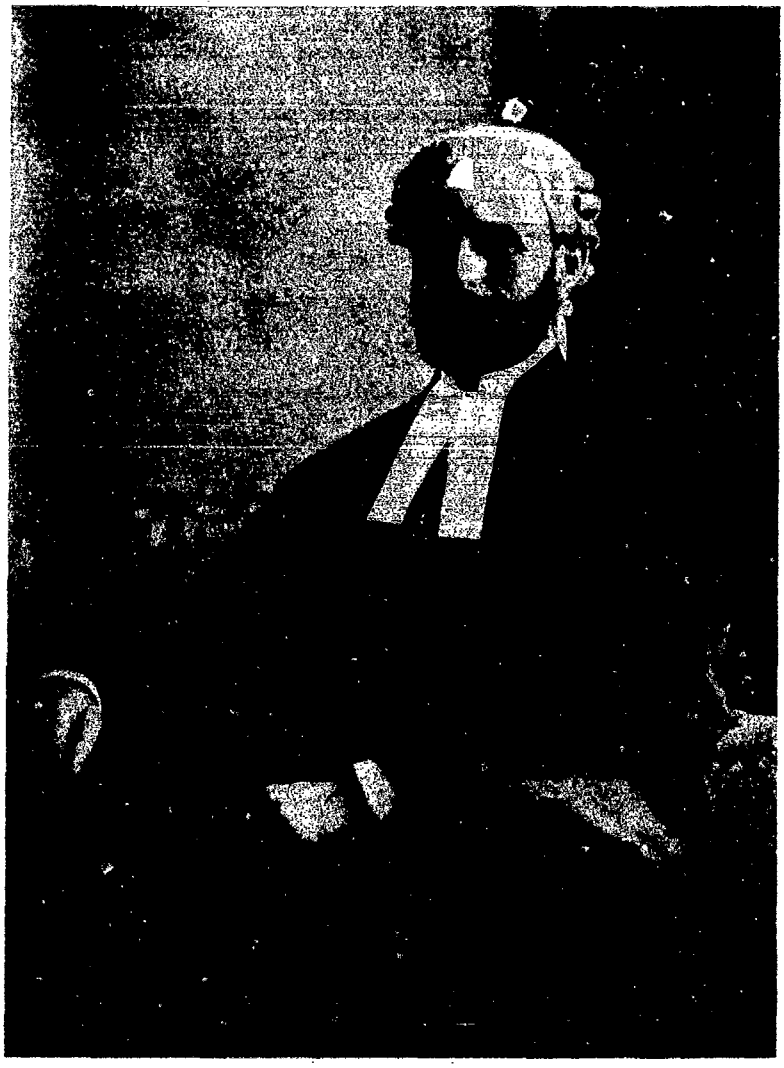

MATTHEW WILSON, Q.C.

Canada Law Journal.

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MATTHEW WILSON, Q.C.

Matthew Wilson, Q.C., whose portrait appears on the opposite page, is a leading member of the bar of Western Ontario. He was born in the County of Kent on August 28th, 1854, being the son of the late Robert Wilson, a native of Dublin, Ireland, and of Anglo-Saxon origin. He received his education in Chatham, Whitby and Toronto, and having chosen to follow the legal profession, he served his time in one of the great firms of former days—Harrison, Osler & Moss—two of whose members afterwards became Chief Justices and two others now sit as judges in the Court of Appeal. Mr. Wilson, following the example of the senior member of the firm under which he studied, gave special attention to municipal law, and has for some years been recognized as an authority in that branch, and to-day must have very nearly, if not quite, the largest clientele of municipal corporations in the province, and in drainage cases he may safely be said to be facile princeps.

Mr. Wilson was called to the bar in 1879, made a Q.C. in 1889, and is now at the head of the firm of Wilson, Kerr & Pike, Chatham, Ont. In 1894 he was elected president of the Western Bar Association, which position he still holds.

He takes an interest in legal literature, some of his articles finding their way into some of the American legal periodicals as well as into the lay press of this country. His energies have not been confined to his chosen profession. He has long been an advocate and liberal supporter of higher education in all its branches, and he has for years been a member of the council of Huron Divinity College, and a senator of the Western University of London. An Anglican in religion, he is a foremost advocate in the church and its councils, being a delegate from the Synod of Huron to the first General Synod for Canada, and afterwards made a member of the Supreme Court of that body.

As a lawyer and as a citizen Mr. Wilson enjoys the confidence and esteem of the profession and the public. He is a ready and graceful speaker, a keen debater, and has the art of putting a

great deal of matter into a few words. Although an active conservative and a convincing platform speaker, he has never been induced to become a candidate for any political office or position.

In 1882 Mr. Wilson married Anna Marsden, eldest daughter of C. R. Atkinson, Q.C., Chatham.

Our portrait is copied from a photograph of Mr. Wilson as he appeared before the Judicial Committee of the Privy Council. The costume is unknown in the Dominion, except, strangely enough, in the extreme westerly province of British Columbia.

The following appointments have been made to the County Court Bench: J. R. O'Reilly, Q.C., of Prescott, has been appointed judge of the County Court of the United Counties of Stormont, Dundas and Glengarry in the place of Judge Pringle resigned. Neil McCrimmon, barrister, of Toronto, fills the vacancy caused by the death of G. H. F. Dartnell, late judge of the County of Ontario; and Robe : B. Carman, junior judge of Stormont, Dundas and Glengarry, becomes judge in the room of E. J. Senkler, deceased, late County Judge of Lincoln.

The *Central Law Journal* calls attention to the case of *Marden* v. *Derthy* decided by the Court of Appeals of New York, which, it is said, has caused great discussion and comment in that State, and is worthy of note by practitioners of this country. As stated by our contemporary, the facts of the case were that the owner of property was induced by artifice to sign her name to a paper without any knowledge that it was a deed, and she had no intention of conveying her property. The deed was never delivered nor acknowledged, but a genuine certificate of acknowledgement was in some way obtained and the deed recorded. No consideration passed, and the grantee had no knowledge of the deed, and was induced by artifice to sign papers which proved to be mortgages on the property. The owner lived on the property, with the grantee, her daughter, her name appearing in large letters on the doorplate and house block, and the alleged bona fide mortgagees resided in the same city. It did no appear that the mortgagees ever saw the genuine signature of the owner, or made any investigation beyond the record. It was held that the owner was not estopped from questioning the validity of the fictitious mortgages

and was entitled to have them cancelled. Two of the judges dissented from the conclusion of the majority.

It has frequent y been remarked that in the development of countries certain classes of litigation from time to time prevail. In this country we have arrived at the damages-for-negligence epoch. An increasing number of these actions in proportion to other litigation are tried every year. This is not to be wondered at considering the extraordinary activity in the use of machinery, rapid production of manufactured articles, and new means of transit. In addition to actions of this nature of a legitimate character, there are, of course, many which are purely speculative; and in this connection one is compelled to recognize the fact that certain members of our profession degrade its honorable traditions by being parties to proceedings which should never have been taken, and which partake of the nature of blackmail. An instance of this kind recently came before an English judge. The action was by a child against a cab owner for negligence. The verdict was for the defendant, whose counsel had no hesitation in saying that the suit was obviously brought in the interests of the solicitor. The judge, being apparently of the same opinion, eventually put the solicitor in the witness box, with the result that he was ordered to pay the costs instead of his client. This seemed a practical way pour encourager les autres. A drastic measure of this sort even in this country, where we may justly claim for our brethren quite as high an average standard of morals as even amongst English solicitors, might sometimes be beneficial.

The *Law Times* in its issue of February 10, in commenting on this order of Mr. Justice Darling, says that it will be of far-reaching effect, and should not be accepted without some hesitation. However salutary such an order might seem to be, it involves grave results, for it is very difficult for any solicitor under certain circumstances to be at all certain as to the result of an action which may appear to have its meritorious side, and there are cases which must be largely speculative. The writer instances a foreign governess, who was wrongfully dismissed without salary, her luggage detained, and herself thrown on the streets with no means,

and properly says that it would be lamentable if such a person were deterred from obtaining redress by fear of any such rule as above laid down. To avoid such an order a solicitor must be prepared to answer the allegation that there was a clear point decisive of the action against his client. The writer therefore expressed a hope that the ruling of the learned Judge might be reviewed, and the limits of a Judge's jurisdiction in such matters strictly defined.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CRIMINAL LAW—BAIL—INDEMNITY TO BAIL—CONTRACT, ILLEGALITY OF.

