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TABLE OF CASES.

ERRATA.

Page 4, line 11 from bottom—*For* "seller" *read* "buyer."

Page 4, line 10 from bottom—*For* "if he has" *read* "if he, the seller, has."

Page 411, note (*b*)—*For* "Cap." *read* "C."

Page 607, line 7 from bottom—*For* "Supreme Court of Canada" *read* "In the Supreme Court."

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SPECIFIC PERFORMANCE OF CONTRACTS IN THE CIVIL LAW.

WHEN Sir Edward Fry, more than twenty years since, published his excellent work on specific performance, he stated, in sec. 1, that "The maxim of the civil law, *Nemo potest præcise cogi ad factum*, is equally the principle of the Common Law of England." In the recent edition of his book, the statement is more elaborate and positive. "It is certain that the Roman Law gave a title to damages as the sole right resulting from default in performance, and did not enforce specific performance directly, or in any other manner than by giving such right to damages. It held to the maxim, '*Nemo potest præcise cogi ad factum.*'" The only authority referred to in both editions is *Poth.* Tr. des Oblig. pt. 1, c. 2, art. 2, sec. 2. But in an additional note, at p. 669 of the second edition, the statement is repeated, that no jurisdiction to enforce specific performance existed in the Roman Law; and there is added an explanation of M. Renault as to the French Law, which, however, scarcely bears out the interpretation placed upon it by Sir Edward Fry, that in France there is no remedy by way of specific performance.

My present purpose is not to inquire what the law of France on this subject is, but whether the assertion that the Roman Law did not enforce specific performance

directly, or in any other manner than by giving a right to damages, be accurate.

The treatise of Pothier is not an account of the Roman Law as to obligations, but of the law of France in his time. His translator, Sir W. D. Evans, in a note to the passage referred to by Sir Edward Fry, says, "The real meaning of this is, that in the nature of things, it is impossible for one man specifically to direct or constrain the acts of another; but, by putting a restraint upon his person or property, he may be induced to do the act which is the object of his obligation, rather than submit to the continuance of such restraint. The doctrine of Pothier, derived from his own law, is, that the only mode of enforcing the performance of obligations to do an act, is by subjecting the party to the damages arising from its not being done. The English Courts of Equity, in exercising their jurisdiction of compelling the performance of acts agreed to be done, proceed by the imprisonment of the person in case of refusal, which is not a contradiction of the maxim of the Roman Law above cited, but an application of it; such imprisonment not being any more a specific performance than compensation in damages, etc."

I much doubt if Pothier himself would, at any time, have said, "It is certain, etc." Referring to his edition of the Pandects, in a note to a text of the code (*a*), providing that if the property sold were not delivered pursuant to the contract of sale through the fault of the vendor, the President of the Province would see that he should be condemned to indemnify the purchaser, he says, indeed, "But yet, he will not order the property to be taken from him by military force, as in *Rei vindicatione*. For it would be impolitic (*incivilis*) to take property from the owner in this manner. On this subject, however, there is a controversy among the interpreters. It is not an objection that Paul says, 'the seller may be compelled to deliver (*b*), for the question remains, how is he to be compelled. Nor does law 6 of

(*a*) C. 4. 49. 4.
(*b*) Paul. Sent. 1, 13.

the code *de rescind. vend.* (*c*) form an objection, in which the property sold is to be understood to have been delivered. *Consensu autem facta venditio* is there said, not that delivery had not taken place, but to contrast it with a sale extorted by duress, which might be rescinded."

The text of the code upon which he was commenting (*d*), is of the date A.D. 290, and prior, therefore, to the abolition of the mode of procedure by formula; which was A.D. 294 for the Empire of the East, and A.D. 305 for the Empire of the West (*e*), a subject to which reference will be made further on.

Pothier, indeed, shows the inclination of his opinion in this controversy to be against the execution of contracts *by military force*, and perhaps against there being any remedy by way of specific performance, but by no means in the positive terms of Sir Edward Fry.

It will be better, however, to permit Pothier to be his own interpreter, when it will be found that Sir W. D. Evans was mistaken in supposing that he applied the maxim generally, or that it needed any qualification as being influenced by the law of France; and that Sir Edward Fry is likewise mistaken in supposing it to be intended to deny the right of specific performance in the Roman Law. In his *Traité du contrat de vente* (*f*), Pothier discusses the subject as applicable to the contract of sale, and, expressing his more mature opinions, declares that specific performance may be enforced. He explains the maxim *Nemo potest cogi ad factum* to apply only when the act, the object of the stipulation, is a simple act of the person of the debtor, *merum factum*—a class of cases in which even the English Law does not give specific performance. The instances Pothier gives are such as "where one is bound to copy my papers, or to make me a ditch, it is plain I cannot make him write or work at the ditch in spite of himself, and that his obligation, in case of his refusal to execute it, must

(*c*) C. 4. 44. 6.
(*d*) 4. 49. 4.
(*e*) C. 3. 3. 2.
(*f*) Part 2, C. 1, sec. 1; Art. 5, sec. 3.

necessarily resolve itself into damages. It is not the same of the act of delivery; this act *non est merum factum, sed magis ad dationem accedit*, and the debtor may be constrained by the seizure and removal of the property he has bound himself to deliver. Our opinion is that of Cujas, of Zoes, of Perez and of Davesan. Among those who hold the first opinion (against specific performance) to be more conformable to the Roman Law, some agree that in this respect the Romans had departed from natural law. It is the opinion of Barbeyrac. Finally, it appears that the opinion we embrace is followed in practice, as Wissenback admits, though he was of the contrary opinion."

No text of the *corpus juris* expressly decides this question, and it is to be determined by argument from many scattered laws, from the course of procedure, the nature of the remedies upon contracts, and the changes that have at different periods been made in these remedies. Hence, it seemed to me, that a collection of the opinions of eminent jurists, who were intimately versed in the civil law, many of whom made it their whole study, would be a safer method of ascertaining what remedy the law provided for enforcing the contract of sale, than to subject the texts to a new examination.

At a very early period, the true doctrine of the Roman Law was the subject of inquiry, discussion and controversy. The ablest commentators were at variance. In the gloss on D. 19, 1, 1, the question is asked, "But what if the seller wishes to have the specific property—can he?" And the answer is that Martin says he may, if he has the power of restoring it; if not, he is to be condemned in damages (*interesse*). Bulgarus, Joannes and Azo deny this, and they, with Hugolinus, assert that the seller is always discharged by payment of damages (*interesse*), even if he has the property. Since it is said in these texts that he may either give the property or damages (*interesse*), it is plain that it is at his election. The names mentioned above were all those of able and distinguished jurists.

At a later period, the matter was discussed by Bartolus in his comment on the law *Stipulationes non dividuntur* (*g*), where he gives the opinions of the writers who had preceded him on both sides of the question. He sums up in this way:—"I come to the third, when it is in the obligation that a thing be delivered, whether specific performance of it can be compelled. The gloss varies, for upon D. 19, 1, 1, it approves the opinion of Bulgarus and Joannes, that without distinction the seller is discharged by paying damages by that law and by C. 4, 49, 4. But upon the Inst. 3, 23, 1, it approves the opinion of Martin, and distinguishes whether the seller has the power of delivering the property, when he is compelled to deliver it specifically, as in that section (23), and in the law D. 19, 1, 11; or the seller has not the power of delivering it, and then he pays damages, as in the laws quoted on the other side. And Jacobus, Dynus and Petrus hold that opinion in this case, as Cynus says (in his comment) on the law C. 4, 49, 4. Jacobus de Arena holds that he may be compelled specifically to perform, if he has the power of delivering the property; otherwise, he is condemned in damages. But yet that these damages are not sued for according to him, as Cynus relates on C. 7, 47. But other Doctors teach that the damages may be sued for, as is the case in the cited law D. 19, 1, 1 :—

"What shall we say? I say thus:—Either that the property to be delivered is in an obligation *ex contractu* of purchase and sale; and I hold the opinion of Martin, as he distinguishes whether the seller has the power of delivery or not by the laws above quoted, which all the Doctors commonly hold. Or that the thing to be delivered is in an obligation arising out of another simple stipulation, and then without distinction the defendant is discharged by paying damages, as in this law, D. 45, 1, 72, that a field be delivered, joined to the following sentence, and in the law D. 45, 1, 114. The reason is because when one is bound by reason of purchase, he is not bound to the mere

(*g*) 45. 1. 72.

act only; nay, the obligation has the nature of an obligation to give. For if he is the owner, the seller transfers the ownership; or, if he is not the owner (he transfers) the right to obtain a title by possession (*usucapiendi*), as above in the law D. 19, 1, 1. On that account, therefore, that it partakes of the nature of an obligation to give, he is compelled specifically to perform it, if he has the power of delivering it; but on account of the act resting in obligation, an obligation to pay damages succeeds. And that the obligation does not contain merely an act, you have the gloss on D. 12, 1, 9, the 3rd gloss, and, it seems, the text above, D. 45, 1, 52, at the end, understanding that in the last case the purchase precedes; but when the delivery of the property is in an obligation arising from a simple stipulation, then the act alone is in the obligation, as in D. 45, 1, 28."

This was the opinion of the most celebrated jurist of the middle age. Most authors speak of him only with admiration. In Spain, his opinions long had the force of law. In Portugal, his commentary on the code was translated and placed in the same rank as the text and the ordinary gloss. At Padua, a chair was founded to explain the text, the gloss, and Bartolus (*h*).

At a later period, Cujas, whose fame as an interpreter of the civil law has seldom been surpassed, in his comment on D. 19, 1, 1 (*i*), adopts the opinion of Martin, and says, that if the seller does not give possession, it will be taken from him by the strong hand (*manu militare*), in the same manner as the buyer can be compelled to pay the price. He compares it to a legacy, which must be delivered, if it can be easily done (*j*). He cites the opinion of Paul (*k*), *venditor cogi potest ut tradat*, and Justinian (*l*), that gifts perfected by naked consent, like sales, involve the necessity of

(*h*) *Savig.* droit Rom. au moy. age, 4, 225.
(*i*) Ed. Prati, 7. 1171.
(*j*) D. 30, 71. 3.
(*k*) 1 Sent. tit. 13.
(*l*) Inst. de don. 2, 7.

delivery, since the Code *de donationibus* (8, 54, 35) says *omnimodo*, and the passage in the Institutes is taken from it. It is not a necessity that may be avoided by a plea, viz., that the seller was ready to pay damages. Finally, that the option lay with the buyer, not with the seller, and the seller shall be compelled to deliver the subject of sale, or pay damages for not doing so. He then inquires if the same rule applies to a stipulation, and if the stipulation provided *rem tradi*, no one doubts that it applies. But if it simply concluded *quanti ea res est dari*, the stipulator could not insist on the specific delivery, but only for damages. The same law applies to the buyer—he cannot abandon the purchase paying damages, but must pay the price.

In a *repetita prælectio* on the same law (*m*), he recurs to the subject, and repeats the same arguments. He quotes the opinion of Martin in the gloss, and approves of it, and so, he says, do nearly all the Doctors: *Sententiam Martini omnes doctores fere probant.* And, referring to the law of the code above cited (*n*), he observes: "The case of this law is this. If the delivery of the property sold is not made through the obstinacy and default of the debtor, what shall be done? That law says that the seller is to be condemned in damages. This is true, for the buyer had sued for damages, or because he pleased to accept them. But nothing prevents him from claiming that the property itself shall, at all events, be delivered, and if he shall sue for that, the seller will not be discharged by paying damages." And he sums up, that if the buyer elects to have the property, he may.

Doneau, or Donellus, a contemporary of Cujas, maintained the contrary doctrine, in a very able argument, commenting on the law in the D. 42, 1, 13. But this remedy (specific delivery), he says, is little adapted to compelling the seller or promissor, since the result would be useless for what the creditor desires. The judge may provide that

(*m*) D. 19, 1, 1; Ed. prati 8, 338.
(*n*) C. 4, 49, 4.

the property be delivered to the creditor, but what then if ownership is not transferred to him? For by the agreement to deliver a thing is not contained the bare act of delivery, but a question of property as Ulpian mentions (*o*), *i. e.*, that the seller shall so transfer the property to the buyer, that from the delivery the ownership may be acquired, or, as a condition of usucaption. Moreover, the judge is not able to pass this to the purchaser, because he is not the owner (*p*). That it is only in three classes of suits the ownership is transferred, a division of a family inheritance, a division of property held in common, and a suit for regulating boundaries; and after a careful consideration of many, if not all, of the texts usually cited, he concludes, that since, in obligations *faciendi* is included an obligation to pay damages, if the act is not performed, he who pays these damages is discharged, though contrary to the wish of the creditor.

Hotman, a contemporary of Doneau and Cujas, advocates the same view as Doneau, I think, in commenting on the Institute, 4, 6, 32, and in his epitome in Pand. lib. 18, *De contrah. emp. et vend.* sec. 19 (D. 18, 1, 19), and in his tract *de eo quod interest.*

Vinnius, in commenting on the Inst. 3, 16, 7, says: "In obligations *faciendi* this is the law, that though at first, and so long as that can be done which was promised, the act rests in obligation, whence, also, it is termed an obligation *faciendi;* yet, never so that the act may be sued for before the lapse of the time when what was promised could and ought to have been done; but so far only that the promissor may be discharged by performing what he has promised. But after default has been made in performance, thenceforth there begins to be due that which the interest of the stipulator is worth, but so, however, while issue has not been joined, the promissor may yet be discharged by performance. Vinnius considers the acts

(*o*) D. 45, 1 52.
(*p*) D. 41, 1, 20; D. 50, 17, 54.

referred to in the text of the Institutes, to be such as require personal services or exertion, such as, To go to Rome, To paint a picture, To build a house, To dig a ditch. These acts are considered only to rest in obligation, and the debtor may be discharged by performance; they can never be sued for. but only the interest of the creditor (*i. e.*, damages). But if the act which is specified in the agreement consists in the furnishing of anything, or is directed to the giving or transfer of the ownership, or of any right, it is rather to be considered to lie in giving than in doing. For it cannot be doubted, that if by reason of a sale, I have stipulated that the property should be delivered to me. I may sue for the very property itself. But whether in this case the property may be sued for so that it may be specifically performed, or that by payment of damages the seller may be discharged, will, perhaps, be treated of elsewhere." (I have not been able to discover that this was ever treated by the author elsewhere. There are some few observations on Inst. 3, 30, 1 and 4, 6, 32, but nothing of much importance.) "At present," he continues, "it is sufficient for us to know what kind of acts are here (Inst. 3, 16, 7) intended, viz., naked and simple acts, to extort which from the unwilling bears some appearance of slavery."

Huber, in Inst. 3, 16, says: "If the promissor does not perform his promise, he is bound for the interest of the promisee, which consists of two parts, in that which we do not get, and the profit we might have made of it, both of which are matters of fact, and often difficult to prove. The interest of the stipulator (the damages) may be sued for when the time has passed within which the act might have been accomplished by a man not negligent (*q*). Whether the promissor may discharge himself by paying the damages, is a grave question. Whether he who has promised to do an act, as to build a house, to paint a picture, to dig a ditch, may be compelled to do the act itself, or whether he may discharge himself by paying damages. The latter is approved by the more recent writers by general vote,

(*q*) D. 45. 1; ll. 14, 72, 84 and 137.

whom our Weisenbach cites and follows. A few, but noted, writers think otherwise—as Cujas, Coras, Bronchorst and Perez—to whom I willingly add my vote; moved in the first place by this argument, that there is no reason of policy why it should be permitted to break pledged faith; for when it is said that no one can be compelled to do an act, I understand it plainly to mean that the voluntary actions of men cannot be commanded by an external power, nor that any one who hardens his mind to contumacy can be compelled to do an act; nor, indeed, in *giving* and in other payments, can one be compelled to give what he does not wish, because to *give* or to *pay* is not less a voluntary act than to *do*. But contumacious persons are said to be compelled civilly when prætorian remedies are applied to them to the end that their consent may be extracted, as the taking of pledges, putting in possession, imposing fines, military force, and, last, the gaol. There is nothing to prevent the use of those remedies against a person who does not wish to do what he has promised; for he breaks faith as much as he who refuses to pay what he owes. Now, he who can be affected by these remedies, is bound to perform specifically, otherwise they could not be applied. * * I find, indeed, in various laws, that where the act has not been performed, damages may be recovered; but this is a *quasi* punishment of him who does not keep a promise, * * but it is not thence to be inferred that the plaintiff cannot insist upon the performance of the act itself if he prefer it. Moreover, it is said elsewhere of the purchaser that, if the seller do not deliver the property, he may sue for damages, from which it can as little be inferred that if he wishes the property itself he cannot sue for it (*r*). But he who owes an act cannot be compelled to perform it if he continues unwilling. To this argument it suffices to say, that a debtor may be condemned to do an act by a judge; whom, if he does not obey, those means of compelling obedience to a sentence of this kind will be applied, such as the nature of the case demands."

(*r*) Inst. 3, 23.

Coming now to more recent writers, I find that Lord McKenzie, in his *Studies in Roman Law* (*s*), says, that in Justinian's time, "All questions of law and fact were discussed before the same magistrate or judge, and the sentence, if given against the defendant, might either condemn him to pay a sum of money or to restore the subject in dispute."

And it may be noted that the word *restore* is not unfrequently used not only to signify the reinstatement of a person in his former position with regard to property, but also to the creation of new rights as by the contract of purchase (*t*).

And Sir George Bowyer, in his work on the civil law, pp. 185, 6, after quoting the Inst. 3, 16, 7, Vinn. Com. in idem, Heinec. Com. in idem, and the Code 8, 42, (43), 16, concludes that the Roman Law enforced specific performance when the nature of the case admitted, but left the creditor his option between specific performance and damages.

Sandars, in his commentary on the Inst. 4, 6, 32, says: "It was only under the system of *judicia extraordinaria* that the *condemnatio* might be not only for a certain sum of money, but also for any other definite thing, that thus the object of the demand might be directly obtained."

Many of the writers above named may perhaps be said to have applied themselves to a critical examination of isolated texts, and no doubt that was the case, and they paid little attention to the advantages to be derived from the study of the history of the sources.

I now, therefore, propose to add a few references to writers who have availed themselves of all the benefits to be derived from a profound study of the history of Roman legal development, the absence of which will account in a great measure for the contrariety of opinion among the earlier commentators.

(*s*) 4th Ed. p. 355.
(*t*) D. 19, 1, 19, sec. 18, etc.

There are three periods requiring special attention in the history of the Roman Law—the first, that in which the *legis actiones* dominated the whole system of procedure, but which were found in process of time to be unsuitable to the advanced condition of the Roman people, and fell gradually into discredit. By the *lex Aebutia*, passed, probably, in the 6th century of the State, and by the *leges Juliae* the system of formulas was introduced (*u*). This system prevailed till the reign of the Emperors Diocletian and Maximian, when the rescript, already referred to, introduced the *cognitio extraordinaria*, in A.D. 294 for the Eastern, and A.D. 305 for the Western Empire.

We learn from a text of Gaius 4, 48, that, in the time of the *legis actiones*, the judge condemned the defendant to give the thing itself, but under the *formula* he was condemned to pay the estimated value (*v*).

Savigny, in his *Traité du droit Romain* (*w*), (I use the translation by Guenoux) remarks that under the system of formulas the judge could never condemn except to the payment of a sum of money. Thus, by a very unjust whimsicality an obstinate defendant might always force his adversary to receive a sum of money in place of the object in litigation. * * * The principal advantage of arbitrary actions, that of an indirect constraint to obtain a restitution in kind, no longer existed in the time of Justinian, since this restitution might be obtained by way of direct execution.

In a very able and learned work now in course of publication—*Précis du droit Romain, par C. Accarias*—the three systems are explained, viz., the *legis actiones*, vol. 2, 829; the formulary, *ib.*, 849; and the extraordinary, *ib.*, 926. At p. 878, the author says that under the formulary system judicial condemnations had for their invariable object a sum of money; and, at p. 931, that under the extraordinary

(*u*) Gaius, 4, 30.
(*v*) Vide Gaius by Tomkins & Lemon, 677.
(*w*) V. 125.

system the condemnation was no longer necessarily pecuniary; and, at p. 873, note 2, that in the legislation of Justinian the judge might condemn *ad faciendum* (*x*).

And this writer, in his *Theorie des contrats innommés* (*y*), says: "What is the object of the obligation of the debtor? Does he owe the thing itself, *i. e.*, the act or the giving agreed upon? Or, on the contrary, has his obligation for its object only a sum of money representing the interest the plaintiff had to obtain the execution of the agreement? The interest of the question is very visible under the system of procedure of Justinian; if the defendant owes the thing itself, the judge will condemn him to perform it specifically, as often as that shall be possible."

Savigny, in another part of his treatise (*z*), says:— "The rule that a condemnation must be in a sum certain of money did not exist before the *formulae*, and it ceased after they ceased, and the judgment ordered the restitution of the property in litigation, not a sum of money in its stead" (*a*).

Marezoll, in his, *Droit privé des Romains*, sec. 61, Pellat's translation, states the rule in the same way.

And Warnkoenig (*b*), quoting a number of texts, states the result to be that the debtor is bound to perform the act itself which is the subject of the stipulation, and cannot escape by the payment of damages.

From the foregoing, it appears that, in the common opinion of the ablest civilians, specific performance was optional with the buyer while the *legis actiones* and *cognitio extraordinaria* prevailed. In the intermediate period, while the formula regulated the mode of procedure, an indirect method was practised of obtaining a restitution of specific property by means of the *arbitraria formula;* the distin-

(*x*) C. 7. 45. 14.
(*y*) 4me. conf. p. 80.
(*z*) VI. 311.
(*a*) Citing Inst. 4. 17. 2; *ib.* 4. 6. 32; Cod. 7. 4. 17, and Cod. 7. 45. 14.
(*b*) Com. Jur. Rom. privat. vol. 2, 12.

guishing feature of the judgment in this action was an indication to the defendant of a means of satisfying the plaintiff by restoring the property, which if he did not do he would be condemned in damages; and these being fixed in the oath of the plaintiff were much superior to the value of the property in dispute—a very effectual means of coercion. But this form was only applied to actions having for their object the *restitution* or *exhibition* of property, and only in such cases—not to actions arising out of the contract of sale (*c.*) It is probable, therefore, that there were no means of enforcing specific performance of such a contract during this period.

The high reputation of Sir Edward Fry, both as an author and as a judge, has led me to refer to these writers at greater length than may seem necessary. But his statement of the Roman Law on this subject should not pass without remark, as it tends to give an inaccurate description of the jurisprudence of the lawgivers of the world in its later and more perfect state. And from this examination it appears that the rule of the English Court of Chancery--instead of being an unique system, the result of an advanced state of civilization—but follows, and that not to its full extent, the law of Rome, which made the right, in every case but a contract for personal services, rest in the election of the purchaser.

(*c*) Savig. V. 133.

ANONYMOUS.

DOWER IN JOINT ESTATES.

One of the requisites to entitle a woman to dower is that the husband should be seised. And Mr. Leith adds (*a*), "The seisin must have been a *sole* seisin; therefore, the widow of a joint tenant is not, though the widow of a tenant in common is, entitled to dower." And he refers to *Haskill* v. *Fraser* (*b*) and *Ham* v. *Ham* (*c*), in support of the text. While the truth of this conclusion is undoubted, it is more than questionable if the correct reason is given for it. The two cases cited will not support it, as may be seen from the following extracts. In the former case, at p. 388 of the report, Draper, C.J., says:—"The deed from Cain was a deed to the demandant's husband and his brother, of the premises in question as joint tenants in fee, and the widow of the one who died first is not entitled to dower, for the well-known reason that on his death the whole estate vested in the other joint tenant who then was in, not through the deceased, but from the first feoffor or donor." In the latter case, Robinson, C.J., says, at page 497:—"It is only in the case of joint tenancy that dower cannot be claimed, because the estate held is to survive, and that without being diminished by a claim for dower."

It is manifest from the passages cited, that these cases will not bear out the proposition as to sole seisin. In *Ham* v. *Ham*, it was held, according to the established rule, that the widow of a tenant in common was entitled to dower. There was, therefore, the opportunity for his Lordship, in contrasting the two estates, to give the special

(*a*) Leith & Sm. p. 145; Leith. R. P. Stats. 222.
(*b*) 12 C. P. 383.
(*c*) 14 U. C. R. 497.

reason for the difference between them in respect of this interest. But no such reason is given as that mentioned by Mr. Leith.

Let us examine and compare the properties of an estate in joint tenancy and a tenancy in common, and ascertain their points of similarity and difference.

"*Seisin*," saith Coke, "or *seison*, is common aswel to the English as to the French, and signifies, in the common law, possession, whereof *seisina*, a Latin word, is made, and *seisire*, a verb" (*d*). So in Cruise's Digest (*e*), we find :— "The possession of a feud was called seisin, which denoted the completion of the investiture, by which the tenant was admitted to the land. Upon the introduction of the feudal law into England, the word seisin was only applied to the possession of an estate of freehold, etc." Does the seisin in the one case differ from the seisin in the other to such an extent as to account for the proposition stated? The properties of a joint estate are—(i), unity of *interest*; (ii), unity of *title*; (iii), unity of *time*; and (iv), unity of *possession*. Destroy any one of these, except the last, and a tenancy in common is produced.

In contrast to this, tenants in common hold by several and distinct *titles*; the titles may accrue at different *times*; and the *interests* of the tenants may be of different values. "This tenancy happens, therefore, where there is a unity of *possession* merely, but perhaps an entire disunion of *interest*, *title*, and of *time*" (*f*). The dissimilarity of the general properties of these two species of estates becomes so apparent by the contrast that the only point of similarity between them, viz., the unity of *possession* becomes the more noticeable. "In short," continues the same learned writer (*g*), "whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity

(*d*) Co. Litt. 153 a.
(*e*) Tit. I. sec. 19.
(*f*) Leith & Sm. p. 265.
(*g*) *Ibid.* p. 266.

of *possession* continues, it is turned into a tenancy in common." And Coke speaking of these estates, says :— "Only this property is common to them both, viz., that their occupation is undivided" (*h*).

A disuniting of the *possession*, on the other hand, does not produce a tenancy in common, but makes the joint-tenants thenceforth tenants in severalty of their respective parcels. And, so the manner of the seisin is the same in both estates. If the one be not a sole seisin, then neither is the other; and the rule which excludes the widow of a joint-tenant from dower, on account of the peculiarity of his seisin, should not operate to endow the widow of a tenant in common, whose seisin is the same. It is true, as Mr. Leith says (*i*), that tenancies in common differ in nothing from sole estates; but there is an exception in one particular, and that is in the blending and unity of possession, the only characteristic which they possess in common with joint tenancies.

The rule must have some other foundation; and it seems to rest upon this, that the estate of the husband must be one of inheritance in order to entitle the widow to dower, and that the estate of a joint tenant cannot, while the estate of a tenant in common may, be an estate of inheritance. This is apparent from both *Haskell* v. *Fraser* and *Ham* v. *Ham*, supra. Draper, C.J., gives the "well-known reason" that, on the death of a joint tenant in fee the whole estate vests in the survivor, and no part of it descends. And he also points out that the survivor takes *per formam doni* from the first feoffor or donor, and not from the deceased joint tenant. And this opinion is borne out by other authorities. To refer again to Coke. "And it is to be understood that the wife shall not be endowed of lands or tenements which her husband holdeth jointly with another at the time of his death; but where

(*h*) Co. Litt. 189 a.
(*i*) Leith & Sm. p. 269.

he holdeth in common, otherwise it is, as in the case next aforesaid. The reason of this diversity is, for that the joint tenant, which surviveth, claimeth the land by the feoffment, and by survivorship, which is above the title of dower, and may plead the feoffment made to himself without naming of his companion that died, as shall be said hereafter in his proper place; but tenants in common have several freeholds and inheritances, and their moieties shall descend to their several heirs, and therefore their wives shall be endowed" (*j*). We have it very plainly stated that the reason for endowing the widow of a tenant in common, is that her husband's estate was one of inheritance; and it is adopted by Cruise, who cites this passage (*k*), and Crabb (*l*), citing Co. Litt. 31, b.

(*j*) Co. Litt. Sec. 45, 37 b.
(*k*) Cruise's Dig. Tit. XVIII. sec. 52.
(*l*) Secs. 11, 31.

EDITORIAL REVIEW.

The Law School.

The Law School is now an established fact at Osgoode Hall; and we have but little fear that it will again suffer disestablishment at the hands of the Benchers. During the past year the question of its establishment has been mooted by our contemporary and ourselves, and the students enthusiastically set about petitioning the Benchers for it. Nor must we forget the efforts of the Osgoode Literary and Legal Society which has done good service in the past by providing voluntary lectures for the students. Its necessity is beyond question and of this we think the Benchers are firmly convinced; and any changes made in the future will, we anticipate, be nothing more than a modification of the present scheme.

The attendance of students will be voluntary; they will be divided into a senior and a junior class. Every student and articled clerk who is not a graduate of a University, and has not entered his fourth year before the commencement of any term of the school will be entitled to admission to the junior class. Every graduate of a University, being a student or articled clerk, and every other student or articled clerk who shall have passed through the junior class, or entered his fourth year before the commencement of any term of the school, shall be entitled to admission to the senior class. The first term commenced on the twelfth of December last, and will extend to the first of May. The next term will commence on the first of October and will extend to the first of April. To entitle students in the law school to prizes under the rules affecting the Osgoode Literary and Legal Society, they shall be deemed two classes within the meaning of sections seven and eight of the rule;

and the other provisions of the rule shall, so far as necessary, be applicable to students in the school, in the same manner as if the lectures and examinations were held under the authority of the said rule. Section nine of the rule is not to take effect during the continuance of the school.

The attendance has already been very large; and, this alone is matter for congratulation. No one can for a moment doubt the efficacy of oral instruction; and the periodical discussions of moot questions, which are to form part of the course of instruction in the school, will not only serve as a test of the results of the lectures, but will also tend to discover and aid those very essential qualities in an advocate, in which, heretofore, he who aspired to become one had no practice until he perhaps had been several years at the bar. We look forward with pleasure to a bright future for the school.

Queen's Counsel.

The Governor General has been pleased to appoint the following gentlemen to be Her Majesty's Counsel:—Theophilus Desbrisay, William James Gilbert, George G. Gilbert, R. Hutchinson, B. R. Stevenson, Daniel L. Harrington, Charles H. B. Fisher, Edward L. Wetmore, and P. A. Landry—all of New Brunswick.

BOOK REVIEWS.

The County Constable's Manual, or Handy-Book. By J. T. JONES, High Constable of the County of York. Toronto: Carswell & Co., 1882.

This little handy-book, which is got up in a very neat fashion, will be found of great service to Justices of the Peace and Constables. The matter is arranged under subjects in alphabetical order. Under each title is a reference to the Act of Parliament or Legislature bearing upon it. Following this is a compressed statement of the substance of the Act. Subjects upon which there is no statutory regulation are variously treated. For instance, under "Foot-marks," we find a direction as to a constable's duty in making comparisons, so that he may intelligently give evidence. Under "Oath, nature of," is a quotation, showing the nature and obligation of an oath, and the manner of administering it. "Warrant, arresting on," and "without warrant," show the constable's duty when he receives a warrant for execution, and how he should act without same. Appended to the Manual are three Schedules containing respectively constables' tariff of fees, an alphabetical list of felonies, with a reference to the Acts of Parliament bearing on each, and a similar table of misdemeanours and other offences, not felonies. This little work is in a convenient and portable form, and should be read by every constable, and be on every Justice's table.

Public General Acts of the Ontario Legislature, relating to Insurance; with notes of amendments and an analytical

index; also, a list of Special Acts of Incorporation. By J. HOWARD HUNTER, M. A., *Inspector of Insurance for Ontario.* Toronto: Printed by C. Blackett Robinson, 1881.

This Manual is simply a collection and reprint of the Acts of Ontario, relating to Insurance. It contains an analytical index, which is of a little more use than those which are to be found in the Ontario Statute Books; and for this reason, as well as on account of its encompassing in a small space all the Insurance Statutes will be found useful for ready reference.

BOOKS RECEIVED.

The Law relating to the Sale of Goods and Commercial Agency. By ROBERT CAMPBELL, M.A., of Lincoln's Inn, Barrister-at-Law, etc., etc. London: Stevens & Haynes, 1881.

Transfer of Title to Real Estate; a Lecture delivered before the West Side Association of New York. By DWIGHT H. OLMSTEAD. New York: *Evening Post* Job Printing Office, 1881.

CORRESPONDENCE.

On the legal degrees of Marriage in Canada.

To the Editor of the Canadian Law Times:

SIR,—In the last of your articles on the legal degrees of marriage in Canada, I notice at page 667 the following passages:—"The provisions of that statute (5 & 6 Wm. IV. cap. 54) are carried out by the Civil Courts in England, and it may, therefore, fairly be said to be in force in Manitoba under the Provincial statute referred to," viz. Con. Stat. Man. cap. 31, sec. 4. "Since confederation, no Province has the power to deal with the law affecting the essentials of marriage." Manitoba came into Canada after Confederation, and came in subject to the British North America Act, by which the power to legislate upon marriage and divorce is, as you have pointed out, assigned to the exclusive jurisdiction of the Parliament of Canada. She cannot therefore legislate in respect of the essentials of marriage, even though to do so would be merely to impose a restriction upon civil rights. The Parliament of Canada has power to entrench upon the subject of civil rights, so far as it may be necessary to carry out its authority in respect of a matter within its jurisdiction. For instance, in Bankruptcy and Insolvency, it has the right to interfere with property, civil rights and procedure within the Provinces; *Cushing* v. *Dupuy*, 42 L. T. N. S. 445. *Quære*, then, whether Manitoba could legislate, even indirectly, upon a civil right which is properly classed under a subject of legislation coming within the exclusive jurisdiction of the Parliament of Canada.

Yours truly,

Belleville Dec., 1881. W. N. PONTON.

[We acknowledge cheerfully the force of our correspondent's remarks. The point is a nice one, and one of a character with which we are occasionally entertained in working out the provisions of our Constitutional Act. If the law of Manitoba be not as we have said, (and our correspondent's argument seems sound), then we cannot pretend to say what it is. Perhaps some of our Manitoba friends can enlighten us.—ED.]

REVIEW OF EXCHANGES.

American Law Review.—December, 1881.

Waiver and Estoppel as applied in the Construction of Fire Insurance Policies, by H. G. Wood. The first part of this article is devoted to a generalization of the effect of various cases, in which it has been held that, where the ordinary usages of the risk are repugnant to a condition on the policy, and the insurer knew or ought to have known this, the condition is waived. As when a risk is taken on a powder mill and its machinery, a condition that powder should not be kept on the premises is waived. And, generally, it is held that an insurer who contracts with full knowledge of facts at the time that constitute a breach of the conditions of the policy, is estopped from asserting them to defeat his liability thereon. After noticing some cases of the principal being bound by the agent's acts, the question of the company's agent being by agreement the agent of the insured in filling up the application is dealt with. The doctrine is said to be inequitable and not founded upon any well-recognized principle. The weight of authority is said to be against it. In *Masters* v. *Madison Insurance Co.* 12 Barb. (N. Y.) 624, Crippen, J., said: "It is true the by-laws of the company make the person taking the survey the agent of the applicant; nevertheless, he is still the agent of the company. He is not divested of his office by being deemed also the agent of the person making the application." This seems to be common sense and common justice. Any knowledge that he gains as agent for the applicant he retains when he is again acting as agent for the insurers only. And his knowledge is the knowledge of his principals. If, therefore, they issue the policy having this knowledge they should be estopped from setting up this condition in fraud of the policy. *Benson* v. *The Ottawa Agr. Insurance Co.* 42 U. C. R. 282, is in point, where the majority of the Court adopted this view.

Who are Partners, by Wm. L. Murfree, Sen. This article is a collection of cases, English and American, principally upon the various tests of a partnership.

Central Law Journal—18th November, 1881.

Adverse Parties defendant in Foreclosure cases in Equity, by W. W. Thornton. A collection of American cases upon the rights of mortgagors and mortgagees in foreclosure suits.

Imputed Negligence, by W. H. Whittaker. In New York it is held that the contributory negligence of the driver of a vehicle will not be

imputed to a person riding by invitation with him, so as to bar an action by that person for injuries so incurred. In Wisconsin it is held that it will. The latter view is established in our own Courts by the cases of *Nicholls* v. *G. W. R. Co.*, 27 U. C. R. 382, and *Rastrick* v. *G. W. R. Co.*, 27 U. C. R. 396. Some American cases are cited and commented upon.

Ibid.—*25th November*, 1881.

Powers of Partners, by HENRY WADE ROGERS, concluded in the following number. A partner has power generally to bind the partnership, but when there are restrictions or limitations upon this power in the articles, third persons must have actual notice thereof. A solicitor has no power to bind his co-partners by accepting a bill in the firm name to secure re-payment of money to a client. See on this *Wilson* v. *Brown*, 6 App. R. 411; S. C., 1. C. L. T. 609. One partner cannot make general assignments, yet if the assignment be made, it is not void, but voidable, and may be ratified by the co-partner. Though one partner may make a chattel mortgage of partnership property, he cannot mortgage the realty. He cannot bind the firm by guaranteeing the debt of a third person unless it is within the scope of the business. See *Wilson* v. *Brown*, supra. The Supreme Court of the U. S. A. has held that after the dissolution of a partnership, one of the late co-partners cannot by a promise or admission take a case out of the statute of limitations as against his co-partners. Contra opinions are found in some of the States, while in several there are statutory enactments concerning the point. When one is constituted special agent to wind up the affairs after dissolution, he cannot make bills and notes unless specially authorized. A different rule prevails in some States. Many other instances of power and want of power are given. The authorities cited are American.

Fellow-servant in same Employment, by WM. L. MURFREE, JUN. The enquiry is directed to what constitutes two persons fellow-servants, within the meaning of the rule that a master is not liable to a servant for an injury resulting from the negligence of a fellow-servant in a common employment. The master's liability depends upon the implied contract of the master not to indemnify the servant against the negligence of any one but himself. Hence the separation of the employment into different departments does not take away the relation of fellow-servants. This rule, however, is not generally recognized in the U. S. A. The basis of association in the work between the injured one and the negligent one forms an element in a line of American decisions. *E. g.* One loading a freight car and a switch-tender and a brakesman, held not to be fellow-servants. The foreman of track-repairers killed by a lump of coal thrown from a passing engine, held entitled to recover. The engineer of a locomotive held not the fellow-servant of a master mechanic in the repair shops. Where the master commits the management to a foreman or agent, he stands in the position of the master, and is not fellow-servant to those under him. These doctrines have no place in English jurisprudence. *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326; *Smith* v. *Howard*, 22 L. T. N.S. 130, followed by *Wilson* v. *Hume*, 30 C. P. 542. In the latter case, a determined attempt was made,

without success, to obtain recognition of the American doctrine. A minor, who cannot make a valid contract, cannot be held by an implied undertaking. It has therefore been held that he would not be an employee so as to preclude a recovery for injuries suffered from the negligence of a co-employee. It has also been held that such a contract is voidable only, and if he expressly adopt it by bringing an action, he is estopped.

Ibid.—9th December, 1881.

Some Cases on Discretion, by CHARLES MARTINDALE. Some definitions of "discretion" are given, and it is distinguished by contrasting "discretionary" with "ministerial." Some cases are cited, and the learned writer concludes:—"From the authorities noted, the rule seems to be that a 'discretion' is where a person is left to his own choice or judgment within the bounds of reason, justice and morality, uncontrolled by any superior authority or fixed rules."

Ibid.—16th December, 1881.

Embezzlement, by SHELDON G. KELLOGG. Generally, it is said, when a person receives money, a portion of which belongs to himself as a commission on the whole amount, he is not guilty of embezzlement, though he converts the whole to his own use. This is modified, however, as follows:—"If, after the money comes into the servant's hands, any act still remains to be done, before he has the right to take his share, wrongful conversion to his own use is embezzlement; otherwise, as in the case of an attorney's commission on a claim collected; it is not." Some cases on pleading and evidence are given.

Delay in applications to sell Realty for debts of decedents, by A. J DONNER. Some American authorities are given concerning the time within which an executor should apply.

The right of a prisoner to be present at his trial, by A. G. MCKEAN. A prisoner on trial for felony has the right to be present at his trial. The right may be waived. Where there is misbehaviour to such an extent as to necessitate removal, the right has been considered waived; *United States* v. *Davis*, 6 Blatch 464; *Fight* v. *State*, 7 Ohio, 180. *Guiteau's* case is then mentioned. It seems to us that a good deal of gratuitous advice is being tendered the learned Judge who is trying this unfortunate man. A little reserve and patience in waiting for the result before discussing the merits of the case would be in place.

Criminal Law Magazine.—September, 1881.

Judicial Problems relating to the disposal of insane criminals, by JOHN ORDRONAUX. Concluded in the following number. A very full discussion from many points of view of the subject.

Ibid.—November, 1881.

Jurisdiction in Guiteau's Case. The Common Law of England is touched upon, and the remedial statute of 2 & 3 Edw. VI. cap. 24, under

which one who had given a stroke in one county might be tried in another county in which the person stricken had died. The learned writer doubts whether there is any jurisdiction in the District of Columbia; but thinks that under a New Jersey statute, which we referred to Vol. I., p. 596, the Courts of that State would have jurisdiction.

Irish Law Times.—5th November, 1881.

The Right to Manacle Prisoners, concluded. Cases are mentioned in which the Court has refrained from putting prisoners in irons, preferring to try them without, though their conduct requires several attendants to hold them. In the opinion of the learned writer it is illegal to fetter prisoners during their trial.

Ibid.—12th November, 1881.

Police Officers Inducing the Commission of Crime. Some cases on this abominable and reprehensible practice are given. A distinction is made between the original institution of an offence for the purpose of bringing the offender to justice, and the furnishing opportunities or lending aid to the criminal after the inception of this Act, with the purpose of exposing him. In our humble opinion this amounts to casuistry Whenever a police officer discovers the intention to commit an offience at any time before it is complete, it is his duty to do what he can to prevent its commission, and not to aid it. It is a matter of principle and not of expediency, and must relate to *all* offences. To go from questions of liquor selling and larceny to a case of murder. Suppose the police to have go news of an intended murder. Would an officer discharge his duty to society by facilitating the commission of the crime, at a time when he might prevent it, so that the criminal might be brought to justice? And upon what principle does he discharge his duty by aiding in the commission of a lesser offence?

Ibid.—26th November, 1881.

Transfers of Chattels under the Hire-and-Sale System, concluded in the following number. The custom of hiring furniture had been proved so often that in *Crawcour* v. *Salter*, 44 L. T., N. S, 62, the Court of Appeal judicially noticed it. In one case a new trial was ordered to ascertain whether this custom was generally known. Scotch and American cases are cited. The established rule appears from them to be that laid down in *Walker* v. *Hyman*, 1 App. R. 345, followed since by *McDonald* v. *Forrestal*, 1 C. L. T. 728.

Law Journal.—5th November, 1881.

Writs out of the Jurisdiction. Some notes on a case of *Bree* v. *Morescaux*, reported in the November number of the *Law Journal* Reports. The defendant, a passenger on a steam-vessel, on arrival at Jamaica, charged the plaintiff, the third officer, with improper conduct towards a female passenger. It was reported to England, where the Directors of the Steamship Company dismissed the plaintiff. It was held that the case did not come within the rule corresponding to our Rule 45, "Where any act or thing * * for which damages are sought to be recovered was or is to be done * * within, etc."

Ibid.—*12th November*, 1881.

The Disabilities of Deck Cargoes. Remarks upon a case of *Wright* v. *Merwood*, reported in the October number of the *Law Journal* Reports. The plaintiff shipped cattle on the defendants' ship pursuant to written agreement, by which the defendants let the upper deck of their vessel for a cargo of cattle. The cattle were jettisoned in a storm. Judgment was given for the plaintiff.

Ibid.—*26th November*, 1881.

The Statue of Counter-Claims. A case of *Gathercole* v. *Smith*, 50 L. J. R., Chy. 671; S. C., on a different point in the *Law Journal* Reports for November, is commented upon. The plaintiff was entitled to a pension payable by the defendant, which was "not transferable at law or in equity." He sued defendant for half a year's income, and defendant set up a judgment against the plaintiff, of which he held an assignment. The counter claim was dismissed with costs. The debt was admitted, but it was decided that it could not be deducted from the plaintiff's claim. The learned writer contends that this was not the intention of the Judicature Acts, the object of which was to prevent cross actions, circuity and expense. In this case a cross action would have succeeded, the debt being admitted. Why should not the rights of the parties then have been adjusted in one action. Again, what is the effect on the defendant's claim? Can he issue execution on his original judgment?

Ibid.—*3rd December*, 1881.

Rights in Titles of Books. Some remarks on a case of *Dicks* v. *Yates*, reported in the December number of the *Law Journal* Reports, in which it was held that there can be, in general, no copyright in the title or name of a book.

Ibid.—*10th December*, 1881.

The Contract of Sale by a Maker. A review of a case in which the Court of Appeal decided that there is an implied contract by the manufacturer of goods to supply his own goods.

Law Magazine and Review.—*November*, 1881.

On Jurisprudence and the Amendment of the Law, by the Rt. Hon. J. T. BALL. An address delivered before the Jurisprudence Department of the Social Science Congress, Dublin. Three questions are propounded for discussion. "1. Is it desirable that there should be periodical meetings of representatives of various States, to which all disputed international questions should be referred? 2. Should the procedure on Private Bill Legislation in reference to local improvements be amended so as to facilitate enquiries on the spot by Parliamentary Committees, or otherwise? 3. Are any, and what, alterations in the jury laws desirable?" The first question is answered in the affirmative. Touching the third, it is suggested that the qualification of jurors should be such that their education should be sufficient to enable them adequately to understand and appreciate the evidence. In the absence of an educational test, the pecuniary qualification is thought as well fitted to accom-

plish the desired object as any other. The objections to a majority verdict are given, and unquestionably are, as the learned writer says, "decisive, if not in favour of absolute unanimity, certainly of requiring a considerable preponderance in order to authorize a verdict to be received."

Ought Grand Juries to be Abolished? by JOHN KINGHORN. The tenor of the learned writer's remarks is decidedly in favour of their abolition. A great many instances are given showing how the Grand Jury can be made an instrument of vindictiveness and extortion. And upon this, and the ground that it is useless where a magistrate has committed for trial, and a bar to penal justice, its abolition is advocated.

The Practice of Quarantine, by Sir SHERSTON BAKER, Bart. Some remarks upon the practice and policy of Quarantine.

Southern Law Review.—June—July, 1881.

Fraudulent Mortgages of Merchandize, by E. J. MAXWELL. The view taken in an article in a former number is combatted, that a mortgage of personal property which permits the mortgagor to retain possession and dispose of it in the usual course of trade, is not necessarily fraudulent upon its face. The learned writer points out that a reasonable *use* of property is consistent with an honest purpose, as, *e. g.*, the user of horses in a livery stable, or of a stock not of a saleable nature. So, where the permission to sell is for the benefit of the mortgagee, the proceeds being applied in payment of the mortgage. He then examines the authorities of a good many States, and points out that in the majority of them the doctrine attacked is not supported by them, and concludes that, inasmuch as a mortgage is a security, to permit the mortgagor to have the full and free use and disposal of the goods mortgaged, would be to defeat the very office of the mortgage, which must, therefore, be kept on purpose for some other purpose than as a security.

The Authority in the United States Courts of State Constructions of the law of Municipal Bonds, by H. J. BEAKES.

Right of a Receiver to Sue in a Foreign Court, by SIMON GREENLEAF CROSWELL. The status of a Receiver is pointed out and a short review given of his powers and duties. The peculiar powers of receivers appointed by certain statutes are commented on, and the learned writer thus sums up: "1. The character, powers, and duties of the old chancery receiver are quite different from those of the statutory receiver. 2. That the chancery receiver is a ministerial officer of the Court, and will not be recognized by extra-territorial courts, under any circumstances, when suing in his own name. 3. That the title to possession of the goods or credits, when he sues in the name of the original owner or creditor, to his own use as receiver, will be recognized by extra-territorial courts on the principle of comity of nations, giving effect to his title, though only a possessory one. 4. That in general the statutory receiver has the general legal title to the property vested in himself. 5. That such title will be recognized by extra-territorial courts, as to both personal and real property, in all cases in England, and in all cases, except where it conflicts with domestic creditors' rights, in the United States."

Law Society of Upper Canada.

TRINITY TERM, 46TH VICTORIÆ.

During this Term the following gentlemen were called to the degree of Barrister-at-Law. The names are placed in the order of merit :—

John Henry Mayne Campbell, with honours; George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duntombe, William Franklin Morphy.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term :—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-law, namely :—

GRADUATES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alpin Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Thibley, Joseph Wesley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Chas. Higgins, Wm. H. Holmes, R. S. Smith, John Wesley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Marquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson, Douglas Harrington Cole, Thomas Steele, Andrew Charles Halter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H. F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone.

And the Preliminary Examination for Articled Clerks was passed by William Mansfield Sinclair.

RULES.

As to Books and Subjects for Examinations.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the

prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other Candidates for admission as Articled Clerks or Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

ARTICLED CLERKS.

1881.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

In 1882, 1883, 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

STUDENTS-AT-LAW.

1881.—CLASSICS.

Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero in Catilinam, II., III., IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

1882.—CLASSICS.

Xenophon, Anabasis, B. I.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum, (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
Cicero, Pro Archia.
Virgil, Æneid, B. II., vv. 1-317.
Ovid, Heroides, Epistles V. XIII.

1883.—CLASSICS.

Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Heroides, Epistles V. XIII.

1884.—CLASSICS.

Cicero, Cato Major.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Fasti, B. I., vv. 1-300.
Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.

1885.—CLASSICS.

Xenophon, Anabasis, B V.
Homer, Iliad, B. IV.
Cicero, Cato Major.
Virgil, Æneid, B. I., vv. 1-304.
Ovid, Fasti, B. I., vv. 1-300.
Paper on Latin Grammar, on which special stress will be laid.
Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis or a selected Poem :—
1881—Lady of the Lake, with special reference to Cantos V. and VI.
1882—The Deserted Village. The Task, B. III.
1883—Marmion, with special reference to Cantos V. and VI.
1884—Elegy in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose :—
1881, 1883 and 1885—Emile de Bonnechose, Lazare Hoche.
1882 and 1884—Souvestre, Un philosophe sous les toits.

Or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A Student of any University in this Province who shall present a certificate of having passed within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

From and after January 1st, 1882, the following books and subjects will be examined upon :—

FIRST INTERMEDIATE.

Williams on Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; the Act respecting the Court of Chancery; Anson on Contracts; the Canadian Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117 R. S. O. and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone (2nd edition); Greenwood on the Practice of Conveyancing (chapters on Agreements); Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act; Caps. 95, 107 and 130 of the Revised Statutes of Ontario.

FINAL EXAMINATIONS.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Hawkins on Wills; Taylor's Equity Jurisprudence; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobold on Wills; Harris' Principles of Criminal Law, and Books III. and IV. of Broom's Common Law; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Examinations for Hilary Term, 1882, will take place as follows:—

PRIMARY EXAMINATIONS:—Junior Class, Tuesday, January 24, 9 a.m.; Graduate Class, Thursday, January 26, 11 a.m.; Matriculant Class, Thursday, January 26. 11 a.m.

First Intermediate and Certificate of Fitness, Tuesday January 31, 9 a.m.; Second Intermediate and Call to the Bar, Thursday, February 2, 9 a.m.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m., on the second Thursday before Term.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, and in the case of Graduates, of three years, under articles, must be served before before Certificates of Fitness can be granted.

Candidates for Call to the Bar must give notice, signed by a Bencher during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for certificates of Fitness are requested to deposit fees and papers on or before the the third Saturday before term.

Notice Fees..	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Attorney's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fees	1 00
Fee in Special Cases additional to the above	200 00

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[DIVISIONAL COURT, 24TH DECEMBER, 1881.

CRATHERN v. BELL.

Guarantee—Payment before default—Discharge.

The defendant guaranteed the due payment by G. at maturity of two promissory notes of $751 each, with a limitation upon his liability to the amount of $751. On the day the first note matured, G. was unable to pay it in full, and the defendant gave him his note for the requisite amount, which he discounted and applied the proceeds of, without notice to plaintiffs or specific appropriation, to the payment of the note at a bank where it lay for collection.

Held, that no default had been made in the payment of the note, that the advance by the defendant to G., before default in payment to the plaintiff, was not a payment in satisfaction of his liability by virtue of the guaranty, which remained unaffected thereby.

Britton, Q.C., for the plaintiffs.

Bethune, Q.C., for the defendant.

REGINA v. RICHARDSON.

Assault with intent—Defendant incompetent witness.

Upon an indictment for an assault with intent to do bodily harm, the defendant cannot be admitted as a witness on his own behalf.

J. G. Scott, Q.C., for the Crown.
Osler, Q.C., for defendant.

BURKE v. TAYLOR.

Mortgage—Fixtures—Onus of proof.

S. mortgaged land upon which was a sawmill, together with machinery, plant, trade and other fixtures, to the Dominion Bank. He afterwards erected a drying kiln, with the necessary iron piping for drying lumber, and subsequently released his equity of redemption in the lands, and conveyed other property to the mortgagees. The latter sold to the plaintiff the iron piping, which was claimed by defendant under a sale from S.

Held, that *primâ facie* the piping being part of a building erected for the purpose of improving the inheritance, was a fixture and passed to the mortgagees, either under their mortgage or conveyance, and that the burden of showing that it was to continue chattel property when put into the kiln lay on the defendant.

Tilt, for the plaintiff.
Bigelow, for the defendant.

In re GALLERNO & ROCHESTER.

GRANT v. McALPINE.

Single Court—Appeal to Divisional Court.

In these cases, one of which was upon the validity of a by-law, and the other respecting the off-set of judgments, noted 1 C. L. T. 444 and 609 respectively,

Held, that there was no appeal to a Divisional Court from the judgment of the Judge who heard them, sitting alone for the full court; and it made no difference that the judgments sought to be appealed from were delivered before the Judicature Act came into force.

REGINA v. GRAINGER.

Conviction—Certiorari—Jurisdiction of Superior Court.

On an application to quash a conviction brought up on certiorari, the Court will not notice any facts, not appearing on the conviction, for the purpose of impeaching it on any ground except want of jurisdiction; nor

has the Court any power to review the decision of the Sessions in a matter within their jurisdiction, nor to grant a mandamus to compel them to rehear an appeal.

Hodgins, Q.C., for the motion.

Dougall, Q.C., and *Dickson, Q.C.*, contra.

COWAN v. DOOLITTLE.

Promissory Note—Principal and Surety—Payment by Surety—Rights of Surety.

The M. Company, in the usual course of their business, took from their agents notes for machines supplied to them, which were transferred by the M. Company as collateral security to a Bank where they had a line of credit. The agreement with the agents was that, upon their substituting their customers' notes for their own, they were entitled to delivery up of the latter. The defendant, who was an agent, had given notes for machines supplied him, which, with his knowledge, were handed to the Bank by the M. Company. He afterwards transferred to the Company a large number of his customers' notes. The bank manager finding some of defendant's notes overdue demanded that they should be replaced with fresh paper, and the M. Company then applied to the defendant, who gave the notes sued on, without getting an adjustment of accounts between them, though there was but a small balance due the M. Company; and these notes were transferred to the Bank and the old notes given up. The M. Company got into difficulties, and the Bank sued B., their president, and another who, jointly with the Company, had guaranteed the Company's account B., in order to protect himself, resigned the presidency, and undertook to pay off the Company's indebtedness to the Bank and take all their securities. A resolution of the Board was passed approving of this, and the M. Company directed the Bank to transfer to B. the Company's securities on payment. B. applied to the plaintiff for the money, and he advanced the requisite amount, and took all the notes held by the Bank, to hold for collection, to pay expenses, repay the advance, pay B.'s indebtedness to the M. Company, and to account to B. The notes sued on were among those transferred to the plaintiff, who took them without notice of their character or the state of the account between the defendant and the M. Company.

Held, that he stood in the place of the Bank and succeeded to all its rights, and that the defendant was liable to the full amount of his notes in the plaintiff's hands.

Ritchie, for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

GOODALL v. SMITH.

Contract for Sale of Goods—Condition—Waiver.

By telegraph and letter the defendant offered to sell the plaintiff twelve cars of barley, to be delivered free on the track in Toronto, at sixty cents

per bushel, of the quality of two cars previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff at his own expense at Landsdowne. The plaintiff telegraphed, "All right; will take the lot. Ship one car on receipt quick." By letter of same date the plaintift said that this might save the necessity of his sending down to inspect. The car was sent by the defendant (who still asked for inspection) as well as several other cars, all of which were paid for. The plaintiff did not inspect. The defendant subsequently refused to deliver the remainder of the twelve cars except at an advance, freight having gone up.

Held (Cameron J., dissenting), that the contract was subject to the condition stipulated for by the defendant, that the plaintiff should inspect b fore shipment, and that the shipment of the one car was not a waiver of the condition for inspection at Landsdowne of the residue, which the defendant was, therefore, not bound to deliver.

Bethune, Q.C., for the plaintiff.

W. H. P. Clement, for the defendant.

PARKHILL v. McLEOD.

Execution for costs—Conditional undertaking to pay.

The plaintiff had an order for costs against the defendant, which the defendant's solicitor guaranteed payment of, and requested taxation to be delayed pending an intended appeal from the order. This guarantee was not accepted. There was some delay after the taxation. A Division Court suit had been stayed by the defendant pending the appeal. The defendant's solicitor, in answer to a demand for the costs and a threat of execution, guaranteed their payment, *if* the plaintiff's solicitors would guarantee their return in case of a reversal of the order. Execution was issued without further notice, and was set aside by the Master in Chambers.

Mr. Justice Osler reversed the Master's order, holding that as the parties were acting strictly, the plaintiff had a strict right to issue the execution.

On appeal from this order to the Divisional Court, it was reversed and the Master's order reinstated.

[WILSON, C.J., 16TH DECEMBER, 1881.

LONGHI v. SANSON.

Overholding Tenants Act—Negative covenants—Forfeiture.

The defendant leased from the plaintiff the "refreshment room and apartments connected therewith," part of a railway station, and covenanted that "no spirits of any kind should be sold or allowed to be sold in the refreshment room," and that if he "should fail, refuse or neglect to carry out the terms of the lease, then that the lessee should, if required by the

lessor, quit leave and absolutely vacate the premises, and the lease should terminate." The learned Judge of the County Court of the County of York found that by a sale of spirits in the bar-room, part of the demised premises, the lease had been forfeited, and ordered the issue of a writ to put the landlord in possession. The matter came up on certiorari.

Held, affirming the decision of the learned Judge, that the sale was in contravention of the terms of the lease, that the proviso for termination of the same extended to negative covenants, that the lease was therefore forfeited, and that it was a case coming within the overholding Tenants Act.

Falconbridge, for the landlord.

O'Sullivan, for the tenant.

[CAMERON, J., DECEMBER, 1881.

VETTER v. COWAN.

Capias—Commencement of action.

The writ of capias is a writ given by R. S. O. cap. 67, sec. 5, ancillary to the proceedings in an action, to which any *party* as well as any plaintiff is thereunder entitled, and is not affected by the Judicature Act, and it is, therefore, not necessary that an action should have been already commenced by writ of summons before its issue.

Shepley, for the defendant.

Aylesworth, contra.

[OSLER, J., 10TH DECEMBER, 1881.

REGINA v. SMITH.

Conviction—Regularity—Request to proceed summarily—Distress—Estoppel.

The defendant was convicted of a common assault upon the complaint of the prosecutor, who verbally requested the magistrate to proceed summarily.

Held, that the request to proceed summarily need not be in writing.

The conviction adjudged payment of a fine and costs, and, in default of payment, imprisonment.

Held, good; and that it was not necessary to order that a distress warrant to compel payment of the fine should be issued before imprisonment.

Held, also (i), that the fact that the memorandum of conviction differed from the conviction as returned, in not providing for imprisonment in default of payment, did not invalidate it, for it is sufficient if the penalty has been fixed at any time before the conviction is formally drawn up. (ii), That the defendant, having had the certiorari directed to the magistrate who had convicted, was estopped from objecting that the conviction was in reality made by three, as appeared from the memorandum of conviction which was signed by them.

H. J. Scott, for defendant.

A. Cassels, contra.

[20TH DECEMBER, 1881.

In re ST. CATHARINES AND LINCOLN.

Separation of City from County—Award—Basis of.

In proceedings upon arbitration between a city and county under secs. 42, 445, 446 and 447 of the Municipal Act, the questions submitted are largely in the discretion of the arbitrators. Where, therefore, arbitrators, in forming estimates of the proportion of expenditure under these sections, took population as a basis instead of the assessment rolls; and where they took the past five years criminal records as a basis for the computation of compensation for care and maintenance of prisoners,

Held, that these were no grounds for interfering with their award.

Bethune, *Q.C.* (with him *Rykert*), for the motion.

Robinson, *Q.C.*, and *F. McDonald*, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 30TH DECEMBER, 1881.

THE GREAT WESTERN RAILWAY CO. v. LUTZ.

Ejectment—Proof of title—Possession—Evidence.

Where land has been taken by a Railway Company for the purposes of the Railway, under 9 Vict. cap. 81, sec. 30, and 16 Vict. cap. 99, the Company, in ejectment brought by them, can rely on the title acquired thereby, and are not driven to prove a strictly legal right by conveyance from the patentee to their grantors.

Robinson, *Q.C.*, for the plaintiff.

Ewart and *Campbell*, for the defendant.

THE MERCHANTS' BANK v. CAMPBELL.

Execution against lands—Sale—Sheriff's fees.

Held, affirming the decision of Osler, J., noted 1 C. L. T. 701, that a sheriff has no right to poundage upon an execution against lands unless there has been an actual sale.

Wilson, C.J., dissenting.

Bethune, *Q.C.*, and *A. Cassels*, for the sheriff.

Walter Read, contra.

THE EXCHANGE BANK v. STINSON.

Chose in action—Action by assignee—Set-off—Judicature Act—New trial.

Held, that, to an action by an assignee of an account for the price of timber and staves delivered by the assignor to the defendant under two

certain contracts therefor, the defendant, under R. S. O. cap. 116, secs. 7 and 10, and the O. J. Act, secs. 12 and 16, and Rule 127, can set up as a defence a claim for damages for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts.

In this case, the learned Judge at the trial having refused to entertain such defence, a new trial was ordered.

Falconbridge, for the plaintiff.
McCarthy, Q.C., for the defendant.

DUNBAR v. MEEK.

Sale of land—Misrepresentation—Adding parties.

The defendant and his brother partitioned their lands, defendant taking the west half of a lot, on which a hotel was erected, and the brother the east half, on which a store was built, each supposing that the division line so made ran between the two buildings. Defendant sold his portion to the plaintiff, who had lived opposite for many years, the land being described as the west half according to a plan. The hotel encroached upon the east half about thirty-four inches, the value of the land encroached upon being very trifling. The evidence was conflicting; but it was shown that the hotel could be moved for about $40, and that the defendant had offered to procure a lease of the portion encroached upon at a nominal rent which was refused; nothing was said about the line when the deed was drawn. The plaintiff contended that the defendant had falsely represented to him that the hotel stood wholly upon the west half, and brought his action on the alleged false representation, for a recission of the sale, for an account of improvements and for damages. The finding at the trial was in favour of the defendant as to the representation.

Held, that the verdict should not be disturbed.

At the trial an amendment was made by adding the defendant's brother, and directing him to execute to the plaintiff a conveyance of the portion encroached upon.

Held, that the amendment was wrong and should be struck out.

Dunbar, for the plaintiff.
Fead, for the defendant.

JONES v. DUNBAR.

Principal and surety—Mortgage—Foreclosure—Notice to surety—Principal debtor becoming surety—Payment and discharge.

Where sureties for a debt give to the creditor a second mortgage on land, as additional security, and proceedings in foreclosure are taken by the first mortgagee,

Held, that the creditor on being notified thereof, must either make himself a party to the suit and prove his claim, or give notice to the sureties

of such proceedings to enable them, if they so desire, to prove at their own expense.

In this case the evidence showed that the sureties had notice, if not before the foreclosure decree, yet, at any rate, some three months before the day for redemption.

The evidence showed that one of the sureties had originally occupied the position of a principal debtor.

Held, that the fact of his changing his position as between his co-debtor and himself could not affect the creditor.

The other surety admitted his liability, but claimed that he could not be called upon to pay, until or unless the creditor executed a proper release, not only of the money paid but also of anything else arising out of the claim.

Held, clearly no defence.

Guthrie, Q.C., for the plaintiff.

A. H. Macdonald, for the defendant.

COURT V. SCOTT.

Foreign judgment—Cause of action—22 Vict. cap. 5, sec. 58—Defence on merits—Jurisdiction—"Not otherwise or elsewhere."

Under 22 Vict. cap. 5, sec. 58, consolidated in C. S. L. C. cap. 83, sec. 63, sub-sec. 2, a judgment may be recovered in the Province of Quebec on a personal service in Ontario, in an action in which the cause thereof arose in Quebec, so as to render such judgment conclusive on its merits.

A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C. cap. 57, sec. 4, is payable at the place named therein, the C. S. U. C. cap. 42, requiring the use of the restrictive words "not otherwise or elsewhere" applying to notes made and payable in Ontario.

The note in this case was made in Toronto, payable at the Mechanics' Bank, Montreal, and was sent to Montreal and there held until maturity, when it was presented for payment and dishonoured.

Held, that the contract being performable in Quebec, and the breach occurring there, the cause of action arose there, so as to bring the defendant within the operation of 22 Vict. cap. 5, sec. 58, and to make a judgment recovered against him in Quebec on a personal service in Ontario, conclusive on the merits; and the defendant was therefore precluded from setting up a defence on the merits, and was allowed to except to the jurisdiction only.

Semble, that personal service referred to in R. S. O. cap. 50, sec. 145, refers to personal service in Quebec.

Maclennan, Q.C., and *Langton*, for the plaintiff.

Snelling, for the defendant.

CHANCERY DIVISION.

[THE CHANCELLOR, 14TH DECEMBER, 1881.

MERCHANTS' BANK v. BELL.

Married Woman—Promissory Note—Liability of separate estate after death —Notice of dishonour, sufficiency of.

Though the Court will not restrain a married woman from dealing with her separate estate pending suit, yet, if she dies seised of the property, it will administer her estate for the satisfaction of her debts payable out of that fund.

Held, therefore, that, in such a case, the estate of a married woman deceased was liable, in the hands of her infant heirs, to the payment of a note of which she was endorser.

The endorser died intestate before maturity of the note. Notice of probate was sent to "J. B., executor of the last will and testament of M. A. B., Perth," and was received by the husband, who was then living with his children in the house which his deceased wife had lived in. No letters of administration had been taken out.

Held, that the notice was sufficient.

NELLIS v. SECOND MUTUAL INSURANCE CO.

Mutual Insurance Company—Arrears of calls—Forfeiture.

The plaintiff was a member of the defendant Company, and bound himself to take his shares subject to the rules of the Company. Rule six provided that, upon default in payment of dues for a year, the directors might forfeit the shares in default. The plaintiff being in such default, the directors declared his shares forfeited, and their action was confirmed at a subsequent meeting of the shareholders. The plaintiff contended that the forfeiture was invalid for the following reasons:—(i) No notice of intention to forfeit was given. (ii) No notice of the forfeiture was given to enable the plaintiff to appeal, if so minded, to the shareholders. (iii) The resolution did not expel the plaintiff from membership. (iv) The plaintiff's name was not set forth in full in the resolution; it did not specify the shares to be forfeited; and a number of other persons were included whose shares were jointly forfeited. (v) No notice of the holding of the annual meeting for the election of directors was given, whereby the directorate was illegally constituted. (vi) One of the directors had become an insolvent under the Act of 1875, though his shares still stood in his name on the stock book, and he held shares in trust. (vii) It was not shown that the proper and sufficient notice was given of the meeting of the directors at which the forfeiture was declared. (viii) The plaintiff had capital at his credit in the Company sufficient to pay arrears, and by a rule "all fines and forfeitures should be charged to members liable, and if not paid, deducted from capital to the credit of such member."

Held, that none of those objections should prevail; and, as to the last, that this was not a forfeiture within the meaning of the rule.

SLATER v. MOSGROVE.

Vendor and purchaser—Payment—Statute of Limitations.

A note made by the purchaser and endorsed by his son was given as security for the price of land. A payment was afterwards made by the endorser.

Held, that such payment was applicable to reduce the amount due upon the purchase money, and intercepted the running of the statute.

NATIONAL INSURANCE CO. v. EGLESON & CLUFF.

Stock—Subscription—Partnership—Notice of calls.

The defendants were appointed agents of the plaintiff company as partners, on condition that they should become the holders of 200 shares. They were entered in the stock register as shareholders for that amount, under the name "Egleson & Cluff," and 200 original shares were allotted to them and a certificate sent; but they did not subscribe formally for the shares. A draft upon E. & C. for the first call was accepted and paid pursuant to an agreement with C. Subsequently, E. wrote to plaintiffs that he was about retiring from the firm of E. & C., and desired to be informed of the position of the "stock subscribed for by them." He signed this letter "J. Egleson, senior partner of Egleson & Cluff."

Held, in an action for calls upon the stock that the defendants were liable and could not be heard to say that they had not subscribed for the stock.

The notice of two calls, payable on 27th July and 27th August respectively, was mailed on 27th June, addressed to E. & C., Ottawa. Cluff received it, but there was no affirmative evidence that it was not communicated by C. to E. who had retired from the firm.

