the journey, that he, the passenger, has assumed custody of it or has taken it out of the legal custody of the carrier.

Railroads.—The principles to be applied to cases such as these will, as a general rule, be varied more or less by the question: (*a*) Has there been a delivery to the carrier? (*b*) Though in the possession of the carrier, has the passenger himself assumed the custody of the article? (*c*) Has the passenger's own conduct contributed to the loss? In the first case the carrier obviously could not be charged with any liability; in the second, the carrier would be liable as an insurer if it had the custody, and for negligence only if the passenger had assumed the custody; and in the last the contributory negligence of the passenger would be a legal bar to his action.

(*a*) In *Tower* v. *Utica R. Co.*, the plaintiff, a passenger, went into a car with his overcoat on his arm, which he threw on his seat, and when he left the train at its destination forgot to take it with him. The carrier was held not liable, the court saying: 'The overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers. . . . If they were under any obligation to take charge of the article in question after it was discovered to have been left in the car (and it is not necessary to deny that they were), ordinary care is all that can be exacted, and that was sufficiently established.' So in a Canadian case where a passenger entered a car just before the train started, left his valise on a vacant seat and went out, and upon his return the valise was gone, it was held that there had been no sufficient delivery of the valise to the carrier, it not appearing that any one was in charge of the train at the time.

A railroad is not liable for the negligent destruction of a sum of money in the custody of the passenger and carried by him, without notice to the carrier, for a purpose unconnected with the expenses of the journey. Thus where plaintiff intrusted a package of money to his agent to carry, and the agent, while a pas-

senger on the railroad, was killed, and the money which was carried on the agent's person, without notice to the railroad company, was destroyed by the company's negligence, it was held that the company was not liable for the loss of the money. Again, in an Iowa case a passenger gave his overcoat, containing a pocketbook in which was the sum of $500, which he was taking with him for the purpose of making an investment, to the porter of the sleeping car, who hung it up in his berth. He had money enough for travelling expenses elsewhere about his person. During the journey the train was derailed, the car in which he was was riding being thrown on its side and taking fire. The passenger got out safely, and, after the fire was extinguished, he told the porter in regard to the money, and the overcoat was returned to him, but the pocketbook had disappeared. It was held that there was no cause of action against the railroad.

(*b*) Several well considered English cases lay it down, that if the passenger has not assumed the custody of the article, the fact that it is placed in the carriage with him, and therefore is under his more immediate control and inspection, does not relieve the carrier from his extraordinary responsibility. In one of these cases it was proved that the plaintiff's wife became a passenger upon a railway carriage, and that a dressing case which she was taking with her was placed in the carriage under the seat, and that on the arrival of the train at her destination the porters of the company took upon themselves the duty of carrying her luggage from the railway carriage to the hackney carriage, which was to convey her to her residence. The dressing case was lost, but at what time did not appear. The carrier was held liable, the court saying that the fact that it was placed in the railway carriage with her made no difference. In the Le Couteur case, already referred to, the passenger's valise had been placed by the railroad porter on the seat of the carriage in which he was riding, and the court said that it would require 'such circumstances as would lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company before we say the company, as carriers, are relieved from their liability in case of loss.' But the authority of these cases would seem to be shaken by the more recent case of *Bexyheim* v. *R. Co.*, where it is held by the Court of Appeal that a railroad is not an insurer in respect to

baggage placed at the passenger's request in the same compartment in which he intends to travel, and cannot be made to compensate him if baggage so placed is lost or stolen without any negligence on its part.

The American authorities seem to agree that a railroad is not responsible as a common carrier for an article of personal baggage kept by a passenger exclusively within his control, unless the loss arises from the neglect of its agents and servants, thus regarding the carrier in such a case as a bailee for hire and not an insurer. But in the following case negligence of the carrier was held to be proved, and he was held liable, viz.: Where a passenger, on leaving the car at a station for the purpose of getting his dinner, inquired of an employee in the car whether his baggage would be safe if left in the car, and was told to leave it there; that it would be safe. He left it in the car, and on his return found that the car had been detached from the train and his baggage removed to another car, where he could have a seat. On going to this car he found only part of his baggage. No notice of the change had previously been given to him. In *Hannibal, etc., R. Co.* v. *Swift*, baggage and munitions of war were being transported by the defendant railroad, and it was urged that the carrier was not liable as such for their loss, because a guard of soldiers went with the train to protect the property from the public enemy. But the court said: 'The control and management of the car or of the train by the servants and employees of the company were not impeded or interfered with; and where no such interference is attempted, it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety.'

(c) 'All the books agree that if the negligence of the passenger conduces to the loss of the goods, the carrier is not responsible.' Thus where a passenger, on leaving the train at his destination, forgot to take his overcoat, which he had placed on the seat beside him, the carrier was held not liable, the court saying: 'The loss in this case occurred through the gross neglect of the plaintiff. Common sense and attention on his part would have prevented it. A passenger might as reasonably complain because he had forgotten to leave the cars at the point of destination and been carried beyond it, as to do so in a case like the

present. The carrier is not bound to act as guardian for his passenger, and treat him as a ward under age. The passenger must at least assume the responsibility of taking ordinary care of himself, including the wearing apparel about his person.' In a very similar case of a passenger in a chair-car, the court said: 'If the appellee carelessly and negligently left his pocketbook in the car when he reached his destination, and its contents were abstracted by persons other than the servants of the company, there would be no liability on the part of the company, for it is only by reason of the fact that the company owes some duty to the passenger as such that there is any sort of responsibility resting on it in relation to his property, which for the time is considered as a part of his person. But when a passenger leaves a train at its destination, the company may reasonably think that he has taken with him all those things which he is accustomed to carry about his person, and, until it is shown that the property is discovered by its agent to have been left behind, we know of no principle of law by which it can be charged with any duty concerning it.' So in a recent case in Massachusetts, where a passenger in a day parlour car had in her possession, and kept under her own control, a satchel containing valuables, and, on reaching a station, she, with her husband, left the car for several minutes, leaving the satchel in the car near an open window where any person on the station platform could easily have abstracted it, and it was stolen, it was held that the plaintiff was negligent, and the car company not liable. In an English case, a passenger whose portmanteau had been placed at his request in the car with him got out at a way-station, and then carelessly failed to get into the same car again, but finished his journey in another car. The article was stolen by passengers in the first car, but it was held that the railroad was not liable. In return, the court said, for the convenience of having his luggage at hand, the passenger should, during the journey, take such reasonable care of his own property as might be expected from an ordinary prudent man, and should not, by his own negligence, expose it to more than the ordinary risk of luggage carried in a passenger carriage.

A railroad is not liable for a loss resulting to a passenger from its refusal to stop the train upon which he was riding, short of a usual station, to enable him to recover a hand-bag containing a large sum of money and valuable jewelry which he was carrying

with him, and which he dropped from the window of the car while attempting to lower the sash.

Carriers by Water.—Some light may be shed upon this subject by a brief examination of the decisions in regard to the liability of a carrier by water for property of the passenger kept in his own possession and not delivered to the carrier for custody. The passenger by ship or vessel is usually assigned a room like a guest at an inn, in which to sleep, and to which he takes such articles as he requires for his personal use during the trip or voyage. And it has been asked, is not the carrier, so far as he provides this separate place to sleep, acting in the capacity of an innkeeper, and subject to the same liability as is the innkeeper for the baggage of his guests in their rooms? This question was ably discussed by the Supreme Court of Michigan in *McKee* v. *Owen*, where a female passenger occupying a stateroom on a steamer, upon going to bed at night, rolled up her dress, with her portmonnaie, containing a sum of money, in its pocket, and laid it upon the upper berth of the stateroom. During the night the money was stolen through a broken window of the stateroom. She brought an action against the owner of the vessel to recover for the loss, and the court below instructed the jury that, having retained the money in her possession, she could not recover.

The apparently conflicting views of the courts, in the case of carriers by water, may be easily reconciled when the kind of property for which recompense is asked is considered; and a distinction will be found to exist between (*a*) property which the passenger carries about his person, and (*b*) property which, for his convenience merely, he takes to his room instead of delivering to the baggagemaster or other proper officer of the boat.

(*a*) As to articles carried upon or about the person—the clothing he is wearing, the watch or jewelry carried in his pocket, the money in his purse, or the like—it seems to be generally settled that the carrier is not liable, because there has been no delivery to him, and the question of the carrier's negligence and want of care is not material.