Consolidated Exploration Co. v. *Musgrave* (1900) 1 Ch. 37, was an action brought to obtain a retransfer of certain shares, which had been transferred to the defendant, Musgrave, under the following circumstances: Two persons, named Ainsworth and Jordan, were indicted for fraud in promoting a company. Ainsworth applied to Musgrave to become bail for himself and Jordan, which Musgrave agreed to do upon Ainsworth procuring to be transferred to him 1,500 shares of the London Woolen Co., as an indemnity for the liability to be incurred by him as such bail. The shares belonged to the plaintiff company, and Ainsworth procured a resolution to be passed by persons purporting to act as a board of directors of the plaintiff company, authorizing the transfer of the shares to Musgrave, which was accordingly done, but it appeared that the plaintiff company authorized the transfer to be made as a security for costs, and it did not appear by the resolution that it was intended to be by way of indemnity for his going bail. Subsequently Jordan absconded, his bail was estreated, and Musgrave was compelled to pay £1,500. It was contended by the plaintiff company that the bargain between Ainsworth and Musgrave was illegal, as being a contract to indemnify bail in a criminal proceeding. The defendant, Musgrave, on the other hand, contended that though an indemnity given by Ainsworth himself

to Musgrave would have been illegal, his procuring the plaintiffs to indemnify him was not so, and that in any case the plaintiffs were in pari delicto. North, J., however, held that the transaction was illegal, and that the plaintiffs were in no way participators in the illegality and were therefore entitled to have the shares retransferred as they claimed.

SOLICITOR—AUTHORITY TO DEFEND—DEFENDANT COMPANY, DISSOLUTION OF, PENDENTE LITE—JUDGMENT AGAINST DISSOLVED COMPANY—ABATEMENT—COSTS, LIABILITY OF SOLICITOR FOR.

Salton v. *New Beeston Cycle Co.* (1900) 1 Ch. 43. After judgment had been recovered against the defendant company in this action, it was discovered that the company had been dissolved, and the judgment was consequently invalid. The plaintiff thereupon applied to set aside the proceedings subsequent to the dissolution, and to compel the solicitor who had continued to act for the defendant company after its dissolution, to pay the costs of the abortive proceedings. It appeared that the action was tried on 16th March, 1899, and judgment was given on the 23rd March, and that the company had been dissolved on 12th November, 1898. The solicitors for the defendant company were instructed to defend in February, 1898, the company being then in liquidation, and it was subsequently dissolved as the result of the liquidation proceedings. The solicitor had no knowledge of there having been a final meeting of the defendant company until the day of trial, and they took no steps then to find out whether the dissolution of the company had taken place. The solicitor contended that the judgment was valid notwithstanding the dissolution. Stirling, J. held that the judgment was invalid, but that the solicitors were not liable for costs incurred before they had notice of the final meeting, he however said that they were then negligent in not making the necessary inquiries to find out whether a dissolution of the company had taken place, and in consequence were liable for the costs subsequently incurred.

DEVOLUTION OF ESTATES—LAND TRANSFER ACT, 1897, (60 & 61 VICT., C. 65), S. 1, S. 2, SUB-S. 2; S. 24, SUB-S. 2—(R.S.O. C. 127, S. 4)—EXECUTORS.

In re Pawley & London and Provincial Bank (1900) 1 Ch. 58, was an application under the Vendors and Purchasers Act. After the passing of the Land Transfer Act 1897 (60 & 61 Vict., c. 65),

which contains similar provisions to those in the Ontario Devolution of Estates Act (R.S.O. c. 127, s. 4), a testator died having devised his real estate to three trustees upon certain trusts, and he also appointed the trustees his executors. Only two of them proved the will, power being reserved to the other to come in and prove. This third executor had neither proved the will nor disclaimed the trusts thereof. The two executors who proved the will entered into a contract to sell certain real estate belonging to the testator's estate, and the purchasers required that the third executor, who had not proved, should also join in the conveyance, or that a disclaimer by him of the trusts of the will should be abstracted and produced. The other executors contended that they alone could make title, and this was the point submitted to Kekewich, J., who was of opinion that the purchasers' requisition was well founded, and although there was a power in the will expressly enabling the proving executors to sell, he nevertheless considered that the legal estate was vested in the three, and as an executor derives his title from the will, and not from the probate, the omission of the third executor to prove the will did not prevent the title vesting in him. The term "personal representatives" in the Act, in the learned judge's opinion, applies to those filling that character irrespectively of the question whether they obtain probate or not.

LEASE—COVENANT BY LESSOR NOT TO LET ADJOINING LAND FOR A SPECIFIED TRADE—LESSEE, RIGHT OF, TO ENFORCE COVENANT MADE BY THIRD PERSON WITH HIS LESSOR.

Ashby v. *Wilson* (1900) 1 Ch. 66 is a somewhat peculiar case. Ashby was a tenant of Wilson who also owned adjoining premises which he had covenanted with Ashby he would not let for the purposes of the same kind of trade as that carried on by Ashby. Subsequently Wilson let the adjoining premises to one Bebb, who covenanted with Wilson that he would not use the premises for carrying on a trade like that of the plaintiff's, but in breach of this covenant he actually did carry on a trade like that of the plaintiff Wilson's. The action was brought against both Wilson and Bebb, to restrain Wilson from letting the premises, and Bebb from using the premises, for the business carried on by the latter. Kekewich, J., however, held that the plaintiff was not entitled to succeed as against either defendant,—not against Wilson because he had not

been guilty of any breach of his covenant, nor yet against Bebb because as between him and the plaintiff there was no privity of contract, nor could the plaintiff require Wilson to sue Bebb for this breach of his covenant with Wilson, that point, in his opinion, being covered by *Kemp* v. *Bird*, 5 Ch. D. 978, notwithstanding *Fitz* v. *Iles* (1893) 1 Ch. 77, where *Kemp* v. *Bird* seems to have been overlooked.

LUNATIC—FOREIGN DOMICIL—FRENCH TUTEUR OF LUNATIC—MONEY OF LUNATIC IN ENGLISH BANK, RIGHT OF FOREIGN TUTEUR TO RECOVER.

Thiery v. *Chalmers* (1900) 1 Ch. 80, was an action by a lunatic by his next friend and by the tuteur of the lunatic appointed by a French court, the lunatic being domiciled in France, to recover money of the lunatic deposited in an English bank. According to French law it appeared that a tuteur of a lunatic is entitled to take possession of the whole of the lunatic's estate wherever situated, and to maintain actions on behalf thereof. The defendants were ready to pay the claim, and only desired to get a legal discharge. Kekewich, J. held that the tuteur alone was competent to give a legal discharge for the money, and he gave judgment for the plaintiffs.

WILL - CONSTRUCTION—GIFT FOR PARTICULAR PURPOSE—GIFT SUBJECT TO PERFORMANCE OF PARTICULAR PURPOSE—SURPLUS—RESULTING TRUST.

In re West, Geo ge v. *Grose* (1900) 1 Ch. 84, shews the marked difference between a gift in a will for a particular purpose, and a gift subject to the performance of a particular purpose. In the former case there is a resulting trust of any surplus for the benefit of the residuary devisee or legatee, if any, or if none, for the heir or next of kin, whereas in the other case the donee is beneficially entitled to the surplus. The facts in this case were as follows: A testatrix gave and devised all her real and personal estate to certain persons in trust for sale, and out of the proceeds to pay her funeral and testamentary expenses, debts and legacies. No other trusts were declared, and there was no residuary gift. The property not being exhausted by the trusts above mentioned, the question arose, who was entitled to the surplus? The trustees, or the heirs and next of kin? Kekewich, J. decided that question in favour of the heirs and next of kin.

WILL—NAME AND ARMS CLAUSE—SURNAME, USE OF.

