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Hon. Thomas Horace McGuire, one of the judges of the Supreme Court of the North-West Territories, was, on the 22nd ult., gazetted Chief Justice of that Court. The place rendered vacant by the death of Mr. Justice Rouleau has been filled by J. E. P. Prendergast, formerly one of the County Judges of Manitoba.

The appointment of Hon. Charles Fitzpatrick, K.C., Solicitor General of Canada, to the position of Minister of Justice and Attorney-General of the Dominion, will be received with much satisfaction by his brethren of the Bar. Having already (35 C.L.J. 657) referred to his career, we need not now do more than congratulate him upon his appointment, and express our pleasure that such a genial, worthy and learned member of the Quebec Bar should have been promoted to the high position he now occupies.

On the 18th ult. the Attorney-General of Canada, at the opening of the Supreme Court at Ottawa, referred to the death of Mr. Justice Gwynne and to the appointment of Mr. Justice Mills in the following terms:—

"Since your last adjournment, one of the most distinguished representatives of your Lorpships' Court has answered the final summons. This is the second call within one year, and thus are we forced to realize that:

Whether the cup doth sweet or bitter run,
The wine of life keeps oozing drop by drop,
The leaves of life keep falling one by one.

Mr. Justice Gwynne gave to his country the best years of his life and his unrivalled knowledge of the Ontario municipal system, his long and varied judicial experience and his patient industry made him one of our most useful Judges, while his never failing courtesy endeared him to members of the Bar. He was one of the best types of that body of distinguished men who have rendered such great services to Canada, and who for their almost perfect training were indebted to Trinity College, Dublin.

His successor brings to the performance of his new duties a great reputation won in the highest Court of this country, the High Court of Parliament. For over a quarter of a century he has taken a large part in

shaping that legislation which this Court is so frequently called upon to consider, and in all that period of time he has been admittedly without a superior in his knowledge of the law and usages of Parliament. His wide experience of men and affairs will be of invaluable assistance to your Lordships; his appointment has met with general approval, and we at the Bar feel that while the dignity and honor of the Bench are safe in his keeping, the privileges of the Bar will suffer no impairment at his hands. We wish the new Judge a long and useful career."

The Chief Justice responded in feeling terms touching the death of Mr. Justice Gwynne. In the course of his eulogistic remarks he characterized the late Judge as beyond question the most industrious member of the Bench he had ever known. With reference to his successor, he welcomed him as his colleague in felicitous language.

We have heard with much surprise that the article in our issue of February 1st upon the Supreme Court has created an impression, not only among some of the legal profession in Ottawa but among those most intimately connected with the Supreme Court itself, that the article in question appeared to exonerate the Chief Justice from any share in the responsibility for the existing state of affairs in that Court, because it was mentioned that he was absent from the Court during the unseemly "squabble" referred to in the earlier part of that article. We should have supposed that it was sufficiently clear that our reference to the Chief's absence on the occasion in question was intended to draw attention to the fact that such unfortunate displays can occur even without his presence. Those who appear in that Court know perfectly well who is the real offender and where the blame lies.

We notice that the County of York Law Association, at its recent annual meeting passed a resolution to request the Law Society to make some change in the mode of electing Benchers by devising some system of nomination of men out of whom the proper number should be chosen, and urging that in future the list of Benchers whose term is about to expire should not be sent to the profession by the secretary as heretofore. We pointed out a year ago that the present system largely insures the re-election of the same men. We may assume that this is not the intention of the men in office. They may or may not be the best men; the minds of the profession are, however, certainly

swayed in that direction by the old list being thus prominently brought to their attention, and other names not being suggested. The course we spoke of, and now urged by the above resolution, is the proper procedure, and the usual one in other bodies. The change should be made as asked.

Mr. Justice Byrne recently took occasion to make some observations on the fact that on three occasions lately three witnesses in his Court had evaded kissing the Book on the administration of the oath to them, and had, instead, kissed their thumbs, or some part of their hands. He said that this was probably due to an idea that the practice of kissing the Book is liable to spread disease. He pointed out that under the English Act, 51 & 52 Vict., c. 46, s 5: "If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question,"—and he very properly observed that persons who objected on sanitary grounds to kissing the Book ought to avail themselves of the statute and not make a pretence of going through the other form of oath. Some such statute should be adopted in Ontario, or the Scotch form of oath made the rule, and the practice of kissing the Book abolished. As for those who think, by kissing their thumb, they evade the penalties of perjury, for false swearing, it is well known that the law gives no sanction to any such idea.

We report in the present number an interesting decision of the Local Master at Ottawa under the Mechanic's and Wage Earners' Lien Act (*Gauthier* v. *Larose*, p. 156). The Master holds that, notwithstanding s. 99 (1) of the Registry Act, advances made under a mortgage to secure future advances after the registration of a mechanic's lien, though without actual notice of the lien, are under s. 13 (1) of the M.L. Act postponed to the lien. He also holds that *Dufton* v. *Horning*, 26 O.R. 252, has no application to the present Act, and that the officer trying a mechanic's lien action has now jurisdiction to deal with all questions of priority, even as between the lien holder and a mortgagee whose mortgage is prima facie prior to the lien. In considering questions of priority under the Act it is necessary to bear in mind that the date of a mechanic's

lien is the date of the performing of the work or supplying of the material, as the case may be, and not the date either of the swearing of the claim of lien, or of its registration. A curious effect of the Act is that a mortgage prior in date to the lien ranks subsequent to the lien (as regards the increased selling value), and that a mortgage subsequent in date to the lien ranks in priority to it (excepting in the cases provided for by s. 13 of the Act) or, to put it shortly, a prior mortgage, is subsequent, and a subsequent mortgage is prior!

In an article on Prohibited degrees of Marriage in our last issue (ante p. 99) reference was made to a passage from Gibson's Codex, adopted by Cresswell, J., in *Wing* v. *Taylor*, therein cited. As this work is not easily accessible we give it below ; but in order that it may be properly understood it is necessary to say that 28 Hen. 8, c. 7, s. 7, according to Gibson's arrangement of that Act, forms ss. 9, 10 and 11. Sections 9 and 10 containing the part setting out the prohibited degrees, and s. 11 the part prohibiting marriage within those degrees. The passage forms a note to the repealing clause of 1 and 2 P. & M., c. 8, and is as follows :

"It is observed by Vaughan that the part here repealed is s. 11 (and not s. 9 nor 10). 'For,' saith he, 'there was no reason to repeal the clause declaratory of marriages prohibited by God's law, which the Church of Rome always acknowledged. But (as the time then was) there was reason to repeal a clause enacting that all separations of such marriages, with which the Pope had dispensed, should remain good against his authority.' But against this distinction it may be observed that that enumeration of degrees, not dishonorable by the Pope, which was begun and carried on 25 and 28 Hen. 8, was in order to disannul the King's marriage with the Queen's mother, and in effect to bastardize the Queen ; whose Parliament thereupon cannot well be presumed to have spared these two clauses (9 and 10) when they repealed the 11th ; especially since the words of the repeal are much more naturally interpreted of the whole. And it is certain that the Church of Rome thought at least one of the cases specified in those Acts as expressly against the law of God (viz., the marrying of the brother's wife), to be a dispensable case."

But in his next note to 1 & 2 P. & M., c. 8, he refers to the fact that Vaughan had held that by the reviver of 28 Hen. 8, c. 16, 28 Hen. 8, c. 7, s. 7, was revived, and apparently without dissent. (See vol. 1, pp. 410, 411, folio edition of 1761.)

HON. MR. JUSTICE MILLS.

The vacancy in the Supreme Court caused by the death of Mr. Justice Gwynne has been filled, with commendable promptitude, by the appointment of the Minister of Justice, Hon. David Mills, K.C., of whom a portrait and biographical sketch appeared in our issue for July, 1900.

It was generally understood that Mr. Mills was to take the first vacancy, and it was, in a sense, his right by virtue of his position. We congratulate him upon his promotion, and regret that his services are lost to the Senate.

The career of Mr. Mills and the eminent position which he has attained is sufficient evidence of great natural capacity, aided by painstaking industry and self-culture. His extensive learning in two important branches of the law is recognized by all, for no one in this country is his superior, or perhaps his equal, in knowledge of constitutional questions and international law. It must of course be admitted that he has not had the advantage of an experience (more necessary in judges of first instance than in an appellate Court) acquired by a large practice at the Bar, his time having been mainly devoted to his duties as a member of the House of Commons and of the Senate, where he gained not only a high reputation in the branches of law to which he mainly devoted his thought, but also a large knowledge of men and things and of the changing needs of a growing country, invaluable in the court of last resort for this Dominion.

It must be remembered, moreover, that Mr. Justice Mills is one of the best read men in this country, and his scholarly mind has been well stored with the great principles that underlie all law. It has also been remarked that in the fierce political battles in which he was so long engaged he was well known for his fairness in debate and the judicial character of his utterances.

As to an objection which has been suggested, that he has been appointed at an age when most men seek retirement from active work, we can only say that there can be no cast iron rule as to intellectual fitness. Some men are as clear of brain and as sound of health at three score years and ten as others are at fifty. For illustrations of this we need not go beyond Mr. Mills' predecessor, Mr. Justice Gwynne. Although the latter was ten years older than the former at the time of his unexpected death, he had not

failed one iota in his mental vigour. We might refer also to Mr. Gwynne's contemporary of the same age, Senator Gowan, whose intellect is as keen to-day as it was when he retired from his position as one of the most eminent judges of the Ontario Bench.

That the new judge will be kind and courteous in all his relations with both Bench and Bar goes without saying; he could not be otherwise. His tact and experience in dealing with men will, we trust, help to secure some improvement in the transaction of business in the court to which he has been appointed, so that if possible there may be less internal friction, more care for the convenience of counsel, and, above all, a proper regard for the necessity of consultation and interchange of thought amongst the judges, without which no court can be a success

The attention of the department over which Mr. Mills formerly presided has time and again been called to various matters requiring change and attention in connection with the administration of justice in the Supreme Court. He is therefore thoroughly familiar with the situation, and having now a seat in that Court, and possessing the confidence of the Government, the country will look to him to play an important part in endeavouring to place the Tribunal in a more satisfactory condition.

