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When discussing the recent deliverance of the English Bar Council on the subject of the status of the Colonial Bar before the Judicial Committee of the Privy Council we dealt with the matter on general principles, but we may observe that the opinion we expressed seems also to be that of no less a personage than Lord James of Hereford, who, in 1884, as Attorney-General, in response to an inquiry of an English Q.C., gave an opinion to the like effect as may be seen by reference to 20 C.L.J. 299. His Lordship then said: "It appears to me that the Privy Council is common ground to the Bars of this country and all our colonies and dependencies. I see no reason why we should not accord equal rank to Her Majesty's counsel in the colonies when pleading in colonial causes," etc. This, it is true, was only the opinion of an Attorney-General, and is of course in no way binding on the Council itself, but it can hardly be doubted as being the correct view, and we think any English barrister would be ill advised to dispute it.

The *Central Law Journal* in a lengthy article discusses the question whether damages are recoverable for physical injuries resulting from fright caused by defendants' wrongful acts, and arrives at the following conclusions: 1. The weight of authority holds that physical injuries may proximately result from a wrong through fright. 2. Damages for physical injuries resulting from fright are measured by exactly the same standards that the common law has used for centuries in measuring damages for physical injuries resulting through impact, therefore they are not vague, or shadowy, or sentimental. 3. Physical injuries resulting through fright are no more easily feigned than those resulting from impact. 4. In jurisdictions were damages for physical injuries resulting through fright have been allowed no injurious consequences such as speculative litigation have followed. 5. The adoption of the rule allowing damages will render no defendant liable who has not committed a wrong and caused the plaintiff physical injury. It will give damages to no one except his rights have been invaded and physical injury has been inflicted upon him. It will not injure but protect the public.

THE LATE MR. JUSTICE KING.

In the death of Mr. Justice King, which sad event happened on the morning of the 8th inst., the Supreme Court of Canada loses one of the ablest men who have as yet sat upon its bench.

The Honourable George Edwin King was born in St. John, N.B., October 3rd, 1839. He was educated partly in his native province and partly in the United States, taking the degree of B.A. at the Wesleyan University in Middletown, Conn., in 1859. In 1862 he received an M.A. from the same institution. He was admitted to the Bar of New Brunswick in 1865, immediately taking a prominent place in his profession. In 1867 he was returned as a member of the Legislative Assembly of N.B., and sat in that body until 1878, when he resigned to contest the city of St. John for the Dominion Parliament, but was defeated. He was Premier and Attorney-General of N.B. from 1872 to 1878. In 1886 he was made an Hon. LL.D., University of New Brunswick, and in 1893 Hon. D.C.L. of Mount Allison University. He received silk in 1873, during Lord Dufferin's tenure of the office of Governor-General of Canada. He was directly responsible for some of the most progressive legislation upon the statute-book of his native province. Among such legislation being the Controverted Elections Act of 1868, the first passed by any of the British Colonies for the trial of election petitions by Judges; The Free Schools Act of 1871, (which was the parent of the present excellent school system, that has been taken as a model for one about to be introduced into South Africa under the guidance of several New Brunswick educationists); the Abolition for Imprisonment for Debt Act; the General Assessment Act and the Municipal Act. In 1880 he was appointed a member of the Bench of the Supreme Court of New Brunswick; and on the death of Mr. Justice Patterson in 1893 he was elevated to the Supreme Court of Canada, this transfer being considered at the time as greatly strengthening the personnel of the Federal Judiciary. In 1895 he was appointed a Commissioner of Her Majesty in the matter of the arbitration of Great Britain's claims in connection with the seal fisheries in Behring Sea, in which office he acquitted himself with great ability.

The late Judge was a man of high ideals, both in public and in private life. His manner on the Bench was characterized by that

uniform courtesy and kind consideration for others which is due as well to the dignity of the Bench as to those practising before it. The consequence was, that what he so abundantly gave in this way to those about him he received back in equal measure in the form of respect and affectionate regard. Of his whole life it may truly be said, in the words of the old poet, "He did as 'longeth to a gentilmanne."

THE ONTARIO BENCH AND THE GOVERNMENT.

Almost a year ago a vacancy was created in the Queen's Bench Division of the High Court of Ontario. That vacancy has not yet been filled. The result has been prejudicial to the interests of the public, unfair to the other judges, and causing much inconvenience to the profession, loss to litigants, and delay in public business which has been in some cases disastrous. This state of things is entirely discreditable to the Government of the country, and should not be allowed to continue. It is said that the delay is caused by the exigencies of party politics. It is also said that the Government at Ottawa has not made the appointment owing to a desire to befriend the Ontario Government in connection with difficulties under which the latter is said to labour in reference to the claim put forward by some adherents of the Roman Catholic faith for a fuller representation of that religious body on the Ontario Bench. We do not know anything as to the truth of these assertions, but they are current, and many believe that they have a substantial foundation in fact.

As an excuse for this claim, it is alleged, and said to be true, that some years ago a certain learned judge was appointed by the late Government as a representative of the Methodist body. All we can say as to this is, that two wrongs do not make a right. To pay any attention to such a claim on the part of any religious body would be an admission that the Government recognizes the right of religious denominations to be represented as such, on the Bench, and that a particular form of belief is one of the judicial qualifications. We should be sorry for the country should any such outrageous proposition obtain a foothold. Upon what principle any religious body, be it Anglican, Methodist, Roman Catholic, Presbyterian, Baptist, or any other, should have such

right of representation, we are at a loss to know. The only admissible principle in the appointment of judges is the selection of the best available men from a professional standpoint. A man's fitness for the position no more depends upon his religious convictions than it does upon the colour of his hair. If a Roman Catholic be the best man, let him be appointed; if a Methodist, let him be appointed. It would, moreover, be a disgrace that appointments to the high and responsible office of a judge should be made to depend upon the political exigencies of any party. To pay any attention to such a claim would also be an admission that the Government is not strong enough to do what is right in the premises. To a large extent, the Government enjoys the confidence of the public. Making a political plaything of a matter so vital to the integrity of the public life of the country must tend to destroy that confidence. A Government would merit only contempt and reprobation should it condescend to use powers given for the public good, for the purpose of bolstering up a political ascendancy. There may be some good reason for delay not connected with political difficulties, but this certainly is not evident. Imagination fails to suggest one.

As to this delay in filling the present vacancy, it is manifestly the duty of the Government to provide the proper machinery for carrying on the business of the country. A recognized part of the duty, and perhaps the most important, is to see to the prompt and due administration of justice. Even with a full complement of judges, the Ontario High Court can scarcely keep abreast of its work. At the present time, however, there is a dearth of judicial power. There is the vacancy above referred to; there is the absence, in Europe, of Mr. Justice Meredith, owing to ill-health, partly caused by overwork; and the further fact that another judge is unable from physical infirmity to do his quota. The necessary result is that the work of the Court is falling into arrear, to the great annoyance and delay of business men, and, in some cases it is said, to the ruin of litigants. Overworked judges who are busy from Monday morning till Saturday night have no time to prepare judgments, as they have to devote all their time to the hearing of causes. Some of these cases are of course important and intricate, and cannot and should not be decided without full

consideration. In fact, the judges at present have either to dispose hurriedly of cases at the conclusion of the arguments, or else to reserve judgment until a future time which never seems to come. Litigants have a right to proper time being given for the due consideration of their cases, and to as prompt a disposal as is consistent therewith. This at present is impossible. We need not allude to the annoyance and inconvenience to counsel, and other difficulties of minor importance, nor to the unfairness of overworking the existing judges, but we do insist that the public interests should be attended to, and the Government of the Dominion must bear the blame for any neglect.

A journal devoted to the interests of the legal profession, if we understand its mission aright, should not be silent whenever circumstances arise in connection with the administration of justice and the welfare of the profession which call for comment or criticism. Such comment never is a pleasant duty, and certainly is not, either in the matter we have already referred to, or in regard to another subject, which we approach with even more hesitation, but which, in the discharge of the duty which seems to be laid upon us, cannot be passed over. It need scarcely be stated that a thoroughly competent, vigorous Bench, as well as an independent Bar, true to their best traditions, are a blessing to any country and necessary to its best interests. We have in Canada reason to congratulate ourselves in reference to both these matters, and it should be the aim of all to see that this state of things shall continue.

The matter we have to refer to is a frequent subject of conversation amongst the members of the profession, and has given rise to grave dissatisfaction. We allude to the unfortunate physical infirmity of one of the High Court judges in the Province of Ontario. An infirmity or defect which might in private life be of little moment, becomes a serious evil in one entrusted with the important and responsible duties of a judge. We all regret that Mr. Justice Robertson, so much respected and of a most kindly disposition, should be unable fully to discharge his duties owing to a deficiency in his sense of hearing. This must, of course, more or less impair his usefulness, for of necessity he cannot be sure of knowing all the facts of the case, and cannot always grasp the arguments of counsel. An undue share of work is thrown on other judges, and

the interests of the public suffer. It is, moreover, well known that several counsel decline to appear in cases coming before this learned judge, the physical effort to make themselves heard being too great a strain. The result is that frequent efforts are made to have cases heard before other judges. To this must be added the waste of time involved in the trial of cases before him. It is human nature not to recognize or appreciate defects and peculiarities in ourselves which are patent to others, and we are sure that the learned judge, when his attention is called to the matter, will sufficiently realize the present unsatisfactory condition of things.

Were the Bench up to its full strength, which it is not, this hindrance to business would not be of so much importance. Why it is not, the Government has not condescended to say. Whilst it can have no valid excuse for neglecting to fill the present vacancy, there may be some excuse for a judge who does not retire when the occasion would seem to demand such retirement; for he can truly enough point to the small salary he has received and to the absurd inadequacy of his retiring allowance. It is a manifest injustice to an old and faithful public officer, such as the learned judge referred to, to compel him to accept a pittance, when he may, by reason of infirmity, desire to retire, but cannot financially afford to do so; perhaps having been unable to lay by anything for the future owing to the smallness of his salary and the cost of living consistent with the high position of a judge. These matters are of more interest to the public than to the profession, and we are surprised that they have not been more fully discussed from that standpoint.

