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THE JUBILEE, 1837-1897.

We join the many millioned voice that encircles the earth with the glad acclaim "GOD SAVE THE QUEEN."

Among the many achievements of the illustrious reign now drawing to a close none are more remarkable, and none have been attended with more benefit to the British people, than those reforms in legal and judicial procedure which have been steadily going on for many years past. Though based upon the most enduring foundations of justice and equity, the methods of conducting suits had by degrees become needlessly complex, and, in consequence, oppressively costly. The complete severance between courts of law and equity; the growth, in a ruder age, of the conflict between the civil and ecclesiastical elements, each struggling in its own way, and according to its own lights, to overcome the barbarism of the feudal system, was one of the chief causes of the complicated systems of pleading which exercised the ingenuity and swelled the incomes of the legal profession, while it wearied the patience and depleted the pockets of the public.

The present simplicity of pleadings, the brevity of proceedings, and summary processes of the courts, the fusion of the hitherto distinct branches of law and equity, the codification of the criminal law, and the consolidation of the statute law, are the result of patient and cautious, while steadily progressive effort, as creditable to the good sense as to the unselfishness of those members of the profession who have taken the lead in the path of law reform. In the manner characteristic of our race, we have gone on, step by step, cautiously feeling our way, looking to reform, and not to revolution, as the true method of accomplishing the end in view.

Old principles have been freshly applied—not cast aside. Old methods have been altered and fitted to present uses—not thrown away with the contempt often shown by zealous innovators who regard everything old as consequently useless. Changes in the constitution of the courts found by experience to be necessary or desirable have kept pace with the changes in their methods of procedure, but no violence has been done to the authority or dignity of the Bench, nor, as yet, has the most ardent reformer ventured to assail the many forms and ceremonies which, valueless perhaps in themselves, are connecting links between the Past and the Present, and evidences of the stability as well as antiquity of our institutions.

Nor has the criminal law, nor methods of procedure in criminal cases, been neglected. Greater leniency in punishment where safely permissible, has been adopted. The interests of the accused are more carefully guarded. The rules of evidence have been modified in his favor. Everything that can be thought of has been done in the direction of mercy that is compatible with the greater aim of attaining the ends of justice. In our treatment of the criminal after condemnation we have sought to reform as well as to punish, and in this direction, at any rate, we have approached the limit that the safety of the community at large will allow.

To the credit of the legal profession be it said that in all these beneficial, and, to them, self-denying labors, they have been foremost. The honor of the profession rather than its emoluments, its usefulness rather than its profits, its reputation for probity and integrity rather than its dignity, have always been kept in view. And, as its reward, the reputation of its members in all these respects has never stood higher than in this year of grace 1897.

To the Bar and to the Bench in all portions of the Empire, whether sitting in the great palace of justice at the seat of Imperial dignity, or settling an account of a few dollars in a small debts court in the backwoods of Ontario—whether deciding great questions of national interest in the Supreme Court at Ottawa, or in appeal therefrom by the Lords of the Privy Council in the highest court of the realm—whether

dealing with the strange and complex elements of Indian social life, or the simpler disputes of the most barbarous of our subject races, the British Judge is the embodiment not only of British law and of British justice, but of the highest standard, not only of law and justice, but also of Christian truth and Christian honor, which the world of the present day can produce. Fittingly, then, can the Bench and the Bar throughout all Her Majesty's wide domains join with their fellow-subjects of all races and nationalities, of all creeds and all professions, in celebrating the close of the Jubilee period as one in which they too have worthily borne their part, and the honors of which they are entitled to share.

THE ROYAL SUPREMACY.

In the introduction by the Hon. G. W. Ross to a book recently published, "Victoria Sixty Years a Queen," it is said "The spirit of ecclesiasticism which made the king the head of the Church, as well as of the State, had much to do with the abuse of that power which the Stuarts considered the divine right of kings, and which they exercised with an insolent disregard of the feelings of their subjects."

This statement appears to us to be quite misleading. "The spirit of ecclesiasticism" is surely not answerable for the doctrine of the Royal Supremacy, but rather the spirit of statecraft. The principle of the Royal Supremacy had its origin, not in the ecclesiastical brain, but rather in the brains of the statesmen of the Tudor era. It was the result of the clear apprehension of the danger to the State which must inevitably follow from the existence of an empire within an empire, an *imperium in imperio*. It is a danger with which we in Canada are to-day threatened. The doctrine or principle of the Royal Supremacy has been and is very greatly misunderstood. Properly understood it simply means not that the sovereign personally is endued with any spiritual powers and prerogatives over the Church, any more than that as head of the State she is endued with any personal autocratic power over the affairs of the State. It merely means that in matters

ecclesiastical, as in matters civil, she acting in the one case through her ecclesiastical, and in the other through her civil courts, is the supreme judge from whom there is no appeal to any tribunal outside her dominions.

Some people ignorantly assume that the doctrine or principle of the Royal Supremacy is confined to the Church of England, but in truth and in fact it applies to all classes and creeds of Her Majesty's subjects. It is not a personal but a constitutional attribute of the sovereign. She can no more alter or regulate, or in any degree affect or promulgate any doctrine of Christian faith or practice, even in the Church of England, than she can go into a court of law and assume to give judgment in any civil action, notwithstanding all judgments given therein are given solely by the authority proceeding from her. It is needless to remind the reader that James II., though a professed, and Charles II., though a concealed Romanist, were, notwithstanding the doctrine of the Royal Supremacy, absolutely and entirely powerless to impose their individual religious opinions on their subjects.

The principle or doctrine of the Royal Supremacy applies to all Her Majesty's dominions and to all classes of Her Majesty's subjects, entirely irrespective of the particular creed they profess. In aid of this doctrine or principle the State in England exercises a superintending voice in the choice of bishops of the Church of England. This controlling voice over the selection of bishops was certainly claimed by the British Crown on the conquest of Quebec, and we believe we are right in saying that for some time thereafter no Roman Catholic bishops were appointed in Quebec without the concurrence of the British Crown. With the march of time different ideas have come to prevail in regard to the supposed necessity of the Crown superintending the choice of bishops. It seems to have gradually come to pass that the exigencies of the State no longer, at all events as far as Canada is concerned, require that this supervision should be exercised in the appointment either of Anglican or Roman bishops, and it has to all intents and purposes been abandoned; but though this outwork of the Royal Supremacy has been abandoned, it

must not be assumed that the principle itself has no longer any force. For we must remember that it is by virtue of this principle that no coercive jurisdiction, civil or ecclesiastical, of any kind, can be exerted in any parts of Her Majesty's dominions, save under the authority of her duly established Courts.

As regards questions of doctrine, no doubt in the reign of Henry VIII. the right to control and regulate the credenda of the Church was claimed by that arbitrary monarch, imbued as he undoubtedly was with Papal ideas, and he really sought to transfer that personal ecclesiastical sovereignty which was claimed by the Roman bishops, to himself personally, so far as the Church within his dominions was concerned; but any such pretensions were laid aside by all succeeding sovereigns and have never since been asserted.

From what has been said we think it must be apparent that the principle of the Royal Supremacy is one arising from the exigencies of the State, and is in no sense whatever due to a spirit of ecclesiasticism. The spirit of ecclesiasticism is most apparent among Roman Catholics, and owing to the fact that their recognized spiritual head is a foreigner, and not a fellow-subject, it is from them that the most danger to the State is to be apprehended.

They have, in common with all Her Majesty's subjects in this Dominion, the most ample religious freedom, and it is to be hoped that that liberty may not be abused to the detriment of the State. So far it would seem that the laity of that Church, at all events, do not seek to set themselves in antagonism to the rest of the people; they are content to rely on the justice and fairness of their fellow-subjects, and it would be greatly to be deplored if any external power, spiritual or otherwise, should seek to create feelings of animosity between them and the rest of the people of the Dominion.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

LOAN—REDEMPTION OF LOAN BEFORE DUE—CONSENT OF LENDER TO PREMATURE REPAYMENT OF LOAN—MUNICIPAL CORPORATION—STATUTORY POWER TO REDEEM LOANS BEFORE DUE.

West Derby Union v. *Metropolitan Life Assurance Society*, (1897) 1 Ch. 335, was a case in which a municipal corporation claimed the right to pay off a loan before it was due, by virtue of certain statutory powers in that behalf. The statute in question expressly authorized the corporation to borrow money at a lower rate in order to pay off outstanding loans, but it contained a proviso that as to loans outstanding at the passing of the Act no such redemption should take place without the consent of the lender. The loan which the corporation claimed to redeem in the present case was contracted after the passing of the Act, and the simple question was whether the consent of the lender was necessary to its redemption before it was due. North, J., thought that the proviso in the Act, not extending to the loan in question, the corporation had the right to redeem without the lender's consent; the majority of the Court of Appeal (Lindley and Rigby, L.JJ.) were of opinion that inasmuch as the Act did not expressly empower the corporation to pay off loans which had not matured without the consent of the lenders, such a power could not be inferred, and therefore that it had no such right, and the decision of North, J., was therefore reversed. Smith, L.J., however, dissented, and was of opinion that the Act in question was obviously in aid of the ratepayers, and its purpose would be defeated, if the powers conferred were dependent on the consent of the lenders.