REFORM IN THE JUDICIARY.

The daily press informs the public that "some plan of dealing with judges who are incapacitated by age or other infirmity from performing their duties seems to be called for," and as this expression is from the leading exponent of the party in power, we may look for something with more substantial result than befell the projects anent the County Courts and procedure during the last two sessions in the Queen's Park.

In the administration of justice the interest of litigants is, of course, of paramount importance; and the remedy must come from both the Dominion and Provincial Legislatures.

The number of the County Court judges is quite out of proportion to the work assigned them and the needs of the province. They are as numerous as in the neighbouring great and populous State of New York. While those in Toronto, and in half-a-dozen other centres, are well occupied, the others rust from official inactivity. Several of the counties might well be amalgamated for

judicial purposes, both civil and criminal. To do that, and extend the jurisdiction of these courts, is within Provincial power.

It may be useful to refer shortly to the usages of the State of New York as to judicial salaries and terms of office. Where the population of a county does not exceed 40,000, the offices of County Judge and Surrogate are held by one person. In other cases there is also a Surrogate, their salaries varying from $2,500 in rural districts to $10,000 in King and Queen's Counties. There is no such anomaly as a county of 300,000 souls whose Surrogate business is left to the off-work of judges otherwise fully occupied, as in our County of York.

The jurisdiction of the New York County and Surrogate Courts is such as to relieve the higher Court, called the Supreme Court, of actions involving less than $1,000 and of all matters in regard to wills, intestacy, the administration of estates, and care of infant wards. The City of New York has a special tribunal called the City Court for the trial of cases up to $2,000 in value.

All who sit in the Court of Appeal, and in the Supreme Court, are elected for terms of 14 years, with proviso, enacted in 1894, that no person shall hold office longer than the 31st of December next after his attaining seventy years of age.

County and Surrogate judges are elected for six years, except in the County of New York, where they continue for fourteen years, subject also to the 70-year age limit.

The salaries of the appellate judges at Albany were, until lately, for the Chief $10,500, and for each associate $10,000, with an additional $2,000 allowed for expenses, but now the Chief gets $14,200, the other six judges $13,700 each. In the Supreme Court of the State, which takes the place of our High Court, with an appellate as well as original jurisdiction, the salaries vary from $7,200 in rural districts to $17,500 in the metropolis, or the first and second districts, with their heavy calendars and expensive living. This remuneration is apparently the highest given any judges in the Federal union, and is still considerably below that of men of the like learning and position in Great Britain. This Supreme Court may be defined as having general jurisdiction of law and equity except in cases coming within the exclusive control of the Federal courts, arising under the constitution of the U. S. laws, as to patents, controversies between citizens of different States, and admiralty matters.

It has many judges and is divided into eight divisions.

The pleadings are simple in form, technicalities are avoided, and the court generally gets to the root of the issue without useless detail.

There seems to be seldom complaint of delay in proceedings here, but if appeal be taken to Albany, there is prospect of the respondent's interests being tied up for a couple of years, as, for some reason, the chief Appellate Court is noted for long arrears on its calendar.

The work of the Appellate Division of the Supreme Court for the First Division is especially highly regarded. By the power of selection given, the five members are men of exceptional capacity for the work before them. Proceedings are by printed case as in our Appeal Courts. The court sits from one o'clock to five to hear argument, and devotes the rest of the time to discussion and preparing judgments. Out of 1,769 cases heard in 1898 and 1899, this Division was only reversed on final appeal in fifty-three, and modified in six. The decisions of the Divisions of the Supreme Court are only appealable as to matters of law, except in case of disagreement of the judges and consent given in peculiar cases.

It is also to be remembered, as was shewn in recent investigations, that these elective judges are not free from calls on their purses for political purposes, and they have to contribute pretty freely to State and Federal taxes.

The strain of official life may not be as severe in Ottawa and Toronto as in the rushing life of New York, which will probably wear out most men in the fourteen years for which the judges are elected there.

Mr. Justice Gwynne commenced in our old Common Pleas in November, 1868, his useful judicial career, which he lately completed in the Supreme Court at Ottawa at the venerable age of eighty-eight, after thirty-four years of service—about as long as that of the late Chief Justice Sir John B. Robinson.

The Chief Justice of Canada has been Vice-chancellor or judge for thirty-two years. The Chief Justice of Ontario, the President of the High Court of Justice, and two of their learned associates, have each adorned the Bench for more than twenty consecutive years. Mr. Justice Robertson has just completed his fifteenth year, and other four from thirteen to fourteen years.

Were the New York rule applied, Canada would be deprived of the judicial services of the last academic appointee to the Supreme Court, who, when he took his seat on that Bench, had attained the limit of age assigned by our neighbours for retirement.

In Pennsylvania we find salaries provided similar to those in New York, the judges being here also elective. The system so relieves itself automatically of infirm and incapable members at the close of the term, but still, in case during his term, any judge appears to be physically or mentally incapacitated, the Governor may appoint a medical commission of three disinterested physicians, each from a different part of the State, and act on their report, to the extent of allowing the judge, if he retire voluntarily, half of the salary he would have received had he not retired.

In the old and conservative State of Rhode Island, judges of the Superior Courts are appointed by the joint votes of both Houses of the Legislature. When one shall have held office for twenty-five years continuously, or having been judge for ten years, shall have reached the age of seventy years, he may resign the office and shall be entitled to receive his then salary during his life.

It seems curious to find the emoluments af the judges of the supreme Federal tribunal at Washington less than those of the members of State courts at Albany and New York City. The Chief Justice of the United States receives but $10,500, and his associates $10,000 and they may, it is stated, retire at any time on full pay, an honourable privilege which has not been abused. Federal circuit judges get $6,000 and district judges $5,000, and a moderate allowance for travelling expenses

It would seem that judicial salaries are graded to a great extent in relation to the incomes of the men who practice or do business in the courts, and in New York there is power given to the Governor to draft, from the general body of Supreme Court judges elected, men best suited for the heavy work of business centres, known as the first and second districts.

A gentleman connected with that Bar writes: "There is no doubt that good judges are generally re-elected. The Bar of the State is well organized and takes an active interest in seeing that good men are nominated and elected." The same may be said as to Philadelphia, Pittsburgh, Cleveland, and other important places.

The salaries given are never expected to equal the incomes occasionally made by the most ingenious and capable men in practice, such as Joseph J. Choate, James B. Dill, James C. Carter and Edward Lauterback, whose fees, in heavy railway and other consolidation matters, counted up in the hundred thousands. While such may be the enormous incomes of the leaders of the Bar, the average net earnings of the lawyers of New York are said by William G. Inglis, writing in ***Munsey's Magazine***, to be less than a thousand dollars a year.

After thus looking at the judicial system of our wide-awake neighbours, we will probably be less inclined to make a fetish of the judicial position. They smile on learning how reluctant young Canada is to move in such matters. We are like the old Cretans, who had Minos and Rhadamanthus to judge them on earth as long as they lived, and were not reconciled to the regions of Pluto until he gave judicial commissions to the shades of these worthies below.

The constitution of the Dominion Supreme Court and the salaries and pensions of the judges of that and of the Superior and County Courts are within the Federal jurisdiction, though the Ontario Provincial Government has ventured to supplement judges' incomes, with general approval.

While the appointments are made at Ottawa, it would seem within the scope of the Local Legislature to provide that persons beyond an age to be decided on should not occupy a position in courts created by it, and whose constitution it can undoubtedly vary at will. An occasional result might be an old judge at large without a court to sit in. The Federal Legislature will, it is hoped, ere more scandal arises, do its part in providing a practical remedy tending to sustain our courts in their full capacity.

In the discussion which has begun in the House of Commons as to the reform in judicial appointments, the constitution has been referred to as an obstacle.

Section 99 of the British North America Act provides that "The judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons."

Under this it may be argued that it is now only open, as to them, to so increase retiring allowances as to induce voluntary retirement at the country's expense for such as have served for a

long term. But as to the County Court judges, there seems no obstacle to Parliament regulating their time of service and mode of retirement. Removal by impeachment, a slow and heroic mode of treatment, remains to be resorted to in other cases. The reasons for so acting are not defined in the Act, but would seem to include loss or practical failure of mental or physical powers.

It is certainly suggestive to find that in the conference of last June as to an Imperial Court of Appeal, of which the Hon. David Mills was a member, the question as to the time of service was discussed, and fifteen years was recommended, with suitable pensions for such members as complete such term.

If it be prudent to increase salaries and retiring pensions, the country will certainly uphold any necessary movement in that direction. No land is more satisfied as to the integrity of its judiciary, and it is due to the judiciary itself that practical means be provided to rid it of such weak or useless limbs as may from time to time weigh upon its vitality.

Toronto. J. C. HAMILTON.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

PRACTICE—COSTS—LIBEL—DEFENCE OF JUSTIFICATION AND PRIVILEGE.

Brown v. *Houston* (1901) 2 K.B. 855, was an action of libel in which the defendant set up as a defence justification and privilege. The jury found for the plaintiff on the defence of justification, but they also found that the defendant acted without malice, and he succeeded on the ground of privilege, and the action was consequently dismissed with costs, but the plaintiff was awarded such costs as related exclusively to the defence of justification. On taxation of the costs, the taxing officer refused to allow the plaintiff any costs of witnesses, because they were not called exclusively on the defence of justification. Bucknill, J., affirmed his ruling, and the Court of Appeal (Smith, M.R., and Williams and Stirling, L.JJ.,) dismissed an appeal from Bucknill, J., on the ground that the plaintiff's witnesses were not called exclusively on the question of justification, but that their evidence was also material on the question of malice.

GENERAL AVERAGE—DAMAGE TO SHIP ON OUTWARD PASSAGE IN BALLAST—LIABILITY OF CHARTERED FREIGHT TO CONTRIBUTE TO LOSS.

