Canada Law Journal.

VOL. XXXII. SEPTEMBER 15, 1896. NO. 14.

CANADIAN BAR ASSOCIATION.

There will be found in another place an extract from a Halifax paper noticing the meeting of the Nova Scotia Barristers' Society, to receive the report of a committee appointed to consider the formation of a Bar Association for the Dominion of Canada. The report and the paper read by a member of the Nova Scotia Bar contain much sound common sense and some valuable suggestions, which, however, are not new to the readers of this journal. It will, however, be news to some of them to be told that legal education in all the provinces is "below the standard in Nova Scotia," and that "there is not much use trying to raise the standard there with the low averages about us of New Brunswick, Prince Edward Island, Quebec and Ontario." This writer evidently knows nothing about Ontario. In his next paper, however, he can give his own ignorance on the subject as further evidence of the need of some such association as he ably contends for, to enlighten even this member of the Bar of Nova Scotia.

We are glad to know, however, that this gentleman only represents his own views, for we are authorized to say on behalf of the Nova Scotia Barristers' Society that the Bar of that province do not at all claim that the standard of legal education in that province is higher than in Ontario or in the other provinces of Canada. The lawyers of Nova Scotia are only too sensible of the fact that in their province much can be done to improve not only the standard, but the system of legal education. They can, however, claim that they have endeavored to make some advance in these respects. The late Sir John Thompson, the late Mr. Justice Rigby, Mr. Justice Sedgewick, of the Supreme Court of Canada, and Mr. Justice Graham, of the Supreme Court of Nova Scotia, were

mainly instrumental in founding in 1884 the Law School of Dalhousie University, which has done and is still doing good work in Nova Scotia, and has attracted students from the Maritime Provinces. The reference to the standard of education in the various provinces has already given rise to considerable discussion, as a result of which the merits of our more western schools have received favorable comparison with that of Nova Scotia. We are pleased to publish a contribution on this subject, in the form of a joint letter, from the president of the Nova Scotia Barristers' Society and the secretary of the Dalhousie Law Faculty.

In reference to the Dominion Bar Association, the great object to be aimed at is the assimilation of the laws of the various provinces. Whether that should precede the formation of the proposed society or whether such formation would be a factor in producing the desired end, may be a matter of opinion, but we shall certainly hear more of these matters as time moves on. The next step is a meeting to be held in Montreal on the 15th inst. in response to a circular which has been largely signed by a number of the leading members of the Bar in the various provinces. A copy of the circular appears in another place.

IS A WRONGFUL ARREST CURABLE?

Having in a former article examined the conditions of an arrest, the auxiliary question, "Is an arrest when wrongful curable?" and its disseverable partner, "May a detention so originated be lawfully continued?" seem naturally to suggest themselves for treatment. A candid and close study of the matter shows that all judicial lore, in England, in emphatic strain, asserts the negative to both these queries. Our own decisions, unfortunately, are difficult to reconcile with the consensus of English opinion, or rather, one particular judgment (*Southwick* v. *Hare*, 24 O.R., 528) is hard to explain in the light of the accordant burden of the rest.

The proposition now being considered—the justice and

force of which, heretofore but feebly challenged by counsel, have been time and again judicially approved—could not be better expressed, could not appropriate a fitter garb than is shown by the crisp, all-satisfying sentence from *Withers* v. *Henley*, Croke 379, (honored and venerable record): "Every unlawful detainer of a prisoner, after he has gained a right to be discharged, constitutes a fresh imprisonment."

In *Lyford* v. *Tyrrell*, 1 Aust. 85, the Court held that a party, to facilitate whose arrest on criminal process the following day, had been taken in charge on civil process on a Sunday—a prohibited course in this regard—was entitled to be discharged altogether.

Again, in *Wells* v. *Gurney*, 8 B. & C. 769, the Court, confronted with the converse state of facts—a specious arrest on criminal process made upon a Sunday, so as to permit of a taking into custody on valid civil process on the Monday—in distinctly forcible fashion, and by reasoning certainly as lucid as that discernible in *Lyford* v. *Tyrrell*, justify their finding that the concerted artifice disclosed was a glaring abuse of authority. *Birch* v. *Prodger*, 1 New R. 135—another luminous case—adopts the same position as that assumed in *Lyford* v. *Tyrrell*, reliance being had on the near identity of circumstances in each.

In *Eggington's Case*, 2 Ell. & B. 717, it was, with fuller, still more powerful argumentation, ruled that, where a defendant had been improperly apprehended on civil process, on a Sunday, he could not be detained, for the same cause, on subsequent legal warrants sought to be lodged against him. Moreover, could there be language more explicit than that employed in *Percival* v. *Stamp*, 9 Exch. 171: "If the sheriff make an arrest on . . . an invalid warrant, this gave him no right to detain the party on any other valid writs which might be at that time in his hands; for the sheriff could not avail himself of a custody brought about by illegal means to execute the other writs." "If an arrest was made on a Sunday, or in a way not authorized by law, the sheriff could not afterwards make that valid by detaining the person under a legal writ."

Further, in *Humphrey* v. *Mitchell*, 2 Bing. N.C. 619, it was stated that where a first arrest was a false imprisonment, by reason of the wrongful act of the sheriff himself, or his officer, no subsequent conduct or act of his could legalize the continuance by him of that imprisonment. In this country *McGregor* v. *Scarlett*, 7 P. R. 20, shows conclusively that where an arrest has been compassed in an irregular way no expedient can be resorted to to rectify it.

The adjudication in *Southwick* v. *Hare* (an action for false arrest and imprisonment) was that the detention of the plaintiff after the time at which a warrant of commitment (under which he had been arrested in another county without a backing, for an offence punishable on summary conviction), was actually endorsed for execution in such county, was justifiable.

The importance of this decision, whether right or wrong, reaches far beyond a mere question of pecuniary damages, for it was decided by the Judge, before whom an application by the then defendant for his release from custody had come (and who happened, afterwards, to preside at the trial) that he could not be discharged; but must await, in gaol, the promised ceremony of endorsement of the warrant—a declaration that seems to impugn an imposing mass of English authority, as well as contradict no little of our own.

It might at this point be observed that it does not, of necessity, follow that a party—no matter what its foundation—may maintain an action for every unlawful detainer of his person, as, for instance, in the case of *Reg.* v. *Boyle*, 4 P.R. 256, where, although a person imprisoned under a warrant of a justice not fully qualified, was, on habeas corpus, conceded his freedom, his title to recover in an action was thought questionable. On the other hand, it is essential, of course, to be established in a suit of this description, that some illegal detention has been endured.

It might be said that *Southwick* v. *Hare* went on the ground that the bulk of the cases cited for the plaintiff had reference to dealings with civil process, and were, therefore, properly deemed inapplicable to that investigation. The impression, however, is apt to be formed that if an imprisonment grow-

ing out of a civil matter—by exposing its tainted origin—may be shown to be invalid, a fortiori one connected with a criminal charge (where the loss of liberty would, in general, be more prolonged or reveal conditions of greater severity), ought not to be supported. Furthermore, in a contrast of their salient events, neither *Lyford* v. *Tyrrell*, nor *Wells* v. *Gurney*—both crucial authorities—can be distinguished from a case presenting purely criminal features. There are, besides, several cases in our own Courts, which, in another, though closely related, aspect of the discussion, seem exactly in point.

Trespass ab initio is a cognate theme, and its bearing on the inquiry here is impossible to be escaped. In *Kerby* v. *Denby*, 1 M. & W. 326 (an action for breaking into and entering the plaintiff's dwelling and for false imprisonment) it was decided to have been an appropriate direction to the jury that the defendants, having become trespassers ab initio by the breaking open of the door, they could give damages for the later grievance. And in *Hooper* v. *Lane*, 6 H. L. C., 535, it was announced that where a wrongful entry had been consummated, a legal arrest could not afterwards be effected.

In *Morris* v. *Wise*, 2 F. & F. 51, where a constable, in carrying a prisoner to jail, took him half a mile extra viam, Byles, J., intimated that damages might be awarded—not for the unwarrantable deflection alone—but also for the periods of detention that preceded and followed it; an instruction plainly implying that the custody on which was thus impressed, and to which adhered the stamp of illegality, had suffered vitiation, likewise, at its source.

In *Clark* v. *Woods*, 2 Exch. 402, a party whose goods had been distrained under a warrant of a Justice of the Peace, which contained an unauthorized award of costs, was held entitled to recover the whole sum directed to be levied, though part of the amount was rightfully due; while the magistrate who had endorsed the warrant for execution in another county, was relieved from liability.

