THE

Canada Law Journal.

HENRY O'BRIEN, - - Editor.

VOL. XXXIV.

FROM JANUARY TO DECEMBER,

1898.

TORONTO:
CANADA LAW JOURNAL COMPANY,
59 VICTORIA STREET

TABLE OF CASES

Reported and Noted in this Volume

Canada Law Journal.

VOL. XXXIV. JANUARY, 1898. NOS. 1 & 2.

TO OUR READERS.

With greetings for the New Year we have sent to our subscribers a photograph of the judges of the Supreme Court of Canada; and with this number we send our sheet almanac for 1898.

We trust our readers will also appreciate the prompt production of the Index for the volume which has just been completed. Neither time, money nor trouble have been spared in the preparation of this exhaustive analysis of the contents of the volume. It contains (including table of cases) 47 pages of closely printed matter, and is in effect a digest in condensed form of all principal matters of interest to the legal profession in the English speaking Provinces, which have transpired both there and in England during the past year.

We thank many of our readers for their kindly expression of appreciation for the increased usefulness of the JOURNAL, and their flattering comments on the enterprise displayed. The most substantial evidence of this is a very large increase in circulation. We shall spare no effort to retain the good opinion of our rapidly increasing circle of friends and patrons.

We have received from Mr. J. S. Ewart, Q.C., a letter referring to our criticism, under the heading "Mispresentation as Negligence," of an article written by him and published in a contemporary journal. Want of space compels us to hold over his letter and our answer thereto until our next issue.

On the 18th November last the resignation of the Hon. John Foster McCreight, who for the past nineteen years has been Judge of the Supreme Court of British Columbia, was announced. Mr. McCreight was the last of that race of well trained English barristers who came to that Province on the discovery of gold in the early sixties. He immediately took and maintained his position as a leading authority on all questions of law. For a short period he was Premier of the Province under the first responsible Government, after Confederation. Through and through a lawyer, learned, conscientious, fearless, indefatigable and possessed of a marvellous memory of cases in all branches of the law, he carries with him on his retirement the esteem and respect of all with whom he has come in contact.

The appointment of a successor to Mr. Justice McCreight was deemed in legal circles in British Columbia a matter of pressing importance. Owing to the illness of two judges an excessive strain was thrown upon the other occupants of the Bench, and the Benchers of the Law Society of that Province considered it of sufficient moment to despatch an urgent request to the authorities at Ottawa that the appointment of a Judge to fill the vacancy might not be delayed. Mr. P. E. Irving, Q.C., who was mentioned as his possible successor, and who, it was said, would be acceptable to the profession, has received the appointment. It is believed to be a good one.

The profession will watch with interest judicial appointments by the government which has recently assumed the reins of power. We are glad to voice the general opinion that the three which appear in the *Canada Gazette* of the 1st inst., are exceedingly good. Of Mr. Justice Irving we speak in another place. Mr. John A. Barron, Q.C., of Lindsay, will, we venture to predict, prove a valuable addition to the County Court bench. He is a sound lawyer, of good judgment, and irreproachable character. He has had a large

practice in criminal as well as in general law, and his parliamentary experience will be valuable in many ways. He takes the place vacated by Judge Woods in the county of Perth. We note that this appointment is one of the very few where a judgeship is filled by one residing in another county. We have already expressed the opinion that this is the proper course, and trust it may hereafter prove the rule and not the exception.

The appointment of Mr. D. B. MacTavish, Q.C., as Senior Judge of the County of Carleton meets with general acceptance where he is best known. Not only a good lawyer, but a member of a firm in large practice, he will bring to the discharge of his duties a ripe experience. For some years city solicitor, he has a thorough knowledge of municipal law, of great value in his new position. Mr. MacTavish takes the position occupied by Judge Ross. This appointment, or some appointment, should have been made long ago. Public interest demanded it. The Bar should not be made to suffer from political exigency, and especially when an appointment was so imperatively and so long required as in the present instance.

The judgment of the judicial Committee of the Privy Council in the appeal by the Attorney-General for Canada from the judgment of the Court of Appeal for Ontario in the Queen's Counsel Case was delivered on the 8th of December. The hearing took place on the 30th July last when counsel for Ontario were not called on. The Judicial Committee decides in effect that the Ontario Acts of 1873, (see R.S.O. 1877, c. 139), conferring on the Lieutenant-Governor power to appoint Queen's Counsel and to regulate precedence, etc., are within the legislative competence of the Provincial Legislature under the B. N. A. Act, enumerations 1, 4 and 14 of s. 92. Their Lordships, however, refrain from dealing expressly with the question whether such power existed as a prerogative right independently of and prior to the passing

of the Acts, merely affirming the decision appealed from in general terms. The judgment in the Fisheries Appeals is not expected to be delivered before the February Sittings of the Judicial Committee.

The death of Sir Charles Pollock of the English Bench has been announced. He was the fourth son of the late Chief Baron Pollock, and came of a family which supplied the Bar with a greater number of distinguished men than any other. It is noted in our exchanges with special interest, as he was "the last of the Barons." Our namesake in England regrets that the ancient title should no longer be borne by any member of the Bench, as it has not been without a judge bearing the title of Baron for some six hundred years. His death means also a reduction to five in the number of the fast disappearing order of Sergeants. The only surviving members of the ancient order of the Coif are Lord Penzance, Viscount Esher, Lord Field, Sir Nathaniel Lindley and Mr. Spinks. We note also that a peculiarity of the elevation of Sir Walter Phillimore to the Bench, in succession to Baron Pollock, is that the son of a judge is followed by the son of a judge. Also that the Bench now has three occupants whose fathers adorned it before them, viz.: Lord Justice Williams, Mr. Justice Channell and Mr. Justice Phillimore.

THE BENCH AND ITS CRITICS.

We referred shortly in our last issue to some articles which recently appeared in one of our leading daily journals commenting freely upon the administration of justice by the judiciary of the Province. The subject is important and should not be passed over, although it is a difficult and a delicate one to deal with.

In one of these articles a learned judge was criticized adversely for having with undue haste, as it is alleged, closed the Criminal Assize at Toronto; in another, sweeping charges are made under the caption of "Autocracy on the Bench." Other articles have appeared since and several letters have

been written to the lay press on the same line. As to the first article the criticism at first blush seemed to have some merit, but an examination into the facts would seem to indicate that after all a wise discretion was probably exercised. As to the other article, lovers of their country will, we think, agree with us that the greatest care should be exercised by the press in matters of this sort. In the first place it should not be forgotten that judges cannot take up their pens to reply to attacks made upon them, nor is it possible for any one on their behalf, except in the most general way, to answer general charges.

Another important consideration and one which lies at the root of all good government, is that general charges such as those alluded to tend to weaken the administration of justice, and it is not desirable, especially so at this period of the world's history, to do or say anything which would tend in the slightest degree to disintegrate the fabric of society in this or in any other way by bringing into disrepute those who are appointed to administer justice and conserve law and order. We are menaced on all sides by the spirit of anarchy, which we see developing itself in varied forms and with increasing vitality. Self-preservation compels us to be careful not to give an opening to this enemy.

There is a clear distinction to be drawn between general charges and specific charges. It is within the province as well as it is the duty of public journals, and desirable in the public interest, that all defects in the administration of the law, and all slackness or impropriety on the part of its officers, should receive attention and be commented upon with a view to their cure or prevention. But this is manifestly a different thing from making general charges against the judiciary that its members are arbitrary, unreasonable, partial or careless, either in general or in reference to some particular class of the community.

Criticisms in reference to specific charges, we may remark, are being constantly made in England, but all respectable journals set their faces against, and decline to make attacks of a general character.

We have every reason to be and are exceedingly proud of our judiciary. Being mortal, they are imperfect. Some of them have personal characteristics which are occasionally irritating and possibly offensive, and which sometimes seriously detract from their usefulness, but on the whole we recognize their general worth and their conscientious regard for the duties connected with the responsible position in which the crown has placed them. Anything which lessens the dignity of the judicial position, or in the slightest degree conveys to the public any suspicion that justice is being carelessly and improperly administered, is most damaging to the welfare of the State. Each citizen is deeply interested in the maintenance of law and order, and we are only doing ourselves harm when we weaken the hands of those who dispense justice. The judges are the representatives of the Sovereign, and the Sovereign, under our present system of government, is practically the will of the people—ourselves.

There is no divinity to hedge a judge; and he cannot claim to be beyond reasonable criticism. If a judge ought to be retired by reason of his unfitness or incompetence whether on physical, mental or moral grounds, the Government is remiss in not dealing with such a case, and it is manifest that no such judge should be allowed to remain on the bench. If there is any ground of unfitness or incompetence, or any act which would indicate any departure from that high plane of moral rectitude which has happily always been and is now the pride of the Ontario bench, the press is certainly within its limit in drawing attention to particular instances in a calm and dispassionate manner. This, however, is very different from a general onslaught such as already spoken of, which too often has its foundation in the disappointment or malice of an unsuccessful solicitor or counsel.

It is the duty of the Minister of Justice to see that the machinery of the courts is kept in good running order; and the judges, as important parts of such machinery, have the right to be protected as well as the public, and it is for the public welfare that they should be. It would, therefore, seem to be the duty, when a proper occasion presents itself,

for the Minister, who is presumably the proper person to act in such cases, to make an investigation, so that the State may suffer no detriment, and that justice may be done in the premises. The new Minister of Justice, Hon. Mr. Mills, is an eminently fair and just man, and, by reason of his want of local connection with Toronto and the Local Legislature, is in a position to deal with the whole subject in a manner entirely independent of personal or judicial association, and we believe the bar will be satisfied with his conclusions, after he has made a careful enquiry into the cause or causes of the murmurs and complaints which are undoubtedly in the air.

ACTIONS ON BONDS.

Notwithstanding the Judicature Acts, and the Law Courts Act, and that the Rules of Practice have been so often revised and amended and consolidated, the procedure on bonds as laid down by the 8 & 9 Wm. III, c. 11, has not been materially affected (*a*).

Rule 580 provides "Notwithstanding anything in the Rules contained, the provisions of the Act of the Parliament of Great Britain passed in the session held in the eighth and ninth year of the reign of King William the Third, entitled 'An Act for the Better Preventing Frivolous and Vexatious Suits,' as to the assignment and suggestion of breaches, and as to judgment, shall continue in force in Ontario."

The Act referred to in this Rule is the 8 & 9 Wm. III, c. 11 (*b*).

(*a*) See *Tuther* v. *Caralampi*, 21 Q.B.D. 414.

(*b*) Section 8 provides that "In all actions which shall be commenced or prosecuted in any of his Majesty's Courts of record, upon any bond or bonds or on any penal sum, for non-performance of any covenants or agreements, in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury upon trial of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon the trial of the issues shall prove to have been broken; and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions. And if judgment shall be given for the plaintiff on a demurrer, or by confession or nihil dicit, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices, or justice of assize or Nisi Prius, of that county, to inquire of the truth of every one of these breaches, and to assess the damages that the plaintiff shall have sustained

This statute, so far as it required the writ to be executed before the justice of assize or nisi prius, was, in cases where breaches were suggested on the roll after judgment, and perhaps in all cases where no issue was joined, altered by 3 & 4 Wm. IV., c. 42, s. 16, which, to prevent delay, provided that in such cases the damages could be assessed by the sheriff and a jury instead of a judge at assize or nisi prius. Sec. 16 was repealed in Ontario (*a*) and now the damages may be assessed as provided by Rules 578, 579, 589.

It must be borne in mind that common money bonds do not come under 8 & 9 Wm. III, but are subject to the statute 4 & 5 Anne, c. 16, s. 12.

Common money bonds are bonds with the condition to pay a sum of money at a certain day, upon payment of which the bond is to be void, otherwise it is to be forfeited (*b*), but if the condition aims at securing any other matter—as the performance of the covenants in a deed, the faithful discharge of an office or the rendering of accounts, upon satisfoction of which the bond is declared to be void—such bonds are called bonds with special conditions (*c*), and the procedure on such bonds is governed by the 8 & 9 Wm. III, c. 11.

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thereby; in which writ it shall be commanded to the said justices or justice of assize or Nisi Prius, that he or they shall make return thereof to the Court from whence the same shall issue, at the time in such writ mentioned. And in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay into the Court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenant.., together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body lands or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record. But, notwithstanding in each case such judgment shall remain, continue, and be as a further security, to answer to the plaintiff or plaintiffs and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained; upon which the plaintiff or plaintiffs may have a scire facias upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively, to show cause why execution should not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt, upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches, or enquiry thereof, upon a writ to be awarded in manner as aforesaid; and that, upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so toties quoties, and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."

(*a*) See C. L. U. C., c. 22, s. 149. R.S.O. (1877) c. 50, s. 152.

(*b*) Leake on Contracts, 3rd ed., 122.

(*c*) Leake, 122.

At common law the whole penalty of the bond was recoverable upon breach of any of the conditions in the bond. In fact only one breach could be assigned, upon proof of which the plaintiff was entitled to judgment for the whole penalty (*a*). Courts of Equity, however, gave relief to the obligor upon his paying the amount really due or upon payment of the damages arising from the breach of the condition. The above statutes aimed at giving courts of law power of granting similar relief in certain cases.

Under the 8 & 9 Wm. III, c. 11, judgment is entered for the whole penalty and costs, but the plaintiff is entitled to execution only for the damages assessed and costs (*b*). The defendant is not entitled to have satisfaction entered up upon showing payment of damages and cost, because the plaintiff is entitled to the judgment as security for future breaches (*c*).

The statute does not extend to a bond for the payment of a sum certain at a day certain (*d*); nor a common money bond (*e*) or a bond for the payment of money at a given rate of interest in the meantime by instalments, with a clause that the whole sum shall be due on default of payment of interest (*f*); or a bond to replace stock (*g*); or bonds where the damages assessed are calculated to satisfy the entire condition (*h*).

This statute did not extend to bail bonds (*i*); or a replevin bond (*j*); because courts of law could afford relief in such cases to the defendant without his being compelled to file a bill in equity, and such cases therefore did not fall within the rule which called for the Act.

(*a*) *Steward* v. *Greaves*, 10 M. & W. 715, per Parke B; *Hardy* v. *Bern*, 5 T. R. 636.

(*b*) *Carlisle* v. *Hostel*, 7 L.J. 99; *Wilde* v. *Clarkson*, 6 T.R. 303; *Welch* v. *Ireland*, 6 East, 613. 1 Wm. Saunders, 1871 ed. pp. 75 et seq.

(*c*) *Hill* v. *Hill, et al.*, 1 P.R. 268; *Carlisle* v. *Hostel*, 7 L.J. 99; *Randall* v. *Burton*, 23 U.C.R. 268

(*d*) *Murray* v. *Earl of Stair*, 2 B. & C. 82, 89, 3 D. & R. 278; *Cardozo* v. *Hardy*, 2 Moore 220.