In re Eversley, Mildmay v. *Mildmay* (1900) 1 Ch. 96, is a decision of Bryne, J., to the effect that where property is left by a will subject to the donee assuming the name of the testator, "alone or together with" the donee's own family name, the donee may tack the testator's surname before or after his own surname at his pleasure.

VENDOR AND PURCHASER—LAND SUBJECT TO RESTRICTIVE COVENANT—CONTINUOUS BREACH OF RESTRICTIVE COVENANT FOR UPWARD OF TWENTY YEARS—WAIVER OF RESTRICTIVE COVENANT, PRESUMPTION OF.

Hepworth v. *Pickles* (1900) 1 Ch. 108, was an action by a purchaser of land to obtain a rescission of the contract, on the ground that the land, the subject of the contract, was subject to a restrictive covenant against selling intoxicating liquors on the premises. The covenant was contained in a conveyance of the land to the defendant's predecessor in title made in 1874. The evidence shewed that intoxicating liquors had in fact been uninterruptedly sold on the premises for twenty-four years. Farwell, J., under these circumstances, was of opinion that there was a conclusive presumption that there had been a waiver or release of the covenant, and he dismissed the action, but without costs.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

Sir Alfred Milner's proclamation that the British Government will not recognize any forfeitures or incumbrances declared or created by the Transvaal Government upon property within the South African Republic since the outbreak of the war, throws a somewhat clear light upon England's post-bellum intentions. The Transvaal will undoubtedly be declared British territory. There will probably be little international difficulty as to that event being consummated; but as to European concessionaires tamely submitting to British repudiation of their claims, there is some doubt. At all events some nice questions of International Law are likely to arise in the matter. In order to justify her position England may

be obliged to establish that the declaration of war by the Boer oligarchy operates a forfeiture of its right to independent government of the state under the conventions of 1881 and 1884, and a consequent reversion of the territory to British dominion as of the date of the Kruger ultimatum. Nous verrons.

* * * An interesting illustration of the overwrought state of the English mind during the dark days of the Boer war is afforded by Mr. Justice Grantham's stinging comments, in his address to the grand jury at the Lancaster Winter Assizes, upon an apparently very silly sermon preached by the Dean of Durham concerning the moral attitude of the English people in the conduct of the war. It seems that the Dean had seized upon the insignificant fact that a few of the volunteers for service in South Africa, overestimating the virtues of strong waters in tempering their emotions, had, consequently, embarked in a somewhat demoralized state, to justify a violent onslaught upon the character of the British soldier and the British public in general at the end of the century. He also undertook to defend the Boers against what he termed the "slanders" of the English press. Now all this was quite foreign to the business before the Lancaster Assizes, but Mr. Justice Grantham had come to court fresh from much patriotic labour in behalf of volunteer enlistment, and the opportunity was not to be lost for chastening his friend the Dean. In the course of his strictures he said: "There might have been cases, unfortunately, where friends had forced drink too freely on their parting friends, but compared with the thousands, over the hundred thousand, who had gone out in all ranks, and in all employment, the instances were few. Intemperance in drink was a vice, but it affected the individual only; intemperance of speech and of tongue was a national crime when the words uttered would be as useful to our enemy as they were insulting to our country." This coup de maitre was too much for the perfervid Dean, and he published in the press an open letter to the Judge, in which he genially observed that "it would be a very bad day for England dio the judicial Bench stoop to follow your unhappy example—did the ermine descend so low as to play to the gallery in days of political or national trouble." To this Grantham, J. magnanimously rejoined: "I am very sorry for the controversy which has arisen, for I know your goodness of heart, and when political prejudices do not

arise (!) you would be the last person to say an unkind word against any one." But the matter did not end here, for the Earl of Durham asked a question in the House of Lords concerning it, and in the course of his reply the Lord Chancellor said that while he had no control over either the Judge or the Dean in this matter, he "would express his opinion as an Englishman that it was a great outrage to preach such a sermon in a church." From all of which it appears that the Dean had the worst of the argument, and we are sorry to say that he quite deserved all he got.

* * * Mr. Justice Gray, in delivering the opinion of the United States Supreme Court in the case of *The Paquete Habana* (January 8th, 1900) said that for the purpose of ascertaining the rules of International Law "where there is no treaty and no controlling executive or legislative Act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who, by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." This "opinion" is a singularly able one throughout, and contains a very learned review of the principal authorities exempting fishing vessels from capture as prize. We are pleased to note a very complimentary reference by Judge Gray to Calvo's work on International Law, a work which may be said to have no peer among the productions of the more modern publicists.

* * * To those who are pleased to discover a parallel between Oom Paul Kruger and Oliver Cromwell, we would recommend a perusal of Lord Rosebery's address upon the occasion of the celebration of the tercentenary of the Protector's birth in London in November last—also bearing in mind the fortunes of the present war. Expressing his firm conviction that Cromwell was not a hypocrite, Lord Rosebery said: "Had he been, he could not have been such an enormous success; he could not have wielded the enormous force that he did. A religious force which is based on hypocrisy is no force at all. * * * * I believe, then, that had Cromwell been a hypocrite he would not have been able to

maintain himself in the dazzling position which he achieved; and had he been a hypocrite he could not have med that army which he commanded, and which was indubitably the greatest army in Europe at the time of his death." And so if complete and ultimate success in a leader of men is a criterion of his honesty of purpose, then Paul Krüger is too sorry a rascal to be mentioned in the same breath with Oliver Cromwell. For further information concerning this interesting parallel read Mr. Fitzpatrick's estimate of Kruger on pp. 85, 288 of "The Transvaal from Within."

* * * What Montesquieu said of little England some hundred and fifty years ago might with equal force be applied to the sons of Greater Britain at the present crisis in Imperial affairs: "The men of this nation are more confederates than fellow-citizens." (Notes Sur l'Angleterre). Truly, the Englishman is developing new qualities with the march of years, but the fine old grain is still in the stuff whereof he is made.

* * * Sir Edward Clarke's retirement from the House of Commons is being deplored by the leading English press, notwithstanding the fact that they say of him that he is, in cricketing parlance, "an umpire who generally gives his own side out." His fine adhesion to the principle of doing what he believes to be right independent of consequence, recalls the saying of Marcus Aurelius: "Whatever anyone does or says, I must be emerald, and keep my colour."

* * * The cycle of the serious has come round upon us again. For the next decade at least we shall not let the faddists be our schoolmasters. The good old German proverb, "Allzu klug ist dumm," will be forgotten, or, if recalled, will cease to constrain us. We are to forsake the sciolism of the problem-novel, and, placing confident hand in that of the savant, go forward to explore with him the bed-rock of true knowledge. Even now we are told by the publishers that the sale of religious works exceeds that of fiction. Several important contributions to history, ethics, and speculative philosophy are in the new English catalogues; many more are announced. So it behoves the lawyer to put on his reading-glasses at once if he wishes to keep in the van of enlightenment. He could not begin with a better book than

Professor (William) Graham's "English Political Philosophy from Hobbes to Maine," because it is both cognate to his proper professional studies and replete with data whereby he may modify and revise his, haply, rusty opinions. It is a far cry from Hobbes to Maine, and quite a number of works familiar to those who have studied law as a science are discussed more or less at length, such as those of Locke, Burke, Bentham and Mill. No one would, perhaps, be disposed to dispute Professor Graham's view that amongst English political thinkers Hobbes is "the first great fountain of original ideas," but we fear the admirers of Bentham (amongst whom we are not) will resent the rather inconspicuous place he is accorded in the learned Professor's pantheon.

Correspondence.

SUCCESSION DUTY ACT.

To the Editor, CANADA LAW JOURNAL.