The judgment in our own Courts which most authoritatively expounds this doctrine is *Hoover* v. *Craig*, 12 App. R. 72. There, the defendant, Hunter (a constable), armed with

a search warrant of a Justice of the Peace of the county of Haldimand, for a horse suspected of being stolen and concealed, which required the bringing of the property, together with its harborer, before him—on its discovery, seized and conveyed it into the adjoining county of Brant, where the informant (his co-defendant) lived. The action being one of replevin, to determine the jurisdiction of the County Court of the county of Haldimand to try the case it became necessary for the Courts to pass upon the validity of the original taking. This they concluded had been tortious; and, having been so branded, it was further declared on the authority of the *Six Carpenters' Case*, that the constable was a trespasser ab initio, and could neither justify the detention, nor resist replevin, of the animal in Brant.

In *Jones* v. *Grace*, 17 O.R. 681, the Court applied the reasoning of *Hoover* v. *Craig* to disclosures there relating to a personal arrest; and emphasized the conclusions of the higher Court in an exceedingly strong judgment. The case under of *Re Hendry* (reported ante p. 241), while in this respect an extension, is none the less an affirmance of *Jones* v. *Grace*.

In *Friel* v. *Ferguson*, 15 C.P. 584, where a party had been arrested under a backed warrant, in another jurisdiction, on a charge of felony, without a complaint in writing, and upon oath having been first made, the justice issuing it was found liable for the imprisonment. The sole derivative of authority for founding the warrant, viz., a sworn information, being wanting, this, doubtless, will appeal to the mind as an extreme case; but the Court, meeting the defendant's contention that the act of the endorsing magistrate exonerated him (the initiating justice), enforced the principle that the detention was indefensible by reason of the latter's previous action.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

We continue the June reports from p 508, ante.

COMPANY — DEBENTURES — TRUSTEES FOR DEBENTURE HOLDERS — RECEIVER — PRINCIPAL AND AGENT — LIABILITY FOR GOODS ORDERED BY RECEIVER — UNDISCLOSED PRINCIPAL.

In *Gaskell* v. *Gosling*, (1896) 1 Q.B. 669, the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) differed in opinion. The action was brought for the price of goods ordered by a receiver of a joint stock company, who had been appointed by the defendants in pursuance of a power contained in a mortgage deed made by the company to the defendants by way of security for certain debenture holders, and which deed expressly provided that the receiver so to be appointed was to be "the agent of the company, who alone should be liable for his acts and defaults." The defendants, in pursuance of the power, appointed the receiver and directed him to pay all moneys received into an account in a banking establishment in which they were partners, and that no money should be withdrawn without the concurrence of a person named by them. After the appointment had been made the company was ordered to be wound up, and the receiver nevertheless continued to carry on the business of the company, and in so doing the goods in question were ordered by him. Lord Esher and Lopes, L.J., thought that, notwithstanding the terms of the trust deed, the receiver was not a receiver within its terms, because of the special stipulations made as to the moneys to be received by him; that what was contemplated by the deed was the appointment of a receiver with the ordinary powers of a receiver, and who out of the moneys received would have power to pay for goods ordered by him, and that in any case he ceased to be agent of the company, if he ever was so, so soon as the winding-up order was made, and that therefore the receiver in this case was the

agent of the defendants who appointed him and continued him after the winding-up order, who were liable as undisclosed principals for the goods in question. Rigby, L.J., on the other hand, considered that the fact of the stipulation as to the disposition of the moneys to be received by the receiver, was immaterial, and that according to *Cox* v. *Hickman*, 8 H. L. C. 268; and *Mollwo* v. *Court of Wards*, L. R., 4 P. C. 419, and *Jefferys* v. *Dickson*, L. R., 1 Ch. 183, the stipulation of the deed as to the receiver being the agent of the company was binding, although the moneys to be received were to be applied for the benefit of the defendants who appointed him, and that the making of the winding-up order did not make any difference. The majority of the Court seems to have considered that unless the defendants were liable the plaintiffs would be without remedy, and the defendants would be reaping the benefit of the goods furnished by the plaintiffs without paying for them. Rigby, L.J., on the other hand considered the receiver was personally liable to the plaintiffs, and entitled to indemnification out of any other assets of the company, and that if the plaintiffs failed to recover from the receiver they would be entitled to be subrogated to his rights against the company.

PROBATE—PRESUMPTION OF DEATH—PROOF OF DEATH.

In the goods of Saul, (1896) P. 151, which was an application for probate of the will of a person who had gone to sea on board of a ship which had not been heard of since 31st March, 1895, it appeared that an insurance company with whom the alleged deceased had insured his life, had by the letter of its officer stated that it did not intend to contest the application. Barnes, J., on the letter being filed, granted probate.

TRUSTEE—BREACH OF TRUST—TRUSTEE BENEFICIARY—CESTUI QUE TRUST CONCURRING IN BREACH OF TRUST—CONTRIBUTION BETWEEN CO-TRUSTEES—ADVANCE OF TRUST MONEY—PAYMENT OF DEBT DUE TRUSTEE OUT OF ADVANCE.

Chillingworth v. *Chambers*, (1896) 1 Ch. 685, was a suit brought by the plaintiff, who was both a trustee and cestui que trust, against a co-trustee to compel him to contribute to

a loss occasioned to the trust estate by reason of an improper investment of the trust funds in which the plaintiff had concurred. The share of the plaintiff in the trust estate was more than sufficient to make good the loss, but the plaintiff contended that the defendant was liable to contribute equally with himself to make good the loss. The Court of Appeal (Lindley, Kay and Smith, L.JJ.) affirmed the judgment of North, J., that the plaintiff was not under the circumstances entitled to any contribution from the defendant; and holding that where a breach of trust is committed at the instance of a cestui que trust, the share of the cestui que trust is liable to be impounded to indemnify the trustee against the loss occasioned by such breach of trust; and that the fact that the plaintiff occupied the double position of both trustee and cestui que trust did not in any way lessen his liability to indemnify his co-trustee to the extent of his beneficial interest. Part of the moneys improperly advanced by the trustees to the plaintiff had been applied by him in payment of a debt due by him to his co-trustee the defendant, and it was contended that inasmuch as the defendant had in this way indirectly derived a benefit by the breach of trust, he was at least bound to make good one half of the amount so applied, but the Court refused to accede to that contention.

MORTGAGE—PURCHASE OF EQUITY OF REDEMPTION—PAYMENT OF PRIOR MORTGAGE BY PURCHASER OF EQUITY OF REDEMPTION—MERGER.

Liquidation Estates Purchase Co. v. *Willoughby*, (1896) 1 Ch. 726, is a decision of the Court of Appeal in which there was a difference of opinion. The question was whether a charge paid off by a purchaser of the equity of redemption was kept alive for the benefit of the purchaser, or was to be deemed to have been discharged. Lindley and Smith, L.JJ., decided in favor of the view that the charge had not been kept alive, and Kay, L.J., that it had. The facts of the case as stated in the report are somewhat complicated—but the result of them seems to be as follows. Walker having contracted to purchase a business, agreed with Willoughby, Paulet and Kennedy, to borrow from them £10,000, £9,000 and £6,000 respectively,

for which he gave them a charge on his interest in the business. Kennedy assigned his interest in the charge to one Norton. After this assignment Walker paid Kennedy sums reducing his claim to £1,878, but whether these payments had been made with the concurrence or privity of Norton was not shown. Kennedy subsequently mortgaged his equity of redemption to Windsor. Windsor then sold the interest mortgaged under a power of sale in his mortgage to the plaintiffs, and in the same deed Norton also joined and assigned all his interest, receiving £1,000 of the plaintiffs' purchase money. The plaintiffs claimed to be entitled to the benefit of Norton's charge for £6,000 on the ground that the payments to Kennedy were invalid as against Norton, and as against the plaintiffs as his assignee. There was no express assignment of Norton's mortgage to the plaintiffs. The majority of the Court considered that all that the plaintiffs intended to buy was Windsor's interest free from incumbrance, and that by treating Norton's claim as paid off the plaintiffs got all the benefit thus bargained for, but by permitting them to treat it as a subsisting encumbrance it would enable them to rank in competition with Willoughby and Paulet in respect of the original £6,000 advanced by Kennedy and mortgaged to Norton, which was never intended. Kay, L.J., on the other hand considered that the plaintiffs were entitled to treat Norton's mortgage as a subsisting security, and to any benefit which might be derived therefrom, including the right to dispute the validity of the payments made by Walker to Kennedy after he had mortgaged his interest to Norton.

MORTGAGE—POWER OF SALE—SALE UNDER POWER TO ONE OF SEVERAL MORTGAGORS—REDEMPTION—MORTGAGEE, DUTY OF—TENANTS IN COMMON—FIDUCIARY RELATIONSHIP.

