HON. CHARLES FITZPATRICK, Q.C., M P.

SOLICITOR GENERAL OF CANADA.

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The prominent positions which the Hon. Charles Fitzpatrick, Q.C., now occupies as Solicitor General of Canada, Batonnier of the Province of Quebec, and Batonnier of the Bar of his native city, attest his professional standing, and mark him as a representative lawyer of his province.

Born in Quebec in 1853, he was called to the bar in 1876, after obtaining the degrees of B.A. and B.C.L. at Laval University. He was at once taken into partnership by the law firm of Andrews, Caron & Andrews, which then enjoyed a very large and lucrative practice, one of the members being the present Mr. Justice Andrews, of the Superior Court. Soon afterwards he was named Crown Prosecutor for the district of Quebec, which office he filled for several terms, bringing to bear in the discharge of his duties, the energy, acumen and learning for which he has continued to be distinguished. To enumerate the criminal cases wherein Mr. Fitzpatrick has been engaged, whether for the prosecution or defence, would be to mention nearly every one of importance before the Courts of the Province of Quebec, for the last twenty years. Suffice it to say that he was employed as Counsel for the United States Government in the Eno Extradition matter, and for the Belgian Government in the Canon Bernard case; in 1885 he led for the defence in The Queen against Louis Riel, tried for high treason, at Regina, N. W. T., and appeared before the Privy Council in England on the application for a new trial; in 1892 he defended the late Hon. Honore Mercier and others in the political prosecutions of that day, and subsequently the late Thomas McGreevy, M.P., and the Connollys, before the Committee of the House of Commons on Privileges and Elections. Not only in criminal but in commercial and other cases have Mr. Fitzpatrick's services been called into requisition to the great advantage of his many clients.

In 1897 he represented the Dominion Government before the Judicial Committee of the Privy Council in the Fisheries case; and more recently he appeare for the Government of the Province of Quebec before the same high tribunal, the ear of which, as well as of the Supreme Court at Ottawa, he appears, judging from results, to have secured by the clear, concise and fair way in which he states a case. Mr. Fitzpatrick was appointed a Q.C. in 1893, called to the Ontario Bar in 1896, and twice elected Batonnier of the Province of Quebec and Batonnier of Quebec District. On the formation of Sir Wilfred Laurier's administration, in June 1896, he was appointed Solicitor General, sitting as Member for the County of Quebec, having previously served for some time in the Legislative Assembly for the same constituency. Though in parliament but for a few years, Mr. Fitzpatrick has already taken a prominent place in the councils of the country.

In 1879 he married Corinne, daughter of the late Hon. R. E. Caron who closed a long and distinguished public career as Lieutenant-Governor of the Province of Quebec.

It would have seemed probable that the Hon. A. S. Hardy, when he relinquished the position of Premier of the Province of Ontario and Attorney-General, would either have returned to the practice of his profession, or taken some prominent judicial position, for which he would be eminently qualified. He has, however, chosen to accept the quiet position of Surrogate Clerk and Clerk of the Process at Osgoode Hall, which are practically sinecures. It is recognized that Mr. Hardy's choice was on account of his being unfortunately in poor health; and, not feeling equal to the strain of heavy judicial work, did not like to undertake it. The long record of Mr. Hardy as a Minister of the Crown has, irrespective of politics, been singularly honorable and upright. Few men have spent a quarter of a century in Canadian politics without more or less imputation of a personal character being made against them, and perhaps, though very seldom, not unjustly. The late Attorney-General has, however, since his retirement, received high praise for his integrity, and this it is a pleasure to notice, coming as it does from the press of both political parties.

Before entering politics, Mr. Hardy was an able and rising

counsel, full of combat, and a strong man before a jury. His practice was large, and his services were sought far beyond his own county, but the more alluring and exciting arena of politics deprived the bar of his Province of an able advocate, whilst it gave to his native country a distinguished politician and leader.

Whilst Mr. Hardy's many friends will be sorry that he has felt it necessary, for a time at least, to retire from the ranks of the profession, it is hoped that the rest which he will now have, and which he has so well earned, will soon restore him to his usual vigor.

The above suggests some reflections. Mr. Hardy, feeling the infirmities resulting from the illness which has afflicted him, quietly drops into a position for which his strength is sufficient, although one of greatly less importance and responsibility than others he might naturally aspire to, but the work of which he would consider he could not satisfactorily accomplish. Such a thought on his part is much to be commended, and contrasts very favorably with the way in which we sometimes see a person in high office cling to a position for which his infirmities manifestly unfit him. Another reflection is that the offices now held by Mr. Hardy have been very properly filled by a professional man. Such, however, has not always been the case. The rule should be that offices connected with the administration of justice should be given to men in the ranks of the legal profession and not to outsiders. It surely was not in accordance with the eternal fitness of things that a baker (we believe he made very good bread) should be appointed Registrar of a Surrogate Court, or that a dry goods merchant should endeavour to master, late in life, some of the intricacies of practice in the office of the Clerk of the Crown and Pleas. There always will be those in the profession, who, from circumstances beyond their control and without any fault of their own, lose their practice; and it is only right that legal offices which they are well qualified to fill should be given to them, and not to those who are utterly incompetent to do the business entrusted to them, and are only appointed for political reasons.

There was an interesting divergence of opinion between two of the justices of the Supreme Court of North Carolina in the case of the *State* v. *Rhyne*, 33 S. E. Rep. 118, as to whether the lynchings

in that state were or were not partly due to the actions of the courts. We take our information from the *American Law Review*. The discussion among the judges had apparently elicited a statement that the Appellate Courts were so lenient with murderers that lynchings were resorted to in order to protect society. Judge Douglas in his judgment takes exception to this, and in answer to the suggestion that wealthy men who have money enough to obtain counsel are rarely convicted of murder, said: "Are they ever lynched? If they are not, then lynch law can in no sense be regarded as a protest against their acquittal." Judge Clark, discussing the question generally, said: "From the report of the Attorney-General to Congress, it appears that in the last dozen years the number of homicides in the United States has suddenly risen from 4,000 to 10,500 per annum, and that for the vast slaughter represented by the last figure, in round numbers, 100 were convicted of murder by the courts and 240 were executed by lynch law—that growing blot upon our civilization. In this state, from the official criminal statistics, on an average there are 125 homicides per annum, from which on an average two are executed by law and four are lynched, though all the lynchings are doubtless not reported. In 1894 the Attorney-General's report showed eight lynched and no execution by law. Lynch law, evil though it is, is a protest of society against the utter inefficiency of the courts, as above shown, to protect the public against murder." He contended that the inefficiency is chiefly due to the law as to murder trials in North Carolina, by which the state is only allowed four peremptory challenges, while the prisoner has twenty-three and gives prisoners the right to except to any ruling of the court, but the solicitor for the state cannot; the result being that "murder, however flagrant, if the prisoner or his friends have money, entails merely a sharp fine upon the slayer, imposed for the benefit of some influential and able lawyer, in the way of a fee." He then suggests corrective legislation. It strikes us that Judge Clark has done a helpful thing by this judicial utterance.

The dryness and solemnity of the law has occasionally some amusing incidents, as witness the following: As most of our readers are aware the practice is common in the United States of preparing what is called a brief or factum, giving the arguments of

counsel at length, for presentation to the court. The attorneys for the interveners in a suit of *Perkins* v. *Lyons*, now pending in the Supreme Court of Iowa, are Messrs. Kinne, Hume & Bradshaw. The senior member of this firm was recently Chief Justice of that court. Whilst occupying that position he gave a judgment which was dead against the law as contended for in the factum prepared by the firm of which he is now a member. It was important, as far as possible, to overcome this difficulty; and that there was dexterity and tact in the effort will be seen from the following amusing extract from the printed argument of the attorneys for the interveners:

"We recognize the fact that the senior member of the firm, the name of which is subscribed hereto, among his last official duties as chief justice of this honorable and respected court, wrote the decision in the case of *Ottumwa* v. *Stodghill*, reported in 103 Iowa, 437, in which this court held that a transfer of stock in a corporation is invalid as against an attaching creditor, even though he has actual notice of the transfer, when the transfer is not entered upon the books of the corporation in the manner provided by section 1078 of the Code of 1873. Since that case was decided the junior members of the firm have labored long and earnestly with the senior member to convince him of the error of his decision. We have shown him that it is based upon a harsh, strict and literal interpretation of the statute; that it is contrary to equity and good conscience, and opposed to the trend of modern and enlightened authority. We have pointed out to him that he wrote it as the shades of night were falling upon his judicial career, and that his theretofore clearsightedness in legal matters had become temporarily dimmed, and that he is now in the bright light of a free and unhampered advocate, and more capable of seeing things in their proper proportions. We have even quoted to him the speech of Mrs. Browning's maiden to her lover:

> Yes—I answered you last night.
> No—this morning, sir, I say.
> Colors seen by candle light,
> Do not seem the same by day

In short though he has never said so in words, we are convinced that the ex-Chief Justice is heartily ashamed of that narrow, almost mediæval, decision, and that all we have to do is to present the question to his successor, and five associates, in a proper manner to convince them also that the rule promulgated in the Ottumwa case is not the law."

We are glad to know that a difficulty of this kind does not often present itself in this Dominion, as we do not often see a judge re-entering the professional arena. It is said, however, that a prominent leader of our bar was once placed in a somewhat similar

position; but even his ready wit did not suffice to prevent the court from expressing the opinion that his opinion as judge was sounder than his argument as counsel.

SWORN AND UNSWORN STATEMENTS CONTRASTED.

Grave miscarriage of justice not infrequently occurs from the adoption, by some of those charged with the duty of weighing evidence, of a sort of mechanical rule in the process. One very common instance is the case of a witness whose statements out of court are inconsistent with, or directly contradictory of, his testimony upon the witness stand. It too often happens—indeed it is doubtful whether it does not happen in the great majority of cases—that the judicial functionary who has to pronounce upon such evidence adopts the easy rule, that the sworn statement must be taken in preference to that which was not made upon oath.

The temptation to do this is very great, inasmuch as judges and juries not unnaturally shrink from findings that virtually pronounce a fellow-mortal guilty of the heinous moral and legal offence of perjury. They well know that a man would much rather be called a liar than a perjurer; and they have an apparent warrant for assuming that he is more likely to be guilty of the minor fault.

Now one could not quarrel with this disposition, merely *as* a disposition. It is a very natural one. The view just stated is one that ought to be taken into account in all such cases. But the making this view a conclusive rule may result in a serious abuse, by shutting out all further inquiry or consideration by its operation. The attitude of mind we object to is that in which the inquirer simply says: "We have here a sworn statement on the one hand, and, on the other hand, we have against it, contradictory statements by the same witness upon other occasions when he was not on oath; but we are bound to take his sworn statement in preference to any number of unsworn ones."

