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It is fitting that a Canadian legal journal should record the death of Sir Oliver Mowat, K.C., P.C., G.C.M.G., Lieutenant-Governor of Ontario. For half a century he has been prominent before the public. In 1864 he was appointed Vice-Chancellor of Upper Canada, a position which he left to take the Premiership in the Government of his native province, Ontario. Having served in that capacity for many years he became Minister of Justice of Canada in 1896. On his retirement a year later he was appointed Lieutenant-Governor of Ontario. The profession has nothing but what is pleasant to say of his memory. He was a sound lawyer, a just and painstaking judge and an honest statesman. As Premier of Ontario and as Minister of Justice he evinced a thorough knowledge of the varied questions which arose in reference to Federal and Provincial jurisdiction, and proved successful in most of his contentions connected therewith. Though nominally a Reformer in politics he was essentially conservative in his ideas and practice, high minded, unselfish and kindly in all relations of life he had a multitude of friends and but few enemies.

Two vacancies in the County Court Bench of Ontario have just been filled, and the appointments that have been made are excellent. The Senior County Judgeship in York goes to Mr. John Winchester, K.C., Master-in-Chambers at Toronto, who takes the place of the late Judge McDougall, and that of the County of Grey to Mr. W. J. Hatton, K.C., of Owen Sound, vice Judge Creasor, deceased. The appointment of Mr. Hatton will be acceptable to the Bar of the county, and although he is comparatively a young man, he has shown qualities that seem to warrant the prophecy that he will make a good and worthy judge.

The position in Toronto is a very important one, requiring not only a wide knowledge of law, but the experience and wisdom of a man of affairs. Though it will be no easy matter for anyone to fill with satisfaction to the public and the profession the place occupied by Judge McDougall, a better selection than Mr.

Winchester could not have been made. Apart from his other qualifications the experience gained by him in his professional career and in the public positions which he has since occupied will be most helpful to himself and useful to the public. In other important particulars his appointment is much to be commended, for in addition to being a good lawyer, thoroughly up in practice, he is a man of high personal character, and in connection with his professional and judicial duties he has always shown the utmost courtesy and consideration to all with whom he has come in contact. It is gratifying moreover to know that this appointment is not, as so many others have been, based upon political services or party claims, but is made upon its merits. We trust that this new departure will henceforth be the rule and not the exception, and we congratulate the Minister of Justice, Hon. Charles Fitzpatrick, upon his wise choice of these County Judges.

Mr. Winchester was educated in Toronto, admitted to practice in 1871, called to the Bar in 1877, and made K.C. in 1902. In October, 1882, he was appointed Registrar of the Queen's Bench Division of the High Court of Justice, subsequently becoming Inspector of Legal Offices. He was made Master-in-Chambers in Aug. 1st, 1892, which office he has filled until his recent promotion. This appointment carries with it the position of Surrogate Judge of the County of York, as well as that of a Police Commissioner for the City of Toronto.

Mr. J. S. Cartwright, K.C., Registrar of the Court of Appeal for Ontario, takes Mr. Winchester's place as Master-in-Chambers, his place being filled by the appointment of Mr. J. A. MacAndrew. Mr. Mallon taking the place vacated by Mr. MacAndrew as Inspector of Legal Offices. These appointments are also very satisfactory. Mr. Cartwright was educated at Rugby and Oxford. He was called to the Bar in 1868, and appointed Registrar of the Supreme Court of Ontario in May, 1883, and in 1889 Registrar of the Court of Appeal, and appointed K.C. in 1902. He is a sound lawyer with a judicial turn of mind, ready for hard work, and a courteous gentleman. He will, we doubt not, be a success in his new position.

JUDICIAL DISCRETION AS TO SUMMARY JUDGMENT.

I. THE ENGLISH PRACTICE.
II. THE ONTARIO PRACTICE.

I. THE ENGLISH PRACTICE.

"Order XIV.," protested Lord Esher, in the course of a judgment delivered on behalf of the Court of Appeal (*a*) "was equivalent to an enactment by statute, and no practice however long, could alter the plain language of the rule." But as one studies the cases and dicta upon that Order for a definition of the general principles governing the exercise of the judicial discretion which it conferred, a topic rendered timely by a very important recent decision of the House of Lords, (*b*) he does not meet with such a consistent body of precise decisions as might be expected after reading Lord Esher's remarks, or Cavanagh's argument (*c*) that "the discretion which a judge is said to exercise in granting or refusing an application under Order XIV. does not, or should not, involve any arbitrary element; but means, or should mean, the conclusion to which a judge is led on applying the principles contained in Order XIV., to the facts submitted to his decision."

It is this arbitrary element involved in the discretion which seems to account for the wide variety of opinion expressed in the cases and dicta upon the Order; from which, as Cavanagh points out (*d*) the "principles contained in Order XIV. are to be collected rather than from its actual wording."

Of course, as already noted, it is a knowledge of general principles alone that is sought in reviewing those cases and dicta; for, in the words of Hall, V.C., (*e*) "the facts of each case being different, cases are only useful for the purpose of getting the general view of the judges as to the character and description of case in which the court ought not to allow a plaintiff to sign judgment."

(*a*) *Shurmur* v. *Young*, 5 T.L.R. 155.
(*b*) *Jacobs* v. *Booth's Distillery Co.*, 85 L.T.R. 262.
(*c*) Cavanagh's Law of Summary Judgment, 118.
(*d*) Cavanagh's Law of Summary Judgment, 118.
(*e*) *Anglo-Italian Bank* v. *Wells*, 38 L.T.R. 197.

On turning, by way of introduction to that review, to a brief consideration of the history of the English legislation respecting summary judgment, in the hope of learning something of the general principles intended to govern the exercise of the judicial discretion conferred by Order XIV., it is found (*f*) that the procedure introduced by the Order was an extension of the principle embodied in "an Act to facilitate the remedies on Bills of Exchange and Promissory Notes by the prevention of frivolous or fictitious defences to actions thereon." The purport and scope of that Act (18 & 19 Vict., c. 67,) is shewn by its title, and by the reference in its preamble to "the unjust delay and expense" such frivolous or fictitious defences often caused bona fide holders of dishonoured bills of exchange and promissory notes in recovering the amount thereof.

Order XIV. brought into force a new method of working out the principle. Under the Act of 1855, a defendent whose case fell within the Act, and who was served with a writ in proper form, had to obtain leave to appear and defend. Under the Order the defendant appears as of right, and it lies upon the plaintiff to apply for an order for judgment notwithstanding appearance. The original and amended forms under it contain a provision for the judge making an order empowering the plaintiff to sign judgment . . . . . "unless the defendant . . . . shall satisfy him that he has a good defence on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend the action."

The two modes of proceeding embodying the same principle, though in different degree, the later one may be better understood by noting schedule "A" to the Act of 1855; which provided as follows: "Leave to appear and defend may be obtained on an application at the Judge's Chambers, supported by affidavit shewing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear."

"Leave to appear and defend to be given on defendant paying into court the amount endorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration."

(*f*) Wilson's Judicature Acts (4th ed.) 214.

It might be remarked that, for some time after Order XIV. was passed, a plaintiff desiring to take summary judgment proceedings to enforce payment of a bill, note, or cheque, could proceed under either that Order or the Act of 1855; but the alternative remedy provided by the earlier Act was abolished, owing to the inconvenience experienced in working it in with the English Judicature Act system. (*g*)

Order XIV., introduced with the intention of facilitating the High Court of Justice in the collection of debts in general (*h*); and not, as the Act of 1855 provided, debts due under bills of exchange and promissory notes alone, by hastening the remedy and preventing the accumulation of costs, (*i*), was regarded by Jessel, M. R. (*j*), as designed to prevent "a man clearly entitled to money from being delayed where there is no fairly arguable defence to be brought forward;" and Lord Hatherly thus later explained the Order (*k*):—

"If a man really has no defence, it is better for him, as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and, therefore, there was a power given in cases in which plaintiffs may think they were entitled to use the power, by which, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution."

Even though, as above shewn, Order XIV. relieved a defendant from such an onus as that imposed upon him by the Act of 1855, and allowed him to appear as of right, without being required to shew that he had a defence until after the plaintiff had sworn that there was none, it was, from the first, (*l*) judicially regarded as the result of a very strong piece of legislation, invading a defendant's common law right to appear in court and defend himself against the plaintiff's claim.

(*g*) Wilson's Judicature Acts, (4th Ed.) 214.
(*h*) *Ray* v. *Barker*, 27 W.R. 746.
(*i*) Per Dowse, B.L.R., Ir. 420.
(*j*) *Anglo-Italian Bank* v. *Wells*, 38 L.T.R. p. 199.
(*k*) *Wallingford* v. *Mutual Society*, L.R. 5 A.C. p. 699.
(*l*) *West Central W. Co.* v. *North Wales W. Co.*, 37 L.T.R. 628.

Another apparently pertinent line of preliminary enquiry is that relating to the powers of investigation possessed by the tribunal which has to exercise the discretionary power conferred by this Order. "It is necessary," says Hall, V.C. (*m*), "to try the case to a certain extent in order to ascertain whether there is a fair and reasonable defence or not, for the beneficial provisions of the clauses under which the plaintiffs are proceeding ought not to be frittered away by anything in the shape of defence or counter-claim which the court cannot consider of a substantial character." Pollock, B., thought (*n*) "it was not the object or intention of Order XIV. to try the case on affidavits, since that course would have very serious consequences in practice, entailing upon parties enormous expense in affidavits upon which, after all, the case could not be satisfactorily determined." This great expense, continued that learned judge, would be incurrred in trying the preliminary question whether the cause should be tried or not, and, after all, it would have to be tried. Manisly, J., concurred in Baron Pollock's view, observing that "it was most important that Order XIV., which, if properly acted on, was most beneficial to suitors by saving unnecessary litigation, should not be perverted to the trial of disputed questions of fact upon affidavits."