Held, that the notice was sufficient except as to time, and that inasmuch as "not less than thirty days notice" was requisite, the mailing on the 27th June for a call payable on 27th July was too late.

In re ROSS.

Loan repayable on ability—Limitation of actions—Administration of insolvent estate of deceased—Corroboration—Retainer by executor.

Where money is lent, to be repaid when the borrower is able, his ability may be shown by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs; and it is not necessary to show a competency to pay without inconvenience.

Where each item in an account against the estate of a deceased person is an independent transaction and stands upon its own merits, and is or might be the matter of a separate and independent cause of action, some material corroboration of the testimony of the opposite or interested party should be adduced as to each item, in order to satisfy the tenth section of the Evidence Act.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees and executors displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor has the right to set up the Statute of Limitations.

[PROUDFOOT, J., 21st DECEMBER, 1881.

DALBY v. BELL.

Costs on consent reference—New hearing.

By consent a decree was made referring to the Master the question whether the defendant did certain work for a specified price or not. The Master reported that it was not so done. On an appeal therefrom the learned Judge who heard it, thinking that this question should have been tried by the Court, set aside the report and directed a trial to be had upon that issue, reserving the costs of the proceedings before the Master and of the appeal.

Held, that, these costs having been incurred in a proceeding consented to by both parties under a common mistake as to the proper tribunal to dispose of the matter, neither party should be ordered to pay them.

HEAMAN v. SEALE AND COOPER.

Preferential judgment—R. S. O. cap. 118.

The defendant Cooper defended an action brought against him by the plaintiffs, while in an action brought against him by the defendant Seale, he entered an appearance and filed a plea some days before each was due, and, on the day of filing his plea, filed a *relicta verificatione*. Judgment was thereupon signed and execution issued.

Held, following *Yonng* v. *Christie*, 7 Gr. 307; *McKenna* v. *Smith*, 10 Gr. 40; *Labatt* v. *Bixell*, 29 Gr. and *McEdie* v. *Watt*, 1 C. L. T. 722, that these proceedings were not within the mischief intended to be remedied by R. S. O. cap. 118, sec. 1, which prohibits a confession of judgment, a *cognovit actionem* and a warrant of attorney to confess judgment, only.

DUMBLE v. DUMBLE.

Will—Construction of.

D. made a will, and subsequently intending to modify it, left a testamentary paper in the form of a letter to his wife, in which he said, "I wish my dear wife and our children to have all my property, to be divided equally, my wife to have the use of the whole until the children are of age. In case of death of my children my wife to have the use of the property her life-time, and then to go to my brothers and sisters." The testator left two children who both died under age and unmarried, leaving their mother surviving.

Held, that the phrase "in case of death of my children," referred to death before the testator, and that the children took vested interests, which were transmitted to their mother upon their death.

HAWKINS v. MAHAFFY.

Riparian Proprietor—Description of land.

In the grant from the Crown of a certain lot which was situate on the bank of a river, there was a reservation of free access to the bank of the river for all vessels, boats and persons. There was a large quantity of stone on the lot which the plaintiff desired to quarry, but the defendant, who was owner of a mill on the stream below the plaintiff's land, penned back the water for the purposes of his mill, and interfered with the plaintiff's operations.

Held, that the reservation in the grant of the plaintiff's land merely gave an easement to the public, and that, notwithstanding the same, the plaintiff was a riparian proprietor and entitled to complain of the penning back of the water upon his land.

The parties desiring the assistance of scientific evidence as to the effect of raising the defendant's dam and as to its height, the Court appointed an engineer to inspect the same and report, reserving the cause therefor.

IN CHAMBERS.

[WILSON, C. J.

FRANCIS v. GRACEY.

Dismissal of action—Computation of time—Rule 255.

Held, on appeal from the Master in Chambers, affirming his decision, that, in computing the six weeks between the close of the pleadings and the sittings, on a motion to dismiss, the time after the close of the pleadings, and before the coming in force of the Judicature Act, is properly reckoned.

[THE CHANCELLOR, 9TH DECEMBER, 1881.

DOMINION, ETC., COMPANY v. STINSON.

Evidence not used—Costs of.

The plaintiff procured evidence to be taken under a commission, but neither he nor the defendant put in the evidence at the trial. The order for the commission directed that the costs should be costs in the cause.

Held, that the taxing officer was not precluded, by the direction in the order as to costs, from disallowing on the final taxation the costs of the unused depositions and commission.

[OSLER, J., 11TH NOVEMBER, 1881.

CLARKE v. CREIGHTON.

Apportioning costs—Married Woman—Taxation of costs of.

Where a rule was taken out on behalf of two defendants, C. and G., to set aside a verdict against them, and enter a nonsuit for one or both, or enter a verdict for the defendant G., and it was made absolute as to the latter party,

Held, that the plaintiff was entitled to tax against the defendant C. a proportion of the costs of the term proceedings.

The defendant G. was a married woman.

Held, that the Master should enquire whether any binding contract of retainer had been entered into by her with her attorney, and if not, that the costs taxed to her other than disbursements should be disallowed.

[THE MASTER IN CHAMBERS, DECEMBER, 1881.

CAMPON v. LUCAS.

Judicature Act—Replevin.

Held, that actions of replevin are not within the Ontario Judicature Act, the proceedings thereunder being inapplicable.

In re DUNSFORD; DUNSFORD v. DUNSFORD.

Interim examination of witness—Rule 285.

In an administration suit the accounts had been filed in the Master's Office, but no proceedings had been taken thereon. The plaintiff's solicitor procured *ex parte* from the Master in Chambers an order to examine at Toronto, before a special examiner, a witness who expected to stay there for a few days previous to leaving the country. A motion was made to rescind the order—because it was made *ex parte*, there was no defined issue upon which evidence could be given, and the Master in Ordinary had complete control over the proceedings while in his office.

Held, that, under Rule 285, the Master in Chambers has full power to direct evidence to be taken at any time and at any stage of the proceedings.

H. Cassels, for the motion.

W. Read, contra.

LOWSON v. CANADA FARMERS' MUTUAL INSURANCE CO.

Certificate of Court of Appeal—Execution.

Writs of fi. fa. were issued out of the High Court of Justice upon production of the certificate of the Court of Appeal.

Held, that the certificate was not sufficient to support the writs, and they were therefore set aside.

H. Cassels, for the motion.

Cattanach, contra.

BYRNE v. BOX.

Action against Bailiff—R. S. O. cap. 73—Rule 323—Costs.

The defendant, a Division Court bailiff, seized certain goods of the plaintiff's under two writs. H. & Co. claimed the books and book debts under an assignment of the latter from the plaintiff. The defendant applied for an interpleader order or that H. & Co. be made parties.

Held, that inasmuch as the defendant was protected by the Division Courts Act in his duty, and it appeared from the facts sworn to that the result of the action would be a nonsuit or a verdict for defendant, the whole proceedings should be set aside with costs under R. S. O. cap. 73, sec. 8, and Rule 323.

Held, also, that there was no jurisdiction to provide for H. &. Co.'s costs.

BANK OF HAMILTON v. BLAKESLEE.

Partners—Service of writ—Rule 40.

A partnership, unregistered, existed between Blakeslee, Brown and Osler, under the style of Blakeslee & Co. Blakeslee absconded on 19th September. On 22nd September, Osler made a secret assignment of his interest in the business to Brown. On 24th September, Osler was served with the writ. Brown was aware of the proceedings, which were against the partnership in the firm name.

Held, that the service was good.

SACKVILLE v. PACEY.

Counterclaim—Alternate relief.

Held, that a defendant is not entitled to set up in his counterclaim a hypothetical case for relief against a third party.

Shepley for the plaintiff.

Geo. H. Watson, contra.

LEROUX v. LANTHIER.

Payment into Court—Proper officer.

The plaintiff paid to a local registrar a sum of money for security for costs, under an order allowing him to do so instead of giving a bond. The defendant refused to accept the security, and the plaintiff signed judgment for default of a defence.

Held, that the accountant is the only proper person to receive payment of money into Court, and that security had not, technically speaking, been given, and the judgment should be set aside for irregularity in having been signed before security was given.

Caswell, for the application.

Aylesworth, contra.

Common Law Chambers.

[HAGARTY, C. J.

REGINA *ex rel.* WATT v. LANG.

THE SAME v. CHADWICK.

Municipal Act, section 194—*Disclaimer.*

The defendants had been elected as Aldermen of Guelph, sworn in, and acted in their offices. Their elections being about to be contested by *quo warranto*, just before the lapse of six weeks from the election they disclaimed under sec. 194 of the Municipal Act. The defendants now contended that, as they had acted in office, their disclaimers were inoperative as such, and were resignations merely, requiring the assent of the Council, which had not been given.

Held, on appeal from Mr. Dalton affirming his order, that the disclaimers were sufficient within the meaning of the Act.

THE

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ERRATA.

p. 4, l. 11 from bottom, for *seller* read *buyer*.
" " 10 " between *he* and *has*, insert, *the seller*.

which we think the mortgagee's claim may become a right capable of being enforced, and the grounds upon which that right may be sustained.

The nature and extent of the mortgagee's rights and remedies against the purchaser must, of course, depend in great measure upon the nature and terms of the contract into which the purchaser enters. The case of his entering into a direct and express contract with the mortgagee calls for no special notice, as it is governed by the well understood rules of law, and we shall, therefore, confine our attention to those cases where the contracting *parties* are the purchaser and the mortgagor, or other person primarily liable for payment of the mortgage debt. These latter contracts may be conveniently divided into two classes:—

1. Contracts, express or implied, creating an obligation on the part of the purchaser to pay off the mortgage debt.

2. Contracts, express or implied, creating an obligation on the part of the purchaser to *indemnify his vendor* against the mortgage debt.

These two classes of contracts are clearly distinguishable, not only in form, but also in substance. A contract of the latter class is less onerous than one of the former, for "The covenantor may hope, or anticipate, that a judgment will not be recovered against the mortgagor, and mean to leave himself free to determine whether he will suffer the mortgagee to foreclose, or discharge the debt out of the personal assets. Such an obligation is, therefore, essentially different from the assumption of a sum certain as due on the bond, and to be paid to the mortgagee as part of the consideration of the sale" (*a*). Various grounds have, from time to time, been urged in support of the mortgagee's claim for a personal order against the purchaser, and we shall consider these grounds under the following heads, and endeavour to point out the application of each thereof to each of the above-mentioned classes of contracts.

I. The right of a third person to sue on a contract made in his favour.

II. The doctrine of Subrogation.

III. The doctrine of Trusts.

I.

Contract in favour of third person.—The Courts of Law and of Equity appear to have originally been in harmony upon, at least, this one proposition, that, if A. enter into a contract with B. for the benefit of C., the latter shall be able to enforce that contract as against the promisor, at any rate, if the promisee be under a legal or moral obligation to C. (*b*). The Courts of Equity have sustained this proposition by an almost unbroken line of authorities, extending back from the present time for about a century and a half. The Courts of Law, on the

(*a*) *White and Tudor*, L. C. (4th Am. Ed.), vol. ii. p. 342.

(*b*) *Dutton* v. *Poole*, 2 Levinz 210 (1676); *Company of Feltmakers* v. *Davis*, 1 B. & P. 98 (1797); *Hook* v. *Kinnear*, 3 Swanst. 417 note (1743).

other hand, appear to have yielded, after a struggle, and to have confessed themselves unable to give effect to the intent of the parties, by affording relief to the person for whose benefit the contract was made. The leading case upon the point at Common Law, and the one which, at law, was always relied upon to support the third person's claim, is *Dutton* v. *Poole* (*c*), decided by the Court of King's Bench in 1676, and afterwards affirmed by the Court of Exchequer Chamber. In that case, a father being seised of a wood, intended to fell the same in order to raise portions for his younger children. The defendant, being his heir apparent, in consideration that the father would, at his request, forbear to cut down the wood, promised the father to pay his daughter, the plaintiff's wife, £1,000, and the father, upon such request and promise, did forbear; but the defendant failed to pay. Whereupon the daughter and her husband brought their action against the son upon his promise. The Court appeared to be of opinion that a necessary element in this case, in order to insure the plaintiff's success, was that there should be a consideration for the contract as between the father and the daughter, and the chief difficulty that they seemed to feel was in deciding whether or not, the natural love and affection of the father for his daughter was a sufficient consideration. They held that it was, and that the plaintiff was entitled to succeed.

In 1797, Eyre, C.J., expressed his opinion as follows:— "As to the case put at the bar of a promise to A. for the benefit of B., and an action brought by B., there the promise must be laid as being made to B., and the promise actually made to A. may be given in evidence to support the declaration" (*d*).

Speaking of *Dutton* v. *Poole*, Lord Mansfield said: "It is a matter of surprise how a doubt could have arisen in that case" (*e*). The courts of law, however, as time went on, became either more timid in policy, or less flexible in procedure, and saw, or thought they saw, giants in their

(*c*) 2 Levinz 210.
(*d*) *Company of Feltmakers* v. *Davis*, 1 B. & P. 102.
(*e*) *Martyn* v. *Hind*, Cowp. 443 (1776).

path. The most stubborn of these were the lack of consideration moving from the plaintiff to the promisor and the want of privity between them. It would appear now to be firmly settled at law, that in no case can a third person bring an *action upon a contract* to which he is not a party (*f*).

This result was finally brought about by the decision of the Court of Queen's Bench in *Tweddle* v. *Atkinson* (*g*), in which case the earlier decisions are reviewed, and the conflicting ones overruled. Crompton, J., says: "At the time when the cases which have been cited were decided, the action of assumpsit was treated as an action of trespass on the case, and therefore in the nature of a tort" (*h*). That is, the action was brought, not upon the contract, but to recover damages incurred by reason of the defendant's failure to perform the contract. This objection, therefore, would appear to go only to the form of action in that particular case, and not to the plaintiff's right to recover damages in another form of action. The learned Judge adds: "Nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him." We must think that it was a retrogression and not an advance when it was so settled. A. is indebted to B. in a certain sum, and C. is indebted to A. in the same sum. A. and C. enter into an agreement whereby A. releases his claim on C., in consideration of which C. agrees to discharge the indebtedness of A. to B. by payment, but fails to do so. In an action by B. against C. to enforce this contract, why should the latter be enabled to defeat the action upon the ground that no consideration moved from B. to him, or, indeed, on any other ground appearing in the facts stated?

(*f*) See 15 Am. L. Review, 231, for an interesting article citing American authorities and showing that the courts of a large number of the States of the American Union have adopted the rule of *Dutton* v. *Poole*, while others have refused relief to the third person. See also note to *Fiske* v. *Tolman*, 26 Am. Rep. 660.

(*g*) 1 B. & S. 393 (1861).

(*h*) *Ib.* 398.

The same learned Judge then proceeds: "It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it and not for the purpose of being sued."

A. loans a sum of money to B., which the latter agrees to repay at a stated time; here is a contract to which A. is a party for the purpose of suing upon it and not for the purpose of being sued, yet he must be possessed of a very sensitive and timid nature who can discover anything very startling or "monstrous" in connection with it. All contracts which are completely *executed* (*i*) on the part of one of the contracting parties must necessarily belong to the class of contracts the contemplation of which so alarmed the learned Judge. It may be said that the promisee party to such a contract may be made defendant to a suit for the rescission of the contract or for some similar purpose, and is therefore a party for the purpose of being sued, but taken in this sense, so is the third person a party for the purpose of being sued (*j*). This case of *Tweddle* v. *Atkinson* is all the more noticeable from the fact that the agreement between the contracting parties was in writing, was for valuable consideration moving from each of the contracting parties to the other, and that the agreement gave express power to the party for whose benefit it was made to sue at law upon the contract. Crompton, J., felt quite prepared to overrule any and every decision that was adverse to his expressed opinion; Blackburn, J., however, remarked that they were unable to overrule *Dutton* v. *Poole*, as it was a decision of the Exchequer Chamber, but that there was a distinct ground upon which that case could not now be supported, as subsequent cases have shown that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded. This decision leaves open the question whether

(*i*) *i. e.*, as distinguished from an *executory* contract.

(*j*) As to the right of the *promisee* to bring action upon a contract made for the benefit of a third person, see *West* v. *Houghton*, 4 C. P. D. 197, and see remarks upon that case in *Lloyds* v. *Harper*, 16 Chy. D. 301, 311.

the plaintiff could have recovered damages in an action on the case (*k*).

The Courts of Equity have consistently adhered to their early doctrine upon the point, and have endeavoured in each case to discover the real intent of the parties, and to remove all obstacles that might prevent them from effectuating that intent. The same spirit animated those courts with respect to the matter in question, which induced them to recognize the validity of a declaration of trust, even when given without consideration (*l*), and to afford relief to the assignee of a chose in action at a time when his rights were ignored by the Courts of Law. Lord Hardwicke says:—"It is certain, that if one person enters into a contract with another for the benefit of a third person, such third person may come into a Court of Equity and compel a specific performance"(*m*). Afterwards, in 1756, the same learned Chancellor disposed of the case of *Tomlinson* v. *Gill* (*n*), where A. promised B. (who was the widow of an intestate), that if she would permit him to be joined with her in the letters of administration of the intestate's assets, he would make good any deficiency of assets to discharge the intestate's debts. Joint administration was accordingly taken out, and A. and B. possessed themselves of the estate of the intestate. A bill was filed by a creditor on behalf of himself and all other creditors against A. and B., praying for satisfaction of their debts, and for payment by A. in pursuance of his promise made to B. Lord Hardwicke said: "The plaintiff is proper for relief here, for two reasons. 1st. He could not maintain an action at law, for the promise was made to the widow; but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them." The

(*k*) "The form of *trespass on the case* properly and technically includes among other species, the action of *assumpsit*," (3 Stephens Com. 449 note *a*). The remark of Crompton, J., in *Tweddle* v. *Atkinson*, above cited, shows that *assumpsit* was not there treated as an action on the case.

(*l*) *Jones* v. *Lock*, L. R. 1 Chy. App. 25.

(*m*) *Hooke* v. *Kinnear*, 3 Swanst. 417 note (1743); and see *Parsons* v. *Freeman*, Amb. 115.

(*n*) Amb. 330.

second reason given need not be referred to, as it does not affect the question under discussion. Cotton, L.J., in *Lloyds* v. *Harper* (*o*), quotes the above extract from Lord Hardwicke's judgment, and says: "This principle is, I think, a good and sound one, and one upon which we can properly act." It is suggested in *Lloyds* v. *Harper*, that the widow was a trustee for creditors, by reason of her having taken out letters of administration. This is unquestionably the case, but it is submitted that that is not the sense in which Lord Hardwicke called her a trustee; *qua* administratrix, she would be a trustee for creditors if the intestate's assets come to her hands to be administered, but not of the benefit to accrue to creditors from a promise made to her before she became administratrix. Of such promise, and of the benefits to accrue therefrom which might come to her hands, she was a trustee for creditors simply because she was the promisee party to a contract made for the benefit of the creditors, and it is submitted that it was in this sense that Lord Hardwicke called her a trustee for creditors. Sir William Grant, M.R., in 1817, applied the same equitable doctrine in *Gregory* v. *Williams* (*p*), the material facts of which case are, that Parker being indebted to Gregory, and also to Williams, entered into an agreement with the latter, by which Williams undertook, that upon Parker's making over to him certain property, he would pay Gregory's claim out of the first proceeds, apply the residue in satisfaction of his own claim, and pay the surplus, if any, to Parker, of which agreement Gregory had no notice at the time of the making thereof. Parker made over the property, according to agreement, but Williams refused to pay Gregory out of the first proceeds. A bill was filed by Gregory and Parker against Williams for an account, and for a *personal order against Williams for payment of Gregory's claim.* It has been pointed out in a recent case (*q*), that "The man with whom the contract

(*o*) 16 Chy. D. 317.

(*p*) 3 Mer. 582.

(*q*) *In re Empress Engineering Company*, 16 Chy. D. 130. And see upon this point *Peel* v. *Peel*, 17 W. R. 586. See also *Touche* v. *The Metropolitan*

was made was one of the plaintiffs, and the only defence there would have been misjoinder of plaintiffs; and that was a defence which the Court was not likely to view with much favour." The judgment, however, makes no reference to this fact, but the learned Judge says: "Now, it may be a doubt whether they could have recovered at law upon this agreement, for the engagement is not made directly to Gregory; it is made to Parker, and to Parker only; and the consideration is furnished by Parker; for it is Parker alone that does the acts which constitute the consideration for the agreement. Gregory himself furnishes no part of that consideration, and he is no party to the contract. Parker acts as his trustee; and Gregory may derive an equitable right through the mediation of Parker's agreement. * * * * *Here Gregory has a right to insist upon the benefit of the promise made to Parker.*" A dictum of Lord Langdale, M.R., in *Colyear* v. *The Countess of Mulgrave* (*r*), is sometimes quoted as an authority adverse to the right of third persons to recover, even in equity, upon contracts made for their benefit. The clause of the judgment relied upon is as follows:—"I apprehend that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might, as against the other." No such general proposition of law was necessary for the decision of that case, as the judgment proceeded upon the ground that the effect of the agreement in question, made between a father and his son for the benefit, among others, of the plaintiff, one of the father's natural children, was this, that the son should, in a certain event, *at the request of his father*, procure a transfer of a certain fund to a trustee for said natural children, and it appeared that *the father never made the request* (See p. 94 *arguendo*), and the whole was execu-

Railway, etc., Co., L. R. 6 Chy. App. 677, where *Gregory* v. *Williams* is followed by Lord Hatherly, L.C. See also *Mulholland* v. *Merriam*, 19 Gr. 395.

(*r*) 2 Keen 81 (1836).

tory and nothing concluded. It is doubtful, moreover, if Lord Langdale, by the term "mere stranger," as used in that case, meant to include a third person for whose benefit the contract is entered into, *and to whom one of the contracting parties is indebted*, which indebtedness will be discharged, in whole or in part, by the specific performance of the contract. He was, moreover, probably, referring to a case like the one then in hand, where the contract is wholly *executory*, and not to a case where the contract is completely executed either by the party who stands in the position of settlor, or by the party who is indebted to the third person.

In *Lamb* v. *Vice* (*s*), the material facts are, that an officer of the Palace Court entered into a bond with sureties to the plaintiff, as Knight Marshall of the Court, conditioned for the due performance of the duties of his office, and (*inter alia*) that he should take sufficient bail from all defendants arrested. The officer (defendant) took insufficient bail from a defendant arrested, in an action in that Court brought by one Moses, and it was held by the Court of Exchequer that the plaintiff was entitled as a trustee for Moses, to recover in an action on the bond the full amount of the debt and costs. Lord Abinger, C.B., says (p. 472): "The plaintiff clearly was a trustee for Moses; he (*i. e.*, Moses) might sue on the bond in the plaintiff's name, or the plaintiff might sue for the benefit of Moses. Nothing is more common than for a *cestui que trust* to sue on a bond in the name of his trustee." It is also pointed out by Parke, B., in this case (*t*), that a suitor had a right to sue in equity, in the name of the sheriff, upon a bail bond given to that officer, even before he acquired a statutory right (by 4 Anne, cap. 16, sec. 20) to procure an assignment of the bond to himself and to maintain an action thereon. Lord Hatherly, L.C., says: "Where a sum is payable by A. B. for the bene-

(*s*) 6 M. & W. 467 (1840). It is to be observed that the Court of Exchequer at that time was a Court having equity jurisdiction. See *Robertson* v. *Wait*, 8 Ex. 299, and comments thereon in *West* v. *Houghton*, 4 C. P. D. 202.

(*t*) 6 M. & W. 472.

fit of C. D., C. D. can claim under the contract as if it had been made with himself." (*u*).

The English Court of Appeal recently discussed the question in *Re Empress Engineering Company* (*v*). A. agreed with the promoters of a company intended to be formed, that A. would sell and the company should buy a certain business, and it was a term of the agreement that the company should pay a certain sum of money to the solicitors of the proposed company for their services rendered in its formation, *for which services the promoters were personally liable to the solicitors.* The company was afterwards formed and forced into liquidation, and in the winding-up proceedings the solicitors attempted to prove their said claim against the company, when the same was disallowed. The Master of the Rolls says (p. 129): "It is contended that a mere contract between two parties, that one of them shall pay a certain sum to a third person, not a party to the contract, will make that third person a *cestui que trust.* As a general rule, that will not be so. A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to a new agreement the next day releasing the old one. If C. were a *cestui qui trust*, it would have that effect." No such general statement of law was necessary for the decision of that case, which was simply one of disputed agency. The promoters were purporting to act as agents of the company, but were in fact unauthorized so to act; and being themselves personally indebted to B., they on behalf of the company purported to enter into an agreement with A. that the company would pay B.'s claim. The reputed agents were unauthorized to act, and therefore could not bind their principal, and the case admitted of this easy solution. The Master of the Rolls, however, proceeded in his judgment, in the part from which we have made the above extract, to say how the case should have been treated if the promoters had

(*u*) *Touche* v. *The Metropolitan Railway Co.*, L. R. 6 Chy. App. 677 (1871).
(*v*) 16 Chy. D. 125 (1880).

been fully authorized, and by way of illustration, he put the above hypothetical case of "A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly)." Upon consideration of the circumstances of the real case and of the supposed variation thereof, which this hypothetical case was put to illustrate, we are entitled to assume that the hypothetical agreement is one that is wholly executory as to both contracting parties, and that neither of the contracting parties is under any obligation to the third person, since this could be the actual state of facts in the supposed variation of the case under consideration (*w*). The learned Judge, however, proceeds to say (p. 129): "I am far from saying that there may not be agreements which may make C. a *cestui que trust*. There may be an agreement, like that in *Gregory* v. *Williams*, where the agreement was to pay *out of the property, and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party*. So, again, it is quite possible that *one of the parties to the agreement may be the nominee or trustee of the third person*."

It may be observed that it is equally competent for either of the parties to the contract, whether promisor or promisee, to constitute himself a trustee for a third person of the benefits which he has derived, or is going to derive, under the contract. The observations of Sir George Jessel appear to amount to this, that the third person cannot enforce a contract made in his favour unless a trust is created of which he is the *cestui que trust;* and that, unless such trust is created, the parties to the contract may

(*w*) It is but proper to point out that during the course of the argument, the Master of the Rolls, by way of interjection, made the observation (p. 127) that, "*A. being liable to B.*, C. agrees with A. to pay B. This does not make B. a *cestui que trust*." Certainly not, unless there be a sufficient consideration passing from A. to C., and probably not, in case the agreement is never communicated to B., or being communicated, its benefits are repudiated by him, and possibly not, if, upon being communicated to him, he neglects to accept its provisions. Another explanation remains, and that is, that possibly the Master of the Rolls, being warmed by the debate in progress, gave vent to an observation that he afterwards thought it better to tone down in his more considered judgment. This seems not improbable when we consider that the case put was not parallel to the case in hand.

effectually grant mutual releases. How such trusts may be created is exemplified in several of the cases already cited, and will be further noticed under Trusts.

The latest case in which the English Courts have adjudicated upon the question, is the case of *Lloyds* v. *Harper* (*x*), decided by the English Court of Appeal in 1880. The question there arose in this way:—A father, on the occasion of the admission of his son as an underwriting member of Lloyds, addressed to the Managing Committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. Lloyds were an association, consisting of various classes of members, including the underwriting members, and the practice of the latter class was to underwrite policies of marine insurance for the benefit of various owners of property, *upon which policies the association, as such, incurred no liability.* In an action brought by Lloyds against the executors of the father, it was held that the plaintiffs were trustees of the benefit of the guarantee for all the persons with whom the son had contracted engagements as an underwriting member, and that the plaintiffs could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons. In the Court below (p. 309), Fry, J., says: "In my opinion, the action can be maintained for the whole amount covered by the guarantee. It appears to me from the cases which have been cited in the course of the argument, especially *Tomlinson* v. *Gill* and *Lamb* v. *Vice*, that where a contract is made for the benefit and on behalf of a third person, there is an equity in that person to sue on the contract, and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into"; and this statement of the law was fully affirmed in the Court above (*y*). Lush., L.J., in delivering

(*x*) 16 Chy. D. 290.

(*y*) It is to be observed that James, L.J., sat in the Court of Appeal both upon the hearing of this case and that of *In re Empress Engineering Co.*, *supra*. It is evident, therefore, that the principles enunciated in this case were not supposed to conflict with the judgment in that case.

his judgment, says: "I consider it to be an established rule of law that where a contract is made with A. for the benefit of B., A. can sue on the contract for the benefit of B. and recover all that B. could have recovered if the contract had been made with B. himself." We shall hereafter point out how the third person can himself enforce performance of a promise in all cases where the promisee can do so, holding the proceeds of the suit for the benefit of the third person.

THE EXTINCT RACE.

You can seldom find an attorney-at-law—he knows better. —*Lay Paper.* You can't find him at all since the Judicature Act—some one else knows better.

THE DISTRIBUTION OF BUSINESS.

The decision of the Chancery Division in *Trude* v. *The Phœnix Insurance Co.*, to be found noted in the Occasional Notes, gives rise to grave questions touching the distribution of business.

It was pointed out by the learned Chancellor in giving judgment, that by the old Chancery practice the Judge hearing the cause could separate the matter to be tried, and find certain facts as a jury might do, and afterwards decide the questions of law. These are separate acts of the Judge. His findings of fact may be right, and so admitted; but the law may be wrongly applied, or his findings of fact may be wrong, when they will not support the judgment on questions of law. Rule 317, when read by the light of this practice, bears only the construction given to it by the Divisional Court. When the Judge, under Rule 274, directs certain findings of fact to be entered, the case is then ready for the application of the rules of law governing the case. The facts being ascertained, it becomes necessary, according to the practice, before applying these rules of law, to make a motion for judgment. After judgment, the question arises as to what appellate tribunal must be sought for a review of the case. If the matter is brought before the Divisional Court the judgment can only be reviewed "upon the finding as entered." That is to say, the party dissatisfied cannot ask the Divisional Court to go into the evidence at all. The "finding *as entered*" is the foundation upon which he rests his appeal, and upon the motion based on that finding he is limited to the contention that some other judgment or judicial conclusion of law should have been passed. A further argument in support of this view may be deduced from section 44 of the

Judicature Act, by which it is enacted that no party shall be entitled to judgment on the ground of his pleading being true, if the facts proved are not sufficient in point of law to entitle him to judgment. The case is tried by a Judge, who finds the facts and applies thereto what he considers the proper rules of law. An opportunity is then given to show that the party proving the facts upon which he relies is, nevertheless, not entitled to judgment; and if a party is dissatisfied with the ruling of the Judge he may renew the same motion before the Divisional Court. But it is no part of the duties of the latter to review the facts. If a review of the whole case is desired the Court of Appeal is the only tribunal which has jurisdiction.

The result of this construction of the act and rules is, that almost all causes in the Chancery Division will go direct to the Court of Appeal, where a party is dissatisfied. For where the Judge at the trial disposes of the action, as in the case under review, by one judgment or decree, without separating his findings of fact from his judgment upon the law, the jurisdiction of the Divisional Court is ousted; and where he separates his findings of fact from his judgment upon the law, dissatisfied litigants will hardly care, upon an appeal, to shut themselves out from the opportunity of having a review of the evidence as well as of the law applied.

We bow to the wisdom of our legislators. But for this, we should have hazarded the opinion that the better policy would be to reverse the positions of the Courts, and endeavour, as far as possible, to have the facts fully discussed and finally disposed of before arriving at the Court of Appeal.

Why the finding of facts by a Judge should be subject to review only by the Court of Appeal is not quite clear, so long as the Divisional Courts are required to sit. The event of working out this policy will be practically to limit the functions of the Judges of the High Court of Justice to going Circuit and hearing arguments in single Court, while the Court of Appeal will have its duties very largely increased by hearing all appeals. The common law divisions must, it is true, sit for new trial

motions in jury cases, but trial by jury is being gradually effaced from our system of judicature, and the policy is thus further advanced. To attain perfection it only requires the total abolition of Divisional Court Sittings, and a Court of Appeal in constant session whose Judges are relieved from Circuit going. It would be manifestly unfair that the Court of Appeal, which has already plenty of work to do, should have an additional amount assigned to it, without relieving the Judges from Circuit going. And if they are to hear all appeals in cases tried by a Judge, this must certainly be done.

On the first of January the jurisdiction of the County Court Judges over interlocutory and other chamber applications commenced. So far no appreciable diminution is noticeable in the business transacted before the Master in Chambers, nor perhaps will it be. A great number of *ex parte* applications will be made before the County Judges. But *quære* whether solicitors residing without the county towns will not prefer having their applications made in Toronto. According to the present practice agency fees are not allowed in a party and party bill to a solicitor employing an agent in his own county town, though they are allowed to him where he employs an agent in Toronto to make his application in Chambers. He has the choice, therefore, of two courses, each costing him exactly the same sum, with a preference in favour of Toronto, because he can in that case tax his agency fees. The business to be transacted before the County Judges will therefore probably be limited to *ex parte* applications by solicitors practising in the county towns, in addition to contested applications where all the solicitors engaged practice in the county town. This is, perhaps, as much decentralization as the convenience of solicitors in the outer counties requires.

EDITORIAL REVIEW.

Law Reform.

The advance of the Law Reformers is as clearly marked by great measures and events, as the progress of a victorious army is marked by the great battles on its line of march. For many years the disturbing agent in Law Reform has been Equity. She has been steadily influencing the whole cause of law and procedure; and has tended onwards and upwards, until she now sits poised upon the dizzy pinnacle of the seventeenth section of the Judicature Act.

But, a few late years form an era in Law Reform in which an important factor has been at work, which is closely associated with Equity practice, but whose influence has been either totally ignored or vastly under-rated. The beginning of that era is clearly marked by the invention and introduction of the Elastic Band. It was clear that as the leaven of flexibility leavened the whole lump of Equity, she must discard the unyielding red tape of the Common Law. The Elastic Band was a fitting symbol of the adaptability of the maxims and decrees of Equity to the peculiar circumstances of each particular case. She could not be bound by red tape. Her maxims must needs be of such a nature that they might easily be disentangled from one case, and, while assuming for a moment a recognizable form in the hand of the Court, might be just as easily put through a variety of new contortions to suit the exigencies of another case of entirely different proportions. The abstract Maxim found a fitting symbol in the concrete Elastic Band. It might be strained, distorted, twisted, reduced in size by doubling upon itself, distended almost to bursting; yet when disentangled, relieved from its strain and out of immediate use, it would readily resume its nor-

mal shape, and rest peacefully and gracefully on the practitioner's table, mutely testifying—No wrong without a remedy. Elasticity was henceforth the watchword of the Law Reformers, who had already inscribed Equity on their banner. Practice, procedure and rules of law, all partook of the qualities of the Elastic Band. Those who remained in the bondage of red tape called it looseness. But the Chancery bird never once stopped "a-filin' her bill,"* but to stretch her flexible neck, and shriek back ELASTICITY.

The pioneers of Equity, pledged to move rapidly onward in the direction of Law Reform, formed themselves into a band—neither a band of hope nor a brass band—but an Elastic Band. In their rapid advance a corner of the Bench became entangled in the circle, and the recoil, as they brushed past, caused one of its members to start from his seat as from a catapult, and land clean within the circle of the Elastic Band.

To alight was not to rest. Bound after bound was made in the direction of Law Reform by the leader, on whom the Elastic Band rested lightly, until his companions were left far in the rear. The tension of the Elastic Band increased as he strode forwards, until, drawn tightly around him it now stretches far into the rear, strained to the utmost, while it merrily hums in the breezes of popular favour that blow across it as across the strings of an æolian harp.

Another bound, and what will be the result? Elastic bands will not stretch forever. The retractile force may overcome the projectile force, and Law Reform and its leader receive a rude shock. Or the projectile force may be more than the Elastic Band can bear. Should it snap, the recoil would produce a stinging and lively attack in the rear of the valiant leader less pleasant to feel than to contemplate.

* We are indebted to the acute Hosea Biglow for this gentle thought.

Osgoode Hall Law Lectures.

We have received the first number of a series of Law Lectures reported and published by J. P. Mabee, Esq., Stu-

dent-at-Law,* who, we understand, proposes to continue the publication as the lectures are delivered—of course, with the consent and approval of the learned lecturers.

The first number contains two lectures, delivered by Jos. E. McDougall, Esq., Examiner to the Law Society on Criminal Law and Torts. The subjects chosen are Torts and Negligence. One lecture on Torts cannot be a very comprehensive one. The subject is therefore treated of on general principles only, illustrated by the introduction of examples of particular torts.

Negligence is a subject which may be dealt with in a scientific manner, or in a purely practical manner. We have text books of each description. From a philosophical point of view we see nothing but casuistry and speculation. From the lawyer's point of view we never look beyond the proximate cause, and are constantly seeking for certain and unyielding rules for the determination of specific questions. The practical side of the question is taken up by the learned lecturer, and frequent illustrations of the principles upon which the Courts proceed are given in the citation of numerous cases. The style is somewhat colloquial; and in this the learned lecturer has, we think, wisely permitted the publication of the lectures as far as possible in the same style as that in which they were delivered. A colloquial style of delivery brings the subject more nearly home to the student, and affords relief from the unyielding and sometimes non-committal text books.

The chief value of these lectures will be in leading the student to search for and examine living examples of the application of principles of law in the reported cases.

* Toronto: Rowsell & Hutchison, 1882.

Vacations.

The past vacation recalls to mind that the matter of the vacations generally needs re-consideration. The vacations under the old law, not having been touched by the Judicature Act, remain as they formerly existed.

The summer vacation ends in the very hottest weather : and those who have had the good fortune to get cool during July and the first three weeks of August, and who are forced to return to the glaring heat of town, in order to set litigation again in train, are apt to lose all the good of their holidays by slaving away the last and hottest days of August, which might have been well enjoyed in some cool resort, without loss to any one. In an intensely practical age, in which iconoclasm is rapidly developing into a profession, it would not be amiss to extend the long vacation to the thirty-first of August. Two months is not a very long time for partial rest, and business would certainly not suffer by an addition of ten days to the long vacation. The practice heretofore existing of postponing nearly all the Chancery business to the first of September worked well, and there is no reason why this practice should not now be made a standing rule, with a proviso, that absolutely necessary applications might be made. By the twentieth section of the Ontario Judicature Act, the Lieutenant-Governor in Council may, upon a report or recommendation of the Council of Judges, regulate the vacations. Apparently, the matter must be set in motion by the Judges; and we feel sure that any action which their Lordships might take in the premises would be received with gratification by the Profession at large.

NOTES OF RECENT DECISIONS.

Guilford v. *Anglo-French Steamship Company*, 1 C. L. T. 554. The *Law Magazine and Review* for November last, prints our note of this case, and appends thereto the following remarks:—Some cases referred to in Desty's *Manual of the Law relating to Shipping and Admiralty*, San Francisco, 1879, seem worth citing here in their bearing both on the judgment of the Court and the dissenting opinion of the Chief Justice. In section 51, *s. v.*, Managing Owners, Mr. Desty has the following:—"Where the master is part owner, with entire control, he may sue in his own name." *Cawthron* v. *Trickett*, 15 C. B. N. S. 754. [This was an action for demurrage. ED. C. L. T.] He is presumed to have no right to compensation for his own services. *Rennell* v. *Kimball*, 5 Allen, 205; *Smith* v. *Lay*, 3 Kay & J. 405: *Benson* v. *Heathorn*, 1 Younge & Co. 326. Still Mr. Foard, *Law of Merchant Shipping*, 1880, quotes Abbott on *Shipping*, to the effect that the master being part owner, is the confidential servant or agent of his co-owners.

Vetter v. *Cowan*, *Antea*, p. 38. We call attention to this case as a decision arising fairly upon the right of a party to issue a capias without first issuing a writ of summons. Mr. Justice Cameron, in giving judgment, referred at some length to *Robertson* v. *Caulton*, 1 C. L. T. 701, but distinguished it. In that case, it will be noticed, the point was not fairly in issue. The action had

been commenced, but the writ of capias was not in proper form. No objection could be raised to it, save its irregularity in form. But in the principal case the defendant complained that no action had been commenced, and that the act of the learned Judge, who ordered the issue of the capias, was, therefore, *ultra vires*. No doubt, the right to arrest on a capias is an extraordinary one, and is ancillary to the ordinary proceedings in an action. But at the same time actions were *commenced* in that manner before the Judicature Act, and the question is, should they be commenced in that manner now. The provisions of the C. L. P. Act have some bearing on the point. Sections 3 and 4 are classed under the heading, "Commencement of actions," as follows:—1. *Non-bailable process.* Sec. 3. "*Except* in cases where it is intended to hold the defendant to special bail, all personal actions * * shall be *commenced* by writ of summons." * * 2. *Bailable process.* sec. 4. "In case any person is to be arrested and held to special bail, the process shall be by a writ of capias, * * which writ shall bear date, be tested, and (in addition to other endorsements) be endorsed in the same manner as writs of summons." * * According to *Wood* v. *Hurl*, 1 C. L. T. 112; S. C. 28 Gr. 146, the fourth section, relating to capias, would be controlled by the heading "Commencement of actions." There were, therefore, under the above classification two ways of commencing an action before the Judicature Act, viz., either by writ of summons or by capias. But now, by Rule 5 of the Judicature Act, "*Every* action in the High Court shall be commenced by writ of summons, etc." The principal case was an action for breach of promise of marriage, and, under the former practice, might have been commenced by capias, the plaintiff having a right to this writ under R. S. O. cap. 67. There seems, therefore, to be no escape from the cast-iron rule laid down by this enactment, save to hold that this writ is an extraordinary remedy, independent of the ordinary proceedings in an action, the right to which arises under an Act, R. S. O. cap. 67, not intended to be effected by the Judicature Act. The decision is in the interest of

convenience, common sense and justice; for a party, having the right of this plaintiff, should be allowed the most speedy, convenient and safe proceeding to prevent an irreparable mischief, and should not be hampered by forms. There still remains the stubborn fact that this proceeding is the commencement of an action, and that the commencement of an action shall be by writ of summons. And it must also be remembered that R. S. O. cap. 67 gives the *right* to the writ, while the C. L. P. Act regulates the *proceedings* taken pursuant to such right.

BOOK REVIEWS.

Drinks, Drinkers and Drinking, or the Law and History of Intoxicating Liquors. By R. VASHON ROGERS, JR., of Osgoode Hall, Barrister-at-Law. Albany: Weed, Parsons & Company, 1881.

This is a jovial subject, and one which we might expect the learned author to deal with in his well-known humorous style. We confess to a slight feeling of disappointment on finding that he is more serious than usual.

Wine that, according to the Psalmist, maketh glad the heart of man, and oil to make him a cheerful countenance, seem to have been abjured by Mr. Rogers while engaged in the preparation of this work. It is a pity that some good Samaritan had not met him by the way, and stopped to pour in both and leave him at an inn, where our learned author and friend might have recovered some of the hilarity which he must have left behind him at one or other of these places. Strange to say, as soon as he takes to drinks, drinkers and drinking, (he has our sympathy), upon the principle of *lucus a non lucendo*, or something cognate thereto, he sobers up to such an extent as to furnish some evidence (rebuttable, of course), that the book was written "next day," or on a succession of them, when under the potent influence of remorse and soda-water—a condition which a poet graphically depicts in "A Pensive Thought" concerning an empty beer-bottle:—

> "And what remains? An empty shell!
> A lifeless form, both sad and queer,
> A temple where no god doth dwell—
> The simple memory of beer!"

The first chapter is descriptive, and treats us to intoxi-

cants, showing an unenviable intimacy with an unusual variety of drinks, which the learned gentleman, however, has taken the precaution not to mix. There is one commodity, very prevalent in this country, which has been omitted from the list, probably because it is not intoxicating except in theory. It has been described by a caustic writer as follows:—"Small beer—an undrinkable drink, which, if it were set upon a cullender to let the water run out, would have a residuum of—nothing. * * Small beer comes into the third category of the honest brewer, who divided his infusions into three classes—strong table, common table, and *lamen-table*." The history of intoxicants and laws to restrain the evils arising from their abuse forms the subject of the second chapter. The remainder of the work deals with definitions, the effect of drunkenness upon contracts, deeds, wills, insurance, etc. Though the book was written "for use in the United States," there are one or two Ontario cases which might have found a useful place in the notes. A "keeper" of a place for the unlawful sale of liquor is not only the owner thereof, but any one who is in possession and control. So it is held in Ohio. A somewhat similar point arose in Ontario, where, in *Regina* v. *Howard*, 45 U. C. R. 346, following *Regina* v. *Williams*, 42 U. C. R. 462, it was held that a conviction of a servant for selling was good. *In re James*, 1 C. L. T. 698, where it was held that the estate of a lunatic, who had received no consideration for the indorsement of a promissory note, was not liable to his indorsee thereupon, though the latter was not aware of the lunacy, has some bearing on the subject of indorsements made in a state of intoxication. It may be, however, that the latter case was not published in time.

Laying joking aside, we are glad to be able to say that this little work, well planned and well written as it is, will be found a very useful contribution to our libraries—more useful than the title would indicate. Mr. Rogers has, by his former works, shown that, while he makes merry over the law, he gives us nothing bad. He is always ready with his authorities, which are well selected and to the point—

seeking to persuade us by the quality instead of overwhelming us with a quantity.

The Law relating to the Sale of Goods and Commercial Agency. By ROBERT CAMPBELL, M.A., of Lincoln's Inn, Barrister-at-Law, etc., etc. London: Stevens & Haynes, 1881.

Mr. Campbell is already known to the Profession through his scientific treatise on the Law of Negligence. He has undertaken and carried out this work in the same scientific manner. Part I. is devoted to the "Limits of the Subject," which is then treated of under the following heads:—The parties to a sale; the consent; the statutory requisites; the common intention of the parties—wherein the effect of the sale is considered with regard to the property in the thing sold, and the primary obligations arising from the contract; vendor's rights remaining in the goods, etc.; the secondary obligations arising out of breaches of the contract; agency; fraud and breach of confidential duty.

Mr. Campbell's style is generally clear and incisive, and his meaning free from ambiguity. He has not hesitated, as stated in his preface, to express an independent opinion upon principles gathered from sources common to himself and other writers; and we must say that, bold as the attempt is, this course has furnished matter for congratulation rather than for regret, for the expressions of opinion manifest great clearness of mental vision. His faculty for analysis is displayed in the division and sub-division of the subject, which, though not commending itself to all, seems to us to be well adapted to the treatment of a subject in which the most minute details and the finest distinctions are of the utmost importance. We cannot agree with the learned writer as to the wisdom of confining himself strictly to the English decisions. Much is to be learned abroad, and many able opinions are to be met with on this side of

the Atlantic. English Judges have in many cases expressed their approval and admiration of American decisions; and indeed the English law upon some subjects has, in the course of events, undergone a complete revolution, having been preceded on this continent by a mode of thought, which seemed more practical and suited to the modern habits of society than the Common Law of England permitted. The book is a valuable contribution to legal literature, and, notwithstanding the existence of a formidable rival, will gain a place among the authoritative text books.

BOOKS RECEIVED.

A Manual of Practical Conveyancing. By D. A. O'Sullivan, LL.B., Barrister-at-Law, Osgoode Hall. Toronto: Carswell & Co., 1882.

Report of the Fourth Annual Meeting of the American Bar Association, held at Saratoga Springs, New York. Philadelphia: E. C. Markley & Son, Printers, 1881.

REVIEW OF EXCHANGES.

American Law Register.—December, 1881.

Convertible Property, by A. DONAT. Conversion at the present time need not be by alteration or appropriation alone. It may consist of seizure, with holding, or other complete exclusion of the owner; or it may consist of a purchase of goods from one who has himself been guilty of a conversion in disposing of them. Examples of convertible property are given from decided cases, among which is a curious one as to ice. The defendant having taken possession of a building containing a beer-room and ice-house, gave notice to the plaintiffs to remove their ice, which they failed to do, and the defendant opened the slides between the ice-house and the beer-room, whereby the ice melted. *Held*, that he was responsible for a conversion of the ice; *Aschermann* v. *Philip Best Brewing Co.*, 45 Wis. 262. Some remarks and cases on fixtures conclude the article.

American Law Review.—January, 1882.

A National Codification of the Law of Evidence, its advantages and practicability, by WILLIAM REYNOLDS. The learned writer states his views as to the advantages that would accrue from having the law of evidence codified, and concludes that branch of his subject as follows:—"As we have now seen the results of enough decided cases to determine definitely what the rules of evidence ought to be, the time has fully arrived for expressing them authoritatively, in such explicit terms that the rules themselves, and not the adjudications they are founded upon, shall be the ultimate standard hereafter to be applied by the Courts in deciding questions of evidence."

Is a sub-lease for the residue of a lessee's term in effect an assignment? by CHARLES R. DARLING. The learned writer gives an exhaustive review of the English cases, and sums up the result as follows:—"The result is that we find the balance of English authority to be in favour of the view that a sublease for the whole, or unexpired residue, of a lessee's term is in law an assignment, but that, nevertheless, there is respectable authority, and that not inconsiderable, upon the other side of the question." The American authorities are then reviewed. In New York, a number of cases appear to have arisen on the subject, as to which the learned writer says, "we discover the introduction of a distinction unknown in the English cases, according to which the sublease retains its character of a sublease, if it contains a power of re-entry, or an agreement that the sublessee shall surrender the premises at the end of the term, or

perhaps even if a different rent is reserved from that in the original lease." As to the agreement to surrender to the sublessor at the end of the term, it seems to us that, rather than allow it to control the whole nature of the conveyance, its meaning and validity should depend upon the nature of the conveyance itself. If the agreement be (as the learned writer puts it in cases cited) to surrender possession *at the end* of the term, and not before, it is quite clear that the sublessee has the right to hold possession until the end of the term, which being ended, the sublessor has no right to receive the possession. In such a case, the sublessee having acquitted himself to the sublessor, the original lessor is the only person having any right to receive possession. We should suppose, therefore, that the agreement to yield possession, as above, should be construed as repugnant to the nature of the assignment and void. It is also said that the sublessor does not part with his whole interest where covenants are entered into between him and his lessee which do not give the latter the full benefit of the covenants in the original lease; and therefore it is a sublease though for the whole term. But he *does* part with his whole *estate*, though upon conditions differing somewhat from those which he received it upon. And the whole question in fact is, Does he part with his whole estate?

Canada Law Journal.—*1st January*, 1882.

Costs when Defendants sever. At Common Law if the breach or tort be a joint one, defendant cannot sever. *Aliter*, when the breach or tort is not joint. The ordinary retainer of two or more defendants only enables the solicitor to claim from each his proper share of the costs incurred. Such a retainer is not a joint and several contract. Any variation from this must be strictly proved. Trustees and *cestuis que trustent* should not sever, nor should mortgagor and mortgagee. Where trustees sever and one imputes misconduct to the other, and this appears by the evidence, the innocent trustee is entitled to his costs to the exclusion of his co-trustee. Parties attending in the M.O. should appear by one solicitor. A class can only be represented by one solicitor.

Central Law Journal.—*23rd December*, 1881.

The effect of coverture upon torts and crimes committed by the wife, by WM. L. MURFREE, JR. The common law doctrine of the merger of the wife in, and coercion by, the husband is stated. The possibility of coercion in inferior offences was sufficient. The husband's presence was not necessary to support the possibility, provided he were near at hand. The presumption of coercion may be rebutted. Where a woman was a sole trader, sold liquor, and so violated an ordinance forbidding the sale to negroes after certain hours, she was convicted, though her husband was present. The line between inferior and other offences is said to be uncertain. Treason and murder are exceptions; and so are offences peculiar to the female sex, as the keeping of bawdy houses. The civil liability is then discussed.

Ibid.—6th January, 1882.

Insanity—Burden of Proof, by HENRY WADE ROGERS. The different theories prevailing in the different States are treated of. I. The first theory to be noticed is that which holds that the burden of proof rests upon the prisoner. It is adopted in the following States:—Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Iowa, Kentucky, Maine, Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Pennsylvania, Tennesse, Texas and Virginia. II. The second theory is that the burden of proof rests upon the State. In Illinois the first theory was held till 1863, when the second was adopted. The presumption of innocence was said to be as strong as the presumption of sanity. In Indiana and Kansas, if there is a reasonable doubt the jury should acquit. In Michigan the able opinion of Chief Justice Cooley is on the side of the second theory. He holds that the malicious intent must be proved, which carries with it as a consequence the necessity of proving sanity. Mississippi, Nebraska and New Hampshire hold the same theory. In New York it is doubtful which prevails.

Ibid.—13th January, 1882.

Bills of Lading, by ADELBERT HAMILTON. They are both receipts and contracts. In the absence of contract or custom railway companies are not obliged to give them, nor the consignor to procure them for the consignee. Carriers' agents are authorized to issue bills of lading only for goods actually received. A bill of lading is a muniment of title. Cases are cited to show that when a carrier's agent issues a bill of lading fraudulently it will not support an action. The consignor's acceptance of a bill of lading without objection is an implied assent to its terms, and he will be bound though he fail to read it. If an association of railway companies agree to guaranty their bills of lading, each company is bound by a bill issued by any one of them. "Contents unknown" relates only to the quantity or quality of the contents. It cannot be used to show that the packages contain nothing. A receipt of goods "to be forwarded" is not a contract that the carrier will himself convey and deliver the goods to the place of destination if it be beyond his route. Limitation of liability contracts do not relieve carriers from responsibility for their own negligence.

The duty of mutual disclosure, by CHARLES BURKE ELLIOTT. "Where there is any defect, moral writers hold that the vendor is bound, *in foro conscientiæ*, to make such defect known to the purchaser. This was also the general doctrine of the Roman law." If the defects were patent, however, and the purchaser could have discovered them, he could obtain no relief. At the Common Law the vendor warranted the title alone and not the quality. Where any peculiar relation exists between the parties, perfect good faith is required. The condition "with all faults" excuses the seller from stating those within his knowledge, but he must not use any artifice to conceal them. In contracts of guaranty and sure- information of all the facts that would increase the surety's risk is ary.

Ibid.—*20th January*, 1882.

Equitable liens on personal property, by BENJ. F. REX. A Common Law lien is defined. "An equitable lien may be defined to be a right not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part, to the payment of a particular debt or class of debts." Solicitors' liens are referred to. Instances of equitable liens are then given, and the liens of partners touched upon.

Limiting the time of argument of Counsel, by A. G. MCKEAN. In a slander case where the Court limited opposing counsel to an hour and a half each, *held* not an abuse of the discretion of the Court. Where a defendant's counsel, on a trial for an attempt to murder, was limited to forty minutes against his protest that he could not do justice to his client in that time, *held*, error so to limit him.

Southern Law Review.—*June—July*, 1881.

Consignee's Right of Action against Carrier, by JAMES O. PIERCE. The subject is reviewed under the following heads:—First, where there is a special property in the goods there is a right of action. Secondly, the owner of the goods may bring the action. Thirdly, the party contracting for their carriage may bring an action on the contract. The consignee is the presumptive owner of the goods, and may therefore bring the action; but the presumption may be rebutted by showing who the true owner is. Where the consignor acts merely as the agent of the consignee in shipping, the right of action lies in the consignee, either as actual owner or as presumptive owner upon the bill of lading. But where the consignor employs the carrier and the latter looks to him for the freight he may maintain the action on the contract. Where the consignee has no property in the goods, either general or special, and incurs no risk in their transportation, he cannot maintain an action for their loss or damages.

Ibid.—*August—September*, 1881.

Rights of Persons who Acquire an Interest in Land Subject to a Lien, by ORLANDO F. BUMP. "A lien, from its very nature, binds the entire estate on which it is a charge, and affects every part thereof equally. In this respect it is immaterial whether the lien arises from a mortgage, or a charge under a will, or consists of a vendor's lien. Therefore, if the lien is a charge on several parcels, it binds each parcel equally; and if the parcels are owned by different persons, who are in *æquali jure*, each must contribute proportionately to discharge the encumbrance." Numerous cases are then cited, which are rather illustrative of the various phases through which the subject passes, than necessary to establish a manifest equity.

The Power of the State and National Governments to Regulate and Control Railroads, by DAVID WAGNER. The principle is referred to of those cases in which it has been held that charters

to private corporations are contracts. This is now the established doctrine of the United States Courts. It is denied in England where it is held that the charters are *laws* and are subject to amendment as other laws are. This view has been adopted by the Court of Appeal of Ontario in *Attorney-General* v. *International Bridge Co.*, 1 C. L. T. 720. In the United States, Acts which amend, alter or impair private charters without the consent of the corporation, or which impair obligations entered into with corporations on the faith of their charter are held unconstitutional and void, under that article of the constitution which provides against the enactment of laws which impair the obligation of contracts. A distinction is made between corporations for purposes of gain to private investors, and municipal corporations and other public bodies. The learned writer seeks to bring railroads within the latter, as being essentially of a public nature, though commercial enterprises.

American Law Schools, Past and Future, by W. G. HAMMOND. A historical retrospect. With respect to the future, it is hoped that law schools "will never lose the help of those who come filled with wisdom from the bench, or fresh from the earnest discussions of the bar, to breathe into their lectures the breath of active life."

Parol Contracts of Insurance. A case of *Baile* v. *St. Joseph Fire and Marine Insurance Co.*, decided in the Supreme Court of Missouri, is noted. It was held that, on an oral contract of insurance, the assured may, in equity, recover. In *Jones* v. *Provincial Insurance Co.*, 16 U. C. R. 477, a declaration on a promise for value to insure was held bad on demurrer.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C.J., 10TH JANUARY, 1882.

UNION FIRE INSURANCE CO. v. LYMAN.

Statement of defence—Contents of paragraph—Rule 128—*Calls on stock—Allotment—Vesting of shares—Suspension of license — Business of insurance.*

Though each paragraph of a statement of defence should, under Rule 128, as near as may be, contain a separate allegation, it need not contain a separate defence.

Claim: Calls upon shares upon which the defendant's testator had paid ten per cent. at the time of subscription. Defence: By a by-law of the plaintiff company no subscriber of stock should be a shareholder until the shares had been allotted to him by order of the Board; the testator subscribed for fifty shares or any portion thereof which might be allotted to him, but no allotment was ever made.

Held, on demurrer, bad; for the by-law does not extend to a case in which a subscriber pays the necessary deposit, in whom the shares vest under 39 Vic. cap. 93, sec. 2 (O.), the plaintiff company's act of incorporation.

The statement of defence was amended and again demurred to, and the demurrer was argued on the 24th January, 1882, before Wilson, C.J.

Defence: That by an order of the Lieutenant-Governor of Ontario in Council, issued under 42 Vic. cap. 25, the plaintiffs' license had been and still is suspended, whereby it became unlawful for the plaintiffs to do any further business in Ontario; and that the calls in respect of which the action is brought were made for the purpose of enabling plaintiffs to carry on business of insurance in Ontario. Demurrer.

Held, that the defence should have alleged notice in the *Gazette* of the suspension of the license, pursuant to R. S. O. cap. 160, sec. 34, and 42 Vic. cap. 25, sec. 3, sub-sec. 7; but an amendment being allowed, this point not having been taken on the argument,

Held, good.

Held, also, that bringing an action for calls is transacting business of insurance within the meaning of the above Acts.

A. C. Galt, for the demurrers.

Maclennan, Q.C., contra.

In re MISENER AND THE TOWNSHIP OF WAINFLEET.

Drainage by-law—Withdrawal of petitions—Alteration in work petitioned for.

A petition was presented under section 529 of the Municipal Act, for the draining of certain lands, by constructing a drain in a certain direction and deepening a stream. The petition was signed by eighteen persons, being a majority of those shown by the assessment roll to be benefitted by the work, viz: thirty-three. A resolution of the Council was passed under which surveys and estimates were made. Subsequently five of the petitioners withdrew, some by petitioning for a simple clearing of the bed of the stream, and some by informing the Council that they would dig their own drains. By a subsequent petition three more of the petitioners desired the Council that they might do the work themselves. By another petition seven interested persons desired to add their names to those who were in favour of the works. The names of six of the original petitioners remaining were not in the schedule to the by-law of those to be benefitted. This left the number of petitioners at eleven. The Council having procured a second estimate, showing that by diverting the direction of the drain the work could be done at less expense, passed a by-law, reciting that a majority of those to be benefitted had petitioned, and providing for the construction of the work, according to the altered plans. No debentures had been issued nor contracts let when a motion was made to quash the by-law.

Held, that the by-law should be quashed; for (i) The Council had no power to authorise the undertaking of any work other than that petitioned for, but should have refused the petition. (ii) The petitioners had the

right to withdraw at any time after subscribing the petition, and before the contracts were let or the debentures negotiated, *i. e.*, while the Council had the control of the matter—the preliminary surveys and estimates being as much for the information of the petitioners as of the Council. (iii) A sufficient number of petitioners having withdrawn to reduce the number below the majority of those to be benefitted, the by-law untruly recited that a majority, etc., had petitioned.

W. H. P. Clement, for the motion.

Bethune, Q.C., and *Rykert, Q.C.*, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 1882.

In re WIDMER v. McMAHON.

Division Courts—Jurisdiction—Married woman—Separate estate—Title to land.

The plaintiff sued upon a promissory note for $176.44, payable with interest at 10 per cent., the amount being $185.65.

Held, following *McCracken* v. *Creswick*, 8 P. R. 500, that under the Division Court Act, 1880, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of the defendant, and the above claim could therefore be recovered in a Division Court.

In an action against a married woman, the obligation on the part of the plaintiff to prove that she is possessed of separate estate, does not, when it is charged that she is possessed of real estate, necessarily bring the title thereto into question, so as to oust the jurisdiction of the Division Court; at all events the possession of separate personal estate is sufficient to enable an effectual judgment to be given, and although the absence of proof of any personal estate may be urged as a ground of defence, it does not oust the jurisdiction.

Aylesworth, for the plaintiff.

Holman, for the defendant.

[WILSON, C.J., 21ST JANUARY, 1881.

BERRY v. BEISS.

Married Woman—Separate trader—Liability.

Held, that debts contracted by a married woman in carrying on a business, employment, occupation or trade on her own behalf, or separately from her husband, may be sued for as if she were a *feme sole, i. e.*, without regard to separate estate.

Bethune, Q.C., for the plaintiff.

No one appeared contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 13TH JANUARY, 1882.

FARRELL v. CAMERON.

Marriage settlement—Trustee and cestui que trust.

The plaintiff being about to marry, conveyed lands to trustees upon trust, to suffer the plaintiff to receive the rents, etc., for her own use during her life, and upon her death to convey to her child or children, if any, surviving her; in case she died before her intended husband without leaving children, then to suffer him to receive the rents, etc., for life, and upon his death, or in case he should die before her, she leaving no children, then upon her death to convey to her right heirs. There was no issue of the marriage, and the husband pre-deceased the plaintiff, who was now above the age of fifty-five. The latter requested the trustees to re-convey to her, but they declined to do so without the sanction of the Court, as they thought the trust for children was not confined to the issue of the then contemplated marriage.

Held, that the plaintiff was entitled to the re-conveyance, for there were no children of the marriage, and it must be assumed that the plaintiff never could have any children.

TRUDE v. PHŒNIX INSURANCE CO.

Trial by Judge—Re-hearing—Divisional Court—Jurisdiction of.

This cause was heard and a decree made on 19th May, 1881. It was set down after the coming in force of the Judicature Act, for re-hearing of the whole case, before the Divisional Court.

Held, that under Rules 274 and 317 the jurisdiction of the Divisional Court after judgment extends only to cases in which, the findings of fact being undisputed, it is sought to modify or set aside the judicial conclusion drawn therefrom, and manifested in the award of judgment, and that an appeal on the whole case as to conclusions of fact and law must be to the Court of Appeal.

Foster, for the plaintiff.

Plumb, for the defendant.

[16TH JANUARY, 1882.

In re KERR, AKERS & BULL.

Solicitor and Client—Costs.

One C., a barrister and solicitor, being mortgagee of leasehold premises, procured a forfeiture of the lease, and a new lease to be made to himself. The mortgagors took proceedings to redeem. C. satisfied himself that he was absolute owner, and instructed the above named solicitors to defend the suit. They told him their doubts about his succeeding. He then went with his solicitors to an eminent real property counsel, who, being unable to give a well considered opinion, said he thought the suit was one that should be defended. C. then drew the answer himself, his solicitors adding one clause. Counsel was employed at the hearing, who, on reading his brief, told C. that he could not succeed. The suit resulted in the usual decree for redemption, with an order that C. should pay the costs occasioned by his setting up his absolute ownership. It was charged against the solicitors that they had advised him that he would be entitled to costs in any event; that they had refused to consider a tender of the mortgage money and costs (though C. claimed nearly three times that amount); that they had colluded with the plaintiff's solicitor in having a bill filed; that they had wrongly advised him to defend; that there was a good defence, but that it had been negligently managed. The retainer was in writing, and disclosed no special arrangement as to costs or the terms as to which the defence was to be gone into. The Court held on the evidence that C. had not established his charges.

Held, affirming the order of Spragge, C., that the solicitors were entitled to their costs of the defence.

[THE CHANCELLOR, 19TH JANUARY, 1882.

COOTE v. COOTE.

Marriage—Foreign Divorce.

The defendant, in 1842, was validly married in the Province of Canada to a wife who is still alive. Both were British subjects. In 1876, the

defendant, for the purpose of procuring a divorce, went temporarily to the State of Ohio, and by proceedings which were practically *ex parte* procured a divorce. A form of marriage was then had between the defendant and the plaintiff, who now claims alimony. The actual domicile of the defendant had never been changed since the marriage in 1842.

Held, as the question of divorce affects the *status* of the defendant, and that *status* is to be determined by the law of his place of domicile, the Courts of another jurisdiction could not interfere therewith; and therefore the Ohio Court had no jurisdiction to annul the marriage.

See *Shaw* v. *Attorney-General*, L. R. 2 P. & D. 156; *Harvey* v. *Farnie*, L. R. 5 P. Div. 153, S. C. 6 P. Div. 35.

ERB v. BEAMAN.

Lapsed bequests—Administration—Costs.

Held, following *Trethewy* v. *Helyar*, L. R. 4 Chy. Div. 53; *Fenton* v. *Wills*, L. R. 7 Chy. Div. 33; and *Blann* v. *Bell*, *ib.* 382, that the costs of an administration suit are payable out of the entire residuary personal estate, and not out of lapsed shares in exoneration of the general residue.

RUMOHR v MARX.

Amended statement of claim—Partial demurrer.

The plaintiff pleaded to a statement of defence by amending his statement of claim by the addition of two new paragraphs thereto, which would have been demurrable if pleaded as a reply. The matters set up therein, when severed from the rest of the statement, did not disclose any distinct cause of action. The defendant delivered an amended statement of defence, and demurred to the added paragraphs.

Held, that as the added paragraphs did not disclose any severable and substantial cause of action, the partial demurrer thereto, however decided, would not advance the cause; and the demurrer was over-ruled.

Remarks as to the propriety of demurrers which do not raise the whole or a substantial question between the parties, and therefore only tend to expenditure of costs.

[PROUDFOOT, J., 24TH JANUARY, 1882.

RODY v. RODY.

Administration—Practice—Costs.

A bill had been filed for the construction of a will and administration. The registrar, in settling the minutes of the judgment, allowed only the costs of hearing over and above the commission under order 643.

Allan Cassels, for the plaintiff, spoke to the minutes.
H. Cassels, for an adult defendant.
Plumb, for the infants.

It was pointed out that in two similar cases unreported (*McNeil* v. *Fenton*, before the Chancellor, and *Armstrong* v. *Armstrong*, before Blake, V.C.) the decree had given taxed costs of suit up to the decree in addition to the commission under order 643 for the administration proceedings in the Master's office.

PROUDFOOT, J., followed these cases and varied the minutes of the judgment accordingly.

(Reported by T. S. Plumb, Esq., Barrister-at-Law.)

[26TH JANUARY, 1882.

In re INGLEHART v. GAGNIER.

Vendors and Purchasers Act—Building Society.

A mortgage was made, pursuant to 9 Vic. cap. 90, to the president and treasurer of a building society. The society having received the power of sale, the president and treasurer for the time being conveyed to the purchaser under a seal not being the society's seal. The purchaser sold to G., who objected to the title.

Held, that the lands were held in fee simple by the president and treasurer, and that these officers for the time being had the power to convey in fee, and that the power had been duly exercised by them, and G. was bound to accept the title.

KING v. HILTON.

Default of Executor—Liability of Co-Executor.

H. & C. were appointed executors. H., with the knowledge and consent of C., took upon himself the actual management of the estate and applied a sum of money to his own use. The will contained the usual indemnity clause exonerating each from liability for the other.

Held, that C. was not liable for the sum appropriated by H.

JOSEPH v. HAFFNER.

Insolvent Act of 1875—Practising Barrister—Dealer in Land—Trader.

One C., a practising barrister, dealt largely in land transactions, but it was not shown that he depended thereon for his living. Becoming involvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by C. and brought suit thereon against H. the assignee of C., and D. the owner of part of the mortgaged lands.

Held, that C. was not a trader within the meaning of the Insolvent Act, and that nothing passed to the assignee of the Insolvency proceedings.

Held, also that D. was not concluded by the Insolvency proceedings, and had the right, on motion for judgment, to demand that C. should be made a party.

IN CHAMBERS.

[WILSON, C.J., 20TH JANUARY, 1882.

CROWE v. STEEPER.

Taxation—Revision.

The defendants' costs of suit were taxed by the local officer at Chatham. A motion was made to the presiding Judge in Chambers for a revision thereof.