Neither the law nor the experience of mankind justifies any such rule. If any such rule were contemplated by the law, to what purpose would be the 22nd and 23rd sections of 17 & 18 Vict. c. 35 (Imp.) Why confer (or, rather, confirm; for the legislation was really declaratory) the right of proving such contradictory statements, if this absurd principle is to make them absolutely nugatory?

Manifestly the Imperial Parliament, which passed this enactment, and our several legislatures which have adopted it, recognized no such rule-of-thumb for determining the weight of evidence.

There might be some reason in this principle if perjury were a thing unknown in our courts. But unfortunately it is very far from being such. On the contrary, those who have experience with litigation know that it prevails to an alarming and disheartening extent. Why, then, should some judges and jurors adopt a supposed rule that gives a special virtue to the oath of the man who swears he is a liar? For as a general thing the witness in these cases has no other explanation to offer of his contradictory statements than the shameless one that he was not then on oath.

Both law and common-sense dictate that these contradictory statements—sworn and unsworn—should be weighed in the same way as other evidence. All the circumstances should be taken into consideration. The question should be, not which is the sworn statement, but which is the true statement? And the answer to the one is not by any means, in view of the general experience with witnesses, an answer to the other. Very often it is just the other way. If the witness's statements in contradiction of his own evidence were spontaneous; if no motive for falsehood upon the occasion is shown; and especially if he has no other explanation to offer than that he was not then on oath—the chances are that they, and not the sworn testimony, for which a motive can readily be assigned, are true. In this, as in all other inquiries in human affairs, the great thing to be sought for is motive. The greatest crimes are committed every day from some motive; not even the most trivial act is done without a motive. So that when a man asks a court of justice to believe that he, without any motive whatever, and for no reason that he can explain, deliberately lied to several different persons, the strong probability is that he is displaying upon oath that propensity to prevarication which he solemnly swears he possesses—but displaying it in a less degree than he gives himself credit for, inasmuch as he is now lying from a motive, whereas he swears he repeatedly lied without any motive whatever.

REASONABLE AND PROBABLE CAUSE IN ACTIONS FOR MALICIOUS PROCEDURE.

(*Continued from p. 608.*)

In the following pages we purpose to supplement the monograph published last month on "Reasonable and probable cause," by summarizing, from the special standpoint of trial practice, the rulings which bear upon that subject. The numbering of the sections is continuous with that of the previous article.

22. Forms of action—Under the old rules of pleading, putting the law in motion falsely and maliciously without any probable cause, was deemed to be the subject of an action on the case, and not of trespass (*a*).

The question of probable cause is not affected by any technicality in regard to the form of the action. Hence, though the covenant upon which the action in which a debtor was arrested is expressly several in its terms, the absence of probable cause is not shewn by the fact that the action was brought against the debtor and another jointly. (*b*)

23. Declaration—The want of probable cause, being a matter of substance must be expressly alleged. (*a*)

A declaration is not demurrable which alleges that the defendant maliciously and without reasonable or probable cause detained the plaintiff in custody upon a second arrest for the same cause of action in respect of which he had already been duly discharged out of custody. Under such circumstances the words "reasonable and probable cause" will be taken to mean that the defendant knew he had no ground for the second arrest and could derive no advantage from it. (*b*)

In an action for malicious arrest, under a statute giving a creditor authority to sue out a ca. sa., upon swearing that he has reason to believe that the debtor has made some secret or fraudulent conveyance of his property, it is sufficient prima facie to charge that the defendant maliciously sued out a ca. sa. when he had no reason for such a belief. The plaintiff need not aver that he had not made such a conveyance. (*c*)

(*a*) *Ysee* v. *Smith* (1822) 2 Chitty 304; 1 Dow & R. 97.

(*b*) *Whalley* v. *Pepper* (1836) 7 C. & P. 506. "Probable cause," said Tindal, C.J., "means a probable cause of action, and not probable cause for any particular form of action."

(*a*) *De Medina* v. *Grove* (1846) 10 Q.B. 152; *Barbour* v. *Gettings* (1867) 26 U.C.Q.B. 544. Contra, see *Jones* v. *Gwin* (1710) Gilb. K.B. 185 (1889).

(*b*) *Heywood* v. *Collings* (1838) 9 Ad. & E. 208.

(*c*) *McIntosh* v. *Demeray* (1848) 5 U.C.Q.B. 343

The subjoined rulings deal with the sufficiency of the declaration, so far as it bears upon probable cause, in actions under statutes giving a creditor the right to arrest a debtor when there is reason to believe that he is about to leave the country.

A declaration in an action under 1 & 2 Vict., c. 110, sec. 3, for malicious arrest and holding to bail on a false affidavit of the amount owed need not set out the false statement by which the judge was induced to make the order, nor shew that the facts were false within the defendant's knowledge, nor that he had not reasonable or probable cause for believing it to be true. (*d*)

A declaration on an action under the same statute for falsely and maliciously procuring an order for the arrest of the plaintiff under the Act of 1 & 2 Vict., c. 110, sec. 3, is bad, unless it shews the nature of the falsehood by which the order was procured (*e*).

In an action for malicious arrest under the Upper Canada Statute, 8 Vict., c. 48, which required that the plaintiff should swear that he had "good reason to believe and did verily believe that the defendant was about to leave Upper Canada with intent to defraud the plaintiff of his debt," a declaration was held to be sufficient which alleged that the defendant "had not any reasonable cause for believing." (*f*) In actions under Upp. Can. Consol. Stat., c. 24, sec. 6, (a provision also found in Rev. Stat. Ont., 1877, c. 67, sec. 5: see also Rev. Stat. Ont., 1897, c. 80, secs. 1, 8), for procuring the arrest of a debtor on the ground that he was about to quit the country, the grievance is that the defendant maliciously and without probable cause, set the law in motion, and, that by his false and untrue statements he obtained from a judge the order for bailable process. Hence a count which avers that the defendant made an ungrounded statement and "by means of such false allegations, falsely and maliciously induced the said judge" to grant the order for arrest, is not demurrable, although the statute requires the affidavit on which the order is granted to shew facts and circumstances to satisfy the judge. (*g*)

In an action under the same statutes against one of the deponents of a creditor a declaration is sufficient which alleges that he "made a false affidavit that he had good reason to believe and did believe that the plaintiff had departed from the country with intent to defraud the creditor."

(*d*) *Ross* v. *Norman* (1850) 5 Exch. 350.

(*e*) *Bryant* v. *Bobbett* (1847) 11 Jur. 1021, following *Daniels* v. *Fielding* 16 M. & W. 200.

(*f*) *Lyons* v. *Kelly* (1849) 6 U.C.Q.B. 278.

(*g*) *Griffith* v. *Hall* (1867) 26 U.C.Q.B. 94.

It is not necessary to aver also that the defendant had no reasonable or probable cause for making the said affidavit, or for believing, &c. (*h*)

24. Plea -The defendant is not bound to set forth in his plea all the evidence on which he acted; it is enough if he shows facts which would create a suspicion in the mind of a reasonable man. (*a*)

Evidence of probable cause may be given under the plea of Not Guilty. (*b*) But such a plea puts in issue merely the malicious use of process without probable cause, (*c*) not such a fact as the plaintiff's acquittal. Hence, a new trial will not be ordered, for the reason that no evidence was given of an acquittal alleged in the complaint. (*d*) So, also, a discontinuance is a material allegation which the defendant must deny specially, if he wishes to dispute it; if he does not do so, he admits the discontinuance. (*e*)

In order to throw upon the plaintiff the burthen of proving the reversal of an outlawry, such reversal should be specially pleaded. (*f*)

If the defendant, instead of relying on a plea of Not Guilty, elects to bring the facts before the court on a plea of justification, he must not only allege certain facts which were sufficient to make him or any other reason-

(*h*) *Fahey* v. *Kennedy* (1860) 28 U.C.Q.B. 301. For decisions on the pleadings under the repealed Canadian Statute of Geo. IV., c. 1, regarding the right to arrest a debtor where the creditor apprehended that he was about to leave the country, see *Denham* v. *Ridout* (1842) 6 U.C.Q.B. (O.S.) 193; *Thompson* v. *Garrison* (1842) 6 U.C.Q.B. (O.S.) 213; *McBean* v. *Campbell* (1843) 6 U.C.Q.B. (O.S.) 457.

(*a*) *Broughton* v. *Jackson* (1851) 18 Q.B. 378.

(*b*) *Cotton* v. *Browne* (1835) 3 Ad. & E. 312 [where the court struck out a special plea setting forth the facts shewing the existence of probable cause]: *Hounsfield* v. *Drury* (1839) 3 Perr. & D. 127; *Jones* v. *Dunn* (1851) 1 U.C.C.P. 204. To set out a plea in an action for false imprisonment, stating that the crime had been committed and that the defendant had cause to suspect the plaintiff of its commission, is considered in aggravation of damages, as shewing the animus of the defendant in persevering in the charge to the very last. Such a plea differs in this respect from one justifying the false imprisonment on the ground that the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of felony, a justification being in the nature of an apology for the defendant's conduct: *Warwick* v. *Foulkes* (1844) 12 M. & W. 507. A plea in an action for malicious arrest, which states that the defendant "had good, sufficient and reasonable and probable cause of action against the plaintiff in respect of the sum of money mentioned" is bad, because it neither traverses a fact which he would have been taken to have admitted by pleading only the general issue, nor amounts to a special plea of facts and circumstances on which the court could render judgment: *Sanderson* v. *Downs* (1853) 11 U.C.Q.B. 94, distinguishing *Pain* v. *Rochester*, Croke Eliz. 871, and *Chambers* v. *Taylor*, Croke Eliz. 900, and relying on *Cotton* v. *Browne*, 3 A. & E. 312.

(*c*) *Watkins* v. *Lee* (1839) 5 M. & W. 270, decided with reference to the Hilary Rules, 4 Will. IV., cas. iv., r. 1. Under these rules, the only effect of a plea of Not Guilty in an action for maliciously suing out a fiat in bankruptcy is to put in issue the procuring a fiat without probable cause: *Atkinson* v. *Rudeforth* (1843) 3 Q.B. 72, holding it not to be a ground of nonsuit that the complaint stated that the fiat had been annulled by the Court of Review, whereas on the trial the annulment was shown to have been by the Lord Chancellor.

(*d*) *Haddrick* v. *Heslop* (1848) 12 Q.B. 267.

(*e*) *Watkins* v. *Lee* (1839) 5 M. & W. 270.

