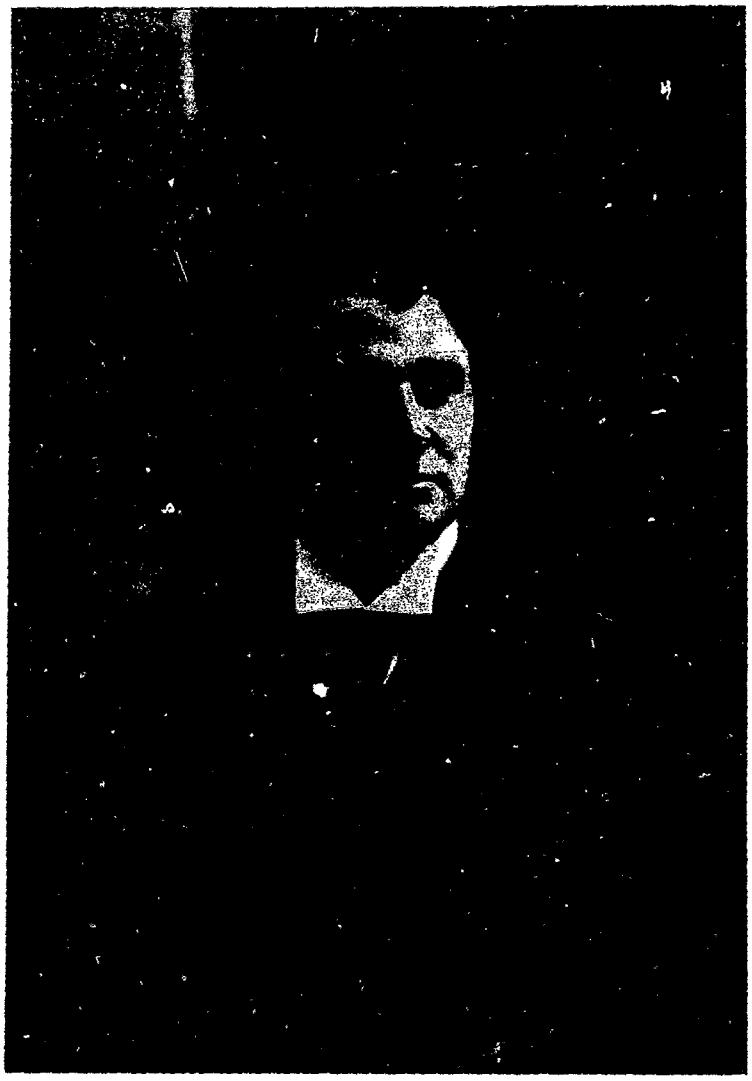

HON. SIR CHARLES HIBBERT TUPPER, K.C.M.G., Q.C., M.P.

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HON. SIR CHARLES HIBBERT TUPPER, Q.C.

Few men have so early in life occupied the prominent position which has fallen to the lot of the gentleman whose portrait appears on the opposite page.

Sir Charles Hibbert Tupper, was born at Amherst, Nova Scotia, on August 3, 1855, being the second son of Hon. Sir Charles Tupper, so well known in Dominion politics. Mr. Tupper received his education at Windsor Academy in Nova Scotia, then at McGill University, Montreal, where he obtained the Governor-General's scholarship, and subsequently at Harvard University, graduating in 1876.

In the year 1878 he was called to the Bar of Nova Scotia, and to the Ontario Bar in 1895. After practicing his profession for some years in his native Province, in October, 1897, he removed to Vancouver, at once taking a prominent position at the Bar in the Province of British Columbia. Although his legal abilities were fully recognized in his own Province, it may perhaps be said that Sir Hibbert's career of success in his profession is but beginning, inasmuch as very early in life he was engaged in politics, not the best way it may truly be said of obtaining briefs. A strong conservative like his father, he was sent to the House of Commons as member of Pictou in 1882. In 1888 he was appointed Minister of Marine and Fisheries under Sir John A. Macdonald. In December, 1894, on the death of Sir John Thompson he became Minister of Justice and Attorney-General in the Bowell Administration.

The most important event of his political career was his appointment in June, 1892, as Agent for Great Britain in connection with the Behring Sea arbitration. The great ability and industry shown by him in the preparation of the case for the British Government received from them the very warmest acknowledgement, as appears in the message from the Secretary of State for the Colonies to the Governor-General of Canada, which read as follows: "Without waiting the official text of arbitration award I will not delay congratulations to Canada upon Tupper's

success as British Agent in asserting the freedom of the sea and in maintaining the legal rights of Canadian ships." For his services on this occasion he received the honour of knighthood.

From the ability and energy exhibited in his past career it may well be expected that there is a large field of usefulness and distinction yet in store for the subject of this sketch, and should his life be extended to the allotted span, there will doubtless be more to record of him hereafter. A warm friend, genial, outspoken and manly he is deservedly popular.

In 1897 he married Janet, daughter of the Hon. James Macdonald, Chief Justice of Nova Scotia.

The year 1899 has marked the loss of several eminent members of the Bench in England. Lord Justice Chitty died suddenly in February; Lord Herschell in March, when on duty as President of the Anglo-American Commission; Lord Watson, in the month of September and Lord Ludlow on Christmas Day. These were all distinguished men and eminent judges. In addition to the above, who were engaged more or less in judicial duties, the following eminent men who had retired from work have also passed away; Lord Esher, formerly Master of the Rolls, who died in May, and Lord Penzance, who was Dean of Arches until March last, who also passed away in December. Sir Arthur Charles succeeded Lord Penzance as Dean of Arches, and Mr. Bucknill fills the vacancy created in the Queen's Bench Division by the resignation of Mr. Justice Hawkins, the latter retiring under the title of Lord Brampton. In the present year Mr. Justice North, after a long and honorable judicial career, has retired, and Mr. Buckley, Q.C., the eminent authority on company law, has been elevated to the Bench in his place.

It may not be out of place to remind the profession that the legacy tax under the Ontario Succession Duty Act, R. S. O. 1897, c. 24, is to be deducted from the amount payable to the legatees in the proportions provided for by the Act, and that executors have no discretion to deduct the whole amount from residue and pay to legatees the amounts bequeathed free from duty. Should executors by accident or forgetfulness make payments of legacies in full, they would be charged with the amount of the duty in

passing their accounts before the Surrogate Judg : *Kennedy* v. *Protestant Orphans' Home*, 25 O.R. 225 ; and *Manning* v. *Robinson*, 29 O.R. 483.

Some time ago a discussion took place in the columns of the *Solicitors' Journal*, England, as to who was the longest practising solicitor, when after much research and some heart burnings the conclusion was arrived at that Mr. George Hensman, of Lincolns Inn field, was entitled to that honor. He is said to be in his ninetieth year; was admitted in Easter Term, 1835, and is still in practice. This is very good for England, but Mr. Hensman is but an infant as compared with Mr. B. D. Siliman who recently returned to the practice of his profession in New York. He is in his ninety-fifth year, and was admitted to the bar in 1829. We gather from the notice of his life in the *Albany Law Journal* that he was never known to lose his temper, avoided stimulants of all kinds, was remarkable for his regular habits, and never married. To which of these incidents or whether to any of them his vigorous old age is to be attributed we know not. It may truly be said that in his case at least the old adage "Go it while you're young" has no application. Let the white haired man of this generation take comfort hereby.

We reproduce as worthy of preservation, as well for those of us who know their present applicability as for all who shall in future years hail from the loyal precincts of Osgoode Hall, the eloquent words with which Mr. Justice Rose closed his lecture on legal ethics to the third year students of the Law School on the 19th inst. After enlarging upon a lawyer's duties to his client, to the court, to himself and to his country he quoted the language of the oath of allegiance, and thus spoke of recent stirring events in reference to Canada's connection with the wars of the empire: "It was only yesterday that from our ranks went forth noble and brave young men, with quick step, bounding pulse, and hearts filled with love for the empire, placing at her command not only fullness of service, but also the life-blood of their hearts, whose every throb is a prayer for Queen and country. If they shall fall on the field of battle, they shall not die but live—live in our hearts, live in memory, in the pages of history, in deeds which cannot die. We are proud of those who have gone, and as to those who remain, I know there

is but one heart, one mind, one love, and if—which may God forbid—the tide of war shall roll to our shores, it will be met by a solid wall of loyal hearts bound together by a strong tie of devotion to a united empire, a wall against which the waves may dash, but shall dash in vain, and, broken, shall be thrown back into the sea to die with the sullen roar of final defeat, for 'God will save our Queen.'"

