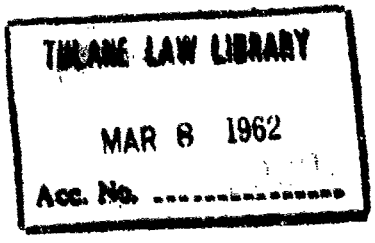
THE

# Canada Law Journal.

EDITORS:
HENRY O'BRIEN, Q.C.
C. B. LABATT.

VOL. XXXV.
FROM JANUARY 1 TO DECEMBER 31,
1899.

TORONTO:
CANADA LAW BOOK COMPANY,
32 TORONTO STREET.



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**Reported and Noted in this Volume.**

CHRISTOPHER ROBINSON, Q.C.

# Canada Law Journal.

VOL. XXXV. JANUARY, 1899. NOS. 1 AND 2.

## *MR. CHRISTOPHER ROBINSON, Q.C.*

In the reign of Charles II., Christopher Robinson, Esq., of Cleasby, Yorkshire, England, came to America as private secretary to Sir William Berkley, Governor of Virginia, in which office he subsequently became his successor. His second son was John Robinson, President of the Council of Virginia, from whom was descended Christopher Robinson, the father of Sir John Beverley Robinson, Chief Justice of Upper Canada, whose third son, Christopher, is the subject of this sketch.

Sir John's father, when a boy of 17, joined Colonel Simcoe's regiment of Queen's Rangers as an ensign, and served in that corps on the Royalist side until the peace of 1783, when he emigrated with other United Empire Loyalists to New Brunswick. A few years afterwards he came to Upper Canada, where he was appointed Deputy Surveyor-General. He was called to the bar in 1797; residing at that time in Kingston, which he left for York, now Toronto, in 1798.

Did space permit, it would be interesting here to refer more at length to the career of one of the greatest men Canada has produced, the late Sir John Beverley Robinson, but the story of his life can be found elsewhere. We may, however, note in passing, two interesting incidents connected with the life of the younger brother of Mr. Christopher Robinson, Major-General Charles W. Robinson. While Sir John was yet a student, he served as a lieutenant in the York Militia in the War of 1812, and was present at the battles of Detroit and Queenston Heights. The colors of two of the American regiments, one taken at each battle, found their way to England, and were placed in the chapel of Chelsea Hospital. Some few years ago, when General Robinson, as Lieutenant-Governor of Chelsea Hospital, sat in his pew in this chapel, there were hanging above him the two flags that his father had seen captured some eighty years previously in another continent. Again, in 1820, John Beverley Robinson, then Attorney-General, visited England, and was there offered the position of

Chief Justice of the Mauritius, which, however, he declined. Seventy years afterwards his son General Robinson went there as Military Governor.

Mr. Christopher Robinson, Q.C., whose portrait we give in this number, was the third son of Sir John, having been born at Beverley House, Toronto, January 21, 1828. His elder brothers were the late Sir James Lukin Robinson, Surrogate Clerk, and Hon. John Beverley Robinson, prominent in public life, and at one time Lieutenant-Governor of the Province of Ontario. His younger brother, Major-General Robinson, has already been referred to.

Mr. Robinson received his education at Upper Canada College, and took his degree at King's College, Toronto. In Trinity Term, 1850, he was called to the bar of Upper Canada and March 27th, 1863, was made a Q.C. In 1856 he became Reporter of the Court of Queen's Bench. He continued in that position until 1872, when he became the Editor of the Ontario Law Reports, but resigned on his election as a Bencher in 1885.

In 1880 he completed the preparation (assisted by the late Frank J. Joseph,) of a digest of all the cases contained in the Ontario reports, from their commencement in 1822—a work of immense labour and invaluable to the profession. The first of the Upper Canada digests was made by Robert A. Harrison, while a student, under the supervision of James Lukin Robinson, in 1852; the next in order being made by Henry O'Brien, bringing the cases down to 1863.

After his call to the bar, before commencing to practice, he took an extended tour in the East. He was at first mainly engaged in solicitor's work, but giving up a good connection rather than submit to conditions which he considered unprofessional, he devoted himself more and more to counsel business. His clear conception of legal principles, his knowledge of case law, and his conscientious thoroughness in all he undertook, soon brought him briefs. As was the fashion in those days, men devoted themselves to special circuits, and Mr. Robinson chose the Western as his special field. The leaders of this circuit were at that time, John Wilson, Q.C., H. C. R. Becher, Q.C., Albert Prince, Q.C., and others. After the elevation of Mr. Wilson to the Bench, Mr. Robinson took the leading place, being on one side or the other in nearly every case. Gradually, however, as his reputation increased, he devoted himself more and more to special work, his briefs being now largely confined

to the Court of Appeal, the Supreme Court and the Privy Council; the rest of his time being occupied in the preparation of opinions on important matters.

Acknowledged leader of the bar of his own Province of Ontario, we think we may safely say that he occupies the same position in reference to the Dominion. As such he has been engaged in some of the most interesting and important legal events which have taken place in this country during the past thirty years. His reputation is not, however, confined to his own Province or even to the Dominion, but is recognized in connection with many important interests affecting the Empire at large. It will be of interest to refer to some of these cases.

In 1868 the country was shocked by the death of one of the brilliant men of the day, the Hon. Thomas D'Arcy McGee, at the hands of his assassin, Whelan, who, being convicted of the murder, applied for a writ of error. Mr. Robinson' successful argument for the Crown in that case was a masterly effort, indicative of his minute and thorough familiarity with criminal law. This case will be found reported in 28 U. C. R. 1.

In 1875, party politics ran high, and out of this ferment grew the famous political suit of The Queen v. Wilkinson, the defendant being the editor of a newspaper in which a serious charge of political intriguing was made against Senator Simpson in connection with what was known as the "Big Push" letter. In connection with this the Hon. George Brown made a violent attack in the *Globe* newspaper upon the late Chief Justice Adam Wilson, then a puisne Judge of the Queen's Bench. An application was thereupon made on behalf of Wilkinson, to commit Mr. Brown for contempt of court. Mr. Robinson and Mr. Henry O'Brien were counsel for the applicant, Mr. Brown conducting his defence in person with his usual force and courage, but repeating and emphasizing and seeking to justify the libellous charges made in his paper. The Court was composed of Chief Justice Harrison and Mr. Justice Morrison, Mr. Justice Wilson taking no part. The language used by Mr. Brown was held to be a reckless and unjustifiable attack on a Judge of the Court and a contempt of court; but, as the judges who heard the case were divided in opinion as to the action to be taken, the rule was dropped. 41 U. C. R. p. 79.

In 1884, Mr. Robinson was counsel for the Dominion Government in the arbitration with Manitoba respecting the boundaries

of that Province, arguing the case before the Judicial Committee of the Privy Council. In the next year he had a more serious task in connection with the North-West Rebellion, as senior counsel for the Crown, in the prosecution of Louis Riel for high treason, which resulted in the conviction and execution of that noted rebel. As will be remembered, this case was tried before Mr. Justice Richardson and his associate Mr. Lajeune. There was an appeal from the verdict to the Court of Queen's Bench of Manitoba. The verdict was sustained and a subsequent appeal to the Privy Council met the same fate. With Mr. Robinson were Mr. B. B Osler, Q.C. and Mr. Burbidge, the present Judge of the Exchequer Court of Canada; Mr. Fitzpatrick, Q.C., now Solicitor-General, and Mr. Lemieux defending the prisoner.

A few years later he was counsel for the Dominion Government, together with Mr. B. B. Osler, Q.C. and Mr. Hogg, Q.C., in the arbitration with the Canadian Pacific Railway, represented by Mr. Edward Blake, Q.C., Mr. Walter Cassels, Q.C. and Mr. G. T. Blackstock; Chancellor Boyd, Mr. Gregory, Q.C., of Antigonish, and Mr. T. C. Keefer, C.E., being the arbitrators. This was a lengthy dispute, carried on for four years, a claim for several millions being reduced by the award to $300,000. Mr. Robinson was also one of the leading counsel engaged for the defendants in the well-known suit of Maclennan et al. v. C. P. R., a suit which lasted upwards of seven years, from 1885 to 1892, and was one of the most keenly contested cases which have come before the courts during recent years.

But perhaps the most famous matter in which he has been engaged was the Behring Sea Arbitration, in which, in 1893, he represented the Dominion Government before the arbitrators at Paris, his colleagues being Sir Richard Webster, Sir Charles Russel, now Lord Chief Justice of England, Mr. Box and Mr. Piggot; Sir Charles Hibbert Tupper being the agent in charge of the whole case for the Dominion. Amidst all the array of talent in this important international arbitration, not the least conspicuous figure was that of Mr. Christopher Robinson. The London *Times* refers in complimentary terms to his "brilliant speech at the conclusion of the argument, in which he summarized the whole case, reducing it to a series of concise propositions, which, from the British point of view, demonstrated the absurdity of the American claims." For his services in this case, the learned Counsel was offered knighthood, which, however, for private reasons, he declined.

We have only touched upon a few of the many important cases in which Mr. Robinson has been engaged and won distinction. Space forbids more extended reference to them. It affords us the most sincere pleasure to think that his recovery from his recent severe illness gives promise of many years of usefulness in the profession of which he is so great an ornament.

The regret has often been expressed that the learned gentleman of whom we write is not on the bench. In a higher degree perhaps than anyone otherwise eligible, he is fitted for such a position; for, apart from his learning, industrious research and keenness of intellect, his mind is essentially judicial in its character. We have had counsel of marvellous skill, persuasive eloquence and brilliant address—such men, for example, as John Hillyard Cameron, Henry Eccles, Chief Justice Hagarty, Matthew Crooks Cameron and others—but of none, we venture to think, could it be as truly said as of Mr. Robinson that he has the capacity to see at a glance all round a case, recognize the strong points of both sides, and avoiding all side issues and detecting all fallacies, grasp the salient fact or the governing principle which should rule the decision. That Mr. Robinson might have occupied the highest judicial position that the country could give him goes without saying.

Perhaps, however, we have said enough. We might speak of his unblemished character as a citizen—his gentle courtesy and consideration for others, both in his professional and private life; but it would be distasteful to him to enlarge further upon the many qualities which have not only brought him to the prominent position which he occupies in the profession, but which have also made one so modest and retiring in disposition the most popular man in the profession to-day. This feeling of friendship and respect is not confined to the seniors, who know him best and longest, but is widely diffused among the younger members of the Bar, to whom he is uniformly kind and encouraging, and who look up to him as a model worthy of their sincerest imitation, realizing that in his person he worthily sustains the best traditions of the profession. The following expressions from the pen of a well-known writer, in language none too strong, sums up the estimate in which he is held by all who know him: "There is no member of the Canadian Bar worthier of distinction on the ground of ability, legal learning, or in the possession of those rarer qualities of head and heart which find no better name than the good old term 'gentleman.'"

We are pleased to state that Mr. C. B. Labatt has been added to our editorial staff. Our readers have already seen specimens of his work in various articles which have appeared in these columns during the past year. Mr. Labatt's experience as a legal writer is very considerable. The fact that articles from his pen have appeared in the foremost of the English and American law periodicals, such as the *Law Quarterly* and the *American Law Review*, and that he is the author of numerous lengthy notes in the American State Reports and Law Reports annotated is sufficient guarantee of his capacity. Another new departure for the year is indicated by the excellent portrait of the leader of the Canadian Bar, Mr. Christopher Robinson, Q.C., accompanied by a short sketch of his career. We shall hope from time to time to refer to other prominent members of the profession in a similar manner

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Our readers will be glad to know that Sir John Hagarty is rapidly recovering from a severe attack of the prevailing epidemic, which had given his friends much uneasiness.

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The elevation to the peerage of Mr. Justice Hawkins, who lately retired from the English Bench, is well deserved, as everyone knows. His resignation when still in good health and in full use of all his faculties only serves to demonstrate that English judges are prone to place the best interests of the public service above mere selfish considerations. When their fruitage of years is over-ripe, or some infirmity creeps in, they know the proper and becoming thing to do, and, with most infrequent and marked exception, do it ungrudgingly. Their retirement *at mero motu* may be said to be a custom of the *usus fori*. In Canada it is otherwise; here, alas!

"Weak, withering age no rigid law forbids."

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The London *Law Times* thus comments upon the subject above referred to: "We should belie much which we have said in times past if we did not congratulate the learned judge and the profession that he should vacate his seat upon the Bench in favor of a younger man. We do not say a better man, or a better judge, but a younger man; first, because if judges remain for prolonged periods on the Bench promotion at the bar flags, eligible candidates

grow stiffened in practice and less capable of adapting themselves to the judicial office, whilst purely political and other persons of occult qualities rush for the infrequent vacancy with results too deplorable to dwell upon."