(*f*) *Drummond* v. *Pigou* (1835) 2 Scott 228.

able person believe the truth of the charge, but that he knew of those facts at the time the charge was laid, and that this knowledge was the reason and inducement for putting the law in motion. (*g*)

25. Divisibility of issues—That an indictment for perjury was preferred without probable cause is sufficiently proved, where evidence is given which shews that some of the charges in the indictment were without probable cause, though there was probable cause for several of the other assignments. (*a*) On the other hand, an indictment containing several assignments of perjury upon several parts of the plaintiff's examination constitutes but one charge; and the preferring of that charge without probable cause constitutes but one cause of action. The plea of Not Guilty denies that one cause of action, and amounts to an assertion that the defendant had probable cause for the whole of the indictment. That is one entire issue; and if there was a want of probable cause for any part of the charge, the plaintiff is entitled to a verdict. Whether there was or was not probable cause for other parts of the charge may affect the damages, but cannot affect the verdict, or shew that the defendant had properly preferred the indictment, that is, with probable cause for every part of it. (*b*)

26. Questions which cannot be raised for the first time on an appeal—In an action for malicious arrest the defendant cannot succeed in banc in nonsuiting the plaintiff, or in obtaining a new trial, on the ground that no probable cause was shewn, if he did not make this objection at the trial, or in applying for a new trial. (*a*)

The objection that an action for unlawfully, &c., arresting the plaintiff without a warrant was really an action of trespass, and, therefore, should have gone to the jury, on the question of justification as well as on the other issues, cannot be taken for the first time on appeal (*b*).

(*g*) *Delegal* v. *Highley* (1837) 3 Bing. N.C. 950.

(*a*) *Reed* v. *Taylor* (1812) 4 Taunt. 616. Where the plaintiff, after giving evidence to shew that, as to one of several arguments of perjury, the charge was malicious and without probable cause, rests his case, and obtains a verdict, a new trial will not be granted on the theory the defendant was not permitted to shew that there was reasonable and probable cause for the charge contained in the other assignment: *Ellis* v. *Abrahams* (1846) 8 Q.B. 709. These decisions were followed in *Wilson* v. *Tennant* (1894) 25 Ont. R. 339, where the prosecution was for the theft of certain specified articles; and the court (Meredith, J., diss.) upheld the ruling of the trial judge that the action was maintainable because the evidence shewed that there was no probable cause for the prosecution in respect to some of the articles. The fact that as to others there was such cause only affected the amount of damages.

(*b*) *Delisser* v. *Towne* (1841) 1 Q.B. 333. Where the plaintiff on the trial proves want of reasonable cause as to one assignment only, and takes a verdict in respect to that, he is not entitled to costs in respect to the assignments as to which damages were not given, and the defendant is not entitled to the costs of the defence prepared by him in respect of those assignments: *Ibid.*

(*a*) *Jones* v. *Duff* (1898) 5 U.C.Q.B. 143.

(*b*) *Donnelly* v. *Brooden* (1877) 40 U.C.Q.B. 611.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE PROPERTY USED AS A DISORDERLY HOUSE.

In *Hope* v. *Walter* (1899) 1 Ch. 879, the facts were simple; the defendant agreed to purchase from the plaintiffs a tenement used as a house and shop, before completion it was discovered that a quarterly tenant of the plaintiffs', unknown to them, and in breach of a covenant in his lease, was using the premises as a disorderly house, whereupon the defendant refused to complete, and this action was brought to compel specific performance: Cozens-Hardy, J., gave judgment for the plaintiffs, holding that the improper user of the premises by the tenant afforded no ground for refusing relief to the vendors.

NEWSPAPER PUBLICATION "SPORTING PAPER."

McFarlane v. *Hulton* (1899) 1 Ch. 884, determines two questions, viz., what is meant by publication of a newspaper, and what is legally a "sporting paper." As to the first point Cozens-Hardy, J., determined that a newspaper is published whenever and wherever it is offered to the public by the proprietor; consequently, that it may be published in more than one place, thus where the proprietor has offices at different places, at each of which the newspaper is offered for sale or distribution, then the paper is published at each of such offices. The question as to what is within the definition of a "sporting" paper arose in this way: On the sale of *Bell's Life in London* the vendors agreed with the purchaser not to print or publish any sporting paper or periodical within ten miles of a certain London street. The defendants published within the defined radius, a paper containing no racing intelligence or betting odds, but merely recording such amateur sports as cricket, football, cycling, and running, and this was held not to be "a sporting paper" within the meaning of the agreement. From which one would infer that "a sporting paper" is one containing

racing intelligence and betting odds, this definition does not seem altogether satisfactory.

MORTGAGE — FORECLOSURE — PARTIES — DEBENTURE HOLDERS — FLOATING SECURITY.

Wallace v. *Evershed* (1899) 1 Ch. 891, deals with a point of practice in foreclosure proceedings. The plaintiffs were seeking to foreclose a mortgage given by the trustees of a joint stock company, and they added as defendants certain debenture holders whose debentures were secured by a subsequent charge to that of the plaintiffs. The debentures were not due and the charge created thereby to secure them was for the benefit of all the debentures pari passu as a floating security. The debenture holders objected that they were not proper parties, but Cozens-Hardy, J, held that they were. In such a case in Ontario the debenture holders would be added as defendants in the Master's office, in the same way as other subsequent encumbrancers. The learned judge also held that the working out of a foreclosure decree in the absence of the debenture holders would not be a dealing with its property by the company in the ordinary course of its business, which would bind the debenture holders.

COMPANY—WINDING-UP—SURPLUS ASSETS, DISTRIBUTION OF.

In re Mutoscope and Biograph Syndicate (1899) 1 Ch. 896. This was a winding-up proceeding in which it turned out that there was a surplus of assets for distribution among the shareholders, and the question Wright, J., had to determine was, in what proportion they were entitled. The shares of the company were £1; and the articles of association provided that in the event of a winding-up, and in the event of there being any surplus assets, they should be distributed among the members in proportion to the capital paid, or which ought to have been paid on the shares held by them respectively at the commencement of the winding-up. Some of the shares had been paid up in full, and on others only 10 per cent. per share had been paid. The partly paid shareholders claimed that all the shares should first be levelled up or down, and the excess would be distributable equally, but Wright, J., came to the conclusion that the excess was properly distributable among the shareholders first by repaying the paid up capital, and the balance must be divided among the shareholders in proportion to the capital actually paid up.

PRACTICE—MANDATORY INJUNCTION, FORM OF.

In *Jackson* v. *Normanby Brick Co.* (1899) 1 Ch. 438, the Court of of Appeal (Lindley, M.R. and Rigby and Collins, L.JJ.) decided that in future, mandatory injunctions are to be framed in the affirmative form, and expressly command the thing to be done, instead of following the ancient and round about way of restraining the party enjoined from allowing the thing to remain. The reporter adds a note that this court has now for the first time had the courage to exercise in a direct form this branch of its jurisdiction; but this was previously done by North, J., in *Bidwell* v. *Holden*, 63 L.T. 104, in the case of an illiterate defendant; see also *Smith* v. *Smith*, L.R. 20 Eq. 505, and *Snarr* v. *Granite Rink*, 1 Ont. 107.

INFANT APPRENTICESHIP DEED CONTRACT NOT FOR BENEFIT OF INFANT.

Green v. *Thompson* (1899) 2 Q.B. 1, was a case in which an employer claimed to enforce an apprenticeship deed made with an infant employee, and the question was whether the deed was for the benefit of the infant. It was argued that it was not, because it contained a provision exonerating the employer from paying the infant wages during the usual holidays, and days on which the master's business should be at a standstill through accident beyond his control. The Divisional Court (Darling and Channell, JJ.) held that this stipulation was not so disadvantageous to the infant, as to render the contract void, as against the infant employee. The case was held to be distinguishable from *Corn* v. *Matthews* (1893) 1 Q.B. 310, on the ground that in that case the master was exonerated from payment of wages not only when his works were at a standstill from causes beyond his control, but also in cases where he had himself caused the stoppage.

COUNTY—LIABILITY FOR EXPENSES OF TROOPS SUMMONED TO PRESERVE PEACE MANDAMUS.

The Queen v. *Glamorgan* (1899) 2 Q.B. 26, is a case which involves an important principle, and it is a case, strange to say, in which the decision of the Court (Wills, Darling, and Channell, JJ.) is one of first impression, and not based on any previous authority. The facts were simple enough. Riots, and disturbances of the peace had taken place in Glamorganshire, and the magistrates of the county called in the assistance of troops for the purpose of maintaining peace. Arrangements were made on behalf of the magistrates for the maintenance of the troops called in and in pursuance

of such arrangement the prosecutors supplied food and lodging to the soldiers for a considerable time, and they now applied to the Court for a mandamus to the county council to compel them to pay the expense they had thus incurred, the account being duly certified by the magistrates. The Court came to the conclusion that the application could not succeed, on the ground that there was no liability on the part of the county to pay for the maintenance of troops under such circumstances, and that the expense must be borne by the Crown.

PRINCIPAL AND AGENT. CONTRACT BY AGENT FOR HIS OWN BENEFIT IN NAME OF PRINCIPAL.—RATIFICATION OF CONTRACT BY PRINCIPAL.

In re Tidemann & Ledermann (1899) 2 Q.B. 66, was a case stated by an arbitrator. The question raised was whether Tidemann, the claimant, was entitled to damages against Ledermann and two others for breach of their contracts for the sale of wheat made by one Vilmar in the name of Tidemann, and which he had subsequently, at Vilmar's request, expressly ratified, but which Vilmar originally intended to be for his own benefit. The contracts were made by Vilmar in the name of Tiedmann because the defendants had refused to deal with Vilmar individually in consequence of previous unsatisfactory dealings. After the contract was made, and in June, 1898 the market fell, and the defendants, suspecting Vilmar had made the contracts with them on his own behalf, refused to carry them out, whereupon Tidemann, at Vilmar's request, on 22 July, 1898, ratified the contracts and forwarded the wheat for tender to them, defendants, which they refused to accept, and the question stated for the opinion of the Court was whether on the facts above stated Tiedmann could in July, 1898, validly ratify the contracts so as to bind the defendants. This question the Divisional Court (Darling and Channell, JJ.) answered affirmatively being of opinion that the claimant could validly ratify the contract notwithstanding previous repudiation of it by the defendants, considering this point covered by *Bolton* v. *Lambert*, 41 Ch. D. 295, they also held that it was immaterial that Vilmar originally intended to get the benefit of the contracts personally.

NEGLIGENCE.—PUBLIC BODY.—CONTRACT TO EXECUTE WORKS FOR PUBLIC BODY.—LIABILITY OF EMPLOYER FOR NEGLIGENCE OF CONTRACTOR.—PAYMENT INTO COURT BY CO-DEFENDANT.

