Canada Law Journal.

VOL. XXXIV. MARCH 1, 1898. NO. 5.

We publish in another place (p. 165) an interesting judgment by His Honor Judge Morgan, Junior Judge of the County Court of York, as to the liability of a municipal corporation for damages resulting from ice on sidewalks. The same learned Judge has since given a judgment in the case of *Duhig* v. *City of Toronto*, on a somewhat similar point. In this case a sidewalk known as the Bryce pavement, which it was alleged was of a soft and spongy character, became out of repair in patches, which were mended by filling the decayed places with granolithic pavement, which is exceedingly hard and becomes very slippery in the winter time under certain conditions of atmosphere and temperature. There was no want of care in the mode of reparation of the sidewalk. The plaintiff slipped on one of the hard patches, and suffered injury, and brought an action against the city for negligence. On behalf of the corporation it was urged that there was neither negligence nor want of repair, and that the plaintiff's claim was in effect that the judge should adjudicate upon whether or not the material used was under the circumstances proper for the purpose, it being contended that this was a matter of sound discretion to be exercised by the corporation, and was in fact reasonably exercised.

The learned judge held that although the patching might be dangerous in bringing in juxtaposition materials differently affected by the weather, the reparation had been properly done, and would under ordinary circumstances prove satisfactory, that the pavement only became dangerous under conditions over which the corporation had no control, the evidence showing that there were days in winter when it was safe, and other days when it was not quite safe. He held that the corporation in repairing the sidewalk was not bound to do

more than provide material reasonably suitable for a sidewalk, and for the necessary repairs, and of such a character as was adapted for the use of pedestrians during the greater portion of the year, and that the corporation was not bound to consider, and not bound to provide against exceptional circumstances arising from the elements over which they had no control, and he found for the defendants. From this judgment the plaintiff appealed; but the Queen's Bench Divisional Court, after argument, dismissed the appeal, holding unanimously that the defendants were not liable.

The following authorities were cited: *Picton* v. *Geldert*, (1893) App. Cas. 524; *Pratt* v. *Stratford*, 16 Ont. A.R. 5; *Yeomans* v. *County of Wellington*, 4 Ont. A.R. 301; *Brant* v. *Hammersmith R. W. Co.*, L.R. 4 H.L. 171; *Caledonia R. W. Co.* v. *Ogilvie*, 2 MacQ. H. L. (Sc.) 229; *Garfield* v. *Toronto*, 22 Ont. A.R. 128; *Raleigh* v. *Williams* (1893) App. Cas. 540; *Johnson* v. *Columbia*, 6 Sup. Ct. Rep. U.S. 924; *City of Detroit* v. *Beckman*, 34 Mich. 125. Con. Mun. Act, 1892, s. 531; 57 Vict., c. 150, s. 13; 59 Vict., c. 51, s. 20.

COURT FOR CROWN CASES RESERVED.

The recent decision of the Chancery Divisional Court in *The Queen* v. *Hammond* (p. 164), seems to emphasize what appears to be a blot on the administration of justice in criminal cases in Ontario. Under the Criminal Code, s. 3 (*e*) the Court for the disposition of Crown cases reserved in Ontario, is any Division of the High Court of Justice. But a Divisional Court of the High Court is a fluctuating tribunal composed from time to time of different judges—now of the judges of the Queen's Bench Division, now of judges of the Chancery Division, and yet again of Judges of the Common Pleas Division, and each of these tribunals, it is held, are so far separate and independent tribunals as that none of them is bound by any decision of either of the other two, so that it is quite possible that three different and conflicting decisions may be given by them severally on the same ques-

tion of law. Two absolutely conflicting and irreconcilable decisions have even now been given by the Judges of the Queen's Bench Division and the Judges of the Chancery Division on the point of law arising on the construction of the Canada Evidence Act, 1893 (56 Vict., c. 31), s. 5.

That section provides that "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him, other than a prosecution for perjury in giving such evidence."

The Judges of the Queen's Bench determined, in *The Queen* v. *Williams*, 26 O.R. 583, that the evidence of a person called as a witness before a coroner, is admissible against him on his subsequently being prosecuted for a criminal offence, unless, at the time of giving his evidence, he expressly claimed to be excused from giving evidence on the ground that his evidence might criminate him. The majority of the Judges of the Chancery Division (Boyd, C., and Robertson, J.) on the other hand have held in *The Queen* v. *Hammond*, that the evidence is inadmissible against the witness on any subsequent criminal prosecution, whether he claimed to be excused from giving evidence before the coroner or not. Meredith, J., however, dissented, and agreed with *The Queen* v. *Williams*. It appears, therefore, that there is a numerical majority of Judges in favour of the latter decision, but in arriving at their judgment in that case, the Judges of the Queen's Bench Division overruled the prior decision of Meredith, C.J. C.P., at nisi prius, in *The Queen* v. *Hendershott*, 26 O.R. 678. There are therefore Armour, C.J. Q.B., and Falconbridge, Street, and Meredith, JJ., in favour of *The Queen* v. *Williams* and the Chancellor, and Meredith, C.J. C.P., and Robertson, J., in favour of the view taken in the *Queen* v. *Hammond*. Considering the momentous interests at stake it must be confessed that this is not a satisfactory method of

administering the criminal law, and it is needless to say that it is a somewhat unpleasant reflection that if the case reserved in *The Queen* v. *Hammond* had been argued before the Judges of the Queen's Bench Division, it would probably have resulted in the affirmance of the conviction of the prisoner upon evidence, the admissibility of which, in any view of the case, must now be considered at all events as doubtful.

The life of a human being in any civilized community ought not to be exposed to any such hazard; and it is entirely contrary to the genius of the modern British criminal law that it should be so uncertain in so material a matter.

It is always an anomalous thing for judges of co-ordinate jurisdiction to arrive at diametrically opposite conclusions on the same question of law, and while it is bad enough in civil cases, it appears to be tenfold worse in criminal cases, as to which the law ought alway· to be as certain as human ingenuity can make it, and it therefore appears to be a matter urgently demanding the attention of the Dominion Government whether some remedy for the present condition of affairs cannot be found.

In England the importance of securing, as far as possible, certainty on questions of criminal law seems to be recognized. There the court for crown cases reserved is a tribunal composed of all of the Judges of the Queen's Bench Division, or any five or more of them. This tribunal has an inherent identity, although its membership may fluctuate, and the uncertainty consequent on conflicting decisions is thus avoided, and it may be well worth consideration whether it would not be better in Ontario to provide that the court for crown cases reserved should be composed of the whole of the Judges of the High Court, or at all courts of at least seven of them, and that its decision should be binding on the court, however it may be composed.

The difficulty of securing unanimity of opinion among judges where they are at liberty to form independent conclusions untramelled by previous decisions, is well illustrated by two recent cases, *Hawke* v. *Dunn* (1897), 1 Q.B. 579, (noted ante vol. 33, p. 578), and *Powell* v. *Kempton Park* (1897),

2 Q.B. 242 (noted ante vol. 33, p. 762) where five of the Judges of the Queen's Bench Division in a Crown case reserved arrived at one conclusion as to the meaning of a statute, and five of the Judges of the Court of Appeal in a civil proceeding arrived at a diametrically opposite conclusion as to its meaning. The criminal law in England, however, we apprehend, would be regarded as settled by the decision of the Criminal Court, and not by that of the Civil Court, notwithstanding its superior authority as a Court of Appeal. The anomaly of two courts for the administration of the criminal law arriving at opposite conclusions on the same point of law is at all events avoided there.

The present condition of things in Ontario is not only open to the serious objection that the law in one of its most important branches is liable to be rendered uncertain, but it is open to the further objection that the uncertainty of the law renders the administration of justice unnecessarily costly and burthensome to the public. In this very case of *The Queen* v. *Hammond*, the Judge at the trial admitted the evidence objected to, on the authority of the decision in *The Queen* v. *Williams*, and now the very heavy expense of a further trial has to be borne by the public. The counsel for the Crown, moreover, was placed in a position of great embarrassment. Had he neglected to offer the evidence in question he would have laid himself open to a charge of serious neglect of duty, and yet in offering this important evidence he had to take upon himself the equally serious risk of incurring the enormous expense involved by a third trial of the prisoner.

On the abstract merits of the question involved in the conflicting decisions which have been referred to, it may not be inopportune to offer some observations. With regard to the question which of the two Courts has correctly interpreted the statute, it would be presumptuous for me to offer any opinion, but it may be worth while to discuss what the law on the point ought to be. The fundamental principle of the criminal law that no man ought to be compelled to accuse himself is one that ought to be jealously

guarded, but it must be remembered that that principle has never been held to prevent a person from being found guilty on his own confession. Very often a prisoner after pleading guilty is permitted to withdraw his plea and substitute one of not guilty, but a confession freely and voluntarily made is perfectly good evidence. The fact that such a confession may be used against the person making it, is necessarily a wholesome deterrent against persons confessing to crimes of which they are really guiltless in order to shield the person who is really guilty. Now it is very important that this deterrent should not be lightly removed. The decision in *The Queen* v. *Hammond* may lead to this unpleasant result, that if A. B. is accused of a murder which he really has committed, his friend C. D. may step into the box, in order to shield him from the consequence of his crime, and swear in the most positive and unequivocal and circumstantial manner that he, C. D., committed the murder, with no other danger to be apprehended to himself than a prosecution for perjury. In the face of such evidence it may be very difficult to induce a jury, even with the most circumstantial proof of guilt, to find a verdict against the real criminal.

This seems to be by no means an improbable case, and the annals of the criminal law would disclose many instances in which a false confession of this kind has been made to shield another. The law as interpreted in *The Queen* v. *Hammond* may, it is to be feared, open the door to that kind of testimony, and especially as the terror of incurring the risk of having such evidence used against the party giving it is altogether removed.

It is submitted that the section of the Evidence Act under discussion needs reconsideration, and that more ample safeguards should be provided than there are at present, against the manufacture of false evidence in order to shield the guilty.

GEO. S. HOLMESTED.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MARINE INSURANCE—POLICY—COLLISION—SUNKEN VESSEL.

In *Chandler* v. *Blogg* (1898) 1 Q.B. 32, the policy sued on contained the usual clause that the insurer would pay all claims for loss or damage done or received through collision. The vessel insured was damaged by coming into collision with a barge which had just been sunk by collision with another vessel. The barge was raised next day and sailed to her home port, and was repaired. It was held by Bigham, J., that the plaintiff was entitled to recover because though "collision" prima facie means collision with some other navigable vessel, yet though the barge could not at the moment of collision have been navigated, nevertheless she was a vessel, and was navigable within the meaning of the policy, though temporarily disabled.