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The same journal further says that by the resignation of Sir Henry Hawkins the Bench loses one of the most careful and painstaking judges of his generation, and (notwithstanding a groundless reputation in favor of capital sentences) one of the fairest criminal lawyers who ever presided at the trial of a prisoner. He is described in another contemporary as a typical Englishman of the best sort, with the strong individuality, the bulldog courage, the essential fairness and indifference to the opinion of others characteristic of his race. Though he had attained the great age of eighty-one at his last assize, complaints were made that he had carried the administration of justice into the night watches, and thereby important interests were likely to suffer, on four occasions remaining on the Bench till 9 p.m. and on a fifth sitting till nearly midnight. Such exhibitions of vitality and capacity for work are certainly not to to be commended. They are bad for all concerned, and in every way objectionable. Lord Hawkins is succeeded by Thomas Townshend Bucknill, Q.C. He was member for Mid-Surrey, and went to the Western Circuit.

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## *LEGAL PROCEDURE.*

A member of the profession, "of credit and renown," desires to express his views in reference to a suggestion made by a writer in a leading daily paper that the time has arrived for making a further change in the practice and procedure in the Courts of Ontario. He commences with the very sensible observation that the legal profession would rather prefer a rest after the constant and extensive changes which have from time to time been made in the practice of the Courts during the last few years. He then proceeds :—

The system advocated in the article referred to is the one in vogue in England for arriving at an issue. Under this plan, as

soon as an appearance is entered, a motion is made for directions as to the future conduct of the action. It is urged that a wider discretion should be given to the judges as to matters of practice, and that they should not be tied down as at present by a voluminous code of procedure. It is assumed that there would thereby be a saving of expense and a more speedy trial of causes, and the happy result which has followed the establishment of a special Court for the trial of commercial causes in the City of London is referred to.

I doubt very much whether these benefits would result from the proposed changes. It so happens that the English *Law Times* of December 10th ult. contains a note of a case which illustrates very forcibly the working of the preliminary motion for directions: An application was made to a Master who made an order from which an appeal was had to a Judge, who varied it, and from whose order a further appeal was had to the Court of Appeal, which appeal was dismissed. The motion for directions in this case therefore involved three motions, all attended with a considerable amount of costs, which somebody had to pay. This is likely to be a common occurence, so that it is difficult to see where the saving of expense comes in.

Furthermore, the English method of trial of commercial cases in London cannot be generally applied. The English Court for the trial of such cases is usually presided over by the same Judge, one of the ablest and most experienced on the English Bench, and the mode in which he may be expected to exercise his discretionary powers is by this time pretty well understood; but I imagine it would be worse than chaos if every Judge upon the bench was to have the wide discretion as to the conduct of causes which the writer of the article suggests. Instead of one system of practice, we should probably then have thirteen.

The real difficulty which lies at the root of all systems of procedure may be summed up in one word, and that word is "costs." No method has yet been devised whereby solicitors and barristers can be well and comfortably fed on the supposed chameleon diet of air, or whereby they can be persuaded to clothe themselves in cobwebs or other similarly inexpensive materials. They seem to think, and not without some show of reason, that the world owes them a reasonably decent living, and, as far as the conducting of litigious proceedings is concerned, the only way that living is to be obtained is by costs.

Laymen are not generally aware that a lawyer's bill, unlike that of any other professional man, is always subject to the pruning knife of a taxing officer, who ruthlessly lops off any undue excrescences which may come under his notice. The solicitor cannot, like a doctor, render a neat little bill, thus : " For professional services from such a day to such a day " ; but, in order to obtain his remuneration, must, item by item, charge for every attendance, every paper drawn, and every payment made, even though it be only a one-cent stamp. But, at the same time, there is a great deal of work done for which no charge, or no reasonably sufficient charge, can be made. The drawing of a bill under such circumstances is a work of time and thought. It is obviously quite against the interest of a solicitor under the present system to hurry proceedings, or to seek to shorten cases ; on the contrary, a great temptation is offered to every practitioner, and if some succumb to it, it is not very surprising, for though lawyers are quite as honest, as a class, as any other, and probably more so, some have not as much moral backbone as others. The plan generally adopted in the United States is for solicitors and clients to agree upon a certain sum for the work to be done or a commission on the amount recovered. This is said to be generally satisfactory.

Now for a suggestion : Probably in an ideal state, should any citizen require the assistance of the law to enforce his legal rights, or supposed legal rights, all necessary means of attaining a judicial determination of his case would be furnished at the public expense. Under such a system private litigation would become as much a public affair as is a criminal prosecution under our present imperfect conditions. Those charged with the conduct of legal proceedings would be public officers, whose services would be available to litigants, and would be paid not by the litigants, but by the State. Their interests would be to bring litigating parties together to get them to settle their difficulties, and if that should prove impossible, then to bring the points in controversy to a judicial determination in the speediest manner possible, the expense being borne by the State. Numerous details present themselves, but it would not now be profitable to spend time and space in discussing them ; they must wait, at least so far as we are concerned, until the subject becomes of practical interest. Many wise heads have honestly worked at the problems presented in the various matters above referred to, and have not yet found solutions which are satis-

factory either to themselves or to the public; but the ideal has a way in these days of sometimes becoming the actual sooner than expected.

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## *SET-OFF AND COUNTER-CLAIM.*

This subject is fully and ably treated in the following pages by a gentleman occupying a prominent position in the New Brunswick bar and Equity reporter of the Court there. He approaches the question from the point of view of sections 112 and 113 of the New Brunswick Supreme Court Act of 1897. His observations will be read, however, with profit and interest in the other English-speaking parts of the Dominion.

In this province the subject is covered by our Judicature Act, section 57, sub-section 7, and by Rule 251, which must, of course, be before the Ontario reader in his examination of Mr. Trueman's article, which is as follows:

The distinction between set-off and counter-claim, as used in the Judicature Act rules, has been the subject of frequent and closely-reasoned examination by the English Courts. In such instances, the cases exhibit a tolerable unanimity in their acceptance of the precise meaning to be assigned to each term, and there would now seem little need for confusion in their use. Unfortunately, cases abound in which the words not being the subject of critical construction their distinction has not been observed, and a looseness of language has been allowed in which they have been run together as convertible terms. Again, cases are not wanting where judges expressly declined to agree that there was any difference between the words. (See per Bramwell, L.J., in *Gathercole* v. *Smith*, 7 Q.B.D. 626.) So much divergence of views is fruitful in difficulties to one approaching the consideration of the words for the first time, and may account in some degree for the conflict of opinion in the profession in New Brunswick as to their meaning in a context not identical with the English rules.

By the New Brunswick Supreme Court Act, 60 Vict., c. 24, it is enacted under the title of "Set-off and Counter-claim" as follows:

"112. A defendant in any action may set off against the claim of the plaintiff any right or claim, whether such set off sound in damages or not."

"113. Such set off shall have the same effect as if relief were sought in a cross action, and so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claims."

The meaning of "set off" as thus used is certainly obscure. If the words are used in their technical or customary sense, the statute must be given a narrow construction. If they are not so used one may place upon them a meaning agreeable to the language in which they are found. The question thus is whether the construction of the sections is to be governed by the term set-off, or is to be determined by the meaning of that term in relation to its surroundings. How real the difficulties are in putting a construction upon the sections is apparent when they are placed in contrast with Order xix., rule 3 of the Judicature Act rules, which reads as follows:

"A defendant in an action may set-off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

Set-off, while sometimes spoken of as a cross-action, properly signifies a defence as distinguished from an independent action or counter-claim. It does not dispute the existence and validity of the plaintiff's claim, for it cannot be enforced and given effect to except upon an admission of the plaintiff's claim. A counter-claim, on the other hand, is consistent with a denial of the plaintiff's demand, and may be allowed, although the plaintiff's action is defeated. This distinction is taken, though in different terms, by Pitt-Lewis in his work on County Court Practice, p. 321, in a passage quoted with approval by Cockburn, C.J., in *Stooke* v. *Taylor*, 5 Q.B.D., 569. 577. "A set-off," he says, "would seem to be of a different nature from a defence (*sic*), inasmuch as a set-off appears to show a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-

claim, it would seem, consists of a cross-claim, not necessarily extinguishing or destroying the plaintiff's demand. In other words, a set-off appears to consist of a defence to the original claim of the plaintiff; a counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff." In *Gathercole* v. *Smith*, 7 Q.B.D. 626, Lush, L.J., makes a similar contention, and observes that the character of set-off as a defence is not altered by the Judicature Act. It is not an independent action; it is still a defence and nothing more. Hawkins, J., had occasion to distinguish between set-off and counter-claim in *Neale* v. *Clarke*, 4 Ex. D. 295, and describes the latter as a cross-action, as distinguished from set-off or matter of defence. In *Stumore* v. *Campbell*, [1892] 1 Q.B. 314, Lord Esher, M.R., after remarking that in some of the cases language has been used which would seem to imply that a counter-claim is sometimes in the nature of set-off and sometimes not, and that matter is occasionally pleaded as counter-claim which is really set-off, said: "Counter-claim is really in the nature of a cross-action. This Court has determined that, where there is a counter-claim, in settling the rights of parties, the claim and counter-claim are for all purposes, except execution, two independent actions." The relevancy of these quotations is not diminished by the circumstance that they refer to the meaning of set-off as used in the Judicature Act, since the construction given is precisely that borne by the term under the statutes of set-off of Geo. II.

Is set-off used in the New Brunswick Act in the sense it is agreed by the foregoing authorities it strictly bears, that is, as meaning matter of defence as distinct from and exclusive of matter of counter-claim? In such a view the right to set-off unliquidated damages must be taken to exist only in such cases where they have a direct and inseparable connection with the dealings and transactions which also gave rise to the subject-matter of the plaintiff's action.

In *Neck* v. *Taylor*, [1893] 1 Q. B. 562, Lord Esher, M.R., describes a counter-claim arising out of the transaction in respect of which the action was brought as being a defence to the action, and Lindley, L.J., in the same case said: "The matters set out in the counter-claim appear to me to be of such a nature and so closely connected with the cause of action that, whatever according to legal

technicalities they may be called, they are, in substance, in the nature of a defence to the action."

That the Act should be construed narrowly finds well-nigh convincing support from the significant absence of the term counter-claim in the sections except in their title. The sections were framed upon Order xix., rule 3, and the alteration of the language must have been made deliberately. It seems reasonable to conjecture that the draftsman noticing the provision in the English rule for the exclusion of a set-off counter-claim that could not be conveniently tried in the action, and deciding to omit the provision in the Act before him, sought to overcome its absence by excluding matters of counter-claim from its operation. But speculation as to the intention of the framers of an Act is only valuable as an aid to its interpretation if supported by the language they have used. It is submitted, but with diffidence, that the language in question must be construed to include counter-claim, and that the distinction between set-off and counter-claim is abolished for many purposes.

Under the Judicature Act as both the terms set-off and counter-claim are used, meaning must be given to each, and set-off is construed in the sense given to it in the statute of Geo. II., and to apply to set-off as allowed by that statute. Thus in *Neale* v. *Clarke*, 4 Ex. D. 295, Hawkins, J., says: "It is important to bear in mind the distinction between that which is matter of defence in the nature of set-off as allowed by the statute of Geo. II., and that which is matter of pure counter-claim as allowed by the Judicature Act, 1873, and the orders framed thereunder. Both set-off and counter-claim under the Judicature Act are in one sense cross-actions, but there is a wide difference between them. A set-off is a debt allowed by the statute of Geo. II. to be set-off against another debt, and for it the plaintiff may in his particulars give credit so as to prevent the defendant from again setting it up." (See also *Gathercole* v. *Smith*, 7 Q. B. D. 629.)

This view of the meaning of the term under the Judicature Act is nowhere better summed up than in *Monteith* v. *Walsh*, 10 P. R. 163. It is there said: "Of these two, set-off and counter-claim, counter-claim is by far the more extensive. As to set-off, it has acquired a well known signification, and subject to the extension of it that is made by the rule, exists as it always did, and is liable to the old limitations. It does not follow that because they are

mentioned in the same rule, and may sometimes be used indifferently for the same practical object, that they are therefore co-extensive. Counter-claim may include every legal demand, but set-off is no new introduction, but a remedy well known and long settled—enlarged by the rule it is true, but left in other respects as it was before the rule." See also *Chamberlain* v. *Chamberlain*, 11 P. R. 503. Set-off cannot be said to be used in the New Brunswick Act in this sense, but in an extensive and new sense, and as the equivalent of counter-claim or cross-action when relating to a claim in damages set up by a defendant.

