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We are glad to know that the views we ventured to express on the subject of judicial courtesy have been favorably commented upon, not merely by the Bar, but by members of the Bench. It would not, in this connection, be out of place, but simply and only to show the thought of those to whom our government might naturally look for guidance in such matters, to repeat the well known observation of one of England's greatest Chancellors, who is reported to have said, "My judges must be gentlemen, and if they know a little law, so much the better."

We follow the example of a contemporary in referring to what is described as a widespread belief still existing, that when a cheque is sent in settlement of a claim the creditor must return the cheque if he wishes to say that a sum larger than the amount of the cheque is due to him. Reference is made to the cases of *Miller* v. *Davies* and *Day* v. *McLea*, 58 L. J. Rep. Q.B. 293, 294; L.R. Q.B.D. 610, 612. In both these cases the defendant had sent to the plaintiff a cheque for a smaller amount than was claimed, stating that it was intended to be in settlement of the plaintiff's claim. The plaintiff replied that he accepted the cheque on account, and it was held that he was not precluded from suing for the balance of his claim, the keeping of the cheque not being, as a matter of law, conclusive that there was accord and satisfaction, but rather that it was a question of fact on what terms the cheque was kept.

Our namesake in England says that the accounts received from different parts of the country as to the working of the Criminal Evidence Act, which enables all persons charged

with indictable or other offences to be competent witnesses on their own behalf show that more than half of the accused persons elect to give evidence on their own behalf, and that often the husband or wife is also called. The result is that the sittings of the courts are protracted, and the pressure of work is largely increased in all criminal courts. Mr. Justice Hawkins has recently been discussing the Act at considerable length whilst addressing a grand jury. He thought it badly drawn, and difficult to construe, and was not in his opinion well considered, and he was not in love with it, and it would not tend on the whole to the beneficial administration of criminal justice. Another writer says that it will prove useful in securing for a guilty person his own just punishment by clearing up in the course of cross-examination any doubt which the evidence for the prosecution might have left in the minds of the jury. The manner in which it has been received in England does not induce us to alter the opinions which we have from time to time expressed in reference to the change which has been made in criminal evidence.

We are rather apt, and with some reason, to grumble at the amount of cases reported in the Dominion, and possibly it might be better to have fewer of them. However, this may be, we are very happily situated as compared with our legal brethren across the border. We issue in this country about fifteen volumes per annum. In the United States lawyers are supposed to be more or less familiar with the contents of about 110 large volumes. To keep track of all these cases would, of course, be simply impossible. Efforts are therefore made by various law book publishers to select the most important cases, and note authorities bearing thereon. As an example of this, we might refer to the Lawyer's Reports Annotated for October last. We see there a note by Mr. Labatt, articles from whose industrious and able pen have from time to time appeared in this journal. The principal case in that number is one reported of the Michigan Supreme Court, on the subject of knowledge as an element of an employer's liability to an

injured servant. To give some idea of the exhaustive nature of this note it may be said that it would make three hundred pages in an ordinary text book, and nearly a thousand cases from all States of the Union are consulted and referred to.

The present sittings of the Judicial Committee of the Privy Council is not presumably a convenient one for the Canadian profession. However that may be, the list of business just to hand shows that of the twenty-six Colonial and Indian appeals down for argument during November and December of this year, only one is from a Canadian court, viz., *C. P. R.* v. *Parke* from the Supreme Court of British Columbia. This case is an interesting one, involving the question whether the respondents can be restrained by injunction from continuing to irrigate on their ranch above the railway, thereby causing landslides, to the damage of the railway track. Both the trial judge and the full court on appeal were of opinion that the British Columbia statute authorizing the bringing of water on the land for irrigation purposes impliedly exempted the irrigator, in the absence of negligence, from all liability in respect of the escape of such water, however destructive such escape might be to neighbouring lands. (See *C.P.R.* v. *McBryan*, ante p. 282). Among the appeals set down for judgment are three from Canada, viz.: *G. T. R.* v. *Washington*, *Young* v. *Consumers Cordage Company*, and *Seminaire de Quebec* v. *Limoilu*.

Attention was recently called in these columns (ante, p. 449), to what appeared to the writer to be the objectionable and demoralizing practice of recklessly filing election petitions, and then going through the procedure of "sawing-off" one against another. Mr. Justice Osler took occasion, in the Haldimand case, on 17th ult., to criticize such proceedings with considerable severity. His remarks sound almost like an echo of the article referred to. In discussing the petition he alluded to the m[illegible]er in words which are reported in the daily papers

as follows: "I feel certain that there has been something very disgraceful in the way of setting off one petition against another. I think the judges can only draw one conclusion from the way in which these cases are being disposed of. I tried a case in East Lambton, in which, after two days' contestation, two charges of paying for bringing in voters to the constituency were proved, but agency was not made out. The case was adjourned, and more witnesses were to be subpœnaed, and when the case came on the other day, before my brother Ferguson and myself, the petitioner said he did not propose to offer any more evidence, and respondent's counsel said he did not ask for costs, and he would have been entitled to costs if he had asked for them. What inference can be drawn from such a course as that? But the courts are powerless to do anything. They can only try a case when it is presented to them. They cannot act as commissioners and direct evidence to be sought for. But it is an unsatisfactory mode of disposing of cases. Some seventy petitions were filed, and some seventy persons swore that they believed the charges in these petitions were true, and the result is that only about ten petitions have been tried. But the courts can do nothing except register a disposition of the case as it comes before them."

SOME POINTS IN ASSESSMENT LAW.

The recent appeals from the Court of Revision in the City of Toronto have given rise to various matters of interest under the Assessment Act, to which it may be useful to refer. Some of the judgments we shall endeavour to report in full.

The most important, possibly, was a question as to whether trust funds, in the hands of the Accountant of the Supreme Court of Ontario, are assessable. The County Judge holds, and it seems to us very properly so, that these amounts are liable to assessment. The law should reach all property, whether it is in the hands of trustees or persons in their own right. These trust funds are not held by the Crown for the public benefit, but by the Accountant of the court for individual beneficiaries.

In another case a question arose as to whether the respondent was owner or tenant of certain premises. He claimed to be the owner under an alleged purchase, which, as the judge remarked, was adorned with numerous badges of insincerity and deception. No money was paid, and there was no registration of the deed and mortgage. There was in the mortgage a covenant to pay a certain sum in less than six months, which covenant was given by the alleged owner, who was shown to be insolvent, to the knowledge of the vendor, and the actual payment to be made under the mortgage during its currency, was the exact rental value of the property assessed; it also appeared that the alleged purchase was made to enable the respondent to qualify for municipal honours. The learned judge on the evidence held that the real transaction was a rental of the premises, and not a purchase, and that the so-called purchaser was not at the time of the assessment, or at the date of the appeal, the owner of the premises in question, but should be rated as tenant.

A contribution was made to the mountain of decisions on the subject of fixtures. There seems to be no possibility of arriving at any rule, or set of rules, to guide as to what articles are to be considered as fixtures. In this appeal it was held that the wires, switchboards and instruments of a telegraph company are assessable as real estate. The city was not successful, however, in sustaining the assessment of either the patent of the Luxfer Prism Co. or its supposed value.

The appeals also brought out various defects and oversights in the Assessment Act. We can only at present refer to a few of the many which need careful attention at the hands of the legislature. The present practice as to appeals from the Court of Revision is cumbersome and expensive. An appellant who desires to be in a position to obtain the opinion of the Court of Appeal can only do so as a matter of right by first demanding an appeal to a Board consisting of three county judges, who must first hear and decide the case. An appeal to a single judge gives no such right. This procedure entails considerable expense, and is of no value whatever, if it is the desire to have a final decision from the Court

of Appeal. The simple remedy would be in all cases of large amounts to allow an appeal as a matter of right from the county judge sitting alone, leaving appellants the right, should they so desire and are willing to pay the expense, to have their cases heard before three county judges as at present.

Another point here arises. The provision as to costs is most incomplete, and often bears very hardly upon appellants. Under the Act the only costs that can be imposed are fees to witnesses on the Division Court scale, and the costs of obtaining the attendance of such witnesses, and, in case of an appeal to three judges the court can only deal (at least it has been so held by the judges of York, Ontario and Peel) with an apportionment of the five dollar per diem allowance to the two judges called in from adjoining counties. This is of no substantial benefit to a successful litigant. Energetic officials, desirous of increasing the revenue of the corporation, or of obtaining kudos for their supposed diligence, recklessly assess everything in sight, regardless of their true value, or whether they are assessable or not. Parties, therefore, have to appeal, and often have to go to a large expense in the employment of experts to prove values. If successful they should not have to bear this expense. The offending assessor can theoretically be brought within the criminal provision of the Act as to fraudulent assessments. But here again the merciful interpretation of the courts requires that the assessment should not only be fraudulent, by reason of its being thirty per cent. above the true value, but also that it should be shown to be wilfully fraudulent, thus rendering this provision of the statute practically inoperative. It would, we think, be a very proper amendment to the Act to declare that it means what it says, or in other words to enact that it is not necessary for the proof of a fraudulent assessment within the meaning of the section to show that it was wilfully, intentionally, or maliciously so.

CANADIAN FISHERIES APPEAL.

A REPLY AND REJOINDER.

I would like to make my reply to Mr. C. B. Labatt's article in a recent number of this journal (ante, p. 677), wherein he criticises some comments of mine in the current number of the Law Quarterly Review upon the judgment of the Privy Council in the Fisheries Case.

Mr. Labatt is evidently of opinion, first, that I do not understand Lord Herschel; and secondly, that Lord Herschel does not understand English.

