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Our friends of the Bar in Hamilton have, we understand, been somewhat exercised recently by what they consider disregard of their convenience by the learned Chief Justice, who held the assizes in that city, commencing the court at nine o'clock, and continuing without intermission until six o'clock in the evening. There may be and often are reasons for "rushing" an assize: but there are also objections. It should not be forgotten that in this country the professions are not divided as in England. The barrister who presents the case in court is very often the solicitor who has the preparation of the case. He must for this reason be in personal communication with his client, and there should always be time allowed for counsel to consult with clients during an assize. Other clients and other business, moreover, need his attention in his office for at least a short period of the day. This is no new grievance to the profession, or to those of the public who need the services of their lawyers outside the walls of the court house as well as within. The fellow feeling which makes us wondrous kind is sometimes lost in the mists of the past by those whose rise from the turmoil of the Bar to the more serene atmosphere of the Bench: but what was admittedly desirable then is desirable still. It is unnecessary to state that judges are for the public, not the public for the judges: but whilst the latter must in this matter, as in many others, decide what is best in the general interest of the community, we would respectfully submit that the side of the question which has recently been brought rather prominently before the Bar at Hamilton, and has frequently been a grievance in other places, needs more attention. It would, we venture to think, be better to devote, if necessary, an extra day to an assize for the reasons aforesaid than to rush the business through, to the annoyance and irritation of the Bar, and to the great inconvenience, and perhaps loss, of clients.

WE recently referred to the subject of Queen's Counsel and precedence in connection with a special case to be presently laid before the Court of Appeal (*see ante* vol. 28. p. 484). We there ventured the opinion that there was no burning need for a settlement of the question, and this seems to be also the view of the Minister of Justice, for we understand he declines to expend public money by retaining counsel to support the appointments heretofore made by the Governor-General in reference to the matter. A duel of one, even with the usual complement of seconds, doctors, and "coffee for two," is not a very exciting affair, and we can easily imagine that when this tempest in a teapot is raised before the Court of Appeal the chief of that court may take from his ready quiver some polished shafts for the edification of those concerned. The fact is there is very little interest in the matter, and it is not one of practical importance. The sooner the title is abolished, the better. What should have been a title of honour has been brought into disrepute by politicians for party purposes, and the attainment of the position has ceased to be a goal of ambition to any professional man in good standing. The learned counsel who, if the Dominion Government had intervened, would have had a client, but who at present seems to have none, is of the opinion that the position is an "office"; but as it is an office without remuneration, and practically without privileges, as it is also without duties or responsibilities and conferring no distinction of merit, it could, without any great wrench, be dispensed with. A correspondent, whose letter we publish in another place, amusingly and instructively calls attention to the special case which is, with due solemnity, shortly to be presented to the Court of Appeal. We trust the headnote will help them in arriving at a conclusion on this momentous question.

FOR the benefit of whom it may concern, it may be desirable to record a judgment of His Honour Judge McDougall in reference to some questions left to his decision on a dispute which arose between the City of Toronto and the Toronto Street Railway Company under an agreement between them by which the city is entitled to a certain percentage upon the "gross receipts from all passengers, freight, express and mail rates, and all other

sources of revenue derived from the traffic obtained by the operation of the said railway."

The first question was as to the meaning of the word "gross receipts from passenger fares." The city contended that this included receipts from all tickets sold from the date of sale, whether used or not, whilst the company urged that it only meant actual fares received through fare boxes. The learned judge was of the opinion that the city was only entitled to their percentage upon the daily receipts at the fare boxes of the fares of passengers actually carried, basing this view mainly on the ground that, as the company was bound to sell tickets, and that these might be destroyed, their owner would be entitled to recover the value of them from the company upon proof of loss.

The other question was as to whether the money derived by the company from advertisers for the right of displaying their advertising cards in the cars of the company is revenue "derived from the traffic obtained by the operation of the said railway." On this point the learned judge referred to the case of *Queen* v. *Coleridge*, 45 L.J., Q.B. 649, where it was held that receipts from the refreshment rooms, cloak rooms, and warehouses connected with the railway line, were covered by the words, "receipts for traffic conveyed by said railway." He, therefore, held that under this authority and under the spirit of the agreement the city was entitled to its percentage upon the revenue derived from renting space in the cars of the company to advertisers.

COUNTY LAW ASSOCIATIONS.

The Inspector of Legal Offices, in his annual report upon the County Law Associations, makes some remarks which will be read with general interest:

"During my inspections this year I carefully explained the working of the card catalogue system to the librarians, or those in charge of the books. This system I consider the very best for the Law Associations to adopt. It is much cheaper and more useful than a printed catalogue, and can be enlarged so as to make it, in a manner, a digest. The attention of the officers of the associations should be given to this matter, as it is important to have a catalogue to which additions can be made daily, if neces-

sary, without any expense. In my report for the year 1890, I set forth how the catalogue may be kept; I would suggest it be referred to for information on the subject.

I also gave instructions as to noting up reports, statutes, etc. I consider that if the noting alone was carried out properly, it would be the means of inducing the members of the associations to take greater interest in the welfare of their associations.

In my opinion, it would be advisable for each association to appoint at the annual meeting a standing committee on legislation; where such committees have been appointed in the past good work has been the result. The duty of this committee would be to consider all proposed legislation introduced in the Legislature and House of Commons, as well as to suggest necessary legislation and amendments to the rules of court, etc.

I am pleased to report that the associations appreciate the great interest taken by Mr. W. F. Burton, the treasurer of the Hamilton Law Association, in obtaining for them the promise of Sir John Thompson, Minister of Justice, to supply the associations free with the Supreme Court Reports, Exchequer Reports, Dominion Statutes, pamphlets on Criminal Law, Orders in Council, and the official *Gazette*."

The inspector, in stating that this would probably be his last report, expresses the pleasant relations that have existed between himself and the officers of the various associations, who, he says, have made his work easier through their willing and able assistance. In conclusion, he calls attention to the fact that at the date of his appointment in 1887 there were but thirteen associations, with a membership of 491 members, having 9034 volumes on hand; while there are at present twenty associations, with a membership of 888 members in good standing, having 17,757 volumes on hand, in addition to Statutes of Canada and Ontario, and sessional and other papers.

Mr. Winchester says with regard to the York Law Association:

"I have much pleasure in reporting the continued success of this association. Notwithstanding the small annual fee paid by its members, its progress and success appear phenomenal; this, however, is owing, no doubt, to a large extent, to the ability and zeal of its officers. The association has been most fortunate in having the best men in the profession at its head, and, without in any degree underestimating the assistance given the officers

and members of the association, I desire to express my opinion that more credit is due to Mr. Walter Barwick, the treasurer of the association, than to any other single member in bringing the association to its present useful position. I wish also to state that the untiring efforts of Miss Read, the librarian, have resulted in making the library the most useful one of the kind in the Province. In addition to the system of card cataloguing, which, under her able direction is working most satisfactorily, the noting of reports, statutes, etc., have made her services invaluable to the profession.

The association, as formerly, has taken an active part in introducing needed reforms, not only to the consideration of other County Law Associations, but also to the attention of the Bar generally, and to the Legislature.

The number of volumes in the library at present is 2032, all most carefully arranged and cared for. There are at present 393 members, of which 341 had paid their fees for this year at the date of my inspection, The books of the treasurer and secretary were all carefully and fully entered up."

INCORPORATION OF NON-RESIDENT ALIENS.

Now and again there has appeared in the official *Gazette* a notice that certain residents of a foreign country have been incorporated as a joint stock company; and the question therefore arises, can the Crown create a corporation, composed exclusively of non-resident aliens, so as to constitute them a domestic corporation capable of doing business in this country? The place of residence of all such corporators being stated to be in a foreign country creates the legal presumption that they are aliens.

Prior to any remedial legislation, aliens had very little rights under the common law. For upwards of two centuries after the Conquest, it appears that aliens were not permitted to reside in England, even for the purposes of trade, beyond a limited time, except by special warrant; nor could an alien hold or transmit real estate there. The tendency of modern legislation has been to relieve aliens of these disabilities, so that now the only incapacities which in England may be said to be retained against them are those contained in the Naturalization Act of 1870, 33-34 Vict., c. 14 (Imp.), which are:

(1) They are disqualified from holding any public office, or of enjoying any municipal, parliamentary, or other franchise (s. 2).

(2) They are disqualified from being owners of a British ship (s. 14).

No definition is given of the meaning attached to the term "other franchise"; but under the doctrine *noscitur a sociis*, it may be construed to mean any public franchise analogous to that known as municipal or parliamentary.

The Canadian Naturalization Act, R.S.C., c. 113, provides that "real and personal property of any description may be taken, acquired, held, and disposed of by an alien in the same manner, in all respects, as by a natural born British subject; and a title to any real or personal property of any description may be derived through, from, or in succession to an alien in the same manner, in all respects, as through, from, or in succession to a natural born British subject: but nothing in this section shall qualify an alien for any office, or for any municipal, parliamentary, or other franchise; nor shall anything therein entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly conferred upon him." And at the end of the second clause is a re-enactment of the English provision, "Nor shall the provisions of this section qualify an alien to be the owner of a British ship."

The Dominion Companies Clauses Act, R.S.C., c. 118, in s. 9, and the Dominion Companies Letters Patent Act, R.S.C., c. 119, in ss. 5 & 30, contain provisions requiring the majority of the directors of a company to be "persons resident in Canada"; the first-mentioned Act adding the further qualification that such majority shall be "subjects of Her Majesty by birth or naturalization."

The Ontario Companies Clauses Act, R.S.O., c. 156, in s. 10, provides that the major part of the directors of the company shall at all times be persons resident in this province, and "subjects of Her Majesty by birth or naturalization." There is no similar provision to the above, nor to that above quoted from ss. 5 & 30 of R.S.C., c. 119, in the Ontario Letters Patent Act, R.S.O., c. 157. Under this latter Act, the Lieutenant-Governor may constitute any number of persons, not less than five, who shall petition therefor, and others who may become shareholders, "a body corporate and politic for any purposes or objects to which the

legislative authority of the Legislature of Ontario extends." The original Act, Con. Stat. Canada, c. 63, provided in s. 10 that a majority of the trustees (directors) should be actual residents of the province, but should not be ineligible by reason of their not being subjects of Her Majesty by birth or naturalization. This provision was not re-enacted in the Ontario Act, 37 Vict., c. 35 (now R.S.O., c. 157); and it may be noted that when the latter Act was passed, and up to 1883, aliens were subject to the disabilities removed by the Naturalization Act, R.S.C., c. 113.

We may now return to the question whether the Crown can create a domestic corporation, composed exclusively of persons who are residents of a foreign or alien sovereignty, and who, in law, are presumed from such foreign residence to be aliens.

Corporations are defined to be mere artificial bodies, invisible and intangible, and, although so defined, they are said to be "local inhabitants of the place of their creation." A corporation has not the articulate powers and qualities of a natural person, but it acts and uses its powers by the agency of natural persons, and the acts and dealings of such natural persons are made the acts and dealings of the corporation, so far as they are within the terms of its charter. By the common law this artificial person, or legal entity, labelled and commonly known as a corporation, has no legal existence out of the bounds of the sovereignty by which it is created and endowed with legal life and powers. From this rule of the common law the courts have deduced the doctrine, or legal presumption, that the members of such corporation are citizens of the sovereignty in which alone the corporate body has a legal existence: *Ohio and Mississippi Railroad Co.* v. *Wheeler*, 1 Black 285. And as the legislative enactments of a nation have no binding force, *proprio vigore*, in other territorial sovereignties, a corporation which is created by and derives its existence and working powers from such legislative enactments is said to have no existence where that law of its domicile ceases to operate. But by the comity of nations an exception has been made, for the benefit of trade, by which such corporation may, like a natural person, transact business by its agents in a foreign sovereignty: *Bank of Augusta* v. *Earle*, 13 Peters 519.