In *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762, two points of some importance are discussed. The action was brought by one of two mortgagors (tenants in common) to impeach a sale made to the other of the mortgagors under the power of sale contained in the mortgage. The plaintiff claimed either that the sale was void as a sale under the power, and that the

mortgaged property was still redeemable by plaintiff; or that the mortgagees were liable to the plaintiff for negligence in selling without taking proper precautions to secure the best price obtainable; or that the plaintiff was entitled to the benefit of the purchase as a purchase on the joint account of the plaintiff and his co-mortgagor. The sale had been made by private contract after the usual notice of the intention to exercise the power had been given to the mortgagors, at a price equal to the principal interest and costs due on the mortgage. Previous unsuccessful efforts to effect a sale had been made, and the offer of the mortgagor who had purchased had been accepted bona fide by the mortgagees. The Vice-Chancellor of Lancaster had declared the sale void, but the Court of Appeal (Lindley, Kay and Smith, L.JJ.) unanimously reversed his decision, holding that the sale was a valid and effectual exercise of the power, and that there is nothing to prevent one of two tenants in common mortgagors from purchasing for his own benefit under the power of sale, and therefore that the plaintiff was entitled to no relief either as against the mortgagees, or as against the mortgagor who had become the purchaser; and the fact that the plaintiff had not been informed of the contemplated sale to his co-mortgagor was held to be no ground for avoiding the sale; and the contention that tenants in common of an equity of redemption stand in a fiduciary position to each other so as to preclude any one tenant from buying the mortgaged estate for his own benefit was declared to be unfounded in law.

TRUSTEE—DEBT DUE TESTATOR'S ESTATE FROM PARTNERSHIP—AUDIT—STOCK TAKING—EXPENSES OF PROTECTING ESTATE—TENANT FOR LIFE—REMAINDER-MAN—CAPITAL AND INCOME.

In re Bennett, Jones v. *Bennett*, (1896) 1 Ch. 778, was a petition by a trustee of a will for the advice of the Court on two questions. By the will the residuary estate had been bequeathed in trust for one for life, and for others in remainder. The residuary estate in part consisted of a debt due to the testator of £15,000, being the amount of his capital in a firm from which he had retired under an agreement with the continuing partners that it should be a debt due from them, and bear

interest until repayment, and which provided that the testator should have free access to the books at all times, and contained various provisions intended to satisfy him as to the continued solvency of the partnership, and on breach of any of which he was to be entitled to claim payment of the £15,000. The questions submitted for the opinion of the Court were (1) how often an audit of the accounts and stock-taking of the partnership ought to be made? and (2) whether the expense of such audits and stock-taking was chargeable against capital or income? The Vice-Chancellor of Lancaster determined that the audit and stock-taking ought not to be made oftener than once a year, and that the expense thereof should be borne by the income; but the Court of Appeal (Lindley, Kay and Smith, L.JJ.) thought he was wrong on both points, and that the trustee ought not to be limited to a yearly audit and stock-taking, but that he ought to have a discretion to have an audit and stock-taking at more frequent intervals, although, in the absence of special circumstances, an annual audit would be sufficient. On the second point it was held by the Court of Appeal that the expense of the audit and stock-taking was chargeable against the capital, as being an expense incurred for the protection of the fund.

COMPANY—DIRECTORS—NOTICE OF MEETING OF DIRECTORS—NOTICE OF BUSINESS TO BE TRANSACTED—COMPANY, AUTHORITY TO USE NAME OF.

La Compagnie De Mayville v. *Whitley*, (1896) 1 Ch. 788, was an action brought by a director of a joint stock company in his own name and that of the company against two other directors of the company, to prevent them carrying out certain resolutions passed at a meeting of directors at which the plaintiff was not present. The plaintiff Seal, and the defendants Whitley and Tellier were the directors of the company which had been recently formed, two directors being a quorum. Tellier and Whitley held a meeting on 14th February without notice to Seal, at which they appointed O'Brien a director, appointed solicitors and bankers for the company, and accepted an offer for offices for the company. On hearing of these resolutions on the 22nd February, Seal

procured a memorandum to be signed by five of the seven signatories to the memorandum of association, authorizing him to use the name of the company in an action to prevent the resolutions being carried into effect, and on the same day the writ issued in the name of the company and Seal as co-plaintiffs against Tellier and Whitley. On the same day before the writ was served Seal received notice of a board meeting to be held on the 24th of February, not stating the business, and a letter from Whitley stating that the business transacted on the 14th February would be brought up again. The meeting was held; Seal did not attend; Tellier and Whitley were present and allotted to themselves the necessary qualification shares as directors, and the resolutions of the 14th February were confirmed, and O'Brien and Taylor were appointed directors. The plaintiff then amended the writ by adding O'Brien and Taylor as defendants, and asking a declaration that the resolutions of the 24th February were invalid, and for an injunction to restrain the defendants from acting on them, and to prevent O'Brien and Taylor acting as directors. The plaintiff moved for an interim injunction, and the company, pursuant to a resolution passed on the 24th February, also moved by the same solicitors who had been appointed at that meeting, to have the name of the company struck out, as having been used without authority. North, J., before whom the motions originally came, granted the injunction, being of opinion that the meeting of directors on the 24th February was void, because of the omission to state the business to be transacted in the notice calling it, and though he was of opinion that the name of the company was used by the plaintiff Seal without authority, yet he refused the motion to strike out the company's name as a plaintiff, because he was of opinion that the resolution authorizing the motion to be made was invalid. On appeal, however, the Court of Appeal (Lindley, Kay and Smith, L.JJ.) differed with North, J., altogether on the crucial point of the case, and held that although a notice calling a meeting of shareholders must specify the business, yet that rule did not apply to meetings of directors, and though it might be convenient that it should

do so, it was not necessary to its validity. The meeting of the 24th February being therefore regular, the resolutions passed at it were held to be valid, and the plaintiff's motion for an injunction failed, and the company's motion to strike out its name as a plaintiff was granted, with costs against Seal as between solicitor and client.

TRADES UNION—STRIKE—PICKETING—INDUCING PERSONS NOT TO CONTRACT WITH PLAINTIFFS—INDUCING WORKMEN TO STRIKE IN ORDER TO INJURE THEIR EMPLOYER'S CUSTOMER—CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875 (38 & 39 VICT., c. 86) ss. 3, 7—(CR. CODE ss. 523, 524.)

Lyons v. *Wilkins*, (1896) 1 Ch. 811, shows that although the operations of trades unions have been to some extent legalized, there is still a limit beyond which they may not lawfully go. The facts of the case were that a strike had been ordered by the defendants, the secretary and a member of the executive committee of a trades union for the purpose of securing an increase of wages. For the purpose of making the strike effective the plaintiff's works were picketed, that is, certain persons were posted in the neighborhood of the plaintiff's premises, who were furnished with cards requesting those to whom they were delivered to refrain from working for the plaintiffs. The pickets accosted persons on entering and leaving the plaintiffs' premises and endeavored to persuade them not to work for the plaintiffs. The executive committee also endeavored to get one Schoenthal, who was a manufacturer of goods for the plaintiffs, to cease to do work for them, and on failing to do so, they ordered a strike of his workmen. And another man named Scott, who made goods for the plaintiffs, was also threatened with a strike if he did not cease to work for the plaintiffs. The action was brought for an injunction to restrain the defendants from procuring or conspiring to procure persons to break contracts with the plaintiffs, and from inducing or conspiring to induce persons not to enter into contracts with the plaintiffs. On a motion for an interlocutory injunction, North, J., granted the application and restrained the defendants from maliciously inducing or conspiring to induce persons not to enter into the employment of the plaintiffs. On appeal the Court of Appeal (Lindley, Kay

and Smith, L.JJ.), though dismissing the appeal, varied the terms of the injunction so as to make it more strictly conform to the words of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict., c. 86), (see Cr. Code, sec. 523 (f)), and restrained the defendants, etc., "from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information," and also "from preventing Schoenthal or other persons from working for the plaintiffs by withdrawing his or their workmen from their employment respectively." The action of the defendants as regards Schoenthal, between whom and his workmen no dispute existed, being held to be wholly illegal and unwarranted.

BREACH OF TRUST—FOLLOWING TRUST FUNDS—SATISFACTION.

Crichton v. *Crichton*, (1896) 1 Ch. 870, is a decision of the Court of Appeal (Lindley, Kay and Smith, L.JJ.), on appeal from North, J., (1895) 2 Ch. 853, noted ante p. 65. Part of the funds of a marriage settlement had been diverted by the husband from the purposes of the trust, and the action was brought by the representatives of the two children of the marriage, against the personal representatives of the grandfather's estate to compel the restoration of moneys which he had diverted from the trusts. It may be remembered that North, J., held that as to £4,801 of stocks which had belonged to the trust in question, but which had been settled on one of the children of the marriage by way of marriage settlement, that child's representatives were precluded from calling for the restoration of that sum. The Court of Appeal, however, found that there was no evidence that the son on whom that sum was settled knew from whence it was derived, or that there was any evidence that his father intended that it should be in any way a satisfaction of any part of his claims under his, the father's, marriage settlement. Notwithstanding therefore that the £4,801 of stocks had been part of the trust funds in question, the representatives of the child on whom it had been settled were held not to be debarred from calling

on the representatives of the grandfather's estate to restore that amount to the trusts of the grandfather's marriage settlement.