In *S. S. Carisbrook Co.* v. *London & P. M. & G. Ins. Co.* (1901) 2 K.B. 861, the plaintiffs sued on a policy of marine insurance. The vessel in question was chartered by the plaintiffs to proceed to a foreign port, there load a cargo and bring it to England, the chartered freight being payable on delivery of the cargo. On her outward passage, in ballast, she ran aground and sustained damage which was repaired, and she proceeded to her destination, loaded the cargo and brought it home. An average statement of the repairs to the ship was prepared, but the adjusters omitted to make the chartered freight contribute. The defendants contended that this was erroneous, and Mathew, J., so held, following *Williams* v. *London Assurance Co.*, 1 M. & S. 318; 14 R.R. 441, notwithstanding the adverse comments of text writers, cited on behalf of the plaintiff.

DAMAGES, MEASURE OF—STOCK BROKER—WRONGFUL SALE OF SHARES.

In *Michael* v. *Hart* (1901) 2 K.B. 867, the question was, What is the proper measure of damages for the wrongful sale of shares by a stock broker? The defendants were stock brokers, and had purchased on the plaintiff's behalf a number of shares, and they contracted that they would at any time before the settling day, if so directed by the plaintiff, sell the same on his behalf. Before the settling day arrived, however, they sold the shares in breach of their contract with the plaintiff. Wills, J., held that the measure of damages was the highest price which could have been realized in the market at any time between the date of the sale and the settling day.

MARINE INSURANCE—INSURANCE OF SHIP FOR LESS THAN ITS REAL VALUE—GENERAL AVERAGE LOSS—SALVAGE

S.S. Balmoral Co. v. *Marten* (1901) 2 K.B. 896, was an action on a policy of insurance on a vessel for £33,000, at which sum the ship was valued in the policy. During the currency of the policy a general average loss took place, and a sum awarded in a salvage action had also to be paid. In the salvage action the ship was found to be worth £40,000, and in the average statement that sum was taken as the contributory value of the ship, and the rights of all parties were adjusted on that footing. Bigham, J., held that under these circumstances the insurers were only liable to make good to the plaintiffs thirty-three fortieths of the salvage and general average losses, and the Court of Appeal (Smith, M.R., and Williams and Stirling, L.JJ.,) affirmed his decision.

INSURANCE — PROPERTY OF ALIEN ENEMY—LOSS BEFORE COMMENCEMENT OF WAR—SEIZURE BY ENEMY'S GOVERNMENT—WARRANTY AGAINST "CAPTURE, SEIZURE AND DETENTION."

In *Robinson Gold Mining Co.* v. *Alliance Ins. Co.* (1901) 2 K.B. 919, the action was brought to recover on a policy of insurance covering the product a gold mine in the Transvaal. The policy, amongst other risks, covered "arrests, restraints and detainments of all kings, princes and people during transit of the gold"; but it also contained a warranty "against capture, seizure and detention, and the consequences thereof." The gold in question was in process of transit from the mines before the South African war broke out, and was seized by the Government of the Transvaal in

anticipation of the outbreak of war, which shortly thereafter took place. This seizure Phillimore, J., held was within the terms of the warranty, and therefore was not covered by the policy, the effect of the warranty being to blot out some of the risks previously mentioned in the policy as risks insured against.

PROBATE — PRACTICE — WILL OF FOREIGN FEME COVERT — APPOINTMENT OF EXECUTOR—DOMICILED ITALIAN —ADMINISTRATION WITH WILL ANNEXED.

In the goods of Vannini (1901) 1 P. 330. A feme covert, a domiciled Italian, in pursuance of a power of appointment in respect of English property, made a will executing the power and appointing an executor. The will was a sufficient execution of the power under English law, but was not a sufficient will according to Italian law. The executor named in the will applied, with the consent of the husband of the deceased testatrix, for a grant of probate; but Jeune, P.P.D., held that he was not entitled to that, but could only have a general grant of administration with the will annexed.

MORTGAGEE — MORTGAGE BY SUB-DEMISE — RECEIVER APPOINTED IN SUIT TO ENFORCE SECURITY—HEAD LEASE—LANDLORD, RIGHTS OF, AS AGAINST SUB-LESSEE.

Hand v. *Blow* (1901) 2 Ch. 721, was an action by a debenture holder of a limited company to enforce their debentures, which were secured by mortgage by way of sub-demise of certain leasehold property of the company. The action was brought against the company and the trustees to whom the mortgage had been made, and a receiver and manager was appointed on the plaintiff's application in the action, and he went into the occupation of the premises and carried on the company's business, and by direction of the Court sold the chattel property of the company. A quarter's rent under the head lease being over-due, the head lessor applied for leave to distrain, or in the alternative that the rent should be paid by the receiver out of the proceeds of the goods Stirling, J., refused the application, holding that as there was no privity of estate between the sub-lessee and the head lessor, the sub-lessee was not liable for the rent due under the head lease, and that the receiver being in possession for the benefit of the mortgagee, he was also under no liability to the head lessor. It was argued that the Court should see that its officer, the receiver,

did what was equitable, but the answer was that the head lessor had no equity as against the sub-lessee. The Court of Appeal (Collins, M.R., and Rigby and Romer, L.JJ.,) affirmed the judgment of Stirling, J.

WILL—CONSTRUCTION—SURVIVOR.

Inderwick v. *Tatchell* (1901) 2 Ch. 738, is a case upon the construction of a will whereby the testator gave seven portions of his estate to his seven children for life, and after their respective deceases to their respective children, then living absolutely, and he provided that, in case of any child dying without children, the shares of such child, both original and accruing under this clause, should go to their surviving brothers and sisters for life, and after decease to their respective children. All of the seven children survived the testator ; three died without issue, then one son died leaving children, and then a daughter leaving no children. The children of the deceased son claimed to participate in the deceased daughter's share on the ground that the word "surviving" ought to be read not in its primary sense of surviving in person, but in its secondary sense of surviving in stock. Kekewich, J., however, declined to give effect to that contention, and the Court of Appeal (Lord Alverstone, C.J., and Williams and Romer, L.JJ.,) agreed with him.

PRACTICE —COSTS—TAXATION—CO-DEFENDANTS—LIABILITY OF ONE DEFENDANT FOR ALL PLAINTIFF'S COSTS.

In *Kelly's Directories* v. *Gavin* (1901) 2 Ch. 763, the plaintiffs sued two defendants to restrain an infringement of copyright. By the judgment an injunction was awarded against one defendant, who was ordered to pay the plaintiffs "their costs of this action" ; no relief was awarded or costs given to or against the other defendant. On taxation, the plaintiffs' costs, as against the other defendant, were allowed, which was objected to on the ground that the defendant against whom judgment was pronounced was in this way made to pay the costs of the plaintiffs' unsuccessful attempt to make the other defendant liable. Byrne, J., sustained the taxing officer's ruling, holding that under the terms of the judgment the plaintiffs were entitled to these costs, and that if such costs were intended to be excluded the judgment should have been so framed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT OF CANADA.

Ex. C. Adm.] [Nov. 16, 1901.

SCHOONER RELIANCE *v.* OWNERS OF CARRIE E. SAYWARD.

Collision—Evidence—Findings of fact—Appeal.

In an action claiming compensation for loss of the fishing schooner Carrie E. Seyward, by being run into and sunk while at anchor by the Reliance, the decision mainly depended on whether or not the lights of the lost schooner were burning as the Admiralty rules required at the time of the accident. The local judge gave judgment against the Reliance.

Held, affirming the judgment of the Local Judge in Admiralty of Nova Scotia (7 Ex. C.R. 181), that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not, therefore, be disturbed on appeal. Appeal dismissed with costs.

Harris, K.C., for appellant. *Borden*, K.C., for respondent.

Ont.] OTTAWA ELECTRIC CO. *v.* ST. JACQUES. [Nov. 16, 1901.

Contract—Duration—Right to cancel—Repugnant clauses.

A contract for supplying light to a hotel contained the following provisions: "This contract is to continue in force for not less than thirty-six consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto." . . . "Special conditions if any. This contract to remain in force after the expiration of the said thirty-six months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the thirty-six months the lease was renewed for five years longer.

Held, reversing the judgment of the Court of Appeal (1 O. L. R. 73) that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term. Appeal allowed with costs.

G. F. Henderson, for appellant. *Hogg*, K.C., and *Magee*, for respondent.

Man.] SCHMIDT *v.* RITZ. [Nov. 16, 1901.

Statute—Amending Act—Retroaction—Sale of land—Judgments and orders.

Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under Rules 803 et seq of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular,

and in the following session the Legislature passed an Act providing that "In the case of a County Court judgment, an application may be made under Rule 803 or Rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment."

Held, SEDGEWICK, J., dissenting, that the words "Orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments and not to orders and judgments of the County Court.

Held further, reversing the judgment of the Queen's Bench, (13 Man. L.R. 419), DAVIES, J., dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force, but not from the date on which they were made.

Held, per SEDGEWICK, J., that the clause had no retroactive operation at all. Appeal allowed with costs.

Aylesworth, K.C., and *Phillips*, for appellant. *J. Stewart Tupper*, K.C., for respondents.

Ont.] LONDON STREET RAILWAY CO. *v.* BROWN. [Nov. 16, 1901.

Negligence—Findings of jury—Contributory negligence.

In an action founded on personal injuries caused by a street car the jury found that defendant's negligence was the cause of the accident, and also that plaintiff had been negligent in not looking out for the car.

Held, reversing the judgment of the Court of Appeal (2 O.L.R. 53) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover. Appeal allowed with costs.

Hellmuth, for appellant. *Gibbons*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL

From Boyd, C.] KING *v.* LAW. [Nov. 14, 1901.

Building contract—Contract to do work for a specific sum—Destruction of building before completion—Right to sue on a quantum meruit.