Held, that Rule 449 applies only to appeals from the taxing officers at Toronto, and that there is therefore no direct appeal to a Judge in Chambers from the taxation of a local officer, the old practice in such cases being continued in all respects except as to length of notice of revision by Rule 439 (*a*).

E. Douglas Armour, for the motion.
Aylesworth, contra.

[THE CHANCELLOR, 17TH JANUARY, 1882.

In re BLEECKER AND HENDERSON.

Solicitor and client—Taxation of costs—Appeal.

A solicitor's bill had been taxed by the local officer at Belleville, at the instance of the client, who now moved to have it referred to the taxing officer at Toronto for revision.

Held, that there was no right of revision under rule 439 (b), which applies only to taxations between party and party; that the practice in appealing from certificates of taxation between solicitor and client is unaffected by the Judicature Act; and that the appeal should be made under R. S. O. cap. 140, sec. 49.

The certificate of taxation was confirmed.

H. Cassels, for the motion.
Hoyles, contra.

In re DOWLER.

Husband and Wife—Loan—Statutes of Limitations.

A widow married a second time and then administered to her first husband's estate. She lent moneys received by her as administratrix to her second husband, who died leaving her surviving. The administration and loan were after 1872.

Held, that her right to recover against her second husband's estate was not affected by the Statutes of Limitations.

[CAMERON, J., 3RD JANUARY, 1882.

In re ENGLISH v. MULHOLLAND.

Prohibition—Division Court—Title to Land.

In an action in a Division Court to recover the rent and taxes of certain land, certain facts as to the terms and conditions of the tenancy were disputed, but the defendant did not dispute the plaintiff's title. On the plaintiff obtaining judgment for the amount claimed, the defendant applied for a prohibition, on the ground that the title to land was called in question.

Held, that the amount was properly recoverable in a Division Court.

English, for the plaintiff.

Bigelow, for the defendant.

[18TH JANUARY, 1882.

MACFIE v. HUNTER.

Interpleader—Division Court Executions—Chattel Mortgage.

The terms writ of *fieri facias* and warrant of execution, used in the Division Courts Act, are convertible terms.

The term execution creditors, used in the 11th section of the Interpleader Act, includes parties holding executions in the Division Court, who are therefore proper parties to, and should be called upon in, an interpleader application by a sheriff.

An interpleader order had been made which directed the payment over to the claimants of $1,000 and interest, the proceeds of the sale of goods claimed by them under a chattel mortgage, which was not impeached. The order directed an issue as to a second chattel mortgage held by the claimants, the execution creditors contending that it was fraudulent. A. & Co. obtained execution in a Division Court against the execution debtors after the date of the order, and moved to vary it by directing that the amount of their execution debt should be retained by the sheriff out of the $1,000 until garnishee proceedings against the debtor in the Division Court in which the sheriff was garnishee, should be disposed of.

Held, that the moneys in the sheriff's hands belonged to the claimants, the chattel mortgagees, as on a sale of the mortgaged chattels by them as mortgagees; that, there being no want of *bona fides* in the mortgage, no want of formalities in the same would make it invalid as between the parties thereto so as to entitle the debtor to claim the money secured thereby, or to entitle A. & Co. thereto under their execution.

Aylesworth, for the motion.

Langton, for the claimants.

Ogden, for the sheriff.

[THE MASTER IN CHAMBERS.

CANADIAN SECURITIES COMPANY v. PRENTISS.

Counter Claim—Issue—Notice of Trial.

Where a defendant counter-claims against the plaintiff and another, the cause is not at issue until either the counter-claim is struck out or the third party has pleaded or incurred default.

The plaintiff, immediately after delivery of such a counter-claim, joined issue and gave notice of trial.

Held, irregular, and that they should be set aside.

MACKELCAN v. BECKET.

Pending Writ of Summons—Effect of Judicature Act—Renewal.

A writ of summons was issued in 1879, and had been regularly renewed down to 6th April, 1881, when it was again renewed for six months. The Judicature Act came into force on the 22nd August following, and the writ was served on the 27th December, 1881. A motion was made to set aside the service on the ground that the writ had expired.

Held, that the action having been pending when the Act came into force, the writ must be regarded as if it had been issued under the Judicature Act, and the effect of the Act was to keep it in force for one year from the date of the last renewal thereof, viz., the 6th April, 1881.

[THE MASTER IN CHAMBERS, 29TH DECEMBER, 1881.

WALLACE v. COWAN.

Replevin—Notice of Trial.

In an action of replevin, ten days' notice of trial must be given, instead of eight days as under the old practice; the ground of this decision being that under the wording of Rule 4, the new practice is introduced as to notice of trial in replevin.

Akers, for the defendant.

Meek, for the plaintiff.

[17TH JANUARY, 1882.

FREED v. ORR.

Certificate of Court of Appeal.

A motion was made to make the certificate of the Court of Appeal an order of the High Court of Justice.

Held, that this proceeding is now unnecessary.

Held, also, that process should issue out of the High Court of Justice, and not from the Court of Appeal; the 14th section of the Judicature Act merely confers additional powers upon the Court of Appeal without interfering with the practice under the Appeal Act.

H. Cassels, for the motion.

DOCKSTADER v. PHIPPS.

Counterclaim.

Claim: To recover possession of lands to which plaintiff was entitled as heir at law of her mother, and for mesne profits; the contention being that a lease made by the plaintiff's father, since deceased, to the defendant was invalid, except during the continuance of the father's estate by the courtesy. Defence: Amongst other things, that plaintiff had, during the period for which mesne profits were claimed, distrained on two occasions for rent; and counter-claim against the plaintiff and her bailiff for wrongful distress.

Held, that the counter-claim related to, or was connected with, the original subject matter of the action; and a motion to strike it out as embarrassing was refused.

Hoyles, for the motion.
Maclennan, Q.C., contra.

[23RD JANUARY, 1882.

LOWSON v. CANADA FARMERS' MUTUAL INSURANCE CO.

Leave to appeal.

An appeal from the Master in Chambers had been set down for the 9th January, 1882, instead of the 26th December, 1881, it having been announced that cases set down for the latter day would not be taken until the 9th January, and the appellant's solicitor being therefore under the impression that he brought himself within rule 414. The learned Chancellor held the contrary, and the appeal being too late was not heard. A motion was then made for leave to appeal.

Held, that, as the appeal had not been set down in time owing to a mistake, it was a proper case in which to exercise a discretion, and allow the appeal to be made on payment of costs.

Cattanach, for the motion.
H. Cassels, contra.

[23RD JANUARY, 1882.

HENDRIE v. NORTON.

COOPER v. NORTON.

Garnishment—Assignment for Creditors—Void Deed.

A motion was made to garnish the moneys of a debtor which were in the hands of the assignee for the benefit of his creditors. The deed of assignment contained a proviso requiring creditors to release the debtor on accepting a dividend.

Held, that the assignment was void, that the money was therefore the debtor's, and the order was accordingly made for payment to the applicants.

On appeal, Wilson, C.J., affirmed this order.

Black and *Holman*, for the plaintiffs.

McMichael, Q.C., and *Caswell*, for the garnishee.

[24TH JANUARY, 1882.

CANADIAN BANK OF COMMERCE v. BRUCE.

Interpleader—Undisputed execution.

A sheriff, in whose hands there were several executions, had made a sum which was insufficient to satisfy the prior executions, which were undisputed. There was a claimant to the debtor's goods, who disputed the subsequent executions, to which there were no funds applicable.

Held, that the sheriff had no right to ask for an interpleader order, and his application was dismissed with costs.

Allan Cassels, for the sheriff.

Smith and *Holman*, for execution creditors.

Clement, for the claimant.

CASWELL v. MURRAY.

Former action—Security for costs—Time for applying.

Security for the costs of an action was applied for, a former action for the same cause having been brought, and the defendant having been awarded the costs thereof which had not been paid. It was objected that the defendant had waived his right by appearing and defending.

Held, that under the present practice, where the defendant has but eight days after the delivery of statement of claim from which he first learns the plaintiff's position, it was more convenient that the defendant should be at liberty to apply at any time before issue.

Hoyles, for the defendant.

Meek, for the plaintiff.

BARRETT v. BARRETT.

Settlement of suit by parties—Liability for costs.

The plaintiff and defendant met and agreed upon a settlement of the suit without providing for payment of the plaintiff's solicitor's costs. The defendant's solicitor refused to act in the matter when he saw the agreement. The parties then went to another solicitor who told them that in any settlement provision ought to be made for the payment of costs. No settlement was arrived at then. Subsequently the parties went to

another place and employed a solicitor to draw an agreement between them. The plaintiff's solicitor refused to recognize the agreement and attempted to force on the trial. The parties again met at another place, and the plaintiff employed a solicitor to draw further papers, in which no provision was made for costs. The plaintiff was insolvent to the knowledge of the defendant.

Held, on the evidence adduced, that there was a combination between the defendant and plaintiff to defeat the claim of the latter's solicitor for costs, and an order was made for the payment thereof by the defendant as between attorney and client.

[THE OFFICIAL REFEREE, DECEMBER, 1881.

WORKMAN v. ROBB.

Appeal—Security—Time.

On the 2nd April, 1881, a decree was pronounced in this cause, dismissing the plaintiff's bill with costs. On the 9th April due notice of appeal was given by the plaintiff, and about the same time an arrangement was made that the defendant's solicitor should accept the undertaking of the plaintiff's solicitors instead of the usual bond for security for costs. On the 8th September the plaintiff's solicitors wrote to the defendant's solicitor, enclosing their written undertaking, which the defendant's solicitor, on the 1st October, declined to accept. Execution for the defendant was issued on the 10th November. The plaintiff then applied for an order to set aside the execution with costs.

Held, that the agreement between the solicitors applied only to the nature of the security to be given, and not to the time within which it was to be furnished. That sec. 38 of the Judicature Act does not limit to three months the right to appeal within twelve months given by R. S. O., cap. 38, sec. 46, and the execution was set aside.

Hoyles, for the motion.

H. Cassels, contra.

NOVA SCOTIA.

In the Supreme Court.

[5TH APRIL, 1881.

ADAMS *et al.* v. CROSSBY *et al.*

Bill of lading—Consignee—Non-delivery—Action.

Plaintiffs shipped goods on defendants' vessel, to be delivered at Halifax to the consignees, "he or they paying freight." After the shipment and before action brought the consignees paid plaintiffs for the goods.

Held, that the consignees were the proper persons to bring the action for damages occasioned by non-delivery of the goods, according to the terms of the bill of lading.

McKENZIE v. ÆTNA INSURANCE COMPANY.

Equitable question—Transfer of cause—Appeal from order—Affidavit.

In an action against defendants on a policy of insurance, a third party claimed to be interested in the insurance and forbade payment to plaintiff. Defendants obtained a rule *nisi* for an interpleader, upon argument of which, before a Judge at Chambers, the Judge transmitted the cause to the Equity Court under R. S. cap. 89, sec. 6. The order transmitting did not disclose any "equitable question or mixed question of law and equity," but this ground was not taken in the rule for appeal. In the affidavit for appeal it was alleged that no equitable questions arose in the cause.

Held, that the affidavit could not be looked at to ascertain this, as it was a question of law and not of fact; and that the ground that the order disclosed no such question could not prevail, as it was not taken in the rule.

Quære, whether the order to transmit a cause, under cap. 89, sec. 6, can be made without an application for that purpose, or any notice to either party.

LAWSON v. CORBETT.

Lien—Waiver.

Defendant, in an action of replevin for fish, claimed to have a lien for storage and wharfage. A waiver of the lien was pleaded, and plaintiff swore that when he first presented the order from his vendor to defendant, the latter claimed only storage. It appeared, however, that when plaintiff first disposed of part of the fish, defendant claimed both storage and wharfage, and refused to deliver any of the fish until the claim was paid. On the same day plaintiff wrote to defendant that "he presumed the

amount for storage and wharfage was correct, and he enclosed a cheque for the amount." Plaintiff testified that this amount was paid under protest.

Held, that defendants could not be precluded from shewing that their lien remained, and that the verdict for plaintiff must be set aside.

SUTHERLAND *et al.* v. WILSON *et al.*

Administration—Default—Acquiescence—Surety.

An action was brought at Common Law by the Judge of Probate against an administratrix and sureties for not faithfully administering. The administratrix made default, and the sureties pleaded an equitable defence that the administratrix had, with the knowledge of the creditors at whose instance the suit was brought, continued trading instead of winding-up the business of the intestate, and that the deficiency of assets had resulted from such trading. The jury found the issue raised by this plea in favour of the defendant, and the cause was then referred to the Equity Court, where the learned Judge held that the creditors were estopped by their consent, and a decree was made in favour of the defendant with costs.

On appeal from this decree, the Court held, however this equitable defence might avail against the creditors so assenting, it afforded no answer to those, if any, who had not acquiesced, and the cause was referred to a Master to ascertain whether there were any creditors unaffected by assent or knowledge who were entitled to administration.

Re HOWE ESTATE.

Quo warranto—Form.

It is a fatal objection to a rule *nisi* for a *quo warranto* that no grounds are set out.

HART *(assignee)* v. TROOP *et al.*

Bailee—Lien—Insolvent Act of 1875*—Proving on estate—Effect of.*

D. N. Shaw stored a lot of fish with defendants, which he afterwards sold to Richardson, giving him a memo., headed, "W. M. Richardson bought of D. N. Shaw," signed by the latter. Richardson paid half in cash and gave Shaw a note for the balance, which was endorsed by defendants, and retired by them at maturity. Richardson, after the sale, became insolvent, and plaintiff, his assignee, produced at the first meeting a memo. of assets, the first item of which was "236 bbls. of mackerel stored at Black Bros." (defendants). One of the defendants attended the meeting and saw this memo., remarking to those present that he was not aware of any fish of Richardson's stored with them, but he gave no such intimation to the assignee or inspector; and long after the defendants

made a claim on the estate for the amount of the note, stating that they held no security, and a dividend was paid them. The assignee, having brought an action of trover for the fish, recovered a verdict.

Held, that the defendants had no right to retain the fish (no claim of lien having been set up), and that, by holding the note and claiming for the amount on the insolvent estate, they would have lost all right to retain possession of the fish, if they ever had any such right.

Re ADMISSION TO THE BAR.

Session of Court—Motion.

Under an order pursuant to the Act of 1880, providing that a session should be held for "calling, arguing and disposing of the causes remaining on the docket."

Held, that the only motion that could be entertained, except motions relating to causes on the docket, was a motion for admission to the Bar.

WILMOT v. SHAW.

Practising Physician—Registration.

The plaintiff, a physician, practising in Newfoundland, performed medical services for the defendant, also resident there.

Held, that the plaintift could recover in this Court in this Province, notwithstanding he was not registered under R. S. cap. 28, sec. 22.

KANDICK v. ARTHUR.

Promissory note—Plea—Setting aside.

To an action on a promissory note brought by the indorsee, defendant pleaded, on equitable grounds, that the note had been made merely to enable the payee, who had indorsed it to plaintiff to raise money on it, and the plea set out other circumstances connected with the note by way of equitable defence, alleging that plaintiff had knowledge. Plaintiff, in his affidavit to set aside the plea, denied knowledge of the facts relied on, and plaintiff, in reply, asserted his belief that plaintiff had knowledge, and that plaintiff and said payee had been very much mixed up with each other; and "he considered it almost impossible but that plaintiff should have known the true history of the note."

Held, that the plea must be set aside, the essential allegation of *scienter* being denied by plaintiff, and that denial not controverted by the defendant.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court of Canada.

ONTARIO.]

McDOUGALL v. CAMPBELL.

Mortgage—Agreement to postpone—Non-registration—Priority.

In 1861, W. M., the owner of real estate, created a mortgage thereon in favour of J. T., for $4,000. In 1863, he made a subsequent mortgage in favour of J. M., the appellant, to secure $20,000, which was duly registered on the day of its execution. In 1866, W. M. mortgaged to C., the respondent, the lands mortgaged to J. M., for the sum of $4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied towards the payment thereof. J. M. executed an agreement that the proposed mortgage for $4,000 to respondent should have priority over his mortgage of $20,000. In 1875, J. M. assigned his mortgage to the Quebec Bank, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement to postpone, which had never been registered, and the existence of which J. M. had not mentioned to the Bank, and of which they had no notice otherwise. C. filed his bill against the executors of W. M. and against J. M. and the Quebec Bank, claiming payment by J. M. of any loss that might occur by reason of his assigning to the Bank without notice. The Court of Chancery held (26 Gr. 280) that the respondent was not entitled to relief upon the facts as shown, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants except J. M., who was ordered to pay off the plaintiff's mortgage, principal and interest. J. M., thereupon appealed to the Supreme Court.

Held, affirming the judgment of the Court of Appeal (Strong, J., dissenting, that, as J. M. could not justify the breach of his agreement with C., he was bound, both at law and in equity, to indemnify C. for any loss he sustained by reason of such breach.

Maclennan, Q.C., for appellant.

J. A. Boyd, Q.C., for respondent.

QUEBEC.]

DUPUY *et al.* v. DUCONDU *et al.*

Sale en bloc—Deficiency—Warranty—Effect of.

By a deed, executed 22nd of October, for the purpose of making good a deficiency of fifty square miles of limits, which respondents had previously sold to appellants, together with a saw mill, the right of using a road to the mill, four acres of land, and all right and title obtained from the Crown to 256 square miles of limits, *en bloc*, for a sum of $20,000, the respondents ceded and transferred, with warranty against all troubles generally whatsoever, to the applicant, two other limits containing fifty square miles. In the description of the limits given in the deed, the following words were to be found:—"Not to interfere with limits granted or to be renewed in virtue of regulations." The limits were, in 1867, found in fact to interfere with anterior grants.

Held, (Henry and Gwynne, JJ., dissenting), that the respondents having guaranteed the appellants against all troubles whatsoever, the latter were entitled, pursuant to Art. 1518 C. C. P. Q., to recover the value of the limits from which they had been evicted, proportionally upon the whole price, and damages to be estimated according to the increased value of said limits at the time of eviction, and also to recover pursuant to Art. 1515 C. C. for all improvements; but as the evidence was not satisfactory, it was ordered that the record should be sent back to the Court of first instance, and that upon a report to be made by experts to that Court on the value of the said limits, proportionally upon the whole price, and on the increased value of the same at the time of eviction, the case be proceeded with as to law and justice might appertain.

S. Bethune, Q.C., and *Trenholme*, for appellants.

Pagnuelo, Q.C., and *McConville*, for respondents.

In the Court of Exchequer.

[FOURNIER, J.

McPHERSON v. THE QUEEN.

Appeal under 42 Vict. cap. 8—Award—Damages resulting from obstructing access to property—Personal damages not proper subject of compensation—31 Vict. cap. 12, sec. 34, "Direct or consequent damage to property."

The official arbitrators, to whom the Minister of Public Works referred the suppliant's claim for damages, sustained by him in consequence of and during the construction of the extension of the Intercolonial Railway at Halifax, awarded the suppliant $500. On an appeal to the Exchequer Court, under 42 Vict. cap. 8, the amount awarded was increased to $3,633.

The facts are briefly these:—The suppliant was a shipbuilder, owner of a shipyard in Halifax, to which he had access on the north side from Young Street, and on the south by the harbour of Halifax. The railway was extended along 150 feet of these premises, and Young Street was raised from 2½ to 5 feet, and facing the property on the south east level of the railway was 19 feet above the suppliant's land. During the progress of the works, a drain was built which extended 120 feet on suppliant's land, and some damage was caused to his property by the breaking up of the embankment. The suppliant proved that the construction of the railway through Young Street obstructed that access to his shipyard, and that in consequence his property had become useless as a shipyard, and had depreciated in value over 33 per cent.; he also proved that in consequence of the frequent passing of the locomotives there was extra danger of fire, and higher rates of insurance were asked; also, that he had suffered personal damage in his business to the extent of $1,200 per annum.

Held, that the building of the drain on suppliant's land, and the obstruction of access by way of Young Street to claimant's shipyard, was "a direct damage to suppliant's property" within the meaning of these words in 31 Vict. cap. 12, sec. 34, for which he was entitled to claim compensation, and which in this case he had proved to amount to $3,633.

Held, also, that the damages claimed for loss of business and extra risk of insurance were personal damages, and too remote, and not such damages as suppliant was entitled to claim compensation for under the statute. *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 216; *Henry Ricket* v. *The Directors* and *Metropolitan Railway Co.*, L. R. 2 H. L. 175 followed.

Gormully, for appellant.

Lash, Q.C., for respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C. J., 29TH JANUARY, 1882.

In re SQUIER.

County Judge—Alleged Misconduct—Commission of Enquiry—Prohibition —Court of Impeachment.

Certain charges having been preferred against a County Court Judge, a commission was issued under the Great Seal of Canada, reciting these facts and the provisions of 22 George III. cap. 75 (Imp.), and directing the Commissioner to examine into the charges, and for that purpose to summon witnesses and require them to give evidence on oath, and to produce papers, and to report thereupon. The enquiry proceeded, and a motion was made for a prohibition.

Held, that enquiries under the Imperial Act should be made before the Governor-General in council and not under oath, and the commission being a delegation of authority, could not be supported thereunder.

Held, also, that it could not be supported at Common Law, for it created a Court for hearing and enquiring without determining.

The C. S. C. cap. 13, and 31 Vict. cap. 38 (D), give power to issue commissions for inquiring into the administration of justice when the inquiry is not regulated by any special law, and an enquiry into the conduct of any one connected with the administration of justice is within the meaning thereof; but

Held, that this enquiry into the conduct of a County Court Judge falls within the exception in the Act, being regulated by C. S. U. C. cap. 14, secs. 1 and 4, which is a special law for such cases.

The 32 Vict. cap. 22, sec. 2 (O); 32 Vict. cap. 26 (O); 33 Vict. cap. 12, sec. 1 (O), and R. S. O. cap. 42, sec. 2, assuming to repeal C. S. U. C. cap. 14, and C. S. U. C. cap. 15, sec. 3, and to abolish the Court of Impeachment for the trial of County Court Judges and regulate their tenure of office, are *ultra vires* of the Provincial Legislature. The tenure of office of the County Court Judges is regulated by C. S. U. C. cap. 15, sec. 3.

The different modes of proceeding against County Court Judges for misconduct pointed out.

McCarthy, Q.C., for the motion.

Robinson, Q.C., contra.

[3RD FEBRUARY, 1882.

MORRISON v. TAYLOR.

Judgment before Appearance—Jurisdiction of Judge.

Held, that a Judge in Chambers has no jurisdiction to make an order for judgment under Rule 324 *(a)*, but the motion for such an order must be made to the Court.

J. H. Macdonald, for the motion.

Caswell, contra.

COMMON PLEAS DIVISION.

[CAMERON, J., FEBRUARY, 1882.

LIGHTBOUND v. HILL.

Judgment—Estoppel—Insolvent Act of 1875, sec. 136.

When judgment has been recovered for a debt, without fraud being charged under sec. 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action on the express ground of the fraud, even although the judgment was recovered by default; for the plaintiff might, instead of signing judgment, have declared, averring such fraud, and have had the question tried.

Quære, whether, when an insolvent's estate vested in an assignee under the Insolvent Act before its repeal, the action for the alleged fraud commenced after such repeal, was a proceeding that might be continued thereunder, under the terms of the repealing act, 43 Vict. cap. 1, or was protected by the Interpretation Act, 31 Vict. cap. 1; and whether the said sec. 136 was *ultra vires* of the Parliament of Canada.

J. K. Kerr, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

CHANCERY DIVISION.

[THE CHANCELLOR, 7TH FEBRUARY, 1882.

CARROLL v. WILLIAMS.

Interim injunction—Defendant's loss thereby—Balance of convenience—Dealing with undischarged insolvent—Estoppel.

The plaintiff, an undischarged insolvent, with the sanction of the assignee, who did not intervene, leased from the defendant, who was aware

of his *status*, certain premises for five years still unexpired. The defendant contended that the agreement under which the plaintiff claimed was a conditional one. The defendant subsequently contracted with builders and others to make extensive alterations and improvements in the premises, and entered thereupon, and commenced tearing down buildings.

Held, that the plaintiff was entitled to an interim injunction to preserve the property till the trial; that the question of the condition in the agreement was one for the trial; that the balance of convenience to the defendant by reason of the excess of loss to him, if prevented from carrying out his improvements, over the loss to the plaintiff by the defendant's action, was no ground for refusing the injunction, the policy of the law being to give a party that which he has contracted for as nearly as possible, instead of leaving him to his remedy by action of damages; and that the defendant, after dealing with the plaintiff as an undischarged insolvent, was not competent to challenge the right of the plaintiff to take the lease, the assignee not intervening.

[PROUDFOOT, J., 27TH JANUARY, 1882.

HENDRIE v. BEATTIE.

Interim injunction—Plaintiff's undertaking—Varying minutes.

On a motion to vary minutes, nothing can be done at variance with the order as granted, but additions or variations may be made so as to carry out the intention of the Court in pronouncing it.

An interim injunction was granted, without going into the case, on terms of an undertaking, given by the defendants upon a prior return of the motion, that nothing should be done in the meantime. On settling the minutes the registrar refused to comply with the request of the defendants, by inserting an undertaking on the part of the plaintiffs that the property be retained in the same plight and condition as at the date of the order. A motion was made to vary the minutes by inserting such an undertaking.

Held, that though the undertaking might have been properly asked for on the motion as a condition of granting the injunction, it could not now be exacted, as the effect would be to reverse or alter the order which had been made by arrangement of the parties. As a misunderstanding seemed to have arisen, the injunction was stayed for ten days to allow a substantive motion to be made for an injunction restraining the plaintiffs from doing anything detrimental to the property pending the interim injunction.

IN CHAMBERS.

[WILSON, C.J., 24TH JANUARY, 1882.

NAPIER v. HUGHES.

Security for costs—Appeal—Payment out of Court.

The plaintiff, who resided in Great Britain, having obtained a verdict for the price of goods sold to the defendants, which were in the defendants' possession, applied, pending an appeal by the defendants, for payment out of Court of the amount paid in as security for the costs of the action.

Held, that it was a proper case for payment out; for if the defendants succeeded on the appeal, the goods in their possession would be the goods of the plaintiff, and would be ample security for the costs of the action.

See *McKenzie* v. *Kittridge*, 1 C. L. T. 110; *King* v. *Duncan*, *Ibid*, 562; *McLaren* v. *Caldwell*, *Ibid*, 657.

Howard, for the motion.

C. Millar, contra.

[3RD FEBRUARY, 1882.

In re McCLIVE & GILLELAND.

Solicitor and client—Interest on bill of costs.

Held, reversing the order of the Master in Chambers (but upon grounds not fully disclosed to him), that a solicitor is entitled to recover interest upon his bill of costs delivered to his client, after demand of payment and notice that interest will be claimed under R. S. O. cap. 50, sec. 267. Referred to the taxing officer to use his discretion as to allowing interest, as a jury would in charging a debtor with interest.

J. H. Macdonald, for the appeal.

Aylesworth, contra.

[7TH FEBRUARY, 1882.

CANADIAN BANK OF COMMERCE v. BRUCE.

Interpleader—Undisputed execution.

On appeal, the judgment of the Master in Chambers, noted *ante* p. 92, was affirmed.

A. Cassels, for the sheriff.

Smith and *Holman*, for execution creditors.

W. H. P. Clement, for the claimants.

In re ELLIOT.

Solicitor and client—Taxation—Balance due client—Order for payment.

Where an order has been made referring a solicitor's bill for taxation, and directing the solicitor to refund what, if anything, has been over-paid him, it is proper to obtain a subsequent express order for payment of the balance found due to the client by the Master's report.

Aylesworth, for the solicitor.

Shepley, for the client.

BEATTIE v. BARTON.

Examination of judgment debtor—Unsatisfactory answers—Fraudulent preference.

A defendant, on examination under an order made upon a judgment summons, showed that he had disposed of four or five thousand dollars worth of goods in eighteen months; that on a sale of his stock in trade at the end of the eighteen months he took notes, which he disposed of by assigning them to several of his creditors, with the express intention of preferring them and defeating the plaintiff's claim, which he had contested as far as he was able. His answers were to the effect that he could not explain the disappearance of the profits made during the eighteen months.

Held, that his answers were unsatisfactory. Judgment was suspended to permit of the defendant's attending, at his own expense, to be again examined.

Quære, however, whether, notwithstanding any explanations he might make, he could avoid imprisonment, after having made away with the notes in order to defraud the plaintiff.

The examination of a judgment debtor is not only intended to be an examination, but to be a cross-examination, and that of the severest kind; *Republic of Costa Rica* v. *Strausberg*, L. R. 16 ch. D. at p. 12.

Held, also, that the disposal of the notes was fraudulent and void under R. S. O. cap. 118, sec. 2, they being liable to seizure under execution under R. S. O. cap. 66, sec. 28.

[THE MASTER IN CHAMBERS, 30TH JANUARY, 1882.

HARRISON v. GRAND TRUNK RAILWAY CO.

Incorporated company—Order to produce.

An order for production by the defendants had been issued by the plaintiff, upon præcipe, in the usual form, whereby it was ordered, "that the

defendants do, within ten days after the service of this order, make discovery on oath, etc." The order not having been complied with, a motion was made to strike out the defence; whereupon it was objected that the præcipe order was insufficient and improper under the authority of *Lindsay Petroleum Co.* v. *Pardee*, 6 P. R. 140; and that a special order for production should have been obtained on motion in Chambers, according to the former practice in Chancery which had not been altered by the Judicature Act.

Held, that the order was sufficient, and should be complied with by filing the affidavit of the proper officer of the defendant company.

Ogden, for the motion.

H. Cassels, contra.

[2ND FEBRUARY, 1882.

CORNISH v. MANNING.

Appearance—Execution—Sunday—Time.

A defendant was served with a writ of summons on the 22nd December, 1881, judgment was entered in due course in default of appearance, and execution was issued thereon on the 10th January following.

Held, that the execution was not too soon, but might have been issued on the 9th January.

Held, also, that, notwithstanding Rule 456, the time within which an appearance should be entered is the "ten days inclusive of the day of service" of the writ, as mentioned in the form of writ provided by the Rules.

Held, also, that in the computation of time in such a case, Sunday must be reckoned.

Holman, for the plaintiff.

H. J. Scott, for the defendant.

NORVALL v. CANADA SOUTHERN RAILWAY CO. CUNNINGHAM v. THE SAME.

Certificate of appeal—Order thereon—Reversal of judgment—Execution on order.

An appeal from the Court of Chancery by the defendants was dismissed with costs. The plaintiffs thereupon, on 18th February, 1880, had the certificates of the Court of Appeal made orders of the Court below. The defendants appealed to the Supreme Court, and were there allowed to

amend their answer in the Court below—the result being that the plaintiffs' decrees were virtually vacated. The plaintiffs issued executions for costs upon the orders of the 18th February, 1880.

Held, that the orders were ineffectual to support the executions; for the costs of the appeal were attributable to the judgment of the Court, which being avoided, the orders had no vitality in themselves.

Symons, for the motion.

H. Cassels, contra.

[7TH FEBRUARY, 1882.

In re SOLICITOR.

Solicitor and client—Taxation—Place of reference.

Held, that a solicitor's bill rendered to his client must be taxed in the county where the work charged for was done, pursuant to the Attorneys Act, sec. 33, which has not been affected by any subsequent enactment.

NOVA SCOTIA

In the Supreme Court.

WRIGHT v. MORNING HERALD CO.

Non-suit—Setting Aside.

The defendant company was incorporated by statute for the purpose of printing and publishing the *Morning Herald* newspaper, and was charged by the plaintiff with having published of and concerning him, that he had absconded, meaning that he was insolvent. A letter was put in evidence from plaintiff's solicitor to Cahill, the business manager of the company, referring to the statement as false and demanding reparation; to which the following reply was received in the hand writing of the business manager, who had shown the letter to the editor:—"The editor of the *Herald*, referring to Messrs. McCoy & Soyley's letter, requests that they state what reference they wish to make to the matter in the *Herald*. If the statement, as published, is now desired by Mr. Wright, the editor is willing to accord him the benefit of such denial." The business manager, who had been a practical printer, testified that he had knowledge of the make-up of the paper, and that there were advertisements in the paper tendered that were charged for by the defendants; but on the following day he gave evidence somewhat conflicting with that of the previous day in reference to his knowledge of the make-up of the paper. The Judge on the first day declined to receive a question as to Cahill's belief that the

paper tendered was one issued by defendants. In his report the Judge said, "I refused to receive the newspaper as proved, and the plaintiff having become non-suit I offered to give him a rule *nisi*."

Held, that this was not such a voluntary non-suit that the plaintiff could not move to set it aside, and that the evidence of Cahill as to the make-up of the paper should have gone to the jury. (*Quære*, as to Ritchie, C.J.'s concurrence in this ruling).

Per McDONALD, J., that on the evidence of the letters, the question of publication was one of fact for the jury.

SCOTT v. CROCKETT.

Goods sold and delivered—Bill of sale—Action for price of goods.

Defendant, in writing, requested plaintiff's firm to supply to F. R. "the outfit for his boat," then being built by F. R. and D. R. jointly, and promised to see that they got their money. The goods were first charged to F. R., but afterwards to F. R. and D. R. jointly, to whom other goods, being supplies for a fishing voyage, had been sold. Several months after the date of the guarantee, a balance was struck at $303.10, for which a joint and several note was given by F. R. and D. R., who also executed a bill of sale of the boat to plaintiff's firm, the consideration mentioned being $400. The plaintiff stated that the note was only taken as an acknowledgment of the debt, and that both the note and the bill of sale were held only as security.

Held (James, J., dissenting), that the Judge was warranted, as the bill of sale contained no release, in finding for the plaintiff for the value of the goods supplied as outfit for the boat only.

CROUCH v. GUNN.

Set-off—Partnership.

Defendant pleaded a set-off to plaintiff's claim for goods sold and delivered, and under that plea gave evidence of a sale of goods to plaintiff by the defendant and his co-partner, and an agreement between plaintiff, defendant and defendant's co-partner, that plaintiff's claim should be paid in goods from the partnership store. The County Court Judge first gave judgment for the defendant on this evidence, and the appeal from his judgment was dismissed with costs.

CORBETT v. ANCHOR MARINE INSURANCE CO.

Insurance premium—"Satisfactorily secured"—Failure in business of insured.

The insured gave a note for the premium, which became due 30th September, 1878. On account of their failure in business previous to this date, the defendants demanded and secured a guarantee, dated August 6th, 1878, for the payment of the note, which they held at the time of the loss, 12th

October, 1878, having never returned it to the makers or demanded payment of it from them. The policy provided, among other things, that "should the person liable for the premium or any note or obligation given therefor, fail in business before the time for payment arrives, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the Company."

Held, that the terms of the policy were fulfilled and the policy was in force, the premium having been "satisfactorily secured" to the Company.

McNUTT v. McCABE.

Payment after action—Judgment for plaintiff—Reversal of.

Plaintiff brought action for $84.33 for work done, etc., for defendant, to which defendant pleaded payment after action brought. It appeared in proof that while plaintiff was in prison on a charge, the nature of which was not disclosed, defendant obtained from him a written acknowledgment as follows: "this day I have settled all matters of account and the suit brought against me by John McCabe for $84.33. Signed, F. H. McNutt." The signing of this was followed by the payment of fifty cents by defendant to plaintiff, which the County Court Judge held to be a payment under the plea. Yet he gave the plaintiff judgment for the cents to enable him to tax summary costs.

The Court set the judgment aside and remitted the case to the County Court.

JENKINS v. WAY.

Infant—Necessaries—Liability.

An infant trader bought goods from plaintiff, part of which were found by the Judge to have been given to his boarding-house keeper on account of his board.

Held (reversing the decision of Johnstone, J.), that the fact of the goods being so supplied did not render them necessaries so as to enable the plaintiff to recover, and that judgment must be entered for defendant with costs.

HOWARD v. LANCASHIRE INSURANCE CO.

Special case—Conflicting evidence.

A rule of Court was made by consent of the parties that the evidence should form a special case, to be submitted to the Court, with power to draw inferences of fact and enter judgment for either party for such amount as the Court should determine, the right of appeal in either to be the same as if a verdict had passed.

Held, that under this consent the Court had no power to entertain the case.

Per McDonald, J., that the Court would not entertain the case, as there were conflicting statements on issues involving the question of fraud.

THE

CANADIAN LAW TIMES.

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THE RIGHT OF A MORTGAGEE TO A PERSONAL ORDER AGAINST THE PURCHASER OF THE MORTGAGED PROPERTY.

IN a former paper, we cited the principal English cases touching the right of a third person to enforce a contract, the specific performance of which would accrue to his benefit. We shall now refer to the principal Canadian and American cases relating thereto.

The question of the third person's rights engaged the attention of our Court of Chancery in the case of *Shaw* v. *Shaw* (*a*), where a mother had conveyed certain lands to one of her sons upon condition that he should convey a certain portion thereof to his brother, which, however, he failed to do. The brother filed his bill making the grantee and the mother parties defendant, and seeking specific performance of the agreement that had been made for his benefit. It was held that the suit was properly constituted, and that the plaintiff was entitled to succeed.

The next case in our Courts is that of *Mulholland* v. *Merriam* (*b*). A settlor by an informal instrument, executed by himself and the defendant, purported to assign to the defendant all his real and personal estate, *on condition* that

(*a*) 17 Gr. 282 (1870).
(*b*) 19 Gr. 288 (1872), affirmed 20 Gr. 152.

the defendant should pay the heirs of the settlor the various sums in the instrument set forth, and it was recited therein that the defendant became bound to pay such sums. Strong, V.C., held that the words "on condition," as there used, were equivalent to the words "in trust," and that each of the heirs, beneficiaries under the instrument, was entitled after the death of the settlor to maintain a suit in his own name to enforce payment of the amount so agreed to be paid to him. The learned judge then proceeded to say: "But even if Merriam is not a trustee, I think there could be no doubt but that a personal representative of the testator [settlor] recovering this money in an action at law would be considered as a trustee for the plaintiff. * * * * * * * * This *must* be so, for the only other alternative is, that it was in the power of the defendant to defeat any or all of the gifts which the settlor made to his children by compelling the personal representative to bring an action, the fruits of which would be free from any trust, and liable to be distributed amongst the next of kin; which would, of course, be absurd.

"Then, if the money, when recovered by the administrator, would be affected by a trust, it must also be that the right of action, which the personal representative has, is also bound by a like trust; and if this is so, there is the highest authority for saying, that even though the obligation of Merriam rests (as I have already determined it does not) merely on contract, and he should not be bound by any trust, yet as the personal representative would be a trustee for the plaintiff, he and the plaintiff conjointly might maintain this bill. The authority which I refer to is the case of *Gregory* v. *Williams*, decided by a very great Judge (Sir William Grant, M.R.)" (*c*).

(*c*) In this case of *Mulholland* v. *Merriam*, the beneficiary under the contract was allowed to maintain the suit in his own name without adding a personal representative of the settlor as a party, on the ground that there was no such representative in existence, and that if one were constituted it would only be for the express purpose of the suit, and he would be a mere formal party as a trustee not having the slightest interest, and that such a course is justified by General Order 56 of the Court of Chancery. See pp. 296, 297.

In *Re Cozier, Parker* v. *Cozier* (*d*), this question is considered, and a number of the cases collected and commented upon by Proudfoot, V.C. In that case, B. sold land to C. which was encumbered by a mortgage made by the vendor. The conveyance described the land as "subject to" the mortgage, and was signed by the grantor, but not by the grantee; it contained no recitals, and the consideration was expressed to be $100, for which amount a receipt by the grantor was endorsed. It was shown by oral evidence that the real consideration for the conveyance was an agreement by the grantee with the grantor to pay off the mortgage and that the $100 was in fact paid by the grantee to the mortgagee on account of the mortgage, and not to the grantor as stated in the conveyance. It was there held that in a suit to administer the estate of the grantee, the mortgagee was entitled to prove his mortgage claim against the estate. This part of the judgment proceeded upon the ground that the purchase money having been retained by the purchaser for the purpose of paying off the mortgage, and the purchaser, by paying a portion of the purchase money to the mortgagee, having impliedly agreed to hold the balance for his use, an action by the mortgagee would have lain at law for the recovery thereof (*e*). It was further held that parol evidence was admissible to prove the agreement between the parties and to show the true consideration for the agreement.

The only Canadian case which appears at all to conflict with the authorities already cited is the case of *Clarkson* v. *Scott* (*f*), decided by the same learned judge who disposed of *Shaw* v. *Shaw*. The head note to this case states its result to be that "although a purchaser from the mortgagor of the equity of redemption covenants with him to pay off the mortgage debt, this, owing to the want of privity, affords no ground for the mortgagee proceeding against the purchaser either at law or in equity, to compel him to perform

(*d*) 24 Gr. 537 (1877).
(*e*) See p. 546.
(*f*) 25 Gr. 373.

his covenant." This, it is submitted, is too general a statement of the law, and no such statement is necessary to support the decision in that case, which may be supported by reason of its special circumstances. The *judgment*, moreover, does not assume to lay down any such *general* proposition of law, but should be read as applying merely to the special circumstances of the case in hand. The plaintiff was the assignee of a mortgage made by the defendant S., who, after making the mortgage, had assigned the equity of redemption to one M. B. G., who assigned the same to her husband, the defendant, W. N. G. The lastly mentioned assignment was expressed to be "in consideration of the assumption by the grantee of the incumbrances hereinafter mentioned, and in consideration of five hundred dollars" and to be made "subject to certain mortgages" therein particularly set forth (*inter alia* the plaintiff's mortgage) "all of which the grantee hereby assumes, and covenants to satisfy and discharge." The prayer of the bill was for the usual remedies in mortgage cases, including a personal order against W. N. G., as well as against the mortgagor. The bill was *pro confesso* against the mortgagor. The defendant W. N. G. answered the bill, setting forth that it was never intended or agreed that he should become personally liable to any one other than his grantor for the amount of the plaintiff's mortgage, but, on the contrary, that it was distinctly understood that he was purchasing the interest of his grantor in the premises, and assuming the incumbrance only to the extent to which the land purchased should be sufficient to satisfy the same. The cause was heard on motion for decree as against the defendant W. N. G. By going to a hearing on motion for decree, the plaintiff admitted the truth of the allegations in the defendant's answer, which are above set forth (*g*). In the first place, it may be assumed from the statement of facts given in the report of the case, that M. B. G. (the grantor) was under no personal liability to pay the mort-

(*g*) See *Wilson* v. *Cossey*, 14 Gr. 80, as limited by *Edinburgh Life Ass. Co.* v. *Allen*, 23 Gr. 238.

gage debt; and if not, then the mortgagee was a mere stranger to the contract, and this fact of itself was sufficient to warrant the making of the decree as it was made (*h*). It has been already mentioned that the Courts of Equity, in granting relief to the third person, always do so for the purpose of carrying out the expressed or implied intention of the parties; and as it appeared by the answer in this case that it was never intended or agreed that he should become personally liable to any other than his grantor for the amount of the plaintiff's mortgage (but on the contrary, etc., as above set forth), this, of itself, was also sufficient to warrant the making of the decree as made, for it is open to the contracting parties, by the form of their contract to exclude all third persons from enforcing its performance, although the carrying out of its provisions may be highly beneficial to such third persons (*i*). It will, therefore, be seen that the general statement in the head note to the report of that case is not warranted by the judgment (*j*).

The New York courts early adopted the rule of *Dutton* v. *Poole* (*k*), and that rule has, with some restrictions, been ever since followed by them (*l*). It was intimated by Chancellor Kent, in *Cumberland* v. *Codrington* (*m*), that a mortgagee can enforce a contract made between the mortgagor and a purchaser of the equity of redemption for payment of the mortgage by the latter, where the amount of the

(*h*) *Vrooman* v. *Turner*, 69 N. Y. 280, and see *Colyear* v. *Mulgrave*, as explained in our former paper.

(*i*) See *Garnsey* v. *Rogers*, 47 N. Y. 233, and *Judson* v. *Dada*, 79 N. Y. per Rapallo. J., p. 379.

(*j*) This further appears from the reference made by his Lordship, the Chancellor, to the case of *Nichols* v. *Watson*, 23 Gr. 606, which he says involved the same principles as those involved in *Clarkson* v. *Scott*. This case, which will be again referred to, was decided upon the construction of a particular statute and had no bearing whatever upon the general question of the right of a third person to enforce a contract made for his benefit.

(*k*) *Schemerhorn* v. *Vanderheyden*, 1 Johns. R. 140 (1806); *Weston* v. *Barker*, 12 Johns. R. 276 (1815); *Barker* v. *Bucklin*, 2 Denio 45 (1846); *Lawrence* v. *Fox*, 20 N. Y. 268 (1859).

(*l*) *Garnsey* v. *Rogers*, 47 N. Y. 233 (1872); *Thorp* v. *Keokuk Coal Co.*, 48 N.Y. 253 (1872); *Little* v. *Banks*, 23 Alb. Law. Journal 395 (1881).

(*m*) 3 Johns. Chy. 254, 258, 261 (1817), as explained and approved of in *Garnsey* v. *Rogers*, 47 N. Y. 238.

mortgage debt is treated as a part of the consideration for the conveyance, but is retained by the purchaser, and is therefore considered as so much money left in the hands of the purchaser for the use of the mortgagee. It is not necessary in order that a third person may enforce a contract made for his benefit that any consideration should move from him; it is sufficient that there should be a consideration moving from the promisee to the promisor, at any rate where the promisee is under a legal obligation to the third person (*n*), and it is not necessary that the undertaking of the promisor to discharge this obligation should be in writing, since such an undertaking is not a promise within the Statute of Frauds to answer for the debt of another (*o*); but that the promisee should be under a liability to the third person appears to be absolutely necessary in order to vest a right of action or suit in the third person (*p*); unless, indeed, it should plainly appear that the promisee intended to donate the beneficial interest in the contract as a gift to the third person, in which case the third person's rights under the contract will be consummate as soon as the promisee (in this case settlor) has so far completed his gift that no relief need be sought by the third person *as against him* for the purpose of perfecting the gift (*q*).

There is one feature which, more than any other, must necessarily be one of the constituents of the contract in order to afford a right of action therein to a third person who will be benefitted by the specific performance thereof, and that is, there must be an intention on the part of the promisee that the third person shall be a beneficiary under

(*n*) *Barker* v. *Bucklin*, 2 Denio 45 (1846).

(*o*) *Ibid.* And parol evidence is admissible to show the true state of facts with regard to the relations existing between the promisor and the promisee. *Re Cozier*, 24 Gr. 537.

(*p*) *King* v. *Whitely*, 10 Paige 465 (1843). *Vrooman* v. *Turner*, 69 N. Y. 280 (1877). But it appears that it is not necessary for the promisee to be legally liable to the third person in order to enable the promisee himself to sue upon the contract for the benefit of the third person. See *Lloyds* v. *Harper*, 16 Chy. D. 290.

(*q*) *King* v. *Whitely*, 10 Paige 469; *Jones* v. *Lock*, L. R. 1 Chy. App. 28; *Donaldson* v. *Donaldson*, Kay 718.

the contract (*r*), which intention, in the absence of any expression to the contrary, will be presumed, in case the promisee be indebted to the third person (*s*), to which perhaps it should be added, and that such indebtedness be overdue. It is not necessary that the contract to confer a benefit on a third person should be expressed in words; it is sufficient that it should be implied from the surrounding circumstances, and that the promisor should be estopped by his actions from disputing the correctness of the implication; that is, there may be a *quasi* contract created by a sort of equitable estoppel *in pais*, the benefit of which may be actively claimed by a third person. Under this head may be classed cases like *Carter* v. *Carter* (*t*), where a devise of real estate was made subject to the payment of an annuity. The devisee accepted the devise, and he was held by the Court to have thereby assumed a personal liability to pay the annuity which was enforced against him by a personal order in favor of the annuitant. It may be said that this case should rather be classed among trusts than among contracts, but it is very frequently a difficult matter to draw with precision a line indicating exactly where contracts end and trusts begin, and there would appear to be better reasons for classing this case with contracts than with trusts (*u*). Under this head may also be classed cases like *Crawford* v. *Edwards* (*v*), holding that the acceptance by a grantee of a conveyance of an equity of redemption containing a provision that he is to pay off the existing mortgage is equivalent to an execution thereof by him, and the mortgagee may have a personal order against him on the implied contract. The most complete, concise and

(*r*) *Garnsey* v. *Rogers*, 47 N. Y. 233; *Miller* v. *Winchell*, 70 N. Y. 437 (1877); *Judson* v. *Dada*, 79 N. Y. 379 (1880).

(*s*) *Lawrence* v. *Fox*, 20 N. Y. 268, as explained per Rapallo, J., in *Garnsey* v. *Rogers*, 47 N. Y. 240.

(*t*) 26 Gr. 232.

(*u*) In *Mulholland* v. *Merriam* (19 Gr. 288) the conveyance or assignment was "upon condition," etc., and these words were there held to be equivalent to the words "in trust."

(*v*) 33 Mich. 354; see also *Thorp* v. *Keokuk Coal Co.*, 48 N. Y. 253, and *Campbell* v. *Smith*, 71 N. Y. 26, to the same effect; see also *Re Cozier*, 24 Gr. 537.

accurate statement of the present equity doctrine on the subject which the writer has been able to find in any one judgment, is contained in the following extract from the opinion of Allen, J., delivered in the New York Court of Appeals, in the case of *Vrooman* v. *Turner* (*w*): "To give a third party who may derive benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefitted, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract by other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement; there must be a legal right, founded upon some obligation of the promisee, in the third party to adopt and claim the promise as made for his benefit." This statement of the law, it is submitted, must be qualified to the extent of admitting that a debt or obligation owing from the promisee to the third person is not absolutely necessary in all cases, though usually necessary, for the purpose of showing by implication an intention on the part of the promisee to confer a benefit upon the third person by entering into the

(*w*) 69 N. Y. 284.

contract. It is submitted that this intention may be otherwise shown, and that if there be a clearly indicated intention to that effect it is quite competent for the promisee to so donate the benefits to arise from the execution of the contract, as a gift to a third person, that the latter may successfully bring suit upon the contract (*x*). This question will be again referred to when treating of trusts. There is still another class of contracts operating by way of equitable assignment in favor of a third person, not indeed by virtue of any expressed intention at the time of making the contract, or of any act or intention subsequent thereto, and comprising those cases which fall within the principle of the decision in *Greet* v. *Citizens Insurance Co.* (*y*), where a mortgagor covenanted with the mortgagee to insure the buildings upon the mortgaged premises and to assign the policy of insurance to the mortgagee. He did insure the buildings, but failed to assign the policy as agreed upon. It was there held that the *convenant in the mortgage operated as an equitable assignment* to the mortgagee, of the policy subsequently issued, so as to entitle the latter to maintain a suit upon the policy as against the insurance company. This is really nothing, but another form of application of the principles that have already been laid down with reference to contracts for the benefit of third persons. The mortgagee there was the third person to whom the mortgagor was under an obligation. The insurance company, as promisor, entered into a contract with the mortgagor (promisee), the execution of which would discharge the obligation of the latter to the third person. It is perhaps unnecessary to say, by way of applying this general discussion of the rights of third persons to the main subject of

(*x*) See *Lloyds* v. *Harper*, 16 Chy. D. 290. There, it is true, the action was brought by the *promisees*, but as trustees for the third parties for whose benefit the contract was made, and the action might doubtless have been brought by the *cestuis que trust* in their own name, if there had first been a declaration of trust of the benefits of the contract made by the promisees in favor of the third parties, and possibly without any such a declaration. Compare *Jones* v. *Lock*, L. R. 1 Chy. App. 25, showing that any consideration of trust may be effectually made as a mere gift and without any consideration.

(*y*) 27 Gr. 121, and affirmed upon this point, 5 App. R. 596.

our paper, that we treat the mortgagee as the third person, the mortgagor as the promisee, and the purchaser as the promisor. It will be observed that the cases cited are only applicable to a case where the agreement entered into by the purchaser is to the effect that he will pay the mortgagee's claim, and not where it takes the form of a mere indemnity to the mortgagor. Where the agreement takes the latter form the mortgagee will, as a usual rule, be unable to obtain a personal order against the purchaser in the character of a third person for whose benefit the contract was made, although he may perhaps be able to obtain that relief upon application of the doctrine of subrogation, as we will hereafter point out; but even without the aid of that doctrine, and without relying upon any right of his own against the purchaser, he may sometimes get a personal order against the latter by reason of existing equities in favor of the mortgagor, and for the purpose of preventing circuity of action. We may see an instance of this in the case of *Campbell* v. *Robinson* (*z*), where a mortgagor having covenanted for payment of the mortgage debt sold his equity of redemption subject to the mortgage. The mortgagee filed his bill upon the mortgage seeking a personal order against the mortgagor on his covenant, and making the purchaser a defendant as being owner of the equity of redemption. The mortgagor by his answer prayed relief against his co-defendant, and asked that the latter should be ordered to pay the plaintiff's claim, since the effect of the purchase had been, as between the mortgagor and the purchaser, to make the latter the principal debtor and the former his surety for the due payment of the mortgage debt, and a decree was accordingly made giving the mortgagee a direct personal remedy against the purchaser of the equity of redemption.

A. H. MARSH.

(*z*) 27 Gr. 634.

(To be concluded.)

EDITORIAL REVIEW.

Unprofessional Conveyancing.

The following is a *verbatim* copy of a will, brought in for proof after the death of the testator, by the gentleman who "drawed it," and is proud of having done so. It now forms one of the records in a Surrogate Court of Ontario, much to the delight of the conveyancer, who is convinced of his claim to the title of Jurist, without ever having looked at a law book or copied an English statute. We dedicate this, without permission, to those who are anxious to simplify conveyancing.

July the 28th 1870

francis M—— Makes his his Will as fllows in sining over to his airs and assines all the property oned by the said francis M——.

he be quathed to his son Paterick M—— the south half of lot nomber twenty three in the 7 concesshion he be quathed to his son fransis M—— and Petter M—— the north half of lot nomber twenty too in the sixth conceshion each Wone to have half

he quathed to Mary ann M—— wone hundred dollers
wone hundred dolers to bridget M—— and her choice
of the cows for wone

and wone hundred dolers to alise M—— all to be Paid
out of Personal Property if chusson

and twenty five cents to rebeca M—— as long as she
remains francis M——'s Widdow. Paterick M—— is to
have the Controll and manage ment of all the Property on
till it Comes to be divided an to give each wone thare share
when tha come of age or requires it

the to youngest boys is to be cep at school six months

duering the Winter season and to Work at home the remainder of the time or if tha take anotion to sell out tha have liberty Closed and Sinde

his
francis X M——.
mark.

Bernard McG—— witness
James McD——.
Phillip D——.
Witness to the said Will.

The Distribution of Business.

Almost simultaneously with the issue of our February number was promulgated the Rule of Court, number 510, which we print at another page with the other rules made by the Judges since the Judicature Act came into force.

Rule 510 is directly aimed at the defect in Rule 317 discovered by *Trude* v. *Phœnix Insurance Co.*, ante, p. 84. By striking out of Rule 317 the words "upon the finding as entered," liberty is given to the dissatisfied party to move the Divisional Court upon the whole case for some judgment other than that entered by the learned judge of first instance; and so the equilibrium is restored. A re-hearing of the case upon the whole of the material used at the trial may now be had before going to the Court of Appeal. And there are no limitations upon the party re-hearing as to presenting his case to the full Court. He re-hears on the simple ground that the judgment appealed from is wrong.

The Conversazione at Osgoode Hall.

The opening of the new Convocation Hall at Osgoode Hall was attended with anything but solemnity. A more brilliant throng than that which assembled in the Hall upon the evening of the festivities is seldom seen here. Those who undertook the management are to be congratulated upon the success which attended their efforts. But few of those who were not present upon the occasion of the festivities in honour of H. R. H. the Prince of Wales, had

any idea of the full beauty of the building until it was lighted up on the evening of the conversazione. The new Convocation Hall, besides being very handsome, has excellent acoustic properties, and supplies a want which has long been felt by the Society.

Agency Fees.

At another page, a correspondent points out, with great justice, that the practitioners living in places other than the county towns are under a great disadvantage as to charging agency fees where they employ agents in their county town. Of course the solicitor taxes these fees against his client. But there is no reason why the necessary costs of employing an agent should be rejected from the party and party bill of costs, and thrown upon the client. The rule rests upon no intelligent principle that we can see. There must be solicitors in the towns outside of the county towns, and it would be difficult to suggest a reason why the suitors who employ them should be under this disadvantage.

An amendment of this rule would be a great boon to the large body of solicitors throughout the country.

The Ontario Reporterships.

The Benchers of the Law Society of Upper Canada have removed Mr. Grant from the reportership of the Chancery Division to that of the Court of Appeal. The necessary presence of the learned gentleman in the latter court during its sittings in his capacity of registrar, made this change a matter of convenience.

Mr. T. P. Galt succeeds Mr. Grant as reporter in the Chancery Division. We heartily congratulate Mr. Galt upon his appointment, and we are sure that his characteristic diligence and energy will be productive of good results in the work which he is entering upon.

NOTES OF RECENT DECISIONS.

In re James, 1 C. L. T. 698; 9 P. R. 88. *The American Law Register* for January, 1882, contains, at p. 29, a report of a case decided by the Supreme Court of Pennsylvania upon the subject matter of this case. The name of the case is *Wirebach* v. *First National Bank of Boston*. The head-note is as follows:—"A lunatic who is an accommodation endorser without consideration upon a promissory note, and who has derived no advantage from his endorsement, either to himself or to his estate, is not liable to a *bona fide* holder, although the latter had no knowledge of the lunacy." A distinction is drawn between executory and executed agreements. Trunkey, J., says, in giving judgment: "There can be no binding executory agreement where one of the parties is bereft of reason—a capacity to contract is absolutely necessary." And again: "It is noticeable that in this Commonwealth, where the lunatic has been held liable, there was neither imposition nor want of full consideration for the amount of the liability, and when not for necessaries, the opposite party had no knowledge of the lunacy." And again: "An infant who makes or endorses a note may, by his representative, plead his infancy as a complete defence. In like manner a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder, who may have given value to his endorser."

A learned note by MARSHALL D. EWELL is appended to the case, in which numerous authorities are cited. The learned writer says that the doctrine that a contract entirely executory on both sides cannot be enforced against an insane person is too well settled to need any citation of authorities. But where the contract is wholly or in part executed there is some difference of opinion. The result seems to be that in order to hold the lunatic liable the conditions expressed in the above quotation must exist.

Hamilton v. *Harrison*, 46 U. C. R. 127; 1 C. L. T. 424. The case of *Ex parte Rolph, In re Spindler*, lately decided by the Court of Appeal in England, and reported in 19 Ch. Div. 98, recalls this case to our recollection. From the divergence of opinion upon the subject, we may consider the point, if not unsettled, at least not satisfactorily settled. *Ex parte Rolph* is an affirmance of the opinion that the very consideration of a bill of sale must be expressed in the bill. The expressed consideration was £50, paid by the assignee to the assignor, at or before the execution thereof. £21 10s. was paid on the execution of the deed; £3 10s. was retained for expenses; £25 was retained and paid a week afterwards to the landlord of the assignor's house for rent—both on the written request of the assignor. *Held*, that the consideration was not truly stated in the deed, because £25 was not paid to the assignee, but agreed to be paid on his behalf, and because it was not paid at or before the execution of the deed. In the principal case, Hagarty, C.J., held that the erroneous statement of the consideration in a chattel mortgage does not avoid the deed as a matter of law, but is a circumstance for the jury to consider when deciding the issue of fraud or no fraud. The dissenting judgment is based upon the reasoning, that the affidavit of the mortgagee must state that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage; that the sum mentioned in the mortgage, being intended to be sworn to as the true debt, must, in every case, be truly stated. The Imperial Act requires that the bill of sale "shall set forth the consideration for which such bill of sale was given." There is to the writer's mind a manifest distinction between the two enactments. Unless "debt" and "consideration" are convertible terms, the English case is not an authority upon our statute. The mortgagee, in that case, might very truly have made the affidavit required by our statute, because, although he did not state the consideration truly, the *amount* of the consideration was correct, and he would have fully complied with our statute by truly stating the amount of the *indebtedness* of the mortgagor to himself. All the safeguards re-

quired would be complied with by stating the true amount under the Ontario Statute. According to the policy of our Act, a collateral transaction or agreement as to the mode of application of the amount of the consideration is not of material importance, if the amount of the debt be truly stated. So we read the dissenting judgment. So it was decided in *Ex parte National Mercantile Bank*, 15 Ch. D. 42, under the stricter English enactment; and this is not disapproved of in *Ex parte Rolph*. Note also the differences in the three sections of our Act governing the three transactions of (i) a mortgage to secure an ordinary loan or pre-existing debt; (ii) a sale of goods; and (iii) a mortgage given on an agreement for future advances, or to secure the endorsement of bills or notes. In the first case the *amount* of the indebtedness must be sworn to. In the second case, the oath must be pledged to a "*good consideration*, as set forth in the conveyance." In the third, the mortgagee must state both the *true agreement* between the parties and the *extent of the liability* intended to be created. This is an intelligible enactment. In the first case there is a redeemable security given. The debt is held over the debtor. Other creditors should know the amount. In the second, there is a complete transfer of the property. What it was sold for cannot interest creditors, who must look to what has been received therefor. Therefore, there must be a good consideration. The third case is similar to the first, but, as there is an agreement which is the gist of the transaction, the mortgage being itself collateral thereto, the whole transaction must be set out in addition to the extent of the liability.

BOOK REVIEWS.

A Manual of Practical Conveyancing, Real and Personal Property, including Wills, with Precedents, Forms and References, by D. A. O'Sullivan, LL.B., Barrister-at-Law, Osgoode Hall; author of "A Manual of Government in Canada." Toronto: Carswell & Co., 1882.

Mr. O'Sullivan touches upon a great variety of subjects in his Manual, and consequently precludes himself by the very plan of his work from profundity in any one subject. Perhaps we should no more expect to find profundity in a work on practical conveyancing than to find it in the great majority of those who practice conveyancing in Ontario. That there is some profundity left in the learning and practice of conveyancing, however, we must be allowed to suppose, since a bill is promised by the Attorney-General for their simplification. It comes rather inopportunely for our author.

After an introductory chapter, the following subjects are treated of:—Agreements, conditions of sale, sales of land, leases, mortgages, assignments, personal property, wills; an appendix contains forms, precedents, and some useful notes. The subjects are very fairly treated, the salient points in each being touched upon, though we notice the omission of a good many of the leading cases of our own Courts. We think we may say, without making any invidious distinctions amongst the learned gentlemen whose names appear in the preface, that the chapters on sales of land and leases are the best. Besides being comprehensive, they are more precise in detail than some of the others—a matter of not a little importance in a practical treatise. Many useful hints will be found in the chapter on personal property.

This subject, however, must always suffer by condensation. The points which have arisen, are arising, and, no doubt, will yet arise, are legion. Still, we doubt whether the perusal of any treatise, long or short, will ever enable a practitioner of average modesty to foretell the result upon entering into a contest upon the validity of a chattel mortgage.

We regret to say that we cannot always agree with the learned author in his ideas of what is correct English. Both grammatical errors and careless composition appear at times, and we think it but simple justice to refer to the matter.

CORRESPONDENCE.

Legal Grievances--Agency Fees.

To the Editor of the Canadian Law Times:

SIR,—Some of the grievances which country practitioners of the law continue to endure possibly only require to be more fully ventilated in order that their grossness may call forth the much needed reforms.

A particularly obnoxious and unrighteous rule insisted upon by the local taxing officers in the various county towns throughout the Province is the disallowance of all agency fees between solicitors in the same county. For example, Listowel—the chief town of the northern part of the County of Perth, is distant about thirty miles from Stratford, the county town. A large amount of the law business of the county is intrusted to the six practitioners in Listowel because of its natural convenience to litigants; and necessarily the Stratford solicitors must often be employed to do the usual agency work. As the tariff of charges now stands, no agency fees can be taxed for such services, and consequently the Listowel solicitor is out of pocket, or else is bound to charge his client when the adverse party ought properly to pay. The absurdity and unfairness of such a rule is forcibly demonstrated when I say that agency fees are now taxed between Listowel and Palmerston—towns five miles distant—simply because an imaginary county line separates them, but agency matters between Listowel and St. Marys—over forty miles apart—are disallowed, because unfortunately in the same county. There are dozens of other large counties in Ontario where the same grievances exist besides the County of Perth.

Another hardship country practitioners are subjected to, is being compelled to get fiats from the taxing officers

at Toronto for many of the items the authorized tariff allows. This system practically means excluding all practitioners outside of Toronto from taxing these fees, as the country solicitor would sooner undergo the disallowing of a $2 or $5 fee in his bill than put in motion the cumbrous machinery necessary to get the wanted fiat, when the fee is about eaten up by disbursements in getting authority for it. This injustice could easily be remedied by giving the County Court Judges power to more fully examine into each matter of the kind and grant the necessary fiat to the local taxing officer.

It is submitted that the above should receive the attention of the proper authorities.

Yours, etc.,

D. B. DINGMAN.

Listowel, Ont., February, 1882.

RULES ADOPTED BY THE SUPREME COURT OF JUDICATURE OF ONTARIO.

THURSDAY, 25TH AUGUST, 1881.

Made under the authority of sec. 54 of the Ontario Judicature Act.

495. These Rules may be cited as the Rules of the Supreme Court of Ontario, 1881, or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Rule mentioned in the margin.

496. In Rule 45, sub-sec. (*d*), the word "act" is hereby substituted for the word "action," in the first line thereof.

497. In Rule 74, sub-sec. (*a*), the word "satisfied" is hereby substituted for the word "notified," in the third line thereof.

498. In Rule 246, sub-sec. (*a*), the word "produce" is hereby substituted for the word "prove," in the third line thereof.

499. In Rule 352, sub-sec. (*b*), the word "periods" is hereby substituted for the word "period," in the fourth line of the said sub-section.

500. In Rule 376 the word "proceeding" is hereby substituted for the word "proceedings," in the fourth line thereof.

501. Rule 100 is hereby amended by inserting after the word "summons," in the fourth line thereof, the words "or on notice, as the case requires."

502. Rule 78 is amended by adding after the word "behalf," in the last line, the words "in which the reference, when required by the practice, shall be to the Master or Local Master."

MONDAY, 5TH SEPTEMBER, 1881.

503. Where a seal is, under the fifty-first section of the Judicature Act, impressed on any document which, before the passing of the said Act, did not require to be sealed, the fee of fifty cents mentioned in the fifty-third section of the Superior Courts of Law Act (R. S. O. cap. 39) shall not be payable on such document.

SATURDAY, 10TH SEPTEMBER, 1881.

The Tariff of Costs was this day unanimously adopted and ordered to be signed by the Chief Justice.

TUESDAY, 3RD JANUARY, 1882.

504. Copies of orders dispensing with payment of money into Court are, in all cases, to be left with the Accountant forthwith after entry thereof.

505. Where infants are concerned, no order dispensing with payment of money into Court is to be made without notice to the guardian *ad litem* of the infants.

506. No conveyance of the lands of infants is to be settled until evidence is produced to the officer settling the same of the purchase money having been paid into Court, or of the payment thereof into Court having been dispensed with; and in cases where there is to be a mortgage for part of the purchase money, until evidence is given to the said officer of such mortgage having been registered and deposited with the Accountant.

507. It shall be the duty of the official guardian to see that moneys payable on mortgages held by the Accountant in which persons for whom the said guardian has

acted are interested, are promptly paid, and that the mortgaged premises are kept properly insured, and that the taxes thereon are duly paid.

SATURDAY, 28TH JANUARY.

508. It shall not be necessary for the deputy Clerk of the Crown or deputy Registrar to transmit to the principal Clerk or Registrar of the several divisions of the High Court at Toronto the original roll and the papers of or belonging to the same pursuant to section 303 of the Common Law Procedure Act and rule 419 of the Judicature Act; but instead thereof, every deputy Clerk of the Crown and deputy Registrar shall once in every three months transmit to such principal Clerk or Registrar at Toronto a list, in the form hereinafter mentioned, of all judgments which have been entered by him during such period, and from the said lists the principal Clerks or Registrars shall prepare and from time to time keep up a general index or list of judgments, which shall be open to inspection by all persons interested upon payment of the usual fee.

FORM.

List of judgments entered in the office of the Deputy Clerk of the Crown (or Deputy Registrar as the case may be) of the County of during the three months ending the day of 18

(1) Plaintiff Defendant

(2) Date of entry of judgment

(3) The amount recovered or other relief given exclusive of costs.

(4) The amount of costs taxed.

509. All orders issued by a local officer which require to be entered shall be entered at the office of such local officer only. (See R. 418.)

510. In view of the state of business in the several courts, and of doubts that have arisen upon the construction of rules 316 and 317, it is ordered that where, at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any

party may, without any leave reserved, apply to set aside such judgment on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them. Where at or after the trial of an action before a judge the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that the judgment so directed is wrong, and such application may in either of the above cases be to a Divisional Court of the High Court, or to the Court of Appeal, and this rule is to be substituted for rules 316 and 317.

511. In every case in which judgment is entered without trial or the decision of a court or judge or order as to the costs and where the amount of judgment, *prima facie*, appears to be within the jurisdiction of an inferior court, the taxing officer shall not tax full costs of the High Court, without proof on affidavit to his satisfaction that the suit was properly instituted therein; and if properly within the jurisdiction of the County or Division Courts, then the taxation shall be on the scale of fees in such courts, subject to revision as in other cases.

