Canada Law Journal.

VOL. XXXV. JULY, 1899. NOS. 13 AND 14.

We congratulate the Chancellor upon the honor of knighthood recently conferred upon him by Her Majesty. It is a well merited tribute to his high personal character and his eminent judicial qualities, as well as to the position which he occupies as President of the High Court of Justice of Ontario. It is fitting, moreover, that this journal should tender to Sir John Boyd its congratulations and best wishes on this occasion, inasmuch as before his elevation to the Bench he was for many years a highly valued contributor to the pages of this journal. May he long live to enjoy the honor and serve his country.

As the Lords and Commons of Canada have not as yet come to terms as to the measure known as the Re-distribution Bill, the proposal to appoint three judges of the High Court of Justice, as a Board of Arbitration for certain purposes in connection therewith, must stand over for the present, and any comment thereon may also be postponed until after the "dog days."

The English journals have called attention to the unsatisfactory condition of things there in relation to the tardy administration of justice, especially in connection with criminal trials, and the absurd character of their circuit system, which is a relic of a bygone age. The Bar Council have taken up the matter, and have exposed the scandals of long delay in the trial of criminals. A suggestion has been made, which will probably be carried out, for the appointment of a royal commission to enquire into the subject. The *Times* in a trenchant article advocates an enquiry into the legal system as a whole, and it may be assumed that some radical changes will shortly be made. As a matter of minor importance we notice that the long vacation in England will run from August 1st to October 12th, instead of from August 12th to October 24th.

The discussion on the above subject brings into prominence the free manner in which the sayings and doings of judges of the English Bench are criticised by the legal press. The Chief Justice, it appears, considers the Queen's Bench Division undermanned. Mr. Justice Lawrance, according to the *Law Times*, believes that the judges are, on an average, walking about Regent Street with their hands in their pockets, and does not seem to think a case should not find a jury to try it as soon as it is ready. The writer asks: "Why not? Does a man wait six months before he can find a dentist to relieve his toothache, or a surgeon to operate, or a telegram to send his message? Why is a law-suit alone, of all things in business and in life, supposed to be a matter to which immediate attention should not be given?" And he sees no objection to Mr. Justice Lawrance walking about Regent Street with his hands in his pockets if he so pleases. Again, our namesake takes Mr. Justice Phillimore to task for his occasional misapprehension of the functions of a judge. Some time ago this learned judge thought fit at the close of a civil case to express his disagreement with the verdict of the jury. He is now very properly taken to task for remarking, after a verdict of not guilty, that the jury had failed to understand the case, notwithstanding all that had been said to them, thus making an unjustifiable attack on the system of trial by jury, and setting up his own judgment as infallible, and casting a slur upon the prisoner whom the jury in the discharge of their legitimate functions had declared to be not guilty. Judges may not like such criticisms, but doubtless they tend to make them more careful in their utterances.

That the telephone accommodation furnished at Osgoode Hall is extremely unsatisfactory is only too notorious, and the commencement of the long vacation seems to be an appropriate time to draw attention to the manifold inconveniences which the profession will have to endure from this source during the coming juridical year, if some radical improvements are not effected. Not only is the number of telephones in the public room absurdly insufficient to satisfy the requirements of lawyers who need them during the busier hours of the day, but much unnecessary waste of time is caused by the fact that those who are engaged on the upper floors are obliged to go downstairs whenever they have occasion to use them. The valuable

minutes lost from these two causes would, if reckoned at their pecuniary value,—the most practical test that can be applied—represent in a single year a sum many times greater than the rental of a dozen telephones. The situation speaks for itself so plainly that comment is superfluous. It is hoped, therefore, that the benchers will consider the advisability of devoting a small portion of the ample means at their command to remedying a state of things which gives rise to so much irritation. The telephones should be largely augmented, the extra ones being distributed so that they would be available without making an unreasonably long journey. And whilst we are upon this subject it is not amiss to suggest that the telephone enclosures should be so constructed as to intercept the voice of the speaker somewhat more effectually than at present. Much of the talk that passes over the wires is of course such that it is a matter of perfect indifference whether it is overheard or not. But not infrequently the conversations deal with matters in regard to which a lawyer would very decidedly prefer not to take into his confidence the more or less curious crowd of auditors, which, owing to the inadequate number of telephones available, is usually to be found waiting for a chance to use them.

DISCHARGE OF SURETIES UPON CROWN BONDS.

The Exchequer Court in the case of *The Queen* v. *Black*, a short note of which is given post p. 442, has decided that the doctrine of the well-known case of *Phillips* v. *Foxall* (L. R. 7 Q. B. 666) does not apply to a bond given by an officer or servant of the Crown for the faithful performance of the duties of his office. Reference to the reasons of Quain J., who delivered the judgment of the court in *Phillips* v. *Foxall*, (at pp. 672-673) makes it abundantly clear that the Court of Queen's Bench proceeded upon the theory that it amounts to a fraud for the obligee to withhold his knowledge of the principal's dishonesty from the surety. The court there expressly adopted the view of Story (Eq. Juris. vol. I secs. 215 and 324) upon this point. In the passage first cited from Story, that learned writer says: "If a party taking a guaranty for a surety conceals from him facts which go to increase his risk and suffers him to enter into the contract under false impressions as to the real state of the facts, such a concealment will amount to

a fraud, because the party is bound to make the disclosure; and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." In sec. 324 Story says: "Any undue advantage taken of the surety by the creditor either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract."

In the case before the Exchequer Court, the principal, in his lifetime, was a postmaster in the Province of Quebec, and had entered into a bond to the Crown with two sureties, for the faithful performance of his duties. At the date of his appointment it was one of his duties as such postmaster to receive all deposits for remittance to the central Savings Bank, established as a Branch of the Post Office Department at Ottawa. During his continuance in office and the existence of the bond, several defalcations occurred in the savings bank department of his office which came to the knowledge of the Post Office authorities, and in respect of which his excuses were accepted by them, and he was allowed to make the shortages good and remain in office. There was at one time an investigation by the Post Office authorities into the affairs of his office when a shortage was discovered on the part of a clerk, and this amount was also allowed to be made good and no notice given to the sureties.

After the postmaster's death still larger defalcations on his part were found, and suit was brought against the sureties. They defended the action upon the following ground, amongst others, viz.: that the postmaster having without the consent of the sureties been continued in office after it had been discovered that he had been guilty of dishonesty, the sureties were discharged as to any subsequent losses arising from his dishonesty, in other words, they sought to bring themselves within the principle enunciated by *Phillips* v. *Foxall* and cases similarly decided between subject and subject.

Burbidge J. while doubting that the principle of *Phillips* v. *Foxall* had any place in the law of the Province of Quebec, adhered to the opinion that in any event that principle could not be invoked against the Crown. Speaking of the doctrine above enunciated by Story the learned judge says: "I think that the rule is not applicable to cases arising upon bonds given for the faithful performance of their duties by officers or servants of the Crown, because fraud cannot be imputed to the Crown, and the

Crown is not to suffer loss because a public officer contrary to his duty conceals the truth or fails to disclose it. And it is obvious that the Crown would suffer loss equally by losing its remedy upon the bond in such a case, as it would by being held liable in an action brought against it for the negligence or wrongful conduct of its officer or servant. For like reasons the decision in *Phillips* v. *Foxall*, on whatever ground it may be supported, is not applicable to bonds given to the Crown for the performance by its officers or servants of their duties and for the due accounting for moneys that come into their possession by virtue of their office or employment."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPANY—PROSPECTUS—DIRECTORS, LIABILITY OF, TO MAKE GOOD STATEMENTS IN PROSPECTUS—STATEMENT THAT DIRECTORS WILL TAKE SHARES—IMPLIED AGREEMENT—ESTOPPEL.

In re Moore (1899) 1 Ch. 627, this was a proceeding in a winding-up matter, and the question at issue was as to the liability of a director to be placed on the list of contributories in respect of certain shares of the company in liquidation. The ground of the claim against the director in question was, that he had been party to the issue by the company of a prospectus in which it was stated that the vendors of the property to the company would reinvest their purchase money in the ordinary shares of the company, on which they would receive no interest until the interest on certain debentures and preference shares were paid. And it included the statement: "Seeing that, with the other directors, they take the whole of the ordinary shares, investors have the best possible assurance that every effort will be made to insure the prosperity of the company's business." All the ordinary shares were taken up by the vendors or other persons (not directors), except 367. It was sought to make the directors liable for these 367 shares. Bartholomew, one of the directors, appealed from the order of Wright, J. confirming him on the list

of contributories in respect of the 367 shares. No allotment had ever been made of the stock; but Wright, J., was of opinion that the prospectus constituted an implied contract on the part of Bartholomew as well as the other directors to take up the stock. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.), however, reversed the order of Wright, J., holding that as between the directors and the company the prospectus did not constitute either an express or implied contract to take shares, although Lindley, M.R., remarks: "If we had to consider the effect of the prospectus with regard to a complaint made by a person who had taken shares in the company on the faith of those statements (i.e., of the prospectus), we might possibly come to a conclusion advantageous to that person."

WILL—CONSTRUCTION—GIFT TO TWO, AFTER DEATH OF LIFE-TENANT, "AND IF EITHER OF THEM SHALL BE DEAD" THEN FOR THE SURVIVOR—DEATH OF LEGATEES BEFORE TERMINATION OF LIFE INTEREST—"EITHER" AND "SURVIVOR," MEANING OF.

In re Pickworth, Snaith v. *Parkinson* (1899) 1 Ch. 642, was a somewhat singular case arising on the construction of a will, whereby a testatrix gave her residuary personal estate upon trust to pay the interest to her sister, Therza, for life, and, after her death, to pay and divide the trust moneys between the testatrix's two sisters, Frances and Sarah, share and share alike; "and if either of my said sisters shall be then dead . . . upon trust for the survivor of my said sisters absolutely." Both Frances and Sarah predeceased Thirza, and the question was how the shares bequeathed to them were in that event to be distributed. North, J., held that the gift to the survivor did not take effect, because neither of the sisters fulfilled the condition, in that both died before Thirza; that being so, the clear original gift in favour of the two as tenants in common was not divested, and that their personal representatives were each respectively entitled to one-half the fund. With this judgment the majority of the Court of Appeal (Lindley, M.R., and Williams, L.J.) agreed, but Rigby, L.J., dissented, being of opinion that the representative of the last survivor of the two sisters was entitled to the whole of the fund. We notice that Williams, L.J., launches into poetry, and, to illustrate the meaning of "either," quotes the well-known lines from "The Beggar's Opera," "How happy could I be with either," etc. It isn't often we get poetry in law reports.

