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A summary of the legislation of the last session of the Ontario Legislature has to stand over until next number for want of space.

The honor of knighthood has just been conferred on the Chief Justice of Common Pleas, who will now be known as Sir William Meredith. This title was some time ago offered to Chief Justice Hagarty, Chief Justice Armour and Chancellor Boyd, but they did not, for personal reasons, think proper to accept the distinction. Whilst the degree of Knight Bachelor does not mean much in these days, and titles do not seem very appropriate to the Western hemisphere at the close of the 19th century, it is almost a pity that these learned Chiefs (than whom none are more entitled to the honor) did not accept the title as appurtenant to the honorable positions they occupy.

THE COURSE OF STATUTE REVISION IN CANADA.

"When an acquaintance was one day exclaiming against the tediousness of the law and its partiality.—"Let us hear, sir," said Johnson, "no general abuse; the law is the last result of human wisdom acting upon human experience for the benefit of the public." BOSWELL'S JOHNSON.

A new revision of the general statutes, upon the wisdom of which depends the general welfare of the country, and under which, almost entirely, criminal justice is administered in all the provinces, cannot fail to be of interest to the profession.

The necessary Act has recently been passed by which the Governor-in-Council may appoint three or more commissioners to collect, classify, revise and consolidate the Public General Statutes of Canada, and submit a report of what they have done, which will be in effect the Consolidated Statutes of Canada, 1896.

A brief reference to the original sources of law in Canada and to the history of the previous revisions of the statutes, in the various provinces, will not be without value.

The sources of our Canadian laws are briefly as follows: Firstly, in the periods between the conquest of the various provinces and the issue of commissions from the Crown to the Governors, the country was governed by martial law in military tribunals, with recourse to the law of the conquered people where the military law was wanting, or on questions without its jurisdiction; secondly, the regular commissioners and instructions of the Governors of the various provinces, supplemented, in the case of Ontario and Quebec, by a Royal Proclamation: and, thirdly, the ordinances passed thereunder and the laws enacted by the Legislative Assemblies called together in pursuance thereof, or erected pursuant to acts of the Imperial Parliament. Thanks to Todd, Bourinot and Houston, the documentary history of our law is clear enough.

The source of the lex scripta in each of the various provinces of the Dominion may be briefly enumerated as follows: In Nova Scotia, Governor Cornwallis' commission in 1749; in New Brunswick, Governor Carleton's commission in 1784; in Prince Edward Island, Governor Patterson's commission in 1769; in Quebec and Ontario, the royal proclamation of 1763; in British Columbia, Governor Blanshard's commission in 1849; and in Manitoba, the Canadian Act, 33 Vict., ch. 3 (1870). A useful reference can be made to the earlier chapters of Mr. J. G. Bourinot's book, which are very clear, for a more detailed account of the introduction of English law into Canada. It will be noticed that in the commissions to the Governors of the other provinces, there is no express provision introducing the law of England into the new colony, as was held to be the case in Quebec and Ontario from the wording of the proclamation of 1763; and it seems rather as if it was intended that legislative assemblies should be, as soon as possible, called together, and that they should introduce into their respective provinces such part of the law of England as they might consider necessary or beneficial to the country. On the following dates legislative assemblies

were constituted in the various provinces: Nova Scotia, 1758; New Brunswick, 1784; Prince Edward Island, 1773; Quebec and Ontario, 1792, and British Columbia, 1856.

The results of all the ordinances passed by the early governors in their legislative councils, together with the subsequent legislation after the grant of representative government, are summed up in the first revision of the laws of each of the Provinces, which took place on the following dates; Nova Scotia, 1767; New Brunswick, 1823; Prince Edward Island, 1862; Ontario, 1843; Quebec, 1845, British Columbia, 1871 and Manitoba, 1880.

A short review of all the revisions of the statutes, in each Province and in the Dominion, may present some points of historical interest.

NOVA SCOTIA.

The Province of Nova Scotia has had eight revisions in all.

First revision of 1767, made by Chief Justice Belcher, contains a revision of all the Acts passed since 1758. As the first book published in Canada was printed in 1765, no very great delay occurred before the newly-imported art was employed in the service of the law.

Second revision of 1784, made by Henry Newton, Alex. Brymer, John Cunningham, Thomas Cochran and John Geo. Pyke, also covers all the legislation between 1758 and the date of its publication.

Third revision of 1805, containing the Acts from 1758, when the Legislative Assembly was constituted, up to the year 1804, was prepared by John Uniacke, Esq., the Attorney-General of the province, and a man of much learning and eminence in Nova Scotia. Useful reference may be made to his preface in which he makes a characteristic comment on the French Revolution, which might serve as a model defence of those principles of religion and morality which form the only sound basis of law and order, and which should, as far as possible, guide the actions of governments as well as of their citizens. I quote from the first page: "It has been our misfortune to live at a period during which every art has been used to destroy the principles of true religion,

and to subvert the rules of civil government. The Christian religion, which is our sure guide to the worship of the true God; the allegiance of subjects to the king; the natural love of our country; the union of husband and wife; the duties of parent and child; the affection of brothers and sisters, and the attachment of friends and countrymen have been, by impious and wicked men, styled prejudices originating in the human mind from the errors of a false education. It has been our lot to see those venerable principles, which our forefathers considered fixed as firmly as the pillars of the earth, shaken to their basis, and the fundamental rules of human happiness scoffed at and ridiculed in the publications of artful men, who have proved themselves the enemies of the human race. Works of this kind have been circulated far and near, and the opinions of those men propagated with a true fanatic zeal. To give the name of a revolution to the events which have sprung from those novel doctrines, would be applying a term too feeble to comprehend the horrid and sanguinary actions of the apostles of liberty and equality. Their deeds have produced a convulsion in human nature which has been accompanied with a degree of atrocity so dreadful, that it may be reasonably doubted whether our posterity will give credit to the pages of history which shall record the wonderful events that have happened within the compass of a few years. I think I do not exaggerate when I say that those diabolical principles, during the short period I advert to, have produced to the world more human wickedness, distress and misery than any equal space of time has exhibited in the previous history of man."

Later he gives a very earnest exhortation in favor of exactness and zeal in obedience to the law. He says: "In no way can we more effectually manifest our love and attachment to the King than by punctually obeying his laws. It is the duty of an English subject, in this respect, not merely to attend to his own conduct, he is also bound to observe the actions of others; for this purpose our Constitution has wisely provided that all men, high and low, are in some shape or other called to assist in the execution of the laws, some as

justices of the peace, others as jurors, constables, or in an endless variety of different offices and stations. The wisest and best of kings, with all the state offices appendant to his high rank and station, would, without such help, be unable to execute our laws. . . . If apathy pervades the minds of the people as to the execution of the laws, and if they see them violated and broken, without any exertion to bring offenders to justice, the virtues of the King, the wisdom and integrity of his judges, and the honest zeal of his public officers, will have but a small effect, when the people do not themselves co-operate."

We cannot too favourably comment on this statement of the duty of the citizen to aid in insuring obedience to the law. It is, moreover, too often forgotten that if the law be not in accord with the wishes of the great body of the people, there is danger that they will not assist in enforcing it, and will even, perhaps, assist in violating it, until it becomes a dead letter and a reproach to the government which imposes it upon an unwilling people.

This revision is called the Statutes at Large, and is not, nor are the two previous compilations, referred to as revisions, though all of them were such in fact.

Fourth revision (R.S.N.S., first Series, 1851) was prepared by the following Commissioners: Messrs. William Young, J. McCulley, J. W. Ritchie and Jos. Widden.

Fifth revision (R.S.N.S, second Series, 1859). The Commissioners were Messrs. Martin, J. Wilkins, afterwards Attorney-General of the Province, W. A. Henry, and James R. Smith, Q.C.

Sixth revision (R.S.N.S.., third Series, 1864). Commissioners, Messrs. Stewart Campbell, Q.C., Charles F. Harington, Q.C., and Hiram Blanchard, Q.C.

Seventh revision (R.S.N.S., fourth Series, 1873); Commissioners, Messrs. Alonzo J. White, Henry C. D. Twining and James W. Johnston.

Eighth revision (R.S.N.S., fifth Series, 1884). Commissioners, Messrs. Otto S. Weeks, James W. Johnston, and J. Wilberforce Longley.

NEW BRUNSWICK.

The first revision of 1823 contains all the Acts passed from the year 1786, when the first session of the Provincial Assembly was held, up to the year 1820.

Second revision of 1838, prepared by Mr. George F. S. Burton, covers all the legislation in the province down to the year 1836.

Third revision of 1854, was prepared by the following Commissioners: Messrs. W. B. Kinnear, J. W. Chandler and Charles Fisher; the first-named being the Solicitor-General of the province. The Act authorizing the consolidation of the statutes gives power to the Commissioners to summon witnesses and examine them on oath, and to require the production of all books and documents of any of the provincial courts: a very wide-reaching power indeed.

In the report of the Commissioners will be found a very determined attack on the maxims of equity, the fictions of the law, the old forms of action and pleading and other subterfuges by which a well-intentioned judiciary in early times succeeded in dealing out justice to the people in spite of the hardships which would have resulted from a rigid enforcement of the written law of the land. I quote from page viii.: "We are already prepared to assert the necessity of extensive changes in the whole law procedure of this province. We think the practice of the law must for the future be founded more on the principles of common sense than on ancient precedent; that it is time to abolish a system by which fictions seem too often to have been considered unavoidable in order that truth and justice might be reached; that the old maxim, "*In fictione juris subsistit equitas*," whence have sprung all the subtleties of the action of ejectment and many other modes of procedure, can no longer be considered the perfection of wisdom. We do not think that the man who seeks justice should be driven from one form of action or court to another, or that a judge of any court should ever be so painfully situated as to declare a party to have the right, but consistently with precedent find it impossible to afford the remedy."