As to disputed questions of law, Coleridge, C.J., held (*o*) that it was impossible for the court to try a question as to foreign law on affidavits; and, in such a case, gave leave to defend; while Wills, J., (*p*) "did not think that Order XIV. . . . applied to cases . . . raising what might turn out to be a difficult question of law. It was never intended to throw on the Judge at Chambers such a burden. To decide such questions satisfactorily at Chambers was not possible; and it only tended to put the Judge at Chambers in a false position."

The House of Lords has lately (*r*) defined the scope of the inquisitional powers of a court hearing a motion under Order XIV. in no uncertain way. The Lord Chancellor said, when deciding the appeal in that case, that "he did not propose to enter into the

(*m*) *Anglo-Italian Bank* v. *Wells*, 38 L.T.R. 198.
(*n*) *Saw* v. *Hakim*, 5 T.L.R. 72.
(*o*) *Western National Bank* v. *Perez*, 6 T.L.R. 366.
(*p*) *Electric and General* v. *Thomson*, 10 T.L.R. 103.
(*r*) *Jacobs* v. *Booth's Distillery Co.*, 85 L.T.R. 262.

merits of the case or the comprehension of it which is necessary to some extent in order to deal with the merits. That question will have to be dealt with when the cause is tried;" and Lord James wanted it made "very clear that in giving judgment in accordance with that which has been proposed by the Lord Chancellor, there is no expression of opinion upon the merits of the case. . . It is not for that tribunal (to which the application under Order XIV. is made) to enter into the merits of the case at all."

Nor is it in the way above shewn alone that the tribunal called upon to decide a motion for summary judgment is limited in the search for data whereon to base the exercise of its discretion. When, upon such an application, (*s*) it was urged on behalf of the defendants that they had been attacked by a very summary proceeding, and that there might be, and were, other facts which might entitle them to raise an entirely new defence to that raised on their affidavits filed on the motion, Jessel, M. R., replied that "under the rule . . . we are not entitled to take that into consideration in deciding upon this application, because it must appear to the court 'by affidavit or otherwise,' that is, by some kind of evidence beyond the mere statement of counsel; which is not sufficient."

Subsequently considering the same words (*ss*), James, L. J., said: "The Court or a judge may do certain things 'unless the defendant by affidavit or otherwise' satisfies the Court or judge that he ought to be allowed to defend. The grammatical meaning of the words is that the defendant may satisfy the Court or judge by affidavit, or by any other sufficient means. If 'by affidavit' means by the affidavit of the party defending, then 'or otherwise' must mean 'by some other means than the affidavit of the defendant.' The substance of the rule is, that by the affidavit of the defendant, or in some other way, the facts must be brought before the judge so as to satisfy him. I am of opinion . . . that any evidence which satisfies the Court or judge is sufficient within the meaning of the rule."

It appearing on an appeal from a Master's order, (*t*) however, that the Master had looked at some documents not brought

(*s*) *Anglo-Italian Bank* v. *Wells*, 38 L.T.R. 199.

(*ss*) *Shelperd* v. *South & S. E. R. W. Co.*, L.R. 4 Ex. D. 317.

(*t*) *United Founders Trust* v. *Fitz-George*, 7 T.L.R. 620.

forward on affidavits, and therefrom gained an impression that there might be a defence, Denman, J., "observed that this was a practice to which he had always objected. Documents should be brought properly before the Judge of the Court upon affidavits, but it was irregular to look at documents not brought before the Court on affidavits;" and the opinion expressed by the Divisional Court in the same case was that "no doubt the proper course was to bring forward any defence on affidavit."

. . . "It is clear that a defendant may shew cause otherwise than by affidavit, or offering to bring the money into Court," says Cavanagh, (*tt*). Practically it is only by preliminary objection or on technical grounds that defendant may so otherwise shew cause, for, although it has been laid down that hearsay is not to be excluded in applications under O. XIV., yet no facts, as a rule, are allowed to be proved except by affidavit"

The foregoing must be taken subject to the present amended form of Order XIV., providing that a defendant's case may be made out "by affidavit, by his own viva voce evidence, or otherwise."

The following words of Lord Blackburn (*u*) are very instructive, as shewing the extent of knowledge required by that learned judge, on summary judgment applications, as a basis for the exercise of his discretion:—

"When the affidavits are brought forward to raise that defence, (denial of debt), they must, if I may use the expression, condescend upon particulars. It is not enough to swear: 'I owe the man nothing.' Doubtless, if it were true that you owed the man nothing, as you swear, that would be a good defence. But that is not enough; you must satisfy the judge that there is reasonable ground for saying so. So, again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned."

In view of the already-noted attitude of the judges towards this Order on its introduction into the English procedure, it is

(*tt*) Law of Summary Judgment, 110.

(*u*) *Wallingford* v. *Mutual Society*, L.R. 5 A.C. 704.

not surprising to find that very little has been considered sufficient to turn the scale, and bring about an exercise of the judicial discretion in favour of allowing a defendant to defend. Denman, J., stated it (*v*) as his opinion that "a plaintiff's right to take summary judgment was not absolute, merely because the defendant's affidavits are not completely satisfactory. The jurisdiction was one to be exercised with great care, so as not to preclude a party from raising any defence he may really have." Lopes, L.J., considered (*w*) that "judgment ought not to be allowed to be summarily signed except in the clearest cases," and Lord Esher's opinion was (*x*) that "a defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion."

Passing from the foregoing in search of a less general definition of the defence sufficient to secure leave to defend, one finds that the practice in this respect has been very variously stated. Thus, such a defence has been defined to be "such a state of facts as leads to the inference that at the trial the defendant may be able to establish a defence to the plaintiff's claim:" (*y*) "enough to entitle the defendant to interrogate the plaintiff:" (*z*) a plausible (*aa*): reasonable (*bb*): very probable (*cc*): bona fide (*dd*): real (*ee*): real and bona fide (*ff*): substantial (*gg*): good (*hh*): fair (*ii*): fairly arguable (*jj*) defence.

Pollock, B., by way of summary of the practice under Order XIV. said, (*kk*), that "the general principle had been laid down

(*v*) *Manger* v. *Cash*, 5 T.L.R. 271.

(*w*) *Edmands* v. *Davis*, 4 T.L.R. 386.

(*x*) *Sheppards* v. *Wilkinson*, 6 T.L.R. 13.

(*y*) *Kay* v. *Barker*, L.R. 4 Ex. D. 283.

(*z*) *Harrison* v. *Bottenheim*, 26 W.R. 362.

(*aa*) *Wardens of St. Saviour's* v. *Gery*, 3 T.L.R. 668.

(*bb*) *Anglo-Italian Bank* v. *Wells*, ubi sup.; *Wallingford* v. *Mutual Society*, ubi sup

(*cc*) *Manger* v. *Cash*, 5 T.L.R. 271 (per Denman, J.).

(*dd*) *Ford* v. *Harvey*, 9 T.L.R. 329: *Manger* v. *Cash*, ubi sup.

(*ee*) *Wallingford* v. *Mutual Society*, ubi sup.

(*ff*) *Manger* v. *Cash*, 5 T.L.R. 272 (per Manisty, J.).

(*gg*) *Anglo-Italian Bank* v. *Wells*, ubi sup. (per Hall, V.-C.).

(*hh*) *Shurmur* v. *Young*, 5 T.L.R. 155.

(*ii*) *Bowes* v. *Caustic Soda & C. Syndicate*, 9 T.L.R. 328.

(*jj*) *Anglo-Italian Bank* v. *Wells*, ubi sup. (per Jessel, M.R.).

(*kk*) *Saws* v. *Hakim*, ubi sup.

that if a fair case for a defence was made out by the defendant, unless it was displaced by some undoubted documentary evidence, as an account shewing a balance due, or a letter promising to pay, the defendant ought to be allowed to defend; or, on the other hand, that if the defence set up was so met and disposed of, then the defendant ought not to be allowed to defend."

But, Wills, J., said, (*ll*) in entire disagreement with Pollock, B.'s statement of the practice, that "he could not help concurring with those judges who had said that, even though the case for the plaintiff appeared to be supported by documents and letters, yet it might be there was a defence; and if there was a fair probability of a defence, a defence ought to be allowed." . . .

In a case not belonging to either of the classes he mentions above, that is, where there is a prima facie case for the plaintiff, and prima facie a case for the defence, and then, as to the facts, the affidavits were entirely contradictory, Pollock, B. considered (*mm*) that leave to defend should be given.

Those numerous and sometimes conflicting definitions of the practice were still too relative and general in their language to furnish any really satisfactory practical criterion by which to judge of just what sort of a defence was necessary to be shewn in order to successfully resist a motion for judgment under Order XIV. This needed criterion has been supplied by the House of Lords in the case of *Jacobs* v *Booth's Distillery Co.*, above-mentioned and cited.

Jacobs, the (appellant) defendant, along with a co-defendant who did not contest his own liability, signed a memorandum of charge and two promissory notes to secure an advance and further moneys. Jacobs, who had received an indemnity from his co-defendant, stated that he had signed the memorandum and notes, relying on a representation made to him that he was thereby incurring no liability. The distillery company sued for the amount due from Jacobs and the co-defendant; and, on an application under this Order, the Master ordered that judgment should go against defendants unless the amount claimed was paid into court within seven days. This order, successively affirmed by the Judge-in-Chambers and Court of Appeal, was reversed by the House of Lords.