It has also been decided in the United States that a state may make a corporation created by another state its own: *Railroad Co.* v. *Harris*, 12 Wallace 65. But it is not competent for a state

to unite a foreign corporation with one of its own created corporations, so as to give them one identity: *Farnum* v. *Blackstone Canal Co.*, 1 Sumner 47. And it has been held that where justice requires it a court will take notice of the residence of the members of a corporation; and if they can individually sue in the court by right of being citizens, so may the corporation itself: *Lexington Manufacturing Co.* v. *Dorr*, 2 Litt. (Ky.) 256. For it is conceded that the jurisdiction of a court over a corporation attaches in consequence of the citizenship of its members and its domicile within the jurisdiction; and as to foreign corporations in consequence of their trading within the jurisdiction. But the question whether a *de facto* corporation had been organized strictly according to the law can only be inquired into at the suit of the Crown, or on information by the Attorney-General.

By the common law, aliens have very limited rights within an English sovereignty, and statutes extending the rights of aliens are to be construed in reference to the principles of the common law; and where the statutes have not expressly authorized the incorporation of non-resident aliens, such incorporation cannot be lawfully made. For it is not to be presumed that the legislature intended to make any innovation upon the common law further than what it has specified and plainly pronounced: *Dwarris on Statutes*, p. 564.

The laws of a country are intended for the benefit of the residents in that country; and such aliens as come within its territory are bound to obey its laws. Foreigners have no claim of right in respect of our laws, and cannot, while resident in their foreign country, take any benefit under them. And when it is considered that a corporation is, as we have stated, "a local of the place of its creation," it would also seem from the reason of the law that it must include residents within the sovereignty creating it, and that it is not within the prerogative of the Crown, under either its reserved or statutory powers, to create a local corporation, composed exclusively of non-resident aliens.

SOME ANCIENT CONVEYANCES.

Litera scripta manet, and so we have recently been told all about the sale of a house in the city of Nineveh about the year 692 B.C., and have had the pleasure of perusing a translation of the deed given therefor, such deed being still in existence.

In Assyria, as in Babylonia, in those far-away days, documents were, for the most part, written upon clay with a wooden reed or metal stylus; clay was plentiful and cheap, and easily impressed with the wedge-shaped lines of which the letters were composed. Doubtless papyrus and parchment were at times used for writing materials; but, in the damp climate of the Euphrates, writings on such materials have long since disappeared as effectually as have the writers themselves; only the clay tablets remain, and the dust of the scribes. The Babylonians were a nation of students, and a considerable portion of them could read and write; the legal documents that we now have, and that the modern savants are amusing themselves by reading, are written in a great variety of handwritings, some as good as the caligraphy of a skilful conveyancing clerk in this present year of grace, and others no worse than the caligraphical chirography of leading counsel of the day. The Assyrians, however, were not so well educated as their neighbours, and some learned men say that probably until the days of Tiglath-pileser (*vulgo*, Tickle-a-flea-sir) "it was only the scribe, as a general rule, who had learned to read and write. In Assyria, accordingly, we find (*i.e.*, of course, if we examine into these clay relics) none of that variety of handwritings which often makes the decipherment of a Babylonian document so difficult; a neat official hand was in use there, which seldom displays any individual peculiarities." The writing on many of the Ninevite tablets is so very minute that it is clear the writers and readers of that land must have been decidedly short-sighted, and the users of magnifying glasses. The language in use among the Babylonians and Assyrians, for writing purposes, was called the Accadian, or Accado-Sumerian, and was an extinct dialect ere Babylon and Nineveh were known.

But let us to our deed. Sennacherib, who "came down like a wolf on the fold," was king when it was writ. It runs: "The nail-mark of Sar-ludari, the nail-mark of Atdar-suru, the nail-mark

of the woman Amal-suhla, the wife of Bel-dur, a captain, the owner of the house which is sold." (Then follow four nail-marks.) "The house, well-constructed, with its beams and doors, situated in the city of Nineveh, adjoining the houses of Mannu-ki-khi and Ilu-ittiya, in the street of the Messenger, has been sold, and Tsil-assur, the superintendent, an Egyptian, has bought it for one maneh of silver, according to the royal standard, in the presence of Sar-ludari, Atdar-suru, and Amal-suhla, the wife of its owner. The full sum has been paid, the house in question has been bought; there shall be no retractation or annulment of the contract. Whosoever hereafter, among the sellers, shall claim an annulment of the contract from Tsil-assur shall be fined ten manehs of silver. The witnesses are: Susanqu, the son-in-law of the king; Kharmaya, the captain; Rasah, the sailor; Nebo-dur-sjikari, the spy; Kharmaya, the naval captain; Senshareger and Zedekiah. Dated the 16th day of the month Swan (May), in the eponymy of Zaza, the governor of Arpad. The contract has been signed in the presence of Samas-yakan-akhi, Latturu, and Nebo-sum-utsur."

With this and other deeds before us, we can almost apply the words spoken by Sir Henry Spelman, anent the deeds of the Saxons, to those of the Ninevites, and say that the people of Assyria "in their deeds observed no set form, but used honest and perspicuous words to express the thing intended with all brevity, yet not without the essential parts of a deed."

Let us consider our text. The four nail-marks tell a tale of ignorance equal to that of those lords and knights of the middle ages who signed their grants with the sign of the cross. Babylonians in a similar sphere of life would, without a doubt, have written their signatures. These nail-marks remind us that in England (we mean early for that tight little isle the wax attached as a seal to deeds and charters was sometimes marked with the front tooth of the grantor, as appears by the old rhyme:

> "And in witness that it was sooth,
> He bit the wax with his fore-tooth."

It was Edward III. that owned that incisor. William, the king, used his when he wrote:

> "In witness that this is sooth
> I bite this wax with my tooth,
> In the presence of Madge, Maud, and Margery,
> And my third son, Henry."

By the way, it would appear that old Norman kings and magnates often made their marks with another part of the human form divine. They inserted a hair from the head or beard in the wax. At times, the Accadians and Babylonians made impressions on the tablets with the cylindrical signets which they wore tied with a cord around the wrist.

Our conveyancer did not flounder over the description of the parties to the instrument as did the members of the profession who dwelt on the banks of the Nile. For instance, we have a deed drawn there under the Ptolemies in which one of the male grantors is described as "Pamonthes, aged about 45, of middle stature, dark complexion, handsome person, bald, round-faced, and straight-nosed," and one of the female parties as "aged about twenty-two, middle size, sallow complexion, round-faced, flat-nosed, and of quiet demeanour." Nor did our conveyancer encumber his document by giving the pedigree of the witnesses as did the scribe who wrote the deed quoted by Wilkinson in his "Ancient Egyptians" (Vol. II., p. 57), where each of the sixteen witnesses gives the name of his father.

The expression, "the house, with its beams and doors," seems simplicity itself as compared with "the houses, outhouses, edifices, barns, stables, yards, gardens, orchards," etc., etc., that Canadian conveyancers used to write about. The position of the house in Nineveh is made clear, but the size of the property in question is not specified, so we are left in the dark—so far as this document is concerned—as to how they measured land in the city of Sennacherib; whether by the distance between the sovereign's finger-tips when his arms were outstretched, as the Malagasy did; or by the number of plugs of tobacco a man would chew in walking round it, as in Assam; or as in Domesday Book woods are usually measured, namely, by the number of pigs they could contain (Kent's Commentaries (Black Ser.), Vol. IV., p. 441).

That the conveyance was to Tsil-assur, the superintendent, an Egyptian, shows that these ancient Assyrians were, in this respect at least, in advance of some states of the present day that make great pretensions to enlightenment—because an alien was allowed to hold real estate, as well as office, under the government. The consideration was one maneh of silver "according to the royal standard," just as we would now say "one dollar of

lawful money of Canada." Our text asserts "the full sum has been paid," as we even yet state of the consideration, "the receipt whereof is hereby acknowledged." "The full sum has been paid, the house in question has been bought; there shall be no retractation or annulment of the contract." This is very like the old Egyptian form: "All these things have I sold thee: they are thine, and I have received their price from thee, and make no demand upon thee for them from this day."

The mention of Susanqu, the son-in-law of the king, reminds us that the members of the royal family in those old days did not consider business dealings beneath them. In fact, the records show that Belshazzar, so well known to us through the prophet Daniel, did not by any means spend all his time drinking with his princes, his wifes, and his concubines, and in singing hilariously the praises of his "gods of gold and of silver, of brass, of iron, of wood, and of stone," but was nothing loath to earn an honest penny by commercial transactions. The tablet that we have, containing the contract of a sale of wool made by this young prince, shows conclusively that he (or his steward or secretary) knew right well how to secure the payment of his money. Here is an extract from the document (which was attested by six witnesses, and dated and drawn in conformity to the law governing dealings betwen ordinary mortals, although he was a king's son). It reads: "The wool has been handed over to Nadin-Merodach, the son of Basa, the son of Nur-Sen; in the month Adar, the silver, namely, 20 manehs, he shall give. The house of . . . a Persian, and all the property of Nadin-Merodach, in town and country, shall be the security of Belshazzar, the son of the king, until Belshazzar shall receive in full the money. The debtor shall pay the whole sum of money, as well as the interest upon it." And the interest under Nebuchadnezzar and his successors was usually *twenty* per cent.

Legal papers were generally dated according to the year of the reign of the monarch, as was the way until recently among ourselves.

Jeremiah's purchase of Hanameel's field was attended with legal formalities very like those in vogue in Assyria and Babylonia. He agreed to pay so much silver for it, and weighed the money out in the presence of witnesses. Then he signed the deed, sealed it, and enclosed it in a clay envelope, on which he

indorsed a memorandum of its contents. The witnesses had previously attached their names to the document. Such jars as that mentioned by the prophet served the purpose of a modern safe, and were each appropriated to a particular set of documents, or to those that related to a particular family. Prof. Sayce (who knows far more about these relics of the past than we or the readers of THE CANADA LAW JOURNAL) seems to think it within the bounds of possibility that this deed signed by Jeremiah, and the earthen vessel to which it was entrusted, may yet be discovered, and so add to the romance of modern excavation.

In those pre-Christian days, formal marriage settlements were much affected. These were attested by a number of witnesses, always being carefully dated and registered. Provisions were at times inserted in them not now to be found in such agreements. For instance, in the one drawn up by the legal advisers of Nebo-akhi-iddni, who married a singer when Nebuchadnezzar was king, the contract stated that if Nebo should divorce her and marry another he should pay her six manehs of silver, and that if she should prove unfaithful to her marriage vows she should be put to death with an iron sword! (Exactly what a maneh was we cannot say; its size is stated in the table of weights and measures given by Ezekiel (c. xlv.), but that table is, to say the least, vague; so also is the dictionary interpretation, which calls it a weight of gold co isisting of 100 shekels, a weight of silver consisting of 60 shekels.) When a woman in those regions had property she could act apart from her husband, could enter into partnership, could trade, and conduct lawsuits in her own name. Her rights and privileges were great as compared with many of her sisters in more recent times. We still have (that is, one of the public museums has it) a document drawn up in the second year of Nesiglessor (B.C. 559), which says: "As long as Pani-Nebo-dhomi, the brother of Ili-ganna, does not return from his travels, Burasu, the wife of Ili-ganna, shall share in the business of Ili-ganna in the place of Pani-Nebo-dhomi. When Pani-Nebo-dhomi returns, she shall leave Ili-ganna and hand over the share of Pani-Nebo-dhomi."

In the twelfth year of Naboni-dos (B.C. 544), a husband and wife borrowed, jointly, a sum of money on which they agreed to pay twenty per cent. interest. We cannot say whether they carried out their promise to pay, but the written contract is still on

hand. So is also a conveyance by which a father, some five and a half centuries before Christ, transferred all his property to his daughter, reserving to himself only the use of it during the rest of his life. The daughter, on her part, contracted to take care of the old man, and to provide him with the necessaries of existence, food and drink, oil and clothing. Provident Babylonians sometimes purchased property in the names of their wives; the wife's property was usually protected from liability for the husband's debts. Well saith the Preacher, "There is no new thing under the sun." Is there even a device for defrauding creditors tried in this sharp nineteenth century after Christ of which it cannot be safely said, "It hath been already of old time which was before us"? R.V.K.