LEGAL EDUCATION.

We are glad to see that the voice of the profession in Ontario, which found its expression on several occasions in these columns as to the defects in our system of legal education, has resulted in a change which is in the direction we indicated as desirable. There is, however, much ground still to be occupied, but now that the defects are recognized, there is hope that more may eventually be accomplished. The change referred to is not in itself very important, but is good so far as it goes. It is to give lectures on elementary points of practice to first-year students, instead of waiting to take up matters of practice during the second and third years. Of course, no amount of lectures on practice can take the place of work in an office, but they are better than nothing.

The subject opens up a wide field for discussion, and various questions present themselves for consideration. Amongst others, it may be asked: Whether it would not be well to require at least one year in an office in addition to three years of academic study? Whether university graduates should or should not have the privilege of only three years' study, whilst others must have five—whether, in fact, the college training of the former is as useful or beneficial as the two years' extra experience of the latter, especially when too often the former amounts to little more than a capacity to "cram" for an examination? Whether it is well to attempt, as at present, to combine office work with Law School studies, and so spoil both? Whether any better system than the present can be devised, either by a reconstruction of the Law School, or how otherwise? The subject is of interest not to Ontario alone, but to all the provinces whose system of jurisprudence is based upon the common law.

QUO WARRANTO.

The earliest form of quo warranto proceedings was by a prerogative writ in the nature of a writ of right by the King against one who had usurped or claimed any office, franchise or liberty of the Crown, enquiring by what authority he supported his claim ; and the writ was issued out of Chancery.

The first proceeding of which we have record was in A.D., 1198, during the reign of Richard I., and was against the incumbent of a Church, calling upon him to shew "Quo Warranto" he held the church. It was frequently employed during the Feudal period to strengthen the power of the King against the Barons.

The encroachments of the Crown caused statutes to be passed in the reign of Edward I., curtailing its authority under the writ. Shortly after this time, the form of an information was substituted; and in lieu of the original writ, Charles II. and James II. used the information for the purpose of forfeiting the charters of large numbers of municipal corporations throughout the Kingdom ; and these actions brought about the passing the statutes in the reigns of William III. and Anne, restricting the power of the Crown very considerably.

Whether the original writ or its successor has or has not any legal existence in Ontario at the present day it is not the purpose of this article to inquire. For practical purposes the only proceeding now in use in Ontario bearing the title of quo warranto is that authorized and provided by the Municipal Act R.S.O. c. 233, s. 219, et seq., for the purpose of inquiring and declaring whether persons assuming to act as municipal officers have been duly elected to the office which they assume to hold.

The proceedings may be taken in Chambers either before the Master in Chambers, or before a Judge of the High Court, or before the Judge of the County Court of the County in which the election took place.

Who may be a relator.—Any candidate at the election or any voter who gave or tendered his vote at that election, or, in the case of an election by acclamation, any person entitled to vote may institute the proceedings and is known as a relator. The style of cause being "The Queen upon the relation of *John Doe* v. *Richard Roe.*"

Proceedings and time for instituting.—Proceedings must be instituted within six weeks after the election, or four weeks after the

acceptance of office by the defendant. The first proceeding is an ex parte application for a fiat authorizing the relator to serve a notice of motion by way of quo warranto. The application is founded on an affidavit shewing that there is reasonable ground for supposing the election was not legal, or for contesting the election. Before obtaining this fiat the relator must give and file a recognizance in the sum of $200, and sureties of $100 each, that he will pay any costs which may be adjudged against him. This recognizance may be allowed by the Judge on affidavits of justification and such allowance is endorsed by him on the recognizance. Where a recognizance has thus been allowed the sufficiency of the sureties cannot subsequently on appeal or otherwise be inquired into: *Reg. ex rel. Mangan* v. *Fleming*, 14 P R. 458.

A summons issued within a month after the formal acceptance of office, although more than six weeks after the election is in time: *Reg. ex rel. Felitz* v. *Howland*, 11 P.R. 264. At least seven clear days' notice of the motion must be given, and it must contain the name of the relator, his occupation, address, and whether he is a candidate or voter; if the notice of motion does not shew the interest of the relator, but this is set out in the affidavit filed in support of the motion, an amendment would, if necessary, be granted: *Reg. ex rel. Percy* v. *Worth*, 23 O.R. 699. The notice must state specifically the grounds of objection to the validity of the election, and also those in favour of the validity of the election of the claimant if there be a claimant. On the hearing the relator will be confined to these grounds, and if the grounds of objection apply equally to two or more persons they may all be proceeded against in one motion, but a person cannot take proceedings as a relator against the election of a person he has himself voted for unless he shews he was ignorant of the objection: *Reg. ex rel. Coleman* v. *Hare*, 2 P.R. 18.

Affidavits may be filed in support of the motion, or viva voce evidence may be taken, and the names of the witnesses must be set out in the notice of motion which must be served personally within two weeks from the date on which the fiat is granted, but substitutional service may be ordered by the Judge if he deem it proper. If, however, the question of bribery or undue influence is raised, the evidence in support of that charge must be given viva voce and not by affidavit. The affidavits should be filed before the notice, if served otherwise they cannot be read in support of

the motion, but the failure to file the material does not vitiate the motion: *Reg. ex rel. Mangan* v. *Fleming*, 14 P.R. 458.

On the hearing the Judge may require the clerk of the municipality to produce any assessment rolls or other document in his possession, and shall try and determine the validity of the election complained of, and of the alleged election of the claimant of the seat if there is one, and when more motions than one are made against an election, all shall be returnable before the Judge who tries the first one, and he may give a separate judgment in each case or give one judgment for all.

Concurrent proceedings. — If concurrent proceedings are launched in the High Court and in the County Court against the same person, the Judge of the High Court sitting in Chambers cannot prohibit the County Court Judge from proceeding with the trial. In such case the proper procedure is for the defendant to make a motion in that Court in which the last proceeding was launched calling upon both relators to shew cause why the quo warranto proceedings last brought should not be set aside or made returnable before the Court having cognizance of the earlier proceedings: *In re Reg. ex rel. Hall* v. *Gowanlock*, 29 O.R. 435.

Where the trial is before the High Court Judge he may order evidence to be taken viva voce by the County Court Judge, and he may at any stage of the proceedings order any person to be made a party, or may allow any eligible person to intervene and become relator, but when the relator in a quo warranto proceeding desires to withdraw, the Court has no power under the statute or otherwise to compel him to go on against his will or to substitute a new relator: the power given by 55 Vict., c. 42, s. 196, now R.S.O. c. 223, s. 231, is to substitute a new defendant, not a relator: *The Queen ex rel. Masson* v. *Butler*, 17 P.R. 382.

Disclaimer and its effect.—Any person elected may, after the election and before it is complained of, deliver a disclaimer, signed by him, to the clerk of the municipality in the following form: "I, A. B., do hereby disclaim all right to the office of —— —— in the ——, and all defence of any right I may have to same," or, if the election is being proceeded against, may (unless the proceedings are on the ground of corrupt practice by him), within one week after the service of the notice of motion on him, forward a disclaimer, signed by him, to the Judge before whom the proceedings are being taken, and also to the relator or his solicitor; the disclaimer must be in

the form prescribed by R.S.O. c. 223, s. 238, otherwise it will not be a protection: *Reg. ex rel. Mitchell* v. *Davidson*, 8 P.R. 834, and this will relieve the person from liability for costs, and will operate as a resignation by him, and the person having the next highest number of votes is thereby elected. The provisions relating to disclaimer have proved to be of great practical utility, and persons whose election is complained of very frequently take advantage of them.