(*ll*) *Ward* v *Plumbley*, 6 T.L.R. 198.

(*m m*) *Saws* v. *Hakim*, ubi sup.

"I am somewhat surprised at the decision which has been arrived at by the tribunals before whom this question has come," the Lord Chancellor is reported (*nn*) to have said in the course of his judgment on the appeal. "I think that if this is an example of the mode in which Order XIV. is administered, it would be desirable for the Legislature to consider whether that order should continue to be put in force. People do not seem to understand that the effect of Order XIV. is that upon the allegation of the one side or the other, a man is not to be permitted to defend himself in a court; that his rights are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV. was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights."

"The view which I think ought to be taken of Order XIV.," said Lord James, in part, "is that the tribunal to which the application is made should simply determine 'Is there a triable issue to go before a jury or a court?' . . . It ought to make the order only when it can say to the person who opposes the order 'You have no defence. You could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact. We are not expressing any opinion whatever on the merits of the case. . . . On which side the chances of success are it is not for this House to determine, but thinking, as I do, that there is a fair issue to be tried by a competent tribunal, it seems to me to be perfectly clear that the order of the Court of Appeal ought to be reversed.'"

The effect of that most important unanimous decision of the House of Lords is thus summed up in the reporter's head note:

"Judgment should only be ordered under Order XIV., where, assuming all the facts in favour of the defendant, they do not amount to a defence in law."

For the purposes of this Order, a counter claim may be a defence. "The defendant says as regards the deed," said Jessel,

(*nn*) 85 L.T.R. p. 262.

M.R., on considering this subject, (*oo*) "that there is another covenant in that deed which you, the plaintiff, have broken, and that by reason of your breach of that covenant, I am entitled to claim damages from you; and if I establish the breach and get the damages, I may be entitled to set off those damages against the sum claimed in the action. I must remark that, as regards that form of defence, it is not necessarily a defence under this Order. It is quite true that you may, by way of counterclaim, bring forward under the pleading rules, a defence of set-off of damages, but even that is in the discretion of the judge. He may strike out the counterclaim when it is there, 'if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed.' So that it is merely a right depending on the discretion of the judge. It is not an absolute right to set off damages against a debt, and I must say, speaking for myself, that I should hesitate long before I allowed a defendant in an action on a bill of exchange to set up a case for damages by reason of the breach by the plaintiff of some other contract or the commission of some tort. I do not say that there cannot be a case where the two transactions may not be so connected, but at present I cannot even imagine the existence of such a special case." The view expressed by Thesiger, L.J., on the same appeal (*pp*) was that "if the defendants had disclosed by their affidavits facts sufficient to establish a good ground of counter-claim, I think the counter-claim would have been sufficiently connected with the cause of action in the present case to justify its being set up as a defence even to a liquidated claim on a bill of exchange."

Special considerations have been later held to sometimes regulate the discretion as to allowing a counter-claim as a defence to be set up in an action on a note, cheque or bill. "When a man gave a cheque," said the Divisional Court, (*qq*) "it was given and taken in payment, and as so much cash, and was not intended or understood as merely giving a right of action and putting the creditor to sue upon it and liquidate a counter-claim. If the defendant had a cross-claim let him sue upon it, but he ought first to pay his cheque."

(*oo*) *Anglo-Italian Bank* v. *Wells*, 38 L.T.R. 199.
(*pp*) Ibid, p. 20.
(*qq*) *Jackson* v. *Murphy*, 22nd July, 1887, noted at foot of p. 92, 4 T.L.R.

Stephen, J., one of the judges who decided the case above-cited, again (*rr*) having occasion to consider the subject, stated that "it was not, indeed, conclusive against a counter-claim set up that it was an action on a bill or note, and there might be cases in which a counter-claim arising out of a distinct transaction might be allowed. . . . . Without such strong ground, a counter-claim ought not to be allowed in an action on a bill, cheque or note which was not disputed."

"There might be either a defence to the claim which was plausible or there might be a counter-claim, pure and simple," said Lord Esher, in a clear statement of the practice to be applied where a counter-claim is set up (*ss*). "To shut out such a counter-claim, if there was any substance in it, would be an autocratic and violent use of Order XIV. The Court had no power to try such a counter-claim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded. If the counter-claim was for a less sum than that claimed, then judgment might be signed if there was no real defence for so much of the amount of the claim as was not covered by the counter-claim; but if the counter-claim overtopped the claim and was really plausible, then the rule, which had often been acted upon at Chambers, of allowing the defendant to defend without conditions, was the right one. There were, however, circumstances which might call on the Court . . . to act differently. If it was clear that the claim must succeed, and there was really no defence to it, and the plaintiff would be put to expense in proving his claim, then there ought to be judgment on the claim; but the matter must be so dealt with that defendants who had a plausible counter-claim must not be injured. That could be done by staying execution on the judgment until the counter-claim had been tried."

The various kinds of orders which may be made on applications under Order XIV. have been summarized under the following heads (*tt*).

(*rr*) *Newman* v. *Lever*, 4 T.L.R. 91.

(*ss*) *Sheppards* v. *Wilkinson*, 6 T.L.R. 13.

(*tt*) Laws of Summary Judgment under Order XIV, p. 117.

1. Dismissal of the application.
2. Unconditional leave to defend.
3. Leave to defend on terms.
4. Judgment for part of the claim—Leave to defend unconditionally or on terms as to the residue.
5. Judgment for the whole claim.

It is hoped that the law has been so collected in the foregoing portion of this article as to show in general the circumstances under which the Court has deemed itself warranted in taking the first and last of the above-mentioned courses.

The endeavor to ascertain the general principles upon which the Court proceeds when adjudicating along the remaining lines above indicated leads us to enquire as to what circumstances justify the imposition of terms upon a defendant.

"Leave to defend on terms," says Cavanagh, (*uu*) "should be given in those cases in which a defendant sets up or suggests a defence in the bona fides or sufficiency of which the judge does not believe." Of a similar tenor is the view expressed in the following often-quoted summary, attributed to Lord Coleridge, (*vv*), of the effect of the important cases interpretive of Order XIV. decided during the formative period in the development of the practice under the Order: "The cases shew that the true view of Order XIV. is that if there is a bona fide defence—not necessarily a good one, and not necessarily a right one—the defendant is not liable to be put on terms."

But Lord Esher, who considered (*ww*) it more correct to say that "If the judge was satisfied that there was a good defence he ought not to impose terms," believed that "the language of Lord Coleridge, as reported in *Yorkshire Banking Co.* v. *Beatson*, 4 C.P.D. 215, was most likely not accurately reported, as he was a party to the order in the present case," (*Shurmur* v. *Young*).

Shurmur v. *Young*, was an action to recover a liquidated sum of £352; and the defendant's affidavit, in answer to an application under Order XIV., Rule 1, for leave to sign final judgment for the amount endorsed on the writ, set up an agreement to pay the debt by instalments. The order of the Judge in Chambers,

(*uu*) Ibid, 120.
(*vv*) *Yorkshire Banking Co.* v. *Beatson*, 4 C.P.D. 215.
(*ww*) *Shurmur* v. *Young*, 5 T.L.R. 155.

allowing the defendant to defend as to £300 upon bringing that sum into Court, and giving unconditional leave to defend as to the residue, was affirmed by the Divisional Court (Coleridge, C.J., and Wills, J.). Defendant's counsel in the Court of Appeal cited *Yorkshire* v. *Beatson*, ubi. sup. et al., as supporting the contention that, where a defendant shewed on the face of his affidavit facts which amounted to a defence, he was entitled to have unconditional leave to defend, unless the affidavit contained contradictory statements, or unless documents were produced contradicting the statements in the affidavit. "It was said," replied Lord Esher, directing his attention to the foregoing argument, "that when the defendant's affidavit on its face shewed a defence, the judge would be obliged to give unconditional leave to defend. That is to say, if the defendant's affidavit shewed a defence on its face, the judge might give unconditional leave to defend, though the plaintiff's affidavit in reply shewed such defence to be of a most crumbly nature. It was further said that if the defendant's affidavit shewed a defence on its face, unconditional leave to defend must be given, unless the plaintiff, in reply, produced documents disproving the defence set up. There was no such rule. A judge might probably, if he was clear from the documents under the defendant's own hand that there was no defence, order judgment for the plaintiff; and if the documents shewed the defence to be not hopeless, but problematical, he might probably give unconditional leave to defend."

The writer has not found that Lord Coleridge himself ever questioned the accuracy of the report of the dictum attributed to him; while remarks made by that learned judge in *Ford* v. *Harvey*, (*xx*) long after Lord Esher's comments, and elsewhere (*yy*) incline one to accept the report as correct.

Ford v. *Harvey* was an action on a deed; by which a deceased person, (plaintiff's testator) then an attorney, assigned his practice to defendants for £5,000, to be paid by instalments, he covenanting with defendants that he would use his best endeavours (of which he was to be the judge) to promote the firm's welfare, and also that so long as the firm should duly make their payments he would not at any time practice directly or indirectly, as a solicitor.

(*xx*) 9 T.L.R. 329.

(*yy*) *Bowes* v. *Caustic S. & C. Syndicate*, 9 T.L.R. 328.

