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THE MINES ACT OF ONTARIO.

The announcement has been made that at the present session of the Ontario Legislature the Mines Act and its amendments will be revised and consolidated. In view of this a few observations upon the evolution of our mining law and upon the principles which should govern such legislation may be opportune.

While the rule stated in the celebrated maxim "cujus est solum ejus est usque ad coelum *et deinde usque ad inferos*" is generally applicable to this Province, there are certain well known exceptions. The only one necessary to be discussed here is that relating to the precious metals which is fully stated by BOYD, C., in *Ontario Mining Co.* v. *Seybold* (1899) 31 O.R. p. 399 as follows:—

"According to the law of England, and of Canada, gold and silver mines, until they have been aptly severed from the title of the Crown are not regarded as partes soli or as incidents of the land in which they are found. The right of the Crown to waste lands in the colonies and the baser metals therein contained is declared to be distinct from the title which the Crown has to the precious metals which rests upon the royal prerogative. Lord Watson has said in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889) 14 App. Cas. at pp. 302, 303, these prerogative revenues differ in legal quality from the ordinary territorial rights of the Crown. These prerogative rights, however, were vested in Canada prior to the Confederation by the transaction relating to the civil list, which took place between the Province and Her Majesty—the outcome of which is found in 9 Vict. c. 114, a Canadian statute, which, being reserved for the royal assent, received that sanction in June, 1846. The hereditary revenues of the Crown, territorial and others then at the disposal of the Crown, arising in the United Province of Canada, were thereby surrendered in consideration of provisions being made for defraying the expenses of the civil list.

So that while the Crown continued to hold the legal title the beneficial interest in them as royal mines and minerals, producing or capable of producing revenue, passed to Canada. And being so held for the beneficial use of Canada, they passed by s. 109 of the British North America Act to Ontario by force of site."

In *Lyddall* v. *Weston* (1739) 2 Atk. 19, a case between vendor and purchaser where there was a reservation in a grant of the estate in question by the Crown of tin, lead and all royal mines within the premises, the Lord Chancellor (Hardwicke) in giving judgment against the purchaser who objected to the title said there was "no instance where the Crown has only a bare reservation of royal mines without any right of entry that it can grant a license to any person to come upon any man's estate and dig up his soil and search for such mines: I am of opinion that there is no such power in the Crown, likewise that by the royal prerogative of mines there is no such power." In referring to this statement the Master of the Rolls (Sir Wm. Grant) in *Seaman* v. *Vawdry* (1810) 16 Ves. 380, said, at p. 393: "That position is liable to considerable doubt as being inconsistent with the resolutions of the judges in the case of Mines in Plowden." (Plowd. 310, see p. 336.)

In the precious metals case *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889) 14 App. Cas. 295, Lord Watson said, at p. 302: "In the *Mines Case* (1 Plowd. 336, 336*a*) all the Justices and Barons agreed that all mines of gold and silver within the realm whether they be in the land of the Queen or of subjects belong to the Queen by prerogative with liberty to dig and carry away the ores thereof and such other incidents thereto as are necessary to be used for the getting of the ore"(*a*).

The earliest mining legislation in this country dealt only with these precious metals. The first statute dealing with the subject was the Gold Mining Act of 1864 (27 & 28 Vict. c. 9) and dealt

(*a*) See also *Esquimalt and Nanaimo Railway Co.* v. *Bainbridge* (1896) App. Cas. 561.

only with the more precious of the two royal minerals. It established a system of gold mining divisions and mining licenses. Two classes of mining licenses were provided for, one known as the Crown lands gold licenses and the other as private lands gold licenses. Before this Act the subject had been dealt with by Orders-in-Council and Regulations. In 1845 certain general regulations were made, but prior to that date each case requiring executive action was dealt with as it arose by Order-in-Council.

Section 13 of this Act provided that "the ground in every claim shall be deemed to be bounded under the surface by lines vertical to the horizon." This continued to be applicable to mining claims until the General Mining Act 1869, 32 Vict. (Ont.) c. 34, s. 20, which added the words "except that every mining claim shall include and shall authorize the licensee to work every dip spur and angle of the vein or lode laterally to the depth to which same can be worked with all the earth and minerals thereon." This crude and inconvenient system of extra-lateral rights, sometimes inaccurately referred to as the apex rule, was continued as to mining claims until it was repealed in 1897 by 60 Vict. (Ont.) c. 8, s. 14, and the original rule of 1864 that the "ground included in each claim shall be deemed to be bounded under the surface by lines vertical to the horizon" was restored. It did not apply to mining locations which in this respect are governed by the more reasonable rule of the common law now also again made applicable to mining claims.

The Act of 1864 was amended in the following year by 29 Vict. c. 9, and, as so amended, the law stood at the date of Confederation. The prerogative right above defined to the precious metals being included among the rights vested in the Crown jure coronae was included in the term "royalties" which s. 109 of the British North America Act declared to belong to the Province(*b*).

(*b*) *Attorney-General of Ontario* v. *Mercer* (1882-3) 8 App. Cas. 778; *Attorney-General B.C.* v. *Attorney-General Canada* (1888) 14 App. Cas. 295; *Caldwell* v. *Fraser*, a decision of Rose, J., unreported, but referred to in *Ontario Mining Co.* v. *Seybold*, 31 Ont. R. 400.

In the year following Confederation the system of mining divisions and licenses was extended by the Province to silver mining by the Gold and Silver Mining Act of 1868, 31 Vict. (Ont.) c. 19.

These Acts were repealed in the following year by the General Mining Act of 1869, 32 Vict. c. 34, which introduced the system of mining locations in addition to that of mining divisions and mining claims. By this Act all royalties, taxes and duties theretofore imposed or made payable upon or in respect of any ores or minerals extracted from patented lands were repealed and such lands declared free from every such royalty, tax or duty.

The next important legislation was contained in the Act respecting Mining Regulations, 53 Vict. (Ont.) c. 10, cited as the Mining Operations Act, 1890. A system of royalties was imposed in the following year by 54 Vict (Ont.) c. 8, but these royalties were subsequently declared to be abandoned by the Act to amend the Mines Act, 63 Vict. (Ont.) c. 13.

60 Vict. (Ont.) c. 8, entitled an Act to further improve the mining laws, enacted (s. 7) that every application for a mining location shall in addition to certain other requirements "be accompanied with an affidavit shewing the discovery of valuable ore or mineral thereon by or on behalf of the applicant, and that he has no knowledge and has never heard of any adverse claim by reason of prior discovery or otherwise." This statutory requirement is continued in the Mines Act, R.S.O. 1897, c. 36, s. 28, and is likely to give rise to much discussion in the Courts in regard to the proper interpretation of the word "discovery" and of the phrase "valuable ore or mineral."

Before this statutory requirement priority of discovery of mineral was a potent argument in favour of any applicant for mining lands able to allege and prove such discovery in a contest before the Commissioner of Crown Lands, who decided such disputes according to what Chancellor Vankoughnet aptly designated "Crown Lands Law."

By an Order-in-Council of August 18, 1905, amending the regulations for mining divisions it is provided:—

30(*a*). The Inspector may at any time require the licensee holding any mining claim to point out and identify, either to himself or some other officer appointed for the purpose by the Minister of Lands and Mines, the vein, lode or other deposit of ore or mineral in place described or referred to in the affidavit filed with the Inspector upon which the said claim was recorded, giving the licensee recording such claim or in whose name such claim is recorded at least seven days' personal notice, or notice by registered letter to his address as shewn in such record, and upon failure or neglect of such licensee to so point out and identify the said vein, lode or other deposit of ore or mineral in place, or upon it being apparent to the Inspector or other officer appointed by the said Minister and inspecting the claim as aforesaid that the alleged discovery is not a bonâ fide and valuable vein, lode or other deposit of ore or mineral in place, the said Inspector acting upon his own inspection or upon the written report of such other officer may cancel the said claim and declare it to be null and void by entering such cancellation in the margin of the record and appending his initials thereto, and shall at once notify the licensee thereof by registered letter and post a notice of such cancellation upon the walls of his office; provided that the said licensee shall have the right of appeal from the Inspector's decision to the Minister of Lands and Mines within twenty days from the date of such decision.

The statute R.S.O. 1897, c. 36, s. 44, gives the Lieutenant-Governor authority by Order-in-Council to set aside mining divisions and declare all mines on Crown lands situate in the division to be subject to the provisions of the Act and to any regulations to be made under the Act. Section 47 of the above Act, as amended by 61 Vict. (Ont.) c. 11, s. 3, declares that a licensee who discovers a vein, lode or other deposit of ore or mineral in place within the division mentioned in his license shall have the right to mark or stake out thereon a mining claim.

The Order-in-Council above referred to purports to authorize the Inspector to cancel the claim if the vein, lode or other deposit of ore or mineral in place discovered by a licensee is not also "bonâ fide and valuable."