RENT—USE OF WAY—REVERSIONER—PERSONAL REPRESENTATIVE.

In *Hastings* v. *North-Eastern Ry.* (1899) 1 Ch. 656 the Court of Appeal (Lindley, M.R. and Rigby and Williams, L.JJ.) affirms the judgment of Byrne, J. (1898) 2 Ch. 674, noted *ante* p. 182, holding that the reversioner and not the personal representative of the lessor was entitled to the rent reserved in a lease of a right of way.

MARRIED WOMAN—GENERAL POWER OF APPOINTMENT—EXERCISE OF GENERAL POWER—LIABILITY OF APPOINTED LAND TO DEBTS—MARRIED WOMENS' PROPERTY ACT 1882 (45 & 46 VICT. C. 75), S. 4)—(R.S.O. C. 163, S. 8.)

In re Hodgson, Darley v. *Hodgson* (1899) 1 Ch. 666. A married woman having a general power of appointment over a fund, by her will appointed £1100 of it to one Darley "in satisfaction of a debt, and that amount due from one to her." As a matter of fact there was no debt due by the testratrix to Darley, but a debt of £1100 was due from her husband to Darley—and the evidence satisfied the Court that it was this debt which was referred to in the appointment. After the death of the testratrix her husband paid the debt to Darley, but it appeared that there were debts due by the testatrix, and that, including the £1100, her estate was insolvent. The question was whether there had been such an exercise of the power of appointment as to make the fund appointed liable for the testatrix's debts generally under the Married Women's Property Act 1882 (45 & 46 Vict. c. 75) s. 4.—(R.S.O. c. 163, s. 8). It was contended that the appointment failed first because the debt to Darley was not owing by the testatrix, and secondly because it had been paid by the husband who really owed it, but North, J. was of opinion that the appointment was valid at the time of the testatrix's death, and though by reason of her claim being paid, Darley might not now be beneficially entitled to the fund, yet, the appointment having been validly made, the fund became liable under the statute for the payment of the testatrix's debts generally.

PRACTICE—ATTACHMENT—ENFORCING ORDER AGAINST CORPORATION—DIRECTORS LIABILITY OF, TO ATTACHMENT—SERVICE OF ORDER—RULE 609.

In *McKeown* v. *Joint Stock Institute* (1899) 1 Ch. 671 the plaintiff sought to enforce an order against the defendant company requiring it to deliver accounts. He therefore moved for an attachment against the sole director, and the secretary of the defendant company. The order in question had been personally served on

the secretary, but not on the director. The motion was resisted by the director on the ground that he had not been personally served with the order, and North, J. held that to be a good objection, and he ordered the motion to stand over for the purpose of serving him.

Correspondence.

LEGAL EDUCATION.

Editor Canada Law Journal.

DEAR SIR: I have read with much interest your well considered article on "Legal Education in Ontario." If I understand the matter properly "a graduate in the faculty of law in any University in Her Majesty's Dominions empowered to grant such degrees is entitled to admission on the books of the Society as a student at law, without any further examination." Thereafter he can pursue the Ontario legal course and be admitted and called in three years Owing to the difficulties surrounding the subject I do not feel competent to suggest amendments in the curriculum by the Benchers, but those of us who have sons to educate in our own profession can avail ourselves (not having a law faculty of our own) of the Universities of McGill and Dalhousie in the other Provinces. A degree in the faculty of law at McGill for instance, being first acquired, a good ground work in civil law at least would be secured, after that I would suggest to my young friends, diligent attention and much observance of details in an office either in City or County Town; in fact during the McGill course, three years, I believe the student should spend his vacation in an office. He can of course take his medicine at the law school as a matter of form if nothing more, and proper attention should make it a crowning work to the foundation laid in McGill or Dalhousie and in the solicitor's office. If I am wrong in my conclusion I would like correction. The weak point now is lack of experience in detail. I commend to notice of intending students, page 197 of the McGill Calender, "Faculty of Law."

Prescott, Ont., April 28th. PATER.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ont.] CANADIAN COLOURED COTTON MILLS CO. *v.* KERVIN. [May 30.

Negligence—Dangerous Machinery—Statutory duty—Cause of accident.

K., a workman in a cotton mill, was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident and it could not be ascertained how it occurred. In an action by his widow and infant children against the company the negligence charged was want of a fence or guard around the machinery which caused the death of K. contrary to the provisions of the Workmen's Compensation Act.

Held, reversing the judgment of the Court of Appeal (25 A.R. 36) and of the Divisional Court (28 O.R. 73), Gwynne, J., dissenting, that whether the omission of such statutable duty could or could not form the basis of an action at common law, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident.

Osler, Q.C., and *Pringle*, for appellants. *Aylesworth*, Q.C., and *Cline*, for respondent.

B.C.] HOBBS *v.* ESQUIMALT & NANAIMO RY. CO [May 30.

Agreement for sale of land—Mutual mistake—Reservation of minerals—Specific performance.

The E. & N. Ry. Co. executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him which he refused to accept, as it reserved the minerals on the land though the agreement was for an unconditional sale. In an action by H. for specific performance of the agreement the Co. contended that in its conveyances the word "land" was always used as meaning land minus the minerals.

Held, reversing the judgment of the Supreme Court of British Columbia (6 B.C.Rep. 228), TASCHEREAU, J., dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance.

Riddell, for appellant. *Hogg*, Q.C., and *Marsh*, Q.C., for respondents.

N.B.] NORWICH UNION FIRE INS. CO. *v.* LEBELL. [May 30.

Fire insurance—Application—Ownership of property insured Misrepresentation.

A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known a fact material to the risk, would avoid the policy. In the application for said policy the insured stated that he was sole owner of the property to be insured and of the land on which it stood, whereas it was, to his knowledge and that of the sub-agent who secured the application, situated upon the public highway.

Held, reversing the judgment of the Supreme Court of New Brunswick, that as the application was more than once referred to in the policy, it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition.

Wallace Nesbitt and *C. J. Coster*, for appellants. *J. B. M. Baxter*, for respondent.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] THE QUEEN *v.* BLACK. [March 6.

Postmasters' bond — Validity — Breach — Primary obligation — Release of sureties — Laches of government officials — Estoppel — Effect of 33 Henry VIII., chap. 39, sec. 79.

In a case in the Province of Quebec upon a postmaster's bond, the principal and sureties were each bound in the penal sum of $1,600, and the condition of the obligation was that if the principal faithfully discharged the duties of his office and duly accounted for all moneys and property which came into his custody by virtue thereof, the obligation should be void. The bond also contained a provision that it should be a breach thereof if the postmaster committed any offence under the laws governing the administration of his office. It was objected by the sureties against the validity of the bond that it contained no primary obligation, the principal himself being bound in a penal sum, and that the sureties were therefore not bound to anything under the law of the Province of Quebec.

Held—1. That there was a primary obligation on the part of the principal insomuch as he undertook to faithfully discharge the duties of his office, and to duly account for all moneys and property which might come into his custody.

2. That as the bond conformed to the provisions of An Act respecting the security to be given by officers of Canada (31 Vict., c. 37; 35 Vict., c.

19) and The Post Office Act, (38 Vict., c. 7,) it was valid even if it did not conform in every particular to the provisions of Art. 1131, C. C. L. C.

It was also objected that the bond did not cover the defalcations of the postmaster in respect of moneys coming into his hands as agent of the savings bank branch of the Post Office Department.

Held, that it was part of the duties of the postmaster to receive the savings bank deposits and that the sureties were liable to make good all the moneys so coming into his custody and not accounted for.

The sureties upon a postmaster's bond are not discharged by the fact that during the time the bond was in force the postmaster was guilty of defalcations, and that such defalcations were not discovered or communicated to the sureties owing to the negligence of the Post Office authorities Nor is the Crown estopped from recovering from the sureties in such a case by the mistaken statement of one of its officers that the postmaster's accounts were correct, and upon the strength of which the sureties allowed funds of the postmaster to be applied to other purposes than that of indemnifying themselves.

The Crown is not bound by the doctrine of *Phillips* v. *Foxall*, L. R. 7 Q. B. 666, inasmuch as it proceeds upon the theory that failure by the obligee to communicate his knowledge of the principal's wrong doing amounts to fraud, and fraud cannot be imputed to the Crown.

The statute 33 Hen. VIII, c. 39, s. 79, respecting suits upon bonds is not in force in the Province of Quebec.

Newcombe, Q.C., and *Gisborne*, for the Crown. *Hogg*, Q.C., and *Madore*, for defendants.

Province of Ontario.

COURT OF APPEAL.

Practice.] MURPHY *v.* PHOENIX BRIDGE CO. [June 29.

Writ of summons — Service on foreign corporation — Business within Ontario—Servant—Acquit—Rule 159.

Order of a Divisional Court, 18 P. R. 406, reversed, and order of MEREDITH, C. J., restored.

W. H. Blake, for the appellants. *Mulvey*, for the respondents.

Moss, J.A.] CONFEDERATION LIFE ASSOCIATION *v.* LABATT. [June 30.

Appeal Court of Appeal Stay of execution—Security for damages—Rule 827 (2).