INTESTATES' ESTATES ACT, 1890 (53 & 54 VICT., C. 29) SS. 2, 4—WIDOWS' CHARGE —DOWER—(58 VICT., C. 21, ONT.).

In *Re Charriere, Duret* v. *Charriere*, (1896) 1 Ch. 912, it became necessary to determine the effect of the Intestates' Estates Act, 1890 (53 & 54 Vict., c. 29), from which the Ontario Act, 58 Vict., c. 21. is adapted. The question was whether the widow's dower was subject to a proportional part of the charge of £500 given by the Act in favor of the widow of an intestate, or whether she was entitled to the £500 and also to her dower without any abatement. North, J., held that the £500 must be proportionately charged on the dower.

IMPROVEMENTS—TENANT IN COMMON—MORTGAGE.

In re Cook's Mortgage, (1896) 1 Ch. 923, a tenant in common in fee of one-half, and a tenant in common for life of the other half of land, jointly laid out £700 in permanent improvements; the land was subsequently sold under a paramount mortgage and the tenant in common in fee died. The question arose as to how the surplus purchase money, after payment of the mortgage, was divisible. North, J., decided that the representatives of the deceased tenant in common were entitled to one-half of the value of the improvements at the time of sale, provided the same should not exceed £350. He says: "The share of the purchase money now distributable to be received by those now entitled to Rebecca Cook's moiety will be one-half, and also such further sum as represents one-half of the present value of the improvements, but so that such further sum is not in any case to be more than one moiety of £700."

COMPANY—WINDING UP—LIQUIDATOR—SUMMARY JURISDICTION—DAMAGES.

In re Hill's Mining Co., (1896) 1 Ch. 947, a company being in voluntary liquidation, a scheme was sanctioned providing for the sale of the assets to a new company, and that the

shareholders should have the option of taking shares in the new company, in proportion to their respective holdings in the old. One Bayliss, one of the shareholders of the company. applied for shares in the new company, and sent with his application a cheque for the required deposit. The bankers of the company with whom the application was lodged omitted to forward the application to the liquidator, who thereafter sold off all the shares in the new company, including those which should have been allotted to Bayliss. The liquidator distributed all the assets of the old company, except the proceeds of shares unapplied for, and he had no shares which he could allot to Bayliss. Under these circumstances, Stirling, J., held that he had no jurisdiction upon a summary application by Bayliss in the winding-up proceedings against the liquidator, to declare the latter liable in damages.

EXECUTOR LEGATEE — MORTGAGES—PRIORITIES OF EQUITABLE TRANSFEREES—NOTICE.

In *Graham* v. *Drummond*, (1896) 1 Ch. 968, a testator who had covenanted in a settlement for the payment of an annuity during the joint lives of himself and wife and the life of the survivor of them, bequeathed certain railway stocks to his widow, whom he appointed his executrix. He died in 1882. The executrix proved the will, and in 1886 she transferred the railway stock to her bankers to secure a debt of her own. In 1892 she gave the plaintiff a charge on the same stock to secure advances made to her. Neither the bankers nor the plaintiff had any notice of any unsatisfied debt of the testator, and the plaintiff gave notice to the bankers of his claim. The bankers subsequently sold the stock, and after deducting their own claim, paid the balance of the proceeds into Court; the trustees of the settlement claimed that the money was still an asset for the satisfaction of the testator's debt upon his covenant for the payment of the annuity. The plaintiff, on the other hand, claimed it by virtue of his charge, and Romer, J., held that he had the better right, being of opinion that the rule that a purchaser for value from an executor who

is also a residuary legatee, without notice of unsatisfied debts, or of anything making it improper for the executor so to deal with the asset, is entitled to hold as against any unsatisfied creditors, applies equally whether the transferee acquires a legal or only equitable title, provided that neither the Court nor the executor retains any control over the asset.

PRACTICE—SPECIAL CASE—QUESTIONS OF FACT—PROCEEDINGS EXTRA CURSUM CURIA—APPEAL—JURISDICTION—ORD. XXXIV., R. 1—(ONT. RULE 554).

Burgess v. *Morton*, (1896) A.C. 136, is a somewhat peculiar case in that the parties by special case sought to obtain the judgment of the Court on a question of fact. The parties were in conflict as to the facts, but stated in the case such facts as they were agreed on, but as Lord Halsbury observes, they did not state either the inferences of fact, or all the facts from which inferences were to be drawn. Having thus launched the case, they sought to make it subject to the ordinary consequences of appeal, as if the case had stated simply a question of law. When the case came before the Divisional Court, on the judges of that Court objecting that it was not properly a special case, they on the invitation of counsel nevertheless agreed to hear it and decide it as a question of fact. This judgment the Court of Appeal reversed. The appellant being dissatisfied with that decision, appealed to the House of Lords, but their lordships (Lords Halsbury, L.C., Watson and Shand) were unanimous that where, as in this case, the proceedings are extra cursum curia, the judgment of the Court is in the nature of an arbitrator's award, and is not appealable, if objected to—and where the Court of Appeal in such a case has entertained an appeal and reversed the decision of the Court below, the House has no jurisdiction except to reverse as incompetent the judgment of the Court of Appeal, which it did with costs.

STATUTE AUTHORIZING RENEWAL OF LICENSE—REPEAL OF STATUTE, EFFECT OF—VESTED RIGHT.

Reynolds v. *Attorney-General for Nova Scotia*, (1896) A.C. 240, may be briefly noticed as involving a point of general interest. By a statute of Nova Scotia licenses for working coal

were authorized to be issued, and by the same statute there was given a power of renewal. The appellants having obtained a license for two years, applied for a renewal, but prior to the application the section of the statute authorizing the renewal had been repealed by an amending Act. Under this state of facts it was held by the Privy Council that the amending Act took away the power to renew the license, and that even if the amending Act were construed so as not to interfere with vested rights, the appellants possessed only a privilege and not an accrued right to a renewal.

PRACTICE—SPECIAL LEAVE TO APPEAL—STATUTE GIVING COURT POWER TO ACT ON OTHER THAN LEGAL EVIDENCE.

Moses v. *Parker*, (1896) App. Cas. 245, was an application to the Privy Council for leave to appeal from a decision of the Supreme Court of Tasmania, pronounced under the provisions of a statute of that colony, which empowered the Court to be guided by equity and good conscience only and on the best evidence procurable, even if not required or admissible in ordinary cases, and not to be bound by strict rules of law or equity, or by any legal forms. Their lordships (Lords Watson, Hobhouse, Macnaghten, Davey and Sir R. Couch) refused the application, being of opinion that a decision so authorized could not properly be made the subject of an appeal.

CORRESPONDENCE.

LEGAL EDUCATION IN THE DOMINION.

To the Editor of the Canada Law Journal.

SIR,—It seems to us that a correspondent of the *Canada Law Times* is taking too seriously the remarks reported as having been made by Mr. Bulmer at a meeting of the Nova Scotia Barristers' Society, respecting the condition of legal education in the various provinces. Mr. Bulmer took a very active part in the establishment of the Dalhousie Law School,

and, naturally, has a very high opinion of its merits; but you may be well assured that in making a comparison between the standard of local education in Nova Scotia and in the other provinces, he spoke for himself alone. There is not a barrister of any standing in the province of Nova Scotia who is not aware of the existence of excellent faculties of law connected with Laval and McGill Universities, or who is not familiar with the distinguished names connected with the Osgoode Hall School and the law faculty of Toronto University. The Bar of Nova Scotia have a high opinion of their own institution, but they realize that the relative smallness of their province makes it a difficult task to compete with the institutions we have named; and certainly they would never dream of asserting on its behalf any such peculiar and extraordinary eminence as is claimed for it by Mr. Bulmer, whose zeal for the institution with which he had been connected, betrayed him into the use of an expression which, upon second thoughts, he would be the first to disclaim. The remark in question was certainly not acquiesced in by the audience to which it was addressed.

ROBERT L. BORDEN,
President Nova Scotia Barristers' Society.

B. RUSSELL,
Secretary Dalhousie Law Faculty.

Copy of a resolution of the Council of the Nova Scotia Barristers' Society, held the 2nd September, 1896:

"*Resolved*, that this Council observes, with regret, that publicity has been given to a remark made at a late meeting of the Society, derogatory to the standards of legal education in the other provinces of the Dominion. That this Council do take this early opportunity of expressing its disapproval of that remark, and of recording its opinion that the gentleman who made it spoke his own views only, and not those of the profession in Nova Scotia."

SIC UTERE TUO UT ALIENUM NON LAEDAS.

FIRTH *v.* BOWLING IRON COMPANY.

L.R. 3 C.P.D. 254.

Alack! sweet Muse, not mine the high emprise
To sing the cherished Ram of Polypheme,
The Zebu all good Brahmins patronize,
Nor yet the steeds of Phœbus's proud team,—
I sing the passing of Dame Firth's milch cow.
(A meet yoke-mate for Pegasus in plow!)