At an election there were three candidates, and the two who received the highest number of votes successively disclaimed; thereupon the remaining candidate made a declaration of office and took his seat, and it was held that what took place constituted the election of respondent and entitled him to seat: *Reg. ex rel. Percy* v. *Worth*, 23 O.R. 688.

A ground of complaint very frequently raised is that the person elected has not the necessary property qualification prescribed by the Municipal Act. In considering the property qualifications of a candidate, the rating in the last revised assessment roll is final and conclusive: *The Queen ex rel. Hudgin* v. *Rose*, 33 C.L.J. 398, and occupation of partnership property was held to be "actual occupation" by each of the partners in *The Queen ex rel. Joanisse* v. *Mason*, 28 O.R. 495, and voters' lists are final as to the qualification to vote at a municipal election in Ontario: *The Queen ex rel. McKenzie* v. *Martin*, 28 O.R. 523.

A frequent ground of objection is that the defendant was disqualified by having some contract with the municipality. In *Reg. ex rel. McGuire* v. *Birkett*, 21 O.R. 162, the election of a person who had a contract with the corporation of which he was elected an officer was held invalid. A municipal election was set aside, but without costs to the relator, on the ground that he was auditor of the corporation: *Reg. ex rel. Brine* v. *Booth*, 9 P.R. 452.

Besides lack of personal or property qualification the election of a person may be attacked on account of bribery. Bribery is defined to be giving, lending, or agreeing to give or lend any valuable consideration to any person, or procuring or promising to procure any office for any person on account of his having voted or refrained from voting, but municipal elections are not avoided for bribery of agents without authority where the candidate has a majority of votes cast (*Reg. ex rel. Thornton* v. *Dewar*, 26 O.R. 512), or the complaint may be of having exercised undue influence,

which means any restraint whatsoever placed on a person which interferes with the free exercise of the franchise.

A person found guilty of either of the above forfeits his seat and is disqualified for two years, and any person found guilty of bribery is liable to a penalty of $20, and is disqualified from voting for two years; and this penalty may be recovered in the Division Court, and the person against whom judgment is given is disqualified until it is paid.

The issue is tried in a summary manner without formal pleadings, and if the election is invalid the judgment removes the person from office. If some other person is found duly elected the judgment orders that such person be admitted to the office, and if that person was not duly elected it orders a new election. The order for a new election is directed to the sheriff of the county in which the election was held. The order also provides for costs and may be enforced in the same way as an order for mandamus and by writ of execution. If the election has been declared invalid on account of improper conduct of the returning officer or deputy returning officer the judge may order him to pay the costs of the proceedings. As to penalties imposed on such officers see *Wilson* v. *Manes*, 28 O.R. 419. The duties of such officers are ministerial not judicial; and no proof of malice or negligence is required in an action for such penalties.

A deputy returning officer was absent from the polling booth on three occasions. There was no suggestion of bad faith, and it being proved that the absence and what was done during his absence did not affect the result of the election it was declared that the election was valid: *The Queen ex rel. Watterworth* v. *Buchanan*, 28 O.R. 352.

An appeal may be taken from the decision of the Master in Chambers or of the County Court Judge to a Judge of the High Court and the procedure is the same as on an appeal from the Master in Chambers. The decision of a Judge of the High Court whether on such appeal or in the first instance is not further appealable.

Precedents affording suggestions as to the various forms connected with these proceedings may be found in Bell and Dunn's Forms and Precedents of Practice at pages 45, 80, 172, 335, 524 and 590.

JAMES H. SPENCE.

Toronto.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

POWER—EXECUTION OF POWER—LIMITED POWER—EXERCISE OF POWER BY WILL—INTENTION.

In re Sharland (1899) 2 Ch. 536, a summary application was made to the court for the purpose of determining whether there had been a valid execution of a limited power. The donee, in addition to a limited power to appoint the income of certain property to her husband for life, had also two general powers of appointment; by her will, which contained no reference to the limited power or to the property subject thereto, she gave, devised and bequeathed all her real and personal estate, and appointed all real and personal estate over which she might have a power of appointment unto her husband absolutely. It was contended on behalf of those entitled in default of appointment under the limited power, that that power had not been validly exercised because the general words would not include the limited power unless the testatrix had no other, here the existence of the other two general powers, prevented the general words from applying to the limited power in the absence of any express intention of the testatrix to exercise it. Kekewich, J. however held that the limited power had been validly executed as the will sufficiently shewed that the testatrix intended to exercise all powers which she had.

VENDOR AND PURCHASER.—CONDITION AGAINST ALIENATION—REVERTER—REFUSAL TO FORCE TITLE ON UNWILLING PURCHASER.

Re Hollis Hospital, Hagues' Contract (1899) 2 Ch. 540, was an application under the Vendors and Purchasers' Act, in which the point submitted to Byrne, J., was as to the effect of a condition of reverter contained in a deed made in 1726, whereby certain property was conveyed to trustees for the use of a charity, subject to the provision that if any part of the property conveyed should be employed or converted to any other use or purpose than that of the charity, the property should revert to the original donor. The trustees of the charity had entered into a contract for sale of part of the property so conveyed, and the heir of the original donor had notified the purchaser that he would, in the event of the sale being carried out, claim the property by virtue of the proviso. Byrne, J.,

was of opinion that the condition or proviso for reverter offended against the law against perpetuities, and was null and void, but in view of the notice served by the heir of the original donor, who refused to become party to, or bound by, the present proceedings, he held that the title was not one which could be forced upon the purchaser if unwilling to complete.

APPROPRIATION OF PAYMENTS—BANKING ACCOUNT—FOLLOWING FUND—APPLICATION OF RULE IN CLAYTON'S CASE.

Mutton v. *Peat* (1899) 2 Ch. 557, is a case in which the application of the rule in Clayton's case came in question. The facts were, that certain brokers had an account current and a loan account with their bankers. On 11 Jan, 1896, the brokers paid into their current account £790 4s. 6d., received from one Parker for investment, a few days after the brokers were adjudicated bankrupt. On 20th January, 1896, the bankers closed the current account and transferred the balance standing to the credit of that account to an account in their books called the "liquidation account." At this time there was owing by the brokers on the loan account £7,500, for which the bankers held securities, which they proceeded to realize, and from time to time as the securities were realized they gave credit in the "liquidation account," debiting a proportionate part of the loan account charging interest thereon up to the date of such credit. The securities realized sufficient to pay off the whole debt of £7,500 and left a balance over, and Parker now claimed that the £790 4s. 6d. should be paid to him out of the balance in the bankers' hands. Byrne, J., held that under the circumstances he was entitled to it, as owing to the way the bankers had kept the account it was clear that they had not appropriated as they might have done the balance standing to the credit of the current account towards the payment of the debt owing by the brokers on the loan account. The rule in Clayton's case, therefore, did not apply, and as between third persons interested in the securities which had been realized, and Parker, the latter, was held to have the better equity.

HUSBAND AND WIFE—SEPARATE ESTATE—LOAN BY WIFE TO HUSBAND—BOND BY HUSBAND—INTEREST ON BOND—DAMAGES—STATUTE OF LIMITATIONS (21 JAC. 1, C. 16)

In re Dixon, Heynes v. *Dixon* (1899) 2 Ch. 561, was an action for the administration of the estate of Thos. Dixon in which the

plaintiffs as trustees of his marriage settlement claimed to be creditors of his estate under the following circumstances. By the marriage settlement made in 1847 certain real estate was vested in trustees upon trust for the wife for life with remainder to the husband for life, with remainders over. The settlement contained power to sell and invest proceeds with the consent of the husband or wife on real or personal security. The estate was sold in 1852 and the trustees at the request of the wife advanced the proceeds of the sale to the husband on the security of his bond in a penal sum equal to double the amount advanced conditioned for re-payment of the sum advanced six months after date with interest at four per cent. The husband and wife lived together in amity until the wife's death in 1876, and the husband died in 1896. No interest was ever paid on the bond or any acknowledgment given by the husband. The plaintiffs claimed to be entitled to recover from the husband's estate the principal money secured by the bond with interest thereon from the date of his death. The bond was found among the husband's papers. The husband's executors contended that the claim was barred by the Statute of Limitations, and that at any rate, interest could only be recovered as damages. Byrne, J., came to the conclusion that as the hand to pay and receive the interest was, until the death of the husband, the same, no payment was necessary, and that therefore the Statute of Limitations did not apply. He also held that where a bond, as in this case, is subject to a defeasance to make the same void on payment of a lesser sum and interest, the interest is payable as interest and not as damages, and that the amount of interest recoverable on such a bond is not diminished by reason of the bond being conditioned for payment of interest up to or at a certain date.