MINING LEASE—POWER TO DISTRAIN ON ADJOINING LANDS—BILLS OF SALE ACT, 1878 (41 & 42 VICT., C. 31)—COMPANY—WINDING-UP—RESTRAINING DISTRESS—DEBENTURE-HOLDERS—FLOATING SECURITY—RECEIVER.

In re Roundwood Colliery Co., (1897) 1 Ch. 373, a company were lessees from separate lessors, at certain rents, of two adjoining coal mines, A and B. In each of the leases the lessor reserved power to distrain for rent in arrear not only upon

chattels belonging to the lessees on the demised property, but also on chattels belonging to the lessees on "any adjoining or neighbouring collieries." The property of the company was charged as security for certain debentures issued by the company, and before any effective proceedings had been taken to enforce the security, and while it was still "a floating security," the lessors of mine B levied a distress on chattels of the lessees in mine A, and the next day the company went into voluntary liquidation and a receiver was appointed at the instance of the debenture-holders. A motion was then made to Stirling, J., to restrain the distress under the Companies Act, 1862, ss. 85 & 87, (see R.S.C. c. 129, ss. 16, 17) and also on the ground of the non-registration of the lease under the Bills of Sale Act, and that learned Judge, while holding that a distress properly levied by a landlord before the winding-up had been commenced could not be restrained, nevertheless restrained it on the ground that the lease came within the Bills of Sale Act and was void for non-registration, but the Court of Appeal (Lindley, Smith and Rigby, L.JJ.) were unable to adopt the latter view and held that the lease was not affected by the Bills of Sale Act, and the decision of Stirling, J., was therefore reversed.

COMPANY—WINDING-UP—"JUST AND EQUITABLE"—FRAUD—SUBSTRATUM OF COMPANY GONE—COMPANIES ACT, 1862 (25 & 26 VICT., C. 86) S. 99, SUB-SEC. 5—(52 VICT. C. 32, S. 4, D.)

In re Brinsmead & Sons, (1897) 1 Ch. 406, the Court of Appeal (Lindley, Smith and Rigby, L.JJ.) have unanimously affirmed the decision of Williams, J., (1897) 1 Ch. 45 (noted ante p. 228), and on the same grounds; the Court of Appeal was also of opinion that the company had been organized for the purpose of carrying out a fraud, and that the appeal was not being really bona fide prosecuted by the company or any of its shareholders, but in the interest of another company which were the real promoters of the company sought to be wound up, and into his hands the purchase money of the business had got, and who were resisting the winding-up for fear of being compelled in the winding-up proceedings to disgorge moneys which they had dishonestly acquired.

REPORTS AND NOTES OF CASES

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] [Nov. 10, 1896.

MONTGOMERY *v.* CORBIT.

Bankruptcy and insolvency—Assignments and preferences—Fraudulent preference—Previous agreement.

One of the defendants, when threatened with an action on behalf of the plaintiff to recover damages for slander, conveyed his farm to his co-defendant, his son, the alleged consideration being the son's agreement, entered into some years before, to maintain the grantor and his wife for life. The plaintiff brought the threatened action and obtained judgment for damages and costs, and then attacked the deed, and in that action it was proved that such an agreement had in good faith been made.

Held, that the previous agreement, although not proved with sufficient clearness to have enabled either party to it to enforce specific performance, was an answer to the charge of fraud.

Judgment of a Divisional Court (ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.) reversed.

Aylesworth, Q.C., and *W. L. Walsh*, for the appellants.

Myers, Q.C., for the respondent.

From ARMOUR, C.J.] [May 5.

LAUGHLIN *v.* HARVEY.

Evidence—Negligence—Damages—Exposure of body to jury—New trial—Jury—Misconduct of juror.

In an action to recover damages for alleged malpractice, the plaintiff is not entitled to show to the jury the part of the body in question for the purpose of enabling them to judge as to its condition.

Sornberger v. Canadian Pacific R. W. Co., 24 A.R., approved and distinguished.

Judgment of ARMOUR, C.J., reversed.

Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial.

Osler, Q.C. and *W. M. Douglas*, for the appellant.

H. Lennox, for the respondent.

From FALCONBRIDGE, J.] [May 5.

BICKNELL *v.* PETERSON.

Patent of invention—New application of old mechanical device.

The application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study.

The application to an oil pump of the principle of "rolling contact" was held patentable.

Judgment of FALCONBRIDGE, J., reversed.

Aylesworth, Q.C., and *A. E. Shaunessy*, for the appellant.

J. G. Ridout, for the respondent.

From ARMOUR, C.J.] [May 11.

LEWIS *v.* MOORE.

Settlement—Mortgage—Exoneration—Will—Construction—Direction to sell—Discretion as to time—Legacy—Discretion as to time of payment.

Certain land subject with other lands to an over due mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death.

Held, that the mortgage should be paid out of the settlor's general estate.

A testator devised all his estate, real and personal, to trustees upon trust so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money on first-class mortgage securities, and to invest the proceeds, and to apply the corpus and income in a specified manner. In a later part of the will there was the following provision: "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they may deem best.

Held, that the later clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient.

The testator gave certain shares of his estate to two sons, the provision for payment being as follows: "To each of my sons as they arrive at the age of twenty-three years, or so soon thereafter as my said trustees shall deem it prudent or advisable so to do, they shall pay over one moiety of his share of the corpus of said estate and the accumulated income on said moiety, if any, and the remaining moiety upon his attaining the age of twenty-seven years, or so soon thereafter as they shall deem it advisable so to do."

Held, that this direction did not give the trustees an absolute discretion as to the time of payment, but that the general rule, that every person of full age to whom a legacy is given is entitled to payment the moment it becomes vested, applied.

Judgment of ARMOUR, C.J., affirmed.

McCarthy, Q.C., and *W. M. Douglas*, for the appellants.

Moss, Q.C., and *H. J. Wright*, for the respondents.

Shepley, Q.C., for the respondent, the trustees.

W. B. Raymond, for the respondent, the infant.

From ROSE, J.] [May 11.

HOOVER *v.* WILSON.

Executors and administrators—Accounts—Commission.

An executor who discharges his duty honestly, but owing to want of business training keeps his accounts loosely and inaccurately, is entitled to compensation for his care, pains and trouble, but the amount of compensation should not, in such a case, be relatively large.

Compensation when allowed should be credited to the executor at the end of each year.

Judgment of ROSE, J., reversed.

Moss, Q.C., and *J. G. Rykert*, for the appellant.

H. H. Coltier, for the respondent.

From ROSE, J.] [May 11.

IN RE COUNTY OF CARLETON AND CITY OF OTTAWA.

Municipal corporations—City separated from county—Maintenance of court house and gaol—Compensation for use of court house and gaol—Care and maintenance of prisoners—55 Vict., c. 42, ss. 469, 473.

No compensation can be awarded by arbitrators to a county municipality in respect of the use by a city separated from that county of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality.

A claim for compensation for the care and maintenance of prisoners stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for compensation for the use of the court house and gaol.

The right to and the mode of arriving at the amount of compensation for the use of the court house and gaol considered.

Judgment of ROSE, J., affirmed.

MacTavish, Q.C, for the appellants.

Chrysler, Q.C., for the respondents.

From MEREDITH, J.] [May 11.

DALE *v.* WESTON LODGE.

Insurance—Life insurance—Benevolent Society—"Member in good standing"—Domestic forum.

Where the rules of a benevolent society give to a member dissatisfied with a decision as to sick benefits a right of appeal to a domestic forum, the widow of a member, whose application for sick benefits has in his lifetime been refused, and who has acquiesced in that decision and has not appealed, cannot recover sick benefits.

Judgment of MEREDITH, J., reversed.

Where, however, the widow of "a member in good standing" is entitled to certain pecuniary benefits, and the status of the member has not been passed upon by the society in his lifetime, an action by the widow will lie, and the status of the deceased member at the time of his death is a question of law to be determined in the usual way.

In the present case the fact that the deceased member was at the time of his death in arrear for dues was held, having regard to the constitution and rules of the society, not to deprive him of his status, and the widow was held entitled to recover.

Judgment of MEREDITH, J., affirmed.

Shepley, Q.C., and *F. C. Cooke*, for the appellants.