An application by the defendant Labatt for an order Rule 827 (2), that, notwithstanding the pendency of the appeal of the MacWillie Company,

third parties, execution should not be stayed as regards the damages awarded against them, or at all events as regards the sums of $160 and $282.25 part thereof, or that the MacWillie Company should be directed to give security for the damages. The motion was made upon two grounds: (1) that the company had no assets and had discontinued business; (2) that the company did not on the appeal dispute their liability to the defendant to the extent of $160, in other words that they admitted the propriety of the judgment in favour of the plaintiffs against the defendant, but disputed that they were liable to indemnify the defendant beyond the sum of $160. The sum of $282.25 represented the costs of the plaintiffs paid by the defendant. The appeal of the company was in form an appeal against the judgment in favour of the plaintiffs, as well as against the judgment of indemnity in favour of the defendant, but the reasons for appeal indicated that the company were relying chiefly on the ground that their liability to the defendant ought to be limited to $160.

Held, that security is not to be required from the appellant for damages, unless, upon an application showing special circumstances, the court otherwise orders. *McCormick* v. *Temperance and General Life Assurance Co.*, 17 P.R. 175, followed. An application under Rule 827 (2) is not sufficiently supported by showing that the appellant does not appear to be presently possessed of assets immediately available under execution. But in this case the allegation of wants of assets was displaced, and it was not shown that any fraudulent or improper disposition of the assets spoken of had been attempted or contemplated. As to the second ground, the defendant was not willing to accept the $160 in full of his claim against the company, but insisted upon the full measure of the judgment in his favour. It might be that, should the company succeed in their appeal to any extent, there would need to be a readjustment of not only the amount of damages, but also of the costs for which the company had been made responsible. It could not be said at present that the company must in any event be ordered to pay $160 to the defendant, for there might be deductions or off-sets. The defendant was not in any immediate danger from inability to enforce his judgment. Motion refused with costs to the company in the appeal.

Rowell, for defendant. *W. H. Irving*, for MacWillie Company.

HIGH COURT OF JUSTICE.

Boyd, C., Robertson, J., Meredith, J.] [Jan. 22.

FOSTER *v.* TORONTO STREET RAILWAY CO.

Dies non juridicus—Good Friday—Trial.

Held, that in this country the only day on which no judicial act can be validly done is the Lord's Day, or Sunday. This does not result from Sunday being a statutory holiday, but because it is dies non juridicus as declared

by early canons of the Church, adopted or confirmed by the English Kings and so incorporated into the common law, and as such introduced into this province by its first colonization and constitution. Christmas Day, Good Friday, and the like, are holidays by statute, but they are not on the same footing as to separateness from ordinary or secular work as the Lord's Day. Therefore the proceeding with the trial of this case on Good Friday, both counsel consenting and the jury desiring, it was a perfectly proper and competent thing to do so far as the legal validity of the proceeding was concerned.

W. R. P. Parker, for plaintiff. *Bicknell*, for defendants.

Armour, C.J., Falconbridge, J., Street, J.] [March 10.

REGINA *v.* REID.

Lord's Day Act—Ordinary calling—Foreman of grain elevator of Grand Trunk Railway Co.—R. S. O. c. 246—Employer—Employee.

The defendant was convicted of following his ordinary calling of foreman of Grand Trunk Railway Co. grain elevator in superintending the unloading of grain from a vessel into the elevator on the Lord's Day.

Held, that R. S. O. c. 246 does not apply to defendant's employer the Grand Trunk Railway Company of Canada, and as it did not apply to the employer it did not apply to the employee (the defendant) and the conviction was quashed.

Du Vernet, for the motion. *O'Meara*, contra.

Armour, C.J., Falconbridge, J., Street, J.] [May 1.

MCMILLAN *v.* MCMILLAN.

Will—Devise—Estate in fee—Cutting down—Estate in tail.

A testator by his will provided as follows: "Thirdly. I give and devise to my son A and his heirs and assigns forever . . the south half of lot 23. . . Fourthly. It is my will and desire provided my son A shall have no lawful heir or children that . . . the south half of lot 23 . . after his death that my son D shall have it with all the right and title that my son A had to it heretofore, provided that my son D will come and take possession of the same six months after my son A's death . . Fifthly. I will and bequeath to my beloved wife the use of all my stock of cattle and personal property, it is my will likewise that she will have the use of the East half of the South half of lot 23 . . during life, to remain on the premises on which she shall be entitled to reside during her life. After her decease my will is that the same shall belong to my son A, his heirs and assigns forever." After the testator's death his widow remained in possession of her half and A took possession of the remainder which he retained until his mother's death after which he occupied the whole until

his own death. A never had any children but he made a will devising all his real and personal estate to his wife (the defendant, M.) D (the plaintiff) demanded possession within the six months, but it was refused by the defendant M.

Held, that under the third clause of the will A took an estate in fee simple which was by the fourth clause cut down to an estate tail with remainder in fee to D, but that the fifth clause gave a life estate in half the property to the testator's widow with a remainder in fee to A and that, therefore, the plaintiff and the defendant were each entitled to a half in fee simple. Judgment of Robertson, J., reversed in part.

Master in Chambers.] MAIR *v.* CAMERON. [May 12.

Writ of summons—Renewal—Withholding of evidence—Statute of limitations.

Where orders were made from time to time renewing a writ of summons, and it appeared that the plaintiff all the time knew, but did not disclose, where the defendant could be served, and the Statute of limitations had, but for the renewals, barred the plaintiff's claim, the orders were rescinded, upon an application by the defendant made under Rule 358, after the orders had come to his knowledge. *Doyle* v. *Kaufman*, 3 Q.B.D. 7, 340, and *Hewett* v. *Barr* (1891) 1 Q.B. 98, followed.

W. M. Douglas, for plaintiff. *D. O. Cameron*, for defendant.

Boyd, C., Ferguson, J.] [May 12.

MASON *v.* MASSACHUSETTS BENEFIT LIFE ASSOCIATION.

ALLAN'S CASE—O'DEA'S CASE.

Insurance—Benefit association—Transfer of business—New contract—Validity of—Misrepresentation as to age—Effect of—Pedigree—Dominion license—Registration in Ontario—55 Vict., c. 39, s. 34 (O).

A Canadian Benefit Association in which the assured held certificates of insurance, assigned all its assets and business to an American Association, who issued new certificates sealed with the association's seal, and signed in the United States by the president and treasurer to the assured, which were sent to the Canadian agent, who countersigned and delivered them to the assured who subsequently paid premiums. In winding up proceedings where the claimants (one as assignee of one of the assured) sought to prove claims on the certificates, the Master found on the evidence that misrepresentations as to age had been made in both cases by the assured, and disallowed the claims, and that as the contracts had been made with a benevolent association previous to the passing of 55 Vict., c. 39 (O.) the claimants were not entitled to the benefit of s. 34 of that Act,

and the misrepresentation being material was fatal to the contracts. *Cerri* v. *Ancient Order of Foresters* (1898) 25 A. R. 22 followed.

On appeal to a Divisional Court.

Held, that as the matter was not one of pedigree, hearsay evidence should not have been received; that there was a novation and a new contract of insurance between the American company and the assured which came into effect and existence after the Ontario statute of 1892, as the former were validly doing business in Canada, being licensed under R.S.O. c. 124, s. 39. That the completion of the contract by the signature of the agent in Canada made the contract subject to Canadian law; that the association doing business in Canada must be subject to statutory conditions imposed for the benefit of the public, and that the claimant was entitled to the benefit of ss. 33 and 34 of 55 Vict., c. 39 (O). Judgment of the Master in Ordinary reversed.

Marsh, Q.C., for Robert Allan. *W. R. Smyth*, for Harriet O'Dea. *Watson*, Q.C., for liquidator.

Meredith, C.J., Rose, J.] LEEMING *v.* ARMITAGE. [June 16.

Judgment—Setting aside—Fraud—Procedure—Petition—Action—Rule 642

In this action the plaintiff alleged a wrongful interference with his property under a judgment obtained against him by the defendant by fraud in a former action in the High Court of Justice for Ontario, and his claim was to have the judgment set aside and to recover damages for the wrong. Rule 642 provides that a party entitled to impeach a judgment on the ground of fraud shall proceed by petition in the cause.

Held, that the provisions of the Rule were not applicable to this case, and were only applicable to and imperative, if imperative at all, in a simple case where no consequent relief is sought, or, if sought, where it may be granted upon the petition in the original action.

Teetzel, Q.C., for plaintiff. *Munro Grier*, for defendant.

Armour, C.J.] HOFFMAN *v.* CRERAR. [June 16.

Judgment—Default—Writ of summons—Special endorsement—Nullity—Abandonment of action—Joint contractors—Release of some after judgment—Effect of—Costs—Amendment—Execution.

The writ of summons was indorsed with a claim for $404 for service rendered and money expended for the defendants, indicating the nature of the services and of the expenditure, but not the items;

Held, not a special endorsement, and that there was no right to sign final judgments thereon for non-appearance of certain of the defendants, and the judgments which the plaintiffs purported to sign were nullities, and the plaintiffs by proceeding against the other defendants without taking any

warranted proceedings against the defendants who did not appear, must be taken to have abandoned his action against them.

The cause of action was a joint one against thirty-one defendants. Twelve of them did not appear, and judgments were signed against these for the full amount claimed. The other nineteen appeared, and as against them the action proceeded to trial, and judgment was given for the plaintiff against these defendants for $116. An appeal by these nineteen defendants was allowed as to the eleven of them, but dismissed as to eight. After this the plaintiff made an agreement with the twelve defendants against whom judgments had been signed for default, that upon each defendant paying to the plaintiff the sum of $10, such defendant should be released from all liability in respect of the plaintiff's cause of action against him.

Held, that as the release occurred after judgment against the defendants who had appeared, it could not be pleaded in the action; but, as the action was for a joint liability of the defendants who did not appear and of those who failed in appeal, and the plaintiff never had any claim against these defendants for any sum but $116, and the plaintiff had been paid by or had agreed to accept from the defendants who failed to appear, a larger sum, $120, it would be inequitable that the plaintiff should be permitted to enforce his judgment against the defendants who failed in appeal.

Held, also, that the plaintiff, after the judgment in appeal, should have amended the judgment below in accordance with the certificate of the Court of Appeal, and that the costs in the Court of Appeal should have been added to the costs of the action, and only one execution issued thereon.

D. L. McCarthy, for plaintiff. *J. H. Moss*, for defendants.

Moss, J.A.] [June 17.