512. In case of trial by jury, and the Judge or Court makes no order respecting the costs, under rule 428, the taxation of costs shall be under such scale of allowance only as would have been applicable before the passing of the Judicature Act; and the event shall in such case be to recover costs according to such scale, subject to such rights of set off as to costs as apply under the Common Law Procedure Act.

513. Discovery may be obtained under rule 222 after the defence is delivered, or after the time for delivering the defence has expired.

RULES ADOPTED BY THE HIGH COURT OF JUSTICE OF ONTARIO.

MONDAY, 22ND AUGUST, 1881.

I. It is ordered by the Judges of the High Court that one of the Judges of the Queen's Bench Division, or of the Common Pleas Division, shall sit in open Court in Osgoode Hall every week, except during the long vacation and except during the period from the twenty-fourth day of December to the sixth day of January, both days inclusive, for the purpose of disposing of all Court business in the said Divisions which may be transacted by a single Judge.

II. Such sittings shall be held on Tuesday and Friday of each week, and on such other days as the Judge holding such sittings may direct.

III. One of the Judges of the Chancery Division of the said High Court shall sit in open Court in Osgoode Hall every week, except during the long vacation and except during the period from the twenty-fourth day of December to the sixth day of January, both inclusive, for the purpose of disposing of all business of the said Division which may be transacted by a single Judge.

IV. The business before the said Judge shall be taken as nearly as may be as provided by the General Orders of the Court of Chancery.

V. Demurrers and special cases shall be set down to be heard and notice thereof given to the opposite party six days before the day on which they are to be heard.

VI. A copy of the demurrer book or of the special case shall be left with the Registrar of the Division in which the action is pending, for the use of the Judge before whom such demurrer or special case is to be heard, two days before the day appointed for the hearing thereof.

VII. All rules or orders *nisi* directed to be issued by the Judge shall be four-day rules, and shall be set down to be heard at the first sittings of the Judge in open Court for arguments after the same are returnable, unless otherwise ordered by the said Judge.

VIII. The proceedings before a Judge sitting as aforesaid shall shew on their face in any judgment, decree, rule, or order to be given or made that the business was carried on before a single Judge, as follows :—"In the High Court of Justice for Ontario. Before the Hon. Mr. Justice ——" [*naming the Judge*].

IX. It is ordered that the Divisional Courts of the High Court do meet on Tuesday, the twenty-third day of August, instant, at eleven o'clock, a.m.

THURSDAY, 25TH AUGUST, 1881.

X. All mortgages, stocks, funds, annuities, and securities, and all interest and estate therein; and all moneys and effects standing in the name of the Accountant of the Court of Chancery or the Referee in Chambers, or any other officer named by the Court of Chancery, or in the name of the Clerk of the Crown and Pleas of the Court of Queen's Bench, or of the Clerk of the Crown and Pleas of the Common Pleas, on the 21st day of August, 1881, be and the same are hereby transferred to and vested in the Accountant of the Supreme Court as such Accountant, subject to the same trusts as respectively attach thereto, and the same officers are to execute all necessary cheques or documents to effect a formal transfer thereof.

REVIEW OF EXCHANGES.

Albany Law Journal—*11th February*, 1882.

Woman as an office-holder and Law Breaker. An unmarried woman may be an arbitrator. A married woman may not. Many instances are given of offices held by women, such as that of justice, sexton, governor of a work-house, keeper of a gaol-house, constable. In Massachusetts it has been held that a woman cannot be an attorney-at-law. In England it was held that a woman cannot vote for members of Parliament. A peeress in her own right cannot sit or vote in the House of Lords.

In *Tully* v. *Farrell*, 23 Gr. 49, it was held that women who were pew-holders might vote at vestry meetings for the election of church-wardens.

Ibid.—*18th February*, 1882.

Burden of Proof of a Negative. The case of *Goodwin* v. *Smith*, 72 Ind. 113, involving the above matter is discussed. *Held*, that the applicant for a license to retail intoxicating liquors must prove his fitness by, amongst other things, proving that he was not in the habit of becoming intoxicated. Various cases are cited in which the general principle is recognized that where a negative is essential to the existence of a right, the party claiming the right has the burden.

American Law Register.—*January*, 1882.

Maritime Liens, by THEODORE M. ETTING, concluded in the following number. They exist irrespective of possession, actual or constructive; their origin is independent of the creation of a trust; they arise and take effect by virtue of the act done, whether breach of a maritime contract or the commission of a maritime tort. The maritime law recognizes the personality of a ship—it is *she* that may contract or commit a tort, and it is against *her* that the lien is implied. Proceedure is against *her* by name. Causes cognizable in the Admiralty embrace both maritime contracts and torts. The test of jurisdiction in the former is determined by the subject matter; in the latter by locality. In tort, if the injury be complete on public navigable waters of the United States the jurisdiction will be sustained. There is a reciprocal obligation between ship and cargo, each being pledged to the other for the faithful performance of the contract. Liens of material men and lenders are considered. The lien follows the ship and may be enforced wherever there is jurisdiction to enforce it. It may be waived, or lost by laches. The making of an express contract is not waiver; nor is the taking of a note *per se*. The statute of limitations will not in such a case be regarded as a bar.

American Law Review.—February, 1882.

The Responsibility of Guiteau, by CHARLES F. FOLSOM, M.D. The tone of this excellent article is so dispassionate, and is so indicative of a mind searching after truth, regardless of opinion, that it is most refreshing reading, after the uniform opinions of Guiteau's responsibility garnished with unveiled desires for his blood. The unequivocal expression of a desire for Guiteau's death into which even some of our learned contemporaries were entrapped, and which counsel for the prosecution did not think beneath their dignity, can be excused only in that it exhibits the universal love for the deceased President. This article weighs most carefully the many evidences for and against insanity, and the conclusion come to is thus expressed: "My own opinion is very decided that Guiteau is an insane man, that he would have been thought a proper subject for detention in an insane asylum a half-dozen years ago, if he had been sent there, and that once committed he would not have been discharged to entire freedom by the advice of the medical officers. His responsibility is not so easily determined. * * It is my opinion that without insanity the assassination would not have been attempted. With Guiteau's amount of insanity alone, and none of the criminal motive, the crime would have been probably equally impossible."

Liability of Subscribers as affected by Amendments to Charters of Corporations, by W. H. WHITTAKER. In early turnpike cases the Courts held the companies strictly to the performance of their articles of incorporation. Upon a departure from the terms of their charters the subscriber is entitled to say *non hæc in foedera veni*. When the doctrine was recognized, that a subscriber took his shares in consideration of the benefits to be derived from his investment, instead of some incidental local advantage to be derived from the construction of the works, a different class of cases sprung up. The greatest space is devoted to railway charters, and the learned writer sums up:—"As to those cases wherein the business of the corporation has been totally changed by an alteration in the charter, there is no question. As to those in which the business has been partially changed, the law is pretty well settled. At any rate, there can be little doubt of its conclusions in this country, viz., that it operates as a discharge of non-assenting subscribers." Authority to construct branch roads does not, while expensive extensions to the main road will, release the subscriber. A change of route in an intermediate point will generally release; so will consolidation with other companies.

Issues involving the fact of insanity—the burden of proof, by A. G. SEDGWICK. The learned writer takes the view that in criminal trials the prisoner is entitled to the benefit of a reasonable doubt as to his sanity, or as to any other substantive matter of fact involved in the side of the issue which he maintains. In testamentary cases evidence must be produced to establish sanity, except in Maryland, where, after proof of the formal execution of the will the contestants take the positions of plaintiffs.

Can damages for causing death be recovered independent of any statute? by R. C. McMURTRIE. The learned writer asks, Is there any instance in which an injury to the person of another gives a right of action, except where there is that relation to the party injured that we define under the word "property?" Injuries to a wife and daughter are based on this. "No one will pretend that for the destruction of a man's capacity to labour the wife or child may sue; and it is because this capacity is *his property*, and not theirs, that he, and he alone, can sue." "If a probable benefit or probable capacity to perform a duty gives rise to an action for an injury to the person who ought to perform it, it certainly ought to lie for incapacitating performance by anything short of killing; and if death is the exception, because the dead man cannot sue, then the damages should be assets, for as to property the creditors are admittedly first entitled. And if these are not assets, what are the rights to which the remedy is restricted? If it be said that they are the legal rights of those to whom a duty was owing by the deceased, these are discharged by the death, precisely as they are by an injury that renders performance impossible."

Canada Law Journal.—1st February 1882.

Procedure in impeaching return to mandamus nisi. Formerly, if the return were good on its face, but false in fact, it could not be traversed, and there was no remedy but an action on the case. Various statutes have provided remedies. *Napanee* v. *Napanee*, 1 C. L. T. 727, is noted, and several English cases are cited. The learned writer sums up the courses now eligible if a return is unsatisfactory. (i) If the return is good upon its face but false in fact, the prosecutor can, (*a*) Bring an action on the case against the defendant for his false return; (*b*) Proceed under 9 Anne. cap. 20, as extended by R. S. O. cap. 52, sec. 11, and plead to or traverse all or any of the material facts contained within the return. (ii) If the return is defective upon its face he can demur. The learned writer thinks that upon the authority of *Campon* v. *Lucas*, ante p. 46, the proceedings in the matter of a return to a mandamus nisi would from their special nature be held not to be within the Judicature Act.

Central Law Journal.—27th January, 1882.

The action of malicious Prosecution—Probable cause, by JOHN D. LAWSON, concluded in the following number. On the general issue the plaintiff must prove (1) The fact of the prosecution; (2) that the defendant was the prosecutor, or instigator; (3) that the prosecution terminated in the plaintiff's favour; (4) that the charge was made without reasonable or probable cause; (5) that the defendant in making it was actuated by malice. What is probable cause? Several definitions are given. "Reasonable" and "probable" are considered synonymous. Honest belief is no defence. "A party may believe on suspicion and suspect without cause, or his belief may proceed from some mental peculiarity of his own; no man's liberties and rights can be allowed to depend on the belief of another." The learned writer proceeds to illustrate his subject by giving cases where probable cause did not exist and

cases where probable cause existed. Evidence of want of probable cause:—A magistrate's discharge upon a warrant of felony is *prima facie* evidence; an acquittal of larceny after investigation, or the ignoring of a bill by a grand jury. Discharge by a *nolle prosequi* is not *prima facie* evidence of a want of probable cause. Evidence of probable cause:—The finding of a grand jury is evidence, though there be an acquittal; so is proof that the magistrate committed or bound the accused to appear, though an acquittal was the result. In *Smith* v. *Macdonald*, 3 Esp. 86, Lord Kenyon said that if the evidence offered to the jury caused them to pause, he should hold that it amounted to probable cause. Probable cause is a question of law. "Whether the circumstances do or do not show probable cause, is a question of law; whether the circumstances did or did not exist, is a question of fact." A legal crime is not essential. It is sufficient that his acts should be such as to excite in men unskilled in the rules of law a belief that a crime had been committed. Guilt or innocence is immaterial. It is the prosecutor's belief, based upon reasonable grounds, that turns the question. Actual personal knowledge in the defendant is unnecessary. Evidence of the general bad reputation of the plaintiff before the institution of the prosecution is admissible on the question of reasonable cause.

Ibid.—*3rd February*, 1882.

Promissory Note.—Does stipulation for attorney's fee render it non-negotiable? by E. G. TAYLOR. It has been held by the Supreme Court of Missouri that if a negotiable instrument contains a stipulation for the payment of an attorney's fee, if default is made in payment, and it is put into an attorney's hands for collection, it is rendered non-negotiable. The learned writer combats this doctrine.

Ibid.—*10th February*, 1882.

Conveyances in Fraud of Dower, by SEYMOUR D. THOMPSON. It is stated as a general rule that any conveyance, made by a person in contemplation of marriage, of dowable property with intent to defraud the intended wife of dower, is voidable by his widow after his death. Some statutes are considered.

Criminal Law Magazine.—*January*, 1882.

Political Economy and Criminal Law, by FRANCIS WHARTON. This is an able article reviewing the old penal statutes forbidding certain trade dealings. The changes of opinion among political economists are pointed out; and the advances or retrogression of the criminal law in the effort to cope with fraudulent dealings or to permit lawful combinations are traced.

Irish Law Times.—*31st December*, 1881.

Forcible Entry. *Beddall* v. *Maitland*, 17 Ch. D. 174, is noticed, where Fry, J., held that A., being in unlawful possession of land, cannot recover damages for forcible entry, the 5 Rich. II. Stat. 1, cap. 8, giving

no civil remedy. The cases of *Ryan* v. *Goddard*, 15 Ir. L. T. Rep. 103, and *Edwick* v. *Hawkes*, 45 L. T. N. S. 168, are also considered, and numerous other kindred cases cited.

Ibid.—21*st January*, 1882.

Retention of Judgment Debts by Town Agent for Debts due from Country Solicitors. *Ex parte Edwards*, 7 Q. B. D. 15, is discussed. It was there held that a town agent cannot retain money made on a judgment recovered for a client of his principal's to meet a debt due to him by his principal. On a summary application by the client the money was ordered to be paid over. The salient points in the case are noticed.

Ibid.—28*th January*, 1882.

Contracts between Vendors and Purchasers within the Statute of Fraude. *Shardlow* v. *Cotterill*, 45 L. T. N. S. 572, is considered, and other cases are cited. In that case the plaintiff was declared purchaser at an auction sale, and the following memorandum added to the conditions of sale was handed him: "The property duly sold to Mr. S., butcher, Pinxton, and paid at close of sale.—H. M., auctioneer." At the same time the auctioneer gave the plaintiff the following receipt: "Received of Mr. S., the sum of £21 as deposit on property purchased at £420, at Sun Inn, Pinxton, on the above date. Mr.C., Pinxton, owner. Received by H. M., 29th March, 1880.—H. M." *Held*, that the two papers might be read together, and that they satisfied the Statute of Frauds; and that parol evidence was admissible to point out the property.

Ibid.—4*th February*, 1882.

Loss of Goods by Carriers. Some cases on the Carriers Act are noticed.

Law Journal.—24*th December*, 1882.

The Registration Appeals. The question in these cases is a purely local one; but the opening matter of the article has no little interest for practitioners under the Judicature Act. The learned writer demonstrates the absurdity of the present system of limiting appeals. A column is devoted to it, but the question is disposed of in the following lines: "If there is to be a discretion at all over the right of appeal, it should be a discretion in the Court of Appeal, not in the Court below. But the Court of Appeal may as well hear the appeal as pass judgment on this question; so that either there should be no appeal at all, or it ought to be an absolute right." We might add that when leave to appeal is refused below, and the case is of any importance, a resort will generally be had to the appellate tribunal, by way of appeal from the refusal of leave to appeal. There are many other considerations indicative of the uselessness of the restrictions imposed by the Act, which we shall refer to at another time.

Ibid.—7*th January*, 1882.

Implied Contracts as to Chattels. In *Robertson* v. *Amazon Tug and Lighterage Co.*, reported in the January number of the *Law Journal*

Reports, it was held that, where the plaintiff agreed to take a steam tug towing certain vessels from Hull to Brazil for a certain sum, he could not recover damages because the voyage took longer than usual on account of the slowness of the tug. Some remarks are made thereon. It is said with great justice: "As a matter of policy, the buyer ought to be forced to look after his own interests at the time, or suffer for it afterwards. * * Mr. Robertson ought to have tried the speed of the tug, and seen to the engines and boilers." To hold that, after a man had made a contract to do the work for a specified sum, and after ascertaining by actual experiment that his work was worth more to himself than the sum specified, to hold, we say, that he should recover the excess, would be to render such contracts not only utterly useless, but a positive snare to the other party thereto.

Ibid.—*14th January*, 1882.

Acting for Mortgagor and Mortgagee. A case of *Cockburn* v. *Edwards*, reported in the January number of the *Law Journal* Reports, is discussed. The defendant, a solicitor, acted for both mortgagor and mortgagee, and to aid the transaction himself advanced a sum of money to the borrower, taking a second mortgagee therefor. Lord Justice Brett said: "A solicitor would act more wisely if he did not lend money at all to his clients, it not being any part of a solicitor's business to lend money; but if he does, then, as a matter of fairness, he should not conduct the conveyancing connected with the mortgage in his own office." As to which the learned writer says: "It is difficult to know how solicitors can conduct their business unless they find investments for one set of clients and capital for another. * * If a second solicitor is always to be employed, not only are the costs increased, but clients are lost. A mortgage is not so very complicated a transaction but that a solicitor can be trusted to arrange its terms so as to be fair to all parties, even though he himself is one." To this we subscribe. We hope that solicitors are still honest, and that they may be permitted sometimes to make a little money.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 13TH FEBRUARY, 1882

NOBLE v. THE CITY OF TORONTO.

Negligence—Flooding by Sewer—Proof of Negligence—New trial.

The plaintiff leased premises at the corner of Queen and Bathurst streets which ran at right angles to each other in Toronto. There was a main sewer on Queen street with which plaintiff's private drain, constructed by the defendants at the expense of the plaintiff's lessor, connected, and which had been extended westward. There was therein, at or about Bathurst street, a wall said to be for the purpose of dividing the water and compelling it to flow eastward and westward. A sewer on Bathurst street, south of Queen street, connected with the Queen street sewer. Subsequently and about four years before the action, a sewer was constructed on Bathurst street, north of Queen street, and connected with the Queen street sewer. Into this sewer a creek was turned, in which at times the water was six feet deep; and a number of cross streets drained thereinto. Within the four years before action, but never before, the plaintiff's cellar

had been flooded several times, and the cause of this action was the flooding during a steady rain of eight or nine hours duration. The plaintiff alleged originally defective construction of the sewers and negligence in not repairing, but simply proved the flooding and the above facts, and the jury found a verdict for him.

A new trial was directed, Armour, J., dissenting.

Per Hagarty, C.J., and Cameron, J. The mere proof of the flooding did not establish a *prima facie* case of negligence against the defendants. The liability for damage resulting from sewers not being statutory, a specific ground of negligence must be proved.

Per Armour, J. .The fact of the flooding by sewers, constructed, controlled and managed by the defendants, was *prima facie* evidence of negligence. But the fact that no flooding had occurred before the construction of the Bathurst street sewer north of Queen street, coupled with the other evidence, was sufficient to show *prima facie* that that sewer brought down more water than the Queen street sewer and Bathurst street sewer south of Queen street were capable of carrying away rapidly enough, and that the plaintiff was entitled to recover.

Bethune, Q.C., for the plaintiff.

McWilliams, for the defendants.

NORTH OF SCOTLAND MORTGAGE CO. v. UDELL.

Mortgage—Release of equity of redemption—Merger—Onus of proof—Action on covenant.

The plaintiff held a mortgage made by the defendant, who covenanted to pay the mortgage money and interest. The defendant conveyed his equity of redemption to A., who subsequently released to the plaintiffs for a nominal consideration after striving for a substantial one. The defendant, as part of the arrangment, gave the plaintiffs his note for some interest. The plaintiffs sued on the covenant for payment. The learned Judge at the trial charged the jury, that if the release and note were taken by the plaintiffs in satisfaction of the liability in the covenant, to find for the defendant; if taken under stipulation that it should not have that effect, to find for the plaintiff; and that in the absence of evidence upon these points the inference would be that it was taken in satisfaction of plaintiff's claim, the charge being thereby merged. The jury found for the defendant.

Held, that there was no misdirection. The *onus* is upon the plaintiff to prove that there is no merger in such a case.

WILSON v. GILMER.

Ejectment—Lease for life—Construction of—Exception in grant.

R. G., being seised in fee, by an instrument in writing purported to lease his daughters "three acres, with the right of way to a well, including an orchard and dwelling-house, after the decease of his beloved wife, J. G.," to hold to his daughters for and during their lives or the life of the survivor of them. Ten days afterwards he conveyed in fee to his son W. G. the land of which the three acres formed part, subject to a mortgage, the son having actual notice of the agreement between his sisters and R. G. Subsequently, W. G. conveyed to the plaintiff "subject to the right of [R. G.'s wife and daughters] to occupy the house and three acres during the life of them or the survivor, and the right to and from the well," and subject to the mortgage. To this deed the plaintiff was an executing party. The plaintiff brought ejectment against R. G.'s daughters for the three acres.

Held, that the agreement by which R. G. intended to demise the three acres created a term at once, the wife of R. G. retaining the right to occupy during her life.

Held, also, that the words "subject to, etc.," in the conveyance to the plaintiff operated either as an exception, or, by reason of the execution of the deed by the plaintiff, as a re-grant of the three acres to the vendor. In either case, therefore, the plaintiff was not entitled to succeed.

DEVLIN v. QUEEN INSURANCE CO.

Fire insurance—Omission of statutory conditions—Wilful neglect of insured to save property—Liability of company thereupon.

Action on a fire policy upon which the statutory conditions were not indorsed, but which was on its face declared to be subject to the company's conditions indorsed, the 11th of which was that the insured should do all in his power to save and protect the insured property and prevent injury thereto. By the 17th condition, the non-fulfilment of these conditions entailed the forfeiture of the policy. The jury found specially, amongst other things, that the plaintiff wilfully neglected to save, and prevented others from saving, the insured property, whereby his goods were prevented from being saved.

Held, that the policy must be taken to be a policy with statutory conditions merely.

Semble, however, that a fire policy, which is a contract of indemnity, carries with it, even irrespective of conditions to that effect, a provision that the insured shall not wilfully cause, or refrain from taking means within his power to prevent, the destruction of the insured property; but a new trial was directed upon this issue, the pleadings to be framed accordingly.

CHANCERY DIVISION.

[THE CHANCELLOR, 1ST FEBRUARY, 1882.

CLEAVER v. NORTH OF SCOTLAND MORTGAGE CO.

Specific performance—Non-delivery of possession—Abatement in price—Time for delivery of possession.

In a suit for specific performance, it was declared by the Decree that the plaintiff was entitled to an abatement in the price of the land on account of non-delivery of possession, and for loss of one-half of the crops advertised for sale, which half had been already sold by the defendants' mortgagor with their assent. The Master charged the defendants with interest on the portion of the purchase money received by them up to the time of delivery of possession, and allowed for deterioration in value through neglect and non-cultivation.

Held, that there was no reason to interfere with his ruling; but that the contract might have been more nearly carried out, by allowing interest on the purchase money unpaid, and charging the defendants with an occupation rent for the time they had retained the land after possession should have been delivered.

By the conditions of sale it was stipulated, that the balance of the purchase money was to be paid one month after sale, and conveyance to be then made, but nothing was said as to delivery of possession. At the end of the month and subsequently third parties occupied the land.

Held, that, the expiration of the month being the time for the completion of the contract, the purchaser ought *prima facie* to have been put in possession by the defendant at that time.

Held, also, that the purchaser was not bound to take possession while any part of the premises was occupied by third parties; and that in a case like the present the *onus* lay on the vendor of showing that the purchaser could safely take possession.

[15TH FEBRUARY, 1882.

BARKER V. LEESON.

Chattel Mortgage—Sale without renewal—Creditor, meaning and rights of—Interpleader—Setting up new title.

A chattel mortgage, which has expired by effluxion of time under R. S. O. cap. 119, sec. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgagor then existing; and a sale on default in good faith made by the mortgagee, though good as between the parties to the mortgage, cannot re-establish the mortgage as against creditors, but passes to the purchaser a title subject to the rights of any creditors then existing who take steps to follow the goods.

A creditor to be within the meaning of the above section need not be a judgment creditor.

Remarks upon the policy of the Chattel Mortgage Act.

In an interpleader issue, the claimant relied upon his purchase and bill of sale from the chattel mortgagee, and the issue was found against him.

Held, that he could not afterwards set up another title in the same issue, but that this was matter for a substantive application to the Court.

Shepley, for the plaintiff.
J. Reeve, for the defendant.

[22ND FEBRUARY, 1882.

In re MACNABB.

Vendors and Purchasers Act—Will, construction of—Power of sale with executors' consent—Practice—Parties.

Where there is a power of sale, with consent of executors, and the right to give consent to the sale is attached to the office of executors, and not to any particular persons, it may, as a general rule, be given by any persons who fill the office.

Therefore, where a testator devised land to his wife for life, with a power to sell at any time during her life time, subject to the consent of his executors, and one of the executors died,

Semble, that the consent of the two surviving executors was sufficient; but,

Held, that, in the conflicting state of the authorities upon the question, the title was not one which the Court would force upon a purchaser.

Held, also, that under such a general power the land might be sold in parcels.

On a petition under the above Act, the question of the existence or validity of the contract for sale cannot be tried, but only those matters which could be entertained upon a reference as to title under a decree for specific performance. The only parties necessary on such a petition are those who would be parties to a bill for specific performance.

[PROUDFOOT, J., 8TH FEBRUARY, 1882.

DAVIDSON v. OLIVER.

Will, construction of—Bequests of farm stock—Future division of.

A testator, who died in February, 1869, by his will, amongst other things, gave legacies payable in nine and thirteen years, and devised lot 8 to his son R. and lot 9 to his son D., subject to charges, and to get possession thereof when his youngest child attained twenty-one. At that time D. and he were to get one half of the stock and implements which should at that time be on the said lot, the other half to be divided amongst other legatees. The youngest child had not yet attained twenty-one. The Master at Hamilton directed an account to be brought in of the stock and implements at the time of the reference on said lots, being the proceeds of the old stock left thereon by the testator, and also those subsequently procured from the produce of the said lots, and also an account of the stock and implements on hand which were there at the testator's death. The defendant contended that an account should be brought in only of stock or implements left by the testator, which still remain on the land, and that if any further account was to be furnished, it should be only of stock and implements purchased with the proceeds of the sale, or obtained by the exchange, of the stock or implements left by the testator.

Held, on appeal from the Master, that his directions were right.

[FERGUSON, J., 13TH FEBRUARY, 1882.

VANSICKLE v. VANSICKLE.

Will, construction of—After-acquired property.

The testator owned 80 acres of land and sold a part thereof. Subsequently, and on the 30th March, 1875, he made his will, whereby he devised to his son N. the said 80 acres, "excepting so much thereof as I may have sold and conveyed." Thereafter, and shortly before his death, he again acquired the part which he had sold.

Held, that though the will spoke from his death, the after-acquired property did not pass; for the testator had specified the subject matter of his devise, within which the property in question was not included.

Robertson, Q. C., for the plaintiff.

Smyth, for the defendant N.

BRAYLEY v. ELLIS.

Chattel mortgage—Prior advances—Pressure.

Where there is a promise to execute a chattel mortgage upon the faith of which money is advanced, or where there is a pre-existing duty to give such a security, which is in consequence of pressure by the creditor subsequently executed, it is not void within the meaning of the Act respecting fraudulent preferences.

Held, also, that the doctrine of pressure, which obtained before the Insolvency laws, now occupies the same position since their repeal.

Gibbons, for the plaintiff.

W. Cassels, for the defendant.

SNARR v. THE GRANITE CURLING AND SKATING CO.

Artificial lateral support—Material thereof—Damages by removal of support—Future damages—Costs.

The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged.

Held, that in substituting artificial support for the natural support of the soil which had been removed, the defendants might construct it of any material, provided it was a sufficient support for the time being, and that they continued to maintain the plaintiff's land in its proper position.

Held, also, that, in estimating the plaintiff's damages, past injuries only could be taken into account, and no sum should be allowed for damages to arise in future.

The damages were assessed at $40, but judgment was given for the restoration of the plaintiff's land.

Held, that the plaintiff was entitled to her full costs of suit.

DICKSON v. CARNEGIE.

Riparian proprietors—Right to reasonable user of water.

A mill-owner has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands for the use of his mill, but his right is a qualified one, and subject to the lawful and reasonable user of the water by a mill-owner above him on the same stream, and this, although the user above him may be at times for an extraordinary purpose.

Ritchie and *L. English*, for the plaintiff.

W. Cassels, for the defendant.

IN CHAMBERS.

[WILSON, C.J., JANUARY, 1882.

In re McCARTHY.

Insolvent Act of 1875—Solicitor of estate — Opposing discharge — Motion against assignee—Costs.

The solicitor of an insolvent estate claimed to be allowed out of the estate for services in opposing the discharge of the insolvent, which the taxing officer disallowed him. He had opposed the discharge by the direction of the assignee and inspectors, on the ground that the insolvent

had an estate in England, the existence of which had not been disclosed to the creditors, and which subsequently, through the solicitor's efforts, realized several thousand pounds sterling, and largely increased the dividends. The discharge was at the same time opposed by a solicitor acting for one St. J., a creditor to a large amount, but on the ground that the insolvent had not kept proper books. Both solicitors attended on each occasion, until all the creditors but St. J. had been settled with, when the latter creditor continued alone to oppose the discharge.

Held, that the solicitor to the estate was entitled to be allowed his costs of opposing the discharge.

The assignee failed to pay into a chartered bank to a special account the moneys come to his hands. The solicitor of the estate applied for an order to compel him to do so, which was granted with costs against the assignee; but the assignee absconded, and the moneys were lost to the estate.

Held, that the application was a necessary and ordinary proceeding, and that the solicitor was entitled to be allowed therefor out of the estate.

[THE CHANCELLOR, 30TH JANUARY, 1882.

LAPLANTE v. SCAMEN.

Vendor and purchaser—Title—Vesting order—Depreciation.

Held, that a purchaser at a sale of lands under a decree of the Court, upon the usual conditions, is not bound to accept a vesting order.

Held, also, that where the plaintiff, the vendor, was first mortgagee, and the purchaser, a defendant, was second mortgagee, of the interest of A. S., who was out of the jurisdiction, and refused to execute a conveyance, the purchaser could not be compelled to take a vesting order or a conveyance under the power of sale contained in the plaintiff's mortgage.

Held, also, that, until a good title is shewn, the purchaser is not bound to accept possession even though offered to him by the vendor, and that the purchaser was entitled to a reference to the Master to ascertain the amount of the depreciation, if any, caused by the property being left vacant and neglected pending the investigation of the title, although the vendor had offered to give possession to the purchaser pending the investigation of the title.

On a motion to compel the payment into Court of the purchase money.

Beck, for the motion.

J. A. Patterson, contra.

CHAMBERLAIN v. ARMSTRONG.

Mortgage suit—Service out of jurisdiction—Judgment.

Action on a mortgage against several mortgagors, one of whom, living in the United States of America, was served with process there. There was no appearance, and an order was made by the Master in Chambers, under Rule 45, allowing the service out of the jurisdiction. Application was then made to the Registrar for a præcipe judgment under Rule 78, but was refused, on the ground that, in addition to the order allowing service, there should be an order to proceed under Rule 45 (*e*).

This application was then made for an order to proceed by entering a præcipe judgment.

Semble, that the provisions of Rule 45 (*e*) as to obtaining directions to proceed, apply to all cases coming within Rule 45; but

Held, that mortgage cases are peculiar, and are specially governed by Rule 78, under which the plaintiff was entitled to judgment on præcipe without an order to proceed.

H. Cassels, for the motion.

(Reported by H. Cassels, Esquire, Barrister-at-Law.)

[PROUDFOOT, J., 6TH FEBRUARY, 1882.

SIEVEWRIGHT v. LEYS.

Appeal—Time—Costs—Rule 427.

The defendant, supposing that the Christmas vacation did not count in the time for appealing from a report of the Master in Ordinary, did not bring on the appeal within the time required by Rule 427. Discovering the mistake, before the whole time had expired, he offered to expedite matters in every way in his power. The offer was declined. The Master in Chambers allowed leave to appeal on payment of costs.

Held, on appeal, affirming the decision of the Master, that the defendant was entitled to relief; but he was ordered to pay into Court the amount found due by the report as a condition precedent, and to pay the defendant of the costs of this appeal.

[20TH FEBRUARY, 1882.

RAND v. ROLPH.

Appeal from Master in Chambers—Chancery Division—Setting down.

Held, that, in the Chancery Division, appeals from the Master in Chambers must be set down for hearing according to the practice of the Court of Chancery, which is not altered in that respect by the Judicature Act.

Read, Q.C., and *Walter Read*, for the appeal.
W. Barwick, contra.

[THE MASTER IN CHAMBERS, FEBRUARY, 1882.

CARROLL v. WILLIAMS.

Insolvent plaintiff—Security for costs.

The plaintiff, being an undischarged insolvent, took from the defendant, who was aware of his *status*, a lease for a term of years. The plaintiff's assignee in insolvency did not intervene, but sanctioned the lease. The defendant attempted to resume possession of the premises, and began tearing down buildings with a view to the erection of new buildings. The action was for an injunction to restrain the defendant from interfering with the premises during the alleged term. A motion was made, under section 39 of the Insolvent Act of 1875, for security for the costs of the action. It was resisted on the ground that the defendant had dealt with the plaintiff knowing of his *status*, as if he were *sui juris*, and should be estopped now from disputing his right to litigate without giving security in respect of the property which the defendant had leased to him.

Held, that the words of the above section are imperative, and that the defendant was entitled to the usual order for security for costs.

J. H. Macdonald, for the motion.
A. H Meyers, contra.

[7TH FEBRUARY, 1882.

In re CLARKE.

Solicitor and client—Taxation—Order for Payment.

In this case the order for the taxation of the solicitor's bill contained a clause ordering payment of the amount taxed within twenty-one days from the taxation.

Held, that the order for payment should be struck out, and that the order for taxation should be drawn in the terms of Rule 443 for ascertainment of the amount simply.

S. R. Clarke, solicitor, in person.

J. A. Worrell, for the client.

[25TH FEBRUARY, 1882.

LIGHTBOUND v. HILL.

Judgment—Opening up for new relief.

After the judgment was rendered, which is noted *ante*, p. 101, the plaintiff moved in the original suit for leave to open up the judgment, which had been entered on default of a plea nearly two years ago, and to add to the declaration a count for fraud, under section 136 of the Insolvent Act of 1875. Execution had been issued on the judgment, and the defendant had been examined as a judgment debtor. The motion was refused on the grounds that the judgment was final and conclusive as to both parties thereto.

Holman, for the motion.

Aylesworth, contra.

Ninth Division Court, Wentworth.

OLIVER v. SMITH.

Execution against goods—Assessment and taxes—Lien for taxes—Demand for taxes—Absconding debtor.

7TH FEBRUARY, 1882, SINCLAIR, Co. J.—The facts of this case appear to be these. The defendant was bailiff of the First Division Court of this County. Certain executions were placed in his hands against the goods and chattels of one John B. Dayfoot at the suit of several creditors. The plaintiffs here were the plaintiffs in one of such executions. The defendant, as bailiff, seized under the executions a quantity of lumber, as the property of Dayfoot. About this time the debtor Dayfoot absconded. A claim was made to the goods by Mr. Carscallen, as assignee of Dayfoot, under an assignment in trust for creditors. Some of the goods seized were on three separate places of Dayfoot's business, one on Main Street, another on Cherry Street, and another at a different place in the city. The bailiff took out interpleader summonses to test the validity of Carscallen's claim. The plaintiffs refused to interplead, but still kept their execution in the bailiff's hands, going through the form of renewing it, under

the amended Division Court Act of 1880, for six months. After the seizure, and within 30 days of its issue, this was done. During the interpleader proceedings, which appear to have been finally disposed of in October, 1880, all the stuff seized was placed in the lumber yard on Main street, formerly occupied by John B. Dayfoot. The bailiff, on behalf of the creditors, and Mr. Carscallen and Mr. P. W. Dayfoot, on behalf of those interested under the assignment, appeared by consent of all to have a sort of joint possession of the property.

The defendant advertised the goods to be sold under his writs of execution on the 26th day of October, 1880. Previous to the day of sale, a distress warrant for $152 taxes over due on the Main street property was received by the bailiff from the city collector.

It appears that he also received from the manager of the Water Works two warrants for water-rates, one dated 21st October, 1880, for $5.57, on property on Cherry street, and another for $36.58, water-rates on the Main street property. On these the defendant swore he seized the property then under seizure, on the 25th of October, 1880. The stuff was sold under the executions on the next day—the defendant deducting taxes, water-rates and expenses, and applying the balance towards paying the executions in their order. There was not enough to pay this execution, and the plaintiffs bring this action to recover against the defendant, as for breach of his covenant, or for money still in his hands not legally disbursed or appropriated.

1. If the proper preliminary proceedings are taken, I am of opinion that the warrant for taxes formed a first lien or charge *after seizure* on all this property. The taxes formed a charge against the land, as I understand it, being on an assessment of it, and the words of the statute are sufficiently comprehensive to shew that any goods on the land are liable for such tax. I refer on this point to sections 93 and 105 of the Assessment Act.

The seizure being made on *all* the warrants, the chattels became subject to the taxes as a first charge on them. Until seizure such claims would have no priority, but *after* seizure they would (*a*).

2. It is urged that no proper demand of the taxes or water-rates was made the necessary time before the issue of the warrants. Had John B. Dayfoot been a resident of Hamilton, or had he had a place of business there, I think the objection would have been well founded. It is urged that it is necessary for the collector to call on the person taxed himself and make the demand. The 92nd section of the Assessment Act declares that the collector "shall call at least once on the person taxed, or at the place of his usual residence or domicile, or place of business, if within the local municipality, in and for which such collector has been appointed, and shall demand payment of the taxes payable by such person, and shall, at the time of such demand, enter the date thereof on his collection roll opposite the name of the person taxed; and such entry shall be *prima facie* evidence of such demand."

In answer to this contention, it is urged that the Legislature could not have intended this, owing to the inconvenience it would be to the collector.

(*a*) *Cooley* on Taxation, 303.

But it must be borne in mind that the council of a municipality is not confined to the appointment of *one* collector. The 250th section of the Municipal Act enacts that the council of every city, town, etc., "shall, as soon as may be convenient after the annual election, appoint as many assessors or collectors for the municipality as the assessment laws from time to time authorise or require." If, therefore, it is necessary for the one collection of taxes that more than one collector should be appointed, the council has the legislative power to meet the difficulty by additional appointments. But it appears to me that such an argument is one more proper to be addressed to the Legislature than to a Judge. I have searched in vain for any authority either way except one. The principle applying to all cases of this kind has, I find, obtained a *consensus* of authority in the American as well as the English Courts. The able author of the standard work on taxation (Chief Justice Cooley, of Michigan), expresses himself in these words: "In the construction of any grant of the power to tax made by the State to one of its municipalities, the rule which is accepted by all the authorities, is that it should be *with strictness*. The reasonable presumption is held to be that the State granted, in clear and unmistakable terms, all it has intended to grant at all; and whatsoever authority the municipal officers assume to exercise, they must be able to shew the warrant for in the words of the grant. There is no *inherent* power in the municipalities to levy taxes; they can tax only as the State in its wisdom has thought proper to permit, and if the State has erred in the direction of strictness, the Legislature alone can correct the evil" (*b*).

Applying that rule of construction to the clause in question, any doubt in the case should be given in favour of the public (*c*). Of course, counsel for the defence invokes the application of the well known principle of law, that what a person can do by himself he can do by another. But I do not think that principle can apply here.—The Municipal Law has conferred on Municipal Councils, the power to appoint an assessor or assessors. These are certain officers recognized by law and usually known to the public; they are responsible to the corporation for malfeasance in office, and have a responsibility in the execution of the duties of their office which could not be imposed on any one employed by them. If the collector has the power to name a substitute to make the statutory demand and receive the taxes, the appointment need not be in writing. The agent, though unknown to or unheard of by the tax-payer, could legally demand the taxes under pain of a distress if payment to him were refused. He need shew no authority to make the demand or receive the taxes. He could peremptorily refuse to do so. Should the taxes be paid him and he give a receipt for the amount, the *onus* could be cast on the tax-payer to shew that he was the authorized agent of the collector. If he were not, of course it would be no discharge of the tax, and the person assessed would be still liable to pay it to the proper authority. Again how can it be said that it is meeting the requirements of the Act declaring that "the collector *shall call*" on the person taxed and demand the taxes, by the collector sending some one else

(*b*) *Cooley* on Taxation, 209.

(*c*) *Dwarris* on Statutes, 742, 749; *Cooley* on Taxation, 201.

to do so? If the contention of Mr. MacKelcan be correct, then the statute is satisfied by the collector's sending his servant man with a verbal authority merely to make the demand, and on its non-observance that the collector or his agent may seize the taxpayer's goods as for default of payment. Then the collector is to enter the date of the demand on the roll, which is to be *prima facie* evidence of the demand. If his agent were to make the entry of the demand made by him, would that be the *prima facie* evidence the statute contemplates?

By the 101st section, the collector is required, on returning his roll, to "make oath before the treasurer that the date of demand of payment * * * required by sections 92 and 94 in each case has been truly stated by him in the roll." How can he properly make this affidavit if he can only know by hearsay? He might be taking an oath that his agent might not properly take, and the taxes might be returned in default to become a charge on the land and for which it could be sold.

Did the Legislature ever intend to confer such power on the hands of irresponsible people? Did it mean to declare that when the collector was commanded to call for the taxes, that he need not call, but send some one else. Did it intend that he could farm his office out, and that those employed by him could take the oath which the statute says the collector shall take, or that the latter could satisfy the law by swearing to the facts upon the information of somebody else? I am quite sure that a public officer, such as a collector of taxes, cannot delegate his functions in this way. Where the statute intends to confer the power of delegation on the collector, it finds apt words to do so. In the 93rd section, it is enacted that the collector "*or his agent*" may distrain for the taxes. Why use the latter words if the power existed without them? In every case where a public officer's duties may in their performance receive assistance, statutory provision is made for the appointment of a substitute. A county Crown attorney may, with the sanction of the judge, appoint another to do certain of his duties. A Division Court clerk is also authorized, under certain circumstances, to appoint a deputy; and so it may be said of other officers. Did the Legislature intend to give collectors greater authority than other officers?

I do not think that it did. I am strongly of opinion that a tax-collector cannot, as here, demand taxes by another; that such a construction would be totally at variance with the policy of the Act, and quite inconsistent with its plain provisions. The Legislature intended, in my judgment, to protect people's property against the action of irresponsible persons, and only to permit its being distrained for taxes after a reasonable opportunity has been given to pay the claim to some person *authorised by the municipality* to receive it. Our law has always cast around our property, as against claims for taxes, the safeguard that all the acts necessary to found a legal liability upon must clearly appear. Were the defendant's construction of the statute correct every man's property might be at the mercy of any one the collector might send out to demand people's taxes. This, I am quite sure, never was contemplated.

A case which sustains the view I have expressed, is *Chamberlain* v. *Turner* (*d*).

In construing the 92nd section of the Assessment Act in question here, Wilson, C.J., says: "The collector is required to call at least once on the person taxed, or at the place of his usual residence or domicile, or place of business, if within the municipality, and to demand the taxes payable by such person. He is, therefore, to make a *demand*, and to demand *payment of the taxes*, and that duty should be plainly and efficiently done by *the collector in person*, and not by the handing in of a printed form, which contains most valuable information, but does not seem to be at all of the character of the duty which the law has cast on the collector to perform; and when the default of the ratepayer is to be so summarily and severely prosecuted."

Assuming, therefore, that the demand must be made "*in person*" (to use the words of the learned Chief Justice), which I think it must, do not the circumstances of this case excuse the making of such demand? I am clearly of opinion they do. John B. Dayfoot, the person assessed, had absconded, and his family had, in the months of August or September, left to join him in the United States, He had no "usual residence or domicile, or place of business" in Hamilton, at the time the collector received his roll or during its currency.

At page 345 of *Maxwell* on Statutes, it is laid down that, "enactments which impose duties or conditions are, when these are not conditions precedent to the jurisdiction, subject to the maxim that *lex non cogit ad impossibilia aut inutilia*. They are understood as dispensing with the performance of what is required when performance is impossible." At page 346, the same learned author says, enunciative of the same principle: "The provision or condition is dispensed with, when compliance is impossible in the nature of things." For these reasons, I think the collector was not bound to make any demand; but even if he was, it was proved that he did all that was possible for him to do in compliance with the statute (*e*).

Mr. Laidlaw argued that the chattels could not be seized in the custody of the law. No doubt that it is so as to the Common Law distress for rent; but, as I have already remarked, I think the Statutes have given these claims priority *over all claims*, and that the goods, when found on the premises, could have been taken out of the possession of sheriff or bailiff under the warrants (*f*).

(*d*) 31 C. P. at page 474.

(*e*) See also *Hilliard* on Taxation, 412; *Cooley* on Taxation, 304, note (2).

(*f*) See *Fraser* v. *Page*, 18 U. C. R. at p. 331; *Anglin* v. *Minis*, 18 C. P. 170.

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THE RIGHT OF A MORTGAGEE TO A PERSONAL ORDER AGAINST THE PURCHASER OF THE MORTGAGED PROPERTY.

II.

THE *Doctrine of Subrogation.*—Having, in a former paper, treated of the rights and remedies of a mortgagee as against a purchaser of the mortgaged property, in so far as those rights and remedies can be enforced by him in the character of a third person, actively claiming the benefit of a contract, the execution of which will prove beneficial to him, we will proceed to discuss the mortgagee's rights in such case, as accruing to him by virtue of the equitable doctrine of subrogation or substitution (*a*). This doctrine takes its origin from the Roman law, and is very nearly akin to the English doctrines of the Marshalling of Securities and the Marshalling of Assets, the former of which presupposes the existence of *two creditors* of the same person, the one with a right to resort to either of two funds (securities) for payment of his claim, and the other with a right to resort to one only of these funds. In such case, if the first creditor satisfy his claim out of the fund to which the second creditor has no right to resort, the latter will be subrogated (substituted) to all the original rights and remedies of the first creditor against that fund which he

(*a*) For the origin, scope and general results of this doctrine, see Story's Eq. sec. 635 and following sections. See also, notes of the American editors to *Aldrich* v. *Cooper*, White & Tudor L. C., and *Brandt* on Suretyship, sections 260 to 285.

has left untouched. The latter of these doctrines of the English law presupposes the existence of a creditor with a right to resort to either of two funds for payment of his claim, and *two debtors*, owners of these funds, who, as between themselves, are, the one primarily, and the other secondarily, liable for payment of the creditor's claim. In such case, if the creditor satisfy his claim out of the fund belonging to the debtor who is subject to the secondary liability only, the debtor who is primarily liable will be bound to indemnify the latter to the extent that his fund has been diminished, and the latter will to that extent be subrogated to the position of the creditor, and have all his rights and remedies against the principal debtor. The doctrine, in fact, operates as an equitable assignment to the creditor making the payment, of the securities held by the creditor and obtained by him from the principal debtor.

The principles involved in these doctrines have had given to them a more extended application than that above indicated, and have been rechristened by the American lawyers with the more euphonious name of the doctrine of Subrogation, which is thus defined by one of their Judges:—"The familiar doctrine of subrogation is, that, when one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor both may have been equally liable, but if as between themselves there is a superior obligation resting on one to pay the debt; the other, after paying it, may use the creditor's security to obtain reimbursement. * * * The doctrine does not depend upon privity, nor is it confined to cases of strict suretyship. It is a mode which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay. To effect this the latter is allowed to take the place of the creditor and make use of all the creditor's securities as if they were his own" (*b*).

(*b*) *Per* Strong, J., *McCormick* v. *Irwin*, 35 Penn. 117.

Upon examining the cases decided under the doctrine of subrogation, it will be found that the term is used, as in the above extract, to indicate the rights and remedies of a surety, or other person subject only to a secondary liability, as against the primary debtor, *after the former has had to satisfy the creditor.* It is used more loosely to cover any case where, by reason of the equities existing between the parties concerned, one man is allowed to stand in another man's shoes, and avail himself of the latter's rights and remedies against a third party. An example of the latter application of the term is given in the following extract from the judgment of Parker, J., in *Hopewell* v. *Bank of Cumberland* (*c*). "If a surety is bound for the debt, and is indemnified by the principal debtor, the creditor may pursue the indemnity in exoneration of the liability of the surety. And this arises not from any notion of mutual contract between the parties, that in providing for the surety the creditor shall be equally provided for, but from a principle of natural equity, independent of contract; namely, that to prevent the surety from being first harassed for the debt or liability, and then turning him round to seek redress from the collateral security given by the principal, a Court of Equity will authorise, and even encourage the creditor to claim through the medium of the surety all the rights he has thus acquired, to be exercised for his benefit and in discharge of his obligations. The claim of the creditor, therefore, is as much founded on the well-known doctrine of substitution as the claim of the surety to stand in the place of the creditor who has received collateral security from the debtor; and, in my opinion, it has no other foundation. For when the principal debtor conveys property to his surety, not specifically bound to the creditor, he has no intention of giving any lien to the creditor or to pledge the property to him for the debt; and as he has a right to dispose of his property as he pleases, provided he commits no fraud, the Court will not construe the instrument giving the lien beyond the

(*c*) 10 Leigh 221, 222.

intent; although it will, to effect the exoneration of innocent parties, permit their substitution to the creditor's rights, or his substitution to theirs. By the Civil Law, this principle of natural justice was carried into effect by an actual cession of the action or debt; and this serves to mark the extent and nature of this doctrine, which we have evidently derived from that source."

In cases coming within the scope of this article the mortgagee is frequently allowed to avail himself of the mortgagor's securities, obtained from a purchaser of the equity of redemption, by reason of the relationship of creditor, surety and principal existing among them.

This relationship of principal and surety, in the absence of express provision to the contrary, is created between a vendor and purchaser by the mere force of a sale and delivery of possession to the latter of an equity of redemption by one who is personally liable for the payment of the mortgage debt. As between themselves the purchaser becomes the principal debtor, with respect to the moneys secured by the mortgage, and the vendor becomes his surety, and that without the necessity for any express contract upon the subject (*d*). The relationship, moreover, remains the same where the purchaser enters into an express agreement with the vendor either to pay the mortgage debt or to indemnify him in respect thereof (*e*).

Although, as between a vendor, who is personally liable for payment of the mortgage debt, and a purchaser of the equity of redemption, who has agreed to indemnify the vendor, or who has purchased the equity of redemption without any express agreement upon the point, the latter becomes the principal debtor, and the former a mere surety for payment of the mortgage debt; yet, as between the vendor and the mortgagee, who is not a party to any dealings between the vendor and purchaser, the former still remains a principal debtor, and as between himself and the mortgagee, has none of the equities of a surety

(*d*) *Waring* v. *Ward*, 7 Ves. 337; *Campbell* v. *Robinson*, 27 Gr. 634.
(*e*) *Calvo* v. *Davies*, 73 N. Y. 211; *Ayres* v. *Dixon*, 78 N. Y. 318.

until after the maturity of the mortgage, when he becomes clothed with all of those equities. That this is a correct statement of the law as to the change of the status between the parties will appear from an examination of a recent decision of the House of Lords (*f*), where Lord Selborne, L.C., examines the authorities with reference to the relationship existing between the principal, the surety and the creditor, and classifies them into three kinds of cases. (1). Those in which there is an agreement to constitute for a particular purpose the relation of principal and surety, to which agreement the creditor thereby secured is a party. (2). Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger. (3). Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being as between the two, that of one of the persons only, and not equally of both, so that the other, if he should be compelled to pay it would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. His Lordship says, that as between the debtor and the creditor, to the first class of cases, and to the first class only, do the doctrines relating to suretyship apply in their full extent; and, if, so far as the creditor is concerned, there is no contract for suretyship, and if the person who has (in fact) made himself answerable for another man's debt is, towards the creditor, no surety, but a principal, then the creditor will not be subject to those special obligations under which a creditor labours when dealing with a surety; nor will he, generally, have his powers of dealing with securities circumscribed and restricted as they would be in a case falling within the first class. Parties to contracts falling within the second and third classes, however, appear in the opinion of his Lordship, to become clothed with all the advantages and obligations incident to the first class, immediately upon

(*f*) *Duncan, Fox & Co.* v. *North and South Wales Bank*, L. R. 6 App. Cas. pp. 11, 13, 23 (1880).

the maturity of the principal debt, and notice to the creditor of the actual state of facts.

Many important consequences follow from the creation of the relationship of principal and surety between the vendor and the purchaser; and from the application of the general rule that "where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence (*g*). Some authorities base this rule wholly upon the doctrine of subrogation (*h*), while others base it upon the ground that the duty or obligation of the purchaser is, in the nature of a pledge, held in trust by the vendor and created for the better security of the debt and that it attaches to the debt, and may therefore be made available by the creditor, although originally unknown to him (*i*). The former view is taken by Denio, J., in *Burr* v. *Beers* (*j*) where he applies the rule to the immediate subject of this article, and speaking of the undertaking or duty of the grantee to pay off an existing mortgage or incumbrance upon an estate purchased from the Mortgagor, says that it is a collateral security acquired by the Mortgagor which enures by an equitable subrogation to the benefit of the Mortgagee."

It is to be observed however that unless the vendor as between himself and the incumbrancer is personally liable to pay the incumbrance, or unless he has a legal or equit-

(*g*) *Brandt* on Suretyship, sec. 282. See also Story's Eq. sec. 638; *De Colyar* on Guaranties, p. 257; and cases there cited. *Maure* v. *Harrison*, 1 Eq. Ca. Abr. 93 pl. 5, and *Wright* v. *Morley*, 11 Ves. 22, where Sir Wm. Grant, M. R., says "As the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor" thus reasoning from the first proposition as a postulate requiring no support from authorities.

(*h*) *Hopewell* v. *Bank of Cumberland*, 10 Leigh 222.

(*i*) *Brandt* on Suretyship, sec. 282; *Moses* v. *Murgatroyd*, 1 Johns. Chy. Rep. (N. Y.) 119, *Curtis* v. *Tyler* 9 Paige 435.

(*j*) 24 N. Y. 179.

able interest in the payment thereof, beyond any interest arising from the mere fact that the incumbrance is a charge upon the lands in question, the relationship of principal and surety in such case does not arise between the vendor and purchaser, in consequence of which the incumbrancer can obtain no relief against the purchaser by virtue of the doctrine of subrogation; not even in a case where the purchaser has expressly covenanted with the vendor for the payment of the incumbrance (*k*).

In *Judson* v. *Dada* (*l*), it is treated as a moot point whether or not the Mortgagor and his grantee, after having created between themselves the relationship of principal and surety, with respect to the mortgage debt and made the grantee primarily liable therefor, can, by mutual agreement, so far discharge the grantee from his personal obligation to pay the mortgage debt that the Mortgagee will not be able to enforce the same against him. Cole, J., in *Rankin* v. *Wilsey* (*m*), referring to the right of a creditor to avail himself of securities obtained by the surety from the principal debtor, says:—"But in order to reach such securities or pledges they must be valid and subsisting securities in the hands of the surety at the time the creditor seeks to subject them; for the rights of such creditor are derived through, and not independently of such surety. If therefore the surety, who has thus availed himself of collateral securities or pledges, in good faith surrenders, releases or discharges them, before the creditor gives notice or takes steps by equitable proceedings or otherwise to subject them, such surrender, release or discharge will defeat the equity of the creditor. In other words, the trust in favor of the creditor does not attach upon the execution or delivery of the security or pledge, but results to him upon the failure of the debtor or surety in paying the debt." Where the owner of an equity of redemption conveyed the same to his grantee by a conveyance absolute in form, but

(*k*) *Vrooman* v. *Turner*, 69 N. Y., 280. *King* v. *Whitely*, 10 Paige 495.
(*l*) 79 N. Y. 379.
(*m*) 17 Iowa 466.

intended merely as a mortgage security, and the grantee assumed and agreed to pay off the prior mortgage, it was held that after the cancellation and discharge of the second mortgage the prior mortgagee could not enforce the stipulation against the second mortgagee (*n*). It is submitted that the true rule is that any right which the Mortgagor and his grantee may have to thus defeat the Mortgagee's remedies against the latter must arise either from some term, condition or defeasance embodied in the original contract between the parties, or from the failure or lack of consideration to support that contract, or from some other defect in its constitution, and that in so far as it is necessary for the Mortgagee to base his right upon the doctrine of Subrogation, the operation of this rule must be confined to cases where the mortgage is overdue, for we have already seen that usually it is not until after the mortgage has fallen due that the purchaser, Mortgagor and Mortgagee fully occupy the relative positions of principal debtor, surety and creditor, and are fully subject to all their usual incidents. Another result flowing from the relationship of principal and surety existing between the Mortgagor and his grantee is that if the Mortgagee extends the time for payment by agreement with the principal debtor (grantee), made without the consent of the surety (Mortgagor), and without expressly reserving his rights against the surety, the latter is discharged from all obligation to pay the mortgage debt (*o*).

It will be seen that the decision in the case of *Re Cozier* (*p*), already referred to, is capable of being sustained under the doctrine of subrogation, while the cases of *Nichols* v. *Watson* (*q*), and *Clarkson* v. *Scott* (*r*), which have been sup-

(*n*) *Garnsey* v. *Rogers*, 47 N. Y. 233. But compare *Pardee* v. *Treat*, 18 Hun 298, and see *Miller* v. *Winchell*, 70 N. Y. 437 and *Morrill* v. *Morrill* 24 Alb. L. J. 151.

(*o*) *Calvo* v. *Davies*, 73 N. Y. 211.

(*p*) 24 Gr. 537.

(*q*) 23 Gr. 606.

(*r*) 25 Gr. 373.

posed to conflict with *Re Cozier* are clearly distinguishable from the latter case in this respect, because in neither of these cases did the relationship of principal and surety exist between the purchaser of the equity of redemption and his vendor, and consequently the doctrine of subrogation had no application, although in *Nichols* v. *Watson* there was a relationship very nearly approaching that of principal and surety.

Strangely enough, the application of this doctrine to the question of mortgagees' rights and remedies does not appear to have ever been discussed in any of the English cases, although the principles of the doctrine are well known and frequently applied in the marshalling of assets and securities. Indeed we have been unable to find any English case in which there has been a direct contest between a Mortgagee and a purchaser of the equity of redemption. The reported English cases bearing upon the question are all struggles between the personal representatives of the purchaser of the equity of redemption and his heir or devisee to determine, as between them, out of what portion of the purchaser's estate the mortgage debt should be paid, and there appears to be no reported case in which it became necessary to look at the question purely from the mortgagee's stand-point. The decision of the question whether the purchaser's real or personal estate is primarily liable for payment of the mortgage does not necessarily decide whether or not the Mortgagee has a personal remedy against the purchaser. If the purchaser merely purchases the equity of redemption and covenants with the Mortgagee for payment, this alone does not render his personal estate primarily liable for payment of the mortgage debt, although it renders the purchaser personally liable to the Mortgagee; and the same remark applies where the purchaser covenants with the vendor to pay off the mortgage (*s*). Where the cases show that the personal estate of the

(*s*) *Bagot* v. *Oughton*, 1 P. W. 347; White & Tudor L. C. (4th Am. Ed.) vol. i. p. 903, vol. ii. p. 345; *Cumberland* v. *Codrington*, 3 Johns. Chy. (N. Y.) 262; *Barry* v. *Harding*, 1 S. & L. 485.

purchaser is primarily liable, there the Mortgagee has a personal remedy against the purchaser, but it does not by any means follow that where the purchaser's personal estate is not primarily liable the Mortgagee has no personal remedy.

A. H. MARSH.

(*To be concluded.*)

A FACT.

Pompous J.P., Acting Police Magistrate:—Well, constable! What's this man been doin'?

Constable.—Arrested as a lunatic, 'r worsh'p, but the doctors haven't had time to examine him yet, 'r worsh'p.

P. J.P., stroking his beard.—Prisoner, you are charged with being insane. You are *re*-manded till Monday, so that the doctors may report upon your sanitory condition.

RECENT ONTARIO LEGISLATION.

The Statute Book for the last Session of the Legislative Assembly of Ontario is replete with remedial legislation. The first Act of importance is chapter 6, which, while it goes a certain distance in amplifying the powers of the Court of Appeal in County Court appeals, stops short of the most useful measure that could have been enacted—we mean the power to make such amendments as should have been made in the County Court; unless, indeed, that power is included in the vague terms of section five, to which we shall refer presently. In *Wilson* v. *Brown and Wells*, 1 C. L. T. 609; 6 App. R. 411, the Court of Appeal held that they had no jurisdiction to make amendments on appeal from a County Court. The rather inartistic plan had to be adopted of remitting the case to the County Court, accompanied by a little advice as to amending for the purpose of entering a verdict, which, as it turns out, was not accepted by the learned Judge of the County Court, on account of the view which he took of the probable results. This case furnishes a very good example of the working out of this practice. The action was against a firm of solicitors on a note made by one of them in the firm name. It was held that the plaintiff could not recover against the defendants jointly, as there was no power in the signing partner to bind the firm; but the Court of Appeal were of opinion that the defendant who had made the note was liable. Having no power to amend, so as to direct judgment to be entered on an amended record, their Lordships remitted the case to the County Court, where the amendment might have been made. The learned Judge of the County Court, being of opinion that the defendant who was thought to be liable by the Court of Appeal should not be treated so harshly, instead of following the advice of the Court of Appeal, granted a new trial, upon such amended pleadings

as the parties might be advised. The plaintiff, believing himself injured, again appealed to the Court of Appeal, but this time without success. (Judgment was delivered on the 24th of March.) The latter Court cannot find fault with the learned Judge of the County Court for the course he has adopted; yet we cannot help feeling that the case should have ended with the judgment of the Court of Appeal firstly mentioned. The case is reduced, in fine, to a difference of opinion between the Court of Appeal and the learned Judge of the County Court as to the course to be pursued, and the Court of Appeal is without power to put its views in force.

Section five, above referred to, after providing for the bringing of appeals, notwithstanding that judgment may have been signed, proceeds: "And in case the decision appealed against is reversed, the Court of Appeal shall have authority to set aside the judgment if signed, and to make such other order as may be requisite." Does this add anything to the powers already possessed by the Court of Appeal in County Court cases? By section 42 of the County Courts Act, the Court of Appeal "shall give such order or direction to the Court below, touching the judgment to be given in the matter, as the law requires." This, evidently, did not include power to amend, as *Wilson* v. *Brown* (supra) shows. The words of the County Courts Act are, if anything, more comprehensive than those of the section under review. Again, the new power to "make such order as may be requisite" applies only "in case the decision appealed against is *reversed*." Suppose judgment for defendant in a case upon a promissory note in which, after a full discussion in the Court of Appeal, it appears that the judgment of the County Court is right upon the record as constituted; but, upon a statement of facts actually existing and appearing in evidence, it appears that, though the note is defective, the plaintiff is entitled to succeed upon the common counts. In such a case the decision of the County Court Judge must be affirmed. Here is a case for amendment, upon terms it may be, but still a case for amendment.

Even if the newly granted power be held to include the power of amending, which is doubtful, it could not be exercised in such a case, because the decision of the County Court Judge is not reversed. *Wilson's* case may yet determine the question. It has now been before the Court of Appeal three times. A judgment was delivered on the 1st March, 1881 (see 1 C. L. T. 204); another on the 8th September, 1881 (see *Ibid.* 609); and a third on 24th March, 1882 (not yet reported). An Act, if passed next session, might still be in time to give the Court of Appeal power to finally dispose of it.

The right of appeal given to suitors in matters relating to the examination of judgment debtors, and proceedings against garnishees, by section 4 of the above Act, is a most useful one. This section is due, no doubt, to the decision in *Sato* v. *Hubbard*, 1 C. L. T. 754, where it was held that appeals from the County Court were expressly limited by section 35 of the County Courts Act.

In *Ontario Bank* v. *Harston*, 1 C. L. T. 660; 9 P. R. 47, it was held that the Division Courts Act of 1880, did not apply to the territorial district of Parry Sound. Chapter 7 now extends its operation to the judicial district of Nipissing, and the territorial districts of Muskoka, Parry Sound and Thunder Bay.

Chapter 9, which will be known as "The Newspaper Libel Act, 1882," makes any report published in any public newspaper or other periodical, of the proceedings of a public meeting, privileged under certain circumstances, but obliges a defendant seeking the protection by the Act to insert reasonable explanations or contradictions by or on behalf of the plaintiff.

There was a difference of opinion in the Profession before *Jones* v. *Gallon*, 1 C. L. T. 281, as to the right of a party to an action of breach of promise of marriage to examine his or her opponent before the trial. It was admitted that if the purpose of this examination was the use of the depositions in evidence, the right did not exist; but it was contended that it existed for the purpose of obtaining discovery;

and that, for this purpose, the opponent might be examined. *Jones* v. *Gallon* set this at rest by deciding that, as discovery could only be obtained when the party interrogated was liable to be called as a witness, and as the parties in this action were not competent or compellable witnesses, the right of discovery did not exist. By section 3 of chapter 10 the parties to such an action are now competent to give evidence in the action. But no plaintiff shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of such promise.

By section 4 of the Act, the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties shall be competent to give evidence in such proceeding. A very able article appears in the *Criminal Law Magazine* for March, which we review shortly in this number, upon "Departures from the common law rule as to testimony of husband and wife." The common law rule of incompetency was founded upon grounds of public policy, "which deems it necessary to guard the security and confidence of private life." It is questionable whether this statutory exception can be made without danger, for, though in such cases "the mutual confidence and affection, the preservation of which is the object of the rule, may well be presumed to have been already supplanted," yet, that presumption cannot arise until after a breach of the confidence has been established. And once it is established, what need is there of the evidence? Even if a *prima facie* case be made, the efficacy and policy of the measure are questionable. And it will be probably found that it is not unattended with difficulties in practice. Suppose a case of *crim. con.* in which, without the wife's evidence, there is a balance of testimony, and the wife does not choose to "give evidence in disproof of her alleged adultery." What is the effect? Her position is an awkward one. Is her silence to go to the jury as a tacit admission of her guilt? If she tenders her evidence it is with an overwhelming presumption against her. For if she goes into the box at all, it can only be with the intention of swearing to her innocence. The jury accept her testimony

of her innocence as a matter of course ; how could she swear otherwise, they will say. If she is in fact innocent, she not only has not the same chances of being believed that other witnesses have, but she will be subjected to a cross-examination which must be revolting, abhorrent and distressing to her. If she is guilty, this act gives her the opportunity of adding to her moral turpitude by committing perjury. If she refrain from giving evidence altogether, the jury might, and probably would, infer guilt. When she was absolutely incompetent, no inference could be drawn from her silence. When she has the opportunity of giving her evidence, and refrains, her silence may be more disastrous to her than her testimony would be.

If a *prima facie* case cannot be made out, there is no occasion for her to give evidence in disproof of her adultery; and she cannot be asked the question unless she does give such evidence. If there is a *prima facie* case made, there is nothing gained by this Act, except an unfair presumption against the party if she do not choose to give her evidence.

The next section of this Act empowers the Courts to receive the evidence of persons who are incompetent to take an oath, upon their making the affirmation prescribed by the Act. By 31 Vict. cap. 71, sec. 4 (D.), and 32-33 Vict. cap. 23, sec. 2 (D.), the consequences of testifying falsely upon such an affirmation are the same as those which follow upon false swearing.

We shall continue this review in our following number.

EDITORIAL REVIEW.

The Attempt on Her Majesty's Life.

All of Her Majesty's loyal subjects have rejoiced at her merciful escape from the attempt upon her life, perpetrated by the poor wretch who is now in custody awaiting his trial therefor. The loyalty of Canadians found immediate expression in the address of their representatives in Parliament. None should be more grateful than lawyers. Although all of her Majesty's subjects have reason to be thankful therefor, lawyers, more than any one, appreciate the fact that Her Majesty's authority has always been constitutionally exercised.

Our American contemporary, the *Albany Law Journal*, settles itself down to "watch the proceedings with a curious interest, to see if the British Bench and Bar can improve upon our dealing with Guiteau." The remark reminds us of a line which we used to write in our copy books anent comparisons. If comparisons are to be sought for, it will not be necessary to await the impending trial. We think cases can be cited where men as violent as Guiteau have been on trial, and neither the dignity of the Bench suffered, nor did the prisoner escape his reward. As for the Bar, we think we shall not be far wrong in saying that one of Guiteau's counsel might have assisted materially in improving upon the proceedings at the trial, if he had made a study of Erskine's speech for Hadfield before delivering his own address to the jury. The charge of the learned Judge and the address of the prisoner's other counsel, for dignity and decorum, were beyond criticism. The conduct of the former, in allowing Guiteau to act as he did, we do not propose to criticize. The conduct of a trial must be in the discretion of the presiding Judge. And if, as a matter of discretion, he thought fit to allow the prisoner to give vent to his dis-

ordered feelings, we cannot find fault with the exercise of his discretion. Guiteau added to great cowardice a cunning shrewdness, which enabled him to find out, at a very early stage of the trial, that he could say and do pretty much what he pleased. Our opinion, if it is worth anything, is, that, if the prisoner had been firmly checked in the beginning, he would have been awed into submission and would have sulked quietly during the whole trial.

International Highways.

We learn from the *Law Journal* that legal as well as military difficulties are arising respecting the projected channel tunnel. It is said, "It is clear that the tunnel might be run from the French coast to the line at which British jurisdiction begins, before any difficulty of international law would arise." The point is, where does British jurisdiction begin? Is the line to be *medium filum aquæ*, or the three miles' limit? Is there any constructive possession of land under the sea? Could not the French Company buy their footing within British jurisdiction? There are other considerations, which are connected with the administration of municipal law, and which have arisen in Ontario in the International Bridge suits, viz: *Att'y-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 490, and *International Bridge Co.* v. *Canada Southern Railway Co.*, 28 Gr. 114. The Bridge companies have a Canadian charter and an American charter, each giving power to the corporation so created to amalgamate with the other. The Canadian half of the bridge is therefore within the jurisdiction of the Ontario Courts, and the other half is under the control of the American law. This distribution of authority seems fatal to its exercise at all; for in *Att'y-General ex rel. Barrett* v. *International Bridge Co.*, 1 C. L. T. 720, the Court of Appeal for Ontario declined to interfere by declaring that the public had the right to pass over that part of the bridge which was within their jurisdiction, because as their jurisdiction extended only to the boundary line of the Province, it would be unavailing to exercise it, the Company being at

liberty to bar the entrance to the American half just beyond the line.