H. E. Irwin, for the respondent.

From MACMAHON, J.] [May 11.

BOURGARD *v.* BARTHELMES.

Defamation—Slander—Privilege.

The defendant while aiding, at his request, the owner of stolen material in his search for it, said, when what was supposed to be part of it was found in the possession of a workman employed by the defendant, that the plaintiff had stolen it.

Held, that both on the ground that the defendant had an interest in the search, and on the ground that it was his duty to tell his workman that the material did not belong to the person from whom he had received it, the statement was prima facie privileged.

Judgment of MACMAHON, J., reversed.

E. Taylour English, for the appellant.

John Greer, for the respondent.

HIGH COURT OF JUSTICE.

Mr. Cartwright, Official Referee. [March 19.

REG. EX REL. FRANCIS *v.* YOUNG.

Municipal election—Property qualification—Alien.

Motion to set aside election of respondent as mayor of the town of Rat Portage on the ground of want of property qualification as provided in the Municipal Act, 55 Vict., c. 42, s. 73.

The motion was opposed on the ground of the insufficiency of the evidence showing the absence of property qualification.

On behalf of the respondent it was also contended that the relator not being a British subject, was not an elector, and had no sufficient status in these proceedings.

The relator admitted that he had become a citizen of the United States, but swore that he had returned to Canada and taken the oath of allegiance before a stipendiary magistrate, but the evidence was conflicting as to whether it was taken prior or subsequent to July, 1885, when the Act was changed, and the certificate of a Court of Record made requisite for naturalization.

Held, that the relator's admission that he had become naturalized in the United States was conclusive against him, and cast upon him the onus of proving his re-naturalization in Canada.

Held, upon the evidence, that the oath of allegiance was made subsequent to July, 1885, and was therefore insufficient to constitute relator a British subject under the present statute, R.S.O., c. 113.

Held, also, that in the absence of an affidavit by the respondent showing his property qualification the other evidence must be taken most strongly against him, because this is a matter peculiarly within his own knowledge as to which he has not seen fit to make any statement.

Motion dismissed on the ground of relator not being a British subject, but without costs.

E. T. English, for relator.

Rowell, for respondent.

BOYD, C.] [April 29.

TURNER *v.* DREW.

Trust—Deed by husband—Rents—Yearly income—For the use of wife and children—Interests or shares in.

A husband conveyed certain lands to trustees to receive the rents and pay off a mortgage, and after payment of the mortgage to pay the balance into the hands of his wife during her life "for the use of her and (three children) . . . . which said moneys shall be at the separate disposal of (wife) not subject nor liable to the power or control of (husband) or to his debts engagements or disposal."

Held, that the plaintiff who was the sole surviving child and was well up in years and unable to keep herself, was entitled to half the yearly income.

Hislop, for the plaintiff.

Delamere, Q.C., for the defendant.

MOSS, J. A.] [June, 1.

WELSBACH INCANDESCENT GASLIGHT CO. *v.* STANNARD.

Security for costs—Appeal to Court of Appeal—Special order—Judicature Act, 1895, s. 77.

Motion by the plaintiffs for a special order under s. 77 of the Judicature Act, 1895, for security for the plaintiffs' costs of the defendants' appeal to the Court of Appeal from the judgment of Boyd, C., at the trial, in favor of the plaintiffs, upon the ground of the defendants' inability to pay the plaintiffs' costs in case the appeal should prove unsuccessful.

Held, that, there being no reason to suppose that the defendants were not intending to prosecute their appeal in good faith, and as they were conforming to the injunction obtained by the plaintiffs at an early stage, and as their ability to answer for costs had not been put to the test of an execution, and the proof of their alleged inability rested in great measure upon statements founded upon information and belief, it was not a case for ordering security.

McCormick v. *Temperance, etc., Co.*, 17 P.R. 175; *Confederation Life Association* v. *Kinnear*, cited in that case; *Donnelly* v. *Ames*, 17 P.R. 106; and *McDougall* v. *Copestoke*, 34 Sol. J. 347 referred to.

Application refused. Costs in the appeal.

R. McKay, for the plaintiffs.

James Bicknell, for the defendants.

Mr. Cartwright, }
Official Referee. } [May 6.

CROSSLEY *v.* FERGUSON.

Consolidation of actions under 57 Vict., c. 27, s. 5—Abuse of process—Pendency of criminal proceedings.

Motion by defendants under 57 Vict., c. 27, s. 5, to consolidate these actions, which are brought against several defendants for the same libel, or to stay proceedings until after the determination of the criminal proceedings against the defendants, or to dismiss the actions as an abuse of the process of the Court.

Held, that 57 Vict., c. 27, s. 5, does not apply to private defendants, being intended for the protection of newspapers only, as in the case of *Beaton* v. *Globe* (unreported).

Held, also, that the motions to consolidate and to dismiss as an abuse of the process of the courts, are premature, no statements of claim having been delivered as had been done in *Beaton* v. *Globe*, when Mr. Justice Robertson made an order consolidating those actions.

Held, also, that as the criminal proceedings were not under plaintiff's control, the actions could not be stayed on that account.

Motion dismissed, costs in cause to plaintiff.

C. C. Robinson, for plaintiff.

Kyles, *W. A. Skeans*, and *A. B. Armstrong*, for defendants.

FALCONBRIDGE, J.] [May 7.

RE DIAMOND *v.* WALDRON.

Division Court—Breach of contract—Place of—Cause of action—Where arising—Mandamus.

Plaintiff, a merchant in Ontario, gave an order in Ontario for goods to the traveller of the defendants, wholesale merchants in Montreal, "Ship via G.T.R. When—1st Sept." The goods were not so shipped and a correspondence ensued, ending in the defendants refusing to supply the goods.

Held, that the breach was the non-shipment via G. T.R. at Montreal and not the subsequent refusal by correspondence, and as the whole cause of action did not arise where the order was given, a mandamus to compel a Division Court Judge to try the action was refused.

W. R. Riddell, for the motion.

Geo. Kerr, contra.

ARMOUR, C.J., FALCONBRIDGE, J., }
STREET, J. } [May 10.

PETRIE *v.* MACHAN.

Division Courts Act, R.S.O., c. 51, s. 148—Appeal—Sum in dispute—Claim exceeding $100.

Where in a Division Court action the plaintiff claimed $100 and interest, and the defendant paid $35 into Court to answer the plaintiff's claim, and judgment was given for plaintiff for that amount, and plaintiff appeals from the order of the order of the Division Court Judge refusing a new trial, and de-

fendant objects that an appeal does not lie because the sum now in dispute upon the appeal (i.e. $65, the balance of plaintiff's claim) "does not exceed $100, exclusive of costs," within s. 148 of the Division Courts Act, R.S.O., c. 51.

Held, that the subject matter of the suit was one cause of action only, the breach of a contract for which plaintiff claims $100 damages and interest. Plaintiff is still claiming that sum on the appeal and disputes the correctness of the judgment for $35. Therefore the $35 is as much in dispute as the balance of the $100, and the appeal must be heard.

R. McKay and *Gideon Grant*, for plaintiff.

Aylesworth, Q.C., for defendant.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [May 13.

TALBOT *v.* LONDON GUARANTEE AND ACCIDENT CO.

Contract—Employer's liability policy—Condition—Construction—Conduct of employer.

An appeal by the plaintiffs from the judgment of Rose, J., at the trial at Hamilton, dismissing the action, which was brought by the firm of Talbot, Cockroft & Harvey, who were carpet manufacturers at Elora, and by their assignee for the benefit of creditors, to recover upon a policy of insurance against accident in their factory. An employee in the factory had his fingers cut off by a machine and brought an action against the plaintiffs for compensation, which action was defended by the present defendants, and recovered $1,200 and costs, which the plaintiffs in this action sought to recover against the insurers. The defence was mainly based upon a condition of the policy that "the employer shall, at the cost of the company, render them every assistance in his power in carrying on any suit which they shall undertake to defend on his behalf."

Held, that the implication from the condition was that the employers should not assist the opposite side, and the evidence showed that one of the plaintiffs had assisted the other side, and in view of the case of *Wythe* v. *Manufacturers Ins. Co.*, 26 O.R. 153, the Court should not interfere to assist the plaintiffs.

The appeal was dismissed with costs.

Aylesworth, Q.C., and *Teetzel*, Q.C., for plaintiffs.

W. Nesbitt, and *J. H. Denton*, for the defendants.

Mr. Cartwright, Official Referee [May 13.

BRISTOL *v.* GERMAN PRINTING AND PUBLISHING CO.

Defamation—Plea of justification—Particulars—Change of venue—R.S.O. c. 57, s. 10.