SECURITY FOR COSTS—WHEN ORDERED.

The profession generally have experienced considerable difficulty with the question as to when a party may be ordered to give security for costs, and a great deal of litigation has thereby been occasioned and costs incurred through lack of knowledge of the elementary principles applicable. A brief synopsis of the law on the subject may be of interest, not so much to the older members of the profession—who, no doubt, have been taught by bitter experience in some cases and have not forgotten the lesson—but rather for the benefit of the student and for the younger

members of the profession. In this article, which must necessarily be brief, we do not deal with the security ordered on appeals from judgments, reports, orders, etc., but confine ourselves to initiatory proceedings.

The rule governing this subject, in Ontario in the Rules of Practice, does not change the law, but simply affirms what the law was at the time the rule was promulgated, or extends the application of the principles of giving security for costs in some cases, and does not in any way limit the right to security for costs to the cases mentioned in the rule, but gives the right to security in the cases enumerated, in addition to any others a party has been formerly entitled to claim.

Residence out of the jurisdiction is one of the most familiar grounds for ordering security to be given, but a plaintiff is not primâ facie liable to furnish security because he resides out of the jurisdiction of the court. Where it is made apparent to the court that the defendant has no defence to the action, security will not be ordered; and if a præcipe order has been taken out, it can be set aside on proper evidence. Where one of several plaintiffs, suing on a joint claim, resides out of the jurisdiction, security would not formerly have been ordered, but since the change in the rules, whereby all the plaintiffs are not now liable for the whole cost incurred, security will be ordered by a plaintiff residing out of the jurisdiction. A plaintiff who at the commencement of an action resides within the jurisdiction, but afterwards permanently removes, may now be ordered to give security not only for the costs incurred after removal, but also from the commencement of the action.

It was the former law that a plaintiff who was in fact within the jurisdiction, but whose actual domicile was without the jurisdiction, could not be ordered to give security, but since the rules now governing the subject, temporary residence within the jurisdiction is not sufficient ground of defence to an application by the defendant for the plaintiff to furnish security.

Another ground under the rule where the plaintiff may be ordered to furnish security is where the plaintiff has brought another action or proceeding for the same cause in Ontario or elsewhere and the action has not been finally adjudicated upon. It must be shewn on the application for security that the actions

are in fact the same, and if they are in any way different, but arise from the same transaction, security will not be ordered.

Where the party is in default in payment of costs in another action for the same cause, security will be ordered. It was the former practice that all proceedings would be stayed in the second action until the costs of the first action were paid.

It may be noticed that it is not necessary that the action be between the identical parties to the original suit; it is sufficient if the plaintiff sues and claims the same relief, although other parties are added.

In addition to the cases enumerated in the rule, there are several others where it is now well settled by practice that security will be ordered: The case where the plaintiff is suing, and it can be shewn that he has no interest in the subject-matter of the litigation, but the action has been brought in the interest and for the benefit of some other party, is one directly in point; the poverty of the plaintiff, or the fact that he is insolvent, is no ground for asking for security; even though the plaintiff is an insolvent corporation, and a receiver has been appointed of its assets, that will make no difference.

Persons suing for penalties under any statute or law, either for his own benefit solely or for the benefit of the Crown, or partly for his own benefit and partly for the Crown, may be ordered to give security for costs where it can be shewn that the informer has not sufficient property to answer the costs in the action in the event of judgment being given for the defendant, and the defendant must also swear that he has a good defence to the action upon the merits. Where the defendant is a corporation aggregate, however, it has been held that they are not entitled to obtain security.

By statute, in actions of libel, the defendant may, after the statement of claim is filed, obtain an order for security upon notice and upon an affidavit stating that the defendant is not possessed of property sufficient to answer the costs of the action in case a verdict is given in favour of the plaintiff. He must also swear that he has a good defence on the merits, and that the statements complained of were published in good faith, and that the grounds of the action are trivial.

If, however, the alleged libel involves a criminal charge, the defendant is not entitled to security for costs, unless he can satisfy the court that the action is trivial or frivolous, or that the article

complained of was published in good faith and that there was reasonable ground to believe that the same was for the benefit of the public, and that the publication took place in mistake or misapprehension of the facts, and that there was a public retraction. On such an application the judge is not to try the case on the merits, and affidavits in answer will not be received.

Where the libel complained of is against a candidate for public office, it would appear that the defendant is not entitled to security for costs.

By statute, in actions by women for slander, adultery, fornication, or concubinage, after the statement of claim is filed, the defendant may apply to the court or a judge upon similar material as in actions for libel, and obtain an order for security for costs. In this class of actions, however, it is not sufficient for the defendant simply to swear that he has a good defence; the nature of the defence must be fully disclosed.

Where proceedings are brought against a police magistrate or a justice of the peace, or any other officer or person fulfilling any public duty, security may be ordered at any time after the service of writ or other proceedings, on notice to the plaintiff and upon affidavit stating the nature of the action and of the defence, and also shewing to the satisfaction of the court or a judge that the plaintiff is not possessed of sufficient property to answer the costs of the action in case a verdict or a judgment should be given against him, and that he has a good defence and that the grounds of the action are trivial or frivolous. The merits of the action will not be tried on the application for security, but a primâ facie defence must be established.

Security may also be ordered where parties reside out of the jurisdiction and come into the Master's office to prove a claim as creditors or otherwise; also in garnishee proceedings; and in interpleader actions either party may be ordered to give security in the same way and for the same cause as a plaintiff in an ordinary action.

Parties who place themselves substantially in the position of a plaintiff and who reside out of the jurisdiction, will be ordered to give security. For example, where a defendant resides out of the jurisdiction and makes an application to be made a party and asks for substantial relief. Also, where the defendant resides out of the jurisdiction, and counterclaims, and the counterclaim is really a

cross and independent action, and has no connection with the original claim. Where, however, a foreign defendant counterclaims for a breach by the plaintiff of the contract sued on, security will not, as a rule, be ordered, as the court has a discretion to refuse the application.

In the space allotted to this article it is impossible to take up the practice in connection with the matter or cite the cases on the subject, but the above are the conclusions arrived at after a thorough study of the authorities and the examination of a large number of the most important decisions bearing on the subject.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

SPECIFIC PERFORMANCE—BUILDING CONTRACT—LAND CONVEYED IN COVENANT TO BUILD.

Wolverhampton v. *Emmons* (1901) 1 Q.B. 515, is a kind of case which does not usually fall to the Queen's Bench Division (as we see it is still called in England notwithstanding the recent demise of the Crown). The action being one for specific performance of a contract to build. The contract arose in this way. The plaintiffs, a municipal corporation, being the owners of a vacant piece of land, conveyed it to the defendant in consideration of £1,000, and his entering into a covenant to build houses upon the plot of a minimum height, and within a specified time. Delay took place in building, and by a subsequent arrangement in consideration of the time being extended the defendant agreed to build eight houses in accordance with a specified plan. Wills, J. who tried the action, at first doubted whether a judgment for specific performance could be awarded in the case of a building contract, but ultimately came to the conclusion that it could, where the terms of the contract were precise, and damages would not be a sufficient indemnity, and he gave judgment accordingly, which was affirmed by the Court of Appeal (Smith, M.R. and Collins and Romer, L.JJ.), that court also being of opinion that although the terms of the original contract were too indefinite, yet that by the subsequent agreement they had

been made sufficiently definite and precise to bring the case within the exception to the general rule that building contracts will not be specifically enforced.

BILL OF LADING—DESCRIPTION OF GOODS—"MARKED AND NUMBERED AS IN MARGIN"—MISTAKE—BILLS OF LADING ACT, 1855 (18 & 19 VICT., C. 11) S. 3—(R.S.O. C. 145, S. 5 (3)).

In *Parsons* v. *New Zealand Shipping Co.* (1901) 1 Q.B. 548, the Court of Appeal (Smith, M.R. and Collins and Romer, L.JJ.) have affirmed the judgment of Kennedy, J. (1900) 1 Q.B. 714 (noted ante vol 36, p. 408) to the effect that under the Bills of Lading Act 1855 (see R.S.O. c. 145) where the goods intended to be covered by a bill of lading are by mistake incorrectly described therein by certain marks which do not affect or denote, substance, quality or commercial value, such description in the bill of lading is not conclusive, and that the party giving the bill of lading is not precluded from shewing the mistake.

MUNICIPAL CORPORATION—DISREPAIR OF ROAD—NEGLIGENCE—LIABILITY—SINKING OF ROADWAY THROUGH DEFECTIVE SEWER.

Lambert v. *Lowestoft* (1901) 1 Q.B. 590, deserves to be noted. The action was against a municipal body to recover damages for injury sustained owing to a sinking in the roadway under the defendants' control, occasioned by a defect in a sewer, also vested in the defendants, and for the repair of which they were liable. The plaintiff's horse in passing over the road broke through the crust of the road into a cavity thus caused, and was injured. The defect in the sewer was caused by rats, and there was no evidence that the defendants had any notice of the defect, and it was held by Lord Alverstone, C.J, that they were not liable.

SALE OF GOODS—CONTRACT—GOODS NOT ACCORDING TO CONTRACT—STIPULATION AGAINST REJECTION.

Vigers v. *Sanderson* (1901) 1 Q.B. 608, was an action to enforce certain contracts for the sale of laths. There were two contracts, one provided that the laths were to be of varying lengths, from 2½ to 4½ feet, and the other, that they were to be from 2 feet to 4½ feet, but not more than three per cent. of two feet. The contracts contained a stipulation that "should any dispute arise the buyers shall not reject any goods, nor refuse acceptance of the draft, but

the dispute shall be referred to arbitrators, whose award on all points shall be final." The laths shipped to the defendants under the first contract included 33 per cent. of laths five feet long, a length not mentioned in the contract, and under the second contract the shipment included about 60 per cent. of two feet instead of not more than 30 per cent. The defendant rejected the laths, and refused to accept the drafts, and the question was, whether the rejection was justifiable? Bigham, J., held that it was, and that the stipulation as to arbitration must be held to apply only where it was doubtful whether the shipper had adhered sufficiently closely to the contract, that the goods should be of "about" the specified lengths, and did not operate so as to force the buyer to accept goods which were obviously neither within, nor "about" the specification, nor commercially within its meaning; and as it was established in evidence that neither the two feet nor five feet lengths were worth the contract price, he held there had not been a substantial compliance with the contract. The contracts provided that the property in the laths was to pass to the buyers on shipment thereof, and it was urged that on this ground the plaintiffs were entitled to recover, but the learned judge held that there was nothing in that point, as it only applied to goods which were within the terms of the contract.