(*b*) As to the ordinary baggage of passengers by ships and steamboats, the best considered of the cases support the statement of the law as made by Mr. Hutchinson in his work on Carriers, viz., that their baggage may be taken by them into the staterooms which are assigned to them, without relieving the

carrier from any of his responsibility for its safety, as a common carrier, in the absence of negligence on the part of the passenger contributing to its loss, unless forbidden by a regulation of the vessel, or otherwise specially prohibited, or unless it appears as a matter of fact that the passenger has taken it into his charge *animo custodiendi*, to the exclusion of the carrier, the assignment to the room being generally 'a designation of the place in which the traveller may put his ordinary baggage,' without excluding the custody of the carrier.

Sleeping Cars.—It is well settled that a sleeping-car company, so far as its responsibility for the baggage and valuables of passengers is concerned, is not a common carrier. And it is also denied—although the car might well be likened in many respects to a moving inn—that his responsibilities are those of an innkeeper. The sleeping-car proprietor is, however, bound to take reasonable care to protect the property of the passenger, especially while he is asleep, and for any neglect of his duty he will, in the absence of contributory negligence on the part of the passenger, be responsible. It must, therefore, keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent theft by the occupants. Thus negligence was held to be present so as to render the company liable—where property in the plaintiff's berth was stolen while he was asleep, both the conductor and porter being asleep at the rear end of the car for two or three hours, leaving the front door unlocked and a brakeman sitting in the front end of the car; where, on the occasion of a similar theft, the conductor was absent from the car for a distance of eighty-four miles, having left the train altogether, leaving no one about the car but the porter, who was engaged in blacking boots in a room at the end of the car; where the plaintiff, having occasion to open her valise, which was in her berth, was assisted by the conductor, who, instead of returning it to the berth, said it would be perfectly safe in the unoccupied seat opposite, and himself placed it there, from which place it was stolen in the night.

This duty does not terminate with the period during which the passenger is actually asleep, but it extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him, nor watch himself while he is absent from his berth preparing his toilet, or for other

necessary purposes, or where he may temporarily leave the car, leaving his personal baggage there.

The passenger's contributory negligence will, of course, bar a recovery. The passenger was held to be guilty of contributory negligence when, on getting out of his berth in the morning, he went to the lavatory, leaving in the pockets of his vest under his pillow his watch and a large sum of money.

It does not affect the case at all that the property of the passenger is in his own possession and custody. As well put in the Blum case: 'It is undoubtedly the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care, upon his own part, is impossible. There is all the delivery which the circumstances of the case admit.'

The liability of the company extends to his clothing and personal ornaments, the small articles of luggage usually carried in the hand and a reasonable sum of money for his travelling expenses. The word 'baggage' has no special or restricted meaning when applied to such articles as the passenger may carry with him in his valise instead of placing in a trunk or delivering to the baggagemaster of the railroad, but has the meaning which I have already pointed out. Hence the liability of sleeping-car companies for a loss resulting from a failure to keep reasonable watch over, and to use reasonable diligence to protect, its patrons' baggage extends to such articles of baggage as are ordinarily or usually carried by travellers in like situation, in valises which they carry with them into the car, provided they would be considered baggage in an action against an ordinary carrier of passengers. But it does not extend beyond this so as to cover money

in the keeping of the passenger to an amount beyond what would be required for travelling expenses.

The sleeping-car company is liable for such articles in the custody of the passenger as fall within the denomination of 'baggage,' and which there is a duty upon it to protect, even where they are stolen or abstracted by its servants, and in such an action the contributory negligence of the passenger would be no defence. But as to articles not baggage, the passenger having no right to their free transportation, there is no duty on the carrier to protect it, and, if such property should be stolen by its servants, the carrier would not be responsible, for 'a master is not liable for the torts or crimes his servant commits, not within the scope of his employment, but to effect some purpose of his own, unless such tort or crime is of itself a violation of some duty which the master has assumed toward the person injured, and which he has undertaken to perform through the servant.'

While it is held in Missouri, that the naked fact that a passenger has been robbed when asleep in the sleeping-car is not evidence of negligence on the part of the defendant, yet where the circumstances of the theft tend to show that, but for the defendant's negligence, the loss would not have occurred a *prima facie* case of negligence arises, and the burden of the proof is shifted. 'The sleeping passenger can never know whether or not the defendant's servants are keeping diligent watch, and they have the strongest interest to exonerate themselves from any charge of negligence. A rule that would prevent the case from going to the jury without affirmative proof that at the time when the theft took place, or at some time during the night, the defendant's servants were not keeping watch would in most cases deprive passengers of any redress for the loss which they might sustain through the negligence of such carriers; such a rule is not only against reason, but is against public policy, and ought not to be declared.' In a recent Colorado case, it is, however, laid down that while negligence must be shown in actions against sleeping-car companies, the fact of the loss sufficiently shows it so as to place the burden upon the defendant to prove that it has discharged its legal duty. But in the case it was ruled that the presumption of negligence on the part of defendant arising from such loss is rebutted by the uncontradicted evidence of the car porter that he was on duty, and engaged in watching the car, through the night, till after the loss."

CURRENT ENGLISH CASES.

HIGHWAY—"PASSING UPON" HIGHWAY—STATUTE, CONSTRUCTION OF.

In *Phythian* v. *Baxendale*, (1895) 1 Q.B. 768; 15 R. May 353, the construction of a statute was in question, which made it an offence for the driver of any carriage to be at such a distance from it "whilst it shall be *passing upon* such highway that he cannot have the direction and government of the horses or cattle drawing the same," and the point raised was whether it extended to the case of a driver leaving a carriage standing by the road-side. The court (Cave and Wright, JJ.) decided that it did.

PROBATE—WILL—SIGNATURE OF TESTATOR "AT THE FOOT OR END THEREOF," "BESIDE OR OPPOSITE TO THE END"—MEANING OF—WILLS ACT, 1852 (15 & 16 VICT., C. 24), S. 1—(R.S.O., C. 109, S. 12).

Royle v. *Harris*, (1895) P. 163; 11 R. Apl. 64, is a probate action. The will presented for probate consisted of a sheet of paper, containing on the first page a lithographed form of will, which was filled in by the testatrix, and contained a general bequest to "my sisters and friends," without specifying them, and at the foot of this page was the signature of the testatrix and attesting witnesses. On the second and third pages was a list of bequests to persons, some of whom were sisters, and others friends, of the testatrix. There was no direct evidence that the second and third pages had been written before the execution of the will. It was held by Jeune, P.P.D., that even assuming that these pages were written before the execution of the will, yet that the signature of the testatrix was not so written "opposite to" or "at the foot or end" of the writing contained in those pages, within the Wills Act (see R.S.O., c. 109, s. 12); and the first page alone was, therefore, admitted to probate.

MORTGAGE—CONSTRUCTION—IMPLIED TRANSFER OF BUSINESS—RECEIVER AND MANAGER—DEED IRREGULARLY EXECUTED, VALIDITY OF.

County of Gloucester Bank v. *Rudry Merthyr S. & H. C. Co.*, (1895) 1 Ch. 629; 12 R. April 153, was a foreclosure action involving two points of interest. The first was whether a deed of sub-lease by way of mortgage irregularly executed by a joint stock company was valid, in favour of a mortgagee having no notice of the irregularity. By the articles of the company, power was given to the directors to fix the number of directors

which should form a quorum. They fixed three, but at a meeting at which only two were present they authorized the secretary to affix the seal to the mortgage in question, which was accordingly done by him in the presence of the same two directors. The Court of Appeal (Lord Halsbury, Lindley and Smith, L.JJ.) held that the deed was valid notwithstanding the irregularity, and distinguished the case where, as here, the quorum depended on the regulations of the directors themselves, and the case where, as in *D'Arcy* v. *Tamar*, L.R. 2 Ex. 158, the quorum was fixed by statute. The other point in the case was whether the colliery business passed by the deed which conveyed the lands, mines, seams of coal, and other premises comprised in certain leases, but did not expressly specify the business of the colliery. The plaintiffs claimed to be entitled as mortgagees of the business and applied for the appointment of a receiver and manager thereof, which North, J., refused, considering the case was similar to *Whitley* v. *Challis*, (1892) 1 Ch. 64 (noted *ante* vol. 28, p. 167); but the Court of Appeal was of opinion that there was an implied transfer of the business, without which the transfer of the seams of coal would be useless, and that the plaintiffs were therefore entitled to a receiver and manager.