IN RE TORONTO RAILWAY CO. AND CITY OF TORONTO.

Appeal—Court of Appeal—Assessment appeal—Notice of—Non-prosecution—Motion to dismiss—Rules 790, 821, 822.

Notice of an appeal to the Court of Appeal, under s. 84 (6) of the Assessment Act, R S.O., c. 224, against the decision of a board of County Court Judges with respect to a municipal assessment was served by the municipality upon the railway company whose assessment was in question, but the motion was not set down to be heard nor proceeded with in any way. Upon motion by the railway company for an order dismissing the appeal;

Held, that the appeal, by force of s. 84 (6), was lodged in the Court of Appeal in like manner as an appeal from a decision of a County Court in an ordinary action becomes lodged—when the proper proceedings have been taken—in a Divisional Court, in which case Rule 790, or Rules 821 and 822 applied, and a motion to dismiss was unnecessary; or, if not, that

the appeal was not in the Court of Appeal at all, and no order could be made.

J. Bicknell, for railway company. *H. L. Drayton*, for city corporation.

Armour, C.J., Street, J.] EVES *v.* BOOTH. [June 17.

Dower—Husband and wife—Separation deed—Trustees—Covenant as to release of dower—Construction of.

In 1868 the plaintiff and her husband and trustees on her behalf executed a deed which contained an agreement for separation of the husband and wife, the conveyance of certain property by the husband for the benefit of the wife, and a number of covenants, one of which was as follows: "And the parties of the third part" the trustees "hereby covenant that the said Jane Eves," the plaintiff "will, whenever called upon, release her dower in any lands of which he, the said James Eves" the husband "may hereinafter (*sic*) acquire a title." The other covenants were expressed to be on behalf of or with the heirs, executors, and administrators of the husband. In an action by the plaintiff against the executrix of her husband's will, for dower in his after-acquired lands.

Held, that this covenant was a part of the consideration for the benefits the plaintiff received under the deed, and which she had ever since continued to enjoy, and, although she did not personally covenant, yet, as the covenant was entered into by her trustees on her behalf, and she was a party to and executed the deed containing it, she was bound by her recognition and assent to it, and it would be contrary to equity to permit her to maintain the action.

George Wilkie, for plaintiff. *A. Hoskin*, Q.C., for defendant. *J. E. Irving*, for defendant by counterclaim.

Armour, C.J., Street, J.] [June 20.

QUICK *v.* TOWNSHIP OF COLCHESTER SOUTH.

Equitable assignment—Designation of funds—Alternative—Notice—Agreement.

A contractor, having done work under his contract with the defendants and having brought an action against them for the contract price, and for extra work, gave the plaintiff the following order: "S. Baltzer, Esq., Reeve, Colchester South. Please pay William Jackson Quick, the sum of $100 on account of my contract on the Richmond drain outlet." Nearly a year after the action having been in the meantime referred and another action brought by the contractor against the defendants for damages for overflowing his land, he gave the plaintiff a second order, as follows: "To the reeve, deputy-reeve and councillors of Colchester South. Sirs,—Will you kindly pay to W. J. Quick the sum of $144.25, and charge to my contract

on Richmond drain outlet or damage suit." Shortly after this the referee made his report, finding $139.40 to be due to the contractor, after deducting money paid by the defendants before action and the amounts of certain orders given by him in favor of a number of person, not including the plaintiff. Each party having appealed from the report, a settlement of both actions was agreed upon and carried out, by which, inter alia, the balance of $139.44 was to be applied towards payment of the defendants' costs of the action for damages. Before the making of the agreement the defendants had notice of both the orders given to the plaintiff.

Held, that both the orders were good equitable assignments; the second being an assignment of either of two specific funds, and the defendants being bound to treat it as an assignment of the one which did not arise. The agreement, carried out as it was, established conclusively that the defendants were indebted to the contractor in $139.44, and, having had notice of the orders before the agreement, they were bound to apply the sum to them, instead of in the manner provided in the agreement. Judgment of the County Court of Essex affirmed.

F. A. Anglin, for plaintiff. *Aylesworth*, Q.C., for defendants.

Street, J.] COX *v.* PRIOR. [June 23.

Discovery—Examination of party resident out of Ontario—Order for—Enforcement—Member of Parliament—Attachment—Striking out defence—Rules 443, 454, 477.

Where a defendant resides out of Ontario, and is only in it for a temporary purpose, his attendance to be examined for discovery can only be obtained, under Rule 477, by a judge's order upon notice, and not by appointment under Rule 443. An order was made under Rule 477 for the examination in Ontario of a defendant who resided in British Columbia and who was temporarily in Ontario attending the meetings of the House of Commons of Canada, of which he was a member. Although this order could not be enforced by attachment against the defendant while the House was in session, in the event of his refusing or neglecting to attend, it could be enforced, under Rule 454, by striking out his defence.

Watson, Q.C., for plaintiff. *R. McKay*, for Prior.

Armour, C.J., Street, J.] [June 23.

IN RE ONTARIO MUTUAL LIFE ASSURANCE CO. AND FOX.

Executor and administrator—Life insurance policy—Domicile of insured—Possession of policy—Assignment—Foreign administrator—Domestic insurance company—Administration—Foreign creditors—Agreement—Construction.

The insurance company having its head office in Ontario, insured the life of a person domiciled in Ontario, by two policies, one for $2,000 and the other

for $3,000, payable to his executors or administrators at his death, at such head office. These policies were assigned by the insured to certain persons in Ontario, and an agreement in writing was subsequently made between the insured and these persons, by which his indebtedness to them was settled by his giving two promissory for $500 each, and by which it was also provided that the policies should be reassigned to the insured "upon the payment * * * of the first of the said $500 promissory notes, and shall in the meantime be held as a collateral security for the payment of the said $500 note * * * and the said (insured) shall be bound to keep up all premiums in the meantime, and if not paid when due, the said premiums may be paid by (the assignees), and the payments so made shall be added to said (insured's) indebtedness, to which said policies shall remain as collateral security therefor." The insured died in a foreign country, where he had been for some time domiciled, having in his actual possession, at the time of his death, one of the policies. Letters of administration to his estate were granted by a court in the country where he died to a person there, and also by a Surrogate Court in Ontario to one of the assignees of the policies.

Held, 1. Although the locality of a specialty is where it is conspicuous at the time of the death, that means where it is rightly conspicuous, and, as the assignees were entitled in law to the possession of the policy, it was conspicuous, not where it actually was at the death, but where it rightly ought to have been: and the rule that the locality of a specialty is the jurisdiction in which letters of administration are to be granted is subject to this qualification, if the specialty can be recovered and enforced in the country where it is found at the death; and, assuming that letters were properly granted by the foreign court, the policy could not have been enforced and the moneys payable thereby recovered in the foreign country, for the insurance company being as to that country a foreign corporation and not doing business therein, could not be sued there. The appointment of an administrator in Ontario was, therefore, necessary; and the insurance company having paid the insurance moneys into court, they should be handed over to that administrator to be administered. The foreign creditors of the insured could not be prejudiced by this administration, for they would be entitled to file their claims and rank equally with the Canadian creditors.

2. Upon the true construction of the agreement, the assignees were entitled only to the amount of the first one of the promissory notes, with interest from the maturity, and to the amount of the premiums paid by them since the date of the agreement, with interest.

W. E. Middleton, for claimants R. & J. Fox and John Fox. *McEvoy*, for the claimants Trimble and Stevens.

Boyd, C., Robertson, J., Meredith, J.] [June 23.

REGINA *v.* ELLIOTT.

Criminal evidence—Questioning prisoner—Statements while in custody.

Held, that in accordance with the great weight of authority, answers given by the prisoner under arrest on a criminal charge in response to the officer in charge, are to be received as evidence so long as they are not evoked or extorted by inducements or threats. They may be received if the presiding judge is satisfied that they were not unduly or improperly obtained, which depends upon the circumstances of each case.

T. E Godson, for defendant. *Cartwright*, Q.C., for Crown.

From Boyd, C. COLQUHOUN *v.* MURRAY. [June 24.

Limitation of action—Mortgage—Arrears of interest—Acknowledgment.

Upon the sale of a property which was subject to mortgage the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee endorsed upon the mortgage, and signed a memo. fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser.

Held, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit and that as against an encumbrancer claiming under the purchaser the mortgagee was entitled to only six years arrears of interest. Judgment of Boyd, C., reversed.

J. H. Moss, for appellant. *D. W. Saunders*, for respondent.

Robertson, J.] SWAZIE *v.* SWAZIE. [June 27.

Action on foreign judgment for alimony—Defences—Pleading.

Action on a foreign judgment recovered by a married woman against her husband in the State of Wisconsin for a sum of $800 alimony, which sum she was by the judgment declared to be entitled to be paid out of the real and personal estate of the husband in Ontario. In this action it was sought to have the said judgment declared a lien to that amount on the lands of the defendant in this province. Both husband and wife were British subjects.

Held, that the courts of this country could not aid in giving force to a foreign judgment based on the grounds on which this was based, viz., that though she had been guilty of such cruel and inhuman treatment of her husband that he was entitled to divorce under the laws of Wisconsin, which

divorce was therefore declared, yet the wife was entitled to alimony out of his said property. It was a good answer to this action that the plaintiff had not made out a case for alimony in this country.

German, for plaintiff. *Rykert*, for defendant.

Boyd, C.] HIGGINS *v.* TRUSTS COPORATION OF ONTARIO. [July 6.

Mortgage—Purchaser of equity of redemption—Indemnity—Death of mortgagor—Insolvent estate—Administrator—Release.

Where the mortgagor is dead and his estate is insolvent, the mortgagee cannot compel the administrator of the estate to seek indemnity from one who purchased the mortgaged estate from the mortgagor subject to the mortgage, nor is the administrator responsible in damages to the mortgagee for having released the purchaser from liability.

R. U. Macpherson, and *G. C. Campbell*, for plaintiff. *J. H. Moss*, for defendants.

Nova Scotia.

Full Court.] [March 1.