DEAR SIR:—To your recent warning to the profession of this Province regarding certain provisions of The Succession Duty Act, I should like to add a word with respect to the amendments of last Session, contained in 62 Vict., c. 9, the effects of which may have escaped the notice of legal advisers of corporations. Sections 12 and 13 of the amending Act cast new and sweeping obligations upon corporations of every nature having their head offices within this Province, including banks I believe as well, to satisfy themselves that shares held by foreign owners are exempt from succession duty, or that the duty has been paid or the security for same furnished to the Treasurer of the Province, before consenting to their transfer by executors or administrators. Any omission to take these precautions before transfer, no matter how small the holding of shares may be, may impose the liability upon a corporation to pay succession duty. The provision in the 12th section by which the aggregate value of the estates of foreigners, wherever situated, is to be taken into account in ascertaining whether the portion in Ontario is subject to succession duty or otherwise, will doubtless bring within the scope of this Act many small holdings of shares heretofore exempt, as found

in *Re Renfrew*, 29 O. R., p. 565, the decision in which case is responsible for the present amendment. It appears to me that the only safe course to be followed by a corporation is to insist upon the production of letters of probate or administration issued from a Surrogate Court of this Province, accompanied by a certificate from the Treasury Department, or its properly authorized representative, shewing clearly that no succession duty is claimed upon the shares in question, and relieving the company from all liability in respect of the transfer. It would seem also that the mere following of the practice prescribed in sections 57 and 58 of the Loan Corporations Act, relating to the transfer of shares in loan companies, without taking the additional precautions mentioned, will no longer afford protection to any loan company consenting to the transfer of shares subject to duty by the executors or administrators of a non-resident.

Yours truly,

F.C.J.

To the Editor, CANADA LAW JOURNAL.

DEAR SIR:—Referring to Mr. Griffin's article in the last number of the LAW JOURNAL, I would like to suggest a question which he has not touched: Suppose the trustee, by virtue of the stock held in trust, has a controlling interest in the Company, and, therefore, power to say whether or not a bonus is to be treated as capital or income (under certain circumstances indicated by Mr. G.), and suppose he, or some member of his family, is one of the beneficiaries of the trust, what would be his liability, if any, to a cestui que trust, if he procured a disposition by the Company favourable to himself and unfavourable to the other?

J.W.C.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Practice.] [Jan. 24.

MCCULLOCH *v.* TOWNSHIP OF CALEDONIA.

Costs—Scale of—Drainage Act—Reference.

Sec. 115 of the Drainage Act, R S O. c. 226, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under s. 93, and not to actions referred to under s. 94 which might properly have been brought at common law without reference to the Drainage Act, and which are referred to the Referee because the Court thinks they may be more conveniently disposed of by him.

J. H. Moss, for the plaintiff. *J. B. O'Brian*, for the defendants.

HIGH COURT OF JUSTICE.

Boyd, C.] ALLSTADT *v.* GORTNER. [Oct. 28, 1899.

Statute of Limitations—Moneys in Court—Paid out by mistake—Lapse of time—Restitution—Mistake of officer of the court.

The Statute of limitations has relation only between subject and subject —the Crown cannot be bound by it.

The Court is a public trustee as to all moneys and securities in its hands.

Moneys in Court are in custodia legis—in this case tantamount to custodia regis, and to such a fund and such a custodian the Statute of limitations has no pertinence.

Suitors and claimants are not barred by any lapse of time in their application to be paid out of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution if they have improperly or fraudulently received moneys from the Court to which they had no just claim, and an order was made ordering restitution after a period of fourteen years, although without interest, as the mistake was that of an officer of the Court.

J. Hoskin, Q.C., for the motion. *E. Sydney Smith*, Q.C., contra.

Boyd, C.] PEDLOW *v.* TOWN OF RENFREW. [Dec. 21, 1899.

Highway—Dedication and acceptance—Registered plan—Statutory regulations—Sale of land by reference to it. Setting apart street.

A public highway may be established by dedication and acceptance.

The non-conformity to statutory regulations of a registered plan which shews a new street, may affect the right to have it treated as properly registered so as to give a new basis for description of lands sold by reference to it, but it will not affect transactions which manifest the actual setting apart and acceptance of the street on the site proposed by the co-operation of the owners and municipal authorities.

Aylesworth, Q.C., and *T. W. McGarry*, for plaintiffs. *S. H. Blake*, Q.C., and *James Craig*, Q.C., for defendants.

Meredith, C.J.] BARBER *v.* MCQUAIG. [Jan. 16.

Res judicata—Reported reasons for judgment—Premature action—Second action for same cause—Mortgagor and mortgagee—Purchaser's covenant—Assignment of—Agreement as to—Exhaustion of remedies.

A mortgagee had taken an assignment from a mortgagor of the covenant of a purchaser of the equity to pay off the mortgage and had on receiving certain securities agreed with the purchaser not to sue him until certain other remedies were exhaused and had been unsuccessful in a suit against the mortgagor on the ground that the remedies were not exhausted. In a second action on the same covenant,

Held, that the Court may properly examine the pleadings, evidence and proceedings at the trial on the former action and that the reports of the reasons given for the judgments may be looked at for the purpose of ascertaining what the law is. That the dismissal of a suit on the ground that it was prematurely brought is no bar to another action on the same demand after time has removed the objection. And in a second action that the mortgagee having exhausted her remedies and made an arrangement with the purchaser by which she was placed in the same position with respect to him as she was before she received the securities, was entitled to recover notwithstanding she had retransferred the securities to him and agreed not to sue on his covenant, but the latter agreement was not to apply to the mortgagor in case the purchaser's covenant was reassigned to him.

C. Robinson, Q.C., and *W. H. Irving*, for plaintiff. *Aylesworth*, Q.C., for defendant.

Armour, C. J.] SILLS *v.* COUNTY OF LENNOX AND ADDINGTON. [Jan. 16.

Criminal law—Detection of crime—Constable's services and expenses—Obtaining evidence—Payment for—Certified account—R.S.O. c. 101, s. 12.

The gist of s. 12 of R.S.O. c. 101 is to empower a Warden and County

Attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff which are in their opinion necessary for the detection of crime or the capture of persons believed to have committed serious crimes, and to do so upon the credit of the County and so to render the County liable for the payment for such special services, and that whether the account is certified by the Warden and County Attorney as required by the said section or not.

Aylesworth, Q.C., and *Deroche*, Q.C., for plaintiff. *W. G. Wilson*, for defendant.

Armour, C.J.] PARNELL *v.* DEAN. [Jan. 19.

Covenant not to carry on business—Breach—Constitution of action—Good-will—Injunction.

Three brothers, C. F. D., G. F. D. and R. D., carrying on business as bakers in the city of L., entered into an agreement with P., another baker in the same city, by which it was agreed that both businesses should be put into a Joint Stock Company, and C. F. D. was to retire, and he covenanted with G. F. D., R. D. and P. jointly not to carry on the business of baker in the said city or within ten miles of it for ten years. Subsequently G. F. D. and R. D. retired from the company, and gave up business, and two other brothers J. D. and A. D. started a new business as bakers in the said city, and C. F. D. assisted them in making and distributing bread, but as he said simply as a volunteer.

Held, 1. His so doing was engaging in the business of baker in the said city and was as much a breach of his covenant as if he had done so for hire.

2. Either the plaintiff P. or the company could maintain the action for an injunction, and that it was properly constituted by both being made plaintiffs with C. F. D., G. F. D. and R. D. as defendants.

3. It was no answer to the relief sought that G. F. D. and R. D. had ceased to carry on business and an injunction was granted.

Talbot Macbeth, for plaintiffs. *I. F. Hellmuth*, *A. Casey* and *J. H. A. Beattie*, for defendants.

Boyd, C., Ferguson, J., Robertson, J.] [Feb. 7.

IRVINE *v.* SPARKS.

County courts—Action tried with a jury—Motion for new trial—Judgment—Appeal.

There is no appeal to a Divisional Court from a judgment of a County Court on a motion for a new trial made to that Court in an action tried with a jury. *Brown* v. *Carpenter* (1896) 27 O.R. 412, followed.

Aylesworth, Q.C., for the appeal. *Shepley*, Q.C., contra.

Meredith, C.J., Rose, J., MacMahon, J.] [Feb. 8.

GROVE *v.* BENDER.

Costs—Appeal for—Error in principle—Scale of costs—Action for price of goods sold—Refusal to accept—Re-sale pendente lite—Recovery of difference in price—Amount in controversy.