CURRENT ENGLISH CASES.

The Law Reports for December comprise (1892) 2 Q.B., pp. 613-735; (1892)P., pp. 377-491; (1892) 3 Ch., pp. 177-587; and (1892) A.C., pp. 497-669.

APPEAL—DECISION FINAL—COSTS IMPROPERLY AWARDED, APPEAL AS TO.

In re Knight and The Tabernacle Building Society (1892), 2 Q.B. 613, was an appeal from the decision of a Divisional Court (Grantham and Charles, JJ.) upon a special case stated by an arbitrator with regard to a question of law arising in the course of the reference under s. 19 of the Arbitration Act, 1889. The Divisional Court, besides disposing of the question stated, had also awarded the successful party costs. The Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.) was of opinion that no appeal lay from the decision of the Divisional Court on the special case, on the ground that it was exercising a merely consultative jurisdiction, and not one resulting in a decision equivalent to a judgment or order: yet being of opinion that that court had no power to award costs, the appeal was dismissed except as to the costs, as to which the order of the Divisional Court was varied.

PRACTICE—DEFAULT OF DEFENCE—MOTION FOR JUDGMENT—ORDER XXVII., R. 11—(ONT. RULES 727 748).

In *Charles* v. *Shepherd* (1892), 2 Q.B. 622, a defendant having made default in delivering a defence the plaintiff moved for judg-

ment under Ord. xxvii., r. 11 (Ont. Rule 727). Part of the claim (£4462) was for an unliquidated demand, and part of it (£194) for goods sold and delivered, and money had and received. The plaintiff claimed that he should get an immediate judgment for the £194, and a reference to take an account as to the residue of his claim. The Divisional Court (Mathew and A. L. Smith, JJ.) refused to give final judgment on either branch of the claim, and referred the whole claim to an official referee to take an account and report to the court the amount due. From this decision the plaintiff appealed, contending that the whole claim should not have been sent to the referee; but the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.) dismissed the appeal, holding that on such motions the court has a discretion as to the judgment it will pronounce, and is not obliged to give a final judgment (even for a liquidated demand), but may give an interlocutory judgment directing an account to be taken. According to this case, it would appear that the plaintiff would have to move for final judgment on obtaining the referee's report; but in Ontario references of this kind are frequently directed to a master, coupled with a direction for the payment of the amount which shall be found due forthwith after the confirmation of the master's report, whereby a second motion for judgment is usually saved.

ATTACHMENT OF DEBTS — MARRIED WOMAN — EXAMINATION AS JUDGMENT DEBTOR — COSTS.

Aylesford v. *Great Western Ry. Co.* (1892), 2 Q.B. 626. was an appeal to a Divisional Court (Wright and Bruce, JJ.) from a decision of a County Court judge discharging an order for the examination of the plaintiff as a judgment debtor as to her separate estate. The plaintiff (a married woman) had been nonsuited in the action, and the defendant's claim was for the costs of the action. The Divisional Court held that the defendants were entitled to examine the plaintiff as to her separate estate, and allowed the appeal. According to *Troutman* v. *Fisken*, 13 P.R. 153, the plaintiff would not have been examinable in Ontario on the ground that the judgment was for costs only.

TRADE MARK — UNREGISTERED TRADE MARK — INFRINGEMENT — INTENTION TO DECEIVE.

Reddaway v. *Bentham Hemp-Spinning Co.* (1892), 2 Q.B. 639, was an action to restrain the alleged infringement of the plain-

tiffs' unregistered trade mark of "Reddaway's Camel-Hair Belting." The plaintiffs having given evidence at the trial that their belting, and no other belting, was known for many years to the trade as "camel-hair belting," and that the defendants had lately made and sold similar belting, which they called "The Bentham Camel-Hair Belting"; but no evidence being offered of the defendants ever having sold their belting as the plaintiffs' belting, or that any person had brought the defendants' belting supposing it was of the plaintiffs' manufacture; the judge at the trial, without calling for evidence for the defendants, stopped the case, and the jury by his direction gave a verdict for the defendants. The Court of Appeal (Lindley and Lopes, L.JJ., Smith, L.J., dissenting) held that there must be a new trial, at which it should be left to the jury to say (1) whether the term "camel-hair belting" had acquired in the trade the meaning of belting made by the plaintiffs, and (2) whether the defendants' description of the belting was likely to deceive purchasers and to induce them to believe that the defendants' belting was made by the plaintiffs; and if the jury should find affirmatively on these questions, the plaintiffs would be entitled to an injunction restraining the defendants from using the term "camel-hair belting" for their goods, without proof of an intention to deceive. Smith, L.J., agreed with Cave, J., the judge at the trial.

ASSIGNMENT OF DEBT—NOTICE OF PRIOR CHARGE—DEBENTURES CREATING CHARGE ON ALL PROPERTY—SOLICITOR—CONSTRUCTIVE NOTICE.

In *The English and Scottish Mercantile Investment Trust* v. *Brunton* (1892), 2 Q.B. 700, the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.) have affirmed the decision of Charles, J. (2 Q.B. 1), noted *ante* vol. 28, p. 429. The decision in the Court of Appeal turns on the question of constructive notice, and the court holds that the debentures being documents which might or might not affect the property of the company, the mortgagee having knowledge of the debentures was not chargeable with constructive notice of their contents, he having *bonâ fide* relied upon the assurance of the managing director of the (mortgagor) company that his mortgage would be a first charge.

JUSTICES—QUARTER SESSIONS—APPEAL AGAINST SUMMARY CONVICTION—EXCESSIVE PUNISHMENT, APPEAL ON GROUND OF—JURISDICTION TO QUASH CONVICTION—NON-APPEARANCE OF RESPONDENT.

The Queen v. *Justices of Surrey* (1892), 2 Q.B. 719, was an appeal from a decision of the justices at Quarter Sessions quashing a conviction under the following circumstances. One Bell was prosecuted for cruelty to an animal by an officer of the Society for the Prevention of Cruelty to Animals, and was convicted. He gave notice of appeal to the Quarter Sessions, alleging as the only ground of appeal that the punishment awarded was excessive. On the appeal the prosecutor failed to appear, and there being in consequence no evidence adduced in support of the conviction the conviction was quashed. The prosecutor appealed on the ground that the sessions had no power to go into any ground of appeal not stated in the notice, and consequently had no jurisdiction to quash the conviction; but a Divisional Court (Lord Coleridge, C.J., and Cave, J.) held that on an appeal to the sessions, even where the only ground of appeal assigned is excessive punishment, if the respondent do not appear to sustain the conviction, the conviction may properly be quashed, as the court has no means of determining whether any punishment should be awarded, and a conviction without a sentence would be bad.

ILLEGAL CONTRACT—CONTRACT FOR PURCHASE OF SHARES—AGREEMENT TO BUY SHARES AT A FICTITIOUS PREMIUM—ACTION TO RECOVER MONEY PAID ON ILLEGAL CONTRACT—CONSPIRACY—"RIGGING THE MARKET."

Scott v. *Brown* (1892), 2 Q.B. 724, was an action brought to recover the price paid to the defendants for the purchase of shares in a projected company, on the ground that the defendants, while acting as the plaintiff's brokers, had delivered their own shares to him instead of purchasing them on the stock exchange. At the trial it appeared, upon the plaintiff's own case, that the money sought to be recovered had been paid in pursuance of an agreement between him and one of the defendants, whereby it was agreed that, with the money in question, such defendant should purchase a number of shares in a projected company upon the stock exchange at a premium, with the sole object of inducing the public to believe that there was a real market for the shares and that they were at a real premium, which, as a fact, both the plaintiff and the defendants well knew they were not. The Court of Appeal (Lord Esher, M.R., and

Lopes and Smith, L.JJ.) affirmed the decision of Wright, J., at the trial, nonsuiting the plaintiff, and held that the contract was illegal on which the money had been paid, and within the maxim, *Ex turpi causa non oritur actio;* and the court was, moreover, of opinion that the evidence disclosed a case of criminal conspiracy for which the plaintiff and defendants were indictable. It may be noted that the illegality of the contract was not pleaded, but it was a point taken by the court itself.

PROBATE—WILL—CODICIL—REVOCATION CLAUSE IN PRINTED FORM.

In the goods of Moore (1892), P. 378, a testatrix made a will constituting an illegitimate son her universal legatee and one of of her executors. Afterwards, and shortly before her death, she expressed a wish to bequeath part of her furniture and other personal effects to her sister, and for this purpose procured a printed form of will, which she filled up in such terms as she thought would carry out her intentions. The form, however, contained a clause revoking all former wills, and appointing executors, but the blanks left for the names of executors she did not fill up. At the time of the execution of this will, it appeared that she had produced the will and asked one of the executors named in the first will to read it to her, which he did, but omitted the revocation clause. The sister of the testatrix consented to the grant of probate of both wills, omitting the revocation clause in the last of them, and the court (Jeune, P.P.D.) so ordered.

PROBATE—WILL—"EXECUTORS ACCORDING TO THE TENOR."

In the goods of Russell (1892), P. 380, Jeune, P.P.D., held that trustees nominated by a testator "to carry out this will" and "for the due execution of this my will" were executors "according to the tenor," and entitled to probate.

DIVORCE OBTAINED BY COLLUSION IN SCOTLAND—ENGLISH MARRIAGE—DOMICIL—COLLUSION.

Bonaparte v. *Bonaparte* (1892), P. 402, was a suit to have a marriage declared null and void under the following circumstances: The respondent had been duly married to one Megone, who had commenced a suit for divorce against his wife and present petitioner as co-respondent on the ground of adultery. By an arrangement between the parties that suit was dismissed, and Mr. Megone proceeded, in collusion with his wife and the

co-respondent, to take up a temporary residence in Scotland for the purpose of giving a Scotch court jurisdiction, and, by the collusion of the parties and concealment of the true facts from the Scotch court, a decree of divorce was obtained, Mr. Megone having, in the course of the proceedings, denied on oath the existence of collusion. The petitioner in these proceedings then went through a form of marriage with Mrs. Megone, which was the marriage sought to be declared null. Barnes, J., pronounced the marriage null and void, and ordered the petitioner to pay all the costs, holding that the Scotch court had no jurisdiction, neither Mr. Megone, nor his wife, nor the petitioner ever having had a *bonâ fide* Scotch domicil. It was urged that no decree should be pronounced in favour of the petitioner, as he himself had been guilty of fraud; but the learned judge, relying on *Miles* v. *Chilton*, 1 Rob. 684, and *Andrews* v. *Ross*, 14 P.D. 15, held that the contract of marriage stands on a different footing and must be regarded on different principles from other contracts, and that there was good reason for the court setting them aside, not merely as relating to the parties themselves and their status, but also as to the legitimacy of children.

DOMICIL—DOMICIL OF ORIGIN—DOMICIL BY CHOICE.

In re Craignish, *Craignish* v. *Hewitt* (1892), 3 Ch. 180, the principal question discussed is that of domicil. The action was brought by a widower, claiming to be entitled according to Scotch law *jure mariti* to one-half the personal property of his deceased wife, who was an Englishwoman, notwithstanding anything to the contrary in her will. The right of the plaintiff depended on the fact of his domicil being Scotch, but it appeared in evidence that although the plaintiff's domicil of origin was (as Chitty, J., found) Scotch, yet that after his marriage, which took place in 1883, he and his wife had lived in England, and, with the exception of various yachting trips and pleasure trips to the continent, had continuously resided there, and had, in fact, no other home except in England. Under these circumstances the learned judge was of opinion that the plaintiff had, during his marriage, acquired an English domicil, and that therefore he had not, at the time of his wife's death, a Scotch domicil, and her personal property was not subject to Scotch law, and this decision was affirmed by the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.).