(*e*) 4 & 5 Anne, c. 3. *Gerrard* v. *Clowes*, (1892), 2 Q.B. 11.

(*f*) *James* v. *Thomas*, 5 B. & Ad. 40. *Van Sandau* v.—— 1 B. & Ald. 214.

(*g*) See *Savile* v. *Jackson*, 13 Price, 715.

(*h*) *Savile* v. *Jackson*, 13 Price, 715; *Smith* v. *Bond*, 10 Bing, 125.

(*i*) *Moody* v. *Pheasant*, 2 B. & P. 446.

(*j*) *Belcher* v. *Burn*, 24 U.C.R., 259; *Middleton* v. *Bryan*, 3 M. & Sel. 155.

In an action on a bail bond to the sheriff, the Court may now give such relief as may be just and reasonable (*a*). A replevin bond is now subject to 8 & 9 Wm. III, c. 11 (*b*).

Bonds for the payment of money by instalments (*c*); or upon a written instrument for the recovery of a penalty though not under seal (*d*); or the payment of an annuity (*e*); or the performance of an award (*f*); or the performance of any other specific act (*g*), are within the Act. The statute also applies to actions for penalties on covenants and agreements in writing, for payment of a penalty on non-performance (*h*). Even though a bond on the face of it be a common money bond, yet if there be a concurrent instrument showing that it is in substance a bond intended to secure the performance of covenants within the meaning of the statute, it falls within the statute, although the bond does not refer to the instrument which explains it (*i*).

It will be noticed that Rule 580 does not provide that all the provisions of 8 & 9 Wm. III., c. 11, shall continue in force, but only such parts of this Act as relate to the assignment and suggestion of breaches and as to judgment. Before the Judicature Act a plaintiff had two courses open to him in suing on a bond within 8 & 9 Wm. III. c. 11. He could frame his declaration claiming the penalty without mentioning the condition in the bond, and without assigning a breach of it, or he could set out the condition and allege breaches. If the breaches were not assigned the defendant could set out the condition in his plea, and plead that he had performed it, or he could plead any answer which would excuse performance of the condition. If the condition and breaches were set out in the declaration, the defendant could plead

(*a*) Rule 1035.

(*b*) Rule 1073.

(*c*) *D'Aranda* v. *Houston*, 6 C. & P. 511; *Preston* v. *Dania*, L. R. 8, Ex. 19.

(*d*) See *Drage* v. *Brand*, 2 Wils, 377.

(*e*) *Walcot* v. *Goulding*, 8 T. R. 126; *Tuther* v. *Caralampi*, 21 Q.B.D. 414.

(*f*) *Welch* v. *Ireland*, 6 East, 613; *Hanbury* v. *Guest*, 14 East, 401.

(*g*) Leake, 122.

(*h*) 2 Wm. Saunders (1871 ed.), 541; *Betts* v. *Burch*, 4 H. & N. 506, 510; *Ex p. Capper*, 4 Ch. D. 724.

(*i*) *Hurst* v. *Jennings*, 5 B. & C. 650; *Quin* v. *King*, 1 M. & W. 42.

denying the bond or breaches or both or confessing the bond or breaches or both, and pleading excuse for non-performance (*a*).

If the plaintiff did not set out the condition and breach in his declaration, and the defendant pleaded performance generally, then under the statute it was necessary for the plaintiff in his reply to assign the breaches upon which he intended to rely (*b*). If the defendant denied making the bond or pleaded any other plea in excuse, then after issue was joined the plaintiff was obliged, under the statute, to suggest on the record all the breaches which entitled him to have the bond declared forfeited (*c*). If the defendant allowed judgment to go against him by default or on demurrer, and the breaches had not been assigned in the declaration or reply, the plaintiff was obliged to suggest the breaches on the record in the same way as when the plaintiff joined issue on the defendants denial (*d*).

The statute made it compulsory to assign or suggest breaches and damages could only be assessed for breaches assigned or suggested (*e*). A verdict taken without assigning or suggesting breaches, was irregular and could be set aside (*f*).

In all cases in actions on bonds within 8 & 9 Wm. III, c. 11, whether the defendant appeared or not, the damages should be assessed at the sittings or assizes, and it was irregular to enter up final judgment without assessing damages for the breaches assigned or suggested (*g*). The defendant could not assign or suggest breaches which occurred after the action was commenced, but he was obliged to proceed by scire facias upon the judgment (*h*).

Under the practice as laid down in the Rules, a plaintiff

(*a*) 2 Wm. Saunders (1871 ed.), 544.
(*b*) 1 Wm. Saunders, 133; 2 Ib. 544.
(*c*) *Homfray* v. *Rigby*, 5 M. & S. 60; *Arch. of Canterbury* v. *Robertson*, 1 C. & M. 690; *Webb* v. *James*, 8 M. & W. 645.
(*d*) *Lawes* v. *Shaw*, 5 Q.B. 322.
(*e*) *Walcott* v. *Goulding*, 8 T.R. 126; *Welch* v. *Ireland*, 6 East, 613.
(*f*) *McMahon* v. *Ingersoll*, 6 O. S. 301.
(*g*) *Douglas* v. *Powell*, 2 O. S. 87.
(*h*) *Willoughby* v. *Swinton*, 6 East, 550. But see *Leach* v. *Stevenson*, 3 O. S. 310.

in an action on a bond within 8 & 9 Wm. III, c. 11, may still claim the penalty in his statement of claim without assigning breaches, but the course usually adopted is to set out the condition and allege the breach or breaches upon which the plaintiff intends to rely, and ask for a declaration that the bond has become forfeited and judgment for the whole penalty of the bond so that the judgment may stand as security for future breaches.

No reference is made in the Judicature Act or the Rules to the writ of scire facias, and the writ is probably not abolished. Lord Justice Lindley says the writ is not abolished (*a*), and it has been adopted in several cases since the Judicature Act came into force (*b*). Instead of proceeding by scire facias to assess damages for further breaches, the plaintiff could probably proceed by petition under Rule 642 (1), and instead of directing that the damages for further breaches assigned be assessed by a judge at the sittings, the Court could probably refer it to the Master to assess the damages under Rule 579.

The liability of the obligor on the bond is limited to the amount of the penalty (*c*), but where the condition shows a contract or covenant to do or abstain from doing a particular act, such contract or covenant may be enforceable by injunction (*d*). The penalty of a bond within 8 & 9 Wm. III., c. 11, cannot, of course, be claimed by special endorsement (*e*), but in the case of a common money bond within 4 & 5 Anne, c. 3, the writ may be specially endorsed with a claim for the amount of the bond (*f*).

Interest, when expressly made payable by the bond, might formerly have been claimed by special endorsement (*g*), but now interest may be specially endorsed whether it is expressly made payable or not (*h*).

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(*a*) Lindley's Law of Companies, 5th ed., 281.
(*b*) *Shaver* v. *Cotton*, 16 P.R. 278; *Brice* v. *Munro*, 12 A. R. 453; *Portal* v. *Emmens*, 1 C. P. D. 201, 664; *Kipling* v. *Todd*, 3 C. P. D. 350
(*c*) *Wilde* v. *Clarkson*, 6 T. R. 303; *Branscombe* v. *Scarborough*, 6 Q.B. 13; *Hatton* v. *Harris* (1892) A.C. 547; *McMahon* v. *Ingersoll*, 6 O. S. 301; *Randall et al.* v. *Burton et al.*, 4 P. R. 9.
(*d*) *London, etc., Bank* v. *Pritt*, 36 W. R. 135; *National, etc., Bank* v. *Marshall*, 40 Ch. D 112.
(*e*) See *Tuther* v. *Caralampi*, 21 Q.B.D. 414.
(*f*) *Gerrard* v. *Clowes* (1892) 2 Q. B. 11.
(*g*) *Steeds* v. *Steeds*, 22 Q. B. D. 537.
(*h*) Rule 138.

OBITER DICTA.

It was the wish of the King . . .
Grandly to hold a magnificent Court, and with that intention
One with another he summoned, the small as well as the great ones.
GOETHE: *Reineke Fuchs.*

We think the latter part of the above quotation applies with some significance to the summoning of Mr. Charles J. Darling, Q.C., M.P., to the English Bench, which has brought down upon Lord Chancellor Halsbury's head a storm of abuse quite as violent as that which assailed Lord Campbell when he appointed unpretentious Colin Blackburn to the Queen's Bench in 1859. But we fear that the present Chancellor cannot emulate King Lear and bid the wind blow until it cracks its cheeks with the same firm belief in time justifying his choice that animated Lord Campbell. Perhaps Blackburn was no better known as a practitioner at the Bar than the newly appointed judge, but in the case of the former there was the reassuring fact that he was above all things a bookman, and that he had, moreover, undergone a splendid training in case-law as a reporter of the decisions of the Courts. Mr. Justice Darling has, it is true, dabbled in literature with a legal flavor about it; but that legal flavor is extremely tenuous, and the literature itself not to be called robust. We feel that it would be far safer to predicate the possession of an adequate quantum of the judicial quality on the part of one of the compilers of Ellis and Blackburn's Reports than on the part of the author of "Scintillæ Juris." Speaking of the latter upon its merits, we hold to the view that the humorous side of the reason of the law demands a deft and subtle hand in its presentment; and hopelessly fatuous is the effort of him who attempts to exploit it without the needful talent therefor. "Scintillæ Juris," we regret to say, has to be classed amongst the most dismal failures in the legal catalogue. We cannot recall that we ever met with anything more absolutely banal in all the literature of the profession than the author's chapters on "Advocacy" and "Maxims." The Machiavelism of the former chapter, however, would be mischievous if it were not silly. *Ruit mole sua.*

Before quitting the subject, we should like to say that the opening paragraph of his chapter on "Judges" has now a peculiar significance. He says: "It is a natural result of the laws not being understood by those who make them, that persons of *legislative* (the italics are ours) capacity should be employed in their interpretation and improvement." Mr. Justice Darling was himself an M.P. when he made this naive confession of the nescience of British law-makers; could it be expected, then, that he would come to the Bench clothed cap-a-pie in the mantle of the judicial quality, even as he understands its texture?

* * *

The publication of the fourth edition of Mr. Hunter's excellent work on Roman Law reminds us that the charge of "looking to Rome" can nowadays be applied with quite as much force to English lawyers as to some English churchmen. With the first appearance of Maine's "Ancient Law" the insular prejudice of the average English lawyer against the study of the great Roman system began to abate. He came to recognize that it was not the product of mediæval monks; that Canon law and Roman law were not convertible terms; and, most astounding fact of all, that a very considerable portion of the foundation of the Common law was hewn in the Roman quarries. The writings of Bentham and Austin had prior to this, it is true, stimulated in England the study of the historical and philosophical phases of jurisprudence; but they were hard reading, and sought their constituency in minds of an academic caste. Sir Henry Maine, on the other hand, places the treasures of his learning within the reach of all sorts and conditions of men in the profession. The scholar here finds an explication of the recondite sources of modern law which disarms his criticism, and compels his assent; while the busy man of affairs, who can only employ his spare moments in expanding his knowledge, is led over a broad and pleasant path to the desired goal, without having to flounder wearily through mazes of crabbed text and morasses of laboured foot notes, which unsettle rather than

inform the average mind. So, we repeat, it is to Sir Henry Maine that the honour belongs of broadening the views of the profession in England as to the history and philosophy of the law. And what Maine so admirably began has been zealously forwarded by Markby, Holland, Pollock and Hunter. It is not too much to say of the latter that what Pothier and Savigny did for the study of the Roman law in France and Germany, respectively, he has accomplished for it in England. He has opened for his fellow-countrymen the hitherto sealed door of the stately treasure house of the Corpus Juris Civilis. Strange as it may seem, it is quite possible that the long Blackstone may be entirely displaced as the fetish of English law students, and the devoirs of their bibliolatry accorded to Hunter's Roman Law.

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The popular opinion that Astraea and the Muses are not the best of friends is quite a mistake. History tells us that the laws of Pittacus were in verse, and so were those of Charondas (see Gibbon's Decl. and Fall R.E. ch. 40). It is also on record that in ancient Erin the poets were regularly entrusted with the exposition of the laws,—and not altogether with the happiest results to the judicial bards, so it is said. Unfortunately, on one occasion (see Patterson's "Liberty of the Subject," ch. 12, p. 137) a bard erred so prodigiously in his metrical rendering of a certain ratio decidendi that the legislative authority determined to then and there rob the sweet singers of their forensic functions. This was, no doubt, the beginning of the era of prosy judgments. It must be remarked, however, that the change did not wholly produce the desired improvement, for Irish judges have been known to err in prose. Blackstone, it is true, felt himself impelled to abandon his muse after he entered upon the serious business of the law, and perhaps it is just as well for his reputation that he did; but we know that one of the most illustrious lawyers of our own times—Sir Frederick Pollock—is wont to frequently put aside his learned lucubrations, so that he may refresh the real inner man with the waters of Aganippe. Then there is the case of Sir John Davies, the

first reporter of Irish decisions, of whom Wallace ("The Reporters," p. 229) says "he was one of those rarely found men to whom Heaven gives genius." Death robbed him of the Chief Justiceship of Ireland under James I., but could not rob him of the splendid fame accruing to him from his poem "On the Immortality of the Soul," written after he had gone to the Bar, and had become a busy member of Parliament. By the way, it would do none of us any harm to read that noble poem some of the long winter evenings. It is capable of restoring our faith in more than poetry.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

VENDOR AND PURCHASER—IDENTITY OF PARCELS - PAROL EVIDENCE—STATUTE OF FRAUDS (29 CAR. 2, C. 3) S. 4.

In *Plant* v. *Bourne*, (1897) 2 Ch. 281 the question how far parol evidence is admissible to show the parcels referred to in a contract for the sale of lands, is discussed. By the contract in question Plant agreed to sell to Bourne "24 acres of freehold land at Totmonslow in the parish of Draycott . . . . possession to be had on March 25th next. The vendor guaranteeing possession accordingly." The action was by the vendor for specific performance, and the purchaser pleaded that the contract was insufficient under the Statute of Frauds, s. 4. At the hearing the plaintiff proposed to prove that he was the owner of certain land in the parish of Draycott containing 24 acres more or less, and that on the morning of the day the contract was made the defendant, being well acquainted withthe land and being desirous of purchasing it, had by appointment gone over it with the plaintiff. This evidence having been rejected by Byrne, J., the plaintiff appealed, and the Court of Appeal (Lindley, Lopes and Chitty, L.JJ.) held the evidence admissible.

STATUTE—ACT COMMENCED UNDER STATUTE SUBSEQUENTLY REPEALED—COMPLETION OF ACT COMMENCED BEFORE REPEAL OF STATUTE AUTHORIZING IT.