Defendants delved in mines of coal and iron
Beneath the plaintiff's farm in York's old shire;
And, 'gainst the straying kine, they did environ
Their gaping pits with fence of cabled wire—
A sage device if well maintained, in sooth;
A snare withal if left to Time's sharp tooth!

Now iron oft is good for man and beast
When taken in the form called iodide;
But in its common state, to say the least,
Is no fit lodger for a cow's inside!
So, when our heroine had grazed her fill
From sward bespent with wire, she fell quite ill.

She died. A Vet. was called, skill'd in his art;
"I swear," quoth he, sans thought of irony,
"This cow 'gainst living more did steel her heart!
"Her pericardium's strung up to "C"
"With wire that erstwhile fenced the Bowling Works.
"Go sue the careless wights; they're worse than Turks!"

* * * * * * * * *

Cave, for the plaintiff: "Clear law 'tis to-day
"That he who puts upon his low—or high—lands
"A lethal thing, all damages must pay
"That flow therefrom. (see *Fletcher* versus *Rylands.*)"
Swift, contra: "Here no laches doth arise,
"And *Wilson* versus *Newberry* applies!"

Per LINDLEY, J.: "We think defendants knew
"The woe their fence would work when waxen old;
"Their duty was to keep it staunch and true,
"Nor let it knock the plaintiff's cattle cold
"Unseasonably. Wire fences have their use,
"But not in wrestling with cows' gastric juice!"

"*Quoad* this case the law's plain to the Court";
[Though rhyme forbids the very words employed,
Yet have I not committed false report.]
"'Tis couched in a sound rule, of doubts devoid,
"A maxim old, that he who runs may read as
"*Sic utere tu' ut alienum non laedas!*"

CHARLES MORSE.

DIARY FOR SEPTEMBER.

1 Tuesday.....Court of Appeal for Ontario sits.
2 Wednesday ..De Beauharnois, Governor, 1726.
6 Sunday .....*Fourteenth Sunday after Trinity.*
7 Monday.....Labor Day.
8 Tuesday.....Jewish year 5657 begins.
12 Saturday ....Frotenac, Gove.nor of Canada, 1692.
13 Sunday .....*Fifteenth Sunday after Trinity.*
14 Monday.....Quebec taken, 1759. Law Society of U. C. Convocation meets.
17 Thursday ....First Parliament of U. C. met at Niagara, 1792.
18 Friday .....Earl of Aberdeen, Governor-General, 1893.
20 Sunday..... *Sixteenth Sunday after Trinity.*
22 Tuesday.....Courcelles, Governor of Canada, 1665.
24 Thursday ....Guy Carleton, Lieut.-Gov. and Com.-in-Chief, 1766.
25 Friday .....Sir W. J. Ritchie died, 1892.
27 Sunday .....*Seventeenth Sunday after Trinity.* Law School opens.
28 Monday.....W. H. Blake, 1st Chancellor of U. C., 1849.
29 Tuesday.....Michaelmas Day.
30 Wednesday ..Sir Isaac Brock, Administrator, 1811.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] [June 6.

PURDOM *v.* PAVEY.

Action—Jurisdiction to entertain—Mortgage on foreign lands—Action to set aside—Secret trust—Lex rei sitae.

An insolvent firm assigned for the benefit of creditors. Shortly after the assignment a brother of E. D., a member of the firm, died in Oregon, U.S., and left real estate there which he devised to his parents for life, and at their death to E.D., who some months after sold his interest to his father, who mortgaged the lands to P. An action was brought by creditors of the insolvent firm to have this mortgage set aside as fraudulent, and a demurrer to the statement of claim was allowed: *Burns* v. *Davidson*, 21 O. R. 547. The action was then abandoned, and another brought in which it was alleged that P. took the mortgage as trustee only for E.D., in pursuance of a fraudulent scheme to hinder, delay and defraud the creditors of the firm, and it was asked that P. be declared a trustee for D. of the said mortgage and the monies secured thereby. A demurrer to this statement of claim was allowed by ARMOUR, C.J., but his judgment was reversed on appeal.

Held, reversing the decision of the Court of Appeal (23 A. R. 9) that the action would not lie; that the above allegation could only be read as one impeaching the mortgage transaction as fraudulent for having been made on a secret trust; that so far as the lands were concerned the validity of the

transaction depended on the law of Oregon, and it was not alleged that according to that law a constructive trust would arise by reason of the intent to hinder and delay creditors, and the Court could not assume that the law of Oregon corresponded to the statutory law of Ontario; that the debt could not be separated from the security, and it was doubtful if the action would lie, even if only an attachment of the debt had been asked for; and that the action was in substance an attempt to get satisfaction by way of equitable execution for debt out of a mortgagee's interest in foreign lands.

Appeal allowed with costs.

Purdom, for appellants.

Gibbons, Q.C., for respondents.

Ontario.] [June 6.

CARTER *v.* LONG.

Trust—Principal and agent—Advances to agent to buy goods—Trust goods mixed with those of agent—Replevin—Equitable title.

If an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing it.

If the goods so bought are mixed with those of the agent, the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance.

Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin.

Judgment of the Court of Appeal (23 A. R. 121) affirmed.

Appeal dismissed with costs.

Gibbons, Q.C., for appellant.

Crerar, for respondent.

Ontario.] [June 26.

WILLIAMS *v.* LEONARD.

Chattel mortgage—Description—Bills of Sale Act R. S. O. (1887), c. 125—Appeal—Order to amend pleadings—Interference with—Debtor and creditor—Purchase by creditor—Consideration—Existing debt.

In a chattel mortgage the goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor, and are situate in and upon the premises of the London Machine Tool Co. (describing the premises) on the north side of King street in the city of London"; and in a schedule referred to in the mortgage was this additional description: "and all machines . . . in course of construction, or which shall hereafter be in course of construction or completed, while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor . . or which are now or shall be on any other premises in the said city of London."

Held, affirming the decision of the Court of Appeal and of the Divisional Court (16 Ont. P. R. 544), that the description in the schedule could not

extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could the description was not sufficient, within the meaning of the Bills of Sale Act, (R.S.O., 1887, ch. 125) to cover machines so manufactured.

The Supreme Court will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such order being a matter of procedure within the discretion of the Court below.

A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt, is a purchaser for valuable consideration within sec. 5 of the Bills of Sale Act.

Appeal dismissed with costs.

McEvoy, for the appellant.

Gibbons, Q.C., for the respondents.

North-West Territories.] [June 6.

CONGER *v.* KENNEDY.

Constitutional law—Marital rights—Married woman—Separate estate—Jurisdiction of N. W. Territorial Legislature—Statute—Interpretation of—R.S.C. ch. 50—N.W.T. Ord. No. 16 of 1889.

The provisions of Ordinance No. 16 of 1889, respecting the personal property of married women, are intra vires of the Legislature of the North-West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the Order of the Governor-General in Council passed under the provisions of the North-West Territories Act, R.S.C. ch. 50. The provisions of said Ordinance No. 16 are not inconsistent with secs. 36 to 40 inclusively of the North-West Territories Act.

The words "her personal property" used in the said Ordinance No. 16, are unconfined by any context, and must be interpreted as having reference to all the personal property belonging to a woman, married subsequently to the Ordinance, as well as to all the personal property acquired since then by women married before it was enacted.

Brittlebank v. *Grey-Jones*, 5 Man. L.R. 33, distinguished.

Appeal allowed with costs.

Hogg, Q.C., for the appellant.

Taylor, Q.C., for the respondent.

Province of Ontario.

COURT OF APPEAL.

Practice.] [May 12.

CLARKSON *v.* DWAN.

Summary judgment—Writ of summons—Special indorsement—Interest—Promissory notes—Amendment.

The indorsement of a writ of summons by which sums were claimed for interest upon promissory notes largely in excess of anything which could possibly be due except by virtue of some special contract, which was not alleged.

Held, not a good special indorsement.

McVicar v. *McLaughlin*, 16 P.R. 450, distinguished.

Held also, BURTON, J.A., dissenting, that the special indorsement was bad, and no amendment could be permitted, for the reasons given in the Court below, reported 17 P. R. 92.

A. R. Lewis, Q.C., for the appellants.

F. A. Anglin, for the respondent.

Practice.] [May 12.

SMITH *v.* LOGAN.

Judgment—Appearance—Default—Tender—Notice—Irregularity—Motion for judgment.

Until the law stamps have been attached to, or impressed upon, the paper upon which a judgment is drawn up, there is no complete, effective, or valid judgment ; and an appearance tendered after all the work of signing judgment for default has been completed, except the attachment of the stamps, should be received and entered.

Where an appearance, though tendered before, is not entered by the officer until after judgment, it cannot become an effective appearance until after the judgment has been set aside ; and therefore the defendant cannot be said to be in default for not giving notice of appearance on the day on which it is entered, pursuant to Rule 281.