The plaintiffs brought an action in a County Court for $175.55, the price of goods sold. The defendants had rejected the goods on the ground that they were not up to sample. After delivery of the statement of claim the plaintiffs sold the goods and delivered an amended statement of claim, in which they gave the defendants credit for the proceeds of the sale and proceeded with their action for the balance, $77.90. The trial judge found that the goods were equal to sample, and gave the plaintiffs judgment for $77.90. As to the costs, he held that by their amended statement of claim the plaintiffs' cause of action became an entirely new one, and solely one within the jurisdiction of a Division Court, and for this reason they were entitled only to Division Court costs, and the defendants were entitled to set off the excess of their costs incurred in the County Court.

Held, that an appeal lay to a Divisional Court, notwithstanding that costs only were involved, because the judgment appealed from shewed that the trial judge had proceeded upon a wrong principle.

Held, also, that the plaintiffs, having properly brought their action in the County Court, should not be deprived of their costs of such action by what they had done pendente lite, and were entitled to costs on the County Court scale.

Worrell, Q.C., for plaintiffs. *Vickers*, for defendants.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 12.

TRUSTS AND GUARANTEE CO. *v.* HART.

Gift—Parent and child—Fiduciary relationship—Influence—Presumption—Onus—Absence of independent advice.

For fifteen years before his father's death the defendant managed his father's shop and his business generally, and did all his banking business under a power of attorney. For eleven years before the death the defendant and his wife and children all lived with the father in a dwelling above the shop. The fullest authority was given to the son and the fullest trust reposed in him. After the death of the father, at the age of seventy-eight, in September, 1898, the son claimed a sum of $20,000, represented by a bank deposit receipt dated 3rd of June, 1898, payable to himself, which he alleged was a gift from his father to himself or his children. He obtained the deposit receipt by drawing a cheque for the amount in his own favour upon his father's account and signing it with his father's name, by virtue of the power of attorney. The father died intestate, leaving the defendant

and two other children. The sum of $20,000 represented more than one-fourth of the value of the estate. The trial judge found that the $20,000 was a gift to the defendant's children and ordered it into Court for their benefit.

Held, reversing that judgment, that, on grounds of public policy, the presumption was that the gift, even though freely made, was the effect of the influence induced by the confidential relationship which existed, and the onus was on the defendant to shew that his father had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances; and nothing of the kind was shown in this case. *Morley* v. *Longhoran*, (1893) 1 Ch. 736, *Rhodes* v. *Bate*, L.R. 1 Ch. 252 and *Liles* v. *Terry*, (1893) 2 Q.B. 679, followed.

The rule is not confined to the case of trustee and cestui que trust, but has been applied to every case where confidence has been reposed, and the fact that the benefit obtained has not been so obtained for the personal benefit of the person in whom the confidence was reposed, does not affect the application of the principle.

Evidence was given to the effect that the deposit receipt was taken in the defendant's name in lieu of a promissory note made by the father in 1895, which itself was a renewal of an earlier note made in favour or the son as a settlement for his children, and that both notes had been destroyed.

Held, that the notes, if they existed at all for the purpose alleged, were incomplete gifts, not binding upon the deceased or his estate. The hand by which the transfer of the $20,000 was effected was that of the son, and the ratification rested almost wholly upon the evidence of the son and his wife, who kept the matter a secret until after the death. The father at the time the transaction was carried out in June, 1896, was not legally bound to pay his note; he was ill and old; and the only adviser to whom he had recourse was the defendant. Therefore that time, and not the time when the notes were said to have been given, was the time at which the gift must be taken to have been made, if at all, and at which the effect of the lack of the independent advice was to be considered.

Osler, Q.C., and *E. M. Young*, for defendants. *Aylesworth*, Q.C., and *C. H. Widdifield*, for defendant George D. Hart and infant defendants. *R. Wardrop*, for Standard Bank of Canada.

Meredith, J., Rose, J., MacMahon, J.] [February 15.

CANADIAN MUTUAL L. & S. Co. *v.* NISBET.

Receivership order—Life policy—Assignment of same—Security for money—R.S.O. c. 77, s. 18.

Held, that the plaintiffs were entitled to a receivership order to receive the defendant's interest in a life ten-payments policy which was fully paid

up—the same having been assigned to the plaintiffs as security for a debt due to them, and the assignment entitling the defendant to receive from time to time the cash surrender value of the bonus additions to the policy, and so having ceased to be exigible in execution under R.S.O. c. 77, s. 18, as "a security for money"—on the principle that the benefit of the defendant's interest in the policy under ordinary process being defeated by a prior title—that of his assignee—not extending to the whole interest of the defendant in the property upon which the judgment was proposed to be executed—the plaintiffs were entitled to the aid of the court to enable them to reach it.

Macdonell, for the plaintiffs. *J. H. Moss*, for the defendant.

Ferguson, J.] COLE *v.* CANADIAN PACIFIC RAILWAY COMPANY [Feb. 16.

Evidence—Discovery—Negligence—Absence of safeguards—Subsequent placing.

Where an injury is alleged to have been caused by the negligence of the defendant in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of shewing his prior negligence; and upon an examination for discovery the defendant is justified in declining under advice to answer questions relating to such subsequent placing.

D. L. McCarthy, for plaintiff. *Shirley Denison*, for defendants.

Meredith, C.J., Rose, J., MacMahon, J.] [Feb. 19.

LEES *v.* OTTAWA & NEW YORK R.W. CO.

Railways — Tolls not fixed by Governor-General — Threefold penalty—Right to receive back—51 Vict., c. 29, s. 227.

The fact that a railway company has not had its tolls approved by the Governor-General under 51 Vict., c. 29, s. 227, does not in itself entitle a passenger who has paid such tolls to recover three times the amount under s. 290 of that Act, in the absence of evidence that the fares charged were unreasonable or excessive; nor is such passenger entitled to recover back the amount so paid by him as paid under a mistake of fact, where it is such as in equity and conscience he ought to have paid.

Plaintiff in person. *W. H. Curle*, for defendants.

Armour, C.J.] MOKE *v.* TOWNSHIP OF OSNABRUCK. [Feb. 26.

Costs—Scale of—Drainage Act—Reference.

Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope

of s. 93 of the Drainage Act, R.S.O. c. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to the tariff of the County Courts, under s. 113.

J. H. Moss, for the plaintiff. *Cattanach*, for the defendants.

Meredith, C.J., Rose, J., MacMahon, J.] [March 1.

UNION BANK OF CANADA *v.* RIDEAU LUMBER CO.

Appeal—Abandonment—Reinstatement—Grounds for leave to appeal—Judgment—Error—Injustice.

The defendants, after setting down an appeal for hearing by a Divisional Court, served notice abandoning it, and the case was struck out of the list. They afterwards moved to have it restored to the list.

Held, that if the motion could be treated as one for leave to appeal, notwithstanding the lapse of time, it would be incumbent upon the applicants to shew that prima facie the judgment below was wrong; and there being no error apparent on the face of the judgment, and no specific error having been pointed out, such an application must be refused. But, *semble*, the motion could not be so treated.

The judgment below found that the defendants were trespassers and directed a reference as to damages. When the appeal was abandoned the defendants thought the claim of the plaintiffs would be much smaller than it subsequently appeared to be; and on learning the size of the claim, the defendants wished to renew their appeal.

Held, no ground for interfering.

The defendants had not made out any case shewing that any injustice was likely to arise if they were not allowed to appeal, or that they were only asking for what was just.

Aylesworth, Q.C., for defendants. *W. H. Douglas*, Q.C., for plaintiffs.

Meredith, C. J., Rose, J., MacMahon, J.] [March 1.

RE WOOLIVER AND THE COUNTY OF KENT.

Public schools—County Council—Appointing arbitrators—An appeal from Township Council—Discretion—Mandamus—R.S.O. c. 292, s. 39, s-s. 3.

The provisions of s-s. 3 of s. 39 of the Public Schools Act, R.S.O., c. 292, are permissive not imperative.

It is plain from a review of the history of the legislation as to the matter with which that section dealt, that the legislature in 1897 deliberately abandoned the policy of making it obligatory upon the County Council to

appoint arbitrators, and plainly vested in the County Council the discretion of appointing them or not as it might in the exercise of that discretion deem proper. Judgment of ARMOUR C J., reversed.