A short quotation from Maine's Ancient Law shows at least one way in which legal fictions have resulted beneficially in

the development of the law. "It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the fiction of adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling clothes and taken its first step towards civilization. We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law."

In another place, also, he says: "No institution of the primitive world is likely to have been preserved to our day, unless it has acquired an elasticity foreign to its original nature through some vivifying legal fiction."

Fourth revision of 1877. The Commissioners were Messrs. Charles N. Skinner, Q.C., Frederick E. Barker, Q.C., and Edward L. Wetmore, with Mr. Geo. W. Burbidge, now the judge of the Exchequer Court of Canada, as secretary.

PRINCE EDWARD ISLAND.

Prince Edward Island has had but one revision, in 1862. It is a chronological revision merely, and contains all the Acts passed from the year 1773, which remained in force in 1862. The Commissioners were Messrs. Edward Palmer, John Longworth and William H. Pope. The subsequent Acts down to 1868 were revised and published in a third volume by Messrs. Edward Palmer and Joseph Hensley, the commissioners appointed for the purpose. No later revision has been made in the province.

QUEBEC.

Revisions in the Provinces of Quebec and Ontario are more interesting than in the other provinces, because more complicated.

First revision of 1845 (Revised Acts and Ordinances of Lower Canada, 1845), contains all the Ordinances and Acts passed since the establishment of civil government in the province, which remained in force in 1841, the date of the union of Upper and Lower Canada.

The Commissioners were Hon. Messrs. Ogden and Day, the Attorney and Solicitor-General of the province, and Messrs. Buchanan, Heney, and Wicksteed, the last-named still taking an active and intelligent interest in public affairs at ninety-four years of age.

This revisibn was, in one respect, peculiar, for, as pointed out in the fourth report of the Commissioners appointed in 1883 to consolidate the Quebec statutes, it never had the force of law, but was a mere compilation authorized by public authority.

Second revision of 1861 (Consolidated Statutes for Lower Canada, 1861). The Commissioners, Messrs. Antoine Polette, Q.C., Gustavus W. Wicksteed, Q.C., Andrew Stewart, Q.C., Thomas J. J. Loranger, Q.C., Robert Mackay, and George De Boucherville, were appointed about the same time as the Commission to revise the Upper Canada Statutes.

Third revision of 1888 (Revised Statutes of Quebec, 1888), sole Commissioner, Mr. T. J. J. Loranger, Q.C. His fourth report contains a very remarkable discussion of the powers of the Federation as opposed to those of the Provinces, and the following synopsis of his conclusions, which I quote from page 23, was compiled in the form of a series of maxims by which to interpret the British North America Act.

"1. The confederation of the British Provinces was the result of a compact entered into by the Provinces and the Imperial Parliament, which, in enacting the British North America Act, simply ratified it.

"2. The Provinces entered into the federal union with their corporate identity, former constitutions, and all their legislative powers, part of which they ceded to the Federal Parliament, to exercise them in their common interest and for purposes of general utility, keeping the rest which they left to be exercised by their legislatures, acting in their provincial

sphere, according to their constitutions, under certain modifications of form, established by the federal compact.

"3. Far from having been conferred upon them by the federal government, these are the residue of the old powers, and far from having been created by it, it was the fruit of their association and of their compact, and it was created by them.

"4. The Parliament has no legislative powers beyond those which were conferred upon it by the provinces, and which are recognized by section 91 of the British North America Act, which conferred upon it only the powers therein mentioned, or those of a similar nature, ejusdem generis.

"5. In addition to the powers conferred upon the legislatures by section 91 and section 92, their legislative jurisdiction extends to all matters of a local or private nature, and all omitted cases fall within the provincial jurisdiction if they touch the local or private interests of one or some of the provinces only; on the other hand, if they interest all the provinces, they belong to Parliament.

"6. In case it be doubtful whether any special matter touches all, or one, or a few provinces only, that is to say, if it be of general or local interest, such doubt must be given in favor of the provinces, which preserved all their powers not conferred upon Parliament.

"7. In the reciprocal sphere of this authority thus acknowledged, there exists no superiority of Parliament over the provinces, but subject to Imperial sovereignty these provinces are sovereign within their respective spheres, and there is absolute equality between them."

This is a very remarkable statement. The tendency towards widening the provincial powers, resembling the agitation for State Rights in the United States, is more marked than may be considered sound by federalists. For instance, in the sixth maxim it is stated that in cases where the jurisdiction over any subject matter is doubtful, "such doubt must be given in favor of the provinces, which preserved all their powers not conferred upon Parliament." This would seem to directly controvert sec. 91 of the B.N.A. Act, which

gives to Parliament power to make laws "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

ONTARIO.

The first revision of 1843 (Revised Statutes of Upper Canada, 1843), was prepared by Chief Justice Robinson and Mr. Justice Macaulay and Messrs. W. H. Draper, Q.C., and John H. Cameron, Q.C. It contains all the Acts passed since 1792, the date of the establishment of Upper Canada, which remained in force in the province at the time of the union with Quebec in 1841. The Public Acts are not consolidated according to their subject-matter, but are printed chronologically, with notes showing the Acts repealed, amended, become obsolete, etc. The Private Acts, however, are arranged in groups according to subject-matter, as in more recent revisions.

On the first page of their report appended to the first volume, the Commissioners refer to "the great frequency of changes in legislation which distinguishes the present age," so that this instability in our statute law, which is generally characteristic of modern legislation, dates back at least in this province for a period of over fifty years.

As before stated in dealing with the corresponding revision in Quebec in 1845, this revision never became law, but was merely a compilation for convenience in reference, sanctioned by the Government.

Second revision, 1859 (Consolidated Statutes for Upper Canada, 1859). Commissioners, Sir J. B. Macaulay, and Messrs. Adam Wilson, Q.C., D. B. Read, Q.C., and S. H. Strong.

Third revision of 1877 (Revised Statutes of Ontario, 1877). Commissioners, Mr. Justice Strong, Mr. Justice Burton, Mr. Justice Patterson, Mr. Justice Moss, Vice-Chancellor Blake, Judge Gowan (now Hon. J. R. Gowan, C.M.G., Senator), and Messrs. Oliver Mowat, Q.C., Thomas Langton, C. R. W. Biggar, and Rupert E. Kingsford.

Fourth revision of 1887. (Revised Statutes of Ontario, 1887). Commissioners, Mr. Justice Burton, Mr. Justice Pat-

terson, Chancellor Boyd, Mr. Justice Osler, Mr. Justice Rose, Mr. Justice O'Connor, and Judge McDougall, Oliver Mowat, Q.C., Alexander Morris, Q.C., A. S Hardy, Q.C., J. G. Scott, Q.C., John R. Cartwright and F. J. Joseph.

MANITOBA.

Manitoba, first revision of 1880 (Consolidated Statutes of Manitoba, 1880.) This revision was provided for by chapter 3 of the Acts of 1878, which enacted that any judge of the Supreme Court of Manitoba might be appointed a Commissioner. The late Chief Justice, Hon. E. B. Wood, was the Commissioner appointed.

Second revision of 1891 (Revised Statutes of Manitoba, 1891). Commissioners, Hon. Mr. Justice Killam, Mr. Ghent Davis, and Mr. J. R. Haney, barristers.

BRITISH COLUMBIA.

The first revision of this province in 1871, contains a revision of all the Acts, ordinances and proclamations of the separate colonies of Vancouver Island and British Columbia up to the time of their union in 1866, and of the subsequent laws of the united province, which remained in force in the year 1871 when the province entered the Dominion. The Commissioners were Hon. Henry P. P. Crease, and Messrs. George Phillipps and Ed. Graham Alston.

Second revision of 1877. Commissioners, Hon. Henry P. P. Crease, and Messrs. Andrew Elliot and John McCreight. The revision was provided for by chapter 1 of the Acts of the province for 1877, but the Acts of that year and subsequent years do not appear to contain any authorization of them as having the force of law.

The third revision took place in 1888, but we cannot at present give the names of the Commissioners.

A fourth revision is now being prepared by Chief Justice Davie of the Supreme Court, who has been appointed sole Commissioner for that purpose. This has already been referred to (ante p. 179).

CANADA.

The first revision was in 1859 (Consolidated Statutes of Upper and Lower Canada, 1859). The commission was composed of the Upper and Lower Canada commissions sitting jointly to revise the Acts applying to both provinces.

No further revision took place until 1886, a period of nearly thirty years. The troubled state of public affairs previous to Confederation prevented any action. For some years (from the time of the Charlottetown and Quebec conferences in 1864, certainly,) it was obvious that a confederation was necessary and inevitable. A revision was therefore useless. From 1867 to 1881 the Ministers were so overwhelmed with work in getting the Governmental machinery of the newly created Dominion into working order that no time could be spared even to consider the revision of the statutes. Finally, however, (in 1881) the Hon. James Cockburn, Q.C., was made Commissioner to collect and classify the Acts required to be consolidated; (see Sessional paper No. 17 for 1883, for particulars as to his duties, etc.)

After the report of Mr. Cockburn had been prepared and presented, on the seventh of June, 1883, by Order-in-Council, six Commissioners, Hon. Alex. Campbell, A. Alphonse Ouimet, Mr. Justice Graham, George W. Burbidge, Alexander Ferguson and William Wilson, were appointed, who prepared a report, which was in effect the statutes revised. By chapter four of the Acts of 1886, the revision was adopted and became law as the Consolidated Statutes of Canada, 1886, being the second revision of the Dominion Acts.

The work of the new Commissioners (who have not yet been appointed) will naturally be looked forward to with interest by the profession and the public.