As has already been pointed out, set-off under the statute of George II., was a defence to the plaintiff's action, and was only operative in the event of plaintiff establishing his claim. A set-off supposed that there was something against which the defendant's claim could be balanced. If there was nothing against which it could be set-off it fell to the ground and the defendant had to sue upon it in a new action. It could not be tried and disposed of concurrently with the claim of the plaintiff in the event of the failure of the plaintiff to make out his claim. If the debt due to the defendant exceeded that due from him to the plaintiff he was not entitled to judgment for the excess. That could only be recovered in a separate action. If the plaintiff discontinued his action the set-off could not be tried. In the event of the set-off equalling or over-topping the amount of the plaintiff's claim judgment with costs was entered for the defendant. The New Brunswick statute provides an altogether different procedure A set-off is allowed which does not operate as a defence but as an independent action. If the plaintiff's action is defeated defendant's action may be tried and verdict recovered therein. Judgment may be entered for the defendant for the residue of his claim in excess of the plaintiff's demand. If the plaintiff discontinues his action it is submitted that the defendant's action may still be proceeded with. See *McGowan* v. *Middleton*, 11 Q.B.D. 464, overruling *Vavasseur* v. *Krupp*, 15 Ch. D. 474. Where defendant's action is not in pure set-off and both parties establish their causes of action, there may be separate judgments with costs to each: *Stumore* v. *Campbell*, [1891] 1 Q.B. 317; *McGowan* v. *Middleton*, 11 Q.B.D. 470; *Amon* v. *Bobbett*, 22 Q.B.D. 543; *Hewitt* v. *Blumer*, 3 Times Rep. 221; *Shrapnel* v. *Laing*, 20 Q.B.D. 334. Differences so fundamental as these between the statute of set-off of George II. and the New

Brunswick statute demonstrate that set-off as used in the latter Act is not synonymous with defence but is co-extensive in meaning and effect with both set-off and counter-claim.

This conclusion properly ends the inquiry I have ventured to make, if it were not essential to point out that a diversity of opinion exists in England as to the scope to be given to counter-claims under the Judicature Act. The authorities are all one way that counter-claim is an independent action, but they are not agreed as to the extent of defendant's right to set it up. One view is that a counter-claim must have its origin in the transaction in which the plaintiff's action arose, while another body of judicial opinion permits causes of action to be opposed to one another regardless of any connection between them, whenever they may be conveniently tried together. Commenting on Order xix., rule 3, Hall, V.C., in *Padwick* v. *Scott*, 2 Ch. D. 744, said: "That rule is principally addressed to a difficulty which arose under the old law, that you could not set off that which sounded in damages. Admitting that the rule may embrace cases of a different character, the set-off is to have the same effect as a statement of claim in a cross-action, so as to enable the court to pronounce a final judgment in the same action," and it must be a cross-action of a nature connected with the particular original cause of action, so as to be capable of being fairly and reasonably dealt with by way of set-off or counter-claim therein. The question again came before the same learned Vice-chancellor in *Harris* v. *Gamble*, 6 Ch. D. 748, and he acted upon his ruling laid down in the former case. In *Pellas* v. *Neptune Marine Insurance Co.*, 5 C.P.D. 40, Lord Justice Bramwell is thus reported: "The argument for the defendants was that whatever was a defence to a liquidated claim, has been made by Order xix., rule 3, a defence to an unliquidated claim. I cannot assent to that argument; according to it, if A. sues B. for damages for breaking his leg, B. may set up as a defence a claim against A. as the acceptor of a bill of exchange; is it possible to say that that can be deemed a defence." In *Westacott* v. *Bevan*, [1891] 1 Q. B. 778, Wills, J., says: "I take it that, ordinarily speaking, if a counter-claim is set up in respect of matters totally unconnected with the claim, the jurisdiction given by Order xix., rule 3, would be exercised and the counter-claim would not be allowed to be disposed of in the same action. But here the cross-claims are intimately connected one with the other.

It seems to me impossible to deny that where the plaintiff is claiming to recover the price of work and labor under the contract, and the defendants are counter-claiming damages for the plaintiff's delay in completing the work according to the contract, both claim and counter-claim arise out of the same transaction. The claim and counter-claim make up one action, in which there will be one result."

These views, however, are not uniformly held. In *Stooke* v. *Taylor*, 5 Q.B.D. 576, Cockburn, C.J., held that a counter-claim need not be analogous to the claim of the plaintiff, and that a claim founded on tort may be opposed to one founded on contract or vice versa. Mr. Justice Fry, in *Beddall* v. *Maitland*, 17 Ch. D. 181, says: "It is, to my mind, evident that there is no intention to confine the claim made by the counter-claimant to damages, or to an action of the same nature as the original action, and therefore when it is said that the defendant may set up against the claim of the plaintiff a claim of his own, it does not necessarily mean that the claims are to be ejusdem generis because it says expressly whether such counter-claim sound in damages or not. The plaintiff's right may be in damages, the defendant's right may be to an injunction or to any other equitable relief not sounding in damages; and therefore there is nothing to confine the defendant's claim to something in the nature of set-off or to setting up against the claim of the plaintiff merely something which counteracts that claim." In *Gray* v. *Welsh*, 21 Ch. D. 804, Kay, J., contended for a wide interpretation of the rule, and laid down that its terms were large enough to include any case raised by the way of defence, whether it is or is not connected with or of the same character as the plaintiff's claim.

It is to be observed that the decisions favorable to an extended meaning of the counter-claim could not fail to be influenced by the consideration that under the rule and also other rules, power is reserved to the Court or a Judge to strike out a counter-claim not admitting of convenient trial with the action. This power is not contained in the New Brunswick statute, and its absence fairly suggests the argument that counter-claim should be given a narrow operation. Section 133 of the same statute providing that the Court or a Judge may order any pleading so framed as to prejudice, embarrass, or delay the fair trial of the action to be struck out, does not apply to counter-claim: *Whitford* v. *Zinc*, 28 N.S. Rep. 531, 534.

St. John, N.B. W. H. TRUEMAN.

# ENGLISH CASES.

## *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*

(Registered in accordance with the Copyright Act.)

**FISHERIES CASE**—B.N.A. ACT, SS. 91, 92, 108—RIVERS AND LAKE IMPROVEMENTS —"PUBLIC HARBOURS"—FISHERIES AND FISHERY RIGHTS—R.S.C., C. 92, C. 95, S. 4—R.S.O., C. 28, S. 49—55 VICT., C. 10 (O.)

The judgment in the case of *Attorney-General of Canada* v. *Attorney-General of Ontario* (1898) A.C. 700, has already been fully reported by us (see ante vol. 34, p. 451) we would therefore only here remark that their Lordships seem to lay it down that whenever any subject is exclusively assigned to the Dominion, all power of a Provincial legislation on the subject is excluded. A contrary view, they hold, would enable the Provinces to enact a bankrupt or a copyright law, unless and until the Dominion had legislated on those subjects, but their Lordships do not think the Provinces have any power to legislate at all on such subjects. This may seem somewhat to conflict with the view previously entertained, under which such enactments as the Creditors' Relief Act and the Assignment and Preference Act of Ontario have been held to be intra vires of the Provincial Legislature and may perhaps serve to re-open discussion as to the validity of such enactments. It is true their Lordships refer to their former decision *Attorney-General of Canada* v. *Attorney-General of Ontario* (1894) A.C. 189, and uphold it on the ground that the Assignment and Preference Act was held to be not strictly a Bankruptcy Act, but merely dealt with a matter which would be properly auxiliary to such an Act. The province of Provincial legislation in regard to fisheries, their Lordships hold, is restricted to the regulation of the mode of tenure, conveyance and succession, and the terms on which fisheries or rights of fishing may be granted or leased by the Province so far as such matters come under the head of "The management and sale of Public Lands," or "Property and civil rights." R.S.C., c. 92, is declared to be intra vires.

**STATUTE OF LIMITATIONS**—21 JAC. 1, C. 16—A CONTINUING GUARANTEE—APPROPRIATION OF PAYMENTS — INTEREST WHERE RECOVERABLE AS PRINCIPAL— BANKING ACCOUNT — INTEREST CONVERTED INTO PRINCIPAL — APPEAL ON QUESTION OF FACT.

*Parr's Banking Co.* v. *Yates* (1898) 2 Q.B. 460, is a somewhat important decision in reference to the Statute of Limitations (21

Jac. 1, c. 16) as applied to a continuing guarantee. The defendant had given the plaintiff a continuing guarantee in respect of "all moneys and liabilities" owing to, or incurred by the plaintiff, in account with the guaranteed party. The action was brought to recover the balance due on advances made by the plaintiff to the principal debtor, with interest and bank charges. It appeared that the last advances made by the plaintiffs were made more than six years before action, but that the principal debtor had from time to time made payments on account within these six years, and that after giving credit thereon, and debiting him with interest and bank charges, the balance was carried forward half-yearly as principal. The defendants pleaded the Statute of Limitations as a bar to the whole claim. Bruce, J., who tried the action, was of opinion that there had been a stated account between the plaintiffs and defendant within six years before action, and that the defendant was consequently liable for the full amount claimed. On appeal, however, the evidence as to the stated account was held to be insufficient, and the Court of Appeal (Smith, Rigby and Williams, L.JJ.) held that the plaintiffs were barred as to all the advances, but that with regard to interest and bank charges which had become due within the six years before action, the plaintiffs were entitled to succeed. The doctrine of *Clayton's Case* was held to have no application, because the interest was recoverable against the defendant as principal money, and not merely as an accessory of the money advanced to the principal debtor, and that though the plaintiffs were barred as to the advances, they were not as to any interest or bank charges which had accrued, due within six years before action. This case is an instance of the Court of Appeal reversing the Judge appealed from, on a question of fact.

**BILL OF EXCHANGE** — ORAL AGREEMENT TO RENEW — EVIDENCE — BILLS OF EXCHANGE ACT, 1882 (45 46 VICT., C. 61) S. 21, S-S. 2 (*b*); S. 29, S-S. 2—(53 VICT. C. 33, S. 21, S-S. (*b*); S. 29, S-S. 2(*b*), D.)

In *New London Syndicate* v. *Neale* (1898) 2 Q.B., 487, the plaintiff sought to recover on a bill of exchange, against the defendant as acceptor. The defendant set up a parol agreement to renew, and relied on the above-mentioned sections of the Bills of Exchange Act. The plaintiff sued as indorsee, but it was conceded that he took with notice of the alleged agreement, and under these circumstances Darling, J., dismissed the action; but the Court of Appeal,

(Smith, Rigby and Williams, L.JJ.) reversed his decision, holding that evidence of any contemporaneous agreement to renew a bill is inadmissible, as being, in effect, an attempt to vary a written instrument by parol.

**GARNISHEE PROCEEDINGS**—COSTS—APPEAL ON QUESTION OF COSTS—ORDS. XLII., RR. 32, 34; XLV., R. 9 (ONT. RULES 900, 1139.) JUD. ACT, 1873, S. 49, (ONT. JUD. ACT, S. 72.)

In *Adbrigton* v. *Conyagham* (1898) 2 Q.B., 492, an appeal was brought from an order of Channel, J., refusing the appellant the costs of the examination of the defendant as a judgment debtor, and of certain garnishee proceedings. It appeared that the learned judge had refused to order the defendant to pay the costs on the ground that it had been the practice to regard such proceeding as a "luxury" for which the plaintiff had to pay. The Court of Appeal (Lindley, M.R. and Chitty, L.J.) gave leave to appeal, but on the hearing of the appeal, came to the conclusion that the order was not appealable without the leave of the judge who made it, at the same time very plainly intimating that they considered it erroneous.

**COSTS**—TAXATION—CLAIM AND COUNTER-CLAIM SUCCESSFUL.

In *Atlas Metal Co.* v. *Miller* (1898) 2 Q.B. 500, the plaintiff succeeded on the claim and the defendant on his counter-claim, each party being entitled to costs, and on the taxation the question was raised as to the principle on which the costs should be taxed. The master, following what he understood to be the rule laid down in *Shrapnel* v. *Laing*, 20 Q.B.D., 334, apportioned some of the costs of the action between the plaintiffs and the defendant. This mode of taxation the defendant objected to, contending that none of the costs of the action should be thrown upon him, relying on *Saner* v. *Bilton*, 11 Ch.D., 416. Channel, J., affirmed the ruling of the taxing master. On appeal, however, the Court of Appeal (Lindley, M.R., and Chitty, L.J.,) reversed his decision, holding that a plaintiff who is to be paid, or to pay, the costs of an action, is to pay or to be paid the whole of such costs as if there were no counter-claim; and, on the other hand, where a defendant is entitled to costs of a counter-claim, the Court of Appeal considered that the dictum of Lord Esher, that he was entitled to the whole costs of the counter-claim as if no claim existed, was misleading, unless it is understood that by the costs of the counter-claim is meant the

costs occasioned by the counter-claim; and that the costs saved by reason of the defendant not having to issue a writ or take other proceedings which would have been necessary in a cross action, are not to be taken into account, nor is any deduction to be made from the plaintiff's costs of the action on that account, but any costs incurred both in support of the defence and the counter-claim, or in support of the plaintiff's claim and in opposing the counter-claim, must be apportioned. Where there are no separate issues requiring special treatment, the cost of the defence are costs of the action, and costs attributable to the counter-claim are costs of the counter-claim.