In that appeal the Privy Council were asked among other questions, whether the Dominion Parliament had jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in waters, the beds of which were Provincial property at the time of the passing of the British North America Act, or had been granted to private individuals before that event. These questions obviously relate to legislative jurisdiction over proprietary rights in relation to fishing in the strict and ordinary sense of those words; and the Privy Council so treated them. The part of the judgment with which we are now concerned clearly recognizes this, and is as follows:

"Their lordships pass now to the questions relating to fisheries and fishing rights. Their lordships are of opinion that the ninety-first section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading of 'Sea, coast and inland fisheries' in section ninety-one. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the Provinces respectively, remained untouched by that enactment. Whatever grants might previously be lawfully made by the Provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time it must be

remembered that the power to legislate in relation to fisheries, does necessarily to some extent enable the legislature so empowered to affect proprietary rights."

Thus the Privy Council in the clearest possible way show that they are drawing a distinction between legislative power and proprietary rights; and they then give utterance to the proposition which was the fons et origo of my article, namely: "If the Legislature purports to confer upon others proprietary rights where it possess none itself, that, in their lordships' opinion, is not an exercise of the legislative jurisdiction conferred by section ninety-one. If the contrary were held it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the Provinces, and not vested in it." And so the judgment concludes: "It follows from what has been said that in so far as s. 4 Revised Statutes of Canada, c. 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the Provinces, it would not be in the jurisdiction of the Dominion Parliament to pass it."

This judgment was delivered by Lord Herschel, and Mr. Labatt has come to the conclusion, to use his own words, "That that eminent jurist has inadvertently fallen into a verbal blunder, and that the control to which he was referring was rather that which finds its active exercise in laws declaring to whom proprietary rights shall belong than that which amounts to 'possession' (properly so-called)."

So what Lord Herschel ought to have said in the sentence which has given rise to this discussion was, apparently, "If the legislature purports to make laws declaring to whom proprietary rights shall belong where it has no power to make such laws, that in their lordships' opinion, is not an exercise of the legislative jurisdiction conferred on the legislature by section ninety-one."

Mr. Labatt, however, gives Lord Herschel an alternative mode in which he might have expressed himself without falling into any verbal blunder. Mr. Labatt says: "The real meaning of Lord Herschel's words I believe to be merely

this—that the inference of an excess of power by the Dominion Parliament in the given case necessarily follows from the fact that it was undertaking to confer proprietary rights in regard to a subject matter which the British North America Act did not authorize it to control to this extent."

If Lord Herschel, then, had had the advantage of discussing the matter with Mr. Labatt, he might have expressed his meaning thus :—" If the legislature purports to confer proprietary rights in regard to a subject matter over which the British North America Act did not authorize it to confer proprietary rights, that in their lordships' opinion is not an exercise of the legislative jurisdiction conferred upon it by the British North America Act."

Now I think we generally expect and find in the judgments of the Privy Council propositions of more value than such as Mr. Labatt suggests, namely, that if the Dominion Parliament purports to exercise legislative power which it does not posess, it exceeds its legislative jurisdiction.

I am afraid I cannot accept Mr. Labatt's corrections, or retire from the Fashoda which I occupy. The fact is, I think, there were two ways in which the question of legislative jurisdiction submitted as above stated in the Fisheries case might have been dealt with. One was by founding the judgment strictly on the construction of the legislative power conferred in item 12 of section 91, whereby the Dominion Parliament is given power to make laws for the peace, order and good government of Canada in relation to sea, coast and inland fisheries, and holding that, on the proper construction of this item, it does or does not comprehend legislative power over proprietary rights in relation to sea, coast and inland fisheries. This was the way in which the Supreme Court of Canada dealt with the matter, though they founded their decision upon what I have ventured to submit, is a somewhat peculiar analogy between the construction of an ordinary legislative enactment and the construction of a legislative power conferred by the British North America Act. But this mode of dealing with the matter, at all events, gives rise to no constitutional difficulty.

The Privy Council follows another, or what seems to me the other, way of dealing with the matter. They do not say that on the construction of the words conferring that particular legislative power over sea, coast and inland fisheries, jurisdiction over proprietary rights in relation to fisheries is not included, but they bring to bear on the matter what may be called an extraneous principle applicable to Dominion legislative power generally, and not merely to the construction of the particular words conferring the particular legislative power over fisheries. They hold, through the mouth of Lord Herschel, that in conferring legislative jurisdiction upon the Dominion Parliament, the British North America Act did not confer upon it any power, in any case, to confer upon others proprietary rights which it does not itself possess.

No doubt to talk of a legislature possessing proprietary rights is something novel and unusual, and I think, as I have stated in my article in the Law Quarterly Review, that if a British legislature can be said to possess any property at all, it can only be such property as is vested in the Crown as a constituent part of the legislature, although no doubt a legislature might do the extraordinary thing of creating itself a corporate body competent to possess property as such. But I am not aware that any legislature has ever done so. In spite of Mr. Labatt's remarks I think that what Lord Herschel says is quite clear, and I have no doubt he meant what he said, but if so, I still think that a limitation has been expressed with regard to the legislative power of the Dominion Parliament, which has not heretofore ever been expressed with regard to the power of any colonial legislature, and which must apply as much to the Provincial legislatures and to the legislatures of all self-governing colonies, as it does to the Dominion Parliament. If I am right in this I certainly cannot see how this is consistent with the view hitherto entertained as to the plenary character of colonial legislative power, throughout the British empire.

The sequence of thought in the Privy Council judgment, *pace* Mr. Labatt, is clear enough. There is a distinction

between conferring proprietary rights and conferring legislative jurisdiction. Section 91 of the British North America Act confers the latter not the former; nor are proprietary rights in relation to fisheries conferred on the Dominion by other parts of that Act. Therefore, in legislating in relation to sea coast and inland fisheries under section 91, the Dominion Parliament could not confer upon others proprietary rights in relation to fisheries, neither it nor the Crown as represented by the Dominion Government being vested with such proprietary rights. It is the supposed sequitur which I contend is novel and surprising.

In regard to Mr. Labatt's comments in respect to the case of *Dobie* v. *The Temporalities Board*, to which I referred in my article in the Law Quarterly Review, I think I need only point out that the Privy Council are not there referring at all to proprietary rights created by the Province of Ontario being legislated upon by the Legislature of Quebec. What they speak of there is legislative power over funds of a corporation belonging to Ontario which are situate or vested in Quebec. But the creation of a corporation does not, so far as I am aware, necessarily involve any proprietary rights at all, though it may involve the creation of an entity capable of becoming vested with proprietary rights.

I may perhaps, be allowed to add that it does appear to me that it would be quite possible to hold that though the Dominion Parliament could not transfer to itself property which has by the British North America Act been left to the Province and not vested in it, yet, that in exercising its legislative powers under section ninety-one, it might incidentally affect even Provincial property, where to do this is necessary to the full and effectual exercise of such legislative powers.

With regard to the concluding part of Mr. Labatt's article I will only observe that the doctrine of inherent law-making powers does not on the authorities apply to our constitution. Nothing seems better established on the highest authority, than that both Dominion Parliament and Provincial Legislatures have only such legislative powers as are con-

ferred upon them by the British North America Act. When my friend, Mr. Labatt, disparages my "bolt out of the blue" by calling it a mere "brutum fulmen," I can only say "Et tu quoque, Brute!"

A. H. F. LEFROY.

It is convenient that the above reply to Mr. Labatt's article and the rejoinder of the latter should appear together. The duel between these doughty champions is an interesting one, but press of other matter will prevent its further continuance. The rejoinder is as follows:

The editor of the CANADA LAW JOURNAL considers that the maxim, *Interest reipublicæ, ut sit finis litium*, is applicable to the discussion between Mr. Lefroy and myself, but has kindly shown me the manuscript of the above article, and given me permission to say something by way of rejoinder, on condition that I confine my remarks within a reasonably narrow compass.

I am not at all disposed to complain of the limitations of space thus imposed upon me, for my critic has, in my humble judgment, wholly failed to meet the main contention put forward by me, viz., that it is a solecism to predicate "possession" of that species of dominion or control which a legislature normally exercises over proprietary rights, whether these rights are vested in the Crown or in private persons, and that, supposing my views upon this point to be correct, Lord Herschel's use of the word in such a connection could not justifiably be made the basis of an argument that the Privy Council intended to enunciate a principle limiting, in this particular direction, the effect of its earlier rulings as to the plenary powers of the Canadian legislatures. In the lowly spirit which was befitting I requested Mr. Lefroy to sustain his theory by producing from the treasure-house of his constitutional lore, some authoritative precedent for the terminology to which I excepted, and the only answer I have received to my petition is some good-natured persiflage about my audacity in venturing to suggest that Lord Herschel does not understand English. I

asked for the bread of instruction, and my "guide, philosopher and friend," has given me the stone of reproof. Unless I am much mistaken, however, the readers of our respective articles will scarcely regard this as a satisfactory way of settling the matter. Immunity from criticism is a privilege to which Lord Herschel has no special claim. Besides this, not a few persons, I fancy, will be inclined to think that there is a certain inconsistency in the attitude of a disputant who, as will be seen from his article, admits that the phraseology under discussion is "novel and unusual," and at the same time can find nothing but what is ludicrously irreverent in my refusal to accept his conclusions, until he has furnished me with some other instance of a similar use of the word "possess." One who shelters himself behind the dogma of judicial infallibility places himself in a rather awkward dilemma by virtually confessing that his own faith is not sufficiently robust to preserve him from some qualms of doubt as to the correctness of the ex cathedra utterances to which we are invited to listen with unquestioning veneration.