COMPANY—DIRECTOR—REMUNERATION OF DIRECTOR—YEARLY PAYMENT—SERVICE FOR PART OF YEAR.

Inman v. *Ackroyd* (1901) 1 Q.B. 613, was an action brought by an ex-director of a limited company to recover remuneration for part of a year's service as director of the company. The articles of association provided for the payment of "the sum of £125 per annum and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportion and manner as the directors by agreement may determine, and in default of such determination, equally." The plaintiff had resigned after serving a part of a year. Bruce, J. held that the plaintiff was not entitled to recover, and the Court of Appeal (Smith, M.R. and Collins and Romer, L.JJ.) affirmed his decision, and held that the Apportionment Act did not apply.

BUILDING CONTRACT—ARCHITECT'S CERTIFICATE—NEGLIGENCE—ARBITRATOR.

Chambers v. *Goldthorpe* (1901) 1 Q.B. 624, was an action brought by an architect to recover for professional services; the defendant admitted the claim, but counterclaimed for damages occasioned by the plaintiff's negligence in giving a certificate as to work done under a building contract. The contract which was one entered into between the defendant and a third party for the building of certain houses, provided for payments on account as the work progressed, and for payment of the balance after completion of the work upon the certificate of the architect shewing the final balance due to the contractor, which was to be final and conclusive evidence of the work having been duly completed. The defendant had employed the plaintiff as architect, and claimed that he had been guilty of negligence in giving the certificate. The plaintiff contended as a matter of law that he was in the position of an arbitrator, and as such was not liable for negligence, and it was agreed that the question of law should be first disposed of before entering on the question whether there was in fact any negligence. Mathew, J. on appeal from the County Court held that the plaintiff was not liable; and the Court of Appeal (Smith, M.R. and Collins and Romer, L.JJ.) affirmed his decision on the ground, contended for by the plaintiff, that he was in the position of an arbitrator.

LUNATIC—PAUPER LUNATIC—MAINTENANCE—RECEIVER—DEBT.

In re Taylor, Edmonton v. *Deely* (1901) 1 Ch. 480, the Court of Appeal (Rigby and Stirling, L.JJ.) overruled a decision of Kekewich, J. A pauper lunatic, while being maintained by the guardians of the poor, became entitled to a fund, and on the application of the guardians, who claimed six years' arrears of maintenance, a receiver of the fund was appointed and he was directed to apply part of it towards the arrears of maintenance, and the balance towards the future maintenance of the lunatic. Before the fund was exhausted the lunatic died and the guardians then claimed to be paid the arrears out of the balance of the fund. Kekewich, J. held they were not entitled and he dismissed their application, but the Court of Appeal held that the previous order was no estoppel to the guardians, and that they were entitled to recover the arrears due out of the lunatic's estate.

FIXTURES—TAPESTRIES AFFIXED TO WALL—TENANT FOR LIFE—REMAINDER-MAN.

In re De Falbe, Ward v. *Taylor* (1901), 1 Ch. 523, was a contract between the personal representatives of a deceased tenant for life and remainder-man, touching the right to remove certain tapestries which had been fixed by the deceased tenant for life to a mansion to which the remainder-man was entitled in remainder. The tapestries in question had been affixed to the walls of a drawing room in the following way: strips of wood were fastened on the walls by nails, canvas was then stretched over the strips, and the tapestries were then stretched over the canvas and fastened by tacks to it and pieces of wood mouldings fastened to the walls were placed round each piece of tapestry. Portions of the wall not covered by tapestries were covered with canvas, which was coloured so as to harmonize with the tapestries. Byrne, J. considered that the tapestries had been so affixed to the freehold as to be irremovable by the tenant for life or his personal representative, but the Court of Appeal (Rigby, Williams and Sterling, L.JJ.) took a more liberal view, and held that as the tapestries had been affixed to the walls merely for purposes of decoration, they were removable by the tenant for life or her representative, and though the latter should make good any damage to the wall occasioned by the removal, he was not liable for the cost of entirely redecorating the room. Although Williams, L.J. seems to think the principles laid down by Lord Romilly in *D'Eyncourt* v. *Gregory*, L.R. 3 Eq. 382 were not in conflict with the present decision, Rigby, L.J. did not hesitate to say that he thought the decision in that case was not right "if it would apply to such a case as the present" and ought not to be followed.

SPECIFIC PERFORMANCE—AGREEMENT TO LET FOR A YEAR—OFFER OF TWO ALTERNATIVES—VERBAL ACCEPTANCE OF ONE OF TWO OFFERS—STATUTE OF FRAUDS, S. 4.

Lever v. *Koffler* (1901), 1 Ch. 543, was an action for specific performance to grant a lease for a year. The contract on which the plaintiff relied, was evidenced by a letter, offering either to let the premises in question upon an annual tenancy at a specified rent, or to sell part of the premises for a specified price. The plaintiff verbally accepted the offer to let, and the question was whether the contract, being in the alternative form, was a sufficient memorandum to bind the defendant under the 4th section of the Statute of

Frauds. Byrne, J. held that it was, following a dictum of Lord Cairns in *Hussey* v. *Horne-Payne*, 4 App. Cas. 311; and, notwithstanding the shortness of the time, he considered it a proper case in which to decree specific performance of the contract.

CONFLICT OF LAW—DOMICIL—SETTLEMENT—POWER OF APPOINTMENT—WILL—FOREIGN LAW RESTRICTING TESTAMENTARY POWER—PERSONAL PROPERTY.

In re Megret, Tweedie v. *Maunder* (1901), 1 Ch. 547, involved a question which may sometimes arise in Canada. The question turned upon the effect of a marriage settlement made upon the marriage of an English woman with a domiciled Frenchman. By the settlement English personal property was settled by a settlement made in English form and vested in English trustees on such trusts as the intended wife should by will appoint, and subject thereto to her separate use. The wife died leaving issue and having made a will in pursuance of the power appointing the property. By the French law part only of a testator's property can be disposed of by will if the testator has issue living, and the question was whether this French law overrode the settlement. Cozens-Hardy, J. held that it did not.

MARRIED WOMAN—PRESUMPTION—PAST CHILD BEARING—WIDOW OF 56 WHO HAS HAD A CHILD.

In re White, White v. *Edmond* (1901), 1 Ch. 570, by the will of a testator certain leaseholds were bequeathed to trustees in trust for his daughter Anna for life, and upon her decease, for her children who should attain twenty-one years, and if more than one, in equal shares as tenants in common. The daughter Anna had married and had one son. She subsequently lived with her husband twenty-four years without having had any other children. The son was now thirty-four years old and he and his mother now claimed that the trustees should convey the property to them on the ground that it must now be presumed that the mother was past child bearing. Buckley, J. held that they were entitled to the conveyance. He held that the principles which had been laid down in regard to spinsters applied also to a widow who had had a child.

ADVERTISING STATION—LICENSE—REVOCATION—NOTICE.

In *Wilson* v. *Tavener* (1901) 1 Ch. 578, the plaintiff made an agreement with the defendant whereby the defendant agreed to

permit the plaintiff to erect a hoarding upon the forecourt of a cottage and also to allow him the use of the gable end of the cottage for a bill posting station at a yearly rent payable quarterly. The defendant had revoked the license by three months' notice, and the action was brought to restrain the defendant from removing the hoarding and for damages. The plaintiff claimed that the agreement created a tenancy from year to year, and could only be terminated by a six months' notice ending with a current year of the tenancy. Joyce, J. however held that the agreement only amounted to a license revocable on reasonable notice, and that the notice given was reasonable.

COMPANY—PROMOTER—SECRET PROFIT—DIRECTOR INTERESTED IN SALE TO COMPANY—DISCLOSURE OF INTEREST.

In re Lady Forrest Mining Co. (1900), 1 Ch. 582, an application was made by the creditors of a company being wound up to compel one of the directors of the company to account for a profit made by him upon the sale of certain property to the company. The director in question was one of a syndicate formed to acquire a gold mine, and which the syndicate at first intended to operate, but after they had acquired it they decided to form a company for the purpose of working the mine. A prospectus was issued stating that the object of the company was to acquire from the syndicate, and operate the mine, but not disclosing the profit made by the syndicate on such sale. The company was formed and the director, who was also a member of the syndicate, voted for the purchase of the mine. He did not disclose the profit that was being made by the syndicate, or by himself, on the sale; but there was no express fraud or misrepresentation. The omission by the director to disclose his interest Wright, J. held was a breach of duty which might have entitled the company, if matters had not been too much altered in the meantime, to a rescission of the contract, but gave the company no right to call on the director to account for the profit made by him.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] THE KING *v.* ADAMS. [March 11.

Scire facias—Crown Lands—Grant made in error—Adverse claim—Cancellation.

The provisions of the Quebec Statute respecting the sale and management of public lands (32 Vict., c. 11, R.S.Q. Art. 1299) do not authorize the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist. Appeal allowed with costs.

Fitzpatrick, K.C., and *L. A. Cannon*, for appellant. *J. A. Lane*, for respondent.

Que.] FAIRMAN *v.* MONTREAL. [March 22.

Municipal corporation—Montreal city charter—Local improvements—Expropriation for widening street—Action for indemnity.