Heston v. *Grout*, (1897) 2 Ch. 306, is deserving of attention, although it turns to some extent on statutory enactments not in force in Ontario. By a statute of 1875 a municipal body was authorized to give a notice to property owners to repair the street in front of their property, and in default of their executing the repairs the municipal body was empowered to perform them and apportion the expense. After the giving of the notice, the municipal body adopted another statute of 1892 which provided that after its adoption the former Act of 1875 should cease to apply, and notwithstanding this the municipal continued the proceedings commenced under the Act of 1875, and the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) agreed with North, J., that they had a right so to do even apart from the provision of a statute which expressly provided that the repeal of any Act is not to affect the previous operation of any enactments repealed, or anything duly done or suffered under the enactment so repealed. But the latter provision the Court held in any case enabled the municipal body to complete any proceeding begun under the repealed Act before its repeal.

COSTS—COMPROMISE TO DEFEAT SOLICITORS' LIEN—PRACTICE—RIGHT OF APPLICANT TO READ RESPONDENT'S AFFIDAVITS AS PART OF HIS OWN CASE.

In re Margetson, (1897) 2 Ch. 314. In this case Kekewich, J., reaffirmed the well settled rule that the parties to a litigation although at liberty to compromise their differences without the intervention of their solicitors, provided they do so honestly and without any intention to cheat the solicitors of their costs; yet wherever the compromise is effected for the purpose of cheating a solicitor, the latter will have a right to an order for payment of his costs, notwithstanding the compromise. In the present case Pugh retained Mr. Margetson to obtain the delivery of a bill of costs by Mr. Jones and a taxation thereof. Before the taxation was completed Jones, without Margetson's knowledge and with the intention of stopping the taxation and so defeating Margetson's lien for

costs, paid Pugh, who was in distressed circumstances, a small sum in settlement of the taxation, which was consequently dropped. Margetson thereupon applied to Kekewich, J., for an order to compel Jones to pay his costs up to the time of the compromise, which was granted—the Judge being of opinion that Jones as a solicitor must have known from the circumstances of Pugh that the money paid by him would not be applied towards payment of Margetson's costs. A point of practice arose also in the case which is worth notice. The case of the applicant was not made out on his own affidavits, but affidavits were filed in answer, which he claimed to be entitled to read, and which supplied what was lacking in his own affidavits. The respondents objected, but Kekewich, J., held that the applicant was entitled to use his opponent's affidavits to make out his own case.

PATENT LAW—INFRINGEMENT — FOREIGN MANUFACTURER — SENDING INFRINGING ARTICLES FROM FOREIGN COUNTRY BY POST—PLAINTIFF OUT OF JURISDICTION—JUDGMENT FOR PLAINTIFF AT TRIAL—SECURITY FOR COSTS—RETENTION OF COSTS IN COURT PENDING APPEAL.

Badische Anilin v. *Johnson* (1897), 2 Ch. 322, was an action by a plaintiff resident abroad to restrain the infringement of an English patent. The defendant was a foreign manufacturer, and the infringement complained of was his sending into England by post in response to an order from a trader in London, a parcel containing articles which were an infringement of the patent. North, J., was of opinion that the plaintiff was entitled to succeed, and he granted an injunction and an inquiry as to damages. The majority of the Court of Appeal (Lindley and Smith, L.JJ.) were, however, of the opinion that the action could not be maintained. They considered that the defendant's part of the transaction ceased when he delivered the package to the post office, and that he could not be held responsible for its being imported or carried into England. Rigby, L.J. dissented from this, and thought that the defendant was responsible for the importation of the package into England, and its carriage there as being a necessary consequence of his initial act, in depositing it in the post office for that purpose. The plaintiffs had been required to

give security for costs, and had paid money into court therefor; and on the judgment being given by North, J., in their favour, the defendants asked that the money which the plaintiffs had paid into court should be retained, pending an appeal from the judgment. North, J., granted the application on the defendants' undertaking to present the appeal within a fortnight. The plaintiffs claimed that an equal amount should be paid into court by the defendant as security for the plaintiffs' costs of the appeal, but this North, J., refused to order. The injunction and inquiry as to damages were not stayed, and the costs of the plaintiffs' solicitors were ordered to be paid upon their giving the usual undertaking to refund them in case the appeal should be successful.

MARITIME LAW—SEAMAN—MERCHANT SHIPPING ACT, 1894 (57 & 58 VICT., c 60), s. 186—"PASSAGE HOME."

Edwards v. *Steel*, (1897) 2 Q.B. 327, is a decision of the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) affirming the judgment of Collins, J., (1897) 1 Q.B. 712, noted ante vol. 33, p. 620. Upon the appeal the plaintiff seems to have raised in addition to the point mentioned ante p. 620, that he ought to have been provided with maintenance during his journey as well as his transportation, but the Court of Appeal held that as the master had deposited the amount called for by the Consul's certificate given under clause *d.* of s. 186, the ship owners were relieved from any further liability. Their Lordships in the Court of Appeal seem, however, to have differed with Collins, J., as to the meaning of the words "a passage home," and intimate that they mean the port at which the seaman was shipped, or some port of the United Kingdom agreed to by him; but they upheld the judgment of Collins, J., on the ground that the plaintiff had agreed to go to the port to which he was given a passage.

INTERPLEADER—GOODS IN EXECUTION—ORDER FOR SALE—APPLICATION OF PROCEEDS IN DISCHARGE OF SECURITY NOT DUE—ORD. LVIII. R. 12 (ONT. RULE 1,112).

Forster v. *Clowser*, (1897) 2 Q.B. 362, was an interpleader proceeding by a sheriff, in which the goods were claimed by a chattel mortgagee whose security was not due, and which bore a high rate of interest. A Judge (Grantham, J.) in pursuance of the power conferred by Ord. lvii. r. 12 (Ont. Rule 1,112) directed a sale of the goods in question, and the application of the proceeds in discharge of the chattel mortgage, though it was not due, and without making any allowance to the mortgagee in respect of the additional interest which would have accrued had the debt not been paid off before the day appointed for payment. From this order the mortgagee appealed, but the majority of the Court of Appeal (Lord Esher, M.R., and Smith, L.J.) were of the opinion that in exercising jurisdiction under the Rule in question the Judge was not limited by the rules of equity and had a discretion to make the order he did, which under the circumstances they considered to be proper. Rigby, L.J., however, dissented. He is probably right in principle, but then the rate of interest was 60 per cent., and this is possibly an instance of a hard case making bad law.

DISCOVERY—PRODUCTION—CROWN, RIGHT OF, TO DISCOVERY.

Attorney-General v. *Newcastle* (1897), 2 Q.B. 384, was an information by the Attorney-General on behalf of the crown against a municipal corporation in which the rights of the crown to discovery are discussed. Apart from certain technical points of practice to which it is not necessary here to refer, the Court of Appeal (Lopes and Rigby, L.JJ.) on appeal from Wills, J., decided that the crown is entitled to the same rights of discovery from a subject which any ordinary litigants have against each other, but the subject has not the same right of discovery as against the crown; and furthermore that the crown in virtue of its right to discovery was entitled to the production of documents which might tend to show that the defendants had not the absolute right

which they claimed to have in the property in question. Rigby, L.J., is careful to point out that although the crown cannot be compelled to give discovery as a matter of practice, it always does so unless the public interests conflict with its doing so.

SOLICITOR—COSTS—LIABILITY OF DORMANT PARTNER FOR COSTS INCURRED AFTER DISSOLUTION BY SOLICITOR RETAINED BEFORE.

In *Court* v. *Berlin* (1897), 2 Q.B. 396, the question was whether the dormant partners of a firm were liable for the payment of costs incurred by a solicitor retained by the active partner of the firm, to collect a debt due to the firm; and whether such liability extended to the costs incurred after the firm had been dissolved, but of which as well as the existence of the dormant partners, the solicitor had no notice. A Divisional Court (Wills and Grantham, JJ.) had decided that the dormant partners were not liable for any costs incurred after the dissolution, but the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) unanimously reversed that decision. The defendants endeavoured to escape liability under the provisions of the Partnership Act, 1890 (53 & 54 Vict., c. 39) s. 36 (3), which enacts that "the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively." This Act has been held to be merely declaratory of the common law, and the answer which the Court of Appeal gave to the argument founded on this section, was, that the debt in question was contracted when the retainer was given, and therefore before the dissolution, and did not arise de die in diem, as the Divisional Court appears to have assumed. See *Friend* v. *Young* (1897) 2 Ch. 421 noted *post*.

LICENCE—REVOCATION—BREACH OF CONTRACT BY LICENSOR—LICENSEE, RIGHT OF ACTION OF.

In *Kerrison* v. *Smith* (1897) 2 Q.B. 445, the plaintiff sued for damages for breach of a contract, whereby the defendant had orally agreed to let his wall to the plaintiff for the pur-

pose of bill posting, at £2 10s. a year, the plaintiff agreeing to erect a hoarding on which the bills were to be posted. The plaintiff erected the hoarding and made several payments, and thereafter the defendant gave notice to the plaintiff to remove the hoarding, and about a month later took it down himself. The defendant contended that he had a right to revoke the licence, and that no action was maintainable, but Lawrance and Collins, JJ., held that although the permission to post the bills was a licence, and not being by deed was revocable, yet that the action for breach of contract was nevertheless maintainable, and they reversed the decision of the County Court Judge who had nonsuited the plaintiff—relying on the well known case of *Wood* v. *Leadbitter*, 13 M. & W. 838, and it is pointed out that although that case establishes the right of the defendant to revoke the licence, it does not decide that no action will lie against him for so doing in breach of contract.

MORTGAGE—POWER OF SALE.

In re Rumney and Smith (1897), 2 Ch. 351, was a case in which the question at issue was the validity of an assumed exercise of a power of sale contained in a mortgage. The mortgage was made to the trustees of a building society, and contained a power authorizing "the trustees or trustee for the time being of the society" to sell the mortgaged property. The mortgage was transferred by the mortgagees, without the concurrence of the mortgagor, to some third person, who was not a trustee of the society, and who in assumed exercise of the power of sale, offered the property for sale, and the question was raised by the purchaser at such sale whether the vendor could make a good title. Stirling, J., decided that he could not, as he was not within the terms of the power, which could not be exercised by any one except a trustee or trustees of the society, and his decision was affirmed by the Court of Appeal (Lindley, Lopes and Chitty, L.JJ.)

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Nova Scotia.] KNOCK *v.* KNOCK. [Nov. 10, 1897.

Right of way—Easement—Winter road—Appurtenant and necessary way—Implied grant—Landlocked tenement — User—Prescription—Obstruction—Interruption of prescription—Acquiescence—Limitation of action—R.S.N.S. (5 ser.) c. 112—R.S.N.S. (4 ser.) c. 100—2 & 3 Wm. IV. (Imp.) c. 71, ss. 2 & 4.

K. owned lands in the County of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway as a winter road for hauling fuel from his wood-lot to his residence at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There did not appear to be any defined form of the way across the lands more than a track upon the snow during the winter months, and it was not utilized at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff.

The statute (R.S.N.S. 5th ser. c. 112) provides a limitation of 20 years for the acquisition of easements and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same.

Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute.

Held, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was a necessary easement appurtenant or appendant to the lands formerly held in unity of possession, which would pass by implication upon the severance of the tenements, without special grant. Appeal allowed with costs.

Wade, Q.C., for appellant. *Harrington*, Q.C., for respondent.

Girouard, J.] EX PARTE MACDONALD. [Dec. 31, 1896.

Habeas corpus—Jurisdiction—Form of commitment—Territorial division—Judicial notice—R.S.C c. 135, s. 32.

A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence therein stated to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou, there being also four incorporated towns within the county limits, and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. c. 3, s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county, entitled to return two councillors to the county council.

Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place of the offence mentioned was within the territorial extent of the police division.

Held, also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of habeas corpus in criminal cases is limited to an enquiry into the cause of imprisonment as disclosed by the warrant of commitment.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] PAYNE *v.* CAUGHELL. [Oct. 20, 1897.

Municipal corporation—Power to lease toll road to individual—Tolls—16 Vict., c. 190, s. 26—Practice—Appeal—Divisional Court.

Under above statute a municipal corporation to which, under 12 Vict., c. 5, s. 12, a toll-road has been transferred by the Governor-in-Council, has power to lease the road to an individual who may exact tolls for the use thereof. The right is not limited to leases to toll-road companies.

Judgment of a Divisional Court, 28 O.R. 157, 33 C.L.J. 39, reversed.

Where pursuant to 12 Vict., c. 5, s. 12, the Governor-in-Council has transferred to a municipal corporation a toll-road upon which certain rates of toll are in force with the right to alter or vary the rates of toll, it can increase the rates of toll to any sum not exceeding the maximum mentioned in schedule A to 12 Vict., c. 4, and the lessee can exact payment of the increased rates and is not limited to a toll sufficient to keep the road in repair.

Where the judge presiding at the trial of an action directs it to stand over to have parties added, and both parties apply to a Divisional Court to set aside this direction, and, by consent and without prejudice to the right of appeal,

ask the Divisional Court to hear the case on the merits, either party may, without leave, appeal to the Court of Appeal for Ontario from the judgment of the Divisional Court.

Robinson, Q.C., and *D. Meek*, for the appellants

J. A. McLean, and *W. K. Cameron*, for the respondent.

Moss, J.A.] IN RE SHERLOCK. [Nov. 22, 1897

Executors and administrators—Application by executor under Rule 938 (a)—Appeal to Divisional Court—Leave to appeal to Court of Appeal—Interest of executor—Reimbursement of costs—Security for costs.

Under Con. Rule 938 (a), an executor applied in Chambers by way of originating notice, and obtained a determination of a question affecting the rights of legatees under the will, which involved the construction of the will, but, upon appeal by residuary legatees, the order in Chambers was reversed by a Divisional Court, which put a different construction upon the will.

Held, that the judgment of the Divisional Court was a sufficient protection to and indemnity of the executor, and if he sought to appeal to the Court of Appeal, he must do so at his own risk as to reimbursement of the costs, in the event of failure ; and his application for leave to appeal could be granted only upon the usual terms as to giving security for costs under Con. Rules 826 et seq.

McBrayne, for the applicant. *S. Price*, for the residuary legatees.

Moss, J.A.] IN RE SHERLOCK. [Dec. 10, 1897.

Appeal—Leave — Status of appellants—Con. Rule 938—Will—Contending beneficiaries—Security on appeal.

Application by the daughters of Samuel L. Sherlock, who were the legatees interested in the bequest in question, for leave to intervene and appeal from the decision of a Divisional Court (see ante) and to dispense with the security required by Con. Rule 826.