The defendant, who had taken a contract for the erection of a dwelling house at $4,050 accepted the plaintiff's tender to do the plumbing and tinsmithing work for $500; but before the completion of the plaintiff's

contract, though after he had done work up to $488, the building was destroyed by fire. The defendant had received two sums of $1,500 on account of his contract, but he denied that any portion of it was for work done by the plaintiff. In an action by the plaintiff to recover the $488 on a quantum meruit,

Held, that where, as here, the contract is to do work for a specific sum, and this applies, as well to original as to sub-contracts, there can be no recovery until the work is completed, or unless the failure to do so is caused by the defendant's fault, and as the plaintiff admitted the non-completion by suing on a quantum meruit, and there being nothing to shew any fault on defendant's part, there could be no recovery.

Judgment of BOYD, C., reversed. *Appelby* v. *Meyers*, L.R. 2 C.P. 660 followed.

J. A. Hutchinson and *Alison A. Fisher*, for plaintiff. *R. G. Code*, for defendants.

From Street, J.] REX *v.* MORGAN. [Dec. 19, 1901.

Criminal law—Summary trial—Police magistrate—Theft—Attempt to commit—Conviction—Warrant of commitment—Necessity for.

A prisoner charged with picking a woman's pocket, and stealing a sum of money from her person, on being brought before a police magistrate, elected to be tried summarily; but was convicted merely of an attempt to pick the pocket.

Held, on appeal from the judgment of STREET, J., 2 O.L.R. 483; 37 C.L.J. 786, that the defendant was properly convicted, for that the charge was one which might have been tried at the Sessions, and therefore under section 785 of the Criminal Code, could with the accused's consent be tried by the said police magistrate, who could sentence him to the same punishment, as if tried at the sessions, while by section 711, where the offence charged is not proved, a conviction can be made for the attempt to commit the offence.

Per MOSS, J.A., the conviction being sustainable under section 785, it was unnecessary to decide whether a person charged with theft in a case under sub-section (a) of section 783, might upon his consenting to be tried on that charge, be properly convicted of having attempted to commit theft under sub-section (b), without the charge therefor being made, or his consent to be tried therefor given.

Quære, as to the necessity for a formal commitment.

J. E. Jones, for prisoner. *J. R. Cartwright*, K.C., for Crown.

From Divisional Court.] HILL *v* HILL. [Dec. 31, 1901.

Alimony—Right to maintain—Summary judgment—Rule 616.

On a motion for leave to appeal from the judgment of the Divisiona Court, reported in 2 O.L.R. 541; 37 C.L J. 823, affirming the decision of MEREDITH, C.J.; (1) that the plaintiff in the action was not entitled to alimony; and (2) that on a motion for summary judgment under Rule 616, he could pronounce judgment dismissing the action, the Court of Appeal were of the opinion that the judgment was right, and leave to appeal was therefore refused.

S. H. Bradford, for plaintiff. *Riddell*, K.C., contra.

Moss, J.A.] IN RE VOTERS' LISTS OF CARLETON PLACE. [Feb. 11.

Parliament—Voters' lists—Notice of complaint—Form of—Grounds of objection—Subjoined lists—Amendment of notice.

In a list of complaints contained in a notice of complaint under the Ontario Voters' Lists Act, R.S.O. 1897, c. 7, the names of persons wrongfully omitted from the voters' list were given, and in the column headed "grounds on which they are entitled to be on the voters' list," "M. F. and" appeared.

Held, 1. Having regard to the provisions of s. 6 (1) and (7) and Form 6 (list 1) of the Voters' List Act, and of ss. 1 (12), 13, and 56 of the Assessment Act, and of s. 4 of the Manhood Suffrage Registration Act, that the letters "M. F." could properly be read as meaning "Manhood Franchise,' and those words were sufficient for the purposes of the notice, while the word "and" should be treated as surplusage.

2. The notice of complaint consisted of fifteen sheets, each in itself in the form given in the schedule to the Voters' Lists Act as No. 6, the lists Nos. 1, 2, 3 and 4 being printed on the backs of forms of notices of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the whole fifteen sheets were attached together when the complainant signed the notice, and handed the whole to the clerk; and they so appeared before the court. The notice referred to the "subjoined lists."

Held, that the lists were part of the complaint, and it was sufficient in that regard. But that, if it were necessary in order to make the notice of complaint a good one, to amend it so that it should refer explicitly to the annexed sheets, the amendment should not be allowed under s. 32.

G. H. Watson, K.C., for electors against the rulings of the County Court Judge. *E. Bristol* and *E. N. Armour*, for electors supporting the rulings.

HIGH COURT OF JUSTICE.

GAUTHIER *v.* LAROSE.

Mechanic's Lien—Registration—Advances under prior mortgage after registration of lien—Priority.

The Local Master or other officer trying an action to enforce a mechanics' lien has now jurisdiction to deal with a question of priority as between the lien-holder and a mortgagee whose mortgage is prima facie prior to the lien.

Where a mortgage to secure future advances is registered and dated prior to the date of registration of a mechanics' lien, quoad advances made after the registration of the lien, it is a subsequent encumbrance to the lien, and the mortgagees are proper parties as subsequent encumbrancers in a suit to enforce the lien.

Advances made under a mortgage to secure future advances after the registration of a mechanic's lien, though without actual notice of the lien, are under s. 13 (1) of the Mechanics' and Wage Earners' Lien Act (R. S. O. c. 153) postponed to the lien notwithstanding s. 99 (1) of the Registry Act (R. S. O. c. 136).

Where a lien is registered it is not necessary that actual notice should be given of the lien to a mortgagee, whose mortgage has been previously registered, in order that the lien holder may acquire priority over the mortgage in respect of advances made to the mortgagor after the registration of the lien.

(Ottawa, Oct. 18,—W. L. Scott, Local Master.)

This was an action to enforce a mechanics' lien. The defendants were the owner and his mortgagee claiming under a mortgage to secure future advances.

The plaintiff's contract was dated Feb. 17, 1901, and work was commenced thereunder Feb. 25, 1901. The lien was registered June 21, 1901, at 1.20 p.m. The mortgage of the defendants, The Ottawa Trust and Deposit Company, was dated April 2, 1901, and was registered April 3, 1901. It was made to secure future advances. No question was raised as to any of the money advanced thereunder, except an advance of $400 made by cheque dated June 21, 1901. The other facts sufficiently appear in the judgment.

W. J. Code, for plaintiffs.

Blanchet, for defendant, Larose.

Henderson, for The Ottawa Trust and Deposit Company, the mortgagees. The mortgage being prima facie an encumbrance subsequent in time, but registered before the lien, and therefore ranking in priority to the plaintiff's lien, could not be postponed in these proceedings, as to any portion of it, to the plaintiff's lien: *Dufton* v. *Horning*, 26 O. R. 252. In that case the plaintiffs added a prior mortgagee as a party for the sole purpose of having a declaration that her mortgage should be postponed to them by reason of notice of their liens at the time her advances were made, and of the absence of the declara-

tions required by the Act of 1893. It was held by STREET, J., under the provisions of the Act then in force that the Master had no jurisdiction to deal with the question. Further, in the absence of actual notice of the lien the morgagees were entitled to priority in respect of the advances made on 21st June, 1901.

W. L. SCOTT, Local Master:—Assuming, as contended, that the mortgage of the defendant Company is prima facie a "prior mortgage" by reason of the priority given under the Act to mortgages subsequent in date to the arising of the lien, I think it nevertheless clear that I have jurisdiction to deal with the plaintiff's claim to rank in priority to it, as regards the $400 last advanced. *Dufton* v. *Horning* was decided on the ground that in a proceeding to enforce a mechanics' lien under 53 Vict., c. 37, the Act then in force, the Master, apart from certain limited statutory powers, had no greater jurisdiction than on a reference to take accounts in an ordinary mortgage action. The provisions of 53 Vict., c. 37, are however very dissimilar to those of the Act now in force. Sec. 13 of the former Act, the section dealing with the adjudication by the Master, was as follows:

"13. Upon the return of the appointment to take accounts, the Master or referee shall proceed to take an account of what is due from the owner and also what is due to the respective lienholders and incumbrancers who have filed their claims, and shall also tax to them respectively such costs as he may find them entitled to, and shall settle their priorities, and shall make all other inquiries and take all other necessary accounts for the adjustment of the rights of the various parties, including therein where there is a prior mortgage or charge, and the holder thereof is a party to the proceedings, the amount by which it shall appear to the Master or referee that the selling value of the land has been increased by reason of the work or materials for which a lien is claimed on the land, and shall thereupon make a report of the results of such inquiries and accounts, and shall direct that the money found due by the owner shall be paid into Court to the credit of the action, at the expiration of one month from the date of the report."

It is not a trial of an action that is here provided for, but a mere taking of accounts, much as in the case of a reference to take accounts in an ordinary mortgage action. See also ss. 5, 20 and 30 to 33 inclusive.

The provisions of the Act now in force (R. S. O. c. 153) are widely different from those of the former Act. Sec. 31 provides that "The liens created by this Act may be realized by actions in the High Court according to the ordinary procedure of that Court, excepting where the same is varied by this Act." Sec. 33 provides that an action to enforce a lien may be tried by, among others, a Local Master, "or by a Judge of the High Court of Justice at any sittings of that Court for the trial of actions." Sec. 34 provides that the Local Masters shall have, in addition to their ordinary powers, all the jurisdiction powers, and authority of the High Court or a Judge thereof to try and otherwise completely dispose of, an

action to realize a lien, and all questions arising in such action. See also ss. 35 and 39 where the adjudication is again referred to as a "trial." It will thus be seen that what now takes place before the Master is a trial of an action and not a mere taking of accounts, as was formerly the case, and the Master or other officer trying the case has full jurisdiction to dispose of all questions properly raised by the pleadings.