MARRIAGE SETTLEMENT—AGREEMENT FOR SETTLEMENT BY INFANT—REPUDIATION — RATIFICATION — COVENANT TO SETTLE WIFE'S AFTER ACQUIRED PROPERTY.

Viditz v. *O'Hagan* (1899) 2 Ch. 569, turns upon the validity of marriage articles made by a lady on marriage before attaining her majority. The marriage took place in 1864 in Bern, the husband being an Austrian. The marriage articles were executed at the British Embassy at Bern, and therein the husband covenanted to settle the wife's after acquired property (except pecuniary legacies)

upon the usual trusts for the wife for life, with a restraint on alienation and for the children of the marriage. In 1867 the wife attained 21. In 1870 she became entitled on the death of her mother to £6,000, which was paid over to the trustees of the marriage articles. In 1880 a deed in English form was executed in Paris which purported to be a settlement in pursuance of the articles of 1864, but contained a covenant to settle all after acquired property of the wife, not excepting pecuniary legacies. In 1882 the wife become entitled to a further sum of £2,000, and by virtue of a compromise of a suit to a further sum of £13,000 to be settled on her and her children, and £5,000 to be paid to her personally. In 1892 the wife became entitled to a legacy of £2,000, and in November of that year she was informed that this sum and also the £5,000 would have to be paid over to the trustees of the marriage settlement. She then took advice, and, in November, 1893, she and her husband executed in Austria in accordance with Austrian law a notarial act, by which they purported to revoke and annul the deeds of 1864 and 1880, and to vest in the wife the unrestricted administration of all her property. The present action was instituted by the husband and wife and the children of the marriage who had all attained 21, praying a declaration that the settlements of 1864 and 1880 had been validly annulled, and alternatively that the settlement of 1880 was void or that the wife was entitled to repudiate it so far as the £5,000 and the £2,000 legacies were concerned. Cosens-Hardy, J., who tried the action, held that under *Edwards* v. *Carter* (1893) A.C. 360 (noted ante vol. 29, p. 735) the marriage articles, though made during the infancy of the wife, were not void but voidable only on her repudiating them within a reasonable time after coming of age, and that the lady had not repudiated them, but on the contrary had ratified them after coming of age, and that the settlement must be governed by English law and the attempted annulment thereof in 1893 was inoperative and that the £5,000 was bound by the settlement, but he held that the settlement of 1880 had gone beyond the original articles in so far as it extended the covenant to settle after acquired property to legacies. That deed being binding only so far as it carried out the articles, and being inoperative as to future estate, and to that extent he ordered the settlement of 1880 to be rectified so as to conform to the articles of 1864.

UNDUE INFLUENCE—HUSBAND AND WIFE—SOLICITOR AND CLIENT—BENEFIT TO RELATIVE OF SOLICITOR.

Barron v. *Willis* (1899) 2 Ch. 578, was an action brought by the plaintiff for the purpose of obtaining a declaration that certain deeds varying a post nuptial settlement of the plaintiff's deceased husband's property, were invalid on the grounds that they had been prepared by the solicitor of the husband, and the deeds had the effect of accelerating a benefit which the solicitor's son was entitled to under the settlement. Cosens-Hardy, J., was of opinion that there had in fact been no undue influence exercised by the solicitor, and that the deeds in question had been duly explained to the plaintiff and their effect understood by her, and the mere fact that the husband's solicitor had prepared the deeds without the plaintiff having independent advice did not render the deeds invalid, nor yet the fact that the solicitor's son was benefited thereby. Notwithstanding what may be said by text writers to the contrary, the learned judge holds that the authorities have established that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley*, 14 Ves. 273, applies, and in other words, that there is no presumption that a voluntary deed executed by a wife in favor of her husband and prepared by the husband's solicitor is invalid, and that the onus probandi lies on the party who impeaches such a deed, and not on the party who supports it.

TRUSTEES—SEVERING IN DEFENCE—COSTS.

In re Maddock, Butt v. *Wright* (1899) 2 Ch. 588, one of the several defendants, who were trustees, under circumstances which the court considered proper, appeared on a motion by separate counsel, and the costs of such separate appearance were allowed to such defendant. On taxation of the costs the taxing officer allowed the plaintiff the costs of two counsel, but refused to allow but one counsel to the defendant although he had in fact been represented by two. On appeal from the taxing officer, Cosens-Hardy, J., held that the defendant was entitled to tax two counsel fees.

COMPANY—WINDING UP—CONTRIBUTORY—COMPANY LIMITED BY GUARANTEE—CALLS.

In re Bangor & North Wales M. M. P. Ass'n. (1899) 2 Ch. 593. This was a winding-up proceeding in respect of a mutual insurance company which had no paid-up capital but was limited by

guarantee, the guarantors undertaking, in the event of a winding-up, to contribute in certain proportions to the assets of the company. One of the guarantors was also liable in respect of certain subscriptions for insurance, and calls for losses, and the simple question presented to Wright, J., was whether he was liable as a contributory in respect of such subscriptions and calls as well as for the amount guaranteed, which question the learned judge answers in the negative, considering that the liability for subscriptions and calls is one that must be enforced by suit as in the case of any other debt due to the company.

LEASE COVENANT—CONSTRUCTION—DISCONTINUANCE OF LICENSE.

In *Bryant* v. *Hancock* (1899) A.C. 442, the House of Lords (Lords Macnaghten, Morris and Shand) affirmed the judgement of the Court of Appeal (1898) 1 Q.B. 716 (noted ante vol. 34, p. 407.) The point at issue being the construction of a covenant in a lease whereby the covenantors bound themselves and their assigns that they would keep the demised premises (a public house) open every lawful day, and conduct the business in a proper and orderly manner so as to afford no ground or pretence for discontinuing the license thereof. The breach alleged by the plaintiff was that the covenantors under-lessee had been guilty of a breach of the license law, in consequence of which the magistrates refused to renew the license. Lord Shand, though agreeing with the affirmance of the judgment of the Court of Appeal dismissing the action, expressed grave doubts whether the opposite view was not the correct one.

CONTRACT—AGREEMENT FOR SHARE OF PROFITS—AUDIT—FINALITY OF AUDIT—UNFOUNDED CHARGES OF FRAUD—COSTS.

Teacher v. *Calder* (1899) A.C. 451, was an appeal from the Court of Session, Scotland. The appellant had advanced a sum of money to the respondent to be used in his business on the terms of being paid interest and 37½ per cent. of the profits of the respondent's business; and the contract stipulated that there should be an annual audit of the profits by a firm of accountants, and that their certificate as to the profits should be binding on the parties. One of the firm of accountants accordingly for four years audited the respondent's books, but he did so in ignorance of the agreement between the parties and also of the fact that his certificate was to be final and conclusive, and he swore that if he had

known this he would have made the audit on a somewhat different plan, by debiting to capital account some items which had been charged to revenue. The action was brought to have the accounts re-taken, and was dismissed by the Court of Session. The House of Lords (Lords Watson, Shand and Davey), however, reversed that decision, and granted the plaintiff the relief he claimed, holding that the contract was a quasi agreement to refer to arbitration, and that although the parties might have agreed to be bound by the award of a referee who was ignorant of the agreement between the parties and of the fact that his decision was to be final, yet they had not done so in this case, and that, under these circumstances, the audit having been made in ignorance of the rights of the parties, and of the fact that the audit was to be conclusive between them, it was not such an audit as the agreement contemplated, and was not binding, and the plaintiff was held entitled to have the accounts re-taken. Their Lordships, however, refused to give the successful appellant costs of the court below, because of the unfounded charges of fraud made in their pleadings.