CONTRACT OR TORT — COSTS — CONTRACT OF AGISTMENT — BAILMENT — NEGLIGENCE—(ONT. RULE 1132).

Turner v. *Stallibrass* (1898) 1 Q.B. 56, may help to solve the difficulty which not unfrequently arises in determining whether an action is founded on tort or contract, for the purpose of determining either a question of jurisdiction, or a question of costs under Ont. Rule 1132. The action in this case was brought to recover damages for breach of a contract of agistment arising from the negligence of the defendant, and it was held by the Court of Appeal (Smith, Rigby and Collins, L.JJ.) that the action was founded in tort. Smith, L.J., states the rule of law on the subject as follows: "If in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but on the other hand if it is necessary for him to rely upon and prove a contract, the action is one founded upon contract." The mode in which the action is stated the pleadings, or in

the address of counsel, is, in the opinion of the Court of Appeal, entirely immaterial. In this case the plaintiff showed a good cause of action by proving a bailment on which a duty arose at common law on the part of the defendant not to be negligent in respect of the plaintiff's horse, and a breach of that duty. That being the case and the plaintiff's right of action being independent of any contract, the Court held that it was one founded on tort. Collins, L.J., states that although the relation of bailor and bailee arises out of some agreement of minds, yet that agreement of minds is not the contract contemplated in the rule as stated by Smith, L.J. The duty arises, in his view, by virtue of the relation of bailor and bailee, and not by reason of any contract whereby that relation is brought about; but wherever the plaintiff claims that the defendant ought to have done something, or taken some precaution, not embraced in his common law liability, that there the plaintiff is obliged to rely on a contract within the meaning of the rule.

INTERPLEADER—SALE OF GOODS IN INTERPLEADER PROCEEDINGS — ORD. LVII, R. 12—(ONT. RULE 1112.)

Stern v. *Tegner* (1898) 1 Q.B. 37, may be usefully referred to as indicating the opinion of the Court of Appeal (Lindley and Chitty, L.JJ.) as to the circumstances under which the jurisdiction of the court to order a sale of goods in dispute in interpleader proceedings, may properly be exercised. Lindley, L.J., says at p. 41: "There are three cases which arise in practice. First of all where the security is ample, and where the bill of sale holder tries to assert his rights so as to defeat the execution creditor. That is the common case which s. 13 of the C.L.P. Act, 1860, was intended to rectify. The bill of sale holder cannot stand upon his rights, when it is plain that he is defeating the execution creditor, which of course involves the assumption that after paying off the bill of sale there will be something left. That is a plain case; in such a case a sale will be ordered.—The next case is where the security is plainly deficient. There if there were a sale there would not be a surplus, whence it follows that the only proper course is to

direct the sheriff to withdraw. What has the execution creditor to do with the goods, if he cannot possibly get anything out of them? That is another plain case.—The third case is somewhat more difficult. When it is difficult to say whether the security is sufficient to pay off the secured creditor or not, what is the right course to take? The proper course in such a case is for the court to say, 'Unless the execution creditor will guarantee the secured creditor against loss by sale we will not order the sale,'" and the case coming within the third class and the execution creditor, and another claimant refusing to redeem or give the required guarantee, an order for sale was reversed.

CRIMINAL LAW—OBTAINING CREDIT BY FRAUD—FALSE PRETENCES—(CR. CODE, SS 358, 359).

In *The Queen* v. *Jones* (1898) 1 Q.B. 119, the Court for Crown Cases Reserved (Lord Russell, C.J., and Wright, Kennedy, Darling and Channell, JJ.) were called on to determine whether the act of going into a restaurant with only a half-penny and ordering and consuming a four shilling meal was a criminal offence, and if so to what category it belonged. The Court held that it was a criminal offence, but that it was not obtaining goods by false pretences, as no representation was made by the prisoner, and that the offence was obtaining credit by fraud within the meaning of the Debtors Act, 1869, s. 13. The Criminal Code does not appear to include any similar provision and it would seem that such an act as was in question in this case would not be indictable in Canada.

MASTER AND SERVANT—CUSTOM—REASONABLENESS—NOTICE TO DETERMINE SERVICE AT END OF FIRST MONTH.

Moult v. *Halliday* (1898) 1 Q.B. 125 is a decision of Hawkins and Channell, JJ., on appeal from a County Court, in which those learned judges determined that there is no recognized custom with regard to the hiring of domestic servants, which enables either party to terminate the service at the end of the first month on giving a fortnight's notice; but that if such a custom were proved it would be reasonable, and would be given effect to by the Court. The Court

adopt the statement of Parke, B., in *Turner* v. *Mason*. "The contract between the master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages," as expressing the custom recognized by the Court as governing such contracts, and the attempt to establish an exception to this was held to have been unsustained by evidence.

PROBATE—DEATH OF ONE OF TWO TESTATORS - JOINT WILL.

In the goods of Piazzi—Smyth (1898) P. 7. This was an application to obtain a grant of probate of a joint will of two persons, only one of whom was dead. The Court granted probate of so much of the instrument as became operative on the death of the decedent.

ADMINISTRATION—WILL ANNEXED.

In the goods of Butler (1898) P. 9, Jeune, P.P.D., held that where a limited administration is applied for as to part of the estate of a deceased testator (in this case certain leaseholds) the will must be annexed to the grant.

ADMINISTRATION—NOTICE—GRANT TO ATTORNEY.

In the goods of Barton (1898) P. 11, administration had been granted to the attorney of one of two next of kin, both of whom resided out of the jurisdiction, the administrator having died, upon the application of the other next of kin, and on proof of notice to the next of kin for whose benefit the administration had been granted, and no objection being offered by him, the application was granted.

PROBATE—RENUNCIATION—RETRACTION OF RENUNCIATION—PROBATE ACT, 1857, 20 & 21 Vict. c. 77, s. 79. (R.S.O., 1897 c. 59 s. 65).

In the goods of Stiles (1898) P. 12, Jeune, P.P.D., decided that the effect of 20 & 21 Vict. c. 77, s. 79 (see R.S.O. 1897 c. 59 s. 65) is not to prevent one of several executors who has renounced from subsequently retracting his renunciation; and one of two executors after taking probate, having absconded, the Court allowed his co-executor who had renounced to retract his renunciation and take probate. The learned judge held that the effect of the section above referred to is merely to dispense with the necessity of afterwards citing an executor who has renounced.

PRESUMPTION OF DEATH—ABSENCE FOR THREE YEARS.

In the Goods of Matthews (1898) P. 17, this was an application by a legatee and one of the next of kin for leave to depose that the death of the testator had occurred on or since Nov. 24th, 1894. On that day he, being then seventy-three years of age, had disappeared from his home, and had never since been heard of. Proof was given of enquiries having been made and of advertisements having been published in five newspapers, and the President being satisfied that there had been ample enquiry granted the application.

COMPANY—DIRECTORS—CLAUSE VALIDATING ACTS OF DE FACTO DIRECTORS.

In *Dawson* v. *African Consolidated L. & T. Co.* (1898) 1 Ch. 6, the plaintiff sought to restrain the defendant company and its directors from enforcing a call by declaring plaintiff's shares forfeited for non-payment, on the ground that the call had not been validly made. The invalidity relied on was that one of the directors had vacated his office by reason of having for six days parted with all his shares. It appeared that after the six days he acquired other shares and there was no evidence that his co-directors had reappointed him, or had been aware of his disqualification, but they all along treated him as a duly qualified director. One of the articles of the company provided that all acts done at any meeting of directors, or by any person acting as a director should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that any of the directors were disqualified, be as valid as if every such person had been duly appointed and qualified to act as a director. The Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) were of opinion that this clause cured the alleged irregularity and that the call was valid, and they overruled Ridley, J., who had granted an interlocutory injunction in favour of the plaintiff.

APPOINTMENT—GIFT OF SUFFICIENT TO RAISE A "NET SUM"—SUCCESSION DUTY.

In re Saunders, Saunders v. *Gore* (1898) 1 Ch. 17, a summary application was made to the Court by originating summons for the purpose of determining the question of the incidence

of succession duty under the following circumstances. In pursuance of a power of appointment in a marriage settlement the appointor appointed that so much of the stocks and securities held by the trustees "as shall be sufficient to raise the net sum of £2,000" should, subject to the life interest of the appointor, "henceforth belong to and be vested in" E., an object of the power, and be held in trust for him. Stirling, J., was of opinion that the appointee took subject to the payment of succession duty, but the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) reversed his decision and in doing so differ from *Banks* v. *Braithwaite*, 32 L.J. Ch. 35, on which, Stirling, J., relied.

TENDER—CHEQUE—SOLICITOR.

In *Blumberg* v. *Life Interests and R. S. Corp.* (1898) 1 Ch. 27, the Court of Appeal (Chitty and Williams, L.JJ.) have affirmed the decision of Kekewich, J., (1897) 1 Ch. 171 (noted ante vol. 33 p. 284.) It may be remembered that the question before Kekewich, J., was as to the validity of a tender by cheque to a solicitor of mortgagees, and his decision was that a solicitor has no implied authority to accept a cheque; and that a tender made in that way is not a valid legal tender. But in the Court of Appeal the case seems somewhat to have turned on the fact that the sale made by the mortgagees had been effected for an excellent price, which was not denied, and that the appellants had no grievance, and that there was no point of law or substance justifying the appeal. This may perhaps be considered an affirmance of the point of law on which the case was decided by Kekewich, J., though the Court do not except in this general way refer to it.

TENANT FOR LIFE—REMAINDERMAN—REPAIRS.

In re Freeman, Dimond v. *Newburn* (1898) 1 Ch. 28, is a decision of North, J., on the question whether a tenant for life of real estate is liable to keep the estate in repair during his tenancy. The estate in question had been purchased by the trustees of a settlement in pursuance of a power therein contained, and which provided that the estate so purchased was to be held as personal estate. North, J., held on the author-

ity of *Powys* v. *Blagrave*, 4 D. M. & G. 448, and *In re Cartwright*, 41 Ch. D. 532, that in the case of real estate a tenant for life is not liable for repairs, and that there was no difference in principle in the present case where the land was to be held as personal estate. He therefore directed that the cost of the repairs should be borne by the capital, but held that the tenant for life was liable to keep down the interest on money borrowed for the purpose of such expenditure, or if made out of the capital he should lose the interest on the money so expended.

In a recent case of *Patterson* v. *Central Canada Loan & S. Co.* the same point was before the Divisional Court on 27th Jan., 1898, and the cases referred to by North, J., were said to be contrary to an earlier decision of Lord Hardwicke; judgment has since been given in accordance with the above case.