Even where the utmost good faith is shewn by the discoverer an Inspector may think a vein, lode or deposit deceptive, but the opinion of an official as to the value of such a vein, lode or deposit should not be decisive of the rights of the licensee. As pointed out by Pollock, C.B., in *R.* v. *Skeen*, Bell's Crown Cases, at p. 134, "There is no word in the English language which does not admit of various interpretations," but clearly the word "valuable" as used in the statute of 1897, and in the Order-in-Council of 1905, is altogether too uncertain to be made, without statutory definition, the basis of the rights of discoverers and licensees.

The Order-in-Council was intended to deal with unique conditions at Cobalt, but in the proposed revision of the mining law the wise maxim "optima est lex quae minimum relinquit arbitrio judicis" should be applied. In any event the authority of officials to cancel mining claims which are property and sometimes property of great value should be defined by Statute and not by Order-in-Council.

Sections 4 to 12 of the Act above referred to (63 Vict. Ont. c. 13) provided for a system of license fees, but these provisions were only to be brought into force by proclamation of the Lieutenant-Governor-in-Council. Section 4 enacted that no owner of any mine shall carry on the business of mining for any ore or mineral in respect of which a license fee is imposed without first taking out a license under the provisions of the Act.

The license fees authorized were

(*a*) For ores of nickel $10 per ton or $60 per ton if partly treated or reduced.

(*b*) For ores of copper and nickel combined $7 per ton or $50 per ton if partly treated or reduced.

or such less rates as may be substituted by proclamation of the Lieutenant-Governor.

The license fees so payable were declared to be a charge upon the lands in respect of which such fees are payable and in case the same are not duly paid it was declared that proceedings may be taken for or on behalf of Her Majesty to foreclose the estate

and right of all persons claiming any interest in the property. The Act also provides that any person required to take out a license who works or permits to be worked any mine without a license shall be subject to certain penalties.

Section 10 provides that "Where ores or minerals that have been mined, raised or won in this province are smelted or otherwise treated in the Dominion of Canada by any process so as to yield fine metal or any other form of product of such ores or minerals suitable for direct use in the arts without further treatment, then, and in every such case, the fees provided herein or such proportion thereof as may be fixed by the Lieutenant-Governor-in-Council shall be remitted or if collected shall be refunded under such regulations as the Lieutenant-Governor-in-Council may prescribe."

The disallowance of this Act by the Governor-General-in-Council was asked by the Canadian Mining Institute and interested parties on several grounds the principal of which were: (1) That the Act amounted to confiscation of lands patented in fee simple for mining purposes and to which the legislature had applied the language "such lands, ores and minerals shall be free and exempt from every such royalty, tax or duty." (R.S.O. 1897, c. 36, s. 3.) (2) That the legislation trenched on the exclusive jurisdiction of the Dominion Parliament respecting trade and commerce. (3) That the license fees amounted in substance to an export duty which could only be authorized by the Dominion and that the statute shewed on its face that it was not passed "in order to the raising of a revenue for Provincial purposes."

The Province undertook by Order-in-Council not to bring the legislation into force until its constitutionality should be affirmed by the Courts, and to join with the Dominion in obtaining a decision of the Supreme Court of Canada as to the validity of the Act, subject to appeal to the Judicial Committee of the Privy Council. Upon this the Dominion Government allowed the statutory time to expire without exercising the power of disallowance and the matter stands in that way.

It is to be hoped that the result of the proposed revision of the Mines Act and its amendments by the Ontario Legislature will be a mining law which will satisfy the tests of Sir Frederick Pollock, who states as the criteria of just laws in a civilized community—generality, equality and certainty.

J. M. CLARK.

RETIRED JUDGES AND KING'S COUNSEL.

In the last number of the Ontario Law Reports will be found a lengthy report of the Committee of Discipline of the Law Society of Upper Canada on the subject of the status of retired judges and King's Counsel, in which two conclusions appear to have been reached by the Committee and adopted by the Benchers in Convocation:—

(1) That the provisions in the Ontario Judicature Act and the Criminal Code purporting to authorize retired judges and King's Counsel to act as judges of the High Court or Court of Appeal are ultra vires and invalid and should be repealed, except perhaps as regards King's Counsel appointed prior to Confederation. (2) That the office of King's Counsel is incompatible with that of a judge. The Committee further seem to suggest that by accepting the office of judge a King's Counsel, ipso facto, resigns that office or honorary distinction; and that, in case of his retirement from the Bench, this office or status of King's Counsel does not revive.

The conclusion of the Law Society is based on s. 96 of the B.N.A. Act, which provides that all judges of the Superior, District and County Courts in each Province shall be appointed by the Governor-General; and that, therefore, there is no power in the Dominion Parliament, or in the Local Legislatures by statute or otherwise to enable any person to act as a judge who has not been so appointed.

That conclusion appears to us to be incontrovertible; but with regard to the other points, we are not prepared to accede to the conclusion of the Committee.

There are at present two gentlemen who have retired from

the Bench, who, on resuming practice, have claimed and been accorded their previous status at the Bar as King's Counsel. One of these gentlemen has been recently elected a Bencher, and in the list of Benchers his name bears the addition of K.C. The report would seem to suggest that these gentlemen in resuming practice and claiming precedence by virtue of their former status are assuming a position to which they are not legally entitled.

Is there not some inconsistency between the theory and the practice of Convocation on this point? Convocation says that they are not entitled to such precedence, yet this precedence is claimed and allowed by the Courts; Convocation, moreover, has taken no action in the premises, and individual members thereof do not challenge in Court the claim so made.

But does the acceptance of the office of a judge work a resignation of the office of King's Counsel? And, if so, why does not a retired judge also lose his status as a barrister-at-law? No doubt as long as a man is a judge it is incompatible for him to exercise the office of King's Counsel. It is equally incompatible for him to exercise the office of a barrister. But no one has ever pretended that by accepting the office of a judge a man ceases to be a barrister. On the contrary the early history of the law seems to shew that transitions from the Bar to the Bench, and from the Bench to the Bar were frequent, and that the right of a judge who retires from the Bench to resume practice at the Bar as a barrister has never been questioned. The mere incompatibility of the office of a King's Counsel and that of a judge seems, therefore, to prove nothing. Is not the proper view that so long as a man is a judge, his rights to the status of King's Counsel is in abeyance, or is merged in the superior dignity? If so, why is he not entitled to resume his status at the Bar, and claim precedence as King's Counsel on retiring from the Bench?

A County Court judge is a judge of a Court of record both here and in England, and although the office and dignity are inferior to that of a judge of the Court of Appeal and the High Court he is still a judge debarred from practice, entitled to a

pension, etc. In England 13 out of 57 County Court judges have the letters K.C. after their names in the teste of the writs of their respective Courts.

The Committee, in dealing with this point, consider that because these judges are appointed by the Lord Chancellor and not by the King, that that fact accounts for their retaining the title of K.C., although the incompatability of their acting as such while occupying the position of County Court judges is just as obvious as it is in the case of a judge of the Supreme Court of Judicature. In Canada both classes of judges are appointed by the Crown, but we fail to see that that makes any difference.

The supposed analogy between the offices of King's Counsel and King's Serjeant is probably illusory, and we doubt whether any Canadian Court would recognize it. For, as the Committee's report shews, serjeants-at-law were formerly appointed by the King's writ or patent, and the office was not vacated by the acceptance of a judgeship. And, though the exercise of the office was in abeyance while the serjeant was a judge, on his retirement from the Bench he was entitled to resume practice as a serjeant-at-law. This seems to furnish a much more reasonable analogy than the case of King's Serjeants on which the Committee rely. The King's Serjeants were specially appointed from among the serjeants-at-law, and, as appears from Serjeant Pulling's book, p. 40, acted "like the Attorney-General, not only as the legal advisor or counsel of the Sovereign, but as the Crown advocates or public prosecutors." It was apparently not a mere general retainer like that of King's Counsel, but an appointment to an office to which certain duties were assigned similar to those of an Attorney-General.

There are obvious reasons why a King's Serjeant, when appointed to the Bench, should be deemed to resign the office of King's Serjeant precisely in the same way as when as Attorney-General or a Solicitor-General resigns his office on appointment to a judgeship; but the same reasons certainly do not apply to an ordinary King's Counsel, who now stands in the position of the old serjeant-at-law. His office, qua office, is honorary, and

the title is conferred as a mark of honour and distinction like the degree of "doctor," and to give him certain rights of pre-audience in Court.

The desire of the profession to perpetuate the memory of the late Christopher Robinson finds expression in various suggestions. The Ottawa Bar suggest the erection of a statue. Others would prefer the founding of a scholarship in connection with the Law Society, or possibly the University of Toronto. Others would like (and this should be done in any event) a brass tablet to be placed in the historic Cathedral Church of St. James, Toronto. As to the first suggestion it is questionable whether it would be possible now to produce a statue which would sufficiently portray his likeness and figure. Statues, also, are becoming common. In Lord Bacon's apothegms we find the following: "Cato the elder, what time many of the Romans had statues erected to their honour, was asked by one in a kind of wonder why he had none. He answered, 'He had much rather men should ask and wonder why he had no statue, than why he had a statue.'" Speaking for ourselves we should prefer, as most appropriate, the suggestion to found a law scholarship to be held by a student of Toronto University.