The Stamp Act.

The last "time defence" has been taken from tardy promissors by the repeal of the Act imposing duties upon bills and notes. As a defence for time, the plea of defective stamping was generally a very successful one. Very few business men were aware that it was necessary to write the initials or name upon the stamp in addition to the date; and the consequence was that very few bills and notes were validly stamped. The act had survived its usefulness, had become a perfect nuisance, and had dwindled down into a purely technical defence to actions on bills and notes. The revenue derived from bill stamps was but a small one, and therefore, while no tax could better be remitted than this one, no measure could be devised which would be better received in commercial circles than the repeal of the Stamp Act.

NOTES OF RECENT DECISIONS.

Morrison v. *Taylor*, *ante*, p. 101. This decision gives rise to the question, which is not unworthy of consideration, whether Rule 324 should not be amended, so as to permit the order for judgment before appearance to be made by a Judge in Chambers. Its inconveniences are apparent. The only object contemplated by this rule is to enable the plaintiff to get judgment as speedily as possible; and it, to a great extent, defeats itself by imposing the necessity of awaiting the sitting of the Court. It is true that the delay cannot be very great in the High Court, because a Judge sits twice a week in Court; but it is practically useless in County Court cases. In the County Courts the Judges sit in open Court at long intervals, though they sit in Chambers frequently. There is a very large number of actions of debt for ascertained amounts, ranging between two hundred and four hundred dollars. These are all brought in the County Courts, and the benefit of this rule does not therefore extend to them; for times have changed since Shakespeare wrote, and both lawyers and suitors find that there is a long time between term and term, and much to be done in it. There can be no reason for withdrawing jurisdiction over such cases from the County Judges sitting in Chambers. Although their surroundings are more dignified in Court, they are themselves no less effective in Chambers. As long as the rule remains as it is, *quære*, whether, in a case, within the County Court jurisdiction, but brought in the High Court on account of urgency for the express purpose of taking the benefit of this rule, the discretion of the Court would not be well exercised in according full costs.

Again, during the long vacation, when the High Court is at rest, debtors will enjoy a two months' immunity from trouble under this rule. We presume a Judge, or the

Master in Chambers, will sit in Chambers for cases of urgency during vacation. The obtaining of judgment under the present law is always a matter of urgency, in order to establish priority. But the plaintiff will only be able to proceed under Rule 80. We do not think that any weighty reason can be advanced against the suggested amendment. As between Rules 324 and 80, the only point for deliberation under the former, which does not arise under the latter, is whether there is any justification for proceeding speedily. The same material will answer for motions under both Rules, with the addition of evidence of necessity for speed in moving under Rule 324; and the Master in Chambers practically decides that it is case for speedy judgment when, on the *ex parte* application for leave to move, he grants it. We trust that the Judges will see their way to making these applications more practically useful by amending the Rule.

National Investment Co. v. *Egleson, postea*, Occ. N. This decision places the whole question in issue in an entirely new light. In *King* v. *Duncan*, 1 C. L. T. 562; 9 P. R. 61, it was held that where money is paid into Court for a specific purpose, the party paying it in is entitled to withdraw the same when the purpose has been answered. But where the form of the order for payment in is that the money shall "abide the further order of the Court," it is discretionary with the Court to order payment out. Where money is paid in as security for costs, it is paid in for a specific purpose. But his Lordship the Chancellor, in the principal case, in effect holds that the purpose is not answered until the cause is ended; and as an appeal from the High Court is only a step in the cause under R. S. O. cap. 38, sec. 31, the purpose of the payment into Court exists until a determination of the cause by the Court of Appeal. The Court of first instance is not by any means *functus officio* upon the giving of judgment. By section 44 of the Court of Appeal Act, it proceeds, after correction or affirmation by the Court above, as if no appeal had been had, and as if the decision of the Court above had been

given by itself. Attention was not directed by his Lordship to the form of the order for payment in; but in the light of this decision it is immaterial. If it were "to abide the further order of the Court," the Court could not and would not order payment out while the cause was pending. If it were simply "as security for the costs, etc. of this action," it should be retained until the liability of the plaintiff for costs is finally adjudicated upon. *Napier* v. *Hughes*, *antea* p. 103 was a peculiar case. The plaintiff claimed to have sold certain goods to the defendant, which were in the possession of the latter, and the action was brought for the price. The plaintiff had a verdict. If the defendant succeeded on the appeal, the goods would be declared to be the plaintiff's, and would be subject to execution for the costs of the appeal. If the defendant lost his appeal he would pay costs. It was therefore a proper case for payment out of the plaintiff's deposit. Indeed, if the reason for the decision had been urged in answer to the original application for security, the order might have been refused.

PRINTING APPEAL CASES FOR THE SUPREME COURT OF CANADA.

On the opening of Court, SIR WM. RITCHIE, C.J., said :— Before proceeding to the business of the Court, inasmuch as much misapprehension appears to exist as to the effect of the rules of this Court in regard to the printing required to be done in cases coming before this Court, for the information of Gentlemen of the Bar I will read some observations which were addressed to the Minister of Justice on this subject, which show conclusively that there is not the slightest ground for attributing any unnecessary printing to any failure on the part of this Court to make rules in reference thereto.

MEMORANDUM of the Chief Justice and Justices of the Supreme Court in relation to the notice given by the Hon. Mr. Blake of a resolution, "That in Appeals to the Supreme Court of Canada, the printed records in the Courts below should be accepted for the purpose of the Appeal, without requiring the reprint of the same matter."

The Supreme Court Act, section 28, provides that no writ shall be required or issued for bringing any appeal in any case to or into the Supreme Court, but that it shall be sufficient that the party desiring so to appeal, shall, within the time limited in the Act, have given the security required, and obtained the allowance of the appeal.

Section 29 provides that the appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the Court appealed from, or a Judge thereof, and the case shall set forth the judgment objected to, and so much of the pleadings, evidence, affidavits and documents as may be necessary to raise the question for the decision of the Court.

Rule 2 of the Supreme Court of Canada provides that the case, in addition to the proceedings mentioned in the

said section 29, shall invariably contain a transcript of all the opinions or reasons for their judgment delivered by the Judges of the Court or Courts below, or an affidavit that such reasons cannot be procured, with a statement of the efforts made to procure the same.

It must be apparent that it is most necessary, in justice to the Court below and to the parties, especially the party in whose favour judgment below has been given, and which it is sought to reverse, that the Court should be in possession of the reasons which led to the conclusion at which the Court below arrived. This is required in all cases by the Privy Council. See 7 & 8 Vict. cap. 69, sec. 11 (Imp.), and Rule of Privy Council No. XVI.

Rule 3 of the Supreme Court of Canada requires the case to contain a copy of any order made by the Court below enlarging the time for appealing. This is necessary, in order that it may appear to the Court that it has jurisdiction to hear the appeal.

Rule 4 provides that the case may be remitted to the Court below, in order that it may be made more complete by the addition of further matter. This is obviously necessary, as it may happen, and has happened, that at the hearing it has been discovered that the case did not contain all that had taken place in the Court below, and which was necessary for the hearing and determination of the matters in controversy.

Rule 7 provides for the printing of the case, and Rule 8 for its form. The form adopted is the same as that used in the Court of Appeal of Ontario. This was done for the express purpose of enabling practitioners in that Court to use the cases printed for that Court, should such be the cases agreed on or settled under section 29, to which nothing would be required to be added but copies of the reasons of the Judges under Rule 2, and the order enlarging the time under Rule 3.

At the time this rule as to the form of the case was promulgated, there was no rule in Quebec on the subject. Since then, we are informed that the Court of Appeal of

Quebec has adopted a rule similar to the rule of this Court. So far from the Court having ever refused to receive the printed matter used in a Court below, when it contained the matter appealed, the attention of the Bar has been repeatedly called by the Bench to the advisability of utilizing the cases printed in the Courts below, when it can be done consistently with the requirements of the statute, and so saving a large amount of printing.

Rule 10 provides that certified copies of all original documents and exhibits used in evidence in the Court of first instance, shall be deposited with the Registrar.

The same rule provides that production of the exhibits may be dispensed with by order of a Judge of the Supreme Court, so that if either or both parties think the depositing such copies unnecessary, and shall make the same appear to a Judge in Chambers, an order can immediately be obtained dispensing with their production. It will be observed that nothing in this rule requires the exhibits to be printed.

The Court has had repeatedly to call attention to the unnecessary amount of printing of matter not required by the rules, and have been compelled, in several cases, to direct the Registrar to refuse to allow the expenses of such unnecessary printing to be taxed as costs in the cause.

The statute requires that the contents of the printed case shall be settled by the parties, or by a Judge of the Court appealed from, and the only additional printing which this Court by its rules has prescribed, is the opinions of the Judges in, and the judgment of, the Court below.

It may also be noticed, that the form and size of the case established by the Supreme Court Rule, is precisely the same as that prescribed by section II. of the schedule annexed to the order of the Privy Council of the 24th of March, 1871; and, in one case from this Court, the Judicial Committee of the Privy Council directed that the printed Record of the proceedings in this Court should be allowed to be used on the hearing of the appeal.

ORDERS OF THE COURT OF APPEAL.

25TH MARCH, 1882.

LXVII. The following order shall be substituted for order XVIII. of the orders of 30th March, 1878 :—

The appeal books shall be printed on paper of good quality, on one side of the paper only, and in demy-quarto form, with small pica type, leaded; and every tenth line of each page shall be numbered in the margin, the numbering to be from the top of each page and not from the beginning of the book; and the size of the book shall be eleven inches in height and eight and a half inches in width. An index to the pleadings, evidence and other principal matters shall be added. The opinions of the Judges of the Court appealed from shall not be printed where the same have been already issued in the regular reports, but a reference to the same shall be given in the appeal books and shall be sufficient. The style of the cause in the Court below shall be used and retained in the appeal book and in every proceeding in this Court, the designation 'appellant' or 'respondent' being added, *e. g.* :—

Between A. B. (*Respondent*),

PLAINTIFF.

and

C. D. (*Appellant*),

DEFENDANT.

LXVIII. The following is to be added to order XIV. :—

And also thirty copies for the purpose of being delivered, in the event of an appeal to the Supreme Court of Canada, to the party appealing to that Court for use upon such appeal.

Such additional thirty copies are not required to be deposited in cases of appeals from County Courts.

OSGOODE LITERARY AND LEGAL SOCIETY.

The meetings of the Society during the present season have been profitable and successful, though the loss of some of its members, who have migrated to the North-West, was at first somewhat felt. The attendance has been good, and the interest taken in the welfare of the Society has not decreased.

The third public meeting of the season was held in the new Convocation Hall, which the Law Society have kindly allowed this Society to use. The body of the Hall and the gallery were filled almost to overcrowding, and this was without doubt the most enthusiastic and best attended meeting which has as yet been held.

The chair was occupied by D. B. Read, Esq., Q.C., who opened the meeting in a few pleasing remarks, and, referring to the programme prepared, called on Mr. A. D. Kean, who recited "The Scarlet Brigade," a companion to "The charge of the Light Brigade." Following this was a reading, by Mr. A. J. W. McMichael, of a sketch by Mark Twain.

The subject for discussion was—*Resolved*, "That the mental faculties of woman are inferior to those of man."

Mr. A. S. Clarke opened the affirmative of the question, being followed by Mr. W. J. Nelson, as leader of the negative. Messrs. J. M. Duggan and W. Cook then spoke on behalf of the affirmative and negative respectively. The debaters acquitted themselves very creditably, and appeared from their manner of handling the subject to be perfectly familiar with it.

The learned chairman summed up the several arguments advanced, and, in an exhaustive and gallant judgment, spoke favourably of the qualities of the fair sex, and, while holding that ladies were superior to the opposite

sex in many stations of life, decided on the arguments advanced that the affirmative had made out the best case.

A vote of thanks was then tendered to the learned chairman, who, in a few words, expressed his pleasure at the efforts of the students to improve in public speaking, and thanked those present and the Society for the pleasure offered.

Dr. Larratt W. Smith, who occupied a seat with the President upon the platform, was called upon, and congratulated the President on the success of the Society, and the gentlemen taking part in the evening's entertainment on the manner in which they had acquitted themselves. The meeting then adjourned.

At the regular meeting, held on the 18th inst., after a humorous reading by Mr. G. Bolster, the subject, *Resolved*,—"That a representative should be bound by the will of his constituents," was debated by Mr. W. R. Cavell and Mr. Murray for the affirmative, and Mr. Morehead and Mr. A. J. W. McMichael for the negative. The President rendered his decision in favour of the negative.

REVIEW OF EXCHANGES.

Albany Law Journal.—25th February, 1882.

The value of Oil Paintings. Some cases, principally of insurance, respecting oil paintings.

Ibid.—4th March, 1882.

Recent humourous cases of negligence. A collection of cases showing some of the absurdities and humours that enliven the practice of the law.

Ibid.—11th March, 1882.

Decoye. "The laying of traps to detect criminals, although such detection involves the commission of a new or the repetition of an old offence, is not illegal." "But there is a difference between detecting and decoying; between traps and invitations; between contrivances to expose, and contrivances of participation by an owner. The decoy must not consent to the crime. So, if the owner delivers property to the would be thief, this is no larceny. In like manner the decoy must not himself commit any ingredient of the act which it is necessary for the criminal to commit in order to constitute the offence." Instances are then given illustrative of this distinction. In *Saunders* v. *People*, 38 Mich. 218, with which the learned writer closes his article, there is a strong protest, in the interest of morality, against the encouragement and assistance of parties in the commission of crime, in order that they may be arrested and punished. We heartily subscribe to this protest, and have before expressed our views to be, that the duty of officers is to prevent crime, not simply to procure the offender for punishment.

Constructive self-defence, by SAM'L D. DAVIES. "It is not a little singular that a person should be allowed by law to defend the life of a servant upon a more liberal principle than that of a brother or sister, and yet this seems to be the settled doctrine." The only writer cited as sustaining the view that a man may defend the life of a brother is Bishop. "The general doctrine here is that whatever one may do for himself he may do for another. The common case, indeed, is when a father, son, *brother*, husband, servant, or the like, protects by the stronger arm the feebler." The learned writer examines Mr. Bishop's authorities and concludes that they do not sustain his text. A killing in such a defence must be under such circumstances as would sustain the defence of using means to prevent a felony.

American Law Register.—March, 1882.

Maritime Liens, by THEODORE M. ETTING. Liens arising by virtue of municipal law are considered. If repairs have been made or necessaries furnished to a ship in the port of a state to which she does not belong, the material man's lien is dependent on the principle of general maritime law. But if the repairs have been made in the port of a state to which she belongs, the question of lien or no lien is determinable by local municipal law, but the right to sue in the Admiralty remains; *The General Smith*, 4 Wheat. 438. Foreign vessels are divided into two classes, one in which the vessel flies a foreign flag, the other in which she has her home in another state. If the legal and equitable ownership be distinct in the first case, and the vessel be at the time at the residence of her actual owner, and this circumstance be known to the material man, she will be domestic as to him, even though she fly a foreign flag. If the material man be ignorant of the fact, the rule is otherwise. In the second case, when the fact of her enrolment and the residence of her actual owner are different, the rule is that the material man knowingly dealing with her at the residence of the true owner, cannot claim that the vessel was foreign by reason of registry in another State. As to priority, practically the last service performed takes precedence, as being most efficacious in bringing the vessel to her destination. Cases of priority of particular liens are given.

Mechanics' Lien on Personal Property, by JOSEPH H. VANCE. At Common Law, a lien is a right in one man to retain personal property in his possession belonging to another, until certain demands of his, the person in possession, are satisfied. In Equity, it is synonymous with a charge upon a thing when there is neither *jus in rem* nor *ad rem*, nor possession. It is dependent upon, though not part of the contract. It is unassignable at Common Law. Though restricted at Common Law, the right, with few, if any, exceptions, is given to every bailee for hire who has bestowed labour and expended means on the personal property of another. A mortgage of after-acquired property, though inoperative as a conveyance, is an executory contract which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee. General liens are claimed in respect of a general balance of account, and are not favoured. A Common Law lien gives no title, nor a right to sell, without express contract. A purchase of the property by the lien holder produces a merger. A lien acquired under an illegal contract, if an executed one, may be good; as one arising under usury laws, if they impose a penalty but do not invalidate the contract.

American Law Review.—18th March, 1882.

Some Features of Maritime Liens, by FRANK GOODWIN. "It may be stated that from all contracts made by the master with third persons which bind the owners, there results an express or implied hypothecation of the ship; likewise, that from all torts committed by the master, in pursuance of his business as master, or which are beneficial to the vessel, there results an implied hypothecation of the ship, enforceable by a Court

of Admiralty by virtue of its jurisdiction as such." When a person is debarred from proceeding by libel, and the vessel is otherwise sold and the money paid into Court, his lien may be recognized thereon. A lien for building a ship is not on the same footing as a lien for repairs or supplies furnished. A raft of timber in navigable waters may be the subject of salvage services; 2 Lowell 64. There is no lien for services in navigating a raft of logs; 9 Chic. Leg. News 26. The master has a lien upon the freight for his wages; and, under the English law, upon the ship also. There is a lien for demurrage upon the cargo, though not stipulated for. Possession is not essential to the existence of a maritime lien in case of salvage. A lien for freight is lost by an unconditional delivery of the goods. A mortgage confers a qualified but vested general interest in the thing; a maritime lien is at the most but a contingent interest never rendered consummate, except as to the proceeds, and only then, provided proper steps be taken in a Court of Admiralty to enforce the lien. A maritime lien may be extinguished by some paramount subsequent lien.

Objections to Grand Jurors, by EDWIN G. MERRIAM. There is no case showing the right of challenge at common law, though Hawkins asserts that the right existed. In Ireland, it was held not to exist; 31 How. St. Tr. 543. It has been adopted by some American Courts. There is no right to challenge peremptorily; nor, in some States, for cause. American statutes giving certain rights of challenge are referred to. A plea in abatement may be pleaded. In some jurisdictions, the accused can object only at the time of the impanelling; in others, upon his arraignment. The plea of not guilty waives the right to object. Illustrations are then given.

Central Law Journal.—17th February, 1882.

Notice of unrecorded Deed to subsequent purchaser or attaching creditor, by WM. L. MURFREE, JUN., concluded in the following number. Authorities are cited to show that notice is equivalent to registration. Notice which is barely sufficient to put a party on inquiry is not sufficient, nor is a suspicion of notice sufficient. Possession is notice. But inquiry does not become a duty where the apparent possession is consistent with the title appearing of record. What is possession is then considered. Notice to the agent is notice to his principal, though he may not have communicated it. By the Ontario Registry Act, ss. 74 and 80, the subsequent purchaser must have actual notice of the prior unregistered deed; and this notice is effectual if acquired at any time before *registration* of the subsequent deed. As to this, Hagarty, C.J., says, *obiter*, in *Millar* v. *Smith*, 23 C. P., at p. 54: "I have no doubt the legislature, if their attention were called to it, would correct a very serious effect which this 67th [80th in the R. S. O.] section may have. The intention was evidently to protect an innocent purchaser who had not actual notice when he effected the purchase; but the section is worded so as to refer the notice to the time of registration, instead of the time of purchasing or paying his money." Gwynne, J., was of the same opinion, and thought that the intention of the Legislature was to introduce the equitable doctrine of notice into all cases, though it had failed in expression;

but held that effect must be given to the clause as expressed. He says, at p. 57: "To give literal effect to this clause would be to deprive a purchaser for valuable consideration *without any notice* whatever of the prior instrument before he got his deed and paid his purchase money, if actual notice of such prior instrument should be brought home to him in the interval between his getting his deed and putting it on registry."

Proof of Foreign Law, by HENRY WADE ROGERS. Judicial notice is taken of, 1. The law of nations. 2. The law merchant. 3. The maritime law, so far, at least, as recognized by the law of nations. 4. The ecclesiastical law, for the purpose of determining how far it is a part of the common law. 5. The Courts of a State which has been carved out of another State, take judicial notice of the statutes of the latter State, passed prior to the separation. 6. All Courts take judicial notice of their domestic law. 7. The State Courts take judicial notice of the Federal Constitution and of its amendments, as well as of Federal statutes. 8. The Federal Courts take judicial notice of the laws of the several States composing the national government. But the laws of foreign states are not judicially noticed; and the several States of the Union are foreign states as respects their political relations to each other. In Tennessee the contrary was held and maintained, and now by the State Code, the Supreme Court of this State takes judicial notice of all foreign laws and statutes. In Rhode Island there is a similar holding. In *State* v. *Hinchman*, 27 Pa. St. 479, it was held that a State Court, when its judgment would be liable to review by the Supreme Court of the U. S. A., in a case arising under the law of a sister State, would take judicial notice of such law, because in the latter Court the several States and the Confederacy are not regarded as foreign states, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be interesting to know how far such a doctrine would hold in our Provincial Courts—almost every case being appealable to the Supreme Court of Canada. What would be findings of fact according to our present authorities might be reviewed in the Supreme Court as questions of law. Unwritten law may be proved by experts; written law by the production of the law itself. But the construction put upon a written law may be proved by parol testimony. In England parol testimony may be given of a foreign law, though it be a written one.

Ibid.—24th February, 1882.

Sale of goods by parties lacking title, by JAS. P. OLIVER. "The sale of another's thing is null." This maxim is the groundwork of this article, in which it is expanded by illustrations. The doctrine of market overt has been distinctly repudiated in the U. S. A. See an article on Conversion by Purchase in the *American Law Review* for June, 1881, reviewed in 1 C. L. T. p. 492.

Ibid.—3rd March, 1882.

Adultery in Actions for Divorce, by JOSEPH A. JOYCE. A collection of cases, English and American, upon the subject.

Comments of a Judge upon the Evidence, by ADDISON G. MCKEAN. Strictly speaking, the Judge had the power of instructing the jury only in relation to the law applicable to the facts proved. In addition to being judges of fact, the jury are judges of the credibility of witnesses. But the Judge may include in his charge an opinion upon the weight of evidence; *Davidson* v. *Stanley*, 2 M. & G. 721. But see *Lucas* v. *Moore*, 3 App. R. 602, where the Court of Appeal of Ontario granted a new trial, because they conceived that the comments of the learned Judge at the trial must have had a prejudicial effect upon the minds of the jury.

Ibid.—*10th March*, 1882.

Execution of Deeds by Agents, by ORLANDO F. BUMP. Some cases are noted as to the execution of deeds under power of attorney.

The Effect of Delays and Irregularities in Enforcing Executions, by A. J. HIRSCHL. The holding of an execution over a debtor's property to protect it against creditors is, of course, fraudulent. So, an understanding that the sheriff shall do nothing unless other writs issue destroys the priority. Cases are then cited, where the prior writ has been declared dormant or fraudulent, but in which it was shown that the writ was only presumptively so, and that it would have been sustained had there been satisfactory reasons given for the delay. Instances follow of delays, indulgences and irregularities, which have been held not to deprive the plaintiff of his rights. The latter are, in general, grounded upon good reasons for the delay, such as allowing growing crops to mature and so bring a better price.

Criminal Law Magazine.—*March*, 1882.

Departures from the Common Law Rule as to Testimony by Husband and Wife. The Common Law rule is stated and illustrated. It is shown to be not a privilege as in the case of an attorney, but absolute incompetence to testify. It is founded upon public policy, which deems it necessary to guard the security and confidence of private life. They cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other, because this is inconsistent with the relation of marriage, and the admission of such evidence would lead to disunion and unhappiness, and possibly to perjury; 1 Phill. Ev. p. 78. The enactment of laws which aim at a destruction of this policy is deprecated.

Irish Law Times.—11th *February*, 1882.

Liability of Innkeeper for loss of guest's property. *Herbert* v. *Markwell*, 45 L. T. N. S. 649, is discussed. A guest at a hotel left his door unlocked, and was despoiled of his valuables during the night. A verdict was entered for the defendant. It was held, on a motion to set aside the verdict, that it could not be laid down as a proposition of law that leaving the door unlocked is not evidence of negligence, but each case must depend on its own circumstances, and not locking the door is one of those circumstances. Kindred cases are cited.

Ibid.—*11th March*, 1882.

Presumptions of Life, Death and Survivorship. I. The early Scotch and English authorities as to presumption of life are noted. More recent English cases are then cited. A grant of administration is not sufficient proof of death. It was held in *Fairholme* v. *Fairholme's Trustees*, 20 D. 813, that a person who sailed with Sir John Franklin in 1845 had perished in 1850. But the circumstances there were exceptional.

Law Journal.—*11th February*, 1882.

Expulsion from Clubs. A case of *Lambert* v. *Addison* is discussed. The plaintiff had passed some criticisms upon the committee for admitting a retired member without a new ballot, and putting him on the committee. The committee summoned the plaintiff to defend himself in an enquiry into his conduct, and on his failing to appear, expelled him. It was held, that there had been the opportunity for a fair trial, and that perfect *bona fides* had been shown throughout, and that the plaintiff had been expelled according to the rules. The learned writer points out, however, that the committee were sitting in judgment on their own case, and that one of the chief grievances of the plaintiff was the presence on the committee of one of its members whose vote was for expulsion; and the soundness of the decision is questioned. The other cases on expulsion from clubs are distinguished.

Recent Bills of Sale Cases. Some remarks upon *In re Spindler ex parte Rolph*, 19 Ch. D. 98, which we discussed in connection with *Hamilton* v. *Harrison*, *ante* p. 123.

Ibid.—*18th February*, 1882.

The Law Society on Procedure. The report of the committee of the Law Society is reviewed. The abolition of pleadings is disapproved of; the ordinary mode of trial by a Judge without a jury, approved of. It is recommended to abolish Courts in Banc. They recommend discovery of documents without an order. With respect to the abolition of Courts in Banc, it is proposed that new trial motions and appeals from Chambers be made to the Court of Appeal. It seems to us nothing more than transferring business from one Court in Banc to another Court in Banc. The evident tendency is, as we pointed out *ante* p. 64, to have a Court of Appeal in constant session, while trials would, as a consequence, be taken by a number of circuit going Judges detailed for that purpose alone. We can not say that we look with favour upon such a result. The recent rule passed in consequence of *Trude* v. *The Phœnix* is an intimation that it is not impending here.

Ibid.—*28th February*, 1882.

Costs Against the Third Party. Judgment cannot be recovered against him by the defendant; *Treleaven* v. *Bray*, 45 L. J. Chy. 113. But if he appears, and is at the trial held to be the party liable, the Judge has the power to direct the payment by him of the costs incurred by the original defendant; *Hornby* v. *Cardwell*, reported in the February number of the *Law Journal* Reports.

The Debts of Married Couples. *Quære*, whether a husband of no means, living with a wife who has separate property, is not her agent to charge her property; the liability of a wife for the contract of her husband being a branch of the law of agency, just as the liability of a husband for the contract of his wife. In a case of *Mercier* v. *Williams*, a creditor got judgment against a married woman for goods supplied, and seized her jewels. The husband claimed them, and upon an interpleader issue, succeeded, on the ground that there having been a marriage settlement, which did not include the jewels, they had vested in him. If, however, he had been made a party defendant, he would have been liable to the extent of the value of the jewels under the Married Women's Act.

Ibid.—*11th March*, 1881.

The effect of suing a Firm. The case of *In re Young, Ex parte Young*, reported in the March number of the *Law Journal* Reports, is discussed. In 1880, F. Young was a member of Griffin, Young, Burbidge & Young. On 8th December, the partnership was dissolved, F. Young retiring. On 18th December, Whiting issued a writ against the firm, and served Griffin at the firm's office. Judgment by default was signed. Nothing was made out of the firm's goods, and Whiting served F. Young with a debtor's summons in bankruptcy. This was the first intimation F. Young had of the proceedings. The registrar in bankruptcy refused to dismiss the summons, and F. Young appealed. There was a great difference of opinion among the Lords Justices, but the learned writer sums up thus:—"The result of their judgments is, that the members of the firm incurring the liability sued upon are bound by a judgment recovered against the firm, notwithstanding some of them may have ceased to be partners before the writ was issued. * * The result, therefore, to be gathered from this case is that, although a judgment against a firm is a judgment against the members constituting it at the time of the liability and not at the time of the writ, such judgment cannot be enforced in bankruptcy by a debtor's summons against a partner who was not personally served with the writ." Not a very satisfactory result. It is pointed out also, that by reason of the concluding portion of our Rule 346, leave to issue execution would have to be given in such a case. Paragraph (*c*) of the rule permits execution against any one served *as a partner*. Lord Justice Brett thinks this means *personally served*. The Rule has been imported into our system intact, without regard to the provisions of R. S. O. cap. 123, respecting the registration of co-partnerships, some of the provisions of which are at variance with the Rules of Court. Are they therefore repealed?

Southern Law Review.—August-September, 1881.

Stock—Its Nature and Transfer, by HENRY BUDD, JR. Angell and Ames' definition of stock is given. The learned writer submits the following as a more comprehensive one: "A right to receive profits, according to a pre-ascertained proportion; to enjoy such privileges as are bestowed by the act of incorporation, by-laws or rules of the company; and to share in the ultimate division of the property when wound up, and

subject to such liabilities as attach to the holding of stocks"—a definition, so carefully worded, and yet so very general and non-committal in its terms, that it reminds us forcibly of a definition of negligence once given in a law examination, and which we think we may give without disparagement to the learned writer. "Negligence is such a careless act on the part of any person as to render him liable to an injury to himself, or to render other persons liable to injuries which would not have occurred in ordinary cases." Stock is generally personalty. Where lands have been vested in the shareholders, the management being in the company, they have been held realty, and within the Statute of Mortmain. The result of the authorities is said to be that all other stocks are personalty. They are choses in action, not chattels. There are cases for and against the right to bring trover. In England shares are not, in some of the United States they are, "goods, wares and merchandize" within the meaning of the Statute of Frauds. Stock is not money, nor a security. With regard to transfer, in general the equitable title passes by delivery of the certificate with a power of attorney to transfer, as between the parties and all others having notice. As against the company, the transfer must be made on their books according to charter or by-law. The cases conflict as to unregistered transfer as against creditors and subsequent purchasers. A delivery of the certificate without assignment has been held a good *donatio mortis causa*. Where no certificate had been delivered, but a new one was issued and a transfer was made on the books, held a good gift. In *Kiely* v. *Smyth*, 27 Gr. 220, it was held that where there was no by-law or other enactment as to the mode of transfer of stock a good gift could be made by word of mouth. The right of a company to a lien on the stock of a shareholder indebted to the company is touched upon. The Banking Act of Canada, 34 Vict. cap. 5, sec. 51, as amended by 43 Vict. cap. 22, gives a lien to the Bank upon the stock and unpaid dividends of a shareholder for any debt or liability to the Bank, with power of sale over the shares. A mandamus, it is said, will not in general lie to compel registration of a transfer. The rule is not inflexible. As to compelling registration of railway bonds, see *in re Osler* v. *T. G. & B. Railway Co.*, 8 P. R. 506; 1 C. L. T. 507; and *in re Johnston* v. *T. G. & B. Railway Co.*, 8 P. R. 535; 1 C. L. T. 564.

Ibid.—October-November, 1881.

Misconduct of Juries, by SEYMOUR D. THOMPSON. Misconduct is not always ground for a new trial. Eating and drinking was no ground unless it were at the expense of the successful party. If they separate it is no ground unless a reasonable suspicion cast upon their verdict; but an unexplained separation where by law or practice, they should not separate, creates a presumption against the integrity of their verdict sufficient to warrant a new trial. So, as to speaking with persons not on the jury. But in capital felonies, the learned writer says, after referring to the Common Law rule, "I affirm with confidence that where a jury empannelled to try a capital felony are permitted to separate, to mingle with the community, and to imbibe their prejudices, before rendering their verdict, the prisoner has been denied the right of trial by jury." But they may separate in charge

of a sworn officer. The consent of the unsuccessful party, however, in civil cases, releases error. *Aliter*, in criminal cases where the prisoner cannot exercise a free choice through fear of prejudicing the jury. But, where he voluntarily and without solicitation tenders consent, he is bound by it. The rules as to sealed verdicts are touched upon. The practice of allowing the jury to disperse, after agreeing upon and sealing their verdict, is shown to be a dangerous one in civil cases. An uncertain or informal verdict may be returned upon which judgment cannot be rendered. There must either be a new trial or the jury must again retire. If they retire they may be prejudiced by having received impressions gained by discussions with others entered into by themselves, believing their work to have been finished. Drinking intoxicating liquor is not *per se* ground for a new trial. Similarly, as to communications with the successful party, or third persons. Hearing testimony after retiring vitiates the verdict; so does examining documents not in evidence. Where all the testimony is in writing, it may be taken to the jury room; but if part has been held inadmissible it ought not to go. Where the testimony is partly oral and partly written the latter ought not to go to the jury room for fear of their giving too much weight to it, and disregarding or forgetting the oral testimony.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Exchequer Court of Canada.

[TASCHEREAU, J.

Petition of Right—Breach of notarial contract—Representations.

On the 14th of July, 1875, the Government of Canada, through one M., advertised for tenders for the removal of steel rails from the Harbour of Montreal to Rock Cut at Lachine. The suppliant's tender having been accepted, a notarial deed of contract was entered into and executed. The contract provided *inter alia* that "The said party of the second part hereby undertakes to remove and carry for the Government of Canada, all the steel rails that are actually, or that will be, landed from sea-going vessels on the wharves of the Harbour of Montreal during this season of navigation, and deliver and lay on the ground the said steel rails, at the place commonly called the Rock Cut, on the Lachine Canal, subject to the terms and conditions hereinafter mentioned."

By this Petition of Right the suppliant alleged, as a breach of the contract by the Crown, that M., acting for the Crown, had represented to the suppliant that some 30,000 tons of rails would have to be removed, and that under such representations the suppliant entered into the contract. The Government had 5,000 of the rails removed by another person, and the suppliant claimed $10,000 damages.

Held, that under the terms of the written contract, suppliant was entitled to have the removal of all the rails landed in Montreal during the season of 1875, and that the Crown was answerable in damages for breach of contract.

Held, also, that the representations made by M. as agent of the Crown, as to the probable quantity to be removed, were unauthorized, and having been made previous to the written contract, could not now be said to form part of the same.

A. Ferguson and *John S. Hall, Jr.*, for the suppliant.

Hogg, for the Crown.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 8TH MARCH, 1882.

HAYWOOD v. HAY.

Obstructing sheriff—Conviction—32-33 Vict. cap. 32—Additional punishment.

The Sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendants, who rescued the goods. On complaint of the Sheriff's officers, they were summarily tried before a police magistrate and fined, under 32-33 Vict. cap. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion was now made by the plaintiff to commit the same parties for contempt.

Held, that the above Act does not contemplate any additional punishment after such a conviction, and that after the defendant had been subjected to the risk of the severe sentence prescribed by the Act, this Court should not interfere.

Robertson, Q.C., and *McCarthy*, Q.C., for the motion.
Bethune, Q.C., and *Aylesworth*, contra.

TOWNSHIP OF GANANOQUE v. STINDEN.

Principal and surety—Innocent misrepresentation—Release of surety.

The defendant's son was the plaintiffs' treasurer. The plaintiffs, requiring security for the due performance of their treasurer's duties, applied to the defendant for a bond. The latter stated that if his son was in default he would not give a bond, but would pay certain moneys he had to relieve him if his indebtedness did not exceed that amount. The members of the plaintiffs' council assured the defendant that their treasurer was not in default, and that they had examined his books and ascertained this. They were not aware that this statement was false, the treasurer, in fact, being in default for a large sum. Relying upon their representation, the defendant executed the bond.

Held (Hagarty, C.J., dissenting), that the misrepresentation avoided the contract of suretyship, and that the defendant was therefore entitled to judgment.

After the discovery of the default and the dismissal of the treasurer, the defendant promised to pay anything he was liable for. He had during the treasurer's incumbency also written a letter to the council, asking them to cancel the bond, but had withdrawn it at the treasurer's request. He was at the time ignorant of the default made before execution of the bond.

Held, that he had not thereby waived his right to set up the above defence.

Britton, *Q.C.*, for the plaintiff.

McMichael, *Q.C.*, for the defendant.

TRERICE v. BURKETT.

Interpleader—Shares in a ship—Seizure of—Co-sureties—Surety's right to co-surety's securities on payment.

The plaintiff sold twenty-four shares in a vessel to B. & Co., who, not being able to pay cash, procured O. to make a note in the plaintiff's favour, which was endorsed by him and B. & Co. In order to secure himself, O. took a bill of sale of the shares to himself. The plaintiff discounted the note at a bank, and after several renewals was obliged to pay it. In an interpleader issue between the plaintiff and the execution creditor of O.,

Held (Armour, J., dissenting) that the effect of this arrangement was to make B. & Co. principal debtors to the bank for the amount of the note, and the plaintiff and O. his sureties therefor; and upon payment thereof that the plaintiff was equitably entitled to the twenty-four shares held by O. his co-surety as security against his liability on the note.

Quære, whether interpleader is a proper remedy in such a case; and whether the shares could be seized and sold by the sheriff.

Per Hagarty, C. J. Some proceeding to which O. and B. & Co. were parties, in which the title to the shares could be cleared up, would be a better remedy.

Per Armour, J. The questions raised could not be properly adjudicated upon without O. and B. & C. being parties.

McCarthy, *Q.C.*, and *Creelman*, for the plaintiff.

Robinson, *Q.C.*, for the defendant.

BATE v. MACKAY.

Replevin bond—Action on—Staying proceedings on equitable grounds.

The defendant's timber limits adjoined those of B. & C., but, from uncertainty of description in their respective licenses, the division line was not defined. The defendant replevied 216 pieces of timber cut by B. & C. within a line run under instructions of the Crown timber agent as the boundary of the defendant's limits, but on account of the infirmity in his license the defendant failed in the action as to 175 pieces, for a return of which B. & C. were entitled to judgment. The latter procured an assignment of the replevin bond to themselves and assigned it to the plaintiff, who brought this action thereon. The Court was of opinion that the timber in question was cut upon lands intended by the Crown to be within the limits of the defendant's license, though B. & C. had some grounds for asserting title thereto.

Held, that, there having been a breach of the condition of the bond, B. & C. become entitled to recover such damages as they had sustained by the replevin proceedings; that the bond, after it was assigned by the sheriff to B. & C. was a debt and a chose in action assignable pursuant to the

statute; and that the plaintiff having the beneficial interest therein by assignment was entitled to recover; but, it being a case for the equitable interference of the Court, it was directed that, upon payment by the defendant of the cost incurred by B. & C. in cutting and transporting the timber up to the time it was replevied, less a set-off found for the defendant in this action, (the amount to be ascertained by a reference, if the defendant should so elect) further proceedings should be stayed.

Robinson, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

SHEPHERDSON v. McCULLOUGH.

Survey—Conventional line—Statute of Limitations.

In 1836, R., under instructions from the Surveyor-General, in making an original survey of Euphrasia, laid it out into concessions, leaving a road allowance in front of every other concession, and a side road at every sixth lot. He planted a stake at each side road upon the blind line between the abutting concessions. C., being the grantee of the Crown, conveyed to the defendant the W. ½ of lot 25, and subsequently the E. ½ to the plaintiff. Sixteen years before suit, L., a surveyor, was employed by both plaintiff and defendant to ascertain the true division line between their lands, and he took R.'s stake at a side line adjacent to the lot as a starting point, and ran a line therefrom. The parties cleared up to this line on each side of it, and a fence was gradually built along this line as the clearing proceeded, but did not extend across the lot, and the plaintiff notified the defendant that, if any of his timber fell on the plaintiff's side of the line, the defendant must remove it. Two years before suit another survey was made, at the plaintiff's instance, throwing the division line two chains ten links farther west than L.'s line. On this line the plaintiff erected a fence, which the defendant took down. The plaintiff then brought trespass.

Held, (Armour, J., dissenting) that there was ample evidence of the defendant's possession of the land bounded by the line run by L., and, as it had continued for a sufficient length of time to give him a statutory title, the verdict entered for him at the trial should not be disturbed.

Masson, for the plaintiff.

Creasor, Q.C., for the defendant.

STEERS v. SHAW.

Boundary line—Wild land—Statute of Limitations.

Thirty or forty years before action, a blazed line had been run between the lots of plaintiff and defendant by S., a surveyor, along part of which a fence had been erected. The parties respectively cut timber and exercised acts of ownership on the lands on each side of, and up to, the blazed line. The plaintiff swore that, although there had been no interference with the defendant's occupation, it was always his intention to dispute his right when he should be able to establish the true line.

The learned Judge at the trial found that there was sufficient evidence of defendant's occupation of the land up to the blazed line, to extinguish the plaintiff's title.

Held (Armour, J., dissenting), that the verdict was right.

The doctrine repudiated, that title by possession can only be made out where there has been actual enclosure of the land by fences for the statutable period.

WADE v. KELLY.

Interpleader—Sale by insolvent—Delaying Creditors—Change of possession.

E. B. W., being indebted to various persons and unable to pay them, sold all his property to his father, the plaintiff, who gave therefor his notes at six, twelve and eighteen months. The father was aware of his son's difficulties, but there was no intention to defraud creditors, the expectation being that this arrangement would be the most favourable for the eventual satisfaction of all E. B. W.'s liabilities. There was no change of possession nor any registered bill of sale, and the business was carried on just as before. The defendant was an execution creditor of E. B. W.

Held, in an interpleader issue, that the sale was void as against the creditors of E. B. W. (i) under the Chattel Mortgage Act, and (ii) because it was made by a person in insolvent circumstances, and had the effect of delaying his creditors, though made without intent to defraud them.

Robinson, *Q.C.*, for the plaintiff.

Mackelcan, *Q.C.*, for the defendant.

REGINA v. CHUTE.

Case reserved—Indecent assault—Evidence of subsequent conduct—Admissibility of.

Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents of what had happened, and they did not hear for two months; after the prosecutrix had given evidence of the assault, evidence was tendered of the conduct of the prisoner towards her, subsequent to the assault.

Held, that the evidence was admissible, as tending to shew the indecent quality of the assault, and as being in effect a part or continuation of the same transaction as that with which the prisoner was charged.

Irving, *Q.C.*, for the Crown.

No one appeared for the prisoner.

[OSLER, J., 28th FEBRUARY, 1882.

REGINA v. CLUFF.

Recognizance—Certiorari—Allowance of—Quashing same.

Where the recognizance to prosecute a *certiorari*, returned after the allowance of the latter by the convicting justices, together with the conviction, is substantially and clearly bad, and the conviction may possibly be upheld, the allowance of the *certiorari* may be quashed on the return of the rule *nisi* to quash the conviction, without a substantive motion for that purpose; but otherwise, where the objection is a trivial or purely technical one, or the conviction is clearly defective, and must inevitably be quashed.

G. H. Watson for the rule.

Aylesworth, contra.

[3RD MARCH, 1882.

In re LANGMAN & MARTIN.

By an agreement made between L., a builder, and the building committee of a religious body, all previous contracts and agreements were terminated and surrendered, and L. was to forego all right to compensation except under this agreement. One E. was to inspect and value the work already done on a building, and if not according to plans and specifications he was to rectify the same at his own expense. E. was also to inspect and value the building material on the ground, which was to be paid for at the original cost.

Held, that the effect of this agreement was that a price to be fixed by E. was to be paid for L.'s work; that E. was, therefore, not an arbitrator, and that the agreement could not be made a rule of Court as a submission to arbitration.

Aylesworth, for the motion.

Clute, contra.

[14TH MARCH, 1882.

REGINA v. PIPE.

Discriminating municipal by-law—Ultra vires—Conviction—Hard labour.

A by-law of the City of Guelph declared that no one should use any waggon, etc., upon any of the streets for the purpose of drawing loads above a certain weight, unless the tire of the wheel was of a prescribed width, excepting persons drawing lumber, etc., into the city from a place of manufacture, distant more than two miles from the city limits, and excepting persons passing through the city. The defendant was convicted of an offence against this by-law.

Held, that the by-law, being unequal in its operation by reason of the exceptions, was *ultra vires* of the corporation, and that the conviction was bad.

The conviction did not show that the defendant was not a person coming within the exceptions; and imprisonment, with hard labour, was imposed in default of payment of the fine.

Held, bad on these grounds also.

Rose, *Q.C.*, for the rule.

Bethune, *Q.C.*, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 10TH MARCH, 1882.

O'DOHERTY v. THE ONTARIO BANK.

Husband and wife—Separate equitable estate—R. S. O. cap. 175, ss. 2, 5.

A husband, not being in debt, or engaged in, or contemplating engaging in, business, bought certain land and stock from one C., the purchase-money comprising nearly all the property the husband had, and procured C. to make the conveyance thereof direct to the wife, who had been married in 1860 without any marriage contract or settlement, and the wife

mortgaged the property to the plaintiff. In an interpleader issue between the plaintiff and the defendants, execution creditors of the husband,

Held (Osler, J., dissenting), that the property in question was the wife's equitable separate estate, and was not affected by R. S. O. cap. 125, ss. 2 and 5.

McCarthy, Q.C., for the plaintiff.

J. K. Kerr, Q.C., for the defendants.

BECKETT v. JOHNSTON.

Sale of land for taxes—Assessment, invalidity of—Township Clerk—Right to purchase.

In ejectment by plaintiff, under a tax deed, as the assignee of the tax purchaser, it appeared that the sale was for taxes alleged to be due for the years 1871 and 1872. The land was described in the assessment roll for 1871, as the "S. part 12, 53 acres," and for 1872, as "S. E. part lot 12, 53 acres." Parts of lot 12 were owned respectively by F. and C., and part was laid out as a village; and it appeared that the land, whether taken as the S. or S. E. part included parts respectively of F. and C.'s land, which was already assessed against them, and also certain of the village lots.

Held, that the plaintiffs title failed; for the assessment was invalid and the defect was not cured by sec. 155 of the Assessment Act of 1868.

The purchaser at the tax sale was the township clerk.

Held, that his purchase was a voidable transaction.

J. B. Clarke, for the plaintiff.

Bethune, Q.C., for the defendant.

WOODWARD v. SHIELDS.

Adding parties—Rule 90—Costs.

Action by assignees of the assignee in insolvency of W. and A., who had become insolvent in 1879. At the trial, it appearing that the amount sued for did not pass to the plaintiff, but still belonged to the insolvents, application was made to add the latter as plaintiffs, but was refused on the ground that the defendant was not then in a position to know whether he had a defence as against them. At this sittings the defendant having had sufficient time to acquaint himself with his rights, and showing no defence, the Court pursuant to Rule 90, directed the insolvent to be added, and judgment to be entered for the plaintiff for the amount claimed; but, under the circumstances, without costs.

J. Reeve, for the plaintiff.

Tilt, for the defendant.

McLAREN v. CANADA CENTRAL RAILWAY CO.

Negligence—Contributory negligence—Loss by fire—Evidence—Findings of jury.

In an action of negligence for the destruction of a large quantity of the plaintiff's lumber by fire communicated thereto by one of the defendants' locomotives, the jury found that the emission of the fire which caused the

for improvements made by him after litigation commenced with him concerning the title.

Beaty, Q.C., for the plaintiff.

McLennan, Q.C, for the defendant.

McDONALD v. PHIPPEN.

Mortgage sale—Growing crops—Purchrser's right to.

Upon default made in payment of a mortgage, the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to retain the whole as his security.

Therefore, where land was sold under a decree of the Court of Chancery, made in a mortgage suit, without any reservation of crops,

Held, that the purchaser took all that the mortgagee could beneficially hold possession of, and was entitled to the growing crops, mature and immature, no severance of the same having taken place.

P. McGregor, for the plaintiff.

Moss, Q.C., for the defendant.

FLETCHER v. RODDEN.

Mortgage—Foreclosure—Recovery of land—Statute of Limitations.

The remedy by way of foreclosure or sale in mortgage cases is a proceeding to recover land within the meaning of R. S. O. cap. 108, sec. 4.

Therefore, where a foreclosure suit was commenced ten years and eight months after the date of the default in payment, and the plaintiff claimed payment of the mortgage debt, possession and foreclosure,

Held, that the only relief to which he was entitled was judgment upon the covenant for payment.

C. H. Ritchie, for the plaintiff.

Moss, Q.C., for the defendant.

[THE CHANCELLOR, 1ST MARCH, 1882.

In re BELL & BLACK.

Power of attorney—Sealing.

In executing a power of attorney, the constituent wrote the word "seal" opposite his signature, and encircled it with a pen stroke. The *testimonium* clause declared that the constituent set his hand and seal to this instrument. The attestation clause declared that it was signed and sealed in presence of the subscribing witness.

Held, that the device employed amounted to a sealing of the document.

[3RD MARCH, 1882.

CROWTHER v. CAWTHRA.

Intestacy—Collaterals—Nephew's children.

C. died intestate, leaving him surviving his wife, and, as next of kin, two nephews, one niece, and the infant children of a deceased nephew.

Held, that the infants were not entitled to share under the Statute of Distributions.

McArthur, for the plaintiff.

Robinson, Q.C., *J. Hoskin*, Q.C., *Moss*, Q.C., and *S. H. Blake*, Q.C., for several defendants.

[PROUDFOOT, J., 8TH MARCH, 1882.

CHAMBERLAIN v. CLARKE.

Administration—Deficiency of assets—Status of creditors—R. S. O. cap. 107, sec. 30—Secured creditors.

The R. S. O. cap. 107, sec. 30, which enacts that, on the administration of the estate of a deceased person, in case of a deficiency of assets, all debts shall be paid *pari passu*, not only abolishes privilege among creditors, but places them in the same position with respect to each other as that in which legatees stand towards each other; and a creditor receiving payment in full, either in an action against the executor or by the voluntary act of the latter, must refund the excess above his proportionate share at the instance of other creditors.

A secured creditor need not bring his security into hotchpot as a condition precedent to ranking on the estate, his lien being expressly preserved by the Act.

H. Cassels, for the creditor moving.

Moss, Q.C., G. H. Watson, and *J. Pearson*, for creditors paid in full.

WILKES v. WILKES.

Will, construction of—Legacy reducible by testator's debt—Payment of debt.

A testator bequeathed to his "sister M. J. such sum as will, together with what shall be at her credit in my books at Montreal, make $6,000." At the date of the will, there was $3,258.42 at M. J.'s credit; but subsequently the testator disposed of his business, and in carrying out the terms of the sale, $2,000 was placed at M. J.'s credit in the books, making her credit $5,258.42. Of this sum, $3,000 was to be placed on a special account at interest, and $2,000 to be repaid to her by the purchasers in ten years. Her account was then debited with merchandize, $5,000; the sum of $258.42 was paid to M. J., and her account was balanced. M. J. then accepted the purchasers' undertaking to pay the $5,000 pursuant to the terms of the purchase, and the books showed nothing due her by the testator at the time of his death.

Held, that the intention of the testator was that M. J.'s legacy should be reduced by the amount of his debt to her at the time of his death, that what had taken place amounted to payment of the debt, and that she was therefore entitled to the legacy of $6,000.

Moss, Q.C., for the executors.

Robinson, Q.C., for the legatee.

IN CHAMBERS.

[THE CHANCELLOR, 1ST MARCH, 1882.

NATIONAL INVESTMENT CO. v. EGLESON.

Security for costs—Deposit of money—Appeal—Pending cause—Payment out.

Instead of giving the usual bond for security for costs the plaintiffs paid money into Court under an order allowing them to do so. Judgment

having been given for the plaintiffs, the defendants appealed; and the plaintiffs thereupon moved for payment out of their deposit on the ground that the cause was ended.

Held, that the cause was still pending, that the moneys had been paid into Court for a purpose for which it might still be required by the order of this Court, and should be retained therefor; because (i) the deposit of money is to be regarded as made on the same condition as that contained in the usual bond, whereby the obligors are to pay all such costs as the Court shall award; (ii) the appeal to the Court of Appeal is, by virtue of the Court of Appeal Act, but a step in the cause, which is, therefore, still pending; (iii) the Court of Appeal has power to give any judgment which might have been given in the Court below, including orders as to costs, and this Court takes all subsequent proceedings upon the certificate of the Court of Appeal as if the decision had been given in the Court below, and it might still have to make an order for costs on such a certificate.

Porteous (*Robinson, O'Brien & Scott*) for the motion.

Thurston (*Beaty, Hamilton & Cassels*), contra.

[11TH MARCH, 1882.

CHAMBERLAIN v. ARMSTRONG.

Mortgage suit—Service out of jurisdiction—Order allowing.

After the motion, noted *ante*, p. 150, the plaintiff proceeded to sign judgment and tax his costs. The taxing officer disallowed the charges for obtaining the order under Rule 45, allowing the service out of the jurisdiction, on the ground that it was unnecessary in mortgage suits. The matter was informally referred by the taxing officer to his Lordship the Chancellor, who heard argument for the plaintiff, and

Held, that an order allowing service out of the jurisdiction is necessary in mortgage suits, and that the costs of obtaining the same had been properly incurred.

H. Cassels, for the plaintiff.

(Reported by H. Cassels, Esquire, Barrister-at-Law.)

[PROUDFOOT, J., 13TH MARCH, 1882.

In re KIRKPATRICK; STEVENSON v. KIRKPATRICK.

Illness of Master—Changing reference—Decentralization.

Held, affirming the order of the Master in Chambers, that the illness of the Master at Goderich, which unfitted him for efficient attendance to business, was sufficient ground for changing the reference to Toronto.

Held, also, that the mere imputation of centralization of business at Toronto was not a sufficient answer to the motion to make it the place of reference, it being the most convenient place for all parties.

Plumb, for the original motion.

Hoyles, Langton and *H. Cassels*, for several defendants.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

P. E. I.]

REID v. RAMSAY.

Appeal—Judgment on Demurrer not a final Judgment—Motion to quash—42 Vict. cap. 39, sec. 3.

In an action for false imprisonment, the defendants (appellants) justified the imprisonment under a judgment entered up in the Supreme Court, and an execution issued thereon. The plaintiff replied that the execution was issued in blank, and, 2ndly, that the execution issued without a præcipe therefor ever having been filed. To both of these replications the defendants below demurred, and rejoined that forthwith upon the issuing of the writ a præcipe therefor had been filed; to which rejoinder the plaintiff below demurred.

Judgment was subsequently rendered for the plaintiff on all the demurrers. The defendants appealed to the Supreme Court of Canada, and the printed case contained the reasons for judgment, and the following extract from the minutes of the prothonotary of the entry of the judgment delivered by the Court: "Demurrer argued 30th October last, when the Court took time to consider. The Chief Justice now gives judgment for the plaintiff on all the demurrers."

Held, that the case did not show that a judgment had been entered up on the demurrers, and even if entered up, that, the action having been instituted in a Superior Court of Common Law, such judgment would not have

been a final judgment from which an appeal would lie, within the meaning of the Supreme and Exchequer Court Act, or of the Supreme Court Amendment Act of 1879. Appeal quashed.

Peters, for respondent.
Thomson, *Q.C.*, for appellants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B.] [24TH MARCH, 1882.

NEILL v. UNION MUTUAL LIFE INSURANCE CO.

Life Policy—Overdue Premium—Payment.

By a policy of insurance upon the life of J. N. it was stipulated that if any premium should not be paid when due, the consideration of the contract should be deemed to have failed, and the company to be released from liability. By another clause, if an overdue premium was received, it was upon the express condition that the assured was in good health, etc.; and if the fact were otherwise, the policy should not be put in force by such receipt. A cheque was given for a quarterly premium, with the request to hold it for a few days, as there were no funds. It was frequently presented, but without its being accepted. On the 21st October, funds were provided, but, it being after banking hours, the cheque was not presented. That night J. N. was killed. The premium receipt had never been given up.

Held, affirming the decision of the Court below (1 C. L. T. 180; 45 U. C. R. 593) that the policy lapsed the day after the premium fell due; that nothing but payment could then revive the policy, and that there was no evidence of payment, or of anything dispensing with it.

S. H. Blake, *Q.C.*, and *Watson*, for appellant.
C. Robinson, *Q.C.*, and *Mulock*, for respondents.

FURLONG v. CARROLL.

Fire—Negligence.

The defendant, while harvesting in his own field, threw upon the ground a match, which set fire to combustible material. The fire might have been put out, but the defendant, after confining it to one place, left it to burn out. After burning for four or five days, it was communicated to the plaintiff's premises. The jury found for the defendant.

Held, reversing the decision of the Queen's Bench refusing a rule for a new trial, that the defendant was liable for the damage caused; and a new trial was ordered without costs.

Meek, for the appellant.

Bethune, *Q.C.*, and *Deroche*, for the respondent.

BARBER v. MORTON.

Principal and Surety—Non-disclosure to surety—Bill of exchange—Partial failure of consideration.

The defendant agreed with P. and the plaintiff that whatever goods P. should order of the plaintiff he would become surety for. P. sent a written order to the plaintiff, who, in addition to the goods ordered, sent others which had not been ordered, and the whole consignment was invoiced at prices higher than those quoted by the plaintiff, and than those at which P. had ordered some of the goods. Without disclosing these facts to the defendant, but without any fraudulent intent, the plaintiff presented a bill of exchange upon P. for signature by the defendant, who drew the same supposing that it was for the price of the goods as ordered.

Held, reversing the judgment of the Queen's Bench (45 U. C. R. 386; 1 C. L. T. 49), that the defendant was liable to the extent of the goods ordered, the consideration for the bill having failed as to the remainder.

Bethune, *Q.C.*, for the appellant.

E. Douglas Armour, for the respondent.

INGRAM v. TAYLOR.

Married woman—Separate estate.

The plaintiff, a married woman, married in 1864, cultivated a farm, one-half of which had been devised to her by her husband's father in 1874, and the other half of which had been devised to her son, a minor. In an interpleader issued between her and a judgment creditor of her husband,

Held, affirming the judgment of the Court below (46 U. C. R. 52; 1 C. L. T. 207), that the plaintiff was entitled to the crops on the whole farm as against the defendant.

Bethune, Q.C., and *J. W. Kerr*, for the appellant.
McCarthy, Q.C., for the respondent.

C. P.]

PAGE v. AUSTIN.

Sci. fa.—Shareholder—Stock illegally issued.

The Ontario Wood Pavement Company, incorporated under 27-28 Vict. cap. 23, and having power to make a by-law for increasing the capital stock after the whole of the original capital stock should have been allotted and paid in, but not sooner, assumed to pass a by-law increasing the capital stock before the original capital had been paid up. The plaintiff, being a judgment creditor of the company, whose execution had been returned unsatisfied, brought this action by way of *sci. fa.* against the defendant as holder of shares of the increased capital.

Held, allowing the appeal on ground not taken in the Court below (30 C. P. 108), that the by-law of the company being *ultra vires*, the alleged shares of the defendant had no legal existence, and that the plaintiff therefore failed to show that the defendant came within the statutory definition of a shareholder, and was not entitled to succeed.

C. Robinson, Q.C., and *McLennan, Q.C.*, for the appellant.
Bethune, Q.C., for the respondent.

CARLISLE v. TAIT.

Chattel mortgage—Affidavit of bona fides by agent—Contents of—Sale under power—Registration of bill of sale.

Held, reversing the judgment of the Court below (32 C. P. 43; 1 C. L. T. 428), that the affidavit of the *bona fides* of a chattel mortgage, when made by the agent of the mortgagee, need not state that he is aware of all the circumstances connected therewith. *Freehold L. and S. Society* v. *Bank of Commerce*, 44 U. C. R. 284, explained.

Held, also (Patterson, J.A., dissenting), that, where a chattel mortgagee sells on default, under the power in his mortgage, the purchaser cannot properly re-file the mortgage, which is satisfied *quoad* the goods, nor need he (the mortgagor remaining in possession) file a bill of sale from his vendor in order to preserve his rights as against execution creditors of the mortgagor.

Moss, Q.C., for the appellant.
McClive, for the respondent.

SPRAGGE, C.]

LAVIN v. LAVIN.

Voluntary conveyance—Independent advice.

A conveyance of land from a father, ninety years old, to his son, was prepared on the instructions of the latter. The deed recited that the son had agreed to pay his father $10 a month for his life, but no such agreement had in fact been made, and there was no other consideration. The deed was not explained to the father, and the solicitor's clerk, who witnessed it, could not say that he had read it over to the father. There was no direct fraud, but the father was under the sway of his children and had acted without advice.

Held, affirming the decision of the Court below (27 Gr. 567), that the deed, having been executed without proper advice, should be set aside.

O'Donohoe and *Haverson*, for the appellant.

J. H. Macdonald, for the respondent.

JESSUP v. GRAND TRUNK RAILWAY CO.

Railway company—Grant of land in consideration of erecting a station.

The plaintiff agreed with the contractors for the building of the defendants' railway, to convey to them in fee simple six acres, to be increased to ten if necessary, in consideration of their placing the defendants' station for the town of Prescott thereon. The station was built on the land pursuant to agreement; but after about ten years it was removed one and a half miles to the eastward.

Held, reversing the judgment of the Court below (1 C. L. T. 441; 28 Gr. 583), that the defendants' compliance with the agreement was a substantial one, and that they were not under any obligation to continue the station for all time upon the land.

S. H. Blake, Q.C., for the appellants.

Bethune, Q.C., for the respondent.

McCRAE v. WHITE.

Insolvent Act of 1875—Unjust Preference—Presumption of Fraud.

D., being liable on paper discounted for him by the defendant, a banker, ceased his then business and embarked in mercantile business, having been entrusted with goods by some new creditors on the representation that he had no available capital, but had experience in business. Shortly afterwards he was threatened with proceedings by S., a mortgagee of his land, which would, if taken, have closed his business. He then applied to defendant, who advanced him sufficient to meet overdue interest, took a

second mortgage and gave him an extension of time on his paper. About four months afterwards he became an insolvent, and the defendant's mortgage was impeached as an unjust preference. The evidence left the Court in doubt as to whether D. knew or had probable cause for believing himself to be on the eve of insolvency.

Held, that the plaintiff must therefore fail, the presumption being in favour of innocence and honesty.

G. C. Gibbons, for the appellant.

J. H. Macdonald, for the respondent.

HODGINS v. ONTARIO LOAN AND DEBENTURE CO.

Loan company—Public announcement of company's rule—Payment of mortgage pursuant to—Retrospective rule.

A circular was issued, with the knowledge of the defendants' directors, which, amongst other things, set out that "loans can be paid at any time and a discharge of the mortgage will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." The plaintiff saw this circular exposed in the office of an appraiser of the company through whom the loan was effected, and was thereby induced to mortgage his land for twenty years, the loan to be repayable on the instalment plan.

Held, affirming the decision of the Court below, that the circular could not be regarded merely as an advertisement, but that, as against the plaintiff, the words should be construed as referring to a fixed rule of the company, whose existence it would be inequitable for them now to deny, and that the plaintiff was therefore entitled to pay off the loan on the terms thereof.

Held, also, that the plaintiff, who had become a member of the society, and subscribed the rules thereof, was only bound by the then existing rules, and that, without an express stipulation to that effect, he could not be affected by a rule subsequently made, empowering the directors to fix the rate of discount upon future payments when members desired to pay off their loans in advance.

Bethune, Q.C. for the appellant.

Street, for the respondent.

BLAKE, V.C.]

NORRIS v. MEADOWS.

Mortgage—Sale of parcel subject to—Right to call on purchaser to pay same.

M., the owner of parts of lots 12 and 13, which were mortgaged in one parcel for the respective sums of $1,600 and $500, sold 13 to C., subject to the $1,600 mortgage, with absolute covenants for title, save the $1,600 mortgage, the consideration in fact being payment of the mortgage. He

afterwards sold 12 to N., subject to the $500 mortgage, with absolute covenants for title, it being, however, understood that the sale was subject to the mortgage, payment of which was part of the consideration. The land was sold by the mortgagee for default in payment of the mortgages, and N. purchased the whole in order to protect himself, and filed a bill to compel M. and C.'s representatives to pay off the mortgage debt of $1,600.

Held, affirming the judgment of the Court below, allowing a demurrer by C.'s representatives (28 Gr. 334; 1 C. L. T. 128), that there was no privity between the plaintiff and C.'s representatives, and that the personal demand against the latter remained with M., the original vendor.

Bethune, Q.C., and *McLean*, for appellant.
E. Blake, Q.C., for respondent.

PIERCE v. CANAVAN.

Mortgage—Purchasers of parcels of mortgaged land—Exoneration.

B. owned lots D. and E., and mortgaged them to J., who assigned the mortgage, and thereafter purchased the equity of redemption. The plaintiff subsequently purchased from J. lot D., paying the full value for it and receiving a conveyance with statutory covenants for title and quiet possession. Subsequently, J. sold lot E. to C., who conveyed to the defendant, who had notice of the mortgage.

Held, affirming the judgment of the Court below (28 Gr. 356; 1 C. L. T. 127), that the plaintiff was entitled to be indemnified out of lot E. to the extent of the full amount of the mortgage.

Osler, Q.C., and *F. E. Hodgins*, for the appellant.
Ewart and *W. Roaf*, for the respondent.

PROUDFOOT, V.C.]

DAVIDSON v. MAGUIRE.

Post-nuptial settlement—Ante-nuptial agreement—Valuable consideration—Insolvency.

M. was about to marry the defendant, and the latter's father agreed to convey a certain lot to his daughter as her marriage portion, if M. would build upon it a house which he contemplated erecting; to which M. agreed. The marriage took place, and, in the following year, M. erected a house upon his father-in-law's land, which was thereupon conveyed to the defendant. Two years afterwards M. became insolvent.

Held, affirming the decision of the Court below, that the erection of the house by M. was the consideration for the conveyance of the land, and that the transaction could not be regarded as a voluntary settlement, and as there was no fraud in so building the house, the transaction could not be impeached.

Jackson v. *Bowman*, 14 Grant, 156, distinguished and approved.
Bruce, for the appellant.
Bethune, Q.C., for the respondent.

INTERNATIONAL BRIDGE CO. v. CANADA SOUTHERN RAILWAY CO.

CANADA SOUTHERN RAILWAY CO. v. INTERNATIONAL BRIDGE CO.

Bridge company—Corporate powers—Tolls—Reasonableness of tolls—Reference to Master of questions proper for Court—Duty of junior counsel.

Held, affirming the judgment of the Court below (28 Gr. 114), that it is incident to the corporate powers of a corporation of the character of the International Bridge Company, incorporated under 20 Vict. cap. 227, and 22 Vict. cap. 124, to demand payment of tolls from railway companies for the user of their bridge.

Held, also, that the tolls payable for the passage of trains are not fixed by the said Acts.

The dividends paid by the Bridge Company were adopted at the Bar as a test of the reasonableness of the tolls charged. It was shown by the evidence of eminent engineers that the construction of the bridge was an exceptionally difficult undertaking, that the bridge when complete was exposed to extraordinary risks and dangers, and that a large sinking fund was necessary to provide for unforeseen contingencies, and the Court was satisfied that the omission to provide such a fund would be improvidence on the part of the directors.

Held, that a sinking fund was, therefore, a proper and reasonable charge against the annual income: that upon the evidence the Court could not declare that a point of unreasonableness had been reached when they should relieve against overcharge, assuming it to be competent to the Court so to declare and relieve; that a dividend of six per cent. per annum on capital laid out in such an enterprise would be unreasonably small; but that it was not necessary for the Court to say what would be reasonable.

Where a question is directly raised by the pleadings, and is distinctly presented to the Court for its decision, and evidence has been given upon it in order to obtain the judgment of the Court, it will not be referred to the Master for his decision.

Held, therefore, that it was not proper to refer to the Master the enquiry as to the reasonableness of the tolls charged.

Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders.

Crooks, Q.C., and *Cattanach*, for the Railway Company.
S. H. Blake, Q.C., for the Bridge Company.

LEAMING v. WOON.

Equitable Garnishment—Receiver.

Held, following *In re Cowan's Estate*, 14 Ch. D. 638, that, under Rule 370, a creditor may attach any debt due by any other person to his judgment debtor, without distinction between legal debts formerly garnishable and equitable debts; and that moneys payable under an order of Court, but in the hands of a receiver, are liable to garnishment.

Per Burton, J.A. At the time of the passing of the Judicature Act, the word "debt" included equitable debts, by virtue of the clause of the Administration of Justice Act, which gave an action at law for the recovery of a purely money demand, though the right to recover the same might be an equitable one, and therefore *semble* that equitable debts are garnishable under the Judicature Act.

R. M. Wells, and *G. Tate Blackstock*, for the appellant.
W. Cassels, and *J. Roaf*, for several respondents.

C. C. OXFORD.]

WILSON v. BROWN & WELLS.

County Court appeal—Remission to Court below for amendment—Discretion of Court below as to amending.

After this case had been remitted to the Court below, this Court being of opinion that the record should be there amended and a verdict entered for the plaintiff against the defendant B. alone (1 C. L. T. 609; 6 App. R. 411), the learned Judge of the County Court, instead of entering such a verdict, directed a new trial, the parties to amend their pleadings as they might be advised, so that B. might raise any defence which he was not obliged to raise in the action on the joint liability.

Held, that the direction of the learned Judge of the County Court as to the way in which he thought it most just to the defendant B. that the application to amend should be made, was an exercise of his discretion with which this Court would not interfere.

McCarthy, Q.C., for the appellant.
Falconbridge, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 18TH MARCH, 1882.

MONTEITH v. MERCHANTS' DESPATCH AND TRANSPORTATION CO.

Carrier—Delivery at wrong place—Fall in market—Damages.