MARKET- BY-LAW, VALIDITY OF.

In *Scott* v. *Lord Provost of Glasgow* (1899) A.C. 470, the validity of a market by-law was in question. The by-law was made in pursuance of a statute empowering the municipal authority to make by-laws (inter alia) "For regulating the use of the market place, and fair, and the buildings, stalls, pens and standings therein; and for preventing nuisances or obstructions therein, or in the immediate approaches thereto." The by-law in question provided in effect that sale rings in the market should not "be used for private sales, or for sales to any limited number of persons, or for sales from which any particular class of the public are excluded from bidding or buying." The House of Lords (Lord Halsbury, L.C., and Lords Watson, Shand and Davey) affirmed the decision of the Court of Session in favour of the validity of the by-law.

LEGACY—VESTING—POSTPONED PERIOD OF DISTRIBUTION.

Bowman v. *Bowman* (1899) A.C. 519, although a Scotch case, deals with a point of law in which the law of England and Scotland are alike. The case turns upon the construction of a will whereby the testator directed his trustees to allow his wife a life-rent use of his house and such allowance as they thought necessary, and "on

the dissolution and winding-up of the firm of B. & C. (of which he was a partner) in the event of the pre-decease of my said wife, and if she then survives, on her death, to realize my whole means and estate and to divide the same into four equal shares, and pay one share to each of my children (naming them) or to their respective heirs." The widow survived the testator and the firm had not been wound up, two of the children had survived the testator but were now dead. The action was instituted by the representatives of one of the deceased children against the testator's trustees praying a declaration that the shares of residue vested in the four children at the death of the testator. The Court of Session so decided, and the House of Lords (Lord Halsbury, L.C., and Lords Watson, Davey and Shand) affirmed the judgment of the court below.

STATUTORY POWERS -- DAMAGES OCCASIONED BY EXERCISE OF STATUTORY POWERS—INJUNCTION—DAMAGES—IRRIGATION—LAND SLIDE.

Canadian Pacific Railway Co. v. *Parke* (1899) A.C. 535, was an appeal from the Supreme Court of British Columbia, in which the point involved was whether the defendants, who had in the exercise of certain statutory powers authorizing them to construct irrigation works, by diverting water on to their lands from adjacent streams, were responsible in damages to the plaintiffs for damages occasioned to their railway by reason of a land-slide occasioned by such irrigation work of the defendants. The defendants contended that the statutory authority under which their works were constructed relieved them from liability for the damages in question. The Judicial Committee of the Privy Council (the Lord Chancellor Halsbury, and Lords Watson, Hobhouse, Macnaghten, Morris, Shand and Davey,) reversed the judgment appealed from, on the ground that the statutory authority under which the plaintiffs acted did not authorize them to injure the plaintiff's land: they agreed with the court below that the critical question was whether the act was, as between the persons using the powers thereby conferred and the owners of adjacent lands, imperative or merely permissive, and they agreed with the court below also in holding that the right was merely permissive, but they dissented from the conclusion which the court below arrived at that the permission to use the water would be a bar to an action for damages where the use had been non-negligent. On the contrary, the Judicial Committee determined that where the Legislature has authorized a proprietor

to make a particular use of his land, and the authority is in the strict sense permissive only and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

CONTEMPT OF COURT—INNOCENT LOAN OF PAPER CONTAINING SCANDALOUS MATTER RESPECTING A COURT—JUDGE ORDERED TO PAY COSTS—COSTS.

In *McLeod* v. *St. Aubyn* (1899) A.C. 549, the appellant was a barrister-at-law, who had been committed to prison for fourteen days for an alleged contempt of court by the respondent as acting Chief Justice of the Supreme Court of St. Vincent. The alleged contempt consisted in the fact of the appellant having innocently lent to a third person a copy of a newspaper of which the appellant was the agent and correspondent. The paper in question contained, unknown to the appellant, libellous matter affecting the acting Chief Justice, the respondent, who made an order calling on the appellant to shew cause why he should not be committed for contempt, and subsequently, after hearing the appellant, committed him to prison for 14 days. The Judicial Committee (Lords Watson, Macnaghten, Morris and Davey) were of opinion that the facts did not warrant the finding of the Judge that the appellant had been guilty of contempt of court, and rescinded the order and ordered the respondent to pay the costs of the appeal. Some of the observations of the Committee may be useful to note: At p. 561, it is said, "The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of a Judge as a person. He must resort to action for libel or criminal information. Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence when a trial has taken place and the case is over, the judge or the jury are given over to criticism. . . . Committals for contempt of court by scandalising the court itself have become obsolete in this country."

PROBATE—LEGATEE PREPARING WILL IN HIS OWN FAVOUR—FINDINGS OF JURY—NEW TRIAL.

Farrelly v. *Corrigan* (1899) A.C. 563, was an appeal from the Supreme Court of Queensland. The action was a probate action in which the court had precluded from probate a pecuniary legacy

exhausting nearly the whole of the testator's estate to his confidential agent who had drawn the will. The jury, as the court held, had properly found that the testator knew and approved of the contents of the will, except as regards the above mentioned bequest, which they found he did not know or approve of, but they had added a rider in which they expressed the belief that the testator intended to give to said legatee half his property. The appellant had applied in the court below for a new trial on the ground that the verdict was against the weight of evidence, and that the rider was inconsistent with the rest of the verdict. The court below thought that the rider was irrelevant and immaterial, but that if it was to be treated as a finding of fact it rather increased than diminished the suspicion attaching to the transaction, inasmuch as it shewed that the will did not truly express the testator's intention, and they refused the application, and with this conclusion the Judicial Committee, (Lords Watson, Macnaghten, Morris and Davey) agreed.

B.N.A. ACT S. 91, S-S. 25 AND S. 92, S.-SS. 10, 13—B.C. COAL MINES REGULATION ACT 1890, S. 4—CHINAMEN—ALIENS.

In *Union Colliery Co.* v. *Bryden* (1899) A.C. 580, the Attorney-General of British Columbia intervened, in order to uphold the validity of an Act of the Provincial Legislature forbidding the employment of Chinamen in any coal mine within the Province. The Supreme Court of British Columbia had upheld the validity of the Act as being within the power of the Provincial Legislature but on appeal to the Judicial Committee of the Privy Council (Lords Watson, Hobhouse, Macnaghten, Sir Richard Couch and Sir Edward Fry) they reversed the decision, holding that although regarded merely as a coal working regulation the Act in question would be within the competence of the Provincial Legislature; yet from the fact of its exclusive application to Chinamen who are aliens or naturalized subjects, it instituted a statutory prohibition affecting that particular class, which was a matter within the exclusive jurisdiction of the Dominion Parliament conferred by the B.N.A. Act, s. 91, s-s. 25, in regard to "naturalization and aliens," and that therefore the Act in question was ultra vires and invalid.

GAS COMPANY—RIGHT TO STOP GAS SUPPLY.

In *Montreal Gas Co.* v. *Cadieux* (1899) A.C. 589, the Judicial

Committee (Lords Watson, Hobhouse, Macnaghten, Sir Edward Fry and Sir Henry Strong) on appeal from the Supreme Court of Canada, have held that, under a Canadian statute relating to gas companies which provided that "If any person . . . supplied with gas by the company shall neglect to pay any rate rent or charge due to the . . . company, at any of the times fixed for the payment thereof it shall be lawful for the company . . . on giving twenty-four hours previous notice to stop the gas from entering the premises, service pipes or lamps of any such person . . . by cutting off the said service pipe or pipes or by such other means as the company shall think fit," it is competent for a company to refuse to supply a person with gas at any of his houses on his neglect to pay his bill for gas supplied to any one of them. The case presents a curious variety of judicial opinion; the action was brought to compel the gas company to supply gas. The Supreme Court of Quebec in which the action was commenced decided in the plaintiff's favour; the Court of Queen's Bench of Quebec unanimously reversed the judgment and the Supreme Court of Canada (Gwynne, Sedgwick, King, and Girouard, JJ., Taschereau, J., dissenting) reversed the judgment of the Queen's Bench and their decision is now reversed by the Judicial Committee.