LIMITATIONS, STATUTE OF—DISPOSSESSION—ACTS OF OWNERSHIP—REAL PROPERTY LIMITATION ACTS, 1833, 1874 (3 & 4 W. 4, c. 27, s. 3; 37 & 38 VICT., c. 57, s. 1)—(R.S.O., c. 111, s. 4).

In *Marshall* v. *Taylor*, (1895) 1 Ch. 641, we find discussed a somewhat interesting point arising on the Statute of Limitations. The question was as to the ownership of a strip of land which had formerly been a ditch, and which for the purposes of the judgment was assumed by the Court originally to have belonged to the plaintiff's predecessors in title. In 1868 drain pipes were laid along the ditch by one of the plaintiff's predecessors, into which he allowed the drainage of his own and the defendant's house to run, and the ditch was then filled up. From that time the surface of the ditch was used by the defendant and his predecessors in title as part of the garden of defendant's house, part of the surface being paved with cobblestones and part with cinders, and part as rose garden and fowl house. The plaintiff claimed that notwithstanding the apparent possession of the defendant, he and his predecessors had from time to time

exercised acts of ownership which preserved his title; these acts consisted of sending a servant upon the strip in order to clip a hedge which bordered it, and also that he had opened the drain and repaired it on two occasions. It was held by the Court of Appeal (Lord Halsbury, Lindley and Smith, L.JJ.), overruling the Vice-Chancellor of Lancaster, that these were not acts of ownership, sufficient to prevent the running of the statute in the defendant's favour, because the trimming of the hedge and repairing the drain was consistent with the plaintiff's merely claiming an easement for those purposes; and were not a plain and unequivocal claim of ownership on the land.

COMPANY—WINDING-UP ORDER, EFFECT OF—JUDGMENT IN PERSONAM—JUDGMENT IN REM

In re Bowling & Welby, (1895) 1 Ch. 663, may be noticed for the fact that the Court of Appeal, among other things, decided that a winding-up order against a joint stock company is not a judgment *in rem*, and, if made improperly, is not binding on strangers.

COMPANY WINDING UP—DIRECTOR—MISFEASANCE—MISAPPLICATION OF ASSETS OF COMPANY—PRESENTS TO DIRECTORS.

In re Newman & Co., (1895) 1 Ch. 674; 12 R. May 148, is a case arising out of one of the numerous fraudulent companies started by the notorious Jabez Balfour. Upon its being wound up it was discovered that Newman, the chairman of the company, in which substantially all the shares were held by himself and his family, had purchased, on behalf of the company, the right to a building agreement, to be obtained from certain commissioners. The commissioners objected to the company as tenant, and proposed to substitute Newman, who became the purchaser for £16,000, and then sold the agreement to the company at an advance of £10,000. £7,000 was spent on commissions and other expenses, in order to obtain the agreement from the commissioners, and £3,000 of the balance was applied by Newman to his own use, and a further sum of £3,500 of the assets of the company was spent by Newman on his own private house. These payments were made out of money borrowed by the company for the purpose of its business, and when it was insolvent: they were sanctioned by resolutions of the directors,

and informally approved by all the shareholders individually. The articles contained no power to make presents to the directors. The liquidator claimed that Newman should refund the three sums of £7,000, £3,000, and £3,500. Williams, J., dismissed the claim on the ground that there had been no concealment from the shareholders, and considered the case fell within the principle of *In re British Seamless Box Co.*, 17 Ch.D. 467; but the Court of Appeal (Lord Halsbury, and Lindley and Smith, L.JJ.), though affirming his decision as to the £7,000, yet, as to the other two sums, held that Newman was liable to refund them because the moneys in question were borrowed moneys, which the directors had no power to apply in making presents to themselves, as the articles of association did not authorize such presents, and though the shareholders, at a properly convened meeting, might, if they saw fit, remunerate the directors for their trouble, or make presents to them out of assets properly divisible among the shareholders themselves, yet they had no power to sanction such payments out of money which was not so divisible, but needed for the payment of the company's debts. And, even if the shareholders could have sanctioned the payments in question, it could only be done at a general meeting, duly convened for the purpose, and in this case no such meeting was ever held, the individual assents of the different shareholders not being sufficient to bind the company in its corporate capacity.

PATENT—REVOCATION—ESTOPPEL.

In re Deeley's Patent, (1895) 1 Ch. 687, the Court of Appeal (Lord Halsbury, and Lindley and Smith, L.JJ.) held that where, in an action for infringement, a patent had been declared invalid, the patentee is not estopped by such judgment from maintaining the validity of the patent on a petition being presented subsequently for its revocation. The court proceeded on the ground that the latter petition is on behalf of the public, and, though the petitioner may have been a party to the former litigation, yet it was in a different capacity, and, therefore, the former action was, in contemplation of law, *res inter alios acta*.

CONVERSION—SPECIFIC DEVISE OF REALTY—LEASE OF SPECIFICALLY DEVISED PROPERTY, WITH OPTION TO PURCHASE—CODICIL CONFIRMING WILL—EXERCISE OF OPTION TO PURCHASE AFTER TESTATOR'S DEATH—DEVISEE.

In re Pyle, Pyle v. *Pyle*, (1895) 1 Ch. 724; 13 R. May 186, a testator by his will dated in 1886 specifically devised certain

freeholds, and devised and bequeathed his residuary real and personal estate to other persons. In June, 1890, he made a codicil, which did not in terms refer to the specifically devised property, but confirmed his will. On the same day, but whether before or after the execution of the codicil was not shown, he made a lease of the specifically devised freeholds, and granted to the lessee an option to purchase the same; this option the lessee, after the death of the testator, exercised, and the question in this case was whether the purchase money belonged to the specific devisee of the land, or whether it fell into the residuary estate. Stirling, J., although admitting the general rule that where an option to purchase is exercised after the death of the person creating the option, the purchase money will devolve as personalty, and not as real estate, unless the deceased directs otherwise, yet here, following *Emuss* v. *Smith*, 2 De G. & S. 722, he found that the codicil, made when the testator must have known of the option then given or about to be given, and expressly confirming the will, indicated an intention on the part of the testator to give the devisee the purchase money should the option be exercised, and he held that it had that effect, and decreed in favour of the devisee.

SETTLEMENT—VOLUNTARY DEED—RECTIFICATION OF VOLUNTARY DEED.

Bonhote v. *Henderson*, (1895) 1 Ch. 742, was an action on the part of the plaintiffs (who were the settlors) against the defendant, the trustee of the settlement, to have the settlement, which was a voluntary one, rectified, so as to make it conform to their alleged intentions. Kekewich, J., though conceding that the court had jurisdiction to reform a voluntary deed (see *Walker* v. *Armstrong*, 8 D.M. & G. 531; *Courthope* v. *Daniel*, 2 H. & M. 95), a point which was also so decided, we may observe, by Proudfoot, J., in *Calvert* v. *Linley*, 21 Gr. 470; yet declined to grant the relief prayed in the present case, on the ground that the evidence of the alleged mistake was insufficient, notwithstanding the change which was desired would have brought the settlement more into harmony with recognized precedents and the reasonable views of the settlors.

COMPANY—WINDING UP—LESSOR, PROOF BY.

In re New Oriental Bank, (1895) 1 Ch. 753, the question arose in a winding-up proceeding for what amount a

lessor was entitled to prove under the following circumstances. The company was the lessee for a term of fourteen years, under a lease dated in October, 1890, with a power to determine the lease at the end of seven years on paying the rent and performing the covenants up to the date of the term being so determined. Before the end of the seven years, the company was ordered to be wound up in 1892. The liquidator refused to pay the rent for the residue of the seven years, and it was held by Williams, J., that the lessor was entitled to enter a claim for the whole future rent for the rest of the fourteen years, and to prove for the breaches which had taken place up to the present time.

COMPANY—WINDING UP—COSTS OF SUCCESSFUL LITIGANT PAYABLE OUT OF ASSETS —PRIORITY.