MARRIED WOMAN—SEPARATE ESTATE—WIFE EXPENDING MONEY TO PAY HUSBAND'S DEBTS.

Paget v. *Paget* (1898) 1 Ch. 47 although bearing principally on the effect of an order made under a statute enabling the Court to relieve a wife's property from a restraint against anticipation, of which we have in Ontario no counterpart, may, nevertheless, be noticed for the statement of Kekewich, J., that the doctrine that a wife is entitled to be indemnified by her husband's estate after his death, against loss incurred by contribution out of her separate estate towards payment of his debts, necessarily involves the right to be indemnified by him personally if living.

COPYRIGHT—INFRINGEMENT—SEVERAL REMEDIES FOR SAME WRONG—COMBINING CAUSES OF ACTION—DAMAGES—COPYRIGHT ACT 1842 (5 & 6 VICT., C. 45) SS. 15, 23, 26.

In *Muddock* v. *Blackwood* (1898) 1 Ch. 58, Kekewich, J., decided that a plaintiff suing for an infringement of copyright may combine in the same action a claim for damages under s. 15, and also a claim in detinue or trover, or if necessary both combined, to recover the infringing copies, or damages for their conversion under s. 23, and that he is not

shut up to one or other of such remedies. In addition to the usual injunction against further infringements, he granted an order for delivery up on oath of the copies in the defendant's possession, and awarded damages to the amount of £42, although the defendant's sales had resulted in a net loss of 5s 6d.

PUBLIC OFFICER—TRESPASS—LIABILITY OF SERVANTS OF CROWN—PREROGATIVE—AMENDMENT.

In *Raleigh* v. *Goschen* (1898) 1 Ch. 73, Romer, J., lays down the law respecting the liability of officers of the Crown for wrongful acts committed by them or their subordinates by their authority. The action was brought against the Lords of the Admiralty in their official character, to establish as against them that they were not entitled to enter upon or expropriate by compulsory purchase, certain lands of the plaintiff, for the purpose of erecting thereon a training college for navel cadets, and claiming damages for alleged trespass, and an injunction to restrain further trespasses. The learned judge holds that such an action will not lie against officers of the Crown in their official capacity. That the Crown cannot be sued in tort, neither can its officers in their official character.—But he also holds that the alleged authority of an executive department of the government is no justification for a trespass: but only those who actually commit or authorize the trespass are liable; and therefore the chief of a department is not liable for the acts of subordinates unless he actually authorizes them. Under these circumstances it was held that the action was not maintainable, and the plaintiffs then desired to amend so as to convert the action into one against the defendants individually; but the learned judge refused the amendment which would entirely change the character of the action; the dismissal, however, was without prejudice to any further action the plaintiff might bring against the defendants individually.

VOLUNTARY DEED—CONSTRUCTION—RECITAL—ESTOPPEL—APPOINTMENT—SUBSEQUENT ACQUISITION OF ESTATE BY GRANTOR.

Lovett v. *Lovett* (1898) 1 Ch. 82, was an action by a grantor in a voluntary deed, for the purpose of obtaining a declaration of the Court that a subsequently acquired interest had not

passed by the deed. The deed in question was a post-nuptial settlement, and it recited, as was the fact, that the grantor was entitled to a reversionary interest thereby purported to be conveyed, under a settlement of 15th April, 1874, and she thereby conveyed such reversionary interest in trust for herself for life, then to her husband for life, and on the death of the survivor, on the usual trusts for their issue, and in default of issue for the grantor. The grantor's interest, was, however, defeasible and only took effect in default of appointment, and after the making of this deed the plaintiff's mother in pursuance of the power of appointment, irrevocably appointed the property subject to the power in favour of the plaintiff absolutely. It was contended that the plaintiff was estopped by the recital in the deed from disputing that the subsequently acquired interest under the appointment passed under her deed; but Romer, J., was of opinion that the doctrine of equitable estoppel cannot be invoked by a volunteer, and that the deed could not be construed as passing any greater interest than the grantor actually had at its date, and he made the declaratory judgment as prayed by the plaintiff.

WILL—ABSOLUTE GIFT—GIFT BY CODICIL "INSTEAD OF" BEQUESTS IN WILL —REVOCATION.

In re Wilcock, Kay v. *Dewhirst* (1898) 1 Ch. 95, was a case for the construction of a will. The point was whether an absolute gift made by the will had been effectively revoked by the codicil. By the will in question the testator bequeathed his personal estate to his two daughters equally; but by his codicil he directed that "instead of such bequests in the manner expressed in my said will to such daughters absolutely," his executors should stand possessed of his personal estate in trust for sale and conversion, and to pay the income in moieties to his two daughters for life, and on the death of either of them to pay the moiety of the trust moneys to their children as they should appoint; but the codicil contained no gift over in the event of either daughter without issue. One of the daughters having died without issue, the question was whether the codicil had the effect of revoking the absolute gift to the deceased daughter, and consequently whether there

was an intestacy as to her moiety. Romer, J., determined that the codicil must be construed as revoking the prior absolute gift only so far as was necessary to give effect to its express provisions, and following *Doe* v. *Marchant*, (1843) 6 M. & G. 813, he held that the deceased daughter's personal representative was entitled.

COMPANY—WINDING UP — CONTRIBUTORY — APPLICATION TO REMOVE NAME FROM LIST—WAIVER.

In re Brinsmead (1898) 1 Ch. 108, was an application in a winding-up proceeding by a person to whom shares in the company had been allotted, to have his name removed from the list of contributories, and to rescind the contract, if any, to take the shares. The motion was resisted on the ground that the applicant had appeared and taken part in opposing the granting of the winding-up order, and in appealing therefrom. Before the winding-up proceedings were instituted the applicant had commenced proceedings against the company to rescind the contract. Wright, J., held that the applicant had not waived his right to make the present application, which he granted on the merits.

COMPANY—WINDING UP—CONTRIBUTORY—ERROR OF SUBSCRIBER FOR SHARES AS TO IDENTITY OF COMPANY.

In re International Society of Auctioneers, etc., (1898) 1 Ch. 110, was also an application in a winding-up proceeding to have the name of the applicant removed from the list of contributories. The ground on which the application was based was that the applicant in applying for membership had believed, which belief was known to, and fostered by the person who obtained his subscription, that the society he was applying for membership in was an old established society, whereas in fact it was a new society with a similar name. In answer to inquiries subsequently made of the new society, untruthful statements were made to the applicant which had the effect of keeping him in ignorance as to the identity of the society. Wright, J., held that the principle of *Cundy* v. *Lindsay*, (1878) 3 App. Cas. 459, applied, and that there was no contract, and the applicant was entitled to have his name removed, although he had not, before the winding up, taken any steps to have it declared that he was under no liability.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

Davidson, J.
Pro hâc vice. } THE QUEEN *v.* OGILVIE. [Nov. 16, 1897.

Contract—Conflict of law—Appropriation of payments—Receipt—Error—Rectification.

The doctrine that where a contract is made in one Province in Canada, and is to be performed either wholly or in part in another, ther the proper law of the contract, especially as to the mode of its performance, is the law of the Province where the performance is to take place, may be invoked against the crown as a party to a contract.

2. While both the English law and the law of the Province of Quebec give to the debtor owing several debts the option of appropriating any payment he may make to any particular one of such debts, provided he exercise his option at the time of such payment, yet under the Quebec law where the debtor does not exercise such option, and thus gives a right to the creditor to appropriate the payment, the creditor must exercise his option immediately upon payment being made, and cannot delay exercising it up to the time of trial as he may do under the doctrine of the modern English cases.

3. Where a person owing several debts has accepted a receipt from his creditor by which a specific imputation is made, he may afterwards have the payment applied upon a different debt by showing that he had allowed the former imputation to be made through error, unless the creditor has been thereby induced to give up some special security.

The Solicitor-General, *J. N. Greenshields*, Q.C., *E. L. Newcombe*, Q.C., for the plaintiff. *J. S. Hall*, Q.C., *W. D. Hogg*, Q.C., for the defendant.

Burbidge, J.] WOODBURN *v.* THE QUEEN. [Nov. 29, 1897.

Contract—Statutory requirements—Informality—Ratification by the Crown.

A contract entered into by an officer of the crown, empowered by statute to make such a contract in a prescribed way, although defective in respect of the statutory requirements, may be ratified by the crown.

R. V. Sinclair, for suppliant. *W. D. Hogg*, Q.C., for respondent.

THE QUEEN *v.* KILROE.

Information of intrusion—Possession and mesne profits—Joinder of claims—Judgment—Costs.

Rule 21 of the General Rules of Practice on the Revenue side of the Court of Exchequer in England made on the 22nd June, 1860, which prohibits the joinder of claims for the recovery of mesne profits or damages in an infor-

mation for intrusion upon lands of the Crown governed the practice of the Exchequer Court of Canada in such matters until May 1st, 1895, when a general order was passed by that court, enabling the joinder of such claims.

Rule 36 of the English Rules above mentioned, providing that in cases of judgment by default either for non-appearance or for want of pleading to informations of intrusion no costs are to be allowed to the Crown, is still in force in the Exchequer Court of Canada.

W. E. Hodgins, in support of motion for judgment.

DAVIDSON *v.* QUEEN.

Petition of Right—Damages from public work—Liability of Crown—Assessment of damages once for all—50-5, Vict., c. 16, s. 16 (b).

The Dominion Government constructed a collecting drain along a portion of the Lachine Canal. This drain discharged its contents into a stream and syphon culvert near the suppliant's farm. Owing to the incapacity of the culvert to carry off the large quantity of water emptied into it by the collecting drain at certain times the suppliant's farm was flooded and his crops thereby injured. The flooding was not regular and inevitable, but depended upon certain natural conditions which might or might not occur in any given time.

Held, that the Crown was liable in damages; that the case was one in which the Court had jurisdiction under clause (*b*) of s. 16 of the Exchequer Court Act; and that in assessing the damages in such a case the proper mode was to assess them once for all.

J. U. Emard, for suppliant. *J. S. Hall*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Maclennan, J.A.] [Feb. 11.

IN RE TOWNSHIP OF RALEIGH AND TOWNSHIP OF HARWICH.

Appeal—Drainage Act, 57 Vict., c. 56, s. 106—Rules applicable to High Court appeals—Time—Vacation—Motion to confirm proceedings—Costs.

The Rules applicable to appeals from the High Court to the Court of Appeal are to be applied, as far as possible, to appeals from reports of the Drainage Referee under the Drainage Act, 57 Vict., c. 36; and the Christmas Vacation is to be excluded in the computation of the month within which, by s. 106 of that Act, such an appeal is to be made.