**LUNACY**—JURISDICTION OVER ESTATES OF LUNATICS—CONDITIONAL DEVISE TO LUNATIC - PERFORMANCE OF CONDITION BY LUNATIC TO ENABLE HIM TO RETAIN ESTATE DEVISED—STATUTE DE PREROGATIVA REGIS. (17 EDW. 2, C. 10.)

*In re Sefton* (1898) 2 Ch. 378, an application was made to the Court to authorize the committee of a lunatic to execute a settlement of a certain estate which he held in base fee, in order to enable him to retain a devise of the lands which had been made to him subject to the settlement being made. The Court (Lindley, M.R. and Chitty and Collins, L.JJ.) were clearly of opinion that it would be for the benefit of the lunatic that the settlement should be made, and the only question was whether the Court was precluded from ordering it to be made by the old statute *De Prerogativa Regis* (17 Edw. 2, c. 10) which ordains that the lands of lunatics are to be safely kept to be delivered to them when they become of right mind "so that such lands shall in no wise be aliened." But the Court was of opinion that the statute, although it had been very strictly construed in the past, did not prohibit such an alienation as was in contemplation here, which was in fact giving up a small piece of his estate in order that he might retain a much larger piece, and to hold the contrary, they thought, would be still further narrowing the construction of the Act, and an abuse of the Act, and not carrying it out according to its true intention. The settlement was therefore ordered to be made in accordance with the conditions of the devise.

**RAILWAY COMPANY**--COVENANT FOR QUIET ENJOYMENT.

In *Manchester, Sheffield & L. R'y* v. *Anderson* (1898) 2 Ch. 394, the plaintiffs sought to recover rent as owners of the reversion of a lease under which the defendant held. The defendant counter-claimed for damages for breach of the covenant for quiet enjoyment

contained in the lease; the alleged breach consisting in obstructions of the highway fronting the premises caused by an assemblage of carts for the purpose of constructing the plaintiffs' line of railway, and also for a structural injury caused by the plaintiffs to the house on the aforesaid premises caused by the plaintiffs' operations, and also for blocking up a passage for three or four days over which the defendant had a right of way. It was not alleged that the plaintiffs had exceeded their statutory powers or exercised them negligently. Bryne, J., who tried the action, dismissed the counter-claim, being of opinion that no action would lie against the plaintiffs for anything done by them under their statutory powers, the only remedy for any injury resulting therefrom, being under the compensation clauses of the Railway Act, and though the covenant for quiet enjoyment was binding on the company, yet that acts authorized by this statute could not be deemed a breach of it, and with this the Court of Appeal (Lindley, M.R. and Chitty and Collins, L.JJ.) agreed.

**LUNACY**—COMMITTEE OF PERSON, LIABILITY OF TO ACCOUNT.

In *Strangways* v. *Read* (1898) 2 Ch. 419, the plaintiffs were the executors of a deceased lunatic and they claimed an account from the defendants who were the committee of her person. By an order of Court the committee of the estate was authorized to pay to the committee of the person £2500 per annum for the maintenance of the lunatic, and it also provided for the keeping up of an establishment, and that the committee of the person should be at liberty to reside with the lunatic, and have the use of horses and carriages and other effects of the lunatic. For the convenience of the committee of the person the allowance was paid quarterly in advance. A quarter's payment was made on the 29th October, 1896, and thirteen days afterwards the lunatic died. The plaintiffs claim that the defendants should repay £528, being a proportionate part of the allowance for the period subsequent to the death of the lunatic, or in the alternative, for an inquiry of what was properly payable for the thirteen days and payment of any surplus which might be found in defendants' hands. Romer, J., held that the plaintiffs were entitled to an inquiry as to what sum should be allowed for the thirteen days' maintenance. He distinguished *Re Ponsonby* 3 Dr. & War. 27, where it was held that the committee of the person is entitled to the benefit of the savings from the lunatic's maintenance, on the ground that that rule only applies

where the lunatic has been actually and properly maintained for the full period for which the allowance has been paid.

**RESTRAINT OF TRADE** — SEVERABLE COVENANT — MASTER AND SERVANT — INJUNCTION.

*Robinson* v. *Heuer* (1898) 2 Ch., 451, was an action to enforce by injunction a contract of hiring and service, in which the Court was somewhat embarassed by the peculiar form of the agreement, and the course taken by the parties. The agreement was made between the plaintiffs and the defendant whereby the defendant was engaged as the confidential clerk of the plaintiffs for five years, from 1 January, 1895, the plaintiffs having the option to continue the engagement for another five years. The defendant covenanted that during the term he would devote his whole time and attention to the business of the plaintiffs and that he would not engage as principal or servant in any business relating to goods of any description made or sold by the plaintiffs, or in any other business whatever, on pain of dismissal, and he also covenanted that if dismissed he would not at any time within three years from his dismissal be engaged directly or indirectly as principal, agent or servant in the business of dealer of wares of the description made by the plaintiffs, within 150 miles of Wolverhampton. In 1898 the defendant left the service of the plaintiff and became a traveller for another firm carrying on the same business as the plaintiffs'. The plaintiffs claimed that the defendant had not been dismissed, and was still their servant, and brought an action for an injunction on that basis. North, J., who heard the motion for injunction, was of the opinion that the case was governed by *Ehrman* v. *Bartholomew* (1898) 1 Ch., 671, (noted ante vol. 34, p. 626) and refused the motion; but the Court of Appeal (Lindley, M.R., and Chitty and Collins, L.JJ.,) though conceding that the Court will never enforce by injunction an agreement by which one person undertakes to be the servant of another, yet held that the plaintiffs were entitled to an injunction to restrain the defendant from acting as the servant of another. Counsel for the plaintiffs undertaking not to exercise the option to continue the agreement for a further period of five years, the Court granted an injunction restraining the defendant during his engagement with the plaintiffs, from carrying on or being engaged in any trade or business or calling relating to goods of any description sold or manufactured by the plaintiffs, but omitting the words "or any other business."

# REPORTS AND NOTES OF CASES

## Dominion of Canada.

### SUPREME COURT OF CANADA.

Ont.] BOULTBEE *v.* GZOWSKI. [Oct. 13, 1898.

*Principal and agent—Broker—Stock Exchange custom—Sale of shares—Marginal transfer—Undisclosed principal—Acceptance—"Settlement"—Obligations of purchaser—Construction of contract—The Bank Act—R.S.C., c. 120, ss. 70-77—Liability of shareholders—Stock jobbing.*

The defendant, broker doing business on the Toronto Stock Exchange, bought from C., another broker, certain bank shares that had been sold and transferred to C. by the plaintiff. At the time of the sale C. was not aware that the defendant was acting for an undisclosed principal, and the name of a principal was not disclosed within the time limited for "settlement" of transactions by the custom of the Exchange. The transferee's name was left blank in the transfer book in the bank, but it was noted in the margin that the shares were subject to the order of the defendant who, three days after settlement was due, according to the custom of the Exchange, made a further marginal memorandum that the shares were subject to the order of H. The affairs of the bank were placed in liquidation within a month after these transactions and the plaintiff's name being put upon the list of contributories, he was obliged to pay double liability upon the shares so transferred under the provisions of "The Bank Act," for which he afterwards recovered judgment against C., and then, taking an assignment of C.'s right of indemnity against the defendant, instituted the present action.

*Held*, that as the defendant had not disclosed the name of any principal within the time limited for settlement by the custom of the Exchange and the shares had been placed at his order and disposition by the seller, he became legal owner thereof, with the necessity of any formal acceptance upon the transfer books, and that as such he was obliged to indemnify the seller against all consequences in respect of the ownership of the shares, and the double liability imposed under the provisions of "The Bank Act."

Appeal allowed with costs.

*H. J. Scott*, Q.C., for appellant. *Aylesworth*, Q.C., for respondent.

N.B.] COMMERCIAL UNION INS. CO. *v.* TEMPLE. [Nov. 21, 1898.

*Fire insurance—Condition in policy—Notice of additional insurance—Liability of assured to give notice.*

A policy of insurance against fire contained the following, among other, conditions:

"11. Persons who have insured property with this company must forthwith give notice of any other insurance already made, or which shall afterwards be made on the same property, and have a memorandum of such other insurance endorsed on the policy or policies effected with this company, otherwise this policy will be void; provided, however, that on such notice being given at any time after the issue of the policy it shall be optional with the company to cancel such policy. In the event of any other insurance on the property herein described having been once declared as aforesaid, then this company shall, if this policy shall remain in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, whether such other insurance be in force or not, unless the discontinuance of such other insurance shall have been previously agreed to by this company by endorsement upon this policy."

On the 10th July, 1895, while the policy was in force, application was made on behalf of insured for additional insurance in another company. On July 17th this application was accepted, but notice of such acceptance did not reach the assured until the 20th. On July 18th the insured property was burnt, and the company refused payment of the insurance on the ground that the policy was void for want of notice of the additional insurance and indorsement thereof, as required by the condition.

*Held*, affirming the judgment of the Supreme Court of New Brunswick, that the policy was not avoided; that the condition did not require the assured to give notice of an insurance of which he had no knowledge, but only covered the case of insurance effected before a loss of which the notice could be given also before the loss.

Appeal dismissed with costs.

*Stockton*, Q.C., and *Dixon*, for appellants. *Pugsley*, Q.C., for respondent.

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N.S.] WALLACE *v.* HESSLEIN. [Nov. 21, 1898.

*Vendor and purchaser—Specific performance—Laches—Waiver.*

The purchaser under a contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time, even though time was not of its essence, nor when he has declared his inability to perform his share of the contract.

The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements.

Appeal dismissed with costs.

*Wallace*, in person, and *Sinclair*, for appellants. *Borden*, Q.C., for respondent.

## EXCHEQUER COURT OF CANADA.

Burbidge, J.] TYRELL *v.* THE QUEEN. [Nov. 3, 1898.

*Customs seizure—Decision of Minister—Reference to Exchequer Court—R.S.C., c. 32, ss. 182, 183.*

A reference, under the provisions of the 182nd section of the Customs Act of a claim with the Minister's decision on which the claimant is dissatisfied, is not to be regarded as an appeal to the Exchequer Court from such decision. Under the provisions of the 183rd section the Court may deal with the matter upon the evidence before the Court, whether such evidence has been before the Minister or not.

*Pugsley*, Q.C., and *J. M. Stevens* for claimant; *Earle*, Q.C., and *E. H. MacAlpine* for defendants.

# Province of Ontario.

## COURT OF APPEAL.

From Divisional Court.] GIGNAC *v.* ILER. [Nov. 15, 1898.

*Bankruptcy and insolvency—Fraudulent conveyance—Consideration—Untrue statement—Onus of proof—Sheriff.*

This was an appeal by the plaintiff from the judgment of a Divisional Court, reported 29 O.R. 147 (ante, vol. 34, p. 163), and was argued before BURTON, C.J.A., OSLER, MACLENNAN, MOSS and LISTER, JJ.A., on 27th September, 1898. Appeal dismissed with costs, the Court holding, on the evidence, that the deed was void under the statute of Elizabeth.

*F. E. Hodgins* and *F. D. Davis*, for appellant. *J. C. Hamilton* and *S. White*, for respondents.

From Falconbridge, J.] [Dec. 28, 1898.

PORT ARTHUR HIGH SCHOOL BOARD v. TOWN OF FORT WILLIAM.

*Mandamus—High Schools—Pupils from adjacent municipality.*

Under its Act of incorporation, 57 Vict., c. 57 (O.), the Town of Port Arthur has the same rights and powers in regard to the organization and maintenance of High Schools as other incorporated towns. A board of trustees of a High School may be appointed by resolution of the municipal council having jurisdiction; a by-law is not necessary. *In re Dawson and Sault Ste. Marie* (1889) 18 O.R. 556, disapproved.

Judgment of FALCONBRIDGE, J., ordering the Town of Fort William

to pay to the Port Arthur School Board a proportion of the cost of maintenance of the High School in respect of pupils residing in the town attending the High School affirmed, but that part thereof directing a mandamus to the mayor and councillors of the town to pass a resolution to the treasurer to pay the amount struck out as unnecessary.

*G. Bell* and *T. G. Thomson*, for the appellants. *Aylesworth*, Q.C., for the respondents.

## HIGH COURT OF JUSTICE.

Armour, C.J., Street, J.] LAIDLAW *v.* LEAR. [Nov. 1, 1898.