In re London Metallurgical Co., (1895) 1 Ch. 758; 13 R. May 226, the question of the order in which a successful litigant in a winding-up proceedings is entitled to be paid costs which are ordered to be paid out of the assets, is discussed by Williams, J., who holds that such costs are *prima facie* payable immediately and in full out of the net assets of the company, and that the onus is on the liquidator to show that the condition of the assets is such that immediate payment cannot be made; and if he shows that other persons have a prior right to, or are entitled to be paid *pari passu* with the successful litigant, no order will be made without providing for their claims. The date of such an order gives no priority to the litigant obtaining it, but payment will not be indefinitely postponed until all claims have come in.

COMPANY—SHARES—ILLUSORY CONSIDERATION.

In re Theatrical Trust, (1895) 1 Ch. 771; Williams, J., although holding that where shares are issued by a company for an illusory consideration, or for a consideration permitting an obvious money measure to be made showing that a discount has been allowed, the allottee may be compelled to pay the nominal value, or the amount of the discount in cash, and this, notwithstanding that the agreement may have been registered as provided by the English Companies Act, 1887 (30 & 31 Vict., c. 131), s. 25, of which we believe we have no counterpart; yet held that, in the present case, the consideration, which was the transfer of certain con-

tracts to the company and the payment of all the expenses of the formation and registration of the company up to the allotment, was not shown to be illusory, or to afford any ground for concluding that any discount had been allowed.

COMPANY—DEBENTURE ACTION—DECLARATION OF CHARGE—CONSENT JUDGMENT.

Marwick v. *Thurlow*, (1895) 1 Ch. 776, was an action to enforce payment of debentures against a joint stock company, which came on to be heard on motion for judgment by consent, and the question is discussed whether, on such a motion, the plaintiff is entitled to a declaration that the debenture-holders are entitled to a charge on the assets of the company. It appeared that Romer, J., had declined to make such a declaration without first ordering an inquiry as to the validity of the debentures; but, on consultation with him and the other judges of the Chancery Division, Williams, J., stated that, according to the practice, it had been customary to make such declarations, but he stated that he would not in future make such a declaration in actions brought after a winding up had been commenced without the consent of the official liquidator, and in the present case, after hearing that officer, and it appearing to be doubtful whether or not the validity of the debentures could be disputed, he declined to make the declaration.

Correspondence.

AMENDMENTS IN PROCEDURE.

To the Editor of THE CANADA LAW JOURNAL:

DEAR SIR,—I observe that the committee in charge of the consolidation of the new rules of practice sit in September next, and it may be that my experience as a practitioner for thirty years in a county town may be of some interest. Great changes in practice have occurred during that period, and very many in the direction of lessening litigation. Within the period of my practice, all defended actions proceeded to trial, and a majority of the actions so tried were defended really to gain time. Of late motions for speedy judgment have practically got rid of defences entered to gain time. All this in itself is desirable, for

it is in the interest of the profession that the public should have no complaint, and the machinery is now at hand to prevent any unreasonable delay if handled with zeal and proper care.

The profession should, and, I believe, as a rule, do desire that, when litigation becomes necessary, a final disposition of such litigation should be obtained as speedily as possible, and with the least possible expense consistent with good work and fair remuneration for services rendered.

However, there is, I regret to say, a great deal of useless litigation, actions that should never have been brought, including actions that might and ought to have been settled without litigation at all, for which the client is not at all times to blame, and even yet costs can be and are incurred that are utterly needless. The courts, as well as the profession at large, should endeavour to eradicate this evil, and decidedly the best method is to remove the temptation, or, rather, to amend the rules of practice so as to reduce this evil to a minimum, and then, if the courts and the officials are watchful, this evil will be largely non-existent.

Some rules have been introduced with this view, such as the one that will very much reduce the examination of the parties to an action; but still more can be accomplished in the same direction. Take the case of the production of documents. This, in most instances, is unnecessary. In equitable issues, the production of documents was a highly useful means of placing both parties in possession of the facts that must necessarily appear at the trial, for such actions usually involved the construction of documents, but common law courts practically had no such remedies, and, indeed, in common law actions such remedies were rarely necessary. Now, if production of documents be ordered when unnecessary, it simply means that the unsuccessful litigant pays about thirty dollars in each action for a needless luxury, for he pays the costs of production on both sides. It seems to me that a simple remedy will be to require a direction from the presiding judge at the trial before such costs can be taxed, and the presiding judge, when giving directions as to the allowance of costs of the examination of parties before trial, can add or not, as he sees fit, directions as to the allowance of the costs of production of documents, and in solicitor and client bills some official—the taxing officer—can attend to a similar duty. It seems

to me that the sole test as to the allowance of such costs ought to be what has been the result of the production, that is, have documents been produced that were reasonably desirable, in view of the facts that have been brought out at the trial? In solicitor and client bills, costs of production that produced no real result might be allowed when the client authorized this work in writing. If proper rules be framed to secure what I suggest at once, a very needless expense will be eliminated in the majority of actions heard.

Again, why is it necessary to take out an order at all? Cannot the same result be accomplished by enabling the parties at the proper stage in the action, to serve a notice upon the opposite party requiring such party to make the usual affidavit of production, and why, when the affidavit has been made, should there be a notice of filing and a demand of a copy of the affidavit? The affidavit, when made, should be filed and a copy at once served upon the opposite party, and, even when production is desirable, the procedure I would suggest would lessen the cost of production fully one-half. I think, however, when documents are produced in proper cases, a fee of five dollars should be allowed counsel for inspecting and making extracts for briefing. I desire to see lawyers well paid for all work reasonably necessary.

There are other points to which I might refer, by which the costs of actions would necessarily be lessened, but, in ordinary actions, getting rid of the costs of examinations and productions, when—as is the case in the majority of actions—unnecessary, would reduce the general costs, as a whole, probably one-third. There are actions where a previous examination of the parties is not only desirable, but necessary, and there are many actions, no doubt, where the same rule would apply to the production of documents; but I think, broadly speaking, in a majority of actions, these elements in making costs may as well be eliminated, and this will occur when the solicitor knows that he is unlikely to secure such costs.

There are instances, of course, where actions are settled before trial, and in such actions the taxing officer should have power to deal with this question, and I would suggest that all bills of costs in defended actions should be revised in Toronto. I believe the country taxing officers would desire this as well, so

as to ensure uniformity in taxation, and to feel at all times able to resist the importunity of those who are in daily intercourse with them.

A very great benefit to clients arose when, a good many years ago, the Court of Chancery required that all bills in that court should be submitted for revision.

The immediate effect was, probably, to reduce costs one-third, but now the views of the revising officer are so accurately known that a careful solicitor will probably not lose, on an average, more than three or four dollars on the taxation even of a large bill, and I should prefer myself to see all bills of costs revised at Toronto where the action has proceeded to trial, or was at issue.

To accomplish this, it would practically only be necessary to exclude bills of costs where judgment is entered either by default, or upon a motion for speedy judgment.

Again, why cannot the originating summons, as is the case in England, be introduced, and thus often save the very useless costs of an action where the only point that requires decision is the construction of a clause in a will, or the construction of a commercial document, or, in fact, the construction of any document where the point involved is simply the law applicable to the document itself?

If the originating summons be introduced into our practice, a very large saving in the way of costs would ultimately be the outcome to the unsuccessful client, and he is really the person who should be protected from being saddled with unnecessary costs. In my view the great difficulty that the profession now contends with is the reluctance of people in moderate circumstances to resort to litigation. It may be that for such people no litigation is desirable, and, if that be the case, matters may well remain in regard to practice as at present.

As a matter of fact, the only persons resorting to litigation at the present time are those to whom costs are really no great object, such as wealthy individuals and corporations, and those who are execution proof. This latter class will never be eliminated as long as there are lawyers who practically take cases upon speculation, but there is a third and a large class who are now simply deterred from litigation by the ruinous results of an adverse decision in the way of costs. My view, and I believe it

to be the view of the large majority of the profession, is that both the solicitor and counsel should be well paid for the services they render, but that no needless costs should be incurred so far as rules of practice can reach this evil.

Yours, etc.,

W. H. McCLIVE.

Notes and Selections.