Where the respondents' solicitors, by letter, insisted that the appeal was not regularly or properly brought, the appellants were justified in making a motion to extend the time for taking certain steps or to confirm the proceedings taken, and were entitled to the costs of such motion, although it was, strictly speaking, unnecessary, because the proceedings were found to be regular.

J. H. Moss, for appellants. *E. D. Armour*, Q.C., for respondents.

HIGH COURT OF JUSTICE.

Robertson, J.
Trials of actions. [Jan. 10.

HOEFNER *v.* CANADIAN ORDER OF CHOSEN FRIENDS.

Insurance—Friendly society—Relief certificate—Non-compliance with rules as to initiation.

Action on relief fund certificate for $1,000 issued by defendants, who were incorporated under R S.O. 1877, c. 167, on one Hoefner, deceased, in favour of the plaintiff. The deceased was balloted for and elected at a meeting of a subordinate council, but died before being duly initiated according to the rules of the Order before a duly constituted court of the council, though an irregular initiation had taken place before the Chief Councillor and the Prelate of the Order, and the subordinate council falsely recorded in their minutes that the deceased had been initiated at a certain meeting.

Held, that the defendants were not bound by the irregular acts of the subordinate council which could not, nor could its officers, waive the requirements of the company's laws in respect to the relief fund, and as the deceased had not been properly initiated the plaintiff could not recover.

Teetzel, Q.C., and *McClement*, for the plaintiff. *Aylesworth*, Q.C., and *Lee*, for the defendants.

Boyd, C.] LAFRANCE *v.* LAFRANCE. [Jan. 11.

Alimony—Interim allowance—Consent judgment in former action—Payment—Separation deed—Change of circumstances.

In 1897 a wife brought an action against her husband for alimony, and to set aside a judgment pronounced by consent in a former action for alimony begun in 1884, under which the wife had received $200. The defendant pleaded the judgment as a bar, and also adultery by the wife, and a deed of separation. The plaintiff disputed the deed of separation, and impeached the judgment as obtained by fraud and without her knowledge or consent; the payment of $200 she attributed to a release of dower given by her. She also alleged expulsion and desertion by her husband, and that he had been living in adultery after the judgment.

Held, that under these circumstances, the plaintiff was entitled to an order for interim alimony.

Atwood v. *Atwood*, 15 P.R. 425, distinguished. *Henderson* v. *Henderson*, 19 Gr. 464, followed. *Morrall* v. *Morrall*, 6 P.D. 98, and *Williams* v. *Baily*, L.R. 2 Eq. 731, also referred to.

W. B. Taylor, for plaintiff. *H. W. Church*, for defendant.

Armour, C.J., Street, J.] ARMSTRONG *v.* ARMSTRONG. [Jan. 31.

Security for costs—Plaintiff out of jurisdiction—Property within jurisdiction—Administration order—Consent to charge share with costs—Place of reference.

A plaintiff residing out of the jurisdiction, but owning a substantial amount of property within it, should not be ordered to give security for costs.

And where a plaintiff was applying summarily for an administration order, and it appeared that he had an interest worth $273 in the estate in respect of which he applied, he was absolved from giving security for costs, although his residence was out of the jurisdiction, upon his consenting that his whole interest in the estate should be subject to a first charge in respect of any costs which he might be lawfully ordered to pay in the course of the administration proceedings.

The testator lived and died in the county of S.; the defendant executor lived there; and one of the two parcels of land which made up the real estate of the testator was in that county. The other and smaller parcel of land was in the county of Y., and the plaintiff's solicitor practised there.

Held, that the reference should be to the Master at the county town of S.

Gallagher, for plaintiff. *Aylesworth*, *Q.C.*, and *Scanlon*, for defendant.

Street, J.] MILLER *v.* BATTY. [Feb. 1.

Limitation of actions—Ejectment—Tenant at will—Commencement of statutory period.

Ejectment and for recovery of rent and mesne profits. The defendant entered into possession in July, 1886, upon a promise from his father, the true owner, to give him the land, and had remained in possession ever since, without disturbance and without payment of rent, or anything in the nature of rent, and without any acknowledgment of his father's title. This action was begun on the 19th May, 1897, by the executors and devisees under the will of the father.

Held, that the defendant's position from July, 1886, when he entered upon his possession, was that of a tenant at will to his father, and, for the purposes of the statute, that tenancy must be taken to have continued until July, 1887. During that period the statute did not begin to run in his favour. This action was therefore brought before the defendant's possession had ripened into a title, and the plaintiffs must have judgment for possession of the land with costs of the action. *Keffer* v. *Keffer*, 27 C.P. 257, referred to.

J. Armstrong, for plaintiffs. *J. M. Kilbourn*, for defendant.

Boyd, C., Robertson, J. } PATTERSON *v.* CENTRAL CANADA L. & S. CO. [Feb. 2.

Waste—Permissive waste—Tenant for life—Growth of weeds.

An action for permissive waste will not lie against a tenant for life. *Re Cartwright*, 41 Ch. D. 532 (1889), followed.

The spread of weeds, such as mustard and quack grass, from natural causes or by the action of cattle depasturing or eating hay or straw that comes from the fields where the weeds were, and the failure to overcome the growth and spread of the weeds by a process of summer fallowing or hand-picking is no evidence of waste, but only of ill-husbandry. The fact that there is an Ontario statute for the prevention of the spread of noxious weeds does not make any difference in this respect.

N. F. Davidson, for plaintiff. *Dumble*, for defendants.

MacMahon, J.] BEAULIEU *v.* COCHRANE. [Feb. 3.

Trade union—Expulsion of member—Fine—Conspiracy — Remedy—Action Bar—R.S.C. c. 131, s. 4—Libel—Malice—Privilege.

An action by a member of a trade union against certain of his fellow-members for an alleged conspiracy and for unlawfully imposing a fine upon him and expelling him from the union and depriving him of its benefits, and for libel. There was no evidence warranting a finding that the defendants had entered into a conspiracy to inflict a fine and thus cause the plaintiff's expulsion from the union. The plaintiff had a monetary interest in the death benefit and sinking funds of the union.

Held, notwithstanding this, and notwithstanding the fact that the imposition of the fine was wholly illegal and unwarranted by the rules of the union, and was virtually an expulsion of the plaintiff, he had no remedy by action; for by the Act respecting trades unions, R.S.C. c, 131, s. 4, the Court is not to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for a breach of any agreement for the application of the funds of a trade union to provide benefits to members; and this action came within these words. *Rigby* v. *Connel*, 14 Ch. D. 428, followed.

The alleged offence for which the fine was inflicted was the causing an extra apprentice to be brought into the yard in which the plaintiff and defendants were employed. The defendants, after being told by their employer that the plaintiff had nothing to do with bringing the apprentice in, wrote and caused to be published in their trade journal a statement that the strike ordered by the union when the apprentice was brought in would not have occurred but for the treachery of the plaintiff, who richly deserved the fine imposed.

Held, that there was evidence of malice, and the publication was not, therefore, privileged.

Belcourt, for plaintiff. *T. McVeity*, for defendants.

Divisional Court.] REILLY *v.* MCILLMURRAY. [Feb. 7.

Lien on race horse by trainer—Use by owner—Right of continuing possession—Loss of lien by parting with possession—Resumption of possession—Revivor of lien.

In an action of replevin for a mare in which the defendant set up a lien for training her for races, it was shown that the owner had on one occasion at least apparently as of right gone to the defendant's stable, harnessed and driven her away, and returned her when he was done with her, and according to the weight of the evidence taken her on other occasions, and after the death of the owner the defendant had under the instructions of the solicitor for his administratrix (plaintiff) taken her to a sale stable and left her there a week for the purpose of selling her, and when he got her back undertook to keep her upon payment of a certain sum per month.

Held, that on the evidence there was not such right of continuing possession as would give the defendant a lien, as the owner was at liberty to use the mare whenever he desired; and that even if the defendant had a lien he had lost it by delivering her to the sale stable, when he gave up complete

possession, where she remained at the cost and under the control of the plaintiff, and that the subsequent possession by the defendant did not revive the lien as such possession was taken under a new and different agreement. Judgment of the County Court of York reversed.

O'Donohue, Q.C., for appeal. *A. F. Lobb*, contra.

Boyd, C., Robertson, J.] THE QUEEN *v.* HUGHES. [Feb. 8.

Liquor License Act—Club—Conviction of steward—R.S.O. c. 194, secs. 50, 53, 108, 112.

Motion on rule nisi to quash conviction for keeping liquor for the purpose of sale without license. The evidence showed that the defendant was the steward of an incorporated bicycle club, which by its charter was prohibited from selling intoxicating liquors; that he kept a bar in a room in the building of which the club was lessee, and, as agent of the club, supplied liquors, which apparently belonged to the club, at his own discretion, to such of the members and others, as presented tickets purchased from the club.

Motion dismissed with costs; and *held*, defendant rightly convicted under R.S.O. 1887, ss. 50, 53, 108, 112.

Ritchie, Q.C., for defendant. *J. R. Cartwright*, Q.C., for prosecutor.

Boyd, C., Meredith, J.] IN RE FORSTER. [Feb. 9.

Costs—Style of—Cause removed from Surrogate Court—Order of transfer—Terms—Consent judgment—Costs out of estate.

An order transferring a cause or proceeding from a Surrogate Court into the High Court contained a clause providing that in the event of the defendant, the applicant for the order, failing to establish his defence, his costs, if any were allowed him, should be on the Surrogate Court scale. By a consent judgment, which recited the pleadings and proceedings, and adjudged that the will which was disputed by the defendant was the last will of the testatrix, and should be admitted to probate, it was also adjudged that the costs of all parties should be paid out of the estate.

Held, upon appeal from taxation, that the defendant was bound by the order of transfer, and his costs should be taxed on the scale of the Surrogate Court.

L. G. McCarthy and *D. L. McCarthy*, for the appellant. *C. J. Holman* and *Pattullo*, for respondents.

Boyd, C., Meredith, J.] VIDEAN *v.* WESTOVER. [Feb. 10.

Appeal—Waiver—Acting on judgment—Quashing appeal—Costs.

Appeal from the decision of Ferguson, J., (ante. p. 35) quashed, following *International Wrecking Co.* v. *Lobb*, 12 P.R. 207, and *Keith* v. *Keith*, 25 Gr. 110, because the defendant was held to have waived his right of appeal by acting upon the judgment in obtaining his costs out of the fund in Court, pur-

suant to the judgment, which costs, with the plaintiffs' costs, also paid out, exhausted the fund. Appeal quashed without costs, as no motion to quash was made by respondents.

Tremeear, for appellant. *C. J. Holman*, for respondents.

Armour, C.J., Street, J.] GIGNAC *v.* ILER. [Feb. 10.