FRANCKLYN *v.* THE PEOPLE'S HEAT AND LIGHT CO.

Gas Company — Nuisance to adjoining property — Interim injunction — Granting of, deferred on undertaking to remove nuisance and pay damages—Delay in commencing proceedings.

Where it was clearly established that smoke, gases and vapors of a noxious or offensive kind passed continually from the defendant's works and invaded plaintiff's premises, and occasioned material discomfort and annoyance to plaintiff and his family, by rendering plaintiff's house uninhabitable,

Held:—1. The case was one in which the court could properly exercise the summary power entrusted to it by granting an injunction without waiting for the trial. Nevertheless, that as it was possible for the defendant company to carry on their operations in such a way as to remedy the annoyance and injury to plaintiff, that the injunction should be stayed upon the defendant company giving an undertaking to remedy the annoyance and injury complained of and to make proper compensation for the damage already suffered.

2. Plaintiff, having warned the defendant company at the outset, of the results likely to arise from the erection and carrying on of the works, and having protested from time to time without effect against the manner in which the works were carried on, was not to be held prejudiced by a delay of two years after the erection of the works, in commencing his proceedings,

the commencement of the action having been deferred until plaintiff thought he was fully prepared to prove his case and the damages sustained.

Per MEAGHER, J., dubitante: Plaintiff having been in a position to have the case tried and the questions of fact disposed of at an earlier date, and having left his house and not being likely to return thereto before the trial, defendant company should have the option of filing a bond to respond such damages as it should be determined that plaintiff had sustained in the interval between the hearing of chambers and the date of the perpetual injunction in case plaintiff obtained one.

W. H. Covert and *H. Mellish*, for appellant. *R. E. Harris*, Q.C., for respondent.

Full Court.] JOHNSON *v.* LOGAN. [March 1.

Contract for future delivery of goods—Appropriation under conversion by sheriff—Seizing under execution—Title—Special right of property.

Plaintiff and P. entered into an agreement in writing whereby plaintiff agreed to purchase and P. agreed to sell all the deals that P. should cut and manufacture during 1897. Under the terms of the contract the deals were to be cut to certain dimensions and were to be hauled out and ready to be delivered on board the cars at Thompson Station about the last of July, 1897. The deals were manufactured according to the contract and were hauled out and piled alongside the railway siding ready to be loaded on board the cars. A large quantity of the deals delivered at the siding were placed upon the cars by plaintiff with the assent of P. and were sent to Halifax for shipment, and some days after the last of the deals were brought out and deposited at the station, P. was present and went over the deals with plaintiff. Subsequent to the making of the contract and prior to the delivery of the deals, plaintiff made advances to P. on account of the contract to the amount of about $500, and, after the delivery of the deals was commenced, he paid several further sums amounting to nearly, if not the whole amount to which P. was entitled under the contract. The balance of deals remaining at the station having been levied upon by the defendant sheriff under an execution and absent or absconding debtor process against P.,

Held, allowing plaintiff's appeal with costs that there was an irrevocable appropriation of the deals under which plaintiff became possessed of the right to receive and to have them under the contract and was vested with a special right of property in them, which was destroyed or interfered with by the seizure and sale by defendant, and that defendant was guilty of a conversion.

Held, also, that after the delivery of the deals at the railway siding the court would have restrained P. from diverting them to any purpose foreign to the contract and that the mere fact that the complete legal title had not passed would not give an execution creditor a right which P. himself could not claim to exercise.

H. A. Lovitt, for appellant. *H. McKenzie*, for respondent.

Full Court.] SUMNER *v.* COLE. [March 14.

[Writ of summons for service out of jurisdiction—Order for—Practice with regard to—Will not be set aside for technical objections where plaintiff has a good cause of action—Form of order—Affidavit—Where service is to be effected on party residing in the Dominion not necessary to show that he is a British subject.

Plaintiff applied for and obtained an order for a writ of summons for service out of the jurisdiction upon the defendant at Toronto. The affidavit upon which the application for the writ was made set out that plaintiff had a good cause of action, viz.: the failure of defendant to deliver according to contract a quantity of oats purchased from him for delivery at Truro, and other points in this province Attached to the affidavit was certain correspondence relied upon as evidence in support of the contract. Defendant denied the making of the contract and moved to set aside the writ and service, and the order therefor.

Held—1. The question being a doubtful one must be decided upon the trial and not by affidavit.

2. The order which was that plaintiff be at liberty to issue a writ for service out of the jurisdiction against defendant was good, and that the words used were reasonably sufficient to cover leave to issue as well as leave to serve the writ, and that the English practice by which leave to issue is embodied in one paragraph of the order and leave to serve in another is not binding in this province.

3. It was not necessary in the affidavit for the order to show that defendant was a British subject, the writ being issued for service on a defendant residing in a British possession.

4. Where the court is satisfied that the plaintiff has a good cause of action it will not set aside the writ or the service thereof on account of technical objections or slips by which no injury has been caused to the defendant.

D. McNeil and *W. F. O'Connor*, for appellant. *Borden*, Q.C., for respondent.

Full Court.] FOSTER *v.* WALKER. [March 14.

Donatio mortis causa—Evidence of delivery to render effective.

Several years before his death deceased drew up a number of promissory notes which he placed in envelopes addressed to each of his five children, to whom he said they were intended to be delivered after his death. The envelopes were kept in the possession and under the control of deceased up to within a short time before his death, and changes were made in the contents of the envelopes from time to time. Shortly before his death, when he felt he was about to die deceased sent for defendant, and directed him to take the envelopes out of the box in which they were kept and seal them up, return them to the box, lock them up, take the keys

home with him, and deliver the envelopes to the persons to whom they were addressed after his death.

Held, per WEATHERBE and TOWNSHEND, JJ., GRAHAM, E.J. and HENRY, J. dissenting, that there was a delivery sufficient to constitute a good and effectual donatio mortis causa.

W. E. Roscoe, Q.C., for appellant. *J. J. Ritchie*, Q.C., for respondent.

Full Court.] MILLER *v.* GREEN. [March 14.

Libel—Publication—Evidence of motive tendered and refused—New trial ordered.

In an action brought against defendant, one of the general agents of the Confederation Life Association for publishing certain alleged libellous matter of and concerning plaintiff, formerly local agent for the company at B., and who had been removed from his position by defendant, to a policy holder in the company. Counsel for defendant tendered evidence at the trial to show the motive of defendant in writing the letter complained of. The trial judge having refused to receive the evidence.

Held, that he was wrong in doing so, and that there must be a new trial.

Borden, Q.C., and *J. J. Ritchie*, Q.C., for appellant. *Roscoe*, Q.C., for respondent.

Full Court.] THE QUEEN *v.* ETTINGER. [March 14.

Canada Temperance Act s. 105—Information held bad not having been laid before two justices—Fact to be shown on face—Summons to follow information—Judicial Act—Words "if such prosecution is brought"—Estoppel.

On the 14th October, 1898, defendant was convicted before two justices of the peace for the County of H. of an offence against the provisions of the Canada Temperance Act. On the 15th of November of the same year an order was granted for a writ of certiorari to remove into this court the conviction and all things touching the same, on the ground that the information was bad on its face, not having been laid before two justices, but before one only, in the absence of the other justice named in the summons, who was one of those that made the conviction.

Held—1. Dismissing the appeal taken by the inspector, following *The Queen* v. *Brown*, 23 N.S.R. 21, that the two justices must be present when the information is laid, and must concur in directing the issue of the summons, that being a judicial act; also that the information should show on its face that it was laid before the two justices, and that their names should appear therein, and the summons should follow the information.

2. The words "if such prosecution is brought" in s. 105 of the act as amended by Dom. Acts of 1888, can apply only to the laying of the information or the issuing of the summons.

Per MEAGHER, J.—3. Defendant was estopped from taking the objection to the jurisdiction of the justices by whom the conviction was made, by having appeared to the summons, and gone on with the trial and examination and cross-examination of witnesses, and by failing to take any objection to the jurisdiction until after the prosecutor had rested his case.

Drysdale, Q.C., for appellant. *Power*, for respondent.

Full Court.] PITFIELD *v.* TROTTER. [March 14.

Partnership—Acceptance given in firm name by one partner for private debt with consent of corporation—Latter not discharged by extension of time as a surety, but bound by joint obligation.

The defendant T. T. with the knowledge and consent of his partner F. T. gave an acceptance in the firm name to retire a draft drawn for a debt that T. T. personally owed the plaintiff's firm. T. T. subsequently gave a renewal, but before it was accepted the partnership between T. T. and F. T. was dissolved, though without plaintiff's knowledge.

Held, affirming the judgment in favour of plaintiff that F. T. having authorized or consented to the use of the firm name on the original acceptance was bound thereby, that he was not entitled to be regarded as a surety who could be discharged by the giving of an extension of time, and that the obligation being a joint one and not a joint and several one, there could be no discharge except by satisfaction of the debt assumed, and not paid.

Drysdale, Q.C., and *W. A. Fulton*, for appellant. *J. J. Ritchie*, Q.C., contra.

Full Court.] HOLMES *v.* TAYLOR. [March 14.

Pleas—Motion to set aside as false, etc., dismissed—Striking out a part of pleading only to be done under special circumstances.

Plaintiff applied to the judge of the County Court for District No. 5 to set aside as false, frivolous and vexatious the pleas pleaded by defendant to an action to recover the amount of an award made by J. in relation to matters in dispute between plaintiff and defendant. The learned judge set aside certain of the pleas and allowed others to stand as raising questions which should be determined upon trial.

Held, dismissing plaintiff's appeal from the latter portion of the judgment, that as the pleas which were allowed to stand fairly raised questions in relation to the construction of the agreement for submission to arbitration and the regularity of the award, the case must go to trial or hearing in the ordinary way. Also that on an application such as that in question the defendant was not called upon to prove his defence by affidavit, but merely to satisfy the judge that he had a defence which should be investigated in the ordinary way; and the judge to whom the application was made being

satisfied that the case was one which should go to trial, there was no reason for coming to a different conclusion.

Semble, that as under the present practice there is difficulty in striking out a portion of a defence, it should be done only under special circumstances.