PRACTICE—LUNACY—EXAMINATION OF LUNATIC BY DOCTOR—REPORT OF EXAMINATION.

In re B—— (1892), 3 Ch. 194, an order had been made under the English Lunacy Act, 1890, directing an alleged lunatic to attend for examination before a medical practitioner *pendente lite*. The examination had taken place, and the doctor had written a letter stating the result of his examination to the petitioner's solicitor. The alleged lunatic demanded a copy of this report, which was refused, the petitioner's solicitor stating that the doctor would be called to give evidence as a witness on the hearing of the inquisition. A motion was then made on behalf of the alleged lunatic to compel the filing of the doctor's report, or the delivery of a copy of it. The applicant contended that the doctor who examines a lunatic under the order of the court becomes an officer of the court, and his report should be open to both parties; but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) sustained the ruling of the Master in Lunacy that the alleged lunatic had no right to see the report of the doctor, and Kay, L.J., was of opinion that if the examination had been made by the doctor as an officer of the court neither party would have been entitled to see his report without the leave of the court.

PRACTICE—DISCOVERY—PRODUCTION OF DOCUMENTS—MOTION TO REMOVE TRADE MARK FROM REGISTER.

In re Willis (1892), 3 Ch. 201, was a motion to remove a trade mark from the register. The applicant applied for an order for discovery of documents. Kekewich, J., made an order in a modified form, restricting the discovery to documents relating to certain specified questions; but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) rescinded his order, holding it be oppressive, and in doing so Lindley, L.J., made some observations which we think worth while reproducing. "There is nothing in modern times which requires greater care than making orders for discovery and inspection of documents. The old practice of the Court of Chancery was limited to cases with which the Chancery Courts were familiar—such as breaches of trust where all the documents were in the possession of a trustee, and the *cestui que trust* knew nothing about the matter; and in that class of case the practice of the Court of Chancery was admirable, and, without it, it would have been impossible to administer justice. But the tendency to

extend the power of the court to order discovery in cases of a totally different character ought to be very carefully checked, and certainly not encouraged. Nowadays a man cannot run over another in the street without there being an application for an affidavit of documents. An undue extension of an old and just principle has given rise to an enormous expense and great oppression." These observations are true as regards our own practice, and it may be well doubted whether the unrestricted extension of the right of discovery to all sorts of cases was a wise proceeding, and in the real interest of litigants.

WILL.—CONSTRUCTION—CONTINGENT REMAINDER OR EXECUTORY DEVISE—CESSER OF LIFE ESTATE ON BEING TAKEN IN EXECUTION—EQUITABLE EXECUTION.

Blackman v. *Fysh* (1892), 3 Ch. 209, was a case involving two questions upon the construction of a will. The testator had devised a freehold estate to his son for life, and after his death among all the children of the son born or to be born who should live to attain 21 in equal shares as tenants in common in fee. By a subsequent clause he directed that if the estate devised to the son "should be taken in execution by any process of law for the benefit of any creditor or creditors" the son's estate should cease, as if he were dead, and the estate thenceforth should "absolutely vest in the person or persons who under the devises and limitations hereinbefore contained would be next entitled thereto." A judgment for debt having been recovered against the son who was in possession, the judgment creditor obtained the appointment of a receiver of the rents. At this time the son had two sons, one of age and one under age, and he afterwards had other children. The first question was whether the appointment of the receiver worked a cesser of the son's life estate, and Kekewich, J., held that it did, and from his decision on this point there was no appeal. The other question was whether the estates limited were, on the cesser of the son's life estate, contingent remainders or executory devises. Kekewich, J., held that as they did not take effect on the natural determination of the prior estate they were not contingent remainders, but executory devises, and took effect in favour of all such children of the son, whenever born, as attained twenty-one; and on this point his decision was affirmed by the Court of Appeal (Lindley, Lopes, and Smith, L.JJ.).

PRACTICE—ADMISSION IN PLEADING—AMENDMENT BY WITHDRAWING ADMISSION—TERMS IMPOSED ON ALLOWING AMENDMENT.

In Hollis v. *Burton* (1892), 3 Ch. 226, the plaintiff sued the defendants Burton & Jennings, who were a firm of solicitors, to recover a sum of trust money alleged to have been received by the firm. Jennings was the sole trustee of the fund. Burton by his defence admitted that the money had been paid into the banking account of the firm, but without Burton's knowledge; and he made a like admission in answer to interrogatories. On the admissions an order had been made for the payment of the fund into court by the defendants. Burton having subsequently discovered that he was mistaken in supposing the money had been paid into the banking account of the firm applied to withdraw his admissions and to rescind the order, and, on proving conclusively that the money had not been paid in, the order was rescinded as against him, and leave given to him to amend his defence by withdrawing the admission by Stirling, J. On appeal, however, the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), though thinking that the leave to amend should be granted, were nevertheless of opinion that as in the evidence there was still a strong case for contending that the firm had received the money the leave to amend should not have been granted except upon the terms of bringing the money into court, and the order was varied accordingly.

DECLARATORY JUDGMENT—RULES OF S.C., 1883—ORD. XXV., R. 5—(ONT. JUD. ACT, S. 52, S-S. 5).

London Association of Shipowners and Brokers v. *London and India Docks Joint Committee* (1892), 3 Ch. 242, may be referred to as an instance of the court granting a declaratory judgment without any consequential relief. The defendants had made certain regulations for shipowners using the docks, the validity of which the plaintiffs denied, and they claimed an injunction. On the trial, A. L. Smith, J., held that the plaintiffs were not entitled to the relief claimed, and dismissed the action with costs. On appeal, however, the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.), although affirming the judgment of Smith, J., nevertheless, acting under the rules of the Supreme Court, 1883, Ord. xxv., r. 5 (Ont. Jud. Act, s. 52, s-s. 5), made a declaration that the regulations in question were not binding on the plaintiffs, save so far as they agreed to be bound by them, and dismissed the appeal without costs.

WINDING UP—INSURANCE COMPANY—POWER OF COMPANY TO PURCHASE ITS OWN SHARES—EXTINGUISHMENT OF SHARES—POLICY-HOLDERS.

In re Sovereign Life Assurance Co. (1892), 3 Ch. 279, was a winding-up proceeding in which an application was made by the liquidator for authority to make a call upon the shareholders of the company to the extent of the amount unpaid on certain shares of the company which, under a special Act of Parliament, the directors were empowered to purchase, and had purchased. These shares were 8781 £10 shares, on which only £2 10s. had been paid at the time of their purchase by the directors. Chitty, J., held that the effect of the purchase of the shares of the company was to extinguish them, whether they were bought in the name of the company or in the names of trustees for the company, and that the policy-holders had no charge on the uncalled capital of the company, but were unsecured creditors whose claims were payable out of the existing assets of the company only; and the Court of Appeal (Lindley, Lopes, and Smith, L.JJ.) affirmed the decision. As Lindley, L.J., observes: "A reduction of capital, is a necessary consequence of a statutory power enabling a company to invest its assets in the purchase of it own shares."

Reviews and Notices of Books.

An Introduction to the Study of the Constitution. By Morris M. Cohn, Attorney-at-Law. Baltimore: Published by the Johns Hopkins University Press.

The Old English Manor: A Study in English Economic History. By Charles McLean Andrews, Ph.D., of Bryn Manor College. Published also by the Johns Hopkins Press.

These two volumes form part of a series of "Studies in Historical and Political Science," written chiefly for the use of students in the Johns Hopkins University, of Baltimore, an institution which has established a well-deserved reputation for the excellence of its teaching in science, philosophy, and the higher branches of English literature. As stated in the preface, the object of the "Introduction to the Study of the Constitution" was to bring before the student of the American constitutional system a mass of information at present scattered throughout the works of many different writers, a knowledge of which is essential to a

thorough understanding of the underlying principles of the constitution, and of the means by which they have attained their present form. To accomplish this, the author enquires into the source of law and sovereignty from the rudest conditions of society. He then discusses the physical and social factors of law, as relating to the individual, to property, and to the family, and the growth of procedure. He then considers the evidences of physical and social factors in constitutional law, concluding with an application of the deductions arrived at to the political growth and constitution of the United States. Though especially adapted for the student of American constitutional law and history, this interesting volume contains much valuable information, and many interesting deductions of great use to the general student.

"The Old English Manor" is a work, as the title implies, of a more limited scope, but more interesting to the general reader. That so carefully written and vivid a picture of early English life should have been entirely drawn from documentary evidence, far removed from the scene of investigation, is indeed very remarkable. We have, first, a general introduction, in which are very fully discussed and set forth the various theories as to the origin and growth of village communities in England, the conditions out of which they arose, the various elements of race and language on which thew were founded, the objects to be attained, and the means by which they were arrived at. This involves a close study of what is known of English history, if we may so use the term, during and previous to the period of Roman occupation, as well as during the time which elapsed from the first Saxon invasion to the Norman Conquest. To these intricate questions Mr. Andrews has given the most careful and painstaking consideration, and has also imparted to a dry historical subject a degree of interest which a less earnest writer could hardly inspire. In the subsequent chapters he deals, first, with the "lands of the manor"—their arrangement, title, nature of occupation, dwellings, and modes of cultivation; secondly, the relations between the "lord and the tenantry"; thirdly, the "landless" dwellers upon the manor, the followers and slaves of the lord of the manor; fourthly, the "special workers"—the men engaged in various occupations and handicrafts, showing the division of labour in those early times: fifthly, the "yearly routine of work"; and, lastly, the

"farm and house utensils" and the "recreations" of the people. From the headings of these chapters, it will be seen that Mr. Andrews has done his work in a thorough and systematic fashion, and certainly he has succeeded in giving as clear an insight into the inner life and economy of the Anglo-Saxon period as the meagre authorities at his disposal could permit. We strongly commend this work to the student who desires to know something more than the mere personal or political record of early English history.

Correspondence.

THE APPOINTMENT OF QUEEN'S COUNSEL.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Modern journalism demands that the reports of many important matters should be prepared in advance, and it has occurred to me that this system might be introduced into legal reports with great advantage. Speed, rather than absolute accuracy, is what the age requires.

With a view to lending you a helping hand in this new departure, I enclose a headnote for the report of the great Queen's Counsel case, which will probably be heard by the Court of Appeal this month. The names of the judges, as inserted, are, of course, fictitious; but, after all, the decision of the court is all that is of importance to the public.

AN AMATEUR REPORTER.

RE QUEEN'S COUNSEL.

(Headnote of Report up to date.)

Upon facts admitted by the Attorney-General for Ontario, it appeared that the Governors-General of Canada and the Lieutenant-Governors of Ontario had, respectively, from time to time, appointed barristers to the dignity of Queen's Counsel, and that no breach of the peace or other unpleasantness had arisen thereby.

Per MADDEN, J.: The power of appointment in question depends upon the construction of the Letters Patent under which a Governor is empowered to appoint judges, commissioners, justices of the peace, *and other officers*. From the fact that a Queen's Counsel is an officer, no inference can be drawn in favour of the proposition that he is "another officer."

Semble: He is not an officer at all.

Per MARSH, J.: Queen's Counsel are officers within the meaning of the Letters Patent of the Governor-General, and hence he has the power of appointment; but the ancient duties and privileges of this species of officer have long since been abolished.

Per CURIAM: He is *functus officio*, and an appeal in respect of such an official is "inofficious."

Dictum of OSLER, J.A., in *Re Lilley & Allin*, 19 A.R., at p. 108, explained, approved of, and adopted.

The Attorney-General for Canada having refused to take part in this appeal,

Held, that he was acting within his rights, for no man is bound to criminate himself.