Insolvency — Conveyance by insolvent debtor — Preference — Impeaching — Pressure—Time—Consideration—Untrue statement in conveyance—Proof of other consideration—Burden of proof—Statute of Elizabeth.

Appeal by the plaintiff from the judgment of Meredith, J., dismissing the action, which was brought against the sheriff of the County of Essex and his bondsmen, for damages for wrongful seizure and conversion of a crop alleged to be the property of the plaintiff. but seized and sold by the sheriff under an execution against one Antilla, who had conveyed to the plaintiff the land on which the crop grew. The trial Judge held that the crop was not the plaintiff's because the conveyance to him was an unjust preference by an insolvent debtor, and therefore void.

Held, that as there was evidence of a request amounting to pressure on the part of plaintiff for the conveyance to secure him against the liability he was under for Antilla, and the first proceeding taken to impeach the transfer was the actual seizure by the sheriff more than sixty days afterwards, the transfer could not be impeached as a preference. But the transaction was void under the statute of Elizabeth. The statement of the consideration was untrue, because there was, confessedly, no exchange of properties, as stated in the conveyance. The onus was upon the plaintiff to prove beyond reasonable doubt that there was some other good consideration. The plaintiff contented himself with giving his own unsupported evidence of the existence of a consideration, which contradicted the statement in the deed. Under these circumstances the evidence of the existence of a consideration was insufficient, and the conveyance must be treated as voluntary. Appeal dismissed with costs.

F. D. Davis, for plaintiff. *S. White*, for defendants.

Meredith, C.J., Rose, J.] CHRISTY *v.* ION SPECIALTY CO. [Feb. 14.

Pleading—Disclosing no reasonable answer—Striking out—Rule 261—Amendment.

Appeal by the plaintiff from an order of Boyd, C., in Chambers, dismissing a motion by the plaintiff under Rule 261 to strike out paragraphs 13 and 14 of the statement of defence in an action to restrain the infringement of a patent for a bicycle saddle, on the ground that they disclosed no reasonable defence and were embarrassing. These paragraphs set up the invalidity of the first claim of the plaintiff's patent, and were, admittedly, an answer to the original statement of claim ; but the plaintiff had amended his statement of claim by omitting his assertions based upon the first claim in the patent, and the defendants did not amend their defence.

Held, that it was only in a very clear case that a pleading should be struck

out as showing no reasonable ground of action or defence, and it could not be said that this was manifestly such a case; and it was also doubted whether a defence which was originally good could be struck out after the plaintiff had amended, and whether it was the duty of the defendant to amend. Appeal dismissed with costs to the defendant in any event.

Bristol, for the plaintiff. *W. Cassels*, Q.C., for the defendants.

Rose, J.] IN RE DOMINION COLD STORAGE CO. [Feb. 15.

LOWREY'S CASE

Execution—Order of court of another Province—Winding-up Act, R.S.C. c. 129, s. 85—Production of certified copy—Entry.

Execution may be issued under s. 85 of the Winding-up Act, R.S.C. c. 129, upon the order of a court of another Province, without making such order a rule of court, or obtaining the direction of a judge, but upon the mere production to the officer of the High Court of a properly certified copy of such order.

Re Companies Act and Hercules Insurance Co., 6 Ir. R. Eq. 207, followed. *Re Hollyford Copper Mining Co.*, L.R. 5 Ch. 93, and *Re City of Glasgow Bank*, 14 Ch. D. 628, followed.

In such cases the settled practice of the High Court is to have the order entered in the proper book as a judgment or order.

Marten, for D. Lowrey. *George Bell*, for liquidator.

Boyd, C., Robertson, J., Meredith, J. } THE QUEEN *v.* HAMMOND. [Feb. 17.

Criminal law—Evidence—Coroner's inquest—Canada Evidence Act, 1893—56 Vict., c. 31, s. 3.

Crown case reserved. The Canada Evidence Act, 1893, 56 Vict., c. 31, s. 3, enacts: "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him. . . . . Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceedings thereafter instituted against him other than a prosecution for perjury in giving such evidence. The evidence in this case was given before the coroner who had told the prisoner that "it was not necessary to be examined under oath without he wished to be so, and that any evidence taken might be used against him." The prisoner, however, said that he wished to give evidence and was sworn in the usual way, and gave evidence which was afterwards used to fix criminal liability upon him.

Held, (Meredith, J., dissentiente,) that the section applies to any evidence given by a person under oath, although he may not have claimed privilege.

Held, also, that as the Court of Appeal for criminal cases is now constituted the decision of the judges of one court is not binding on the judges sitting in another court of the same jurisdiction.

E. F. B. Johnston, Q.C., for prisoner. *J. R. Cartwright*, Q.C., for Crown.

Armour, C.J., Falconbridge, J.] SMITH *v.* BOYD. [Feb. 18.

Amendment—Pleadings—Trial—Partnership—Conspiracy—Accounts—Parties—Terms—Costs.

The action as framed was to recover damages for an alleged conspiracy between the defendants, the plaintiff's partner in a mercantile business and another, whereby they fraudulently and secretly withdrew money from the assets of the firm. The real grievance was the alleged misappropriation by the plaintiff's partner, with the assistance of the other defendant, of partnership funds to the injury of the partnership and of the plaintiff. At the trial the plaintiff sought to amend by alleging that moneys were received by the other defendant in trust for the firm, and by adding the firm's assignee for the benefit of creditors as a party, and by claiming an account.

Held, that the amendment should have been granted upon proper terms as to costs.

Du Vernet, for plaintiff. *Delamere*, Q.C., for defendant Boyd. *H. S. Osler* for defendant Cooper.

COUNTY COURTS.

COUNTY OF YORK.

O'BRIEN *v.* TORONTO.

Municipal corporation—Negligence—Icy sidewalks—55 Vict., c. 42, s. 531—57 Vict., c. 50, s. 13—Granolithic pavement.

Held, that a municipal corporation has the right to select such material for sidewalks as in its discretion may think best, so long as it is a material which is generally used or adaptable for the purposes required, and the corporation is not liable for damages which may result, merely because such pavement becomes at any time so affected by natural causes, over which the corporation has no control, that more than ordinary caution is required by the public using such sidewalk to prevent accidents.

[TORONTO, 1897, MORGAN, J.J.

This was an action brought against the City of Toronto, for damages sustained by the plaintiff through the alleged negligence of the defendants.

The plaintiff while walking along a sidewalk in the City of Toronto slipped and fell violently, seriously injuring herself. It appeared that the sidewalk in question was a granolithic pavement, and had been in a slippery condition since the inception of the winter, that at the time of the accident it was covered with thin slippery ice, that the walk had been so covered for some five days prior to the accident.

At the close of the plaintiff's case the defendants moved for a non-suit.

A. Mills, for plaintiff.

J. S. Fullerton, Q.C., and *H. L. Drayton*, for defendants.

MORGAN, J.J.: I have felt for a long time the difficulty that must come up and must eventually be decided with respect to the icy and dangerous condition of foot pavements. The city is not bound to construct a foot pavement of any description, either wooden or otherwise. If in the absence

of a pavement the snow fell upon the earth as it stood in its original character and was tramped down by foot passengers, it is very doubtful whether there would be the same condition of dangerous slipperiness as is complained of here; and, presuming such condition existed, it is exceedingly doubtful whether, in the absence of an artificial sidewalk the city would be bound to interfere with conditions of slipperiness that nature has produced by frost or fallen snow upon the places where foot passengers ordinarily go.

But, it may be argued that if the city chooses to change the condition of the original earth by putting down some sort of improvement for the convenience of passengers, and that the presence of that improvement produces a higher degree of slipperiness than would exist in the absence of the improvement, that to that extent they must at all times take care, under all circumstances and climatic influences, to protect the public against a condition of affairs that would not have existed but for the improvement and if they had not interfered with existing conditions. One would properly regret that this should be the law, because the demands of civilization call for these foot pavement improvements, the convenience of the public calls for, they are all put there with the consensus of the public, they are all enjoyed by the public and the public would naturally object if these pavements were not put down, and the city is only yielding to a well appreciated and well understood public demand if these things are done. Then can it be said, when the corporation, in obedience to a public demand, makes these sidewalk improvements, and makes them of the best and most durable material that experience seems to suggest as the proper thing for sidewalks, and that when these sidewalks, affected by the forces of nature, uncontrollable by the city—namely, snow and frost—at times become very slippery, that the city is bound, all over these sidewalks, at all times and under all circumstances, to protect the public against a danger caused by the forces of nature? I do not think I can say so.

The Legislature has recently provided that in damage actions for injury through snow and ice on sidewalks gross negligence must be proved (57 Vict., c. 50, s. 13). I think that the intention of the Legislature was to disturb an existing state of the law as expressed in decided cases and produce a different state of the law, that state of the law being to relieve the city from responsibility in cases on all fours with this; and I think I must give effect to the legislation intended and hold that in cases of this description the city is not liable and that the plaintiff has not made out such a case as would bring her within the right to recover.

The action must be dismissed.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Jan. 11

BANQUE D'HOCHELAGA *v.* MARITIME RY. NEWS CO.

Partnership—Service of writ after dissolution.

Appeal from the decision of GRAHAM, J., at Chambers, deciding that service on one or more partners of a dissolved firm is good service on all the partners of the firm where plaintiff had no knowledge of the dissolution. On appeal to the Court :

Held, following the dictum of CHITTY, J., in *Shepherd* v. *Hirsch*, 45 Ch. Div., p. 244, that the service on one or more partners was good service on all partners, although the firm had been dissolved, if plaintiffs had no knowledge of the dissolution.

C. H. Cahan, for plaintiffs. *J. A. Chisholm*, contra.

Full Court.] WEATHERBEE *v.* WHITNEY. [Jan. 11.

Affidavit for capias—Lands sold—Action for price.

This was an appeal from an order made in chambers by RITCHIE, J., setting aside an order for arrest. The affidavit of the plaintiff upon which the order for arrest was made stated that he had sold to the defendant certain mining areas for a stated price, and a further paragraph in said affidavit set forth an agreement for the sale of said areas, and that the plaintiff had performed his part of the agreement, and that the price agreed upon was due from the defendant to the plaintiff. On the application before RITCHIE, J., the defendants produced affidavits contradicting all the material allegations in plaintiff's affidavit. On appeal

Held, that it appearing from the affidavits that the title to the mining areas had not passed from the plaintiff to the defendant, the plaintiff could maintain only an action for damages and not an action for the price : *Laird* v. *Pinn*, 7 M. & W. 474. Appeal dismissed with costs.

Ritchie, Q.C., and *J. A. Chisholm*, for plaintiff. *Ross*, Q.C., and *H. Mellish*, for defendant.