The manner in which Mr. Lefroy has dealt with my linguistic criticism renders it unnecessary for me to examine in detail the remainder of his article, even if the editor were willing to allow me the necessary space for that purpose. Until it is determined whether Lord Herschel's words are to be taken literally, or, as I ventured to suggest, he has inadvertently been guilty of a solecism, it is not worth while to pursue the secondary inquiry whether his words really contain the germ of a doctrine which would revolutionize the constitutional law of Canada in some very important respects. But I dare say I shall not be regarded as taking an unwarrantable advantage of the editor's license if I point out that my theory that Lord Herschel does not really mean to make the possession or non-possession of proprietary rights by a legislature itself the test of its capacity or non-capacity to confer such rights upon others is strongly supported by some language which he uses elsewhere. The inference that in the sentence which is the bone of contention between

Mr. Lefroy and myself, his Lordship was merely employing a rather loose metonymy in which the legislature is treated as identical with the political entity which it represents seems to me quite inevitable when I read the following passage taken from the second paragraph of the judgment (the italics are mine):

> "It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect to a particular subject matter *is conferred on the Dominion legislature*, for example, affords no evidence that any proprietary rights *were transferred to the Dominion.* There is no presumption that, because legislative jurisdiction *was vested in the Dominion Parliament*, proprietary rights *were transferred to it.*"

The confusion between the Dominion and its Parliament here becomes quite obvious, owing to the juxta-position of the two sentences in which it occurs. But that the sentence discussed in Mr. Lefroy's article presents another example of the same verbal laxity, is, to my mind, almost too clear for argument when I find in an earlier part of the same paragraph the statement that "their lordships were of the opinion that the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries." The only difference between the two cases is that in the latter the error is somewhat less patent, owing to the fact that the correct and incorrect expressions are separated by several sentences.

The objections to the explanation thus offered for the purpose of bringing Lord Herschel's remark into harmony with the normal conceptions and terminology of constitutional jurisprudence, as well as with the earlier rulings of the Privy Council itself, seem to be quite imponderable. There is nothing at all startling in the assumption that a judge, however eminent, may sometimes, to borrow a phrase from Mr. Silas Wegg, "decline and fall" into language which does not satisfy the stricter standards of technical accuracy. *Aliquando bonus dormitat Homerus.* To most lawyers, I think, the supposition of a momentary lapse of this character will appear infinitely preferable to the alternative theory that, in this single sentence, the judgment breaks away from the conception which dominates it, viz., that the extent of the power of

the Dominion Parliament to legislate in regard to fisheries, depended simply upon whether the British North America Act had transferred to the Dominion any proprietary rights in the waters which were the physical, tangible subject-matter of the fisheries. Neither the counsel for the Dominion and the Province, nor the Board itself, thought it worth while to deal with the case as if it were one in which the familiar rule of construction, that a grant of an express power carries with it all incidental powers which may be necessary to give it due effect, might possibly be applied so as to vest in the Dominion Parliament the capacity of creating or otherwise controlling such rights. The sole question handled was whether the Dominion Parliament had obtained legislative jurisdiction over certain proprietary rights as the result of a conveyance of such rights to the political entity of which that Parliament is the law-making agent. Such a question being extremely simple in its essence, it is neither extraordinary nor unnatural that a judge, in undertaking to expand the answer to it beyond a mere yes or no, should be led into language savouring more or less strongly of platitude. I own, therefore, that I am not very seriously staggered by the adroitness with which Mr. Lefroy, by paraphrasing my own paraphrase of the sentence under discussion, has tried to put me in the predicament of making Lord Herschel enunciate a jejune commonplace quite beneath the dignity of the Privy Council. Even those who might be prepared to allow some weight to this consideration, if it stood by itself, will, I imagine, agree with me that its importance fades away towards the vanishing point, when we advert to the alarming consequences which would follow, if we should regard his Lordship not as the author of a mere platitude, but as the propounder of a doctrine which would completely overthrow the accepted theories as to the functions and distinctive characteristics of a constitutional legislature. Only the very clearest expression of opinion on the part of the Privy Council will suffice to convince Canadian lawyers that a body whose history, to say nothing of its very official style and title of "High Court of Parliament," exhibits it as a mere jurisdictional assemblage, regulating the investiture and divestiture of proprietary rights, and not as an entity posses-

sing those rights antecedently to the enactment of the statutes which determine their disposition, intended by the British North America Act to create other law-making bodies fashioned in that novel mould which, if we are to accept Mr. Lefroy's views, is suggested by Lord Herschel's words.

My explanation of the relation of the judgment in *Dobie* v. *Temporalities Board* to the doctrine which I put forward as to the real scope and limits of the so-called plenary powers of Canadian legislatures is impugned on the ground that "the creation of a corporation does not necessarily involve any proprietary rights," but "merely the creation of an entity capable of becoming vested with proprietary rights." I am afraid that, until Mr. Lefroy favours me with some explicit authorities, I must decline to accept his theory that a corporate franchise is not a right of property. Such a privilege may in many cases be of small, and even merely nominal value, but, I should apprehend that, in the eye of the law, its value always remains an appreciable quantity.

Mr. Lefroy also thinks that, as "the doctrine of inherent lawmaking powers does not, on the authorities, apply to our constitution," my argument based on the presumed right of Canadian legislatures to exercise the right of eminent domain necessarily falls to the ground. Here again, I must decline to evacuate my position until I am referred to some judicial utterance going to prove that this general principle as to the non-existence of inherent powers extends to a sovereign power like that of eminent domain. And even if I am mistaken on this point, it is quite easy to reach by another road which avoids this difficulty the conclusion which my remarks on Mr. Lefroy's observations regarding the Expropriation Acts were intended to establish. If a legislature has the capacity to authorize the building of a railway, it must have the capacity to invest its grantees with such powers as are reasonably necessary to carry out the work, and one of those powers must clearly be that of compelling individuals to part with their property. Divorced from and unaided by such a power, a grant of a franchise for execution of an extensive public work would be, in almost any conceivable case, a mere barren formality.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MORTGAGE—COLLATERAL ADVANTAGE—REDEMPTION BEFORE DAY FIXED FOR PAYMENT.

In *Biggs* v. *Hoddinott*, (1898) 2 Ch. 307, the plaintiff was a mortgagee of an hotel and the defendants were the mortgagors. The mortgage contained a covenant by the mortgagors that, during the continuance of the mortgage, they would buy liquor exclusively of the plaintiff for sale on the mortgaged premises. The defendants having ceased to observe this covenant, the action was brought for an injunction to restrain the breach of the covenant. The defendants contended that the covenant could not be enforced as being a stipulation for a collateral advantage beyond the repayment of the mortgage debt and interest, and they also, by cross action, claimed the right to redeem the mortgage, although the day fixed for payment had not arrived. The mortgage contained a proviso that notwithstanding the proviso for redemption, the mortgagors should not be entitled to require or compel the mortgagee to receive his principal until the expiration of five years. Romer, J., held that the plaintiff could not be compelled to accept this mortgage money before the time fixed for payment. In Ontario, of course, the statutory provision (R.S.C. c. 127, s. 7) entitling a mortgagor to redeem after the expiration of five years, would override any such stipulation in the mortgage, for payment at a later period. He was therefore of opinion that the defendants' claim to redeem was premature. He was also of opinion that the covenant to buy liquors from the plaintiff was valid and binding, and should be enforced, and he granted the injunction, and his judgment on both points was sustained by the Court of Appeal, (Smith, Rigby and Williams, L.JJ.). The Court of Appeal points out that the statement of the law in *Jennings* v. *Ward*, 2 Vern 520, is too broad, and that it is not correct to say that every collateral advantage bargained for by a

mortgagee, ove and above the repayment of his principal and interest, is void in equity, but, that on the contrary, it is only such collateral agreements as have the effect of unduly clogging the right to redeem, and that as neither the stipulation for the continuance of the loan for a specified period of five years, nor the covenant for the purchase of liquor from the plaintiff, were open to objection as clogging the right of redemption, they were valid and binding on the mortgagors.

DECLARATORY JUDGMENT — INJUNCTION TO RESTRAIN PROCEEDINGS BEFORE JUSTICE UNDER A STATUTE.

In *Grand Junction Waterworks Co.* v. *Hampton* (1898) 2 Ch. 331, the plaintiffs were proposing to erect an engine house, and the defendants, a municipal corporation, objected to the proposed erection as being a breach of a statute, owing to the building extending beyond the general alignment of the street on which it was erected; and they commenced proceedings before justices, and the plaintiffs were found guilty, and were fined; the plaintiffs thereupon applied to the justices to state a case with a view to taking the matter before a Divisional Court. The plaintiffs had previously commenced the present action, claiming a declaration of their right to erect the building in question. The defendants submitted as a question of law that under the circumstances the action could not be maintained, and the case came on for hearing on this point. Stirling, J., after a careful review of the authorities come to the conclusion that even if the court had jurisdiction to grant an injunction to restrain proceedings before justices, it ought to be exercised with the greatest possible caution; and where the legislature has pointed out a mode of proceeding before a magistrate it is not open, as a general rule, for another court to stop that proceeding by injunction, and in contests between local authorities and private owners, he was of opinion that that rule ought to be adheredto somewhat strictly; and in view of the circumstances of this case it was one in which the court ought not to interfere by injunction, or by making any declaration of right, but ought to leave the matter to be disposed of by the tribunal pointed out by the statute, and the action was dismissed with costs.

MORTGAGE—EQUITABLE DERIVATIVE MORTGAGE BY DEPOSIT—NOTICE—PRIORITY.

Hopkins v. *Hemsworth*, (1898) 2 Ch. 347, was a case in which a conflict arose between two derivative mortgagees, under the following circumstances. Hill being a mortgagee by deposit of certain title deeds of land, on Dec. 7, 1875, made a derivative mortgage by depositing the same deeds with Mrs. Walker. Hill subsequently fraudulently got possession of the deeds, and on Sept. 24, 1892, deposited them by way of equitable mortgage with the defendant Hemsworth. On March 20, 1895, Hemsworth gave notice of his claim as mortgagee to the original mortgagor. No notice was ever given of Mrs. Walker's mortgage, and the simple question was whether Hemsworth had by virtue of the notice given to the mortgagor, acquired priority over the Walker mortgage. Kekewich, J., answered this question in the negative, being of the opinion that the effect of the mortgage was to create an equitable estate in land, and that, as to equitable estates, the doctrine of obtaining priority by notice did not prevail.