One would suppose that the names of the Commissioners of the various revisions and some information regarding their appointment and their work from time to time would be within easy reach, but on the contrary the writer in many cases experienced great difficulty in finding even the names of the Commissioners. In view of

the fact that this difficulty will be immensely increased as the records of the country grow in size and in number, with more diversified public interests, all future Commissioners, Dominion and Provincial, would do a service to legal history by giving a clear account of all previous revisions, with copies of any useful reports and suggestions, and appending them to all published volumes of Revised Statutes.

W. MARTIN GRIFFIN.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

WILL—ADMINISTRATION—BEQUEST OF ANNUITY PAYABLE OUT OF RESIDUE—DISTRIBUTION OF ESTATE—COSTS—SOLICITOR IMPROPERLY PROSECUTING APPEAL—ORD. XLV., R. 11—(ONT. RULE 1195).

Harbin v. *Masterman*, (1896) 1 Ch. 351, was what the Court thought might be very nearly described as "a blackmailing appeal." The nominal appellant was an annuitant whose annuity of £150 was payable out of the residue of a testator's estate. The estate had been duly administered and the residue ascertained, and on the application of the residuary legatees a sum of £8,000 was ordered to be set apart out of the residue to answer the appellant's annuity, and the balance of the residue was ordered to be distributed. From this order an appeal was brought in the name of the annuitant, but, as it turned out on inquiry made at the instance of the Court by the official solicitor, really for the benefit of the annuitant's solicitor and for the purpose of compelling the residuary legatees to agree to certain terms as to certain costs in which the solicitor was interested. It was urged on the appeal that the Court had no jurisdiction to make any order for distribution of any part of the residue in the life time of the annuitant, without her consent; but though no reported case could be cited in favor of such a jurisdiction, yet the Court of Appeal

(Lindley Smith and Rigby, L.JJ.) considered that there was, no doubt that the Court had the jurisdiction and had frequently exercised it. And the order of Stirling, J., was affirmed with costs, the Court of Appeal being of opinion that ample provision had been made for securing the appellant's annuity, and Lindley, L.J., also observing that if need be the annuitant would be entitled to resort to the capital of the fund so set apart. The solicitor for the appellant having been called on to show cause why he should not be ordered to pay the costs of the appeal, which was obviously of no benefit to his client, the Court of Appeal directed him to reimburse his client the costs ordered to be paid by her, and declared him not to be entitled to any costs of the appeal against her: See Ont. Rule 1195.

WILL—OPTION FOR SONS OF TESTATOR TO TAKE BUSINESS—INTEREST—ADVANCEMENT—ACCUMULATION OF INCOME—DISTRIBUTION.

In *Re Dallmeyer, Dallmeyer* v. *Dallmeyer*, (1896) 1 Ch. 372, a question arose on the administration of an estate as to the liability of certain children of the testator to be charged with interest on certain moneys and assets, received in advance of the general distribution of the estate under the following circumstances: By the will in question the testator gave his sons in succession in order of seniority the option of taking the testator's business, on the condition of being debited with its value on the division of the residuary estate, and if its value exceeded the son's expectant share of the residuary estate, he was to refund the excess to the residuary estate. After giving certain legacies the testator gave his residuary estate upon trusts for sale and conversion and investment and payment of certain annuities, and directed the trustees to accumulate the surplus income at compound interest for 21 years from his death, if any child of his should so long live and be under 21, and on attainment of 21 by his youngest child to hold the trust fund for his children then living as tenants in common. The will also empowered the trustees to make advancements in favor of the sons out of the capital, and such advancements were to be deemed in satisfaction pro

tanto of such sons' shares in the residuary estate. The testator died in 1883, leaving two sons and three daughters. In 1884 the eldest son elected to take the business, which was valued at £15,000, but did not exceed his expectant share of the residuary estate. The youngest child attained 21 in 1894, and in the meantime the second son had received advances amounting to £8,000. The points argued were first, whether the eldest son was to be debited with interest on the £15,000, and second, whether the second son was to be debited with interest on the advances made to him, for the purpose of the final division of the estate. Kekewich, J., answered both questions in the negative, holding that neither of the sons ought to be debited with interest prior to the period fixed for distribution, and his decision was affirmed by the Court of Appeal (Lord Herschell, and Smith and Rigby, L.JJ.) Rigby, L.J., however, dissented from the rest of the Court on the second point, and thought that the second son was chargeable with interest on the advances made to him from the date of such advances.

COMPANY SHAREHOLDER—PAYMENT OF SHARES IN ADVANCE OF CALLS—INTEREST ON SUMS ADVANCED—PAYMENT OF INTEREST OUT OF CAPITAL—COMPANIES' ACT, 1862, 1ST SCHED., S. 7—(R.S.C., C. 119, S. 40).

Lock v. *Queensland Investment Co.*, (1896) 1 Ch. 397, was a motion for an interim injunction to restrain the defendant company from paying out of its capital, interest on moneys paid by shareholders in respect of shares in advance of calls. By the articles of association it was expressly provided that the directors should be at liberty, if they thought fit, to receive from any shareholder the whole or any part of the amount remaining unpaid on any shares held by him, upon such terms as the board might determine, and enabled the directors to pay interest out of the capital in respect of such advance payments. It was contended by the plaintiff that this provision in the articles of association was ultra vires but the Court of Appeal (Lindley, Kay and Smith, L.JJ.) agreed with Stirling, J., that the articles of association were warranted by the Companies' Act, 1862, sec. 14, and 1st sched. sec. 7 (see R.S.C., c. 119, sec. 40), and that the provision for payment of

the interest out of the capital was intra vires and that such interest could not be regarded as in the nature of a dividend, but was in substance payment of interest on a debt.

VOLUNTARY ASSOCIATION—MEMBER—RESIGNATION OF MEMBERSHIP—ACCEPTANCE OF RESIGNATION—INJUNCTION.

Finch v. *Oake*, (1896) 1 Ch. 409, was an action by the plaintiff to restrain the defendants from excluding him from the privileges of membership in a voluntary trade protection association. The members of the association became such by election, and paid an annual subscription, and were entitled to legal assistance for the purposes of their trade, and to some other benefits. By the rules of the association the members incurred no obligation beyond the payment of their subscriptions. There was no provision for the retirement or expulsion of members. The plaintiff had been elected a member and paid his subscription for the years 1894 and 1895. On 30th Oct., 1895, he wrote a letter to the committee of the association, saying that he desired to withdraw his name as a member. Subsequently he changed his mind, and on 27th Nov., 1895, he wrote another letter, saying that as he had received no acceptance of his resignation, he desired to continue a member. In December, 1895, the secretary wrote to him saying that the committee had decided to accept his resignation. The plaintiff subsequently tendered his subscription for 1896, which was refused, and the defendants refused to accord him the privileges of membership. On motion of the plaintiff, Kekewich, J., granted an interim injunction, but the Court of Appeal (Lindley, Kay and Smith, L.JJ.) dissolved the injunction, holding that the plaintiff had effectually resigned his membership by his first letter, and that acceptance of his resignation was unnecessary to give it effect, and that he could only again become a member by re-election.

LUNATIC—COMMITTEE AUTHORIZED TO CONVEY LUNATIC'S ESTATE—COVENANTS BY LUNATIC.

In *Re Ray*, (1896) 1 Ch. 468, the Court of Appeal (Lindley, Kay and Smith, L.JJ.) held that under an Act empowering the Court to authorize the committee of a lunatic to sell his

property and execute a conveyance thereof, the Court has power to authorize the committee, on behalf of the lunatic, to enter into the usual covenants for title in any such conveyance.

PARTNERSHIP—ACTION FOR ACCOUNT - ILLEGAL ACTS IN CONDUCT OF BUSINESS.

In *Thwaites* v. *Coulthwaite*, (1896) 1 Ch. 496, Chitty, J., determined that the business of book-making is not necessarily an illegal business, and the fact of a partner in such business having been guilty of illegal acts in the prosecution of such a business, is no defence to an action by his co-partner for an account, it not being established that the partner intended that the business should be carried on otherwise than legally.

WILL—CONSTRUCTION—LEGACY TO PLANT TREES.

In *Re Bowes, Strathmore* v. *Vane*, (1896) 1 Ch. 507, a testator had bequeathed a sum of £5,000 upon trust for planting trees on an estate. It was found after the testator's death that only 75 acres of the land in question could advantageously be planted with trees, the cost of which would be only £800. The owners of the land on which the trees were to be planted applied to the Court for the payment of the balance of the legacy to them as tenant for life, and tenant in tail in remainder, and North, J., granted the application upon the execution of a disentailing deed by the tenant in tail.

EXECUTOR—APPROPRIATION OF ASSETS TO SHARE OF RESIDUE—DISTRIBUTION

In *Re Richardson, Morgan* v. *Richardson* (1896) 1 Ch. 512, North, J., held that an executor may validly appropriate specific assets to a trust share of residue, or transfer them to a legatee of a share, in advance of a final division; and a transfer to one of several executors entitled to a fifth share of the residue of certain securities at the then market price, and which had since risen in value, was upheld as valid and binding on other beneficiaries, though there had been no corresponding appropriation of assets in respect of other shares.

WILL—CONSTRUCTION—LEGACY TO PERSONS WHO HAVE BEEN IN TESTATOR'S EMPLOY FOR A SPECIFIED TERM.

In re Sharland, Kemp v. Rozey, (1896) 1 Ch. 517, was a case for construction of a will, whereby the testator had di-

rected his trustees "to pay to each man who shall have been in my employ over ten years the sum of £10 for each year's service beyond the said ten years." The question was whether a man who had been in the testator's employment fifteen years, but had left his employment before the date of the will, and was not in his employment at the time of his death, was entitled to a legacy of £50, and North, J., held that he was.