A WHIPPING-POST BILL.—We entirely concur with the writer of the following article taken from the *American Law Review*: "A bill to re-establish flogging as a punishment for certain offences has been introduced in the legislature of New York and defeated, though a respectable vote favoured it. The *New York Law Journal* argues against it, but its arguments do not seem to us conclusive. We have passed into the age of drivel in government, in literature, and in many other respects; and one of the instances of that decadence was the abolition of the whipping-post. There are certain criminals and certain crimes for which physical pain will afford the only adequate punishment and the only certain deterrent. The whipping-post ought to be administered to a man that maltreats his wife or his child, or that inflicts wanton and cruel pain upon man or beast, or that is guilty of any degrading or loathsome offence. The whipping-post should be applied to that class of prisoners to whom imprisonment is not a terror, but a coveted asylum. We have tried for some fifty years to get along without the whipping-post, and public opinion has been steadily turning in favour of it in view of our experience of trying to do without it. The same is true in countries where capital punishment has been abolished. Besides, the whipping-post has the advantage of public economy. It costs money to feed a criminal while he is in the county jail, and honest people have to bear the expense; but it costs very little to give such a wretch a good flogging and let him go."

DIARY FOR JUNE.

1. Saturday.....First Parliament in Toronto, 1797.
2. Sunday..... *Whit Sunday.*
4. Tuesday..... Lord Eldon born, 1751.
5. Wednesday....Battle of Stoney Creek, 1813.
6. Thursday.....Sir John A. Macdonald died, 1891.
7. Friday.. .....Convocation meets.
8. Saturday.....Easter Term ends. First Parliament at Ottawa, 1866.
9. Sunday..... *Trinity Sunday.*
10. Monday.....County Court and Surrogate Sittings in York.
11. Tuesday. .....Lord Stanley (Earl Derby), Gov.-Gen., 1888.
13. Thursday .....Corpus Christi.
15. Saturday.....Magna Charta signed, 1215.
16. Sunday ..... *1st Sunday after Trinity.* Battle of Quatre Bras, 1815.
18. Tuesday ..... Battle of Waterloo, 1815.
20. Thursday.....Accession of Queen Victoria, 1837.
21. Friday.....Proclamation of Queen Victoria, 1837. Longest day.
23. Sunday.....*2nd Sunday after Trinity.*
24. Monday.....St. John Baptist. Midsummer day.
25. Tuesday.....Sir M. C. Cameron died, 1887. Convocation half-yearly meeting.
28. Friday.....Coronation of Queen Victoria, 1838.
29. Saturday.....St. Peter.
30. Sunday.....*3rd Sunday after Trinity.* Jesuits expelled from France, 1880.

Notes of Canadian Cases.

ONTARIO.

SUPREME COURT OF JUDICATURE.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

OSLER, J.A.] [May 22.

MCCULLOUGH *v.* CLEMOW.

Interest—Trade agreement—Payment of net profits—Ascertainment—R.S.O., c. 44, ss. 85, 86—Damages for delay—Costs.

The defendant, by a written instrument, agreed with the plaintiffs that during one year he would sell coal at the plaintiff's prices, and that the net profits over $3,000 should be the property of the plaintiffs, and should be deemed to be money received by the defendant for the use of the plaintiffs. The net profits were to be ascertained in manner set forth in clause 6 of the agreement, by a named accountant, on or before May 10, 1885. There was also, by clause 8, a provision for a reference to the same accountant in case of dispute. There was no provision as to interest.

This action was brought on the 30th April, 1891, to recover $581, the amount of the net profits as ascertained by the accountant under clause 6

Clause 8 was not invoked by either party. At the trial it was held that the determination of the amount under clause 6 was void, because it was not made until after May 10, 1885; and a reference to a Master was ordered to take an account of the net profits under the agreement. The Master reported that $706.68 and interest was due to the plaintiffs, but upon an appeal the report was sent back, and a new report was afterwards made finding $501.11 and interest as the amount due.

Held, (1) that a contract to pay interest could not be implied from the dealings of the parties, and, there being no express contract, the case was not one in which interest was payable "by law," and therefore it did not come within the first branch of section 85 of the Ontario Judicature Act, R.S.O., c. 44; nor did it come within the second branch, as a case in which it had been usual for a jury to allow interest, for no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or, in default of that, by means of the account taken in the action.

Smart v. *Niagara and Detroit Rivers R.W. Co.*, 12 C.P. 404, and *Michie* v. *Reynolds*, 24 U.R.C. 303, distinguished.

(2) That the mode of computation provided by the contract being departed from, no certainty remained as to the amount payable or the time of payment, which could not be said to arrive until the final decision of the issues raised in the action; nor did all the elements of certainty appear by the contract, so as to require nothing more than an arithmetical computation to ascertain the exact sum or the exact time for payment; and therefore there was no debt or sum certain, payable by virtue of a written instrument at a certain time, within the meaning of section 86, subsection 1.

Merchant Shipping Co. v. *Armitage*, L.R. 9 Q.B. 99, and *London, Chatham & Dover R.W. Co.* v. *South-Eastern R.W. Co.*, (1892) 1 Ch. 120 (1893) A.C. 429, followed.

Spartali v. *Constantinidi*, 20 W.R. 823, considered.

(3) That, having regard to the delay in bringing the action, and the fact that the omission of the accountant to make his award or computation within the time fixed by the sixth clause of the agreement was not attributable to the misconduct, delay, or default of the defendant, the plaintiffs were not equitably entitled to damages in the nature of interest for the delay in payment.

Consideration of the question of costs.

Shepley, Q.C., and *J. Christie* for the plaintiffs.

O'Gara, Q.C., for the defendant.

Chancery Division.

STREET, J.] [June 11.

IN RE MACPHERSON AND CITY OF TORONTO.

Arbitration and award—Municipal corporations—Expropriation of land—Compensation—View of premises—Effect of—Weight of evidence—Opinion evidence—Potential value of property—Improvements—Lands injuriously affected—Purchase money—Interest—Land, when "taken"—By-law—Jurisdiction of arbitrator.

An appeal by the city corporation from the award of a single arbitrator in respect of the amount of compensation to be paid to landowners for an acre and a quarter of land expropriated by the corporation for a road, by a by-law passed on the 27th July, 1888, which described the road by metes and bounds, and provided "that the same is hereby taken and expropriated for, and established and confirmed as, a public highway or drive," pursuant to which the corporation took possession of the land, and offered the landowners $2,600, which they refused. The arbitrator made his award on the 11th March, 1895, allowing the landowners $5,505 for the land taken, and $10,095 for other lands injuriously affected, and interest on both sums from the date of the by-law.

Held, (1) that where an arbitrator has viewed the premises, but it does not appear that he has proceeded partly upon his view, the court should consider only the evidence taken before him, and should not give any greater effect to his findings than if he had not viewed the premises.

(2) As to the weight of evidence, there was ample testimony to warrant the arbitrator, if he gave credit to it, in his findings; and it was not for the court to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions.

(3) That the arbitrator was justified in taking into account the potential value of the property, when improved, after allowing for the cost of filling it in, as a means of arriving at its actual value; otherwise he would have been driven to say that the property in its existing shape, not being useful for any purpose, he must refuse to allow anything for it, because it might never be filled in, although by filling it in the owner might make a large sum out of it.

Ripley v. *Great Northern R.W. Co.*, L.R. 10 Ch. 435; *Widder* v. *Buffalo & Lake Huron R.W. Co.*, 27 U.C.R. 425; and *Boom Co.* v. *Patterson*, 98 U.S.R. 403, followed.

(4) That the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken.

James v. *Ontario & Quebec R.W. Co.*, 12 O.R. 624, 15 A.R. 1, specially referred to.

(5) That the land must, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and interest was payable from that date.

Rhys v. *Dare Valley R.W. Co.*, L.R. 19 Eq. 93, and *Re Shaw* v. *Birmingham*, 27 Ch.D. 614, followed.

(6) That the arbitrator had jurisdiction to award interest.

J. B. Clarke, Q.C., for the city corporation.

H. J. Scott, Q.C., and *H. C. Boultbee* for the landowners.

Common Pleas Division.

ROSE, J.] [May 8.

REG. EX REL. THORNTON *v.* DEWAR.

Municipal corporations—Controverted election—Bribery—Agents—Quo warranto—Consolidated Municipal Act (1892), ss 209-13.

Held, that no one can be found guilty of bribery under ss. 209-13 of the Consolidated Municipal Act, unless the evidence discloses in him an intention to commit the offence. A candidate desiring and intending to have a pure election cannot be made a quasi-criminal by the act of an agent who without the knowledge or desire of the principal, violates the statute to advance the election of such candidate.