Motion by plaintiff in an action of libel against a newspaper, where the defendants pleaded justification, to change venue from Berlin to Toronto, and for particulars of amounts which defendants charge plaintiff with having stolen

Held, following *Zierenburg* v. *Labouchere* (1893), 2 Q.B. 183, and the cases cited in Odgers on Pleading (2nd ed.) 102, that in an action for defamation where defendants justify, they must either in their plea or by particulars give specific instances of plaintiff's misconduct and full information concerning them.

Held, also, following *Roche* v. *Patrick*, 5 P.R. 210, and considering the words of R.S.O., c. 57, s. 10, it has not "been made to appear to be in the interests of justice, or that it will promote a fair trial," to change the venue.

Motion to change venue dismissed, costs in cause to defendants.

Motion for particulars allowed with costs to plaintiff in the cause.

W. H. P. Clement, for plaintiff.

W. Davidson, for defendants.

MOSS, J. A.] [May 13.

REGINA *v.* BALLARD.

Criminal law—Election of trial by jury—Re-election—Mandamus to sheriff to bring prisoner before County Judge—Criminal Code—55 & 56 Vict., c. 29, ss. 766, 767 (c).

Where a prisoner charged with arson before a County Judge elects to be tried by a jury, even though his election is made under a mistake or qualified by the words "at present" being used, and is remanded under s. 767 of the Criminal Code, to gaol to await such trial, there is no duty upon the sheriff to notify the Judge a second time under s. 766, or to bring the prisoner again before him to enable him (the prisoner) to re-elect to be tried by the Judge, and a mandamus will not be ordered to compel him so to do.

Rowell, for the motion.

Cartwright, Deputy Attorney-General, contra.

MEREDITH, C.J.] [May 13.

LAKE OF THE WOODS MILLING CO. *v.* APPS.

Summary judgment—Rule 744—Application of—Special ground for relief—Fraudulent preference.

An unopposed application for summary judgment under Rule 744, made the day after the service of the writ of summons, in an action against a trader upon a bill of exchange, was refused. It was sworn, among other things, that the defendant had fraudulently transferred his business and property to certain persons; but the Court considered that the plaintiffs would not be prejudiced by the action being allowed to proceed in the ordinary way.

Leslie v. *Poulton*, 15 P.R. 332, and *Molsons Bank* v. *Cooper*, 16 P.R. 195, applied and followed.

Arnoldi, Q.C., for the plaintiffs.

(This decision was followed by FALCONBRIDGE, J., on the 15th June, 1897, upon a similar application in the case of *Collins* v. *Graham*.)

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [May 19.

SAMPLE *v.* MCLAUGHLIN.

Security for costs—Application against solicitor—Action brought without authority—Applicants out of the jurisdiction.

Upon an application by the solicitor who brought this action in the names of several plaintiffs for an order for security for costs of proceedings taken against him by two of the plaintiffs, who resided out of the jurisdiction, to set aside the judgment in this action and strikes their names out of the record, upon the ground that the solicitor had no authority from them to bring the action in their names,

Held, that the solicitor having brought these plaintiffs into Court by the use of their names, they were entitled to come into Court to defend themselves against such use, without being required to give security for costs.

In re Perry, 2 Ch.D. 531, followed.

Held, also, that where a charge of improper conduct is made against a solicitor, who is an officer of the Court, by a person out of the jurisdiction, the Court ought not to order security for costs, and thus prevent such a charge being investigated.

W. M. Douglas, for the solicitor.

Aylesworth, Q.C., for the applicants.

Mr. Cartwright, Official Referee. [May 20.

CHURCH WARDENS OF CHURCH OF ST. MARGARET *v.* STEPHENS.

Nuisance—Injunction—Exclusive jurisdiction of Court of Chancery—Jury notice.

Action to restrain the playing of a band near a church as a nuisance.

Held, that the jury notice served by defendants should be struck out on the ground that the cause of action is one formerly within the exclusive jurisdiction of the Court of Chancery, and that this case is not distinguishable from *Lenden* v. *Didmon*, 16 P. R. 74.

Held, also, that *Lendon* v. *Didmon* is not affected by *Toogood* v. *Hindmarsh*, 33 C.L.J. 396.

The English practice appears to be different, see *West* v. *White*, L.R. 4 Ch. D. 631, and *Powell* v. *Williams*, L.R. 12 Ch. D. 234.

H. T. Beck, for plaintiffs.

A. McLean Macdonell, for defendants.

STREET, J.] [May 20.

FAULDS *v.* FAULDS.

Parties—Misjoinder of defendants—Distinct causes of action.

The plaintiff's claim as against her husband, one of the defendants, was for specific performance of an ante-nuptial contract to transfer to her certain property of various kinds, and as against the several other defendants, to whom the husband had made transfers of such property, or in whose hands it was, for relief by way of declaration, cancellation, and order for payment.

Held, that although the plaintiff's right to each cause of action was historically connected with each of the others, that connection related only to her rights; the rights of each set of the defendants were as distinct as they were before the events which conferred upon the plaintiff the rights which she asserted; and such causes of action could not properly be joined in one action.

Smurthwaite v. *Hannay*, (1894) A.C. 494, and *Sadler* v. *Great Western R.W. Co.*, (1896) A.C. 450, followed.

Alex. Stuart, for the plaintiff.

Talbot Macl[illegible]h, and *Hume Elliot*, for the defendants.

Mr. Cartwright,
Official Referee. [May 21.

PALLISTER *v.* MEDD.

Solicitor's lien—Administration action—Delivery up of papers.

A solicitor who has formerly acted for an administratrix in a suit brought against her cannot retain papers upon which he has a lien for his costs, so as to delay an administration suit, but must deliver up the documents to the administratrix' present solicitor without prejudice to his lien, the documents to be returned to him at the close of the administration proceedings. Order to go similar to that *In re Boughton*, *Boughton* v. *Boughton*, 48 L.T.N.S. 413.

Moodie v. *Thomas*, 1 Ch. Cham. R. 19, distinguished.

L. V. McBrady, for applicant.

W. H. Blake, for solicitor.

ARMOUR, C.J., STREET, J.] [May 21.

PEGG *v.* HOWLETT.

Division Court—Jurisdiction—Ascertainment of amount—Promissory note—Interest—56 Vict., c. 15, s. 2—Abandonment of excess—Recovery on note—Indorsers—Sureties—Parties—Substitution of plaintiff.

In an action in a Division Court upon a promissory note expressed on its face to be for $200 and interest, judgment was given for the plaintiff for $210.

Held, that the amount was ascertained by the signatures of the defendants, and the interest accumulated upon the note from the time the amount was so ascertained was not to be included in determining the question of jurisdiction, but interest so accumulated might be recovered in a Division Court, in addition to the claim, under 56 Vict., c. 15, s. 2, notwithstanding that the interest and the amount of the claim so ascertained together exceeded $200.

Held, also, that the Judge in the Division Court had power, under Rule 7 of the Revised Rules of the Division Courts, to permit the abandonment of the excess caused by the claim for notarial fees

Held, also, that upon payment of the amount of the note by the plaintiff to the original holder, the plaintiff being liable as indorser to such holder, the plaintiff became entitled to the note and to enforce his rights against the other parties to it; and, as it appeared that two of the defendants had indorsed the notes as sureties to the plaintiff for the makers, he was entitled to recover against them, although the note was made payable to his order.

Wilkinson v. *Unwin*, 7 Q.B.D. 636, followed.

Held, lastly, that Rules 211, 216 and 224 of the Revised Rules of the Division Courts authorized the Judge in the Division Court to substitute the name of the plaintiff for that of the original holder of the note as plaintiff in the action.

S. W. Burns, for the defendants.

C. J. Holman, for the plaintiff.

Mr. Cartwright, Official Referee. [May 21.

REG. EX REL. SCARLETT *v.* WICKS.

Municipal Law—Alderman—Property qualification—Assessment roll—Local improvements.

Respondent having been previously elected alderman for the city of Guelph, was unseated for want of property qualification, but having had his assessment increased to the required amount was afterwards re-elected.

Held, that as by 55 Vict., c. 38, s. 52, sub.-sec. 2, the assessment roll did not go into force until approved by the Council, which was not done until after the election, that it did not apply, and the election was governed by the previous roll under which the respondent was not sufficiently qualified. *Reg. ex rel. Clancy* v. *McIntosh*, 46 U.C. Q.B. 98, followed.

Held, also, that looking at s. 73 of 55 Vict., c. 42, in the light of the cases of *Cumberland* v. *Kearns*, 17 A.R. 287, *Re Graydon*, 20 O.R. 206, and *Armstrong* v. *Anger*, 21 O.R. 98, the amount of the assessment upon the property for local improvements is to be deducted from the assessed value, and the respondent is only entitled to qualify on the balance, which being less than the amount required by the statute, the respondent is not properly qualified.