McDonald, C.J., Townshend, J. } PIPER *v.* KINGS' CURE CO. [Jan. 11.
Graham, E. J }

Setting aside judgment for default of plea—Sufficiency of affidavit—Discretion of Judge—Defence sent by mail—Miscarriage of.

By agreement between solicitors defendant was allowed further time, expiring July 6th, 1897, for putting in the defence. On July 2nd, 1897, the defence was mailed to the agents of the defendant company's solicitors at Bridgetown, and in the ordinary course should have reached them in time to file and serve on the following day, but through a miscarriage in the mails did not reach them until after judgment had been entered for default of plea.

Application was made to the judge of the County Court to set aside the judgment so entered, and for leave to come in and defend. The only affidavit read in support of the application was that of defendant company's solicitor which contained the following paragraphs: (*a*) "The said defendant company have a good defence to this action, and unless the said judgment is opened up great injustice will be done the defendant company herein." (*b*) "The said plaintiff has no cause of action herein, as I am advised and believe, and the said defendant company are not indebted to the said plaintiff, as in said statement of claim alleged." (*c*) "As will appear by the defence herein the defendant company deny that they are indebted as alleged, and claim that the plaintiff did not on her part fulfil the conditions of the contract alleged to have been made, and which forms the ground of action herein." The judge of the County Court having granted the application the plaintiff appealed.

Before the passage of the Judicature Act (R.S. 4th series, c. 94 s. 75) a defendant seeking to set aside a judgmant entered for default of appearance and plea, was required by satisfactory affidavits to "account for his non-appearance, and disclose a defence upon the merits with the particulars thereof." Under the present practice by O. 27, R, 14, "Any judgment by default, whether under this order or under any other of these rules, may be set aside by the Court or a judge upon such terms as to costs or otherwise as such Court or a judge may think fit."

Held, that the affidavit made by defendant's solicitor who did not profess to have any personal knowledge, except as he was advised and believed, and who while referring to the proposed defence did not undertake to verify the particulars of it, was not sufficient to justify the County Court Judge in setting aside the judgment.

Held, also, that the affidavit was bad under O. 36, R. 4, as containing matter that the solicitor making it was not able of his own knowledge to prove, and not giving the grounds of his belief.

Per TOWNSHEND, J., MCDONALD, C.J., concurring, GRAHAM, E.J., dissenting that following English decisions on a rule in the same terms as O. 27, R. 14, nothing short of an affidavit showing merits would entitle the defendants to come in and defend, or would justify the Judge to whom the application was made in permitting them to do so.

W. E. Roscoe, Q.C., for appellant. *F. Mathers*, for respondent.

Full Court.] BURRIS *v.* RHIND. [Jan. 11.

Duress—Threats of criminal proceedings—Deed so obtained set aside.

The defendant, W.R., conveyed his farm to his sister C. as security for the sum of $450, advanced by her from time to time to assist him in paying off his obligations. The offer of the security was made in connection with a request for a further advance, which was given. Plaintiff, to whom W. R. was indebted, on learning of the conveyance of the land, saw W. R., and told him that the transaction was a fraudulent one, and that he had been guilty of a criminal offence, the punishment for which was the penitentiary, and threatened to take proceedings against him unless he at once took steps to procure a

reconveyance of the land. This conversation and the threats made were communicated to C. who was asked to sign and return a deed sent her reconveying the land to W. R. The deed was signed and returned in accordance with the request, and plaintiff thereupon obtained from W. R. a mortgage of the land to secure the debt due to him. Registration of the deed made by C. having been refused in consequence of an informality in the execution, it was returned to her to be properly executed, but C., having obtained advice in the meantime, declined to re-execute the deed or to return it. In an action by plaintiff to recover possession of the deed or for a declaration that the land was the property of W. R. at the time he gave the mortgage, the trial Judge found, among other things, (1) that W. R. requested C. to reconvey the property to him from fear of criminal consequences, which fears were the result of conversation with plaintiff and one C., a solicitor, and that W. R. when he wrote for the deed informed C. of his fear that he had made himself criminally responsible; (2) that C., acting on the information conveyed to her by W. R. and under the belief that he had made himself criminally responsible, executed the deed; (3) that C. had no knowledge at the time that plaintiff intended to take the mortgage.

Held, that the case came within the class of cases where the Court will set aside the transaction for pressure and undue influence.

Held, that plaintiff having requested W. R. to procure the re-conveyance, made W. R. his agent for that purpose, and that he could not repudiate such agency while seeking at the same time to have the advantage of the re-conveyance procured by W. R. from C., and that C. was entitled to have such re-conveyance set aside with costs.

F. H. Bell, for defendant. *F. T. Congdon*, for plaintiff.

Full Court.] KIRKPATRICK *v.* MILLS. [Jan. 11.

Libel—Evidence—Solicitor—Neglect to attend trial—New trial—Consent to reduce verdict.

On the trial of an action for libel witnesses who had read the paper containing the libel were allowed to state to whom they thought the libel referred.

Held, that the evidence was admissible. At the opening of the term at which the case was set down for trial the jury cases were the first for trial, and after the Court met cases were set down for special days. Defendant's attorney was not present at the time this was being done, nor was he represented by counsel. In consequence, the cause was tried in defendant's absence, and judgment was given against him.

Held, that under these circumstances defendant was entitled to a new trial if he desired it, but only upon payment of costs of the former trial and of argument.

The facts as shown by the affidavits went to show that defendant admitted publication of the libel, and had expressed his willingness to apologize therefor in terms proposed by plaintiff's solicitors.

Held, that plaintiff would be entitled to a verdict, and that as he had agreed to reduce the damages to a nominal amount the verdict should be allowed to stand subject to such reduction.

F. T. Congdon, for appellant. *J. A. Chisholm*, for respondent.

Full Court.] DOMINION COAL CO. *v.* KINGSWELL STEAMSHIP CO. [Jan. 11.

Irregularity in service of summons—Waived by appearance—Appearance under protest—Waiver.

Defendant company's steamer was attached at the suit of plaintiff to respond such judgment as plaintiff might obtain in an action against the defendant for breach of the conditions of a charter party. Defendant appeared under protest and without prejudice to the right to object to the jurisdiction of the Court, and subsequently moved before GRAHAM, E. J., to set aside the summons and attachment on the ground that the service was irregular.

Held, affirming with costs the judgment dismissing the application that the defective service of a summons regularly issued and in proper form, is cured by the appearance of the defendant.

Held, also, that such a thing as appearance under protest is unknown to the practice of the Court, but that even if defendant's right to object to the legality of the service could be protected by protest the protest in this case was limited in terms to the jurisdiction.

Per GRAHAM, E.J., (in the judgment appealed from.)

Held, that if defendant company under protest had put in special bail under the statute and moved to set aside the attachment they could have done so, but when they obtained the release of the vessel by giving security, without notifying the other side that they reserved the right to move to set aside the process, they waived the right to do so.

C. P. Fullerton, for appellant. *H. Mellish*, for respondent.

Full Court.] COMMERCIAL BANK *v.* SCOTT. [Jan. 11.

Collections Act—Order made by Judge at Chambers for payment of money—Attachment to enforce order—Laches—Costs.

The Nova Scotia Collections Act, Acts of 1894, c. 4, s. 1, provides that "no person shall be arrested or imprisoned upon or in respect of any judgment of the Supreme Court . . . ordering or adjudging the payment of any money, unless as in this Act hereinafter provided." And s 2 of the Act reads: "For the purposes of this Act the word judgment shall include any order directing payment of money, costs, charges, or expenses." An order having been made by a Judge at Chambers, directing defendant to pay over money in his hands to the receiver.

Held, that the order was one which could not be made, and was therefore, one which could not be enforced by attachment or imprisonment for disobedience thereto.

Defendant's counsel drew a distinction between an order made as the result of an action between the parties where it is adjudged or ordered that the defendant pay a certain amount of money, and the case of an order for payment of a particular sum of money found or admitted to be in the hands of the party against whom the order is made in the course of the litigation.

Held, that the distinction was well founded, and that the Collections Act did not cover such a case as the latter, but was intended to apply only to the case of a judgment debtor ordered to pay money in satisfaction of the judgment againt him.

Held, further, that inasmuch as defendant did not appear to show cause against the original order, before the judge at chambers, but stood by until the attachment proceedings were taken, he was not entitled to costs.

W. B. A. Ritchie, Q.C., for plaintiff. *W. H. Fulton*, for defendant.

Full Court.] FULTON *v.* KINGSTON VEHICLE CO. [Jan. 11.

Assignment executed under threat of criminal prosecution—Upheld as between original parties where there was a debt actually due—Case of third party distinguishable—Threat to do that which may lawfully be done not duress.

Plaintiffs sought to set aside an assignment and confession of judgment given by plaintiff to defendant company on the ground that they were executed in consequence of a threat of criminal prosecution. It was shown that the defendant company had considered the question of plaintiff's arrest, and that a warrant was actually issued for that purpose, and that proceedings would have been taken in the event of his refusal to execute the documents required of him, but the jury found among other things that there was no agreement, express or implied, on the part of the company with plaintiff to abandon the criminal prosecution conditionally upon his giving the security demanded. The trial Judge, notwithstanding this finding, directed judgment to be entered for plaintiffs.

Held, 1. That he was wrong in so ordering, and that the judgment must be set aside with costs.

2. There being a debt actually due from F. to the defendant, that the security given was not invalidated by the fact that it was given in consequence of a threat to take criminal proceedings against him, there being at the same time no agreement on the part of defendant that if the security was given they would not prosecute.

3. That the case of a party seeking to evade payment of a debt actually due is distinguishable from the case of security given by a third party (*e.g.*, a relative) not a party to the original transaction.

4. That the threat made being only to do that which might lawfully be done there was no duress which would avoid the transaction.

H. A. Lovett, for appellant. *R. L. Borden*, Q.C., and *H. McKenzie*, for respondent.

Full Court.] THE QUEEN *v.* GRANT. [Jan 11.

Liquor License Act—Third conviction—Power of magistrate to vary form prescribed—Amendment of summons in absence of defendant and without notice held bad—Costs.

Defendant was convicted by a stipendiary magistrate of a third offence against the provisions of the Liquor License Act of 1895 and amending Acts, and was adjudged to pay a fine and costs, and, in default of payment, to be imprisoned for 90 days, and in addition to the term of imprisonment imposed in default of payment of the amount of the fine and costs, to be imprisoned for 50 days. A difficulty arose in connection with the carrying out of the punishment imposed, owing to the fact that neither of the forms of conviction

prescribed for use contained words authorizing an absolute term of imprisonment in addition to that provided for in case of default of payment of the amount of fine and costs. The penalties were clearly defined, the jurisdiction complete, and the object of the Act certain.