WILL—CONSTRUCTION—HOTCHPOT CLAUSE.

Wheeler v. *Humphreys*, (1898) A.C. 506, is a case arising upon the construction of a hotchpot clause in a will. In the court below the case was known as *In re Cosier*, *Humphreys* v. *Gadsden*, (1897) 1 Ch. 325 (noted, ante, vol. 33, p. 425), and the decision there reported is affirmed by the House of Lords, (The Lord Chancellor and Lords Macnaghten, Morris and James), but they reach their conclusion by a different process of reasoning to that adopted by the Court of Appeal. The facts may be stated briefly thus: A testator had in his lifetime entered into a covenant to pay to the trustees of his son's marriage settlement, £10,000 six months after the testator's death, to be held in trust for the husband and wife for their respective lives, and then for the issue of the marriage, and in default of issue, in trust for the testator. By his will he provided that all sums which he had covenanted to give to or with any child on his or her marriage should, in default of any direction to the contrary, be taken in or towards satisfaction of his or her share, and should be brought into hotchpot

and accounted for accordingly; and he gave his residuary estate equally between his son and his daughter. On the testator's death, his executors paid the trustees of his son's settlement £10,000, and gave a like sum to the daughter, and then divided the residue equally between them. The son having died without issue, the present action was brought by the daughter claiming to be entitled to one-half of the £10,000 given to the trustees of the son's settlement, in respect of the testator's contingent interest therein, which she claimed formed part of his residuary estate. The House of Lords come to the conclusion that the effect of the will was to give to the son absolutely the contingent interest of the testator in the £10,000, covenanted to be paid to his trustees, because, as Lord Macnaghten points out, to hold otherwise would be to require the son to give credit for something which never was his, and then treat that something as belonging absolutely to the testator. The contingent interest was not given to the son in the testator's lifetime, and therefore did not come under the hotchpot clause. Viewing the will in this light, the conclusion was, of course, inevitable that the contingent interest in the £10,000 was really no part of the share given to the son, for which he had to account, and the daughter's claim to a moiety of the £10,000 was accordingly rejected.

PRACTICE—SERVICE OUT OF JURISDICTION—CONTRACT "WHICH ACCORDING TO THE TERMS THEREOF OUGHT TO BE PERFORMED WITHIN THE JURISDICTION"—ORD. XI., R. 1 (E)—(ONT. RULE 162 (E).)

In *Comber* v. *Leyland* (1898) A.C. 524, the House of Lords (the Lord Chancellor and Lords Herschell, Macnaghten, Morris and Shand) have given a judicial construction to Ord. xi., r. 1 (e) (see Ont. Rule 162, c), which provides for service of a writ out of the jurisdiction, in an action founded on a contract "which according to the terms thereof ought to be performed within the jurisdiction." Their Lordships hold in effect that the word "ought" in this rule means "must," and if the contract be one which according to its terms may be performed within or without the jurisdiction, the Rule does not apply, and leave to serve the writ out of the jurisdiction

cannot be given. The Ont. Rule 162 (e) is rather more explicit than the English Rule, the words used being "a contract wherever made, which is to be performed within Ontario."

TRADE MARK—INVENTED WORD—COSTS.

In *The Eastman Photographic Co.* v. *The Comptroller of Patents* (1898) A.C. 571, the House of Lords discuss the subject of invented words as trade marks, and come to the conclusion that the word "Solio" as applied to photographic paper comes under the head of an invented word, and as such is registrable as a trade mark. The Comptroller-General of Patents had been upheld by the court below in his refusal to register it, and had been awarded costs; the successful appellant now claimed costs against him, but their Lordships held that there was no power to order the Crown to pay costs, but directed the costs paid under the order of the court below to be refunded.

NULLUM TEMPUS ACT—9 GEO. III., C. 16.

In *Attorney-General* v. *Love* (1898) A. C. 679, the Judicial Committee of the Privy Council (the Lord Chancellor, Lords Macnaghten, Morris and Mr. Way) hold that under a statute of New South Wales, providing that all laws and statutes in force within the realm of England at the passing of this Act (i.e., in the year 1828) "shall be applied in the administration of justice in New South Wales," the Nullum Tempus Act, 9 Geo. III., c. 16, was introduced as part of the law of that colony. A similar conclusion was reached in *The Queen* v. *McCormick*, 18 U. C. Q. B. 131.

BANKER—CUSTOMER—ACCOUNT NOT EAR-MARKED AS TRUST ACCOUNT—SET OFF.

Union Bank of Australia v. *Murray-Aynsley* (1898) A.C. 693, was a New Zealand appeal. The point involved was simple, but one of some importance. A trustee had paid trust funds into his private account with a bank; the account was not in any way known to the bank as a trust account, nor did the bank receive the money in question knowing it to be trust money. The customer having become bankrupt, and

being indebted to the bank, the latter claimed to set off the amount standing to his credit against his indebtedness; the action being brought by the trustees of the moneys in question to compel payment thereof by the bank, the courts of New Zealand gave judgment in favour of the plaintiffs; the Judicial Committee of the Privy Council, (Lords Watson, Hobhouse and Davey, and Sir R. Couch) however, reversed this decision, and dismissed the action, being of opinion that the evidence failed to show that the bank had any notice of the trust character of the funds. This is an instance of a successful appeal on a question of fact. The judge of first instance, while professing to give credit to the bank manager for "perfect honesty in his evidence," nevertheless, instead of accepting it according to its plain meaning, adopted what Lord Watson characterizes as "the dangerous course" of first assuming that his statement was an imperfect representation of his conversation with the trustee when the account was opened, and then building upon that assumption a series of speculations and conjectures, arising not out of, but outside, the evidence resulting in the conclusion of fact, that "the manager must have known, or have had strong reason to believe that the moneys referred to were not the moneys of the firm." And the Colonial Court of Appeal were thought also to have failed to appreciate the broad distinction between the relation of an agent to his principals, and his relation to his own bankers.

The first election of benchers of the North-West Territories Law Society has just taken place. We are glad to see that an excellent selection has been made, and the names are a guarantee that the society will be well managed. They are as follows: East Assiniboia, E. L. Elwood, Moosomin; West Assiniboia, W. C. Hamilton, Q.C., and Norman McKenzie, Regina; North Alberta, N. D. Beck, Edmonton; South Alberta, C. C. McCaul, Q.C., J. A. Lougheed, Q.C., and Peter McCarthy, Q.C., Calgary; and C. F. Conybeare, Q.C., Lethbridge; Saskatchewan, James McKay, Q.C., Prince Albert.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Man.] NORTH-WEST ELECTRIC CO. *v.* WALSH. [Oct. 13.

Company—Directors—By-law— Ultra vires — Discount shares — Calls for unpaid balances—Contributories—Trustees—Powers—Contract—Fraud—Breach of trust—Statute, construction of—C.S.M., c. 9—R.S.M., c. 25, ss. 30, 33.

The directors of a joint stock company incorporated in Manitoba have no power under the provisions of "The Manitoba Joint Stock Companies Incorporation Act" to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment without the sanction of a general meeting of the shareholders of the company, is invalid.

A by-law or resolution of the directors of a joint stock company, which operates unequally towards the interests of any class of the shareholders is invalid and ultra vires of the company's powers.

Where shares in the capital stock of a joint stock company have been illegally issued below par, the holder of the shares is not thereby relieved from liability for calls for the unpaid balances of their par value.

Judgment of the Court of Queen's Bench for Manitoba (11 Man. L.R. 629), reversed, TASCHEREAU, J., dissenting. Appeal allowed with costs.

Ewart, Q.C., for appellants. *J. S. Tupper*, Q.C., for respondent.

N.W.T.] AMES HOLDEN CO. *v.* HATFIELD. [Oct. 24.

Contract—Construction—Ownership of goods—Debtor and creditor—Interpleader.

W., a merchant, owing money to H., who was pressing for a settlement, an agreement was entered into as follows: (1) The said G. W. West and Mary Jane, his wife, will during the continuance of these presents provide and furnish free of rent and taxes a store at Innisfail aforesaid, suitable for carrying on the business of a general merchant. (2) The said Thomas A. Hatfield will supply to the said G. W. West and Mary Jane, his wife, at Innisfail aforesaid, all such goods and stock in trade as are usually necessary and required in the trade or business of a general merchant, and replenish such stock in trade from time to time as occasion may require and the said Thomas A. Hatfield deem expedient. (3) The said G. W. West shall, except when prevented by sickness, devote the whole of his time and attention to carrying on the trade or business of a general merchant at Innisfail aforesaid, and diligently employ himself therein, and promote to the utmost of his powers the benefit and advantage of the same. (4) The said G. W. West and Mary Jane, his wife, shall make a report to the said Thomas A. Hatfield of the sales made and the

cash balances once in each and every month during the continuance of this agreement and shall render unto the said Thomas A. Hatfield a general account of the stock in trade, credits, property and effects, debts and liabilities of the said business once every three months. (5) The said G. W. West and Mary Jane, his wife, shall remit to the said Thomas A Hatfield, at Calgary, all the moneys received by them from sales in the course of the business as aforesaid, such remittances to be made on Tuesday and Friday in each and every week, deducting freight ch ·es and such amounts as may have been paid out in cash for local merchandise and farm produce. (6) The said Thomas A. Hatfield may from time to time, and at all times, visit the said store at Innisfail, and examine all and any of the books of account kept by the said G. W. West and Mary Jane, his wife, and take an account of the stock in trade, credits, property and effects, debts and liabilities of the business, and the said G. W. West and Mary Jane, his wife, shall whenever called upon, give to the said Thomas A. Hatfield full explanations with regard to any matters concerning the said business as aforesaid. (7) Proper books of account shall be kept by the said G. W. West and Mary Jane, his wife, and entries immediately made therein of all receipts and payments made, and of all other matters and things as are usually entered in similar books of account. (8) The net profits of the said business, after deducting all freight charges shall be shared in equal proportions between the said Thomas A. Hatfield and G. W. West. (9) This agreement may be determined at any time by Thomas A. Hatfield. (10) If the said G. W. West and Mary Jane, his wife, wish to terminate this agreement they shall give to the said Thomas A. Hatfield one month's written notice of their desire so to do. The goods supplied by H. under this agreement having been seized under execution against W. an interpleader order was issued to try out the title thereto.