About £3,000 was paid off the purchase money, but since about three years before the action was brought the payments had fallen into arrear, and the firm had at various times acknowledged the indulgence of plaintiff's testator. Two years after the deed was executed, this person for whom plaintiff was executor, had been called to the Bar; and an equal length of time after the first default was made in the instalments, the defendants first complained that deceased had broken his covenants by practising as a solicitor. In the result the action was brought by the executor to recover the amount of the instalments then due. Plaintiff moving for judgment under Order XIV., defendants proposed to set up the alleged violations of the covenants on deceased's part by way of defence and counter-claim; but the judge in Chambers allowed this only on condition of defendants paying into Court the amount sued for. Defendants appealed to Divisional Court. "Surely," their counsel urged, "there was a fair and reasonable ground of defence and counter-claim on the plaintiff's (testator's) own covenants; and, if so, why should the defendants be called upon to pay the money into Court." Lord Coleridge in giving judgment said: "Some portions of the case had struck him. It was sufficient, however, to say that there was a bona fide complaint on the part of the defendants of the conduct of the late Mr. Ford. Whether, or how far that was well founded, it was not necessary to inquire. It was enough to say that it was clear that there was a bona fide counter-claim and defence; and that very serious questions might arise that ought to go before a jury. The condition, therefore, imposed by the learned judge ought to be set aside."

Thus, whatever may have been the very words Lord Coleridge used in *Yorkshire* v. *Beat.on*, that learned judge's view of the circumstances warranting the imposition of terms as a condition of leave to defend was clearly at variance with Lord Esher's. And so was that of Charles, J.; who, when defendant's counsel argued, in answer to a plaintiff's appeal to Divisional Court from an order giving unconditional leave to defend, (*zz*) that defendant had a good defence to the action, interrupted counsel with this remark: "It is not necessary for you to make that out; it is enough that there are fair grounds for setting up a defence."

(*zz*) *Ironclad G. M. Co.* v. *Gardner*, 4 T.L.R. 18.

Lord Esher's being a judgment of the Court of Appeal, while Lord Coleridge, and Charles, J., were Divisional Court Judges, and being aware that the attitude of the Court of Appeal in appeals from Divisional Court decisions in matters under Order XIV. was against interference with the exercise of discretion by the Divisional Court where it had permitted a defendant to defend—unless special, (*aaa*), very special, (*bbb*), circumstances were shewn, or indeed, in the words of Lord Esher, himself, (*ccc*), "unless they were absolutely certain that the Divisional Court was wrong," this conflict of opinion between the lower and higher courts need not, by itself, have occasioned much perplexity.

It appears, however, that the opinions of the judges of the Court of Appeal on this subject have also been conflicting. On the one hand, Lopes, L.J., stated, (*ddd*), that "he had often said that the summary judgment powers given under Order XIV. ought to be exercised with the greatest care. "It must be made reasonably clear that the defendant had no case before he was put upon terms to defend." . . . On the other hand, we find a quite different practice later laid down by Lord Esher in *Hong Kong & Shanghai B. Co.* v. *Java Agency Co.*, (*eee*). That was an action to recover balance of £11,682, for advances made by the bank to one Brand, defendant's agent at Batavia. It appeared that defendant Co. was incorporated for carrying on extensive business in Java. They gave Brand a power of attorney to open their business in Batavia; and, assuming to act under that power, Brand obtained from the Bank, for the purposes of the Company, the amount claimed in the action. The defendants alleged that Brand had no power to borrow such sums. Plaintiffs applied for summary judgment under Order XIV.; and the Judge at Chambers' order on that application granting leave to sign judgment against defendants, unless £11,682 were paid into Court, or security for same were given, was affirmed by Divisional Court. Defendants appealed to Court of Appeal contending that the power of attorney at the utmost only gave Brand power to borrow for certain purposes of the Company, and that plaintiffs must shew that Brand had borrowed and used the

(*aaa*) *Wing* v. *Thurlow*, 10 T.L.R. 151, per Lopes, L.J.
(*bbb*) Ibid, per Lord Halsbury.
(*ccc*) *Wardens of St. Saviours* v. *Grey*, 3 T.L.R. 151.
(*ddd*) *Sheppards* v. *Wilkinson*, 6 T.L.R. 13.
(*eee*) 8 T.L.R. 58.

money for these purposes. The appeal was dismissed. Lord Esher thought that "the Judge at Chambers was quite right in ordering the defendants to pay the money in as the condition of defending the action. It could not be said that the defendant had no defence, nor, on the other hand, could it be said that they had a clear defence. . . . The only question to be tried was whether the agent in borrowing the money had exceeded his authority under the power of attorney. That was a defence which did not seem to have much probability of success. The condition imposed, therefore, was not at all too severe."

Quite as conflicting as the decisions on the general question of the circumstances justifying the imposition of any terms at all upon defendant, (*fff*), have been those dealing with the special subject of payment into Court by defendant, within a set time, of the whole or part of the amount claimed as a condition of leaveto defend—the usual terms imposed.

It is noteworthy that while the Act of 1855, already discussed, enacted "that leave to appear and defend to be given on defendant paying into Court the amount indorsed on the writ," Lord Bramwell held, (*ggg*), with regard to the provision on this point contained in Order XIV., rule 3, that it was within the discretion of the judge to refuse leave to defend, notwithstanding defendant's offer to bring the whole sum claimed into Court. Such an offer is "a circumstance connected with the defendant's case which a judge is bound to take into consideration; but it is not decisive in the defendant's favour."

It is said that this right (to defend the action) is not taken away here," remarked the last named learned judge in one of the earliest cases under Order XIV. (*hhh*) because the defendant may bring the money into Court or give security for it; but those conditions practically may take away the power to defend, and they should only apply where there is something suspicious in the defendant's mode of presenting his case."

Cotton, L.J., is reported (*iii*) as saying, in a decision rendered about the same time as Lord Bramwell spoke: "if the defendant's

(*fff*) *Bowes* v. *Canstie*, ubi sup.
(*ggg*) *Crump* v. *Cavendish*, L.R. 5 Ex. D. 213.
(*hhh*) *Lloyds B. Co.* v. *Ogle*, L.R., 1 Ex. D. 263.
(*iii*) *Roy* v. *Banker*, L.R. 4 Ex. D. 283.

affidavit sets up a good defence, the Court has no discretion, and cannot order the money claimed to be paid into Court." Lord Esher questioned (*jjj*) the accuracy of that report, too, in *Shurmur* v. *Young*. "As to the sentence quoted from the judgment of Lord Justice Cotton," his Lordship says, ". . . as appeared from the report of the case in 48 L.J. Ex. 589, and 27 W.R. 745, the report of his language was not accurate. What he did say was: 'If the judge is satisfied that there is a defence.' The effect of the rule, therefore, was that if the defendant satisfied the judge that he had a good defence, the judge could not order judgment to be signed. If the defendants shewed such facts as might be deemed sufficient to entitle him to defend, the judge could not order judgment to be signed."

On the neat point as to what circumstances justify the Court in ordering a defendant to pay money into Court as the condition of defending the action, Lord Esher's own opinion has been above stated (*kkk*).

In a foregoing paragraph (*lll*) it will also be seen that the statement of practice contained in the reports of Cotton, L.J.'s words which Lord Esher believed to be correct, corresponds closely to what Lord Blackburn is said to have laid down about the same time. It corresponds, too, with Hawkins, J.'s statement (*mmm*) that "the only question was whether, under the circumstances, it was reasonable to allow the defendants to defend the action. If so, they ought to be allowed to do so, without having to pay the money into Court."

Manisty, J., observed (*nnn*) that he had always since the case (in which Lord Blackburn expressed the opinion above set out) acted on the principle that if there was a real and bona fide defence, the plaintiff ought not to be allowed to take a summary judgment, nor the defendant required to find money on security. In some cases it had been found that this ought not to have been required, and this shewed how cautious the courts should be in making such orders." Wills, J., held, (*ooo*) that "if there was a

(*jjj*) *Shurmur* v. *Young*, 5 T.L.R. 155.
(*kkk*) *Hongkong & Shanghai B. Co.* v. *Java A. Co.*, ubi sup.
(*lll*) *Wallingford* v. *Mutual Society*, ubi sup.
(*mmm*) *Bowes* v. *Caustic S. & C. Syndicate*, ubi sup.
(*nnn*) *Manger* v. *Cash*, 5 T.L.R. 211.
(*ooo*) *Ward* v. *Plumbly*, 6 T.L.R. 198.

fair probability of a defence, a defence ought to be allowed to defend without imposing the condition of payment into Court, for perhaps the defendant had . . . no money to pay ; and if that were so, and he was deprived of the opportunity of defence, a poor man would, merely, on account of his poverty, be put in a worse position than a rich one, which as far as possible should be avoided."

Through all those diverse expressions of opinion, introducing, as above appears, the relative elements of suspiciousness, plausibility, and probability, one searched in vain for any definite criterion. Again, *Jacobs* v. *Booth's Distillery Co.* has supplied the need. Brushing aside, as immaterial, those considerations on which so much stress has heretofore been laid, considerations which prevented there being any satisfactory standard by which to judge, the House of Lords has, as the head note says, (*ppp*) laid it down that "where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the Court, either by having judgment signed against him, or by being put under terms to pay money into Court as a condition of obtaining leave to defend."

Further, on the general question of imposing terms upon a defendant the practice has been likewise precisely defined in Lord Chancellor Halsbury's and Lord James' judgments in that leading case. The effect of those judgments has been stated (*qqq* to be that "the defendant is entitled to unconditional leave to defend whenever he alleges facts which, however improbable or suspicious, would, if proved, be a good defence in law to the claim ; the only cases for terms are those in which judgment might be ordered, but for some reason the judge in his discretion sees fit to impose terms."

Thus that decision of the House of Lords has been regarded as even more favourable to a defendant than Wills, J.'s opinion (*rrr*) that "unless one is prepared very nearly to give judgment for plaintiff, we ought not to impose conditions which may prevent the trial of the action."