My jurisdiction being established, I shall proceed to deal with the question on the merits: and first as to the facts:

The lien was registered at 1.20 p. m. on June 21. A notice in writing, sufficient in form to satisfy the requirements of s. 13 (1), dated June 21, was mailed on that day addressed to the defendant Company, and was received by them at some time on June 22. The cheque for the $400.00 in question is dated June 21, and was paid at the bank on June 22. So far there is no dispute. The two questions which I have to decide are, first, was the notice received by the defendant Company before or after the handing of the cheque to Larose: and second, was or was not the lien registered at the time the cheque was so handed to him?

Taking the second question first. Larose swears that he asked for or was offered the cheque first on Friday, June 21, but that it was not handed to him until Saturday, June 22, at about noon, and that he then took it direct to the bank and got it cashed. He says that on Saturday morning after he had been promised the cheque, but before actually receiving it, he went up and offered the $400.00 to the plaintiff, who, however, declined to accept it. The plaintiff corroborates this and also Larose's statement that it took place on the morning of the day on which the plaintiff left town. The plaintiff further fixes the time by saying that it was two or three days after the lien was put on. The plaintiff swore to the lien on June 20, though it was not actually registered until the 21st. The only witness called for the defendant Company is their manager, Mr. Chamberlain, but as it was not he who handed the cheque to Larose, he cannot give first hand evidence as to when that was done. The evidence he does give is directed largely to shewing that the cheque was signed on the 21st, the day it bears date, but it does not follow that Larose got it on that day. On the whole I see no reason for disbelieving Larose's positive statement, corroborated as it is in some important respects by the plaintiff, and I therefore find that the cheque was handed by the Company to Larose on June 22, and, consequently, after the registration of the plaintiff's lien.

As regards the other question of fact, the onus is of course on the plaintiff to shew that the notice was actually received by the Company before parting with the money, and in this I think he has failed. All he proves is that the letter was mailed, addressed to the Company, on the afternoon of the 21st, leaving it to be inferred that it was received in the ordinary course of post, early on the morning of the 22nd. But this is not enough, especially in the face of the positive evidence of Mr. Chamberlain that the cheque had been handed to Larose before the notice was received.

I therefore find that no notice in writing of the plaintiff's lien was given to the defendant Company prior to the advance of the last $400.00 to Larose. As will be observed, I am treating the handing of the cheque to Larose, as the payment of the money to him, it having been so treated on the argument; and I am not considering whether, as a matter of law, the actual payment was not the cashing of the cheque by the bank, the Company's agents in that behalf. The point was not raised by counsel and, moreover, in my view of the facts, its determination could make no difference in the result. Larose's story which I am adopting, is that on receipt of the cheque he went direct with it to the bank, and there is no evidence to shew that the notice was received in the interval.

Such being the facts, it becomes necessary to decide whether the registration of the plaintiff's lien before the paying over of the $400.00 is sufficient to give him priority over the defendant's mortgage to the extent of that payment, and this of course involves the construction of s. 99 (1) of the Registry Act (R. S. O. ch. 136) and of s. 13 (1) of the Mechanics' and Wage Earners' Lien Act (R. S. O. ch. 153). The question is discussed by Mr. Holmested at pp. 16, 74 of his work on "The Mechanics' Lien Acts." The proper construction of s. 99 (1) of the Registry Act and its application to Mechanics' Liens is also dealt with at page 605 of Hunter's Real Property Statutes, but the present Mechanics' Lien Act was passed after the publication of the latter book Sec. 99 (1) of the Registry Act reads as follows:—

"99—(1) Every mortgage duly registered against the lands comprised therein is, and shall be, deemed as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through or under him, to be a security upon such lands to the extent of the moneys or money's worth actually advanced or supplied to the mortgagor under the said mortgage (not exceeding the amount for which such mortgage is expressed to be a security), notwithstanding that the said moneys or money's worth, or some part thereof, were advanced or supplied after the registration of any conveyance, mortgage or other instrument affecting the said mortgaged lands, executed by the mortgagor or his heirs, executors or administrators and registered subsequently to such first-mentioned mortgage, unless before advancing or supplying such moneys or money's worth the mortgagee in such first-mentioned mortgage had actual notice of the execution and registration of such conveyance, mortgage or other instrument; and the registration of such conveyance, mortgage or other instrument after the registration of such first-mentioned mortgage, shall not constitute actual notice to such mortgagee of such conveyance, mortgage or other instrument."

The section when first enacted formed s. 1 of 57 Vict., c. 34, and was prefaced by the words, "To remove doubts." It was no doubt passed in consequence of the decision in *Pierce* v. *C. P. L. & S. Co.*, 24 O. R. 426, to the effect that where a second mortgage was registered prior to advances

made under a first mortgage, the registration of the second mortgage was notice of it to the first mortgagee, and his subsequent advances were postponed to it. The section provides that thereafter in certain cases mere registration of the second charge should not of itself constitute notice to the first mortgagee. Let us examine precisely how far it goes. It enacts that every mortgage is a security for the money actually advanced notwithstanding that part of such money was advanced after the registration of an instrument executed by the mortgagor or his heirs, executors or administrators, and registered subsequently to the first mortgage, unless there has been actual notice of it to the prior mortgagee, and that registration shall not constitute such notice. The prior mortgage shall, moreover, be deemed to be such a security, "as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through or under him." It is first enacted that the prior mortgage "is" such a security, and then that it "shall be deemed to be" so as against the class of persons just enumerated. No doubt the holder of a mechanics' lien is a person claiming "by, through or under" the mortgagor and, in consequence, the mortgage will be deemed as against him, to be a security for the amount subsequently advanced; but on the other hand his lien is not an instrument "executed by the mortgagor or his heirs, executors or administrators" and therefore the concluding words of the section to the effect that the registration of it shall not constitute actual notice to the prior mortgagee making a subsequent advance under his mortgage, do not apply to such lien. If this is the meaning of the section, and it seems to me obviously to be so, it has no bearing on the question now before us, nor does it either conflict with or modify s. 13 (1) of the Mechanics' and Wage Earners' Lien Act. Such being the case, we must seek for the meaning of the latter enactment within the four corners of the section itself. In this view the interpretation of it does not present any difficulty. It enacts that "the lien created by this Act shall have priority . . . over all payments or advances made on account of any . . . mortgage . . . after registration of such lien as hereinafter provided." This appears to me to mean precisely what it says. I cannot limit it to any particular class of mortgages, since the legislature has not seen fit to so limit it. It therefore applies to the mortgage of the defendant Company, and the effect of it is to give the plaintiff, by reason of the prior registration of his lien, priority over the advance of $400.00 now in question. This is an absolute priority and is not limited to the increased selling value of the land.

There will therefore be judgment for the plaintiff against the defendant Larose for $1085.08 and to enforce his lien for that amount against the property in question, such lien to rank in priority to the mortgage of the defendant Company as to the $400.00 advanced on June 22, but subsequent to such mortgage as to the amounts previously advanced thereunder.

Master in Chambers.] SCOTT *v.* MEMBREY. [Dec. 4, 1901.

Practice—Statement of defence—Particulars—Order for.

Where in an action by a clerk against his former employer, an hotel keeper, for an alleged assault, and for arrears of wages, the defence was that the plaintiff, contrary to his duty, was disrespectful and uncivil to several of the guests, whereby they left and refused to further patronize the hotel, the plaintiff is entitled to an order for particulars, giving the names of such guests.

J. R. Roaf, for the motion. *D. Urquhart*, contra.

Meredith, C.J.] MARTIN *v.* MERRITT. [Dec. 8, 1901.

Vendor and purchaser—Mortgage—Notice of sale—Service of—Recitals in deed—Assigns—Meaning of—Devolution of Estates' Act—Caution—Non-registration of.

Where by a provision in a mortgage no want of notice required by the mortgage was to invalidate any sale thereunder, but the vendor was alone to be responsible, and the conveyance made on a sale under the power of sale contained recitals that service had been duly made on the mortgagor and his wife, the accuracy of such recitals being in no way disproved, a subsequent vendor of the land in making title on a sale thereof is not called upon to furnish any other evidence of such service; and further, the objection being as to the proof of service on the wife, no such proof was in any event required, for, by the terms of the mortgage, service only was to be required to be made on the mortgagor and his assigns, the wife not being an assign.

Where after the death of a mortgagor, a married woman, and after the coming into force of the Devolution of Estates' Act, R.S.O. c. 127, and the expiration of a year from the mortgagor's death, without any caution being registered, sale proceedings were taken on the mortgage, service of notice of sale on the husband and her heirs, two infant daughters, is sufficient, it not being necessary to serve the personal representatives.

Kerwin Martin, for vendor. *D'Arcy Tate*, for purchaser.

Meredith, C.J.] EVANS *v.* JAFFRAY. [Dec. 9, 1901.

Practice—Examination for discovery—Refusal to answer—Materiality of questions—Affidavit on production—Sufficiency of.

On an examination for discovery in an action alleging a contract of partnership between plaintiff and one of defendants for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, etc., and alleging that the other defendants had maliciously caused a breach of the partnership contract, and claiming a

partnership account and damages for such breach, and for conspiracy, questions were answered by the last named defendants admitting the formation of a company to carry on the said business, and the subsequent payment to the first mentioned defendant of $20,000; but they refused to answer questions tending to elicit the source of said sum.

Held, reversing the order of Master in Chambers, that such questions were irrelevant, and need not be answered.

On such examination the defendants also refused to answer questions relating to certain agreements which defendants had procured to be entered into for the purchase of the said plants, and which, the plaintiff claimed, were in substitution of the agreements procured by the alleged partnership.

Held, affirming the order of the Master in Chambers, that such questions were relevant, and should be answered.

In an affidavit on production made by one of the defendants, who was also the solicitor, it was stated that a search had been made for certain documents, viz.: the said cheque, and a memoradum in writing containing the purchase prices of said plants, but that they could not be found; and that as to the said agreements they were in defendant's custody, as solicitor.

Held, reversing the judgment of the Master in Chambers, that the affidavit was sufficient, and a motion for a further and better affidavit was refused.

F. A. Anglin, for plaintiff. *C. W. Kerr* and *Ryckman*, for defendants.

Meredith, C.J.] RE GOUGH ESTATE. [Dec. 14, 1901.