TOWNSHEND, J., dissented, but chiefly on the facts.

Townshend, Q.C., in support of appeal. *W. E. Fulton*, contra.

Full Court.] McKAY *v.* HARRIS. [March 14.

O. 40 R. 31—Seizure and sale of equity of redemption in goods under action against sheriff dismissed—Necessity of demand and refusal to render sheriff liable as wrong-doer. Duty of sheriff with respect to custody of goods.

By O. 40 R. 31, under an execution the sheriff may seize and sell the interest or equity of redemption in any goods of the party against whom the execution was issued, and such sale shall convey whatever interest the mortgagor had in such goods and chattels at the time of the delivery of the writ to the sheriff. The defendant sheriff sent his deputy to the premises of the judgment debtor, whose stock was covered by a bill of sale held by plaintiff, with instructions to levy for the amount over the bill of sale. The deputy merely went to the premises and made a list of the articles and notified the judgment debtor that he had levied, and the sheriff without taking any further action, and without removing the goods or putting anyone in charge, advertised for sale all the right and interest of the judgment debtor.

Held, that the sheriff had not exceeded his powers under the order, and that no action would lie against him by the holder of the bill of sale.

Per WEATHERBE, J., RITCHIE, J., concurring. The sheriff would have been justified in putting someone in charge of the goods, pending the sale, and that he had not gone as far as the order would have authorized him in doing.

Quære, having failed to do so, whether he would not have been personally liable, in case of the removal of the goods.

Per MEAGHER, J., HENRY, J., concurring. A demand and refusal, or something that would be equivalent thereto, such as notice forbidding the sale and evidence of some act or conduct in disregard of such notice, would be necessary to render the sheriff liable as a wrongdoer as against the holder of the bill of sale.

H. Melish, and *E. M. McDonald*, for appellant. *H. McInnes*, and *J. N. Ross*, for respondent.

Full Court.] McINNES *v.* FERGUSON. [March 14.

Yearly hiring—Action for wrongful dismissal—Burden of proof.

In an action for wrongful dismissal, where the contract was for a yearly hiring, the defendant rested his defence wholly on the ground that plaintiff left his service voluntarily. This plaintiff denied. The employment of plaintiff by defendant for a year being admitted.

Held,—that the onus of establishing his defence rested upon defendant, and the case having been treated by the trial judge as if the onus rested upon plaintiff, and that he must fail if the weight of evidence was not in his favour: that the appeal must be allowed, and judgment entered in plaintiff's favour with costs.

MEAGHER, J., dissented on the ground that the evidence was contradictory and that there was nothing in the judgment appealed from to lead necessarily to the conclusion that the trial judge regarded the burden of proof as resting upon plaintiff

W. B. A. Ritchie, Q.C., for appellant. *H. McInnis*, for respondent.

Full Court.] JONES *v.* SMYTHE. [March 14.

Trust deed—Construction of provisions—Estate conveyed by—Words "upon such attaining.

T. C. K. conveyed a number of railway bonds to trustees in trust to pay the interest and dividends to himself for life, and after his death to his wife, E. K., until the youngest of his two daughters, B. K. and T. K. should attain the age of 21 years, and "upon such attaining" to hold the said bonds to the sole and absolute use of the said B. K and T. K., share and share alike, and of the survivor of them in case of the death of either of them; provided in the event of the said B. K. and T. K. dying leaving children, then and in such case, in trust to transfer and assign such bonds unto such children, etc. T. C. K. died in February, 1880, his youngest daughter, T. K., died in February, 1882; his wife, E. K., died in September, 1882. The surviving daughter, B. K., attained the age of 21 years in May, 1890, and subsequently married.

Held—1. affirming the judgment appealed from, that B. K., having attained the age of 21 years and married was entitled to the whole fund absolutely, and not only to a life estate with a gift over to her children, if any.

2. The words "upon such attainment" were properly applied to the event which had happened, namely the death of the younger daughter under 21 and the attaining of that age by the elder.

Harrington, Q.C., for appellant. *McInnes* and *Cahan*, for respondent.

Full Court.] JONES *v.* SMYTHE. [March 14.

Will—Construction giving effect to obvious intention of testator.

T. C. K. by his last will bequeathed certain property to trustees in trust for his wife, E. K., and his two daughters, T. K. and B. K. The will contained the following provision: "In case the said T. K. shall depart this life in the lifetime of the said B. K. after the decease of the said E. K. without leaving any issue her surviving, then the said trustees ——— shall pay the whole of the interest ·· —— derived from such old trust funds to the said D. K———." The clause immediately preceding made similar provision in case of the death of B. K. in the lifetime of T. K. By other provisions of the will the wife, E. K., was given a life interest in one-half of the whole trust fund and was entitled to receive the income arising from the remainder for the support and education of the daughters during their minority. It being clear that it was the intention of the testator to provide for what was to be done with the income arising from the trust fund after the death of T. K. and E. K. without reference to which of them should die first.

Held—1. The words should be so construed as to give the same effect to them as if they applied expressly to the event of the death of T. K. occuring before that of E. K.

2. The words "after the decease of the said E. K." did not constitute a contingency but merely expressed the position that the death of E. K. was subject to the interest of her mother, E. K., and that the whole income could only be paid to the surviving daughter B. K., after the happening of the latter event.

WEATHERBE, J., dissented.

Harrington, Q.C., for appellant. *Harris*, Q.C., and *Cahan*, for respondent. *H. B. Stairs*, for possible issue.

Full Court.] DOYLE *v.* WURTZBURG. [March 14.

Contract of hiring - Action for wrongful dismissal — Construction of contract—Bona fides and absence of notice.

Plaintiff and defendant entered into a contract in writing for the hiring of plaintiff by defendant, the term of hiring to commence on the 25th April, and defendant reserving to himself, if he had cause, the right to discharge plaintiff at any time during the engagement, paying him up to the day of the discharge. On the 7th April defendant wrote plaintiff that as the season was going to open much earlier than usual they would have to start before the appointed time, and requesting plaintiff to report himself at H. on Tuesday next (April 12th.) Plaintiff reported himself as requested and was discharged the following day by defendant, who tendered him a sum sufficient to cover his time and expenses, up to the time of his discharge.

Held—1. Reversing the judgment of the County Court Judge for

District No. 1, that plaintiff was employed under the terms of the written agreement at the time of his dismissal.

2. Under the reservation in the contract, defendant had the right to discharge plaintiff at any time provided he exercised the right bona fide and without malice.

MEAGHER, J., dissented.

J. T. Ross and *F. T. Congdon*, for appellant. *W. E. Fulton*, for respondent.

Full Court.] INGLIS *v.* HALIFAX ELECTRIC TRAM CO. [March 14.

Electric Tram Co.—Action for damage caused by negligence of motorman —Question of speed a matter for jury.

Plaintiff's driver, who was proceeding in the same direction as a tram car owned by the defendant company, stopped his cab and allowed a passenger to alight. He then turned and attempted to cross the track upon which the car was running, about two car lengths ahead of the car. The motorman, who had been ringing his gong, when he saw the cab turn across the track, put on his brakes, but, seeing that he could not stop in time to avoid a collision, released the brakes and applied the current the reverse way. A collision having occurred, and an action having been brought by plaintiff to recover damages for the injury done to the cab, the jury found that the car was running at too high a rate of speed, and that the motorman was negligent in failing to apply the brakes or reverse the current in time to avoid the accident.

Held, dismissing defendant's appeal, that the question of speed was one for the jury, and that there being evidence to support their finding, that the court should not interfere.

W. H. Covert, for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] THE QUEEN *v.* MOSHER. [March 14.

Criminal court—Order granted by judge sitting at—Power of court in banc to review or discharge—Case for order nunc pro tunc.

At the autumn sittings of the criminal court at H., a bill was preferred against defendant for assault. The bill was ignored by the grand jury, and defendant thereupon made application for an order to compel the payment of certain costs by the prosecutrix. Judgment was reserved, and on the 8th October the court adjourned sine die. On the 10th October the learned judge filed with the officer of the court a memorandum allowing costs against the prosecutrix, and an order was thereupon drawn up, bearing date October 8th, ordering the payment of costs by the prosecutrix, the amount to be determined by the judge by whom the order was granted, on appli-

cation, and that defendant have execution for the costs when so determined. On application to review or discharge the order so made.

Held, per MEAGHER, J., RITCHIE, J., concurring, that the power to hear cases reserved from the criminal court, or appeals or other applications in relation to matters pending or determined therein is not an original or inherent jurisdiction, but is statutory, and that there was no appeal to the court in banc from such an order as that in question, nor had the court power to review or discharge it.

Held, also, assuming that the criminal term ended on the 8th October, and that the order was not made until the 10th, and that the court had jurisdiction, it being obvious that the delay from the 8th to the 10th was due to the act of the court and not to any neglect on the part of defendant, that the case was a proper one for an order nunc pro tunc, and that the order might be regarded as if made on the day on which it bore date.

GRAHAM, E.J., and HENRY, J., dissented.

In re Sproule, 12 S.C. 140 discussed.

Power, for appellant. *J. W. Longley*, Q.C., Attorney General, for respondent.

Full Court.] [May 15.

ROBINSON *v.* THE PROVINCIAL EXHIBITION COMMISSION.

Provincial exhibition—Speed competition—Failure on part of person making entry to comply with requirements—Hack horse—Must be a horse used in ordinary course of business.

At the Nova Scotia Provincial Exhibition, 1897, prizes were offered for a number of so called "speed contests," including one open to "all licensed hackmen." By the rules entries were required to be made in the name of the bona fide owner for three months previously, and in the event of failure to observe the rule it was provided that no premium would be awarded, or, if awarded, would be withheld. Plaintiff entered a horse of which he had not been the bona fide owner for the required time before making the entry, and which was not a bona fide hack horse, inasmuch as it was not a horse used in the ordinary course of the hack business, although it had been driven several times in cabs and other vehicles.