(*ppp*) 85 T.L.R. 262.

(*qqq*) Yearly Practice (1903), 211.

(*rrr*) *Wing* v. *Thurlow*, 10 T.L.R. 530.

It is noteworthy, also, that any terms imposed should not restrict the defendant to particular lines of defence, so as to preclude him from bringing forward at the trial every "triable issue" he has to raise. On this point the remarks of Davey, L.J., on an appeal in an action (*ww*) brought against a defendant as acceptor of a bill of exchange might be referred to. The order of the Master referring that action to the Short Cause List under Order XIV., rule 8, provided that "this action is to be referred to the Short Cause List, the sole question being whether the plaintiff is the bona fide holder for value." It was admitted that the bill was overdue when the plaintiff took it; and the question before the judge was whether it was open to the defendant upon the Master's order to object that the plaintiff was not the holder in due course, and that he took the bill subject to all the equities attaching to it. The judge held that he could only go into the question whether the plaintiff was a bona fide holder for value; and gave judgment for plaintiff with costs. The defendant successfully appealed to the Court of Appeal. Davey, L.J., said in his judgment in the higher court: "He did not understand the Master's order as restricting the right of the defendant to make any such defences to the action as he could, but rather as explaining the reason why he thought it a proper case to go into the Short Cause List. If that was not the meaning of the order, he doubted whether the Master, having given leave to defend, could dictate to the defendant how he should restrict his defence."

Another branch of the enquiry concerning the exercise of the judicial discretion conferred by Order XIV. is the question as to what stage in the course of an action that discretion is validly exercisable.

It will be noticed that the Order contains no express provision on this subject. In a number of cases the motion for summary judgment was not made until after the delivery and close of the pleadings (*rrr*). Cavanagh stated, (1887), (*sss*) as a result of his researches, that there was only one reported English case (*ttt*) in which the decision was based on the stage of the action at which the application was made; and that, since the facts of the one case

(*ww*) *Langton* v. *Roberts*, 10 T.L.R. 492.
(*rrr*) *Hamner* v. *Flight*, 36 L.T. 276; *Wagstaff* v. *Jacobwitz*, W.N. (1884) 17.
(*sss*) Law of Summary Judgment, 86.
(*ttt*) *Fowler* v. *Lee*, W.N. (1876) 86.

were peculiar, there did not appear to be any definite authority as to the precise period at which Order XIV. ceased to be applicable. This question has since been decided. In an action (*uuu*) on a writ of summons specially indorsed, to recover £129, the plaintiff moved, after the statement of defence had been delivered, for summary judgment, on the ground that there was no defence to the demand. Field, J., thought that "under the terms of the Order and according to the practice of the Court, such a judgment should not be allowed to be taken after a statement of defence had been delivered." The plaintiff appealed, and asked that Field, J.'s decision be set aside, unless the defendant paid the amount demanded into court. The Divisional Court took time to ascertain by conference with the judges what was the practice of the courts. Pollock, B., who delivered the judgment of the court, holding that the plaintiff was not necessarily too late in applying, and that his motion should be heard before the judge in Chambers on the merits, said, in part: "No doubt the intention of the rule is that the plaintiff may and ought, unless special circumstances exist, to make his application as soon as the writ of summons is issued, and at some time before the statement of defence is delivered. But we think that there may be peculiar cases, as cases in which there has been improper conduct on the part of the defendant, and to which that restriction in the rule may not apply. But there may be cases in which the defendant may have advanced the delivery of his statement of defence with the very object of defeating the application for judgment. Again, there may be cases in which the statement of defence itself may shew that there is no real defence, and that it is a "sham" defence, so that it is a proper case for the application of the order. It appears to us, therefore, that the proper view is that, though the primary intention of the rule may be that the application should be made within a reasonable time, and in general that will be before the statement of defence has been delivered, yet that that is not a compulsory or absolute restriction, and that it does not absolutely preclude the plaintiff from making the application nor deprive the judge of his discretionary power to allow it."

In conclusion, there remains to be considered the question whether there can be renewed an application for summary judg-

(*uuu*) *McLardy* v. *Slateum*, 6 T.L.R. 185.

ment which has once been dismissed by the tribunal exercising the discretion we have been discussing.

Although that question has been several times raised (*w3*) in Ireland under a rule there similar to English Order XIV., and uniformly answered in the negative, the English practice on the point seems to be conflicting. Matthew, J., considered the question in an action (*w4*) wherein the writ was issued in April, 1883. A summons under the Order issued about a month later, and was dismissed by the Master. There was no appeal taken against the Master's decision. In August, 1883, the pleadings were closed; and in January, 1884, a second summons under the same Order was taken out. It was alleged in the plaintiffs' affidavit that they had just discovered a letter containing an admission. On behalf of defendant, it was argued that such an allegation did not enable the plaintiffs to make a fresh application: that there was no jurisdiction to hear the (second) summons, the dismissal of the first summons being conclusive. Matthew, J., allowed the second summons; and said: "The plaintiffs can make a second application on fresh materials. The Master who heard the first application only decided that a case for judgment was not made out on the then materials."

Cavanagh objected (*w5*) that the above quoted opinion of Matthew, J., is erroneous; and, as authority for his objection, referred to the doctrine of res judicata (*w6*) and cited Irish decisions (*w7*). It certainly does seem hard to reconcile the view of Matthew, J., with that expressed in the following words of one of superior jurisdiction (*w8*): "It is always necessary that parties should not be at liberty of their own accord to litigate their case again on fresh evidence. If a person litigates his case, he ought to come with such evidence as he thinks will prove it, and it would be perfectly wrong in principle to allow a man who has failed on the evidence which he thought was sufficient, and which he contended was sufficient to establish his title, on a fresh petition . . . and when he has found that a link was missing in the evidence, to come

(*w3*) *Keily* v. *Massey*, 6 L.R. Ir. 445; *French* v. *Mulcahy*, 8 L.R. Ir. 146.
(*w4*) *Wagstaff* v. *Jacobwitz*, W.N. (1884), 17.
(*w5*) Law of Summary Judgment, 90.
(*w6*) *Joynes* v. *Collinson*, 13 M. & W. 558; *Re May*, 25 Ch. D. 337; 25 Ch. D. 516, et al.
(*w7*) *Kiely* v. *Massey*, ubi sup; *French* v. *Mulcahy*, ubi sup.
(*w8*) Per Cotton L.J., L.R. 28 Ch. D. 520.

forward, knowing exactly where the blot is, and try and get the case tried over again with the old evidence and the evidence which he has since discovered, in order to meet that blot."

Difficult, too, is it to reconcile Matthew, J.'s opinion with that of Wigram, V.-C. (*w9*) to the effect that, when a given matter became the subject of litigation, the court required the parties to that litigation to bring forward their whole case, and would not, except under special circumstances, permit the same parties to re-open the same subject of litigation."

Some light on the question whether an application under Order XIV. can be renewed on fresh materials, but without change of circumstances, may be gained from the consideration of a later case (*w10*), even though the decision there was based on another ground. On the return of the first summons under Order XIV. in that action, it was objected to as bad in form, and exception was also taken to the affidavit filed in support of the summons. The District Registrar, before whom the matter came up, thereupon suggested that the summons should be dismissed, so that a new summons might be taken out; and wrote "summons dismissed" on the summons, but without date or signature. A second summons was taken out, but, when it came on to be heard, the defendant's counsel contended that, as the first summons had been dismissed, a second one could not be taken out. The defendant did not file any affidavit of merits. The Registrar made an order for judgment; which was affirmed by Pollock, B., on appeal. In support of defendant's appeal to the Divisional Court, it was argued that there had been in fact no adjudication by the Registrar, and that even on the merits, if fresh materials were provided, a fresh application could be made.

Vaughan Williams, J., however, interrupted counsel by referring to a case where, in that learned judge's own experience at the Bar, a Divisional Court had held that this could not be done in the case of fresh evidence being forthcoming. Unfortunately, the name of the case referred to by Williams, J., is not given in the report; and the writer has not found it elsewhere. The above mentioned case decided by Matthew, J., was discussed on the argument, but the remarks of Wills, J., in which his colleague

(*w9*) *Henderson* v. *Henderson*, 3 Hare 115.

(*w10*) *Sykes Brewery Co.* v. *Chadwick*, 7 T. L. R. 258.

concurred, clearly indicate that neither he nor Williams, J., considered that the point decided by Matthew, J., was finally settled by authority. "The appeal must fail," said Wills, J., "and on the simple ground that the Registrar, under the circumstances, had not really adjudicated between the parties at the first summons. . . The summons might, therefore, be treated as an abandoned summons. . . It was not necessary, therefore, to decide the question; which was certainly of importance, as to whether, when there had been an adjudication, a second application might be made under Order XIV.; and, if not necessary, it was not right to affect to decide it."

It is submitted that the effect of the foregoing case is to add much additional weight to the view that when an application under Order XIV. has been once finally disposed of on the merits (*xvii*), it cannot be renewed otherwise than by way of appeal.

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(*xvii*) Vide *Dewar* v. *Winder*, 12 T.L.R. 54, as to the proper practice to be followed where judgment under Order XIV. has, by mistake, been signed for less than the actual amount of the claim.

The *Calcutta Weekly Notes* takes pride in the celerity with which some heavy litigation before the Courts there has been disposed of. Such reading is refreshing. It is noteworthy that the hearing of the case referred to, which was as to the construction of a will, occupied 45 days; the paper books consisted of 1,353 quarto pages, and the argument in the appellate court consumed 18 days.