LATERAL SUPPORT — ADJACENT LANDS — ESCAPE OF PITCH — INJUNCTION — DAMAGES.

The Trinidad Asphalt Co. v. *Ambard* (1899) A.C. 594, is a case to which we recently referred in connection with the case of *Jordeson* v. *Sutton S. & D. Gas Co.*, noted ante vol. 35, p. 108. The appeal was had from the Supreme Court of Trinidad and Tobago, and the question at issue was whether the plaintiffs were entitled to an injunction against the defendant and damages under the following circumstances. The plaintiffs and defendants were owners of adjacent lands in which there were deposits of pitch and the defendants had in the course of working the deposits on their own land caused a subsidence of the plaintiff company's land and the pitch on their land to flow on to the defendants' land. The court below held that the plaintiffs had no property in the pitch which had flowed from the plaintiff's land on to the defendants', but differed as to whether the plaintiff was entitled to damages for loss of lateral support. The Judicial Committee held that pitch is not

like subterranean water the abstraction of which, by pumping or otherwise, causing subsidence gives no right of action, but that it is a mineral the withdrawal of which by the defendants, the plaintiffs were entitled restrain by injunction.

TRADE NAME—COLOURABLE IMITATION OF NAME—INJUNCTION.

Montreal Lithographic Co. v. *Sabiston* (1899) A.C. 610, was an action brought by the plaintiffs who had purchased the assets and goodwill of the dissolved Sabiston Lithographic and Publishing Co. of which one Alexander Sabiston had been the managing director, to restrain the defendant, who was a brother of Alexander Sabiston, from carrying on business under the name of the Sabiston Lithographing and Publishing Co. The appeal was from the Court of Queen's Bench of Quebec refusing the injunction. The Judicial Committee (Lord Halsbury, L.C., and Lords Watson, Macnaghten, Morris and Davey) agreed with the court below in the result, but did not adopt all the reasons of the court below. That court was of opinion that the liquidator of the dissolved company had no power to sell or transfer to the plaintiff company a right to use the name of the dissolved company, which was a grant from the crown, and the sale of the goodwill even though judicially authorized, was inoperative to transfer such right. The Judicial Committee dissented from this, and was of opinion that it was competent for the liquidator to sell the goodwill, but that the extent of the rights thereby transferred would depend on circumstances; and though the appellant could not acquire any corporate name except by grant from the Crown, the promoters of the appellant company might have applied for incorporation in the same name as the old company; but no such application having been made, and the plaintiff company having been incorporated under an entirely different name, and the defendant having carried on his business under its present name for some months prior to the sale to the appellants, and it not appearing that he had represented himself as the successor of the dissolved company, the committee were of opinion that the plaintiffs were not entitled to restrain the use of the name of the old company by the defendant.

MUNICIPAL CORPORATION—ADOPTION OF BRIDGE BY CORPORATION—BY-LAW —ACCIDENT TO BRIDGE UNDER CORPORATE CONTROL.

In *Victoria* v. *Patterson* (1899) A.C. 615, the principal question was whether a by-law by a municipal corporation adopting a bridge is necessary in order to render a municipal corporation liable for damages for negligence in the care of such bridge. By an Act of British Columbia, municipal corporations are empowered to assume the control over bridges within their territorial limits. The Act does not expressly provide that a by-law must be passed for that purpose, and the evidence in the case established that the defendant corporation had in fact assumed the control over the bridge in question, and that the accident had been occasioned thereto by one of their officers having bored holes in one of the beams of the bridge, whereby the beams rotted and broke causing the accident in respect of which the plaintiff sued. The Judicial Committee of the Privy Council (The Lord Chancellor and Lords Watson, Macnaghten, Morris and Davey) affirmed the judgment of the Supreme Court of British Columbia, on the ground that in the absence of an express statutory enactment requiring a by-law, it was not necessary that one should be passed in order to render the corporation liable for negligence in respect of a bridge of which they have in fact assumed the control.

DOMINION RAILWAY—PROVINCIAL LEGISLATURE, POWERS OF.

In *Madden* v. *Nelson & Fort Sheppard Ry. Co.* (1899) A.C. 626, the Judicial Committee (The Lord Chancellor, Lords Watson, Hobhouse and Macnaghten, Sir Edward Fry and Sir Henry Strong) have affirmed the judgment of the Supreme Court of British Columbia holding that an act of that province purporting to make railways under Dominion control liable for cattle killed or injured on their railways unless such companies erect proper fences on their railways, is ultra vires by the provincial legislature.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT OF CANADA.

B.C] MADDEN *v.* CONNELL. [Oct. 24, 1899.

Mining—Adjoining claims—Overlapping—Initial post—Foreign territory.

Two persons having located mining claims in British Columbia near the United States boundary line, it turned out that a piece of ground was included in both, and an action was brought to determine the title thereto. On the trial it was proved and conceded that the initial post of defendant's claim was south of the boundary line and so in foreign territory.

Held, affirming the judgment of the Supreme Court of British Columbia (6 B.C. Rep. 531), that in consequence of this situation of defendant's initial post his location was utterly void. Appeal dismissed with costs.

C. Robinson, Q.C., for appellant. *A. P. May*, for respondent.

Ont.] TUCKER *v.* YOUNG. [Oct. 27, 1899.

Appeal—Jurisdiction—County Court case.

An action was begun in the County Court of Lambton County claiming damages for injury to plaintiff's land by water from defendant's drains. After issue joined the County Court Judge, exercising the jurisdiction of a local Judge of the High Court of Justice, ordered the cause to be removed into the High Court, stating in his order that a question as to the jurisdiction of the County Court had been properly and bona fide raised. All subsequent proceedings were carried on in the High Court, and on the trial a reference was ordered to the Drainage Referee who held that plaintiff had no cause of action. The Court of Appeal overruled this holding and gave judgment for plaintiff (26 O.A.R. 162). Defendant appealed to the Supreme Court of Canada. On motion to quash such appeal,

Held, that the action was not originally brought in a Superior Court as required by R.S.C. c. 135, secs. 24 (a) and 28, and there was no jurisdiction to hear the appeal. Appeal quashed with costs.

Aylesworth, Q.C., for the motion. *Riddell*, Q.C., contra.

B.C.] [Nov. 7, 1899.

WOOD *v.* CANADIAN PACIFIC RAILWAY CO.

Negligence—Railway Co.—Condition of road bed.

W., an employee of the Canadian Pacific Railway Co., in British Columbia, a part of whose duty it was to couple and uncouple cars, was

between two cars on a side track uncoupling when the train backed and in attempting to get out of the way his feet were caught in the long grass and weeds which had accumulated on the road bed, whereby he was struck by the train and seriously injured. In an action to recover damages for such injury,

Held, affirming the judgment of the Supreme Court of British Columbia, 6 B.C. Rep. 561, that permitting the grass and weeds to accumulate on the side track was not such negligence on the part of the company as would render them liable in damages to W. Appeal dismissed with costs.

Martin, Q.C., for appellant. *Nesbitt*, Q.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Rose, J.] [Nov. 24, 1899.

RE FOSTER AND THE CITY OF HAMILTON.

Municipal law—Board of Health—License—Delegation of power to cancel.

A municipal corporation cannot delegate to a Board of Health any power to cancel a license which it may have under 62 Vict. (2nd sess.) c. 26, s. 37 (2) (6), and a by-law delegating such power was quashed. *Hodge* v. *The Queen* (1883) 9 App. Cas. 117, and *The Queen* v. *Burah* (1878) 3 App. Cas. 889 referred to.

Staunton, for the motion. *MacKelcan*, Q.C., contra.

Meredith, C.J., Rose and MacMahon, JJ.] [Dec. 8, 1899.