Held, that the magistrate was justified in adopting a form of conviction made applicable to a different section of the Act.

After hearing the evidence and the arguments of counsel the stipendiary magistrate adjourned the case to a future day for the sole purpose of deciding as to the sufficiency of the evidence and giving judgment in the case. On the day fixed, in the absence of the defendant or his solicitor, and without notice to them, he heard a motion to amend the summons by changing the date of the previous conviction, and after making the amendment asked for, convicted the defendant.

Held, (MEAGHER, J., dissenting) that the stipendiary magistrate could not make this amendment in the absence of defendant and without notice, and that the appeal should be allowed and the conviction quashed with costs on that ground.

A. Drysdale, Q.C., for appellant. *E. C. Gregory*, for respondent.

Full Court.] RUDOLF *v.* BRITISH AND FOREIGN MARINE INS. CO. [Jan. 11.

Marine Insurance—Partial loss on cargo—Evidence of stranding of vessel.

The schooner "Donzella," on a voyage from Porto Rico to Halifax, put into Barrington for shelter. The wind at the time was south-east, with a heavy snow storm prevailing. The vessel was anchored near the light ship, with one anchor out, but as the wind increased a second anchor was put out. Subsequently during a heavy gale that sprang up from the north-west both chains parted. The vessel was then on a lee shore, studded with reefs and shoals, and the tide low. She was abandoned by the master and crew, and the following morning was not visible from the shore. Sometime afterwards she was picked up at sea by salvors, and was brought into port and put upon the slip and repaired. When brought in she had four feet of water in her hold, and the cargo was considerably damaged. On being put upon the slip it appeared that twelve feet of the shoe were off abaft the main chains, and another twelve feet off forward under the main chains. The butts on the bottom were open. The keel was more or less chafed and broken. The rudder was damaged and the rudder braces started off. There was a scar on the bilge on the port side, which looked as if the vessel had dragged or pounded on something. The sides of the keel were bruised more or less, and pieces off of it. The main keel was broomed up The flying jib boom and main boom were broken, and the fore boom was split.

Held, dismissing with costs the motion for a new trial, that there was sufficient evidence to warrant the jury in coming to the conclusion that the vessel had been on shore and beating on the rocks for some time, and on which they could properly find a verdict for plaintiff, and that the trial judge was right under the circumstances in not withdrawing the case from the jury.

R. E. Harris, Q.C., and *W. A. Henry*, for appellant. *A. Drysdale*, Q.C., for respondent.

Full Co irt.] FILLIS *v.* CONROD. [Jan. 11.

County Court—Ex parte judgment set aside—Costs.

S. 26, c. 9, Acts of 1889, enacts that "the pleadings, practice, process, forms and procedure of the Supreme Court for the time being, as embodied in the Judicature Act and amendments thereof, and the orders and rules therein now in force . . . shall apply to and extend to the County Court . . . except as the same may be modified and limited by this Act." S. 54 provides that " . . . if any cause when called is not tried, either party shall be at liberty to move the Court on the last day of said term . . . that the judgment below be affirmed or reversed as the case may be, with costs . . ." On appeal from the decision of the Stipendiary Magistrate in favor of defendant, defendant was not present when the case was called for trial in the County Court, and plaintiff called witnesses and took judgment ex parte.

Held, that the practice of the Supreme Court, which otherwise would have been applicable was modified in this case by the provision contained in s. 54, and that under that section it was the duty of plaintiff to have moved on the last day of term.

The County Court Judge having refused to set aside the judgment for plaintiff,

Held, that he was wrong in doing so, and that the judgment must be set aside, but, as plaintiff undertook to try the cause on the merits, that no costs of the appeal should be allowed except the cost of printing; defendant's costs on the summons to be costs in the cause.

A. R. Rowlings, for appellant. *E. D. King*, Q.C., for respondent.

Full Court.] WRIGHT *v.* POLSON. [Jan. 11.

Contract—Mutual and independent promises—Non-performance no defence—Remedy in damages.

Plaintiff and defendant entered into a contract in writing, under which plaintiff undertook to excavate a cellar on land owned by defendant, and to do certain other work in connection therewith at prices named in the contract, and defendant, on his part, undertook to pay plaintiff for the work by crediting a small sum of money due him by plaintiff, by delivering to plaintiff two waggons, subject to certain alterations to be made in them, by doing the wood work of a light truck waggon for plaintiff, amounting in all to $188.75, and by paying the balance, if any, in cash. It was stipulated that the work to be done by plaintiff was to be finished by November 1st, 1896. Plaintiff brought an action for the amount due him according to the prices fixed, alleging that defendant refused to deliver the waggons, or to do the work on his part agreed to be done. The defence was that plaintiff had neglected to complete the work referred to in the contract, and on his part agreed to be done. The evidence showed that the sum of $15 would remove the defects complained of by defendant, and that in other respects plaintiff had substantially fulfilled his contract.

Held, that the promises made by the parties to the contract were mutual and independent, that it was no defence for defendant to set up non-performance

on the part of plaintiff, and that both parties must be taken to have relied upon his remedy in damages.

Held, also, that as defendant had counter-claimed damages, and could be fully compensated in that way, and admitted that the sum of $15 would cover the defects alleged, plaintiff was entitled to have judgment entered in his favour for the amount of his claim, subject to that reduction, and to have his appeal allowed with costs.

H. Mellish, for appellant. *D. C. Fraser*, for respondent.

Full Court] ALEXANDER *v.* BAKER. [Jan. 11.

Setting cause down for trial before Judge at Chambers—Order must prevail until set aside—Application to set aside judgment.

At the instance of plaintiff and after due notice to defendant's solicitor, who was present when the application was made and made no objection thereto, the cause was set down for trial before a Judge at Chambers.

Held, that the order, being clearly within the jurisdiction of the Judge who made it, must prevail until set aside, and was not affected by the subsequent giving of a jury notice by defendant.

Defendant's counsel appeared at the trial and while objecting that the trial could not be proceeded with on account of the giving of the jury notice, went on with the trial and cross-examined plaintiff's witnesses, and called witnesses on behalf of defendant.

Held, that having taken his chances on the trial he had no merits upon which he could ask to have the judgment against him set aside.

Held, that the judgment of the Chambers Judge must be affirmed and defendant's appeal dismissed with costs.

Sugg v. *Selber*, 1 Q.B.D. 362, distinguished.

D. McNeil, Q.C., for appellant. *C. S. Harrington*, Q.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Court.] COLE *v.* MCDONALD. [Feb. 4.

Constable appearing in Justices' Courts—Presentment of note—Sec. 4 of Justices' Court Act directory.

A constable appeared for the plaintiff on the return of a summons in a Justices' Civil Court and applied for an adjournment, which was granted, on account of the absence of the plaintiff, who was a necessary and material witness in his own behalf.

Held, (1.) that a judgment signed at the adjourned court for the plaintiff was bad, and that a non-suit should be entered (2.) That s. 4 of the Justice's Civil Court Act providing that the Justice "shall read over to each witness

the evidence given by him, and the witness shall subscribe his name thereto," is directory, and that the fact that the Justice's return for review does not show that the evidence has been so read over to each witness, is not a ground for setting aside the judgment. (3.) That in the case of a note payable at a particular place, presentment at that place must be proved under s. 86 of the Bills of Exchange Act to entitle the plaintiff to judgment, and that the stamp of the Bank where the note was payable with the date of presentation was no evidence of presentment.

Non-suit ordered on first two grounds.

O. S. Crocket, for defendant.

This over-rules the judgment of the Chief Justice in *Ackerman* v. *McDougall*, reported in 33 C.L.J., 406.

Full Court.] BOYER *v.* BOYER. [Feb. 4.

Town of Woodstock Civil Court—Plaintiff may abandon at trial so as to give jurisdiction.

Held (VANWART, J., dissenting), that the right of abandonment so as to bring a claim within the jurisdiction of the Town of Woodstock Civil Court may be exercised after the issue of the summons, and at the trial.

A. B. Connell, Q.C., for plaintiff. *W. P. Jones*, for defendant.

Full Court] EX PARTE GORMAN. [Feb. 4.

Canada Temperance Act--Magistrate a ratepayer of town into whose treasury fines are payable.

Held (HARRINGTON, J., dissenting, and LANDRY, J., dubitante), that the Stipendiary magistrate of the Town of Moncton is not disqualified from trying complaints for offences against the Canada Temperance Act by reason of his being a ratepayer of the town into whose treasury the fines collected under the Act are payable.

Ex parte Driscoll, 27 N.B.R. 216, followed, and *Town of Moncton* v. *Hebert*, decided Dec. 1897, but not yet reported, overruled.

Rule nisi for certiorari discharged.

H. C. Hanington and *D. Grant*, in support of rule. *D. I. Welch* and *W. B. Chandler*, contra.

Full Court.] EX PARTE GALLAGHER. [Feb. 4.

Canada Temperance Act—Qui tam action against magistrate

Held, that the fact that a qui tam action was pending against the convicting magistrate in a C.T.A. case at the suit of the defendant was a ground of disqualification. Rule absolute for certiorari.

H. C. Hanington, and *D. Grant*, in support of rule. *D. I. Welch*, and *W. B. Chandler*, contra.

Full Court.] MACPHERSON *v.* MILLER. [Feb. 9.

Agreement on sale of personal property that title shall remain in vendor until purchase price is paid.

Held, that an agreement taken by the respondent on the sale of a wagon providing that its title and ownership should remain in him until promissory notes taken for the purchase price should be paid in full was valid, and did not require to be registered under the Bill of Sale Act to hold the property against the appellant, who had seized it under a bill of sale subsequently executed to him by the purchaser. Appeal dismissed.

C. E. Duffy, for appellant. *O. S. Crocket*, for respondent.

Province of Prince Edward Island.

SUPREME COURT.

Hodgson, J., In Chambers. } EX PARTE TAYLOR. [Feb. 11.

Habeas Corpus—Fisheries Act—Illegal warrant of commitment—Jurisdiction.

Application on a writ of habeas corpus. In November last the applicant was convicted of an infraction of the Fisheries Act before the agent of the Marine and Fisheries Department. The applicant paid the costs of prosecution and was allowed to go at large till a few days before this application when he was arrested on a warrant issued in pursuance of the above conviction. The warrant recited the fact that the applicant had been convicted of an infraction of the Fisheries Act, but did not state that the Fishery Agent had adjudicated on the matter of imprisonment.

Held, that as the warrant did not set forth that the Fishery agent had adjudicated on the matter of imprisonment it did not show jurisdiction to direct imprisonment and was therefore void. Applicant discharged from custody.