[We thank our correspondent for thus keeping us not only abreast of the times, but ahead of them. The reporters will please wake up. We refer to this matter in another place; we would, however, note here that "Amateur Reporter" introduces the names of two persons prominent in this connection: one our Australian friend, whose opinion has been trotted out for the benefit of Her Majesty's colonies, and the other one who, if he so desires, will some day, we doubt not, adorn the position which, by a happy augury, he is made to fill.—ED. L.J.]

Proceedings of Law Societies.

HAMILTON LAW ASSOCIATION.

TRUSTEES' ANNUAL REPORT.

The Trustees beg to present their thirteenth annual report, being for the year 1892.

The number of members at the date of the last report was seventy-one; three members have died, two have left the city, and five new members have been added. The present membership is seventy-one. The annual fees to the extent of $340 have been paid. The number of volumes in the library is 2498 (of which 152 were added during the past year), exclusive of sessional papers, *Gazettes*, etc.

There are still some Reports which the Trustees would like to see purchased when the funds of the association will permit.

The following periodicals are received, namely: *The Law Times* (English), *The Times Law Reports*, *The Law Journal Reports* (English), *The Solicitor's Journal*, *The Albany Law Journal*, *The Canada Law*

Journal, The Canadian Law Times, The Western Law Times, The Green Bag, and *The Law Quarterly Review*.

During the year the Dominion Government, on the application of the various law associations, has generously agreed to supply the associations with the Supreme Court Reports, Exchequer Court Reports, the Statutes, *Canada Gazette*, and Orders in Council, free of charge.

The Treasurer's report is submitted herewith, giving a detailed statement of receipts and expenditures and of the assets and liabilities of the association, and the same is in the form required by the Law Society, and the same has been audited. All the liabilities of the association have been paid except the loan made by the Law Society.

The Trustees have received a communication from the Carleton Law Association, asking for the support of this association upon the question of decentralization of legal business. The Trustees would suggest that a committee be appointed to consider the matter, and report as to the best means of arriving at a satisfactory solution of the difficulty.

During the year the committee appointed by the Law Society with reference to fusion of the courts made their report; but, so far, nothing has been done in that direction.

The Trustees have been considering certain amendments to the Devolution of Estates Act, which it is proposed to present to the Legislature at the next session of Parliament, when it is hoped some remedy will be applied to the existing defects in the said Act.

The Trustees are glad to report that during the year a new carpet was secured for the library through the generosity of the joint Gaol and Court House Committee.

A new catalogue of the books of the library has been prepared, and is being printed for distribution among the members.

The Trustees regret to report the death of the late Mr. E. E. Kittson, who for five years was Secretary of this association. Mr. Thomas Hobson was appointed by the Trustees to fill the office, and has discharged the duties of Secretary up to the present time.

The Trustees have recently received from Mr. B. B. Osler, Q.C., a very handsome gift of an oil painting of the late Chief Justice Sir Matthew Crooks Cameron, who was a native of the County of Wentworth.

EDWARD MARTIN, *President*.

Hamilton, January 3rd, 1893. THOMAS HOBSON, *Secretary*.

DIARY FOR JANUARY.

1. Sunday.....*New Year's Day. 1st Sunday after Christmas.*
2. Monday.....Heir and Devisee sittings begin.
4. Wednesday..Chief Justice Moss died, 1881.
6. Friday .....Christmas vacation ends. Epiphany.
8. Sunday.....*1st Sunday after Epiphany.*
9. Monday.....County Court sittgs. for motions. Surrogate Ct. sits.
10. Tuesday.....Court of Appeal sits.
12. Thursday....Sir Charles Bagot, Governor-General, 1842.
15. Sunday.....*2nd Sunday after Epiphany.*
18. Wednesday..Civil Assizes at Hamilton.
22. Sunday.....*3rd Sunday after Epiphany.*
26. Thursday....2nd Inter. Exam. Sir W. B. Richards died, 1889.
29. Sunday.....*Septuagesima Sunday.* [Gen., 1847.
31. Tuesday.....Exam. for certificate of fitness. Earl of Elgin, Gov.-

Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Nov. 4.

CITY OF QUEBEC *v.* THE QUEEN.

Injury to property on a public work - Negligence of Crown's officer or servant — 50-51 Vict., c. 16, s. 13 (c)—Liability—Remedy.

(1) The Crown is liable for an injury to property on a public work occasioned by the negligence of its officer or servant, acting within the scope of his duty. That liability is recognized in the Exchequer Court Act, s. 16 (c), but had its origin in the earlier statute, 33 Vict., c. 23.

(2) Prior to 1887, when the Exchequer Court Act was passed, a petition of right would not lie for damages or loss resulting from such an injury, the subject's remedy being limited to a submission of his claim to the official arbitrators, with, in certain cases after 1879, an appeal to the Exchequer Court, and thence to the Supreme Court of Canada.

(3) No officer of the Crown has any duty to repair or add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the same. He must exercise reasonable care to know of the condition in which the public work under his charge is, and he must report any defect or danger that he discovers. It do[es] not follow from the fact that a public officer does not discover a defect in[a] danger that threatens a public work under his charge that he is negligent. To make the Crown liable in such a case it must be shown that he knew of the defect or danger and failed to report it, or that he was negligent in being and remaining in ignorance thereof.

The Sanitary Commissioners of Gibraltar v. *Orfila*, 15 App. Cas 400, referred to.

The injury complained of by the suppliants was caused by the falling of a part of the rock or cliff below the King's Bastion at the citadel in Quebec in the

year 1889. The falling of the rock was caused or hastened by the discharge into a crevice of the rock of water from a defective drain which was constructed and allowed to become choked up while the citadel and works of defence were under the control of the Imperial authorities, and before they became the property of the Government of Canada. The existence of this drain and of the defect was not known to any officer of the latter Government, and was not discovered until after the accident, when a careful inquiry was made. In the year 1880 an examination of the premises had been made by careful and capable men, one of whom was the city engineer of Quebec, without their discovering its existence or suspecting that there was any discharge of water from it. The surface indications, moreover, were not such as to suggest the existence of a defective drain. The water that came out lost itself in the earth within a distance of four or five feet, and might reasonably have been supposed to be a a natural discharge from the cleavages or cracks in the cliff itself.

Held, that there was no negligence on the part of any officer of the Crown in being and remaining ignorant of the existence of this drain and the defect in it.

Quære: Whether the place where the accident happened was part of the public work?

Semble: The Crown may be liable although the injury complained of does not actually occur on, *i.e.*, within the limits of, a public work.

Casgrain, Q.C., *Pelletier*, Q.C., and *Flynn*, Q.C., for suppliants.

Cook, Q.C., *Angers*, Q.C., and *Hogg*, Q.C., for Crown.

[Nov. 11.

DUBE *v.* THE QUEEN.

Petition of right—Damages sustained by an accident on a government railway—Burden of proof - Latent defect in the axle of car—Undue speed in passing sharp curve.

On the trial of a petition for damages for injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of truth is upon the suppliant. He must show affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence.

The immediate cause of the accident was the breaking of an axle that was defective. It was shown, however, that great care had been taken in its selection, and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The train had, immediately before the accident, passed a curve which, at its greatest degree of curvature, was one of 6° 52'. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too fast a rate of speed. On that point the evidence was contradictory, and, having regard to the rule as to the burden of proof stated above, it was

Held, that a case of negligence was not made out.

Flynn, Q.C., and *Choquette* for suppliant.

Osler, Q.C., for Crown.

[Jan. 9.

THE AURORA (BERGMAN).

Maritime law—Master's lien—Inland waters—R.S.C., cc. 74 to 75—Colonial Courts of Admiralty Act, 1890—The Admiralty Act, 1891—Construction.

The master of a vessel registered at the port of Winnipeg, and trading upon Lake Winnipeg, had in the years 1888, 1889, and 1890 no lien upon the vessel for wages earned by him as such master.

Even if such lien were held to exist, there was, in the years mentioned, no court in the Province of Manitoba in which it could have been enforced, and it could not now be enforced under The Colonial Courts of Admiralty Act, 1890 (53-54 Vict. (U.K.), c. 27), or The Admiralty Act, 1891 (54-55 Vict. (D.), c. 29), because to give those statutes a retroactive effect in such case as this would be an interference with the rights of the parties.

Wade and *Wheeler* for plaintiffs.

Mather for liquidators.

Darby for creditors.

BULMER v. THE QUEEN.

Crown domain—Disputed territory—License to cut timber—Implied warranty of title—Breach of contract—Damages.

By the 50th section of the Dominion Lands Act, 1883, it is provided that leases of timber berths shall be for a term of one year, and that the lessee shall not be held to have any claim whatsoever to a renewal of his lease unless such renewal is provided for in the order in council authorizing it, or embodied *in the conditions of sale or tender.* The orders in council in question in this case authorized the issue of leases, subject to the terms of the regulations of March 8th, 1883, by which it was provided that under certain conditions existing in this case the Minister of the Interior might renew such lease or license. From the orders in council and character of the several transactions, it appeared to be the intention of the parties that the license should be renewable.

Held, that such renewals were provided for within the meaning of the statute.

When the Crown agrees to issue a lease or license to cut timber on public lands, it agrees to grant a valid lease or license, and a contract for title to such lands is to be implied from such agreement. Not only the word "demise," but the word "let," or any equivalent words which constitute a lease, create, it appears, an implied covenant for quiet enjoyment. *Hart* v. *Windsor*, 12 M. & W. 85, and *Mostyn* v. *The West Mostyn Coal and Iron Company*, L.R. 1 C.P.D. 152, referred to.

But, *quære*, if the rule is applicable to a Crown lease?

Queen v. *Robertson*, 6 S.C.R. 52, referred to.

To the general rule as to the measure of damages for the breach of a contract, there is an exception as well established as the rule itself, namely, that upon a contract for the sale and purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the purposing purchaser is not

entitled to recover compensation in damages for the loss of his bargain. *Bain* v. *Fothergill*, L.R. 7, H.L. 158, and *Flureau* v. *Thornhill*, 2 Wm. Bl. 1078, referred to.

This exceptional rule is confined to cases of contract for the sale of lands, or an interest therein, and does not apply where the conveyance has been executed and the purchaser has entered under covenants, express or implied, for good title, or for quiet enjoyment. *Williams* v. *Burrell*, 1 C.B. 402, and *Lock* v. *Furze*, L.R. 1 C.P. 441, referred to.

The authorities are not agreed, but it is probable that this exceptional rule as to the measure of damages for the breach of a contract of sale of real estate does not apply where the vendor is able to make a good title and refuses or wilfully neglects to do so. *Engel* v. *Fitch*, L.R. 3 Q.B. 314, and *Robertson* v. *Dumaresq*, 2 Moore P.C.N.S. 84, 95, referred to.

An agreement to issue and to renew from year to year at the will of the lessee or licensee a lease or license to take exclusive possession of a tract of land and to cut the merchantable timber thereon is an agreement in respect to an interest in land, and not merely a sale of goods.

The claimant applied to the Government of Canada for license to cut timber on certain timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground rents and bonuses, and make surveys and build a mill. The claimant knew of the dispute, which was at the time open and public. He paid the rents and bonuses, made the surveys, and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, and consequently they could not carry out their promises.

Held, that the claimant was entitled to recover from them the moneys paid to them for ground rents and bonuses, but not the losses incurred in making the surveys, enlarging the mill, and other preparations for carrying on his business.

McCarthy, Q.C., and *A. Ferguson*, Q.C., for the suppliants.

Robinson, Q.C., and *Hogg*, Q.C., for the Crown.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[Dec. 24.

IN RE PRYCE AND THE CITY OF TORONTO.

Municipal corporations—Ways—Damages—Benefit—Set-off—R.S.O., c. 184, s. 483.

In an arbitration under the Municipal Act, R.S.O., c. 184, s. 483, it is proper to allow, as against the amount of damages sustained by an owner of property by reason of the work in question, any enhancement in value to the

property derived specifically from the work in question, notwithstanding that such enhancement in value is one common to all the property affected.