WILL—CONSTRUCTION—LEGACY—LEGAL DISABILITY—FICTITIOUS BANKRUPTCY OF LEGATEE—DEFAULTING TRUSTEE—CHARGE OF SHARE OF LEGATEE WITH MONEYS OWING BY HIM AS TRUSTEE.

In re Carew, Carew v. *Carew*, (1896) 1 Ch. 527, is also a case for construction of a will. In this case the testator after giving the income of his residuary estate to his wife for life, subject thereto, gave a moiety thereof to his son; but in case the son should at the death of the testator's wife be "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit," the testator gave the same to his son's wife and children. Just before the death of the testator's widow, and while she was *in extremis*, the son being heavily indebted, applied for and obtained a receiving order and an order for adjudication in bankruptcy against himself; but within three weeks afterwards both of these orders were annulled on the ground that they should never have been made, the testator's widow having died before the annulment. Under these circumstances the trustees of the will applied for the opinion of the Court as to who, under the circumstances, was entitled to the moiety of the residue bequeathed to the son. Stirling, J., held that the son was; and that the legal disability referred to in the will was not one arising simply by the voluntary act of the son, but one imposed by the act of law, and although bankruptcy would prima facie be such a disability, yet as the bankruptcy in this instance had been the result of a mere contrivance on the son's part to procure a benefit for his wife and children, he was not under any real disability arising therefrom. One other point was also involved in the case. A large sum of money had been found

due by the son to the estate as executor, and it had been by an order of the Court directed to be charged on his beneficial interest in the estate. It was contended that this also constituted "a legal disability," so as to make the gift over take effect, but Stirling, J., although admitting that if an ordinary creditor of the son had recovered judgment against him and had then obtained an order for the payment of the debt out of the son's beneficial interest, that would have constituted a legal disability preventing the son from taking the interest for his own benefit—yet that the charging in this case had not that effect, and that, under such circumstances as the present, the Court treats the defaulter as having taken the sum coming to his hands in respect of his beneficial interest, and the true effect and meaning of the charging order is merely to preclude him from receiving any more from the estate until the other cestius que trust have received as much as himself, and therefore that it did not constitute any "legal disability" within the meaning of the will, and the gift over to the wife and children did not take effect.

SOLICITOR—CLIENT ALLEGED TO BE LUNATIC—ORDER OBTAINED EX PARTE FOR LUNATIC PENDING PETITION FOR INQUISITION—SUPPRESSION OF FACTS—COSTS.

In re Armstrong, (1896) 1 Ch. 536, was an application to discharge an order for the delivery and taxation of a bill of costs, obtained ex parte on behalf of a person against whom proceedings were pending for an inquisition of lunacy, and without disclosure of the fact of the pendency of such proceedings. The client was subsequently declared a lunatic, and it was conceded that the order in question must be discharged, and the only question argued was whether the solicitor who had obtained the order ought to be ordered to pay the costs of the application. It appeared that the solicitor, though aware that his client was subject to hallucinations, nevertheless thought she was competent to manage her affairs. Under these circumstances, Stirling, J., held that as the solicitor believed his client to be sane, he was not debarred from taking out the order in question on her behalf, and that his omission to disclose the fact of the pendency of the lunacy

proceedings when applying for the order, was not professional misconduct, and was, at most, a mistake on his part. Had the solicitor known or believed his client to be lunatic, then the cases of *Hartley* v. *Gilbert*, 13 Sim. 596; and *Bealls* v. *Smith*, L.R. 9 Ch. 85, show that it would be a fraud on the jurisdiction in lunacy to take legal proceedings in the name of the lunatic pending an application in lunacy, which would render the solicitor personally liable for costs.

TRUSTEE—TRUSTEE ACT, 1893 (56 & 57 VICT., C. 53) SS. 31, 32, 50—INFANT TENANT IN TAIL IN POSSESSION—VESTING ORDER, FORM AND EFFECT OF.

In re Montagu, Faber v. *Montagu*, 1896, 1 Ch. 549, was an action to obtain the sanction of the Court to the making of an election on behalf of an infant tenant in tail in possession, in favor of the provisions of a will, under which he was interested, and for the purpose of effectuating such election it became necessary to vest in the trustees of the will the estate tail to which the infant was entitled, and the question was how the estate tail was to be barred. Kekewich, J., decided that under the Trustee Act, 1893, which is a consolidation of former Trustee Acts, where the Court has power to make a vesting order, or appoint a person to convey the estate of an infant tenant in tail in possession, the effect of the order is to bar the entail, and that the proper form of a vesting order in such a case is to vest the land for such estate as the infant, if of full age, could convey.

HUSBAND AND WIFE—LEGACY TO WIFE FOR SEPARATE USE—HUSBAND TAKING FORCIBLE POSSESSION OF MONEY OF WIFE—STATUTE OF LIMITATIONS—TRUSTEE ACT, 1888 (51 & 52 VICT., C. 59) S. 8—(54 VICT., C. 19 [O.] S. 13)—MARRIED WOMEN'S PROPERTY ACT, 1882, (45 & 46 VICT., C. 75) S. 12—R.S.O. C. 132, S. 4.

In *Wassell* v. *Leggatt*, (1896) 1 Ch. 554, the plaintiff claimed to recover against the personal representation of the estate of the deceased husband a sum of £291, being the amount of a legacy bequeathed to her for her separate use, which had been forcibly taken possession of by her husband and never repaid her. The plaintiff was married to her deceased husband in 1854, without a settlement; the legacy

was bequeathed by the will of a person who died in 1875, and was received by the plaintiff in 1876, and was then forcibly taken out of her possession by her husband, and retained by him without her consent. He died in 1894, having by his will bequeathed to the plaintiff an annuity for her life of £350, and some furniture. The defendants pleaded the Statute of Limitations. Romer, J., held that the plaintiff was entitled to recover, as the husband by appropriating the money in question, had made himself trustee thereof for his wife, and that as he had retained the money and never accounted for it, the Statute of Limitations could not be relied on as a defence.

COMPANY—SHAREHOLDER—UNCLAIMED DIVIDENDS—STATUTE OF LIMITATIONS.

In re Severn & Wye & S. B. Ry. Co., (1896) 1 Ch. 559, was a winding up proceeding, in which certain shareholders claimed to recover from the company unpaid dividends. These dividends had been declared prior to 1873, and had never previously been claimed; the liquidator set up the Statute of Limitations as a bar to the claim. The claimants endeavored to support their claim on the ground that the company had become trustees of the unclaimed dividends for the persons entitled thereto, but Romer, J., held that as soon as the dividends were declared they became a debt immediately payable to the shareholder for which he could sue, and the Statute of Limitations then began to run, and the company did not become a trustee of the dividend for the shareholder, and an entry in the company's books—at any rate where no special asset or fund is set apart as representing the dividend, and no notice of the entry is given to the shareholder—does not take the case out of the statute.

DIARY FOR JUNE.

1 Monday .....First Parliament in Toronto, 1797.
4 Thursday .... Corpus Christi. Lord Eldon born, 1751.
5 Friday.....Battle of Stony Creek, 1813.
6 Saturday.....Sir John A. Macdonald died, 1891.
7 Sunday .....*First Sunday after Trinity.*
8 Monday .....First Parliament at Ottawa, 1866.
11 Thursday ....Lord Stanley, Governor-General, 1888.
14 Sunday .....*Second Sunday after Trinity.*
15 Monday .....Magna Charta signed, 1215.
18 Thursday ....Battle of Waterloo, 1815.
20 Saturday.....Accession of Queen Victoria, 1837.
21 Sunday .....*Third Sunday after Trinity.* Proclamation of Queen Victoria.
24 Wednesday ..Midsummer day.
25 Thursday ....Sir M. C. Cameron died, 1887.
28 Sunday .....*Fourth Sunday after Trinity.* Coronation of Queen Victoria, 1838.
30 Tuesday.....Law Society of U. C. half-yearly meeting.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] [March 24.

WILSON *v.* LAND SECURITY CO.

Vendor and purchaser—Agreement for sale of land—Assignment by vendee—Principal and surety—Deviation from terms of agreement—Giving time—Creditor depriving surety of rights—Secret dealings with principal—Release of lands—Arrears of interest—Novation—Discharge of surety.

An agreement for the purchase and sale of certain specified lots of land, in consideration of a price payable partly in cash and partly by deferred instalments on dates therein specified, was subject to payments being made in advance of these dates under a proviso that "The company will discharge any of said lots on payment of the proportion of the purchase price applicable on each."

The vendee assigned all his interest in the agreement to a third party by a written assignment registered in the vendor's office, and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and on account of the principal remaining due from time to time, as lots and parts of lots were sold by him, and, without the knowledge of the vendee, arranged a schedule apportioning the amounts of payments to be made for releases of lots sold, based on their supposed values, and in fact released lots and parts of lots so sold, and conveyed them to sub-purchasers upon payments

according to this schedule, and not in the ratio of the full number of lots to the unpaid balance of the price, and without payment of all interest owing at the time sales were made. The vendors charged the assignee with, and accepted from him, compound interest, and also allowed the assignee an extension of time for the payment of certain interest overdue, and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers.

Held, that the dealings between the vendor and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement.

That notice to the vendors of the assignment, and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously, or impede him in having recourse to it as a security.

In a suit taken by the vendor against the vendee to recover interest overdue, equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot, the full amount that they ought to have got from him on a release of an entire lot, and as having received on each transfer all arrears of interest.

In the absence of any sure indication in the agreement the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein.

Appeal dismissed with costs.

Geo. Kerr and *Rowell*, for the appellant.