It was objected on behalf of the residuary legatees, who opposed the application, that the intervention of the applicants raised a question between contending beneficiaries, and that there was no jurisdiction to deal with such a question under Con. Rule 938.

Held, that the question was one which a Master, by taking the accounts and making the enquiries directed to be taken and made in an administration proceeding, would have jurisdiction to deal with ; see form of administration order (No. 157) ; Con. Rule 953 ; form of Master's report (No. 84) ; and if, for the purpose of ascertaining and determining the persons to whom legacies are payable, and the amount of the legacies, it should become necessary incidentally to place a construction on the will, the Master has jurisdiction to do so ; and the test of jurisdiction under Con. Rule 938 was whether the question was one which, before the existence of the Rule, could have been determined under a judgment for the administration of an estate or execution of a trust : *Re Davies*, 38 Ch. D. 210 ; *Re Royle*, 43 Ch. D. 18.

The will having been construed in the first instance favorably to the

applicants, but in the Divisional Court adversely to them, they should not be precluded from carrying the question further, if so disposed.

Order made for leave to appeal upon security being given by bond for $200 or by paying $100 into Court.

If the appeal should proceed, the costs of the application to be costs in the cause ; if it should not proceed, the applicants to pay them.

J. H. Spence, for the applicants. *J. S. Denison*, for the residuary legatees.

Osler, J.A.] TEETZEL *v.* DOMINION CONSTRUCTION CO. [Dec. 10, 1897.

Appeal—Printed case—When ordered—Rule 802—Terms.

Except where for the convenience of the Court appeal cases ought to be printed, the Court will not, as a rule, force that course upon an unwilling appellant at the instance of the respondent, upon a motion under Rule 802 (3).

If the respondent desires to have the appeal case printed, he may have it done at his own expense ; and the appellant may be put upon terms, in the event of a further appeal by him, upon which a printed case will be necessary, as to the use of the books printed by the respondent.

Aylesworth, Q.C., for the respondent. *D'Arcy Tate*, for the appellants.

Moss, J.A.] MACDONALD *v.* CITY OF TORONTO. [Dec. 17, 1897.

Parties—Substitution of plaintiff—Class suit—Dismissal of action—Appeal to Court of Appeal—Security for costs—Time extension.

A motion on behalf of the plaintiff for an order substituting a new plaintiff for him, and extending the time for giving security for the costs of the appeal to this Court, and for delivering reasons of appeal.

The action was brought by the plaintiff, on behalf of himself and all other ratepayers of the city of Toronto, against the city corporation and R. J. Fleming, to have the appointment of the latter as assessment commissioner declared illegal, etc. On the 11th November, 1897, MEREDITH, J., gave judgment dismissing the action with costs. Notice of appeal from his decision was given by the plaintiff on the 9th December, 1897.

The plaintiff wished to be a candidate for the office of mayor or alderman for the city of Toronto at the next municipal election, and feared that the continuance of the action in his name might disqualify him as a candidate.

The application was opposed by the defendants.

Held, that where a judgment has been pronounced in favor of the plaintiff in a class action, that judgment enures to the benefit of the class, and he cannot deprive the others of that benefit ; but not so where the action has been dismissed ; the reasons which apply in favor of depriving a plaintiff of the control of a favorable judgment do not exist in the case of an adverse decision. There was no ground upon which, unless by consent of the defendants, an order for substitution could be made in this case.

The plaintiff, however, in the event of his wishing to prosecute the appeal in his own name, was allowed further time to give security and deliver the draft appeal case, together with his reasons of appeal.

Bradford, for the plaintiff

Fullerton, Q.C., and *W. C. Chisholm*, for the defendants.

HIGH COURT OF JUSTICE.

Divisional Court.] GILLARD *v.* MILLIGAN. [Oct. 25, 1897.

Assignments and preferences—Costs of first execution creditor—Lapse of execution after assignment—Right to lien, R.S.O., c. 124, s. 9.

There is nothing in the Assignments and Preferences Act, R. S. O. c 124, which supersedes the execution of a first execution creditor for his costs, or which forbids him realizing them out of the debtor's goods, notwithstanding an assignment is made. In an action by such an execution creditor, who. after assignment by the judgment debtor took no active steps to enforce his execution against the assignee and his solicitor, who has received from the estate in settlement of an action a larger sum than the amount of the costs, and applied it in payment of the assignee's costs of administering the estate and the solicitor's costs of the litigation.

Held, that as there was no fund available for division among the creditors, and as the plaintiff might have proceeded under his execution to realize his costs but did not do so, he could not recover.

Semble.—Even if he was entitled to take such a position, and to rank on the estate as a preferred creditor for the costs, he could not treat the whole assets of the estate as subject to a trust in his favor prior to any other charge. He is in no better position than other creditors proving claims, except being entitled to payment in full of the costs out of such estate funds as were divisible among creditors, that is after payment of the costs of collection and assignees' charges.

J. J. Scott, for the plaintiffs. *J. M. Glenn*, for the defendants.

Ferguson, J.] IN RE PONTON. [Oct. 29, 1897.

Life insurance moneys payable to infants domiciled outside jurisdiction—Appointment of trustee to receive the shares of infants—60 Vict., c. 36, s. 155 (2).

Upon the application of the infants who were domiciled in the State of New York with the consent of their mother, the grandfather, a resident of the Province of Quebec, was appointed trustee to receive the insurance moneys upon giving security to the satisfaction of the Registrar, the bondsmen being within the jurisdiction. The insurance company were discharged upon payment to the trustee of the moneys in their hands.

W. F. Burton, for petitioner. *F. W. Harcourt*, for infants.

Ferguson, J.] IN RE SAYLOR. [Oct. 29, 1897.

Insurance moneys- nfants – Foreign trustee—Security—60 Vict. c.36, s. 155(5).

The mother of infants entitled to insurance moneys, having been appointed guardian of the infants in the State of Ohio, and having given security there, was appointed trustee to receive these moneys without giving security in this Province, upon its being shown that security had been given in the foreign country to the satisfaction of the Court there, and upon its being shown that the infants resided within the jurisdiction of a foreign court.

W. F. Burton, for the insurance company, as also for the petitioner.

Meredith, J.] DICKERSON *v.* RADCLIFFE. [Oct 30, 1897.

Discovery—Patent of invention—Action to restrain infringement—Denial of right—Details of business transactions.

In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a certain patent and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right.

Held, that there being a bona fide contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their own and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary.

J. Bicknell, for the plaintiffs. *J. B. Holden*, for the defendants.

Street, J.] RE MCCAULEY. [Nov. 1, 1897.

Will—Mortmain and charitable uses Act, 1892—55 Vict. c. 20 (O).

A devise to a bishop in trust for the use of his diocese is not a devise "to or for the benefit of any charitable use" within the meaning of ss. 4 and 5 of "The Mortmain and Charitable Uses Act, 1892," 55 Vict. c. 20 (O).

Mulkern for the petitioner.

Boyd, C.] RADAM *v.* SHAW. [Nov. 1, 1897.

Trade Mark—"Microbe Killer"—Injunction.

The words "Microbe Killer" constitute a valid trade mark which is within the class of fancy names used to distinguish one article from another by the maker or inventor. And an injunction was granted at the instance of the owner of such registered trade mark to restrain its use by another.

Davis v. *Kennedy*, 13 Gr. 523 followed.

W. Nesbitt and J. R. Roaf, for the plaintiff. *McBrady*, for the defendant.

Divisional Court.] RE SHERLOCK. [Nov. 2, 1897.

Will—Devise—Debt of named amount—Debt larger than amount named—Who entitled to excess.

A testatrix to whom a debt of £290 was owing, by her will devised as follows: "The two hundred and ninety pounds due from —— and moneys in —— to be used by my executors in payment of debts —— the balance thereof to be equally divided among the daughters of S. L. S.," and appointed two nephews residuary devisees. A larger sum than £290 was received after her death by her executors.

Held (reversing MEREDITH, C.J.), that as the testatrix had not given the debt in terms, but only a sum of money in terms the devise only gave the sum of money named, and not the whole debt.

Samuel Price, for the appeal. *W. S. McBrane*, contra.

Boyd, C.] ARMOUR *v.* KILMER. [Nov. 8, 1897.

Barristers and solicitors—Action for counsel fees—Liability of solicitors.

The present law of Ontario, in contrast with that of England, permits counsel to sue clients for the value of professional services. It also appears necessary, contrary again to the English rule, to hold in Ontario that solicitors who employ counsel have implied authority to pledge the client's credit for the payment of counsel fees, and that legal privity exists between client and counsel though a solicitor has intervened in the usual way. But the solicitor is not himself liable for counsel fees unless a bargain be made that he shall be liable, or there is evidence to show by a course of dealing or otherwise, that credit was given to the solicitor and not to the client.

H. Mickle, for plaintiffs. *Lindsay*, for the defendants.

Rose, J.] SUTHERLAND *v.* DANGERFIELD. [Nov. 17, 1897.

Mortgage—Second mortgagee and owner of equity of redemption—Right to recover value of timber cut.

The assignee of a second mortgage, who had acquired the equity of redemption to the land, but who had never been in possession, nor entitled to do so, the first mortgage being in arrears, and the land not of sufficient value to pay it off, cannot maintain an action to recover the value of timber cut by a person, acting under an agreement made with the consent of the first mortgagee by the mortgagor's wife, who had not barred her dower in either mortgage, and was in possession of the land.

D. B. Maclennan, Q.C., for plaintiff. *B. M. Jones*, for defendant.

Street, J.] MCCANN *v.* CITY OF TORONTO. [Nov. 20, 1897.

Municipal corporation—Accident—Liability—Relief over.

Before a building which was being erected for a city, had been taken over, a trap door in the roof, through the want of fastenings, was blown off, injuring a person on the street below. The trap door was a necessary part of the contract, which required all work to be done in a good, workmanlike manner, and imposed responsibility on the contractors for all accidents which they might have prevented. Damages were recovered against the city on the findings of the jury that there was negligence on its part, and that the specifications did not stipulate for fastenings. The city having paid the damages, sought to recover same from the contractors, who, in the action against the city, had been brought in as third party defendants, but on the terms that the findings in such action should be binding on them only as to the amount of damages, and that the question of their liability be afterwards tried.

Held, that under the circumstances the recovery over against the contractors could not be maintained.

Fullerton, for the City of Toronto. *James Jones*, for the contractors.

Meredith, C.J.] HEATON *v.* FLOOD. [NOV. 20, 1897.

Chattel mortgage—Omission to renew—Mortgagee taking possession—Sufficiency of—Seizure by execution creditor—57 Vict., c. 37, ss. 38, 40 (O.)

A mortgagee having omitted to renew a chattel mortgage, issued and delivered to his bailiff, after the time limited for such renewal, a warrant directing the seizure of the goods, which the bailiff accordingly seized, but left them in the possession of the mortgagor's son, who resided with his father on the premises, and his son-in-law, who resided on the adjoining premises, taking from them an instrument under seal whereby they acknowledged that they had received the goods, and undertook to deliver them to the bailiff when demanded. Subsequently the sheriff, at the suit of a creditor who had obtained execution against the mortgagor's goods, seized the goods in question.

Held, that the possession to be effective must be an actual and continued charge of possession, and that what took place here did not constitute such a possession

Quære whether, in any event, the taking of possession after the time for renewal had expired, could validate the mortgage.

A creditor, prior to the placing of his execution in the sheriff's hands, has no locus standi to attack the mortgage.

Clarkson v. *McMaster*, 25 S.C.R., 32 C.L.J. 71, commented on.

Secs. 38 and 40 of 57 Vict., c. 37 (O.) do not apply.

M. Wilson, Q.C., for the plaintiffs. *F. A. Anglin*, for the defendants.

Boyd, C.] STEWART *v.* MILLAR. [NOV. 22, 1897.

Insolvency—Assignee for benefit of creditors—Action against, for account—Assignee's compensation—Payments to inspectors—Solicitor's bill.

An action brought by J. A. Stewart, on behalf of himself and all other creditors of William Southcott, an insolvent, against James Millar, assignee, under R.S.O. c. 924, of the estate of William Southcott, to compel the defendant to carry out the trusts of the deed of assignment and the winding-up of the insolvent estate under the advice and direction of the Court.

Held, as to the compensation of the assignee, the amount received by him being only $46, that if the plaintiff was dissatisfied with this, his proper course, as pointed out in s. 11 (2) of R.S.O. c. 124, was to apply in a summary way to the Judge of the County Court to have it reviewed and readjusted; but it should not be made the subject of litigation in the High Court.

2 As to the amount paid to the three inspectors, $60, that appeared to be an unauthorized payment. No travelling expenses were incurred, and under s. 11 (3) no other allowance is to be made to the inspectors except upon a resolution of the creditors. There was no such resolution; and, although steps might yet be taken to legalize what had been done, the defendants had

not at present properly accounted for this disbursement. Unless the body of creditors should, at a proper meeting, ratify what had been done, or in so far as they should fail to do so, the defendant would have to account for this item.

3. As to the solicitor's bill, there was no need to bring an action, as the solicitor was subject to the summary jurisdiction of the Court, of which he was an officer, and liable to have his bill taxed; and the proper course was to apply for taxation.

H. Collins, for plaintiff. *P. Holt*, for defendant.

Falconbridge, J.] BARBER *v.* CRATHERN. [Nov. 27, 1897.

Assignment by insolvent—Security—Preference—Attack by creditor—Right of an attacked creditor to share in proceeds.

When proceedings are taken under sec. 7, sub-sec. (2) of R.S.O. c. 124, by a creditor on behalf of himself and all those who within a limited time should come in and contribute to the risk and expense of an action to set aside a security held by another creditor, the latter may, while defending his security join with the attacking creditor in indemnifying the assignee, so that in the event of his failing to retain his security he may participate in the fruits of the litigation.

E. Saunders, for the petitioner. *Shepley*, Q.C., for the plaintiff. *Wm. Macdonald*, for the defendant.

Ferguson, J.] IN RE NORRIS. [Nov. 29, 1897.

Assessment and taxes—Vacant tenement—Remission of taxes—Petition—Court of Revision—55 Vict. c. 48, s. 67—Mandamus.

Motion on behalf of the estate of James Norris and of the Canadian Bank of Commerce, for an order in the nature of a mandamus to the Court of Revision for the city of St. Catharines to entertain and hear a petition of the applicants. The applicants were the owners of two separate properties in the city of St. Catharines, called Mill "A" and Mill "B", which properties were assessed under their names respectively. Mill "A" had been vacant and unused for three years, and was assessed at the value of $25,000. Nothing was asked in respect of Mill "B." The petitioners by their petition asked that the taxes, or a substantial part thereof, on "Mill "A" for 1897 should be remitted.