Held, that under the agreement the goods supplied by H. were not sold to W., but H. retained such an interest in them as to prevent them being liable for W.'s debts. Appeal dismissed with costs.

Latchford and *McDougall*, for appellants. *Knott*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] [June 18.

IN RE JENISON AND KAKABEKA FALLS L. & E. COMPANY.

Arbitration and award—Arbitrator—Refusal to state case.

When questions of law arise in the course of arbitration proceedings, any party thereto may apply to the arbitrator to state a case for the opinion of the Court, and in the event of his refusal may apply to the Court to compel him to do so. The application may be made before the arbitrator gives a ruling on the questions of law, and the making of an order is in each case a matter of judicial discretion, the order granting or refusing the direction to the arbitrator being subject to appeal.

On the merits the judgment of ROBERTSON, J. refusing to order the arbitrator to state a case was affirmed.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for appellants. *Johnston*, Q.C., for respondents.

From Armour, C.J.] COUNTY OF SIMCOE *v.* BURTON. [Oct. 4.

Principal and surety—Bond—Municipal treasurer—Audit—Representations.

The treasurer of a county for a number of years embezzled county funds, and by manipulation of his books deceived the county auditors who, from year to year, reported in good faith that his accounts were correct, and the council in good faith adopted the reports. While, in fact, in default to a large amount, the defendant, who was a ratepayer resident in the county and a relative of the treasurer, became, at his request, one of his sureties, and at the time was told in good faith by some of the county officials that the treasurer's accounts were correct:

Held that the auditors' reports so adopted by the council were not implied representations by the council, the incorrectness of which discharged the defendant.

Held also, that the statements made by the county officials did not bind the council, and that even if they did, having been made in good faith, they formed no defence.

Judgment of ARMOUR, C.J., reversed.

Osler, Q.C., and *J. A. McCarthy*, for appellants. *Aylesworth*, Q.C., and *W. A. Boys*, for respondent.

From Rose, J.] KERR *v.* LITTLE. [Oct. 4.

Easement—Right of way—Prescription—Landlord and tenant—Acknowledgment by tenant.

After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription the tenant of the dominant tenement, without the knowledge of the owner, gave to the owner of the servient tenement two pairs of shoes as consideration for the exercise of the right:

Held, that even if an act of this kind could in any event affect the right that had been acquired, the owner of the dominant tenement was not bound by what the tenant did without his authority.

Judgment of ROSE, J., affirmed.

DuVernet and *Millican*, for appellant. *Aylesworth*, Q.C., for respondents.

From Armour, C.J.] [Oct. 4.

GREAT NORTHERN TRANSIT COMPANY *v.* ALLIANCE INSURANCE CO.

Insurance—Marine insurance—Construction of policy—Condition.

The defendants insured a vessel for a stated period, "whilst running on the inland lakes, rivers and canals during the season of navigation, to be laid up in a place of safety during winter months from any extra hazardous building." At the time of the issue of the policy the vessel was at a dock in inland

waters, and remained there unused, though at all times in condition to be used, for more than two years, when she was destroyed by fire, the policy having been kept in force.

Held, per BURTON, C. J. O., and OSLER, J.A., that the risk did not attach the meaning of the policy being that the vessel was insured during the season of navigation only while in commission.

Held, per MACLENNAN and MOSS, JJ. A., that the phrase in question was used merely to limit the risk geographically, and that the risk did attach.

In the result the judgment of ARMOUR, C.J., in favour of the plaintiffs, was affirmed.

W. Nesbitt and *R. McKay*, for appellants. *McCarthy*, Q.C., *W. M. Douglas*, and *MacInnes*, for respondents.

From Armour, C.J.] [Nov. 15.

TOWNSHIP OF LOGAN *v.* TOWNSHIP OF MCKILLOP.

Ditches and watercourses Act—57 Vict. c. 55 (O.)—Owner—Appeal from award—Service of notices—Deepening ditch.

Per OSLER and MOSS, JJ.A., BURTON, C.J.O., contra. Where in proceedings under the Ditches and watercourses Act, 57 Vict. c. 55 (O.), a declaration of ownership has been made and filed by the person initiating the proceedings, any objection to his status as owner must be brought before, and decided by, the County Judge; the effect of section 24 being that the award when made cannot be impeached on such a ground. *York* v. *Township of Osgoode*, 24 O.R 12; 21 A.R. 168; 24 S.C.R. 282, distinguished.

Per MACLENNAN, J.A., BURTON, C.J.O., and MOSS, J.A., contra. A person in possession of land under a lease with an option to purchase, no default having occurred, is the owner of the land within the meaning of the Ditches and watercourses Act, 57 Vict. c. 55 (O.), and as such entitled to join in initiating proceedings thereunder.

Per OSLER, MACLENNAN and MOSS, JJ.A. Where land affected by a proposed work is vested in several persons as devises in trust, none of them living upon the land, service of notice of proceedings under the Ditches and watercourses Act upon one of them for all is sufficient; at any rate sections 23 and 24 cure any objection of this kind.

Per OSLER, MACLENNAN and MOSS, JJ.A. Sec. 36 of the Act applies where a ditch has been completed and a new arrangement is necessary in regard to its maintenance; it does not apply where a ditch is being deepened or extended, and for work of that kind the two years' limitation is not in force.

In the result the judgment of ARMOUR, C.J., was reversed, BURTON, C.J.O., dissenting.

Garrow, Q.C., for appellants. *Shepley*, Q.C., for respondents.

From Divisional Court.] MILLER *v.* LEA. [Nov. 15.

Action—Assault—Criminal prosecution—Civil remedy.

The civil right of action to recover damages for assault is not taken away by the criminal prosecution and ismissal or punishment of the offender, unless

the complaint has been preferred by or on behalf of the person aggrieved. Where a summons is issued by a peace officer of his own motion, and the person aggrieved attends the hearing and gives evidence, the right of action remains.

Judgment of a Divisional Court reversed.

W. Nesbitt, and *W. J. Clark*, for appellant. *Delamere*, Q.C., and *F. C. Snider*, for respondent.

From Armour C.J.] HESKETH *v.* CITY OF TORONTO. [Nov. 15.

Municipal corporations—Fire brigade—Negligence—Damages.

A municipal corporation is liable in damages when the death of a person is caused by the negligence, while in the performance of their duty, of members of a fire brigade organized and maintained by it. Judgment of ARMOUR, C.J., affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for appellants. *Geo. Wilkie*, for respondent.

From MacMahon, J.] HENDERSON *v.* CANADA ATLANTIC R. W. CO. [Nov. 15.

Railways—Highway crossing—Statutory warning—Damages—Mental shock.

The statutory warning required to be given where a line of railway crosses a highway on the level is for the benefit not only of persons crossing the line of railway, but also of persons lawfully using the highway, and approaching the line of railway.

Where, therefore, owing to the failure of the defendants to give the statutory warning, or any equivalent warning, the plaintiff drove close to their line of railway, and his horses were frightened by a passing engine, and injury resulted, he was held entitled to recover.

Damages for "mental shock" are not recoverable.

Victoria Railway Commissioners v. *Coultas* (1888), 13 App. Cas. 229 followed.

Judgment of MACMAHON, J., affirmed.

Osler, Q.C., and *Chrysler*, Q.C., for appellants. *W. Nesbitt*, and *Glyn Osler*, for respondent.

From Drainage Ref.] MCCULLOCH *v.* TOWNSHIP OF CALEDONIA. [Nov 15.

Drainage—Invalid by-law—Damages—Charging assessed area.

Upon the receipt of a petition from certain property owners the municipal council of a township passed a provisional by-law for the construction of drainage works affecting land in three townships, and directed an engineer to make the usual report. The engineer made his report and assessed the cost of the work against lands in three townships, but on the matter coming up before the Court of Revision it was found that the petition had not been signed by the necessary number of owners. The council, then, without any new petition or engineer's report, and without notice to the other townships, passed a by-law for the construction of the works, adopting with some changes the report already made:

Held, that this by-law was void. Where a by-law for the construction of drainage works is void, damages awarded to a landowner because of injury to his crops caused by the negligent construction of the work are not to be assessed against the drainage area assessed for the work, but are chargeable against the initiating municipality. Judgment of the Drainage Referee reversed in part.

McEvoy and *McCrimmon*, for the appellant. *Robinson*, Q.C., and *Hall*, for respondent.

From Robertson, J.] CURRAN *v.* GRAND TRUNK R. W. CO. [Nov. 15.

Railways—Omission of statutory duty—Dominion Railway Act, 51 Vict. c. 29, s. 275—Constitutional law—Workmen's compensation for injuries Act—Executors and administrators—Damages—Reduction of damages—New trial.

The above section giving to any person injured by the failure to observe any of the provisions of the Act a right of action "for the full amount of damages sustained," is intra vires, and the limitation of amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section.

The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under Lord Campbell's Act, without waiting six months.

Judgment of ROBERTSON, J., affirmed.

The Court thinking that the damages awarded by the jury in an action for causing death were excessive, ordered that there should be a new trial unless the plaintiffs accept a reduced amount.

H. S. Osler, for appellants.

From Divisional Court.] MILES *v.* ANKATELL. [Nov. 15.

Fixtures—Mortgagor and mortgagee—Wooden building.