W. Nesbitt and *Sicklesteel* for the relator

Aylesworth, Q.C., for the defendant.

STREET, J.] [June 12.

MORGAN *v.* HUNT.

Life insurance—Foreign benevolent society—Policy—Conditions not on face of—Rules of society—52 Vict., c. 32, s. 4—51 Vict., c. 22, s. 2—Beneficiaries—Right of society to limit to certain class—Substitution of others by will of insured.

Action by a widow against the executors and beneficiaries under her deceased husband's will for a declaration that the plaintiff was entitled to the amount payable under a benefit policy upon the life of the deceased, issued by a benevolent society incorporated under the laws of the United States, with its head office in the State of Illinois, and not incorporated or registered under any act of this Province.

At the time of the issuing of the policy the deceased was an unmarried man, and the benefits under it were made payable to his mother, who predeceased him, or his executors. By one of the by-laws of the society it was provided that where the insured marries after the date of the policy, it *ipso facto* becomes payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his widow the amount of this insurance, and $750 upon another insurance, subject, however, to the payment of his debts.

Held, that the policy was capable of being controlled by conditions not set out upon its face, because s. 4 of 52 Vict., c. 32, applies only to the companies to which R.S.O., c. 167, applies; and as the insurance and the rights of the parties under it did not depend upon anything contained in R.S.O., c. 136, it was not necessary to consider whether it was brought within the scope of that Act by 51 Vict., c. 22, s. 2; and therefore the binding terms of the contract were to be found upon its face and in the rules of the society, which formed part of the contract.

Held, also, that under the terms upon which the society agreed to pay this money the insured had no power to bequeath any part of it to his executors or his creditors, and the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and therefore the money belonged to the widow free from the obligation to pay debts.

H. J. Scott, Q.C., and *D. Robertson* for the plaintiff.

Aylesworth, Q.C., for the defendants.

Practice.

STREET, J.] [Nov. 26, 1894.

CARROLL *v.* PROVINCIAL NATURAL GAS AND FUEL CO. OF ONTARIO.

Interim injunction—Duration of—"Final disposition of the action"—Judgment after trial—Stay of entry—Effect of.

Where an injunction is granted "until the trial or other final disposition of the action, or until further order," it remains in force until the action is finally disposed of, or until some other order is made with regard to the injunction entered, because until then it cannot be certain what the final judgment will be. The pronouncing of judgment is not equivalent to the entry of judgment, although when entered the judgment takes effect from the date on which it was pronounced, unless otherwise ordered.

And where an interim injunction was obtained by the plaintiffs, restraining the defendants from doing certain acts until the trial or other final disposition of the action, or until further order, and by the judgment pronounced after the trial the action was dismissed, but the entry of the judgment was stayed until the fifth day of the next sittings of a Divisional Court,

Held, that the effect of the stay was to leave the whole matter *in statu quo* until the defendants should become entitled to enter judgment, and by so doing to put an end to the injunction in accordance with its terms.

Aylesworth, Q.C., for the plaintiffs.

McCarthy, Q.C., for the defendants.

Chy. Div'l Court.] [May 27.

IN RE SOLICITORS.

Costs—Solicitor and client—Taxation—Application by solicitor—Retainer disputed by one of two alleged clients—Multiplicity of proceedings—Taxation as to quantum—Question of liability reserved.

Where the solicitors sought to obtain an order for taxation of certain bills of costs against two alleged clients, one of whom disputed the retainer and opposed the application,

Held, reversing the decision of STREET, J., in Chambers, MEREDITH, J., dissenting, that, in order to avoid multiplicity of taxations, the usual order for taxation should be made as against the unresisting client; such taxation to be on notice to the other, who was to be at liberty to attend and intervene if so advised; and such taxation to be conclusive against him as to the quantum of liability, in case he should be ultimately found liable in an independent proceeding.

Per BOYD, C., and ROBERTSON, J.: In strictness, the solicitor may take out the common order to tax his own costs, even though he knows that the alleged client disputes his retainer as to the whole bill, and the client is at liberty thereunder to dispute every item on the ground of no retainer; but in such a case it is not well to force the client to contest the question of retainer before the Master, if he desires it to be tried by a judge or a jury, and to accomplish this the taxation should be limited to the quantum of liability.

Per STREET and MEREDITH, JJ.: It is reversing the proper order of events to allow a solicitor to put his alleged client to the expense of a taxation without requiring him first to show that he has a claim upon the client for the bill when taxed.

In re Jones, 36 Ch.D. 105; *In re Salaman*, (1894) 2 Ch. 301; and *In re Totten*, 27 U.C.R. 449, discussed.

Aylesworth, Q.C., for the solicitors.

W. H. Blake for the respondent, one Adair.

Q.B. Div'l Court.] [May 31.

CLOUSE *v.* COLEMAN.

Discovery—Bodily injury—Examination by medical practitioner—54 Vict., c. 11—Questions.

By 54 Vict., c. 11, it is provided that an order may be made directing that the person in respect of whose bodily injury damages or compensation is sought in an action "shall submit to be examined by a duly qualified medical practitioner."

Held, that the statute does not authorize the putting of questions by the medical practitioner to the examinee.

H. S. Osler for the plaintiff.

Bristol for the defendant.

Chy. Div'l Court.] [June 1.

IN RE DRURY NICKEL CO.

Costs—Winding-up of company—Creditors' solicitors—Payment out of assets—Services and attendances—Regulation of.

Upon a reference for the winding up of a company the referee appointed a firm of solicitors to represent the general body of creditors, and ordered that they should be notified to attend whenever he so directed, and that their costs, as between solicitor and client, should be paid out of the assets.

Held, that this class of order and liability was not favoured by the courts, and should be invoked and attendance thereunder had only when there was any special question on which the appearance of some one to represent the creditors was desirable; that attendances and services should not be paid out of the assets except when contemporaneously approved of by the referee; and it was not proper practice to extend this at the close of the proceedings by obtaining a certificate from him that, had he been applied to from time to time, he might have provided for other attendances and services.

Order of MEREDITH, C.J., reversed.

F. J. Travers for the liquidator.

D. Armour for the solicitors.

Chy. Div'l Court.] [June 1.

POLLARD *v.* WRIGHT.

Venue—Change of—Cause of action—Residence of parties—58 Vict., c. 13, s. 21—"Good cause."

By s. 21 of 58 Vict., c. 13, it is provided that every action in the High Court shall be tried in the county in which the cause of action arises, in case all the parties reside in that county, provided that, "for good cause shown," a judge may order the action to be tried in another county.

Held, that this applied to an action pending before it was passed; and that where the cause of action arose, and all the parties resided in one county, a very strong case would have to be made before a trial in another county would be ordered.

C. H. Widdifield for the plaintiff.

Masten for the defendant Milling.

Chy. Div'l Court.] [June 1.

CLARKSON *v.* DUPRÉ.

Writ of summons—Service out of jurisdiction—Rules 271 (e), 1309—"Tort". Action to set aside preferential transfer of goods.

Action against defendants residing in the Province of Quebec, brought by the assignee for the benefit of creditors of one of them, for a declaration that the transfer of certain goods in Ontario by the assignor to the other defendant —which goods had since been removed to the Province of Quebec—was preferential and void and should be set aside, and for an order for delivery up of the goods or the proceeds to the plaintiff, and for an account.

Upon an application to set aside the writ of summons and the service thereof upon the defendant transferee out of the jurisdiction,

Held, that the action was founded on a "tort committed within the jurisdiction," within the meaning of Rule 271 (*e*), as amended by Rule 1309.

Per BOYD, C.: A restricted construction ought not to be given to the language of the Rule. The ground of complaint rests on statutable tort; the method of investigation is accidental.

Per MEREDITH, J.: Substantially the Act is in trover. Under the statute the transaction, as alleged by the plaintiff, is avoided; the goods become, and the proceeds of them are, the property of the plaintiff, and this defendant has converted them to her own use.

R. McKay for the plaintiff.

W. E. Middleton for the defendant Dupré.

C. P. Div'l Court.] [June 7.

WESTERN BANK OF CANADA *v.* COURTEMANCHE.

Stay of proceedings—Motion to set aside judgment—Divisional Court.