Where the City of Montreal, under the provisions of 52 Vict., c. 79, s. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so affected, and notwithstanding the subsequent amendment of the statute in December of that year, by 59 Vict, c. 49, s. 17, the city was bound, within a reasonable time, to apply to the court for the appointment of commissioners to fix the amount of the indemnity to be paid, and having failed to do so, the owner had a right of action to recover indemnity for his land so taken. *Hogan* v. *The City of Montreal*, 31 S.C.R. 1, distinguished.

The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. *Grand Trunk Railway Co.* v. *Coupal*, 28 S.C.R. 531, followed. Appeal allowed with costs.

Fitzpatrick, K.C., and *Archer*, for appellants. *Atwater*, K.C., and *Archambault*, K.C., for respondent.

Exch.] LAROSE *v.* THE KING. [March 22.

Negligence—Militia class firing—Government rifle range—Officers and servants of the Crown—Injury to the person—R.S.C. c. 41, ss. 10, 69.

A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act, 50 & 51 Vict., c. 16, s. 16.

The words "any officer or servant of the Crown" in the section referred to, do not include officers and men of the Militia. Appeal dismissed with costs.

Charbonneau, K.C., for appellant. *Fitzpatrick*, K.C., and *Newcombe*, K.C., for respondent.

Ont.] TORONTO RAILWAY CO. *v.* SNELL. [April 1.

Negligence—Electric railway—Motorman—Workmen's Compensation Act—Injury to conductor.

The motorman of an electric car may be a "person who has charge or control" within the meaning of s. 3 of the Workmen's Compensation Act (R.S.O. 1897, c. 160) and if he negligently allows an open car to come in contact with a passing vehicle, whereby the conductor who is standing on the side in discharge of his duty, is struck and injured, the Electric Co. is liable in damages for such injury. Judgment of the Court of Appeal, 27 Ont. A. R. 151, affirmed.

Bicknell, for appellant. *Robinette* and *Godfrey* for respondent.

Province of Ontario.

COURT OF APPEAL.

Moss, J. A.] MCGUIRE v. CORRY. [May 7.

Appeal—Extension of time for—Application to opposite solicitor—Unreasonable terms—Costs.

Where the respondent's solicitor refused, except upon more stringent terms than the Court would impose, to extend the time for delivery by the appellant of the draft appeal case and reasons of appeal, and the appellant, declining to accept the terms, moved before a Judge of the Court of Appeal and obtained an order extending the time, the costs of such motion were made costs to the appellant in the appeal.

D. O'Connell, for appellant. *E. B. Stone*, for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Trial of action, Street. J.] [April 19.

RITCHIE *v.* VERMILLION MINING CO.

Company—Directors—Powers to sell property of company.

The directors of a mining company incorporated under R.S.O. 1887, c. 156, have a discretionary power to sell all the lands of the company as a part of their duty and authority to manage the affairs of the company after honestly coming to the conclusion that a sale is in the interests of the company; and the directors or such a company having in this case decided so to do, an injunction to restrain the sale was refused.

Where the question is one of mere irregularity in the conduct of the affairs of a company, and where there is undoubted power in the company to do what is proposed to be done, there the company is the proper plaintiff to complain of the irregularity and not individual shareholders, and the practical results of this rule is that unless the persons complaining can shew themselves to have a majority of the votes of the company their complaints receive no attention from the courts, for a minority is not entitled to use the company's name in litigation.

Aylesworth, K.C., and *Davidson*, for plaintiffs. *Nesbitt*, K.C., *Riddell*, K.C., and *McKay*, for defendants.

Boyd, C., Ferguson, J., Meredith J.] [May 6.

IN RE EDUCATION DEPARTMENT ACT AND SEPARATE SCHOOLS ACT.

Schools—Separate schools—Withdrawal of supporter—Continuance of liability.

Questions submitted by the Minister of Education for the opinion of the court:—1. Does property which was owned by a separate school supporter, and so assessed, remain liable for rates for the support of separate schools or separate school libraries or for the erection of any separate school house imposed under by-laws passed before the time at which the separate school supporter has withdrawn his support from the separate school? 2. If the property does not remain liable in the case mentioned in the preceding question, is the person who has withdrawn his support personally liable?

Held, that the first question is to be considered with reference to s. 61 rather than s. 47 of the Separate Schools Act, R.S.O. c. 294. The rate to be levied under a by-law does not form a continuing lien on the property of the separate school supporter at the time when a loan is effected. He

may sell, and if not the owner at the time of the yearly assessment no rate can be imposed in respect of the property. Under s. 47 the supporter is relieved, after notice withdrawing his support, as to future rates, but is not exempt as to any rate imposed before withdrawal. In case of rates under s. 61, he cannot relieve himself by notice of withdrawal, but remains liable during the currency of the by-law unless he ceases to be resident within the particular section within which the separate school is situate.

The first question was answered as follows:—Property which was owned by a separate school supporter and so assessed for rates imposed under by-laws passed before the time when the supporter has withdrawn does not remain liable for such rates in the future unless the property is still owned by him at the time of each aasessment, and he resides in the section.

The second question was answered as follows:—The attempt to withdraw from payments to be made under a by-law under s. 61 is nugatory, and the ratepayer who was such when the loan was effected remains liable for future assessments to the extent of the ratable property he possesses so long as he is resident within the school district.

J. R. Cartwright, K.C., for the Minister of Education. No other counsel appeared.

Boyd, C.] ROURKE *v.* WEIDENBACK. [May 6.

Writ of summons—Service out of jurisdiction—Cause of action—Breach of contract—Tort.

An appeal from an order of a local judge refusing to permit service of the writ of summons to be made in Montreal, Que., on defendant, Ogilvy, residing there. The plaintiff sought damages and costs against both defendants for alleged conversion of a valuable picture, alleging that it was obtained from him by the defendant, Weidenback, in the city of Ottawa, Ont., under an agreement to return it after a short time, but that, contrary to the agreement, he delivered the picture to the defendant, Ogilvy, as his agent, who continued to wrongfully hold it. The defendant, Ogilvy, swore that the picture was pledged to him by Weidenback in Montreal as security for a loan.

Held, upon the material, that the transaction must be regarded as one of conversion by the defendant, Weidenback, begun by the removal of the picture from Ontario and continued by the delivery in Montreal, and there was, besides, an independent transaction by the pledge to the defendant, Ogilvy. If he knew the facts as alleged by the plaintiff, he might be guilty of a tort, but it was committed in Quebec; if he did not know he might be able to hold the picture until paid his loan. There was no contractual relation between the plaintiff and Ogilvy, but if there was the breach would be in Montreal, not in Ontario. Rule 162 (*e*) therefore did not apply. Appeal dismissed.

E. Mahon, for defendant. *J. F. Orde*, for plaintiff.

MacMahon, J.] [May 7.

DIAMOND MATCH CO. *v.* HAWKESBURY LUMBER CO.

Discovery—Affidavit on production—Documents relating to plaintiff's title—Protection.

The plaintiffs' manager made an affidavit on production of documents in which he objected to produce a certain agreement (referred to in the statement of claim) between the plaintiffs and their assignors whereby the property in question in the action was assigned to the plaintiffs, on the ground that such document "relates exclusively to the title of the plaintiffs and to the case of the plaintiffs in this action, and not to the case of the defendants, nor does the said document tend to support the defendants' case, nor does it, to the best of my knowledge, information and belief, contain anything impeaching the case of the plaintiffs."

Held, not sufficient to protect the document from production. *Combe* v. *Corporation of London*, 1 Y. & C.C.C. 631, followed. *Quilter* v. *Heatly*, 23 Ch. D 42, specially referred to.

J. F. Orde, for plaintiffs. *J. Christie*, for defendants.

Boyd, C., Ferguson, J.] WILSON *v.* FLEMING. [May 13.

Attachment of debts — Salary of municipal officer — Payment in advance — Set-off—Equitable assignment—Premature service of attaching order—Misconduct—Costs.

Upon an application to garnish the salary of an officer of a municipal corporation, it appeared that by virtue of a by-law his salary was payable monthly, and that the practice of the corporation was to pay all salaries on the first day of the month, or, if that day were a holiday, on the previous day. It was also shewn that a number of the officers received payments on account of their salary before it became due. The attaching order was served on the 30th April, between ten o'clock in the morning and one o'clock in the afternoon. The judgment debtor, before the service of the order, had been paid in full all his salary for the month of April, under an arrangement between him and the treasurer of the corporation that advances should be made on account of salary and stopped from the debtor's cheque at the end of the month. The debtor in each case of an advance gave an I.O.U. to the cashier (the treasurer's clerk), who would thereupon advance the debtor the amount out of the corporation's funds, and at the beginning of the month the debtor would indorse his cheque and receive from the cashier his acknowledgments and the balance (if any) in cash, and the cheque would be deposited to the credit of the corporation.

Held, that nothing was due to the debtor by the corporation at the time of the service of the attaching order, for there had been actual payment of the salary by the corporation; or, if not payment, an advance by

the corporation which they could set off against a claim for salary; or, if the moneys advanced were to be regarded as misappropriated by the treasurer or the clerk and advanced personally by him to the debtor, there was a good (though verbal) equitable assignment of the salary by the debtor to the treasurer or clerk; and, per the Master in Chambers, a debt in respect of the salary, in any event, would not have accrued due until after the service of the attaching order.

Held, also, per MEREDITH, C.J., in Chambers, that the judgment debtor and the corporation, by its responsible officers, had so misconducted themselves that they should be deprived of costs, although the order of the Master in their favour was in other respects affirmed.

S. W. McKeown, for judgment creditor. *G. G. S. Lindsey*, K.C., for judgment debtor. *A. F. Lobb*, for garnishees.

ELECTION CASES.

RE WEST HURON ELECTION (PROVINCIAL).

BECK *v.* GARROW.

Agency—Evidence.

Held, that on the evidence set out below that the agency of W. V., one of the persons associated with those found guilty of corrupt practice was clearly proved.

Application of saving clause s. 172 of Ont. Elec. Act refused.

The effect of outside agents coming into a riding unrequested, but not disavowed by the candidate, considered.

[Toronto, Dec. 21, 1899—OSLER, J A., and ROSE, J.