New trustees—Appointment of—Married woman.

Under a will, three trustees and executors were appointed, to one of whom only probate was granted, one of the other two dying before probate was applied for, and the other having renounced. The estate was duly administered, and the trusts carried out by such executor and trustee, with the exception of certain property which had been devised to a daughter for life, and after her death to be sold and the proceeds divided amongst testatrix's children. On the death of, or vacancy occurring, as to any one of the trustees, the remaining two could fill up the vacancy, and in the case of there being only one trustee left, he was empowered to apply to the Court to have the vacancies filled up.

On an application by the said trustee to the Court, two additional trustees were appointed, one of whom was a married woman, with whom the said daughter, who was in delicate health, resided, and who was taken care of by her.

J. E. Day, for petitioner. *Harcourt*, for official guardian.

Meredith, C.J.] [Dec. 14, 1901.

NEWSOME *v.* MUTUAL RESERVE LIFE INSURANCE CO.

Practice—Notice of trial—Service of—Letter wrongly addressed—Ratification.

On the day prior to the last day for serving notice of trial, the plaintiff's solicitor, who lived in a county town, drew up a notice of trial, and copies of same, in three cases, which he directed to be forwarded to his Toronto agents, with instructions to serve and return with admissions of service; but, by a mistake in the office, the envelope was addressed to the defendant's solicitors in Toronto, and reached their office on the following morning, but did not come to the notice of the member of the firm who had charge of the defences therein until after four o'clock, when, on discovering that the letter was not addressed to his firm, he returned it with the notices to his St. Thomas agents, with instructions to return it to the plaintiff's solicitors, which was done.

Held, by MEREDITH, C. J., reversing the judgment of the Master in Chambers, that what was done did not constitute valid service of the notices on the defendants' solicitors, nor did the defendants' solicitors do anything to ratify such service.

S. Alfred Jones, for plaintiff. *Denison*, for defendant.

Lount, J.] UNION BANK *v.* RIDEAU LUMBER CO. [Dec. 18, 1901.

Trespass—Wrongful and wilful—Damages—Mode of assessment.

Where, in an action of trespass, the judgment is that the trespass was wrongful and wilful, the assessment of damages must be on the basis of such finding, and not as if the trespass was done innocently or bona fide.

J. T. Lewis, for plaintiff. *G. Henderson*, for defendant.

Meredith, C.J.] McKAY *v.* TALBOT. [Dec. 18, 1901.

Division Courts—Motion for immediate judgment—Service with summons—Regularity of—Computation of time—Sundays and holidays—Enlargement—Waiver.

A special writ of summons issued out of a Division Court was served on Friday, the 8th of November, returnable on the following Tuesday, the 12th, and with it was served a notice of motion for immediate judgment, also returnable on the 12th.

Held, that the notice was properly served, for there is nothing in s. 116 of Division Courts Act, R.S.O. 1897, c. 60, which requires that before such notice is given the time for the filing of a dispute notice should have first expired.

Held, also, that there were two clear days' notice of the motion for the King's birthday, and Sunday, which intervened, would not be excluded.

Con. Rule 343, whereby where the time is less than six days, Sundays and holidays must be excepted, does not appiy to the Division Courts, and no similar provision is contained in the Division Courts Act or Rules: but in any event the objection was cured by an enlargement procured by the defendants on the return day until the next day, which had the effect of giving the defendants two clear days irrespective of such holidays.

Quære, whether an order made upon a motion, of which two clear days' notice had not been given, would be valid.

J. H. Moss, for plaintiff. *Campbell*, for defendant.

Meredith C.J.] WARD *v.* BENSON. [Dec. 25, 1901.

Practice—Numerous defendants in same interest—Application for appointment of solicitor to defend—Con. Rule 200—Non-applicability of.

The object of Con. Rule 200, which provides, where there are numerous parties having the same interest, that one or more of such parties may sue, or be sued, or may be authorized by the court to defend on behalf of or for the benefit of all so interested, is to avoid the expense and inconvenience of bringing before the court, a numerous body of persons, all having the same interest, but does not authorize the making of an order by the court, on the plaintiff's application, for the appointment of a solicitor to defend for a number of persons in the same interest, who are already defendants to the action.

W. J. Elliott, for the motion.

Lount, J.] CHEVALIER *v.* ROSS. [Dec. 30, 1901.

Practice—Pleading—Mistake in amount claimed—Amount paid into court—Acceptance by mistake—Amendment—Rule 312.

Where plaintiff claimed that by mistake, in an action on a building contract, too small a sum had been claimed, and an amount paid by defendant into court in satisfaction of one of the causes of action, had, also by mistake been accepted; but, on the plaintiff being made aware of the mistake, had promptly moved to amend, and by allowing an amendment no undue advantage would be taken of, or injury done defendants, while a refusal to do so might work to plaintiff's prejudice, an amendment under Rule 312 was allowed.

J. H. Moss, for plaintiff. *Hellmuth*, for defendant.

Master in Chambers] [Jan. 7.

PUTTERBAUGH *v.* GOLD MEDAL MANUFACTURING COMPANY.

Practice—Libel—Jury notice—Necessity for.

The effect of s. 102 of O.J. Act, R.S.O. 1897, c. 106, which provides for actions of libel being tried without a jury, is to dispense with a jury

notice being given in such actions, so that a notice of trial is properly given without such notice having been first served; s. 106 not applying to actions of libel.

F. C. Cooke, for the motion. *J. E. Jones*, contra.

Meredith, C.J.] LEISHMAN *v.* GARLAND. [Jan. 8.

County Courts—Appeal to Divisional Court—When authorized, R.S.O. c. 55, s. 51, sub-ss. 1, 2, 3, 5.

Where, from a judgment pronounced by a junior judge in a county court case, an appeal to set aside such judgment, and to enter judgment for the defendants; or in the alternative a new trial, was made to the senior judge; and on such appeal the judgment was set aside and judgment entered for the defendants dismissing the action, an appeal lies to the Divisional Court by the unsuccessful party to such appeal, and the fact that a new trial in the alternative was asked for is immaterial.

The sub-sections of s. 51 of the County Courts Act, R.S.O. 1897, c. 55, applicable are sub-ss. 1, 2, 5, and not sub-s. 3.

R. R. Davies, for appellant. *Riddell*, K.C., for respondents.

Trial—McMahon, J.] [Jan. 13.

WHYTE *v.* BRITISH AMERICA ASSURANCE CO.

Insurance—Fraud—Trial—Dispensing with jury.

Action on policies of insurance for $6,500 on stock of grain and mill produce.

H. D. Gamble, for defendants, at the opening of the case, moved to dispense with the jury. He explained that the main defence (although there were others, such as subsequent and prior insurance without notice) was fraudulent, over-estimate of the stock at the time of the fire; that the defendants proposed to shew that the plaintiff had altered his books so as to make it appear from them that there was more stock on hand at the time of the fire than there actually was; that in order to establish this the books and accounts would have to be gone into and that the matter could be more conveniently dealt with by the court than by a jury.

Nesbitt, K.C., for the plaintiff opposed the application, urging that the plaintiff was entitled to a jury and should not be deprived of the privilege of having his case tried by a jury. He suggested that his Lordship should at all events commence the trial with a jury, and then, if he subsequently found it necessary, to dispense with a jury.

His Lordship decided that he should try the case without a jury.

Ferguson, J.] [Jan. 27.

BANK OF COMMERCE *v.* TOWN OF TORONTO JUNCTION.

Municipal corporations—Treasurer—Tax sale—Power of Treasurer to pledge credit of corporation.

A treasurer of a town has no authority to bind the municipal corporation by a contract to pay the cost of advertising his list of lands for sale for arrears of taxes. Under the Assessment Act, R.S.O. 1897, c. 224, s. 224, he is only persona designata to act on behalf of the municipality, and the municipality has no authority to interfere with him in the performance of his defined duties. A creditor in respect to the publication of such advertisements must look to him personally. *Warwick* v. *The County of Simcoe*, 26 C.L.J. 461, approved and followed.

W. H. Blake, for plaintiff. *C. C. Going*, for defendants.

Master in Chambers.] [Feb. 5.

CANADIAN MINING AND INVESTMENT CO. *v.* WHEELER.

Judgment debtor—Examination of transferee—Third mortgagee—"Exigible under execution"—Rule 903.

A third mortgage upon real estate made by a judgment debtor is not a transfer of property "exigible under execution," within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver.

W. R. P. Parker, for plaintiffs. *J. J. Maclennan*, for alleged transferee.

Meredith, J.] [Feb. 8.

IN RE MCALPINE AND LAKE ERIE AND DETROIT RIVER R.W. CO.

Arbitration and award—Clerical error in award—Motion to refer back—Railway Act of Canada.

Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act.

Held, that if the Provincial legislation (R.S.O. 1897, c. 62) applied, the motion was needless, the arbitrators having power (s. 9 (*c*)) to correct the mistake. If that legislation were not applicable, there was no power to remit the award, nor to correct the error upon this motion.

Except under power conferred by statute, or by the parties, the Courts would not correct errors in awards, either directly or through the arbitrators; *Ward* v. *Dean*, 3 B. & Ad. 234; *Mordue* v. *Palmer*, L.R. 6 Ch. 22; and the Railway Act of Canada does not authorize the re-opening of a reference.

T. W. Crothers, for claimant. *H. E. Rose*, for railway company.

Falconbridge, C.J., Street, J.] [Feb. 8.

WILSON *v.* BOTSFORD-JENKS CO.

Master and servant—Injury to servant—Defective condition of appliances—Knowledge of master — Company — Officer of — Admissions by — Evidence—Onus—Nonsuit.