In connection with this matter we give the following extract from the annual report of the Board of Trustees of the County of York Law Association: "The Trustees have had under consideration the question of honouring in a suitable manner the memory of Mr. Robinson, by a memorial which shall be lasting and at the same time appropriate and worthy of that eminent member of the profession, whose loss is so deeply deplored by all. At the first meeting of the Trustees after his death the following resolution was adopted: 'The Trustees of the County of York Law Association desire to place on record their deep sense of the loss sustained by the lamented death of Mr. Christopher Robinson, K.C. So many eloquent tributes have already been paid to his memory that we can only add to them a few words of admiration and respect. We recall with pleasure that

he was one of our first Presidents, and that we owe to him some of the most valuable books on the shelves of our library. For upwards of half a century he worthily upheld the highest traditions of an honourable profession. His reputation extended far beyond the confines of this Province, and of the Dominion. He represented the cause of Canada before two great International tribunals, winning the admiration of the English-speaking world by his efforts on her behalf. He was

'A man who lived in honour, died in fame,
'And left on memory's page a stainless name.' ''

The report continues as follows: "The Trustees feel assured that if an appeal be made to perpetuate Mr. Robinson's memory, it will meet with universal and hearty response from the members of the profession throughout the Dominion. The Trustees recommend that the Toronto Bar should co-operate with the Bar of the Province and with others who were his friends and admirers in taking the necessary steps to perpetuate his memory in a fitting manner, and that they be authorized to appoint a committee for that purpose which shall form part of a general committee to be formed with all convenient speed."

The Law Quarterly Review for January last refers to the loss sustained by the death of the late Mr. Christopher Robinson, K.C., as follows: "Since our last issue death has removed a very prominent member of the Ontario Bar in the person of Mr. Christopher Robinson, K.C., of Toronto, Canada. Apart from his professional eminence, it is perhaps seldom in any community that the death of a private citizen has been followed by such an outburst of appreciation for his general personal qualities as has followed that of Mr. Robinson. The resolutions of public bodies, and leading articles in the local papers, representing every variety of political view, together with the accounts the latter give of the crowds which attended the funeral service, all bear witness to the extraordinary esteem in which he was held by the members of the community in which he passed his life."

REVIEW OF CURRENT ENGLISH CASES.

DAMAGES — SUBSIDENCE — MEASURE OF DAMAGES — PROSPECTIVE INJURY.

Tunnicliffe v. *Leigh Colliery* (1905) 2 Ch. 390 was an action to recover damages occasioned by the subsidence of land caused by defendants' mining operations, and the question of damages was referred to a referee who assessed the damages down to the date of the judgment, but in doing so made an allowance for the present depreciation in value caused by the risk of a future further subsidence. From this finding the defendants appealed, and Eady, J., held that the referee had erred in principle, and that nothing should have been allowed for the possibility of any future subsidence, as to do so might have the effect of compelling the defendants or their successors in title, to pay twice for the same damage.

WILL—CONSTRUCTION—CHARITABLE GIFT—"CHARITABLE, EDUCATIONAL OR OTHER INSTITUTIONS" IN A NAMED PLACE.—(R.S.O. c. 333, s. 6).

In re Allen, Hargreaves v. *Taylor* (1905) 2 Ch. 400, a testator bequeathed money to trustees, "upon trust for such charitable, educational or other institutions in the Town of Kendal, and also for such other general purposes for the Town of Kendal or any of the inhabitants thereof, as my trustees shall in this absolute, uncontrolled discretion think fit." And the testator without in any way binding the trustees recommended to their attention the claim of four specified charitable institutions of the Town of Kendal. It was contended that the general words in the bequest had the effect of rendering the gift void because it was within the discretion of the trustees to apply the gift to purposes which were not "charitable" within the Statute of Elizabeth (R.S.O. c. 333, s. 6); but Eady, J., upheld the bequest as a good charitable bequest, because, on the true construction of the clause, the purposes for which the money could be applied were all limited to general or public purposes for the benefit of the Town of Kendal and its inhabitants.

CONFLICT OF LAWS—POWER OF APPOINTMENT—TESTAMENTARY EXECUTION OF GENERAL POWER—FOREIGN DOMICIL—UNATTESTED WILL—EVIDENCE OF INTENTION—WILLS ACT, 1837 (1 VICT. C. 26) SS. 9, 10, 27—(R.S.O. C. 128, SS. 12, 13, 29).

In re Scholefield, Scholefield v. *St. John* (1905) 2 Ch. 408. Kekewich, J., following *In re D'Este* (1903) 1 Ch. 898 held that the provisions of s. 27 of the Wills Act (R.E.O. c. 128, s. 29) to the effect that a general testamentary power of appointment may be exercised by a general bequest not referring either to the property or the power unless a contrary intention appears in the will, does not apply to a will which is not executed in accordance with the Wills Act, though it be a valid will according to the place of domicil of the testatrix, and as such admitted to probate in England; and that such a will cannot be implemented by unsigned memoranda in the handwriting of the testatrix shewing an intention on her part that the subject matter of the power should pass to the legatee named in the will, although such evidence would be admissible according to the law of the place where the will was made; because the question of the execution of the power, must, in such case, be determined upon evidence admissible by the law of England.

EXPROPRIATION OF LAND—STATUTORY POWER—DIVERSION OF LAND TO OTHER THAN AUTHORIZED PURPOSES.

Atorney-General v. *Pontypridd* (1905) 2 Ch. 441 deserves a short notice, though decided under special statutes, because it lays down the principle that where land is authorized by statute to be expropriated for a specific purpose, it is not competent for the expropriators to divert it to some other purpose. In this case, under statute, a municipal body expropriated certain land for establishing a generating station for the supply of electricity, and on part of the land not required for that purpose they erected a refuse destructor to be worked in connection with the generating station, and it was held by Farwell, J., that this was ultra vires of the municipal body, and an injunction was granted restraining the use of the destructor buildings erected on the lands expropriated otherwise than for the production of electricity.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Quebec.] [Nov. 27, 1905.

QUEBEC SOUTHERN RY. CO. v. CITY OF SOREL.

Municipal by-law—Railway aid—Condition precedent—Part performance—Assignment of obligation—Notice—Signification —Art. 1571 C.C.

An action for the annulment of a municipal by-law will lie, although the obligation thereby incurred be conditional and the condition has not been and may never be fulfilled.

Where a resolutory condition precedent to payment of a bonus to a railway, under a municipal by-law in aid of construction and operation of works, has not been fulfilled within the time limited on pain of forfeiture, an action will lie for the annulment of the by-law at any time after default notwithstanding that there may have been part performance of the obligation undertaken by the railway company and that a portion of the bonus has been advanced to the company by the municipality.

In an action against an assignee for a declaration that an obligation has lapsed and ceased to be exigible on account of default in the fulfillment of a resolutory condition exception cannot be taken on the grounds that there has been no signification of the assignment as provided by art. 1571 of the Civil Code of Lower Canada. The debtor may accept the assignee as creditor and the institution of the action is sufficient notice of such acceptance. The *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.* (1903) A.C. 59 followed. Appeal allowed with costs.

Beaudin, K.C., and *Belcourt*, K.C., for appellants. *Beique*, K.C., and *Robertson*, for respondents.

Quebec.] [Nov. 27, 1905.

HUARD v. GRAND TRUNK RY. CO.

Negligence — Railways — Collision — Traffic agreement — Negligence of employee—Joint employ.

Where injuries resulted from a collision between two Intercolonial Railway trains negligently permitted to run in opposite directions on a single track of a portion of the Grand Trunk

Railway operated under the joint traffic agreement ratified by the Act 62 & 63 Vict. ch. 8 (D.), the railway company was liable for the carelessness of the train despatcher engaged by the company and under its control and directions, notwithstanding that he was declared by the agreement to be in the joint employ of the Crown and the railway company and that the Crown was thereby obliged to pay a portion of his salary. TASCHEREAU, C.J., dubitante. Appeal allowed with costs.

Lafleur, K.C., and *Beckett*, for appellant. *Laflamme* and *W. G. Mitchell*, for respondent.

B.C.] CLARK *v.* DOCKSTEADER. [Nov. 27, 1905.

Mining law—Staking claim—Initial post—Occupied ground.

In staking out a claim under the Mineral Acts of British Columbia the fact that initial post No. 1 is placed on ground previously granted by the Crown under said Acts does not necessarily invalidate the claim, and sub-s. (*g*) of s. 4 of 61 Vict. c. 33, amending the "Mineral Act," R.S.B.C. c. 135, may be relied on to cure the defect. *Madden* v. *Connell*, 30 S.C.R. 109, distinguished.

Judgment appealed from (11 B.C. Rep. 37) affirmed, IDINGTON, J., dissenting. Appeal dismissed with costs.