The *Law Magazine and Review* for February has a helpful article on "Compensation or damages after completion." The writer divides the cases into which the purchaser asks compensation or damages after the completion of the purchase into three heads: (1) Where the vendor's title proves defective; (2) Where there has been misrepresentation as to the quality or quantity of the property sold; (3) Where there has been some collateral undertaking on the part of the vendor.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

POLICY - MORTGAGE—NOTICE—PRIORITY.

In re Lake (1903) 1 K.B. 151, was a conflict between two mortgagees of the same policies of insurance as to which was entitled to priority. The facts were that a solicitor being indebted to a client executed a mortgage of the policies in his favour, but did not inform the client of the existence of the mortgage, nor give notice thereof to the insurance offices. Subsequently being indebted to another client, he made a second mortgage of the same policies to a clerk in his office as a trustee for this other client, but did not disclose the existence of the first mortgage. Notice was duly given to the insurance offices of the second mortgage. On the subsequent bankruptcy of the solicitor the first mortgage was discovered. On this state of facts Wright, J., held that there was nothing to take the case out of the ordinary rule that in the case of a double assignment of a chose in action the assignee who first gives notice to the debtor is entitled to priority.

SALE OF GOODS - NEGLIGENCE - DANGEROUS ARTICLE - KNOWLEDGE OF VENDOR - DUTY OF VENDOR TO PURCHASER - WARRANTY OF FITNESS.

Clarke v *Army and Navy Cooperative Society* (1903) 1 K.B. 155. The action was by husband and wife; the female plaintiff was the purchaser not of a weapon of offence but a supposed to be harmless disinfectant called chlorinated lime done up in a tin. It appeared that tins of the same compound had been previously sold by the defendants to other customers and they had been informed by two persons that accidents had taken place in opening the tins. The defendants' manager gave instructions to his assistants that a warning should be given to purchasers of similar tins of the necessity of care in opening them, but despite these instructions a tin was sold to the female plaintiff without any such warning, and in opening it some of the contents flew up into her eyes, occasioning the injury for which the action was brought. The jury found that the tins were badly constructed and conducive to danger, and

that the defendants were negligent in not taking steps to stop further accidents, and Wills, J., who tried the action, gave judgment for the plaintiff. On appeal the judgment was affirmed by the Court of Appeal (Collins, M.R., Romer, and Mathew, L.JJ.). The defendants relied on one of their rules which provided that "no warranties were given with the goods sold by the society except on the written authority of one of the managing directors or the assistant manager," and that the female plaintiff bought the goods subject to that rule. But the Court of Appeal held that even if the rule overrode the provisions of s. 14, sub.-s. 1, of the Sale of Goods Act, whereby the seller impliedly warrants the fitness of goods sold for a particular purpose, which Collins, M.R., and Romer, L.J., were inclined to think it did not, yet that the defendants had been guilty of negligence in not giving warning to the purchaser of the tin in question of the danger to be incurred in opening it.

PRACTICE—SOLICITOR AND CLIENT—SOLICITOR ACTING AS PARLIAMENTARY AGENT COSTS INCURRED AS PARLIAMENTARY AGENT TAXATION.

In re Baker (1903) 1 K.B. 189. Solicitors who had acted solely as parliamentary agents delivered a bill of their costs, and on the application of the clients under the Solicitor's Act an order was made referring it to a master for taxation. By two Acts the costs of parliamentary agents are regulated and provisions made for their taxation, and the solicitors contended that it was only under those Acts the taxation could be had, and the Court of Appeal (Collins, M.R., and Romer, L.J.) so held, and reversed the order of Ridley, J.

LANDLORD AND TENANT—COVENANT NOT TO MAKE ALTERATIONS IN DEMISED PREMISES—ERECTION OF CLOCK OUTSIDE DEMISED PREMISES—TRADE SIGN.

Bickmore v. *Dimmer* (1903) 1 Ch. 158, was an action by a lessor for a mandatory injunction to compel a tenant to remove a clock erected on the outer wall of the demised premises as an advertisement for his business, such erection being alleged to be a breach of a covenant not to make alterations in the demised premises without the written consent of the lessor. Farwell, J., granted the injunction, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) reversed his decision, and held that the plaintiff was not entitled to succeed, on the ground that the erection of the clock was not an 'alteration' within the meaning of the covenant.

COMPANY—STATUTORY POWERS—POWER OF COMPANY TO CHARGE SURPLUS LAND—CHARGE TO SECURE EXISTING DEBT.

In *Stagg* v. *Medway Navigation Co.* (1903) 1 Ch. 169, the plaintiff, a shareholder in the defendant company, applied for an injunction to restrain the company from giving a charge on its surplus lands to one of its creditors. The company was incorporated by statute (which did not incorporate the Land Clauses Act), and was empowered to borrow money upon a security of a mortgage of their undertaking, but no express power was given to mortgage their surplus lands. Eady, J., held that the company could create a valid charge upon their surplus lands to secure an existing debt in respect of which the creditor might recover judgment and obtain execution against the lands, and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) affirmed his decision.

ASSIGNMENT OF REVERSIONARY INTEREST—NOTICE OF ASSIGNMENT TO TRUSTEE—PRIORITY—DEATH OF TRUSTEE AFTER NOTICE OF ASSIGNMENT.

In re Phillips (1903) 1 Ch. 183, was a contest for priority between two assignees of a reversionary interest. The first assignee in point of time gave notice of his assignment to one of several trustees, but it did not appear that he communicated the notice to his co-trustees. He died, and a second assignment of the interest was made and due notice thereof was given to all the three existing trustees, and it was held by Kekewich, J., that the second assignee was entitled to priority over the first, following *Timson* v. *Ramsbottom*, 2 Keen 35; 44 R.R. 183.

HUSBAND AND WIFE—POLICY OF ASSURANCE EFFECTED BY HUSBAND FOR "BENEFIT OF HIS WIFE AND CHILDREN"—DEATH OF WIFE, AND RE-MARRIAGE OF HUSBAND—MARRIED WOMEN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75) S. 11—(R.S.O. C. 203, S. 169).

In re Browne, Browne v. *Browne* (1903) 1 Ch. 188. Under a clause in the Married Women's Property Act, 1882, s. 11, similar in its provisions to R.S.O. c. 203, s. 159, a man effected a policy of insurance on his life "for the benefit of his wife and children." After the policy had been effected his wife died, leaving seven children surviving; and the assurred afterwards married again and had a child by his second wife. On his death the question arose who was entitled to the insurance moneys. Kekewich, J., held that the wife and child of the second marriage were entitled to

participate therein jointly with the children of the first marriage The case we may observe is one of first impression.

WILL—CONSTRUCTION—ILLEGITIMATE CHILD.

In re Smilter, Bedford v. *Hughes* (1903) 1 Ch. 198, the point to be solved was whether an illegitimate child was entitled to take under a gift to the issue of his father. The testator in a prior part of his will had given the proceeds of certain property upon trust for the children of his nephew George, "including among such children Samuel, the illegitimate son of my said nephew." The testator then gave the proceeds of certain other property upon trust for such of eight named nephews and nieces (including George) as should be living at the death of his niece Mary, and the issue living at the death of Mary of such of his other nephews and nieces as should die in her lifetime leaving issue. George predeceased Mary, leaving issue, one illegitimate son, namely Samuel; and the question was, therefore, whether Samuel was entitled to take under the latter disposition, and Kekewich, J., held that he was, at the same time admitting that the later decisions had departed somewhat from the strict rule originally laid down in such cases by Lord Eldon.

PRACTICE—DEBENTURE HOLDERS' ACTION—RIGHT OF PLAINTIFF TO STAY PROCEEDINGS AFTER JUDGMENT IN CLASS ACTION.

In re Alpha Co., Ward v. *Alpha Co.* (1903) 1 Ch. 203, was an action instituted by a debenture holder on behalf of himself and all other debenture holders of a limited company for payment of the debentures and appointment of a receiver. After judgment directing accounts, etc., the plaintiff's claim was satisfied and the defendant company moved to stay all proceedings, and the question was raised whether the rule which prevails in creditors' actions precluded the plaintiff from discontinuing the action after judgment. Kekewich, J., while admitting that the plaintiff could not after judgment deprive other debenture holders of the benefit of the judgment if they thought fit to prosecute it, yet considered that a debenture holder's action differs from an ordinary administration action, and that the plaintiff in such an action, even after judgment, if not required by any other debenture holder to go on with it, is at liberty to discontinue it. It must be confessed the reasoning of the learned Judge does not appear to be very

conclusive, and we should doubt whether, notwithstanding such discontinuance, another debenture holder might not, on application, be allowed to intervene and continue the prosecution of the action.

CHARITY—GIFT FOR BENEFIT OF INSTITUTION—INSTITUTE ERECTED FOR GENERAL BENEFIT OF INHABITANTS—USE FOR PURPOSES NOT STRICTLY CHARITABLE—GENERAL CHARITABLE INTENTION.

In re Mann, Hardy v. *Attorney-General* (1903) 1 Ch. 232, was an application by the executors of a deceased lady for the purpose of determining whether a bequest of £3,000 took effect. The sum in question was bequeathed to trustees to be applied at their discretion for the benefit of the Mann Institute. This institution had been erected by the testatrix in her lifetime for the general benefit of the inhabitants of the place where it was erected. The building had never been conveyed to trustees, nor had any charitable trust thereof been created, and it remained in the testatrix's own control at the time of her death. The building had been partly used for recreation, part was let at a nominal rent for workingmen's clubs, and part used for concert halls, lectures and religious and other meetings, and there were also bedrooms used for convalescents. The institute had devolved upon the residuary devisees named in the will, and it was contended that no charitable purpose could be inferred from the way in which it had been used, because those purposes were not charitable, and that the gift was to the building which could not now be used for charitable purposes without the consent of the trustees. But Farwell, J., thought that although the institute could not be used in the way it had been in the testatrix's lifetime without the consent of the residuary devisees, the will indicated that the £3,000 was intended not for the building but for the purposes for which the institute had been founded, for the general benefit of the inhabitants, and that that was a good charitable purpose, and he directed a scheme to be framed for the application of the fund.