The plaintiff was in the employment of the defendants as a labourer assisting in the erection of an elevator. He stated that he was directed by D., a superintendent of the work, to go upon a planking which answered the purpose of a scaffolding in an excavation made for the purpose of placing therein the leg of the elevator. The planking gave way while the plaintiff was on it, and he was precipitated to the bottom of the excavation, sustaining injuries. He alleged that the scaffolding was defectively constructed, unsafe, and unfit for the purpose for which it was intended, to the knowledge of the defendants. It was not argued that the defendants were liable to the plaintiff for D.'s negligence, if any; but it was contended that the defendants had knowledge of the defective construction and unsafe condition of the scaffolding through J., their secretary-treasurer. It was not shewn that J. assumed to give orders to the men, or directions as to the practical work which was going on; but there was evidence that he was standing, with his hands in his pockets, looking down into the excavation, on the morning of the accident, and that on former occasions he had been seen to call D. on one side and say something to him, which no one overheard. There was no evidence that the persons employed by the defendants were not proper and competent persons, or that the materials used were faulty or inadequate; nor was there any evidence that the defendants had any better means of knowing of the danger than the plaintiff.

Held, that the onus was on the plaintiff, and he had not made out a case to be submitted to the jury. *Matthews* v. *Hamilton Powder Co.*, 14 A.R. 261; *Wigmore* v. *Jay*, 5 Ex. 354; *Lovegrove* v. *London, etc., R. W. Co.*, 16 C.B.N.S. 669, and *Allan* v. *New Gas Co.*, 1 Ex. D. 251, referred to.

Evidence was given of an admission made by J. to the plaintiff after the accident, as to the defective condition of the scaffolding and the defendants' knowledge of it.

Held, that he had no authority to make admissions on behalf of the defendants, an incorporated company. *Bruff* v. *Great Northern R.W. Co.*, 1 F. & F., 344; *Great Western R.W. Co.* v. *Willis*, 18 C.B.N.S. 748; *Barnet* v. *South London Tramways Co.*, 18 Q.B.D. 815; *John* v. *Lindsay*, 53 J.P. 599, and *Newlands* v. *National Employers' Accident Association*, 53 L.T.N.S. 242, referred to.

Hatton, for plaintiff. *Riddell*, K.C., for defendants.

MacMahon, J.] [Feb. 10.

KEITH *v.* OTTAWA AND NEW YORK R. W. CO.

Railway—Negligence—Opportunity to alight.

A railway company which has undertaken to carry a passenger to a station on its line must stop its train at that station long enough to give the passenger a reasonable opportunity of getting off. If the train stops and the passenger after making reasonable efforts to do so is unable to get off before it starts again and jumps off and is injured, the company is liable in damages; provided, however, that when the passenger jumps off, the train be not moving at such a rate of speed as to make the danger of jumping obvious to a person of reasonable intelligence.

George McLaurin, for plaintiff. *Nesbitt*, K.C., and *W. H. Curle*, for defendants.

Meredith, C.J.] CARSWELL *v.* LANGLEY. [Feb. 11.

Bankruptcy and insolvency—Assignment for benefit of creditors—Annuitant—Right to rank on estate—Assignments Act.

An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R.S.O. 1897, c. 147 Previous to the assignment the defendant had covenanted with the plaintiffs to pay to J.R. $100 per quarter on the first day of each quarter during her natural life.

Held, that the growing payments were in the nature of contingent debts; and that the plaintiffs were not entitled under R.S.O. c. 147, to rank upon the estate of the insolvent for the present value of such payments. *Grant* v. *West*, 23 A.R. 533, and *Mail Printing Co.* v. *Clarkson*, 25 A R. 1, followed.

Semble, that such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts.

In re Cowan's Trust, 14 Ch. D. 638, has been disapproved in *Webb* v. *Stenton*, 11 Q.B.D. 518.

J. J. Warren, for plaintiffs. *F. E. Hodgins*, and *W. N. Irwin*, for defendant.

Meredith, J.] [Feb. 12.

LANGLEY *v.* LAW SOCIETY OF UPPER CANADA.

Parties—Addition of—Separate causes of action—Joinder—Rules 185, 186, 187, 192—Third party notice—Indemnity.

The plaintiff sued to recover the amount of a book debt assigned to him. The defendants admitted nothing, and pleaded payment and set-off.

Held, that the plaintiff was properly allowed to add as a party defendant the assignor of the alleged debt, and to make a claim against him,

in the event of the original defendants succeeding in their defence, basing such claim upon an alleged warranty or a total failure of consideration.

Rules 185, 186, 187, 192, discussed.

Tate v. *Natural Gas and Oil Co.*, 18 P.R. 82, and *Evans* v. *Jaffray*, 1 O.L.R. 614, followed. *Smurthwaite* v. *Hannay*, (1894) A.C. 494; *Thompson* v. *London County Council*, (1899) 1 Q.B. 840, and *Quigley* v. *Waterloo Manufacturing Co.*, 1 O.L.R. 606, distinguished.

Held, also, that the added defendant was properly allowed to give a third party notice to a bank, upon his allegation that he acted only as the bank's agent in assigning the debt. *Confederation Life Association* v. *Labatt*, 18 P.R. 266, followed.

C. D. Scott, for plaintiff. *Hamilton Cassels*, for defendants. *George Bell*, for added defendant.

Falconbridge, C.J., Street, J., Britton, J.] [Feb. 12.

CHEVALIER *v.* ROSS.

Pleading—Amendment—Increasing amount claimed—Mistake—Money paid into Court—Acceptance by mistake.

The plaintiff was allowed under Rule 312 to amend his statement of claim in an action upon a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court by the defendant, notwithstanding that the plaintiff had filed a memorandum of acceptance, under Rule 423, although he had not taken the money out of Court; the Court being satisfied that the plaintiff had made a mistake, and, on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant. *Emery* v. *Webster*, 9 Ex. 242, followed. Order of LOUNT, J., affirmed.

J. H. Moss, for plaintiff. *Hellmuth*, for defendant.

Ferguson, J.] GLENN *v.* RUDD. [Feb. 12

Contract—Statute of frauds—Master and servant—Employment for an indefinite term—Damages—Master and Servant Act, R.S.O. 1897, c. 157, s. 5.

A sub-contract to employ a person as a salesman so long as the employers' contract with third persons might remain in force, that contract being terminable at any time, is not within the Statute of Frauds, for the sub-contract may or may not continue for a year.

Such a sub-contract does not come within s. 5 of the Master and Servant Act, R.S.O. 1897, c. 157.

The employers' contract came to an end by the voluntary dissolution of their firm:

Held, that this voluntary dissolution operated as a wrongful dismissal of the plaintiff under his sub-contract and that although the probable duration of the contract and consequently of his sub-contract would have been, apart from the dissolution of partnership, quite uncertain, he was entitled to substantial and not merely nominal damages.

Talbot MacBeth, K.C., for plaintiff. *Geo. C. Gibbons*, K.C., and *John J. Drew*, for defendants.

Lount, J.] GEGG *v.* BASSETT. [Feb. 13.

Trade mark—Execution.

The right of property in a registered specific trade mark is not saleable by itself under a writ of execution. Such a right can be sold, if at all, only as appurtenant to the business in which it has been used.

McBrady, for plaintiff. *Laidlaw*, K.C., for defendants.

Street, J., Britton, J.] PARENT *v.* COOK. [Feb. 14.

Third party notice—Time—Enlarging—Rules 209, 353.

Appeal from judgment of MEREDITH, C.J., reported ante p. 44.

At the close of the appellant's argument the appeal was dismissed with costs.

J. H. Rodd, for the appeal. *J. H. Moss*, contra.

Falconbridge, C.J., Street, J., Britton, J.] [Feb. 15.

BELLING *v.* CITY OF HAMILTON.

Way—Injury to pedestrian—Defect in carriage-way—Liability of municipality—Findings of trial judge.

The plaintiff, in crossing at night on foot a busy street in a city, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriage way. There was a hole or depression in the asphalt pavement from one and a half to one and seven-eighths inches deep at its deepest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles; and assessed damages to the plaintiff.

Held, FALCONBRIDGE, C.J., dissenting, that the plaintiff, using the carriage-way when on foot, had no right to expect a higher degree of repair

than would render the way reasonably safe for vehicles; and the last finding of the judge put the plaintiff out of court.

Boss v. *Litton*, 5 C. & P. 407, explained and distinguished.

Semble, per STREET J., that the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage, and therefore the corporation could not be guilty of negligence in regard to it.

Held, also, STREET, J., dissenting, that as a judge had been by statute substituted for a jury as the tribunal for the trial of actions of this kind, at least as much respect should be accorded to his findings as to the findings of a jury.

Per FALCONBRIDGE, C.J., that the judgment ought to be upheld, as it was a question of fact, not of law, whether the depression was an actionable defect in the highway.

J. H. Long, for plaintiff. *J. P. Stanton*, for defendants.

Falconbridge, C.J., Street, J., Britton, J.] [Feb. 19.

MORPHY *v.* COLWELL.

Insolvency—Transfer by insolvent debtor—Attacking—Time—Division Court proceeding—Collateral inquiry—Pressure—Evidence of.

A garnishee summons was issued from a Division Court Jan. 22, 1900, wherein the primary creditor claimed from the primary debtor $200 upon a due bill, and whereby all debts due from an insurance company to the primary debtor were attached. The primary debtor had recovered a judgment against the insurance company Dec. 7, 1899, and had assigned the judgment on the same day to the claimant. No formal notice of the proceedings in the Division Court or of any contest as to his rights was ever given to the claimant, but he appeared in the proceedings on the 6th July, 1900, and consented to an adjournment of them, and afterwards appeared again before the judge, when his rights under the assignment were tried and judgment was given against him setting aside the assignment as an unjust preference.

Held, on appeal, that the transfer to the claimant was not attacked when the summons was issued, nor until the claimant appeared in the proceedings, and, therefore, it was not attacked within sixty days, and its validity should be supported by proof of pressure in procuring it.

Held, also, FALCONBRIDGE, C.J., dissenting, that as it appeared from the evidence both of the primary debtor and the claimant, that the latter had asked the former for security shortly before the security was given, and that the security given was that which was promised there was pressure inducing the giving of the security, and it should be upheld, notwithstanding that the claimant was merely liable for a debt of the primary debtor

which it was expected he should pay, as he did, and notwithstanding that he was not present at the time the assignment was made to him, it having been drawn by his solicitor. *Molsons Bank* v. *Halter*, 18 S.C.R. 88, and *Stephens* v. *McArthur*, 19 S.C.R. 446, followed.