Judgment of STREET, J., 16 O.R. 726, affirmed; BURTON, J.A., dissenting.

Lash, Q.C., and *J. E. Robertson* for the appellant.

Biggar, Q.C., for the respondents.

CONNELL *v.* TOWN OF PRESCOTT.

Negligence—Damages—Remoteness—Voluntary incurring of danger.

Where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger in the hope of saving his property from probable injury, and of preventing probable injury to the life or property of others, and sustains hurt, the person whose negligent act has brought about the dangerous situation is responsible in damages.

Anderson v. Northern R.W. Co., 25 C.P. 301, distinguished and questioned.

Judgments of BOYD, C., in the Divisional Court, and of STREET, J., at the trial, affirmed; BURTON, J.A., dissenting.

W. R. Meredith, Q.C., for the appellants.

J. A. Hutcheson for the respondent.

HILL *v.* ASHBRIDGE.

Limitations—Tenants in common—Right of entry—R.S.O., c. 111.

Where a tenant in common out of possession, entitled to an undivided share of a parcel of land, becomes entitled by the decease intestate of another tenant in common to a further undivided share in the same land, a right of entry then accrues to him, not only as to the new undivided share, but also as to the original undivided share, and the Statute of Limitations runs as to the whole of his interest only from that time.

Judgment of MEREDITH, J., reversed.

W. Macdonald and *R. A. Grant* for the appellants.

G. T. Blackstock and *R. McKay* for the respondent.

ALLEN *v.* FURNESS.

Trusts and trustees—Will—Infant—Maintenance—Equity—Receiver.

Under a devise of land to a father "during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body, or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father; but, the children being in needy circumstances, will be entitled as against the father's execution creditor, who has been appointed receiver of his interest, to have a share of the income set apart

for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver.

Judgment of BOYD, C., affirmed.

Marsh, Q.C., and *C. D. Scott* for the appellant.

Armour, Q.C., for the infant respondents.

Leitch, Q.C., for the adult respondent.

VILLAGE OF NEW HAMBURG *v.* COUNTY OF WATERLOO.

Municipal corporations—Bridges—Rivers - Waters—R.S.O., c. 184, ss. 532, 534.

Under sections 532 and 534 of the Municipal Act, R.S.O., c. 184, county councils are directed to build and maintain "all bridges crossing streams or rivers over 100 feet in width . . . connecting any main highway."

Held, per HAGARTY, C.J.O., and BURTON, J.A., agreeing with the Queen's Bench Division, that the width of the water in its natural flow at ordinary high water mark was the test; and

Per OSLER and MACLENNAN, JJ.A., agreeing with FERGUSON, J., at the trial, that the bridge required to connect the highway was the test.

In the result, the judgment of the Queen's Bench Division, 22 O.R. 193, was affirmed.

W. R. Meredith, Q.C., for the appellants.

John King, Q.C., for the respondents.

BASKERVILLE *v.* CITY OF OTTAWA ET AL.

BASKERVILLE *v.* CANADA ATLANTIC R.W. CO.

Municipal corporations—Arbitration and award—Damages—Ways—Railways—R.S.O., c. 184, s. 531, s-s. 4.

A railway company obtained permission from a municipal corporation to run their line along a certain street, agreeing not to raise the grade to more than a certain height. They built the line and raised the grade of the street to more than the specified height, the corporation not consenting, but not taking any steps to prevent the violation of the agreement.

Held, affirming the judgment of MACMAHON, J., that as against the plaintiffs, who were owners of property injuriously affected by the unauthorized raising of the grade, the railway company were trespassers and liable in an action for damages; but

Held, also, reversing the judgment of MACMAHON, J. (MACLENNAN, J.A., dissenting), that, as against the corporation, the plaintiffs were restricted to the remedy by arbitration, and that in any event the cause of action was not of such a nature as to entitle the corporation to bring in the railway company under s. 531 (4) of R.S.O., c. 184.

J. H. Macdonald, Q.C., and *A. J. Christie*, Q.C., for the railway company.

D. B. McTavish, Q.C., and *Aylesworth*, Q.C., for the city of Ottawa.

McCarthy, Q.C., and *F. E. Latchford* for the plaintiffs.

TRUST AND LOAN COMPANY *v.* STEVENSON ET AL.

Limitations—Mortgage—Payment—R.S.O., c. 111, ss. 22, 23—Bankruptcy and insolvency—27 Vict., c. 18, s. 19.

The assignee in insolvency, under the Insolvent Act of 1864, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but, notwithstanding this conveyance, continued to pay interest to the plaintiffs till within ten years of the bringing of this foreclosure action.

Held, on a case stated in the action for the opinion of the court, with liberty to draw inferences of law and fact, that it was proper to infer that the provisions of s. 19 of the Insolvent Act of 1864 had been complied with; that under that section the subsequent mortgagee taking over his security would be primarily bound to pay off the prior encumbrances; and that therefore his payments kept alive the plaintiffs' rights.

Judgment of the Chancery Division, 21 O.R. 571, reversed; OSLER, J.A., dissenting.

Marsh, Q.C., for the appellants.

Delamere, Q.C., for the respondents.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [Dec. 24.

REGINA *v.* SMILEY.

Gaming—Becoming custodian of wager—R.S.C., c. 159, s. 9—Construction of—Restriction to events to take place in Canada.

R.S.C., c. 159, s. 9, provides that every one who becomes the custodian or depositary of any money, property, or valuable thing staked, wagered, or pledged upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, is guilty of a misdemeanour.

Held, that this enactment should not be construed as extending to the result of any election, race, contest, etc., to take place outside of the Dominion of Canada.

Wells v. Porter, 3 Scott 141, followed.

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

Osler, Q.C., and *W. G. Murdoch* for the prisoner.

REGINA *v.* LEVINGER.

Constitutional law—55 Vict., c. 18, s. 2 (O.)—Intra vires—Constitution of criminal courts—General sessions of the peace—Jurisdiction in cases of forgery—B.N.A. Act, s. 91, s-s. 27; s. 92, s-s. 14.

The power granted by the British North America Act, s. 92, s-s. 14, to the Provincial Legislature to constitute courts of civil and of criminal jurisdiction necessarily includes the power of giving jurisdiction to those courts, and impliedly includes the power of enlarging, altering, amending, and diminishing the jurisdiction of those courts.

The Act 53 Vict., c. 18, s. 2 (O.), so far as it provides that the Courts of General Sessions of the peace shall have jurisdiction to try any person for any offence under any of the provisions of ss. 28 to 31 of R.S.C., c. 165, an Act respecting forgery, is within the powers of the Legislature of Ontario, as being in relation to the constitution of a provincial court of criminal jurisdiction, and does not in any way trench upon the exclusive authority given to the Parliament of Canada by s. 91, s-s. 27, to make laws in relation to criminal law and criminal procedure.

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

Murphy, Q.C., for the prisoner.

Div'l Court.]

PEGG *v.* STARR.

Landlord and tenant—Distress for rent—Goods of third person—Resort first to goods of tenant.

Where a landlord has distrained for arrears of rent goods upon the demised premises liable to distress for rent, belonging in part to the tenant and in part to a third person, such third person has no right to compel, or to ask the court to compel, the landlord to sell the part belonging to the tenant before selling the part belonging to such third person.

A. H. Marsh, Q.C., and *C. C. Robinson* for the plaintiff.

Moss, Q.C., and *T. J. Robertson* for the defendant.

BEAVER *v.* GRAND TRUNK R.W. CO.

Railway company—Passenger—Ticket, non-production of—Ejection from train—51 Vict., c. 29, ss. 214, 348—Contract—Condition—Regulation.

A passenger upon a railway train who has paid his fare cannot, in the absence of any condition in his contract with the railway company requiring the production of his ticket, and in the absence of any regulation relating to or governing it made under s. 214 of the Railway Act of Canada, 51 Vict., c. 29, be treated as "a passenger who refuses to pay his fare" within the meaning of s. 248 because he does not produce his ticket when asked for it by the conductor.

And where, under such circumstances, the plaintiff was put off a train by a conductor on the defendants' railway, a nonsuit entered by the trial judge was set aside and a new trial ordered.

Valentine MacKenzie, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

ERDMAN *v.* TOWN OF WALKERTON.

Evidence—Action for negligence resulting in injury to person—Death of person injured before trial—Examination de bene esse—Subsequent action by executrix under R.S.O., c. 135—Admissibility of depositions taken in former action—Order in Chambers.

The plaintiff's husband was personally injured by an accident which occurred in a highway belonging to the defendants, and brought an action for damages, alleging that the accident was owing to the defendants' negligence in not keeping the highway in repair. Under an order made in that action, upon his own application, he was examined *de bene esse* as a witness in his own behalf, and cross-examined by the defendants, and died before the action came to trial. His widow then brought an action under R.S.O., c. 135, Lord Campbell's Act, as executrix, for the death of her husband, alleging that it was caused by the negligence of the defendants in not keeping their highway in repair.

Held, that the two actions related to the same subject and involved the same material questions, and that the present plaintiff was to be regarded as claiming under her deceased husband; and therefore that the evidence taken in the former action was admissible in the present.

Held, also, that an order in Chambers providing that the evidence in question might be read at the trial, saving all just exceptions, was properly made.

Shaw, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendants.

H. P. O'Connor, Q.C., for Heughan, a third party.

IN RE PERRAS *v.* KEEFER.

IN RE BARRY *v.* KEEFER.

IN RE ANDREWS *v.* KEEFER.

Prohibition — Division Court — Attachment of debts—Assignment of debt attached—Trial of question of validity of assignment—Assignee not called upon as claimant—Submitting to jurisdiction of court—Amount in controversy—R.S.O., c. 51, s. 197.

Each of the three primary creditors began an action in a Division Court against the primary debtor for the recovery of an amount within the jurisdiction of the court, and also attached in the hands of garnishees the amount of the debt in each case, the sum of $500 having been admittedly due by the garnishees to the primary debtor, who, however, asserted that before the actions were commenced he had assigned the debt for valuable consideration to J.

Upon the court day the primary creditors, the primary debtor, and J. appeared before the judge in the Division Court, counsel also appearing for the garnishees. Judgment was first given in favour of the primary creditors against the primary debtor in each case, and then the question of the validity of the assignment was entered upon and evidence given upon it, J. producing his books and giving his evidence. Judgment was then given declaring the assignment void as against the primary creditors as a fraud upon them. From the judgment J. gave notice of appeal, which he afterwards abandoned, and in the style of cause he named himself as "claimant."

Upon motion by J. for prohibition,

Held, that he had submitted himself to the jurisdiction of the court, and could not be heard to say that he was there merely as a witness; and that the judge, having all parties before him, was justified under s. 197 of the Division Courts Act, R.S.O., c. 51, in trying their rights without going through the formality of calling them before him.

Held, also, that the Division Court had jurisdiction to try the right of the primary creditors to garnish portions of the $500 sufficient to satisfy their claims, and under s. 197 to determine whether or not the $500 was at the time of the attachment the property of the debtor.

E. T. English for W. G. Johnson.

Aylesworth, Q.C., and *W. J. Green* for the primary creditors.

IN RE WILSON *v.* HUTTON.

Prohibition—Division Court—Judge reserving judgment till a day named—Judgment not given till a later day—R.S.O., c. 51, s. 144—Acquiescence.

Where a judge in an action in a Division Court has pronounced a judgment otherwise than in accordance with the direction of s. 144 of the Division Courts Act, R.S.O., c. 51, such judgment can, upon motion for prohibition, only be sustained upon clear and satisfactory evidence that the party complaining has agreed in advance to the adoption of the course which the judge has actually adopted in delivering his judgment, or that he has subsequently acted in such a manner as to waive his right to complain.