W. A. McDonald, K.C., for appellant. *S. S. Taylor*, K.C., for respondent.

N.W.T.] PLISSON *v.* DUNCAN. [Nov. 27, 1905.

Receiver—Management of business—Supervision and control—Laches.

The receiver of a partnership who is directed by the Court to manage the business until it can be sold should exercise the same reasonable care, oversight and control over it as an ordinary man would give to his own business, and if he fails to do so he must make good any loss resulting from his negligence.

The fact that the receiver is the sheriff of the district does not absolve him from this obligation though the parties consented to his appointment knowing that he would not be able to manage the business in person.

The Chief Justice and MACLENNAN, J., dissented, taking a different view of the evidence.

Appeal allowed with costs.

Ewart, K.C., for appellant. *Chrysler*, K.C., for respondent.

N.W.T.] [Nov. 27, 1905.

EGGLESTON *v.* CANADIAN PACIFIC RY. CO.

Operation of railway—Straying animals—Negligence—Duty to trespassers.

A railway company is not charged with any duty in respect to avoiding injury to animals wrongfully upon its line of railway until such time as their presence is discovered. IDINGTON, J., dissenting, though concurring in the judgment on other grounds. Appeal allowed with costs.

G. Tate Blackstock, K.C., for appellants. *C. deW. Macdonald*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From MacMahon, J.] [Oct. 13, 1905.

HAY *v.* BINGHAM.

Libel—Newspaper interview—Publication—Privilege—Innuendo—Meaning of words—Nonsuit.

A defeated candidate in an interview with a newspaper reporter the day after an election informed him that the plaintiff (who was a political opponent and an active party worker) had as soon as it was known he was in the field, come to and asked him to endorse a note for $1,000, which he refused to do, and had also later in a speech accused him of disloyalty. The plaintiff claimed the innuendo was that he had offered his services and support as a bribe and had corruptly offered to desert his party and abandon his principles and support the defendant at the election if he would endorse his note; that his opposition to the defendant's candidature was not due to principle or party loyalty, but to the defendant's refusal to endorse the note; and that because of such refusal the plaintiff not only opposed his candidature, but attacked him personally and accused him of disloyalty. The interview was published and the defendant next day called at the newspaper office, and the only thing he found fault with in the report was the omission of a few words in the introductory part. At the trial the judge allowed the case to go to the jury, who found a verdict in favour of the plaintiff.

On an appeal by the defendant it was

Held, that there was evidence that the defendant knew he was speaking for publication and that he authorized what he said to be published in a newspaper; and that the communication was not privileged; but

Held, also, that the words were not capable of the meaning ascribed to them by the plaintiff, and that the motion for a non-suit at the close of the case should have been allowed; and the action was dismissed with costs.

Capital and Counties Bank v. *Henty* (1882) 7 App. Cas. p. 744, referred to.

Judgment of MACMAHON, J., reversed in part.

Aylesworth, K.C., for the appeal. *McVeity*, contra.

From Falconbridge, C.J.K.B.] [Oct. 13, 1905.

THE CORPORATION OF OAKVILLE *v.* ANDREWS.

Partnership—Dissolution—Continued use of firm name and omission to give notice of dissolution or file certificate thereof—Subsequent receipt and deposit of moneys in bank—Liability.

On the evidence set out in this case a partnership in a private banking business which had existed between the defendant and one H. was held to be dissolved; but as the business continued to be carried on in the firm name, and no notice of the dissolution was given, or any certificate thereof under R.S.O. 1897, c. 130, s. 7, was filed, the defendant's liability to persons dealing with the firm continued. After the dissolution of the partnership H., who was also treasurer of a municipal corporation, received, as such, moneys belonging to the corporation, which he deposited with the firm as such bankers, and applied them either in the business or in discharge of its liabilities.

Held, that the defendant would not be liable therefor, for in dealing with the moneys, H. did so either as the corporation's authorized agent, or in breach of his duty; if as such agent, his knowledge that the defendant was not a partner must be attributed to the corporation, and, if in the breach of his duty, his improperly mixing them with his own moneys, in which the defendant had no interest, could not render the defendant liable.

Millar, for appellants. *Shepley*, K.C., and *D. O. Cameron*, for respondents.

From Teetzel, J.] [Nov. 13, 1905.

CANADA CARRIAGE CO. *v.* LEA.

Fraudulent conveyance—Action to set aside—Evidence—New trial—Conspiracy—Costs—Parties—Damages.

In an action by creditors to set aside as fraudulent and void a conveyance of land and a bill of sale made by an insolvent debtor to his sister-in-law, there was judgment for the plaintiffs at the trial, but on appeal by the defendants, the Court of Appeal, deeming the evidence unsatisfactory, ordered a new trial, upon payment by the defendant grantee of the costs of the former trial and of the appeal, notwithstanding the danger which attends the opening up of a case after the attention of the parties has been directed to the defects in their proofs. A brother of the debtor was made a defendant, as well as the debtor himself and his grantee, it being alleged by the plaintiffs, who sued on behalf of themselves and all creditors, that all the defendants entered into a conspiracy to defeat and defraud the creditors.

Held, that the plaintiffs could not succeed upon the conspiracy claim, for they could shew no special damage accruing to them, and could not recover damages on behalf of a class. And that claim failing, there was no ground for making the debtor's brother a party, and he could not be ordered to pay costs, but the plaintiffs should pay his costs.

Judgment of TEETZEL, J., reversed.

Shepley, K.C., and *Murdoch*, for defendants M. C. Lea and E. A. Lea. *Hobson*, for A. C. Lea. *Lynch-Staunton*, K.C., and *F. Morrison*, for plaintiffs.

From Anglin, J.] [Nov. 13, 1905.

STEPHENS *v.* TORONTO RAILWAY CO.

Damages—Excessive amount—Suggestive reduction—New trial.

Damages to the amount of $2,100 were recovered by the plaintiff, suing as the father and administrator of his deceased son, 22 years of age, who was killed through defendants' negligence. The son's occupation was that of a labourer, had driven a delivery waggon, etc., the highest rate of wages received by him being for eleven days' work for a telephone company at $35 a month. His mother was dead and his father had married again. He lived with a widowed sister, but was on good terms with his father and stepmother, whom he visited once or twice a month, when he would give his father from $2 to $4, and on one occasion

$5. His habits were good and he was of an affectionate and generous disposition. Evidence was received of his intention of helping his father to build a house, of assisting him in paying off a mortgage of $650 on his property, as well as a debt of $400, which he owed another son, and for which the father had given his promissory notes.

Held, that the evidence of such expressed intention was properly admitted, not necessarily as shewing a promise to make the payments, but of his being well disposed to his father; but the amount awarded the plaintiff for damages was clearly excessive and unless the parties agreed to a reduction of $500 there should be a new trial.

Bicknell, K.C., for defendants, appellants. *Proudfoot*, K.C., for plaintiff, respondent.

From Teetzel, J.] [Dec. 30, 1905.

HENNING *v.* TORONTO RAILWAY CO.

Contract — Construction — Vagueness — Renewal — Price to be agreed on.

A provision in a contract for the right to use space for advertising purposes for its renewal "at the end of three years at a price to be agreed upon, but not less than $5,000 per annum" leaves the matter at large unless the price is agreed upon and the person using the space cannot insist on a renewal at the rate of $5,000 per annum. Judgment of TEETZEL, J., affirmed.

DuVernet, for plaintiff, appellant. *D. L. McCarthy*, for T. R. Co. *S. B. Woods*, for Street Car Advertising Co.

From Drainage Referee.] [Dec. 30, 1905.

IN RE MCCLURE AND TOWNSHIP OF BROOKE.

Drainage—Defective system—Recovery of damages and costs—Subsequent assessment—Drainage Act, s. 95.

The assessment for damages and costs recovered by a person complaining of a defective system of drainage must be made only against the lands included in the drainage scheme complained of. Lands included in an amended scheme undertaken after the right to damages has accrued and claim has been made are not liable. Judgment of the drainage referee affirmed.

Aylesworth, K.C., for appellants. *Wilson*, K.C., for respondents.

From Divisional Court.] [Dec. 30, 1905.

COMMALFORD *v.* EMPIRE LIMESTONE CO.

Master and servant — Negligence — Evidence — Long continued user.

The fact that for many years an operation has been carried on in the same way and with the same appliances without an accident while strong evidence in the master's favour is not conclusive and if there is evidence that the system is defective the case must be submitted to the jury.

Judgment of a Divisional Court affirmed, OSLER, J.A., dissenting.

German, K.C., for appellants. *Battle*, for respondent.

Pol. Mag., Toronto.] REX *v.* HENDRIE. [Dec. 30, 1905.

Criminal law — Keeping common betting house — Incorporated company—Lease of premises—President—Crim. Code, s. 197.

The president of an incorporated company, owners of a race course, who lease for valuable consideration part of the premises to an individual to be used for betting purposes, is not merely by virtue of his office, and without anything more than acquiescence on his part, liable to conviction as a party to the offence.