GOLDIE & MCCULLOCH CO. *v.* HARPER.

Sale of goods—Possession to vendee—Promissory note for price—Property not to pass—Loss of goods by fire—Liability.

The plaintiffs sold and delivered certain machinery to the defendant, receiving part of the price in cash and part in notes, and by the contract of sale it was provided that no property in the machinery should pass to the defendant until it was paid for. The machinery was destroyed by fire before the notes were paid. In an action on one of the notes it was

Held, that the defendant had the possession and use of the machinery and an interest in it; that there was not a total failure of consideration for the note or a partial failure which was ascertained, and that the plaintiffs were entitled to recover.

Aylesworth, Q.C., for the appeal. *Wallace Nesbitt*, Q.C., and *H. E. Rose*, contra.

Trial of Actions. MacMahon, J.] [Dec. 13, 1899.

MCQUILLAN *v.* TOWN OF ST. MARY'S.

Municipal corporation—Action of negligence — Ice on sidewalk — Notice before action—Sufficiency of—R.S.O. c. 223, s. 606, s.s. 3.

This was an action to recover damages for injuries alleged to have been sustained by plaintiff owing to his slipping on a quantity of snow and ice in a street in the town of St. Mary's, which the defendants were alleged to have negligently allowed to accumulate. The statutory notice (R.S.O. c. 223, s. 606, s.s. 3) given on behalf of the plaintiff described it as having taken place opposite to a certain shop, whereas, in fact, it took place opposite a different shop about twenty feet further on, on the same side of the street.

Held, that the notice was sufficient, as it gave information enough to enable the corporation to investigate, and that is all that can be called for.

Maybee, Q.C., for plaintiff. *Idington*, Q.C., for defendant.

Meredith, C.J., Rose and MacMahon, JJ.] [Dec. 13, 1899.

SWAIZIE *v.* SWAIZIE.

Foreign judgment—Granting divorce and alimony—Domicile—Jurisdiction —Submission to—Effect of production of record—Rebuttable presumption—Dealing with lands in Ontario.

In an action on a judgment of a foreign State, granting a husband a divorce and a wife a sum of money as alimony, it was contended by the husband that as he had never acquired the necessary domicile to give the foreign Court jurisdiction to grant the divorce, the judgment was invalid.

Held, that as he had invoked and submitted to the jurisdiction of the foreign Court, he had precluded himself from setting up any want of jurisdiction.

Held, also, that in the absence of anything appearing on the face of the proceedings to shew want of jurisdiction, the production of the record was prima facie evidence entitling the plaintiff to recover, and although the presumption in favour of the judgment may be rebutted, clear proofs of facts to shew want of jurisdiction must be adduced.

Semble, the judgment being pronounced in a proceeding instituted by the husband which the Court had jurisdiction to entertain, in which it was competent for the Court, when dissolving the marriage, to direct a division of the husband's property, including his Ontario lands, it would be anomalous that he, having by his own act submitted to the Court so doing, and having obtained his divorce on that condition, should be heard to say that the Court had no power to deal with the lands in Ontario.

Judgment of ROBERTSON, J., reversed.

German, Q.C., for the appeal. *A. J. Russell Snow*, contra.

Meredith, C.J.] [Dec. 16, 1899.

IN RE BURNETT AND TOWN OF DURHAM.

Arbitration and award—Motion to set aside award—Time—Publication—R.S.O. c. 223, s. 465—Arbitrator—Omission to take oath—R.S.O. c. 223, s. 458—Municipal corporations—Lowering grade of highway—Retaining wall—Maintenance of—Power to award—Injury to land—Interference with access—Compensation.

The six weeks allowed by s. 465 of the Municipal Act, R.S.O. c. 223, for an application to set aside an award, run from the publication to the parties of the award.

The failure of the arbitrator to take the oath required by s. 458 of the same Act is fatal to his award; but when an award is moved against on the ground of such failure it must be clearly shewn that the applicant was not aware of the omission until after the making of the award.

An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality has no power to direct the municipality to maintain a retaining wall.

The arbitrator has power to include in his award compensation to the landowner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access.

Rowell, for the corporation. *W. H. Blake*, for the landowner.

Armour, C.J., Falconbridge, J.] [Dec. 27, 1899.

FAWKES *v.* SWAYZIE.

County Court Appeal—Setting down—Time—Computation—"Judgment, order, or decision"—Settlement—Power of Judge to re-settle.

The County Courts Act, R.S.O. c. 55, by s. 57 provides that "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order, or decision complained of."

Held, that the month begins to run from the date of the judicial opinion or decision, oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to that date. If such opinion or decision is not pronounced or delivered in open court, it cannot be said to be pronounced or delivered until the parties are notified of it.

Quære, whether after a judgment has been settled and entered, the Judge has power to re-settle it.

Wallace Nesbitt, Q.C., for plaintiffs. *Shepley*, Q.C., for defendant.

Boyd, C., Ferguson, J., Robertson, J.] [Jan. 2.

COWAN *v.* FISHER.

Contract—Breach—Condition precedent—Divisible contract.

The defendant agreed to buy a machine, the said agreement being in the form of an order signed by the defendant and adopted and accepted by the plaintiff, who shipped the machine ordered and now sued for the price. It had been a term or condition of the agreement that M., the inventor of the machine and the plaintiff's agents for sales of it, should personally inspect the placing of the machine in operation. This M. failed to do, but the plaintiff sent a competent person to set the machine up, whom, however, the defendant would not allow to do so inasmuch as M. was not present.

Held, that the plaintiff, nevertheless, was entitled to judgment for the price of the machine on the principle that unless the non-performance alleged in breach of a contract goes to the whole root and consideration of it, the part broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages.

S. H. Blake, Q.C., and *Gwyn*, for defendant Fisher; *E. F. B. Johnston*, Q.C., for plaintiff.

Armour, C.J., Falconbridge, J., Street, J.] [Jan. 2.

MYERS *v.* BRANTFORD STREET R. W. CO.

Street railways—Operation of electric car—Duty of motorman—Frightening horses—Nonsuit.

It is the duty of a motorman, operating an electric car upon a public street, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. *Ellis* v. *Lynn and Boston R. W. Co.*, 160 Mass. 341, applied.

Held, in this case, STREET, J., dissenting, that the fair inference from the evidence was that the motorman saw that the plaintiff's horses were becoming frightened by the moving car, and that they were likely to become unmanageable and run away, and that he saw the signal given by the plaintiff and understood it to be a signal for him to stop the car; and it was his duty, under these circumstances, to do what he reasonably could to avoid the obvious danger; and the case should not have been withdrawn from the jury.

Brewster, Q.C., for plaintiff. *Sweet*, for defendants.

Boyd, C., Falconbridge, J.] [Jan. 9.

HARRIS *v.* BANK OF BRITISH NORTH AMERICA.

Interpleader — Summary application — Rule 1103 (a) — Money in bank — Adverse claims — Foreign claimants — Jurisdiction.

The decision of ROSE, J., affirming an order of the Master in Chambers which dismissed a summary application for an interpleader order in respect of certain moneys deposited with the defendants and claimed by the plaintiff by this action brought in Ontario, and also by an English corporation by an action brought in England, was affirmed on appeal.

Held, that the mere fact that an action was possible here, because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corporation; and a salutary discretion was exercised in refusing the application.

John Greer, for defendants. *D. O. Cameron*, for plaintiffs. *W. H. Blake*, for other claimants.

Armour, C.J.] IN RE JACKSON *v.* CLARK. [Jan. 13.

Mandamus — Division Court — Committal of judgment debtor — Non-production of books — Notice of motion — Uncertificated solicitor.

Motion by the plaintiff for a mandamus to the second junior Judge of the County Court of York directing him to commit the defendant for non-production of his books under a subpœna duces tecum, and pursuant to notice, on his examination as a judgment debtor under s. 243 of the Division Courts Act, in a plaint in the first Division Court in the county of York. The Judge refused to commit because, there being no express provision in the Division Counts Act authorizing a committal for non-production of books, and the liberty of the subject being involved, he thought it wiser to take that course.