Per FALCONBRIDGE, C.J., that the judge in the court below had ample ground for saying that he did not believe the evidence put forward to support the pressure, and his judgment ought not to be reversed because he had not said so in express terms.

W. H. Blake, for claimant. *J. M. McEvoy*, for primary creditor.

COUNTY COURT, PERTH.

Barron, Co. J.] IN RE STEELE. [Feb. 6.

Election of school trustee—Tie—Jurisdiction.

Held, that the Public Schools Act, 1 Ed. 7, c. 39, s. 63, pre-supposes an election and that, inasmuch as there was a tie and the proper officer had not yet given the casting vote, that there was not an election within the meaning of said section, and that there was no jurisdiction for the judge of the County Court to hear the complaint.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] THE KING *v.* GEORGE. [Jan. 14, 1901.

Charge of theft—Not necessary to allege "committed fraudulently and without colour of right.

The prisoner was charged before the Judge of the County Court District number 1, under s. 305 of the Criminal Code, that on a certain day he did unlawfully steal one piece of Oregon pine wood to the value of $5.40, the property of His Majesty, the King. At the conclusion of the evidence counsel for the accused objected that the charge should have alleged that the offence was committed fraudulently, and without colour of right.

The prisoner was found guilty, but judgment was suspended, and a reserve case granted upon the following question: Is the charge to which the prisoner pleaded, and on which he was tried, bad, by reason of its omitting to charge the offence as having been committed fraudulently and without colour of right, and if yes, is the conviction therefore bad, the accused not having objected until after the close of the evidence? The only doubt the learned judge entertained was as to whether there should

be a restricted application of s. 611 of the Code, and form FF. given in Sched. 1.

The reserved case was argued before WEATHERBE, TOWNSHEND, MEAGHER and GRAHAM, JJ.

Judgment was delivered by MEAGHER, J. (TOWNSHEND and GRAHAM, JJ., concurring), upholding the conviction and deciding that the charge was sufficiently stated. WEATHERBE, J., dissented from the majority of the court.

F. F. Mathers, for the Crown. *J. J. Power*, for the prisoner.

Province of New Brunswick.

SUPREME COURT.

En Banc.] THE KING *v.* JUCK. [Feb. 7.

Public Health Act—Compulsory vaccination—Health district—City of St. John.

Regulation 2, made by the Governor-in-Council under the Public Health Act, providing for compulsory vaccination "Whenever within any health district within the Province of New Brunswick it shall be found by the Local Board of Health for such district that a case of small-pox exists, in case such district be a city or town," does not apply to the City of St. John, which of itself is not a health district but is part of the district of the City and County of St. John (per HARRINGTON, LANDRY, BARKER and GREGORY, JJ., the Chief Justice and McLEOD, J., dissenting). Rule absolute to quash conviction.

J. B. M. Baxter, in support of rule. *J. R. Armstrong*, K.C., contra.

En Banc.] EX PARTE GRAVES. [Feb. 7.

Justice's civil court—County Court judge—Jurisdiction.

A County Court judge has jurisdiction to review a justice's civil court case, tried in a county other than a county for which he is the County Court judge. Rule for prohibition refused.

G. W. Allen, K.C., in support of rule. *W. B. Jonah*, contra.

En Banc.] IN RE COLWELL CANDY COMPANY. [Feb. 7.

Companies Act—Distress—Winding-up order.

A winding-up order under the Companies Act does not under s. 17 of the Act void a distress for rent executed before the making of the order.

A. O. Earle, K.C., for distrainor. *G. C. Coster*, for liquidator.

Province of Manitoba.

KING'S BENCH.

Killam, C.J.] WHITLA *v.* MANITOBA ASSURANCE CO. [Jan. 10.

Fire insurance—Condition as to other insurance without consent—Interim receipt—Estoppel.

The defence in this case rested mainly on the subsequent insurance on the same property alleged to have been effected by Bourque in the Royal Insurance Co., as set forth in the report of the preceding case, without the consent or knowledge of the Manitoba Co., thus rendering the insurance void according to one of the conditions of their policy. The learned judge found, as reported in that case, that Bourque had effected no binding insurance with the Royal Co.

Held, that the condition was not broken.

Held, also, that neither the making of a claim by Bourque for the subsequent insurance, his putting in of proofs of loss thereunder, nor the bringing of an action thereon, created any estoppel in this action, and Bourque's statement in his proofs of loss sent in to defendants that "there was no other insurance on the property at the time of the fire excepting a policy in the Royal Insurance for $3,000," did not prevent him from shewing that the insurance in the Royal was never completed so as to bind it. Bourque and the plaintiffs were placed in such a position that they had to claim for both insurances, for, if they elected to claim from one company only, they ran the risk of losing the one from which they could recover, and it should be held that they were entitled to recover from the present defendants, if, as a matter of fact, there was no subsequent binding contract for concurrent insurance. An erroneous claim that there was cannot change the fact. Verdict for plaintiffs with costs.

Haggart, K.C., and *Whitla*, for plaintiffs. *Tupper*, K.C., and *Phippen*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] KETTLE RIVER MINES *v.* BLEASDELL. [Mar. 20, 1901.

Appeal—Security for costs—Practice.

Appeal called on before the Full Court on 20th March, 1901. On 16th March an order had been made for security for costs of the appeal, but not providing for a stay of proceedings. Counsel for respondent

asked that the appeal be struck out of the list as security had not been furnished. The court stated that an order for security for costs of an appeal to the Full Court should provide for a stay of proceedings until security is given. In the result the appeal was stayed until security was furnished and unless furnished one week before the first day of the next regular sittings of the Full Court the appeal should stand dismissed.

Duff, K.C., for appellant. *Galt*, for respondent.

Full Court.] MURPHY *v.* STAR MINING CO. [March 23, 1901.

Mining law—Adverse claim—Affidavit and plan—Extension of time for filing—Practice—Mineral Act, s. 37.

Adverse action under the Mineral Act commenced in December, 1899. No affidavit or plan as required by the Act having been filed within the required time, the plaintiff on an application to IRVING, J., got an order dated 21st February, 1900, extending the time until 15th May, 1900. This order not having been complied with, nor any statement of claim having been delivered, the defendants took out a summons to dismiss for want of prosecution, and on the return on 14th November, 1900, DRAKE, J., refused the summons and without any motion being made for that purpose extended the time for filing the affidavit and plan until 14th May, 1901.

The defendants appealed and the appeal was allowed, MCCOLL, C.J., dissenting.

Per curiam: *Noble v. Blanchard* (1899), 7 B.C. 62, must not be taken as deciding that an order to extend the time for filing the affidavit and plan required by s. 37 of the Mineral Act may be made by a Judge in Chambers. Such an order can be made only by the court. The appeal is allowed, but without costs, as counsel for the respondent may have been mislead by the report of *Noble v. Blanchard.*

Hunter, Q.C., for the appeal. *Alexis Martin*, contra.

Full Court.] [Jan. 10.

STAR MINING AND MILLING CO. *v.* BYRON N. WHITE COMPANY.

Inspection—Underground workings—Extralateral rights—Form of order Copies of plans—Undertaking as to damages—Costs.

This was an action of trespass to extralateral rights appurtenant to a mineral claim located and recorded in 1891, and the point in dispute was as to the terms of an inspection order enabling plaintiffs to inspect defendant's workings.

Held, affirming MCCOLL, C.J., 1. The order may allow the inspecting party to make copies of plans, charts, etc., of the other party's workings.

2. The inspection order should contain an undertaking for damages and the practice does not require security to be given.

3. In interlocutory appeals when a party is allowed costs of the appeal, the costs are payable forthwith. Appeal dismissed with costs.

Bodwell, K.C., for appellants. *Davis*, K.C. (*S. S. Taylor*, K.C., with him), for respondents.

Full Court.] McGuire *v.* Miller. [Jan. 10.

County Court—Practice—Speedy judgment—Leave to defend—Appeal—Preliminary objection—Notice of.

Appeal from Leamy, Co. J., ordering judgment to be entered for plaintiff, and refusing defendant leave to defend or cross-examine plaintiff on his affidavit.

Held, 1. On the facts the defendant should have unconditional leave to defend.

2. On a motion for speedy judgment in the County Court it is open to a defendant to set up other defences than those disclosed in his dispute note.

3. Notice of a preliminary objection to an appeal to the full Court must be served at least one clear day before the time set for the beginning of the sittings. Appeal allowed.

Barnard, for appellant. *Duff*, K.C., for respondent.

Book Reviews.

Law and practice in relation to companies under the Companies Clauses Act, 1845 to 1889, and the Companies Act, 1862 to 1900. By W. D. Rawlings, K.C. and Hon. M. M. MacNaghten, Barrister-at-law, London. Butterworth & Co., Temple Bar, law publishers. 1901.

This is one of the many books which has appeared of late years in reference to a branch of the law which is constantly growing in importance. The conception of this book is more ambitious than previous works on the subject, in that an endeavour is made to consolidate the series of Acts in force in England affecting Company law. The Editors have thus found a new method of treating the subject. The attempt which has been made is a step in the right direction and gives additional value to the book in this country. If, however, there should be a sense of disappointment at not finding information might perhaps be expected in its pages, we must remember that the English statutes are a very undigested mass of legislation differing in this and in many other respects from our own. The volume before us is a valuable addition to the literature of Company law.

COUNTY OF YORK LAW ASSOCIATION.

The annual meeting of the association was held on Monday, January 27th, when the officers were elected.

Resolutions were passed urging assistance to the library from the Dominion Government: As to the mode of electing Benchers; Requesting the Law Society to consider the publication of a work on practice at cost: To amend some rules of the High Court, and as to the expediency of an increase of salaries of High Court judges.