In *Penny* v. *Wimbledon Council* (1899) 2 Q.B. 72, the Court of Appeal (Smith, Williams and Romer, L.JJ.) have unanimously

affirmed the decision of Byrne, J. (1898) 2 Q.B. 212 (noted ante vol. 34 p. 686). The facts, it may be remembered, are briefly as follows: A municipal body had entered into a contract with a contractor to construct a highway. In carrying out the work the contractor negligently left on the road a heap of soil unlighted and unprotected, over which the plaintiff fell and was injured. Under these circumstances the Court of Appeal held that the municipal body was liable, because the negligence of the contractor was not casual or collateral to his employment. Another point in the case arose out of the payment of money into court by the contractor, who was also sued, and which exceeded the amount which the plaintiff ultimately recovered. The municipal body claimed to be entitled to the benefit of this payment in, as a satisfaction of the plaintiff's cause of action against the municipal body, but the court agreed with Byrne, J., that, the defence of these defendants having failed, the plaintiff was entitled to judgment against them for his costs notwithstanding such payment by their co-defendant.

LANDLORD AND TENANT—FORFEITURE—PROVISO FOR RE-ENTRY—NOTICE OF FORFEITURE—REASONABLENESS OF NOTICE—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., C. 41) S. 14, S.-SS. 1-6 (R.S.O. C. 170, S. 13, S.-SS. 1-6)—COVENANT NOT TO ASSIGN, BREACH OF.

Horsey v. *Steiger* (1899) 2 Q.B. 79, was an action by a landlord to recover possession of premises for forfeiture, under a proviso for re-entry contained in a lease in case the lessees should enter into liquidation voluntary or compulsory. The case was tried before Hawkins J., whose judgment is noted ante vol. 34 p. 688. That learned judge held, that the forfeiture had arisen, notwitstanding that the lessee, a joint stock company, was solvent, because, for the purpose of reconstruction with additional capital, it had passed a resolution for voluntary winding-up. The Court of Appeal (Lord Russell, C.J. and Smith and Collins, L.JJ.) affirmed the judgment on this point, but allowed the appeal on the ground that the notice of forfeiture required to be given by the Conveyancing and Property Act, 1881 (44 & 45 Vict., c. 41) s. 14 (R.S.O. c. 170 s. 13), was insufficient, because it alleged as a ground of forfeiture not only the voluntary liquidation, but also a breach of the covenant to repair, for which the court held there were no grounds. The plaintiffs claimed to be entitled to succeed on the ground of an alleged breach of a covenant to assign or sublet without leave of lessors for which no notice is required as a preliminary to action

(see s. 14 supra, sub.-s. 6; R.S.O. 170, s. 13, s.-s. 6). Upon this point it was admitted that there had been no actual assignment, but the defendant company had agreed to sell to the new company and had let it into possession pending the completion of the purchase, and there was a provision for re-delivery of possession if the contract should be rescinded. The Court of Appeal held that this did not amount to a breach of the covenant, although if the covenant had extended "to parting with possession" there would have been a breach.

PRACTICE—STRIKING OUT STATEMENT OF CLAIM—ACTION TO SET ASIDE, JUDGMENT BY DEFAULT ON GROUND OF FRAUD—RULE 308 (ONT. RULE 639.)

In *Wyatt* v. *Palmer* (1899) 2 Q.B. 106, it is determined by the Court of Appeal (Lindley and Rigby, L.JJ.) that a party seeking to set aside a judgment by default on the ground that it was obtained by fraud, is not obliged to resort to the summary procedure provided by Rule 308 (Ont. Rule 639), but may bring an action. The court, however, intimates that where an action is brought, the court may, in a proper case, impose terms, *e.g.* the payment of the amount of the judgment into court to abide the result, as a condition of allowing it to proceed. In the present case such a term was not considered necessary because the defendant admitted that he was a secured creditor. A motion by the defendant to strike out the statement of claim was held to have been properly dismissed by Kennedy, J. It was also contended by the defendant that the statement of claim, in so far as it was founded on alleged malicious proceedings in bankruptcy by the defendant, was bad for want of an allegation of special damage, but the Court of Appeal was of opinion that the point, were it well founded, was not sufficiently clear to warrant the striking out of the statement of claim on that ground,

CRIMINAL LAW RESTITUTION OF STOLEN PROPERTY—CURRENT COIN OF THE REALM—LARCENY ACT, 1861 (24 & 25 VICT., C. 96) S. 100—(CR. CODE 838.)

Moss v. *Hancock* (1899) 2 Q.B. 111, is a case stated by justices. One Neale had been convicted of stealing from the respondent Hancock, his master, one gold five pound piece. The magistrates thereupon made an order that the £5 piece, which had been produced in evidence, should be restored Hancock. The £5 piece had been kept by Hancock in a cabinet, from which it had been

stolen. By Royal Proclamation £5 gold pieces had been declared to be current coin. The thief had taken it to Moss, who was a second-hand clothes dealer who had given him five sovereigns for it, without making any inquiry. It was contended that as the £5 piece was current coin, no order for restitution could be made. But the Divisional Court (Darling and Channell, JJ.) came to the conclusion that the gold piece had not been passed into circulation as current coin, but was rather the subject of sale as an article of vertu, and that therefore an order for its restitution under the circumstances could properly be made. Channell, J., it may be said thinks that on the facts stated the court might properly infer that the piece was not taken bona fide by Moss, and that he acquired no better title to it than the thief.

LICENSING ACTS—INNKEEPER PROVIDING PIANO FOR USE OF GUESTS.

In *Brearley* v. *Morley* (1899) 2 Q.B. 121, it was decided by Day and Lawrance, JJ., on a case stated by magistrates, that where an innkeeper provides a piano in the public smoking-room for the free use of his guests, who were in the habit of playing thereon, for the amusement of themselves and others resorting thereto, the innkeeper cannot properly on that account, be convicted for having kept or used the room for public entertainment, within the meaning of the Licensing Acts.

Four cases in the August number of the Law Reports of decisions under the Workmen's Compensation Act, 1897 serve to show how prolific of litigation that enactment has been, but the Act not having as yet been adopted in Canada it is not necessary here to refer to them any further.

ADMINISTRATION—LACHES. PROCEEDINGS TO COMPEL REFUNDING OF ESTATE AFTER ADMINISTRATION BY COURT.

In *Mohan* v. *Broughton* (1899) P. 211, the plaintiff sought to revoke a prior grant of administration, and to obtain a grant to herself as next of kin of the deceased, on the ground that the previous grant had been made to a person who was not really next of kin of the deceased. Under the previous grant the administrator had taken proceedings in the Chancery Division in which the estate had been duly administered and distributed under the order of the court. The object of the present proceedings was to enable the plaintiff to reopen the administration proceedings and

compel those who had been found entitled as next of kin to refund. It appeared that the plaintiff knew of the prior grant, and of the proceedings in the Chancery Division, and had in 1894 made an application to be allowed to prefer a claim in that action as a first cousin of the intestate, which had been refused, and the applicant took no further steps until the present action was commenced. Under these circumstances, and it also appearing that the plaintiff knew, at the time of the pendency of the former action, of the facts on which her claim in the present proceeding was based. Barnes, J., without deciding whether the matter was strictly res judicata, was of opinion, that the plaintiff had been guilty of such laches and acquiescence that she could not now be allowed to open up the administration proceedings with a view to recovering the property which had been distributed thereunder, and as the only object of the present action, though in form to revoke the previous grant of letters of administration, and obtain a grant in the plaintiff's own favour, was to assist her to do that which the Court was of opinion could not be done, the action must fail, and it was accordingly dismisssd with costs.

HUSBAND AND WIFE—DESERTION—REFUSAL OF HUSBAND TO DISCHARGE SERVANT WITH WHOM HE HAD COMMITTED ADULTERY.

Koch v. *Koch* (1899) P. 221, although a divorce case, may nevertheless be usefully noted, inasmuch as it was held therein by Barnes, J., that where a wife leaves her husband's house because of his having committed adultery with a servant in his employment, and refuses to return, though requested so to do, by her husband, because of his refusal to discharge such servant, such conduct on the part of the husband constitutes "desertion" by the husband within the meaning of the Divorce Acts and entitles the wife to a divorce.

MARRIED WOMAN—PROBATE OF WILL OF MARRIED WOMAN—WILL IN EXECUTION OF POWER—LIMITATION OF GRANT.

In the goods of Trefond (1899) P. 247. A married woman domiciled in France, and having a power of appointment under an English settlement, executed a will which was sufficient as an exercise of the power of appointment, but invalid as a will of her property not covered by the appointment, because not executed as required by French law. The appointee applied for administration

with the will annexed, and as the settlement appeared to include all the deceased's property he claimed that the grant should be general. Jeune, P.P.D., however directed that, in the absence of the consent of the husband of the deceased, the grant should be limited to the property the deceased had power to dispose of, and did dispose of, by the instrument executing the power of appointment.

MARRIED WOMAN—WILL OF MARRIED WOMAN—PROBATE—GRANT OF GENERAL PROBATE TO HUSBAND—IMPLIED ASSENT TO WILL.

In re Atkinson, Waller v. *Atkinson* (1899) 2 Ch. 1, deserves attention, although turning on certain Probate Rules which do not appear to have been introduced into Ontario. These rules provide that probate of the will of a married woman shall take the form of ordinary grants without any exception or limitation. And it was held by Stirling, J., that where a husband takes probate of the will of his deceased wife in a general form as thus provided, he is not to be deemed to have assented to the will as a valid disposition of property she had no right to dispose of, and this decision was affirmed by the Court of Appeal (Lindley, M.R. and Rigby and Collins, L.JJ.) Since 1 January, 1874, it would be difficult to say that there is any limitation on the powers of married women to make wills of their property in Ontario, see R.S.O. c. 128, s. 9, s.-s. 5, and s. 10, but as to wills made before that date it would seem necessary from this case, that the grant of probate thereof to a husband should be limited to property properly disposable by the testatrix, or the husband may be deemed to have assented to other dispositions contained therein, which were beyond the power of the testatrix to make without his assent.

MASTER AND SERVANT—CONTRACT IN RESTRAINT OF TRADE—REASONABLENESS—INJUNCTION—EVIDENCE.