Held, affirming the judgment of the County Court Judge for District No. 1, that plaintiff having entered his horse and allowed it to run subject to the decision of the judges, and having failed to fulfill the conditions upon which defendants agreed to pay the amount of the prize money, could not recover the amount claimed.

Fullerton, for appellant. *MacCoy*, Q.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Bench.] HARTLEY *v.* COLTON. [June 6.

Loafing and loitering—Town by-laws—Constitutionality of.

A by-law passed by the Town Council of Woodstock, providing that "no person shall loiter or loaf upon or along the streets and sidewalks within the said town, and if any person shall continue so doing after being requested by any police officer to move along and desist from such loafing or loitering, such person shall be guilty of an offence against this law, and shall be liable to a penalty of not exceeding five dollars" is intra vires, the council under the general powers of making by-laws for the good government of the town. Conviction affirmed.

J. R. Murphy and *G. F. Gregory*, Q.C., in support of conviction. *W. P. Jones*, contra.

In Equity, Barker, J.] GORMAN *v.* URQUHART. [June 6.

Pleading—Bill to set deed aside as fraudulent.

On the hearing of a bill to set aside a conveyance of a farm as fraudulent against a judgment creditor of the grantor, it appeared that the conveyance was made pursuant to an arrangement made previously to the existence of the creditor's cause of action, that the grantee should receive the farm in consideration of his assisting upon it and keeping the grantor and wife, and that if the grantee moved away he should pay the grantor $400. Plaintiff at the hearing asked that if the conveyance was not set aside his judgment be declared a lien on this purchase money.

Held, (1) That such relief could not be given, if at all, on a bill seeking to set the conveyance aside. (2) That if the grantee had any beneficial interest in the land the plaintiff should pursue his common law remedy to reach it.

C. E. Duffy, for plaintiff. *G. F. Gregory*, Q.C., for defendant.

Full Bench.] EX PARTE ATKINSON. [June 7.

C. T. Act—Two cases for keeping liquor for sale within same period—Prohibition will not lie.

Where two cases are brought against the same defendant for keeping liquor for sale within the same period contrary to the second part of the C. T. A., it is open to the defendant to prove the proceedings in the first case in answer to the second information and prohibition will not lie. Order nisi for prohibition discharged.

E. St. John Bliss, in support of order. *L. A. Currey*, Q.C., contra.

Full Bench.] EX PARTE GALE. [June 7.

C. T. Act—Attorney pleading guilty—Certiorari.

An attorney, who appeared for the defendant in a Scott Act case and pleaded guilty, afterwards made affidavit that the defendant had given him no authority to plead guilty, but had instructed him to fight the case out. Several contradictory affidavits were read tending to show that the defendant had authorized the attorney to plead guilty.

Held—1. The magistrate could not receive a plea of guilty from any person but the defendant himself.

2. Per Landry and Van Wart, JJ. If the defendant had authorized his attorney to plead guilty the court ought not to exercise its discretion and grant certiorari. Rule absolute for certiorari.

L. A. Currey, Q.C., in support of rule. *J. W. McCready*, contra.

Full Bench.] ANDERSON *v.* SHAW. [June 8.

Notice of defence—Sufficiency of—All right if not calculated to mislead.

In an action for false imprisonment in the York County Court defendant pleaded the general issue and gave two notices of defence by way of justification. The first notice set forth that, "the plaintiff being indebted to the defendant in the sum of $36.07, the defendant applied to ——, a Parish Court Commissioner ——, said commissioner having jurisdiction in the matter, and the defendant having filed the particulars of such claim with said commissioner, and an affidavit of such indebtedness having first been made, the said commissioner, having jurisdiction in the matter, then issued a writ of capias out of the said parish court against the plaintiff at the suit of the defendant for said debt, directed to any constable of the County of York to arrest said plaintiff on said capias, and the said plaintiff being arrested on said capias and not giving bail or making deposit as provided by law, was by —— warrant committed to the common gaol of the County of York as by law required, and detained there by virtue of such committal until the return day of such capias when the defendant recovered a judgment against said plaintiff for the said sum, and on such judgment being entered up for the defendant on that day the said plaintiff was released from such custody." The second notice was that "said judgment still remains in full force and effect, not having been paid, reversed or vacated." The County Court Judge on application struck out (with leave to amend) the notices as being no answer to the action, the words "an affidavit of such indebtedness having first been made" not meeting the requirement of the Justice's Civil Court Act—that the plaintiff or his agent make affidavit of his cause of action and there being no allegation as to the defendant being of the full age of twenty one years, and that there was no danger of losing the debt if the defendant were not arrested or held to bail, and the second notice not being in any view of the case a justification for arrest.

Held on appeal that a notice of defence need not be as full as a plea, and that any notice which substantially advised the plaintiff of the defence to be set up was sufficient, so long as it was not calculated to mislead. But see *Dowling* v. *Tri[illegible]*, 2 Allen, 520; *Wilson* v. *Street*, 2 All., 629; *LeGal* v. *Duffy*, 3 All., 57. Appeal allowed with costs.

W. VanWart, Q.C., for appellant. *J. D. Phinney*, Q.C., contra.

Nisi Prius, McLeod, J.] LEWIS *v.* SCOTT. [June 21.

Arbitration—Slander—60 Vict., c. 24, s. 253.

Action of slander referred to arbitration by Nisi Prius order under s. 253 of 60 Vict., c. 24, citing *Linch* v. *Dacy*, 1 Keb. 848.

W. H. Trueman, for plaintiff. *H. A. McKeown*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] DOUGLAS *v.* CROSS. [June 12.

Appeal from County Court—Review of evidence on appeal from decision of County Court Judge on summons to vary judgment or for a new trial under s. 309 of the County Courts Act, R.S.M. c. 33—Agent's commission on sale of land—Recovery of commission by another plaintiff in respect of same sale.

The plaintiff recovered judgment in the County Court for commission on the sale of a parcel of land for defendant at the full amount of percentage usually allowed.

Defendant applied under s. 309 of the County Courts Act, R.S.M., c. 33, for a new trial or to reverse or to vary the judgment, relying on the fact that another real estate agent had recovered a verdict against him for one-half the usual commission in respect of the same sale, and appealed to the Full Court from the County Court Judge's order dismissing that application.

Held, following *Smith* v. *Smyth*, 9 M.R. 569, that on such an appeal the Court cannot review the original decision on the facts in the same manner as it would do in an appeal direct from the original verdict under s. 315 of the Act as re-enacted by 59 Vict., c. 3, s. 2; but can only consider whether the decision of the County Court Judge on the application to him under s. 309 was erroneous or not, and that the original verdict should not be disturbed unless it appeared to be unreasonable or unjust, or a perusal of the evidence showed that the trial judge must, in arriving at his decision,

have omitted through over-sight to consider some undisputed fact, or must have disregarded some plain principle of law applicable to the facts.

The County Judge on such an application, and therefore the Court on appeal from his decision upon it, should not be asked to review his verdict as a juror, but only to correct it when it should have been set aside if rendered by a jury, or when it has been due to some oversight, error or misconception.

The fact of the recovery by another plaintiff of commission in respect of the same sale was *res inter alios acta*, and was not in itself material.

Metcalfe, for plaintiff. *Wilson*, for defendant.

Full Court.] QUEEN *v.* HERRELL. [June 12.

Liquor License Act, R.S.M., c. 90, ss. 147, 149 — Druggist selling by, or without license—Evidence – Pharmaceutical Act, R.S.M., c. 116, s. 38.

Defendant was convicted under s. 147 of the Liquor License Act, R.S.M., c. 90, of having sold liquor without a license.

On the argument of a rule nisi for a writ of certiorari to quash the conviction, the objection relied on was that defendant was a registered druggist under the Pharmaceutical Act, R.S.M., c. 116, and so, by virtue of s. 149 of the Liquor License Act, was entitled to sell intoxicating liquors under certain condions, and that he should have been charged and convicted, if at all, only for a breach of those conditions.

The only evidence given by defendant on this point was his statement that he was a duly registered druggist.

Held, that the objection, if otherwise valid, failed because it was not strictly proved that defendant was a druggist under the Pharmaceutical Act. S. 38 provides a method of proof of such registration by production of a printed copy of the register, but this was not done, nor was the register itself produced, nor was there any evidence that defendant had ever seen it. Rule nisi discharged with costs.

Patterson, for magistrate. *Ashbaugh*, for defendant.

Full Court.] IN RE MORDEN ELECTION. [June 12.

RUDDELL *v.* GARRETT.

Municipal Act, R.S.M., c. 100, s. 51—Qualification of mayor or councillor —Leasehold interest.

The County Court Judge having declared the election of defendant as mayor of the village of Morden void for want of the necessary property qualification as required by s. 51 of the Municipal Act, R.S.M., c. 100, he

appealed to the Full Court. The evidence was that he lived with his wife upon a property in the village that was assessed on the last revised assessment roll, in the name of Mrs. Garrett as owner at $600, that Mr. Garrett's name was added in the roll in respect of the property under the heading Tenant or Occupant, and that Mrs. Garrett had a certificate of title under the Real Property Act for the property, which appeared to be encumbered by mortgages to the extent of $550. He had no other property qualification.

Held, that appellant, was not, at the time of election, the owner of freehold or leasehold, or partly freehold and partly leasehold, real estate rated in his name on the last revised assessment roll of the village to the amount of $500 over and above all charges, liens and encumbrances affecting the same, as required by said s. 51; and was therefore not qualified. Appeal dismissed with costs.

Taylor, for petitioner. *Ewart*, Q.C., for appellant.

Richards, J.] SUTHERLAND *v.* PORTUGAL. [June 13.

Overholding Tenants Act, R.S.M., c. 112—Practice—Demand in writing unsigned—Service of copies not annexed to notice under s. 5—Preliminary objections.

In this proceeding under the Overholding Tenants Act, R.S.M., c. 112, the demand in writing served by the landlord under s. 3 of the Act requiring the tenants to go out of possession, was unsigned, but was otherwise sufficient in form. When it was served its purport was verbally explained to the tenants who were told that it was from the landlord's agent, and one of them then went to see the latter about it.

Held, following *Morgan* v. *Leech*, 10 M. & W. 558, that the demand was sufficient under the circumstances though unsigned.