*Injunction—Restraining publication of stenographer's notes taken in capacity of clerk—Implied contract not to publish—No disclosure of crime.*

Anyone employed as a clerk is under an implied contract that he will not make public that which he learns in the execution of his duty as such clerk; and a stenographer who had taken notes of certain letters while employed in a solicitor's office, and had carried them away with him on being dismissed, will be restrained from publishing them, as well as a third party who had obtained them from him and who has no greater right to them.

As the letters furnished no evidence of any crime, the enjoining their publication was no interference with criminal justice.

Judgment of FALCONBRIDGE, J., affirmed.

*Osler*, Q.C., *E. F. B. Johnston*, Q.C., and *Raymond*, for plaintiffs; *Love*, for defendant Lear; Macdonald, a defendant, in person.

Meredith, C.J., Rose, J., MacMahon, J.] [Nov. 1, 1898.

HEYD *v.* MILLAR.

*Chose in action—Verbal equitable assignment—Subsequent written assignment—Priority on fund.*

A present appropriation, by order, of a particular fund operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity.

The wife, who had authority, of a client who was indebted for costs to a firm of solicitors, instructed one of the firm after its dissolution to sell certain land and retain the costs out of the proceeds as a first charge. The land was sold by a new firm of which another member of the old firm was the principal member.

*Held*, 1. The wife's instructions amounted to an equitable assignment and that the solicitors were entitled to the proceeds of the sale as against an assignee of the same subsequently made.

2. The transaction was not a contract concerning land but an agreement to apply the proceeds of land when sold.

Judgment of the County Court of the County of York reversed.

*Riddell*, for the appeal. *Heyd*, contra.

Ferguson, J., Robertson, J., Meredith, J.] [Nov. 4, 1898.

MCRAE *v.* MCRAE.

*Will—Restraint on alienation—Invalidity.*

Devise of real estate to a son with a condition as follows: "But I direct that before my said son . . shall sell, mortgage, trade or dispose of or encumber the said property or any part thereof or any farm produce or timber that he shall first obtain the consent of my sister. . ."

*Held*, that the restriction was against all kinds of alienation and in that regard absolute and unlimited, and as the required consent was a condition precedent to any kind of alienation and unlimited as to time the restraint was void. Judgment of FALCONBRIDGE, J., reversed, MEREDITH, J., dissenting.

Per MEREDITH, J. The restraint on alienation is limited in point of time to the sister's lifetime and *Earls* v. *McAlpine* (1881) 6 A. R. 145 compels me to hold it, so limited, to be a valid condition.

*Harkness* for the appeal. *Leitch*, Q.C., contra.

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Armour, C.J., Street, J.] [Nov. 11, 1898.

BOLLANDER *v.* CITY OF OTTAWA.

*Municipal law—By-law—Auctioneer—"Regulating and governing"—Prohibiting—Regulation of markets.*

The power to regulate and govern conferred on municipal councils by s-s. 2 of s. 495, c. 184, R.S.O. (1887), did not give power to prohibit the exercise of any lawful calling, and a by-law which prohibits an auctioneer from exercising his calling cannot be supported under that s-s. as amended by 56 Vict., c. 55, s. 19 (O), and 57 Vict., c. 50, s. 8 (O).

The power given by s-s. 2 of s. 503 to pass by-laws "For regulating all markets established and to be established" gives no implied power to prevent an auctioneer exercising his calling in the markets, but he may be prevented from selling therein any commodities but those for the sale of which the markets were established.

Judgment of MACMAHON, J., reversed.

*Geo. F. Henderson*, for appeal. *L. G. McCarthy*, contra.

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Armour, C.J., Falconbridge, J., Street, J.] [Nov. 21, 1898.

CASTON *v.* CITY OF TORONTO.

*Assessment and taxes—Collector's return to treasurer of unpaid taxes—Return to clerk—Necessity for—Collector's affidavit—R.S.O. (1887), c. 193, ss. 135, 136.*

It is for the interest of both municipalities and ratepayers that all the provisions in the Assessment Act for the collection of taxes should be

strictly followed, especially where the words are mandatory and there is nothing in the context to show they are permissive.

There being sufficient property upon premises upon which taxes were due out of which they could have been made, the taxes could not be legally returned to the treasurer under sec. 135 of R.S.O. (1887), c. 193, nor legally placed upon a subsequent collector's roll.

The requirements of that section are imperative; and where a collector did not conform to them in showing on his account delivered to the treasurer opposite to each assessment the reason he could not collect the taxes, and did not furnish a duplicate account to the clerk, the account so delivered to the treasurer cannot form a basis for any further proceedings to collect the taxes, and the affidavit provided for in s. 136 does not heal the breach of the observance of such requirements.

Judgment of MEREDITH, C.J., reversed on a point of law brought out in further evidence subsequently taken.

*Clute*, Q.C., and *J. W. McCullough*, for appeal. *Fullerton*, Q.C., and *W. C. Chisholm*, contra.

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Rose, J.] IN RE TORONTO BRASS COMPANY. [Dec. 3, 1898.

*Company—Winding-up—R.S.C., c. 129—Petition—Chambers.*

An order for the winding-up of a company, upon petition, under R.S.C., c. 129, may be made by a Judge in Chambers.

*J. Parkes*, for petitioner. No one appeared for the company.

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Street, J.] [Dec. 7, 1898.

CASSELMAN *v.* OTTAWA, ARNPRIOR AND PARRY SOUND R.W. CO.

*Discovery—Examination of officer of railway company—Roadmaster.*

In an action for damages for the death of the plaintiff's husband, who was killed while on duty as a fireman on a train of the defendants, an incorporated company, owing to the displacement of a switch:—

*Held*, that the roadmaster in charge of the section of the line in which the accident occurred, although he was under the control of the chief engineer, was an officer of the company examinable for discovery.

*J. L. McDougall*, for plaintiff. *C. J. R. Bethune*, for defendants.

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Street, J.] MCLEAN *v.* AI [Dec. 10, 1898.

*Receiver—Equitable execution—Administrator ad litem—Ex parte order—Subsequent issue of letters of administration—Motion to set aside order—"Parties"—Rule 538—Administration—Advertisement for creditors.*

Motion by the Toronto General Trusts Company, as administrators of the estate of the original defendant, Edwin Allen, deceased, and by Charles

J. Hamilton, a creditor of the deceased, for an order vacating an ex parte order made by Boyd, C, on the 19th of May, 1898, appointing the plaintiff receiver of the interest of the deceased defendant in the estate of his mother, also appointing Peter S. Furness, administrator ad litem of the estate of the deceased defendant, and adding him as a defendant, and directing a reference for administration, etc., and also for an order vacating the report of a referee made pursuant to such order.

*Held*, that the property and assets to which the defendant was entitled at the time of his death never vested in Peter S. Furness, because of the limited character of the administration granted to him; they vested in the Toronto General Trusts Company upon their subsequent appointment as administrators of his estate and effects, and they were bound to administer the estate, paying the debts so far as the estate would extend, ratably, in a due course of administration. They were "parties" who were affected by the ex parte order of the 19th May, 1898, within the meaning of Rule 538, and were entitled to apply to vacate that order and the report founded on it: *Parker* v. *McIlwain*, 17 P. R. 84.

That order was based upon the assumption that the plaintiff was the only creditor of the deceased defendant, and that, owing to almost insuperable difficulties, the plaintiff could not, and no one else was likely to, be appointed administrator. The effect and intention of the order was to give all the assets to the plaintiff, and to leave nothing for any one else. No such order would have been made had it been known that any other creditor existed, for the plaintiff had acquired no lien by a former receivership order as to another estate, upon the property not come to the hands of the receiver; *Croshaw* v. *Lyndhurst Ship Co.*, (1897) 2 Ch. 184; *In re Shepard*, 43 Ch. D. 1.

The report of the referee should not stand, because no advertisement for creditors was issued; this was omitted because of the mistaken notion that the plaintiff, having a receivership order, was entitled to the whole estate, it being too small to satisfy his claim. The Toronto General Trusts Company should be left to administer the estate in the usual manner, but subject to any future order for administration which might become necessary.

Order made vacating the ex parte order and setting aside the report, but without costs against the plaintiff. Costs of the motion to the applicants out of the estate.

*J. H. Moss*, for applicants. *A. McLean Macdonell*, for plaintiff.

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Boyd, C., Robertson, J.] [Dec. 12, 1898.

IN RE MCINNES *v.* MCGAW.

*Receiver—Equitable execution—Interest under will—Interference with discretion of executors—Prohibition—Division Court.*

The mother of the judgment debtor by her will empowered her execu-

tors, if in their discretion they should see fit, to pay the income of her estate, in part or in whole, to and for his benefit and advantage, at such time and in such manner and sums as they should see fit, leaving it to their option and discretion whether they should pay him any sum. An order was made in a Division Court action, after judgment, appointing the judgment creditor receiver to receive the amount of his judgment from the executors, whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment, or any part thereof. Prohibition was granted against the enforcement of this order.

*Held*, following *The Queen* v. *Judge of County Court of Lincolnshire*, 20 Q.B.D. 167, that if the order was intended to interfere with the action of the executors, it should not have been made; and if it did not so interfere, it was nugatory.

*Elliott*, for judgment creditor. *Shepley*, Q.C., for executors.

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Meredith, C.J., MacMahon, J.] [Dec. 14, 1898.

STUART *v.* MCVICAR.

*Judgment—Specific performance and damages—Interlocutory judgment—Subsequent delivery of statement of claim—Assessment of damages.*

The writ of summons was indorsed with a claim for specific performance of an agreement "and for damages for breach of the said agreement." The defendant not appearing, interlocutory judgment was signed against him on the 16th April, 1898, for damages to be assessed. On the 12th May following a statement of claim was delivered, and on the 16th May the damages were assessed by a Judge of the High Court at a sittings for the trial of actions.

*Held*, that the interlocutory judgment was irregular; the plaintiffs, upon default of appearance, should have delivered a statement of claim, and, if no defence delivered, proceeded to judgment by motion.

*Held*, also, that the plaintiffs had no right to treat the statement of claim delivered by them as nugatory, and proceed to assessment of damages on the writ of summons as forming the record.

*Semble*, that the plaintiffs could properly claim specific performance, and, in the alternative, damages for breach of the agreement.

*Watson*, Q.C., for plaintiffs.

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Falconbridge, J., Street, J.] [Dec. 14, 1898.

BERNESKI *v.* TOURANGEAU.

*Solicitor's lien—Attaching order—Priorities—Waiver of lien.*

The lien of a solicitor upon a verdict recovered for his client will prevail against an attaching order obtained by a creditor of the client. *Shippey* v. *Grey*, 28 W.R., 877, followed.

But in the circumstances of this case, where the defendant had paid over to an attaching creditor of the plaintiff the amount of the verdict recovered by the plaintiff, under the full belief that he was obliged to do so, and that the plaintiff's solicitors had no right to prevent the attaching creditor from recovering the money, and the solicitors had conduced to this belief by their neglect to enforce their rights, the solicitors were not allowed to claim payment over again from the defendant.

*F. C. Cooke*, for plaintiff's solicitors. *F. E. Hodgins*, for defendant.

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Falconbridge, J., Street, J.] [Dec. 19, 1898.

CONFEDERATION LIFE ASSOCIATION *v.* LABATT.

*Parties — Conversion of goods — Relief over — Third party — Vendor — Rule 209.*

In an action for the conversion of goods, the defendant may bring in the person who sold him the goods as a third party, the words "any other relief over" in Rule 209 being wide enough to include the claim made by the defendant against his vendor.

*Rowell*, for defendant. *Kilmer*, for third parties.

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Falconbridge, J., Street, J.] REG. *v.* TORONTO R. W. Co. [Dec. 19, 1898.

*Municipal Corporations — Offences against by-laws — Summons against company — Service — R.S.O., c. 223, secs. 569, 704, 705 — Criminal Code, 1892, secs. 562, 853, 858.*

Decision of Rose, J., noted supra, p. 788, affirmed.

*Bicknell* for the appeal. *Fullerton*, Q.C., contra.

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Ferguson, J.] IN RE CARBERY. [Dec. 20, 1898.

*Life insurance — Benefit of wives and children — Apportionment — Will — Abatement.*

Motion by Emma Carbery, one of the adult children of the late Thomas Carbery, for payment out of Court to her of her share of certain insurance moneys paid in by the insurance companies after the death of Thomas Carbery, the assured, on the 20th July, 1898, leaving a will dated the 25th June, 1897. The testator had three policies upon his life, each for $2,000, making in all $6,000. By each of the policies the money was made payable to the wife and children, and, if no change had been made, they would have been entitled in equal shares to the whole of the money. There were nine children, and, therefore, ten persons to receive as beneficiaries, and, had the policies all been good, these ten beneficiaries would have been entitled each to $600. The testator by his will dealt with these insurance moneys as if they were part of his personal property, and he

gave a specific sum to each of eight of his children, some of the sums being more and some less than $600, the total sum given being $5,100. In doing this the testator said nothing as to his wife or the other child, Thomas Evans Carbery. The power which the testator had, under s. 160 of the Ontario Insurance Act, was to "make or alter the apportionment" of the moneys.