Aylesworth, Q.C., for the appeal. *John S. Fraser*, contra.

Street, J.] ALLISON *v.* BREEN. [March 4.

Limitation of actions—Judgment—Revivor—Time—Notice.

In 1894 the plaintiff obtained ex parte (the defendant being out of the jurisdiction) an order reviving a judgment for the payment of money which he had recovered against the defendant in 1875, and allowing the entry of a suggestion on the judgment roll, and the issue of execution. The plaintiff entered the suggestion in 1894, and afterwards examined the defendant as a judgment debtor, whereupon the defendant made an offer of settlement, which was not accepted. The plaintiff died in 1895 and the defendant in 1899, after which the personal representative of the plaintiff obtained an order on praecipe reviving the action in his name as plaintiff and in that of the personal representative of the defendant as defendant.

Held, that the last order should have been made on notice, but it was proper to treat an application to set it aside as a substantive motion on notice, and, so treating it, the order should be confirmed.

The order made in 1894 reviving the judgment should have been made on notice, under the Common Law Procedure Act, then in force, but, under the circumstances of the defendant's absence from the country, his subsequent examination, and the attempted settlement, it was a valid and binding order.

Held, also, following *Mason* v. *Johnston*, 20 A R. 412, that the judgment remained in force for twenty years, and the entry of the suggestion within that time was effectual to renew the time from which the statute begins to run.

Tytler and *C. J. McCabe*, for defendant by revivor. *J. J. Maclennan*, for plaintiff by revivor.

Meredith, C.J., Rose, J., MacMahon, J.] [March 5.

WINDSOR FAIR GROUNDS AND DRIVING PARK ASSN. *v.* HIGHLAND PARK CLUB.

Parties—Third party notice—Agreement—Rule 209—Appearance.

The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the hire of a race track. The defendants alleged that a ferry company had agreed to pay and contribute towards the hire of

the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that the defendants had thereby been induced to enter into the agreement with the plaintiffs.

Held, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within Rule 209, and therefore the defendants should not have been allowed to serve a third party notice.

Held, also, that the proper practice in moving against a third party notice is to move without entering an appearance.

Aylesworth, Q.C., for ferry company. *F. A. Anglin*, for defendants.

Meredith, J.] ROMBOUGH *v.* BALCH. [March 6.

Appeal—Supreme Court of Canada—Security for costs—Stay of proceedings—Payment of money out of Court.

At the trial the plaintiffs recovered judgment in the High Court against the defendants for damages and costs. The defendants appealed to the Court of Appeal, paying $200 into Court as security to the plaintiffs for the costs of such appeal. The appeal was dismissed with costs. The defendants launched a further appeal to the Supreme Court of Canada, and gave the security required by s. 46 of the Supreme and Exchequer Courts Act, but no other security.

Held, that proceedings to enforce the plaintiffs' judgment in the High Court were not stayed, either by force of s. 48 or otherwise.

But the Court was not bound to pay out immediately to the plaintiffs the sum of $200 paid in by the defendants, the judgment of the Court of Appeal being stayed pending the appeal to the Supreme Court, which might determine that the plaintiffs were not entitled to the costs of the Court of Appeal.

And in this case the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in Court during the pending appeal.

J. H. Moss, for plaintiffs. *W. H. Blake*, for defendants.

Armour, C.J.] SPEARS *v.* FLEMING. [March 12.

Summary judgment—Rule 603—Recovery of land—Money claim—Counterclaim—Trial.

The defendant having entered into possession of land which he had contracted to purchase from the plaintiffs, and having, as alleged, made default in payments of instalments of the purchase money, the plaintiffs brought an action against him to recover possession of the land and also for a money demand. The writ of summons being specially indorsed,

and the plaintiffs having moved for summary judgment under Rule 603, the defendant set up that he had been induced to enter into the contract by fraud and misrepresentation, for which he intended to counterclaim, and that nothing was due to the plaintiffs in respect of their money demand. The Master ordered judgment for the recovery of the land, but stayed the operation of it until after judgment upon the plaintiffs' other claim and the defendant's counterclaim, which he allowed to go to trial.

Held, reversing this order, that many serious questions might arise at the trial as to the recovery of the land and the terms upon which it might be recovered, and the trial judge ought not to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action.

J. H. Moss, for plaintiffs. *Lindsey*, Q.C., for the defendant.

Armour, C. J., Street, J.] PICKARD *v.* TIMS. [March 13.

Costs—Scale of—County Court—Defence arising after action—Discharge of part of claim—Division Court garnishment—Payment into court.

On the 5th August, 1899, a creditor of the plaintiff issued a summons out of a Division Court claiming $64 from the plaintiff, and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a County Court to recover $133.40. On the 28th August the garnishee (the defendant in this action) paid $57.50 into the Division Court. On the 6th September judgment was given in the Division Court for the primary creditor against the primary debtor (the plaintiff in this action) for $64 and against the garnishee for $57.50. On the 5th October the plaintiff delivered his statement of claim for the whole $133.40.

Held, that the service of the summons was no bar to this action; that the defence that the defendant was discharged as to $57.50 by his payment into the Division Court was a defence which did not arise until the payment was made and judgment given in the Division Court, and was consequently a defence arising after action brought, and such payment and judgment could not have relation back to the time of service of the summons; and, therefore, it having been adjudged in this action that the plaintiff was entitled to the amount claimed by him, less the $57.50, the action was properly brought in a County Court, and the plaintiff was entitled to costs on the scale of that court.

Jackson, Q.C., for the plaintiff. *Shepley*, Q.C., for the defendant.

Armour, C. J.] [March 14.

ANGLO-CANADIAN MUSIC PUBLISHING ASSOCIATION *v.* SOMERVILLE.

Costs—Infringement of copyright—Consent judgment—Damages—Amount of—Reference—Offer—Payment into Court.

Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only $6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded $100 compensation, and that after action the defendant offered to pay $25 for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer.

Held, that the plaintiffs were entitled to the costs of the action. *Cooper* v. *Whittingham*, 14 Ch. D. 501, *Upmann* v. *Forester*, 24 Ch. D. 231, and *Wittman* v. *Oppenheim*, 28 Ch. D. 260, followed. And also to the costs of the reference, the defendant not having when consenting to judgment offered to pay a fixed sum for damages and to pay it into Court.

Laing, for plaintiffs. *W. Roaf*, Q.C., for defendant.

Province of New Brunswick.

SUPREME COURT.

En Banc.] MACPHERSON v. MOODY. [Feb. 9.

Chattel mortgage—Right of mortgagor to trade—Whether words, "To use same in ordinary way" authorizes trading—Replevin.

Defendant, a farmer, executed a mortgage on his farm and a chattel mortgage on his stock of horses, cattle, sheep, etc., farming implements and all his personal property, as security for a loan, which mortgages were duly registered. The chattel mortgage was in the usual form, transferring all the chattels specified in a schedule and "all other property that may hereafter . . . be bought to keep up the same, in lieu thereof and addition thereto either by exchange, purchase or otherwise," and containing the ordinary proviso allowing the mortgagor to remain in possession of the chattels "with power to use same in the ordinary way while so in possession," and also a proviso prohibiting the disposal of the chattels without the written consent of the mortgagee. Subsequently he traded one of the horses, A, with plaintiff without informing him of the existence of the

mortgage, receiving in exchange another horse, B. Plaintiff some months later learned of the mortgage, and, tendering the horse A back to the defendant, demanded that the bargain be rescinded. Defendant refused, claiming that he had the permission of the mortgagee to trade and subsequently the mortgagee's solicitor telephoned to plaintiff offering to give him a re[illegible]. Plaintiff insisted on a rescission of the trade, and this being declined, he replevied the horse B. The County Court Judge on the trial of defendant's claim of property, held that the horse had legally passed to defendant and ordered its delivery back to him.

Held, on appeal, per VANWART and MCLEOD, JJ., that under the terms of the mortgage defendant had no right to trade without the written consent of the mortgagee and that plaintiff was entitled to recover back his horse.