Held, without expressing any opinion as to whether the Judge was right or wrong in his view, in favour of which there was a good deal to be said, that the Judge having given judgment in a matter within his jurisdiction, mandamus would not lie to compel him to give a different judgment. A preliminary objection that the notice of motion was given by an uncertificated solicitor was answered by *Sparling* v. *Brereton*, L.R. 2 Eq. 64. Motion dismissed with costs.

Langley, for plaintiff. *W. R. Smyth*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Dubuc, J.] MILLER *v.* MCCUAIG. [Dec. 21, 1899.

Fraudulent conveyance—Purchase of land by debtor in name of another—Evidence—Presumption.

This was an action for the purpose of having it declared that the S.E. ¼ 29-13-7 W. purchased from the Dominion Government in the name of the defendant, was the property of his brother, the defendant, Roderick, and should be sold to realize the plaintiff's registered judgment against Roderick. At the time of the purchase in 1888, Roderick was indebted to the plaintiff in $1,800, and to another person in $4,000, and it was shewn that John had never paid anything on the land either for purchase money or taxes, and had never received anything by way of rents or profits; also that the money for the first instalment had been advanced by another brother, Duncan, that Roderick had paid the rest of the purchase money from the proceeds of the land of which he had always enjoyed the use and occupation, either by himself or by tenants, who paid their rents to him, and that the Crown patent for the property was issued to John in 1892 without his having applied for it. The defendants at their examination for discovery before the trial swore that the whole transaction was bona fide, and that Roderick was John's agent throughout in respect of the property, but Roderick was not called as a witness for the defence, and several of the defendant's relatives who had been subpœnaed by the plaintiff to attend the trial as witnesses failed to appear.

John, also in a letter to Roderick, written in 1889, referred to the property as "your land."

Held, that the proper conclusion upon the whole evidence was that the land was really Roderick's property and had been purchased and held in John's name for the purpose of preventing creditors from realizing out of it, and that the plaintiff was entitled to the relief asked for.

Semble, that when a defendant who is in court does not give evidence to support his case, the judge is entitled to make every reasonable presumption against him: *Barker* v. *Furlong* (1891) 2 Ch. 172, per Romer, J., at p. 184.

Anderson, for plaintiff. *Cooper*, for defendant.

Province of British Columbia.

SUPREME COURT.

Drake, J.] DART *v.* ST. KEVERNE MINING CO.

Mining law—Location embracing unconnected strips of land—Whether good—Mineral Acts 1891 and 1893.

Action brought by way of special case to decide whether or not a miner can locate a claim on each side of a prior location under one record. The O. B. R. claim was recorded on 16th of August, 1894, and the only unoccupied land was a strip lying N.E. of the Exeter claim, and a strip lying S. W. of the Exeter claim, but divided further on the east by the Slocan Boy. The two pieces of land which the defendants claimed were thus divided by lawfully occupied and recorded mining claims.

Held, that two strips of land unconnected with each other, although within the statutory limit of 1,500 feet, cannot be embraced in one location and record.

Wilson, Q.C., for plaintiff. *John Elliot*, for defendants.

Irving, J.] GIBSON *v.* MCARTHUR. [Dec. 20, 1899.

Mining law—Adverse action—Mineral claim—Bill of sale—Fraud.

W. sold certain mineral claims called the Big Four group to A., who sold in turn to the defendants after which W. as agent for the plaintiff located a fraction between two of the claims in the plaintiff's name.

Held, that defendants had no right to the fraction in the absence of proof of fraud by W., and that the plaintiff was a party thereto; and held also, that the defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W. that the ends of the two claims between which the fraction in question was located, adjoined each other.

J. A. Macdonald, for plaintiff. *Hamilton*, for defendants.

COUNTY COURT.

Drake, J.] SHAWNIGAN LAKE LUMBER CO. *v.* FAIRFULL. [Jan. 4.

COBURN, Garnishee.

Costs of garnishee proceedings—Not allowed when defendant pays money into court before judgment.

Action commenced in the County Court of Victoria, on Dec. 23, 1899, for the recovery of $22.25. The defendant was served with the default

summons the same day it was issued, and on 28th December, he tendered the Registrar $27.75, in full payment of the claim and costs, but the garnishee had already paid into court $29.75 in full of the claim and cost of the garnishee summons, The Registrar did not receive the money from the defendant, and under the circumstances would not enter judgment until the matter had been mentioned to the Judge, and on Jan. 4th, 1900, the case was called before DRAKE, J.

Jay, for the defendant contended that as his client had tendered the money before judgment and within the eight days' limit mentioned in the default summons, he could not be made to pay the costs of the garnishee summons.

Higgins, contra.

Held, that the defendant should not be made to pay the costs of the garnishee summons.

Flotsam and Jetsam.

THE eloquent tribute of the Irish Lord Chief Justice to the late Mr. Justice O'Brien is worthy of reproduction in the most prominent form: His Lordship said that the Bench would sorely miss the late Judge's great learning, his rapid appreciation of legal propositions, the infinite charm of his literary attainments, the rare and matchless eloquence which graced and elevated all his judgments and all his public life. They should see no more the sparkle of that bright and lambent wit that left no wound. They should ever remember his unfaltering love of justice, his conspicuous fortitude in the discharge of his official duties. His intrepid nature knew not how to fear. One might say of him the best thing that could be said of any man in judicial life—that to attain justice and to be credited by all honorable and candid minds with a desire to attain it was at once his object and his reward.

FRENCH JUSTICE.—Two things stand out with great prominence in the American view of the Dreyfus trial. One is the extraordinary character of French procedure, and the other is an apparent deficiency in the character of the French people. The ludicrous medley of hearsay, gossip, beliefs, suspicions, imaginings, and emotions received by the French court as evidence is a surprising burlesque upon judicial procedure. Even if the judges should disregard what is palpably irrelevant, that would not prevent it from being absurd. To permit a witness to strut before the court in a grandiose way, and declare that upon his honor he believes the prisoner guilty, is in the highest degree ludicrous. The judges may not attribute quite so much importance to the belief of the witness as he himself does,

but the fact that they receive it as evidence, and even allow him to tell what some other person also believes, is sufficient to shew that they are ready to give at least some weight to those beliefs. But every person who has any acquaintance with the unreasonable prejudices and unaccountable beliefs that are by no means uncommon among men can see that any tribunal which takes into account the beliefs of witnesses on the question of the guilt of an accused person is in great danger of doing injustice. The exhibition of French character made in this prosecution has been strikingly unfavorable. The conspiracies, the prejudices, and the forgeries revealed in this prosecution are enough to set the world aghast. Probably no other trial ever disclosed so many evidences of corruption among officials to aid a prosecution. It seems difficult to escape the conviction that there was a deliberate and cold-blooded purpose on the part of some of them to work the ruin of an innocent man. Still more significant, perhaps, is the avowed justification of infamous acts on the ground that the good of France required them. It is not a compliment to the character of the French people to have a sane person offer them such a defense for polluting the fountains of justice. To make such a claim of justification pre-supposes some idea that it will be thought a respectable one; and according to all reports it seems to be taken seriously by many of the French people. In seeking for the reasons why the French people are losing their prestige among the nations we may well believe that the chief of all these reasons is a lack of deep and strong moral character, of which one of the noblest attributes is a sturdy sense of justice.—*Case and Comment.*—U.S.

The performance of the duty of a street railway company to maintain and operate its road for the benefit of the public is held, in *State ex rel. Bridgeton* v. *Bridgeton & Millville Traction Co.* (N.J.) 45 L.R.A. 837, to be enforceable by mandamus.

The liability of a sleeping-car company for theft of a passenger's effects while he is asleep is denied in *Pullman's Palace Car Co.* v. *Adams* (Ala.) 45 L.R.A. 767, if the company has exercised reasonable diligence; but the mere fact that the porter did not go to sleep during his watch is not deemed sufficient proof of such diligence. The theft of a ring carried in a pocket book, and which is not capable of being used on the journey, is held not to make the company liable, even if its loss was due to the company's negligence.