*Held*, that what he did by his will was a re-apportionment of them; and the former apportionment remained, except so far as it was changed by the re-apportionment. Had the policies all been good, each of the eight children would have been entitled to the specific sum given him or her by the will, and the wife and the other children would have been entitled, by virtue of the original apportionment in their favour, varied by the re-apportionment, to the $900 balance divided between them equally. But, as one of the policies turned out to be worthless, and there was only $4,000 to distribute, the sum going to each of the beneficiaries must abate in due proportion.

Order made for payment to Emma Carbery of her proper proportion according to the above disposition. The other persons entitled might come in for similar orders or might be embraced in this order on the settling of it.

*W. L. Walsh* for applicant. *F. W. Harcourt* for the two infant children of the testator. *R. McKay* for widow and T. E. Carbery.

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Meredith, J.] IN RE CRAIG AND LESLIE. [Dec. 21, 1898.

*Execution—Order of Master of Titles—Land Titles Act, ss. 91, 92—Order of court—Receiver—Equitable execution.*

Upon the proper construction of s. 92 of the Land Titles Act, R.S.O., c. 138, a person entitled to payment of costs under an order of a Master of Titles, made by virtue of s. 91, can have "execution issued" by the proper officer upon the order and certificate of the master, without any order of the High Court directing or permitting it; and the practice of the High Court in regard to issuing execution is made applicable by the words of the section, "in the same manner in all respects as if the order made by the master were the order of the Court;" and by that practice "issuing execution" means issuing such process as, under the Consolidated Rules, is applicable to the case, see Rule 836, and does not include that mode of enforcing payment, by way of a receiver, usually called "equitable execution." And, even if an application to the Court were necessary in order to have "execution issued," those words would not include the appointment of a receiver.

*In re Shephard*, 43 Ch. D. 131, *Croshaw* v. *Lyndhurst Ship Co.* (1897) 2 Ch. 154, and *Norburn* v. *Norburn* (1894) 1 Q. B. 448, followed.

*H. L. Dunn*, for applicants. *G. G. S. Lindsey* and *Hall*, for respondents.

Ferguson, J.] IN RE BEATTIE, BEATTIE *v.* BEATTIE. [Dec. 22, 1898.

*Administration—Insolvent estate of private banker—Claim for amount of promissory note collected—Priority—Appropriation.*

Appeal by J. C. Thom, a creditor of the estate of John Beattie, deceased, from the report of the Master at Guelph, upon the administration of the estate, which was insolvent. The appellant was placed by the Master upon the list of creditors as an ordinary creditor. He appealed upon the ground that he was entitled to payment of his claim in full, in priority to other creditors. The appellant, shortly before the death of John Beattie, who was a private banker at Fergus, sent him two promissory notes with instructions to receive payment from and hand the notes over to the makers, and remit the amount paid to the appellant at Woodbridge. The deceased collected $361.20 upon the notes, and drew a cheque for the amount upon the Traders Bank of Canada at Toronto in favour of the appellant, and sent it to him on the 20th March, 1897. There were funds to the deceased's credit in the Traders Bank, but he died on the 21st March, and the cheque being presented after his death, the bank refused to pay it.

*Skeans*, for the appellant, contended that there was an appropriation of the money in his favour by means of the cheque, citing *Farley* v. *Turner*, 26 L.J.N.S., Ch. 710, and *In re Barned's Banking Co.*, 39 L.J.N.S., Ch. 635; or that the deceased was simply an agent to transmit the money, and it never became his money, but was always the appellant's money, and could not be retained as part of the estate of the deceased for the benefit of the general creditors.

*Fasken*, for the executors, and *J. Grayson Smith*, for certain of the creditors, opposed the appeal.

FERGUSON, J. distinguished *Farley* v. *Turner* in view of the circumstance that there was no evidence here to show that the money collected by the deceased was deposited in the bank or set aside or ear-marked in any way. The other case cited was against the appellant. There was no specific appropriation in his favour, and he was in no better position than any other creditor. Appeal dismissed without costs.

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Ferguson, J.] [Dec. 24, 1898.

IN RE TRUSTEES OF SCHOOL SECTION 11, AMARANTH.

*Public schools—Union school section—Alteration of boundaries—Five years' limit—R.S.O., c. 292, ss. 38, 43, 44.*

In 1897 a township council passed a by-law altering the boundaries of an existing school section, and this was affirmed by the county council on appeal. In 1898 the county council, on appeal from the refusal of the township council to do so, appointed arbitrators to consider the advisability of forming a union school section from parts of the section in question and of another section, and an award was made setting apart the

new union school section, and thereby making material alterations in the boundaries of the existing section.

*Held*, that although the by-law of 1898 was passed under ss. 43 and 44 of the Public Schools Act, R.S.O., c. 292, it came within the prohibition of s. 38, s-s. 3, which required that the by-law of 1897 should remain in force for five years, and therefore the by-law of 1898 was quashed and the award set aside.

*Aylesworth*, Q.C., and *G. M. Vance*, for applicants. *W. L. Walsh*, for respondents.

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Ferguson, J.] IN RE THOMAS AND SHANNON. [Dec. 28, 1898.

*Will — Devise — Restraint on alienation — Repugnancy — Invalidity — Contingent executory interest — Remoteness — Perpetuities — Title by possession.*

Petition by a vendor, under the Vendors and purchasers' Act, for an order declaring that the petitioner could make a good title in fee simple to lands in Haldimand. The petitioner derived title under the will of his father. In the early part of the will the lands were devised to the vendor in fee, and other lands were devised to other children, but in the latter part of the will there was this clause: "It is fully understood that my children have no power to make sale or mortgage any of the lands mentioned, but to go to their heirs and successors . . . Should any of my children die childless leaving husband or wife, said husband or wife to have a third during the term of their natural life."

*Held*, 1. The first part of this clause amounted to a total restriction upon alienation, and was repugnant to the nature of the estate given by the devisee, and was therefore void.

2. The words "die childless" in the last part of the clause should be taken to mean "die not having children, or a child living at the time of such death"; and this part of the clause created a contingent executory interest or estate of freehold, which, from its legal nature, would, upon the contingency happening in its favour, spring up into existence, thus defeating, so far as might be necessary for its existence and duration, the estate in fee devised to the petitioner; and, although not a probable event, the petitioner having many children and a wife willing to join in a conveyance, it was possible that a future wife might survive him, and his children be at the the time of his death all dead.

3. Although many children of the vendor were now living, none of whom were born till many years after the testator's death, and all of whom must die before the executory interest could take effect, yet the gift was not too remote, and did not infringe upon the rule against perpetuities.

4. The long and continued possession and occupation of the vendor did not make any difference in his favour. Order declaring that the vendor could not make a good title to the purchaser.

*Clute*, Q.C., for the vendor. *E. D. Armour*, Q.C., for the purchaser.

## MAGISTRATES' CASES.

McDougall, Co. J.] REG. *v.* NURSE. [Nov. 2, 1898.

*Sale of liquor within prohibited hours—R.S.O., c. 245, s. 95—R.S.O., c. 73, s. 9—Proceedings at trial.*

The defendant was charged with selling liquor during prohibited hours. The prosecutor failed to establish any sale by the evidence of the witness to whom it was said the liquor was sold on the day charged. The defendant was then put in the box, and whilst denying the sale to the witness, admitted in answer to a question (which was objected to, but which objection was overruled,) that he had sold liquor to other persons on the day in question. On this evidence he was convicted.

On motion to quash this conviction,

*Held*, that the conviction was right, and the application must be dismissed with costs. The defendant was a competent and compellable witness, and could properly be convicted upon his own admission of a sale or sales upon the day in respect of which an illegal or prohibited sale was charged. *Queen* v. *Hasen*, 20 A.R. 633 referred to.

*Haverson* for defendant. *Raney* for the Crown.

# Nova Scotia.

## SUPREME COURT.

Full Court.] QUEEN *v.* BOWMAN. [Nov. 22, 1898.

*Criminal Code, s. 210, s-s. 2—Failure to provide necessaries for wife—Words "likely to be permanently injured"—Questions of fact for Judge.*

Defendant was tried and convicted by the Judge of the County Court for District No. 1 on a charge preferred under the Code, s. 310, s-s. 2, for having omitted, without lawful excuse, to provide necessaries for his wife, in consequence of which her health was likely to be permanently injured. The evidence showed that defendant who was in regular receipt of wages amounting to six dollars per week, refused to make any provision for his wife, at a time when she was pregnant and incapacitated for work.

*Held*, 1. There was evidence upon which the judge could properly find against the accused.

2. The words "likely to be permanently injured" have no technical meaning, and that in every case it is purely a question of fact whether the acts proved are of such a character that the health of the wife is likely by reason of those acts to be permanently injured.

3. As to the excuse set up, that it was a question of fact as to which the judge had to decide as to its sufficiency.

*Power*, for the prisoner. *Longley*, Attorney-General, for the Crown.

Full Court.] LINDSAY *v.* CROWE. [Nov. 22, 1898.

*Practice and procedure—Counterclaim for slander in action for goods sold—Discretion of judge.*

To an action for goods sold and delivered defendant pleaded among other things a counterclaim claiming damages for words spoken and published by the plaintiff of and concerning the defendant, viz., "I will have you put in Dorchester," meaning that defendant had been guilty of the commission of criminal offences which would justify his imprisonment in the public penitentiary at that place.

*Held*, 1. Dismissing defendant's appeal with costs, that the counterclaim was properly struck out.

2. The costs of the motion to strike out the counterclaim were in the discretion of the judge who heard it, and he having exercised his discretion by allowing the motion with costs, the court would not interfere.

*R. E. Harris*, Q.C., for appellant. *H. A. Lovett*, for respondent.

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Full Court.] FORSYTH *v.* SUTHERLAND. [Nov. 19, 1898.

*Shipping contract—Charter party—Duty of master to sign bill of lading or give up cargo—Lien for demurrage—Cesser clause—Liability of original charterers.*

Defendants' vessel was chartered by R. & Co. to carry a cargo of lumber from Annapolis, N.S., to ports in South America, at a stipulated price per thousand. The charter party contained the two following clauses: (a) "Bills of lading to be signed at any rate of freight without prejudice to this charter party, but not less than the chartered rate. (b) "It is agreed that this charter party is entered into by the charterers for account of another party, their responsibility ceases as soon as cargo is on board, the vessel holding an absolute lien for all freight, dead freight, and demurrage." The bill of lading presented to the master for signature contained this provision, as to delivery of cargo, "to be delivered, etc., unto W. M. F. or to assigns, he or they paying freight for said lumber and all other conditions as per charter party, etc." The master claiming that the lay days provided by the charter party for loading had been exhausted and that the ship was entitled to be paid demurrage, refused to sign the bills of lading when they were presented to him, except upon payment of the demurrage demanded, or to give up the cargo. Plaintiff having paid the amount demanded, under protest.

*Held*, 1. The master was bound either to sign the bills of lading or to give up the cargo, and that his refusal to do so was a breach of the charter party.

2. The bills of lading tendered for signature gave the owners a lien on the cargo for all demurrage legally payable under the cesser clause of the charter party.

3. Neither the plaintiffs nor the consignees were liable to pay demurrage at the port of loading before the cargo was on board, and that the only parties the owners could look to were the original charterers, who were not discharged from such liability by the cesser clause.

*W. H. Fulton*, for appellant. *J. J. Ritchie*, Q.C., for respondent.

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Full Court.] THE QUEEN *v.* LEARMONT. [Nov. 19, 1898.

*N.S. License Act, 1895 — Collusive arrangement to defeat Act — Appeal from County Court Judge's decision affirming conviction dismissed— Costs.*

In a prosecution for selling intoxicating liquors in violation of the provisions of the Nova Scotia Liquor License Act, 1895, defendant relied upon an alleged lease of the bar-room of his hotel, and of two rooms used in connection with the bar, to one H. The evidence showed, among other things, that H. was not a resident of the province; that the only public entrance to the bar was through the main office of the hotel; that the person employed as bar-keeper got his meals at the hotel and paid nothing for his board; that defendant's book-keeper took charge of the cash receipts of the bar and paid the same into the bank to defendant's credit; that defendant had never asked H. for rent and had never paid him any part of the receipts; that fines and all cheques for disbursements in connection with the bar were signed by defendant; that there had never been any settlement with H. since the lease was drawn; that taxes had not been transferred to H. on the books of the town; and that defendant at times had possession of and used the key of the private door through which stock was taken into the bar.