Haynes v. *Doman*, (1899) 2 Ch. 13, was an action to restrain the breach of a contract made between master and servant whereby the servant bound himself that he would not, during his service or after the determination thereof, divulge to any person the secrets of his master, or the mode of his conducting his business or any part thereof, or any information in regard to the same, or, after the determination of his service, work for or serve any other person or firm carrying on the same kind of business or any part thereof, within a radius of twenty-five miles from his master's works,

without the latter's consent. The principal question discussed in the case is whether or not the contract was reasonable, and whether the want of limitation as to time, rendered it void, and whether the limitation as to space was unreasonable. The Court of Appeal (Lindley, M.R. and Rigby and Romer, L.JJ.) agreed with Stirling, J. that the contract was not open to objection on either of these grounds, and that the plaintiff was entitled to a perpetual injunction against its breach. Evidence was tendered of persons in the same trade as the plaintiff as to the reasonableness of the terms of the contract, but the Court of Appeal held that the question of the reasonableness and unreasonableness of such contracts is one of law depending on the true construction of the contract, and that such evidence was therefore inadmissible.

PAYMENT OF PRIOR CHARGES ON SETTLED ESTATE BY SETTLOR—RECONVEYANCE OF MORTGAGED PROPERTY—INTENTION TO KEEP CHARGE ALIVE.

In *Gifford* v. *Fitzhardinge* (1899) 2 Ch. 32, the facts of the case were, that the plaintiff being entitled to a reversionary interest in a mortgaged estate, and subsequently executed a marriage settlement whereby the property was conveyed to the trustees of the insolvent subject to the mortgage. The settlor afterwards paid off the mortgage, intending to keep the charge alive for his own benefit, but by mistake took a conveyance of the land absolutely discharged from all principal and interest secured by the mortgage. The present action was therefore brought by the settlor for the purpose of obtaining a declaration that, notwithstanding such conveyance, the amount paid to redeem the mortgage debt was still a subsisting charge in favour of the settlor in priority to the settlement. North, J. held that the plaintiff was entitled to the declaration asked.

TRADE UNION—"WATCHING OR BESETTING"—INJUNCTION—CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875 (38 & 39 VICT. C., 86) S. 7.—(CR. CODE S. 523 (f)).

In *Charnock* v. *Court* (1899) 2 Ch. 35, the plaintiff applied for an interlocutory injunction against the defendants who were members of a trade union, to restrain them from watching and besetting a landing stage where workmen coming from Ireland to work for the plaintiffs landed, in order to induce them to go elsewhere to work. Stirling, J., held that the plaintiffs were entitled to the injunction, and that the action of the defendants was a breach

of the Conspiracy and Protection of Property Act 1875 (38 & 39 Vict., c. 86) s. 7 from which Cr. Code s. 523 (f) is adapted.

COMPANY—DECEASED SHAREHOLDER—NOTICE, WHERE SHAREHOLDER IS DEAD—REGISTERED ADDRESS—FORFEITURE OF SHARES.

Allen v. *Gold Reefs* (1899) 2 Ch. 40, was an action by the representatives of a deceased shareholder of the defendant company to set aside a pretended forfeiture of certain shares to which the deceased was entitled, and also to have it declared that the company was not entitled to a lien on certain other shares, on the ground that the notices of meetings, and calls, on which the forfeiture was based, and lien claimed, were insufficient, having been sent to the deceased's address after the company's officers knew that he was dead. There was no provision in the company's articles providing that notices sent to the address of any deceased shareholder should bind his estate, and, in the absence of any such provision, Kekewich, J. held that notices so sent were invalid, and could not be made the basis of any forfeiture of, or lien on, the shares of the deceased shareholder, as against his representatives.

PRACTICE—EVIDENCE—INTERLOCUTORY MOTION—INFORMATION AND BELIEF—AFFIDAVIT—RULE 523—(ONT. RULE 518.)

In re Birrell, Doig v. *Birrell* (1899) 2 Ch. 50, was a case in which an affidavit was tendered on an interlocutory motion founded on information and belief; the deponent's informant was not subpœnaed and made no affidavit, and it did not appear that any irremediable injury would result from the exclusion of the evidence. Under these circumstances Kekewich, J. ruled that it ought not to be received. The moral of which is, that, even on an interlocutory motion, it is generally advisable to adduce direct evidence if it can be procured, and not rely on mere hearsay.

TENANT FOR LIFE—LEASEHOLD - SPECIFIC BEQUEST—LIABILITY OF LEGATEE OF LEASEHOLD TO PAY RENT.

In re Gjers, Cooper v. *Gjers* (1899) 2 Ch. 54, the conflicting cases of *In re Betty* (1899) 1 Ch. 821 (see ante p. 627) and *In re Tomlinson* (1898) 1 Ch. 232 (see ante vol. 34, p. 224) were under consideration by Kekewich, J. The facts of the case were as follows: An assignee of a lease, specifically bequeathed all his interest in the demised premises to his wife for life, or widowhood, and the

simple question was whether or not the legatee was bound to pay the rent of the demised premises and observe the covenants and conditions in the lease, during the continuance of her interest. In the recent case of *In re Betty*, supra, North, J., held that the maxim "qui sentit commodum sentire debet et onus" applied, and that the legatee was bound, as between himself and the testator's estate, to pay the rent and observe the covenants and conditions of the lease, following Stirling, J., *In re Redding* (1897) 1 Ch. 876, (see ante vol. 33 p. 642); but Kekewich, J., had himself held *In re Tomlinson* supra, and also *In re Baring* (1893) 1 Ch. 61, in deference to what he supposed to be the effect of the decision of the Court of Appeal *In re Courtier*, 34 Ch. D. 136, that in such a case the legatee was not liable to perform the covenants in the lease; but in deference to the view of North and Stirling, JJ., and of the Vice-Chancellor of Ireland in *Kingham* v. *Kingham* (1897) 1 I.R. 170, as to the proper interpretation of *In re Courtier*, he now decided to follow their decisions in preference to his own, and holds that the tenant for life, in such cases, takes cum onere.

PAYMENT BY MISTAKE—MONEYS UNDER CONTROL OF COURT - REPAYMENT BY OFFICER OF COURT OF MONEYS PAID BY MISTAKE.

In re Rhodes (1899) 2 Q.B. 347, the Court of Appeal (Lindley, M. R., Jeune, P.P.D., and Romer, L.J.) have affirmed the decision of Wright, J., (1899) 1 Q.B. 605. The point decided being that when an executor in ignorance of his right of retainer of a debt due to himself out of the assets of his debtor, by mistake paid the whole amount of such assets over to an official receiver under an administration order, he was nevertheless, so long as the money remained in the hands of the receiver, entitled to get back the amount which he might properly have retained.

GAMING—PLACE USED FOR BETTING—BAR OF PUBLIC HOUSE—BETTING ACT 1853, (16 & 17 VICT., C. 119) S. 3—(CR. CODE 197).

Belton v. *Busby* (1899) 2 Q.B. 380, is another of the many cases which have lately arisen under the Betting Act (16 & 17 Vict, 119). In the present case the defendant Busby was the keeper of a public house, to the bar of which the defendant Woods was with the knowledge and consent of Busby, accustomed to visit daily at certain hours for the purpose of betting with other persons resorting thereto. The magistrates held that the case was within *Powell*

v. *Kempton Park Co.* 1899 A.C. 143 (see ante p. 523), but the Divisional Court (Grantham and Bruce, JJ.) held that that case did not apply and that both defendants were guilty of an offence within the Act, Busby for keeping the bar for the purpose of betting, and Woods for using the bar for the purpose of betting. The Divisional Court distinguished the case from the Kempton Park case, on the ground that Woods "had" to use the language of Grantham, J., "something in the nature of a right or license to use the bar for the purposes of his betting business over and above the right of an ordinary member of the public to resort there." That, in fact, he was there, not as an ordinary customer, but for the purpose of carrying on the business of betting with Busby's knowledge and consent. It may be observed that the defendants did not appear and the case was therefore argued ex parte.

NEGLIGENCE—INDEPENDENT CONTRACTOR—EMPLOYER OF CONTRACTOR, LIABILITY OF, FOR NEGLIGENCE OF CONTRACTOR—HIGHWAY, DANGEROUS WORK ON—COLLATERAL NEGLIGENCE.

In *Holliday* v. *National Telephone Co.* (1899) 2 Q.B. 392, the Court of Appeal (Lord Halsbury, L.C., and Smith and Williams, L.JJ.) have reversed the decision of Wills and Lawrance, JJ., (1899) 1 Q.B. 221, (noted ante p. 222.) It will be seen from our former note that the case turns on the question how far an employer is liable for the negligence of the servants of his contractor. The defendants were entitled to lay telephone wires down in a public highway, they contracted with a plumber to solder the joints of the wires, and in the course of doing the work a servant of the plumber had to use a benzoline lamp provided by the plumber, and for the purpose of obtaining a flare from the lamp which could only be done by the application of heat, the servant dipped the lamp into a caldron of melted solder, which would have been a proper and usual mode of obtaining the flare, provided the lamp had been in good order, but that the servant knew or ought to have that it was not. It turned out that the safety valve to the lamp was out of order, and the lamp in consequence exploded and injured the plaintiff who was passing on the highway. The Court of Appeal proceeded on the ground (1) that there was evidence that the defendants and the plumber were jointly engaged in the performance of the work under such circumstances as to render the defendants liable for the negligence of the plumber, and (2) that even if the plumber were,

as the Court below held, an independent contractor, the defendants having authorized the performance of the work on a highway which from its nature was likely to involve danger to persons passing on the highway, they were in law bound to take care that those who executed the work for them, did not negligently cause injury to such persons, according to the decision of the House of Lords in *Hughes* v. *Percival* 8 App. Cas. 443, and of the Privy Council in *Black* v. *Christ Church Finance Co.* (1894) A.C. 48 (noted ante vol. 30, p. 305.)

INSURANCE - SHIP'S FURNITURE.

In *Hogarth* v. *Walker* (1899) 2 Q.B. 401, Bigham, J., held that the word "furniture" in a policy of marine insurance, includes mats and cloths necessary for the carriage of grain, in which service the ship insured is ordinarily employed, even though on the particular voyage on which the loss occurred, such cloths and mats were not required and were stored away.

CONTRACT—MEMORANDUM IN WRITING—SIGNATURE BY AGENT—STATUTE OF FRAUDS (29 CAR. 2, C. 3) S. 4.