The defendants contracted with the plaintiff to carry a car load of clover seed to Liverpool, and gave him a bill of lading therefor. While it was on the way, by a new contract its destination was changed to London, for delivery to a supposed customer of the plaintiff, and a new bill of lading was given to the plaintiff; but, by a mistake of the defendants, the seed went by a line of steamships to Liverpool; and as soon as the mistake was discovered, the defendants notified the plaintiff. After great delay, which the learned Judge at the trial found to have been caused by the defendants, the seed reached London, and the plaintiff's supposed customer having refused it, it was sold at a reduced price, the market having fallen between the day the seed should have been delivered in London and the day of sale. The learned Judge who tried the case found a verdict for the plaintiff, and assessed as damages, in addition to freight from Liverpool to London, the difference in market price between the date at which the seed should have arrived in London if it had been shipped by the right line, and the day it arrived there.

Held (Cameron, J., dissenting), that the damages were properly assessed, the finding of fact being that the delay was caused by the defendants.

Per Cameron, J. The damages which were the natural result of the breach of contract to carry to London were what it cost the plaintiff to have the goods taken to London from Liverpool, and a reasonable sum to compensate him for correspondence occasioned by the seed having been sent to a wrong destination; and damages resulting from a fall in the market were not incident to the breach of the contract.

McMichael, Q.C., and *McGregor*, for the plaintiff.
McCarthy, Q.C., and *C. Millar*, for the defendants.

CHANCERY DIVISION.

[THE CHANCELLOR, 1ST MARCH, 1882.

TOWNSHIP OF MONAGHAN v. DOBBIN.

Motion to commit—Notice of—Time.

Held, that, in the absence of special leave, all motions are now two days' motions; and therefore a notice of motion to commit for contempt, returnable two clear days after service thereof, was sufficient.

H. Cassels, for the motion.

G. H. Watson, contra.

(Reported by H. Cassels, Esq., Barrister-at-Law.)

IN CHAMBERS.

[CAMERON, J., 16TH MARCH, 1882.

BENNINGER v. THRASHER.

Judgment and execution—Revivor—Insolvent Act of 1864—Discharge—Personal action.

On 18th August, 1866, the plaintiff recovered judgment against the defendant in an action of seduction, and the same day the defendant was arrested on a *ca. sa.* and imprisoned. He was subsequently discharged, and was again committed on 2nd October, 1866, for four months. On 24th October, 1866, he describing himself as a non-trader, made an assignment to an official assignee, his schedule of debts containing only the plaintiff's judgment and one against him for breach of promise of marriage. The defendant had no assets. The discharge was not opposed, and nothing was done on the judgment till 28th January, 1882, when the *ca. sa.* was filed and writs of *fi. fa.* against goods and lands were issued on the judgment.

Held, on appeal from the Master in Chambers affirming his order, that the issuing and return of the writ within six years of the judgment obviated the necessity of reviving the judgment.

Held, also, that the discharge in insolvency did not operate as a release of the judgment, the action being for damages for a personal wrong within the meaning of the Insolvent Act of 1864, sec. 9, sub-sec. 5.

G. E. Henderson, Q.C., for the plaintiff.

Clute, for the defendant.

In re RONALD v. VILLAGE OF BRUSSELS.

Assessment—Appeal from—Time.

In 1881, R. was assessed in the sum of $34,000. He appealed to the Court of Revision, when the assessment was confirmed. Within the proper time he gave notice of appeal to the County Judge of the County of Huron,

but the clerk neglected to inform the Judge, who therefore did not appoint a day for hearing the appeal until 12th November, 1881, when the 16th November was appointed. The junior Judge of the County Court sat for the purpose of hearing the appeal, but failed to hear it, but for what reason was not clear. On 7th February, 1882, the senior Judge of the County Court appointed 17th February to hear the appeal, and proceeded to hear it. A prohibition was moved for on the ground that he was precluded from hearing the appeal by the wording of the Assessment Act, ss. 59, s-s. 7 and 16, s-s. 2, "so that all the appeals may be determined before the first day of August."

Held, that these words were not an imperative prohibition against holding a Court after the 1st August, and that R. having done all in his power to bring on the appeal was not deprived of his right to have it heard.

Shepley, for the motion.

Holman, contra.

[THE MASTER IN CHAMBERS, 25TH MARCH, 1882.

OMNIUM SECURITIES CO. v. ELLIS.

Country Solicitor—Town agent—Service.

Writ issued at Hamilton. 1st March, 1882, letter from P. & P., defendants' solicitors at Belleville, to plaintiff's manager at Hamilton, that they would send to their Hamilton agents an appearance to be entered. 3rd March, appearance entered, on which was endorsed "B. W. & B., agents for P. & P." 4th March, statement of claim served on B. W. & B., without admission of service. 14th March, judgment for want of defence.

Held, that the most convenient practice was to require country solicitors to have registered agents in Toronto, and that all papers served in the action must be served upon the solicitors themselves or their Toronto agents; and the judgment was set aside with costs.

Aylesworth, for the motion.

H. Cassels, contra.

(Reported by H. Cassels, Esq., Barrister-at-Law.)

[1ST APRIL, 1882.

DAVIES v. WICKSON.

Examination of parties—Time for.

Held, that, in actions in the Chancery Division, the defendant may be examined at any time after his defence is filed, or after the time for the filing the same has expired.

D. E. Thomson, for the defendant.

Wardrop, contra.

THE

CANADIAN LAW TIMES.

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THE RIGHT OF A MORTGAGEE TO A PERSONAL ORDER AGAINST THE PURCHASER OF THE MORTGAGED PROPERTY.

III.

THE *Doctrine of Trusts*.—In order to complete the plan originally mapped out, it remains for us to point out the extent to which our subject is affected by the doctrine of trusts.

It has been suggested that all trusts have their origin in a contract, express or implied, between the author of the trust and the trustee (*a*); and countenance is lent to this suggestion by Lord Westbury, who says that "An obligation to do an act with respect to property creates a trust" (*b*). Spragge, C., referring to this remark, observes: "But it can be only a trust in favour of the person in whose favour the obligation exists" (*c*), which observation was correct enough in its application to the case then in hand, where the obligation of the purchaser of the equity of redemption was a statutory one strictly limited to the indemnification of the mortgagor, after the latter should have himself discharged the mortgage debt, and it was there held that the mortgagee had not a direct remedy against the purchaser; and the observation will be correct

(*a*) See Pollock on Contracts (3rd ed.), 214, 215.
(*b*) *Fleeming* v. *Howden*, 1 Scotch App. 372.
(*c*) *Nichols* v. *Watson*, 23 Gr. 607.

in its application to every case, if the "person in whose favour the obligation exists" includes the person to whose benefit the fulfilment of the obligation will accrue. Lord Westbury, however, is his own interpreter, for he goes on to explain: "If a fiar, bound to fulfil an obligation, acquires or retains, by means of his neglect of that duty, a greater estate than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would have been entitled to it, if the obligation had been duly fulfilled." And he adds: "This is a very plain and righteous principle, which is of the greatest use in the administration of justice." Apply this doctrine to the case of the purchase of an equity of redemption, with an agreement between the purchaser and his vendor that the former shall pay off the existing mortgage, and it would appear that there will arise, on the part of the purchaser, such an obligation to pay off the mortgage as may be enforced by the mortgagee. There appears to be no doubt that such a right will be vested in the mortgagee where, upon the contract of sale, the mortgage debt has been taken into account and treated as part of the purchase money. In such case, the purchaser will be treated as a trustee, holding a portion of the purchase money for the purpose of applying it in payment of the mortgage debt, and the mortgagee will be treated as a beneficiary under the trust, who, so soon as the trust is communicated to, and its provisions accepted by him, will be in a position to enforce the same. Jessel, M.R., in enumerating the various sorts of contracts which from their nature are impressed with a trust, says: "There may be an agreement like that in *Gregory* v. *Williams* (*d*), where the agreement was to pay *out of the property*, and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third person" (*e*). The effect produced by treating the mortgage debt as a part of the purchase money is noticed in numerous cases. Lord Chancellor Sugden says: "Although the mere purchase of an estate subject to charges, as an equity of

(*d*) 3 Mer. 582; and see *Gregory* v. *Williams*, 2 C. L. T. 55 and 56.
(*e*) *In re Empress Engineering Company*, 16 Chy. D. 129.

redemption, does not make the personal estate of the purchaser liable to the charge, if the charge is part of the price, then the personal estate is liable" (*f*); because, in the lastly mentioned state of facts, the amount of the charge is retained by the purchaser out of the purchase money, and is treated as appropriated for the payment of the charge and impressed with a trust for that purpose. Referring to the result of treating the mortgage debt as a part of the purchase money, it is said in White & Tudor's Leading Cases (4th Am. Ed. vol. ii. p. 845): "But such a result will not ensue, because the purchaser gives a smaller sum in consideration of taking the estate *cum onere*, nor unless the land is sold for its full or estimated value, and part of the purchase money retained with an express or implied agreement to appropriate it to the satisfaction of the mortgage debt." In the lastly mentioned state of facts, both the mortgagor and the purchaser are interested in having the debt paid, and that the purchase money should be so applied was one of the terms of the purchase. The purchaser cannot hold the money by reason of his promise, and the mortgagor cannot enforce payment to himself, because that was not the agreement. If the money should in any way get into the hands of the mortgagor, his relations with the purchaser would be such that he would hold it in trust to apply in payment of the mortgage debt. The mortgagee is the only person whose receipt will satisfy the agreement, his hand is the only place where the money will be "at home."

With reference to the connection between contracts and trusts, we will probably be correct in saying, that when a contract has been made for the benefit of a third person, and by reason of any facts or circumstances connected with the inception thereof, or arising subsequently thereto and before the dissolution thereof, it would be inequitable toward the third person that it should be dissolved; it then

(*f*) *Barry* v. *Harding*, 1 J. & L. 475. See the cases upon this point collected and discussed in *Re Cozier, Parker* v. *Glover*, 24 Gr. 537. See also *Cumberland* v. *Codrington*, 4 Johns. Chy. 254, 258 and 261, approved of in *Garnsey* v. *Rogers*, 47 N. Y. 238.

is or becomes a trust which can in equity be enforced by the third person. Besides an offer and acceptance, a third element is necessary in order to make either a valid contract or a valid trust, viz., the *vinculum juris*, or the tie of the law which binds the parties to their agreement and prevents retractation. In cases of ordinary contracts, it is sufficient that the *vinculum* should exist as between the contracting *parties*, strictly so called; in cases of trust the *vinculum* must exist, not only as between the settlor and the trustee (who may be called the contracting parties), but also as between the trustee and the *cestui que trust*.

We shall now endeavour to indicate the nature of some of the facts and circumstances referred to, the existence of which will create a trust, or convert a contract into a trust that may be enforced by persons who are not strictly parties to the contract. In so far as any statutory provision or the policy of the law may not be infringed upon in any particular case, equity always recognises the validity and irrevocability of a *completed* gift of either realty or personalty, following in this the doctrine of the Roman Law, that vast repository of jurisprudential wisdom, from which our Equity Judges have so freely drawn their inspiration. If, therefore, a man declares himself a trustee of property for a volunteer (*g*), or if he actually conveys or transfers it to another person *in trust* for him (*h*), the trust is looked upon as completed and irrevocable, although no consideration moves from the *cestui que trust* (*i*). Upon an examination of all the later cases, not involving questions of statutory law or policy, in which the Court has refused to give effect to a voluntary disposition of property, it will be found that the gift was imperfect and executory, and required some further act or sanction *on the part of the donor* to complete the tradition, conveyance or trust, and that upon such imperfection was based the ground of

(*g*) *Jones* v. *Lock*, L. R. 1 Chy. 25 and 28, and cases there cited.

(*h*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 99; *Bill* v. *Cureton*, 2 My. & K. 503; *Dilrow* v. *Bone*, 3 Giff. 538.

(*i*) As to the irrevocability of a voluntary trust without the assent of the *cestui que trust*, even though the settlor and the trustee are both desirous of revoking the trust, see *Paul* v. *Paul*, 19 Chy. D. 47.

decision. With reference to the *time when* the trust becomes irrevocable, Sir W. Page Wood, V.C., says: "The question is in every case, has there been a declaration of trust, or has the assignor performed such acts that the donee can take advantage of them *without requiring any further act to be done by the assignor*, and if the title is so far complete that this Court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him" (*j*).

It would appear from what has been said that a mortgagee, standing simply in the position of a volunteer and without relying upon any obligation owing from the mortgagor to himself, can, as against a purchaser of the equity of redemption, enforce payment to himself of the mortgage debt where the purchaser has retained a portion of the purchase money for that purpose, and has agreed with his vendor, (the mortgagor or other person liable for the mortgage debt), to so apply the same, because no further act on the part of the vendor is required in order to complete the settlement of the fund. And the mortgagee's position is of course strengthened by the fact that he is not simply a volunteer, but that the mortgagor, at least where the mortgage is overdue, is under an obligation to him to make provision for the payment of the mortgage debt.

There is one feature of these voluntary trusts which calls for remark, and we cannot hope to better express it than by quoting from the judgment of Sir John Leach, M.R., in *Acton* v. *Woodgate* (*k*), where he says, "It is established by the authorities which have been referred to that if a debtor conveys property in trust for the benefit of his creditors, to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees which is revocable by the debtor and has the same effect as if the debtor had delivered money to an agent to pay his creditors,

(*j*) *Donaldson* v. *Donaldson*, Kay 718.
(*k*) 2 My. & K. 495.

and before any payment made by the agent or communication made by him to the creditors, had recalled the money so delivered." This exception to the general rule is limited, as will be seen, to cases where the trust is created without the privity of the creditors, and where it has not been subsequently communicated to them, and it is submitted that it does not apply to the trust created where a purchaser of an equity of redemption holds a portion of his purchase money for the purpose of paying off the mortgage, which is a case of a bare trust to pay a certain sum of money to a certain person, and bears no sort of analogy to a case of payment of money to an agent with special directions which can be recalled by the principal at will, for in the case put, the vendor cannot, of his own mere motion, procure the delivery of the purchase moneys into his own hands, the purchaser is something more than a mere agent, and may refuse to pay the moneys to the vendor, and has a right to protect himself by applying the same in payment of the mortgage debt, while the vendor's only right is to see that it is actually so applied.

Whether the exception, however, applies to the lastly mentioned class of cases or not, it will be useful to examine some of the rules governing trusts for creditors, as throwing light upon the class of cases under immediate discussion. In the judgment from which an extract has been given above, Sir John Leach proceeds to say: "In the case of *Garrard* v. *Lauderdale* (*l*), it seems to have been considered, that a communication by the trustees to the creditors, of the facts of such a trust would not defeat the power of revocation by the debtor. It appears to me, however, that this doctrine is questionable, because the creditors being aware of such a trust might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised" (*m*). It would further appear from the cases, that it is not necessary to the validity of

(*l*) 3 Simons 1.

(*m*) For a full discussion of the cases upon this point, see *Goodeve* v. *Manners*, 5 Gr. 114, and *Johns* v. *James*, 8 Chy. D. 744, and *Ellison* v. *Ellison*, 1 White & Tudor L. C.

the creation of a trust by the beneficial owner of property, that there should be notice to, or an acceptance or declaration of the trusts by the trustee (*n*). In order, therefore, to stamp the moneys in the hand of the purchaser with an irrevocable trust, it is not necessary that there should be any agreement between the purchaser and the mortgagee, but it is sufficient if the existence of the trust be communicated to the mortgagee by or through the mortgagor or the purchaser; and it is worthy of consideration whether the existence of such trust would not be so communicated by the registration upon the lands of a conveyance reciting the facts. Even though it should be held to be necessary that some consideration should move from the mortgagee in order to make the trust enforceable at his suit, it seems that it is not necessary for such consideration to pass upon the original creation of the trust, but that an *ex post facto* consideration will be sufficient (*o*). For example, if time for payment of the mortgage should be given by the mortgagee upon consideration of the existence of the trust, and upon the request of either the mortgagor or the purchaser, we think there can be no doubt that the trust would become enforceable by the mortgagee; and it is worthy of consideration whether the mere fact that time was given upon such a request, would not, in the absence of any evidence upon the point, raise a presumption that it was given in consideration of the existence of the trust, where it appeared that the mortgagee had notice of the trust (*p*).

It is submitted as the result of the authorities cited in this and former papers, that in many cases there does exist a right on the part of a mortgagee to enforce personal payment of the mortgage debt by a purchaser of the equity of redemption, which right may in some cases be based upon the position of the mortgagee as a third person, for whose benefit a contract has been made between the mort-

(*n*) *Tierney* v. *Woods*, 19 Beav. 330; *Donaldson* v. *Donaldson*, Kay 711.

(*o*) May on Fraudulent and Voluntary Conveyances, pt. 4, cap. 3, and see *Dillwyn* v. *Llewellyn*. 31 L. J. (Chy.) N. S. 658.

(*p*) *Brown* v. *Carter*, 5 Ves. 878 and 879, appears to be in favour of such a presumption, while *Lambert* v. *Northern Railway of Buenos Ayres Co.* 18 W. R. 180, is against it.

gagor and the purchaser; in other cases the right may be based upon the doctrine of subrogation, and again in others, upon the doctrine of trusts, as above indicated. Sometimes the right may be based upon all of these grounds, sometimes upon one or two of them, according to the circumstances of the case.

A question of some practical importance will not infrequently arise as to the framing of the action or suit, the persons to be made parties thereto, and the relative positions to be assigned to them. The practitioner need be bound by no hard and fast rules, with regard to these matters; but may with a considerable amount of latitude exercise his own discretion in each particular case, for we are told in one case that "All persons who have a joint interest must join in an action at law; but in equity it is sufficient that all parties interested in the subject of the suit should be before the Court, either in the shape of plaintiffs or defendants" (*q*). A *cestui que trust* may file a bill to enforce the specific performance of the trust, making the author of the trust and the trustee parties defendant (*r*), or the *cestui que trust* and the author of the trust may jointly maintain their bill against the trustee (*s*). In a Common Law case it was said: "As to the case put at the bar, of a promise to A. for the benefit of B., and an action brought by B., there the promise must be laid as being made to B., and the promise actually made to A. may be given in evidence to support the declaration" (*t*). "Where a contract is made for the benefit, and on behalf of a third person, there is an equity in that third person to sue on the contract, and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into" (*u*). In some cases the author of the trust could as plaintiff recover the fruits of the trust from the trustee when the plaintiff would hold

(*q*) *Wilkins* v. *Fry*, 1 Mer. 262.
(*r*) *Shaw* v. *Shaw*, 17 Gr. 284 and 285.
(*s*) *Mulholland* v. *Merriam*, 19 Gr. 294, 295 and 296.
(*t*) *Company of Feltmakers* v. *Davis*, 1 B. & P. 102.
(*u*) *Lloyds* v. *Harper*, 16 Chy. D. 309.

the proceeds as trustee for the *cestui que trust* (*v*). "Where a contract is made with A. for the benefit of B., A. can sue on the contract for the benefit of B., and recover all that B. could have recovered, if the contract had been with B. himself" (*w*). In *Parsons* v. *Freeman* (*x*), Lord Hardwicke says in effect that a *cestui que trust* may oblige the author of the trust to let the former use the name of the latter to recover the trust fund, and we are again told in *Lambs* v. *Vice* (*y*), that "nothing is more common than for a *cestui que trust* to sue on a bond in the name of his trustee."

A. H. MARSH.

(*v*) See *Mulholland* v. *Merriam*, 19 Gr. 294.

(*w*) *Lloyds* v. *Harper*, 16 Chy. D. 321.

(*x*) Amb. 115.

(*y*) 6 M. & W. 472. Where some of several persons who should be joint plaintiffs refuse to become so, that fact should be alleged, and they should be added as defendants. See *Luke* v. *South Kensington Hotel Co.* 7 Chy. D. 800, and S. C. 11 Chy. D. 121.

RECENT ONTARIO LEGISLATION.

The sixth section of The Evidence Amendment Act, 1882, relates to an Imperial Statute which has been unfavourably viewed in several Upper Canada cases. By this section, in any civil suit or other proceeding relating to any debt or account other than a suit by or on behalf of Her Majesty, wherein any person residing in Great Britain is a party, the evidence and examination of witnesses on behalf of either or any of the parties to such suit or proceeding, shall be the same, and given in the same manner as in other suits or proceedings, according to the practice of the Court. By the Statute, 5 Geo. II. cap. 7, entitled an Act "for the more easy recovery of debts in Her Majesty's plantations and colonies in America," it was enacted, amongst other things, that in actions of debt or account, wherein any party residing in Great Britain should be a party, the plaintiff or defendant, or any witness, might make an affidavit of the facts to be deposed to before a Mayor or Chief Magistrate of the city in Great Britain where the deponent might reside, and the affidavit was allowed to be of the same effect, as if the person making it had appeared and sworn to the matters in open Court, or upon a commission for the examination of witnesses. In *Gordon* v. *Fuller*, 5 O. S. 174, there is a very full discussion of the question whether the statute was in force in Upper Canada. The majority of the Court (Sir J. B. Robinson, C. J., and Sherwood, J.), held that it was, although it had been passed before Canada had been acquired. They also held that there was no expressed intention of repealing it on our statute books, and, what is more important, that the Parliament of Upper Canada had no power to repeal it. Macaulay, J., in a forcible dissenting judgment, took the view that the Local Legislature had the power to repeal it, for two reasons : 1st, because it did not

fall within the sections of the Constitutional Act containing exceptions to the general power granted by the Imperial Parliament to legislate for the peace, welfare and good government of the colony; and 2nd, because the legislature could abrogate all the existing laws creating Courts of Justice, and could enact that no future Courts should hold jurisdiction of causes of action not arising within the Province; and, having this power, that it had the power involved therein of regulating the course of legal evidence to prove any such debt in a court of law created by its authority with a general jurisdiction. To this the answer, appearing from Sir John Robinson's judgment, was, that the power of the Local Legislature did not reasonably extend to the repeal of an Act of the British Parliament expressly passed to afford facilities to British subjects resident in England. In other words, conceding all that Macaulay, J., argued for the power over the courts and their procedure, it is no answer to the fact that the Imperial Act was passed expressly for the purpose of giving residents of Great Britain peculiar privileges when entering those courts, whatever their constitution and procedure might be. And that the Imperial Parliament had power thus to legislate was not doubted in any of the cases; Leith & Sm. Bl. 55. The 5 & 6 Wm. IV. cap. 62 extended the provisions of the Statute of Geo. II. and substituted an affirmation for an affidavit; and this Act was also held to be in force in Upper Canada; *Smith* v. *McGowan*, 11 U. C. R. 399; 12 U. C. R. 270. See, also, *Gabriell* v. *Derbishire*, 1 C. P. 422. These Statutes, then, remained in force until the Judicature Act was passed, section 90 of which enacts that sections 15 and 16 of 5 & 6 Wm. IV. cap. 62 are repealed, as far as they relate to Ontario. The section of the Act under review relating to the subject is wider in its scope, and assimilates, or attempts to assimilate the law in such cases to the domestic law. We say attempts to assimilate, for it may still be argued, upon authority, that the Ontario Legislature has no more power to abrogate this law than had the Parliament of Upper Canada.

By the several constitutional Acts of old Canada the

Parliaments had the power to legislate for the peace, welfare and good government of the Provinces. By the B. N. A. Act, section 91, the Parliament of Canada has the like power (to make laws for the peace order and good government of Canada) in all matters not exclusively assigned to the Provincial Legislatures. Of the matters exclusively assigned to the latter, the right to make laws in relation to the administration of justice in the Province * * including procedure in civil matters in the Courts, is one. The word "exclusively" has evident reference to the relative distribution of legislative power amongst the legislative bodies created by the Act, and not to the absolute supremacy of the Provincial Legislatures in the matters assigned to them. It is not a question of a conflict of authority between the legislative bodies created by the Act, but it involves the enquiry whether the whole sum of legislative power granted to, and exercisable within the territorial limits of, Canada, includes the power to divest persons resident in Great Britain of special rights and privileges granted to them by the Imperial Parliament. That the authority to legislate respecting Procedure in civil matters in the Courts is not an absolute one, is evidenced by a uniform line of decisions in our Courts. In *Peek* v. *Shields*, 31 C. P. 112, it was held that the right of the Provincial Legislatures to direct the procedure in civil matters in the Courts, refers only to the procedure in matters over which the Legislature had power to give those Courts jurisdiction, and does not in any way interfere with the right of the Parliament of Canada, to direct the procedure in matters within the legislative authority of the latter. This case was affirmed, but with some difference of opinion, on appeal; 1 C. L. T. 718. In *Valin* v. *Langlois*, 3 S. C. R. 1, it was held that procedure in civil matters means procedure in civil matters within the powers of the Provincial Legislatures. See also *Niagara Election Case*, 29 C. P. 261; *Cushing* v. *Dupuy*, L. R. 5 App. 409. The legislative authority of the Ontario Legislature with respect to procedure being so limited, we are brought back to the question, whether the matter in regard to which the attempt is

made to regulate the procedure, is one within the jurisdiction of the Provincial Legislature. The question, in fact, is not one of mere procedure at all. Viewed in this light the point at issue is an exact reproduction of that discussed in *Gordon* v. *Fuller*. In this case the holding of the majority of the Court may be shortly stated thus:—Granting to the Parliament of Upper Canada the full power to regulate the procedure in the Provincial Courts, they have yet no jurisdiction to legislate touching special rights granted by the Imperial Parliament to persons resident in Great Britain. These words may be applied to the Act under review with equal force, and, if a sound exposition of the law, with the same result, unless it can be shown that the whole sum of legislative authority granted to the Dominion of Canada, is greater than that granted by the Constitutional Acts of Geo. III. to old Canada. Perhaps the nearest approach to the question, under the B. N. A. Act, is to be found in *Jones* v. *Canada Central Railway Co.*, 46 U. C. R. 250; 1 C. L. T. 695, though this case may be readily distinguished. The question was as to the extent of the powers of the Local Legislatures to make laws respecting property and civil rights in the Province. It was held that the Legislature had the right to pass an Act respecting a purely local railway, although the result was to affect the civil rights of bondholders and creditors of the railway, who were resident out of the Province when the Act was passed. But, it must be remarked that the rights of these bondholders were dependent for their very existence upon the Act of the Provincial Legislature creating them. Taking these bonds under the authority of an Act passed in the Province, they took them with all the liabilities attaching to a Provincial undertaking. Being the creatures of Provincial laws the bonds remained subject to Provincial laws. Provincial laws were liable to repeal by Provincial Legislatures. But it by no means follows that Imperial laws framed with special reference to the privileges of residents of Great Britain are subject to repeal by Provincial Parliaments.

Chapter 12, respecting the restitution of stolen goods, appears to be on the borderland of Dominion jurisdiction.

Section 1 provides that the Judge, before whom a prisoner has been convicted, may at the same sittings of the Court, or at any subsequent time, try the right of the prisoner and the claimant to property found in the prisoner's possession, but for the stealing, &c., of which the Crown will not proceed. It will be noticed that nothing is intended to be determined as to the right of property in the articles; for, by the second section of the Act, the right of the person convicted to proceed for the recovery of the property against the person to whom the Judge has ordered it to be delivered, is expressly saved. The temporary possession of the property alone is affected. It can hardly be said to come within property and civil rights, as that term is used in the B. N. A. Act, and as the trial of the question is to take place before a tribunal having criminal jurisdiction, must be tried before the Judge who convicts, and is an incident in the administration of criminal justice, it can hardly be said to come under the head of procedure in civil matters. The right to the enquiry, according to section 1, does not arise at any time, except upon conviction of a prisoner at the sittings of the Court of Oyer and Terminer, and then only in case the Crown counsel intimates that the Crown will not proceed upon other charges. If the other charges were proceeded upon, and a conviction followed, restitution would be ordered as a consequence; 32-33 Vict. cap. 21, sec. 113. If restitution is to be ordered without proceeding upon these charges, should not any process, in lieu of the writ of restitution after conviction, receive its validity and sanction from the same legislative power which authorizes the proceeding for which it is substituted? Even if it be doubtful whether the enactment comes within property and civil rights, or deals with criminal law, as those terms are used in the B. N. A. Act, it cannot be matter of doubt that, in attempting to provide a procedure by way of an order for the carrying out of the relief proposed by this enactment, the Legislature has assumed to deal with procedure in criminal matters, which is peculiarly within the jurisdiction of the Parliament of Canada. The whole effect of the enactment,

is to add to the proceedings in a criminal trial a procedure for the recovery of goods in the prisoner's possession. Either the Parliament of Canada had no power to pass section 113 of 32-33 Vict. cap. 21, or the Ontario Legislature has no power to pass this section.

The Mechanics' Lien Act, 1882, betokens a slight movement from contract in the direction of *status*; for the mechanic is to have his wages out of the owner's land, notwithstanding that the contractor may have already received them, and notwithstanding any agreement between the owner and the contractor for excluding a lien. The great defect in this class of legislation, viz., the gross injustice to the owner of making his land the security for the debts of insolvent or dishonest contractors, instead of being remedied, has been aggravated by this new enactment. The only protection left to the owner, the power of contracting against liens, has been taken away from him. The only cases in which workmen require to file liens for their wages arise from either of the causes just mentioned, viz., the dishonesty or insolvency of the contractor. It is true that the privilege is given to the owner of charging the cost of discharging the liens to the contractor; but if the latter is either too dishonest, or unable to pay his workmen, what a very slight probability there is of his paying the owner the same amount, increased by the costs of registering and discharging the liens, and perhaps by the costs of a few suits besides. Section 13 leaves the value of a mortgage upon buildings to a certain extent a matter of speculation. How much the selling value of land may have been increased by the construction, alteration, or repair of a building, may be difficult of ascertainment, unless the land, without the buildings, alterations or repairs, had been recently sold. No distinction is attempted to be made between cases in which the money has been advanced upon the security of the vacant land only, and those in which the money is advanced for the express purpose of building or repairing. The words of Mr. Justice Burton in *Walker* v. *Walton*, 1 App. R. at p. 583 are very pointed, and go to the root of the matter.

"Whether the benefit which the promoters of these bills had in view for the class interested have been realized, I am not aware, but it is clear that they have not been obtained without great injustice to other and perfectly innocent parties."

Chapter 28, the Assessment Amendment Act, 1882, sections 5 and 6, are evidently a consequence of the decisions in *Chamberlain* v. *Turner*, 31 C. P. 460, and *Oliver* v. *Smith*, *ante*, p. 152. The gist of the former case is, that a demand for taxes under section 93 of the Assessment Act (i) must be made by the collector in person, (ii) must be made *after* they are payable, and (iii) *quære*, whether the delivery of the tax bill ordinarily used would be a sufficient demand without more. The law, as it stood when this case was decided, was at least consistent. A day was fixed for payment, of which the ratepayer had notice. If he did not pay his taxes on that day, a demand was made, and that by a known municipal officer in person. If he failed to comply with the demand within fourteen days, the taxes might be collected by distress. Under section 5 of the Amending Act, instead of the demand, a written or printed notice, *specifying the amount* of the taxes, may be left with the person taxed, or at his residence or domicile, or place of business, or upon the premises in respect of which the taxes are payable. In other words, though it was usual formerly to give a notice and necessary to make a demand, the notice alone is now sufficient. Though it is not quite clear, yet the meaning of the amending section apparently is, that the collectors, if intending to make a demand, must call at least once on the person taxed, but if satisfied with giving the notice, *may cause it to be left*. His personal attendance in the latter case is thus dispensed with, and we presume he might now send his notices through the post. It will be observed that the notice is not required to specify a time for payment of the taxes. At what time then are the taxes due? By section 9 of the Assessment Act, as amended by section 6 of the Act under review, the collector may distrain if the taxes remain unpaid for fourteen days after such notice. There

is nothing in the Act otherwise declaring when they shall be payable. It is pointed out in *Chamberlain* v. *Turner*, that although R. S. O., cap. 174, sec. 347, declares that the taxes for any year shall be considered to be due on the first day of January, the Act does not mean that, because there are no taxes until they are fixed, and they cannot be sued or distrained for until a demand has been made, or under the amending section, we suppose until after the substituted notice. By this section a statutory right to recover the taxes by distress arises at the expiration of fourteen days from the deposit of the notice on the land assessed. If the fourteen days expire before the day fixed for payment by the Council, as they did in *Chamberlain* v. *Turner*, the ratepayer will be in an akward dilemma. What the result may be we do not attempt to predict, but it is foreshadowed in the judgment of Wilson, C.J., in the above case. Referring, at p. 474, to the by-law which gave power to the collector, when he deemed it expedient, to distrain before the day for payment of taxes, his Lordship says: "The Legislature has entrusted to the Council the power to fix the time for payment of the taxes, but it does not follow that the Council, after appointing these days, can empower the collector in every case in which he may consider it expedient to disregard these days, and to distrain upon whomsoever he likes." The power to fix the days for payment remains with the Council; but the power to distrain at pleasure, which his Lordship doubted the Council's power to give to the collector, is now superseded by the statutory right to distrain at the expiration of fourteen days from notice, without regard, apparently, to the day appointed for payment. The words used by the learned Chief Justice in *Chamberlain* v. *Turner* to characterize the attempt by the Council to give this power to the collector, may, with the necessary qualifications, be fitly applied to the statutory power now enjoyed by him: "A most oppressive and illegal power is attempted to be conferred upon an officer, and in this case a subordinate officer, to nullify the enactment of the Council at his caprice and pleasure." If we are correct in reading the latter part of section 5, as entirely

independent of the first part, a case of injustice may easily be imagined. A. owns a vacant lot in one part of a city and lives in another part. The collector may discharge his duty in respect to the vacant land, by simply placing the notice upon the same, or sending some one to place it thereon, leaving it to its fate. It need never come to the knowledge of the owner, who may be entirely ignorant, not only of the date of leaving it, but of the fact of its having been left on his land. The collector may then cause to be entered on his roll the date of leaving it, and it becomes not only *prima facie* evidence, but, in the case supposed, there being no one to contradict it, conclusive evidence of the leaving of the notice. At the expiration of fourteen days, the collector's agent may enter the house or place of business of the owner, without further ceremony, and take his goods and chattels by way of distress for the payment of the taxes. It is well that facilities should be afforded for collecting taxes; but it is just that the rate-payer should have some better protection than this.

There is another matter which the collector will have to settle with his own conscience. By section 101 of the Assessment Act, he "shall make oath before the Treasurer that the date of the demand of payment and transmission of statement and demand of taxes, required by sections 92 and 94 in each case, *has been truly stated by him in the roll.*" This section is left untouched. Where the demand is made by the agent of the collector, who also enters a note of the date on the roll, the collector will find some difficulty in swearing that the date has been truly stated *by him* in the roll. Again, did the Legislature intend that this oath should be made only as to *demands*, and not as to the notices substituted by the Act? Or, did the artful draughtsman leave this section intact, in order to nullify the whole of his amendment?

EDITORIAL REVIEW.

The Circuits.

The unfortunate indisposition of several of the Judges during the Circuits, which temporarily prevented their attendance to their duties, has produced a state of affairs which it is to be hoped will not occur again. Mr. Justice Ferguson, with characteristic good nature and a conscientious devotion to work, has been acting as a sort of relieving officer to the Common Law Judges, and in consequence thereof, the Assize work has been much advanced, but suitors in the Chancery Division have in the meantime been sore let and hindered. In the Common Law Divisions, when the Circuit work is going on, provision is made for the weekly work by assigning the same to a Judge who remains in town especially for that purpose. It is otherwise in the Chancery Division, where the work is done by whichever Judge is in town for the time being. It is subject for remark that, during the present spring sittings, several weeks have come in and gone out during which no business was done in the Chancery Division, on account of the absence from town of all the Judges. There would be less reason for comment if it were not that one of the Judges was absent during part of the time on common law business, while the weekly business on the common law side went on without interruption. Of course the Judges must make such arrangements amongst themselves as they deem best for the transaction of business; and the readiness with which an over-worked, but withal, most good-natured Judge undertakes the additional business which falls to his lot, on account of the temporary incapacity of his learned brothers, cannot but be admired. Yet suitors have a word to say anent their business in the Chancery Division. Perhaps there is no business which suffers more from neglect than this. *Ex parte* and other injunctions are left standing *in statu quo* they were when last before the Court; the injunc-

tions continue; and both plaintiffs and defendants may suffer serious inconvenience or loss from the delay. And Judges' Chambers, which are held but once a week in regular course, cease altogether under the circumstances which we mention. It is not a matter for which there is no remedy. For the power to appoint Queen's Counsel to hold Courts of Assize has not been taken away by the Judicature Act. Why this course is not adopted is a matter beyond our comprehension.

Osgoode Hall Law Lectures.

The continuation of these lectures which are referred to *ante*, p. 66, is well up to the standard of the last, and the whole scheme suggests to us the advisability of placing the several numbers when completed in the hands of students as a text book on Negligence.

Numbers two and three, now before us, contain lectures on Master and Servant, Municipal Corporations, Solicitors, Bailees, and Common Carriers. These subjects are shortly but fairly treated, and numerous authorities are cited. In dealing with the liability of Municipal Corporations for non-repair of highways, the subject of notice to the corporation is dealt with in the light of the decided cases. Further than authorities will go, it is not only unnecessary, but perhaps dangerous to venture, especially in the instruction of students. But it is subject for debate, whether the whole doctrine is not a false one, that the liability of the corporation for non-repair depends upon its having had actual sufficient notice of the defect through some of its officers, or upon constructive notice through the notoriety of the defect. The statutory duty to repair is a more rigid one than the common law duty. Section 491 of the Municipal Act declares that "Every public road, street, etc., *shall be kept* in repair by the corporation, and *on default* of the corporation so to keep in repair, the corporation" shall be liable, etc. There has been a qualification added to this section by *Burns* v. *City of Toronto*, 42 U. C. R. 560, and kindred cases, which qualification is, that the liability shall exist, *provided* notice has

been brought home to the corporation through some official, or provided the defect is so notorious that the corporation must be presumed to have had notice. We cannot see what warrant there is for this addition to the Statute, which seems to us clearly to make the duty to keep in repair an *absolute* one, the liability for accidents occurring through non-repair arising *on default to keep in repair.*

The remainder of the subjects do not require special notice. We look with pleasure upon the publication of this series, and hope that nothing will occur to interrupt it.

The Supreme Court Amendment Act.

The bill introduced in the Senate by the Honourable the Minister of Justice, to provide for the services of "Judges in aid" in certain Quebec appeals, seems not to have met with favour from the Bar of that Province. The principle is in our opinion, a bad one. It will not tend to strengthen the feeling of confidence in the decisions of the Court for obvious reasons. The additional weight, so to be introduced into the Supreme Court, is to be brought from the Courts appealed from, and this is the weight, which upon being thrown into the scales, is to decide the questions at issue. It is erroneous in theory, and we think would be found to work badly in practice, that the decisions of the highest Court in Canada should in any case depend upon the accidental sitting in the Court of judges of an inferior tribunal; and our contemporary the *Legal News* points out that as the "judges in aid" would be constantly changing, the door would be opened to dissonant interpretations of the law by the Court, whose function it is to fix the jurisprudence. It is not to be desired that the key to the decisions of the Supreme Court should be in the hands of irregular members of the Court, however learned and able they may be. Will some of our friends who have kept up the study of mathematics calculate the number of combinations that may be made of eight judges, one, two, and three respectively dissenting, how many even divisions of the Court can be made, and how many times the "judges in aid"

will be in the majority, how often in the minority, and how often divided? The problem is capable of actual solution, and the exact value of the Bill may be thus obtained.

By the way would not *aides-de-cours* be more euphonious than *Judges in aid?*

Marriage with Wife's Sister.

The bill, repealing all laws in Canada prohibiting marriage between a man and the sister of his deceased wife, has at length passed into law. The question was raised in both houses as to the power of the Parliament of Canada to deal with the question, but no serious doubt can exist that the Act is *intra vires*. In our articles on the "Legal Degrees of Marriage in Canada" (*a*), we had occasion to refer to the B. N. A. Act as an apt illustration of the two distinct branches of the law of marriage by the division of the power to legislate upon marriage into two distinct parts. The power to legislate respecting the solemnization of marriage, *i. e.* the formal requisites of marriage, is granted to the Provincial Legislatures. All other powers of legislation respecting marriage are given to the Parliament of Canada, including of course the power to fix the legal degrees of marriage. And this is the interpretation which has been given to the clauses of the B. N. A. Act in question by the law officers of the Crown.

The Index Reporter.

We are in receipt of several numbers of this new enterprise, published monthly by the *Albany Law Journal*. It is intended to contain references to all reported cases in the English, Irish and United States Courts as they appear. The work to be done in selecting, digesting, and arranging such a number of cases, if carried out as conscientiously as it has been begun, will be simply stupendous. Considering the various methods of indexing and digesting which obtain among our cousins, the learned editor, in our estimation, has neither a light nor an enviable task before him.

(*a*) Vol. i. at pp. 580, 581.

NOTES OF RECENT DECISIONS.

Cruso v. *Bond*, ante p. 201. No one will question the soundness of the result of this action, whether it is viewed as a point in procedure or as an adjudication upon the explicit terms of the contract between the parties. As a matter of procedure, it must be remembered, that the *omnibus* bill of complaint in mortgage suits, invented shortly after the passing of the Administration of Justice Act, included a proceeding in which the defendant might by his inactivity have compelled the plaintiff to receive, almost immediately, the money—we mean an action at law to recover the mortgage debt. In such an action, judgment would have gone by default in ten days, whereupon the defendant could have satisfied it by payment. This relief was sought by the *omnibus* bill, wherein the plaintiff asked for immediate payment; and it would be somewhat surprising if it were held that he could not be taken at his word. So far it may be said to be a question of election. But there are other matters for consideration.

The mortgage in this case was made pursuant to the Short Forms Act, and therefore a more intelligent notion of the position of the parties may be gained from a perusal of their express contract, as contained in the long form of the proviso, under which payment of the principal is accelerated by default in payment of interest. The words are, as far as it is necessary to quote them :—"If any default shall at any time be made in payment of the interest, then the principal shall forthwith become due and payable, in like manner and with the like consequences and effects, to all intents and purposes whatsoever, as if the time mentioned for payment had fully come and expired." No form of expression could be used, which would convey more clearly than these words do, that the mortgagor is in the same position on default of payment of interest as if the

mortgage had matured in regular course. The mortgagee stands in the same position as if he had originally contracted for re-payment of the principal money on the day on which default in payment of interest happened to be made. We may, therefore, advance a step without danger, and say that, whether there is a writ issued or not, whether there is any other act of the mortgagee's to be construed into an election to call in the principal money or not, is immaterial. It is due by express contract. If the mortgagee had desired the power to refuse the principal money in such a case, he would have drawn his proviso that upon default, etc., the mortgagee may, if he so elect, forthwith call in and demand payment of the whole principal money, etc. Every carefully drawn mortgage should have such a qualification annexed to this clause in favour of the mortgagee. As it now stands he agrees that on default the principal shall forthwith become due. There must be a difference. It is a truism to say that the principal money must have been due before he could have issued his writ therefor; and so his right, or liability, to be paid it depends upon something antecedent to the writ, rather than upon that manifestation of his desire to call in the money. The original contract called it in for his own protection. The remainder of the proviso, whereby it is declared, that the mortgagor may be relieved from the consequences of the default, by paying arrears and costs, either before judgment at law, or within the time allowed by the practice in equity, is so manifestly a privilege accorded to the mortgagor, that by no process of reasoning can it be distorted into the grant of a privilege to the mortgagee to refuse the principal money, which, by his own stipulation and for his own protection, he has made payable. The case, as we understand it, was argued and decided on this clause alone, the form of the bill not permitting an open discussion upon the whole mortgage.

Audi alteram partem. There is another phase of the matter upon which, as we say, it apparently did not become necessary to pass any opinion in this case. The mortgagor has it in

his power, under this clause, to pay off his loan whenever he pleases by making wilful default. In a rising money market he would not attempt this, but on default would take advantage of the clause allowing him to stay proceedings by paying arrears and costs. But where the rate of interest has fallen he is very apt to make default, and borrow at the lower rate to pay off the existing loan. What protection has the mortgagee? Where the mortgagor is execution proof, but able to pay if desirous of so doing, and willing to pay to save his land, and the land will not bear successive judgments for the instalments of interest as they accrue, the mortgagee must evidently, for his own protection, pursue his remedy under the proviso. In doing so he is at the mercy of the mortgagor, if he be not in his power immediately upon default, as we have hinted. The position of the plaintiff, under this clause alone, is that of a mortgagee suing upon an overdue mortgage, and there is evidently no relief for him but to order payment to him of his money. The Court cannot make a further investment for him by extending the time for payment. If, however, we look at the whole mortgage, it is a contract by the mortgagor to borrow, and by the mortgagee to lend, a sum certain, for a time certain, at a rate certain. The acceleration clause must be treated as accessory and subordinate to this contract. Under it, the mortgagee stipulates for his own protection, that the whole amount shall be due on any default, giving to the mortgagor the correlative right to relieve himself from the consequences of foreclosure, etc., by paying off arrears and costs. The mortgagee has a right to ask that the subordinate terms and remedies of his contract be not exalted into the principal term of, or into the contract itself, to his detriment. If wilful default has been made, there has been a wilful breach of the principal contract, for which the mortgagor should answer to the mortgagee in damages for loss of the higher rate of interest on his investment. But in the ordinary mortgage suit this relief cannot be granted. Why should not the mortgagee claim these damages on his writ? If the defendant does not appear, he might move for judg-

ment and have the damages assessed in his absence. If he does appear, the plaintiff might aver in his statement of claim, a contract to borrow for a time, and at a rate, certain; that the defendant had wilfully made default in order that he might pay off the loan; that the current rate of interest was lower than the rate in the mortgage, whereby and by the wilful default of the defendant, the plaintiff suffers damage to the extent of the difference between the current rate and the mortgage rate for the remainder of the time of the original loan; pray for payment of the amount due and damages for loss of investment; in default, sale; and that the mortgage debt and damages be paid out of the purchase money; or, if the land be worth it, that it be sold and the money be paid into Court, and that there be paid out to him from time to time the interest of the rate mentioned in the mortgage and the principal money as they respectively become due.

REVIEW OF EXCHANGES.

Albany Law Journal.—18th March, 1882.

Use of Family Names in Business. The proper name of the manufacturer of an article cannot be made a trade-mark, so as to prevent any other manufacturer of the same name from affixing such name to a similar article made and sold by him, where he uses no unfair means to mislead purchasers. *Secus*, when there is a fraudulent use of a name to induce purchasers to believe that the article is manufactured by another of the same or a like name. Numerous English and American cases are cited, and the learned writer concludes with a summary of the law taken from the argument in *Meneely* v. *Meneely*, 62 N. Y. 427. "First, a mere surname can never become a trade-mark. Second, no man can acquire an exclusive right to the exclusive use of his surname in any business. Third, the only ground of judicial interference is, where one uses his own name in connection with the peculiar trade-mark or device of another, whereby the public are deceived. Fourth, even in such cases the party will not be restrained from the use of his name in the business, but only from the use of the complainant's trade-mark or device."

Ibid.—25th March, 1882.

Severability of Insurance. A digest of American cases upon the subject. In *Phillips* v. *Grand River, etc. Ins. Co.*, 1 C. L. T. 704; 46 U. C. R. 334, where the insured misrepresented the state of the title of a house, and the policy was held void on account thereof it was held good as to the contents of the house, the policy providing for avoiding it in respect to property with regard to which the misrepresentation was made. In *Samo* v. *Gore District etc. Ins. Co.*, 2 S. C. R. 411, we have an instance of an entire and indivisible contract of insurance held void *in toto* for misrepresentation as to encumbrances.

Ibid.—15th April, 1882.

Is a Lunatic liable for Slander? Odger is cited for the following: "Lunacy is in England no defence to an action for slander or libel. Per Kelly, C. B., in *Mordaunt* v. *Mordaunt*, 39 L. J., P. & M. 59," and he goes on to point out that the contrary is the rule in America. The learned writer points out that the *dictum* of Kelly, C. B., was *obiter*, and is the only authority cited for the doctrine expressed in the above quotation. Cases in the American Courts, and American text-writers, are then cited to show that insanity may be shown in excuse or in mitigation of damages.

American Law Register.—April, 1882.

Mechanics' Lien on Personal Property, by JOSEPH H. VANCE. A prior lien gives a prior claim to satisfaction out of the subject it binds. The right to hold property by lien lasts until the debt so secured is paid; but the lien-holder's right may be waived by any act not consistent with the right of possession by the lien-holder. But when a lien-holder has relinquished a prior lien through fraud practised on him, he may re-take the property by virtue of his lien. At common law, a sale of the property to satisfy the debt can be made only with the consent of the owner. A tender of the amount secured by the lien is equivalent to payment, and the lien is gone.

American Law Review.—April, 1882.

Rights and Liabilities arising through the promotion and formation of a Corporation, by HENRY O. TAYLOR. Some propositions of the law of agency are stated, which are the foundation of the remarks which follow them. Promoters of a corporation are not presumptively partners, and they do not become such merely by becoming bound by the same instrument. But, if A. by his conduct caused it to be believed that B. is his agent, he will be liable to those who act on it. Promoters will be held as partners if they have held themselves out as such, or negligently or fraudulently allowed themselves so to be held out by their co-promoters. They are bound to observe good faith in their dealings with each other. They are liable to contribution amongst each other. If a person owning land becomes a promoter, he may sell the property to the corporation without regard to the original cost; yet he must not sell at an unfair or exorbitant price. As to the liability of a corporation in regard to any contract made by its promoters on its behalf, the following propositions are submitted:—"1. As long as the contract remains executory on both sides, the party who contracted with the promoter cannot enforce the contract against the corporation, unless the corporation has ratified the same; and the corporation cannot enforce the contract against the other contracting party, without carrying out all the engagements entered into with the other contracting party at the time of making the contract. 2. Where a contract made by a promoter on behalf of a future corporation has been ratified and performed by the latter, it may force the party who contracted with the promoter, to perform on his side. 3. When the contract has been executed by the other contracting party, the corporation should be held to perform on its side, if (i) it has ratified the contract, and (ii) voluntarily accepted the benefit arising from the performance of the contract, in such manner as to estop the corporation from denying that it has ratified the contract. But, on the other hand, if the benefit from the contract came to the corporation without any voluntary action on its part, or on the part of those whose acts in regard to the subject-matter of the contract are to be regarded as the acts of the corporation, then there is no principle in law or equity on which it can be compelled to carry out engagements entered into without its authority, and which it has never even impliedly ratified."

Central Law Journal.—17th March, 1882.

Real Estate Agents, by J. M. KERR. The learned writer says, "It is now well settled, that where an agent acts merely as a middleman to bring the parties together, and they do their own trading, he may recover a commission from both; particularly so when it is with full knowledge of the parties. * * * But when the agent goes beyond the point of a mere middleman and employs either his skill, knowledge or influence in consummating the transaction, this rule will not apply." This is somewhat in conflict with propositions quite as broad which the learned writer cites later on and supports by authority. After stating that there is a contrariety of opinion as to the right to receive double commission, he says that all the courts "declare that where such double employment is unknown to either party, no commission can be recovered from such party." The question has been decided in Ontario in the same way in *Culverwell* v. *Campton*, 31 C. P. 342; 1 C. L. T. 57. The commission is earned where the agent has been the efficient cause in procuring a sale; and where he is employed to make a sale at a price satisfactory to the seller, he has earned his commission, when he produces a man ready and willing to purchase at a satisfactory price.

Inn-keepers and their liabilities for the property of their guests, by W. W. RAMSAY. To give rise to the extraordinary liability of the inn-keeper at common law, several things must have concurred. First. The person sought to be charged must be (or have been) a common inn-keeper. Second. The person seeking to charge such inn-keeper, should have become, in point of law, his guest. Third. The goods, property, or valuable things of the guest, must have been placed *infra hospitium*, that is, entrusted to the care and keeping of the inn. Fourth. Such goods, property, or valuable things, must have been stolen or lost from the inn, in a manner not attributable to the fault of the guest." The subject is then treated by collecting under each of these heads the cases in which "inn-keeper" and "guest" have been defined, and in which the other points have come up for decision.

Ibid—24th March, 1882.

Injury to Parental Feelings, by A. J. DONNER. "In the absence of personal injury, it has been ruled, that injury to the feelings of another due to negligent conduct, cannot be considered as a basis of damage or as a substantial ground of action." This is exemplified by the citation of authorities, and is the foundation of the main subject. When a child sues he may recover for the suffering he has undergone, both in body and mind. But in an action for the same injury by the father, the latter cannot recover compensation for the child's sufferings, or for his own sympathetic sufferings, lacerated feelings or disappointed hopes. Seduction and forcible abduction are set down as exceptions, because though based upon the predicate of a loss of service, parental feelings may be considered by the jury.

Suits brought on the same Cause of Action in different States; and Actions on Judgments from another State, by WM. ARCHER COCKE. "We are sustained by precedent and text-writers, in concluding that pending the action in one State, suit can be brought in another State on the same cause; but if judgment has been obtained on the first action, then, if necessary, suit must be brought on the judgment."

Ibid.—*31st March*, 1882.

The right of stoppage in Transitu, by CHARLES BURKE ELLIOTT. The right is defined and exemplified. It exists in the vendor or consignor, or any person who rests his claim upon a proprietary right, but not in one who is merely surety for the price. When a third person had paid for the goods and taken an assignment of the bill of lading as security for the advance, he was held entitled to the right. The insolvency of the vendee may have existed at the time the purchase was made, if it were unknown to the vendor, without affecting the right. The carrier should retain possession of the goods till the validity of the asserted claim is established. The right may be defeated, "(*a*) By the actual or constructive delivery of the goods, etc., or by the placing of them under the control of the vendee, or assignee, or his agent or administrator. (*b*) By an indorsement of the bill of lading for a valuable consideration to a *bona fide* indorsee." Cases are then given illustrative of the termination of the right by the ending of the transitus.

Ibid.—*7th April*, 1882.

Telegrams as Evidence, by JAS. A. SEDDON. Authority from the American Courts is cited to show that the original message is that delivered by the telegraph agent, as the agent of the sender, and not that written by the sender and handed to the operator for despatch. "Some inconsiderate expressions of opinion" to the contrary are given, merely to be disposed of by the learned writer, an easy thing to do, if they are all mis-stated, as *Kinghorne* v. *Montreal Telegraph Co.*, 18 U. C. R. 60, has been. In that case it was held, that no damages could be recovered against the Company, "because," as the learned writer says, "if the message had been delivered it would not have made a contract, *it being impossible to make a valid contract over the wires.*" Cut off the words in italics, and we have the ground for the holding of the Court as reported, viz., that the messages, when read together, did not make a contract, and therefore there was no loss by non-delivery of one of them. The discussion as to which is the "original" arises from a confusion of terms. That penned by the sender is the original in every sense of the word, though the copy delivered by his servant, the telegraph agent, may bind him. When a solicitor drafts a notice, signs it, and hands it to his clerk for copying and service, the copy made and delivered by the clerk is not the original, though the solicitor may be obliged to abide by it. The same process is gone through in despatching a telegraphic message. The sender writes, or causes to be written and approves of, the original message. His servant, the telegraph operator, makes a copy—it makes no difference (to use an expression in the article under review) whether with a steel pen an inch long, or with a

copper wire a thousand miles long—and delivers the copy so made. Is this copy any more the original message, because *ex necessitate* a copy must be delivered? Or is the copy of the message delivered any more an original, because the telegraph operator who delivers it is the servant of the sender, than is the copy of the solicitor's notice an original, because it is delivered by his clerk. But it is said, the same presumption of regularity is applicable to telegraphic communications as to those through the post-office, and so the best evidence as against the party receiving, is the message delivered. *Au contraire*, the message itself as written by the sender is the best evidence, not of what the receiver received, but of what the sender sent; and the presumption of regularity in transmission aids the sender, until his *prima facie* evidence thus adduced is rebutted by proof from the receiver that the sender's servant made a mistake in copying, transmitting or delivering the message. In an article on "Contracts by Telegraph," by C. G. TIEDEMAN, 12 Cent. L. J. 365, reviewed in 1 C. L. T. 323, the American doctrine is more truly stated to be that the Company is the agent of the sender, and the latter is bound by the message as delivered, and that the receiver is entitled to put in evidence the message received as the original.

Does stipulation for attorney's fee render a promissory note non-negotiable? by EDWIN VALISE. Some cases are given upon the construction of instruments containing a promise to pay an attorney's fee if the note is collected by suit. The cases are conflicting.

Professional Ethics; Should a Lawyer practice in a Court in which the Judge is his near kinsman? by JNO. F. HAGEMAN. Certainly not, if he has the choice of courts and his kinsman is the sole member of the Court chosen; or if he devotes his time to a special class of business that must be transacted in that Court, and not elsewhere. And that, not so much because of the weak human nature of Judges—at least, we hope not, but to avoid the very appearance of evil, and to take away the ground for whisperings. If the kinsman be but one of several members of a Court, or if the business, in its due and (so far as the counsel is concerned) unalterable course, brings him occasionally into his kinsman's Court, we see no reason why he should not plead there.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

NOVA SCOTIA.] [28TH MARCH, 1882.

CREIGHTON v. CHITTICK *et al.*

Insolvent Act, 1875—*Trader—Pleading.*

This was an appeal from a judgment of the Supreme Court of Nova Scotia (1 C. L. T. 568), making the rule *nisi* taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants. The action was brought by the plaintiff as assignee of L. S. Fairbanks, under the Insolvent Act of 1875, for several trespasses alleged to have been committed on the property known as the Shubenacadie Canal property, and for conversion by the defendants to their own use of the ice taken off the lakes through which that canal was intended to run.

The declaration contained six counts, the plaintiff claiming as assignee of Fairbanks. Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said Creighton was not, nor is such assignee as alleged."

After the trial both counsel declined addressing the Judge, and it was agreed that a verdict should be entered for the plaintiff with $10 damages, subject to the opinion of the Court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the Court should have power to enter judgment for or against the defendants with costs. A rule *nisi* for a new trial to be granted accordingly, and filed.

The rule was taken out as follows:—"On reading the minutes of the learned Judge who tried this cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent subject to the opinion of the Court, with power to take all objections

arising out of the evidence and minutes, and with power to the Court to enter judgment for or against defendants, with costs, be set aside with costs, and a new trial granted herein."

This rule was made absolute in the following terms:—"On argument, etc., it is ordered that the rule *nisi* be made absolute with costs and judgment entered for the defendants against the plaintiff with costs." Thereupon plaintiff appealed to the Supreme Court of Canada, and it was

Held, that by traversing the plaintiff as assignee, the defendants put in issue the fact implied in the averment, that the plaintiff was assignee in insolvency, that Fairbanks was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that Fairbanks bought or sold in the course of any trade or business, or got his livelihood by buying and selling, that the plaintiff failed to prove this issue. Appeal dismissed, the rule varied and made absolute for a new trial.

Per Gwynne, J. Assuming Fairbanks to be a trader still the defendants were entitled to judgment upon the merits which had been argued at length. That the agreement at *nisi prius* authorized the Court to render a verdict for plaintiff or defendant accordingly, as they should consider either party upon the law and the facts entitled; that the Court, having exercised the jurisdiction conferred upon them by this agreement, and rendered judgment for the defendants, this Court was also bound to give judgment on the merits; and as judgment of the Court below in favor of the defendants was substantially correct to sustain it. And it having been objected that as the rule *nisi* asked for a new trial, the rule absolute in favour of defendants was erroneous, that such an objection was too technical to be allowed to prevail, and that the rule *nisi*, having as it did, recited the agreement at *nisi prius*, and the Court below having rendered a verdict for the defendants, it should be upheld, except as to the plea of *liberum tenementum* which should be found for the plaintiff or struck off the record, and that to order a new trial could be but to protract a useless litigation at great expense.

Thompson, Q.C., for appellant.
Rigby, Q.C., for respondent.

ROSS v. HUNTER.

Trespass—Registration—Notice—Rev. Stats. N. S., 4th series cap. 79, secs. 9 and 19.

This was an action brought by appellant against the respondent for having erected a brick wall over and upon the upper part of the south wall or corner of plaintiff's store, pierced holes, etc. (See 1 C. L. T. 554). To that respondent pleaded, besides not guilty and not possessed by special pleas, that he had done the acts complained of for a valuable consideration paid by him. On the argument before the Supreme Court, by permission of the Court, an added replication was filed, setting up the provisions of the Registry Act and the defendant pleaded an equitable rejoinder, alleging that plaintiff and those through whom he claimed had notice of

the defendant's title to this easement at the time they obtained their conveyances. In 1859, one *Caldwell*, who then owned appellant's property, granted by deed to respondent, the privilege of piercing the south wall, carrying his stove-pipes into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than plaintiff's, appellant.—The appellant purchased in 1872 the property from the Bank of Nova Scotia, who got it from one Forman, to whom Caldwell had conveyed it, all these conveyances being for valuable consideration. The deed from Caldwell to respondent was not recorded until 1871, and appellant's solicitor, in searching the title, did not search under Caldwell's name after the registry of the deed by which the title passed out of Caldwell in 1862, and did not therefore observe the deed creating the easement in favour of plaintiff. There was evidence that when one's attention was called to it respondent had no separate wall and the northern wall above appellant's building could be seen.

Held, (Gwynne, J., dissenting), that the continuance of illegal burdens on the plaintiff's property since the fee had been acquired by him, were in law fresh and distinct trespasses against the plaintiff, for which he was entitled to recover damages unless bound by the license or grant of Caldwell. 2. That the deed creating the easement was an instrument requiring registration under the provisions of the Nova Scotia Registry Act, 4th series Rev. Stats., N. S., cap. 79, secs. 9 and 19, and was defeated by the prior registration of the subsequent purchaser's conveyance from Caldwell for valuable consideration, and therefore from the date of the registration of the conveyance to Forman, the deed of grant to respondent became void at law against Forman and all those claiming title through him. 3. That there was no actual notice given to the appellant, such as to disentitle him to insist in equity, on his legal priority acquired under the Statute.

Appeal allowed with costs.

Thomson, *Q.C.*, for appellants.
Rigby, *Q.C.*, for respondent.

GUILDFORD v. ANGLO-FRENCH S. S. COMPANY.

Master of ship—Dismissal of—Damages—Misdirection—New trial.

This was an appeal from a judgment of the Supreme Court of Nova Scotia making absolute a rule *nisi* to set aside a verdict of $2,000 for appellant (1 C. L. T. 554).

The action was brought by appellant against respondents to recover damages for an alleged breach of contract. The plaintiff was master of the S.-S. *George Shattuck*, trading between Halifax and St. Pierre. She was owned by defendant company, the plaintiff being one of the largest shareholders of the company. Plaintiff's contract was, that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at St. Pierre forty-

eight hours, but the time was afterwards lengthened to sixty hours by the company, yet the plaintiff insisted on remaining only forty-eight hours, against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd May, without prior notice, dismissed from the service of the company. The case was tried without a jury before Sir W. Young, C.J., who gave judgment in favour of appellant for $2,000, and in estimating damages, the learned judge considered the appellant to be a part-owner in the steamer, and that he was not a master in the ordinary sense. The verdict was set aside by the Supreme Court of Nova Scotia. On appeal to the Supreme Court of Canada, it was

Held, that appellant, although a shareholder, had no title whatever to any share of the ship, and that damages were allowed upon an erroneous principle; that a new trial was properly ordered, in order to determine whether, irrespective of the appellant being a shareholder, the causes for dismissal relied upon and the evidence given thereof were sufficient to justify dismissal without notice.

Appeal dismissed with costs.

Thompson, Q.C., for appellant.
Rigby, Q.C., for respondents.

TROOP *et al.* v. HART.

Trover—Sale—Lien—Insolvent Act, 1875—Proving on estate—Effect of—Right of possession.

This was an action of trover, charging the appellants with converting 250 barrels of mackerel, which were the property of W. M. Richardson, the respondent's assignor. One of the branches of the appellants' business was the supplying of merchants who were connected with the fishing business in the country, and who in return sent their fish, which was sold, and the proceeds placed by appellants to the credit of their customers. One Shaw, who so dealt with appellants, in October, 1877, sent 77 barrels of herring and 236 barrels of mackerel, and on the 3rd November, same year, while these fish were in the store of appellants, sold the 236 barrels of mackerel, along with a quantity of other fish, to W. M. Richardson, at $8 a barrel. Richardson paid half in cash, and gave Shaw a note for the balance at four months. This note was given to appellants by Shaw, on account of his general indebtedness. On the 4th March, 1878, Richardson became insolvent, and the respondent was subsequently appointed assignee, and demanded and brought an action to recover the 236 barrels of mackerel. After issue was joined, the appellants proved against the estate of Richardson on the note, and received a dividend on it. The Chief Justice at the trial gave judgment for $1,888, less $46.10 for one months' insurance and six months' storage, and found that the defendants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting; *ante*, p. 95.

Held (Strong, J., dissenting), that the defendants failed to prove the right of property in themselves, upon which they relied at the trial; that the property was in the respondent, who had, as against the appellants (no claim for lien having been set up), a right to the immediate possession of the fish. 2. That, as the fish had not been stored with appellants by way of security for a debt due by insolvent, appellants could not at the same time make a claim on the estate for the whole amount of insolvent's note, receive a dividend thereon, and retain possession of the fish.

Appeal dismissed with costs.

Thompson, Q.C., for appellants.
Rigby, Q.C., for respondent.

THE DOMINION TELEGRAPH CO. v. SILVER, *et. al.*

Libel—Slander—Telegraph message—Liability of Telegraph Company—Special damages—Inadmissibility of evidence as to, when not alleged—Excessive damages.

This was an action brought by the respondents as partners in trade for defamation of the respondents in their trade. In the declaration it was alleged:—1. That they were wholesale and retail merchants at Halifax. That appellants wrongfully, falsely and maliciously, by means of their telegraph lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated and published the false and defamatory message following:—"John Silver & Co., wholesale clothiers, of Greenville Street, have failed; liabilities heavy." 2nd. That same message was caused also to be published in other parts of the Dominion. 3rd. That the appellants promised and agreed with the proprietor or publisher of the St. John *Daily Telegraph* newspaper, and entered into an arrangement with him, whereby the defendant agreed to collect and transmit, by means of their telegraph lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages and should publish them in his newspaper, and that in pursuance of said agreement the appellants wrongfully, maliciously and by means of said telegraph, transmitted, sent and published from their office in Halifax to their office in St. John, and there falsely and maliciously caused to be written, printed, copied, circulated and published the above message, whereby many customers who had heretofore dealt with plaintiffs ceased to do so, and their credit and business, standing and reputation were thereby greatly damaged.

The appellants denied the several publications charged, and also the entering into the agreement mentioned in the third count and the forwarding of the messages as alleged. At the trial it was proved that the telegram which was published in the morning paper was corrected in the evening edition, and that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatch was not produced. The only evidence as to damage was the evi-

dence of two witnesses, who proved that by reason of the publication they ceased to do business with respondents as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange and sometimes discounting their notes. The counsel for the defendants moved for a non-suit which was refused and the case was submitted to the jury who, upon the evidence, rendered a verdict for the plaintiffs with $7,000 damages On appeal to the Supreme Court of Canada, it was

Held, 1. (Sir W. Ritchie, C.J., dubitante, and Henry, J., dissenting), that the damages were excessive, and therefore a new trial ought to be granted.

2. Per Strong, Taschereau and Gwynne, JJ. The evidence as to special damages, no special damages having been alleged in the declaration, having been objected to, was inadmissible, and therefore a new trial should be granted.

Per Gwynne and Taschereau, JJ. Assuming the agreement in question to be one within the scope of the purposes for which the defendants were incorporated, and that Snyder had sufficient authority to enter into it on behalf of the defendant company, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the said proprietor and publisher of said news, for which the damages were awarded.

Appeal allowed with costs.

McCarthy, Q.C., and *Rigby*, Q.C., for appellants.

Thompson, Q.C., for respondents.

P. E. ISLAND].

HOLMAN v. GREEN.

Letters patent under Great Seal P. E. I. of foreshore in Summerside Harbour, void—B. N. A. Act, sec. 108—*Public Harbour—*25 *Vict. cap.* 19, *P. E. I.*

This was an appeal from a judgment of the Supreme Court of Prince Edward Island, making absolute a rule for a nonsuit in an action of ejectment, brought to recover possession of a portion of the foreshore of Summerside Harbour. The plaintiff's title consisted of Letters Patent under the Great Seal of Prince Edward Island, dated 30th August, 1877, by which the Crown in right of the Island, and assuming to act in exercise of authority conferred by a Provincial Statute, 25 Vict. cap. 19, purported to grant to plaintiff in fee simple the land sought to be recovered in the action.

Held, that under sec. 108 B. N. A. Act, the soil and bed of the foreshore in the harbour of Summerside belongs to the Crown, as representing the Dominion of Canada, and therefore the grant under the Great Seal of P. E. Island to plaintiff is void and inoperative.

Appeal dismissed with costs.

Davies, Q.C., for appellant.

Peters, for respondent.

ONTARIO.

High Court of Justice.

CHANCERY DIVISION.

[THE CHANCELLOR, 22ND APRIL, 1882.

WILMOT v. STALKER.

Specific performance—Statute of Frauds—Description of vendor—Costs.

One of the conditions of sale of a farm was:—"The vendor shall have the option of a reserved bid, which is placed in the hands of the auctioneer." The reserved bid was.—"*Re* sale of A. W.'s farm. Reserved bid, $105 per acre." The defendant signed an agreement to purchase, at the foot of the conditions of sale, in which the vendor's name was not stated.