*Held*, affirming the conviction and dismissing defendant's appeal, that the transaction between defendant and H. was simply a collusive arrangement to enable defendant to sell liquor without license.

*Held*, also, that costs should not be allowed, the inspector not being liable therefor.

*H. A. Lovett* and *W. R. McDonald* for appellant. *S. D. McLellan* and *F. T. Congden* for respondent.

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Full Court.] THE QUEEN *v.* BROWN. [Nov. 22, 1898.

*Criminal law—Crown case reserved—Jurisdiction of Stipendiary Magistrate, Halifax, to enquire into and commit for offence committed on McNab's Island, Halifax Harbour— Waiver of objection to jurisdiction of County Court Judge by appearance and consent to be tried summarily.*

Defendant was brought before the Stipendiary Magistrate for the City of Halifax charged with being the receiver of a sum of stolen money, the offence having been committed on McNab's Island in Halifax Harbour.

The defendant was committed to the Supreme Court for trial, but elected to be tried summarily before the judge of the County Court for District No. 1, and was tried and convicted.

On a case reserved as to whether the Stipendiary Magistrate had power to commit for such an offence, and as to whether the fact of the prisoner being in jail and being brought before the judge of the County Court, and electing to be tried by him gave the judge jurisdiction to try the case.

*Held*, that the Stipendiary Magistrate had power to hold the enquiry and make the commital.

Per TOWNSHEND, J., HENRY, J. dissenting, the prisoner having appeared and consented to be tried by the County Court Judge, his objection to the jurisdiction came too late.

*Cluney*, for the prisoner. *Longley*, Q.C., Attorney-General, for the Crown.

## EXCHEQUER COURT—ADMIRALTY.

McDonald, C J., Loc. J.] [Oct., 1898.

THE INCHMAREE STEAMSHIP CO. *v.* THE ASTRID.

*Collision—Rules 16 and 20 (1884).*

*Held*, (following *The Franconia*, L. R. 2 P. D. S. 8) that where two ships are in such a position, and are on such courses, and are at such distances, that if it were night, the hinder ship could not see any part of the side lights of the forward ship, and the hinder ship is going faster than the other, the former is to be considered as an overtaking ship within the meaning of Rule 20 and must keep out of the way of the latter.

2. No subsequent alteration of the bearing between the two vessels can make the "overtaking" vessel a "crossing" vessel so as to bring her within the operation of rule 16. (See new rule 24 of the Collision Rules adopted by order of the Queen in Council on 9th February, 1897, and which came into force on the 6th July, 1897.)

*R. C. Weldon* for plaintiffs. *A. Drysdale*, Q.C., for steamship.

# New Brunswick.

## SUPREME COURT.

Full Bench.] SHARPE *v.* SCHOOL TRUSTEES OF WOODSTOCK. [Nov. 8, 1898.

*School rates—Arrest of non-resident—False imprisonment—Damages—Perverse verdict.*

Plaintiff, an unmarried woman and a music teacher, who had been living in British Columbia for three years, returned to visit her former

home at Woodstock in the summer of 1898. While there, she was arrested for arrears of school taxes on an execution issued at the instance of defendants; under Can. Stat., c. 100. The sections providing for the arrest of non-residents had been repealed in 1897, and there was consequently no authority for plaintiff's arrest. She was lodged in gaol, and kept there for seventeen days before the trustees learned of their mistake and ordered her release. The gaoler granted her the use of his private apartments, and allowed her to go out into the yard and garden, and she was also permitted to give music lessons in the gaol. In an action for false imprisonment the Judge directed the jury that if they found plaintiff was a non-resident her imprisonment was illegal, and that he thought they should impose, not punitive damages, "but such reasonable, substantial damages, not technical damages such as one cent, or the lowest coin in the realm, but reasonable and substantial damages for her imprisonment, and for the reasonable consequences following from that imprisonment, whatever they were." In concluding, he said all the circumstances, including the fact of necessary expense of counsel, was "all for your (the jury's) consideration." The jury found that the plaintiff was a non-resident, and assessed the damages at $1.00.

*Held*, on motion for a new trial, VANWART, J., dissenting, that the verdict was perverse, and new trial ordered.

*W. P. Jones* and *C. N. Skinner*, Q.C., for plaintiff.

*F. B. Carvell* and *L. A. Currey*, Q.C., for defendants.

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Full Bench.] DOWNING *v.* CHAPMAN. [Nov. 11, 1898.

*Slander—Privileged communication—Inconsistent verdict.*

This was an appeal from the Albert County Court in an action of slander, in which respondent, plaintiff below, recovered a verdict for $10.00. There were four counts in the declaration, and the defamation alleged was substantially that plaintiff, a physician, had got E. D., defendant's sister, in the family way, and produced an abortion upon her. The publications set out in the first three counts were made to defendant's father and mother, and to two brothers-in-law respectively, and the words complained of in the fourth coun were spoken to a postal clerk on the same train of which defendant was conductor. The judge directed the jury that the occasions of the conversations with the father and mother and brothers-in-law were all privileged, and that defendant would not be liable in these cases, unless they found the words were spoken with malice. The conversation with the postal clerk, he directed, was not privileged, and that for this defendant would be liable, if the words were not true. He left two written questions to the jury, viz., "Were the words true?' and "Was there malice?" The jury found a verdict for plaintiff for $1.00 on the first count, $2.00 on the second count, $3.00 on the third count, and $4.00 on the fourth count. After the verdict had been entered

and just before the jury were discharged, the judge, who had not up to this time thought of the questions, asked the clerk for them, and, observing that they had not been answered in writing, asked the foreman about them, who stated that the jury had agreed to answer both in the negative. On motion for a new trial or verdict for defendant, it was claimed that the jury, having found no malice, and the occasions of the conversations alleged in the first three counts being privileged, the verdict could not stand. The judge refused the motion, holding that as his charge was clear and distinct as to the necessity of malice in respect of the first three counts, and the jury having found for the plaintiff on them, they must of necessity have found that there was malice, and that, in any event, defendant would only be entitled to have the verdict reduced by the amounts found on these counts, which he had not moved for.

Appeal dismissed with costs, the Court holding that the finding of no malice must be taken, under the circumstances, as applicable only to the fourth count, to maintain which malice was not necessary.

*M. G. Teed* and *C. A. Peck, Q.C.*, for appellant. *J. H. Dickson*, for respondent.

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Full Bench.] EDGECOMBE *v.* HUNTER. [Nov. 11, 1898.

*Memorandum of agreement to trade at store—Whether sufficient under Statute of Frauds.*

In 1888 the plaintiff, respondent, a dry goods merchant, gave the defendant, appellant, an insurance agent, an application for a $2,000 policy on his brother's life at an annual premium of $100, when appellant signed the following agreement: "I hereby agree to take annually so long as I am agent of the Sun Life Assurance Co. on account of the premium of insurance due April 1st each year one hundred dollars on account from the store of Fred. B. Edgecombe, which is the annual premium due each year on policy 18484 on life of H. V. Newcombe." Respondent gave appellant another application for a $5,000 endowment policy on his own life, premium $322.25 in 1889, when appellant agreed he would accept half the premium in cash and take the other half out in dry goods at respondent's store. On this occasion appellant signed the following entry in respondent's day book: "J. B. Gunter, Cr., By premium No. 26282, Sun Life, $322.25. Agreed to take half the premium in goods." In 1895 respondent gave appellant an application for still another policy for $5,000 on his own life, premium $374.45, when a similar agreement was made to that which was entered into in respect of the second policy and a similar memorandum was made in respondent's day book. Appellant purchased goods at respondent's store as agreed down to April, 1897, when he stopped and refused to trade further. In an action in the York County Court for breach of contract respondent recovered a verdict for $220.97.

*Held*, on appeal, that the agreements were void under the Statute of Frauds.

Appeal dismissed with costs.

*Van Wart*, Q.C., for appellant. *McCready* for respondent.

Barker, J.] GODEFROI *v.* PAULIN. [Nov. 15.

*Practice—Motion to take bill pro confesso—Service of clerk's certificate.*

On a motion to take a bill pro confesso for want of a plea, answer or demurrer, the defendant need not be served with a copy of the clerk's certificate of the filing of the bill, and that no plea, answer or demurrer has been filed. *MacRae* v. *Macdonald*, N.B. Eq. cases 498, not followed.

*G. G. Gilbert*, Q.C., for plaintiff. *A. I. Trueman*, for defendant.

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McLeod, J.] NASE *v.* PROGRESS PUBLISHING CO. [Nov. 29, 1898.

*Practice—Trial by jury—Libel—Notice to sheriff—60 Vict., c. 24.*

An action for libel may be tried by the jury in attendance at the sittings of the Court, though no notice was given by the plaintiff to the sheriff under s. 155 (4) of the Supreme Court Act, 60 Vict., c. 24.

*L. A. Currey*, Q.C., for plaintiff. *C. N. Skinner*, Q.C., and *A. W. MacRae*, for defendant.

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## EXCHEQUER COURT—ADMIRALTY.

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McLeod, Loc. J.] LAHEY *v.* THE MAPLE LEAF.

*Yacht dragging anchor in public harbour — Salvage — Jurisdiction — R. S. C., c. 81, s. 44.*

A yacht, with no one on board of her, broke loose from anchorage in a public harbour during a storm, and was boarded by men from the shore when she was in a position of peril, and by their skill and prudence rescued from danger.

*Held*, that they were entitled to salvage.

The plaintiffs claimed the sum of $100 for their services.

*Held*, that inasmuch as the right to salvage was disputed, the provisions of R. S. C., c. 81., s. 44 did not apply, and that the Court had jurisdiction in respect to the action.

*W. H. Trueman*, for plaintiffs. *J. R. Dunn*, for yacht.

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McLeod, J.] WYMAN *v.* THE DUART CASTLE. [Dec. 12, 1898.

*Security for costs—Admiralty action—Temporary residence of plaintiff within New Brunswick.*

The plaintiff while in the service of the defendant steamer as an engineer, received physical injury, and brought action therefor against the defendant steamer by summons in rem, and caused the arrest of the steamer, upon which bail was put in for the amount of the plaintiff's claim and costs of action. The plaintiff was injured on March 18, 1897, and was

on that date removed to the hospital at St. John, N.B., where he remained until April 15, 1898, and since that date he continued to reside at St. John, N.B. On an application by the owners of the defendant steamer affidavits were produced that plaintiff belonged to Yarmouth, N.S., and that it was believed his residence in St. John was temporary, and would not continue later than the trial of the action. The plaintiff stated in affidavit on reply that he was residing in St. John permanently, and had no present intention of removing therefrom, and was unmarried. Prior to the action he had never had a residence in St. John. For the defendants it was contended that the practice of the court should be governed by Order 65 Rule 6A of the English Judicature Act rules by which the decisions of *Redondo* v. *Chaytor*, 4 Q.B.D. 453, and *Ebrard* v. *Gassier*, 28 Ch. D. 232 had become obsolete, and that the court was not to be bound by the Provincial decision of *Newcombe* v. *City of Moncton*, 31 N.B. 386.

*Held*, that the application should be refused.

*J. R. Armstrong*, Q.C., for the application. *A. A. Stockton*, Q.C., and *C. J. Coste*, contra.

## Manitoba.

### QUEEN'S BENCH.

Full Court.] REGINA *v.* HODGE. [Dec. 10, 1898.

*Criminal Code, s. 61—Theft—Accessory—Receiver of stolen goods.*

The prisoner was convicted of having received a steer knowing it to have been stolen, but the principal evidence at the trial was such, that if it was fully accepted, it would, under s. 61 of the Criminal Code, have warranted the conviction of the prisoner on a charge of having stolen the animal, as it showed that he was an accessory before the fact, and had furnished the thief with a rope to lead the steer away, and his counsel contended that he should have been prosecuted for the theft and could not therefore be convicted of the receiving. He relied on *R.* v. *Owen*, 1 Moo. C.C. 96; *R.* v. *Evans*, 7 Cox C.C. 151; *R.* v. *Coggins*, 12 Cox C.C. 517, and *R.* v. *Perkins*, 2 Den. C.C. 459.

*Held*, following *R.* v. *Craddock*, 2 Den. C.C. 31, and *R.* v. *Hughes*, Bell C.C. 242, that an accessory before the theft who had subsequently received the stolen article might properly be convicted of either or both offences. Conviction affirmed.

*Patterson* for the Crown. *Bonnar* and *Heap* for the prisoner.

# British Columbia.

## SUPREME COURT.

Martin, J.] REG. *v.* BOWMAN. [Oct. 28, 1898.