And where at the trial of an action in a Division Court judgment was postponed till a named day, but was not then given, and two subsequent days were successfully named by the judge, but judgment was not actually given till three days later than the latest day named, and upon motion for prohibition it was not shown that the party moving had ever agreed that the judgment might be given without previously naming a day for its delivery, and had not acted so as to waive his right to complain, an order was made prohibiting the enforcement of the judgment.

Aylesworth, Q.C., and *Justin* for the defendant.

T. J. Blain for the plaintiff.

Chancery Division.

Div'l Court.] [Dec. 1.

REGINA *v.* DAVIS.

Criminal law—Chancery Division of the High Court—Jurisdiction of, in criminal matters.

On an appeal from an order for a *certiorari*, which the judge (FERGUSON, J.) making it refused to make returnable in the Chancery Division, it was

Held, per ROBERTSON, J., that the Chancery Divison of the High Court of Justice had no jurisdiction in criminal matters.

Held, per MEREDITH, J., that it had.

Held, per BOYD, C., while adhering to his opinion as expressed in *Reginæ* v. *Birchall*, 19 O.R. 697, that it had; that when there is an equally divided opinion for and against jurisdiction entertained by the individual judges constituting the Division,* it would be unseemly that by a mere accident such as the constitution of the court jurisdiction should be affirmed on one day and negatived on the next; and as there was jurisdiction in the other divisions of the High Court, he agreed with ROBERTSON, J., that the motion be not entertained.

Du Vernet for the appeal.

Langton, Q.C., *contra.*

BOYD, C.] [Nov. 12.

PURDOM ET AL. *v.* ONTARIO LOAN AND DEBENTURE CO. ET AL.

Company—Non-interference by court if sanction to an act obtainable—"Two-thirds in value"—Face value, not amount paid—R.S.O., 157, s. 38.

If the sanction to the doing of an act by a company, which sanction should have been obtained before the act was done, can be subsequently obtained, the rule of the court is not to interfere.

McDougall v. *Gardiner*, 1 Ch.D., at p. 25, cited and followed.

The "two-thirds in value" mentioned in s. 38 of R.S.O., c. 157, means the face value of the stock, and the measure of its value for voting is not determinable by reference to what has been paid upon it.

Hoyles, Q.C., and *T. E. Parke* for the plaintiffs.

H. W. Rowell for the Ontario Loan and Debenture Co.

M. D. Fraser and *I. P. Moore* for the Masonic Temple Co. of London.

ARNOLD ET AL. *v.* PLAYTER ET AL. [Nov. 24.

Sale of chattels—Property remaining in vendors—Resumption of possession and resale after judgment on contract notes—Recovery of unpaid balance.

The defendants purchased certain machinery from an engine company under a contract in writing, which provided for a cash payment and the giving

* FERGUSON, J., had held in *Regina* v. *Birchall*, *supra*, that it had not jurisdiction.—REP.

of notes for the balance of the price, and that the title to the machinery should remain in the company till the purchase money, etc., was paid, and that on default the company should remove and resell it. Certain amounts were paid and judgment was obtained by the company for the balance due on the notes, and part realized by execution when the company took possession and resold, and then sought to prove a claim against the defendants for the balance unpaid. On an appeal from the Master who allowed the claim, it was

Held, (reversing the Master in Ordinary) and following *Sawyer* v. *Pringle*, 18 A.R. 218, that as the contract did not provide that the purchase money was to be applied *pro tanto* on what was due and that the purchasers were to remain liable for the difference, no action for any part of the price could be maintained after the vendors had taken possession and resold the machinery. The election to sell was an election to abandon the contract by the vendors, whereupon the vendees acquired a clear right to abandon it also.

Held, also, that the whole matter was examinable in the Master's office though judgment be recovered, and as the consideration for the judgment had disappeared by the intentional act of the vendors they could not collect the amount of it.

Bristol for the appeal.

Hoyles, Q.C., *contra*.

[Nov. 25.

LEYS *v.* THE TORONTO GENERAL TRUSTS CO.

Will—Devise—Dower—Election.

A testator having by his will blended his real and personal estate into a fund from which to obtain an income out of which payments were to be made annually to his wife and other devisees, and postponed the division of the *corpus* until after the death of the wife—the wife also getting the use of a house,

Held, that the wife was not bound to elect between her dower and the testamentary bestowments, *Re Quimby*, *Quimby* v. *Quimby*, 5 O.R. 744, distinguished.

The testator also gave a house for the residence of certain nephews and nieces until the youngest attained twenty-one.

Held, that this right of personal occupation was, while it lasted, inconsistent with a claim of the widow to have one-third of the house set apart for her use as doweress, and that the deprivation of dower for a time in part of the real estate was not sufficient to put her to her election as to the residue of the land.

Semble, if the whole real property were to pass by one devise, the exclusion of dower in any part would be sufficient to indicate its exclusion in the whole; but in the case of separate devises, though the wife may be barred of her dower in one property, she is not therefore barred in the other. *Cowan* v. *Besserer*, 5 O.R. 624, followed.

Held, also, that the widow was bound to elect in the case of a house the occupation of which was given to her for her life, and as to the house the occupation of which was given to the nephews and nieces, but otherwise she had dower in the land.

Wallace Nesbitt for the plaintiff.

A. Hoskin, Q.C., for the defendant.

ROBERTSON, J.] [Dec. 19.

VIVIAN *v.* MCKIM.

Assessment of property—Wrongfully including road allowances—Court of Revision—Notice of holding court—R.S.O., c. 193, s. 64, s-ss. 3, 9.

Held, that the fact that in assessing the real property of the plaintiffs for taxes the defendants had failed to deduct, in making the assessment, certain portions of the lands which were occupied or used for road allowances, rights of way, railways, etc., did not make the whole assessment null and void; but the plaintiffs' proper remedy was to go before the Court of Revision and appeal against the assessment of these portions of the property.

Held, also, that the notice of the time of holding the Court of Revision spoken of under R.S.O c. 193, s. 64, s-ss. 3, 9, is required to be given by the clerk of the municipality only in the case spoken of in the said s-s. 3; that is to say, where a municipal elector appeals to the Court of Revision with respect to the assessment of some other person, and does not apply where the party is appealing against the assessment of his own property.

Aylesworth, Q.C., for the plaintiffs.

Cross for defendants.

BOYD, C.]

COMMISSIONERS FOR THE QUEEN VICTORIA NIAGARA FALLS PARK *v.* HOWARD ET AL.

Crown lands—Ordnance lands—Chain reserve along Niagara river—Slope—Military communication—Government reserve—Waste lands—Public purposes—Military purposes—User for—Ordnance Act (1843), 7 Vict., c. 11.

In an action by the plaintiffs claiming under a patent from the Ontario Government, and the defendants claiming under a lease from the Dominion Government to try the right to a part of the chain reserved along the bank of the Niagara River, and the slope between the top of the bank and the water's edge, which had been reserved out of the original survey of the township of Stamford, and was claimed by the defendants to have been reserved or set apart for military or ordnance purposes,

Held, that the chain reserve was part of the waste lands of the Crown held for public purposes.

It was a government reserve originally made for public purposes.

Held, also, that as there was no evidence that this chain reserve was set apart for military purposes, or of any user, charge, or control of it by the military authorities, that it was not affected by the Ordnance Vesting Act of 1843, 7 Vict., c. 11, but remained a government reserve held for public purposes generally, and that the portion in question vested in the Province of Ontario, as successor of the old Province of Canada, until vested in the plaintiffs who were entitled to succeed.

Held, also, that assuming the chain reserve had been so set apart for military purposes, the slope formed no part of such reserve, but always remained part of the waste lands of the Province.

Irving, Q.C. and *Moss*, Q.C., for the plaintiffs.

Robinson, Q.C., and *Harry Symons* for the defendants.

Practice.

C.P. Div'l Court.] [Dec. 23.

HOGABOOM *v.* COX.

Discovery—Examination of party in vacation—Special examiner.

Where a special examiner issues an appointment for the examination for discovery during vacation of a party to an action, such party, if duly subpœnaed, is bound to attend for examination.

A special examiner, although an officer of the Supreme Court of Judicature for Ontario in the sense of being subject to its control and directon, has no office in connection with the court that comes under any rule requiring it to be kept open or closed during any particular period of the year.

Decisions of the Master in Chambers and GALT, C.J., 15 P.R. 23, reversed.

W. R. Riddell for the plaintiff.

A. Hoskin, Q.C., for the defendant.

TOWN OF BARRIE *v.* WEAYMOUTH.

Parties—Joining plaintiffs without authority—Motion by defendants to strike out—Parties to motion—Costs—Solicitors.

By a resolution of the council of a municipal corporation, the mayor and clerk were instructed to grant a certificate under the corporate seal to the solicitors for the other plaintiffs, authorizing them to join the corporation as plaintiffs in this action upon receiving a bond to the satisfaction of the mayor indemnifying the corporation against all costs. A bond was accordingly handed to the mayor, who retained it, but the action was brought by the solicitors, and the corporation joined therein as plaintiffs without the granting of any certificate under the corporate seal. After the action had been begun the mayor informed the defendants' solicitors that no certificate had been issued, and stated that he would not sign one until he had been properly advised by counsel.

Held, that the action was brought in the name of the corporation without authority; and that the defendants had the right to move to have such name struck out.

Semble, that the corporation should have been parties to the motion.

Held, also, that as the solicitors for the plaintiffs other than the corpora-

tion were not guilty of any intentional wrongdoing in joining the corporation as plaintiffs, they should not be made liable for the defendants' costs.

Aylesworth, Q.C., for the plaintiffs Cook and Bemrose, and their solicitors.

Strathy, Q.C., for the defendants.

Q.B. Div'l Court.] [Dec. 24.

CLARKE *v.* CREIGHTON.

Costs—Counsel fees—Barrister conducting his own case.

A counsel conducting his own case in court cannot tax a counsel fee against the opposite party.

Smith v. *Graham*, 2 U.C.R. 268, followed.

S. R. Clarke, the plaintiff, in person.

W. R. Riddell for the defendant's solicitor.

BASKERVILLE *v.* VOSE.

Costs—Order of trial judge as to, under Rules 1170, 1172—"Good cause"—Scale of costs—Set-off.

In an action for damages for assault and negligence brought in the High Court, and tried with a jury, a verdict for $110 damages was rendered. The trial judge directed judgment to be entered for that sum with County Court costs, and ordered that the defendant should have no right to set off the excess of his costs incurred in the High Court over County Court costs in the manner provided by Rule 1172. The trial judge's reasons for making the order preventing the set-off were (1) because the defendant had induced the plaintiff to go with him to his own physician after the assault complained of, promising to pay the bill, and had afterwards refused to perform his promise: and (2) because the plaintiff might reasonably have expected the damages to have been allowed at more than $200, and so was entitled to bring his action in the High Court.

Held, that neither of these reasons could be treated as "good cause" within the meaning of Rule 1170; and therefore the costs should follow the event under Rule 1172.

McNair v. *Boyd*, 14 P.R. 132, followed.

DuVernet for the plaintiff.

Shepley, Q.C., for the defendant.

SCANE *v.* COFFEY.

Arrest—Order for—Affidavit, sufficiency of—Setting aside order—New material—Application for discharge from custody—Circumstances of leaving Province—Publicity—Intent to defraud—Condition that action shall not be brought against plaintiff—Disclosure of facts — Reasonable grounds — Costs.

An order for the arrest of the defendant was made on March 16th, 1892, upon an affidavit of the plaintiff, in which he alleged that the defendant in March, 1881, absconded from this Province for the purpose of defrauding his creditors, and that, having lately returned to the Province, he was about to leave it again with a like purpose. The defendant applied, upon new material, to the judge who made the order to set it aside, and to be discharged from custody.

Held, that the affidavit of the plaintiff was, if true, a sufficient foundation for the order.

Kersterman v. *McLellan*, 10 P.R. 122, followed.

And the order could not be set aside by the judge upon the new material contradicting the case made by the plaintiff.