PARTNERSHIP—ASSIGNMENT OF SHARE—AGREEMENT TO PAY SALARIES TO PARTNERS—PARTNERSHIP ACT, 1890 (53 & 54 VICT. C. 39) SS. 24, 31.

In re Garwood, Garwood v. *Paynter* (1903) 1 Ch. 236, was a case which turned on the provisions of the Partnership Act, s. 31, which regulates the rights of assignees of individual partners. It

has been said that the Partnership Act is merely declaratory of pre-existing law, but whether this particular provision comes under that category may be open to doubt. The point was this, a partner assigned his share to secure a certain sum of money. After the assignment an agreement was bona fide come to between himself and his co-partners that in consideration of their doing more work they should be paid salaries. It was proved that this was a bona fide arrangement and that the partners had done the work as stipulated. The assignee contended that this arrangement prejudiced him as it diminished the profits and therefore was void. But Buckley, J., held that although under s. 24 a partner is not entitled to remuneration for acting in the partnership business, yet that did not preclude the partners making an express agreement to the contrary, and that as by s. 31 an assignee is not entitled to interfere in the management or administration of the partnership business, and was bound by all bona fide agreements in the management and administration of the business, and that the agreement in question came under that head and was therefore binding on the assignee.

LEGACY—ADEMPTION.

In re Smythies, *Weyman* v. *Smythies* (1903) 1 Ch. 259, Eady, J. held that a pecuniary legacy to a trustee for an infant to whom the testator does not stand in loco parentis is not adeemed by a subsequent gift of the same amount to the same trustee for the same purpose.

WILLS—RESIDUARY DEVISE—LAPSED DEVISE—WILLS ACT (1 VICT. C. 26) S. 25—(R.S.O. C. 128, S. 27).

In *Mason* v. *Ogden* (1903) A.C. 1, the House of Lords (Lord Halsbury, L.C., and Lords Shand, Davey and Robertson) have affirmed the judgment of the Court of Appeal (1901) 1 Ch. 619 (noted ante vol. 37, p. 452). A testator having several houses at Wimbledon gave one of them to his son (which devise lapsed by reason of the devisee being a witness to the will) he then devised all the rest and residue of his estate at Wimbledon and elsewhere. The Court of Appeal, decided that this was a residuary devise within the Wills Act, s. 25 (R.S.O. c. 128, s. 27) and carried the property included in the lapsed devise, which conclusion is affirmed.

Dominion of Canada.

SUPREME COURT.

Que.] DONOHUE *v.* DONOHUE. [Feb. 11.

Appeal—Jurisdiction — Matter in controversy — Removal of executors—Acquiescence in trial court judgment.

The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors, though by the action an account for over $2,000 had been demanded and refused by the judgment at the trial, against which the plaintiff had not appealed. *Noel* v. *Cherrefils*, 30 S.C.R. 327, followed; *Laberge* v. *Equitable Life Assurance Society*, 24 S.C.R. 59, distinguished. Appeal quashed with costs.

Belcourt, K.C., for motion. *Falconer*, contra.

Que.] DREW *v.* THE KING. [March 26.

Criminal law—Perjury—Judicial proceeding—De facto tribunal—Misleading justice—Jurisdiction—Construction of statute.

An information under R.S.Q., art. 5551, for trespass upon lands in the County of Huntingdon, in the District of Beauharnois, was laid, heard and decided before the Recorder of Valleyfield, an ex officio justice of the peace within the whole district, but who did not reside in the county where the offence was charged to have been committed and was, therefore, without jurisdiction to hear the case, as R.S.Q., art. 5561, provides that such offences shall be cognizable only by a justice or justices resident within the county where the offence has been committed.

Held, affirming the judgment appealed from (Q.R. 11 K.B. 477), TASCHEREAU, C.J., dissenting, that the hearing of said charge by the Recorder, acting as a justice of the peace having power to hear it, was a judicial proceeding within the meaning of s. 145 of the Criminal Code, and that the appellant was rightly convicted of perjury committed by him upon such hearing, notwithstanding that the recorder had no jurisdiction over the subject matter of the complaint. Appeal dismissed.

Wilson, for appellant. *Duncan McCormick*, K.C., for the Crown.

N.S.] GREEN *v.* MILLER. [March 26.

Libel—Privilege—Proof of malice—Admissibility of evidence—Misdirection—New trial.

G., local manager for Nova Scotia of the Confederation Life Assurance Co., of which M. had been a local agent, wrote to Mrs. Freeman, a policy

holder, the following letter: "I think you know that at the time of my recent visit to Bridgetown I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which up to the present time we have been unable to get him to report, and I am told that he is doing and saying all he can against myself and the company. The receipt for your premium fell due May 30th, days of grace June 30th. If you have made settlement of the premium with Mr. Miller your policy will, of course, be maintained in force, and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so I am prompted to write you this letter and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy."

In an action by M. for libel it was shewn that he had not been dismissed from the agency, but wanted larger commissions in continuing which were refused, and that he was not a defaulter but was dilatory in making his returns. On the trial Mrs. Freeman gave evidence subject to objection, of her understanding of the letter as imputing to M. a wrongful retention of money.

Held, that such evidence was improperly received and there was a miscarriage of justice by its admission.

The judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and his protection is taken away."

Held, that this was misdirection; that the question for the jury was not the truth or falsity of the statements, but whether or not, if false, the defendant honestly believed them to be true; and that it was misdirection on a vital point.

The majority of the Court were of opinion (GIROUARD and DAVIES, JJ., contra) that as defendant had asked for a new trial only in the Court

below this Court could not order judgment to be entered for him and a new trial was granted. Judgment of the Supreme Court of Nova Scotia, 35 N. S. Rep. 117, reversed. Appeal allowed with costs.

W. B. A. Ritchie, K.C., for appellant. *Roscoe*, K.C., for respondent.

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALTY DISTRICT.

McDougall, Loc.J.] MCLAREN *v.* THE "ISHPEMING." [NOV. 24, 1902.

Maritime law—Wages—Arrest on telegram—Rescue—Contempt of Court.

Action against a foreign ship for wages. A warrant of arrest had been issued, and a telegram sent by the Marshal to his deputy at Port Stanley, where the ship then was, to arrest the ship, and that a warrant had been issued and mailed to him. The deputy thereupon, before receiving the warrant, went on board, read a copy of the writ of summons and of the Marshal's telegram to the master of the ship, and informed him that the ship was under arrest, and tacked up a copy of the writ of summons. The deputy, having temporarily left the ship, the same was towed out of the harbour and continued on her voyage.

Plaintiffs now moved for an order of attachment against the master for contempt of Court in releasing and rescuing the ship from arrest. The master filed his affidavit that he had given no orders to move the ship, and was not aware that the mate had done so until the ship had reached the next port, and that he then decided that it would be useless to return. It was also contended that there was no valid arrest, the warrant not having arrived until after the ship had left, and that notice of the warrant was insufficient.

Held, that the arrest upon the telegram was valid, and that the master was guilty of contempt of Court, but he now apologizing and bringing into Court a sum sufficient to cover the claim and costs, order made that upon payment of the costs of the motion the ship be released from the warrant. *The Seraglio* (1885) L.R. 10 P.D. 120, followed and applied.

Tremeear, for the motion. *H. J. Wright*, contra.

Province of Ontario.

COURT OF APPEAL.

From Lount, J.] [Jan. 26.

IN RE CITY OF KINGSTON AND KINGSTON LIGHT, HEAT, AND POWER CO.

Company—Sale of gas works to municipality—Arbitration as to price—Franchise—Ten per cent. addition.

By 54 Vict., c. 107 (O.), the company was protected against compulsory parting with its works and property to the city until May, 1911; but by an

agreement made in 1896 it was provided that, upon the city giving one year's notice, it would have the option of purchasing and accepting all the works, plants, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business. The city having exercised its option.

Held, affirming the decision of LOUNT, J., 3 O.L.R. 637, that, in ascertaining the price to be paid to the city, the arbitrators were right in allowing nothing for the value of the earning power or franchise of the company; and in refusing to add ten per cent. to the price as upon an expropriation under R.S.O. 1887, c. 164, sec. 99.

Walkem, K.C., and *Whiting*, K.C., for the company (appellants). *McIntyre*, for the city.

HIGH COURT OF JUSTICE.

Meredith, J.] IN RE WILLIAMS. [Jan. 23.

Will—Construction—"All my children"—Children of predeceased child.

The testator by his will directed that after the death of his wife his estate should "be divided amongst all my children." One daughter died, leaving issue, before the execution of the will.

Held, that the daughter's children did not take directly under the will, nor by virtue of s. 36 of the Wills Act of Ontario, there having been no gift to their parent.

D'Arcy Tate, for the executor and children of testator. *Hobson*, for adult grandchildren. *Harcourt*, for infant grandchild.

Street, J., Britton, J.] [Mar. 21.

SHUTTLEWORTH *v.* MCGILLIVRAY.

Husband and wife—Gift from husband—Change of possession—Execution creditor.

Interpleader issue.—The defendant purchased certain pictures and bringing them home handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother, and all three were hung up in the house occupied by her and her husband. Some six or seven years afterwards an execution creditor of the defendant caused the sheriff to levy on these pictures. Hence this interpleader issue.