J. K. Kerr, Q.C., for the respondents.

Ontario.] [March 24.

MARTIN *v.* HAUBNER.

Statute of Frauds—Memorandum in writing—Repudiation of contract.

In an action for the price of goods sold through an agent the alleged purchaser denied the agency and claimed that the goods had never been delivered. In answer to this last contention the following letter was relied on as constituting a memorandum in writing sufficient to satisfy the Statute of Frauds:

"TORONTO, 13th September, 1894.

"L. D. HAUBNER, Esq.,

"DEAR SIR,—In reply to yours of the 5th inst., I have to say that Mr. Silberstein had only limited instructions to buy certain goods and to a certain amount only. Your draft has not been presented and cannot be accepted, as I do not want the goods purchased by Silberstein, and they are of no use to me. I am advised that the goods are here, but have not interfered with them, and they are subject to your order so far as I am concerned. The goods shown by your invoice are not what I wanted, and the amount is far in excess of the value of the goods I did want. Yours truly, JOHN M. MARTIN."

Held, affirming the decision of the Court of Appeal (22 Ont. App. R. 468),

that the invoice referred to in the letter could be identified by evidence, and as the writing contained a statement of all the terms requisite to constitute a memorandum of the contract under the statute, it could be used for that purpose, notwithstanding it repudiated the sale.

Appeal dismissed with costs.

Robinson Q.C., and *Macdonald*, for the appellant.

S. H. Blake, Q.C., and *W. Casscls*, Q.C., for the respondents.

Manitoba.] [March 24.

NORTHERN PACIFIC EXPRESS CO. *v.* MARTIN.

Bailee—Express Co—Receipt for parcel—Condition—Compliance with—Pleading—"Never indebted"—Plea of non-performance.

M. sending a money order by express, received a receipt in a "money receipt book," which contained a provision that the money would be forwarded "subject to the printed conditions on inside front cover of this book," and one of such conditions was that the company would not be liable for any claim "unless such claim is presented in writing within sixty days from the date of loss or damage, in a statement to which a copy of this contract shall be annexed." The parcel was not delivered, and M. presented his claim in writing, but no copy of the contract was annexed.

Held, reversing the decision of the Court of Queen's Bench, Man. (10 Man. L. R. 595), that M. must be held to a strict compliance with the conditions of his contract with the company, and his claim was barred for want of notice.

M. brought an action for money had and received to recover the value of the parcel.

Held, that the company was not obliged to plead non-performance of the condition in answer to this action, as all necessary proof could be made under the plea of "never indebted."

Appeal allowed with costs.

McCarthy, Q.C., for appellants.

Ewart, Q.C., for respondent.

British Columbia] [March 24.

WILLIAM HAMILTON MFG. CO. *v.* VICTORIA LUMBER CO.

Negligence—Construction of boiler—Defect in—Expert evidence—Questions of fact—Concurrent findings of courts below.

A lumber company gave a verbal order for the construction of a boiler for a steam tug to the W. H. Mfg. Co., accompaying such order with a sketch or plan, but without any specifications or details other than those on the plan itself, which was prepared by the engineer of the tug. The boiler was made and delivered to the lumber company, who placed it in the tug. It was not built according to the plan submitted, but was certified under the Steam Boat Inspection Act as properly built, and showing a capacity to stand a working pressure of 128 lbs. to the square inch. After being used for six months it

sprung a leak, and the manufacturing company having sued for the price, the lumber company counter claimed for damages in consequence of defective construction.

On the trial it was proved that no boilers were built according to the plan of the engineer ; that if so built it would only stand a pressure of some 18 lbs. ; and that all the great ocean steamships had boilers of the design of the one in question. The engineer who had prepared the plan agreed with the other evidence as to the ocean steamers, but gave as his opinion that in one particular the boiler in question was defective, and that such defect caused the leak. The government boiler inspector at Victoria, B.C., concurred in this opinion, and the Court below gave damages for the lumber company on their counter claim, affirming the judgment of the trial judge, but increasing the amount.

Held, reversing the decision of the Supreme Court of British Columbia (4 B.C. Rep. 101), that the evidence did not justify the judgment ; that the experts on whose testimony the judgment was founded were not present at the time of the accident, and the evidence they gave was not founded on knowledge, but was mere matter of opinion, and no reasons were given, nor facts stated, to show on what their opinion was based ; that it was mere conjecture which should not be allowed to dispose of the case in hand and still less to condemn, as defective in design and faulty in construction, boilers in general use all over the world ; and that such judgment should not be allowed to stand, notwithstanding the concurrent findings of the two Courts on a matter to be decided by evidence.

Appeal allowed with costs.

Aylesworth, Q.C., and *Dumble*, for the appellants.

Robinson, Q.C., for the respondents.

Province of Ontario.

COURT OF APPEAL.

From McMahon, J.] [March 10.

IN RE CANADIAN PACIFIC RAILWAY COMPANY AND CITY OF TORONTO.

Municipal corporations—Railway company—Joint special agreement—Local improvements.

A city municipality, and a railway company and others, entered into an agreement for the execution of certain works, by the former, authorized by order in council under the Railway Act, the cost being apportioned between them, of which the railway company paid their share.

The agreement provided that no party to it should be entitled to compensation for injury or damages to their lands, by reason of the construction or maintenance of the works, a necessary part of which was the construction of a road towards and under the railway tracks, a portion of the roadway fronting on the lands of the railway company, and the city sought to charge the com-

pany with the cost of the construction of the roadway as a local improvement, under the Consolidated Municipal Act, 1892, and passed a by-law for that purpose.

Held, that the work having been done under the agreement between the parties and the order in council, the local improvement clauses were not applicable and the by-law was void.

Judgment of McMahon, J., affirmed.

Fullerton, Q.C., and *Caswell*, for the appellants.

Armour, Q.C., and *MacMurchy*, for the respondents.

From Robertson J.] [May 12.

BELL *v.* GOLDING.

Easement—Abandonment—Sale of land—Sale by plan—Lane not in use.

Abandonment of an easement may be shown not only from acts done by the owner of the dominant tenement indicating an intention to abandon, but also from an acquiescence in acts done by the owner of the servient tenement.

Where therefore the owner of the property over which a right of way existed, with the knowledge of the owner of the property for the benefit of which the right of way had been reserved, built an ice house upon the portion reserved, and after some years pulled down the ice house, and with the same knowledge built a stable on the same site, it was held that the owner of the dominant tenement could not then have the right of way opened.

Per MACLENNAN, J. A. A conveyance of a lot according to a registered plan upon which a lane is laid out does not pass any interest in the lane when it has not in fact been opened on the land and has not been used or enjoyed with the lot in question.

Judgment of ROBERTSON, J., reversed.

Armour, Q.C., and *Blain*, for the appellant.

McFadden, for the respondent.

From Chy. Div.] [May 12.

PIERCE *v.* CANADA PERMANENT LOAN AND SAVINGS CO.

Mortgage—Building loan—Subsequent mortgage—Priority of advances on first mortgage.

This was an appeal by the plaintiff from the judgment of the Chancery Division, reported 25 O. R. 671, reversing the judgment of Ferguson, J., reported 24 O. R. 426, and was argued before BURTON, OSLER and MACLENNAN, JJ.A., and STREET, J., on the 4th of December, 1895.

The appeal was dismissed with costs, MACLENNAN, J.A., dissenting, the reasons for judgment of the majority of the Court being substantially the same as those reported below.

See now 57 Vict., ch. 34 (O.).

George Bell, for the appellant.

S. H. Blake, Q.C., and *Beverley Jones*, for the Canada Permanent Loan and Savings Company.

Caston, for Parsons.

From C. P. Div.] [May 12.

DAVIDSON *v.* FRASER.

Bankruptcy and insolvency—Assignments and preferences—Payment of money to creditor—R.S.O. ch. 124, sec. 3.

Endorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favor is not a payment of money to the creditor by the debtor within the meaning of section 3 of R.S.O., ch. 124.

Armstrong v. *Hemstreet*, 22 O.R. 336, over-ruled.

Judgment of the Common Pleas Division reversed, OSLER, J. A., dissenting.

G. G. Mills, for the appellants.

Watson, Q.C., for the respondents.

From Q. B. Div.] [May 12.

SHAVER *v.* COTTON.

Company—Winding-up—Action against shareholder by creditor of company—R.S.C., ch. 129, R.S.O. ch. 157, sec. 61.

After a winding-up order has been made under R. S. C., ch. 129, a judgment creditor of the company cannot bring an action under section 61 of R.S.O., ch. 157, against a contributory for payment of the amount unpaid on his shares.

Judgment of the Queen's Bench Division, 27 O. R. 131, reversed.

Raney, for the appellant.

Titus, for the respondent.

From Meredith, J.] [May 12.

GRANT *v.* WEST.

Bankruptcy and insolvency—Assignments and preferences—Assignment for the benefit of creditors—Claim for damages—R.S.O. ch. 124.

A person claiming damages against the assignor for breach of contract is not a creditor within the meaning of the Assignments and Preferences Act, R.S.O. ch 124, and cannot, after the assignment, bring an action to ascertain the damages and rank for the amount against the estate in the hands of the assignee.

Judgment of MEREDITH, J., reversed.

Atkinson, Q.C., for the claimants.

J. S. Fraser, for the assignee.

From C. P. Div.] [May 12.

DRENNAN *v.* CITY OF KINGSTON.

Municipal corporations—Highways—Ice on sidewalk—57 Vict., ch. 50, sec. 13 (O.).

A street crossing in the line of and adjoining parts of a sidewalk on opposite sides of the street is not a sidewalk within the meaning of 57 Vict., ch. 50, sec. 13 (O.).