This case was tried before OSLER, J.A., and ROSE, J., at Goderich on the 12th, 13th and 14th June, 1899, and was then adjourned to be continued in Toronto for the purpose of obtaining the evidence of one, John T. Linklater, a witness who had been duly subpœnaed by the petitioner, but who had disobeyed his subpœna and absconded from the country. It was stated by counsel for the respondent, in the latter's presence, that this person had written to the respondent before the trial to the effect that his evidence would be disadvantageous to him, and suggested that he had better avoid a subpœna, and that the respondent, as might be expected, had strongly refused to countenance the proposal. After some adjournments it became evident that this witness could not be found, and the case was argued by

W. D. McPherson, (*E. L. Dickenson* with him), for petitioner.

G. A. Watson, Q.C., and *W. Macdonald*, Q.C., for respondent.

OSLER, J.A.—The election was held on the 1st-8th December, 1898, the opposing candidates being the petitioner and the respondent. The latter was elected by a majority of 45 votes. A number of charges of

bribery were so clearly proved that no attempt was made by counsel for the respondent to argue against them. It is quite unnecessary to set forth the evidence in detail upon which I find, as a fact, that corrupt practices—i.e., bribery—were committed by the following persons:—[naming them].

The factum of bribery having been established, the question of agency remains to be considered. Respondent was nominated by a party convention held at Dungannon on the 11th November, 1898, and addressing the delegates present said in a speech, the substantial accuracy of which is admitted by him, that he had the right to claim the independent, vigorous and wholesome support of every one of them. And at the trial he said that he trusted to his friends to elect him and expected that the local committees would get to work. The local organizations of the party in this riding, as in others at many of the recent elections, were largely controlled, managed, or assisted by the officers of the Provincial party organization, by whom several "outsiders," as they were called, were brought into the riding, who acted under the instructions of the secretary of the association, a Mr. Alexander Smith, or his assistant, a Mr. James Vance, and in some cases directly under the instructions of the local managers. It does not, I think, admit of doubt that Smith and Vance were both agents of the respondent, and that he and other prominent agents of his, e.g., his partner, Mr. Proudfoot, knew that they were so, though they may not have been aware of all the work they were doing. The reason suggested for these persons coming or being brought into the riding was that the time for doing the necessary work between the party nomination and the election was very brief. They were not brought in at the request of the respondent, nor do I think that he was at all desirous of their presence. He felt, no doubt, pressed by the difficulty there would be in rejecting their assisstance, however unwelcome, and of formally protesting against their presence in the riding.

Coming then to the question of Walter Vanstone's agency. There would seem to have been no formal election of delegates to the nominating convention, but persons who were prominent Reformers attended from Wingham and other municipalities in the riding, and, in my opinion, it ought to be found, and I find as a fact, that Vanstone went with others to the convention to act as a delegate there, or to promote the nomination of the respondent, and, notwithstanding the difficulty many of the witnesses experienced in recollecting whether they had seen him there, I find that he was one of those actually present at the convention. He was then a member in good standing of the West Huron Liberal Association for the years 1898-9, and he was with others requested to go to the convention by one Samuel E. Gracey, the chairman of one of the local party organizations at Wingham.

After a careful examination of the evidence, I find that Vanstone was also a member of the local committee at Wingham, formed for the purpose of promoting the respondent's election, a committee which held its meet-

ings in a room provided by Vance for the purpose. Gracey said that Vance was the man who seemed to take charge there. He was a constant attendant there and he must have been familiar with those who were in the habit of meeting there.

The respondent knew nothing of the personnel of the different committees, but in his examination taken before the delivery of particulars he said of Vanstone, who had admittedly taken an active part at former elections in the same interest, and whose reputation was that of a prominent Liberal worker, that he should "imagine" that he would be a member of the Wingham local committee. At the trial, however, when his misconduct had been exposed, he was spoken of as a wild young fellow whom no one would put in a responsible position. Gracey also discredited him there on account of his drinking habit, recently acquired, and said that he was not a person suitable to be placed on a committee or in any position of trust. His opinion, however, must be read in the light of the fact that it was at his instance that Vanstone attended the nominating convention:—"I asked any man I thought would be a good delegate to go to the convention, and in that capacity I spoke to Walter Vanstone just like the others. I understand he went."

While this witness said that he objected to Vanstone being put on the committee, I thought he was careful not to say that he was in fact not on the committee. He appears, on the contrary, to have been present at every meeting of the committee at which the chairman himself attended, and as frequently as any other person who was on it, "though," as the witness rather significantly says, "there were others who took a more active part in the work than he did." On the evening before the polling day (evidence of Robertson) he was in the committee room with Vance, Robertson, Parke, Linklater, and others, going over the voter's lists and making arrangements to bring out the vote. He was one of those (Lott's evidence) who made arrangements with Lott, a liveryman, for conveyances. He hired one from Lott himself to go out into the country on election business. Lott had been told by Robertson that he would come for it; and at his request Lott drove into the country for a voter and brought him to the poll. On Sunday before the polling day he and Vance drove from Wingham to Goderich together (Lott and Robertson). Robertson's own agency through Vance, and vouched for by the respondent himself, cannot be disputed. There is some slight evidence of Vanstone's canvassing, apart from those persons he is shewn to have bribed.

Under all the circumstances I must hold that Vanstone was an agent whose acts affect the respondent within the authorities on which I relied in the *East Elgin Case*, 2 El. Cas. 100, for holding that the persons there in question were not agents. Others will, not improbably, take a different view, but speaking for myself I do not very well understand how a person who did what Vanstone is shewn to have been doing, to the knowledge and with the

approval (I do not mean as to his corrupt practices) of persons whose agency is undisputed—Vance, Robertson, Gracey—can be deemed otherwise than an agent within the authorities most favorable to the respondent's contention.

As to Linklater there is more doubt. He was present at one meeting of the committee, and, apart from his corrupt practices, I think that is all that is brought home to him. A dense ignorance existed on the part of many witnesses who might naturally be expected to know all about him. Vance was not called. It was stated that he (Vance) could not be found to be subpœnaed, and, as the matter stands, I cannot say enough is proved to make out his (Linklater's) agency.

The case of Sullivan is very unsatisfactory. He was a man with no interest in the riding; so far as appears, a resident of Sault Ste. Marie. How he was brought into the riding we do not know. So far as the evidence shews, he is not brought into touch with any agent of the respondent, apart from the bribery expedition on which he went with Vanstone. That he was assuming to work for the respondent is proved, and some agents of the respondents had reason to believe that he was doing so. I have, I must say, felt some hesitation as to the proper view to take of his position, particularly as Mr. Proudfoot appears to have satisfied himself that he was working in the respondent's interest—judging from his significant appeal to Smith to get rid of him or send him away if he had any influence over him, "as he was doing us no good and only going with Conservatives whom he could not affect or influence." On the whole, I do not think his agency clearly proven, or that he was anything more than an unwelcome volunteer.

Mr. Hugh Guthrie, not an elector of the riding, was engaged by Smith to speak at three meetings in the respondent's interest, and did so, and was paid by Smith $15, I think, his expenses. This did not, and could not, under s. 197 (c) of the Election Act form an item of the candidate's personal expenses, as the orator did not accompany the candidate. It was, if a legal expenditure (see *Wheeler* v. *Gibbs*, 4 S.C.R. 430) made by an agent of the candidate and on his behalf, but it was not made through the financial agent of the candidate, and was not included in the sworn election expense account, contrary in both respects to the express provision of s. 197 (1) of the Election Act. For this reason, i.e., as a thing done in contravention of the Act, it would seem to have been an illegal practice by an agent of the respondent.

Consistently with former decisions, the election cannot be saved under s. 172 of the Election Act. The majority is not very large, and the bribery cannot be regarded as trifling. The election must therefore be declared void and set aside with the usual result.

ROSE, J.—I have held an opportunity of perusing the judgment of my learned brother just delivered, and also of consulting with him as to the

question raised upon this trial, and I entirely agree to the conclusion he has reached. Indeed it seems to me that only one conclusion is possible upon the evidence.

It was urged upon us that neither the respondent, Mr. Garrow, nor the local organization in West Huron had any intention of contravening the provisions of the Election Act, or of permitting others to do so, and that no fund was raised in the riding for illegal or corrupt purposes. Assume this to be so, then it must be that the moneys which were illegally and improperly expended were supplied by outsiders who sent their agents into the riding and interfered with the management of the election. That Smith was an agent of the respondent, can, I think, admit of no question; that he brought others into the riding and assumed a management and control which was known and recognized and submitted to, is perfectly clear; and we have found that at least in one case he made an illegal payment. Of course his expenses and those of the persons with him must have been paid out of some fund, unless indeed one could believe that he and his assistants were volunteers, paying their own expenses.

I quite appreciate the difficulty of the respondent's position, as stated by him in his evidence at the trial substantially as follows.—That he believed that some men who were active in the riding were brought there by Smith, that he did not ask them any questions, that he did not object to what Smith was doing because he did not feel at liberty to say to men who were apparently respectable that he could not have them interfering. I am quite ready to accept the respondent's statement that he did not wish them to be there, and that if he is candidate at any subsequent election he will take steps to see that there is no outside interference. But it still remains that he did know that they were there; he asked no questions, he did not object, he took the benefit of their action; and, if they are responsible for the corrupt practices proven, he must bear the burthen of their misconduct. I do not see how a candidate can be placed in any better position as a principal than any one who knows that another is acting as his agent, and who does not disclaim his acts or discredit his agency. The result is very hard upon the respondent and upon the constituency, if the outsiders were forced upon them. It is manifest, however, that moneys were improperly used, and whether they were supplied from within or without the constituency, as long as they were used by agents of the candidate, the result must be the same. I think it must be clearly understood that if a candidate does not wish outside interference with the management of the election, he must take decided action to prevent such interference.