Rex v. *Hanrahan* (1902) 3 O.L.R. 659 distinguished. Conviction quashed, MACLAREN, J.A., dissenting.

Ritchie, K.C., for appellant. *Cartwright*, K.C., for the Crown.

From Meredith, J.] REX *v.* QUINN. [Dec. 30, 1905.

Criminal law—Acquittal on indictment for personation at election—Subsequent indictment for perjury in taking oath of identification—Autrefois acquit—Right to acquittal at common law.

A prisoner was indicted at the assizes in having applied for and voted on a ballot in another person's name at a Dominion election, when he was acquitted. He was subsequently indicted and convicted for perjury in having, on the said occasion, taken the oath of identity.

Held, that the defences were distinct; the personation being complete under s. 141 of the Dominion Elections Act, 1890, when

he applied for the ballot; while the charge of perjury, which was an offence under the Criminal Code was not committed until, on being challenged, he took the false oath; and, therefore, a plea of autrefois acquit could not be set up as an answer to the subsequent indictment.

Held, however, OSLER, J.A., and TEETZEL, J., dissenting, that he had a good defence at common law—which was reserved to him under s. 7 of the Code—for that the identity of the person committing the offence was essential in both indictments, and the acquittal on the first indictment being a finding on that question, it was, therefore, res judicata, and could not be again raised on the perjury charge, so that the acquittal and discharge of the prisoner on the subsequent indictment should have been directed.

McEvoy, for prisoner. *Cartwright*, K.C., for Crown.

From Street, J.] HIME *v.* LOVEGROVE. [Dec. 30, 1905.

Vendor and purchaser—Covenant—Building restriction—House —Stable.

The owner of two adjoining parcels of land sold and conveyed one, the deed containing a covenant by the purchaser for himself, his heirs, executors, administrators and assigns, not to "erect or build more than one house upon the property hereby conveyed" with special provisions as to the cost and materials of "any house so erected," and as to the distance of its walls from the boundaries of the parcels conveyed. The vendor subsequently conveyed his parcel to the testator of the plaintiffs, having first erected a stable upon it. The parcel first sold by him became vested by various mesne conveyances in the defendants, who built a stable upon part of it, sufficient space being left within the described boundaries for the erection of a house of the nature and value provided for in the covenant, which house, the defendants asserted they have intended to build.

Held, that the stable being built as appurtenant to the house to be afterwards erected, there was nothing in the covenant to preclude its being so built. *Bowes* v. *Law* (1870) 18 W.R. 102 approved.

Judgment of STREET, J., affirmed.

Alan Cassels, for appellants. *Alfred Bicknell* and *G. B. Strathy*, for respondent.

HIGH COURT OF JUSTICE.

Divisional Court.] [Sept. 28, 1905.

BUCKE *v.* CORPORATION OF LONDON.

Taxes—Superannuated official—Income—Exemption.

The annual income allowed under the Superannuation Act, R.S.C. c. 18, to an official of the Dominion who has been superannuated and is no longer in the active service of the Dominion is not exempt from municipal taxation.

Leprohon v. *Corporation of Ottawa* (1898) 2 A.R. 522 distinguished.

T. G. Meredith, K.C., for defendants, appellants. *R. V. Sinclair*, for respondent.

Divisional Court.] [Sept. 29, 1905.

RENWICK *v.* GALT, ETC., STREET RY. CO.

Negligence—Damages—Sufficiency.

The plaintiff, a married woman, who had to depend on her own exertions for her support and maintenance and that of her daughter, her husband contributing nothing, had striven to give her daughter a good education. The daughter was a little over seventeen years of age, and was just finishing her course at the Collegiate Institute, which would qualify her for a first-class teacher's certificate, and expected to be earning in the course of a year from $300 to $500. She was a strong, active girl and worked in the mill during the holidays, earning from $6 to $7 a week, which she gave to her mother, for whose maintenance and support she had often expressed the intention of providing. The daughter having been killed through the defendants' negligence, a finding in favour of the mother for $3,000 was upheld.

DuVernet, for defendants, appellants. *Lynch-Staunton*, K.C., for respondent.

Meredith, C.J.C.P., Anglin, J., Clute, J.] [Oct. 19, 1905.

PLOUFFE *v.* CANADA IRON FURNACE CO.

Negligence—Hole in ice over harbour—Findings of jury—Contributory negligence.

The dead body of the plaintiff's husband was found lying on ice formed over a harbour, the head being in open water where the defendants had made a hole. At the trial of an action to

recover damages for his death, questions were submitted to the jury, and answered in favour of the plaintiff, except the following: "Could the deceased by the exercise of ordinary and reasonable care have avoided the accident which occasioned his death; and, if so, in what respect or how could the deceased have avoided the accident?" To this the jury answered: "Yes, he might have taken another road, or if sober, on a bright night, he might have avoided the hole."

Held, that this was a finding of contributory negligence, and the action was properly dismissed, though the trial judge (10 O.L.R. 37) dismissed it on another ground.

Creswicke, for plaintiff. *DuVernet*, for defendants.

Divisional Court.] WOOD *v.* ADAMS. [Oct. 28, 1905.

Contract—Illegality—Non-recovery back of money paid, cancellation of notes—Notes to remain on files of Court.

The Courts will not intervene at the instance of a party to an illegal contract, to enable him to obtain relief from the negligence thereof.

W. having been threatened with a criminal prosecution for having had sexual intercourse with a young girl under sixteen years of age effected a settlement whereby cash payments were made and promissory notes given. On his death, he having in no way repudiated the settlement during his lifetime, his administrator brought an action for the recovery of the money paid and the cancellation of the notes.

Held, that the action was not maintainable, but the notes having been filed in Court, it was ordered that they remain on the files until further order.

Aylesworth, K.C., and *Panton*, for plaintiff, appellant. *Mabee*, K.C., for defendant.

Mabee, J.] [Nov. 1, 1905.

MASSEY-HARRIS CO. *v.* DE LAVAL SEPARATOR CO.

Defamation—Evidence—Discovery—Circular -Names of recipients—Source of information.

In an action for damages alleged to have been sustained by reason of the sending out by the defendants of a circular stating that they had been "advised that the (plaintiffs) had decided to discontinue their separator business," the defendants' manager was ordered to give on his examination for discovery the

names of the persons to whom the circular had been sent and the name of the person who had "advised" the defendants of the fact alleged, this information being relevant to and important on the pleaded defences of bonâ fides and privilege.

Grayson Smith, for plaintiffs. *MacInnes*, for defendants.

Divisional Court.] PAYNE *v.* PAYNE. [Nov. 10, 1905.

Husband and wife—Alimony—Cruelty—Insufficient evidence of —Non-revival of prior condoned acts.

The Courts scrutinize very closely retaliatory acts of alleged violence and cruelty on the part of a husband arising out of the wife's headstrong and irritating conduct, and will refuse, unless such acts are accomplished by intemperate and excessive violence to call them acts of cruelty, and as effective in reviving prior condoned acts of cruelty and misconduct.

In 1895 the plaintiff and defendant, who prior thereto had been living together, were married, but thereafter only lived together at intervals, the plaintiff living apart from her husband and carrying on, what she called a hospital for pregnant women, In 1904 on the defendant insisting on it, the plaintiff returned to her husband's house, everything going on satisfactorily until the plaintiff desired to carry on the alleged hospital business in the house, which the defendant refused to consent to. The plaintiff then rented a house for herself, and during the defendant's temporary absence, stripped the house of nearly all the furniture, removing it to her own house. This greatly incensed the defendant, and on the plaintiff using foul and abusive language to him, he committed, as the plaintiff alleged, an aggravated assault on her, and by his conduct rendering it unsafe for her to live with him, and reviving prior condoned acts of misconduct and cruelty.

Held, that the defendant's acts were not of such an excessive and intemperate a character as would render it unsafe for the plaintiff to live with him and revive the said prior condoned acts, for not only did it appear that the alleged assault was grossly exaggerated, but was brought on by the plaintiff herself, whose whole object was to goad the defendant into acts of violence which would justify the bringing of an action for alimony.

Middleton and *Faulds*, for appellant. *E. Meredith*, K.C., and *Toothe*, for respondent.

Divisional Court.] SLATER *v.* LABOREE. [Nov. 13, 1905.

Bills and notes—Endorsement by third party without endorsement by payee—Endorsement for valuable consideration—Liability.

The defendant became the endorser of two promissory notes without the payee having endorsed same, being so endorsed by the defendant in pursuance of an agreement with the payees for valuable consideration that he should so endorse them and become liable thereon.

Held, that the defendant was so liable. *Robinson* v. *Mann* (1901) 31 S.C.R. 484 followed. *Steele* v. *McKinley* (1880) 8 App. Cas. 654, and *Jenkins* v. *Coomber* (1898) 2 Q.B. 168 not followed.

It is the duty of Courts to follow the decision of the highest Court in Canada, being the latest decision on the subject, without questioning whether or not it is in accordance with previous cases.