By s. 67 of the Consolidated Assessment Act, 1892, 55 Vict. c. 48, "the Court shall also, before or after the 1st day of July, and with or without notice, receive and decide upon the petition from any person assessed for a tenement which has remained vacant during more than three months in the year for which the assessment has been made . . . and the Court may, subject to the provisions of any by-law in this behalf, remit or reduce the taxes due by any such person, or reject the petition; and the council of any local municipality may, from time to time, make such by-laws, and repeal or amend the same."

The objection of the Court of Revision was that no by-law had been passed on the subject, and, in their opinion, they could not act under the section until a by-law had been passed. There was to be another session of the Court for the year 1897.

D. L. McCarthy, for the applicants

No one appeared to show cause, although all the members of the Court of Revision and the solicitor for the town of St. Catharines were served with notice of the application.

FERGUSON, J.—Mill "A" is a tenement, and has been unoccupied more than three months of the year 1897. I am of the opinion that the Court of Revision is obliged to receive and decide upon the petition, and that the fact that the municipality has not passed any by-law on the subject does not relieve the Court from the performance of this duty. If a by-law on the subject existed, the action of the Court would be subject to the provisions of it; but when there is no such by-law, the action of the Court will simply be independent of any such provisions; their duty is to receive and decide upon the petition. The Court of Revision stands in a position such as that of a public officer having a public duty to perform, and the petitioners are citizens having an interest in the performance of that duty. I am of the opinion that the affidavit of Mr. Collier, unanswered, shows a sufficient demand and refusal. I think the order for the mandamus should go.

Ferguson, J.] [Dec. 3, 1897.

BARTRAM *v.* LONDON FREE PRESS PRINTING CO.

Security for costs—Libel—Newspaper—R.S.O. c. 57, s.9—Contentious affidavit in answer.

Upon an application for security for costs made under R.S.O. c. 57, s. 9, by the defendant in an action for an alleged libel contained in a public newspaper, the plaintiff desired to read and have the benefit of an affidavit made by himself contradicting the statements in the affidavit of the agent of the defendants on which the motion was based, and contended that the object was not to try the facts on affidavits, but to show that the agent had not knowledge of the facts, that many statements made by him were not true, and therefore that his affidavit was not such as is required by s. 9.

Held, that the plaintiff's affidavit could not be read or used upon the application.

The plaintiff in person. *A. B. Cox*, for the defendants.

Meredith, J.] IN RE MATHERS. [Dec. 6, 1897.

Infant—Trust fund—Payment to guardian—Trustees under will—Application for advice—R.S.O. c. 110. s. 37—Payment into Court.

Where an infant had become entitled to a fund, the subject of an express trust in her favour under a will, and the fund was claimed in the infant's name by her guardian appointed by a Surrogate Court, but the infant, represented by the official guardian, opposed the claim,

Held, that it was not a case in which an order should be made under R.S.O. c. 110, s. 37, upon the application of the trustees of the will, determining the claim of the guardian; but that the trustees should be allowed to transfer the fund into court.

Huggins v. *Law*, 14 A.R. 383, distinguished.

A. Hoskin, Q.C., for the applicants. *W. M. Douglas*, for the statutory guardian. *W. Davidson*, for the infant.

Rose, J.] HERMAN *v.* MANDARIN GOLD MINING CO. [Dec. 7, 1897.

Notice of trial—Irregularity—Close of pleadings—Service of papers—Waiver.

Appeal by the plaintiff from an order of the Master-in-Chambers striking out the notice of trial on the ground that the pleadings were not closed when the notice was served.

On the last day for delivering the statement of defence, which was also the last day for serving notice of trial for the Rat Portage Assizes, the defendants filed their defence a few minutes before four o'clock, and served it at the office of the plaintiff's solicitor about the same time. The plaintiff immediately filed a joinder of issue, and then served it and also notice of trial, before four o'clock, on the clerk of the defendants' solicitor, in Osgoode Hall. On the same day, but before the defence was filed, the plaintiff also served the joinder and notice of trial at the office of the defendants' solicitor.

Held, that the notice of trial was irregular, for it could not be properly served until after the close of the pleadings; and the service upon the clerk at Osgoode Hall was of no avail; it could only be effective, if at all, from the moment when it reached the solicitor himself. *McIlroy* v. *McIlroy*, 14 P.R. 264, followed, in preference to *Broderick* v. *Broatch*, 12 P.R. 561.

Held, also, that the issuing by the defendants of an order to produce at the same time that they filed their defence did not waive the irregularity of the notice of trial.

J. D. Edgar, Q.C., for plaintiff *Masten*, for defendants.

Meredith, C.J.] IN RE LOTT *v.* CAMERON. [Dec. 9, 1897.

Division Court—Action for balance of unsettled account—Liquidated claim—Prohibition.

Motion for prohibition. The plaintiff sued in the Division Court for a balance exceeding, with interest added, $100, of a debit and credit account, the debit items of which exceeded in all $400.

Held, that for all that appeared on the claim, the account though exceeding $400 may have been a settled account, and the balance an agreed or admitted balance, and therefore, want of jurisdiction under R.S.O. c. 51, s. 77, could not be said to appear on the face of the proceedings, and the granting of prohibition being therefore discretionary, it should not be granted, on this ground, in this case.

Held, however, that as the amount of the claim was not ascertained by the signature of the defendant as required by s. 70, sub-sec. 1, clause 3, it did

appear on the face of the proceedings that the amount claimed was beyond jurisdiction, but the claim for interest ($14.73) was severable, and prohibition could be limited to that part of the claim which brought it over the $100.

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

Meredith, C.J., Rose, J. }
Macmahon, J. } BROCK *v.* TEW. [Dec. 13, 1897.

Pleading—Embarrassment—Prolixity—Tendering issue—Striking out.

An appeal by the defendant in two actions brought by the same plaintiffs, in respect of different estates assigned for the benefit of creditors to the defendant, from an order of Falconbridge J., in Chambers, affirming an order of the Master-in-Chambers striking out the 10th and 11th paragraphs of the statement of defence.

The actions were brought by creditors against the assignee for an account, and to obtain dividends upon the estates. The two paragraphs in question set up that the defendants had offered to pay dividends upon certain terms, and set out at great length the correspondence and disputes between the solicitors in relation to such terms.

R. McKay, for the defendant, cited *Stratford Gas Co.* v. *Gordon*, 14 P.R. 407, and *Bank of Hamilton* v. *George*, 16 P.R. 418. *H. Cassels*, for the plaintiffs, contra.

The Court held that the paragraphs in question tendered no issue, and that prolix pleading of this kind should be discouraged.

Appeal dismissed with costs to the plaintiffs in any event.

Meredith, C.J.] FITCHETT *v.* MELLOW. [Dec. 13, 1897.

Way—Easement—Way of necessity—Physical inaccessibility—Convenience.

The defendants in an action for trespass to land set up that a portion of their land was disconnected and separated by water from the remainder of it, called the mainland, and they contended that a way of necessity over the plaintiff's land was impliedly reserved by the Crown when these lots were respectively granted, and that such a way was to be deemed to have been reserved, although the land in respect of which it was claimed was not entirely surrounded by the lands of the grantor or other persons, and although there were other means of access to it, those means not being capable of utilization without an unreasonable expenditure of money, and not sufficient for the reasonable purposes of the owner of the lands.

Held, that this contention was not maintainable.

The appellation "a way of necessity" indicates that it is founded on necessity, not on convenience. Some confusion has arisen upon the authorities from failing to distinguish between a way of necessity, properly so called, and quasi-easements which pass or are reserved under certain circumstances, where the reasonable enjoyment of the land with which they have been held to pass, could not be had by the grantee if they did not pass with the land.

Dictum of Lord Mansfield in *Morris* v. *Edgington*, 3 Taunt. at p. 31, and of Bowen, L.J., in *Bailey* v. *Great Western R.W. Co.*, 26 Ch. D. at p. 453, referred to.

The foundation of the right to a way of necessity is the fact that the lands conveyed are physically inaccessible except by passing over other lands.

Clute, Q.C., and *U. M. Wilson*, for the plaintiff. *W. R. Riddell* and *G. F. Ruttan*, for the defendants.

Ferguson, J.] VIDEAN *v.* WESTOVER. [Dec. 13, 1897.

Life insurance—Benefit certificate—"Ordinary beneficiary"—Reapportionment by will—Validity—60 Vict., c. 36, ss. 151, 159, 160—Retroactivity.

The life insurance certificate on its face made the sum of $500 payable to the daughter-in-law of the assured, but the latter subsequently, by his will, professed to make a change in the beneficiaries, leaving her out altogether. The certificate was issued, the will made, and the death of the assured occurred before the passing of 60 Vict., c. 36 (O.)

Held, that ss. 151, 159, and 160 of that Act applied to the certificate and declaration made by the will, and by those sections the assured had power to do as he professed to do by the will, the daughter-in-law being an "ordinary beneficiary," and the reapportionment made by the will was valid.

C. J. Holman, and *H. J. Dawson*, for the plaintiffs. *Tremeear*, for the defendant.

Armour, C.J.,
Falconbridge, J., Street, J. [Dec. 15, 1897.

GOSSLING *v.* MCBRIDE.

Arrest—Ca. sa.—Discharge.

Where a debtor is in custody under a writ of ca. sa., the Court cannot make an order for his discharge except under the Indigent Debtors' Act.

G. W. Lount, for the defendant. *D. Armour*, for the plaintiff.

Divisional Court.] REGINA *v.* WALSH. [Dec. 16, 1897.

Liquor License Act—Treating on Sunday—"Other disposal"—Offence—R.S.O. c. 194, s. 54.

Treating or giving liquor to friends by a landlord in his licensed premises on a Sunday is an offence under above enactment, and such treating or giving is covered by the words "other disposal" as used in that section.

Haverson, for the motion. *Langton*, Q.C., contra.

Meredith, J.] [Dec. 17, 1897.

STYLES *v.* THE SUPREME COUNCIL OF THE ROYAL ARCANUM.

Life Insurance—Action—Time—Ontario Insurance Act, 60 Vict., c. 36, s. 148 (2)—Enabling statute.

The words of s. 148 (2) of the Ontario Insurance Act, 60 Vict. c. 36, "Notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue

of a contract of insurance of the person may be commenced at any time within the term of one year," have reference to a stipulation or agreement giving less time than one year for bringing the action. It is an enabling, not a disabling, enactment.

D. B. Maclennan, Q.C., and *Adam Johnston*, for the plaintiffs.

Aylesworth, Q.C., and *D. F. MacWatt*, for the defendants.

Boyd, C., Ferguson, J., Robertson, J. } LEA *v.* LANG. [Dec. 18, 1897.

Security for costs—Application to set aside—Terms—Payment of costs—Form of order—Dismissal of action.

An appeal by the plaintiff from an order requiring him to give security for costs upon the ground that the costs of a former action brought by plaintiff against defendant for the same cause, were unpaid, was dismissed by a Judge in Chambers, and a further appeal by a Divisional Court, which held (17 P.R. 203, 32 C.L.J. 560) that the plaintiff could not answer the application by showing that the former action was brought without his authority. The costs of the appeals were made payable to the defendant in any event. The plaintiff, upon application in the former action, then had the judgment for costs against him therein set aside, upon the ground that the action was brought without his authority; and afterwards applied to set aside the order for security for costs.

Held, that the Master-in-Chambers, in setting aside the order for security for costs, had discretion to impose terms, and the terms imposed, viz., payment by the plaintiff of the costs of obtaining the order of security, of the appeals therefrom, and of the application itself, were competent and proper.

As to the form of the order, a dismissal of the action, in the event of security not being given within a limited time, was authorized by Con. Rules (1888) 1243 and 1246.

N. F. Davidson, for the plaintiff. *Aylesworth*, Q.C., for the defendant.

Boyd, C., Ferguson, J., Robertson, J. } [Dec. 18, 1897.

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

Railways—Passenger—Contract to carry—Continuous journey—Break in railway—Omnibus transfer—Refusal to carry—Damages—Costs.

The plaintiff was a passenger by the defendants' railway under a contract by which the defendants were to carry him by continuous journey from Harrisburg to Stratford, via Galt and Berlin. There was a break in the line of the defendants at Galt, where the river had to be crossed, the distance between the stations being three-fourths of a mile. The defendants advertised that there was an omnibus transfer at Galt. The plaintiff was asked to pay a fare of ten cents for the omnibus at Galt, but refused to do so, and was not permitted to be transported free from station to station. He failed to make his connection, and brought this action for damages.

Held, that the import was that the passenger was to be carried the whole distance; he was not called on to walk, and it was the business of the defendants to see that he was conveyed this distance free of expense.

Held, however, that it would have been reasonable for the plaintiff to have paid the ten cents and made his connection, and the damages should be restricted to that sum.

Hawkins v. *Great Northern R. W. Co.*, 1. H. & N. 408; *Hobbs* v. *London and Southwestern R. W. Co.*, L.R. 10 Q.B. 111; *Craig* v *Great Western R W. Co.*, 24 U.C.R. 509; and *Knight* v. *Pollard*, 56 Me. 241, referred to.

Held, also, that the plaintiff was entitled to costs, as the action was brought to test a right.

J. Bicknell, for the plaintiff. *W. Nesbitt*, for the defendants.

Boyd, C., Ferguson, J. } MILES *v.* ANKATELL. [Dec. 18, 1897.
Robertson, J. }

Fixtures — Wooden building—Removability — Mode of use—Constructive attachment to soil.

In an action upon a mortgage the plaintiff claimed foreclosure and a declaration that a certain erection upon the mortgaged premises, placed there by one of the defendants, the husband of the owner of the equity, was affixed to the freehold and part of the mortgage security.

The building in question was a small wooden structure of thin clap-board, lathed and plastered, and divided into three rooms, placed on loose bricks laid on the soil, which was perhaps somewhat levelled to make a foundation for it. It was first used as a shop or store, and then turned into a dwelling house, and this was rented for a while by the mortgagor and her husband. The building could easily be moved, and little or no injury done to the soil.

Held, that it was not in fact affixed or annexed to the soil, but was merely a chattel which might be moved at any time: *Wansbrough* v. *Malins*, 4 A. & E. 884, and *Wiltshear* v. *Cotterill*, 1 E. & B. 689.

If it was a chattel, then, according to the rule suggested in *Holland* v. *Hodgson*, L. R. 7 C. P. 334, 335, the onus was on the plaintiff to show that it could not or ought not to be removed as against him. So far he showed nothing, and the evidence of intention with which it was placed on the ground by the husband, and the other circumstances of its temporary and unsightly character, repelled the conclusion that it was to be deemed constructively attached to the freehold.

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

Rose, J.] ALEXANDER *v.* IRONDALE, &C., R. W. CO. [Dec. 18, 1897.

Discovery—Examination of officer of company—Production of documents—Setting aside subpœna.