Where the plaintiffs insist upon the regularity of a judgment as a judgment in default of appearance, they are not in a position to take the alternative and inconsistent course of moving for judgment under Rule 739, treating the appearance as regular.

Decision of the Court below, 17 P. R. 121, reversed.

W. H. Blake, for the appellant.

Aylesworth, Q.C., for the respondents.

Practice.] [May 12.

SALES *v.* LAKE ERIE AND DETROIT RIVER R. W. CO.

Amendment—New defence—Court of Appeal.

The defendants were sued as common carriers for breach of contract to carry and deliver safely the plaintiffs' goods. It was charged in the alternative that if the defendants had become warehousemen of the goods, their loss and destruction by fire was caused by the defendants' negligence. The defendants denied the contract, and averred that the goods were safely carried to their destination, but that the plaintiffs left them in the defendants' hands at their own risk, and if they were destroyed, it was without any negligence on the defendants' part. The only question raised at the trial was whether the fire by which the goods were destroyed was caused by the negligence of the defendants, and that question was found against them by the trial Judge, in accordance with the evidence. On appeal to the Court of Appeal, the defendants for the first time sought to defend under the special conditions on the bills of lading, by which, it was contended, they were exempted from liability for loss by negligence in the character of bailees or warehousemen, and for loss by fire.

Held, that the very right and justice of the case did not require the Court to permit the defendants to raise the new defence by amendment.

Brown v. *Dunn*, 6 P.R. 67, applied and followed.

Wallace Nesbitt, for the appellants.

D. E. Thomson, Q.C., and *W. N. Tilley*, for the respondents.

PRACTICE.] [May 12.

RUTHERFORD *v.* RUTHERFORD.

Parties—Action to realize charge on land—Subsequent incumbrances—Right to vary judgment—Amount of charge—Marshalling.

Testator devised his farm to his son, "subject to the following conditions," that his widow should have the use of half the farm during life or widowhood, and that one-fifth of the value of the farm should be paid to his two daughters. By a subsequent clause of the will he directed that at the death of his wife the half that she occupied should "be equally divided or the value thereof between my three children."

The widow occupied the west half. The son incumbered both halves in favor of different mortgagees. In an action brought by one of the daughters against the son, it was alleged that by agreement the value of her legacy had been ascertained at $400, and judgment was given declaring her entitled to a charge upon the east half for $400, directing a reference to add incumbrancers and take accounts, and in default of payment to sell the land.

Upon motion by the incumbrancers upon the east half, who were added as parties in the Master's office, to set aside or vary the judgment,

Held, reversing the decision of STREET, J., that there was no necessity and no right on the part of the added parties to alter or vary the judgment to enable them to obtain their rights as against the amount of the charge fixed thereby as between the plaintiff and the defendant.

2. That the added parties had the right of marshalling; but the plaintiff, having obtained a regular judgment, had a superior equity to theirs, and they had no right to deprive her of it, nor to involve her in the expense of construing the testator's will, and ascertaining what rights of the defendant in the west half were subject to the charge. If they chose, they could redeem the plaintiff, and, standing in her place, at their own expense, have recourse to the west half

Moss, Q.C., for the appellant.

Watson, Q.C., and *Edmison*, for the respondents.

HIGH COURT OF JUSTICE.

MEREDITH, C.J., ROSE, J., MACMAHON, J. } [May 18.

REGINA *v.* BRENNAN.

Criminal law—Murder—Manslaughter—Criminal Code, sec. 229—Provocation—Assault—Legal right—New trial.

The defendant was tried upon an indictment for the murder of S. It was not denied that he had killed S., but it was urged that, by sec. 229 of the

Criminal Code, the offence was reduced to manslaughter, as having been committed "in the heat of passion caused by sudden provocation." There was evidence that before the killing, S. had laid hands on the defendant and put him out of his (S.'s) house. The Judge at the trial directed the jury that S. was at the time he was killed "doing that which he had a legal right to do," and that there was therefore no provocation and no question of fact to be submitted to the jury to reduce the crime to manslaughter.

Held, misdirection; for whether or not the deceased at the time he was shot was doing what he had a legal right to do depended upon whether, if the jury accepted as true the statement of the defendant given in evidence as to the circumstances attending the shooting, the deceased had, before laying hands upon him, ordered him to leave his house, and whether, if he had done so, the prisoner had refused to leave, and whether, if violence was used in putting him out, it was greater than was necessary; and the deceased was clearly not doing what he had a legal right to do if the facts were found in favor of the defendant's contention on these points.

New trial directed, upon an appeal under sec. 744 of the Criminal Code.

Lount, Q.C., for the defendant.

J. R. Cartwright, Q.C., for the Crown.

BOYD, C., FERGUSON, J. } [June 24.
ROBERTSON, J. }

SANDUSKY *v.* WALKER.

Company—Promoters—Liability for goods supplied—Appeal from report of referee.

A steamer was purchased for the benefit of all the shareholders of a projected company to be organized for the purchase and running of it, and was held by one of the subscribers as trustee for the others. The boat was run for their benefit in advance of incorporation, as all knew. All were aware of these operations, and all admitted under their hands that they were jointly interested in the steamer. Most of them took part more or less in the operations of the company, attending meetings and directing affairs on the steamer or in the conduct of the office business. All would have expected to share in the profits had any been made.

Certain coal was supplied for the use of the boat on the order of the captain or manager of the boat, who stated that the trustee of the boat would pay the bill. The price of the coal being sued for, certain of the subscribers to the stock of the company, which was never actually incorporated, paid the amount of the bill.

Held, that there was a right of contribution to the amount of the coal bill against all the other subscribers to the stock.

Held also that the contribution should be without reference to what had been paid on shares, the liability not arising in respect of calls upon the shares, though the amount of shares subscribed by each might well regulate the quantum of contribution as between those jointly liable.

W. Cassels, Q.C., *W. R. Riddell*, *Mabee* and *Clarke*, for the various parties.

BOYD, C., FERGUSON, J. [May 21.

LEA *v.* LAING.

Security for costs—Rule 1243—Costs of former action unpaid—Solicitor—Want of authority.

Upon an application by the defendant under Rule 1243 for security for costs, upon the ground that the costs of a former action brought against him by the same plaintiff for the same cause, and discontinued, remained unpaid, the plaintiff contended that the former action, though brought by a solicitor in his name, was brought without his authority.

Held, that there should be no discussion as to the incidence of the costs of a prior action, known to the plaintiff, when the proper steps to get rid of these costs have not been taken by the plaintiff, prior to the launching of the second action.

N. F. Davidson, for the plaintiff.

Aylesworth, Q.C., and *F. J. Travers*, for the defendant.

MEREDITH, C.J., ROSE, J. [June 16.

IN RE TORONTO, HAMILTON AND BUFFALO R. W. CO AND HENDRIE.

Appeal—Divisional Court—Railway Act—Order of judge—Persona designata.

A judge making an order under sec. 165 of the Dominion Railway Act, 51 Vict., c. 29, for payment out of Court of compensation moneys, acts, not for the Court, but as persona designata by the statute; and no appeal to a Divisional Court lies from his order.

Canadian Pacific R. W. Co. v. *Little Seminary of Ste. Therese*, 16 S.C.R. 606, followed.

E. Martin, Q.C., for the land-owners.

D'Arcy Tate, for the railway company.

MEREDITH, C.J., ROSE, J. [June 16.

QUEEN *v.* SIMPSON.

Pharmacy Act—Keeping open shop—Unregistered druggist—R.S.O. c. 151.

The defendant being owner of a large departmental store was charged and convicted under R.S.O. c. 151, sec. 24, for keeping open shop for retailing, dispensing and compounding poisons contrary to R.S.O. c. 151, sec. 24. It appeared that part of his store was set apart for the drug department and was under the management and control of one Lusk, a duly qualified and certified chemist registered under the Pharmacy Act, who dispensed the drugs, giving bills for the same on which the defendant's name was printed, and on some of which his own name was also printed with the word "druggist" under it. The defendant was never inside of the drug department nor interfered with the conduct of the business. Lusk purchased all the drugs on his own judgment, but with the defendant's money, who received the proceeds, Lusk receiving a certain portion for his remuneration under agreement with the defendant.

Held, that the matter must be remitted to the magistrate (who had dismissed the information) with instructions to convict.

B. B. Osler, Q.C., and *E. T. Malone*, for the prosecutor.

G. F. Shepley, Q.C., and *M. H. Ludwig*, for the defendant.

BOYD, C.
FERGUSON, J. } [June 24.

LEITCH *v.* MOLSONS BANK.

Executors and administrators—Distribution pari passu—Action by administratrix to recover excess.