Held, per BARKER and LANDRY, JJ., that there being an implied warranty by defendant to plaintiff of his right to exchange, in the absence of evidence shewing a ratification of the trade by the mortgagee before plaintiff's election to rescind, plaintiff was entitled to recover back his horse unless it should be found as a matter of fact that to trade horses was in the ordinary course of defendant's business as a farmer, and the transaction should thereby be brought within the proviso "with power to use same in the ordinary way," and that the judge below, not having definitely passed on this question, there should be a new trial.

TUCK, C.J., and HANNINGTON, J., held that the evidence shewed authority in the defendant to exchange, and that plaintiff was not entitled to recover back the horse, B.

Appeal allowed with costs with directions for new trial.

C. E. Duffy and *Wm. Pugsley*, Q.C., in support of appeal. *A. J. Gregory*, contra.

En Banc.] EX PARTE LANDRY. [Feb. 9.

Several convictions—Rule nisi for certiorari—Leave to take out jointly or severally—Joint rule bad.

In Michaelmas term applicant moved for rule nisi for certiorari to remove several convictions for assault against him and others, the motion being in the alternative to take out a separate rule against each conviction or a joint rule against all jointly, as he should decide. The motion being granted he subsequently took out a joint rule against all the convictions.

Held, on motion to make the rule absolute, that a separate rule should have been taken out in each case.

Rule discharged.

M. G. Teed, in support of rule. *J. D. Phinney*, Q.C., contra.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] MOIR *v.* PALMATIER. [Feb. 8.

Vendor and purchaser—Rescinding agreement of sale—Specific performance—Formal declaration of cancellation—Laches.

Judgment of KILLAM, C.J., noted vol. 35, p. 509, affirmed with costs.

Held, also, per RICHARDS, J., that the laches of the plaintiff barred her from the remedy of specific performance against the defendant Mills, who had entered into possession of the property under a lease from Palmatier, with an option of purchase, and had made valuable improvements without notice that the plaintiff intended to claim specific performance.

Culver, Q.C., and *Pitblado*, for plaintiff. *Ewart*, Q.C., and *Hough*, for defendant Palmatier. *Huggard*, for defendant Mills.

Full Court.] MERCHANTS' BANK *v.* MCKENZIE. [Feb. 8.

Fraudulent conveyance—Exemptions—Real Property Act, R.S.M. c. 133, s. 57—Burden of proof—Concealed fraud—Laches.

The plaintiffs were judgment creditors of the defendant McLean, who at the time judgment was recovered was, and has since remained, in insolvent circumstances; and this action was brought to have it declared that two quarter sections of land which were bought after the recovery of the judgment in the name of the defendant McKenzie were held by her as a bare trustee for McLean, or had been fraudulently transferred to her in order to hinder and defeat the creditors of McLean. Both parcels of land had formerly belonged to McLean, but they had been sold for arrears of taxes in 1886, and subsequently the purchasers, after negotiations carried on by McLean or his solicitor, assigned the tax sale certificate to the defendant McKenzie, a poor girl, who lived with McLean, her uncle. Tax deeds were issued to her by the municipality, and certificates of title under the Real Property Act, were obtained for both parcels in Miss McKenzie's name. She claimed that she had furnished the money, $125, required to acquire the tax sale certificates, but the evidence in support of this was not satisfactory to the court which held that the onus was upon her to establish the fact by clear and convincing proof and the additional sum, about $125 more required to complete the purchases and procure the certificates of title was not provided by her.

After the purchase, the charge and management of the lands were left wholly in McLean's hands, and Miss McKenzie had never received any rents or exercised any rights of ownership except that she agreed to a

suggestion that her cousin, McLean's son, made to her some seven or eight years ago, that she should rent them to him. But no terms were discussed and he had paid her no rent. The evidence also shewed that the defendant McLean had himself cultivated and managed the farms for his own benefit, and had in fact always dealt with the lands as if they were his own, but in his evidence at the trial he stated that he had been working for his son in cultivating the land.

Held, 1. The plaintiffs were entitled to the relief asked for, and that section 57 of the Real Property Act, R.S.M. c. 133, as amended by 55 Vict., c. 38, s. 4, does not prevent the granting of the relief as it provides that a certificate of title is "subject to the right of any person to shew fraud wherein the registered owner has participated or colluded," and the law declares that such a transaction as was held to have been proved is fraudulent under 13 Eliz., c. 5, and Miss McKenzie participated in it. *Barrack* v. *McCullogh*, 3 K. & J. 117; *Merchants' Bank* v. *Clark*, 18 Gr. 594; *Harris* v. *Rankin*, 4 M.R. 129, and *Re Massey and Gibson*, 7 M.R. 172, followed.

2. Laches could not be attributed to the plaintiffs as the fraud was a concealed one, and without any want of reasonable diligence they only became aware of the facts about eighteen months before the commencement of the action.

3. The defendant McLean in view of the evidence given by himself at the trial was not entitled to claim any part of the lands as exempt from seizure and sale.

Appeal from decision of KILLAM, C.J. at the trial dismissed with costs.

Tupper, Q.C., and *Phippen*, for plaintiffs. *Ewart*, Q.C., and *McPherson*, for defendants.

Full Court.] DOIDGE *v.* MIMMS. [Feb. 9.

Married woman—Notice by administrator disputing claim—R.S.M. c. 140, s. 31—Wife suing for personal services—Corroboration in suit against estate of deceased—Joinder of parties.

Appeal from the judgment of a County Court.

The original plaintiff was a married woman who sued the administratrix of one Kingdon deceased for nursing him in his last illness and for meals supplied to other nurses during that period.

The deceased had his domicile in Manitoba, and had boarded and lodged at the house of the plaintiff's husband for about nine years, during which the plaintiff did the ordinary household work. At the trial the plaintiff swore that there had been a special bargain between her and deceased about the nursing and that he had promised to pay her for it, but there was no corroboration of her testimony on this point. Objection

having been taken at the trial as to the plaintiff's right to sue alone, her husband was allowed to be joined as co-plaintiff. The defendent had first taken out letters of administration in Ontario, but in June, 1898, became administratrix here by the re-sealing of the original letters pursuant to the Surrogate Courts Act. Previous to this the defendant had distinctly disputed the plaintiff's claim, and the action was not commenced until June, 1899.

The County Court Judge dismissed the action on the ground that it had not been brought within six months after the claim had been disputed as required by s. 31 of R.S.M. c. 146.

Held. 1. The action should not have been dismissed on such ground, as the defendant, at the time the dispute was made, had no locus standi in this province.

2. If a special contract as to the nursing had been made the wife could sue for it alone. *Young* v. *Ward*, 24 A.R. 147, distinguished.

3. Unless the special contract alleged by the wife was proved, both claims could have been sued for by the husband only, and if it were held to be proved, the claim for nursing would belong to the wife alone, so that in either case the husband should not have been joined with his wife in the suit.

4. Whilst the evidence of a claimant against the estate of a deceased person should be clear and convincing and if uncorroborated will not be readily acted on, there is no absolute rule of law requiring corroboration in this province: *In re Garnett*, 31 Ch. D. 1; *In re Hodgson*, 31 Ch. D. 177.

The plaintiff was allowed a new trial at her option, otherwise appeal to be dismissed. No costs of the appeal to either party.

Heap, for plaintiff *Hull*, for defendant.

Full Court.] IN RE HUGGARD. [Feb. 9.

Costs—Taxation—Solicitor and client—Agency terms to foreign solicitor.

Decision of DUBUC, J., noted ante vol. 35, p. 651, varied on appeal by holding that the amount sent to the Toronto solicitors for their half (on agency terms) of the fees charged should not be treated as having been paid to the company, and that the Winnipeg solicitor should not be credited with the amount in taking the accounts between him and the company.

Appeal allowed with costs.

Huggard, for the solicitor. *Mulock*, Q.C., for the clients.

Province of British Columbia.

SUPREME COURT.

Irving, J.] OPPENHEIMER *v.* SPERLING. [Oct. 22, 1899.

Practice—Service out of jurisdiction—Agreement to transfer shares in a British Columbia Company—Order XI.

An ex juris writ having been issued to enforce an agreement between residents of British Columbia and England for transfer of shares in a provincial company not in terms providing for its performance within the jurisdiction. *Held*, that the writ should be set aside.