On the street crossing in question snow had accumulated, partly from being shovelled there from the sidewalk and partly from the action of passing sleighs, so that there was a descent of some inches from the crossing to the sidewalk, and the plaintiff slipped on this descent and was injured.

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., that the municipality was not liable.

Per BURTON, and OSLER, JJ.A., that there was evidence of negligence to go to the jury.

In the result the judgment of the Common Pleas Division was affirmed.

Walkem, Q.C., and *Shepley*, Q.C., for the appellants.

J. B. Hutcheson, for the respondents.

From Meredith, C. J.] [May 12.

MCPHILLIPS *v.* LONDON MUTUAL FIRE INSURANCE CO.

Fire insurance—Assignment of insurance before loss.

A policy of insurance upon chattels may, before loss, be validly assigned by the insured to the mortgagee of the buildings owned by the insured in which the chattels are, and the assignee may, in the event of loss, recover in his own name.

Judgment of MEREDITH, C.J., affirmed.

E. R. Cameron, for the appellants.

Aylesworth, Q.C., for the respondent.

From Q. B. Div.] [May 12.

FARWELL *v.* JAMIESON.

Landlord and tenant—Distress—Goods of stranger—Person in possession "under or with the assent of" the tenant—R.S.O., ch. 143, sec. 28, sub-sec. 3.

The plaintiffs were let into possession of certain demised premises by the agent of the tenants, who afterwards repudiated the agent's authority and refused to recognize the plaintiffs as sub-tenants. The defendant, who was head landlord, in the meantime distrained the plaintiffs' goods for arrears of rent, and the plaintiffs brought this action to recover damages.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that notwithstanding the tenants' repudiation of the agent's authority the plaintiffs were in possession "under" the tenants, within the meaning of sub-section 3 of R.S.O., ch. 143, sec. 28, and the distress was lawful.

Per BURTON and MACLENNAN, JJ.A., that the right of distress is limited to cases where some privity exists, and the distress was unlawful.

In the result the judgment of the Queen's Bench Division, dismissing the action, was affirmed.

Kappele and *J. Bicknell*, for the appellants.

Kilmer and *W. H. Irving*, for the respondent.

From FALCONBRIDGE, J.] [May 12.

CONFEDERATION LIFE ASSOCIATION *v.* KINNEAR.

Infant—Representation as to age—Mortgage by infant—Husband and wife—Mortgage by infant married woman—R.S.O. ch. 134, sec. 6.

To make an infant liable upon a mortgage of his property there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation.

Sec. 6 of R.S.O. ch. 134, does not make valid deeds executed by infant married women. It merely does away with the necessity of acknowledgment.

Judgment of FALCONBRIDGE, J., reversed.

S. H. Blake, Q.C., and *W. H. Blake*, for the appellant.

McCarthy, Q.C., and *Russell-Snow*, for the respondents.

From Q. B. Div.] [May 12.

PRITTIE *v.* CONNECTICUT FIRE INSURANCE CO.

Chose in action—Collateral security—Action by assignor—Insurance—Fire insurance.

Where an assignment of a chose in action is made by way of security, the assignor retaining a beneficial interest, he may, notwithstanding the assignment, maintain an action in his own name to recover the debt, the assignee being a proper but not a necessary party.

Where there is separate insurance in favor of mortgagee and mortgagor the latter is not bound by a settlement of the amount of the loss between the former and the insurance company.

Judgment of the Queen's Bench Division affirmed.

Watson, Q.C., and *J. G. Smith*, for the appellants.

Ryckman, and *A. T. Kirkpatrick*, for the respondent.

From Rose, J.] [May 12.

CITY OF OTTAWA *v.* KEEFER.

CITY OF OTTAWA *v.* CLARK.

Municipal corporations—Public Parks Act—Purchase by Park Commissioners—R.S.O. ch. 190.

The City of Ottawa adopted the Public Parks Act, R.S.O. ch. 190, and Park Commissioners were appointed, who entered into contracts with the defendants to purchase lands for park purposes, and made a requisition on the city for the purchase money. The city refused to recognize the contracts, and brought these actions for a declaration that they were invalid.

Held, per HAGARTY, C.J.O., and BURTON, J.A., that the Park Commissioners had, in the bona fide exercise of their discretion, the right to enter into the contracts, and that the city, so long as the statutory limit was not exceeded, was bound to provide the purchase money.

Per OSLER, and MACLENNAN, JJ.A., that the City Council had a discretion whether or not to adopt the contracts and provide the purchase money.

In the result the judgment of ROSE, J., dismissing the actions, was affirmed.

Robinson, Q.C., and *McTavish*, Q.C., for the appellants.
Arnoldi, Q.C., and *Chrysler*, Q.C., for the respondents.
Latchford, for the Park Commissioners.

From Meredith, J.] [May 20.

IN RE SMALL AND ST. LAWRENCE FOUNDRY COMPANY.

Arbitration and award—Revocation of submission—Rejection of evidence—Rentals of adjacent properties.

It is not sufficient ground for the revocation of a submission to arbitration to fix the renewal rental of a block of land bounded by streets that the arbitrators decline to receive evidence of the gross and net rentals derived from properties on the other side of one of the streets.

Judgment of MEREDITH, J., affirmed, MACLENNAN, J.A., dissenting.
McCarthy, Q.C., and *R. B. Henderson*, for the appellants.
A. Hoskin, Q.C., and *Thomson*, Q.C., for the respondents.

HIGH COURT OF JUSTICE.

ARMOUR, C.J., FALCONBRIDGE, J.
STREET, J. } [January 28.

IN RE COHEN'S BAIL.

Criminal procedure—Bail—Estreating the recognizance—Next Court of competent jurisdiction.

Where a recognizance entered into before the magistrate committing the prisoner for trial was conditioned for the prisoner to appear at the next Court of competent jurisdiction to be holden at Toronto, and the next Court was the sittings of the Court of Oyer and Terminer for the County of York, commencing on April 30th, 1896, but no indictment against the prisoner was then preferred, but the information, depositions and recognizance were transmitted to the Sessions of the Peace for the County of York, commencing on May 14th, 1895, where an indictment having been preferred and a true bill found, and neither the prisoner nor his bail appearing, the recognizance was on the last day of the sessions forfeited and the surety arrested, the writ of fieri facias having been returned nulla bona.

Held, that the order forfeiting the recognizance, the estreat roll and the writ of fieri facias and capias must be quashed, and all proceedings thereon stayed.

G. G. S. Lindsay, for the surety.
J. R. Cartwright, Q.C., for the Crown.

DIVISIONAL COURT.] [March 3.

ARMSTRONG *v.* LYE.

Equitable assignment—Attorney for sale of lands—Authority to attorney to pay an advance out of proceeds of sale—Attorney subsequently becoming purchaser—Lien for advance on land—Personal obligation.

R. being the owner of certain lands, subject to a mortgage to G., and to certain charges to B. and C., and which had been directed to be sold under proceedings taken by G., defendant agreed with him to pay off G.'s mortgage within a year, and in the meantime to secure G. collaterally to the extent of $10,000, R. to pay defendant $500 as well as G.'s mortgage within three months, failing which, he created defendant his attorney irrevocable for the sale of the land, authorizing him to retain one-third of the net proceeds after payment of G. and B. and C.'s claims. R., who also owed H. $6,000 under a bond therefor, signed an instrument whereby he agreed that in case any person should make H. a loan or advance to the extent of $1,200 and interest, the same could be charged by way of mortgage against the said lands, and authorized defendant to pay the same out of R.'s share in the surplus proceeds of the sale, after paying G. and B. and C.'s claims, and which was to be applied on the $6,000 bond. H. procured an advance of $459 from plaintiff, from whom she had previously borrowed $500, on defendant's agreeing to pay the same out of the said surplus proceeds as soon as he received them. These instruments attached together were deposited in the proper Registry Office, upon an affidavit of execution made as to the first of them. Subsequently defendant became the purchaser of R.'s equity of redemption in the lands.

Held, affirming the judgment of BOYD, C., at the trial, that the plaintiff was entitled to lien on the lands for the amount of his advance; but reversing his judgment (STREET, J., dissenting), that he was also under the circumstances, entitled to a personal order against the defendant therefor.

Watson, Q.C., and *Ruddy*, for the plaintiff.

Wallace Nesbitt, for Lye.

Hilton, for Lye and Rankin.

Walter Reade, for Mrs. Hutchins.

BOYD, C., FERGUSON, J., ROBERTSON, J. } [April 7.

ARDAGH *v.* COUNTY OF YORK.

Revivor—Praecipe order—Delay in prosecution of action—Change of interests

A statute passed in 1889, gave persons making certain claims a right to bring an action within a year. The plaintiffs brought such an action within the year, but did not proceed with it, and no proceeding was taken by either party, after the delivery of the defence in June, 1890, until one of the plaintiffs having died in January, 1895, the action was revived in February, 1896, by a praecipe order. In the meantime changes had taken place in the interests of the parties.

Held, that the order should not be interfered with. The old practice had

been superseded, and the defendants, not having moved to dismiss, were not entitled to complain of the action being revived.

Pearson, for the plaintiffs.

C. C. Robinson, for the defendants.

BOYD, C., FERGUSON, J., ROBERTSON, J. [April 8.

DAVIS *v.* DAVIS.

Will—Election—Period of accounting—Interest.

Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil, not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality was hers. After his death, his widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will.

Held, that her election related back to, and she was liable to account from, the date of the testator's death; but, as she was not called upon to elect until this action was brought, she should not be charged with interest in the meantime.

Marsh, Q.C., and *G. G. S. Lindsey*, for the plaintiff.

D. Macdonald, for the defendant.

DIVISIONAL COURT.] [April 10.