Griffith's Corporation v. *Humber & Co.* (1899) 2 Q B 414, was an action brought to recover damages for the breach of an alleged agreement between the defendants and the plaintiffs whereby the defendants agreed to appoint the plaintiffs their sole agents within a certain area for the sale of bicycles manufactured by the defendants, and the sole question discussed in this report was whether there was any sufficient memorandum in writing of the agreement to satisfy the 4th section of the Statute of Frauds. It appeared in evidence that the plaintiffs were successors in business of a former company which had been wound up, and that the defendants had agreed with the liquidator of that company, that if he would procure the plaintiffs to sign an agreement to act as the defendants' sole agents within a certain territory, which agreement was set out in a schedule annexed, the defendants would appoint them as such agents on the terms of the proposed agreement, which they undertook also to execute. The agreement set out in the schedule was never actually executed by either the plaintiffs or defendants, but the plaintiff company was formed for, inter alia, carrying out the said agreement, and the defendants proceeded to furnish them with bicycles, and letters were written by the defendant company's officers and servants relating thereto, which letters were held by the Court to refer to, and recognize, an agreement in the terms

contained in the above mentioned schedule. These letters the Court of Appeal (Smith, Rigby and Williams, L.JJ.) held being written within the scope of the authority of the defendant's servants constituted a sufficient memorandum in writing within the Statute so as to bind the defendant company; and it was also held that it was not necessary that the defendant company should have expressly authorized their agents to sign the letters as a record of the contract. *Smith* v. *Webster*, (1876) 3 Ch.D. 314 which was relied on by the defendants, was held to determine, notwithstanding some expressions of Lush, J., therein, only this, that where reliance is placed on a document signed by an agent, it must be shown that the agent was "thereunto lawfully authorized."

HUSBAND AND WIFE – WIDOW, ACTION AGAINST, ON CONTRCT MADE DURING COVERTURE—JUDGMENT, FORM OF?

In *Softlaw* v. *Welch* (1899) 2 Q.B. 419, the married woman who becomes a widow, may be said to have scored again. In this case the action was founded on a contract made by the defendant whilst under coverture, and before the Married Women's Property Act of 1893, she being now a widow, the question was as to the form of the judgment. Channell, J., held that it should be limited as laid down in *Scott* v. *Morley*, 20 Q.B.D. 120, the plaintiff appealed, contending that now that the defendant was discovert she had all the rights, and was subject to all the liabilities of a feme sole in respect of her contracts even though made during coverture, but the Court of Appeal (Smith and Williams, L. JJ.) upheld the decision of Channell, J., and in doing so disapproved of a dictum of Lindley, L.J., in *Holtby* v. *Hodgson*, 24 Q.B.D. 103, to the effect that separate property of the wife which she is restrained from anticipating which cannot be got at in any way while her husband is living, becomes immediately subject to the judgment as soon as he is dead. The judgment in *Holtby* v. *Hodgson* the Court of Appeal holds involves no such proposition, and its accuracy is denied. The effect of the decision therefore is, that in the case of contracts made before the Act of 1893 (enacted in Ontario in 1897, see R.S.O., c. 163, s. 3 (4) by a married woman, her separate property, which at the time of the contract is subject to a restraint against anticipation, cannot be made available for the satisfaction of a judgment founded on such a contract even after the restraint has been removed by her husband's death.

PRACTICE—GARNISHEE ORDER, ACTION UPON.

In *Pritchett* v. *English and Colonial Syndicate* (1899) 2 Q.B. 428, the action was founded on a garnishee order, obtained in an action against the defendant company as garnishees; the plaintiff, not having been able to enforce payment under the order, brought this action in order to obtain a judgment, to enable him as a judgment creditor to present a petition for the winding up of the company, which we may remark, appears to involve a certain amount of circumlocution which ought not to be necessary: the Court of Appeal (Lindley, M.R. and Romer, J.) however held that as it has been decided that a garnisheed order to pay over is not "a final judgment" so as to be the foundation of a bankruptcy notice, the action was well founded. Romer, L.J., however expresses surprise that the Court *In re Combined Weighing & A. M. Co.*, 43 Ch. D 99, did not see its way to holding that a judgment creditor who obtains a garnishee order absolute against a company is entitled to petition for the winding up of such company.

LICENSING ACTS—KEEPING OPEN PUBLIC HOUSE DURING PROHIBITED HOURS.

In *Jeffrey* v. *Weaver* (1899) 2 Q.B. 449, Grantham and Bruce, JJ., held, on a case stated by justices, that a charge of keeping open a public house during prohibited hours, is not sustained by proof that though the outer doors were closed, customers who were on the premises previous to closing, remained there, and were supplied with liquor afterwards, although such evidence might justify a conviction for selling liquor during prohibited hours.

PRACTICE—CHARGING ORDER—SOLICITOR'S LIEN SET OFF OF JUDGMENTS—SOLICITORS' ACT 1860 (23 & 24 VICT., C. 27) S. 28—RULE 985—(ONT. RULES 1129, 1165.)

In *Goodfellow* v. *Gray* (1899), 2 Q.B. 498, an application was made by the defendant Gray to set off against the damages and costs payable by him in this action, the damages and costs payable to him in another action of *Gray* v. *Goodfellow*. The solicitor who had acted for Goodfellow in the action of *Gray* v. *Goodfellow* had obtained a charging order on the amount of the judgment for his costs, and the application to set off was resisted by Goodfellow, and it was stated that the solicitor who had obtained the charging order appeared for Goodfellow, but strange to say he does not appear to have been made a party to the proceedings. Under the English

Rule 985 which differs in this respect from the Ont. Rule 1165, the court is authorized to allow a set off of damages and costs between parties "notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set off is sought," whereas the Ont. Rule 1165 provides that a set off is not to be allowed to the prejudice of the solicitor's lien. The case cannot therefore on the main point be considered as authority in Ontario, but the case is noteworthy for the fact that the Court of Appeal (Smith and Williams, L.JJ.) determined that the charging order gave the solicitor no better claim than an ordinary lien, as against the right of set off, Williams, L.J. however, doubted.

VENDOR AND PURCHASER AUCTION SALE HIGHEST BIDDER — DEPOSIT, PAYMENT OF—CHEQUE—STATUTE OF FRAUDS (29 CAR. 2, C. 3), S. 4 DAMAGES.

Johnston v. *Boyes* (1899) 2 Ch. 73 is a useful case on the law relating to the sale of lands by auction. The defendants who were trustees for sale, had advertised a freehold public house for sale by auction, under conditions providing that the highest bidder should be the purchaser, and that he should immediately after the sale pay to the auctioneer a deposit equal to ten per cent. of the purchase money, and sign an agreement to purchase in the form annexed to the conditions, which form stated that the deposit had been paid. The plaintiff, by her agent, was the highest bidder, and her agent tendered to the auctioneer his cheque for the amount of the deposit, which the auctioneer, on the instructions of one of the vendors, who doubted the solvency of the drawer, refused to accept, notwithstanding the plaintiff's agent promised that the plaintiff would find the money tomorrow. The property was thereupon put up again and sold to another at an enhanced price. The action was brought to recover damages for refusing to accept the plaintiff as purchaser. The defendants relied on the Statute of Frauds, sec. 4, as a defence, and also set up the non-compliance with the condition requiring the payment of the deposit. Cosens-Hardy, J., who tried the action, held that the Statute of Frauds was no defence, but that an action for breach of contract would lie on the part of the highest bidder, who complied with the conditions, against a vendor refusing to carry out the sale; but he held that the plaintiff had not carried out the conditions, and that the tender of a cheque for the deposit was not a compliance with the condition requiring

payment of the deposit, even though the cheque would have been paid on presentation; that the conditions meant that the deposit was to be paid in cash, and the vendors were not bound to wait till the next day for it, or to sign the contract until this condition precedent had been performed.

ARBITRATION.—TIME FOR MAKING AWARD—UMPIRE—JURISDICTION—"CALLED ON" TO ACT"—ARBITRATION ACT (52 & 53 VICT., C. 49)—(R.S.O. C. 62, SCH. A (*c*)).

In *Baring-Gould* v. *Sharpington* (1899) 2 Ch. 80, the Court of Appeal (Lindley, M.R. and Rigby and Collins, L.J J.) have been unable to agree with the decision of Stirling, J. (1898), 2 Ch. 633 (noted ante p. 109, which we may remark, en passant, was there erroneously attributed to North, J.) as to the meaning of the words "called on to act" in the Arbitration Act, (see R.S.O. c. 62, Sch. A (*c*)). The decision below was that a notice given to arbitrators by one of the parties to an arbitration calling upon them to appoint an umpire, was not a calling upon them to act, within the meaning of the statute, but the Court of Appeal have now held that it was, and have reversed that decision.

PRACTICE.—STRIKING OUT COUNTER CLAIM—PAYMENT INTO COURT COUPLED WITH DENIAL OF LIABILITY—ACCEPTANCE OF MONEY PAID INTO COURT—ADMISSION OF PLAINTIFF'S CLAIM—RULES 255, 260 (ONT. RULES 419, 420, 423, 425).

In *Coote* v. *Ford* (1899) 2 Ch. 93, the plaintiff claimed damages for trespass, and also an injunction to restrain future trespasses. The defendant put in a defence and counter-claim alleging a right to go on the land, and under Rule 255 though denying liability paid in a sum by way of satisfaction of his liability, if any, in respect of the matters complained of. The plaintiff took the money out of court, and then applied to strike out the counter claim setting up a customary right and claiming a declaration thereof, and an injunction against the plaintiff to restrain him from interfering therewith, on the ground that the payment into court followed by the plaintiff's acceptance constituted an admission of the plaintiff's entire cause of action. Stirling, J., after reviewing the practice on the subject of the payment of money into a court with a defence, was of opinion that the payment in could only be held properly to apply to the plaintiff's claim for damages, and not to his claim for an injunction, and that the money being paid in with a denial of liability did not, though accepted by the plaintiff, amount to an

admission of his entire cause of action, and that the defendants were entitled to proceed with their counter claim; and he also intimated that the plaintiff was also entitled to proceed with his action for the purpose of obtaining an injunction. And with this view the Court of Appeal (Lindley, M.R. and Rigby, L.J) agreed.

PAYMENT BY AGENT—STATUTE OF LIMITATIONS (21 JAC. 1, C. 16) S. 3—PROMISE TO PAY—ACKNOWLEDGEMENT.

In re Hale, Lilley v. *Foad* (1899) 2 Ch. 107, the question was whether the right of action on a debt had been barred by the Statute of Limitations (21 Jac. 1, c. 16) s. 3. The facts were a little complicated. One Hole, who carried on a business mortgaged it to secure an annuity to Mrs. Swartout, and in the mortgage there was, besides an implied statutory power under the English Conveyancing Act, 1881, upon default to appoint a receiver, an express power also to appoint a receiver and manager of the business "to carry on the same as he might think fit." After the mortgage, the mortgagor continued to carry on the mortgaged business, and, in so doing, contracted a debt to the plaintiff, which he agreed to pay off by fixed instalments. In June, 1891, after paying some of the instalments Hole died, leaving a will whereby he appointed the defendant his executrix. Default having been made in payment of the mortgage, the mortgagee in exercise of the powers therein contained appointed a receiver and manager of the mortgaged business. The receiver and manager so appointed, in August, 1891, paid the plaintiff a further instalment on account of his debt; the present action was commenced in July, 1897, and the question was whether the payment in August, 1891, by the manager, kept the claim alive as against the executrix. The Court of Appeal (Lindley, M.R. and Jeune, P.P.D.) held that it did, and affirmed the judgment of Byrne, J., to that effect. The Court of Appeal doubted whether a payment by a receiver under such circumstances would have been a sufficient acknowledgment to bind the debtor, but for the fact that the power to appoint a manager of the business, constituted the manager an agent of the mortgagor and his representatives, so as to bind them by any payment made by him in the course of such management.