The plain result of holding otherwise would be that the candidate, local organization, general committee, and the sub-committee, might all be free from illegal or corrupt practices, as far as they themselves personally were concerned, and yet the management of the election by outsiders sent or coming into the riding to expend money and to use improper means for

the purpose of promoting the election of the candidate, might be most illegal and corrupt, and the Court would be powerless to interfere. The purity of elections must, as far as possible, be secured. Every new scheme for avoiding the consequences of improper conduct must be met by such a construction of the statute as will enforce its provisions according to the spirit, due regard being had to the letter of the enactment. See observations of BOYD, C., in the *East Elgin Case*, ante. I agree that the election must be declared void, with costs.

NOTE.—An appeal was subsequently taken by the respondent to the Court of Appeal, but was dismissed with costs. This case does not appear in the regular reports, but is worthy of being of record.

IN RE NIPISSING ELECTION (DOMINION).

KLOCK *v.* VARIN.

Petition against returning officer—Nomination—Postponement of election——Claiming seat—Prerogative.

On the day fixed for the nomination the returning officer announced that there would be no meeting for the purpose of making nominations as there were no proper voters lists. He made a special return to the executive government, which issued a new writ, under which the present member was declared duly returned by acclamation. A petition was filed against the returning officer claiming the seat for the petitioner who claimed to be a candidate on the day of the abortive nomination.

Held, that there could be no relief under the circumstances. There had been no nomination, and there was no vacancy in the representation of the riding, and there was probably no jurisdiction to entertain the petition.

[North Bay, April 9, 1901.—BOYD, C., and MACMAHON, J.

This was a petition presented under The Dominion Controverted Elections Act (R.S.C. 1886, c. 9), by J. B. Klock, a candidate at the last general election, against H. C. Varin, who was the returning officer, under the circumstances above referred to and set out in the judgment. The trial was held at North Bay on 5th April, 1901.

W. D. McPherson, and *J. M. Macnamara* (North Bay), for the petitioner. *Aylesworth*, K.C., and *Grant*, for the respondent.

BOYD, C.:—The jurisdiction conferred upon the Judges in regard to election petitions is to be found in the Act relating to controverted elections. The matters now in complaint, so far from involving the consideration of a controverted election, do not even reach the preliminary stage of an election, which is the nomination of candidates. For, rightly or wrongly, the returning officer (designated the respondent here) made up his mind, after taking legal advice, that as the election could not be prosecuted for want of proper voters' lists, it was better that it should not be begun. So he declared publicly, as well as to the expected candidates hat there would be no meeting for purposes of nomination on the day,

appointed. His purpose was further to enlarge the time till the lists should be completed, but this was changed pursuant to instructions received from the executive authorities, and he made a special return to the writ of election setting forth why the writ had not been duly executed. The executive government accepted and acted on his return by the issue of a new writ of election for the same electoral district, under which such proceedings were had that the present member was declared duly returned by acclamation. The seat has thus been filled, and the sitting member (Mr. Chas. McCool) is not a party to this petition, and cannot be affected by it. This statement of the actual position of affairs suffices to indicate how misconceived is the present application; no practical result can follow from the attack upon the returning officer as sole defendant, even if (which I doubt) there be jurisdiction to entertain the petition.

The two-fold relief sought is that the plaintiff be declared to have been duly nominated. and that he is entitled to the seat. But, upon the facts, I think there was no public nomination in any legal sense. There was a private transaction in the office of the deputy sheriff (who had no status or authority in these electoral matters) by which nomination papers for the plaintiff, and two hundred dollars in money, were placed upon the office desk, against the will and notwithstanding the remonstrances of that official. Had there been any opportunity of public nomination at the court house, another candidate was ready with papers and money, so that a poll must have followed. It would be unjust to the body of the electorate to declare that the issue of these irregular proceedings is the sole nomination of the plaintiff, and his consequent election by acclamation. That possibility has not been presented to the electors because the usual prosecution of the writ to nomination day has been frustrated by the deliberate action of the returning officer.

Apart from this difficulty, there is yet another to granting the second prayer of the petition. There is no vacancy in the representation of the riding. The seat is filled, and till that is vacated by proper proceedings the plaintiff can have no declaration in his favour. In other words, the special return to the writ is either legal or illegal. If the former, cadit qustio; if the latter, our duty would go no further than to declare that it was an invalid return, upon which parliament might direct the issue of a new writ of election, but that is not the relief sought here. And that is the very thing which the executive government did order upon the former return, and it was then open for the plaintiff to contest the riding.

It does not form part of our duty under the statute to investigate or pronounce upon the constitutional right of the executive to direct the issue of a new writ in the circumstances of this case. That is a matter, not for the election Judges, but for the House of Commons, to whom the ministers are responsible, if there was not plenary power and prerogative in the Governor-General to act summarily upon the return to the first writ.

It appears unnecessary to prosecute the trial further with a view of

unearthing some vague conspiracy which is hinted at, for the presence or absence of this element will not affect the legal situation as it is now made manifest.

It remains but to dispose of the costs incurred thus far, which should be paid by the petitioner, and as to the rest of the proceedings, and of the undisposed of conspiracy, to give no costs, while the whole petition is dismissed.

MacMahon, J., concurred.

Province of Nova Scotia.

SUPREME COURT.

Full Court] [Feb. 4.

McLeod *v.* The Insurance Co. of North America.

Marine insurance—Policies on hull and freight—Cost of repairs—Constructive total loss—Notice of abandonment—Acts working acceptance—Estoppel—Authority of master—Revoked by arrival of special agent—Misdirection and mistake of trial judge—Substantial wrong or miscarriage—O. 37 r. 6—Rejection of evidence—Special Jury—Opinion deferred to—Sue and labour clause.

Plaintiff's vessel while on a voyage from Trindad to Vineyard Haven encountered heavy weather and put into St. Thomas, W.I., in a damaged condition. Notice of abandonment was given to the insurers on hull and freight all of whom replied declining to accept. By direction of the agent for the insurers the cargo was taken out and stored and the vessel put upon the slip for the purpose of being repaired and carrying the cargo forward to its destination. After repairs were made the vessel was taken off the slip, and a portion of the cargo reloaded, when it was discovered that the vessel was leaking and that it would be necessary to again remove the cargo and place the vessel on the slip for further repairs The cost of the repairs up to this time, without including work which remained to be done and could not be done at St. Thomas, was upwards of $4,000, while the vessel was valued at only $6,000. The parties who had made the repairs, in order to preserve their lien, refused to allow the cargo to be taken out a second time, and, in default of payment, proceedings were taken against the ship and cargo under which they were finally sold.

The jury found in answer to questions submitted that the vessel was repaired by the underwriters; that the repairs were not sufficient; and that the vessel was sold under the lien for such repairs. Also that the agent of the insurers, by his acts, prevented plaintiff from dealing with the vessel in respect to repairs as he otherwise would have done. Also that each of the

defendant companies, by its acts, reasonably led plaintiff to believe that the furnishing of formal proofs of loss and interest and adjustment was not required. On motion to set aside the verdict for plaintiff and for a new trial,

Held,—1. In view of their subsequent acts that the refusal of the defendant companies to accept the abandonment did not prevent the working of an acceptance.

2. The taking possession of the ship and incompletely repairing her and then allowing her to be sold for the cost of those repairs constituted an acceptance of the abandonment.

3. If the facts stated were not an acceptance of the abandonment they were such a wrongful conversion of the ship as would preclude the insurers from setting up non-acceptance.

4. The extraordinary powers conferred by implication of law upon the shipmaster in case of shipwreck were displaced on arrival of the owner, or of an agent having express authority from the owner to represent him, and that the trial judge was right in so directing the jury.

5. Misdirection as to the particular agent of defendant companies who waived proofs of loss was immaterial if there was an acceptance of the abandonment.

6. A mistake of the trial judge as to a matter of fact about which there was no dispute, and which he would have corrected if it had been called to his attention, could not be taken advantage of on the appeal unless it was shewn that his attention had as a matter of fact been directed to such mistake.

7. Under O. 37 r. 6 the misdirection must have been such as to have occasioned some substantial wrong or miscarriage in the trial.

8. The trial judge was right in rejecting evidence of a witness as to what he understood or did not understand, generally, where the memory of the witness appeared to be defective as to conversations as to which he was examined.

9. Where the underwriter was wrongfully interfering with the control of the ship there was nothing to prevent the insured from electing at the last moment to hold that the underwriter had accepted the abandonment.

10. If the renewal of the notice of abandonment when the project of insurers to repair failed did not conclude the matter the vessel was lost to the insured by reason of her sale to defray the cost of the repairs put upon her by the underwriters.

11. The Court, even if dissatisfied with the verdict, especially after a second trial, will defer to the opinion of a special jury composed of men peculiarly able to understand the subject matter.

12. Where the members of the jury are selected from a class of people possessing expert knowledge of the matters in dispute, and they are furnished with a stenographic report of the evidence of the witnesses given

on a former trial, it is not a matter of great importance that they should not have had an opportunity of observing the demeanour of the witness.

Plaintiff sought to recover under the sue and labour clause an amount in excess of that payable for a total loss for the services of the master and crew who remained in and about the ship, and for the services of the special agent of the plaintiff.

Held, that the amount claimed for services of the master and crew while the vessel was in the hands of the underwriters did not come within the sue and labour clause and was not recoverable, and that plaintiff could not recover for services of his special agent who was acting adversely to the underwriters.

R. E. Harris, K.C., and *C. H. Cahan*, for plaintiff. *W. B. A. Ritchie*, K.C., for defendants.

Full Court.] DOULL *v.* KEEFE. [Feb. 4.

Sheriff—Sale of land by, under judgment and execution—Adverse possession—Evidence of death of party—Failure to give—Objection to be taken specifically—O. 21, r. 5—Amendment—Registry of judgment—Effect of in respect to title—Statute of limitations.

In an action brought by plaintiffs, trustees under the last will of D., to recover possession of a lot of land bought by plaintiff at sheriff's sale under execution on a judgment recovered by D. against M., defendant relied, among other defences, upon the ground that, at the time of the sale by the sheriff, he was in adverse possession of the land.