In an action against an incorporated company to recover a money demand, the defence was that the indebtedness, if any, was not that of the company, but of the president in his private capacity. Upon an application for a better adffiavit on production of document from the company, it had been determined that the company had no documents to be produced.

Held, that upon the examination for discovery of the president as an officer of the company, he could not be compelled to produce documents or books which had been determined not to be in possession of the company, nor his own books or documents; and a subpœna served upon the president was set aside quoad the production of documents which it called for.

Steel v. *Savary*, (1891) W.N. 195, and Snow's Annual Practice, 1897, p. 650 et seq., referred to.

W. H. Blake, for the defendants. *A. C. McMaster*, for the plaintiff.

Boyd, C.] MORPHY *v.* FAWKES. [Dec. 20, 1897.

Costs—Scale of—Action to set aside fraudulent conveyance—Amount.

An action by simple contract creditors, the amount of whose claim was less than $200, suing on behalf of themselves and all other creditors, to get judgment and equitable execution against the lands of the debtor conveyed to a third person in alleged fraud of creditors. It appeared that the land was worth more than $200, and that the claims of execution creditors exceeded $600 in the aggregate.

Held, that the amount of the subject matter involved exceeded $200, and the costs should be taxed on the higher scale.

Hall v. *Pilz*, 11 P. R. 449, *Dominion Bank* v. *Heffernan*, ib., 504, and *Forrest* v. *Laycock*, 18 Gr. 611, followed.

B. E. Swayzie, for the defendants. *W. R. Smyth*, for the plaintiffs.

Boyd, C., Ferguson, J., Robertson, J. } REGINA *v.* CONLIN. [Dec. 22, 1897.

Criminal law—Larceny from person—Sentence—Police magistrate—Jurisdiction—Consent—Criminal Code, ss. 344, 783, 785, 787.

The charge against the defendant was that he, at the city of Hamilton, did unlawfully steal one purse containing $3.48 in money.

The defendant consented to be tried and was tried before the police magistrate for the city of Hamilton. He pleaded guilty, and was sentenced to three years' imprisonment.

On the return of a habeas corpus it was contended on behalf of the defendant that there was no power to impose on him for the offence a sentence in excess of that provided for by s. 787 of the Criminal Code, namely, imprisonment for a term not exceeding six months.

The contention on the part of the Crown was that the case did not fall under the provisions of s. 787 or 783, but under s. 344, and that the punishment for it might have been as great as fourteen years' imprisoment.

Held, that the fact that "larceny from the person" is omitted from clause (a) of s. 783, leaving that offence specifically provided against by s. 344, indicates an intention to have the offence punishable under s. 344, which is the section applicable to the case here; but if there was any conflict or difference between s. 783 and s. 344, the specific provisions in s. 344 would prevail over any general provisions in the other section.

And the offence being thus one to be dealt with under s. 344 the Court of General Sessions of the Peace would have jurisdiction, and the police magistrate the same jurisdiction, under s. 785, there being the consent of the defendant.

DuVernet, for the defendant. *J. R. Cartwright*, Q.C., for the Crown.

COUNTY COURTS.

COUNTY OF YORK.

HARRIS *v.* CANADA PERMANENT L. & S. CO.

Landlord and tenant—Distress—Exemptions—R.S.O, 1887, c. 143, s. 27—55 Vict., (O.) c. 31.

In 1897 a landlord distrained furniture of a monthly tenant in arrear for eighteen months rent. The furniture would have been exempt if seized under execution, and also under R.S.O. c. 143, s. 27, if seized for rent. In case of a monthly tenacy 55 Vict. c. 31 (O.) purported to amend the section with respect to such exemption. The tenant moved for an injunction to restrain sale. The motion was granted upon the ground that the language of the amendment 55 Vict. c. 31 (O.) is insensible and inoperative, and R.S.O. c. 143, s. 27 is not thereby cut down.

[TORONTO, Nov. 2, 1897.—MCDOUGALL, Co. J.

This was an application for an injunction. The facts of the case sufficiently appear in the judgment.

MCDOUGALL, Co. J.—This is an application for an injunction to restrain the sale of certain goods seized under a landlord's warrant. The parties are agreed that I shall determine the whole matter summarily, as all facts necessary to conclusion have been put in before me on this motion, and the plaintiff's rights depend entirely upon the construction to be placed on the language of R.S.O. c. 143, s. 27, as amended by 55 Vict., c. 31 (O).

Section 27 as amended by this latter Act reads as follows:

"The goods and chattels exempt from seizure under execution shall not be liable to seizure by distress by a landlord for rent in respect to a tenancy created after the first day of October, 1887, except as hereinafter provided; nor shall such goods be liable to seizure by distress by a collector of taxes accruing after said 1st October, 1887, unless they are the property of the person actually assessed for the premises, and whose name also appears upon the collector's roll for the year as liable therefor; provided that in the case of a monthly tenancy such exemption shall only apply to two months' arrears of rent."

The question is what do the words of the amendment, "Provided that in the case of a monthly tenancy such exemptions shall only apply to two months arrears of rent" mean.

The law of landlord and tenant as it stood before the passage by the Legislature of s. 27 of R.S.O. 143 allowed the landlord under his warrant of distress to take all goods found on the demised premises. This was the harshness of the common law, and it had prevailed for a long series of years. The tenant had no exemption save that the landlord could not take the beast

off the plough at work, articles in actual use at the time of seizure and certain similar exceptions, allowed, it is believed, solely because the taking under certain circumstances might lead to a breach of the peace. The more humane tendencies of modern times were expended in many directions and for many years, before the harsh law in favor of the landlord was approached. It was not until 1887, by 50 Vict., c. 23, s. 1 (O.) that our Legislature made a sweeping change, and placed all tenants whose tenancy commenced after 1st of October, 1887, upon the same footing as other debtors, and declared that the goods and chattels exempt from seizure under execution should not be liable for seizure under distress for rent. This broad remedial enactment continued in force until 1892, when the amendment which is now under consideration in this case was made, but purported to apply only to monthly tenancies. In the present case the tenancy was a monthly one. There was about eighteen months rent in arrear at the date of the seizure. The goods seized it is admitted are goods which would be exempt from seizure under execution. Are they exempt from seizure by distress under the provision of the statute, or if not what are the tenant's rights?

The first point to be noticed in the confusing language of the proviso is that it states in a case of monthly tenancies, "such exemptions shall only apply to two months' arrears of rent." Now, the exemption spoken of in s. 27 does not apply to rent, but to goods. There is no such thing as an exemption applying to arrears of rent. The original section, remedial and clearly expressed, gives to every tenant the right to claim all his goods as exempt from distress which would be exempt under execution. Has the proviso of 1892 cut down by clear and intelligible language this clearly expressed right? Does the clause mean that a tenant can claim for his goods exemption only where he is exactly two months in arrears with his rent; that if he be only one month in arrear or three months in arrears he can claim no exemption at all? It is argued that as the proviso takes away from monthly tenants a right which is not affected in the case of tenants holding by the week or quarter or year, such an intention must be expressed in most clear and positive language, otherwise it will not be inferred that the Legislature intended to deal so hardly with a particular class of tenants as distinguished from all other tenants.

Again, if it is meant that to the extent of two months arrears, i.e., one month or two months, but not exceeding two months, the tenant is to have the benefit of the original exemption of certain of his goods from seizure, does it mean that when his arrears of rent exceed two months he is to have no exemption whatever? In other words, is a monthly tenant, in arrear for more than two months, to be viewed as if still under the old common law and liable to have the bed taken from under his sick wife or child, and even his own clothing, or those of his wife and children, taken, if not in actual use at the time of the seizure? Or does it mean, though I see no authority in the language for this latter view, that he is entitled to claim as exempt goods to the value of two months' rent? Or does it mean that all the goods may be sold and he entitled to claim out of the proceeds money to the extent of two months' rent? Is it possible to put a fair and reasonable interpretation upon the language of

the Legislature which can be given effect to? I cannot, I confess, gather the intention. If I am unable to ascertain with reasonable clearness the intention from the language used, I am not allowed to supply a meaning or guess it. As said by Grove, J., in *Richards* v. *McBride*, 8 Q.B.D. 122: "We cannot assume a mistake in an Act of Parliament. If we did so we should render many Acts uncertain by putting different constructions upon them according to our individual conjectures. The draftsman of the Act may have made a mistake. If so, the remedy is for the Legislature to amend it."

I am unable to say from the language used in this proviso what limitations the Legislature intended to put on a monthy tenant's right to exemption for certain of his goods when sought to be taken by a distress for rent. Rather than guess at its meaning it is better to say that the words have no meaning at all. I must, therefore, hold that this tenant's goods were exempt from seizure at the time of this distress, and that the plaintiff is entitled to his order for an injunction.

A. F. Lobb, for plaintiff. *R. B. Beaumont*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Townshend, J.] TOWN OF AMHERST *v.* FILLMORE [Nov. 5, 1897.

Municipal law—Remuneration of councillors—Recovery of money drawn as salary.

This case was tried before Townshend, J., at Amherst, Oct, 1897. The defendant was a member of the town council of Amherst in 1891. The council passed a resolution for the payment of a salary of $100 to each of the councillors and defendant received said sum. Ss. 68, 81 and 269 of the Towns' Incorporation Act, 1888 gives the council power to provide for the salaries and emoluments to be paid to "the officers" of the town. The town brought an action against the defendant to recover the money paid as salary to defendant as councillor, and the defendant pleaded the resolution of the council under which the payment was made.

Held, that a councillor was not an "officer" of the town within the meaning of the Act; and that the town was entitled to recover the money.

TOWNSHEND, J., in giving judgment said, "One cannot shut their eyes to the strong reasons for debarring a body corporate for municipal purposes voting money to themselves or in any way being interested in municipal contracts. Practical experience has proved it to be a source of corruption and weakness. Public policy is against it. If the council could vote themselves $100 they might with equal right vote $1,000 or even more and the citizens would be without remedy. The authorities are numerous and consistent on this subject and it will therefore be unnecessary for me to go through them with any

detail. I may, however, cite a short extract from the judgment of Burns, J., in *Municipal Council of Nissouri* v. *Horseman*, 16 U.C.R., at p. 388: 'The members or councillors comprise the council and not the corporation—they are agents of the corporation for the management of the affairs and funds of the corporation. When these agents have been proved so to misappropriate the funds or to put money into their own pockets, I think an action will lie against them to recover it back.'"

Townshend, Q.C., and *Borden*, Q.C., for plaintiff.

Dickey, Q.C., for defendant.

Full Court.] THE QUEEN *v.* HORTON. [Dec. 13, 1897.

Criminal Code, ss. 501, 872 (b)—Wilfully killing a dog—Conviction—Adjudging payment of a money penalty, and in default, imprisonment with hard labor—Condition not to prosecute.

The defendant H. was found guilty under s. 501 of the Criminal Code of the offence of wilfully killing a dog, and was adjudged to pay a penalty of $10 and $30 compensation and costs, and in default of payment, forthwith to be imprisoned for the period of three months with hard labor. Under the provisions of section 501 a person found guilty under it is liable (1) to a penalty not exceeding $100 over and above injury done, or (2) to three months' imprisonment absolute, with or without hard labour.

Held, that the conviction was bad for imposing imprisonment with hard labour under the Code, s. 872, sub-sec. b., in default of payment of the fine, and that defendant was entitled to a writ of habeas corpus for his discharge on giving an undertaking that no action should be brought against anyone on account of the proceedings taken. See *R.* v. *Turnbull*, 16 Cox C.C. 110.

Held, that when the justice came to make the conviction and to provide for the enforcement of the money penalty he should have had recourse to s. 872, sub-sec. b., which deals with this matter, and supplies the limits and manner of imprisonment which may be imposed in default of payment of a money penalty, and could not award hard labor.

J. J. Power, for prisoner. *J. F. Frame*, for complainant.

Meagher, J.] IN RE BAILLIE.

Insolvent estate—Remuneration to trustees—Leave to creditors to come in and sign deed after expiry of time fixed for that purpose—Costs.

On application by trustees for creditors, under assignment dated January 20th, 1897, to have their remuneration fixed, it appeared that the assets realized $14,680 04, that the amount paid creditors was $13,058, and that the balance remaining on hand was $1,621.61.

Held, that the sum of $700 was a reasonable allowance to the trustees.

The deed provided that after payment of preferred creditors the balance should be distributed among such other persons being creditors as should become parties to the deed by executing it within ninety days from date.

Held, notwithstanding the expiry of the time, that leave should be given

to S. & Co., creditors, to come in and execute the deed, it appearing that they had remained passive, and that they had not acted in a hostile manner, and that no prejudice could arise from such permission. But

Held, that as the delay was deliberate the permission sought should only be given on payment of costs which, for the purpose, were fixed at $5.

Province of New Brunswick.

SUPREME COURT.

Forbes, J.,
At trial. } MILLER *v.* MCPHERSON. [Oct. 26.

Trover—Agreement for sale—Registration.

The defendant took from one C. W. a chattel mortgage on a number of articles, including a wagon, which C. W. obtained from the plaintiff under the following agreement:

I reside at Fredericton, in the County of York, and I hereby agree with Eben Miller & Co. . . . that the title, ownership and right to possession of the 3-spring butcher express wagon, for which I have this day given them my promissory note numbered 13, shall remain in the said Eben Miller & Co. until the said promissory note and any renewal or renewals thereof are fully paid.

Dated 4th August, A.D. 1896. (Sgd.) C. W.

And afterwards seized and sold the property, including the wagon.

Held, in an action of trover that the agreement was not one requiring registration under the Bills of Sale Act, there being no transfer of property from the plaintiff to C. W.

Oswald S. Crocket, for plaintiff. *C. E. Duffy*, for defendant.

Full Bench.] EX PARTE HEBERT. [Nov. 6, 1897.

Liquor License Act—Discretion of the Board of Commissioners.

On application for a license under the Liquor License Act of 1896, the Board of Commissioners of their own motion took objection to the granting of a license to the applicant on the ground that he had previously sold liquor without license, and notified him to appear and answer the objection. At the time fixed for the hearing the applicant appeared, but the Board declining to hear him in answer to the objections thus raised, refused to grant the certificate for a license on the ground that the notice published by the inspector designating the premises of the applicant did not describe them with sufficient certainty, and directed him to make a new application.

Held, on an application for a mandamus to compel the Board to issue a certificate for a license, following *Ex parte Mayberry* and *Rogers*, 33 C.L.J. 505, that the Court could not control the discretion of the Commissioners in refusing to grant the certificate, but that, had the application been for a mandamus to compel them to hear and decide upon the objection which they had raised as to his having sold liquor previously without license, the rule would have been granted.

J. D. Phinney, Q C., for applicant. *White*, Attorney-General, contra.

Full Bench.] CLAIRE *v.* LYNOTT. [Nov. 12, 1897.