When a motion to a Divisional Court to set aside the judgment pronounced at the trial, but not yet entered has been set down for hearing, there is a stay of proceedings upon such judgment *ipso facto*, unless it should be otherwise ordered.

C. E. Henson for the plaintiff.

D. O. Cameron for the defendant Courtemanche.

Q.B. Div'l Court.] [June 13.

GENERAL ELECTRIC CO. *v.* VICTORIA ELECTRIC LIGHT CO. OF LINDSAY.

Pleading—Cross-counterclaim—Striking out—Cross-relief under Rule 374—Action on promissory note—Defence—Counterclaim—Parties—Rule 376.

Held, affirming the decision of MEREDITH, J., 16 P.R. 476, that a person brought into an action as defendant to a counterclaim delivered by the original defendant cannot deliver a counterclaim against such defendant.

Street v. *Gover*, 2 Q.B.D. 498, followed.

Semble, if the company brought in here as defendants by counterclaim had been proper parties, cross-relief might have been given them, under Rule 374, by staying execution upon any judgment recovered against them until they should establish their set-off in an independent action.

The action was upon a promissory note. The counterclaim of the original defendants alleged that the plaintiffs took the note under circumstances which disentitled them to recover.

Held, a defence and not a counterclaim.

It further asked that the plaintiffs might be ordered to deliver up the note to be cancelled.

Held, that if that was a proper subject of counterclaim, it was one arising between the plaintiffs and the defendants as the result of the establishment of the defence, and did not render the introduction of new parties necessary.

It further asked that if the plaintiffs should be found entitled to recover upon the note, the new defendants by counterclaim should be ordered to pay it.

Held, not a matter in which the plaintiffs were concerned, and therefore, under Rule 376, other persons could not be brought in as defendants by counterclaim.

It further alleged that the plaintiffs and the new defendants by counterclaim conspired together with the fraudulent intention of keeping certain insurance moneys without applying them upon the note sued on; but there was no assertion that the plaintiffs received the insurance moneys, or any part of them, beyond the amount of the note; and the prayer was that the new defendants by counterclaim, and not the plaintiffs, should account for the insurance money over and above the amount of the note.

Held, that there was no excuse for joining the plaintiffs as parties liable to account with the added parties, and therefore no excuse for adding the latter.

And the counterclaim of the original defendants, so far as it added new parties, was struck out.

J. A. Paterson for the Canadian General Electric Co., defendants by counterclaim.

W. M. Douglas for the Edison General Electric Co., defendants by counterclaim.

C. Millar for the original defendants.

ROBERTSON, J.] [May 25.

HAGGERT *v.* TOWN OF BRAMPTON.

Interim injunction—Undertaking in lieu of—Duration of—Judgment after trial—Stay of entry—Injunction after trial, where undertaking violated.

Action for the return of certain goods or to recover their value, and for damages for detention or conversion, and for an injunction. Relying upon an undertaking given by the defendants Blain and McMurchy, that nothing would be done to affect the position of the property pending the litigation, according to the plaintiff's version of the undertaking, or until after the trial, according to the defendants' version, the plaintiff did not apply for an interim injunction. The action was tried, and judgment pronounced on the 6th April, 1895, directing that judgment be entered after the second day of the next sittings of the Divisional Court dismissing the action with costs. The next sittings of the Divisional Court were fixed for the 27th May, 1895.

Soon after the delivery of judgment the defendants began to dispose of the property the subject of the action, and on the 9th May, 1895, the plaintiff

obtained from a local judge an interim injunction restraining them from so doing.

The plaintiff also gave due notice of and set down for hearing a motion to the Divisional Court by way of appeal from the judgment of the trial judge.

Upon motion to continue the injunction,

Held, that an undertaking to refrain from doing such an act as the court would restrain by injunction should be as implicitly observed as an injunction, and the court, on application, will adopt the undertaking and give it the effect of an injunction, so far that the party relying on it will be enabled to make any infringement the subject of an application to the court.

Injunction continued until the final disposition of the action.

Pelini v. *Gray*, 12 Ch.D. 438; *London & Birmingham R.W. Co.* v. *Grand Junction Canal Co.*, 1 Eng. Ry. Cas. 224; and *Carroll* v. *Provincial Natural Gas and Fuel Co. of Ontario*, *ante* p. 388, followed.

Justin for the plaintiff.

T. J. Blain for the defendants Blain and McMurchy.

BOYD, C.] [June 4.

OLIGNY *v.* BEAUCHEMIN.

Writ of summons—Service out of jurisdiction—Rules 271 (e), 1309—Malicious prosecution—Arrest in Ontario.

The plaintiff was arrested in Ontario, under a warrant issued in the Province of Quebec, upon an information there laid, and was taken to Quebec, where he was ultimately discharged.

Held, that service of the writ of summons upon the defendants in Quebec in an action for malicious prosecution begun in Ontario could not be permitted under Rule 271 (*e*), as amended by Rule 1309.

The action was one and entire; apart from some contribution as to the total damage, all the matters required to be proved by the plaintiff were localized in Quebec; and proof of some damage in Ontario, which was a continuation of the original tort, was not sufficient to attract the whole cause of action to Ontario.

F. C. Cooke for the plaintiff.

F. A. Anglin for the defendants.

BOYD, C.] [June 6.

BROOKS *v.* GEORGIAN BAY SAW-LOG AND SALVAGE CO.

Evidence—Foreign commission—Jurisdiction of referee—R.S.O., c. 44, s. 102—Rules 34-37, 52, 58, 59, 73, 441, 442, 552, 590.

A referee upon a reference under s. 102 of the Judicature Act, R.S.O., c. 44, has jurisdiction to order the examination of foreign witnesses under a commission; he is in the position of a judicial officer, and can, like the Master or trial Judge, regulate the proceedings, and provide for the attendance of witnesses, and the examination of those who are outside of the Province.

Rules 34-37, 52, 58, 59, 73, 552, considered.

Semble, the provisions of Rule 590 are embraced by inference in Rule 35, so as to enable the referee, by express terms, to grant certificates for the issue of foreign commissions.

But the mere form, whether by certificate or order, is immaterial, having regard to Rules 441, 442.

Hayward v. *Mutual Reserve Association*, (1891) 2 Q.B. 236, and *Macalpine* v. *Calder*, (1893) 1 Q.B. 545, followed.

Kilmer for the plaintiff.

C. W. Kerr for the defendants.

BOYD, C.] [June 8.

HOWLAND *v.* INSURANCE COMPANY OF NORTH AMERICA.

Writ of summons—Foreign corporation—Service on agents within jurisdiction—Foreign contract—Question of jurisdiction—Special appearance—Rule 286.

In an action by residents of Ontario upon a foreign contract of insurance against a foreign corporation service of the writ of summons was effected upon local agents of the defendants in Ontario.

Upon motion to set aside the service, or for leave to enter a special appearance,

Held, that, although the service might be technically right, the question of jurisdiction was a grave one, and should be dealt with at a later stage.

Leave given to the defendants to appear conditionally or under protest, and then raise the defence of want of jurisdiction and other defences, as advised.

There is no obstacle in the present practice to either of these methods of appearance, Rule 286 being wide enough to cover all cases of appearance.

Arnoldi, Q.C., for the plaintiffs.

Ryckman for the defendants.

OSLER, J.A.] [June 10.

LANG *v.* THOMPSON.

Parties—Description—Style of cause—Action by one plaintiff—Words "and Co."—Amendments.

A person carrying on business alone, but in a name denoting a firm or partnership, cannot bring an action in that name. Where, however, such name consisted of his surname, prefaced by the initials of his Christian names, and followed by the words "and Co.,"

Held, that these words in the style of cause in an action were mere surplusage, or, if not, they should be struck out; and, as the mistake was trifling, and no one was misled or affected by it, an amendment at the trial should have been granted as of course.

Mason v. *Mogridge*, 8 Times L.R. 805, distinguished.
Judgment of the 10th Division Court in the County of York reversed.
Aylesworth, Q.C., and *F. J. Travers* for the plaintiff.
Fair for the defendant.
E. Saunders, a third party, in person.
F. E. Hodgins for the garnishees.

MANITOBA.

COURT OF QUEEN'S BENCH.

Full Court.] [June 8.

NORTHWEST COMMERCIAL TRAVELLERS' ASSOCIATION *v.* LONDON GUARANTEE AND ACCIDENT CO.