Election set aside. Costs of relator to be paid by respondent.

C. J. Holman, for relator.

W. M. Douglas, for respondent.

ARMOUR, C.J.] [May 26.

IN RE SOLICITORS.

Solicitor—Taxation of bill—Scale of costs—Action—Recovery.

An appeal by John and William Howarth, the applicants for taxation, from the report or certificate of the junior taxing officer at Toronto, upon the taxation of the solicitors' bill of costs rendered to the applicants in respect of services as plaintiff's solicitors in an action of *Howarth* v. *Smith Wool Stock Co.*, upon the ground, among others, that the officer should not have allowed the solicitors costs upon the High Court scale, for, although the action was brought in the High Court the plaintiff recovered against the defendants in that action only $125 and costs on the County Court scale, and the solicitors were entitled to their costs against their client only on that scale.

Treemear, for the appellants, relied on *Scanlan* v. *McDonough*, 10 C.P. 104.

R. McKay, for the solicitors, contended that the rule laid down in *Scanlan* v. *McDonough*, did not apply here, because the solicitors did not themselves bring the action, which was brought by another solicitor, and the conduct transferred to these solicitors during the progress of the action, and

they therefore had no opportunity of pointing out to the clients that the action should be brought in the County Court, or, if brought in the High Court, the risk which would ensue as to costs.

ARMOUR, C.J., considered that he was bound by *Scanlan* v. *McDonough*, though in his opinion the inquiry should be whether the solicitor had reasonable grounds for bringing the action in the High Court; and, being bound by that case, must hold the solicitors entitled only to County Court costs.

Appeal allowed with costs and reference back to taxing officer directed to tax the costs on the County Court scale.

BOYD, C.] [May 26.

DAW *v.* ACKERILL.

Church—Incumbent's salary—Liability of churchwardens—Voluntary contributions.

Where the free pew system has been adopted in a church, and the voluntary contributions of the congregation are the only means of meeting the expenses, no personal responsibility rests upon the churchwardens in respect of the incumbent's salary; the measure of their liability to him is the extent to which they receive moneys whereout to pay his salary; and if they have nothing he can get nothing.

John Williams and *W. S. Morden*, for the plaintiff.

S. Masson, for the defendants.

ARMOUR, C.J.] [May 26.

WRIGHT *v.* WRIGHT.

Will—Construction—Period of vesting—Infant—Investment of share.

Motion by the plaintiffs, the executors, for judgment on the pleadings in an action for the construction of the will of the late James Garrard Wright. The will was made on the 5th August, 1892, and the testator died on the 11th June, 1896. The testator devised and bequeathed all his estate to his executors and directed them to sell it within one year after his decease, and divide the proceeds among his wife and daughters in the manner set out in the will, and proceeded: "In the event of one or more of my said daughters dying without lawful issue, then in such case her or their share or shares of the proceeds of the sale of my said real and personal estate is to be equally divided, share and share alike, among the survivors of my children, and in the event of the decease of one or more of my said daughters leaving lawful issue, then in such case their heir or heirs are to receive their deceased parent's share equally divided among them; said share or shares are to be invested in mortgage or debenture securities, or deposited in a chartered bank by my executors until each heir or heirs shall have respectively attained the age of 21 years." One of the daughters, Fanny Jane, survived her father and died on the 15th August, 1896, intestate, without receiving her share, and leaving her surviving her husband, the defendant Israel Kelly, and one child, the defendant Ernest Kelly, an infant.

Held, that the intention of the testator was that in case a daughter should die before receiving her share, leaving lawful issue, the executors were to in-

vest the share of that daughter for her children until they should be of age; the effect of the whole will was to make a provision in case any daughter should die before her share should be paid over.

Judgment declaring the defendant Ernest Kelly entitled to the share of his mother, and that plaintiffs should invest it until his majority; also that the plaintiffs should pay the pecuniary legacies to the daughters of the testator. Costs of all parties, including the official guardian, out of the estate; those of the plaintiffs as between solicitor and client.

A. Millar, Q.C., for the plaintiffs.

H. Guthrie, for the adult defendants.

F. W. Harcourt, for the infant defendants.

MEREDITH, C.J.] [May 26.

HARTLEY *v.* MAYCOCK.

Title to land—Conveyance by married woman—Non-joinder of husband—59 Vict., c. 41—Limitation of actions—Visible possession—Enclosed lands—Unenclosed lands—Sale of timber—Trespass—Interval in possession—Building operations—Farm work—Adverse possession—Assertion of right by true owner—Equivocal acts—Entry by one tenant in common—Residence out of Ontario—Possession of unenclosed lands—Color of right—Conveyance—Entry—Improvements under mistake of title.

1. The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seized in fee simple and in possession.

One of the links in the chain of title of the uncle was a conveyance made in 1846 by a married woman, whose husband did not join in the conveyance.

Held, that the conveyance was wholly inoperative, and was not validated by 59 Vict., c. 41, as the action was begun before the passing of the Act, and s. 2 excepts pending litigation; and this objection was fatal to the plaintiff's claim, for, although the uncle's possession was evidence of his seizin, the plaintiff's case disclosed his title, and showed that the true title was in the married woman.

2. Shortly after the uncle's death his widow returned to the farm, which she found in possession of a man put in by a person to whom her husband had contracted to sell, and she thereupon forcibly took possession, and continued to reside upon the farm till her death in 1877, with the exception of a short interval in 1874. During this whole period she tilled such part of the farm as was enclosed and under cultivation, and put such part as was enclosed and not under cultivation to the ordinary farm use. In 1873 she made a conveyance of the whole farm to a neighboring farmer, who worked it until 1879, and then rented it until 1881, after which he put his son, one of the defendants, into possession, and the latter then continued to work it up to the time this action was brought in 1895, though until 1889 he did not live in the house erected upon it. In 1885 the widow's grantee purchased the rights of the heirs-at-law of the person to whom the plaintiff's uncle had contracted to sell.

Held, that the widow entered as a trespasser, and so, in order to extinguish

the right and title of the heirs, her twenty years' possession must have been actual, visible, and continuous; and the Statute of Limitations operated only as to the enclosed part, notwithstanding sales by her of timber from the unenclosed part, which must be treated as mere acts of trespass.

Harris v. *Mudie*, 7 A.R. 414, followed.

3. In April, 1874, the dwelling-house on the farm was destroyed by fire, and during a short period until it was rebuilt the widow did not actually live upon the farm, but stayed in the neighborhood, and the work of the farm went on as usual.

Held, that during this interval her possession was a visible one, by reason of the building operations and the farm work.

Agency Company v. *Short*, 13 App. Cas. 793, and *Coffin* v. *North American Land Company*, 21 O.R. 80, distinguished.

4. The plaintiff resided with the widow upon the land for about two years after her return to it, but at that time had no interest in it, his father being then alive; and he made occasional visits to it in subsequent years, and paid the taxes on it for 1872, but during all this time he made no claim to any interest in the land.

Held, upon the evidence, that he did not go upon the land in the assertion of a right, as owner of an interest, to live upon it, but did so merely as the guest of his aunt, and in paying the taxes he did so on her behalf and as an act of kindness, and not as having or claiming an interest for himself or any one else; and therefore it would not be said that the possession was not hers, or that it was a possession by his license.

5. And, even if what happened amounted to an entry, that entry did not operate in favor of the plaintiff's co-tenants, for an entry by one tenant in common is not an entry by his co-tenant.

6. The fact that all the plaintiff's co-heirs were resident out of Ontario entitled them to no longer time to bring their action than if they had been residents: 25 Vict., c. 20.

7. *Held*, therefore, that in 1874 the right and title of the heirs-at-law as to the enclosed part of the farm were extinguished.

8. The widow's grantee entered not as a mere trespasser, but, after the conveyance to him, or at all events, after the expiration of twenty years from her entry, was in under color of right, and his right was not confined to the portion of the land of which he was in pedal possession, and he and those claiming under him were in the actual and visible possession of the whole of the land included in his conveyance; and the right and title of the plaintiff were therefore extinguished, notwithstanding an entry made in 1878 by the plaintiff, who had not then any interest in the land or any authority from those interested in it.

9. But if not, the defendants were at least entitled to be paid for their lasting improvements since the purchase in 1885, with a set-off of the mesn profit since that date.

E. D. Armour, Q.C., *J. L. Murphy*, and *Sale*, for the plaintiff.

A. H. Clarke, for the defendants, John J. Maycock and Lydia J. Maycock,

Alan Cassels, for the defendants, the Building and Loan Association.

Mr. Cartwright, Official Referee. [May 27.

RE MCLEAN *v.* TOWNSHIP OF TECUMSEH.

Arbitration—Award—Setting aside—Deposit of papers in Court.

Motion to bring in original submission to arbitration and award.