*Summary conviction—Appeal from—By-law ultra vires—Estoppel from setting up because objection not taken in Court below—Plea of guilty—No appeal after—Discretion of magistrate—R.S.B.C., c. 176, ss. 70-85.*

Appeal from the conviction by the Police Magistrate of the City of Victoria for an infraction of s 22 of the Street By-law of the City of Victoria, in that the defendant did "while driving a hack along Birdcage Walk towards town keep to his right hand side he then and there not passing another horse and vehicle going in the same direction or standing still." S. 22 of the said By-law is as follows:—"Every person riding or driving along any street shall keep to his left hand side, except when passing another horse and vehicle, which is going in the same direction or standing still." The accused pleaded guilty, and was fined.

On the hearing of the appeal it was contended on behalf of the appellant that the by-law was ultra vires, and it was also sought to call witnesses as to the merits and to shew that the Magistrate acted improperly or irregularly in the way in which he asked questions of the prosecutor and others regarding the existence of malice in the defendant's mind so as to arrive at the extent of the fine he thought fit to impose. R.S.B.C., c. 176, s. 75 provides that no judgment shall be given in favour of the appellant if the appeal is based on any objection for any defect in the proceedings "in substance or in form ..... unless it is proved before the Court hearing the appeal that such objection was made before the Justice before whom the case was tried and by whom such conviction, judgment or decision was given." It was admitted that the objection that the by-law was ultra vires was not taken before the Magistrate.

*Held*, that the appellant was estopped from contending on appeal that the by-law was ultra vires as the objection was not taken before the Magistrate; he was estopped from appealing on the merits because he had pleaded guilty.

Appeal dismissed with costs.

*Bradburn*, for appellant *Higgins*, contra.

McColl, C.J.] MCGREGOR *v.* MCGREGOR. [Nov. 18, 1898.

*Practice—Replevin—Costs—R.S.B.C., c. 165.*

Summons to set aside writ of summons in replevin for want of jurisdiction, the contention being that inasmuch as the present Replevin Act, R.S.

B.C., c. 165, contains no reference to pleading or practice other than to enable them to be dealt with by rules of Court to be made, and because no rules have been made, the proceeding is unauthorized. Supreme Court Rule 1068 provides that "where no other provision is made by these rules, the present procedure and practice remain in force," etc., and by the Supreme Court Act, R.S.B.C., c. 56, s. 94, it is provided that all the rules including the one mentioned shall be valid and binding. Both these Acts were brought into force by the same statute (c. 40 of 1898). No affidavit had been filed before issue of the writ.

*Held*, that the Court procedure and practice existing under the old Replevin Act are still in force although the new Act contains no reference to pleading or practice other than to enable them to be dealt with by Rules of Court to be made. The writ was set aside on the ground that no affidavit had been filed before issue of the writ, but as that ground was not taken in the summons no costs were allowed.

*Gilmour*, for the summons. *E. J. Deacon*, contra.

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Irving, J.] IN RE E., A SOLICITOR. [Dec. 6, 1898.

*Taxation—Attorney and client—Offer to take less than amount of bill delivered.*

The solicitor delivered several bills, one of which was for $272.32, and at the bottom of it he wrote, "say $250.00," another was for $104.65 and at the bottom was written "say $45.00"; another, being that of the N. & Northern R. R. Co., the solicitor delivered at $13.56, but with his accounts delivered a letter stating that he would not claim the amount of this last named account. The different accounts were by the common order referred to the taxing master for taxation and report. Upon the taxation the taxing master certified that the amount of the bills presented for taxation was the sum of $615.55, and the amount taxed off was the sum of $113.47, and the N. & Northern R. R. bill was disallowed. The taxing master did not state his reason for the disallowance.

The solicitor took out a summons for an order directing the taxing master to tax the costs of the reference to him on the ground that one-sixth had not been taxed off, inasmuch as to the N. & Northern R.R. account he had notified the client that he would not claim the amount of the same, and also upon the ground that the accounts having the words "say $250.00" and "say $45.00" should be understood as offers to accept these amounts for the accounts affected thereby, and as a consequence as the client upon this taxation had not succeeded in reducing the bill below the amounts so named he could not contend that one-sixth had been struck off. For the client it was contended upon the authority of *In re Carthew, re Paull*, 27 Ch. D. 485 and *In re Cameron*, 13 P. R. 173, that the solicitor cannot rely upon a previous offer to take less than the amount found to be due. And as to the Northern R. R. bill in particular

the solicitor should upon the taxation have declined to proceed with such taxation and have relied upon his letter offering to withdraw that account, but having in all cases proceeded to tax regardless of the different offers he could not take advantage of such.

*Held*, that the authorities cited were conclusive and dismissed the summons with costs.

*R. M. Macdonald*, for the solicitor. *Taylor*, Q.C., for the client.

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Irving, J.] HOEPPNER *v.* HODGINS. [Dec. 8, 1898.

*Notice of trial—For day subsequent to first day of assize—Close of pleadings.*

The plaintiff gave notice of trial under Rules 345 and 346 of the B.C. Rules of 1890 for the tenth day after first day of the sittings at Nelson, B.C. These rules in part are as follows: "Notice of trial before a judge, with or without a jury, in Victoria, shall be deemed to be for the day named in such notice, or for the soonest period thereafter on which the action can be conveniently tried. . . . Sittings of the Court in Victoria, for trials of issues, with or without a jury, shall so far as is practicable, be held as often as the business to be disposed of may render necessary. This rule shall also apply to trials in any portion of the Province (other than Victoria) in which effect can be given to it."

Rule 346, "Except as provided at the end of the last Rule, notice of trial . . . elsewhere than in Victoria . . . shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given."

The action was commenced to recover an amount for architect's commission, and the defence was delivered in due course with a counterclaim for monies paid by mistake; the plaintiff delivered reply, and notice of trial was served on the 15th day after delivery of the reply to defence and counterclaim. The defendant took out a summons for an order to strike out the notice of trial on the ground (1) that it should have been for the first day of the sittings of the Court at Nelson, B.C., and not for a day ten days after the first day of the sittings and (2) that the pleadings were not closed. The defendant relied upon rules 223, 224, 225 and 226, claiming that he had 21 days to reply to plaintiff's defence to counterclaim. The plaintiff disputed the right of defendant to reply to the defence to counterclaim, and also relied upon Rules 339 and 343, providing that "Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial;" and that "Notice of trial shall be given before entering the trial; and the trial may be entered notwithstanding that the pleadings are not closed, provided notice of trial has been given."

*Held* that the notice of trial was good.

*Taylor*, Q.C., for plaintiff. *J. H. Bowes* for defendant.

## EXCHEQUER COURT—ADMIRALTY.

McColl, Loc. J.] COOK *v.* THE MANANEUSE. [Oct. 13, 1898.

*Breach of contract to carry passengers—Action in rem.*

The plaintiff for an alleged breach of a contract to carry him from Liverpool to St. Michaels and thence to Yukon Gold Fields took proceedings against the ship and obtained a warrant for her arrest.

*Held*, that even if the breach alleged were established, the plaintiff was not entitled to a lien on the vessel.

*F. R. McD. Russell* for the plaintiff. *D. G. Marshall*, for the ship.

# North-West Territories.

## SUPREME COURT.

En Banc.] ULLRICK *v.* DAUM. [Dec. 5, 1898.
ULLRICK *v.* ANDREWS.

*Criminal law—Appeal from conviction—Defective notice—Ordinance No. 10 of 1895—Deputy clerks.*

Appellant, having been convicted by a J.P. on two charges of assault, gave notice that he would appeal "to the next sitting of the Supreme Court, to be holden at Saltcoats on Monday, the 3rd day of October, A.D. 1898," and filed his notice of appeal and recognizance in the office of the deputy clerk at Yorkton. The next regular sitting of the Court at Saltcoats had been fixed by order-in-council for the 6th (and not 3rd) of October. Under Ordinance No. 10 of 1895, a deputy clerk at Yorkton had been appointed. Saltcoats is situated within the district set apart for the deputy clerk so appointed. On the hearing of the appeal, respondents' counsel objected that the notice of appeal was defective in that it specified a wrong date for the sitting of the Court, and that it and the recognizance should have been filed in the office of the Clerk of the Court for the Judicial District of Eastern Assiniboia at Moosomin. Both points being referred to the Court en banc, it was

*Held*, that the notice of appeal was sufficient, and that the office of the deputy clerk at Yorkton was the proper office in which to file the notice and recognizance.

*Hamilton*, Q.C., for appellant. No one contra.

En Banc.] IN RE LAND TITLES ACT AND ROAD ALLOWANCE. [Dec. 5, 1898.

*N. W. T. Act, 60-61 Vict., c. 28, s. 20.*

This was a reference by the Registrar of the Southern Alberta Land Registration District to Mr. Justice Scott, and by him referred to Court. The question involved was as to the powers of the Lieutenant-Governor-in-Council under the N.W.T. Act, as amended, to close up and sell land which had been set apart for road allowances in the territories.

*Held*, that the Lieutenant-Governor-in-Council has the power not only to close up, but also to sell road allowances in the territories under the T.R.P. Act, as amended

The Deputy Attorney-General, in person. The Inspector of Land Titles Offices, in person.

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En Banc.] IN RE LAND TITLES ACT, 1894. [Dec. 5, 1898.

*Land Titles Act, ss. 40 (2) and 115—Item 3 of tariff of fees.*

This was a reference by the Inspector of Land Titles Offices to Mr. Justice Richardson, and by him referred to the Court en banc. One S. applied to bring certain lands under the operation of the Act. Though these lands were not encumbered at the time of the application, various instruments affecting them had previously been registered. The question referred was as to whether or not the applicants could be called upon to pay the percentage fee for the Assurance Fund prescribed by item 3 of the tariff.

*Held*, that the fee was not properly chargeable in such a case.

*Ford Jones*, for applicant. The Inspector, in person, contra.

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En Banc.] KLEINSCHMIDT *v.* PLASCHAERT. [Dec. 5, 1898.

*The Yukon Territory Act—Appeal from Territorial Court of Yukon District to Supreme Court of N.W.T.*

This was an appeal from the judgment of Mr. Justice McGuire, pronounced herein in the Yukon Territory July 29th, 1898. Upon motion to quash the appeal for want of jurisdiction,

*Held*, that the Court had no jurisdiction to hear the appeal.

Appeal quashed with costs.

*F. C. Wade* and *Hamilton*, Q.C., for respondent. *N. Mackenzie*, for the appellant.

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En Banc.] PACIFIC INVESTMENT CO. *v.* SWANN. [Dec. 5, 1898.

This was an appeal from an order dissolving an interim injunction granted to restrain a trustee from disposing of certain property and paying a portion of the proceeds thereof to defendant. (See ante, vol. 34, p. 207.)

The question involved was as to the jurisdiction of the Court to grant such an injunction before judgment had been obtained against defendant.

*Held*, Rouleau, J., dissenting, that such jurisdiction did not exist. Appeal dismissed with costs.

*McCaul*, Q.C., for appellant. *Muir*, Q.C., for respondent.

## Flotsam and Jetsam.

The following item of news recently appeared in one of our provincial daily papers:

"St. Paul, Minn., Dec. 13.—One of the largest verdicts in a personal injury case obtained in the district court has been rendered in the case of Michael J. Reem by his guardian, A. D. Litem, against the Street Railway Company. The verdict was for $10,500. The plaintiff is a fourteen-year-old boy. It was claimed that the car was crowded, and that he was pushed off the car and under the wheels."

A subscriber who sends the above to us asks Messrs. Flotsam & Jetsam to inform him whether the guardian in the above case is any relation to our own eminent and highly-esteemed John Hoskin, Q.C. Upon being interviewed, the latter gentleman, with his usual promptitude and definiteness, replied in the affirmative, being, as he says, "The only official A. D. Litem."

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A cheque deposited to the credit of a person named as "trustee" is held in *Duckett* v. *National Mechanics' Bank* (Md.) 39 L.R.A. 84, to be sufficient notice to the bank that he is not the actual owner of the money, so that the bank will be liable for the loss to the trust estate if it gives the trustee credit on his individual account, and allows him to check out the funds on personal matters. But it is held otherwise with a cheque not naming him as trustee, although there is a clause in it stating that it is the balance of purchase money due him as trustee.

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A party went into a lawyer's office in New Brunswick some months ago to consult him upon following statement of facts: He had bought a tract of land upon which a water mill had once stood. The mill had rotted down years before the purchase, and the only relics were two old wheels lying in the stream. Question: Who owns the old wheels, the grantor or grantee? The lawyer expressed some doubt as to the ownership, which surprised the purchaser of the land, who said: "Just look at my deed, it says all *remainder* and *remainders*, and are not the wheels the *remains* of the old mill?"