D. C. Leitch being guarantor of the indebtedness of his brother, A. J. Leitch, to the defendants, who were pressing the latter for payment, agreed to buy the latter's stock in trade, giving a number of notes of $100 each, which were to be deposited, and were deposited with the defendants, and as paid the proceeds applied towards the liquidation of the indebtedness of the bank. D. C. Leitch afterwards sold the stock and died, and part of the purchase money on the latter sale being paid to the plaintiff, his administratrix was employed to retire some of his notes to A. J. Leitch, the proceeds being applied to reduce the indebtedness to the bank.

The plaintiff had before this given the usual notice for creditors and the time for puting in claims had expired. She afterwards became aware of two claims against the estate, including a large one by A. J. Leitch, and now sued the defendants to recover the money she had paid as above, or the excess over the defendants' proper pro rata share.

Held, confirming the decision of MACMAHON, J., that the action must be dismissed.

Per BOYD, C.: The widow having duly advertised for creditors under the statute, was justified in making payments as on a solvent estate. The estate was discharged, although the creditors coming in after the statutory period may have the right to follow the payment to the defendants if so advised.

J. A. Robinson, for the plaintiff.

J. S. Robertson, for the defendant.

BOYD, C.] [May 4.

VAN TASSELL *v.* FREDERICK.

Will—Construction—Devise—Estate—Defeasible fee—"Die without issue"—Share.

A testator, dying in 1833, by his will, made in the previous year, gave to his two sons, after a life estate to his wife, certain lands, habendum to the said F. and J., "as tenants in common, their heirs and assigns forever, subject, however, to this proviso, that if either of my aforesaid sons should die without legitimate issue, his share, as aforesaid, shall revert to and become vested in the other son united with him in the aforesaid devise." One son died unmarried in 1843. The other son married and had children, and in 1847 sold the whole property, and conveyed it as in fee simple to the purchaser, who failed to observe the provisions of the Act as to entails, by registering his conveyance within six months.

Held, that the devise was of a defeasible fee, which in the event became absolute in the surviving son. Although the words "die without issue" pointed to an indefinite failure of descendants, the context was sufficient to restrict the interpretation.

Roe d. Sheers v. *Jeffery*, 7 T. R. 589, and *Greenwood* v. *Vendon*, 1 K. & J. 74, followed.

Chadock v. *Cowley*, 3 Cr. & Jac. 695, distinguished.

Little v. *Billings*, 27 Gr. at p. 357, commented on.

Deroche, Q.C., and *Aylesworth*, Q.C., for the plaintiff.

W. N. Ponton and *O'Flynn*, for the defendants.

FERGUSON, J.] [June 5.

NOVERRE *v.* CITY OF TORONTO.

Municipal corporations—Negligence—Way—Opening—Invitation—Accident—Land adjoining highway.

Where the plaintiff was injured by a fall upon a track leading to his own premises, which was not a street or way completed for use or opened for public travel, as he knew, and no invitation or inducement was held out by the defendants to the public to travel upon it,

Held, that he could not recover damages for his injury.

Held, also, that he could not recover upon the alternative allegation that he was obliged to leave the highway, because it was in a dangerous state from snow and ice, and sustained the injury upon the adjoining land.

Laidlaw, Q.C., for the plaintiff.

Fullerton, Q.C., for the defendants.

MEREDITH, J.] [June 8.

MULLIGAN *v.* HENDERSHOTT.

Partition—Summary application—Mortgagee.

A mortgagee, whose title has not been perfected by foreclosure or otherwise, is not entitled to an order for partition or sale upon summary application under Rule 989.

Tremeear, for the plaintiff.

F. W. Harcourt, for the defendants, infants.

MEREDITH, C.J.] [June 11.

IN RE BOKSTAL.

Creditors' Relief Act—Fund in Court—Payment out—Execution creditors—Sheriff—Distribution.

Where the surplus proceeds of a mortgage sale were paid into Court by the mortgagees, and claimed by execution creditors of the mortgagor, whose executions were in the hands of the sheriff at the time of the sale,

Held, following *Dawson* v. *Moffatt*, 11 O.R. 484, and having regard to the provisions of sec. 24 of the Creditors' Relief Act, R.S.O., c. 65, that the fund in Court should be paid to the sheriff for distribution in accordance with the provisions of that Act.

L. G. McCarthy, and *Geary*, for the execution creditors.

F. C. Cooke, for the mortgagor.

MEREDITH, C.J.] [July 14.

IN RE TORONTO, HAMILTON AND BUFFALO R. W. CO. AND BURKE.

Railways—Arbitration—51 Vict., c. 29, sec. 150 (D.)—"Opposite party"—Mortgagor and mortgagee.

Certain land having been taken by the company for the purposes of the railway, an offer of a sum of money as compensation therefor was made to Burke, the owner of the equity of redemption, and Farr, the mortgagee, jointly. The mortgagee accepted the offer, but the owner of the equity stood out for a larger sum. Thereupon the company gave notice of arbitration under the Dominion Railway Act, and appointed an arbitrator; Burke appointed an arbitrator on his behalf: and the two so appointed named a third. The board thus constituted proceeded to take evidence; but the company, not being satisfied that the proceedings were regular, made a motion for an order appointing a sole arbitrator under the statute as in a case of default of appointment by the land-owner.

Held, that the words "opposite party" in sec. 150 of the Act, 51 Vict., c. 29 (D.), must be read distributively so as to include both mortgagor and mortgagee, and that both not having concurred in the appointment of an arbitrator, the case was in the same position as if no arbitrator had been appointed by the land-owner; and an order was made appointing a sole arbitrator.

D'Arcy Tate, for the company.

Teetzel, Q.C., for Burke.

P. D. Crerar, for Farr.

Province of Manitoba.

QUEEN'S BENCH.

KILLAM, J.] [July 20.

CLEMONS *v.* ST. ANDREWS.

Right of action—Declaration of right to compensation—Queen's Bench Act, 1895, sec. 38, s-s. 5—Costs of former action for same relief unpaid.

After the adverse decision against the plaintiff (noted ante, p. 297), and after the Queen's Bench Act, 1895, came into operation, the plaintiff commenced a new action, without payment of the costs of the former action, asking for a declaration of his right to compensation and damages under the same circumstances as before, and basing his claim on sub-section 5 of section 38 of the Act, which says that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or can be claimed, or not.

The referee, on defendants' application, ordered a stay of proceedings until the costs of the former action should be paid.

Plaintiff appealed.

Held, following *Corbett* v. *Warner*, L. R. 2 Q. B. 108, that the relief sought was practically the same as in the former action, and that the appeal should be dismissed with costs.

Whitla, for plaintiff.

Perdue, for defendant.

TAYLOR, C.J.] [July 23.

ELLIOT *v.* MAY.

Prohibition—County Court—Jurisdiction.

This action was commenced in the County Court of Brandon on a promissory note dated and payable at Winnipeg. In the summons which was issued the defendant, the maker of the note, was described as "of Carberry," where he resided. A dispute note was filed stating that defendant was not indebted to the plaintiff as alleged.

At a sitting of the Court on the 4th February last the case came on for trial, but the defendant was not present or represented by any one. A verdict was then entered for the plaintiff, but as, from circumstances connected with the service of the summons, it seemed possible that the defendant might have been misled as to the date of trial, the Judge stayed proceedings until the next Court to permit him to apply to re-open the case.

On the 5th of May, the next Court day, defendant applied to have the case re-opened, and to amend the dispute note, having given the plaintiff's solicitor notice of his intention to do so, and at the same time he raised, although not by the dispute note, the question of jurisdiction, claiming that the want of it was apparent on the face of the proceedings. The Judge of the County Court re-opened the case, and directed it to be tried at the next sitting of the Court, allowing an amendment of the dispute note as so to raise some proposed defences, but refused to entertain the question of jurisdiction, holding that defence to have been waived. Defendant then moved for a writ of prohibition.

Held, that the want of jurisdiction was not apparent on the face of the proceedings, as there might be a place called "Carberry" within the Judicial Division of Brandon, so far as the Court knew; and, following *Maxwell* v. *Clark*, 10 M.R. 406, that prohibition should be refused.

It might have been otherwise if it had been a case of a total want of jurisdiction in any County Court, instead of a question as to which particular Court could entertain the case.

Thompson, for plaintiff.

Andrews, for defendant.

Province of British Columbia.

SUPREME COURT.

BOLE, J.] [June 16.

IN RE SHARP.

Assignment for benefit of creditors—Homestead exemption—Identical goods not exempt—Part of stock in trade not exempt.

In the matter of the Creditors Trust Deed Act, 1890, and Amending Acts, and the homestead exemption claim of Sharp & Co., merchant tailors.

In this matter the claimants (Sharp & Co.) applied for an order declaring them entitled to a homestead exemption of $500 worth of personal property out of the goods assigned by them for the benefit of creditors.