BUILDING & LOAN ASSOCIATION *v.* POAPS.

Statute of Limitations—Sale of land—Trustee and cestui que trust—Possession by cestui que trust—Non-effective right of entry—Mortgage by trustee—Registry Act—Priority.

The relationship arising out of an agreement for the sale of land on payment of the purchase money, and the taking of possession by the purchaser, is that of trustee and cestui que trust, and as the former has no effective right of entry the Statute of Limitations does not apply in favor of the possession of the cestui que trust. The principle of the decision in *Warren* v. *Murray*, (1894), 2 Q. B. 648, applied.

A mortgage from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that anyone other than the mortgagor is in occupation of the land, and without notice actual or constructive of any equitable right of the cestui que trust, is entitled to set up the provisions of the Registry Act, which is retrospective, and to plead it if it is necessary to do so.

Bell v. *Walker*, 20 Gr. 558; *Grey* v. *Ball*, 23 Gr. 390, followed.

Alan Cassels, for the plaintiff.

Leitch, Q.C., for the defendants.

ROSE, J.] [April 29.

IN RE CANADIAN PACIFIC R. W. CO. AND COUNTY AND TOWNSHIP OF YORK.

Constitutional law—Railways—Crossings—Railway Act of Canada, 1888—Powers of Railway Committee of Privy Council—Erection and maintenance of gates—Contribution to cost of—Municipal corporations.

The Railway Committee of the Privy Council of Canada made an order that gates and watchmen be provided and maintained by the Canadian Pacific Railway Company for the protection of the railway crossings at certain streets which traversed the City of Toronto, the township of York, and other townships within the County of York, such crossings being at the north limit of the City of Toronto, and that the corporation of the City of Toronto should contribute to the cost of erection and maintenance.

Subsequently, the Committee, upon the representation of the city corporation, made an order that the township and county should contribute part of share of such cost originally allotted to the city.

Held, having regard to ss. 11, 18, 21, 187 and 188, of the Railway Act of Canada, 1888, that the British North America Act conferred upon the Parliament of Canada the exclusive legislative authority to deal with the Canadian Pacific Railway and with the guarding of the crossings; that legislation upon such a subject was necessary legislation; that the Dominion Parliament could and did confer upon the Railway Committee the power to make such orders as those in question; that it was within the power of the Committee to determine what persons were interested in the crossings; that the Court had no power to review such decision, it being declared to be final; and that the fact that the highways in question were vested in municipalities, or in any sense controlled by them, did not in anywise limit the powers of Parliament to legislate respecting the subject, or of the Railway Committee to make the orders in question, but that the municipal corporations were subject to such legislation and to the orders made thereunder as any private individual would be.

Robinson, Q.C., and *Angus MacMurchy*, for the railway company.
Aylesworth, Q.C., for the township corporation.
C. C. Robinson, and *T. H. Lennox*, for the county corporation.
J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

CRIMINAL LAW.

TORONTO ASSIZES.

REGINA *v.* MARY ELLEN BEER.

Manslaughter—Crim. Code, sec. 250—Christian Scientist—Medical treatment.

The prisoner, who practiced as a Christian Scientist, was called in by the parents of a child suffering from diphtheria She was not expected and was not retained as a medical attendant. She did nothing but sit silently by the child, without giving any medical and other treatment of any kind. The child died of the disease, and the prisoner was indicted for manslaughter. According to the medical evidence the life of the child might have been saved or prolonged if the usual medical remedies had been applied.

Held, that the prisoner could not be convicted under sec. 212 or sec. 214 of the Criminal Code.

Held also. (dubitante) that the father of the child could not be indicted, under secs. 209 and 210, for not having supplied the child with a necessary of life viz., medical aid, nor could the prisoner be indicted as an accessory (under sec 61) to the father's neglect.

[TORONTO, THURSDAY, DEC. 5, 1895, FALCONBRIDGE, J.

The prisoner was put upon her trial at the Toronto Autumn Criminal Assizes, 1895, charged with the crime of manslaughter in that she did on the 28th of October, 1895, at the city of Toronto, in the County of York, unlawfully kill and slay one Percy Robert Beck, and did thereby commit the crime of manslaughter, according to sec. 230 of the Criminal Code.

The prisoner pleaded "Not guilty."

The circumstances under which the alleged crime was committed, were that the prisoner, practising as a Christian scientist, undertook to attend Percy Robert, a child then six years and nine months old, who was suffering from a mild type of diphtheria. Her treatment of the child consisted, according to the evidence, in simply sitting by the bedside, rarely saying anything, never prescribing, nor in any way touching the child, or making any examination or otherwise diagnosing the patient.

The child died, and the post mortem revealed the fact that the child's complaint was diphtheria of a non-malignant character, a disease rarely fatal, and the evidence of the medical men went to show that had the child been properly treated, it would probably have recovered, and that, at any rate, death had been accelerated by no proper medical attendance.

The contention on behalf of the Crown was that there was such negligence on the part of the prisoner as would make her liable for the death of the child, and furthermore, the Crown maintained that there was a legal liability on the part of the parents to provide proper medical attendance, and that the prisoner, by her conduct, had assisted the parents in their breach of duty, and in that way became an accomplice under section 61 (*c*) of the Code.

John A. Barron, Q.C., for the Crown.

Hamilton Cassels, for the prisoner.

The following charge was delivered to the jury by the learned judge who tried the case:

FALCONBRIDGE, J.—The facts of the case are simple. The father and mother of the little boy, Percy Robert Beck, have been for about two years ad-

herents of the doctrines and the practices of what is known as Christian Science. They had had a medical attendant for years and they speak of him with the highest respect as being a man of great skill and intelligence in his profession. They appear to be very respectable people, and people having ample means to procure medical attendance for their sick child, if they had considered it necessary. On this occasion, the child being ill with sore throat, they seek the service of the defendant, Mrs. Beer, whom they had known for some years as a Christian Scientist. Called in by the mother of the child, she came there.

It is important to notice what Mrs. Beer was called in to do. She was not expected, was not retained, to come in as a medical attendant. She did not examine the child ; she did not take the temperature of the child ; she did not make any examination of either the body or throat of the child ; she did not look at or exámine the phlegm or sputa which came from or was ejected from the throat of the sick child in the process of coughing. These are elements of negligence which would be relied upon by the Crown, if the case went to you, to show that the prisoner was guilty of negligence which caused the death of the child. But she was not called in to do any of these things. She was called in to treat as a Christian Scientist ; whether it was to be by the exercise of the will or by prayer, we are not told, but her practice consisted simply of sitting silent in the presence of the patient. She gave no directions as to treatment, no directions as to medicine or food, no directions about diet in the sense a doctor would, but in the sense a friend might do, to keep the child comfortable and give him anything he fancied.

The passage in the code which refers to medical treatment reads as follows : "Everyone who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act, the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally resposible for omitting, without lawful excuse to discharge that duty, if death is caused by such omission."

If I had left the case to you it would have been probably to determine one question only, namely, whether in your opinion the death of the child was caused, or at any rate accelerated, by the prisoner's treatment, or want of treatment, as it may be viewed, a medical man not having been called in. The medical men went in their evidence as far as they could honestly go. They said with great positiveness that the child's life would undoubtedly have been prolonged had proper medical treatment been applied, particularly in the method of cleansing the mouth, cleansing the throat and sterilizing those bacilli which are said to be not merely the cause of the disease, or developed by the presence of the disease, but are the disease itself.

The medical witnesses called stopped short of saying that death was caused by such neglect or treatment, or want of treatment of the prisoner, and that is all any honest scientific man could say. They cannot give a positive opinion that the child's life would have been saved by medical treatment. So it would probably have been a dangerous thing for you to say the death was caused by want of treatment. You might have found that death was accelerated by the neglect alleged by the Crown, or that the life of the child might have

been prolonged, and that the prisoner who has answered to the indictment was guilty of the neglect which entailed the acceleration of the death of the child.

In the view I take of the law and the facts it is quite plain Mrs. Beer did not undertake to administer medical or surgical assistance, nor did she undertake to do some lawful act, the doing of which would endanger life. No one can say that sitting silent by the bedside of a person suffering from sore throat would be dangerous to life. I therefore hold under all the circumstances in evidence here, that the section does not apply.

[The learned judge further said that it was equally clear that Mrs. Beer did not undertake to do any act, the doing of which, or the omission of which, might be dangerous to life, and consequently section 214 did not apply.]

As to the position of the parents, sections 209 and 210 being quoted, it is argued by the Crown that the father is criminally liable, and ought to be today indicted for not having supplied his child with a necessary of life, namely, medical aid, and in that connection *Queen* v. *Downes*, 1 Q.B.D. 15 is cited. Now the English statute, 31 & 32 Vict., ch. 122, sec. 7, provides that it is the duty of the parents to provide medical aid. It always was the law of England that the parent was bound to furnish necessaries to his infant child, and he was criminally responsible if he neglected that duty, if he was able to get the necessary provisions. Some of the most eminent judges in England were called upon to determine the application of the new statute of the case brought before them, but they doubted, whether under the law as it was before the passing of that Act, medical aid was a necessary. Now you will observe our statute left it where the common law left it. So it would be a question whether, under our law, the father would be liable to an indictment for not providing medical aid. One might think that the simple well known remedies that almost every father and mother knows of, and which a parent might procure without the intervention of a doctor, would be considered necessary and fill the requirements of the law. I have said how the highest authorities in England have hesitated to find medical aid to be included in the word "necessary." So there is very great doubt whether the father in this case is liable under our statute to be indicted for a breach of the law.