EVIDENCE—ANCIENT DOCUMENT—ADMISSIBILITY.

In *Blandy-Jenkins* v. *Dunraven* (1899) 2 Ch. 121, the only question discussed is the admissibility in evidence of an ancient

document. The action was brought to determine whether the land in question was the private freehold of the plaintiff, or was land over which the defendants had rights of common. In support of his case the plaintiff tendered a document found amongst his muniments of title, dated in 1625 whereby a certain David D. Morgan, stated that an action for trespass had been brought against him by Richard Jenkins (a predecessor in title of the plaintiff) for trespassing on the land in question, and that in consideration of the action being dropped he bound himself to pay sixteen shillings and to refrain in future from trespassing or permitting other people to trespass on the land. The Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.) held the document to be admissible as evidence of an act of ownership by the plaintiff's predecessor in title, and overruled the decision of Byrne, J. to the contrary.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Exch. Court.] BLACK *v.* THE QUEEN. [Oct. 3.

Crown—Suretyship—Postmasters's bond—Penal clause—Lex loci contractus—Negligence—Laches of the Crown officials—Release of sureties—Arts. 1053, 1054, 1131, 1135, 1927, 1929-1965 C.C.

In an action by the Crown on the information of the Attorney-General of Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the security to be given by the officers of Canada" (31 Vict., c. 37; 35 Vict., c. 19), and "The Post Office Act," (38 Vict., c. 7).

Held, Sir Henry Strong, C.J., dissenting, that the right of action under the bond was governed by the law of the Province of Quebec.

Held further, that such a bond was not an obligation with a penal clause within the application of articles 1131 and 1135 of the Civil Code of Lower Canada.

Held also, that the rule of law that the Crown is not liable for the

laches or negligence of its officers obtains in the Province of Quebec except where altered by statute.

The Exchange Bank of Canada v. *The Queen*, 11 App. Cas. 157, referred to.

Hogg, Q.C., and *Madore* for appellant. *Fitzpatrick*, Q.C., Sol. Gen., and *Newcombe*, Q.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Moss, J.A.] ZIMMERMAN *v.* WILCOX. [July 7.

Trustee—Administration — Guardian — Accounting — Occupation rent—Interest—Timber, cutting of—Neglect and default—Maintenance of infant—Allowance for compensation to guardian—Conditional allowance of—Rental of house—Charging trustee with—Agreement—Failure to collect securities—Onus—Necessaries for infant—Interest on yearly balances—Failure to keep accounts—Costs of appeal from Master's report—Apportionment—Costs of action for administrators—Judgment on further directions—Form of.

An appeal by the defendant from the report of the Master at St. Catharines, dated the 15th of April, 1897.

The plaintiff was the only daughter of one Alexander Patterson, who died intestate on or about the 27th March, 1897. The defendant was his widow, and the mother of the plaintiff. The latter was about twenty-three months old at the time of her father's death. Letters of administration of the personal estate of the intestate were granted to the defendant on the 16th April, 1877. On the 19th June of the same year, she was, upon her own petition, appointed guardian of the plaintiff, who continued to reside with her, and under her care until the month of March, 1895, when the plaintiff was married to James E. Zimmerman, her present husband, and this action was shortly afterwards begun.

The defendant in December, 1878, was married to one Milton Wilcox.

At the time of his death the intestate was possessed of a farm of 100 acres in the township of South Grimsby, and of some considerable personal property, consisting of farm stock, implements, grain, household furniture, cash, and securities, which came to the defendant's hands.

From the time of the death of the intestate until the time of the defendant's marriage with Wilcox, she and the plaintiff continued in occupation of the farm, and from the time of the marriage, she and her husband

and the plaintiff continued in occupation of the farm until the year 1888, when they removed from it, and it was afterwards rented.

The action was for the administration of the real and personal estate of the intestate, and for an account of the defendant's dealings therewith as administratrix, and also for an account of her dealings as guardian of the plaintiff during her minority.

The judgment pronounced on the 1st June, 1895, referred to the Master to take and make the usual administration accounts and inquiries in respect of the personal and real estate of the intestate, and also an account of the rents and profits of the real estate received by the defendant as guardian of the plaintiff, and a statement and account of her dealings as such guardian with the plaintiff's property, and generally to take all accounts necessary to fully invetigate the dealing of the defendant with the intestate's estate, and also to fully investigate the defendant's dealings as the plaintiff's guardian, and to fix the commission to be allowed to the defendant for services as administatrix and as guardian of the plaintiff.

The Master made a report, from which the present appeal was taken upon many grounds, of which the following, with the decision upon each, are of importance :

1. That the Master charged the defendant with interest upon the occupation rent, and also with interest upon the value of certain pine trees, which he had charged against her.

Held, that the defendant's duty was to have rented the farm to a proper tenant, and, having received the rent from time to time, to make such use or investments of it for the plaintiff's benefit as were available. Instead of doing this, she chose to occupy the farm herself, and with her second husband to work it for their mutual benefit and advantage. It was also her duty to have preserved the timber upon the estate, and not permitted it to be cut down, or, if the circumstances made it advisable or she deemed it of advantage to dispose of it, to see to the receipt of the proceeds and the using of them for the benefit of the plaintiff. And the same duty existed in regard to the pine trees blown or fallen down. But according to the evidence, the plaintiff permitted her second husband, not only to dispose of the trees that were lying down, but permitted him to cut down standing trees and dispose of the timber—the proceeds of which or the benefits thereof, were received by the defendant. In respect of both the occupation rent and the proceeds of the trees, there was a distinct act in breach of the trustees' duty, and there was no reason why she should be permitted to occupy the same position as a trustee who through neglect and default, has allowed a debt due to the trust estate to be lost, or to claim that she should not be charged with interest because the amount with which she was charged was not an interest bearing debt until it was fixed in the Master's office. She was to be regarded as having the amounts in her hands; otherwise she would be benefiting by her own wrongful breach of duty.

Sovereign v. *Sovereign*, 15 Gr. at p. 563; *Vanston* v. *Thompson*, 16 Gr. 512; *Blain* v. *Terryberry*, 12 Gr. 221; *Crowter* v. *Crowter*, 10 O.R. 159, and *Horton* v. *Brocklehurst*, 29 Heat. at p. 512, referred to.

Exception disallowed.

2. That the sum allowed by the Master for outlay for the plaintiff's maintenance, clothing and education was insufficient. He allowed $60 a year from the date of the death of the intestate until March, 1887, when she was nearly twelve, and from then until March, 1891, when she was nearly sixteen, he allowed $75 a year, and from then until March, 1895, when she married, he allowed $35 a year, making $1,040 in all. No account was kept by the defendant of her disbursements for the clothing or education of the plaintiff, nor of the moneys she gave her from time to time. The plaintiff did the work usually done by a girl of her age living upon a farm with her parents, and for several years there was no hired female assistant, all the women's work being done by the defendant and the plaintiff.

Held, that, having regard to the fact that the parties were living together on a farm for the greater part of the time, where the chief outlay would be clothing and pocket money, and to the facts that the plaintiff attended the public school free of expense and that the outlay for school books was trifling, the finding of the Master could not be interfered with upon the evidence, although he might well have allowed a larger sum.

Exception disallowed.

3. That the compensation allowed to the defendant was insufficient. The Master allowed a commission of five per cent on $2,499.29 received and expended by her, and two and a-half per cent. on an additional sum of $3,268,30 received, but not expended, and now found to be in the defendant's hands, or an allowance of $208.66 for a period of eighteen years. This allowance did not take into account anything for care, trouble, and responsibility in respect of the plaintiff's person or property other than that involved in the receipt and disbursement of the above sums.

Held, that, although the plaintiff had not done her whole duty as a guardian and trustee, yet it appeared that she had cared for and educated the plaintiff in a manner befitting her station, and the allowance for outlay for this was not on a very liberal scale, and on the whole her treatment of the plaintiff had not been such as to afford ground for complaint, and she had kept the farm so that it now came to the plaintiff in a fairly good condition, and she was of ability to pay over to the plaintiff the amount found to be in her hands belonging to the plaintiff; and therefore some allowance ought to be made in respect of these matters, conditional upon the defendant paying or making good to the plaintiff the amount she would be entitled to receive; and $300 should be credited to the defendant at the foot of the accounts upon her paying or making good to the plaintiff the amount found payable to her upon the adjustment of the accounts.

Re Berkeley's Trusts, 8 P.R. 193, followed.

Exception allowed to the extent indicated.

6. That the Master had improperly charged the defendant with a rental for the house on the farm for five years, while the farm was under rental to P. The lease to P. reserved the dwelling-house and yard around it, and the road from the highway, and the fruit in the yard and around the house to the plaintiff and her husband. In order to excuse herself for not renting the house and yard to a tenant during P.'s tenancy, the defendant proved a verbal agreement made with P. that the house was not to be rented to anyone without his consent, and it was upon this understanding that P. became tenant. The evidence established that this was the case.

Quære, whether, if the defendant had sought to let the house without P.'s consent, she might not have been restrained at his instance.

Held, that at all events, that where it was sought to charge the defendant with wilful neglect and default in not letting the house, it was open to her to shew the existence of a reason, which if not legally binding, was intended to be so, as one of the terms on which P. was induced to become the tenant of the farm, the agreement being made in good faith, and it not being shewn that it was improvident, or that without it as advantageous a lease could have been procured from others; the defendant was not obliged to violate the verbal agreement at the peril of being charged with wilful neglect and default.

Exception allowed.

8. That the Master charged the defendant with the amount of certain promissory notes, the property of the intestate, which she failed to collect, and with interest in respect of them.

Held, that the existence of the debt owing or security belonging to the estate casts the onus upon the personal representative of shewing satisfactorily why it was not collected. The law presumes, until the contrary is shewn, that the debtor could pay, and it lies on the executor or administrator to shew that he has done all he can to obtain payment, but his efforts have not proved successful; and applying these rules to the notes in question, the defendant had not satisfied the onus.

Exception disallowed.

11. That the Master disallowed the sum of $125, cost of an organ which the defendant alleged was bought for the plaintiff when the latter was about eight years old.

Held, that for the eight year old daughter of a deceased farmer, living on the farm with her mother and step-father, an organ costing $125 was not a necessary.