A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, and used at first as a booth or shop and then for a time as a dwelling house, was held to be a fixture in an action by the mortgagee of the land, although the building was placed on the land, after the mortgage was made, by the mortgagor's husband, who swore that it was placed on the land without any intention of leaving it there permanently.

Judgment of a Divisional Court (ante. p. 36), 29 O.R. 21, reversed.

J. Bicknell, for appellant. *W. J. Clark* and *G. H. Galbraith*, for respondent.

From Boyd, C.] BAKER *v.* STUART. [Nov. 15.

Devolution of estates Act—Dower—Election—R.S.O. c. 127, s. 4.

Where in the administration by the court of the estate of an intestate, lands have been sold, and the purchase money paid into court and not dis-

tributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of estates Act.

Judgment of BOYD, C. 33 C. L. J. 431, 29 O.R. 388 affirmed.

J. H. Moss, for appellants. *Armour*, Q.C., for the respondent.

From Street, J.] [Nov. 15.

CITY OF KINGSTON *v.* KINGSTON ELECTRIC R. W. CO.

Street railways—Contract—Running cars—Specific performance—Injunction—Mandamus.

The court will not order specific performance of an agreement by an electric railway company to run its cars on certain streets at certain hours and with certain officers, as the court cannot oversee the carrying out of the judgment if granted. Nor will the court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out in toto, as this would also involve the same minute supervision. Nor will the court direct in an action the issue of a writ of mandamus, where the duty to be fulfilled arises out of an agreement of this kind, the performance of which in specie is not deemed enforceable by the court.

Semble. A prerogative writ of mandamus cannot be granted in an action, only on motion, but even if it can be granted in an action it will not be granted to enforce such an agreement which, though ratified by an Act of the legislature, remains a private contract.

Judgment of STREET, J., 33 C.L.J. 395; 28 O.R. 399, affirmed, MACLENNAN, J.A., dissenting.

Robinson, Q.C., and *D. M. McIntyre*, for appellants. *Aylesworth*, Q.C., and *W. F. Nickle*, for respondents.

HIGH COURT OF JUSTICE.

Ferguson, J.] [Sept. 26.

TOWNSHIP OF STAMFORD *v.* VILLAGE OF NIAGARA FALLS.

Municipal Act—Original road allowance between village and township—Joint liability to keep in repair—R.S.O. (1897), c. 223, s. 622—Damages.

The centre line of an original road allowance constituted the dividing line between a village and a township. Each municipality at first kept in repair the half within its limits. Resolutions were then passed by each municipality whereby it was agreed that the whole road should be kept in repair by the village, which it did, the township undertaking and keeping in repair other roads similarly situated; but no by-laws were passed for the purpose. In order to repair and widen the road, the village entered upon and took sand from the half of the road within the township limits.

Held, that the village was acting within its powers, for it had the right to enter and repair the road regardless of the half thereof upon which the

repairs were done, sec. 622 of the Municipal Act, R.S.O. (1897), c. 223, creating a joint jurisdiction and liability therefor. A claim for damages by reason of the taking of the sand and alleged damage to a high school building was disallowed.

W. M. Douglas and *J. W. Hall*, for plaintiff. *Griffiths*, for defendants.

MacMahon, J.] BABE *v.* BOARD OF TRADE. [Oct. 12.

Board of Trade gratuity certificate—Designation of persons to be benefited.

A gratuity certificate issued by the Board of Trade to a member thereof, was made subject to the by-laws of the board, whereby the amount payable thereby was payable to certain persons or class of persons, and in such proportion as might be designated by the member in writing and under his signature, a blank being left in the certificate for such designation, and unless he so designated, the amount was made payable, where there was a wife and children, in the proportion of half to the wife and half to the children. No designation was made on the certificate by the member. By his will he directed that after the payment of his debts and funeral expenses, all his estate should be converted into cash, etc., and the widow should have the same for her life, and after her death it should be equally divided amongst his children.

Held, that the fund formed no part of the deceased estate, and therefore did not pass under his will, but went to the widow and children to be divided between them as provided for by the by-laws governing the fund.

McGregor and *East*, for plaintiff. *W. R. Riddell*, for the Board of Trade. *Godfrey*, for adult children. *A. J. Boyd*, for infant children.

Rose, J., MacMahon, J.] CAMPBELL *v.* DOHERTY. [Oct. 12.

Venue—Change of—Cause of action—Convenience—Expense—Right of plaintiff.

The injury on account of which the plaintiff sued was received by him in the defendant's building in the county of Huron, but the plaintiff afterwards went to live in the county of Wentworth, and named Hamilton as the place of trial.

Held, that the defendant's application to change the venue to Goderich could not be granted, the difference in expense not being more than $40, and the number of witnesses in Huron county not exceeding the number in Wentworth by more than four.

Leave to appeal was refused by the Court of Appeal on the 16th November, 1898, the opinion being expressed that it was well settled practice that the plaintiff had the right to name the place of trial, and his choice would not be interfered with except on substantial grounds.

J. Dickson, for plaintiff. *J. H. Moss*, for defendants.

Street, J.] SELL *v.* SMITH. [Oct. 15.

Action to set aside mortgage—Registration of lis pendens—Injunction to restrain parting with mortgage—Necessity for—Costs.

The commencement of an action to set aside a mortgage as having been given without consideration and to defraud creditors, and the registration of a lis pendens is notice of the plaintiff's claim, so as to affect persons subse-

quently dealing with the mortgage; and an injunction to restrain the mortgagees from parting with the mortgage, or assigning their interest therein, is unnecessary. An interim injunction obtained in such a case was dissolved with costs.

Masten, for plaintiff. *Elliot*, for defendants.

Meredith, C.J., Rose, J., MacMahon, J.] [Oct. 31.

INCORPORATED SYNOD OF TORONTO *v.* FISKEN.

Landlord and tenant—Action for rent and possession—Parties—Judgment for possession against tenant binds sub-tenant.

In an action by a landlord for overdue rent and possession of the premises under a clause for re-entry contained in the lease, it is not necessary to make sub-tenants parties defendant, and a judgment may be given against the tenant for possession under which the sub-tenant must go out. Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., for plaintiffs.

MacMahon, J.] SHERWOOD *v.* BALCH. [Nov. 10.

Arbitration and award—Motion to stay proceedings—R.S.O. c. 62.

Motion for an order staying proceedings in an action under section 6 of Arbitration Act, R.S.O., c. 62. The action was to recover a balance claimed to be due under a contract for construction of a railway. The contract contained a clause that in case of any disputes or differences as to the meaning of the agreement, price to be paid, etc., such dispute should be referred to the engineer, whose decision should be final, and to whose arbitration the parties to the contract agreed to submit any such dispute. It appeared that a question in dispute had arisen as to whether, in the event of earthwork being measured in embankment instead of excavation, an increase of a certain percentage according to the soil, over and above the embankment figures, should be allowed. The plaintiffs contended that there was a well known custom or usage of this country to this effect established in connection with railroad contracts, while the defendants refused to recognize any such usage. There was evidence that the engineer had publicly and privately expressed himself that no such usage existed. This the engineer did not deny, but stated that he was not satisfied that there was any such usage, but that he did not mean that he would not give the plaintiff's contention fair and impartial consideration should the matter come before him as arbitrator.

Held, that on this state of facts, the proceedings in the action should be stayed. *Jackson* v. *Barry Railway Company* (1892) 1 Ch. 138 238, specially referred to.

Saunders, for motion. *Code*, contra.

Boyd, C., Ferguson, J., Meredith, J.] IN RE EASTMAN. [Nov. 17.

Appeal to Divisional Court from Surrogate Court—Notice—Affidavit—Security.

A motion by the executors of the will of Chester M. Eastman to quash an appeal by certain of the beneficiaries under the will, from an order made on

13th July, 1898, by the Judge of the Surrogate Court of the county of Lambton, fixing at $600 the compensation of the executors for their care, pains, and trouble in and about the estate.

J. H. Moss, for the motion, contended that, as no notice of appeal was served until September, no affidavit filed by the appellants showing the amount involved in the appeal, and no security given for costs, as required by the Surrogate Court rules, the appeal was not properly lodged.

S. Alfred Jones, for the appellants, contended that long vacation was not to be reckoned in the time for appealing, and that the affidavit and security were unnecessary under the present practice.

The Court made an order quashing the appeal, but without costs, owing to the confusion and uncertainty of the practice.

Per BOYD, C.: The notice was insufficient.

Per FERGUSON and MEREDITH, JJ.: The security seems to be necessary. The Surrogate Courts Act and Rules govern the matter.

Rose, J.] REGINA *v.* TORONTO R. W. CO. [Nov. 17.

Municipal corporation—Offences against by-laws—Summons against company—Service—R.S.O. c. 223 s. 705—Criminal Code, 1892, ss. 562, 853, 858.

Motion for prohibition.

Held, that the provisions of section 705, of the Municipal Act, R.S.O. 1887, c. 223, as to summary prosecutions before a Justice of the Peace for offences against by-laws apply to companies as well as to individuals; as do also ss. 562, 853 and 858 of the Criminal Code, as to service of summons, and what is to follow after such service, although some of the provisions of the latter are applicable to persons only, and others to persons and corporations.

Bicknell, for motion. *Fullerton*, Q.C., contra.

Armour, C.J.] [Nov. 17.

IN RE MCLELLAN AND TOWNSHIP OF CHINGUACOUSY.

Municipal corporations—Arbitration—Appeal—Time—Filing—Notice.

An award of compensation to a landowner for lands injuriously affected by reason of work done by a municipal corporation, is an award which does not require adoption by the council, but is subject to an appeal to the High Court, as provided by R.S.O. c. 223, s. 405; and the practice as to the appeal is governed by R.S.O. c. 62, ss. 31, 34, 47.

Where it is not shown that such an award has been filed, or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail.

Blain for the landowner. *McKechnie* for the municipality.