Held, that ss. 3 and 5 of 52 Vict., c. 13, must be read together and not separately, and that the effect is that the submission and award must be brought into Court before proceedings can be taken to set aside the award.

Order to go for the deposit in Court of the submission and award. Costs in the cause.

Hearn, for applicant.

Pepler, Q.C., for municipality.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [May 27.

HAMMOND *v.* KEACHIE.

Husband and wife—Contract of wife—Separate estate—Action after husband's death—Liability—R.S.O. c. 132, s. 3, sub-secs. (2), (3), (4)—Form of judgment.

In 1894 a married woman, possessed of separate estate, entered into a covenant for payment of money, in which her husband joined. In an action against her upon the covenant, begun in 1897, after the death of her husband, but before the passing of 60 Vict., c. 22,

Held, that under s. 3, sub-secs. (2), (3) and (4) of the Married Woman's Property Act, R.S.O. c. 132, the liability which the defendant undertook by her contract with the plaintiffs was expressly limited by the extent of her separate property then existing and of such separate property as she should afterwards acquire; and the judgment for the plaintiffs for the amount of their claim and costs should be in the usual form, against the defendant, to be levied out of her separate estate owned by her at the time of the contract, or acquired or to be acquired by her at any time afterwards during coverture, so far as the same may not have been disposed of by her.

Aylesworth, Q.C., for the plaintiffs.

F. C. Cooke, for the defendant.

STREET, J.] [May 29.

FISHER *v.* FISHER.

Life insurance—Construction of policy—Beneficiary—Designation—Assignment of policy—Security for advances—Trust—Evidence.

The plaintiff was the widow of James T. Fisher, deceased; the defendant was a brother of the deceased; and the action was brought to recover $835 received by the defendant upon a policy of insurance upon the life of the deceased, issued 19th May, 1888, by the Commercial Travellers' Mutual Benefit Society. By the policy the society promised to pay the amount insured, upon the death of the insured person, to "Mrs. Agnes E. E. Fisher, his wife, or such other beneficiary or beneficiaries as the said James T. Fisher may in his lifetime have designated in writing indorsed on this certificate, and

in default of any such designation to his legal personal representatives." The application stated that the money was to be paid to the wife. On the 12th April, 1892, the deceased indorsed an absolute assignment of the policy to his brother, the defendant, and notice of the assignment was given by him to the Society, and all premiums were afterwards paid by the defendant. The assignment was, however, shown to have been made only as security for advances.

Held, that in the absence of an indorsement designating a beneficiary, the insurance money belonged to the legal personal representative of the insured. There was no designation, either on the face of the certificate or elsewhere, constituting the plaintiff a beneficiary, and she never was entitled as a beneficiary to this money. The statement in the application that the money was to be paid to the plaintiff did not affect the matter. There was no contract between the deceased and the plaintiff, nor between the plaintiff and the society. The deceased must be taken to have approved of the form in which the certificate issued, which gave him a right to assign it, because he acted upon that right, rather than to have supposed it to be in a form which would not permit of his assigning it.

If it were possible to place upon the certificate the construction contended for by the plaintiff, a right to revoke the trust in her favor was still reserved to the deceased, and no absolute and irrevocable trust such as was contemplated by the statute was ever created in her favor. The result would then be to give to the defendant a charge for the money advanced at the time of the assignment, with interest, and he would also have the premiums paid by him, as paid by way of salvage.

Held, also, upon the correspondence, that the defendant, believing he was entitled to a charge for all his advances, under the conversations had with his brother, so stated the fact to the plaintiff, and that she, desiring to pay her husband's debts and funeral expenses, ratified the action of the defendant in paying out these sums on her husband's account, and assented to his retaining his own claim, so far as the money would go.

In either case the action failed, and should be dismissed with costs.

McCarthy, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendant.

OSLER, J.A.] [June 1.

IN RE HARLEY'S ESTATE.

Executors and administrators — Administration of estate — Bequest to charities — Next of kin — Advertisement for — Payment into Court — Discharge — Petition for advice — R.S.O. c. 110, s. 37.

A petition by Rebecca A. Wass, the executrix of the will of John Harley, under s. 37 of the Act respecting trustees and executors and the administration of estates, R.S.O. c. 110, for an order authorizing the petitioner to make inquiries as to the relatives and next of kin of the deceased John Harley, and giving directions as to the disposition of certain moneys forming part of his estate.

Held, that in the absence of any of the heirs or next of kin of the testa-

tor, the Court could not give an opinion as to the right of the executrix to dispose of the residue of the estate in accordance with the directions in the will, viz., "among churches and charities or otherwise as he (the original executor) may see fit." It was quite possible, having regard to the date of the will, the vagueness of the language and the nature of the estate, that the direction might prove ineffectual. In the absence of the next of kin, it would be a dangerous experiment for the petitioner to attempt to comply with it. There was no reason why she should concern herself in the matter at all. She had paid the debts and the one legacy about which there could be no question, and some years ago she obtained an order for leave to pay the balance in her hands into Court. She paid it in accordingly, and was discharged from all further responsibility, especially as she or the former executor had advertised for heirs and next of kin of the testator without result. All she needed to do was to leave the money where it was, where the next of kin would find it when they applied for it, or where the Crown might do so if it desired to establish a claim.

No order made.

Lazier, Q.C., for the petitioner.

J. K. Cartwright, Q.C., for the Attorney-General for Ontario.

OSLER, J.A.] [June 1.

IN RE PICKETT AND TOWNSHIP OF WAINFLEET.

Municipal corporations — By-law — Submission to electors — Omission to post by-law and notice — 55 Vict., c. 42, sec. 293 — Irregularities — Result of voting — Saving clause, s. 175.

Upon a motion to quash a municipal by-law which required the assent of the electors, and was voted upon by them and carried by a majority of 16 in a total vote of 550 out of an electorate of 941,

Held, that the unexplained omission of the Council to put up a copy of the by-law with a notice stating, inter alia, the hour, day and places for taking the votes, in four or more of the most public places in the municipality, as required by s. 293 of the Municipal Act, 55 Vict., c. 42, or at any place therein, was fatal to the by-law, the evidence disclosing many other irregularities, and the onus which was upon the council to show, under s. 175, that the proceedings were conducted in accordance with the principles laid down in the Act, and that the result was not affected by the mistakes and irregularities, not being satisfied.

J. J. Maclaren, Q.C., for the applicant.

DuVernet and *L. C. Raymond*, for the municipality.

ARMOUR, C.J., VALCONBRIDGE, J., STREET, J. } [June. 5.

FOX *v.* SLEEMAN.

Discovery — Documents — Photographs — Privilege — Rule 507.

In an action by certain persons, claiming to be the next of kin of a testator, the beneficiary under the will having pre-deceased him, against the administratrix with the will annexed, for administration of the estate, the defendant

denied that the plaintiffs were the next of kin of the testator, and alleged that he had no relatives. By her affidavit of documents she stated that she had in her possession, in her personal capacity, but not as administratrix, certain photographs of the testator, which she objected to produce. The plaintiffs sought production with a view of establishing the identity of a relative of theirs with the testator.

Held, that the photographs in question were "documents" within the meaning of Rule 507, and were not privileged nor protected, and therefore must be produced.

W. M. Douglas, for the plaintiffs.

Aylesworth, Q.C., for the defendant.

ARMOUR, C.J.] [June 5.

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

Railways—Lands injuriously affected—Arbitration and award—51 Vict., c. 29, ss. 90, 92, 144 (1)—Compensation—Damages—Operation of railway—Interest.

A claimant entitled under the Railway Act of Canada, 51 Vict., c. 29, to compensation for injury to lands by reason of a railway, owing to alterations in the grades of streets and other structural alterations, is also, having regard to ss. 90, 92 and 144, entitled to an award of damages arising in respect of the operation of the railway, and to interest upon the amounts awarded, notwithstanding that no part of such lands has been taken for the railway.

Hammersmith, &c., R. W. Co. v. *Brand*, L.R. 4 H.L. 171, distinguished.

Aylesworth, Q.C., and *F. R. Waddell*, for the claimant.

D'Arcy Tate, for the railway company.

ARMOUR, C.J.] [June 8.

IN RE CONNOR, HUNTER *v.* CONNOR.

Gift—Evidence—Burden of proof—Legacy—Advancement—Ademption—Subsequent gift.

The burden of proving a gift lies upon the donee, and the evidence in support of it must be clear and convincing, strong and satisfactory.

In a proceeding for the administration of the estate of a deceased testator there was a contest as to a portion of his property of which it was alleged he had made gifts to two of his children in his lifetime.