The application on the part of the Crown is to hold the father liable, and that the prisoner is liable as accessory to the father's offence, as having counselled or procured the neglect from which the Crown says the child died, or owing to which the death of the child was accelerated. But there is no evidence of counselling or procurement. The only part of this section that could by any possibility apply to the prisoner, is the sub-section about aiding and abetting. But here, what is charged is not the commission of an offence in the common acceptation of the term, but it consists in not doing something. If the offence consisted in doing some overt act, there might be aiding and abetting in the commission of that overt act, but how one can aid or abet a person in not doing something I have not been able to fathom.

It is laid down as a general principle there can be no accessory before the fact in manslaughter, because manslaughter necessarily implies absence of malice, absence of premeditation, and that therefore there can be no accessory before the fact. I do not subscribe entirely to the general principle, because I think sometimes there may be an accessory before the fact.

I direct that the prisoner be set at liberty, the Crown being allowed to reserve a case upon the evidence presented.

Province of New Brunswick.

SUPREME COURT.

EN BANC.] [April 16.

HALIFAX BANKING CO. *v.* SMITH.

Action on bond—Foreclosure of mortgage—Res judicata.

The plaintiffs filed a bill in Equity for the foreclosure of a mortgage, to which the defendant pleaded coercion and fraud. Plaintiffs then sued on the bond, which accompanied the mortgage, in the Supreme Court, to which defendant pleaded substantially the same defence. The plaintiffs won. The suit in Equity was then proceeded with, and plaintiffs contended that the defence set up was res judicata. The Judge in Equity took the same view and ordered a decree for the plaintiff.

On appeal to the Full Court the judgment of the Judge in Equity was sustained.

Wallace supported appeal.

M. G. Teed, contra.

PROBATE COURT.

TRUEMAN, J.] [ST. JOHN, April 14.

IN RE JORDAN.

Deed poll—To take effect after death—Probate of.

The deceased, by deed poll, gave all his property to certain persons named in the deed, to be, after his death, divided as directed in the deed. He kept the deed in his possession until just before his death, when it was delivered to take effect after his death.

Application was made by the trustees named in the deed to prove the deed as a will, it being executed in the formal manner required by the Wills Act. They contended that the deed should be proved as a will and they named as executors thereof.

Held, that the deed could be proved as a will, but that the decree should be for letters of administration cum testamento annexo, to issue to the trustees.

Jordan, Q.C., in support of application.

Province of Manitoba.

HIGH COURT OF JUSTICE.

TAYLOR, C.J.] [May 14.

ÆTNA LIFE INSURANCE CO. *v.* SHARP.

Demurrer—Pleading—Striking out pleas—Amendment—Queen's Bench Act, 1895, Rule 318.

Several paragraphs of the defendant's statement of defence were objected to by the plaintiff, as raising defences which were not good in law, and a

motion was made to strike them out under Rule 318 of the Queen's Bench Act, 1895.

This Rule provides that a Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in the pleading which may be scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action.

Held, that, as no provision is made in the Act for a plaintiff demurring to the statement of defence, any pleadings which would have been held bad on demurrer under the former practice should now be struck out on application, or in a proper case amended on terms.

The 5th and 6th paragraphs of the defence alleged payment, but omitted the words "before action," and leave was given to amend these paragraphs, but the other paragraphs objected to were all held to be bad in law and struck out with costs to be costs in the cause to the plaintiffs in any event.

Culver, Q.C., for plaintiffs.

Dawson, for defendant McKinnon.

TAYLOR, C.J.] [May 19.

GRANT *v.* MCKEE

Practice—Consent order—Application to enlarge time—Forfeiture.

In this case the defendant was a tenant of the plaintiff under a lease containing a proviso for re-entry on non-payment of rent. Rent being in arrear the plaintiff recovered judgment by default for the amount of the rent, and for delivery of possession, and a writ of possession was executed by the sheriff. Afterwards an order was made by consent, providing that upon the defendant paying on the 29th of April the amount of rent and costs, he should be relieved from the forfeiture. On the day named the defendant's solicitor tendered to the plaintiff's solicitor the amount due, and offered to pay it over on condition of receiving an assignment of the plaintiff's judgment to a third person who had advanced part of the money. The plaintiff's solicitor declined to agree to this assignment, being given without first seeing his client, who lived at some distance, and the money was not paid over. Three days afterwards, however, the money was tendered unconditionally, but the plaintiff's solicitor refused to receive it on the ground that it was too late.

The defendant then moved to have the time for making the payment extended.

Held, that an order made on consent cannot be varied or set aside, without showing some ground of surprise, mistake or fraud, or other ground which would invalidate an agreement between the parties.

Holt v. *Jesse*, 3 Ch. D. 177; *Harvey* v. *Croydon*, 26 Ch. D. 249; *In re West Devon, etc., Mine*, 38 Ch. D. 51.

Application dismissed without costs on account of the harsh conduct of the plaintiff in enforcing his rights.

Hull, for plaintiff.

Mathers, for defendant.

FULL COURT.] [May 20.

GRAY *v.* N. & N. W. R. CO.

Appeal to Privy Council—Leave to appeal.

The plaintiffs in this case having applied for and obtained leave to appeal to Her Majesty in Council direct from the judgment of the Full Court, (noted ante p. 167) the defendants now applied to the Court under the Imperial Order in Council of the 26th November, 1892, regulating such appeals, to admit a cross-appeal to Her Majesty in Council from those portions of the decree to which they objected.

Defendants, however, had not applied for such leave within fourteen days after the pronouncing of the order of the Court, and, although the plaintiffs were willing to consent to the order being made, the Full Court nevertheless

Held, that they had no jurisdiction to make any order either to admit or refuse the appeal, the limit of their jurisdiction in the matter being to allow an appeal upon an application for that purpose made within fourteen days after the pronouncing of the order complained of, and even then such jurisdiction arises from implication only.

Flint v. *Walker*, 5 Moo. P.C. 179, *Retemeyer* v. *Obermuller*, 2 Moo. P.C. 293, followed.

Ewart, Q.C., for plaintiffs.

Phippen, for defendants.

North-West Territories.

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

RICHARDSON, J.] [May 2.

ARNOLD *v.* LASCELLES.

Partnership between husband and wife—Action by wife as surviving partner.

Plaintiff (a widow) sued as surviving partner of the firm of F. & M. Arnold (husband and wife) on indebtedness contracted by defendant to the firm of F. & M. Arnold.

For defendant it was contended that husband and wife cannot carry on business in partnership, and that the action must fail, as plaintiff was not executrix of the estate of F. Arnold, who had died intestate.

Held, on authority of *Eddows* v. *Argentine Loan and Mercantile Agency*, 62 L. T. 602, that a married woman can carry on business in partnership with her husband, and that plaintiff had a right of action as surviving partner of the firm of F. & M. Arnold.

Secord, Q.C., for plaintiff.

Robson, for defendant.

RICHARDSON, J.] [May 16.

ROBB *v.* SIMPSON.

Interpleader—Assignment of chattels not in assignor's possession—Bona fide sale by judgment debtor of chattels with change of possession without notice to purchaser of writ of execution—Judicature Ordinance, sec. 337.

Simpson placed a fi. fa. goods in sheriff's hands issued on a judgment, *Simpson* v. *McVannell*, of 19th November, 1895 About the same time McV.

contracted with the M. J. C. C. to erect them a building, and proceeded to make frames and also to order from one R., of Revelstoke, B.C., certain lumber for the same work. On 6th Dec., 1895, McV. assigned to plaintiff his contract and the lumber order, by a writing worded: "For value received I, D. McV., do hereby assign, transfer and set over to David Robb the car of lumber which has been ordered by me of R., of Revelstoke, . . and also the contract which has been entered into with me by the M. J. C. C. . . ." R., who had no notice of this assignment, shipped the lumber to McV., 9th Dec., 1895. The car of lumber arrived 13th Dec., 1895, consigned to McV., and after it had been partly unloaded by plaintiff (the freight charges having been paid for the plaintiff by the M. J. C. C., who had notice of the assignment), was seized under defendant's writ of execution. The plaintiff had no notice of the writ of execution until the actual seizure was made. Plaintiff claiming the lumber under his assignment, an interpleader issue was directed to determine whether the assignment to plaintiff outranked defendant's execution.

Held, that on Dec. 6th, and up to Dec. 13th, McV., not having the car of lumber and being unable to deliver it, the writing operated as an equitable assignment to the plaintiff of chattels not in existence, which assignment plaintiff could enforce when the chattels came within McV.'s control on 13th Dec., and that consequently under sec. 337 of the Judicature Ordinance, the lumber was not bound by the writ of execution. Seizure ordered to be vacated, with costs of sheriff and of plaintiff to be paid by defendant.

J. G. Gordon, for plaintiff.

T. C. Johnstone, for defendant.

BOOK REVIEWS.

Political Appointments, Parliaments and the Judicial Bench in the Dominion of Canada, 1867 to 1895, by N. OMER COTÉ, of the Department of the Interior, Canada.

We have before us this very useful compilation of 480 pages. It embraces the long period of 28 years, and the information is given up to the latest date. It seems to be a complete and accurate record on the subjects of historic interest which are therein treated. Its interest to the profession is largely under the head of the Judicial Bench, the Constitution of the Courts and the names of the Judges. There is here given the dates of the appointments and the periods during which the Judge served, as well as the names of those who have retired, etc. It would have added to the interest to have given their ages, though we can well understand that this would have been only obtainable with great difficulty.

We are also indebted to Mr. Cotè for a copy of a similar work, though less complete, published by his father, Mr. J. O. Cotè, in 1866. These two works really give a complete political history of the Dominion in a statistical form from 1841 to the present time, a period of 54 years. They are indispensable to any student of the history of the Dominion, and will be very useful works of reference, and more especially as a full index of the names completes the last volume.