W. S. Stewart, Q.C., for applicant. *D. A. McKinnon*, for Fishery Department.

Province of Manitoba.

QUEEN'S BENCH.

Taylor, C.J.] ABELL *v.* CRAIG. [Jan. 31.

Appeal from County Court—Leave to appeal—Striking out—County Courts Act, ss. 321, 326, 327, 328, 59 Vict. (M.) c. 3, s. 2—Queen's Bench Act, 1895, Rule 168 (b).

Motion under Rule 168 (b) of "The Queen's Bench Act, 1895," to strike out an appeal by the plaintiffs from a County Court decision, on the ground that the appellants had failed to comply with 59 Vict., c. 3, s. 317, which

requires an appellant to file in the County Court an affidavit stating his bona fide intention to appeal within ten days after the decision complained of is given or made. It appeared that such failure had been entirely owing to the neglect of the County Court Clerk to notify the plaintiff's attorney of the decision when he received notice of it from the judge; that the day after the attorney received the clerk's letter informing him of the decision he sent the affidavit of intention to appeal required by the statute, and that all other steps in the appeal had been regularly taken.

Held, that under s.s. 326, 327 of County Courts Act, as amended by 59 Vict., c. 3, s. 2, a Judge of the Queen's Bench has power, on the motion to strike out, to give the appellant liberty to proceed with his appeal, notwithstanding the failure to comply with any requirement of the statute, and that such leave should be given in the present case, but only on payment of the costs of the motion, as the defendant had made it in good faith, and in ignorance of the special circumstances.

Held, also, that it was not necessary on entering the appeal with the Prothonotary to produce to him evidence that the appellant had furnished the security for costs of the appeal required by s. 321 of "The County Courts Act," as amended by 59 Vict., c. 3, s. 2, although it may be a reasonable and prudent thing to do.

Mathers, for plaintiff. *Pitblado*, for defendant.

TAYLOR, C.J.] RE ROBERT DUNN. [Jan. 31.

Tax sale—Expropriation Act, R.S.M., c. 56—Assessment Act, R.S.M., c. 101.

Application by Robert Dunn for payment out of court of a sum of money paid in by the Provincial Government on taking under the Expropriation Act, R.S.M., c. 56, a parcel of land for the purposes of a Home for Incurables. Dunn had, in June, 1893, bought the lot at a tax sale for $3, paying in cash $1.42, being the amount of the taxes and costs, and leaving a balance of $1.58 which he should have paid within two months after the expiration of the time allowed the owner for redemption, or else, under s. 168 of the Assessment Act, R.S.M., c. 101, he forfeited all claim to the land purchased and to the money already paid. The Government expropriated the land after the tax sale but within the two years allowed for redemption. The owner did not redeem; but there was no evidence that Dunn had paid the balance of his purchase money.

Held, that the applicant had now no interest in the land or in the money in court which stood in place of the land, and that his application must be refused.

McKercher, for applicant.

Bain, J.] KELLY *v.* WINNIPEG. [Jan. 21.

Municipality—Ultra vires—By-law fixing minimum rate of wages for workmen employed by corporation.

The Council of the City of Winnipeg in 1895 passed a resolution providing for payment of a minimum rate of 17½ cents per hour to all workmen or laborers employed in any work by the city, or on any contracts for the city

and, having acted upon it ever since, proposed to maintain the same policy, when the plaintiff, one of the ratepayers, commenced this action for an injunction to restrain the City Council from continuing to enforce the resolution, alleging that competent laborers could be engaged for 15 cents per hour, and that the council had no right to spend the ratepayers' money thus extravagantly and unnecessarily, and moved for an interim order.

Affidavits were filed on behalf of defendants tending to show that 17½ cents per hour was not more than a fair living rate of wages in Winnipeg, and that it was not in the interest of the city to have a large number of its people employed at less than a fair living wage, even if the work would thereby cost the city less.

Held, that the matter in dispute appeared to be a question of policy in the city government, as to the expediency of which the ratepayers and not the court should pronounce; more especially as the resolution had been acted upon by three successive councils, and there had been several opportunities for the electors to express their opinions upon such policy, if they had disapproved of it; and that the application should be dismissed. Costs reserved until the hearing.

Tupper, Q.C., and *Phippe* for plaintiff. *Ewart*, Q.C., and *J. Campbell*, for defendants.

Book Reviews.

The Dominion Law Index (1867-1897), 2nd edition, by HARRIS H. BLIGH, Q.C., Librarian of the Supreme Court of Canada, and WALTER TODD, of the Private Bills Department, House of Commons, Ottawa. Toronto: The Canada Law Journal Co., 1898.

The first edition of this work appeared in 1891, and met with a decided success, filling the long-felt want of an index to federal legislation since the British North America Act. The present edition is much enlarged and improved, and constitutes a most comprehensive and systematically arranged index, not only of all the legislation of the Dominion, repealed and unrepealed, public and private, but of such Imperial statutes, treaties, and orders-in-council as affect Canada. The Criminal Code has received special attention, and has been indexed so thoroughly in this work that it is thought to be not possible that a seeker should fail to make a satisfactory search, whether he directs himself to the most commonly accepted subject title concerned, or to a more obscure collateral heading. The material thus indexed embraces 81 volumes, and must have necessitated a most laborious and painstaking preparation by the authors. The typographical arrangement of the book is excellent, and we have no doubt that the profession will welcome it as a time-saving device, the use of which will in a short time save any one many times its price.

Index to the Railway Act of Canada and amending Acts, by WALTER VAUGHAN, Esq., late of the law department of the Canadian Pacific Railway Co. Toronto, 1898: The Canada Law Journal Co.

Mr. Vaughan's admirable index is compiled and published at the request

of lawyers engaged in railway law practice, who find it necessary to refer constantly to the "Railway Act." The Act itself, 51 Vict. (D.), c. 29, has been amended seven times, and the resulting complication of enactments has made it difficult to readily ascertain what the statutory rights and liabilities may be without a guide such as the present index. The compiler's connection with the large railway corporation mentioned should be a sufficient guarantee of the accuracy of the index, and that the work has been completed in a manner which will be found satisfactory to all concerned in railway law.

The Elements of Mercantile Law, by T. M. STEVENS, D.C.L., Barrister-at-Law. Second edition. London: Butterworth & Co., 7 Fleet st. 1897.

There is no better introduction to the study of the mercantile law than this book. It is largely used by students, and the style is easy and interesting, and the arrangement of that orderly character which enables the reader to more easily remember what is read. We should recommend this book as a useful addition to the Law School curriculum.

A Compendium of the Law Relating to Executors and Admistrators, by W. GREGORY WALKER, B.A., and EDGAR J. ELGOOD, B.C.L., M.A., both of Lincoln's Inn Barristers-at-Law. Third edition, by EDGAR J. Elgood, B.C.L., M.A. London: Stevens & Haynes, Bell Yard, Temple Bar, 1897, pp. 445. Price. $5.25.

The previous edition was published in 1888, since which period a large number of cases bearing on the subject have been decided. This compendium is so well known, and is recognized as such a useful treatise on the law of executors, that it is unnecessary to say more than that this last edition fully keeps up the character of the previous ones, both as to the matter therein contained and as to the work of the printer and publisher.

The Law of Libel and Slander in Civil and Criminal cases, by MARTIN L. NEWELL, counsellor at law. Second edition. Chicago: Callaghan & Co., 1898; pp. 1025. Price, $6.

This is one of the standard books in the United States on this subject. New sections have been added upon the subjects of restraining the publication of libels by injunction, new trials for inadequacy of damages and the publication of libels by letters, telegrams, postal cards, etc. The construction of the work is to give definitions and propositions, illustrated by cases which form a full and well arranged digest of all the leading English and American authorities bearing upon the section. Not only are these cases largely cited, but many Ontario cases are also referred to. This arrangement of the matter is that which is now being largely adopted as being found the most useful to those who desire to ascertain the drift of the authorities with the least possible expenditure of time.

A treatise upon the Law affecting Solicitors of the Supreme Court, with various appendices, by ARTHUR P. POLEY, B.A. of the Inner Temple, Barrister-at-law. London: William Clowes & Sons, limited, 27 Fleet street. 1897; pp. 700. Price, $5.25.

The author's preface is of the briefest. He has apparently confidence

that the contents of the book will not only sufficiently explain its raison d'etre, but justify its publication, and they do both. A portion of the matter is necessarily not applicable to this country, but the large amount of information given on subjects which are of interest, and the exceedingly clear, concise and exhaustive treatment of the subject, cannot be too highly commended. The volume is divided into nine books, covering: The admission and qualification of solicitors—Their rights and privileges, and herein of unqualified practitioners—The jurisdiction of courts over solicitors as officers thereof—Retainers—Remuneration—Liens—Delivery and taxation of bills—Recovery of Costs and Relations of Solicitors inter se, including partnership and agency.

The appendices which contain the Acts and Regulations as to Solicitors in England, and their admission to practice, are inapplicable in this country, but are useful for reference and comparison.

Engineering and Architectural Jurisprudence, a presentation of the law of construction for engineers, architects, contractors, builders, public officers and attorneys-at-law, by JOHN CAPE WAIT, M.S E., LL.B. John Wiley & Son, New York, 1898. $6.

Mr. Wait, who is also a lawyer, was, in 1887, instructor of engineering at Harvard University. In this very useful book he does for the engineer and architect that which Taylor and others have done for the medical profession. It would not be strictly accurate to say that there is no work on architectural jurisprudence, but for all practical purposes this is so, and this text book therefore supplies a felt want. Not only has the engineer's and architect's field of practice been largely extended of late years, but the practising lawyer must in these days, if he desires to be efficient, have a better knowledge of details connected with the departments covered by the various branches of business touched upon in this book than was requisite formerly. Lawyers are not usually as familiar with the difficulties and dangers attending construction work, or the methods employed, as they should be for their clients' protection. The information given by Mr. Wait puts them in a position to acquire a store of knowledge which would be otherwise unattainable without enormous labour. The extent of the author's research is evidenced by the fact that the book contains over 900 pages of extra width and size, which would be sufficient to make an ordinary volume of at least 1,200 pages, and he refers to nearly 5,000 cases. The book is divided into four parts, with numerous sub-divisions, so arranged as to give a very understandable and easily obtainable knowledge of the matters discussed under each heading. These parts are as follows: 1. Law of Contracts in general, illustrated and explained throughout by engineering and architectural cases. 2. Bids and bidders, their rights and liabilities. 3. A construction contract, its phraseology, terms, conditions, stipulations and requirements, their interpretation and force. 4. The employment of engineers and architects, their duties and responsibilities.