Russell Snow, for appellant. *Middleton*, for respondent.

Divisional Court.] RE HURST. [Nov. 17, 1905.

Will—Dower—Election—Specific devise of portion of lot—Use of driving house—Rooms in dwelling house.

A testator by his will devised to his widow for life 17 acres on the west side of a lot together with the use of a drive house on his lands for the storage of crops taken from the 17 acres, and of two rooms, certain furniture and bedding and all the fruit she wanted for her own use from that now grown thereon; and subject to such life estate and a payment of one hundred dollars to his daughter, he devised same to one of his sons. To another son he devised the remainder of the lot, containing thirty-three acres, together with all buildings and erections thereon, reserving such privileges as were theretofore given to his widow during her life time and subject to a bequest of $150 to the said daughter, and the payments of the funeral and testamentary expenses.

Held, that the widow was not entitled to dower in the dwelling house and 17 acres, but she was so entitled as to the thirty-three acres not being put to her election thereto by reason of the disposition made in her favour.

Judgment of ANGLIN, J., affirmed.

Middleton, for appellants. *J. H. Campbell* (St. Catharines), for respondent.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Nov. 18, 1905.

LEVI v. EDWARD.

Solicitor's lien—Set-off—Counterclaim—Con. Rules 1130, 1165.

Appeal from judgment of ANGLIN, J.

The effect of Rule 1165, which provides that "a set-off of damages or costs between parties shall not be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought," seems to be that if A. has judgment against B. for payment of a sum of money, and B. has judgment against A. for a sum of money which includes costs due B.'s solicitor, A. cannot insist upon having B.'s judgment set off against his own, if the effect of the set-off would be to prejudice a lien of B.'s solicitor for his costs of obtaining B.'s judgment.

But the case of a claim and counterclaim in the same action does not come within the purview of this rule. In such a case for the purpose of execution for the final balance between the amount recovered by the plaintiff for debt and costs, and that recovered by the defendant for his debt and costs, there is only one action.

This being so Rule 1164 is special authority for setting off costs taxable to the defendant against those taxable against him without any saving of solicitor's lien.

Per FALCONBRIDGE, C.J.—Rule 1165 does not fetter the discretion of the trial judge which by Rule 1130 (subject to saving clause as to trustees, etc., and subject to the Judicature Act, 1895, and the express provision of any other statute) is practically unlimited. Rule 1165, however, restricts the power of a taxing officer and probably of the judge in Chambers to allow a set-off to the prejudice of the solicitor's lien, but it does not limit the power of the trial judge to order such a set-off.

R. McKay, for defendant. *G. M. Clark*, for plaintiff.

Divisional Court.] [Nov. 21, 1905.

GUMMERSON v. TORONTO POLICE BENEFIT FUND.

Benefit fund—Pension—Right to—Proper forum—Injury in the execution of duty.

By Rule 32 of the Rules and Regulations of a Police Benefit Fund it was provided that where a member "in the execution of duty" received such injury as "in the opinion of the Police Commissioners" permanently incapacitated him from service in the police force, he should receive a pension as therein provided.

The plaintiff, a policeman, while vaulting over a wooden horse in the gymnasium, this being part of a manual exercise prescribed by a police inspector, received an injury whereby he claimed he was permanently incapacitated from further service in the force, and so entitled to such pension, and brought an action therefor.

Held, that the injury was one sustained by the policeman in the execution of duty, but that this matter was one for the consideration of the Police Commissioners, and that the action was not maintainable.

R. McKay, for plaintiff, appellant. *Aylesworth*, K.C., and *D. T. Symons*, for defendant.

Boyd, C., Meredith, J., Magee, J.] [Nov. 28, 1905.

KASTOR & SONS ADVERTISING CO. *v.* COLEMAN.

Principal and agent—Contract—Authority of agent, scope of—Ratification — Conflicting evidence — Reversing finding of trial judge.

The defendant, the owner of a summer resort hotel, engaged a person to manage and conduct it for a season, agreeing that the latter should have the entire control and management of the hotel. Out of the gross receipts 15 per cent. was to be paid to the defendant for rent, and all profits were to be equally divided.

Held, 1. A contract for advertising the hotel was within the scope of the manager's authority as agent for the defendant, and that the defendant was bound by it.

2. Upon conflicting evidence, reversing the finding of the trial judge, that the contract was in fact authorized or ratified by the defendant.

Per BOYD, C.:—Where two witnesses of apparently equal credibility contradict each other as to particular statements or conversations, acceptance should be given rather to one who remembers what happened than to one who denies, probably because he does not remember. Another rule for dealing with such conflicts of evidence is to consider what facts are beyond dispute and to examine which of the two accounts in conflict best accords with those facts according to the ordinary course of human affairs and the usual habits of life or business.

Judgment of STREET, J., reversed.

H. Carscallen, K.C., for plaintiffs. *S. F. Washington*, K.C., for defendant.

Divisional Court.] SHEA *v.* INGLIS. [Dec. 12, 1905.

Master and Servant—Workmen's Compensation Act—Superintendence.

The plaintiff, who was a lad of eighteen, was engaged with two men in rivetting the plates of a boiler. It was the duty of one of the three to heat the rivets, of the second to place them in position, and of the third to fasten them by means of a hydraulic hammer which he put in operation by a lever. This man directed the plaintiff to go inside the boiler to hold back a loose stay which was coming in the way of the rivets, and the plaintiff while in the boiler was injured.

Held, that the man who was using the hammer was in effect necessarily entrusted with superintendence of the whole operation, that to his orders the plaintiff was bound to conform, and that the accident having happened, as was found, owing to this man's negligence, the plaintiff was entitled to damages.

Garland v. *City of Toronto* (1896) 23 A.R. 238 distinguished.

DuVernet and *R. H. Greer*, for appellants. *W. T. J. Lee*, for respondents.

Anglin, J.] [Dec. 15, 1905.

BARRIE *v.* TORONTO & NIAGARA POWER CO.

Practice—Judgment on admissions—Payment into Court of part "in full satisfaction"—Payment out—Rules 419, 616.

The plaintiffs appealed from an order of the Master in Chambers dismissing their application under Rule 616 for judgment upon alleged admissions in the pleadings with leave to proceed for the balance of their claim not admitted, and for payment out of Court of a certain sum paid in by the defendants with their statement of defence under Rule 419. The sum thus paid in by the defendants, they alleged in their pleading to be "balance due in respect of all the said matters," and they brought it into Court "in full satisfaction of the plaintiff's claim therein."

Held, 1. The plaintiffs were not entitled to judgment with leave to proceed for the balance of their claim, and for payment out of the money paid in, for by moving as they did they accepted the statement of defence, and must take the negative as well as the affirmative allegations therein contained, and were not entitled to the benefit severed from the accompanying statement that the account admitted was the entire sum due.

2. The money should not be paid out to the plaintiffs under Rule 419 for whatever discretion the Court may have by virtue

of the words "subject to further order" under that rule, it should not be exercised to enable the plaintiffs to take as payment on account moneys which the defendants had offered only "in full satisfaction."

Middleton, for plaintiffs. *J. H. Moss* and *H. H. Macrae*, for defendants.

Meredith, C.J.C.P.] [Dec. 22, 1905.

DOON *v.* TORONTO FERRY CO.

Practice—Third party notice—Directions for trial—Discretion of the Court—Rules 209 and 213.

On a motion for directions for the trial of an action under Rule 213 it is in the discretion of the Court to determine whether having regard to the nature of the case it is a proper one for the application of the third party procedure notwithstanding that leave has been given to serve a third party notice under Rule 209.

Miller v. *Sarnia Gas Electric Co.* (1900) 2 O.L.R. 546, and *Holden* v. *Grand Trunk Ry. Co.* (1901) 2 O.L.R. 421 referred to and considered.

Judgment of the Master in Chambers reversed.

D. C. Ro , for plaintiff. *Greer*, for defendants. *Mackelcan*, for third parties.

Cartwright, Master.] [Jan. 4.

THOMSON *v.* MARYLAND CASUALTY CO.

Production — Affidavit on — Letters — Solicitor and client — Privilege.

In an action on a policy on the life of the plaintiff's husband, the defendants filed an affidavit on production, but objected to produce certain letters between a local and the head offices on the ground: "that they are privileged, being of a confidential nature and disclosing certain legal points in connection with the defence of this action." On a motion to compel production the defendants manager swore that: "It is my custom in the course of business, frequently to write to the head office on matters involving points of law; the head office confer with their general solicitors, receive legal advice from them, and then communicate with me. The letters (in question) are of the same nature as those between solicitor and client, and are, as I am advised and believe, privileged for that reason."

Held, not sufficient; and that the affidavit should state that the letters "came into existence for the purpose of being com-

municated to the solicitor, with the object of obtaining his advice or enabling him to defend an action." *Southwark and Vauxhall Water Co.* v. *Quick* (1878) 3 Q.B.D. 315 followed.