Witness disobeying a subpœna.

Application for a rule nisi for an attachment against J. L. for disobeying a subpœna. The affidavits disclosed that he lived twenty miles from the court house, and was tendered and accepted $2.25 conduct money, which the Court was of opinion was not sufficient to cover his expenses.

Held, however, that, having accepted the money without objection to the sufficiency of the amount, he should be called on to show cause.

Oswald S. Crocket, for defendant, the applicant.

Full Bench.] [Nov. 16, 1897.

EX PARTE RAYWORTH.

Canada Temperance Act—Adjournment—Day of week or month.

The magistrate adjourned the hearing of a C.T.A. case to Tuesday, December 28th, when M nday was in fact the 28th and Tuesday the 29th December, and on the latter day entered a conviction, the defendant not having appeared either on the return of the summons or on the day of conviction.

Held, that the day of the week governed, and that the conviction was properly made on Tuesday, December 29th.

Rule for certiorari discharged.

D. Grant, in support of rule.

J. W. McCready, contra.

Full Bench.] SMITH *v.* ST. JOHN CITY RY. CO. [Dec. 8, 1897.

Consolidation of suits—Sufficiency of order for.

The Imperial Trusts Co. by petition to Harrington, J., sitting in equity, prayed for directions as to the distribution of $15,360.85 which had been paid over to them out of the funds deposited with the Receiver-General to the credit of these suits. In his order or decree on this petition Judge Harrington declared that these suits by order of the Court in equity on the 26th day of October, 1893, had been consolidated and directed that all costs in connection with the same be taxed on the basis of such consolidation. On appeal from

this decree the only record relied on in support of the contention that the suits were consolidated was the following declaration of the learned Judge contained in the stenographer's notes of the proceedings, and made on the 26th October, 1893: "All consolidated cases and matters to be hereafter considered together, the official stenographer, to notify all parties of this."

Held, per TUCK, C.J., and LANDRY, J. (VANWART, J., dissenting), that the above, informal as it was, was a sufficient order of consolidation, particularly as no one objected to it, and so many other matters in the same cases had been done by consent of counsel in a similarly informal way.

Appeal dismissed with costs.

Pugsley, Q.C., for appellants. *H. H. McLean*, contra.

Barker, J.
In Equity, THIBAUDEAU *v.* SCOTT. [Dec 10, 1897.

Security for costs—Plaintiff residing abroad—Third party interested.

The plaintiff, residing at Montreal, obtained a judgment in the Supreme Court of New Brunswick on July 16th, 1897, for $952.65 against the defendant S., and brought a suit in equity to set aside a bill of sale given by S. to the other defendants a few days previous to the date of the judgment. The defendants, including S., applied for security for costs. For the plaintiff it was argued that the security should not be for the benefit of S. on account of the judgment debt due by him to the plaintiff.

Held, on the authority of *Crozat* v. *Brogden*, (1894) 2 Q.B. 30, that the security should be for the benefit of S. as well as the other defendants.

A. H. Hanington, Q.C., for application. *H. F. Puddington*, contra.

EXCHEQUER COURT—ADMIRALTY DISTRICT.

McLeod, J.] PALMER *v.* SHIP "FRED E. SCAMMELL." [Nov. 20, 1897.

Ship—Action of restraint—Minority owner—Charter party.

The managing owner of a vessel entered into a charter on July 9 to load with lumber from a New Brunswick port for the United Kingdom, and brought the vessel to New Brunswick for that purpose. While loading in pursuance of the charter the vessel was arrested in November in an action of restraint by a minority owner, who, however, had no real interest in the shares, and was under an obligation to transfer them to the beneficial owner upon request. On an application by the managing owner and other co-owners for the release of the vessel:

Held, that the application should be refused, upon the authority of *The Talca*, 5 P.D. 169; distinguishing *The Vindobala*, 13 P. D. 42; and that the plaintiff appearing on the registry to be the owner of shares in his name, the Court would not consider in what character he held them.

A. O. Earle, Q.C., and *A. H. Hanington*, Q.C., for the application. *A. A. Stockton*, Q.C., and *C. A. Palmer*, Q.C., contra.

ST. JOHN COUNTY COURT.

Forbes, J.] R. *v.* C. W. BRENNAN. [Dec. 10, 1887.

C. T. Act, c. 106, R. S. Can.—Sale on board steamer—Sale by agent.

The defendant is the captain and part owner of the steamer "May Queen" plying on the river St. John between the cities of St. John and Fredericton. By an agreement between the owners of the steamer and one George Brennan the latter had the right to supply and sell meals and refreshments to passengers at his own profit in consideration of discharging the duties of steward and providing the necessary help therefor. He was also paid a salary by the owner of the steamer to assist in collecting passenger fares. The Canada Temperance Act, c. 106, R.S.C., is in force in the County of Queen. While the steamer was lying at Chipman, in that county, George Brennan sold liquors on board the steamer, and an information was laid against the defendant under the above Act. By s. 100 of the Act "Every one who, by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly on any pretence or by any device, sells or barters, or in consideration, etc. 2. Everyone who, in the employment or in the premises of another, so exposes or keeps for sale, or sells, or barters, or gives in violation of the second part of this Act, any intoxicating liquor, is equally guilty with the principal," etc. On an appeal from a conviction of the defendant:

Held, that the conviction should be quashed.

F. A. McCully, for the prosecution. *J. R. Dunn*, for defendant.

Province of Prince Edward Island.

SUPREME COURT.

Full Court.] EX PARTE MORRIS. [Dec. 13, 1897.

Canada Temperance Act—Certiorari—Transfer of liquor in bond.

Application for certiorari to quash a conviction under the C. T. Act by the stipendary magistrate of the city of Charlottetown.

The applicant Morris had certain liquor in the bonded warehouse with the duty unpaid. While the goods in question were in bond he transferred them to one C., who paid the duty thereon and removed them. Under these circumstances the magistrate fined Morris for an infraction of the C. T. Act.

Held (HODGSON, J., dissenting), that the conviction was right, there having been a sale when the said Act was in force.

Per HODGSON, J., that the conviction was wrong, and should be quashed. That the C. T. Act does not, nor ever was intended to apply to mercantile transactions such as this. That liquors in bond may be, and often are, retransferred out of the country, and that the transfer of bonded goods create legal obligations between the transferee and the sovereign, incompatible with the commission of a crime, which, under the C. T. Act, a sale of liquor is.

Stewart, Q.C., for rule. *Morson*, Q.C., contra.

Full Court.] YOUNG *v.* MCISAAC. [Dec. 13, 1897.

Property in seaweed on foreshore—Rights of riparian owner.

This important case involved the question of the right to take seaweed from the seashore. At the trial exceptions were taken to the judge's rulings. On motion to set aside the verdict the following propositions of law were unanimously approved of by the court.

1. A proprietor whose boundary towards the sea is the bank or shore of a river or body of water, that boundary is high water mark, meaning by that ordinary or neap tides which happen between the full of the moon twice in twenty-four hours.

2. That seaweed, or any increment of the sea thrown upon, or up to, such land, leaving an increase arising by slow degrees, is deemed by the common law to belong to him as the owner of the soil, and that its protection to the bank forms a reasonable compensation to him for the gradual encroachment of the sea.

3. That the riparian owner, in common with all Her Majesty's subjects, has a right to take what seaweed he can, when it is floating, by a right as undoubted as that to catch fish when swimming in the sea, quite irrespective of the person in whom the foreshore is vested.

4. That if the foreshore has been granted by the crown, the grantee alone by virtue of that grant has the sole right to the seaweed stranded by the ebbing tide.

5. That if the foreshore is ungranted the crown alone has the right to the stranded seaweed, and no one has the right to take it, but if anyone gathers it no person can take it from him unless he can show a better right than his, i.e., nobody but the crown or its grantee.

Peters, Q.C., Attorney-General, *McLean*, Q.C., and *Matheson*, for plaintiff. *M. A. McLeod*, Q.C., and *Stewart*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Taylor, C.J.] [Nov. 27, 1897.

GRAHAM *v.* BRITISH CANADIAN LOAN & INVESTMENT CO.

Principal and agent—Constructive notice—Fraud—Ratification—Acquiescence—Executors—Lien for taxes paid.

This was an action commenced on the Equity side of the Court before the coming in force of the Queen's Bench Act, 1895, to have three mortgages held by the defendant company declared fraudulent and void as against the plaintiffs, and a cloud upon the title to certain lands left by the will of Margaret Logan to the mother of the plaintiffs as executrix in trust for their use with authority to exercise her discretion in the management af the property, and to sell and dispose of the same in any way she might think proper for the benefit of the plaintiffs, but without any power to mortgage the lands.

The executrix, wishing to raise some money on the security of the land, applied to the agent of the defendant company in Winnipeg for a loan on mortgage of the property, and with his knowledge it was conveyed to Miss MacDonald by deed dated the 14th March, 1881. A mortgage was then taken by the company for $2,000 the 16th March, 1881, signed by Miss MacDonald, but the evidence showed that the agent of the company was well aware that there was no real sale to Miss MacDonald, and that no consideration had passed for the deed, and that the executrix and the plaintiffs remained in possession of the property, although it did not appear that the scheme adopted had been suggested by the agent. The evidence also, in the opinion of His Lordship, showed that the solicitor of the company must have known the above facts in connection with the loan, or would have ascertained them if he had made the proper inquiries.

The property was reconveyed by Miss MacDonald to the executrix by deed dated 17th March, 1881, for an expressed consideration of $1,000, and on the 18th November, 1881, a further loan was made on the mortgage of the executrix herself for $2,000, and on the 8th November, 1884, a third mortgage was executed to secure a further sum of $1,200. It was shown that the agent of the company was authorized to make loans and put them through subject to the approval of a local board as to value, and to the report of the solicitor on the title. The application for the first loan showed that the value of the property was at least $7,000 at a forced sale, whilst the consideration stated in the deed to Miss MacDonald was $5,000. The deed and mortgage bore evidence of having been executed about the same time and were registered at the same time, and the solicitor made no inquiry as to the possession.

Held, that the solicitor ought to have known that a breach of trust had been committed, that the agent's knowledge of the fraud committed must be imputed to his principals, and that the circumstances brought the case within the principle laid down in Evans on Principal and Agent, page 516, as follows. "A principal is liable to third parties for whatever the agent does or says, and whatever fraud or wrong he commits, provided the agent acts within the scope of his apparent authority, and provided a liability would attach to the principal if he were in the place of the agent."

Held, also, following *Staintor* v. *Carron Co.*, 18 Beav. 146, and *Yeatman* v. *Yeatman*, 7 Ch. D. 210, that the plaintiffs had a right to bring the action in their own names as the executrix could not sue; and that the Statute of Limitations afforded no defence in any way, as the company never had, but the plaintiffs had always been in possession.

Some evidence was given to show that one of the plaintiffs, being seventeen years of age at the time, had been aware of the making of the loans, and had been present at some of the meetings and interviews between the parties, but the Chief Justice considered that there was nothing to show that she should be estopped in any way by conduct or acquiescence from setting up the present claim. He also held that there was nothing to show that the money borrowed had been used in the maintenance and education of the plaintiffs in any way. The company claimed a lien on the land for money for insurance premiums and taxes, and to redeem the land from a tax sale.

Held, that they were entitled to such lien in respect of the taxes, but not for the insurance premiums.

Judgment declaring the mortgages void as against the plaintiffs, and a cloud upon the title of their lands, but providing for a lien in favor of defendants for moneys paid for taxes, and tax sale redemption.

Ewart, Q.C., and *Andrews*, for plaintiffs. *Mulock*, Q.C., for defendants.

Full Court.] BERTRAND *v.* CANADIAN RUBBER COMPANY. [Dec. 6, 1897.

Fraudulent preference—Insolvent circumstances—Intent to prefer.

Judgment of KILLAM, J., noted 33 C.L.J. 550, affirmed with costs.

Tupper, Q.C., and *Phippen*, for plaintiff. *Hough*, Q.C., and *Richards*, for defendant.

Bain, J.] WILTON *v.* MURRAY. [Dec. 6, 1897.

Watercourse—Drainage—Right to obstruct flow of water.

The plaintiff's claim was that a watercourse ran through her land into and across the defendant's land, and thence into a gully or slough on the defendant's land, which finally emptied into Long Lake; and that for some years past the defendant had obstructed the flow of water in this watercourse by building a dyke or embankment across it on his own land, the effect of which had been to throw the water back upon and overflow the plaintiff's land. And the prayer was that the defendant might be ordered to remove the obstruction this made, and be restrained from continuing it.

Most of the land in the neighborhood is low and flat, and the natural drainage of the plaintiff's land, and of several of the farms to the south and west, is by the alleged watercourse above referred to. The easterly part of the plaintiff's quarter section thus spoken of is high land, but along the westerly part of it there is what is called a depression extending through the quarter section from south to north, crossing into defendant's land and continuing through it till it reaches the slough or gully above mentioned. The fall in the level of this depression from the south line of the plaintiff's land to its lowest level, where it crosses into the defendant's land, is very slight, and at that point the depression has a width of about 300 feet. There is no continuous flow of water through it, but every spring the rain and melted snow from the lands south and west of the plaintiff's land, and from the higher parts of her own land flow or drain into it, and covering it to a depth of six inches or more, according to the season, gradually pass off, in the absence of obstruction, across the defendant's land into the slough. In the high water there is a perceptible northerly current for a few days, and the height of the water on the slope of the depression, and the general course of its flow are defined by the rubbish deposited along the edge of the current, but the position of this line of rubbish varies from year to year, according to the height of the water. Apart from this there was no evidence of the existence of any banks or edges of a channel through which the water flows, and in some years the plaintiff has cultivated portions of this depression right up to her western line.

Held, that there was no watercourse which plaintiff had any right to have kept free and clear of obstruction for the benefit of her land, and that her action must be dismissed with costs. A watercourse has been defined to consist of bed, banks and water, and while the flow of the water need not be continuous or constant the bed and bank must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground, and according to the evidence such do not exist in this case.

Full Court.] RE TAYLOR AND CITY OF WINNIPEG. [Dec. 11, 1897.

Municipality—By-laws—Dairy inspection—Ultra vires.

Appeal from judgment of Dubuc, J., noted 33 C.L.J. 580, dismissed with costs except as to paragraphs 17 and 22 of the by-law in question.

Held, that a vendor of milk could not be required to state where he obtained the milk he has sold or is about to deliver as required by pp. 17, because his answer might subject him to the cancellation of his license, and the other penalties provided for by the 24th and 28th paragraphs of the by-law, or to permit a sample or samples of any milk being delivered or intended to be delivered to any customer in the city to be taken for examination as required by the 22nd par. under the penalties provided for in the by-law in case of refusal, because no provision was made for compensation for what might thus be taken; and that the by-law in those respects was ultra vires.