The goods claimed were of course part of their stock in trade. Claimants' counsel contended that the property in these goods, i.e., the $500 worth claimed, had never passed to the assignee by reason of the clause in the "Deed of Assignment," which read as follows: "Save and except such personal property as may be selected by the said debtors under the Homestead Act and the Homestead Exemption Act, 1890," and that their rights were measured by the assignment deed of March 26th, 1896, without any reference to the Homestead Act of 1893.

Section 10 of the Homestead Act, 1893, reads as follows: "Provided that nothing herein contained shall be construed to exempt any goods or chattels from seizure in satisfaction of a debt contracted for or in respect of such identical goods or chattels," and cap. 24 of the statutes of 1896, sec. 10, reads as follows: "The following personal property shall be exempt from forced seizure or sale by any process at law or in equity, that is to say: the goods and chattels of a debtor at the option of such debtor, or if dead, of his personal representative, to the value of five hundred dollars; provided that nothing herein contained shall be construed to exempt any goods or chattels from seizure in satisfaction of a debt contracted for or in respect of such identical goods or chattels; provided further, that this section shall not be construed so as to permit a trader to claim as an exemption any of the goods and merchandise which form a part of the stock in trade of his business."

The case of *Wert* v. *McEachron*, reported ante p. 208, was cited at the trial.

Held, that as no evidence was adduced to show that the goods claimed under exemption did not fall within the purview of sec. 2 of the Homestead Amendment Act, 1893, therefore the Act applied.

Held, also that the statute of 1896 applied on the ground that it relates to matters of procedure, and would be therefore retrospective: *Hardner* v. *Lucas*, Appeal Cases, 582; *Singer* v. *Hasson*, 26 L. T., 326; *Kimbray v. Draper*, 37 L. J. Q. B. 80; *A. G.* v. *Thebold*, 24 Q. B. D. 560; *Wright* v. *Hale*, 30 L. J. Ex. 40; *Jones* v. *Bennett*, 63 L. T. 705; *Dibb* v. *Walker*, (1893) 2 ch. 429; *Kemp* v. *Wright*, (1895) 1 ch. 121, 126 C. A., then the debtors' contention must fail.

Held, also, that in any event the debtors cannot be heard to say that they

have by such a deed as the present one, in the absence of a clearly expressed assent of all their creditors, rendered futile all statutory provisions passed for the protection of creditors, one of which acts was in force three years before the deed was executed. Furthermore they are asking for a privilege (*Rideal* v. *Fort*, 25 L. J. Exch. 204), and the onus of clearly proving themselves entitled to it, under the existing law, lies on the claimants. Application for a homestead exemption dismissed with costs.

Shaw, for claimants.

J. J. Godfrey and *R. L. Reid*, for certain creditors, contra.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

SCOTT, J.] [Aug. 11.

E. J. BANGS *v.* ALFRED BROWN.

Lien—Livery stable—Ord. 30, N.W.T.

This was an action for value of a horse converted by the defendant; the facts were that one William Brown (not the defendant) left the plaintiff's horse with one Stewart, of Fort Saskatchewan, with instructions to deliver him to the plaintiff upon the plaintiff paying to Stewart for said William Brown $15, which was claimed for finding the horse and bringing him to Fort Saskatchewan. Stewart told plaintiff, who refused to pay any amount, but subsequently offered $5—which Stewart refused and subsequently consented to accept—and took the horse to Alfred Brown, the defendant, who was a livery stable keeper in Edmonton, and instructed defendant to keep the horse until the $5 was paid. Defendant notified plaintiff of the whereabouts of the horse and demanded the $5 and the keep of the horse, and claimed to detain the horse until at least the keep was paid, and subsequently advertised and sold the horse for feed and keep under ch. 30 of Ordinances of 1892 of the N. W.T. entitled "The Livery and Boarding Stable Keepers' Ordinance," sec. three (3) of which reads as follows: "Any keeper of a livery stable or a boarding or sale stable may detain in his custody and possession any animal, vehicle, harness, furnishings or other gear appertaining thereto, and personal effects of any person who is indebted to him for stabling, boarding or caring for such animal."

The cause was tried before SCOTT, J., at Edmonton, at the last March sittings.

S. S. Taylor, Q.C., for the plaintiff contended;

(a) That the defendant had no lien under the above ordinance, because he received the horse as a wrong-doer, knowing that it was being wrongfully held by Stewart.

(b) That the defendant was not acting in his capacity as a livery stable keeper in receiving the horse in question, but in the capacity of special custo-

dian for a special purpose not connected with his business as a liveryman in the usual course of the business, and consequently did not come within the jurisdiction of the ordinance.

(c) That at common law liverymen had no lien, and the defendant only got one if at all under the ordinance, which for the reasons above stated did not apply to protect him.

J. C. F. Bown, for the defendant, urged the protection of the ordinance.

SCOTT, J.—As Stewart had no authority, either express or implied from plaintiff to deliver the horse to defendant, the latter was not entitled at common law or under the ordinance, chap. 30, of 1892, as against plaintiff, to any lien upon it, either for the $5, or for its keep while in the defendant's possession.

CANADIAN BAR ASSOCIATION.

The following is the circular referred to ante p. 534 and issued to the members of the Bar of the various provinces:

"It is proposed to have a meeting at Montreal on Tuesday, 15th September, at 2.30 p.m., to take the requisite steps to form a Canadian Bar Association. The suggestion came from one of the provincial Bar societies some months ago, has been endorsed by other legal societies, and approved of generally by the profession. The undersigned have been favorably impressed by it, and are of the opinion that an opportunity for a comparison of views and friendly intercourse is needed by the profession and would be of service in helping to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation, and uphold the honor of the profession of the law in Canada. This circular is mailed to members of the profession in each province whom it is thought such a project might interest, and whom it is hoped to see at the meeting. Kindly accept this as an invitation to be present, but in any event please communicate your views on the subject of the proposed organization to J. T. Bulmer, Halifax, N. S., who will submit them to the meeting. Due notice of a programme will be given through the press, and efforts are being made to secure the attendance of distinguished visitors at the meeting, among them Lord Russell, Chief Justice of England, and a deputation from the American Bar Association."

The names of some of the leading members of the Bar of the Dominion are attached.

The following is copied from the *Halifax Mail*:—"A meeting of the Nova Scotia Bar Society was held yesterday to receive the report of the committee appointed at the annual meeting to ascertain the views of leading members of the Canadian Bar as to the propriety of founding a Canadian Bar Association. The report approved of the project and submitted letters from the leaders of the Bar in all the provinces of the Dominion, warmly commending the project, except Manitoba. The two law societies in British Columbia have passed

resolutions endorsing it. A paper was read by J. T. Bulmer setting forth the advantages of the proposed society, and pointing out the work done by the American Bar Association and the incorporated law society of England. The Society discussed the matter at great length, and finally adopted a resolution unanimously approving of the proposal. A committee was appointed having full power to make all preliminary arrangements, composed of C. S. Harrington, Q.C., R. E. Harris, Q.C., F. T. Congdon, W. B. Ross, Q.C., D. McNeil, Hector McInnes, Wallace McDonald, J. T. Bulmer, B. Russell, Q.C., R. L. Borden, Q.C. The committee will meet at once, and it is hoped that Sir Charles Russell, the Chief Justice of England, now in this country, will be able to attend in Montreal or Ottawa the first meeting of the Society. The meeting for organization is expected to be held the first or second week in September."

FLOTSAM AND JETSAM

CIVIL LAW ADVANTAGES.—Both the civil law and the common law have their weak points and their strong ones. In Mexico, as in all countries where the civil law prevails, the courts decide cases by finding the facts and stating the legal result arising therefrom, without giving reasons. In short there are no precedents. The Hon. Walter Clark in a resumé of the Mexican judicial system in *The Green Bag* (Boston), says: "Whatever may be said in favor of our system, the civil law system has three distinctive advantages, and there may be others. 1. If an error is made in a case, it cannot be quoted as an authority for the repetition and reproduction of the same error by that Court or any other. 2. There are no groaning shelves filled with lengthening lines of reports, wasting alike the time and the pocket-books of the legal profession. 3. Instead of wasting researches to ascertain the number of times judges (whose capacity, impartiality and training are usually unknown and necessarily incapable of being weighed) have expressed views on one side or the other, the legal mind is permitted to expand by arguing each case as it arises, upon the merits and 'the reason of the thing'—not upon its fancied resemblance, more or less accurate, to other cases which may have been rightly or wrongly decided. This exacts a greater exercise of the reasoning faculties, and saves the time and expense of our system, which requires an exhaustive search for 'precedents,' to ascertain what other men, under circumstances more or less similar, have said was the law."

Notwithstanding a statutory provision that a divorce shall not be granted unless the party exhibiting the petition or bill therefor has resided one year in the State, it is held in *Clutten* v. *Clutten* (Mich.) 31 L.R.A. 160, that divorce may be granted on a cross bill in favor of a non-resident defendant who is brought into the State to defend a suit by a resident of the State, although the marriage and cause of divorce took place out of the State.