Held, that a sheriff selling under execution is not within the class of cases which apply to a person selling land held adversely by another. The objection was also taken that at the trial plaintiffs failed to give evidence of the death of D.

Held,—1. The objection was one which, under O. 21, r. 5, must be specifically taken.

2. The reception in evidence without objection of a certified copy of the will of D. was an implied admission of his death.

At the trial plaintiffs put in evidence a certified copy of the deed to M., the judgment debtor, without shewing that the original was not in plaintiffs' possession.

Held, that this was a matter as to which plaintiffs should be permitted to amend by filing the usual statutory affidavit.

Held, also, that defendant having failed on the only substantial question arising, his appeal should be dismissed with costs.

Per McDONALD, C.J.: The registry of the judgment obtained by D. had the same effect, so far as his title was concerned, as if he held a mortgage.

Held, also, that the judgment being registered, and securing the title,

the statute of limitations would not begin to run until after the date of the recovery of the judgment.

R. E. Harris, K.C., for appellant. *J. A. Kenny*, for respondent.

Full Court.] CITY OF HALIFAX *v.* BENT. [Feb. 4.

Practice and procedure—Default judgment—Motion to set aside—Order reducing amount—Power of judge to make—O. 13, r. 10—Costs.

In an action brought by plaintiff against defendant to recover an amount claimed for taxes an agreement was entered into on behalf of defendant to pay the amount claimed for debt and costs within a day or two from May 16th or 17th, 1901. On the 18th an amount was paid on account of costs, and on the 21st, the balance not having been paid, judgment by default was entered for the full amount claimed for debt and costs, without giving credit for the amount paid on account. On an application to the judge of the County Court to set aside the judgment the learned judge refused the motion but made an order reducing the judgment to the proper amount.

Held,—1. Under O. 13, r. 10, he had power to do so.

2. Inasmuch as the application was a necessary one defendant should have had the costs of the motion below, but as there was a substantial condition in respect of which he had not succeeded there should be no costs of the appeal.

Semble, that if the judgment had been entered in breach of good faith the amendment should not have been granted, but that in this case it was defendant's duty to have seen that the terms of the arrangement as to payment were complied with.

W. F. O'Connor, for appellant. *W. F. MacCoy*, K.C., and *W. B. MacCoy*, for respondent.

Full Court.] KEDY *v.* DAVISON. [March 5.

Arbitration—Appointment of third arbitrator by first two named—Question of consent to—Injunction to restrain party appointed from acting refused—Grounds of objection—Onus as to—Evidence Mode of appointment—Consent to act—Revocation.

Certain rights and easements of plaintiffs were expropriated by the L. Gas Co. under an Act of the legislature enabling the company to make such expropriation, and providing for the determination of the amount of remuneration to be paid by arbitration. Plaintiffs appointed C. to be one of the arbitrators, and the Company appointed D. Plaintiffs claimed a declaration that D., who was alleged to have been agreed upon by C. and B. as the third arbitrator, was not duly appointed, and an injunction to prevent him from acting (1) because the appointment of D. was not agreed

to by C.; (2) because the appointment was not made in writing; and (3) because the appointment, if agreed to by C. in the first instance was revoked by C. withdrawing his consent thereto before action brought.

Held,—1. The onus of establishing the grounds relied upon was upon plaintiffs.

2. The question as to whether C. did or did not assent to the appointment of D. was one of fact, and the finding on the point being adverse to plaintiffs, and the weight of evidence being in favour of the finding there was no reason for setting it aside.

3. In the absence of anything to require the appointment of the third arbitrator to be made in writing the same law would govern as in the case of the appointment of an umpire under a submission, which may be made by parol if no particular mode of appointment be prescribed.

4. D. having been appointed and having consented to act his appointment could not be revoked by subsequent dissent of the parties.

J. A. McLean, K.C., for appellant. *F. B. Wade*, K.C., for respondent.

Full Court.] DUVON *v.* LEBLANC. [March 5.

Equitable action—Entry of default judgment—Common law practice not applicable—O. 13, rr. 11 and 13—Appearance after time limited—Appearance and defence—Motion to set aside for irregularity—Notice of trial and to enter cause—Right of defendant to give—Dismissal of action for non-appearance on trial—O. 34, rr. 11 and 23—Conditions as to costs—Power of judge to impose—Amending order—Costs.

Plaintiffs, as heirs of L., claimed as against defendants, who were also heirs of L., partition of certain lands granted by the Crown to L. in 1805, or, in the alternative, a sale of the property and a division of the proceeds. Also a declaration that a grant of the same lands from the Crown to defendants, dated on or about the 23rd August, 1890, was inoperative and void. Shortly after the issue of the writ plaintiffs' solicitor was informed by F., a solicitor, that he had been consulted by defendants, and had advised them that they had no defence, and that the only thing to be done was to have the property divided as cheaply as possible. No appearance having been entered, judgment by default was entered against three of the defendants on June 6th, 1899. Subsequently, on the 26th February, 1900, appearance was entered on behalf of all the defendants by G., another solicitor, and a defence was filed and served. Notice of trial was given on behalf of defendants for the first day of the September sittings of the Supreme Court at A., and notice was given on behalf of plaintiffs, for the same time, of a motion to set aside the notice of trial and entry of the same on the docket, on the grounds, among others, that default had been marked for want of appearance before and appearance was filed or served, and that the solicitor G. had no authority to appear and defend the action. The latter motion

was dismissed with costs, and as the trial was not proceeded with by plaintiffs, defendants' solicitor obtained an order "that the action be for want of prosecution dismissed with costs to be taxed against plaintiffs, and that judgment be entered for defendants with costs unless plaintiffs paid the costs of their motion to set aside the notice of trial to be taxed, and unless plaintiffs gave to defendants security in the sum of $200 by a bond to respond defendants costs to be incurred, said bond to be approved of by defendants counsel, etc."

Per RITCHIE, J., GRAHAM, E. J., concurring.

1. The proceeding being one of an equitable nature, to have a grant declared void, as well as for partition, plaintiffs were not entitled under any practice of the Court prevailing immediately prior to October 1st, 1884 (the date at which the Judicature Act, 1884, came into force) to obtain a judgment by default against the defendants as at common law.

2. The suit must be governed by the same practice as any other equitable action not provided for in O. 13, rr. 11 and 13.

3. The defendants could appear at any time before judgment, although the time limited in the writ for their appearance had elapsed.

4. So far as the defendant against whom judgment by default had not been entered was concerned, the appearance and defence were unobjectionable, and that he could appear at any time although not served.

5. The appearance and defence being good, the notice of trial and entry on the docket were regular, and the trial Judge was right in dismissing the motion to set them aside, and that the appeal on this point must be dismissed with costs.

And *semble*, that even if the appearance and defence were irregular, the motion should have been to set them aside, and not the notice of trial and entry on the docket which followed them.

6. The notice of trial given by defendants' counsel was regularly given under O. 34, rule 11, and that the defendants having appeared when the cause was called for trial and plaintiffs having failed to appear, the action was properly dismissed under Rule 23 of the same Order.

7. The conditions of the order by compliance with which plaintiffs were entitled to retain their suit, although unusual, were such as it was within the province of the trial Judge to impose.

8. The order should be amended by adding recitals shewing that the cause had been called for trial and that defendants had appeared and that plaintiffs had not appeared, and that the appeal from the order should be dismissed, but without costs, the difficulty having been created by want of care on the part of the plaintiff's solicitor in drawing up the order.

9. The action should be dismissed with costs in case the conditions imposed were not complied with.

Per GRAHAM, E. J., and WEATHERBE, J.: The trial Judge was wrong in requiring the bond to be given for costs to be approved of by defendants' solicitor, and that the order should be varied in that respect.

Per WEATHERBE, J. (dissenting): Even if the judgment by default entered on behalf of plaintiffs was irregular, the practice that prevailed prior to the 1st October, 1884, must be followed, and there must be an application to set it aside.

Held, also that no order could have been made without shewing that the authority of F., who assumed to act on behalf of defendants after the commencement of the action, had been revoked.

Held, also, there being a mistake in the order which could only be corrected on appeal, it was no ground for withholding costs to plaintiffs that the defect in the order was due to the mistake of the solicitor who drafted it.

Held, that the order appealed from could only be supported under O. 34, r. 28, where it appeared that the cause was called for trial and that the defendants appeared and the plaintiffs did not, and that as the order did not shew these facts it could not be sustained.

R. E. Harris, K.C., for appellants. *J. A. Chisholm*, for respondents.

Full Court.] BAULD *v.* FRASER. [March 5.

Practice—Goods sold and delivered—Counterclaim for short delivery and plea of tender—Plea held bad as incorporating counterclaim—Costs where appeal partly successful.

Plaintiffs contracted to supply defendant, who was buying on commission for third parties, with a quantity of canned meats, to be delivered at a fixed price, f.o.b. at Halifax.

Plaintiffs furnished a portion of the goods contracted for but were unable to furnish the balance, and, after some negotiations, authorized K., who was managing the business on behalf of defendants, to settle with the parties for whom defendant was buying on the best terms possible, which was done. In an action by plaintiffs for the price of goods sold and delivered defendant counter claimed for damages for breach of contract, and for grounds of defence, repeating the clauses of the counterclaim, pleaded (1) payment into Court of an amount alleged to be sufficient to satisfy plaintiffs' claim, and (2) tender before action brought of the amount paid into Court. Plaintiffs replied (1) denying that the amount paid in was sufficient to satisfy their claim, and (2) objecting to the paragraphs of the defence, so far as they incorporated the paragraphs of the counterclaim, as bad in law, on the ground that the counterclaim was no defence to the action and could not be so pleaded.

Held,—1. The setting aside in part the judgment appealed from defence, was no answer to the action, and the plaintiffs were entitled to recover the full amount of their claim with costs of suit.

2. The tender was bad, being pleaded to the whole cause of action and being insufficient to cover it.

3. The finding of the trial Judge in favour of the defendant on the counterclaim, being supported by the evidence, should be affirmed.