13. That the Master charged six per cent. interest on yearly balances.

Held, that, in view of the manner in which the defendant dealt with the estate, keeping no accounts and making no endeavour to keep separate the plaintiff's moneys, but making use of all that came to her hands, and

dealing with and treating it as if it all belonged to herself, the Master was justified in holding her to an account on the footing of interest, at the legal rate, upon the yearly balances in her hands. This method of fixing the amount which the defendant is to make good for the use of the moneys come to her hands is as fair to her as any of the other methods to be adopted for such purpose. A guardian may be dealt with in this way as well as any other trustee: *Matthew* v. *Brise*, 14 Beav. at p. 346; Eversley on Domestic Relations, 2nd ed. pp. 584-5.

Costs of appeal apportioned according to success—one-third to defendant, and two-thirds to plaintiff.

As to the costs of the action, there did not appear to have been prior to the comencement of the action any demand of an account or any refusal of the defendant to account to the plaintiff. If an account had been rendered, it would not, looking at the result of the accounting in the Master's office and the large surcharge established, have been satisfactory to or accepted by the plaintiff, and an action would have been necessary. The defendant, as guardian and administratrix, was entitled to have her accounts taken and to be allowed her costs, as between solicitor and client, of the ordinary proceedings for that purpose; but she should not get the costs occasioned by her failure to keep reasonably accurate entries or accounts of her dealing with the estate, nor by the inquiries into her improper dealings with and application of the trust estate and funds, and the costs incurred in these respects should be deducted from her costs. Similar order in this respect to that *In re Honsberger*, 10 O.R. 521; see Judgment Book, No. 8, p. 125.

Judgement on further directions:

1. Declare the plaintiff entitled to the lands set out in schedule B to the report, subject to the defendant's dower, but free from all other claims, charges, or incumbrances, and to two-thirds of the personal estate and rents and profits and proceeds thereof in the defendant's hands, and to two-thirds of the unrealized assets of the estate set out in schedule E.

2. Direct that the said assets be realized and proceeds divided in above proportions, or if parties agree to division in specie, let such division be made.

3. Let defendant's costs be taxed as above, and amount deducted from the moneys in her hands upon adjustment of accounts.

4. Defendant to pay to plaintiff two-thirds of the remainder after deducting such costs; and upon such payment to be at liberty to deduct $300 allowance for compensation from the amount otherwise payable by her. If the amount not paid by the defendant when ascertained, the plaintiff to be entitled to proceed for the whole sum, and in that event defendant not to be entitled to the deduction.

J. C. Rykert and *W. H. Blake*, for the defendant. *Shepley*, Q.C., and *Gilleland*, for the plaintiff.

Divisional Court.] GOLDIE *v.* BANK OF HAMILTON. [July 14.

Mortgage—Reconstruction of machinery in mill—Rights of first and second mortgagees and of person furnishing new machinery—Fixtures.

The owner of mill property mortgaged it to another with the machinery, which was declared to be fixtures, etc, deemed to be of substantial value, to W. Afterwards a second mortgage was made to a bank. Both mortgages were made under the short form Act, and contained covenants to insure, but the insurance moneys, under the policies effected on the property and machinery, were made payable to the first mortgagee. Subsequently the mortgagor with the consent of the second mortgagee, but not of the first one, at all events not so as to prejudice his security, made a contract with the plaintiff under which the plaintiff placed new machinery in the mill, using, as the contract provided, such of the old machinery as was necessary to complete the equipment, and taking and removing such of the old as was not so required. On the mill and machinery being destroyed by fire and the insurance adjusted, the second mortgagee paid off the first mortgagee's claim, and procured from him an assignment of his mortgage as well as of his interest in the policies.

Held, that the plaintiff could not claim that by reason of his betterment of the machinery, prior to the reconstruction thereof was deemed of substantial value, he was entitled to the insurance moneys thereon to the detriment of the first mortgagee's claim; but that he was so entitled as against the second mortgagee; and therefore after the claim of the first mortgagee so acquired by the second mortgagee was satisfied, the plaintiff was entitled to such insurance moneys to the extent of his claim. Remarks on *Hobson* v. *Gorringe* (1897) 1 Ch. 192 as to its effects on the decisions in this province as to fixtures.

W. R. Riddell and *Hugh Rose* for the plaintiff. *E. D. Armour*, Q.C., and *Lees* for the defendants.

Rose, J.] RE SHUNK. [Sept. 14.

Will—Widow—Specific bequest—Dower—Election.

An estate amounting to over $10,000 was, after the direction to pay the debts, funeral and testamentary expenses and after a specific devise of certain land, devised by the testator to his executors in trust to sell and convert into money, and out of the proceeds to pay to his widow $3,000 for her own use absolutely, and to divide the remainder among certain nephews and nieces.

Held, that the widow was not put to her election, but was entitled to her dower in addition to the bequest.

Marsh, Q.C., for the widow. *W. R. Cavell*, for the executors. *W. R. Riddell*, for the adult beneficiaries. *F. W. Harcourt*, for the infant beneficiaries.

Armour, C.J.] IN RE PATULLO AND TOWN OF ORANGEVILLE. [Oct. 9.

Municipal corporations—Arbitrations—Award—Costs—Legal discretion —R.S.O., c. 223, sec. 460.

An arbitrator appointed to determine a subject directed by section 437 of the Municipal Act, R.S.O. c. 223, to be determined by arbitration, is given power by section 460 "to award the payment by any of the parties to the other of the costs of the arbitration or of any portion thereof," such costs being thus placed in the discretion of the arbitrator.

Held, that this discretion must be a legal discretion, and the arbitrator should be governed by the rule laid down in many cases with respect to a like discretion, namely, that where a plaintiff comes to supress a legal right, and there has been no misconduct on his part, the court cannot take away his right to costs. And there being nothing in this to warrant any departure from the rule that the unsuccessful party should bear the whole costs of the litigation, the award was modified accordingly.

Meyers, Q.C., for the action. *Hughson* contra.

Boyd, C., Ferguson, J.] [Oct. 14

RONDOT *v.* MONETARY TIMES PRINTING CO.

Interpleader -- Refusal of application by sheriff — Claimant — Appeal— Summary decision—Question of fact—Rule 1111.—Abandonment of seizure—Issue—Re-seizure.

Where an application was made by a sheriff for an interpleader order in respect of goods seized by him under an execution against the plaintiff for costs, and claimed by a brother of the plaintiff as purchaser of the goods, the Judge, assuming to act under Rule 1111, decided the question in favour of the claimant, without directing the trial of an issue, and made an order refusing the application, directing the sheriff to withdraw from possession of the goods, ordering the execution creditors to pay the sheriff's costs and possession money and the claimant's costs, and directing that no action should be brought by the claimant against the sheriff in respect of the seizure.

Held, that the execution creditors had the right to appeal against this order.

The execution creditors did not dispute the claimant's title to the goods by purchase from one to whom they were sold by the plaintiff's assignee for creditors, but contended that the claimant's present professed ownership was a mere sham and a fraud contrived to enable the plaintiff to carry on business independently of the demands of his creditors

Held, that the question presented was not one of law, but of fact, and an issue should have been directed.

But, the sheriff having relinquished possession of the goods pending the appeal, it was too late to direct an issue; and unless the parties could agree upon one, the proper course would be for the execution creditors to seize again.

King, Q.C., for the execution creditors. *W. R. Riddell*, Q.C., for the claimant. *C. A. Moss*, for the sheriff.

Boyd, C.] TAYLOR *v.* ROBINSON. [Oct. 21

Sale of land—Distribution of proceeds—Priorities—Execution creditors—Solicitor—Charging order—Effect of new Rule of Court.

On Sept. 1, 1897, the Rule was passed by which the Court was enabled to order that land recovered by the exertions of a solicitor should be charged for his benefit: Con. Rule 1129. Prior to this no such power existed as to land. This action was begun by the solicitors for the plaintiffs on the 3rd of June, 1896, and judgment was obtained declaring the plaintiff's right to the land on the 27th October, 1896, but directing a reference for an account, etc. The execution against the plaintiffs for the recovery of the official guardians' costs in another action was issued against their lands and placed in the sheriff's hands on 29th April, 1897, at which time the accounts were being taken in the Master's office. After a year had elapsed, and after a sale could be had under the execution, the Court in this action gave judgment on further directions, on 8th November, 1898, directing a sale of all the lands—the plaintiffs having only a fractional interest therein. A motion being made to restrain a sale under the execution, that was ordered, on account of the larger sale, to be had in this action, after which the rights of all parties to the proceeds were to be adjusted.

Held, that, on this state of facts, the execution bound the plaintiffs' interest in the lands from the 29th April, 1897, at a time when no charge on the lands was possible in favour of the solicitors. The subsequent enactment of the Rule did not operate to divest the charge or to postpone the prior claim of execution creditors to the subsequently acquired equity of the solicitors to the discretionary intervention of the Court. The charge under the execution must precede the solicitors' lien, which was of subsequent origin: See *Goodfellow* v. *Gray* (1899) 2 Q.B. 498.

After payment to the plaintiffs and of the other charges for commission and disbursements, which would leave a balance of $758 in Court, the next payment in order would be to the first execution creditor who seized, and whose levy was intercepted by the Court, but without prejudice to his rights. That right of priority for full payment is secured by s. 26 of the Creditors' Relief Act, R.S.O. c. 78.

It was agreed that other executions against lands came in before the 1st September, 1897, and as to these there should be ratable distribution of the balance pursuant to the Act, though not necessarily by the sheriff. It might be carried out either by the Clerk in Chambers or the Master at Chatham on the usual notices to creditors.

Atkinson, Q.C., for defendant George Robinson and the sheriff of Kent. *H. W. Mickle*, for plaintiffs' solicitors. *A. J. Boyd*, for official guardian.

Province of Nova Scotia.

SUPREME COURT.

Townshend, J.] [In Chambers.

THORNE *v.* BENSON.

Collection Act 1894, c. 4, s. 9, as amended by 1897, c. 38, s. 2—Amount of costs not mentioned in commitment.

Application for discharge of defendant under c. 117, R. S. The defendant was confined in jail under a warrant made under the Collection Act, 1894, c. 4, s. 9, and amendment thereto, 1898, c. 38, s. 2, and the imprisonment was made terminable upon the defendant paying "the amount due on the judgment and all costs" without stating the amount of costs.

F. L. Milner. The amount of costs must be stated, otherwise the defendant cannot know how much to tender, or the jailor how much to accept: *Reg.* v. *Payne*, 4 D. & R. 72, and *Rex* v. *Hall*, Cowper 60.

H. Ruggles. It may be no costs are to be paid, but if so the defendant can ascertain the amount by inquiring of the commissioner who made the warrant.

Held, that the warrant was bad. The defendant was discharged.