Damer v. *Busby*, 5 P.R. 356, and *Gilbert* v. *Stiles*, 13 P.R. 121, followed.

The departure of the defendant from this Province in March, 1891, was open and public; he announced it at a public meeting to six or seven hundred persons, along with the fact that he intended to sell his household effects before his intended departure; the newspapers in the place where he lived announced that he was going to Chicago, in the United States of America, with his family, to take a situation there which he had obtained; and his fellow-townsmen gave him a public dinner, at which several of his creditors were present, before he left. He departed for Chicago, taking no property with him. The only piece of property he possessed in Ontario was an unsaleable and heavily mortgaged house and lot, which a year before he left he had transferred to a creditor as security for a debt. He had a permanent situation and residence in Chicago with his wife and family, and in March, 1893, returned to this Province for a merely temporary purpose. During the year he spent in Chicago, he remitted considerable sums earned by him to his creditors in Ontario.

Held, that, under these circumstances, the defendant could not be said to have left Ontario with intent to defraud his creditors, and that he should be discharged from custody under the order for arrest.

It is within the power of the court or a judge, upon an application to discharge a defendant from custody, to impose upon him the term that he shall bring no action against the plaintiff; but it should only be imposed where the plaintiff is shown to have been entirely frank and open in his application for the order for arrest, and to have had reasonable grounds for the statements he has laid before the judge. The circumstances of this case did not warrant such a term being imposed; for the plaintiff was aware of the circumstances and the publicity of the defendant's departure in 1891, and conveyed a false impression when he swore that the defendant then "absconded from this Province."

For the same reason the defendant was entitled to the costs of his application to be discharged from custody.

H. S. Osler for plaintiff.

M. Wilson, Q.C., for the defendant.

Court of Appeal.]

IN RE SOLICITOR.

Solicitor and client—Delivery of bill of costs—Taxation—Supplemental bill—Inadvertence—Special circumstances—Time.

A solicitor, in delivering a bill of costs, omitted to make any charges for "days employed in going to and returning from Ottawa" upon business for his clients. He stated that the omission was through inadvertence, and after taxation of his bill, but before the certificate was signed, applied for leave to deliver a supplemental bill, alleging that he would not have sought now to make these charges if the taxing officer had allowed him certain sums charged in the original bill for travelling expenses, but which were disallowed on the ground that he was travelling on a pass.

Held, that there was no clear evidence that the omission arose from mere accident or mistake, and that the court below could not be said to be wrong in holding that no special circumstances were disclosed for making the amendment.

Per OSLER, J.A.: It is too late to make such an application after the result of the taxation is known.

Judgment of the Queen's Bench Divisional Court, 14 P.R. 571, affirmed.

The solicitor appellant in person.

E. T. Malone for the respondents.

TALBOT *v.* POOLE.

Costs—Scale of—Action for breach of covenant—Title to land—Custom—Pleading—R.S.O., c. 51, s. 60, s-s. 4—Division Court jurisdiction—Rules 1170, 1172.

In an action brought in the High Court by a landlord against a tenant for damages for breach of the latter's covenants in a farm lease, the statement of claim alleged that the plaintiff by deed let to the defendant the land described for a term of years, and that the defendant thereby covenanted as set forth, and assigned as breaches of the covenants that the defendant did not cultivate the farm in a good, husbandlike, and proper manner. By the statement of defence the defendant denied all the allegations of the statement of claim, and further alleged that the defendant had used the premises in a tenantlike and proper manner, "according to the custom of the country where the same was situate." The plaintiff recovered a verdict of $100, the action being tried with a jury. The title to the land was not brought into question at the trial, but it was contended that it came into question on the pleadings.

Held, not so; for the defendant was on the face of the record estopped from pleading *non demisit*, and his denial could only be read as a traverse of the actual execution of the lease.

Purser v. *Bradburne*, 7 P.R. 18, commented on.

Held, also, that the "custom" pleaded was not the "custom" meant by s. 69, s-s. 4, of the Division Courts Act, R.S.O., c. 51, which refers to some legal custom by which the right or title to property is acquired, or upon which it depends.

Legh v. *Hewitt*, 4 East 154, followed.

Held, therefore, that the action was within the competence of the Division Court, and that the costs should follow the event, in accordance with Rules 1170, 1172.

Shepley, Q.C., for the appellant.

G. W. Marsh for the respondent.

STREET, J.] [Dec. 29.

STRACHAN *v.* RUTTAN.

Costs—Barrister and solicitor acting for himself and co-trustees—Instructions—Counsel fees—Notice of trial.

One of several trustees who is a barrister and solicitor, and acts for himself and his co-trustees as solicitor and counsel in an action, may tax against the opposite party his full costs, including instructions and counsel fees.

Cradock v. *Piper*, 1 McN. & G. 680, followed.

Smith v. *Graham*, 2 U.C.R. 268, distinguished.

Where one of several defendants gives notice of trial, and afterwards, becoming aware that the action is not at issue against the other defendants, abandons his notice, he cannot tax the costs of it against the opposite party.

E. T. English for the plaintiff.

Langton, Q.C., for the defendants McIntyre and Macdonell.

C.P. Div'l Court.] [Jan. 3.

ANDERSON *v.* QUEBEC FIRE INS. CO.

Security for costs—False address indorsed on writ of summons—Mistake—Amendment—Residence out of the jurisdiction—Temporary return—Costs.

The plaintiff, who was a sailor on the lakes, at the time of the issue of the writ of summons was residing out of Ontario. The writ was, by a mistake of the plaintiff's solicitor, indorsed with a statement that the plaintiff resided in Windsor, Ontario; and upon the defendants moving for security for costs on the ground that the plaintiff had given a false address, the plaintiff declared that naming Windsor was a mistake, and that his true place of residence was Collingwood, Ontario. Collingwood was not then his actual place of residence, but he might perhaps have properly regarded as his domicil. Pending the motion, however, the plaintiff returned to Ontario, and went to reside temporarily at Sarnia.

Held, that the plaintiff, by giving a false address, entitled the defendants to move for security for costs, and it lay on the plaintiff to show that his misstatement was not made *malâ fide*. That being shown, the plaintiff would be driven to amend, or the defendants would be entitled to the order. But the plaintiff could not amend by substituting Collingwood, for he did not reside there at the date of the writ, and the defendants would have been entitled to the order but for the plaintiff's subsequent return to the jurisdiction. And

Held, following *Redondo* v. *Chaytor*, 4 Q.B.D. 453, and *Ebrard* v. *Gassier*, 28 Ch.D. 232, that where a foreigner comes within the jurisdiction, pending a motion for security for costs and before judgment, although for the temporary purpose of enforcing his claim by action, he cannot be called upon to give security.

The motion for security was refused, without costs to either party, and leave was reserved to the defendants to apply again if the plaintiff should go to reside out of the jurisdiction before the termination of the action.

W. B. Raymond for the plaintiff.

W. R. Riddell for the defendants.

THE MASTER'S TREES.

(*Vide* 19 A.R. 537.)

Within the Master's garden stood a weeping willow tree,
Beneath whose shade full oft he sat in sportive jollity,
There sheltered from the sun's fierce beams and from the moon's soft ray
He calmly viewed the sylvan scene which there before him lay.
And on his boulevard also stood another gallant tree,
Whose sweeping boughs well dight with leaves did please him mightily;
But as the Master slept in peace one day in Morpheus' arms,
Along there came a reckless man obtuse to sylvan charms;
Assuming to be armed with all the necessary powers,
He cut and slashed and hacked and chopped the Master's leafy bowers.
But when the Master woke from sleep and saw the damage done,
He swore a mighty oath, and said, "I'll unto justice run,
And from the court I'll seek relief in damages," said he,
"For this hacking and this chopping of my weeping willow tree."
The suit was brought and fiercely fought in court of low degree,
And judgment for the plaintiff went for dollars seventy.
Then to the court of high appeal and learned judges three
The base defendants took the case of that poor willow tree;
And there they strove with might and main to get the court to see
Some reason why they shouldn't pay for chopping of the tree.
Now when the court in judgment sat 'twas curious to see
How small a matter it will take to make them disagree;
For two were clear that for the tree which on the boulevard grew
The plaintiff had no right at all for damages to sue;

But then the third was quite as clear as any judge can be
The plaintiff should recover for the damage to that tree;
And as regards the tree which grew upon his own domain,
There was a strange division, too, about the plaintiff's claim,
For while another two agreed the plaintiff's claim was just
The other was as certain that the plaintiff should be "bust."

Appointments to Office.

SUPREME COURT JUDGES.

The Honourable Samuel Henry Strong, a Puisné Judge of the Supreme Court of Canada, to be Chief Justice of the Supreme Court of Canada, *vice* the Honourable Sir William Johnston Ritchie, deceased.

LOCAL MASTERS.

County of Norfolk.

James Robb, of Simcoe, in the County of Norfolk, Judge of the County Court of Norfolk, to be a Local Master of the Supreme Court of Judicature, in the room of Clarence Campbell Rapelje, resigned.

CORONERS.

United Counties of Leeds and Grenville.

John McMillan Shaw, of the Village of Lansdowne, in the County of Leeds, one of the United Counties of Leeds and Grenville, Esquire, M.D., to be an Associate-Coroner within and for the United Counties of Leeds and Grenville.

County of Oxford.

John Ross, of Embro, in the County of Oxford, M.D., to be an Associate-Coroner in and for the said County of Oxford.

POLICE MAGISTRATES.

Village of Colborne.

Frank Meade Field, of the Village of Colborne, in the County of Northumberland, Esquire, Barrister-at-Law, to be Police Magistrate in and for the said Village of Colborne, without salary.

DIVISION COURT CLERKS.

District of Algoma.

Thomas Sullivan, of the Village of Bruce Mines, in the District of Algoma, Gentleman, to be Clerk of the Second Division Court of the said District of Algoma, in the room and stead of David Ballantyne, resigned.

District of Manitoulin.

Peter J. Anderson, of the Township of Gordon, in the District of Manitoulin, Gentleman, to be Clerk of the First Division Court of the said District of Manitoulin, in the room and stead of James M. Fraser, resigned.

United Counties of Northumberland and Durham.

Stephen S. Brintnell, of Colborne, in the County of Northumberland, one of the United Counties of Northumberland and Durham, Gentleman, to be Clerk of the Seventh Division Court of the said United Counties of Northumberland and Durham, in the room of Martin Howard Peterson, resigned

County of Welland.

Thomas Conlon, the younger, of the Town of Thorold, in the County of Welland, Gentleman, to be Clerk of the Fifth Division Court of the said County of Welland, in the room and stead of William Gearin, resigned.

DIVISION COURT BAILIFFS.

County of Haldimand.

George Brooks, of the Township of Canborough, in the County of Haldimand, to be Bailiff of the Fifth Division Court of the said County of Haldimand, in the room and stead of Eli W. Robins, resigned.

County of Welland.

John S. Stayzer, of the Village of Marshville, in the County of Welland, to be Bailiff of the Second Division Court of the said County of Welland, in the room and stead of Charles E. Bradshaw, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS.

City of Liverpool (England).

Hugh Bulkely Kent, of No. 7 Union Court, in the City of Liverpool, Eng., Gentleman, Solicitor, to be a Commissioner for taking Affidavits within and for the said City of Liverpool, and not elsewhere, for use in the courts of Ontario.

City of Edinburgh (Scotland).

Hamilton Maxwell, of 57 Hanover Street, in the City of Edinburgh, Scotland, Esquire, Writer to the Signet, to be a Commissioner for taking Affidavits within and for the said City of Edinburgh, and not elsewhere, for use in the courts of Ontario.

City of New York.

William Ten Eyck Hardenbrook, of No. 38 Park Row, in the City of New York, in the State of New York, one of the United States of America, Esquire, to be a Commissioner for taking Affidavits within and for the said City of New York, and not elsewhere, for use in the courts of Ontario.