4. Plaintiffs' appeal should be allowed; plaintiffs should have judgment for the amount of their claim with costs; defendant should have judgment for the amount of the counterclaim with costs: plaintiffs should recover the amount of their claim with costs, less the amount of the counterclaim with costs; in addition plaintiffs should be entitled to receive out of the amount paid into Court a sum sufficient to pay the balance of their claim with costs; and in the event of the sum paid into Court proving insufficient for that purpose, plaintiffs should have judgment against the defendant for the balance remaining unpaid.

5. Plaintiffs having appealed from the whole of the order or decision, and having been successful only as to costs, neither party should have costs of the argument.

WEATHERBE, J., dissenting.

D. McNeil and *W. F. O'Connor*, for appellants. *A. Drysdale*, K.C., and *W. H. Fulton*, for respondents.

Full Court.] FRASER *v.* MURRAY. [March 5.

Bill of sale—Property remaining in possession of grantor—Provision for redemption not reduced to writing—Held questions for trial judge—Findings of affirmed — Defeasance — Verbal agreement held not to amount to—Bills of Sale Act of 1899—Effect, of as regards documents previously recorded.

Defendant, a constable, levied upon goods and chattels in the possession of S. under an execution issued on a judgment recovered against S. by M. At the time of the levy the goods were covered by a bill of sale to plaintiff to secure the sum of $150. The document purported on its face to be an absolute transfer with a right to immediate possession, but it was referred to in the affidavit as a bill of sale, and the evidence shewed that there was an understanding not reduced to writing that S. should get the property back on payment of the amount secured. After the filing of the bill of sale the property was allowed to remain in the possession of S.

Held,—1. The fact of the property remaining in the possession of the grantor was not a fraud in itself, but a matter for the consideration of the trial Judge, and he having found that the amount named as the consideration was due from the grantor to the grantee, and that the transaction was not tainted with fraud, there was no reason for disturbing his finding.

2. The same principle would apply to the fact that the provision for redemption of the property covered was not reduced to writing.

3. The verbal agreement for the return of the property was not a defeasance in the sense in which the term is used, and that the section of the Act which requires every defeasance to which a bill of sale is subject to be filed with it was not applicable.

4. That as the bill of sale was made and filed prior to the passage of the Bills of Sale Act of 1899, the provisions of the latter Act were no.

applicable, the time prescribed for the filing of a renewal statement not having elapsed.

H. Mellish, for appellant. *C. S. Harrington*, K.C., for respondent.

Full Court.] McLAUGHLIN CARRIAGE CO. *v.* OLAND. [March 5.

Principal and surety—Agreement to sell goods and account—Bond to secure performance of conditions—Default—Notice—Liability of surety.

The plaintiff company entered into an agreement in writing with O. for the sale of carriages manufactured by the plaintiff, by the terms of which O. was required to obtain from the purchaser of each vehicle on delivery his note or cash in settlement, and in all cases where notes were taken to guarantee the payment of and indorse said notes. Defendant became surety on a bond given by O. to the plaintiff that O. would well and truly abide by and perform the conditions of the agreement, and would pay and satisfy all notes and other securities which remained outstanding on termination of said agreement. Some of the notes taken by O. having become overdue during the course of the business, plaintiffs drew drafts on O. for the amounts, which drafts O. accepted but failed to pay. To an action brought by plaintiffs on the bond, after the termination of the agreement, defendant pleaded among other things that plaintiffs were aware of defaults and breaches of agreement by O. and gave time to O. to make payments, and the defendant was thereby released and discharged.

Held,—1. As defendant was not to be liable until after the termination of the agreement, and as the time given had elapsed before the liability of defendant accrued, the giving of the time did not prevent plaintiffs from looking to the surety.

2. If in any case time was given so as clearly to discharge the surety, the amount as to which he was discharged was severable from the rest of the transaction and the discharge would only operate pro tanto.

3. As by the terms of the bond the taking and renewal of notes was contemplated the surety was not prejudiced by the drawing of drafts as a means of collecting the notes.

4. As to the taking by O. of notes in a different form from that stipulated, it must be shewn that plaintiffs by their conduct prevented the thing from being done or connived at their omission, or enabled O. to do what he ought not to do, and but for which conduct on the part of plaintiffs the omission or commission would not have happened, and the mere reception by plaintiffs of notes taken by O. in another form than that required, was not within this principle.

5. A letter from plaintiff's manager to defendant notifying him that notes endorsed by O. were not being paid when due, and that the amount was large and growing, was sufficient to have put defendant upon his guard.

C. S. Harrington, K.C. for appellant. *W. F. O'Connor* for respondent.

Full Court.] DIXON *v.* DAUPHINEE. [March 5.

Trespass—Line fence—New trial to decide point left undetermined—Burden of proof.

Plaintiff and defendant were owners of adjoining lots of land, the title to which was derived from the same original grantor. Plaintiff's lot was described as being bounded on the north by the south line of defendant's lot. In an action claiming damages for trespass plaintiff complained that defendant in erecting a new fence had placed it on a line different from the line of a fence which existed previously, and which was admitted to have been on the true line between the two lots.

The question whether defendant had, as a matter of fact, departed from the old line or not having been left undetermined,

Held, that there must be a new trial.

Per WEATHERBE, J. (dissenting). The burden was upon plaintiff to prove the south line of defendant's lot, and that as she had failed to do so she could not recover.

E. D. King, K.C., for appellant. *J. A. Chisholm*, for respondent.

Province of New Brunswick.

SUPREME COURT.

Barker, J., in Equity.] PENRY *v.* HANSON. [April 16.

Ship—Account—Jurisdiction in Equity.

The Supreme Court in Equity has concurrent jurisdiction with the Exchequer Court in Admiralty in account between co-owners of a ship.

A. O. Earle, K.C., for plaintiff. *A. J. Trueman*, K.C., for defendants.

North-West Territories.

SUPREME COURT.

Full Court.] [March 7.

LAMONT *v.* CANADIAN PACIFIC RAILWAY COMPANY.

Service of process—Place of service—Special provisions—General enactment.

Appeal from the judgment of MCGUIRE, J., allowing the service of a writ of summons on the defendants by serving the defendants' station agent

at Prince Albert. This service was made under the provisions of Rule 14 of the Jud. Ord. paragraph 3, (Con. Orders c. 21). The cause of action arose within the North-West Territories and the defendants had under s. 9 of Sch. A. of "An act respecting the Canadian Pacific Railway," 44 Vict., c. 1, fixed the office of the company at Regina as the place where service of process might be made on it with respect of any cause of action arising within the North-West Territories.

The judgment of the Court was delivered by WETMORE, J.

Held, that s. 9 above referred to is special legislation providing the mode of service of process on the defendant's company, and the general enactment under which the service of process was made should not be allowed to interfere with the special provision unless there is a clear intention to that effect, which the Court was of the opinion there was not in this case. See *Palmer* v. *Caledonian Railroad Co.* (1892) 1 Q.B. 823. Appeal allowed with costs, and service of writ of summons set aside with costs.

H. A. Robson, for appellants. *W. C. Hamilton*, K.C., for respondents.

Book Review.

Seager's Magistrates' Manual, the Practice in Criminal Cases in Certiorari, Habeas Corpus, Appeals and Proceedings before Magistrates; by CHARLES SEAGER, Barrister-at-Law, Police Magistrate, of Goderich. 1901: Canada Law Book Company, Toronto.

This work on the practice in magistrate's criminal cases comprises 528 pages and will be found to be indispensable both to practitioners before magistrates and to the justices of the peace and magistrates themselves. The book is interspersed with numerous forms applicable, not only to practice before justices and on appeals from summary convictions, but to applications to the Superior Courts by way of certiorari, habeas corpus, and stated case. The utmost care has been taken by the learned author in his abstraction of the law, and some of the chapters have been revised by eminent criminal lawyers as the work went through the press. The subject matter includes certiorari, and motions to quash convictions, habeas corpus, prohibition, mandamus, appeal and case stated, evidence, qualification and authority of magistrates, res judicata, preliminary enquiries, summary conviction, and summary trials. There is also a separate chapter dealing with the procedure for the trial of juvenile offenders. The concluding chapter is an alphabetically arranged synopsis of offences with forms of charges and other special matter applicable to each. The index is much more elaborate and detailed than is usual, and consequently no difficulty will be experienced in finding in the text any sub-division of the subject.

The presswork and binding are of a high order and the whole work is a production which redounds great credit alike on the author and publisher.

Leading Cases in Constitutional Law, briefly stated, with introduction and notes by ERNEST C. THOMAS, late scholar of Trinity College, Oxford, etc., Third edition, by CHAS. L. ATTENBOROUGH, of the Inner Temple, Barrister. London: STEVENS & HAYNES, Law Publishers, Bellyard, Temple Bar, 1901.

This book is exceedingly interesting reading, and so arranged and so well printed that reading it is a pleasure. It refreshes one's memory of old mile-stones in the development of our constitutional liberties and their limitations, and so collects them as to make the matter treated of easily accessible for reference. There was, of course, a necessity to make a selection of cases and this has been carefully done, on the basis that constitutional law, as the author defines this term, "is that part of the common law which deals directly with the exercise of the functions of government, sometimes securing the subject against unfair abuses of original or delegated power; sometimes protecting the ministers of government in the proper execution of their duties." The brevity and conciseness of the statements are a feature of the author's work, and a very valuable one in these busy days. In the present edition a few of the cases have been eliminated but the cases have been enlarged and some of them re-written.

Ames on Forgery, its detection and illustration, with numerous causes célèbres (illustrated) by DANIEL T. AMES, San Francisco, 24 Post Street, 1900.

This book embodies the author's long experience in the study of handwriting, as to which he is an expert, and has been largely engaged as examiner of contested handwriting in courts of justice. Examples are given of nearly every phase in which handwriting can come into question. Apart from its usefulness to all persons who have cases of this kind, it is a book of much interest to the general reader. There is much to be said in favour of his proposition that experts should be employed by the Court and not by litigants. Such a book would, of course, be useless without illustrations, but these are given with much fullness and accuracy.