The testator was over ninety years of age when the gift to his daughter was said to have been made, and was living with her and under her influence; no one was present when the alleged gift was said to have been made except the donor and the donee; the money which was the subject of the alleged gift was lying in the house; and the evidence in corroboration was given by a girl, at that time fourteen years of age, who at the age of seven had been taken to be brought up by the donee, and who was under her influence, and her evidence was that of conversations alleged to have been heard two years before.

Held, that the gift was not established.

Held, as to the alleged gift to a son of the testator, that the burden of proof was upon him to show that what was admittedly a payment by the testator to him on account of the share coming to him from the testator's estate, was afterwards, by arrangement between him and the testator, turned to a gift. The facts that he tried to get the testator's daughter to use her influence with her father to get the receipt which he had given for the money, that he made her promise to say nothing about his trying to obtain it, and that he offered to share with her in case he was successful in obtaining it, showed that his evidence ought not to be believed.

Appeals from report of Master at Orangeville, allowed.

W. L. Walsh, for the plaintiffs.

A. A. Hughson, for the defendant, William Connor.

J. N. Fish, for the defendant, Mary Ann Donaldson.

DuVernet, for the defendant, Benjamin Connor.

FERGUSON, J., }
ROBERTSON, J. } [June 8.

DILL *v.* DOMINION BANK.

Discovery—Examination of officers of corporation—Rule 487.

In an action to recover moneys alleged to have been deposited with the defendants, a banking corporation, at a branch, the plaintiff examined for discovery as officers the persons who were respectively manager and ledger-keeper at the branch at the time the alleged deposits were made. They then sought to examine the general manager.

Held, that the plaintiff had the right under Rule 487 to examine the general manager as an officer of the corporation, and the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance.

Shepley, Q.C., for the plaintiff.

J. D. Montgomery, for the defendants.

MOSS, J.A.] [June 14.

IN RE BENNETT INFANTS.

Infants—Sale of land—R.S.O. c. 137, s. 3—Dispensing with examination.

An order was made under R.S.O. c. 137, s. 3, for a sale of infants' lands at a named price, such of the infants as were over fourteen having been examined before a referee and having given their consent, and the remaining infant, who was under fourteen, having been produced before the referee, who certified with regard to her in the manner directed by the Rules, but the sale was not carried out.

A subsequent offer for the lands at a lower price having been received, an order was made for a sale at that price, the circumstances being such as to show that it was in the interest of the infants; and their further examination was dispensed with upon its being shown that they were out of the Province, and that they were satisfied to accept the price offered.

Swabey, for the applicants.

F. W. Harcourt, for the official guardian.

Moss, J.A.] [June 14.

VANSICKLE *v.* AXON.

Discovery—Production of documents—Affidavit—Objection to produce—Specification of document.

Where, in an affidavit of documents made in compliance with the usual order for production, only one document is mentioned, and the possession or control of other documents is negatived, the statement "I object to produce the said document," sufficiently specifies the document mentioned in the affidavit which the defendant objects to produce, though no information is given as to its date, nature, or contents.

James Dickson, for the plaintiff.

Douglas Armour, for the defendant, Frederick Axon.

FALCONBRIDGE, J.] [June 14.

HAACKE *v.* WARD.

Service of papers—Posting up copies—Rule 1330—Judgment—Irregularity.

Where service of a statement of claim and notice of motion for judgment was effected, under Rule 1330, by posting up copies in the office in which the proceedings were conducted,

Held, that the posting up of one copy only for two defendants was not to be deemed service on either; and a judgment founded thereon was set aside as irregular.

G. C. Campbell, for the plaintiff.

J. W. McCullough, for the defendant Ward.

C. J. Holman, for the defendant Heise.

FALCONBRIDGE, J.] [June 14.

LYON *v.* RYERSON.

Mortgage—Notice of sale—Abandonment—Costs—Action on covenant—Motion for summary judgment.

After the issue of the writ of summons and service of a notice of motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed, the plaintiff, without the leave required by R.S.O., c. 102, s. 30, served notice of exercising the power of sale contained in such deed. Before the hearing of the motion, the plaintiff gave notice of abandonment of his notice of sale and of all costs in respect thereof.

Held, that the effect of the notice of sale was to give the defendant time within which to pay off what was claimed, and, unless the defendant was willing to release the plaintiff, he was bound by the notice, and the motion for judgment could not be entertained; but the object of R.S.O., c. 102, s. 30, would be fully attained by directing that the motion should stand over until after the expiration of the thirty days mentioned in the notice.

T. W. Howard, for the plaintiff.

Worrell, Q.C., for the defendant.

CHIEF JUSTICE HAGARTY'S FAREWELL.

The Bench and Bar of Ontario met at Osgoode Hall on Saturday, June 12th, to bid farewell to the Honorable John Hawkin Hagarty, late Chief Justice of Ontario, and to express their respect and esteem for one who has for so many years graced the profession of which he was such a brilliant member.

Convocation Hall was crowded with a representative gathering of Judges, Court officials and members of the Bar. There was also present as a representative of the Supreme Court, Hon. Mr. Justice Gwynne, Chief Justice Hagarty's former colleague in the Common Pleas, as also Sir Thomas Galt, formerly Chief Justice of the same Division.

In felicitous and appropriate language, Mr. Æmilius Irving, Q.C., Treasurer of the Law Society of Upper Canada, addressed the Judges in reference to the occasion which had brought them together. The Attorney-General, Hon. A. S. Hardy, Q.C., read the address of the Bar to the retiring Chief Justice, which concluded with the following expression, in which all most heartily join: "Our cordial and sincere wishes are offered for your enjoyment of life, free from the toil and anxieties of the judicial station, upon which you have for so long a period cast special lustre."

Those who have from time to time listened to the eloquent words of the late Chief Justice were not disappointed in his reply to the address, which we give as nearly as possible in his own words:

"Mr. Attorney-General and gentlemen of the Bar of Ontario:

I have received with deep satisfaction and pleasure the kindly and flattering address with which you have honored me, emanating as it does from those with whom I have been so long and intimately connected. Fifty-seven years have passed since I became a member of your goodly company. There are some among you of fair promise who were born since I ascended the Bench, but only few indeed who started with me in the race of life, whom I valued in their strength of youth and hope, remain to tell of those early days. They have passed before me into the silent land. A long extending vista opens to our gaze as we realize the fact that nineteen of our Judges with whom I sat as a brother have passed from life since I joined their band. A procession of honored figures seems to pass before us, headed by the gracious presence of such cherished names as Robinson, Macaulay, Blake, Draper and others, held in grateful remembrance by all to whom the best traditions of legal worth are dear. No member of the present Bench of Ontario assumed office for eighteen years after my appointment, when my very worthy friend and successor, the present Chief Justice, became a Judge of Appeal. I feel myself to be the last remaining link between the old array of high judicial worth and our existing administrators of the law whom I was till lately proud to call my learned brothers.

You naturally invite attention to the vast expansion of our legal system and of the larger interests now in litigation, compared to the early days to which I have referred. A wider field is now opened for legal decision, in-

volving principles of constitutional, commercial and financial law, arising from the changes in our political system, and the vast development of municipal institutions, railroad and public companies. It is grateful to me to hear your expressed opinion that the judiciary have dealt with the larger questions coming before them, consequent on the upward progress of the country, with judgment and ability, to the satisfaction and confidence of the community.

I, who have seen all the phases of change, amendment and expansion, can bear witness to the efforts constantly and successfully made to administer the law as the Legislature, from time to time, provided. I was for years conversant with the old system first fatally assailed by what may be called the great reform bill, the admirable Common Law Procedure Act. I have combated in those pleasant pastures where that picturesque animal, the special demurrer, flourished luxuriantly, and those long deceased offspring of legal imagination, John Doe and Richard Roe, fought their battle over all the disputed possessions in the Province. They have all passed away without much lament, but it is only fair to say that the old system of precisely framed pleadings and issues had most salutary effects on the careful preparation of a case for trial, and the greater certainty in its hearing and decision Much has been wisely and excellently done to abolish useless form and fiction, but I fear that the result has, unfortunately, not greatly lessened the cost of litigation. But all such views may now be regarded as the prejudices of an old fashioned 'laudator temporis acti,' who must not be allowed to maunder longer over the days of old.

It is a momentous event in an old man's life, when his connection with the profession, followed with engrossing attention through all his long life of service, is finally severed, but his retrospect may be lighted up by pleasant memories, and his remnant of life be cheered by unbroken personal friendships and the sympathies of faithful friends. It has been well said in a pleasant old rhyme, that for such as I, there remains but

> 'A valley to cross, a river to ford,
> A clasp of the hand, and a parting word,
> And a sigh for the vanished past'

Till my time comes to cross the valley of the shadow and to ford the dark river, my most cherished memory will be the kindly clasps of the hand and the still more kindly words that have greeted me to-day. My warmest wish will always be that all present and future occupants of the Bench of Ontario may enjoy as fully as I have enjoyed, the kindness, courtesy and respect extended to me through my long protracted judicial life."