Armour, C.J., Street, J.] WALKER *v.* GURNEY-TILDEN CO. [Nov. 25.

Solicitor—Lien—Settlement of action—Notice—Collusion—Fruits of litigation—Ascertainment of amount due solicitor—Collateral proceeding.

After judgment had been recovered by the plaintiff against the defendants for $550 damages and for costs, and while an appeal was pending, the

plaintiff and defendants, without the knowledge of the plaintiff's solicitors, made an agreement for settlement of the action upon the plaintiff being taken into the defendants' employment and paid $150 in full of damages and costs. The plaintiff's solicitors asserted a lien for their costs, which were unpaid, and gave notice thereof to the defendants before any money was actually paid over to the plaintiff.

Held, that the compromise made was not a collusive one, and the solicitors were therefore not entitled to an order upon the defendants for the payment of their costs; but, such costs amounting to more than $150, that they were entitled to have that sum, for which the action was compromised, and which was to be treated as the fruits of the litigation, paid over to them in respect of their lien.

Held, also, that a question arising between the plaintiff and his solicitors, as to whether they were entitled to taxed costs as between solicitor and client, or to a percentage upon the amount recovered, could not be determined upon the motion to enforce payment by the defendants of the plaintiff's solicitor's costs, but had to be determined in another proceeding before the determination of such motion.

Shepley, Q.C., and *J. H. Denton*, for defendants. *Washington*, for plaintiff's solicitors.

ASSESSMENT CASES.

IN RE THE APPEAL OF THE C.P.R. TELEGRAPH CO.

Assessment—Switchboard and telegraph instruments—Constructive annexation to freehold—Fixtures.

Held, that the switchboard and telegraph instruments, with their attachments, connected with the appellants' poles and wires, and being in use in the business of a telegraph company, are assessable as realty.

[TORONTO, November 17—MCDOUGALL, Co.J.

This was an appeal from the assessment of the switchboard and telegraph instruments and attachments of the C.P.R. Telegraph Co. at their head office in the City of Toronto.

It appeared that the wires of the company were conducted from their poles into the building used by them as their office. These different wires were connected with a switchboard, that is, the different wires from different parts of the outlying country were all conducted to a common centre and connected to an article known as a switchboard, by being attached to certain small metal posts or other device on this switchboard. The board itself was fastened in a wooden frame, which frame was screwed or fastened to the walls or floor of the office. The telegraph instruments, which were claimed as forming part of the realty of the appellants (i.e., the poles and wires), were located on tables, and were only used when connected with these poles or wires by another flexible wire, or pair of wires, the connection being made at the switchboard. One instrument could be connected with any line desired by moving and inserting in the proper receptable, or the attaching point of the switchboard, the flexible wires attached to the instrument itself.

The city assessed the switchboard, instruments and attachments as realty, and the Court of Revision having confirmed the assessment, the company appealed to the County Judge.

MacMurchy, for appellants. *Fullerton*, Q.C., and *H. L. Drayton*, for city.

MCDOUGALL, CO. J.: There is much difficulty in defining with accuracy what is real, and what is personal property under the complex civilization of to-day. Many articles which would appear to come within the expression chattels or personal property are by their use or constructive annexation to real property changed in their character, and become and are treated, so far as all legal incidents are concerned, as real property.

The most familiar illustration of this effect of constructive annexation is seen in chattels attached or used with a building or house. Shutters, windows and doors hung upon hinges, keys of the locks, these are all deemed realty once they have been attached to freehold, and their temporary severance, after having been so used, does not restore to them their character as chattels. It is not the being fastened or fixed to the freehold that is the leading principle in many such cases, but it is rather that they become part of the real estate, and pass with it because it is not the mere fastening or fixing that is required, but the use, nature or intention.

So in an American case a chain used as a driving power in a mill, removable at pleasure, was held to be realty: *Farrar* v. *Stackpole*, 6 Maine, 154, and in our own courts tools ordinarily in use for the working of engines and machines (which had been held by the court to be fixtures) were also held to be fixtures passing with the title to the freehold, ROBINSON, C.J., remarking, "These must partake of the character of fixtures to the working of, or with which they were necessary": *Gooderham* v. *Denholm*, 18 U.C.R. 213.

For a clear definition of what constitutes constructive annexation I cannot do better than cite Ewell on Fixtures, page 34. "In order to constitute a constructive annexation to realty, the article in question, though not physically connected therewith, must not only be appropriated or adapted, and necessary to the fit and beneficial use of the principal thing, the realty, and not to a matter of a mere personal nature, but must also be such as goes to complete the building, machinery, etc., constituting the principal thing which is affixed to the land, and must be such as, if removed, would leave the principal thing incomplete and unfit for use, and would not itself alone be equally useful and adapted for general use elsewhere. In respect to all cases of constructive annexation, there exists both adaptation to the enjoyment of the land and localization in use, as obvious elements of distinction from mere chattels personal."

In the case before us, the poles and wires—the real property of the appellants—are silent and valueless as a telegraph line until the electric current conveying the message is transmitted to and interpreted by these telegraph instruments. The instruments themselves have no use or particular value detached from the connection with the telegraph wires, for they, too, become silent and of no commercial value, but, when united with the wires, they form, with the poles and wires, one indivisible whole, a practicable working telegraph line. The wires and poles by themselves are like the boiler of the steam engine

without the engine—the telegraph instrument like the engine without the boiler. United only do they perform any practical purpose. This being the admitted physical and mechanical relation they bear to each other, I think, that in the office of a telegraph company a sufficient number of instruments to effectively receive and dispatch the messages received and sent, form part of the realty of the company in the sense that such instruments are a necessary and essential part of the poles and wires themselves, neither being capable of use without the other. The same remarks apply to the switchboard. This is valueless by itself and is only useful when connected with the various lines of wire. Its construction enables a number of lines to be brought together and centred in a small space, and thus these lines from all points of the compass are rendered available for speedy and effective use by the operators employed at the various instruments.

The price and value of the instruments in use in the office of the appellants, which are the subject matter of this appeal, have been agreed upon between the parties, so that there is, therefore, no difficulty in adjusting the amount to be inserted in the assessment roll. I hold that both the switchboard and the instrument actually installed for daily use are liable to assessment as realty.

IN RE APPEALS OF TORONTO ELECTRIC LIGHT COMPANY AND CANADIAN PACIFIC R. R. COMPANY.

Assessment—Costs—R.S.O. c. 224, ss. 79, 80, 84 (1), (5), (6).

Held, that on an appeal from a Court of Revision to a Board of three county judges the only costs that can be ordered to be paid to a successful appellant are witness fess on Division Court scale, and the per diem allowance to the two outside judges.

[TORONTO, Nov. 17—MCDOUGALL, DARTNELL, MCGIBBON, Co. JJ.

The above companies were appellants from the decision of the Court of Revision confirming the assessment on certain properties in the City of Toronto. Having succeeded on their appeal before the Board of three county judges, provided for by s. 84 (1) of the Assessment Act, R.S.O., c. 224, the appellants applied for their costs, claiming the witness fees allowed by s. 80, as also the return of all the money deposited under s. 84 (5), for providing the expenses of the two judges from the outside counties.

H. O'Brien, for Toronto Electric Light Company, and *MacMurchy*, for Canadian Pacific R. R. Company. The only mode of enforcing an appeal to the Court of Appeal, from a decision of the Court of Revision, is by proceeding under s. 84 (1) before a Board of three judges. The words "and the sum so paid," in s. 84 (1), include both the travelling expenses payable to the judge, as well as the per diem allowance. The word "sum" refers to the aggregate of the disbursements mentioned in the previous part of the section; and, by the interpretation Act the word "sum" may be read in the plural, and that would be the reasonable reading, in view of the previous part of the section.

Fullerton, Q.C., and *H. L. Drayton*, contra. The words "and the sum so paid" are limited to the per diem allowance, and the travelling expenses are dealt with by the statute and directed to be paid out of the sum deposited by the appellants.

McDOUGALL, Co.J.: The only costs that can be given under the statute are witness fees on the Division Court scale, and the per diem allowance to the two judges from outside counties. The travelling expenses are expressly directed by the section of the statute to be paid by the clerk of the municipality out of the deposit made with him by the complaining ratepayer, the appellants, and the balance of such deposit ordered to be returned to them. The Court has no discretion to order these expenses to be paid otherwise. The order for costs will be made in that way.

DARTNELL, Co.J., and McGIBBON, Co.J., concurred.

Province of Nova Scotia.

SUPREME COURT.

Graham, J.] HART *v.* GIFFIN. [Nov. 1.

Statute of Limitations—Executor—Part payment.

This was an action brought on the 10th day of January, 1898, on a judgment recovered on November 24, 1876. The defence was the Statute of Limitations. An execution was issued Dec. 17th, 1877, returnable within sixty days, and the sheriff sold the defendant's lands under the execution, and credited the proceeds on the execution. The plaintiff contended that this was part payment under the statute.

Held, that there was part payment within the meaning of the statute, following the reasoning in the case of *Chinnery* v. *Evans*, 11 H.L. Cas. 115, where enforced payment was held to be equivalent to voluntary payment for the purposes of the Statute of Limitations.

J. A. Fulton, for plaintiff. *Macgillivray*, Q.C., for defendant.

Province of New Brunswick.

SUPREME COURT.

Full Bench.] CUSLING *v.* KELLY. [Nov. 4.

Woodmen's Lien Act—Logs detained in transit—Order for sale.

Logs detained on a stream for want of sufficient water for driving are in transit within the meaning of s. 12 of the Woodmen's Lien Act, 1894, and an order of sale made by a County Court Judge under s. 18 of the Act, while the logs are so detained is invalid.

L. A. Currey, Q.C., for appellant. *A. R. Slipp* and *C. E. Duffy*, for respondent.

Full Bench.] WATEROUS ENGINE WORKS CO. *v.* POIRIER. [Nov. 11.