Accident policy—Life insurance— Death by freezing.

Judgment of BAIN, J., (noted *ante* p. 37) affirmed with costs.

Full Court.] [June 8.

MARTIN *v.* NORTHERN PACIFIC EXPRESS CO.

Money had and received—Receipt only prima facie evidence of delivery—Common carrier—Delivery of money package sent by express.

Judgment of BAIN, J., (noted *ante* p. 180) affirmed with costs. KILLAM, J., dissenting on the ground that plaintiff had failed to comply with one of the conditions as to notice of the loss endorsed on the receipt given by defendants when the package was first delivered to them, by which a copy of the receipt was to be annexed to the notice.

Ewart, Q.C., and *C. P. Wilson* for the plaintiff.
Howell, Q.C., and *Machray* for defendants.

KILLAM, J.] [June 6.

ROGERS *v.* COMMERCIAL UNION ASSURANCE CO. ET AL.

Arbitration and award—Setting award aside—Misconduct of arbitrators.

At the trial of these cases the plaintiff sought to give evidence of value of certain goods destroyed by fire, against which the defendants had issued policies insuring the plaintiff. The defendants then showed that plaintiff had entered into an agreement with them for ascertaining the amount of loss by a reference to two arbitrators, one chosen by each, together with a third person chosen by them "as an umpire if necessary." An umpire was chosen, but not

being sufficiently skilled in judging the values of the kinds of goods insured an expert was employed by the two arbitrators, apparently with the consent and acquiescence of the plaintiff's manager, who made an estimate of the damage to the goods not entirely burned, and this estimate was approved and signed by the two arbitrators and by the umpire. As to the value of the goods which had been entirely destroyed, the defendants' arbitrator and the umpire agreed upon an estimate. An award was afterwards signed by the two latter, but the arbitrator appointed by the plaintiff did not join in making this award.

Held, that the award was binding notwithstanding that the expert had been called in to determine upon valuations, and that the arbitrators and umpire had accepted his estimate; and that no evidence should be received to show that the plaintiff's loss was greater than the amount ascertained by the award.

Hagel, Q.C. and *Elliott* for plaintiff.

Mulock, Q.C., *Munson*, Q.C., *Richards* and *Bradshaw* for the several defendants.

Appointments to Office.

SHERIFFS.

Counties of Lennox and Addington.

George Douglas Hawley, to be Sheriff of the Counties of Lennox and Addington, in the stead of Oliver Thatford Pruyn, deceased.

District of Parry Sound.

Samuel Armstrong, to be Sheriff of the District of Parry Sound, in the stead of Henry Armstrong, deceased.

DIVISION COURT CLERKS.

County of Prince Edward.

Frederick Slaven, of the Town of Picton, to be Clerk of the First Division Court of the County of Prince Edward, in the stead of France McManus, deceased.

County of Wellington.

Hugh Mitchell, of the Village of Fergus, to be Clerk of the Fourth Division Court of the County of Wellington, in the stead of T. W. Thomson, deceased.

County of Haldimand.

John Farrell, of the Village of Cayuga, to be Bailiff of the Second Division Court of the County of Haldimand, in the stead of Andrew Finlan, deceased.

SURROGATE CLERK.

Toronto.

The Honourable Timothy Anglin, of Toronto, to be Surrogate Clerk.

REGISTRAR OF DEEDS.

County of Brant.

William Bruce Wood, to be Registrar of Deeds for the County of Brant, in the stead of Thomas Strachan Shenstone, deceased.

Flotsam and Jetsam.

A BOOK, which was a compilation of various tariffs of fees, was recently sent to a bookbinder to be bound. It came back labelled "Manual on Tariffs"!

WE would submit a short Act for the consideration of our legislative Solons as furnishing a proper remedy for occasional outrages upon justice, viz.: "In case any newspaper or periodical shall publish, of or concerning any person under accusation for any crime, any statement which shall prejudice, or be likely to prejudice, the fair trial of such person, the publisher of such newspaper or periodical shall be liable to a penalty of $500, to be recovered by the accused person on a summary application to the court in which the trial of such person is pending, or at which the same is to take place, and in default of payment the publisher shall be committed to gaol for six months, with or without hard labour, as the court may order."

SIR JAMES BACON.—The death of Sir James Bacon, at the age of ninety-eight, has deprived the profession of the hope that he would become a centenarian. His career was probably unique. He was fifteen years old when the office of Vice-Chancellor of England was created, and when he retired from the Bench nine years ago he was the last occupant of the office. He held the extinct post of Commissioner in Bankruptcy, and, being afterwards Chief Judge in Bankruptcy, he administered two different Bankruptcy Acts. He was appointed a judge when he had reached what is considered the allotted span of life, and remained on the Bench until he was eighty-eight years of age. He was the oldest Privy Councillor in the country. His judgments, though not unfrequently reversed on appeal, were delivered with a conciseness and vigour that is somewhat rare in the courts, and will bear reading for their literary merits alone. They are adorned by many a literary allusion and phrase, which shows that he was a scholar as well as a lawyer.—*Law Journal.*

A STORY reaches us of a certain judge of an inferior court in Canada who owes his elevation to the Bench more to his ability as a political wire-puller than to his professional standing, and whose acquaintance with the grammar of his native tongue is most casual. He had some reputation at *nisi prius* as a fairly skilful examiner of witnesses who would submit to being bullied and brow-beaten, but one day he became a cropper by reason of his illiteracy. The subject of dispute was the boundary of a certain piece of land, and an old land surveyor was under cross-examination by the judge mentioned, who was then counsel for the defendants. The most serious obstacle defendants had to surmount to prove their title was an old mound of stones which plaintiff alleged had long marked their boundary. Fixing one eye on the jury and the other on the shrinking witness, the learned counsel shouted in awful tones:

"Now, sir, remember you are on your oath! I want you to answer this simple question, 'Was them stones there when you made your survey?'"

"Yes, sir," replied the old man, in a most impressive manner, and with never a smile on his face—"Yes, sir, *them stones was there when I made the survey!*"

THE canny faculty of the "Hielandmon" is a plant that takes transplanting kindly, as witness the following episode at a recent sitting of the Exchequer Court in Cape Breton. The Crown was suing for the recovery of money fraudulently obtained upon certain fishing bounty cheques by means of personation. The locality where the frauds were perpetrated was wholly settled by Highland Scotch immigrants, many of whose descendants to-day can speak nothing but Gaelic. A peculiar custom prevails amongst them of giving precisely the same Christian name to brothers of full blood, often resulting in much confusion. Counsel for the defence was not slow to avail himself of this fact to show that the defendants might have innocently paid over the money to the wrong person by mistaking his identity. But there was a hard nut for counsel to crack in one instance where a certain *Jonathan* Mc—— had been paid the money coming to one *John* Mc—— on the bounty list. He called as a witness a rawboned follower of the craft of Tubal-Cain to prove that "John" and "Jonathan" were one and the same name in Gaelic. Now, the witness was a good Roman Catholic, and his own parish priest was present in court, so when the learned counsel opened fire by asking him if "Jain" didn't mean *Jonathan* in the Old Testament, and *John* in the New Testament, as found in the Gaelic Bible, his Scotch caution was immediately aroused against being entrapped into an admission that he would do "sic a wrang thing" as to read a Protestant compilation of the scriptures. "I canna say for that," he answered, "but I do say that my own name it will be 'John,' and I nefer heerd ennyone callin' me 'Jonathan,' whatever!"

"But," inquired counsel, "you surely read the Gospels sometimes, and you know there is a Gospel according to St. John?"

Witness (with an air of not wishing to commit himself): "I have heerd of them gospels."

Counsel: "Didn't you ever read the Gospel of St. John in Gaelic or English?"

Witness (his manner indicating as much righteous repudiation as if he were asked if he had perused a French novel): "No, I nefer read them books!"

A NEW book on Canada, by Dr. Bourinot, will shortly be issued. It is entitled "How Canada is Governed," and gives in plain, simple language a short account of the executive, legislative, judicial, and municipal institutions of the country, together with a sketch of their origin and development. The book will be illustrated with numerous engravings and autographs, and, being the work of so eminent an authority as Dr. Bourinot, will be indispensable to those who wish to be well informed about the affairs of the Dominion. The Copp, Clark Company (Ltd.) are the publishers.