E. G. Long, for the motion. *Edward Bayly*, contra.

Teetzel, J.] HORLICK *v.* ESCHWEILER. [Jan. 8.

Master's office—Reference—Examination on commission—Right of cross-examination—Con. Rules 654-700.

Appeal from the report of the Master at Kenora made upon reference to tax accounts, based upon the Master's refusal during the reference to issue, on the application of the defendants, a commission to cross-examine the plaintiffs upon their affidavits filed with him in proof of their accounts, upon which he was adjudicating.

Held, that the defendants were entitled to the commission of cross-examination as of right.

Casey Wood, for defendant. *Douglas*, K.C., for plaintiff.

Cartwright—Master.] [Jan. 11.

ONTARIO LUMBER CO. *v.* COOK.

Pleading—Particulars—Settled accounts.

In order to open settled accounts on the ground of mistake specific errors must be alleged and proved. General allegations are not sufficient and if made must be supplemented by particulars.

Lawrence, for plaintiffs. *Marsh*, K.C., for defendant.

Cartwright—Master.] WRIGHT *v.* ROSS. [Jan. 19.

Venue—Contract—Sale of goods—Agreement as to place of trial—Action to set aside contract.

An action for the cancellation of a contract of sale on the ground of failure of consideration is an action "arising out of the transaction" within the meaning of a provision in the contract that any such action shall be tried in the county where the head office of the vendors is situated, and, apart from any question of convenience, the venue if laid elsewhere will be changed to that county.

R. U. McPherson, for plaintiffs. *A. C. McMaster*, for defendants.

Divisional Court.] IN RE MACINTYRE. [Jan. 23.

Surrogate Court—Passing accounts—Executors and administrators—Trustee—Creditor's claim.

A Surrogate Court judge on passing the accounts of an executor, administrator, or trustee, under the provisions of s. 72 of the Surrogate Courts Act as amended by 5 Edw. VII. c. 14 (O.), has no jurisdiction to call upon a creditor of the estate to prove his claim and to adjudicate upon that claim and allow it or bar it. If, however, the executor, administrator, or trustee, has in good faith paid the claim of a creditor before bringing in his accounts the Surrogate judge has jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts. Order of the Surrogate Court of Elgin barring the claim of a creditor set aside as having been made without jurisdiction.

J. A. Robinson, for claimant. *S. Price*, for administrator.

Meredith, C.J.C.P.] [Jan. 30.

WILE *v.* BRUCE MINES RY. CO.

Railways—Appointment of receiver.

The High Court of Justice at the instance of a creditor of a railway company has power to appoint a receiver both where the company, being situate within the province, is under provincial legislative jurisdiction and where it is under federal legislative jurisdiction if there is no federal legislation providing otherwise.

M. C. Cameron, for the motion. *Britton Osler*, contra.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] DOUCETTE *v.* THERIO. [Dec. 9, 1905.

Assault—Forcible removal of trespasser—Liability for excess.

In an action claiming damages for unlawfully assaulting and beating plaintiff, defendant pleaded that at the time the acts complained of were committed defendant was the owner of and engaged in carrying on a lobster factory and that plaintiff entered and created a disturbance and refused to leave, when

requested to do so, and that defendant thereupon removed plaintiff, using no more force than was necessary.

Held, that defendant was justified in using such force as was necessary to effect the removal of plaintiff from his premises, but as by his own admission he did more than this plaintiff was entitled to recover for the excess, and the verdict of the jury in defendant's favour must be set aside.

J. J. Ritchie, K.C., for appellant. *R. G. Monroe* and *T. R. Robertson*, for respondent.

Full Court.] WILCOX *v.* STEWART. [Dec. 18, 1905.

Slander—Words charging theft—Privileged occasion.

In an action brought by plaintiff claiming damages for words spoken by defendant of a concerning plaintiff imputing that plaintiff was a thief, the defence set up was that on the occasions when the words in question were used defendant, on behalf of the Reid Newfoundland Steamship Company, was conducting an enquiry into a shortage of accounts of one M., who was agent of the company at North Sydney and that all the parties present were employees of the company and were endeavouring to ascertain what had become of money which appeared by the accounts to have been taken from the office at the place where the enquiry was being held. The trial judge instructed the jury that the occasion upon which the words complained of were uttered was privileged and that the words were not the subject of an action unless the jury found that defendant in uttering the words was actuated by ill-will or by some indirect motive other than a sense of duty, and that the burden of proving this was upon plaintiff.

Held, that the instructions given were correct and that in the absence of evidence such as that indicated the verdict of the jury in favour of plaintiff was wrong and must be set aside and the action dismissed with costs.

Covert, for appellant. *W. F. O'Connor*, for respondent.

Full Court.] [Dec. 18, 1905.

MARKS *v.* DARTMOUTH FERRY COMMISSION.

New trial—No substantial change in evidence—Withdrawal of case from jury.

The judgment of the Supreme Court of Nova Scotia in an action by plaintiff as executrix of M. to recover an amount

claimed to be due under a contract of hiring with defendant was reversed on appeal to the Supreme Court of Canada the illness of deceased by which he was permanently incapacitated would itself terminate the contract and that a finding of the jury that deceased did not continue in his employment after notice of a rule that an employee was only to be paid for time that he was actually on duty was against evidence and must be set aside. A new trial having been ordered and had, the presiding judge, on the conclusion of plaintiff's case stated that in his opinion the additional evidence given made no material change in the case from what it was before and withdrew the case from the jury.

Held, that the facts being substantially the same as before, no useful purpose could be served in submitting the case to a jury, and that the judge was right in withdrawing the case from the jury and in dismissing the action.

W. B. A. Ritchie, K.C., and *Finn*, for appellant. *Drysdale*, K.C., for respondent.

Full Court.] McLEAN *v.* CAMPBELL. [Dec. 18, 1905.

Slander—Words charging theft—Publication—Misdirection of jury as to privileged occasion—New trial—Damages.

In an action for slander the words complained of were "You (meaning the plaintiff) stole my feather bed and silver spoons," and at the same time, in answer to the question, "Do you really mean to blame me for stealing them," the further words, "Most undoubtedly I do" (meaning thereby that the plaintiff was guilty of stealing his feather bed and silver spoons). Plaintiff was a tenant of a portion of defendant's house and owing to some difference which had arisen was engaged at the time the words in question were used in packing up the articles belonging to her with a view to their removal and defendant was objecting to having them removed until the following day, claiming that they had not been properly checked over. The words were uttered in the presence of third parties. The trial judge instructed the jury that the occasion was privileged unless malice was shewn. The jury returned a verdict in plaintiff's favour and assessed the damages at $250.

Held, 1. The occasion on which the words complained of were uttered was not privileged and that the directions given to the jury were erroneous on this point, but as it was evident that defendant was not prejudiced thereby a new trial should not be allowed.

2. While the damages were large under the circumstances that was a matter peculiarly within the province of the jury and they were not so excessive as to call for the interference of the Court.

W. F. O'Connor, for appellant. *A. Drysdale*, K.C., and *Burchell*, for respondent.

Full Court.] HORNE *v.* HORNE. [Dec. 18, 1905.

Tenants in common—Division of lands by agreement and subsequent occupation—Way—User for more than twenty years.

L. and H. who owned and occupied a farm in common agreed upon a division of the property between them and called in a surveyor for that purpose who ran a line upon which a fence was erected and by which the parties continued to hold. At the time of the division there was a road upon the property which had been used as a means of obtaining access to the public road and which both parties continued to use. After a time H. constructed a road on his part of the property which gave him a more convenient mode of access to the public road when going in certain directions, but he continued from time to time as necessary to use the former road. After the death of H., L. erected a fence for the purpose of preventing defendants, who claimed under H., from making use of the portion of the old road which passed through his land and upon defendants taking down the fence brought an action claiming damages for the removal of the fence and an injunction to prevent defendants from passing over his land.

The evidence shewed a continuous user of the way for a period of about thirty years and plaintiff failed to shew any abandonment or interruption of the user.

Held, affirming the judgment of the trial judge that plaintiff could not succeed in his action, and that the construction by H. of the new road over his own land and its use as mentioned was not an abandonment of his right to use the former way.

W. F. O'Connor, for appellant. *H. Ross*, for respondent.

Province of Manitoba.

KING'S BENCH.

Richards, J.] KEDDY *v.* MORDEN. [Dec. 4, 1905.

Fraudulent conveyance — Statute of Limitations — Amendment after cause of action barred—Promissory note—Negotiable instrument — 13 Eliz. c. 5 — Registration of certificate of County Court judgment, binding effect of.

The defendants were husband and wife and the plaintiff brought this action for a declaration that the wife was only a bare trustee of the land in question for the husband, and that such land was subject to be sold to satisfy the plaintiff's claim under a judgment of a County Court against the husband of which a certificate had been duly registered. The husband had, in 1895, conveyed the land to the wife without consideration and for the purpose of defeating, hindering and delaying the creditors of the husband and to deprive them of recourse against the land. The plaintiff's judgment had been recovered in an action commenced on 3rd December, 1898, on an instrument in the form usually called a lien note, whereby the husband had promised to pay the plaintiff $200 "on or before the first day of December, 1892."