Bodwell, Q.C., and *A. E. McPhillips*, for the motion. *Wilson*, Q.C., and *Marshall*, contra.

Irving, J.] PAVIER *v.* SNOW. [Dec. 22, 1899.

Mining law—Adverse claim—Staking—Admissibility of documents—R.S. B.C. 1897, cap. 135.

In adverse proceedings where it is not established with reasonable certainty; (1) that the ground was properly staked; (2) that assuming the ground had been properly staked, it was identical with the ground mentioned in the record, and the defendant shews title and produces certificates of work for several years, judgment will be given in favour of defendant.

Before a substituted certificate will be admitted in evidence there must be proof of loss of the original. A certificate of a Mining Recorder given under section 98 can be received in evidence without ten days' notice under the Evidence Act.

Nelson, for plaintiff. *MacNeill*, Q.C., for defendant.

Martin, J.] ROGERS *v.* REED. [Jan. 16

Practice—Security for costs of appeal—Amount of.

Summons for security for costs of an interlocutory appeal from an order of a local judge under Order XIV. The question was as to the amount. After conferring with the other judges, MARTIN, J. decided that for the future, so far as he was concerned, security would be ordered (except in exceptional cases) as follows: (1) Appeals, generally, $150. (2) Appeals, interlocutory, from both Supreme and County Courts, $75. (3) Appeals, County Court, $100.

Barnard, for plaintiff. *Lawson*, for defendant.

McColl, C.J.] BURKE *v.* B.C. ELECTRIC RAILWAY CO. [Feb. 5.

Railway—Regular station—Personal injury to passenger alighting—Negligence—Omission or nonfeasance.

Action by plaintiff against the British Columbia Electric Railway Company, Limited, to recover damages for an injury sustained in alighting from a car operated by defendant company between the cities of Vancouver and New Westminster. Special tickets at reduced rates were issued by the defendant company to persons living along the line, and one was held by W. limited to the use of himself and the members of his family between Vancouver and Central Park Station. The plaintiff who lived in Vancouver, went to visit the W.'s, travelling as was her custom, on W.'s ticket although not a member of the family. W. lived beyond Central Park Station, and the company gratuitously and for her own convenience carried the plaintiff some four hundred yards farther along, where she was allowed to alight. At this place the ground was not level, and a person living along the line had been permitted for his own convenience to lay down on the right of way a platform, one end of which rested on the ground and the other upon a plank. The plaintiff descended safely to the platform, but in passing from it she fell and was injured, owing as alleged to some defect in the condition of the plank supporting it.

Held, that the company was not liable. Judgment for defendant with costs.

Hagel, Q.C., and *A. D. Taylor*, for plaintiff. *Martin*, Q.C., for defendant.

Drake, J.] [Feb. 17.

HALL *v.* THE QUEEN AND THE KASLO & SLOCAN RAILWAY COMPANY.

Petition of right—Crown lands—Kaslo and Slocan Railway Subsidy Act and Amending Acts.

Petition of right praying that the Crown grant of lot 873, Group 1, Kootenay District, said to contain 428 acres, dated 21st March, 1898, to the Kaslo and Slocan Railway Company be declared null and void, and that a Crown grant of the said lot be issued to the petitioner upon his paying the purchase price to the Province of British Columbia.

Under the Kaslo and Slocan Railway Subsidy Act, 1892, it was declared lawful for the Crown under certain stated circumstances to issue to the Railway Company lands "not containing areas of less than one mile square." For the suppliant it was contended that it was incompetent for the Crown to grant any lands to the company under its subsidy Act in less quantities than a mile square, and also that the grant to the company was illegally and improperly issued, as it did not contain the provision of s. 32 of the Land Act, R.S.B.C. 1897, c. 113, viz.: a reservation of a quarter interest in town sites and also that there was no reservation of the timber.

Held, dismissing the petition, that the suppliant had no locus standi to obtain any relief.

Hunter and *Walls*, for suppliant. *Maclean*, D. A.-G., for the Crown. *Bodwell*, Q.C., and *Duff*, for the Railway Company.

Obituary.

John Juchereau Kingsmill, Q.C., D.C.L., whose death at sea on his way to Europe was briefly referred to in our last issue, was the son of the late Lieut.-Col. Kingsmill of Niagara. This distinguished officer had four sons who came to manhood, Henry, captain in the Royal Canadian Rifles, who died at Prescott, Ont.; Charles Edward, lieutenant in the Ceylon Rifles, who died in Ceylon, and Nicol Kingsmill, Q.C., of Toronto, one of the most respected and deservedly popular members of the Bar of Ontario. Col. Kingsmill went through the Peninsular war with his regiment, the gallant 66th. At Albuera they went into action with 540 bayonets, but next morning only 53 were on parade; whilst at Maiwand, India, the regiment was almost obliterated. Col. Kingsmill after the war came to Canada as A.D.C. and private secretary to Lord Seaton, and was subsequently appointed sheriff of Niagara. The subject of this sketch was born May 21, 1829, and educated at Upper Canada College, in the welfare of which he always took a lively interest. He was a B.A. of old King's College, graduating with honours in 1849, M.A. of Trinity in 1856, and a D.C.L. in 1863.

In 1852 Mr. Kingsmill was called to the Bar of Ontario, commencing the practice of his profession in the town of Guelph. Six years afterwards he was appointed County Attorney of Wellington. In partnership with the late Adam Johnston Ferguson, Q.C., formerly Judge of that District, he soon acquired a large and influential clientage, whose respect and good-will he won and kept, and whose business he conducted with great energy and success. The writer, as one of his students at that time, is glad to have an opportunity of bearing testimony as well to the benefits derived from a legal training in such an excellent school as to the genial hospitality, the warm and helpful friendship, and the uniform courtesy which were marked features of his character. After the retirement of the Hon. Ferguson Blair, as his partner was subsequently known, Mr. Kingsmill was joined by Mr. Donald Guthrie, who still continues the business.

In November, 1866, he retired from active practice and was appointed County Judge of the County of Bruce, which position he held until 1893, when he removed to Toronto, entering his brother's firm of Kingsmill, Saunders & Torrance. Both at the Bar, on the Bench and as a private

citizen Mr. Kingsmill occupied a high position. The soul of honour, genial and courteous, he enjoyed the confidence and warm esteem of all those with whom he came in contact. He was four times married. His first wife was the eldest daughter of Sheriff Grange, his son of that marriage being Charles Edmund Kingsmill, now a captain in the Royal Navy.

An eloquent tribute to the memory of the deceased was paid by Dr. Parkin, principal of Upper Canada College, the purport of which is as follows: "He had been a pupil in the college from 1840 to 1847, and his loyalty to his old school was unbounded. He had taken the chairmanship of the board at a very critical time in the history of the school; had freely given his time, thought and experience to the work of extricating the college from the difficulties in which it was involved. His name will always be held deservedly in honour among old Upper Canada College boys. His unfailing courtesy and refined feeling has always shown itself in all his relations to the staff of the college. Himself a typical gentleman of the old school, he took the deepest interest in the tone and character of the college, and both masters and boys had the greatest reason to do honour to his memory."

Book Reviews.

The Indian Review, Vol. I, No. I., January 1, 1900. G. A. Natesaw & Co., Publishers, Madras.

Coming from the antipodes we make room to refer to the above monthly magazine which has just reached us. The war in South Africa at present is naturally such an all engrossing topic that the nation seems to have little interest in anything else, and may for the moment forget that the great value of our colony in the southerly end of the Dark Continent, at least up to the present time, lies in the fact that it is a necessity for the maintenance of our Indian possessions; and it may be that in a very short time our attention may be transferred from Africa to India.

A perusal of the many interesting articles in this most readable magazine gives further evidence of the greatness and far reaching character of the Great Empire to which we belong. It begins with a concise resume of the progress of the Transvaal war, and in another place gives the most intelligent and concise sketch of its origin and antecedent events that we have met with. Considerable space is given to a well-written review by an English educated Indian of Mr. Dutt's spirited translation of that ancient and famous epic of India, The Ramayana. For the Indian lawyer there is an article on the alienation of land in the Punjaub, and notes of cases of general interest recently decided in the Courts of the above possessions.