Chief Justice Burton, Mr. Justice Gwynne and Sir Thomas Galt also spoke shortly, expressing their pleasure at being present on this auspicious occasion. Mr. Christopher Robinson, Q.C., and Mr. W. R. Riddell were respectively the efficient chairman and secretary of the Committee of the Benchers of the Law Society, which had charge of the proceedings.

LAW SOCIETY OF UPPER CANADA.

THE LAW SCHOOL.

Principal, N. W. W. Hoyles, Q.C. *Lecturers*, E. D. Armour, Q.C.; A.H. Marsh, BA., L.L.B., Q.C.; John King, M.A., Q.C.; McGregor Young, B.A. *Examiners*, R. E. Kingsford, E. Bayly, P. H. Drayton, Herbert L. Dunn.

ATTENDANCE AT THE LAW SCHOOL.

This School was established on its present basis by the Law Society of Upper Canada in 1889, under the provisions of rules passed by the Society in the exercise of its statutory powers. It is conducted under the immediate supervision of the Legal Education Committee of the Society, subject to the control of the Benchers of the Society in Convocation assembled. Its purpose is to secure as far as possible the possession of a thorough legal education by all those who enter upon the practice of the legal profession in the Province. To this end, attendance at the School in some cases during two, and in others during three, terms or sessions, is made compulsory upon all who desire to be admitted to the practice of the Law. The course in the School is a three years' course. The term or session commences on the fourth Monday in September, and ends on the last Monday in April, with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's day, and another at Easter, commencing on the Thursday before Good Friday and concluding at the end of the ensuing week. Admission to the Law Society is ordinarily a condition precedent to attendance at the Law School. Every Student-at-Law and Articled Clerk, before being allowed to enter the School, must present to the Principal a certificate of the Secretary of the Law Society, showing that he has been duly admitted upon the books of the Society, and has paid the prescribed fee for the term. Students, however, residing elsewhere, and desirous of attending the lectures of the School, but not of qualifying themselves to practice in Ontario, are allowed, upon payment of the usual fee, to attend the lectures without admission to the Law Society. Attendance at the School for one or more terms is compulsory on all students and clerks not exempt as above.

Those students and clerks, not being graduates, who are required to attend, or who choose to attend, the first year's lectures in the School, may do so at their own option either in the first, second, or third year of their attendance in chambers or service under articles, and may present themselves for the first-year examination at the close of the term in which they attend such lectures, and those who are not required to attend and do not attend the lectures of that year may present themselves for the first-year examination at the close of the school term in the first, second, or third year of their attendance in chambers or service under articles. Students and clerks, not being graduates, and having first duly passed the first-year examination, may attend the second year's lectures either in the second, third, or fourth year of their attendance in chambers or service under articles, and present themselves for the second-year examination at the close of the term in which they shall have attended the lectures. They will also be allowed, by a written election, to divide their attendance upon the second year's lectures between the second and third or between the third and fourth years, and their attendance upon the third year's lectures between the fourth and fifth years of their attendance in chambers or service under articles, making such a division as, in the opinion of the Principal, is reasonably near to an equal one between the two years, and paying only one fee for the full year's course of lectures. The attendance, however, upon one year's course of lectures cannot be commenced until after the examination of the preceding year has been duly passed, and a student or clerk cannot present himself for the examination of any year until he has completed his attendance on the lectures of that year.

The course during each term embraces lectures, recitations, discussions and other oral methods of instruction, and the holding of moot courts under the

supervision of the Principal and Lecturers. On Fridays moot courts are held for the students of the second and third years respectively. They are presided over by the Principal or Lecturer, who states the case to be argued, and appoints two students on each side to argue it, of which notice is given one week before the day for argument. His decision is pronounced at the close of the argument or at the next moot court. At each lecture and moot court the attendance of students is carefully noted, and a record thereof kept. At the close of each term the Principal certifies to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student is to be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures on each subject delivered during the term and pertaining to his year. Two lectures (one hour) daily in each year of the course are delivered on Monday, Tuesday, Wednesday and Thursday. Printed schedules showing the days and hours of all the lecturers are distributed among the students at the commencement of the term. The fee for attendance for each term of the course is $25, payable in advance to the Sub-Treasurer, who is also the Secretary of the Law Society.

EXAMINATIONS.

Every applicant for admission to the Law Society, if not a graduate, must have passed an examination according to the curriculum prescribed by the Society, under the designation of "The Matriculation Curriculum." This examination is not held by the Society. The applicant must have passed some duly authorized examination, and have been enrolled as a matriculant of some University in Ontario, before he can be admitted to the Law Society. The three law examinations which every student and clerk must pass after his admission, viz., first intermediate, second intermediate, and final examinations, must be passed at the Law School Examinations under the Law School Curriculum hereinafter printed, the first intermediate examination being passed at the close of the first, the second intermediate examination at the close of the second, and the final examination at the close of the third year of the School course respectively. The percentage of marks which must be obtained in order to pass an examination of the Law School is fifty-five per cent. of the aggregate number of marks obtainable, and twenty-nine per cent. of the marks obtainable upon each paper. Examinations are also held in the week commencing with the first Monday in September for those who were not entitled to present themselves for the earlier examination, or who, having presented themselves, failed in whole or in part.

Students whose attendance upon lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations, either in all the subjects or in those subjects only in which they failed to obtain fifty-five per cent. of the marks obtainable in such subjects. Those entitled, and desiring, to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society at least two weeks prior to the time of such examinations, of their intention to present themselves, stating whether they intend to do so in all the subjects, or in those only in which they failed to obtain fifty-five per cent. of the marks obtainable, mentioning the names of such subjects. The time for holding the examinations at the close of the term of the Law School in any year may be varied from time to time by the Legal Education Committee, as occasion may require.

HONORS, SCHOLARSHIPS AND MEDALS.

The Law School examinations at the close of term include examinations for Honors in all the three years of the School course. Scholarships are offered for competition in connection with the first and second intermediate examinations, and medals in connection with the final examinations. An examination for Honors is held, and medals are offered in connection with the

final examination for Call to the Bar, but not in connection with the final examination for admission as Solicitor. In order to be entitled to present themselves for an examination for Honors candidates must obtain at least three-fourths of the whole number of marks obtainable on the papers, and one-third the marks obtainable on the paper on each subject, at the Pass examination. In order to be passed with Honors, candidates must obtain at least three-fourths of the aggregate marks obtainable on the papers in both the Pass and Honor examinations, and at least one-half of the aggregate marks obtainable on the papers in each subject on both examinations.

The scholarships offered at the Law School examinations are the following: Of the candidates passed with Honors at each of the intermediate examinations the first shall be entitled to a scholarship of $100, the second to a scholarship of $60, and the next five to a scholarship of $40 each, and each scholar shall receive a diploma certifying to the fact. The medals offered at the final examinations of the Law School are the following: Of the persons called with Honors the first three shall be entitled to medals on the following conditions: *The First:* If he has passed both intermediate examinations with Honors, to a gold medal, otherwise to a silver medal. *The Second:* If he has passed both intermediate examinations with Honors, to a silver medal, otherwise to a bronze medal. *The Third:* If he has passed both intermediate examinations with Honors, to a bronze medal. The diploma of each medallist shall certify to his being such medallist. The latest edition of the Curriculum contains all the Rules of the Law Society which are of importance to students, together with the necessary forms, as well as the Statutes respecting Barristers and Solicitors, the Matriculation Curriculum, and all other necessary information. Students can obtain copies on application to the Secretary of the Law Society or the Principal of the Law School.

Book Reviews.

THE LIVING AGE, for all its fifty-three years of life, was never fresher, more vigorous or more valuable than now. Timely and able articles on the leading questions of the day, papers of interest and value, biographical, historical and scientific, are always to be found within its pages. The following partial contents of recent issues will give a slight idea of its world-wide scope and variety: "Some Changes in Social Life during the Queen's Reign," by Sir Algernon West; "The Apotheosis of the Novel under Queen Victoria," by Herbert Paul; "'The Integrity of the Ottoman Empire' as a Diplomatic Formula," by Wemyss Reid and J. Guinness Rogers. "Among the Liars" is the title given to an account of a visit paid to Crete a couple of years ago, and is of interest at this time when the name has become so familiar. "Russia on the Bosphorus" is of more than ordinary interest, emanating, as it does, from the pen of an English naval officer, Capt. J. W. Gambier, R.N. Some good short stories and equally good poetry, etc., vindicate the claim of its publishers that *The Living Age* is a reflection of the world's best thought and literature. Published at $6.00 a year by THE LIVING AGE CO., Boston.