Held, 1. The lien note was not a negotiable promissory note: *Bank of Hamilton* v. *Gillies*, 12 M.R. 495. Therefore, it was due on 1st December, 1892, there being no days of grace allowed, and the plaintiff's right of action on it was barred by the Statute of Limitations at the time when he commenced his suit upon it.

2. During the three days before the commencement of that suit, the plaintiff could not have successfully attacked the conveyance as fraudulent under the statute 13 Eliz. c. 5, relying solely on his own claim as a basis: as *Struthers* v. *Glennie*, 14 O.R. 726, decides that a voluntary conveyance cannot be successfully atacked on the basis of a debt due at the time of the conveyance, but barred by lapse of time before the action to attack was begun.

3. The wife was not bound by the recovery of the judgment, as she was no party to it, and should now be permitted to plead the Statute of Limitations, if necessary, to any claims under the Statute of Elizabeth, just as she could have done if this action had not been commenced on 3rd December, 1898; and, therefore,

the plaintiff could not succeed by any amendment setting up that the conveyance was fraudulent under the Statute of Elizabeth.

4. The husband, after the conveyance was made, had no interest in the land that could be bound by the registration of the certificate of judgment, and so the plaintiff could not have a declaration that the wife held the land as trustee for him.

Action dismissed without costs as the defendants had given false testimony in the case.

McKay, for plaintiff. *Hallen,* for defendant.

Mathers, J.] ARBUTHNOT *v.* DUPAS. [Dec. 15, 1905.

Principal and agent—Undisclosed principal—Payment to agent, when a discharge to principal.

The plaintiff's claim was for the price of lumber used in the erection of a house on the defendant's land, but which had been sold to the defendant's husband and on his credit alone. Upon discovering facts which led him to believe that the husband had only acted as the defendant's agent in buying the lumber, the plaintiff brought this action.

The trial judge found in favour of the plaintiff as to the agency, but the defendant swore that she had furnished her husband with the money to pay for the lumber at the time it was bought, and contended, on the authority of *Thomson* v. *Davenport,* 9 B. & C. 78, and *Stokes* v. *Armstrong,* L.R. 7 Q.B. 598, that her liability as an undisclosed principal was discharged by such payment.

Held, following *Irvine* v. *Watson,* 5 Q.B.D. 102, and *Heald* v. *Kenworthy,* 10 Ex. 739, that the proper rule is that such discharge only takes place when the conduct of the seller has been such as to make it unjust for him to call upon the undisclosed principal for payment, or when the character of the business is such as naturally to lead the principal to suppose that the seller would give credit to the agent alone. See also Pollock on Contracts, p. 104; Broom's Common Law, p. 585, and Addison on Contracts, 1903 ed., p. 149. Verdict of County Court judge in favour of plaintiff affirmed on appeal, with costs.

A. J. Andrews and *R. M. Noble,* for plaintiff. *Hoskin,* for defendant.

Perdue, J.] [Dec. 30, 1905.

BRODSKY *v.* WESTERN CO-OPERATIVE CONSTRUCTION CO.

Summary conviction of corporation—Certiorari to quash under the Masters and Servants' Act—Recognizance as preliminary to certiorari—Deposit in lieu of recognizance.

The defendant company, having been convicted under the Masters and Servants' Act, R.S.M. 1902, c. 108, for unlawfully refusing to pay wages to the plaintiff, obtained a rule nisi for a writ of certiorari to quash the conviction. On the argument it was objected that section 4 of The Manitoba Summary Convictions Act, R.S.M. 1902, c. 163, had not been complied with, as the recognizance filed in assumed compliance with that section was entered into by two persons, but the company was not a party to it.

Held, that the objection was fatal, and that, as a corporation cannot enter into a recognizance, it can only comply with that section by making a deposit with the justice of the peace or magistrate.

Held, also, that the recognizance was defective in being conditioned for the due prosecution of "a writ of certiorari issued out of the Court of King's Bench for Manitoba," instead of a writ *to be issued*.

The defendant company was given leave, under *Ex parte Tomlinson*, 20 L.T. 324, and *Regina* v. *Robinet*, 16 P.R. 49, to make the deposit with the convicting magistrate as provided by the statute within fourteen days, and then to renew the motion.

Costs of the argument to be costs to the plaintiff in any event; and, if deposit not made within the time allowed, the rule nisi to be discharged with costs.

Dawson, for plaintiff. *Elliott*, for defendant.

Eight members of the Campbell-Bannerman Cabinet, which displaces the Balfour administration, belong to the legal profession, an incident which it is said is without parallel in the annals of political history. Five of these have been practising barristers, one of them bred to the law, though not practising, is a Bencher of Lincoln's Inn, and two are solicitors. No great office of State has, however, been entrusted to any one learned in the law.

COUNTY OF YORK LAW ASSOCIATION.

The annual meeting of the County of York Law Association was held on the 29th ult., when Mr. Dyce W. Saunders was elected President. Mr. Walter Barwick, K.C., continues as Treasurer, as does Mr. Nasmith as Secretary. The retiring President, Mr. Hamilton Cassels, K.C., took occasion to refer to some newspaper comments on the profession, which indicated the usual ignorance of the lay press and the public in reference to matters professional.

HAMILTON LAW ASSOCIATION.

The annual meeting of this Association was held on Jan. 9th. The Report for 1905 shews a membership of 69, a Library of 4,264 volumes, of which 159 were added during the year. The Report refers to the death of the Hon. Mr. Justice Robertson, at one time Vice-President of the Association. The following officers were elected for 1906:—

President, F. MacKelcan, K.C.; Vice-President, S. F. Lazier, K.C.; Treasurer, Charles Lemon; Secretary, W. T. Evans.

Trustees.—Wm. Bell, Geo. Lynch-Staunton, K.C., T. C. Haslett, P. D. Crerar, K.C., S. F. Washington, K.C.

Auditors.—W. S. McBrayne and James Dickson.

Committee on Legislation.—H. Carscallen, K.C., S. F. Washington, K.C., Geo. Lynch-Staunton, K.C., Wm. Bell, A. Bruce, K.C., F. MacKelcan, K.C., S. F. Lazier, K.C., W. T. Evans.

THE COUNTY OF HASTINGS LAW ASSOCIATION.

At their annual meeting the following officers were elected for the ensuing year, for the above Association: Hon. President, J. P. Thomas; President, W. N. Ponton; Vice-President, F. E. O'Flynn; Secretary, W. J. Diamond; Treasurer, J. F. Wills; Curator, W. C. Mikel; Trustees, W. S. Morden, E. G. Porter, M.P., W. B. Northrup, M.P., W. J. McCamon, S. Masson; Auditors, E. J. Butler and A. A. Roberts.

THE OSGOODE LEGAL AND LITERARY SOCIETY.

On the 18th ult. some of the Law School faculty, the law students of Osgoode Hall and some of the graduate members of the Society dined together, by way of celebrating the thirtieth anni-

versary of the Society. It is interesting to note that this Society was founded in 1876, with Mr. J. S. Ewart, K.C., as its President, Mr. G. T. Blackstock, K.C., and Mr. J. S. Fullerton, K.C., as its vice-presidents. On the Committee of Management for that year were the present Hon. Mr. Justice Teetzel, His Honour Judge McTavish, Mr. W. H. Biggar, K.C., etc. Mr. Alexander MacGregor, B.A., LL.B., President of the Society, was in the chair. The toast of the Bar was happily replied to by Mr. E. Douglas Armour, K.C. The gathering was a great success and reminded those present of the historical, brilliant dinner of last year, when the late beloved leader of the Bar of Canada, Mr. Christopher Robinson, K.C., made what may be said to have been his valedictory address to the profession.

We are glad to notice that the students of Osgoode Hall are maintaining their status as debaters in their contests with the representatives of the various colleges in Toronto. In November last there was a debate between the Osgoode students and Victoria College. Mr. J. H. Botsford and Mr. George D. Kelly won a victory for their college on the question as to whether the Dominion Government was justified in enacting the legislation of 1897 relative to the deportation of alien workmen. On the 30th ult. Mr. George H. Sedgewick, B.A., and Mr. E. V. O. Sullivan spoke for Osgoode Hall in a debate against the representatives of Wycliffe College on the question as to whether trusts are in the best interests of society. The judgment in this case went to the Divinity students.

The Living Age has been of more than ordinary interest of late, and promises well for the future. It is beginning the publication of two serial stories of more than ordinary interest: "Wild Wheat," a Dorset tale, and "Beaujeu," an historical romance. A brilliant personal sketch of the members of "The New Government" reprinted from the latest *Nineteenth Century*, is the leading feature of *The Living Age* for February 3. Readers who remember with what keenness Dr. Emil Reich, in two review articles last spring assailed the higher criticism and charged it with "bankruptcy" will await with interest a promised third article in which he resumes the attack.