Held, that since the Married Woman's Property Act of 1884 (R.S.O. 1897, c. 163, s. 3,) a married woman was under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her

husband. That in this case the subsequent possession of the pictures was the wife's although the house was occupied by her husband and herself.

Held, also, that the effect of sub-s. 4 of s. 5 of R.S.O. 1897, c. 163, whereby it is enacted that a woman married since March 4, 1889, may hold her property free from the debts or control of her husband, "but this sub-s. shall not extend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from the husband during marriage liable to the husband's debts. This sub-s. must be read in connection with s. 3, sub-s. 1, and a wife is placed precisely in the position of a feme sole with regard to property transferred to her by her husband during coverture; and therefore she can hold the property against his creditors unless the transfer is made for the purpose of defeating them; and there was no evidence of such purpose here.

John A. Meredith, for claimant. *J. H. Moss*, for execution creditor.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] RUGGLES *v.* VICTORIA BEACH RAILWAY CO. [Feb. 21.

Defence arising after action—Costs—Judge's discretion.

Under the provisions of O. 24, r. 3, where any defendant in his statement of defence alleges any ground of defence which has arisen after the commencement of the action the plaintiff may deliver a confession of such defence, and may thereupon sign judgment for his costs up to the time of pleading such defence, unless the Court or a judge otherwise orders. In an action by plaintiff claiming damages for trespass to land taken by defendant company for railway purposes, to which a defence had been pleaded, the defendant company pleaded a defence arising after the commencement of the action, which plaintiff then confessed and entered judgment under the above rule for his costs. An application to set aside the judgment was refused on the ground that the defence necessarily operated as a waiver of the grounds previously set up, and that the judgment should not be set aside and the case sent to trial unless the defendant company agreed to withdraw the subsequent defence. An order having been thereupon made dismissing the application with costs,

Held, that the order should not be disturbed, the matter being one in the discretion of the judge, and that defendant's appeal therefrom must be dismissed with costs.

Wade, K.C., for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] WOOD *v.* LE BLANC. [Dec. 16, 1902.

Injunction—Cutting timber on disputed land—Finding of jury in replevin action.

An ex parte injunction to restrain defendants from cutting timber and removing timber already cut on lands the title to which was claimed by plaintiff and defendants by possession was dissolved where a jury in an action of replevin by the plaintiff to recover timber cut by defendants on the land, had found in their favour, though a motion for new trial was undisposed of.

Pugsley, K.C., A.-G., and *Friel*, for defendants. *M. G. Teed*, K.C., for plaintiff.

Barker, J.] HALE *v.* PEOPLE'S BANK. [Jan 20.

Partnership—Dissolution—Power of partner to complete contracts previously made.

Notwithstanding the dissolution of a partnership a partner continues, until a receiver is appointed, to have the same power that he had before the dissolution to complete contracts previously made for the purpose of winding up the partnership affairs.

Pugsley, K.C., A.-G., and *G. W. Allen*, K.C., for plaintiffs. *Currey*, K.C., *Grimmer*, K.C., and *Carvell*, for defendants.

Barker, J.] STEWART *v.* FREEMAN (No. 3). [Jan. 20.

Tender—Bank notes.

A tender in bank notes is good, though notes are not legal tender, if the tender is not objected to on that account.

D. McLeod Vince, and *J. C. Hartley*, for plaintiff. *A. B. Connell*, K.C., for defendant.

Barker, J.] KERRISON *v.* KAY. [Feb. 17.

Will—Construction—Date of vesting.

By his will testator gave to his wife a life interest in all his property, and upon her death he bequeathed to an adopted daughter a sum of money to be invested in the name of A., her son, or any more issue of hers there might be; the interest to be hers for life, and in case of her death or her

said son "leaving more issue the remainder to be equally divided among them; and in case of her death and her said son leaving no other issue then the (said) sum to revert back to C." On the death of K. she was survived by her said son A. and two other children.

Held, that the fund vested absolutely on the death of K. in her three children, and that it was not the meaning of the will that the fund vested in C. in event of A. dying, leaving no brother or sister surviving him.

A. I. Trueman, K.C., for plaintiffs. *C. N. Skinner*, K.C., for defendants.

Barker, J.] CUSHING SULPHIDE CO. *v.* CUSHING. [March 17.

Practice—Discovery—Production.

Where inspection is sought of documents supposed to be in the possession of the opposite party an order should be obtained under s. 59 of 53 Vict., c. 4, for discovery by affidavits as to what documents are in the opposite party's possession when an order may be made under s. 61 for their production and inspection.

Barnhill, for application. *A. H. Hanington*, K.C., contra.

ST. JOHN COUNTY COURT.

Forbes, Co. J.] BELYEA *v.* HATFIELD. [April 3.

Practice—Pleadings in County Court—Action against an administrator.

Where defendant sued in the County Court as administrator pleaded that intestate was never indebted, and for a second plea, plene administravit, the Court ordered the second plea to be struck out on the ground that more than one plea can only be pleaded by leave of the Court.

G. H. V. Belyea, plaintiff in person. *Porter*, for defendant.

Province of Manitoba.

Full Court.] THORNE *v.* JAMES. [March 7.

Negligence—Contributory negligence—Remoteness of damages—Voluntarily incurring risk.

Appeal from verdict of a County Court Judge in favour of the plaintiff in an action to recover damages for the loss of a team of horses by fire alleged to have been caused by the negligence of the defendant's servants. Defendant was the owner of a threshing machine and a portable steam engine and carried on the business of threshing for farmers through a fore-

man. Defendant hired from the plaintiff a team of horses with a driver for use in moving the engine about and drawing straw or grain during the threshing work. While threshing was going on one day sparks from the engine set fire to a stack and the separator being thereby placed in danger the plaintiff's driver attached his horses to it for the purpose of hauling it into a place of safety, but the fire spread so rapidly and unexpectedly before the separator could be moved or the horses detached that they were severely burned and had to be killed. The judge, who tried the case without a jury, found that the fire had been caused by negligence on the part of the defendant's servants in their mode of managing the threshing in a high wind. He also found that the horses had been attached to the separator either in obedience to a call from the defendant's foreman or under his personal supervision, and that there was no negligence on the part of the plaintiff's driver.

Held, 1. The evidence amply warranted the finding of negligence and unless the plaintiff's driver was guilty of contributory negligence the defendant was responsible for the loss of the horses.

2. Following *Connell* v. *Prescott*, 20 A.R. 49; 22 S.C.R. 147, that the driver was not guilty of contributory negligence in exposing the horses to danger, as it was not obvious and he acted either on the orders of the defendant's foreman or in obedience to a natural impulse to try to save the defendant's property. Seeing the separator in danger of being burnt the driver acted promptly without time for reflection. He did not see that there was any danger in attaching the horses, and the circumstances were not such as to make the danger obvious, and the horses were attached to the separator with the full concurrence and under the supervision of the foreman, if not in response to his actual request. Appeal dismissed with costs.

C. H. Campbell, K.C., A.G., for plaintiff. *Pitblado*, for defendant.

Province of British Columbia.

SUPREME COURT.

Drake, J.] [Dec. 23, 1902.

IN RE LENORA MOUNT SICKER COPPER MINING CO.

Winding-up—Leave to bring action—Secured creditors—Proving claims—R.S.C. 1886, c. 129, ss. 62, et seq.

Summons on behalf of mortgagees to commence a foreclosure action against a company which had been ordered to be wound up. For the mortgagees it was contended that they were entitled to exercise an option

as to whether they would come in under the Winding-up Act or not, but if they did not they of course required leave to commence their action.

Held, that a secured creditor has a right to apply for and obtain leave to bring an action to enforce his security, but that it is not optional for him to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under ss. 63, et seq. of the Act.

F. Peters, K.C., for summons. *W. E. Oliver*, for liquidator.

Full Court.] BEATON *v.* SJOLANDER. [Jan. 26.

County Court—Practice—Defendant outside county—Jurisdiction—Judgment by default—Application to set aside and for leave to defend—Waiver.

In the plaint in an action in the County Court of Yale it appeared that the defendants resided in Vancouver outside the County of Yale and the plaintiff's claim was described as being "against the defendants as makers of a promissory note for $179.12, dated 12th March, 1902, payable two months after date." Judgment for plaintiff was signed in default of a dispute note, but afterwards defendants filed a dispute note (what it contained was not shewn) and applied to Spinks, Co. J., to have the judgment set aside and for leave to defend on the merits. On the hearing of the application it appeared that the Court had jurisdiction as the note sued on was produced on affidavit and it shewed on its face that it was made and payable within the County of Yale.

Held, on appeal from the County Judge who dismissed defendant's application, that County Court process should shew jurisdiction on its face, but the defendants by filing the dispute note and applying for leave to defend on the merits had waived their right to object to the jurisdiction.

Sir C. H. Tupper, K.C., for appellants. *Kappele*, for respondent.

UNITED STATES DECISIONS.

RAILWAYS.—One who enters and rides upon a train which he knows, or by the exercise of reasonable diligence could know, is prohibited from carrying passengers, is held, in *Purple* v. *Union Pac. R. Co.* (C.C.A. 8th C.) 57 L.R.A. 700, to be a trespasser and not a passenger, and the only duty of the railway company toward him is held to be to abstain from wanton or reckless injury to him.

A passenger who leaves his car of his own volition for some purpose of his own not incident to the journey he is pursuing and at a place not designed for the discharge of passengers is held, in *Chicago, R. I. & P. Co.* v. *Sattler* (Neb.) 57 L.R.A. 890, not to be entitled to the protection of a statute making a carrier liable for all personal damage inflicted on a passenger being transported over its road.