During the hearing it was objected that the copies served with the notice of the application, as required by s. 5, were not annexed to the notice.

Held, that delivery of the copies with the notice was probably sufficient compliance with the Act, but at any rate the objection should have been taken as a preliminary objection. On the merits, the learned judge held that the landlord was entitled to an order for possession.

Wilson, for landlord. *Bonnar*, for tenants.

Full Court.] DIXON *v.* MCKAY. [June 13.

Exemptions—Actual residence or home of debtor—R.S.M., c. 53, s. 43 (K).

Interpleader issue in County Court to determine claim of defendant that the building seized in August, 1898, under execution was exempt under

s. 43, s-s. (K), R.S.M., c. 53, being his actual residence or home. The evidence was that in September, 1897, defendant gave up his position as Indian Agent at Berens River, and rented the building in question, in which he had been living and which he had erected on crown land, to his successor in office. He then built a temporary log house on an island about 1½ miles away in which he lived with his family and where he maintained himself by fishing. He afterwards tried to sell the building in question to the Dominion Government. He swore that his absence was only temporary and that if he could not get the Government to purchase he intended to return and occupy this building as his home.

Held, reversing the decision of the County Court Judge, DUBUC, J., dissenting, that the building had ceased to be the actual residence or home of the defendant and was therefore not exempt from seizure.

Elliott, for plaintiff. *Ewart*, Q.C., and *O'Reilly*, for defendant.

Full Court.] BANK OF HAMILTON *v.* GILLIES. [June 13.

Promissory note—Bills of Exchange Act, 1890, s. 82, s-s. 3—Additional provisions in note—Lien—Note.

The instruments sued on in these cases contained the usual provisions of a promissory note with additional provisions to the effect that the title, ownership and property for which they were given should not pass from the payees until payment in full, that if the notes were not paid at maturity the vendors might take possession of the machinery for which they were given and sell the same at public or private sale, the proceeds, less the expenses, to be applied on the notes, and that such action should be without prejudice to the right of the vendors to forthwith collect the balance remaining unpaid.

Held, that the instruments could not be regarded as negotiable promissory notes because, (1) the added provisions qualified the absolute and unconditional promises to pay, as the vendors might not be in a position to give title to the property at maturity which the makers would be entitled to: *Dominion Bank* v. *Wiggins*, 21 A.R. 275; *Prescott* v. *Garland*, 33 C.L.J. 546; and (2) the added provisions were matters entirely unwarranted by s-s. 3 of s. 82 of the Bills of Exchange Act, 1890, as they could in no sense be treated as merely a pledge of collateral security with authority to sell or dispose thereof; and, following *Kirkwood* v. *Smith*, (1896) 1 Q.B. 582, the statute having set out certain additions that might be made to the simple promise to pay, impliedly excluded others. *Merchants' Bank* v. *Dunlop*, 9 M.R. 623, not followed.

Ewart, Q.C., and *Crawford*, for plaintiffs. *Howell*, Q.C., and *Mathers*, for defendants.

Full Court.] PROCTOR *v.* PARKER. [June 13.

Promissory note—Consideration for release from imprisonment—Unnecessary recitals in conviction—Adjournments of hearing before justice of the peace made in absence of accused—C.C., s. 857, s-s. 1—Objections not raised at the trial.

One Luke Parker having been charged upon the information of the plaintiff with an offence under the Fires Prevention Act, R.S.M., c. 60, was convicted thereof by a justice of the peace, fined $125 and ordered to be imprisoned in default of payment. The fine not having been paid, Parker was arrested under a warrant and brought to Winnipeg. The defendant then indorsed the promissory note sued on in this action in order to secure the release of Luke Parker. In making the settlement the Parkers acted under the advice and with the assistance of a solicitor. By the statute plaintiff was entitled to half the fine when collected, and the other half was to go to the Provincial Treasurer of the Province.

Held, that there was a good consideration for defendant's indorsement of the note.

The conviction relied on was dated 13th July, 1896, and was in the form given in the Criminal Code with the addition at the end of recitals to the effect that Luke Parker had been duly served with a summons duly issued on 6th April, 1896, that his solicitor appeared for him on the return of the summons and also when the hearing took place and asked for a further adjournment, which was granted, that accused was subsequently specially summoned to appear before the justice on the first day of taking evidence, when the said solicitor appeared for a short time, but the defendant did not personally appear at the hearing; and it was argued that it should be inferred from these recitals and from the length of time that elapsed from the date of the original summons to the date of the conviction, that there had been one or more adjournments of the hearing for a longer period than the eight days allowed by s. 857, s-s. 1, of the Criminal Code, since at most two adjournments were stated.

Held, that no such inference could be drawn from the recital, also that adjournments of the hearing could be made by the justice in the absence of the accused provided they were made in the presence and hearing of the party or of his solicitor or agent, if present. Parties who do not see fit to appear when summoned must ascertain the dates to which proceedings are adjourned or disregard them at their peril.

On the argument of the appeal a question was raised as to the sufficiency of the proof of presentment of the note, but it appeared that this question had not been raised at the trial.

Held, that it was not now open to the defendant. If it had been raised at the trial, the judge might have given an opportunity to supplement the evidence. Presentment may be very readily waived, and the absence of

objection at the trial should be taken as a waiver of any more strict proof of the presentment.

Appeal from verdict of County Court Judge in favor of plaintiff dismissed with costs.

Culver, Q.C., and *Haney*, for plaintiff. *Wilson*, for defendant.

Full Court.] QUEEN *v.* HAMILTON. [June 23.

Criminal law—Recognizance of bail—Condition to appear for sentence—Conviction quashed and new trial ordered—Estreating recognizance.

The accused was convicted by a jury of a criminal offence, but the judge reserved a case as to the admissibility of certain evidence and admitted the prisoner to bail. The condition of the recognizance entered into was that the prisoner would appear at the next sitting of the Court to receive sentence. Afterwards the Full Court quashed the conviction and ordered a new trial. The accused did not appear at the next sitting and proceedings were taken to estreat the recognizance and for the collection of the named penalties.

Held, following *Queen* v. *Wheeler*, 1 C.L.J.N.S. 272, and *Queen* v. *Ritchie*, 1 C.L.J.N.S. 272, that the condition of the recognizance was not broken, and that the purpose of the accused's attendance having failed, the sureties were not bound for his appearance. Roll of estreated recognizance and fi. fa. issued thereon set aside.

Perdue, for the Crown. *Howell*, Q.C., for the bail.

Full Court.] MUSSEN *v.* G. N. W. C. R. Co. [June 23.

Chose in action—Assignment—Right of assignee not having beneficial interest to sue—Assignments Act, R.S.M., c. 1, s. 3.

Judgment of DUBUC, J., noted ante p. 317 affirmed with costs. *Comfort* v. *Betts* (1891) 1 Q.B. 737, followed. *Wood* v. *McAlpine*, 1 A.R. 234, distinguished.

Howell, Q.C., for plaintiff. *Wilson*, for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.] CALLAHAN *v.* COPLEN. [April 17.

Mineral claim—Defects in location of No. 2 post—Mistake in giving approximate compass bearing of—Whether cured by subsequent certificate of work.

Action to enforce an adverse claim tried at Nelson. The defendant's mineral claim Cube Load was located in May, 1892, and duly recorded, and certificates of work were issued in respect of it regularly since. The plaintiff in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act.

Held, that the irregularity in locating was cured by the defendant's recording his last certificate of work. Action dismissed with costs.

Sir C. H. Tupper, Q.C., for plaintiff. *Hamilton*, for defendant.

Full Court.] CORDINGLEY *v.* MACARTHUR. [May 3.

Fraudulent bill of sale—Husband and wife.

This was an interpleader issue in which Georgina Cordingley was plaintiff, and MacArthur & Co. were defendants, and the question to be tried was whether certain goods seized were the property of the plaintiff as against the defendants who were execution creditors of the plaintiff's husband. C. in 1896, gave his wife $600, which she kept in the house, and he shortly after commenced to receive it back in small portions and continued to do so until he had received it all. In March, 1898, according to the evidence of both, she demanded some settlement and he agreed to give her a bill of sale of the household furniture, but the transaction was not carried out until June, after he had been sued for the price of the furniture.

Held, reversing Martin, J., that there was no legal obligation binding upon the husband to repay the $600, and that the bill of sale must be treated in the same way as if the gift had been made to the wife at the time of the execution of the bill of sale and was therefore void. Appeal allowed.

Duff, for appellants. *McPhillips*, for respondent.

EXCHEQUER COURT.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

McColl, L.J.A.] SUNBACK *v.* THE SHIP SAGA. [May 4.

CARLSSON *v.* THE SHIP SAGA.

Costs—Marshal's possession fees—Taxation.

Actions in the Exchequer Court, British Columbia Admiralty District, against the ship Saga. The marshal had been in possession of the ship simultaneously under warrants issued in each case, and on the taxation of his costs it was claimed that under the scale of fees he was entitled to a double set of possession fees. The registrar allowed only one set of fees and the matter was referred to the judge.

Held, that the registrar's ruling was correct, as where in an admiralty action a marshal is in possession of a ship simultaneously under warrants issued in different actions, more than one set of possession fees will not be allowed. *The Rio Lima* (1873), L.R. 4 A. & E. 157, followed.

Belyea, for the marshal. *Spencer*, contra.

Book Reviews.

Littell's Living Age, Boston, U.S.—Blackwood's review of the autobiography of Mrs. Oliphant is reprinted in *The Living Age* for July 1st. Arthur Symons's appreciation of Balzac, which *The Living Age* reprints from *The Fortnightly Review*, is one of the freshest and most sympathetic of recent contributions to the study of Balzac. A subject which is just now uppermost in many minds, The Ethics of War, is the subject of a thoughtful paper by the Rev. Father Ryder in *The Living Age* for July 1st. The serial attraction of *The Living Age* for the summer months will be a story by "Neera" one of best-known of contemporary Italian writers. It is called "The Old House," and the opening chapter, in the number for July 1st is full of color and romantic charm.