Trover—Plea of purchase under an equity decree to which plaintiff was not a party.

In an action of trover defendant pleaded that by a decree of the Supreme Court in Equity it was adjudged that he had a lien on the property involved,

and that the said property should be sold for the purpose of satisfying the said lien, and that the defendant, having been granted liberty by the said decree to bid at the said sale, purchased the property as the highest bidder, and thereby became the lawful owner thereof.

Held, on demurrer, that the plea was bad in that it did not allege that the plaintiff was a party to the suit wherein the decree was made.

M. G. Teed, for plaintiff. *Geo. G. Gilbert*, Q.C., for defendant.

Full Bench.] EX PARTE SAGE. [Nov. 11.

Assessment—Certiorari—Bond under Con. Stat., c. 100, s. 110.

The applicant was assessed on the property of a fishing club in Restigouche County, on which he had paid the assessments for several years previously. He was a non-resident and obtained a rule nisi for a certiorari to bring up the last year's assessment, but did not enter into a bond as required by above act.

Held, on motion to make absolute the rule nisi, that a bond was not necessary where the assessment was absolutely void.

McLatchey and *Stockton*, Q.C., in support of rule. *W. A. Mott*, contra.

Full Bench.] EX PARTE SMITH. [Nov. 11.

Absent debtor—Sufficiency of affidavits as to absence—Meaning of "indebted" in Con. Stat., c. 44, s. 3.

A County Judge issued a warrant against the property of S. as an absent debtor under Con. Stat., c. 44, s. 3, on the application of C., who produced his own affidavit, in which the absence of S. from the province was clearly deposed to, and the affidavit of his attorney, in which the latter set forth that he had been informed by S.'s wife that S. had left home, and that she had been communicating with him in the United States by letter. An application was made for a supersedeas under sec. 10, which the judge after hearing refused. The debt, on which the proceedings were founded, although contracted before the debtor left the province, and more than six months before the application for the warrant, had not been due six months prior to the application.

Held, on motion to make absolute an order nisi for certiorari to bring up the warrant, MCLEOD and LANDRY, JJ., dissenting, that the Court, although not deeming the affidavit verifying the debtor's absence satisfactory, would not treat it as insufficient, the County Judge having accepted and acted upon it.

Held also, that it was sufficient that the debt was contracted more than six months prior to the application, though not due for that period.

Order nisi discharged.

W. B. Chandler, in support of order nisi. *A. R. Slipp*, contra.

Barker, J.] KING *v.* KEITH. [Nov. 15.

Mortgage—Interest—Rate.

The proviso for the defeasance of a mortgage was as follows: "The full sum of $225 in four years from the day of the date hereof with lawful interest on the same, at the rate of nine per centum per annum, payable annually on

the 18th day of June in each year, the first payment of interest to be made on the 18th day of June, A.D., 1886; the same rate of interest to be paid and chargeable from and after the expiration of the said four years, and until the whole sum is well and truly paid; overdue interest to bear interest at the said rate of nine per centum per annum."

Held, that the principal money bore nine per cent. interest after as well as before maturity, and that overdue interest bore the same rate whether accruing due before or after the maturity of the principal.

Stockton, Q.C., for plaintiff. *W. B. Chandler*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Killam, J.] FOULDS *v.* FOULDS. [Nov. 10.

Practice—Queen's Bench Act, 1895, s. 31—Registering certificate of decree for alimony—Retrospective legislation.

This was an appeal from the referee dismissing a motion to set aside the registration, since the coming into force of the Queen's Bench Act, 1895, of a decree for alimony obtained in 1889.

Held, that section 31 of the Act authorizes the registration of such a certificate, and applies to decree, orders, or judgments previously obtained. Such cases as *Wright* v. *Hale*, 6 H. & N. 227; *Boodle* v. *Davis*, 8 Ex. 351; and *Weldon* v. *Winslow*, 13 Q.B.D. 784, show that legislation relating to procedure only, or improving the remedy, is prima facie applicable to prior existing proceedings or rights.

Pratt v. *Bull*, 32 L.J. Ch. 144; *Queen* v. *Taylor*, 1. S.C.R. 65; and *Hughes* v. *Lundy*, 24 L.J. Q.B. 29, distinguished. Appeal dismissed with costs.

Mathers, for plaintiff. *Mulock*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] MCNERHANIE *v.* ARCHIBALD. [Nov. 10.

Mineral claim—Right of partner who has allowed his license to expire, to share in proceeds of sale of—Mineral Act of 1896, ss. 9, 34, 50, 80-92.

Action for a declaration of partnership in a mineral claim and for an order that plaintiff was entitled to share in the proceeds of the sale thereof by his co-owners.

In 1895, the plaintiff and defendant and one Murchie, went out prospecting together and it was agreed that the three should stake out some mineral claims for themselves, and the plaintiff proposed that they should be interested in

everything that they staked to which the defendant and Murchie agreed. The three then staked a number of claims, some for themselves in their several names. These they sold, and no dispute arose concerning those so staked; but in addition to those claims they located a number of claims for other persons—outsiders—in particular the defendant Archibald (June 21st, 1896), staked a claim known as the Dorothy Morton. He said it was staked on the understanding that he was to have one-half non-assessable interest for staking it, and that the other half was to belong to Chick and Moody, by whom the fees were to be paid. On the other hand, the plaintiff, McNerhanie, claimed that he, under the original agreement, was entitled to a one-third in the half coming to Archibald, and it was in consequence of this dispute that this action was commenced on October 8th, 1897.

The action was tried at Vancouver before IRVING, J. and a common jury, who found that the conversation relied upon by plaintiff as establishing a partnership actually took place, and that the partnership agreement then arrived at applied to the Dorothy Morton. On April 10, 1897, Chick, in whose name the Dorothy Morton was recorded, conveyed to Archibald a one-half interest in the claim, and by a document dated July 19, 1897, Chick, Moody and Archibald entered into an agreement with Messrs. Lang & Ryan for the sale to them of the Dorothy Morton for the sum of $20,000, payable as follows: $1,000 on the deposit in escrow of the crown grant, and a conveyance of the mineral claim; this was paid on January 7, 1898; $8,000 on January 19, 1898; $8,000 on April 19, and the balance on June 19, 1898. This agreement was recorded on July 25, 1897. McNerhanie, who was a free miner at the time the original agreement was formed, and at the time the Dorothy Morton was staked, permitted a certificate to expire in July, 1897, and did not take out a free miner's license until about August 7, 1898.

The defendant in his defence denied any partnership agreement, and set up as a defence that the plaintiff had on July 25, 1897, permitted his certificate to expire, and that under s. 9 of the Mineral Act he forfeited any right which he might have had to claim. The trial judge dismissed the action, holding that by s. 9, on the expiration of the plaintiff's certificate, his interest in the mineral claim vested in the co-owners, and with it his share of the purchase money. On appeal to the full court,

Held, that if a partner in a mineral claim makes an agreement for sale thereof with a third party, another partner does not forfeit his share in the proceeds of such sale, merely because his free miner's certificate was allowed lapse after the making of the agreement.

Martin, Attorney-General for appellant. *Davis*, Q.C., for respondent.

Martin, J.] [Nov. 17.

DROSDOWITZ *v.* MANCHESTER FIRE ASSURANCE COMPANY.

Practice—Judgment debtor—Examination of, where judgment for costs only—R.S.B.C. c. 10, s. 19 and Rule 486.

This was a summons by defendants for an order for the examination of the plaintiff as a judgment debtor for costs only under the above Act or alternatively under Rule 486.

Held, that though the examination could not be held under said sec. 19, as decided in *Griffiths* v. *Canonica*, 5 B.C. 49, yet that under the rule a person against whom a judgment has been recovered for costs only can be examined as a judgment debtor.

Morphy, for application. *Anderson* (McPhillips, Wootton & Barnard), contra.

McColl, C.J.] MCLELLAN *v.* HARRIS. [Nov. 18.

Practice—Affidavit—Sworn before solicitor's agent resident outside Province—Rule 417.

Summons by defendants to set aside an order for service of a writ out of the jurisdiction. It appeared that several affidavits sought to be used in support of the summons were sworn before a notary public of Manitoba, who was the agent or correspondent of the solicitor for the defendants, but was not a solicitor of this Court.

Held, that an affidavit sworn before a notary public in Manitoba who had been acting as agent for the defendant's solicitor, is insufficient under Rule 417, which applies to agents or correspondents without as well as within the Province.

Gilmour, for summons. *Hagel*, Q.C., contra.

Book Reviews.

The Hudson's Bay Company's Land Tenures, by ARCHER MARTIN, barrister-at-law, 1898: London, William Clowes & Sons, limited.

Mr. Martin, now one of the judges of the Supreme Court of British Columbia, has produced a work which will be of lasting historic as well as legal interest as regards the Province of Manitoba and the district of Assiniboia. Its first chapter is upon the subject matter of a paper read by the author before the Historical and Scientific Society of Manitoba in 1892, and which was reprinted in the Western Law Times. The remaining five chapters and the appendices are the result of investigations pursued by the author in regard to the foundations of titles derived from Lord Selkirk and the Hudson's Bay Company in the "Red River Settlement," which has since developed into the important Province and district before mentioned. The company's grant to Lord Selkirk in 1811 comprised 116,000 square miles of territory, and in 1836 the district was repurchased from him by the company, and grants and leases were thereafter made by it until the acquisition of same by the Canadian Government in 1869, which, however, was expressly subject to the confirmation of all titles theretofore granted by the company, thus indicating the importance, in some instances, of investigating titles prior to the crown grant. The work gives evidence of the most careful research, and the subject is handled by the learned author in a way both erudite and entertaining. Lists of grantees under the Earl of Selkirk and the Hudson's Bay Company appear in the appendices as well as a complete copy of the latter company's charter.

Analytical Index

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