Held, that the agreement might be read in connection with the above condition and the memorandum containing the reserved bid; but that, even when taken together, they did not, in the absence of extrinsic parol evidence, identify A. W. as the vendor, and that the agreement was therefore insufficient to satisfy the Statute of Frauds.

The defence being purely technical and unmeritorious, the action was dismissed without costs.

Maclennan, Q.C., for the plaintiff.
Foster and *J. B. Clarke*, for the defendant.

GILL v. CANADA FIRE AND MARINE INSURANCE CO.

Fire Insurance—Contract for sale—Insurable interest of vendor—Assignee in insolvency—Change of risk.

Held, that an intending vendor of property has an insurable interest therein pending the contract of sale; and it makes no difference that he is an assignee in insolvency, his insurable interest as such being not less than that of an ordinary vendor.

Held, also, in such a case, that there was no misrepresentation in the plaintiff insuring the property as "his," there being no application and answers, and no enquiries having been made by the Company as to the nature or extent of his interest.

The policy was conditioned to be void "if the risk be increased or changed by any means whatever." Some new machinery had been substituted for old in the insured premises; but it was not shown that the risk was increased or the character of the premises changed.

Held, following *Ottawa, etc. Co.* v. *Liverpool, etc. Insurance Co.*, 28 U. C. R. 522, that "change of risk" and "increase of risk" are synonymous, and this defence therefore failed.

Moss, *Q.C.*, and *Muir*, for the plaintiff.

W. Cassels, and *Laidlaw*, for the defendants.

SPROULE v. STRATFORD.

Party Wall—Extension in height by one party—Character of extended wall—User of.

There was a party wall between adjoining properties, which the defendant's predecessor in title seventeen years before action extended in height, overlapping on the plaintiff's half with the consent of the plaintiff. The extension formed the side wall of an opera house; and the defendant lately gave notice that he ceased to consider it a party wall, and thereupon pierced and inserted a window in the upper part of the wall.

Held, that the extension in height of the wall was a continuation of the party wall, and that the insertion of the window therein by the defendant was an unauthorized user of it.

Bethune, *Q.C.*, for the plaintiff.

Hardy, *Q.C.*, and *Wilkes*, for defendant.

TOWNSHIP OF OAKLAND v. PROSSER.

Township Treasurer—Bond—Moneys for general uses of Municipality—Deficit in school moneys—Liability of sureties.

The bond of a Township Treasurer, dated 6th October, 1874, was conditioned to pay over for the use of the municipality all moneys coming to his hands by virtue of his office, and applicable to the general uses of the municipality. A deficit occurred in Clergy Reserve moneys and moneys derived from the distribution of the Provincial surplus. By two by-laws of the municipality, passed in 1859 and 1875, these two funds were set apart for educational purposes, and directed to be invested and the interest distributed "amongst the several school divisions as the Township Council shall direct."

Held, that as there is a plainly recognized distinction between municipal moneys specifically appropriated and those unappropriated, *prima facie* these funds being appropriated to educational purposes ceased to be applicable to general uses or purposes of the corporation, and as against the sureties to the bond were not within its condition.

Held, also, that the operation of the bond was not enlarged by R. S. O. cap. 180, sec. 213, and cap. 204, sec. 221, which refer only to Treasurers of Counties, Cities or Towns, and not to Township Treasurers.

Hardy, *Q.C.*, and *Wilkes*, for the plaintiff.

Smyth, for defendant.

[FERGUSON, J., APRIL, 1882.

WOLFE v. HUGHES.

Agreement for sale of land—Construction of—Reformation—Pleadings.

By an agreement for the purchase of land for $2,200, on which there was $364 due the Crown, the defendant agreed to pay down $300, "the remaining $1,900 (after deducting the amount due to the Crown) payable in instalments of $100 each * * during 19 years * * the first of the said instalments to become due on 1st April, 1874."

Held, that the meaning of the agreement was, that the defendant should pay to the plaintiff the difference between $1,900 and the amount due the Crown, in annual instalments of $100 each, commencing on 1st April, 1874; and that the defendant was not entitled to postpone the payment of the plaintiff, by applying the first several instalments, as they matured, in payment of the amount due the Crown.

Semble, that where a plaintiff does not ask for reformation of an agreement on the argument, the mere fact that it is part of the relief sought by his pleadings, does not entitle the defendant (not having asked it in his defence) to ask therefor on the argument.

S. H. Blake, Q.C., for the plaintiff.
McMichael, Q.C., for the defendant.

ROBERTS v. HALL.

Adoption of child—Agreement to devise to child—Specific performance—Illegal Consideration—Public Policy.

The plaintiff's parents entered into a written agreement with D. H. and M. H., the defendants' ancestors (the plaintiff's uncle and aunt) to give the plaintiff to D. H. and M. H. for adoption, in consideration of which D. H. and M. H. were to support and maintain her and leave all their property to her (they having no child), or if children were born to them, then to give her an equal share with them. The plaintiff consequently lived with her uncle as his daughter till she married, during which time he spoke to her of the agreement and that she was to have his property. He died intestate, and the plaintiff claimed specific performance of the agreement as against his heirs at law.

Held, that the agreement should not be performed, for it was contrary to public policy and illegal, inasmuch as the law gives the father the custody and control of his children, and casts upon him the duty of caring for them, and this duty he can neither renounce nor delegate; and the fact that the agreement had been executed as to the plaintiff made no difference.

S. H. Blake, Q.C., for the plaintiff.
McCarthy, Q.C., for the defendants.

PETRIE v. GUELPH LUMBER CO. *et al.*

Incorporated Company—Prospectus—Misrepresentation without fraud—Subscription induced thereby—Laches.

The defendants other than the Company, after carrying on business as lumbermen for some time and incurring liabilities, obtained a charter of incorporation under the name of the Guelph Lumber Company. A favourable prospectus was issued by the Company, purporting to set forth its advantages and the desirability of subscribing for its stock, and on the faith of the prospectus, exhibited to him by the agent of the defendants other than the Company and one of the defendants, the plaintiff was induced to subscribe for preference stock offered by the prospectus. At this time the Company was largely indebted to its bankers, and, the business not being well managed and the price of lumber not increasing, this indebtedness increased, and the property was mortgaged, and finally conveyed absolutely, to the bank. Upon the evidence adduced the Court was of opinion that, though inaccuracies occurred in the prospectus which were traceable to negligence, the plaintiff failed to sustain his allegation that the defendants other than the Company had concocted a scheme to form a company, which should assume their business, relieve them from personal liability and enable them more successfully as a company to induce the public to advance money to extricate them from their difficulties. The plaintiff claimed damages to the extent of his subscription.

Held, that the action, as far as it related to the defendants other than the company, was in effect an action of deceit, and that upon the above finding the plaintiff was not entitled to succeed.

The plaintiff was one of an investigating committee, and after having obtained the knowledge upon which he filed his bill, acted at a meeting of shareholders, and was guilty of delay in taking proceedings.

Held, that he was precluded from asserting the right to be relieved from his contract.

McCarthy, Q.C., for the plaintiff.

E. Blake, Q.C., and *W. Cassels, Bethune, Q.C.*, and *W. Barwick* and *Brough*, for several defendants.

BELL v. LANDON.

Trust for sale—Sale—Subsequent acquisition of property by trustee.

L., being an executor and trustee under a will, became the owner of part of the testator's property by purchase from R., who was declared the purchaser at an auction sale thereof. O., one of the beneficiaries under the will, alleging that the property had been sacrificed, threatened proceedings against the executors, and they settled with him by giving him his proportionate share of the amount which he estimated the property was worth. This was done with the knowledge and consent of the other beneficiaries, who agreed to allow L. to retain out of the proceeds a proportionate contribution from each share to recoup to him the amount overpaid to O. A

deed conveying all the shares to L. was executed in consideration of their proportionate shares. They all had the advice of counsel, and it was explained to the plaintiff that it was a conveyance of his share and not a mere acquittance to the executors. Some years afterwards the plaintiff alleged that R. was the secret agent of L. for purchase of the property, which had been fraudulently obtained at half its value, and that as this was not disclosed to the plaintiff he was not bound by the deed. The Court was of opinion upon the evidence that the property had brought a fair price, and that L. had acquired it *bona fide* by purchase from R., though he had placed himself in a position to excite suspicion.

Held, that the plaintiff was therefore bound by the deed; for he could not complain of the non-disclosure of a fact which had no existence.

IN CHAMBERS.

[THE CHANCELLOR, 17TH DECEMBER, 1881.

SUTHERLAND v. McDONALD.

Security for Costs—Wilful mis-statement of plaintiff's residence—Effect of.

Where a plaintiff, resident without the jurisdiction, wilfully stated in his bill that he resided within it, security for costs was ordered.

A subsequent order was granted rescinding this order, on the ground that the plaintiff had returned within the jurisdiction and intended to remain there, but, on appeal, was reversed, and the order for security directed to stand.

ALEXANDER v. DIAMOND *et al.*

Examination of Parties

If the issues between co-defendants are material to the case of the plaintiff or to the character of the relief which he seeks, he may examine a defendant upon them, though there is no issue between that defendant and himself.

Claim:—That by an agreement, dated 30th November, 1881, made between the plaintiffs and defendants the Diamonds, the plaintiffs purchased from the said defendants certain lands in Manitoba, which agreement had been duly registered. That on 28th September, 1881, the defendant W. Diamond had authorized Crothy & Co., estate agents in Winnipeg, to sell the same land, and they had purported to sell the same to the defendant Walsh, who, having actual notice of the sale to the plaintiffs prior to registration of his alleged agreement, thereafter registered the same, together with the authority to Crothy & Co. Averment, that Walsh's agreement is insufficient under the Statute of Frauds, and though the plaintiffs had no notice or knowledge of the same when they bought, and are ready and willing to carry out their contract, the defendants the Diamonds have

failed to remove from the title the cloud created by Walsh. Prayer for specific performance.

Defence and counterclaim by Walsh:—That his agreement is valid; that he had no notice of the plaintiffs' agreement; that under his prior registration, he is entitled to have the land conveyed to him; prayer for specific performance of his agreement.

Defence and counter-claim by the Diamonds:—Denial of Crothy & Co.'s agency. Averment, that if Crothy & Co. were their agents, they were themselves interested in the pretended purchase by Walsh, and acted in collusion with him to procure the land for their joint benefit, contrary to their duty as agents; prayer that the alleged agreement with Walsh should be set aside.

Walsh was examined by the plaintiffs before the Master at London, and upon counsel's interrogation as to the interest, if any, of Crothy & Co. in the alleged purchase by him, Walsh, he refused to answer, on advice of counsel, because there was no issue between the plaintiff and himself on that point.

H. Cassels now moved for an order that Walsh attend before the Master at his own expense for further examination.

J. H. Macdonald, for Walsh, argued that the examination in the cause was a substitute for the old practice of administering interrogatories, and must therefore be confined to the issue raised between the examining party and the witness; that there was no issue between the plaintiffs and Walsh as to Crothy & Co.'s interest, and that the plaintiffs could not take advan- of the issue between Walsh and his co-defendants. He cited *Proctor* v. *Grant*, 9 Gr. 26; *Fisher* v. *Owen*, L. R. 8 Ch. Div. 645.

6th April, 1882, FERGUSON, J. Counsel say that there is no technical difficulty about the form of the question put, but that the question between them is the broad one as to whether or not the plaintiffs, who have commenced their action for specific performance of a contract made with the Diamonds, and have made Walsh a party to remove a cloud on the title, can examine him on the subject of the interrogation. Walsh claims in his defence that he is owner of the land under his purchase, and the plaintiffs desire to examine him, inquiring into his contract and how it was made, and through whom, and the position of the agent who acted in the making of it. This right is denied by Walsh, and I am of opinion that he is wrong, and that the plaintiffs have the right to examine him on this subject, because it is material to their case both as to the remedy he can have against the Diamonds, and as to the cloud upon the title. Walsh will attend to be further examined at his own expense. Costs to be costs in the cause to the plaintiffs in any event.

[THE MASTER IN CHAMBERS, 4TH APRIL, 1882.

MCDONALD v. FIELD.

Solicitor—Power of to Settle suit.

A solicitor can bind his client by settling a suit if he acts *bona fide*, and, as he believes, for the best interests of the client.

J. E. McDougall, for the plaintiff.

Caswell, for the defendant.

BEAVER v. BOARDMAN.

Term's notice to proceed.

Under the Judicature Act a term's notice to proceed is not necessary though a year has elapsed since the last proceeding.

H. W. M. Murray, for the plaintiff.

Aylesworth, for the defendant.

[5TH APRIL.

KEEFE v. WARD.

Non-production of documents—Committal—Master in Chambers.

Held, that the power formerly exercised by the referee in Chambers to make an order for commital of parties for non-production of documents, is not vested in the Master in Chambers.

Symons, for the motion.

TOWNSHIP OF MONAGHAN v. DOBBIN.

Pending motion—Examination of witnesses—Order for.

Pending a motion to the Court, an appointment was taken out, pursuant to G. O. Chy. 266, before the Master at Peterborough, for the examination of certain witnesses, for the purpose of using their evidence upon the motion. On a motion to set aside the appointment as irregular,

Held, that G. O. Chy. 266 has been superseded by Rule 285, and that, under that rule, an order for the examination of witnesses on a pending motion is necessary.

G. H. Watson, for the motion.

H. Cassels, contra.

(Reported by G. H. Watson, Esq., Barrister-at-law.)

[14TH APRIL, 1882.

LONDON AND CANADIAN L. AND A. CO. v. MERRITT.

Judgment debtor—Examination of—Subsequent examination.

Held, that although a party entitled to enforce a judgment may, in the first instance, examine the judgment debtor without an order, yet where he desires to examine him a second time he must make a substantive motion for that purpose on notice to the judgment debtor, and show grounds for the order.

W. Seton Gordon, for the judgment debtor.

Arnoldi, contra.

(Reported by W. Seton Gordon, Esq., Barrister-at-Law.)

[17TH APRIL, 1882.

HILLIARD v. THURSTIN.

Transfer of action—Jurisdiction of Master in Chambers.

The Master in Chambers has no jurisdiction to make an order transferring an action from one Division of the High Court of Justice to another, notwithstanding the concluding words of section 26 of the O. J. Act. The only manner in which an action can be so transferred, is by an order made by the President of the Division in which the action has been commenced, to which the consent of the President of the Division to which it is proposed to transfer it, must be obtained.

G. H. Watson, for the motion.

H. Cassels, contra.

NOVA SCOTIA.

In the Supreme Court.

REYNOLDS v. DECKMAN.

Mortgagor and mortgagee—Injury to mortgaged property—Fixtures.

Plaintiff, in July, 1870, agreed to sell certain land to one Reynolds, who entered into possession under an agreement to pay the purchase money in October, 1870. Reynolds removed a house to the land and continued in possession for a period of about eight years, after which he left the land and sold the house to defendant, who assisted in removing it from the land. Plaintiff executed a mortgage of the property, the date of which does not appear, but the mortgagee never entered into possession. The evidence as to the nature of the attachment of the house to the soil was conflicting, but it had been occupied as a dwelling-house, had a cellar under it in which vegetables were protected from the winter, rested partially on stone, and had a drain at a depth of five feet to a neighboring brook. Plaintiff brought trover for the house, and the jury found for defendant.

Held, (McDonald, J., dissenting, and Smith, J., hesitating), that the house was part of the realty, and on being severed became the personal property of the plaintiff, that the plaintiff was the proper party to bring the action as the mortgagee could not do so before entry.

Per McDonald, J. Although if the mortgagor had been in possession the mortgagee could not bring an action for injury to the possession before entry, yet he could do so for an injury to the freehold; and the legal mortgagee had the legal title and constructive possession of the property.

BROWN v. WINDSOR AND ANNAPOLIS RAILWAY.

Railway company—Assessment.

Under chapter 24 of the Acts of 1868, the Windsor and Annapolis Railway Company are liable to be assessed for the maintenance of the dyke protecting the marsh over which the track of their road passes owned by them, section 16 of chapter 21 R. S. applying only to county assessments; and recourse need not be had to the land itself under section 159, chapter 40 R. S., as that section refers only to the original construction of the dyke where the owner has not consented.

McLEAN v. TANNER.

Promissory note—Endorsement.

Defendant's two sons purchased a vessel from one P., for which they gave their note, payable to P. or order. The defendant wrote his name on the back of the note in the same direction as the writing in the body of the note inside, and it was afterwards taken to P., who wrote his name across the back of the note. P. then handed the note to plaintiff, to whom he was indebted, plaintiff sued the defendant on the note, alleging that P. endorsed the note to the plaintiff.

Held, that the plaintiff could recover the amount of the note.

Per James, J. The plaintiff, not knowing the facts, had a right to assume that the note was endorsed, first by P. and afterwards by defendant.

Per DesBarres and Smith, JJ. The defendant, by placing his name on the back of the note and allowing it to pass on to the hands of the payee, to be by him transferred to whom he pleased, was liable to the plaintiff as a *bona fide* holder without notice.

BENT v. McDOUGALL *et al.*

Distress for rent—Shop not market—Goods of stranger exposed for sale—Exemption.

Defendants rented to a tenant certain premises, the upper portion of which was used as an inn or hotel for farmers; and a part of the lower flat provided with stalls for his lodgers, in which to sell produce to all buyers. Plaintiff occupied a stall, in which, along with goods brought there by himself, he offered for sale a quantity of apples bought in this same market or outside. The apples were seized under a distress for rent due defendant by his tenant, and plaintiff replevied, claiming that the goods were privileged from distress, being in a public market for sale. The County Court Judge decided that the goods were so privileged.

Held, that the exception could not be claimed on the ground set up in this defence, as the defendant was not using the premises as a market, but simply as a shop in which to offer in the ordinary way goods purchased to be sold for a profit.

BLETHEN v. GARDNER.

Fraud—Uncorroborated evidence.

Plaintiff's action was for the value of lumber shipped under an agreement that defendant should carry it and sell it as agent for plaintiff for cash or bills of exchange on France. Defendant could not sell wholly for cash and exchanged it for tobacco, which on its return was smuggled into port and seized by the revenue officers. The County Court Judge found on the evidence that plaintiff was cognizant of the fraud about to be committed on the revenue and gave judgment for defendant, which was reversed by this court on the evidence of the defendant as to plaintiff's participation in the fraud being wholly uncorroborated and contradicted by plaintiff.

WALLACE v. LAIDLAW.

Trust deed—Registration—Evidence—13 Eliz.

Plaintiff's father leased certain mining areas, with crushing mill and crusher, to J. & T. Watson in November, 1875, with proviso for re-entry on certain conditions. In December, 1876, he conveyed all his estate, including his interest in the lease and the lease itself, to plaintiff, in trust for certain purposes in the deed mentioned, and the trustee took possession in February, 1879, for non-payment of rent over-due. In October, 1878, a distress warrant for poor and county rates was issued against the lessor, under which the property in question was sold and came into the possession of defendant, from whom it was replevied by plaintiff. Objection was taken to the want of registration of the lease, and that the trust deed was not filed, but only recorded. There was no legal proof of the assessment, the posting or service of notice, or of the signature or official character of the officer who issued the warrant, all of which were put in issue by the pleadings, but evidence was given by defendant of conversations with plaintiff's father after he had parted with his legal interest in the property.

Held, that the Statute 13 Eliz. did not refer to the case at all, as it made the conveyances to which it referred void only as against certain classes of persons, none of which could cover the case of defendant, and that the conveyance could be avoided at common law only as against one who had a former right, title or interest, which defendant had not; that the non-registration of the lease did not affect the plaintiff's position at all, or if at all, it only enlarged his interest, and the trust deed did not require to be filed, but only recorded; and that the evidence of defendant referred to was inadmissable, not being part of the *res gestae*.

NAYLOR v. BELL.

Distress for rent—Abandonment.

Plaintiff, through his bailiff, distrained on goods of his tenant Boyne, April 5th, but no attempt was made to sell until twelve days afterwards, no appraisement was made, and the tenant was left in possession. One

reason given for the delay was that the tenant's children were sick and could not be moved, but there were other circumstances connected with the delay that pointed to an abandonment of the distress by the bailiff. The goods were seized April 16, under a writ of replevin, by defendant, as sheriff, at the suit of a chattel mortgagee, upon which this action was brought to recover damages for the removal of the goods. The County Court Judge found that the plaintiff must be considered as having abandoned his distress, and he gave judgment for defendant.

Held, that the appeal must be dismissed with costs.

Per Smith, J. The goods had not been sold in reasonable time, and although the agreement between the landlord and the tenant for delay would obviate this difficulty, had the question arisen between those parties, there was no pretence to hold that as against the sheriff the goods were *in custodia legis*.

Per McDonald, J. The County Court Judge having found that the distress had been abandoned, this court has no power to interfere with that finding and the court could only reverse his decision, if at all, on the ground, not that it was against the weight of evidence, but that there was no evidence to support it, the appeal not having been taken on the ground that it was against the weight of evidence.

Per Weatherbe, J. The evidence in support of plaintiff was of so suspicious a character, that the Judge below was enabled, in the exercise of an intelligent discretion, to find as he had done and should have done.

James, J., dissenting, held, that there had been no abandonment; and interpreted the finding of the County Court Judge that there had been, not as a conclusion of fact, but as a conclusion of law, which he held to be erroneous.

THE

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THE FINE ARTS IN COURT.

A CANADIAN might be pardoned for doubting, whether it would ever be worth while going to law about the sign-board of a country inn; but in England, the ownership of such an article has been seriously contested and gravely considered. In 1847, one Roberts was tenant from year to year of "The Royal Oak Hotel," at Bettws-y-Coed in North Wales. David Cox, a friend of mine host, and a visitor at the hotel, painted on the sign-board a picture of King Charles, the martyr, in an oak, with cavaliers on horseback riding underneath, and it was fastened to the outside wall over the doorway of the inn. In 1849, Cox, being again at the Royal Oak, for (as the Encylopædia Britannica says) Bettws-y-Coed and its neighbourhood was everything to him, retouched and varnished his picture. The King and the oak and the cavaliers and their horses all remained *in statu quo* until 1866, when the sign was placed within the hotel, owing to some alterations made in the house, and at the request of artists, who recognized the merits of this painting, (it being the work of a brother of the brush, whose works are so truly English, with an artistic mastery and a power to convey the impressions intended unsurpassed, perhaps, unequalled by the works of any of his contemporaries). At first the painting was placed in the sitting-room, and then being encased in an old oak frame and glazed, was taken into the hall and

there fastened by means of a screw to a wooden plug let into the wall. In 1879, a dispute as to the ownership of this picture sprang up between Lady D'Eresby, the owner of the hotel, and the trustee in insolvency of Miss Thomas, mine host's representative. The Judge of the County Court gave it as his opinion that it was painted for the house, and was a fixture, and so belonged to her ladyship. But the Chief Judge, when the matter came before him, thought otherwise; considered that the title to the picture was perfectly free from all possibility of doubt; that it belonged to the original Roberts for all purposes—being the gift of the person who painted it; that the manner of fastening it could have nothing to do with the question; that it was a chattel; and that it would be a monstrous thing to say that the inheritance had a right to claim such a chattel, which had been handed down from father to son, and which had been used simply for the purpose of decorating at one time the outside, and at another, the entrance hall of the hotel. The Chief Judge was apparently no great admirer of Cox's style, for he remarked somewhat disparagingly:—"Roberts may have considered that the picture was a great attraction to the hotel, and in point of fact he knew that it was, although, I must say, that the beauty, the picturesqueness of the surrounding scenery of Bettws-y-Coed is of far greater attraction to artists and visitors than this picture could possibly be" (*a*).

Perhaps, the Judge did not remember that however beautiful a landscape be, or however lovely a view, one cannot acquire an easement or right of property therein. Wray, C. J., said long since, "prospect, which is matter only of delight and not of necessity, no action lies for stopping thereof" (*b*).

In *Dicks* v. *Brooks* (*c*), a beautiful engraving of Millai's famous picture of "The Huguenot" and a chromo-lithographed Berlin wool-work pattern of the same picture were

(*a*) *Ex parte Sheen, Re Thomas*, 43 L. T. R. 638; 29 W. R. 248.
(*b*) *Aldred's* Case, 9 Rep. 57, n.; *Bowden* v. *Lewis*, 19 R. I.
(*c*) 43 L. T. N. S. 71.

considered by the Court of Appeal. It was alleged that the latter was a piratical copy of the former, and it was for the Lord Justices to say whether it was or no. James, L.J., must have forever endeared himself to the Gushingtons, when he said: "No doubt the art of the engraver is often of the very highest character of art, as in the print before me. It is difficult to conceive anything of much higher skill or art than that which has by a wonderful combination of lines and touches reproduced the very texture and softness of the hair, the very texture and softness of the dress, and the wonderful look of love and admiration in the eyes of the young lady looking up at her lover." The artists of the South Kensington School of Needlework must have been charmed when the learned Judge called the wool-work pattern, "a mosaic of colored parallelograms—not in any sense a piratical imitation of the print; a work of a different class of art intended for a different purpose, and in my opinion (quoth he), no more calculated to injure, in the sense in which protection is given by these Acts of Parliament (those as to copyrights), the print *qud* print, or the reputation of the engraver, or the commercial value of the property in the hands of the proprietor, than if the same group exactly were reproduced from the same engraving by wax-work at Madame Tussaud's, or in a plaster of Paris cast, or if taking or using this print as the design or model something were devised from it, as like it as could be, for the purpose of being printed upon a surface of porcelain, or upon any other material of that kind."

Baggallay, L.J., thus spake of the pattern and of what might be evolved "by ladies or others working in Berlin wool from it": "Here (in the chromo pattern) you have no doubt a young man and a young woman standing up in the centre of the picture, but beyond that almost every detail is altered from beginning to end you have no work of art in this wool-work pattern. The wool-work eventually to be made might probably be a work of art, but you cannot call this a work of art. You might almost as well call a representation of the king and queen on a ginger-bread

stall at a fair a work of art." Oscar Wilde, or some æsthete, ought to interview this Judge as His Lordship seems to have a liking for chromo-lithography; he spoke of "the high skill and art with which works of art are now executed in chromo-lithography, of a character fitted to be framed and hung up in a person's room or used as an ornament in that way." The Court appeared to think that a lady might work on tapestry or paint upon china, a reproduction of a print without being guilty of making a copy, or a piratical imitation, or a piratical reproduction, or a colorable imitation, of the engraving, within the meaning of the Act. In the Court below, Bacon, V.C., had considered the wool-work pattern an unlawful imitation of the engraving, and that the owners of the latter had a right to restrain the publication of the pattern and recover five shillings for every copy printed and exposed for sale (*d*).

Even under the common law a painter had, before the publication of his picture, a right to prevent any one copying it; and one who has purchased it has the same right. But after the painting has once been published, this right is lost. A sale of a picture is not a publication of it, nor is publishing a wood-cut of it in a magazine with a descriptive article; nor is exhibiting it in a picture gallery where copying is not allowed. So that where one arranged in his own studio a group which bore an exact resemblance to the picture of another painter, and then took photos for the stereoscope (colored so as to correspond with the painting), which he published and sold; it was decided that the owner of the picture was entitled to an injunction to prevent the publication and sale of the photographs, if the picture had not been previously published (*e*).

A year or two ago Malins, V.C., had to consider the portrait of General Martinez Campos, Captain-General of Cuba. One Adams had copied a photograph of this hero as a design upon earthenware; the defendant did exactly the same; and the Vice-Chancellor held that the photo-

(*d*) 40 L. T. 710.
(*e*) *Turner* v. *Robinson*, 10 Ir. Ch. 121; S. C. in Appeal, *Ib.* 510.

graph and the copying of it did not constitute a new and original design within the meaning of the Copyright Acts (*f*).

A portrait of St. Joseph was the subject of controversy in New Mexico lately. The question was, whether priest or people owned an oil painting of this patron saint that had been handed down from the early conquerors; to the people the picture "was a pillar of fire by night and a pillar of cloud by day, the withdrawal of whose light and shade crushed the hopes of these sons of Montezuma, and left them victims to doubt, to gloom and to fear. The cherished object of the veneration of their long line of ancestry, the Court permanently restores, and by its decree confirms to them, and throws around them the shield of the law's protection in their enjoyment of their religious love, piety and confidence." So spake the Court, as it restored the ancient relic to the people, and gave judgment against "one professing to be of a better instructed and more civilized race," who turned San Jose into "the means of extortion and money gathering from the unoffending inhabitants" (*g*).

The value of such men as General Washington, President Taylor and all his Cabinet, President Harrison and all his Ministers, General Taylor at the battle of Buena Vista (that is of the portraits of these worthies), and about one hundred other portraits and landscapes in oil, was considered in the United States recently. The painter, the fortunate owner of this display of bright colors, great men and lovely scenes, estimated the whole to be worth $45,000, and had them insured for that amount. A conflagration came, and Washington, Taylor and Harrison (notwithstanding their baptisms of fire in days gone by) all succumbed with their companions; then the insurance company began to look into their values. When sued, they called four experts, who, although they did not say in the words of A. Ward that these were "oil-paintings done in petroleum," testified "that as works of art these paintings

(*f*) *Adams* v. *Clementson*, L. R. 12 Ch. Div. 714.
(*g*) *Laguna* v. *Acoma*, 1 New Mex. 220.

had no value." Two of the collection (declared by the insurer to be of average merit with those gone into smoke and ashes) had escaped the flames, namely, portraits of John Wesley and Governor Bouck. (We can understand why a good man like Wesley should have been saved from fire, but why Governor B.?) The witnesses based their opinions of the lost upon these saved ones; *ex pede Herculem;* nay more, by the preacher they judged the Father of his country—from a governor they decided the worth of presidents and generals. Wonderful men are experts! Poor Wesley was called utterly worthless, and Bouck very inferior. The witnesses almost seemed inclined to say—like the artists in London, who came every morning before daylight with lanterns, to see Artemas Ward's pictures—they never saw anything like them before, and they hoped they never would again. The Judge remarked: "It is said by these witnesses that landscape paintings of like inferior quality would be worth more than portraits, because they would sell better at auction to persons without taste, or ignorant of art, or of the value of paintings. They say landscapes of like want of merit might bring $25 to $50 at auction . . . such portraits as 'John Wesley' would be utterly worthless. Paintings find their market value mainly from their quality and the name of the artist. There are in this list of paintings eighty-eight portraits, four groups of portraits, five battle pieces, four historical pieces, and four landscapes. Under the evidence, it is somewhat doubtful what the value of the destroyed paintings may be, but the proofs will justify me in finding about $3,000 as the value" (*h*). Oh, shades of Zeuxis and Apelles!

In another case where the company likewise objected to payment on the ground of over-valuation, the insurer had represented that his painting was a copy of Leonardo di Vinci's "Christ Crowned with Thorns," which was worth a million dollars or so; that the copy was by Pinos de J. Salos, the only one in America and that the Pope, who had the original, would not allow another to be taken. The

(*h*) *Luce* v. *Springfield F. & M. Ins. Co.*, 1 Flippen 281.

company, and the Court, considered the owner had misrepresented the value of the painting, thus obtaining an insurance to an exorbitant amount, and that the policy was therefore void (*i*).

In Massachusetts a "family portrait" is not deemed an article of "great and intrinsic value;" still it has some value, and in one case it was held that $200 was not an exorbitant sum at which to appraise the only extant portrait of one's father, Such articles "cannot be said to have any market value" (*j*). On the other hand the present Master of the Rolls considers that the gift of one's own portrait—though only a photograph and not even set in a frame—is a "valuable consideration" (*k*).

Sir Edwin Landseer's picture of a "Piper and a Pair of Nut-crackers" was once before the Court and the Judges took the opportunity of then deciding that there might be a copyright in a photograph taken from an engraving of a painting (*l*).

The publishers of *Punch* came into Court on one occasion and prevented one Hotten from publishing a book called "Napoleon III., from the popular Caricatures of the last thirty years," because—in addition to a great variety of caricatures of the events in the history and adventures of Louis Napoleon taken from other publications, nine had been taken from the *Punch* cartoons, with the original headings and references, but much reduced in size. The stop was put to this book, although not more than one engraving had been taken from any one number of *Punch*, and they had appeared in that periodical at intervals extending over several years (*m*). But these well-known publishers sometimes fail in their lawsuits as well as in their renowned *London Charivari*. The ownership of some of Leech's drawings (which originally appeared in a book entitled, "A Little Tour in Ireland, by an Oxonian, with

(*i*) *Wood* v. *Fireman's Ins. Co.*, 126 Mass. 316.
(*j*) *Green* v. *Boston & Lowell R.*, 128 Mass. 221.
(*k*) *Werderman* v. *Société Generale d'electricite*, L. R. 19 Ch. D. p. 254.
(*l*) *In re Walker, ex parte Graves*, 39 L. J. Q. B. 31).
(*m*) *Bradbury* v. *Hotten*, L. R. 8 Ex. 1.

Illustrations by John Leech"), or rather of the very blocks upon which that inimitable artist had himself exercised his ingenuity and skill, was in dispute in *Hole* v. *Bradbury* (*n*); and the defendants were forced to give them up, and to abstain from printing, publishing and selling "The Little Tour" at the suit of the author of the letter-press, and Miss Ada Rose Leech.

Who was the owner of the copyright of some of Thackeray's sketches and caricatures, was in dispute in *Smith* v. *Chatto* (*o*).

One may fairly and honestly criticise a painting; but if he goes too far the outraged artist may turn upon him. Ruskin, the greatest art critic of the day, wrote and published in *Fors Clavigera*, an article on the pictures in the Grosvenor Gallery, in which he used the following words: "Lastly, the mannerisms and errors of these pictures (alluding to the pictures of Mr. Burne Jones), whatever may be their extent, are never affected or indolent. The work is natural to the painter, however strange to us, and is wrought with the utmost conscience of care, however far to his own or our desire the result may yet be incomplete. Scarcely as much can be said for any other pictures of the modern school; their eccentricities are almost always in some degree forced, and their imperfections gratuitously, if not impertinently, indulged. For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask 200 guineas for flinging a pot of paint in the public's face." Mr. Whistler did not admire this criticism, and sued Mr. Ruskin for libel; the critic defended the action. The jury considered the words "wilful imposture" as just over-stepping the line of fair criticism, and found a verdict for the offended

(*n*) 12 Ch. D. 886.
(*o*) 31 L. T. 775.

painter, giving him one farthing damages as a salve to his wounded feelings. Each party had to pay his own costs (*p*).

There is no better way of concluding this very imperfect sketch of the Fine Arts in Court than by quoting the glowing description of Mr. Justice Sanderson, of the California bench, of the labels used by Messrs. Falkenburg and Lucy, respectively, for their respective washing-powders. F. accused L. of imitating his trade mark. Thus speaks the learned Judge:—"The plaintiff's label commences with a highly colored picture, representing a washing-room with tubs, baskets, clothes-lines, etc. There are two tubs painted yellow, at each of which stands a female of remarkably muscular development, with arms uncovered and clad in a red dress, which is tucked up at the sides, exposing to view a red petticoat with three black stripes running around it near the lower extremity. Each is apparently actively engaged in washing; and clouds of steam are gracefully rolling up from the tubs, and dispersing along the ceiling. In the back ground is extended across the room a clothes line, upon which are suspended stockings and other undergarments, which have evidently just been put to use in testing the cleansing properties of the plaintiff's washing-powder. To the left of the washerwoman stands a lady in a yellow bonnet, red dress, green Congress gaiters, and hoops of ample circumference; upon her left arm is suspended a yellow basket; and in her left hand, which is encased in a red glove, is held a red parasol, while the right, which is encased in a green glove, is gracefully extended towards the nearest washerwoman in an attitude of earnest entreaty. In the immediate foreground is a yellow and green clothes-basket full of dirty linen, and a yellow and green soap packing box. * * * Each wash-tub is supported by a four-legged stool, some of the legs being yellow, some red, some green, and some all three. The floor of the room, as to color, is in part of a yellowish green, and in part of a greenish red; while the walls are of a grayish blue. The design (of the picture) is good, for it

(*p*) *Whistler* v. *Ruskin*, *Times* for November 26th and 27th, 1878; *Odger* on Libel, 49.

is eminently suggestive of the character of the plaintiff's goods. The defendant's label has, on a parallelogram, a picture representing an enthusiastic young man, with head uncovered and hair blown out behind by what one (judging of causes by their effect) might suppose to be a strong breeze. He is dressed in a blouse, tights and top-boots; in his right hand he bears a banner upon whose folds, as they flutter in the breeze, appears "Excelsior." His left hand is extended upwards and pointing towards the summit of a high and precipitous mountain which towers in front of him, and which as his bearing indicates, he proposes to climb. * * * No one could mistake the modest parallelogram of the defendant for the highly coloured pictorial wash-house of the plaintiffs. No one could mistake the defendant's young man in a blouse and tights, climbing a mountain with a banner in his hand, for the plaintiff's washerwoman in petticoats, with their arms in a washtub and their heads enveloped in clouds of steam" (*q*).

To have a finally, after the conclusion (as our brethren of the clergy have oft times); that excellent and interesting contemporary, the *Albany Law Journal*, tells its readers that a M. Jacquet (being wroth at M. Alexander Dumas for having sold one of his paintings at a large profit) painted a picture which he entitled "Le Marchand Juif de Bagdad," in which the features of M. Dumas were distinctly recognizable. Fearing that his satire might be lost, the enraged artist stated whom he meant by his "Marchand Juif." The picture was hung up at a public exhibition. Upon this Dumas' son-in-law, one M. Lipman, allowed his choler to rise and visiting the exhibition poked his cane through the picture thrice. Now the parties go to law to right their wrongs and three suits begin. *Dumas* v. *Jacquet* is for libel or something akin; *Dumas* v. *Exhibition* is for an injunction to restrain the exhibition of the picture, and *Jacquet* v. *Lipman* is for damages to the painting.

(*q*) *Falkenburg* v. *Lucy*, 35 Cal. 52.

R. VASHON ROGERS.

TRUSTEES' ACCOUNTS; SUGGESTIONS FOR AN AMENDMENT OF THE LAW.

We read that "a trustee is bound to keep clear, distinct and accurate accounts. If he does not, all presumptions are against him, and all obscurities and doubts are to be taken adversely to him (*a*)." Of the undoubted wisdom of this maxim, nothing can be said in detraction. The position, the very name, of trustee, implies that the utmost good faith should not only be observed, but should be shown to have been observed in all the transactions concerning the trust estate. In addition to his duty to keep proper accounts, it is laid down that the trustee must be ready at any moment when called upon, to exhibit and render his accounts. In *Pearce* v. *Green* (*b*), Sir Thomas Plumer, M.R., is reported to have said, "It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, (for in this respect, as was remarked by the Lord Chancellor in *Lord Hardwicke* v. *Vernon*, 14 Ves. 504, they all stand in the same situation), to be constantly ready with his accounts."

The honesty of the trustee will avail him nothing if he be not prepared to prove his honesty, and that immediately when called upon. *Prima facie* he is wrong where he cannot show that he is right; and though he may ultimately show that he has dealt properly in all respects with the trust estate, it may be at the expense to himself of a suit instituted to compel him to furnish and prove his accounts. In *Springett* v. *Dashwood* (*c*), the trustee had dealt fairly in all respects, but had neglected to furnish an account when called upon. V. C. Stuart said, "In the present case the plaintiff, before the institution of this suit, applied for the

(*a*) *Perry* on trusts, sec. 821.
(*b*) 1 Jac. and W. at p. 140.
(*c*) 2 Giff. at p. 528.

accounts and got none. I am clearly of opinion, putting the fairest construction upon the conduct of D., who seems to have acted honestly as a trustee, and only to have neglected to render accounts when called upon to do so, that neglect was a breach of duty. He was bound to have his accounts ready." The consequence was that the trustee had to pay costs up to decree.

Even though the trustee furnish an account, and be possibly lulled into security by its supposed acceptance by the *cestui que trust*, he may be again disturbed by being called upon for the vouchers. "If the fact be, as it probably was, that an account was rendered, satisfying all these enquiries [made on the part of the *cestui que trust*,] by furnishing the particulars forming each of the totals which are the subjects of enquiry, and that the deed referred to those accounts, then the plea should have been that such accounts were rendered by which these things appeared, and that by the deeds the Marquis signified that he approved that account, thus manifesting all these particulars; but this plea does not aver anything of that kind. But if that were so, still I think he would be entitled to the inspection of the vouchers" (*d*).

It is in the power of every trustee to procure and exhibit proper vouchers for every transaction, to keep proper accounts and to satisfy his *cestui que trust* as to every transaction; but it is not always in his power to get such a deed of release as that hinted at in *Clarke* v. *Lord Ormonde*, it may be from the disinclination of the *cestui que trust* to bind himself by executing it, or it may be on account of the *cestui que trust* not being *sui juris*, or on account of there being persons subsequently entitled who cannot at the time be bound.

While subject to such heavy liabilities, he has not, as we have said, what should be the correlative right to discharge himself from time to time, when he is in a position to make full and satisfactory proof and explanations. His only right is to preserve his vouchers and keep prepared his ac-

(*d*) *Clarke* v. *Ormonde*, Jac. 120.

counts, which must be brought down to the latest date, ready to be submitted and proved at any moment. If by lapse of time, explanations easily made at one time are forgotten, or vouchers are lost, the trustee must bear the loss. He dare not destroy the vouchers even after exhibiting them to the *cestui que trust*, for it may some future time be taken against him or his representatives. The apathy of the *cestui que trust* in not calling for regular accounts may lull the trustee into a feeling of confidence that his dealings are fully approved, and a corresponding sense of security may throw him off his guard as to preserving evidence. It may be that vouchers have been handed to the *cestui que trust* for inspection and never returned, but lost and forgotten. In this case if the trustee be called upon at a future time by a succeeding *cestui que trust*, the latter may not, and the trustee will not, be able to produce vouchers or give explanations, and the loss falls on the trustee.

The *cestui que trust* may be, often is, a relative, and, afraid of offending his trustee, forbears to call for accounts and vouchers. And many other cases might be suggested in which a perfectly honest trustee may be visited with heavy loss, because though bound to preserve the most minute testimony of all his dealings, he has no such control of the trust as to be able to put that evidence into such a shape that he may at a future time be able to plead it as an absolute discharge up to that time for all his acts.

"It is the duty of trustees to afford to their *cestui que trust* accurate information of the disposition of the trust fund; all the information of which they are, or ought to be, in possession; a trustee may involve himself in serious difficulty, by want of the information which it was his duty to obtain" (*e*). Many things may occur which are susceptible of explanation at the time, but which may be difficult to explain at a future time. Information either not asked for or required by the *cestui que trust*, or furnished and forgotten, may not be procurable at a future time. Again the explanation may have been satisfactory to one *cestui que trust*,

(*e*) *Walker* v. *Symonds*, 3 Swans. at p. 58.

but may fail to satisfy his successors, or may not have reached the latter, who therefore rightly enough demand it. The trustee in such cases is never armed with such an instrument as will suffice to defend him against an attack in which everything is presumed against him.

We have cited the forgoing passages, not so much for the purpose of establishing the point as to the position in which the trustee is placed, as for the purpose of giving what is, we confess, but an imperfect illustration of the extent of his liabilities. And our object is to suggest a means of giving relief to trustees from the hardships to which they are in many cases exposed, and at the same time to do so without derogating in any degree from the rights which the *cestui que trust* possesses. For notwithstanding the wisdom of the law in investing the position and office of trustee with unusual responsibilities, those very responsibilities, being without correlative privileges, are productive of hardships, and those unusual hardships. In the eye of the law, each case which we have suggested is a breach of duty. The trustee, indeed, should never relax his vigilance, should never be lulled into security, should never neglect his accounts, should never lose a voucher, should never be tardy in producing both accounts and vouchers. But this is none the less a hardship in fact, because it is his duty in law. Why should not the trustee be at liberty, when he has the evidence at hand, to call upon those entitled to an account to look at his evidence and audit his accounts, and if there be no good cause to the contrary, to compel them to give him an absolute discharge up to date. Why should not this be a judicial act, be matter of record, pleadable in bar of a further action for an account in all cases except of course those where fraud is alleged? Why in addition to his duty to keep and preserve correct accounts and vouchers, should it be his duty to wait until some one chooses to call him to account at an inconvenient period to all parties and perhaps loss to himself?

Viewed from the side of the *cestui que trust*, the suggestion has also its value. Where the beneficiary is of tender age,

a compulsory periodical accounting by the trustee could not but be beneficial to the trust estate, and we venture to say that there would be a good many less suits against trustees to recover the remains of fortunes wrecked through dishonesty or carelessness, if such a manner of accounting were compulsory. When the beneficiary is a relative, and (as often is the case), is fearful of offending his trustee by asking for an account or for the production of vouchers, the duty of accounting periodically on compulsion of law to the satisfaction of the Court would be of immense relief to both trustee and *cestui que trust*. It would relieve the *cestui que trust* of a disagreeable necessity, and would allay suspicions. We are indebted to the learned editor of the *American Law Review*, for a copy of an Act of the Legislature of the State of Massachusets, relating to the accounts of executors, administrators, guardians and trustees, upon which we base the following scheme for an Act to afford relief suggested. Imperfect though our suggestions are, we trust that they may at least be the seed from which in due time shall be grown and gathered fruit.

Scheme for an Act to amend the Law respecting Trustees' Accounts.

Preamble.—Recite shortly the position of trustees with respect to accounting, their duty to preserve and perpetuate testimony respecting their dealings, their inability to obtain from time to time discharges *pro tanto*, and that it is expedient to give them this power, as well as to provide a short and inexpensive method of taking their accounts.

1. Every trustee (except by apt words cases of implied and constructive trusts) may and shall render an account to the Chancery Division of the High Court of Justice once in every year, or at such times as required by the instrument creating the trust, in the manner provided by this Act. Court may excuse him, if account appears unnecessary in any year.

2. Parties to any instrument creating a trust may stipulate (not contrary to the Act) as to periodical accounting

by the trustee; and in any such case the accounts may be taken at such times (or oftener, if Court direct), in the manner prescribed in this Act.

3. As often as the trustee is required to account he shall prepare accounts of all dealings not already accounted for (according to the present practice in the Master's office) on oath.

(*a*) File same and deposit all vouchers in the office of the Master in Ordinary; deposit with Master for the time being the trust deed.

(*b*) Master thereupon to issue a warrant, giving a day for filing exceptions thereto, and a day for proceeding.

(*c*) Trustee to serve all parties entitled to notice; Master to give directions as to service, if necessary.

(*d*) If a person not *in esse*, or not ascertained, or not legally competent to act, is interested, official guardian to be served and to appear.

(*e*) Any party entitled may file exceptions on or before day named in warrant, or may file notice that he only desires to examine the trustee on oath.

4. If no exceptions or notice to examine trustee filed on or before day named therefor in warrant, Master to report, on day fixed for proceeding, that accounts are correct and trustee is discharged *pro tanto;* and may proceed as to allowance to trustee as in section 5 (*a*).

(*a*) In such case the report to be filed in Records and Writs Office and to be absolute on filing.

(*b*) Any party interested may move to open up accounts within months on the ground of mistake, surprise, fraud, concealment, or such grounds as satisfy the Master that manifest error or fraud has crept into the accounts.

5. If exceptions filed, Master to proceed to hear and determine according to the ordinary practice on a reference, and report. Report to be filed in Records and Writs Office. Right of appeal as at present in ordinary cases.

(*a*) Master may settle allowance to trustee if none is fixed by the trust deed, and may include therein trustee's costs of accounting, or may allow costs in addition to

trustee's remuneration, according to his discretion. Master may for cause deprive trustee of any remuneration though entitled thereto by the trust deed. Full discretionary powers to Master over the trustee's allowance and costs of all parties.

(*b*) If Master reports in favour of any relief to any party (e. g., that a *cestui que trust* is entitled to moneys not paid over by trustee, or that the trustee has negligently made an improvident investment), that party may apply to the Court at any time after report signed in a summary way on notice for the relief to which he is entitled.

(*c*) If the application is made before report absolute, and an appeal is desired, the Court may hear both application and appeal together, or make such order or give such directions as may be necessary to meet the ends of justice; and if necessary in the meantime, make such order as may be necessary for the preservation of the trust estate, or the rights of any party or parties.

(*d*) The Court may, on such summary application, grant the relief asked for, or such relief as the party applying is entitled to, or may direct an issue for the trial of any question, or may direct an action to be instituted for the prosecution of any right.

(*e*) If necessary or expedient, terms may be fixed by the Court upon which an appeal to Divisional Court or Court of Appeal may be had.

6. If no exceptions are filed on or before the day named in warrant, but notice to examine the trustee is filed, the trustee may be examined before the Master on the day for proceeding, and thereupon, if the evidence is satisfactory, the Master may report as in section 4.

(*a*) If evidence unsatisfactory, Master may allow exceptions to be filed. Proceedings then to follow as in section 5.

7. If no appeal is brought from the report, or if appeal dismissed, or if report varied by Court, the same to be final and conclusive as to the matters reported. Right of parties affected to plead the same in any future proceeding.

EDITORIAL REVIEW.

The Chancery Reportership.

It is not often that an office is held for such a short time as Mr. Galt held this one, to be voluntarily given up. Elected during last Hilary sittings, he had entered upon his work with great energy, when a sudden increase of business made it necessary for him to choose between resigning the reportership at once or practically giving up his solicitor's practice. The reporting in the Chancery Division is much more laborious than that of either of the Common Law Divisions or of the Court of Appeal. The reporter must be present in Court at least three days in the week—very often four or five; he must also attend the sittings of the Divisional Court, and must report many cases heard at the sittings. On the Common Law side, in addition to the Divisional Court sittings, there are but two days in the week on which the reporters are required to attend Court, and there are two reporters to keep these attendances; and it is a rare thing for a judgment at Nisi Prius to be reported. If it is reported at all it is generally in connection with the report of the case as heard before the full Court. There is plenty of work for two reporters in the Chancery Division, if the work is to be kept up to date, and the sooner this fact is recognized the better.

Mr. Galt's resignation was followed by the appointment during Easter Sittings of Mr. A. H. Frazer Lefroy, to whom we extend our congratulations. We hope Mr. Lefroy is fully sensible of the compliment which the Benchers have paid him by confiding to him work enough for two men. The compliment might have been made much neater by attaching to the office the salaries of two reporters. However, the editorial labours of Mr. Lefroy in connection with our contemporary, the *Canada Law Journal*, have been good training for the work he is about to undertake, and if his capabilities were exhibited in his editorial work alone, they would have justified the action of the Benchers.

The Ontario Reports.

The first number of the "hotchpot reports" has been issued. "By this housewifely metaphor," as Blackstone hath it, we mean that, as "in a pudding is not commonly put one thing alone, but one thing with other things together," so in the Ontario reports do we find, not the reports of cases in one Court alone, but the reports of cases in one Court with another Court together. We understand that the Editor had nothing to do with the making of this pudding, but was on the contrary strongly opposed to it—when he heard of it, which was after the edict had gone forth. He knew one thing, at least, that the Benchers did not know—that it would be difficult to digest. As for the orderly arrangement of the cases, that is out of the question. The extent to which order can be observed is limited by the covers of each number. The cases in the Queen's Bench Division are reported together in the first part of the number, and the cases in the Chancery Division in the latter part, but as the numbers succeed each other all further attempts at arrangement must be abandoned. When a volume is completed it will be composed of batches of Equity cases huddled together between batches of Common Law cases, endeavouring, as it were, to leaven the whole lump. By changing the titles of the courts, and reporting all the cases in one series, the assimilation of law and Equity *may* be advanced, but we see one mistake which seems fatal to success if the end is possible of accomplishment at all, and that is that the reformers have commenced at the wrong end.

Business in the Chancery Division.

Several weeks ago Mr. Justice Ferguson returned to Toronto from Cobourg for two days during an adjournment of the sittings at the latter place. During those two days he heard no less than fifty-one Chamber and Court motions! We have had occasion before to refer to the business in this Division, and we think that the whole profession will agree that there is more than enough work for three Judges, and quite enough to justify the appointment of a fourth. Every species of business that is not properly common law litiga-

tion is thrown into the Chancery Division. The applications to the Judges of the latter Court are of the most various descriptions, and include, amongst other things, the settling of disputes between vendors and purchasers, and very often the examination and approval of investments of the moneys of wards of Court. And yet there are six Common Law Judges to do the work on the one side, and only three to perform the various duties that fall to the lot of the others.

The result of throwing too much business into too few hands is, that the Judges have not the ample time which they should have for the consideration of their judgments, and must at times feel that they cannot do themselves justice.

We hope that this matter will before long occupy the serious attention of both Governments.

Whether the question does come up or not, we hope the Dominion Government will consider the very momentous question of giving the Judges salaries instead of merely supplying them with pocket money as at present.

The Bench in British Columbia.

The Hon. G. A. Walkem, Q.C., Attorney-General for British Columbia, has been appointed to the vacancy on the Bench occasioned by the death of the late Mr. Justice Robertson.

Mr. Walkem was the only lawyer in the Legislature, we believe, and so while the Province gains a Judge it loses an Attorney-General.

The Vacations.

We are glad to see that the subject of vacations, which we alluded to a short time ago, has received the attention of the Council of Judges. It is recommended, pursuant to to the 20th section of the Judicature Act, that the long vacation should extend from 1st July to 1st September, inclusive of both days; the Christmas vacation to remain as at present, and extend from the 24th December to 6th January, both days inclusive.

Equity never wants a Trustee.

For a novel application of this ancient maxim see Rule 521, *postea*.

NOTES OF RECENT DECISIONS.

Hilliard v. *Thurstin*, *ante* p. 261. The working out of the Rules of Court provided for us by the Legislature, bears ample evidence that they were not drawn for Ontario. Though a step in advance for England, they are in many instances a retrograde step in the above-mentioned Province. This is well exemplified by this case, in which section 26 of the Judicature Act and Rule 392 came before the Master in Chambers for construction. Section 26 of the Act provides that a case may be transferred "by such authority and in such manner as Rules of Court may direct, or as transfers might be made from one Court to another before the passing of this Act." This section bears evidence on its face of the manner of its make-up. The English rule has had tacked on to it an omnibus clause, intended to give to the Courts all the powers of transfer formerly enjoyed, as well as the power to make the transfer under such rules of Court as may be existing. However, the English rule (392), which limits the powers of transfer by directing that a cause may be transferred from one Division to another by order of the Presidents of such Divisions, was adopted without reflection as to the effect it might have upon the construction of the composite section 26, and without reflecting that the powers theretofore enjoyed embraced every case that could arise, whether as regards the necessity for a transfer or the jurisdiction to make it. The effect of adopting such a narrow rule as rule 392 has had the effect of making the power of transfer as conceivably small as it was before conceivably vast. By the Administration of Justice Act the transfer might have been made either upon the application of any party or by the Court or a Judge *sua sponte*, under which the Clerk of the Crown in Chambers, or the Referee in Chancery Chambers, might have made the order to transfer. If the Act had provided simply that causes might be transferred as they had been before the passing of the Act, and the Rules had been silent, the powers would have been ample enough and of much greater utility than those conferred by the above Rule.

BOOK REVIEW.

Principles of the Law of Real Property, intended as a first book for the use of students in conveyancing. By JOSHUA WILLIAMS, Esq., of Lincoln's Inn, one of Her Majesty's Counsel. Adapted to the Laws in force in the Province of Ontario, by ALEXANDER LEITH, one of Her Majesty's Counsel in and for the Dominion of Canada. Toronto: Rowsell & Hutchison. 1881.

Most of us recollect (the time is not so long ago) when Leith's Blackstone was on the Curriculum at Osgoode Hall for the first intermediate, and Williams was the book on Real Property for the second intermediate. It may have been the outcome of the wisdom of the Benchers, whereby they sought to place before the student at as early a day as possible his greatest trial in the way of reading. For the most ardent lover of real property law must confess that Leith's Blackstone was not pleasant reading. We say "was not," because we have not read the new edition, which, we hope, is less of a stumbling block to the rising generation. Whatever was the reason, we are convinced it was not a good one; and the student on arriving at his second intermediate reading was generally surprised to find that reading real property law under the auspices of Joshua Williams, Q.C., was quite a diversion. Happily this has been remedied by a reversal of the order in which these two books are to be read. Still William on Real Property had its drawbacks for Ontario, and a great deal of labour was spent upon many chapters that were entirely useless, through want of power and knowledge in the student to discriminate between what was applicable to Ontario and what was not. This has now been obviated by Mr. Leith, who has expunged from the book all that is useless in Ontario, and has inserted the law peculiar to the Province.

It is a strange thing, and, we think, a matter to be regretted, that the learned Editor's work, designed especially for Ontario, was done in England, necessitating as it did the omission from the book of many Canadian cases. If the work were not what it is intended to be, namely, one upon the first *principles* of Real Property law, the omission would be unpardonable. It is, however, gratifying to reflect that the amendments introduced by our Legislature are not always founded upon principles, but are sometimes the result of whims and fancies, sometimes the necessary result of previous carelessly drawn Acts, and sometimes referable to nothing that the average mind can discover. This has been notably the case in the legislation respecting married women; and in his second edition of Blackstone the learned Editor laments that a statute on this subject seldom remains law long enough in Ontario to arrive at its meaning. As long as the amending of the law is carried on by what we might call thimble-rigging legislation, we must discard principles in Provincial law literature, and look to the Jurists of England for their exposition. Perhaps this is the best that can be said for the omission of Ontario cases, which (without the fault of the Judges) are often painful and hurried attempts to get at the meaning of a statute before it is repealed or amended. There is little to be said about Mr. Leith's edition except that in reading this book the student will not be brought face to face with inapplicable law, and will find many trustworthy guides interspersed through the text to direct him to the law as it exists in Ontario. We doubt not that the English edition, as a Law Society text book, will soon be superseded by this work.

RULES OF THE SUPREME COURT OF JUDICATURE.

17TH MARCH, 1882.

The following rules or orders were proposed and adopted by the Supreme Court:—

514. Rule 462 shall apply to all rules relating to time.

515. In all actions which (before the passing of the Ontario Judicature Act, 1881, and the Law Reform Act of 1868) might have been brought under the equity jurisdiction of the County Court, and which are now carried on in the High Court of Justice, such fees and disbursements may be charged as are fixed by the lower tariff referred to in Order 553 of the General Orders of the Court of Chancery, and for all fees and disbursements not provided for in the said lower tariff may be charged the amounts allowed in like cases by the tariff of the 10th September, 1881, subject, however, to the same proportion of reduction as exists between the said lower tariff and the higher tariff of the Court of Chancery.

516. So much of Rule 419 as applies to sec. 302 of the Common Law Procedure Act is hereby rescinded, and judgments of the High Court of Justice shall not be minuted and docketed as required by said section 302.

517. Rule 508 is hereby rescinded, and the following substituted therefor:—

It shall not be necessary for any deputy clerk of the Crown, deputy registrar or local registrar to transmit to the registrars of the several divisions of the High Court at Toronto the original roll, and the papers of or belonging to the same, pursuant to section 303 of the Common Law Procedure Act and rule 419 of the Judicature Act; but

instead thereof, every deputy clerk of the Crown, deputy registrar and local registrar shall once in every three months transmit to the registrar of each division at Toronto a list, in the form hereinafter mentioned, of all judgments which have been entered by him in such division during such period, and from the said lists the registrars of the several divisions shall prepare, and from time to time keep up a general index or list of judgments which shall be open to inspection by all persons interested upon payment of the usual fee.

FORM.

List of judgments entered in the office of the deputy clerk of the Crown (or deputy registrar or local registrar, as the case may be) of the county of during the three months ending the day of 18 .

(1) Plaintiff Defendant

(2) Date of entry of judgment.

(3) The amount recovered, or other relief given, exclusive of costs.

(4) The amount of costs taxed.

518. Rule 114 is to extend to proceedings in the Master's office, and the Master is to have the same power as the judge.

519. Every bond or recognizance required by the practice of the court for the purpose of security is, unless otherwise ordered, to be taken in the name of the accountant of the Supreme Court, his executors, administrators or assigns.

520. Where the action is in respect of a mortgage, and the plaintiff claims foreclosure, or sale, or redemption, and an appearance has been entered, but default has been made in delivering a defence or demurrer, the plaintiff shall be entitled to a judgment or order on *præcipe* as provided in rule 78.

521. Whereas, by the Act 35 Victoriæ, chapter 83, (Ontario), the Toronto General Trusts Company was incorporated, and thereby empowered to act as agents for the transaction of business as therein mentioned. And whereas, by the Act of 45 Victoriæ, chapter 17, the said company may be accepted by the High Court of Justice as a Trust Company for the purposes of the said court, in case the Lieutenant-Governor-in-Council shall approve thereof as therein set forth. And whereas the said company has been so approved of by the Lieutenant-Governor-in-Council, by order dated the 10th day of March, 1882. And whereas the expenses of the accountant's office have been, by the Ontario Judicature Act of 1881, declared to be a first charge upon the income arising from the funds in court, and it is not desirable to reduce the interest payable to suitors to a less rate than 4 per cent., and it is necessary to procure the investment of moneys in court in order to raise a sufficient income to keep up this rate, and provide for the expenses of the accountant's office. Therefore it is ordered that the judges of the Chancery Division may arrange with the said company to make investments, and to take the securities in the name of the accountant of the Supreme Court of Judicature, of moneys in court upon first mortgages of lands, and may direct the issue of cheques therefor upon condition that the said company do, by proper instrument, guarantee the sufficiency of such securities, and the due payment of interest at the rate of 4½ per cent. per annum, half-yearly, on the moneys so invested from the date of the receipt by the company of the money for each investment, and also the due repayment of the principal moneys so invested; and upon further condition that in case the said company makes an investment as aforesaid at a higher rate than six per cent., then the said company is to pay interest thereon to the court at the rate of 4¾ per cent.; and upon further condition that the said company is to satisfy the official guardian of the said High Court of the sufficiency of the security as to value, and who is to certify the same to the court before the cheque issues for each investment.

522. All appeals, proceedings, and matters to be brought before the Divisional Court of the Chancery Division are to be entered with the Clerk of Records and Writs at least seven days before the day fixed for the sittings of the court, and seven days' notice thereof is to be served upon the parties entitled to notice.

523. An application to the Divisional Court of the Chancery division to change or reverse any judgment shall be made at the first sittings of the Divisional Court, which begins not less than ten days after the pronouncing of the said judgment.

524. After the sittings in June next of the Chancery Divisional Court the said Divisional Court will hold sittings on the first Thursday in September, the first Thursday in December, and the third Thursday in February in each year.

525. Rule 308 is hereby amended by substituting the words "four days, both days inclusive, from the service of the order," for the words "eight days from the date of the order," in the third line of the said rule.

526. Rules 309 and 310 are hereby rescinded.

527. In the Queen's Bench and Common Pleas Divisions all applications under rules 307 and 308, and under rule 510 when made to a Divisional Court, shall be made within the first four days of the sittings of the Divisional Court for hearing such applications, which may take place after the trial or judgment complained of.

(*a*) In case the decision of a question raised at the trial, or the judgment, is reserved, and is not given until the sittings aforesaid, or in case of a trial during the sittings of the Divisional Court, any motion or application respecting the same shall be made within six days after the day on which the verdict or judgment is given, if so many days expire in such sittings, and if not, then within the first four days of the ensuing sittings.

(*b*) In cases tried by a jury, judgment shall not be signed until the time for making such motion or application as aforesaid has expired, unless the judge shall certify under his hand that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification.

528. It shall be sufficient if the notice of any application under rule 510 is served within the time hereinbefore limited for making the same, provided that the day named in such notice for hearing the motion is not more than two clear days from the last day of the time so limited, and falls within the sittings of the Divisional Court in which such notice is given, otherwise such notice may be given for the first day of the following sittings.

529. The party who obtains any order *nisi*, or who serves any notice of motion, may, on or after the fourth day inclusive after the serving such order *nisi* or notice, file the same, together with an affidavit or admission of service with the Registrar of the Divisional Court.

530. The party served with any such order *nisi* or notice of motion may (if the same has not been already filed by the party who obtained or served the same), on or after the fifth day, both days inclusive, after the granting of the order or service of the notice, file the same, together with an affidavit of the fact and time of such service with the said Registrar.

531. In case the party to whom such order *nisi* is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or after the third day after granting such order, and upon filing with the Registrar an affidavit that the order has not been served, enter a *ne recipiatur* with such Registrar, after which the Registrar shall not receive or enter such order; and such order shall be deemed to be abandoned, and the opposite party may proceed as if no such order had been moved for or granted, unless the Divisional Court shall otherwise direct.

REVIEW OF EXCHANGES.

Albany Law Journal.—22nd April, 1882.

Duty of Railroad Company to trespassers on its track. A railway company must not wilfully or needlessly harm an interloper, but must not be hampered in its speedy running of trains for the public benefit by a special duty towards trespassers. An apparently unmoving or helpless or unjudging person must not be run down, but means must be taken to stop the train, but there is no duty to slacken for one apparently in possession of his faculties, who may, in the ordinary course of things, easily get out of the way of danger. American cases are then cited to illustrate the distinction.

Ibid.—13th May, 1882.

Sale of intoxicating liquors by druggist. In Arkansas, under a statute forbidding the sale of ardent spirits without a license, a druggist cannot sell such spirits even as medicine upon the prescription of a physician. Contra, in North Carolina; where, however, it was said that the *onus* lies on the druggist to show that it was sold as a medicine. In Massachusets a druggist may keep spirits to mix with other ingredients to be used as a medicine, notwithstanding a statute forbidding the sale or keeping of spirits without license. In Alabama, where a special prohibitory Act did not except practising physicians from its operation, it was held a contravention of it for a doctor to administer intoxicating bitters to his patients.

Rules relating to opinion evidence. by JOHN D. LAWSON. 1. A witness cannot give his opinion on questions of law or legal conclusions. 2. Jurists and lawyers may testify in foreign courts to the laws and usages of their country, and the practice of its tribunals under common or statute law. 3. Rule 2 embraces persons who are not professional lawyers, but who either (*a*) from their official positions are required to know the laws of their domicile, or (*b*) from their business relations are likely to become acquainted with them. 4. But rule 3 does not include a person who, while residing in another country, has merely studied the laws of the foreign tribunal. 5. A lawyer resident in a foreign country is presumed to be acquainted with its laws. 6. The law of the forum cannot be proved by the opinions of lawyers. 7. But a domestic law not included in the common or statute law of the former may be proved by the opinion of a witness skilled therein. 8. A lawyer may (but an ordinary witness may not) give his opinion concerning the value of legal services rendered.

9. The opinion mentioned in rule 8 may be based on the witness' own knowledge or on evidence of others as to the services rendered or upon a hypothetical case, but it is not conclusive. Illustrations are given of each rule.

Ibid.—20*th May*, 1882.

Rescission of contract—When warranted by act of God or accident. In Michigan, it was held that a public school teacher might recover wages for his stipulated time, though the school work was suspended on account of small pox. The text of Chitty on contracts is cited as to the rights of parties respecting work destroyed before completion or delivery, and cases are cited illustrative thereof. In a case in Maine the plaintiff contracted to work for the defendant for a specified time, but left, on account of the prevalence of cholera in the vicinity. *Held*, entitled to a *quantum meruit*.

Central Law Journal.—5*th May*, 1882.

Chance Verdicts, by EDWIN G. MERRIAM. Verdict by lot where the jury was equally divided was in early days approved; but later such verdicts were set aside. Averaging damages by adding together the sums suggested by each juror and dividing by twelve, held objectionable. But the objections are obviated where the computation is informal for the purpose of ascertaining the sense of the jury and none is bound to accept the result. The affidavits of jurors cannot be taken to show their misconduct; it must be proved from other sources. The sheriff or constable in charge may give evidence, but may be contradicted by the affidavits of the jurors.

Ibid.—12*th May*, 1882.

Gifts causa mortis, by HENRY WADE ROGERS. A *donatio mortis causa* is defined. A citizen leaving home to enlist delivered money to be a gift to the donee in case he perished in the war; held, a gift *causa mortis*. Contra, where a note was delivered, under similar circumstances, to a brother to be given to donor's mother. Where a gift was made in expectation of immediate death from consumption, and the donor temporarily recovered, but finally died of the same disease, held not a valid gift. A promissory note made by a third person may be the subject of a gift; *aliter* of the donor's own notes. What is a sufficient delivery is then discussed.

Ibid.—19*th May*, 1882.

Repetition of Telegraphic Messages, by ADDISON G. MCKEAN. It has been held on the one hand that telegraph companies are common carriers, and may limit their responsibility by the usual notice respecting repetition of the message; and on the other hand, that the restrictions which the companies seek to impose upon their liability are invalid, because they are unreasonable and against public policy. The different rules in the English and American Courts as to the right of a receiver of a message are pointed out; the former holding that no action will lie unless there is a contract, or fraud in the transmission; the latter recognizing the right to compensation for damages.

Irish Law Times.—18*th March*, 1882.