Mathers, for applicant. *J. Campbell*, Q.C., for city of Winnipeg.

Full Court.] FOSTER *v.* LANSDOWNE. [Dec. 11, 1897.

Municipality—Negligence in exercising statutory powers- Right of action—Arbitration—Pleading.

This was an appeal from the judgment of Dubuc, J., noted 33 C.L.J. 579, overruling a demurrer to the statement of claim herein, which alleged that the defendants by constructing in a negligent and improper manner a ditch for drainage purposes had caused the plaintiff's land to be overflowed with water whereby he had suffered damages, but did not allege that any by-law had been passed by the council of the municipality authorizing the construction of such drain.

The Municipal Act apparently gives no authority to the council to execute any such drainage works without first passing a by-law providing for it.

Held, that it is doubtful whether s. 665 of the Municipal Act does not confine the remedy to arbitration, and prevent a party from resorting to an action in case of damage resulting from the exercise of the statutory powers of the municipality in the construction of drainage works whether negligence be alleged or not, but that it was unnecessary to decide that question, as the statement of claim in this case did not show that there had been any by-law to authorize the work in question, and the Court could not assume that there

had been, and for all that appeared the work may have been done without statutory authority, and that the statement of claim was not, therefore demurrable. Appeal dismissed with costs.

Metcalf and *Sharpe*, for plaintiff. *Attorney-General*, and *James*, for defendant.

Full Court.] ADAMS *v.* HOCKIN. [Dec. 13, 1897.

Real property Act—Caveat—Description of land—Statement of interest claimed—Address of petitioner—New evidence on appeal—Rule 476, Q.B. Act, 1895.

This was an appeal from the decision of Taylor, C J., noted 33 C.L.J. 701, dismissing the petition of the caveator with costs.

Held, reversing this decision, that the description there set out was not necessarily indefinite and uncertain, unless there was more than one plan of Oak Lake, when an ambiguity might arise, that, if it followed the description given in the application of the caveatee, it would, according to the form in schedule O, be sufficient; and that both the caveat and petition sufficiently showed what estate, interest or charge the caveator claimed; also that there was no rule of Court requiring the address or description of the petitioner to be stated in his petition, and that the order of the referee should be restored with costs to petittoner of both appeals.

The respondent applied under Rule 476 of the Queen's Bench Act, 1895, for permission to put in evidence to show that the description in the caveat differed materially from that in the application.

Held, that upon payment of the costs of both appeals, such evidence should be received. Order that if respondent should pay such costs within five days after taxation, the order for an issue made by the referee should be rescinded and the matter referred back to him with leave to adduce the evidence mentioned, but if not so paid the order of the referee should stand confirmed with costs of both appeals to be paid by the caveatee.

Clark, for caveator. *Patterson*, for caveatee.

Bain, J.] [Dec. 22, 1897.

CARRUTHERS *v.* HAMILTON PROVIDENT & LOAN SOCIETY.

Mortgagor and mortgagee—Negligence in exercising power of sale.

The plaintiff claimed damages for the sale of his farm by defendants under powers of sale contained in two mortgages, interest being in arrear. The property was near Portage la Prairie, and in the centre of a district of good farming land. The evidence showed, in the opinion of the trial Judge, that the property was worth $3,700, and would have brought that amount at an auction sale if properly advertised. Defendants, however, sold it for $2,800, subject to unpaid taxes.

Held, that defendants were liable for the difference between the two amounts, because they had so negligently and carelessly conducted the sale proceedings that the property was sacrificed.

The objections to the advertisement and sale were as follows :

1. There was no advertisement in any local newspaper; but only in a newspaper published in the town of Brandon, between seventy and eighty miles distant, and which was not shown to have any circulation in the neighborhood of Portage la Prairie.

2. The advertisement itself made no mention of the fact that the farm was an improved one, with valuable buildings on it, and 100 acres ready for next year's crop, but simply described the property as the N. E. ¼ of section 22, tp. 12, range 7, west; and it also contained a description of other properties to be offered for sale at the same time. As to another of these, it stated that "the vendors are informed that on parcel (1) there is a two-story dwelling house," thus suggesting the inference that the plaintiff's land was unimproved.

3. The sale took place at Brandon instead of Portage la Prairie.

Aldrich v. *Canada Permanent*, 24 A. R. 193, followed.

C. H. Campbell, Q.C., for plaintiff. *A. D. Cameron*, for defendant.

MASSEY-HARRIS COMPANY *v.* WARENER.

Exemptions—R.S.M., c. 80, s. 12—Queen's Bench Act, 1895, Rules 803-806—Evidence—Affidavit.

This was an appeal from the decison of BAIN, J., noted 33 C.L.J. 777, who held that where the judgment debtor had conveyed his farm to his wife for the purpose of defeating and delaying creditors, he could not claim the benefit of the Exemption Act, as against the plaintiffs' registered judgment, although he was living on the land.

The judgment debtor had been served with a notice of motion under the Queen's Bench Act, 1895, Rule 803, calling upon him to show cause why the land should not be sold, and took the objection which he had also taken before the Referee and BAIN, J., that the evidence produced by the plaintiffs was not sufficient to prove the registration of the judgment relied on. This evidence consisted of an affidavit sworn by a clerk in the plaintiffs' employment, in which he stated that the plaintiffs had recovered a judgment against the defendant in the County Court of Belmont, and caused a certificate of said judgment in the proper form required by the statute to be issued, and that the same was duly registered in the land titles office for the district of Morden, where the lands in question are situated, but did not show his means of knowledge of such facts. Besides this affidavit, a post card was filed, having a memorandum on it to the effect that a certificate of judgment for $110.20 at the suit of the *Massey-Harris Co.* v. *Robert Warener* was received and registered 24th July, 1896, but not stating where the same was registered. The post card was not signed otherwise then by the stamping of the words "District Registrar" at the foot, and at the top were written the words, "L. T. O. Morden."

Held, that such evidence was not sufficient to prove the registration of the

judgment relied on, that a certified copy of the certificate should have been produced, and that the appeal should be allowed with costs, without prejudice to another application or any other proceedings.

The Court expressed no opinion upon the question of the defendant's right to claim exemption for the land.

Culver, Q.C., for plaintiffs. *Metcalfe and Sharpe*, for defendant.

Full Court.] INCH *v.* SIMON. Dec. 23, 1897.

Bills of Sale Act—Chattel mortgage—Affidavit of execution sworn before the mortgagee.

Held, that under the Bills of Sale Act, R.S.M., c. 10, it is not a fatal objection to a chattel mortgage that the affidavit of the witness as to its execution by the mortgagor has been taken before the mortgagee himself, he being a commissioner for taking affidavits in the Province, as there is nothing in the Act to prevent such a course being adopted.

Pitblado, for plaintiff. *Bradshaw*, for defendant.

Province of British Columbia.

SUPREME COURT.

Bole, Loc. J.] MEISTER *v.* PHILP. [Dec. 10, 1897.

Commission to take evidence out of the jurisdiction.

Application was made in this case on behalf of the plaintiff for a commission to examine him at Seattle, and the defendant resisted the application on the ground, inter alia, that he desired to have the plaintiff cross-examined before the court.

Held, following *Castelli* v. *Groome*, 21 L.J. Q.B. 309, that it lies upon the person applying to the court to show that it would be conducive to the due administration of justice that the commission should issue. It is not enough to show that the plaintiff or defendant lives out of the jurisdiction of the court. It would lead to most vexatious consequences, if constant recourse could be had to this power, and it would be so in all cases where parties wish to avoid the process of examination in court. *Berdman* v. *Greenwood*, 20 C.D. 764; *Ross* v. *Woodford* (1894), 1 Chy. 42; *New* v. *Burns*, 64 L.J. Q.B. 104, *Ehrmaun* v. *Ehrmaun*, 65 L.J. Chy. 747.

Application refused.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

Rouleau, J.] MONGENAIS *v.* HENDERSON. [Oct. 28, 1897.

Costs—Taxation—Counsel fees—Practice in N.W.T. as to setting cause down for trial differs from English practice.

Appeal by the defendant, Henderson, from the Clerk of the Court to the Judge against the disallowance by the Clerk, on taxation of costs, of fees for brief, including counsel fee, advising on evidence and fee with brief at trial.

On June 23, plaintiffs took out an order to "set this cause down for trial at the next sittings of this Honorable Court, commencing on Tuesday the 2nd day of November, 1897 . . . . and that advocates for the plaintiffs do give to the advocates for the defendants eight days' notice of such trial, after which the cause may come on to be heard."

On October 22nd the plaintiffs with the consent of the defendant Henderson procured an order to discontinue as against him "on payment of his costs forthwith after taxation." On the taxation of costs all items respecting brief, counsel fee, advising on evidence and counsel fee with brief at trial were disallowed by the Clerk, on the ground that the notice of trial provided for in the order setting down had not been given.

On appeal it was contended for plaintiffs that cause had not been set down, and that defendant was not entitled to costs of brief until after notice of trial given: *Freeman* v. *Springham*, 32 L.J. C.P. 249; *Cooper* v *Boles*, 5 H. & N. 188.

For the defendant it was contended that the practice in the North-West Territories in this matter differed from that in England. The order setting down virtually covered the English notice of trial and order entering.

ROULEAU, J.: The English practice is set out in E.M.R. 435, 436, 439 and 444. Our procedure is laid down in J. O., section 154, which provides that "After the close of the proceedings the plaintiff may at any time, on notice to the defendant, apply to the Judge for and obtain an order setting down the cause for trial . . . at such time and place as the Judge shall direct. . . . But if such application be not made within three months after the close of the pleadings, the defendant on notice may apply for and obtain an order to set the cause down for trial."

It is quite clear that the practice in the Territories with regard to setting a cause down for trial differs from the practice in England in that behalf. With us the order setting down takes the place of the English notice of trial and order entering. No importance is to be attached to the fact that in the order setting down, provision is frequently made for notice of trial before hearing. This notice is a mere matter of courtesy, and the order is not

impaired if no clause with regard to it be inserted. The date of the opening of court is fixed, and litigants must be ready for trial on that day. Defendant is therefore entitled to tax items claimed, except fee with brief at trial.

P. McCarthy, Q.C., for plaintiffs. *James Short*, for defendant Henderson.

Scott, J., Rouleau, J.] REGINA *v.* MONAGHAN. [Dec. 7, 1897.

Indian Act—Certiorari—Stated case—Res judicata.

The defendant had been charged on an information and convicted under R.S.C. c. 43, s. 94, "for that he did sell to an Indian intoxicating liquor," etc. At the close of the evidence, defendant's counsel objected that two offences were charged. After consideration the magistrates drew up the conviction as above. The defendant thereupon applied for, and obtained a stated case, under s. 900 of the Criminal Code, which was heard before Mr. Justice Scott, who held that to give and sell were not two offences, and affirmed the conviction. The magistrates having transmitted the conviction and proceedings to the Clerk of the Court at Macleod, under s. 801 of the Crim. Code, the defendant applied for and obtained from a single Judge a rule nisi returnable before the full Court, sitting en banc at Regina, asking that the conviction be quashed on the same grounds as were taken on the stated case, and a direction was given to the Clerk at Macleod to transmit the conviction, etc., to the Registrar of the Court at Regina, which he did.

On the return of the rule nisi at the sittings of the full Court at Regina on Dec. 6, 1897, counsel for the private prosecutor and for the magistrates took the preliminary objection :

1. That the conviction, etc., were not regularly before the Court, not having been brought there by a writ of certiorari, and the same could not be examined into, or dealt with.

2. That a single judge under s. 900, sub-sec. 9, being vested with all the authority and jurisdiction of the Court, and having sustained the conviction, from which decision there was no appeal, the question was res judicata, and the conviction could not now be quashed on the same grounds as were taken on the stated case.

Held : 1. By SCOTT and ROULEAU, JJ., That the conviction, etc., were regularly before the court, and could be dealt with, and that a writ of certiorari was not necessary, following *Reg.* v. *Wehlan*, 45 U. C. R., 396.

2. By RICHARDSON and WETMORE, JJ., That the conviction, etc., were not regularly before the court, and that a writ of certiorari to bring them before the court was necessary, following *Reg.* v. *McAllan*, 45 U. C. R., p. 402, and distinguishing *Reg.* v. *Wehlan.*

3. By the full Court, That the grounds now taken on which to quash being the same as those taken and disposed of by a single Judge on the stated case, the matter was res judicata.

Rule nisi dismissed with costs.

Costigan, Q.C., for defendant. *Muir*, Q.C., for the magistrates and for the prosecutor.

Book Reviews.

American Electrical Cases, Vol. VI. 1895-1897. Albany: Matthew Bender. Toronto: Canada Law Journal Co.

This latest volume of the above series gives a verbatim report of the important decisions in the State and Federal Courts of the United States in the past two years on subjects relating to the telegraph, the telephone, electric light and power, electric railway and all other practical uses of electricity. Valuable annotations edited by N. W. Morrill are added as notes to the principal cases, and in them the authorities are carefully summed up. The notes to the report of one of these cases are a valuable dissertation on the ever live subject of contributory negligence in electric street railway cases.

The Law of Mines and Mining. By D. M. BANINGER, A.M., LL.B., and J. S. ADAMS, A.B., LL.B., of the Philadelphia Bar. 1897. Boston: Little, Brown & Co.; Toronto: Canada Law Journal Co.

This very comprehensive work appears opportunely at a time when mining rights and interests are attracting much attention, both in Canada and the United States. It is not confined to the law applicable to any particular portion of the country, or to mines of any particular kind. Its aim is to give a complete and accurate statement of the rules of law governing the rights and duties of miners and mine owners, with citations of the authorities in support of the text. A most important feature is the introduction of an illustrated chapter, dealing with the geology and physical attributes of the subject matter in a manner by which the reader is readily familiarized with the practical and technical knowledge so necessary for the proper consideration of the legal questions.

The Shareholders and Directors Manual, by J. D. WARDE, of the Provincial Secretary's Department, Toronto; Fifth edition; Canada Railway News Company, Limited, 1898.

The fifth edition of this very useful compendium, contains the laws relating to joint stock companies, with pratical information as to the steps to be taken, and the proofs to be furnished on applying for charters of incorporation not only under the Acts of the Dominion of Canada, but of various provinces, relating to the incorporation of joint stock companies by letters patent, together with much useful information respecting the organization and management of such companies, with suitable forms. This edition, which has been revised and enlarged, does not assume to be so much a disquisition upon the law of joint stock companies as a sketch of the general principles, with only a limited reference to case law, with practical suggestions of a useful character, which will made it valuable to the numerous class of lawyers and laymen who are now interested in this new development of the nineteenth century. The information contained would be more useful if the index had been more complete. The value of many works from a practical standpoint is marred by want of attention to this most essential particular.