Presumptions of Life, Death, and Survivorship, continued in the two following numbers. The statutory enactments on the subject are referred to. "The analogy derived from the statutes of bigamy, and concerning leases for life, was afterwards adopted and applied in other cases in which the duration of life came into question, and now the rule is general, that a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death." There is no presumption as to the time of his death during the seven years. Death will not be presumed if further evidence can be obtained. There is no presumption as to the age at which a person died who is shown to have been alive at a given time. The question is one of fact for the jury. How modest and unpresuming the law, is appears from one old case in which the Court of Queen's Bench said, that the law did not recognize the impossibility of a person who was alive in the year 1034, being still alive in the year 1827; *Atkins* v. *Warrington*, 1 Chitty Pl. 6th ed. 258. A remarkable case is *McArthur* v. *Eagleson*, 43 U. C. R. 406. The plaintiff went away temporarily, leaving his wife on his land. He did not return for thirty years, nor did he communicate with his wife. Within seven years of his departure his wife, believing him to be dead, took another husband, and they lived together on the plaintiff's farm, and had a large family. On his return the plaintiff recovered the land in ejectment. There was no question of presumption in the case, but Harrison, C.J., said, "A man, after seven years, although presumed to be dead, is not conclusively proved to be dead, or compelled to stay presumptively dead contrary to the fact, for the benefit of a person who may have, during his absence, dealt either with his property or his wife upon the supposition of his death. Notwithstanding the inconvenience of the re-appearance of such a man under such circumstances, I know of no principle of estoppel which can be properly held, on the facts of this case, to preclude his re-appearance, and upon his re-appearance, the assertion of all his legal rights." In *McDonald* v. *Forbes*, 1 C. L. T. 333, the Court refused to presume that certain persons had died unmarried and without issue, though there was evidence sufficient to warrant the presumption of death and intestacy.

Law Journal.—18*th March*, 1882.

The legality of cremation. A testator directed his body to be taken by his sister-in-law and burnt and the ashes placed in a vase. The body was buried. The sister-in-law obtained the body on representing that she wished to change the place of burial, but having obtained it took it to Italy, where it was burned. She then sued the executors for the expense. *Held*, that she could not recover, having committed an illegal act by obtaining a license for one purpose and then using it for another. It was also laid down (1) that a man could not dispose by will or other instrument of his body; and (2) that it was not legal for a man, by the law of England, to direct his body to be burnt. The Anatomy Act, 1832, is

cited to show that there was a power of disposal of his body by a man, which was restricted by this Act. Instances are cited of ancient wills in which there was always an express bequest of the body. The commonly accepted maxim that there is no property in a corpse is controverted, and is said to rest upon a misconception of an old case. Cremation is said not to be illegal. "That which is not forbidden is allowed." But it must not be carried on as a nuisance. "As a matter of fact, there is at least one instance of its being done, September 26th, 1769, when Mrs. Pratt's body was 'burned to ashes in the new burying ground adjoining Tyburn turnpike,' according to the direction in her will."

Solicitor's lien. A solicitor was instructed to prepare a re-assignment to B., his client, of a life policy, which was mortgaged and which he was redeeming. This done, the policy and re-assignment remained in the solicitor's hands subject to his lien for the costs of the assignment which remained unpaid. B. afterwards assigned the policy to a bank, and a certified copy was used for the purpose, B. alleging that he had forgotten where the policy was. The bank, on discovering where the policy was, brought an action for a declaration that their mortgage was a first charge on the policy. Mr. Justice Fry declined to make the declaration. Some remarks are made on the case, on solicitors' lien generally, and on assignments of choses in action under the Judicature Act.

Ibid.—25th March, 1882.

Fraude on Clients. Newman, a solicitor, was entrusted with a large sum by his client, who gave no direction in writing. On the death of the latter, his trustees called for an account of the securities. After some excuses, Newman was obliged to confess that there were none and that the money was gone. He was tried under the section of the Larceny Act, to which 32-33 Vict. cap. 21, sec. 76, (D) corresponds, and, on a case reserved it was held, that his offence did not come within the meaning of the Act. "Lawyers cannot but regret the result, in the interest of their profession, although they may feel obliged to agree with the correctness of the decision in point of law." "Perfect confidence between solicitor and client is the basis of the whole relation. If scandalous breaches of this confidence lead to inadequate punishment, its foundation is to that extent shaken. In a large profession occasional lapses from fair dealing are almost inevitable; but it is to the interest of the general body that when they occur they shall be sternly punished."

Ibid.—1st April, 1882.

Solicitors and Law Stationers. In two test cases brought by by the Incorporated Law Society against law stationers, for acting as proctors, it was held that by taking messengers' fees for carrying the papers to and from Somerset House, they had not contravened the Statute against unauthorized persons acting as proctors.

Ibid.—8th April, 1882.

Liability of Solicitors for Partners. "If * * a partner received money on the representation that the firm carried on the business of scriveners contrary to fact, or that they had a client ready with a mortgage which was untrue, other partners would not be liable, although they would be liable if there was such a mortgage in the office, and the partner receiving the money misappropriated it." A case is discussed in which an auctioneer handed the deposit paid him at a sale to a member of the firm of solicitors, who had the conduct of the sale, for payment into Court. The solicitor who received it, misappropriated it, and it was held his partners were liable.

Southern Law Review.—October-November, 1881.

Title from fraudulent vendees of chattels, by J. M. GRANT. If a consent to the transfer of title be obtained even through fraud, a good title may be made by the vendee. But where possession alone was obtained by the fraud, no title can be made. "Purchasers" from fraudulent vendees are not only those who buy the whole interest in the chattel, but those who acquire a partial interest also. The purchaser must have acted *bona fide*, and the purchase must have been for value; but there need not have been an absolute purchase. It is sufficient if advances of money have been made thereon.

Western Jurist.—January, 1882.

Proceedings of Grand Jury—How far Secret, by EDWIN G. MERRIAM. In England, the practice is to admit the private prosecutor. Formerly, in cases of high treason, the King's counsel was admitted; but latterly, it has been resolved that no person, if not a witness, could be present. A clerk with the evidence taken before the magistrate and a police officer may be present. In the United States, with some exceptions, the clerk and assistant of the district attorney may be present, if they do not abuse this privilege. There presence during the deliberation and vote of the grand jury seems to be an abuse. The defendant cannot have counsel present. The grand juror's oath requires secrecy of him. In some of the States the form of oath does not enjoin secrecy; but the obligation not to divulge anything rests upon considerations of public policy. When the case comes on for trial the American authorities shew that the proceedings may be disclosed. The grand jurors' testimony may be given to shew what was the finding, or who was the prosecutor, or who were the witnesses, and their testimony. On an indictment for perjury in giving testimony before the grand jury, the jurors may be called to give evidence. So a grand juror may be called to contradict or confirm a witness. Those who are lawfully present in the grand jury room are under the same restrictions as to giving information as the jurors.

Ibid.—February, 1882.

Of the place of making Corporate Contracts and doing Corporate Acts, by SEYMOUR D. THOMPSON. A charter creating a

corporation with power to carry on business in a certain place will not authorize it to establish its principal business in any other place, though it may open an agency there. Corporate bodies may make contracts without their domicile. The question is one of power—not place. Corporate acts, as distinguished from acts done on behalf of the corporation, can only be done at the domicile of the corporation. Meetings held outside the State, by which the corporation is chartered for the purpose of effecting organization, are void. But directors may meet in another State, unless prohibited by the law of the State creating the corporation. Public officers appointed by the duly constituted authorities without any power to make the appointment are regarded as authorized to perform their official duties, because they have been held out to the public as duly appointed officers. But when the corporation have no power at all to appoint, this act cannot bind the corporation. A corporation cannot migrate from one State to another. A railway corporation chartered in Indiana, with power to construct a road through Indiana, Illinois, and Ohio, whose charter had been recognized and adopted by the Legislature of Ohio, held not competent to change its domicile to Ohio. When a corporation does migrate, it has been held that it becomes in the State to which it has migrated a partnership, the stockholders being liable as partners. But the case was reversed on appeal. The cases cited are American.

How far Directors are Trustees for Creditors. ANONYMOUS. It is believed that they are not such trustees until the event of the insolvency of the company. Sir George Jessel, M. R., while holding them trustees for the company, denies that they are in any sense trustees for the company's creditors.

Personal Liability of Grand Jurors. ANONYMOUS. Some cases are cited to show that grand jurors enjoy entire immunity from any consequences for their acts done as jurors.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

EXCHEQUER COURT.]

REGINA v. ROBERTSON.

Fisheries Act, 31 *Vict. cap.* 60.—*B. N. A. Act, ss.* 91, 92 *and* 109—*License to fish—Riparian Proprietors.*

The Minister of Marine and Fisheries purporting to act under 31 Vict. cap. 60, sec. 2, executed to the suppliant, on behalf of Her Majesty, an instrument whereby he purported to lease to the suppliant for nine years a certain portion of the south-west Miramichi River in New Brunswick for the purpose of fly fishing, the bed of which portion of the river had been already granted in fee to certain riparian proprietors. The river at this part, viz., about 40 or 50 miles above the ebb and flow of the tide, and for the greater part upward, was navigable for canoes, small boats, flat bottomed scows, and floatable for logs and timber which were usually driven down in the spring and autumn. The Supreme Court of New Brunswick, as between the suppliant and the riparian proprietors, and the Exchequer Court thereafter, on a petition of right by the suppliant for compensation from the Crown, held that the suppliant's lease was void, as the exclusive right to fish was in the riparian proprietors; and the latter Court in answer to the 8th question in a special case, held that where the lands above tidal water over which the river flows have not been granted by the Crown, the Minister could not lease the bed of the river, but could grant a license to fish, apart from the ownership of the land. On appeal from the Exchequer Court,

Held, affirming the judgment thereof (i), that the power of regulating and protecting the fisheries resides in the Parliament of Canada under the B. N. A. Act, sec. 91; that the exclusive right to fish at the point in question was in the riparian proprietors, who claimed by grant of the soil of the river before the suppliant's lease, as an incident to their ownership, and that inasmuch as by 31 Vict. cap. 60, sec. 2, a license to fish can be granted only where the exclusive right of fishing does not already exist by law, the suppliant's lease was void. (ii) That the right of the public to float logs or rafts, and a right of passage when the state of the water permits it, are not inconsistent with an exclusive right of fishing or with the rights of riparian propietors.

Held, also (per Sir Wm. Ritchie, C.J., and Strong, Fournier and Henry, JJ.), reversing the judgment of the Exchequer Court on the 8th question, that ungranted lands in New Brunswick being in the Crown for the benefit of the people of that Province, the exclusive right to fish as an incident thereto is in the Crown as trustee, and therefore a license by the Government of Canada to fish in streams running through Provincial property would be illegal.

Lash, *Q.C.*, for the Crown.

Weldon, *Q.C.* for the suppliant.

REGINA v. DOUTRE.

Petition of right—Counsel fees—Action for—Retainer for services before Halifax Commission.

The suppliant, an advocate of the Province of Quebec, and one of Her Majesty's counsel for Canada, was retained by the Government of Canada as one of the counsel for Great Britain before the Halifax Commission which sat pursuant to the Treaty of Washington. There was contradictory evidence as to the terms of the retainer, but the learned Judge in the Exchequer Court found "That each of the counsel engaged was to receive a refresher equal to the retaining fee of $1000, that they were to be at liberty to draw on a bank at Halifax for $1000 a month during the sittings of the commission, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The amount awarded to Canada was $5,000,000. The suppliant claimed $10,000 as his remuneration, in addition to $8000 already received by him.

Held, (per Fournier, Henry and Taschereau, JJ.) that an advocate in Quebec can by law maintain an action against his client for fees upon a contract therefor, and therefore the suppliant had the right to present his petition of right for fees agreed to be paid him by the crown; that there

was an agreement to pay him a reasonable sum to be determined at the conclusion of the business; and that $8000 awarded him in the Exchequer Court was a reasonable sum.

Per Sir William Ritchie, C.J. As the agreement between the suppliant and the Minister of Marine and Fisheries on behalf of Her Majesty, was made at Ottawa, in Ontario, for services to be performed at Halifax, in Nova Scotia, it was not subject to the law of Quebec; that in neither Ontario nor Nova Scotia could a barrister maintain an action for fees, and therefore that the petition would not lie.

Per Strong, J. On the evidence the suppliant was only entitled to recover his expenses in addition to the fees already paid him, there being no evidence of a contract for additional remuneration. By the Petition of Right Act, sec. 8, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England under similar circumstances, by the laws in force there prior to 23 and 24 Vict. cap. 34 (Imp.); counsel could not at that time, in England, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover.

Per Fournier and Henry, JJ. Counsel in Canada are entitled to sue for fees.

Lash, Q.C., for the Crown.

Laflamme, Q.C., for the suppliant.

REGINA v. McFARLANE.

Petition of right for tort—Timber slide—Loss of logs by breaking of boom—Alleged negligence of slide master—Demurrer—31 Vict. cap. 12 (D.)

The suppliants, by Petition of Right, claimed damages for the loss of their saw logs through the breaking of a boom on the Ottawa River which, they alleged, occurred through the negligent and improper conduct of the slide master, who was duly appointed under C. S. C. cap. 28 and 31 Vict. cap. 12.

Held, reversing the judgment of the Exchequer Court overruling a demurrer to the Petition, that the public works in question are by Statute vested in the Crown in trust for the public, and that Her Majesty is not liable for the negligence or unskilfulness of the appointee of the Government in charge of the works; that the suppliant's claim is on a tort pure and simple, and that a Petition of Right will not lie thereon; that the slide master, in receiving the tolls which it his statutory duty to collect, did not enter into an implied contract on behalf of Her Majesty to carry

the suppliant's logs safe through the slides, and that the Crown was not to be regarded as a common carrier in passing them through.

Lash, Q.C., for the Crown.

James Bethune, Q.C., and *A. F. McIntyre*, for the suppliant.

ONTARIO.]

LAWLOR v. LAWLOR.

Estate tail—Mortgage of, in fee simple—Statutory discharge, effect of.

Held, reversing the judgment of the Court of Appeal, 6 App. R. 312 ; 1 C. L. T. 456, that a registered statutory discharge, executed by the mortgagee, of a mortgage in fee simple made by a tenant in tail, reconveys the land to the mortgagor barred of the entail.

J. Stewart Tupper, for the appellant.

A. F. McIntyre, for the respondent.

QUEBEC.]

BERGERON v. LASCELLE.

Mandamus—41 Vict. cap. 3, sec. 63 (Q.)—42 and 43 Vict. cap. 3, sec. 11 (Q.) —14 Geo. III, cap. 85, sec. 5 (Imp.) still in force—"City."

In May, 1880, B. applied to L., a license inspector, to obtain a license to keep an inn in the City of Three Rivers, producing to L. the necessary certificate, and tendering him one dollar under 41 Vict. cap. 3, sec. 63, and was refused a license. By the latter Act it was provided that, in addition to the fee of $1, a fee of $200 should be paid in the Cities of Montreal and Quebec, a fee of $80 in other cities; and a fee of $70 in all incorporated towns. This was repealed by 42 and 43 Vict. cap. 3, and no provision was made for other cities than Montreal and Quebec. B. obtained a mandamus to compel the issue of a license.

Held, that 14 Geo. III, cap. 85, sec. 5 (Imp.), is still in force, and that B. was not entitled to a license without payment of the fee of £1 16s. prescribed thereby.

Held also, that under the above mentioned Provincial Acts, L. could not have granted a license for the City of Three Rivers, as they apply only to Montreal and Quebec, and the City of Three Rivers was not within the meaning of "all incorporated towns."

McDougall, for the appellant.

Cerni, for the respondent.

BARSALOU v. DARLING.

Trade mark—Infringement.

The appellants manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows:—A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "J. Barsalou & Co., Montreal," was stamped on the obverse side. The respondents manufactured cakes of soap similar in shape and general appearance to the appellants', having stamped thereon an imperfect unicorn's head, being a horse's head with a stroke on the forehead to represent a horn. The words "Very Best" were stamped one on each side of the head, and the words "A. Bonni, 115 St. Dominique St.," and "Laundry" over and under the head. At the trial the evidence was contradictory, but it was shown that the appellants' soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap."

Held (Henry, J., dissenting), reversing the judgment of the Queen's Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of the appellants' trade mark as to mislead the public, and that the appellants were entitled to an injunction to restrain the defendants from using the device adopted by them, and that the appellants were entitled to damages which were assessed at $100.

Beigue and *Geoffrion*, for the appellants.

Pagnuelo, Q.C., and *Cruickshank*, for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, May 1882.

BENNINGER v. THRASHER.

Insolvent Act of 1864—Personal wrong—Discharge—Ca. sa.—Return.

Held, affirming the decision of Cameron, J., affirming the order of the Master in Chambers, *ante*, p. 215, that a judgment recovered against an insolvent in an action of seduction, is a "debt due as damages for a per-

sonal wrong" within the meaning of the Insolvent Act of 1864, and is, therefore, not affected by a discharge under that Act.

Held, also, that it was not necessary to return and file a *ca. sa.* within a year from the judgment.

Bethune, Q.C., for the appeal.
J. E. McDougall, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 20TH MAY, 1882.

McLAREN v. THE CANADA CENTRAL RAILWAY CO.

Mechanical engineers—Witness fees.

Held, reversing the ruling of the taxing officer, that mechanical engineers, attending as witnesses in a trial, are entitled to be paid four dollars a day.

W. H. P. Clement, for the appeal.
Holman, contra.

CHANCERY DIVISION.

[THE CHANCELLOR, 8TH MAY, 1882.

In re KENT & SMITH.

Vendors and Purchasers Act—Conveyance from husband to wife.

The vendor had made a conveyance of land direct to his wife, in consideration of respect, and one dollar; but had always remained in possession of the land. The wife died intestate.

Held, that the vendor had not such a title to the land as could be forced upon an unwilling purchaser.

Rae, for the vendor.
Hoyles, for the purchaser.

[10TH MAY, 1882.

MUNSIE v. LINDSAY.

Legacy to heirs—Invalid devise to co-heir—Election—Partition.

A testator bequeathed to the plaintiffs legacies charged upon lands an attempted devise of which to R. M. failed by reason of his being a witness to the will. The latter, however, paid certain sums to the plaintiffs, which they accepted in satisfaction of their legacies, giving acquittances for the full amount and releasing the lands. The plaintiffs and R. M. were heirs-at-law of the testator. The defendant L. claimed title through R. M., and had improved the land.

Held, that, there being an intestacy as to the land on account of the invalidity of the devise to R. M., there was no ground upon which the plaintiffs should be put to their election; that they were entitled to a partition of the lands descended, but that their shares should be onerated in favour of the defendant L. with their due proportion of the full amount of the legacies, and with the value of L.'s improvements.

W. Cassels, for the plaintiff.

Bethune, Q.C., and *W. Barwick*, for the defendant L.

Brough, for other defendants.

REID v. SMITH.

Specific performance—Partnership property—Sale by one co-partner—Ratification—Contract for sale—Terms of.

One of two co-partners signed an agreement in the partnership name for the sale to the plaintiff of certain timber limits and plant owned by the firm. This was communicated to his co-partner, who, without dissenting, afterwards furnished information to the plaintiff which he was entitled under the agreement to obtain.

Held, that there had been a sufficient ratification of the agreement.

The agreement referred to certain plant which could be easily identified by parol evidence. It also *prima facie* imposed a cash payment as to $15,500. Memoranda signed by the firm name were put in evidence whereby this payment was distributed over three years, but it was shown that ultimately the cash payment was resolved upon and agreed to by the managing partner and the plaintiff.

Held, that the managing partner had power so to agree, and that the contract was sufficiently definite, and that the plaintiff was entitled to specific performance thereof.

W. Cassels and *Brough*, for the plaintiff and defendants in same interest.

Bethune, Q.C., and *Moss, Q.C.*, for hostile defendants.

Plumb, for other defendants in same interest with plaintiff.

COURT v. WALSH.

Statute of Limitations—Mortgagor and mortgagee—Extinguishment of title—Insolvent Act of 1875—Right of mortgagee, barred as to land, to prove under covenant.

Held, that the operation of the Statute of Limitations, as between mortgagee and defaulting mortgagor, is not only to take away the mortgagee's right of action to recover the land, but to extinguish the mortgagee's title thereto and vest it in the mortgagor; and possession subsequently obtained by the mortgagee will not revive his title.

While time was running under the statute against the mortgagee, the mortgagor became an insolvent under the Insolvent Act of 1875.

Held, that, though the mortgagee was entitled to prove on the estate under the covenant for payment contained in the mortgage, the assignee took the land, discharged from the mortgage, as an asset of the estate on the extinguishment of the mortgagee's title by the statute, and therefore the mortgagee was not entitled to value her security under section six of the Insolvent Act.

Maclennan, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

BRIGHT v. McMURRAY.

"Convey, assign, release and quit claim."—Effect of—Mortgagor and Mortgagee—Statute of Limitations—Extinguishment of mortgagee's title.

Held, that in a conveyance for valuable consideration made by mortgagees in possession, though the words "convey, release and quit claim" were of themselves inoperative, yet the word "assign," especially when coupled with proper words of limitation and followed by a habendum for all the estate of the grantors, was sufficient to pass the fee to the defendant's vendor, subject to the equity of redemption of the plaintiff; and therefore that the possession of the mortgagees, their assigns, and the defendant, enured to the benefit of the latter, so as to extinguish the plaintiff's title.

The plaintiff entered after his right to redeem had been barred by the Statute of Limitations.

Held, that he was a trespasser, and that the defendant was entitled to a declaration of ownership of the land, and judgment for mesne profits.

Moss, Q.C. and *J. E. Robertson*, for the plaintiff.

J. H. Ferguson, for the defendant.

VANKOUGHNET v. DENISON.

Conveyance of land—Restrictive covenant by grantor—Right of assignee—Description of land—Parol evidence.

The defendant, in a conveyance of a piece of land to the plaintiff's vendor, agreed not to build on a certain other piece of land retained by him, of which that sold was a part, and the plaintiff's vendor entered into a restrictive covenant as to his user of the part purchased by him. The plaintiff was influenced by this restrictive clause as to building, which was held out by his vendor as an inducement to him to purchase.

Held, that the benefit of the restriction as to building ran with the land conveyed as an advantage and privilege appurtenant thereto, though the word "assigns" was not used in the covenant, and though the benefit of it was not formally transferred to the plaintiff: and he was therefore entitled to restrain the defendant from building on the land affected by the covenant contrary to its terms.

The land affected by the restrictive covenant as to building was described in the conveyance as "Bellevue Square."

Held, that parol evidence was admissible to designate the locality and description thereof, and that evidence of reputation might also be received.

There was a mortgage upon Bellevue Square created by the defendant prior to the conveyance to the plaintiff's vendor, under the power of sale in which the mortgagee sold to C., who conveyed to the defendant's son, who conveyed to the defendant.

Held, that the defendant's liability upon his restrictive agreement not to build revived upon the property coming into his hands again.

McLennan, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *Black*, for the defendants.

SANDERS v. MALSBURG.

Equitable separate estate—Conveyance from wife to husband—Onus probandi under R. S. O. cap. 109, sec. 2.

By an ante-nuptial agreement between intending husband and wife, lands acquired by the wife after the marriage became her equitable separate estate. She made a conveyance expressed to be for value of part of these lands direct to her husband, which was registered.

Held, that, inasmuch as by virtue of the equitable quality of the estate she had the right to alienate it as a *feme sole* without the joinder of her husband, the latter might be her grantee; and though the conveyance might not technically pass the legal estate, yet a Court of Equity would hold her trustee for her husband.

Ogden v. *McArthur*, 36 U. C. R. 246, distinguished.

Held, also, that under R. S. O. cap. 109, sec. 2, the *onus* lay on the party disputing the validity of the conveyance to disprove the payment of the expressed consideration.

Geo. Morphy, for the plaintiff.

Plumb, for the defendant.

[PROUDFOOT, J., 18TH MAY, 1882.

In re CHARLES; FULTON v. WHATMOUGH.

Will—Construction of—Vested interests.

A testator directed his trustees to invest his personal estate, and after providing for maintenance of his widow and children to invest the dividends unapplied, accumulate them and hold them on the same trusts as those declared concerning the fund which produced them. He devised the realty, except lands in L., in trust, to sell after the death of his widow and the youngest child attaining 21, and apply the proceeds upon the trusts declared as to the residue of the personal estate; power to lease unsold lands from year to year, or for any term not exceeding 10 years in possession. The trustees to hold the trust moneys, after the death or second marriage of his widow and the youngest child attaining 21, in trust for his sons and daughters as tenants in common. If any children should die under 21 without leaving issue, their original and accrued shares to go to the other children; and until the shares became vested the dividends were to be applied for the benefit of the children entitled in expectancy to such shares. The rents of the lands in L. to be held after the death of the widow and the youngest child attaining 21, on the same trusts as the income; power to lease the lands on building leases for 21 years renewable. The share of any child dying without leaving issue to be divided among the other children; but if issue were left the share was to be divided among the issue or by the will of the child so dying, so soon as the issue attained 21; and in default of such issue attaining the age of 21 he devised his whole estate in trust for a charity.

Held, that as it appeared that the duties of the trustees were not to terminate until the testator's grandchildren attained 21, the general scheme being in favour of the children and grandchildren and failing the latter attaining 21, then to a charity; therefore the shares of those who survived the death of the widow and the attaining 21 by the youngest child, at which period the trustees were directed to hold for the children as tenants in common, were not absolute interests in the estate.

TOWN v. BORDEN.

Will, Construction of—Vested Remainder.

B. devised his land, household goods, and personal property to the use of his wife for life, "and at her decease the whole of the personal and real property to be equally divided between my six children." Four of the children pre-deceased the widow.

Held, that the shares of the children were vested immediately at the testator's death.

Baird v. *Baird*, 26 Gr. 367, explained.

THE VILLAGE OF BRUSSELS v. RONALD.

Municipal aid to Manufactures—Mortgage on Real Estate—Security under the Municipal Act—Forfeiture—Damages.

The plaintiff passed a by-law to raise $20,000 as a bonus to the defendant to aid him in manufacturing, on condition that he should execute and deliver to the Reeve, on behalf of the plaintiffs, a first mortgage on his premises for $10,000, and a bond for a further sum of $10,000, both conditioned for the carrying on of the manufactures for 20 years, upon certain conditions, and amongst others to keep invested in the premises and plant at least $30,000. He executed a bond in the penal sum of $10,000, conditioned to be void, if he should carry on the manufactures for 20 years without interruption, and during that time keep invested $30,000. He also executed a mortgage on his premises to be void on the same condition as the bond, but not specifying that it was a security for $10,000. The defendant having used $3,000 of the money received from the plaintiff, in building a house, the plaintiff took a second mortgage for that amount to be void on his investing $3,000 more in the factory. The defendant invested $30,000 in the business, but failed to carry it on upon the conditions of the by-law.

Held, (i) that a mortgage on real estate is a security within the meaning of the Municipal Act, sec. 454, s-s. 5 (*b*), and therefore the plaintiff had power to hold the defendant's mortgage. (ii) That the first mortgage, though unlimited on its face, was a charge upon the lands for any damages the plaintiffs might sustain from the failure of the defendant to perform his engagement, to the extent of $10,000 only. (iii) That the forfeiture of the estate by non-fulfilment of the agreement would be relieved against. (iv) That the second mortgage for $3,000 was without consideration, and unauthorized by the by-law, and should be given up to the defendant.

The by-law provided that the defendant should keep the premises insured, loss, if any, payable to the plaintiffs; but neither the mortgage nor the bond provided for insurance.

Held, that the plaintiffs had no charge upon the lands for insurance premiums.

J. E. McDougall, for the plaintiffs.

A. Bruce, for the defendant.

GAIRDNER v. GAIRDNER.

Will, construction of—Vested remainder—Devise over.

A testator devised to his wife, as long as she remained unmarried, the homestead and farm on which he resided, with the use of all his household goods, stock and farming implements, in trust for the maintenance and support of whatever family might survive him till he or they should attain 21, and thereafter for the maintenance and support of his wife as long as she remained unmarried. If she married again they should be taken possession of by his executors, to make the necessary provision for the maintenance, education and support of his surviving child or children during their minority, and to be handed over to the latter as hereafter set out. All other his estate he devised and bequeathed to his executors in trust to realize, invest proceeds of, and out of the income give his children a liberal education, and put his son Thomas in possession thereof at 21, if the only child. He further devised to his son Thomas the homestead, household goods, farming stock, etc., on the decease or second marriage of his wife, should he have attained 21, but should he be still in his minority, the same to be taken possession of by his executors till he attained his majority. In case Thomas should not survive him or attain 21, and in case he should have no other surviving child who should attain 21, or in case he should have no grandchild, he directed his real and personal estate to be divided amongst his brothers and sisters. Thomas, the only surviving child, attained 22, and died unmarried, without issue, having devised all his real and personal estate to the defendant, his mother, the testator's widow. The plaintiffs were the brothers and sisters of the testator, and claimed under the devise over.

Held, that Thomas' interest was not contingent upon his surviving the widow and attaining 21 (the latter date being fixed for his being put in possession only), but that he took a vested interest, which passed by his will to the defendant.

Held, also, that the intention of the testator as to the devise over was that it was not to have taken effect unless Thomas died under 21 without leaving a child.

IN CHAMBERS.

[ARMOUR, J., 12TH MAY, 1882.

TURNER v. KYLE.

Seduction—Particulars.

Held, reversing the order of the Master in Chambers, that particulars should not be ordered to be given by the plaintiff in an action of seduction.

A. McDougall, for the appeal,
Holman, contra.

[PROUDFOOT, J., 22ND MAY, 1882.

BROWN v. BROWN.

Partition—Infants as plaintiffs—Irregularity.

A partition suit had been commenced by summary application under G. O. Chy. 640, the infant children of the deceased being joined as plaintiffs. On motion of the official guardian,

Held, that the infants had been improperly joined as plaintiffs, and that they should have been made defendants and represented by the official guardian under G. O. Ch. 640.

Symons, for the plaintiffs
Hoyles, for the defendants.

TORRANCE v. TORRANCE.

Taxation of costs—Instructions for pleadings— Saving expense.

Only one charge for instructions for pleadings is allowable under the tariff.

Where an item is not strictly taxable in a party and party bill, but the work done saves the greater expense of proceeding in the regular way, the costs should be allowed.

In this case, the taxing officer disallowed an item of $1.50 for reply, holding that the tariff did not authorize it.

There was also an item for costs incurred in procuring certain persons who were not parties to the suit to allow material documents in their possession to be produced and put in evidence at the trial of the action.

The regular course of proceeding would have necessitated the issue of a foreign commission to take part of the evidence, and the issue of subpœnas to various witnesses resident within the jurisdiction. The expense of the commission and subpœnas would have been many times as great as the costs which had been incurred. The taxing officer disallowed these costs.

Cattanach, for the plaintiff, moved on notice for a review of the taxation under Rule 449; and argued that under the tariff the item for "Instructions for pleadings" was chargeable for every pleading, and that the solicitor was therefore entitled to charge, for instructions for reply. He also contended that as the procuring of the documentary evidence without a commission or subpœnas had saved expense, it should be allowed.

22nd May, 1882.—PROUDFOOT, J., held that the proper construction of the tariff gave only the costs of one set of instructions for all the pleadings in an action, and therefore that the charge of $1.50 for instructions for reply was not taxable. As to the other item, it should have been allowed. The result was a great saving of expense, and under item 155 of the tariff and Rule 442 the taxing officer had authority to tax it to the plaintiff.

The plaintiff should have the costs of this application.

NOVA SCOTIA.

Supreme Court.

HAWES v. HART.

The Seaman's Act, 1873—*Wages—Magistrate's order—Certiorari.*

Held, that 36 Vict. cap. 129, sec. 53 does not take away the jurisdiction of a Superior Court to grant a writ of certiorari.

THE

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PROVINCIAL JURISDICTION OVER CIVIL PROCEDURE.

WE have learned by experience that the language of the ninety-first and ninety-second sections of the British North America Act is, if not ambiguous, still at times somewhat deceptive. But the extent of the deception, or the extent of the power to deceive, was perhaps not appreciated until number 14 of section 92 came before the Supreme Court of British Columbia for construction. At first sight, it is perhaps the one least calculated to excite suspicion or doubt as to the true intent and meaning of the words, and yet a perusal of the judgments in *Sewell* v. *The B. C. Towing and Transportation Co. et al.*, better known as *The Thrasher Case*, shows what different constructions are capable of being placed upon it.

In that case, the question arose as to the right of the Local Legislature of British Columbia, under this clause, to make laws regulating the procedure in the Supreme Court of the Province. There is nothing remarkable in the facts of the case itself; but in order to give an intelligent idea of the manner in which the point was raised, it is necessary to state how the case came on to be heard.

The action was for the recovery of damages for the loss of a vessel named *The Thrasher*, through the alleged negligence of the owners of the tugs by which she was

being towed when the loss occurred. Judgment went for the defendants. The plaintiffs, desiring to move for a new trial, found themselves obstructed by the new rules of procedure framed by the Lieutenant-Governor in Council, under the authority of the Judicature Act, 1879.

By the 17th section of this Act, which is to a great extent a transcript of the English Act, it is enacted that, "The Lieutenant-Governor may from time to time, after the passing of this Act, by order or orders in Council, make rules, to be styled 'Rules of Court,' for carrying this Act into effect, and in particular for all or any of the following matters." The substance of the enumerated subjects is as follows:—

For regulating (1) the sittings of the Court and Judges in Chambers;

(2) The pleading, practice and procedure in the Supreme Court, the reporting of evidence and the reporting of cases;

(3) Generally, any matters relating to the practice and procedure, the duties of the officers of the Court, the privileges of counsel or solicitors, costs, conduct of business not expressly provided for by the Act;

(4) The sittings of Judges in Chambers;

(5) Rehearing of orders, decrees or judgments of a single Judge;

(6) Anything which under that or any Act might be prescribed, regulated or done by rules of Court;

(7) Sittings and conduct of business on the Circuits;

(8) And any such rules may from time to time be rescinded, and new rules in lieu thereof made by the Lieutenant-Governor in Council.

Pursuant to this section of the Act, the Supreme Court Rules, 1880, were framed by the Lieutenant-Governor in Council. They are to a great extent a transcript of the English Rules of Court, but those only which we are immediately concerned with, relate to the sittings of the Court. Rule 401 declares that sittings of the Full Court

in Victoria shall be held as often as the business to be disposed of may render it necessary. In 1879, the Judicial District Act, 1879, was passed, dividing the Province into districts, and enacting that the Judges should reside and discharge their duties in the districts respectively assigned to them. In 1881, the Local Administration of Justice Act, 1881, slightly altered the provisions as to judicial districts, and declared it lawful for the Lieutenant-Governor in Council to direct that the Judges should reside in defined districts, etc. This Act regulated the procedure of the Court in many respects. The impeached sections are 28 and 32. Section 28 is as follows:—"The Judges of the Supreme Court shall have power to sit together in the City of Victoria as a full Court, and any three shall constitute a quorum, and such full Court shall be held only once in each year, at such time as may be fixed by Rules of Court." Section 32, as far as it is material, runs thus:—"The Supreme Court Rules, 1880, shall, as modified by this Act, be valid * * and the Lieutenant-Governor in Council shall have power to vary, amend or rescind any of these rules, or make new rules, provided the same are not inconsistent with this Act, for the purpose of carrying out the scope and aim of this Act, and of the 'Better Administration of Justice Act, 1878.' These rules need not be uniform, but may vary as to different districts in the Province as circumstances may require; and section 17 of the Judicature Act, 1879, with respect to rules of Court, shall continue in force."

The Judicial District Act was on the 9th June, 1881, proclaimed to come into force on the 27th June of the same year; and the Local Administration of Justice Act on the 28th June of the same year, on which day the Full Court was sitting and rose. The plaintiff's case was tried on the 27th, 28th and 29th June and it therefore came within the purview of these enactments.

The plaintiff, as we have said, being dissatisfied with the judgment for the defendants, applied for a rehearing before the Full Court, but was refused it on the authority of the above enactments. Under these circumstances he would

have had to wait a year before another sitting of the Full Court would take place. He then applied for relief to the Supreme Court of Canada, but was denied it on the ground that his case had not been heard by a Court of last resort in the Province. A second application was made for a hearing before the Full Court, pending which Rule 401 A. was framed by the Lieutenant-Governor in Council, whereby a sitting of the Full Court for the year 1881 was directed to be held on 19th December. Their Lordships accordingly met upon that day, not as a Full Court, as Sir Matthew Begbie, C.J., said, but to determine whether they were then lawfully sitting as a Full Court. Counsel for the plaintiffs then contended that the enactments in question were *ultra vires* on various grounds, which Mr. Justice Gray, in his judgment, has summed up as follows:—

(1). That the Supreme Court did not come under the designation of a Provincial Court within the meaning of number 14 of section 92, and consequently that the Local Legislature had no right to regulate its procedure.

(2). That if the Local Legislature had power to make rules regulating the practice and procedure of the Supreme Court, it must itself make the rules, and could not delegate the power of so doing to the Lieutenant-Governor in Council, or to any other parties than the Judges themselves—according to old and immemorial custom and usage.

(3). That the Dominion Government, having a legal right to utilize the Supreme Court in this Province for the enforcement of Dominion laws and rights, legislation by the Local Legislature which impaired, prevented or interfered with that right, was unconstitutional and *ultra vires*.

(4). That the legislation and enactments in question, both as to the sittings of the Courts, the rules of Court, its procedure and practice, and the localizing of the Judges were unconstitutional and *ultra vires*.

(5). That the Court had still the power, *ex mero motu*, to sit in banc and hear arguments on points reserved and raised at *Nisi Prius*, or otherwise in proceedings in the Court, at such times as would promote the rights of suitors.

(6). That the plaintiff having acquired vested rights by the institution of his proceedings, could not be affected, by *ex post facto* legislation.

The Attorney-General at the suggestion of the Court and by agreement with counsel for the plaintiffs was heard in support of the constitutionality of the enactment. After a lengthy argument the full Court (composed of Sir M. B. Begbie, C.J., and Crease and Gray, JJ.,) held that these enactments were *ultra vires*. Their lordships were unanimous in their opinions and held,

(1). That the Supreme Court of British Columbia was not a Provincial Court, within the meaning of number 14 of section 92 of the British North America Act, and therefore that the Local Legislature had no power to regulate procedure therein.

(2). They also held, that the appointment of the days for the sittings of the Court was a matter of procedure, and so, purely of *judicial* cognizance, and that it was not within the power of the Legislature to deal with it, or to delegate it to any one else to be dealt with.

(3). It was also the opinion of their Lordships that they were officers of Canada, by virtue of sections 96, 99, 100, 129 and 130 of the British North America Act, subject only to the constitutional action of the Parliament of Canada.

(4). It was also held, that the Local Legislature had no power to diminish or repeal the powers, authorities, or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular Judge of the Court, nor to alter or add to any of the existing tenures, and conditions of the tenure of office, of the Judges, whether as to residence or otherwise. With respect to the right of the Local Legislature to vary the tenure of office of the Judges, it must be at once conceded that it has not that power. A similar attempt was made by the Legislature of Ontario with respect to County Court Judges, who are appointed by the Governor-General in Council, and the Act was held to be *ultra vires* (*a*).

(*a*) *Re Squier*, 46 U. C. R. 174; 2 C. L. T. 100.

It will be seen that the case raised fairly for discussion the questions, What is a Provincial Court? What is a Provincial officer? What is meant by the constitution, maintenance and organization of a Court? For it is only in those Courts which the Province constitutes, organizes, and maintains that the Local Legislature has power to regulate the procedure.

Before proceeding to discuss the questions involved, it will be necessary for us to state shortly the course of reasoning, which led their Lordships to their unanimous conclusion. The learned Chief Justice points out that the terms "Province" and "Provincial" are ambiguous; and though in section 129 the ambiguity is avoided by using the names of the Provinces, yet in other sections it is left to the context to explain it. We may speak of a Provincial Lieutenant-Governor or a Provincial Minister of Education. The former is allotted to, the latter appointed by, the Province. In other words, an officer may be "Provincial" either by reason of the source from which he derives his authority, or from the fact that his jurisdiction is limited to a particular Province. Their Lordships incline to the opinion that the word "Provincial" in section 92, number 14, means "deriving its authority from the Province." Its meaning is tested by the words preceding it, viz., "the constitution, maintenance, and organization, etc." If the Court is constituted, organized, and maintained by the Province, it is a Provincial Court. If not, then it is a Dominion Court; and the Local Legislature has no power to interfere with its procedure. Their Lordships then show that the Supreme Court of the Province was not organized wholly by colonial authority prior to Confederation. Though this is thought to be immaterial, the learned Chief Justice says:—"What is material, and what cannot be denied, is, that at and up to the *moment* of Confederation a Supreme Court of British Columbia existed in the Colony, completely organized, maintained and constituted. * * This I do consider extremely important. Combined with other circumstances, I think that it places this Court at once under the Dominion Parliament and

removes it from the authority of the Local Legislature, by virtue of section 129 of the British North America Act." Under this section all existing Courts of civil and criminal jurisdiction, and all officers judicial, administrative, and ministerial, are continued in the new Provinces as if the union had not been made, subject, nevertheless, to be abolished or altered by the Parliament of Canada or by the Legislature of the respective Province according to the authority of the Parliament or of that Legislature under the Act.

It is next pointed out that by section 92 the Legislature in each Province "may exclusively *make laws*" in relation to the subject matters assigned to it. The gift of the power to legislate, empowers the Legislature to interfere only in those particulars which are the proper subjects of legislation. Certain portions of the administration of justice are exclusively judicial functions. The regulation of practice and procedure and of all domestic matters in the Courts are peculiarly judicial functions, and therefore they do not fall within the purview of the law making power. "The argument," says the learned Chief Justice, "leaves to the Local Legislature full and unimpaired all essentially legislative functions in respect to all the matters enumerated in section 92, all matters of substantive law, all, surely, that could have been intended to be given to the Legislature of the Province. * * The whole law of inheritance, * * the rights of creditors against the person and property of their debtors, of husband and wife, * * and numberless other matters are left to the Local Legislature; executive and judicial functions, however, are not given and therefore are expressly forbidden to them even in regard to these topics." The learned Chief Justice then proceeds to enquire what is procedure, and what is not. The difference between law and practice is pointed out: "The forms, and the times, and the proofs to be observed and adduced in claiming the rights of suitors are matters for the Court to determine, unless the power be taken away. * * As to moulding the commencement of actions, that was so completely in the hands of the Courts,

that each had its own forms of writs; and it was in order to bring about uniformity of practice that the Imperial Parliament from time to time interfered in all these matters as it had a right to do by virtue of its Sovereign authority. But no Legislature, not sovereign, can interfere with or alter the procedure in a Superior Court unless special authority to do so be conferred on it by the Sovereign, *i.e.*, here by the Imperial Parliament." This right of a Superior Court over its own procedure is a common law right and must be expressly, if at all, taken away.

Authorities are cited showing the manifest distinction between law and practice. "Practice" denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives the rights, the machinery as distinguished from the product. "The orders and rules under the Judicature Acts 1873, 1875, are matters of procedure, and are not intended to alter the law or the rights of parties," says Bramwell, L.J., in *Pellas* v. *Neptune Ins. Co.* (*b*). It is the "product" and not the "machinery" which comes within the meaning of section 92, number 14 of this Act. The making of a rule, the fixing a time for sitting is no more a legislative function than the adjournment of a partly heard case.

But even if this view be erroneous, and if this power be deemed a matter essentially legislative in its nature, then the Legislature should have provided for it, and should not have attempted to delegate the power to the Lieutenant-Governor, in Council. *Regina* v. *Burah* (*c*), and *Regina* v. *Hodge* (*d*) are cited for this.

Some space is devoted to the consideration of the phrase, "constitution, maintenance and organization," the true interpretation of which has a great bearing upon the question at issue. The Provincial Legislature have power to constitute, maintain and organize Provincial Courts. If as a fact they do constitute organize and maintain certain

(*b*) L. R. 5 C. P. D. 41.
(*c*) L. R. 3 App. Ca. 889.
(*d*) 46 U. C. R. 141.

Courts, it is argued that the Courts so constituted, etc., are Provincial Courts, and that having full control over the very being of these courts, the Local Legislature have the right to regulate the procedure therein—that they are within the express terms of the enactment. Is, then, the Supreme Court of British Columbia constituted, organized and maintained by the Provincial Legislature?

To quote from the learned Chief Justice again: "It seems as clear as words can speak, that the procedure handed over to be provided for, by the Local Legislature, is the procedure in * * the Provincial Courts, *i.e.*, in the strictest sense of the term, which the Local Legislature is by that sub-section authorized at any future time to 'constitute, maintain and organize,' and by sub-section 4 of section 92 is specially empowered to pay. It seems perfectly impossible that this description can mean a Court which was fully constituted not by the Province at all, but long before the Province came into existence, and having that constitution secured to it by section 129 till varied by Dominion legislation, a Court of which the Judges are appointed and maintained and removable by the Dominion authority alone (sections 96, 99, 100)." As instances of the class of Courts which the Provinces have the power to constitute, the learned Chief Justice names Courts of Justices of the Peace, Coroners' Courts, Gold Commissioners' Courts, Sheriffs' Courts, etc., and he adds, "When such local courts suggested themselves to the framers of the British North America Act as possible, the question arose, 'What is to be done about procedure in these Courts? In Superior Courts, the Judges, we know, have power to make rules; but in these Courts, who shall settle their practice?' and Parliament said, 'Let the Local Legislature decide that.'"

It was argued by the Attorney-General that the "organization and maintenance" of a Court meant something more than the appointment and payment of the Judges of the Court; that it included, amongst other things, the appointment and maintenance of all the officers of the Court,

Registrars, etc., the providing Court-houses, Chambers, etc., preparations for trials of crimes, juries, etc., all which were provided by the Province, and therefore that the Supreme Court of the Province had, since confederation, been wholly organized and maintained by the Province and not by the Dominion. To this the learned Chief Justice answers, "I am very much of the Attorney-General's opinion as to one part of his suggestion. I have always thought that the registrar and officers were part of the Supreme Court, and ought to be designated and maintained by the Dominion authorities alone. * * But it does not seem to govern the present question. Whether the expenses of the Court are, in the fullest sense of the word 'Court,' wholly defrayed by the Dominion or not, it cannot be said that it is a Court constituted, maintained and organized by the Province. * * The consideration that the Registrar has hitherto been paid by the Province cannot affect the position that the Judges at least are, according to the reasoning in *Valin* v. *Langlois*, officers of Canada, are subject as such to the authority of the Parliament of Canada, and therefore to that Parliament alone."

After showing that the Judges of the Supreme Court are officers of Canada by force of sections 96, 99, 100, it is pointed out that two of the present Judges of that Court were Judges of the Court before and at the time of the Union. They therefore continue to exist, under section 129, as if the Union had not been made. "It is not that the former Provincial Courts, Judges, etc., in the old sense of 'Provincial,' are to become 'Provincial' in the new sense. On the contrary, the former Courts and Judges, with all the powers and jurisdiction over all matters both in sections 91 and 92, in short, as they existed in the completely autonomous Provinces, are to be continued after the Union in the same geographical limits, though they are now called 'Provinces' in quite a different sense." And his Lordship concludes that the Supreme Court and its Judges became by section 129 subject solely to the control of the Parliament of Canada.

The concluding words of that section could not escape

critical observation, and they are consequently made the subject of the following remarks :—"I do not think it can be argued, at any rate it was not argued, that the distributive words at the end of section 129 have reference to the subjects handled by the Courts, officers, etc., and not to the Courts, officers, etc., themselves. In the first place the words of the statute are perfectly plain, and contain no reference to any particular topics, the passive subjects, *i.e.*, enumerated in sections 91 and 92, but only to persons and their powers, active agents, owing allegiance to the one legislature or the other. If it be attempted to be applied to the enumerated topics in sections 91 and 92, it leads instantly to quite absurd confusion. It would provide for instance, that the Dominion Parliament alone had power to legislate concerning the procedure in trying a question in the Supreme Court here concerning the post-office, or shipping, or currency, or any of the matters in section 91, or rather not expressly mentioned in section 92; but that, in trying a question on any of the subjects enumerated in section 92, the Provincial Legislature is to have the power to determine the procedure. * * If we are to ascertain the respective authority by reference to the enumerated topics in sections 91 and 92, we might have the Dominion Legislature keeping this Court on foot for determining all questions of bankruptcy, currency, etc., and the Local Legislature abolishing it so far as regards all questions of inheritance, of legitimacy, or of civil rights generally."

There remains for consideration one section of the Act which bears a most important relation to the point at issue. Section 94 enacts that, "Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the courts in those three Provinces, and from and after the passing of any Act in that behalf, the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted * *." This section is made to agree

with the construction placed upon the others. "Parliament," says the learned Chief Justice, "shall not then for the first time have power, but the existing restrictions shall then for the first time be removed. There seems to be, as I read the British North America Act, one restriction on the interference of Parliament, and only one, viz: section 129, confining it to courts held before officers of Canada, and section 94 seems to allude to this. I do not say that this is the only possible grammatical sense of section 94, but this interpretation supports and is supported by many other sections of the Act, whereas any other interpretation seems to raise anomalies. For the language of section 94 and of many other sections seems hardly compatible with the notion that until the passing of such an Act as therein referred to, Parliament is to have no power whatever to legislate concerning a single court in the whole Dominion, and that by simply refusing consent to any contemplated Act, any Province could forever condemn the Dominion Parliament to perpetual impotency. This would soon compel Parliament to exercise its undoubted power of extinguishing all the Superior Courts in the Dominion by simply leaving them to perish; and then it would fall back, probably, on the power of creating new courts under section 101; but whether these would meet the difficulty, *quære*.

The judgments in the case are very long, and though, as (Mr. Justice Crease says) they were prepared separately, and without any conference, they all dwell very fully upon the points raised, and all lead to the same conclusion. We have quoted largely from the judgment of the learned Chief Justice, more out of respect for the head of the Court, than from choice as to the manner in which the questions presented for adjudication are therein dealt with. All the judgments are very exhaustive, and the reasoning in all is much the same. The report of the case being too lengthy for insertion in our pages, we have been obliged to adopt the plan of stating in our own words with the aid of frequent quotations, the questions presented, the holdings therein and the course of reasoning, which led to those holdings. In doing so we have conscientiously striven to

do all justice to the learned Judges, and to present their views upon this important question truly and faithfully to our readers. If mistakes have occurred they have occurred unwittingly, and as we proceed in our criticisms they may be discovered, and if so will be acknowledged. The judgment, besides being entitled to great respect on account of its being the unanimous judgment of the highest Court in the Province, derives additional weight from the fact that the opinions of the three Judges who sat were formed independently, and from the fact that the result is approved by the whole Bar of the Province. We approach the subject with the respect due to it, and shall proceed to discuss the various points raised by the case *seriatim* in our next regular number.

EDITORIAL REVIEW.

The Court of Appeal.

The Court of Appeal, at the approach of the day fixed for the lately postponed sittings, occupied very much the position of a man whose next meal is about to be served up before he has had time to digest the last one.

We think the course adopted of postponing the sittings meets with universal approval. Where there are arrears of business, the cases standing for argument must be delayed. The only question is, shall they stand on the docket unargued until the Court has overtaken the arrears, and then be taken up and decided while the arguments are fresh in the minds of the Judges? Or, shall they be argued, and then be allowed to lie untouched while the Judges work off the arrears, and be disposed of after the lapse of a term, two, three terms, or perhaps a year from the day of argument. There is no question as to the expediency of the course to be adopted. There is no suitor who would not rather have his cause decided shortly after the argument, than after it had lain a long while waiting for its turn to be considered. There is no counsel who would not feel that his arguments had been better appreciated, if judgment were delivered in the term following that in which his argument was heard, than if it had been delivered a year afterwards. We should like to see an arrangement made whereby the Court should hear a certain number of cases, and then adjourn for the purpose of considering their judgments, to meet again for the delivery of them before the next batch of cases was taken up. But until the Judges of Appeal are relieved from Circuit work we must expect delays and adjournments.

Judgments and Hot Weather.

They don't go well together. All the Courts have been exceedingly busy in delivering judgments before the long vacation arrives. The Queen's Bench and Common Pleas Divisions have disposed of a great number of cases. The Chancery Division is sending forth its decisions as the respective members of the Court are prepared with them; and, at the time of writing, we hear it announced that the Court of Appeal is about to make a large contribution to the Reports.

Reporters and journalists wipe their brows and stand aghast. It is a pleasant thing for their Lordships to dispose of a number of cases and to descend from the Bench, doff their robes and take their summer vacations with a virtuous and refreshing feeling that they at least have finished their work. However, their Lordships' work ended, the reporters' work begins. The latter gentlemen must have their work done up to date, otherwise they cannot draw their salaries. And the contemplation of a pile of judgments that must be read, must be noted, must be prepared for the printer, is not calculated to make a man enjoy his summer vacation—if he can take one under the circumstances—much less will the actual work afford him pleasure. Speaking from personal feelings, we would like to see all the judgments which have been prepared and are ready for delivery during the month of June put into a refrigerator where they would keep during the hot weather.

The Bar in British Columbia.

We see by papers from British Columbia that Mr. D. M. Eberts, late of Chatham, Ontario, who has been practising as a solicitor in Victoria, B. C., for some time, has been called to the Bar of that Province.

Mr. P. Æmilius Irving, also from Ontario, who practised for a time in Newmarket, has also been called to the Bar in British Columbia. We hope both gentlemen will do credit to their native Province.

It is evident that Manitoba is not the only Province that has its attractions for Ontario practitioners. What the attractions of British Columbia may be we are ignorant of. We have seen the tariff of costs, and it possesses none, for it is lower than our own. By the way, the Judges of the Supreme Court have held that the Local Legislature have no jurisdiction over that Court or its procedure. That is decidedly an attraction, for the Parliament of Canada is not likely to trouble itself about procedure, and a man may therefore live long enough to learn his practice.

Osgoode Hall Lectures.

Numbers four and five of Mr. McDougall's lectures on Negligence have just come to hand. These numbers complete the series. They are accompanied by an index and a table of cases cited, and thus is concluded a work of 181 pages, which cannot but have been beneficial to those who heard the lectures, and cannot fail to be beneficial to those who may now read them.

The law of Common Carriers is continued and concluded, and the tenth or final lecture is devoted to the measure of damages. We congratulate Mr. J. P. Mabee who edited this little publication on the manner in which he has done his work.

NOTES OF RECENT DECISIONS.

Brown v. *Brown*, ante p. 311. A correspondent writes us with reference to this case, that the proceedings were not commenced by summary application, but by writ of summons in the name of the infant children of the deceased by their next friend. The motion to set aside the proceedings was on the ground that, in partition matters, where infants are concerned, they must be represented by the official guardian; that Mr. Justice Proudfoot held that the intention of the G. O. 640 was to permit no suit for partition to be commenced by infants, without the sanction of the official guardian; and that the note in Mr. Holmested's annotation of the G. O. which is to the effect that infants must file a bill is incorrect.

We are glad to be able to make the correction. The result, however, is much the same—the principle being that the official guardian must sanction any proceedings by infants in such cases.

There appears to be some doubt about the practice still, and we understand that a motion of a similar kind is now reserved for adjudication by the same learned Judge who decided this case and *Re Wilson, Lloyd* v. *Tichborne*, 9 P. R. 89, which appear to conflict. In the latter case the widow and infant children of the deceased applied for administration of the estate, and Proudfoot, J., held that the order should go without an enquiry as to merits between the widow and the executor who was defendant, on the ground that infants have a right to administration on the mere suggestion of their next friend that it would be for their benefit. The fact that this motion was for partition while in *Re Wilson* it was for administration makes no difference, for the practice and the principle upon which it proceeds as to appearing by official guardian are the same. Though the report of *Re Wilson* does not state that the

official guardian sanctioned the joining of the infants as plaintiffs, it does not appear that he did not. Whether he did or did not is unknown to us; but *Brown* v. *Brown* as reported does not conflict with *Re Wilson* as reported, for they might well be read together. *E.g.* Infant children are entitled to administration or partition on the mere suggestion of their next friend that it would be for their benefit, but they must not be joined as plaintiffs without the sanction of the official guardian.

BOOK REVIEW.

A Practical Exposition of the Principles of Equity, illustrated by the leading decisions thereon, for students and practitioners. By H. ARTHUR SMITH, M.A., LL.B. (London), of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, 1882.

Mr. Smith's title page is a very good index of the contents of his book. It is an excellent example of the saying that the great principles of law are the pillars that support the building, while the cases are the windows which let in the light. The method of treatment is well and shortly illustrated by the introductory chapter. The learned author explains the maxim "Equity acts *in personam*;" and having treated of the principle involved, he cites *Penn* v. *Lord Baltimore* and *The Earl of Oxford's Case* as illustrations of his text. In this manner the Principles of Equity are discussed and exemplified throughout. We know of no better method for instructing students than this. Such expressions as "such and such a case has settled the law," give beginners the idea that Judges have the power to settle or unsettle, make or remake the law. The stubborn fact that there is such a thing as Judge-made law does not mend the case but is rather to be deplored. If the first books that are put into the hands of the student impress him with the

correct notion that cases are only interpretations of the law, applications of the principles of law, a good foundation is laid at once. A case will then always present itself as an exponent of a principle, and, instead of accepting it as final, the student will search in it for the principles it professes to be founded upon. Another feature of the work is the new division of the subject which the learned author has adopted on account of the recent Judicature Acts. The old division into the concurrent, exclusive and auxiliary jurisdiction of the Courts of Equity is now obsolete. Equity and law now to be administered concurrently in all Courts. The learned author divides the work into two parts. Part I. comprises those subjects, the jurisdiction of Equity respecting which, originated in, or chiefly rests on, a substantive difference between its principles and those of the ancient common law. Part II. comprises those branches of the jurisdiction which have arisen chiefly from the peculiarities of its procedure or remedies.

SUPREME COURT OF CANADA.

[3RD JUNE, 1882.

Rule 81. It is hereby ordered that Schedule D. annexed to the Rules of the Supreme Court of Canada be amended as follows:—Instead of the item, "Printed case, per folio of 100 words, including correcting, superintending, printing and all necessary attendances, 30c," the following allowances shall be taxed by the Registrar:—For engrossing for printer copy of case as settled, when such engrossed copy necessarily and properly required, per folio of 100 words, 10c. For correcting and superintending printing, per folio of 100 words, 5c.

Rule 82. It is hereby ordered that an allowance shall be taxed by the Registrar to the duly entered agent in any appeal, in the discretion of the Registrar, of $20.00.

REVIEW OF EXCHANGES.

Albany Law Journal.—3rd June, 1882.

Immunity of witness from process, continued in the following numbers:—Authorities are cited for the proposition, that a person while necessarily going to, staying at, or returning from Court, is privileged from the service of a summons or capias in a civil case. It is not necessary that the witness should have been subpœnaed. If he attends in good faith without it he is privileged. Numerous cases are cited to show the recognition of the right in various cases. Authorities are then cited to show what constitutes an attendance sufficient to entitle the party to immunity. The plea of privilege was overruled where the witness' attendance was voluntary; on service of a summons without arrest; on attendance before U. S. A. land commissioners. A common informer is not protected. The privilege does not extend to criminal cases. Cases are cited to show what constitutes a deviation or delay sufficient to forfeit the privilege, what does not, and what amounts to a waiver of the privilege.

Ibid.—10th June, 1882.

Policies of Insurance on Personal Property "Contained in, &c." Construed, by W. H. WHITTAKER. In the absence of a negative clause in the policy, providing that the policy shall be void in case of a removal of the goods, or the assent of the company is not obtained, the liability of the company will depend upon the construction of the terms "contained in," "situated in," and the like. If they are words of warranty, a removal of the goods will prevent a recovery; if words of description, it will not. The character of the property insured must be considered in determining the true construction of the policy. If the goods are of a movable character, the use and enjoyment of which contemplate a removal from the premises while in the possession by the owner, the words are words of description. *E. g.* household furniture is used only in the dwelling; but a horse and carriage must necessarily be used off the premises. As against this, some cases are cited which hold that similar words preclude the removal of goods, but the weight is in favour of the first mentioned proposition.

Ibid.—17th June, 1882.

Emblements—Second crops—Ploughing in oat stubble. In *Henderson* v. *Cardwell*, 9 Baxt. 389, a tenant under a lease for an indefinite period, but which was terminated 1st September, 1873, having sowed

a crop of oats in November, 1872, and harvested it in June, 1873, had ploughed in the stubble in the latter month, and the crop was growing when he left in November, 1873. *Held*, that he could not enter afterwards and harvest the crop. Analogous cases are then cited which appear to support this view of the law.

American Law Register.—May, 1882.

The Action for the Malicious Prosecution of a Civil Suit, by JOHN D. LAWSON. The question presented for discussion is, Will an action lie for maliciously and vexatiously prosecuting a civil suit against another where no special damage is incurred? Reference is first made to the ancient restraint on vexatious litigation, and to the modern principle that the successful party should have his costs. The early authorities are cited from which it appears that though the defendant is entitled to his costs in the action and no more as a rule, yet he may have an action for undue vexation and damage. A dictum of Holt, C.J., is cited to the effect that if the plaintiff show any special matter whereby it appears that the action against him was frivolous and vexatious his action will lie. And where the action was a pretext for maliciously holding a man to bail, or for making him at bail for a large sum than was due, damages were recoverable. The principle followed in later years is, that the costs are a sufficient remuneration. The American authorities are to the same effect.

American Law Review.—May, 1882.

Rights and Liabilities arising through the Promotion and Formation of Corporations, by HENRY O. TAYLOR. Is an agreement to take shares in the stock of a corporation to be organized binding upon the parties thereto? If the consideration of the promise of A. to take shares was the making of the promises of B., C., D., etc., the agreement is binding; if the consideration was the performance of their promises by B., C., D., etc, A.'s promise is but an offer, which may be withdrawn at any time before performance by B., C., D. Where the subscription agreement is signed by different persons at different times the foregoing does not apply. If the agreement be upon a condition to be performed by the corporation when organized the promises cannot be enforced before the performance of the condition, unless the promissors themselves prevent the fulfilment of the condition in order to invalidate their promises. If the subscriber agree to pay a deposit by a certain day, he cannot plead to an action for not paying it that the projected company has become abortive since that day. Persons agreeing to take shares do not become partners, though they may be held responsible to outsiders. Upon failure of the scheme subscribers can recover from the promoters only such moneys as have not been expended, or such as have been expended, after all hope for the success of the undertaking had passed away. When there has been fraud the whole may be recovered. Or when the deposits were made under statutory requirements without intention by the subscribers or right by the promoters to apply them in furthering the scheme, the whole may be recovered.

Constructive Total Loss, by SIMON GREENLEAF CROSWELL. The subject is divided into three parts in which are treated—vessel, cargo, freight.

Canada Law Journal.—15th May, 1882.

Sunday Laws—Works of Necessity. The case of *Regina* v. *Taylor* in which the Common Pleas Division held that it was unlawful for a barber in Ontario to shave his customers on a Sunday is the occasion for some remarks upon Sunday laws. In Pennsylvania, it is a "worldly employment," not a "work of necessity." In Tennessee, keeping open a barber's shop on Sunday is not indictable either as a nuisance or as a misdemeanor. In Pennsylvania, it has been held unlawful to run street cars or an omnibus on Sunday. Contra, in Georgia. In Indiana, a farmer may gather his grain on Sunday, if by leaving it in the field till Monday it is likely to be spoiled. He can also harvest and haul to market his watermelons, if otherwise they would spoil. In Arkansas, a man, unable to afford a cradle for his grain, borrowed one on Saturday night and cut his own ripe grain on Sunday, and suffered penalties therefor. A similar conviction was sustained in Massachusetts. In Indiana and Vermont, collecting and boiling maple sap where the troughs are full is a work of necessity. In the former State the brewer may turn his barley.

Central Law Journal.—26th May, 1882.

Right of the prosecution to stand jurors aside, by EDWIN G. MERRIAM. Before the 33 Edw. I. stat. 4, the Crown might peremptorily challenge jurors without limit. By this statute the challenges of the Crown were narrowed down to those for cause shown. The accused could thus exercise his right of peremptory challenge to the number of thirty-five, while the Crown could only challenge for cause. This was modified by the rule of practice that the Crown need not show cause against the jurors at the time of challenging. The jurors might be directed to *stand aside* till the panel had been exhausted. If a jury was not procured before that time, then the Crown had to show cause. "This practice," says the learned writer, "is believed to continue in England up to the present time, and but slightly effected by statute." The practice obtained in those States which inherited the Common Law, but was modified by their constitutions and laws. In New York it was abolished, the prosecution being required to show cause at once. From the grant of peremptory challenges some Courts held that by implication the practice above noted was superseded.

Misconduct of Counsel in Argument, by W. F. ELLIOTT. This is wholly within the discretion of the Court. But what is an abuse of discretion is ill-defined. Counsel must adhere to the facts in evidence, but the misconduct may be so flagrant that the Court may interfere without objection raised. The writer recollects a case of objection by the defence where counsel for the plaintiff, in opening, stated to the jury as facts, certain things which it was known could not be proved. The learned Judge presiding held that he could not interfere on that point as he must

assume that Counsel would be particular to state facts only, and not theories as facts. At a later stage, when counsel for the plaintiff in replying persisted in stating the same thing to the jury, although the evidence did not warrant it, the learned judge *ex mero motu* interposed and warned the offending counsel that he must be stopped altogether if he repeated the statement.

It is improper to comment on minutes of evidence taken at a former trial. *Held*, in one case, that counsel should not refer to the fact that the venue had been changed; in another, that the defendant in a criminal prosecution had failed to testify when he might have done so. The opposite parties' characters must not be attacked, if not impeached in evidence.

Ibid.—2nd June, 1882.

City Licenses, by A. J. DONNER. Municipal corporations may be authorized to require persons exercising vocations within their limits, to take out licenses therefor, and may levy a tax for the license, unless the legislature giving authority is restricted. A license may be exacted of a stage company, though its business of carrying passengers is not conducted within the city limits. See *ex parte Lemon*, 1 C. L. T. 552, where the Town Council of Portland, adjoining St. John, N. B., made a by-law that no person should drive a coach without a license. L., who was licensed in St. John, drove a passenger from St. John into Portland, without having a license from the council of the latter. *Held*, that the by-law was valid, and his conviction was sustained. The power must be expressly conferred; and it does not confer authority to make a contract tending to create a monopoly. It cannot be delegated. The power of Congress to regulate commerce is not interfered with by a license fee being imposed by a city council on sales of beer not manufactured in the city, except as to supplies of such beverage shown to have been manufactured in another state. This accords with the principle of the decision in *Citizens' Insurance Co.* v. *Parsons; Queen Insurance Co.* v. *Parsons*, L. R. 7 App. Ca. 96. A power to license and control vehicles authorizes the exaction of a license on coal carts, but not on those used for private convenience or business. The license fee is not a tax in the strict revenue sense, though it may so be considered in determining the jurisdiction of courts over a contest concerning its imposition.

Ibid.—9th June, 1882.

Defrauded Vendors of Chattels, by JAMES P. OLIVER. It is fraudulent if the buyer, at the time of the purchase, conceive an intention not to pay for the goods. It would be otherwise, if the determination to avoid payment were conceived subsequently to the purchase. Subsequent insolvency may show the previous fraudulent intent, but it is not conclusive. The buyer may be insolvent and may conceal his insolvency, and yet the fraudulent intent may be lacking. The vendor may rescind the contract, or may affirm it and sue for the price. In the latter case he cannot sue

till the term of credit has expired, for in affirming the contract he is bound by its terms. Ratification may be by implication; but delay is not *per se* ratification.

A reasonable doubt, by ADDISON G. MCKEAN. The reasonable doubt should be actual and substantial, and not based upon a mere possibility or imagination. It must be such a doubt as the jury can give a reason for.

Ibid.—*16th June*, 1882.

Collateral Securities, by CHARLES BURKE ELLIOTT. The term imports a prior debt, and that the new security thus given depends entirely upon it, and will stand or fall with it as far as the creditor is concerned. A creditor may hold an unlimited number of collaterals, and avail himself of any or all of them so long as his debt remains unpaid. A failure or refusal on the part of a creditor to give an account of the application of property received as collateral security for a debt will bar a recovery on the debt itself. The creditor's right to the possession of collateral securities terminates immediately upon a tender of the amount of the debt on the day of maturity.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

N.S.]

CONFEDERATION LIFE ASSURANCE CO. v. O'DONNELL.

Policy, delivery of—Policy not countersigned, effect of—Premium—Proof of payment of—Delivery of policy insufficient—Escrow.

In an action on a policy the appellants claimed that the policy was never delivered and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to Halifax, to the agent at Halifax, to receive the premium and countersign the policy, and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memorandum was printed:—"This policy is not valid unless countersigned by agent at Countersigned this day of

agent."

The agent in his evidence said he delivered the policy to W. O'D., the party assuring, not countersigned, in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death not countersigned. The policy was dated 1st Oct. 1872, and the first premium would have covered the year to the 1st Oct., 1873. W. O'D. died the 10th July, 1873. The case was tried before McDonald, J., without a jury, and he gave judgment in favour of respondent for the $3,000, and this judgment was affirmed by Supreme Court of Nova Scotia, 1 C. L. T. 711. On appeal to the Supreme Court of Canada, itwas

Held, on the evidence, (Fournier and Henry, JJ., dissenting), that the policy had not been delivered to the assured as a complete instrument and therefore that the appeal should be allowed.

Per Gwynne, J. The instrument was delivered as an escrow to the agent, not to be delivered as a binding policy to W. O'D. until the premium should be paid, and until the agent should, in testimony thereof, countersign the policy, and there was no sufficient evidence to divest the instrument of its original character of an escrow, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed.

Beaty, *Q.C.* and *Lees*, *Q.C.*, for the appellants.

Thompson, *Q.C.*, for the respondents.

McDONALD v. LANE *et al.*

Replevin—Possession as against wrongdoer—Chattels, title to—Mixture of logs.

This was an action of replevin for 1440 logs cut on a lot of land known as the Johnston lot, in the Township of Horton, N. S. L. and others claimed title to the land in question, under a paper title and claimed that they had been cutting logs on the lot in question, since 1875, and had built a barn on the lot, and also a camp. In 1877 the plaintiffs cut some 900 logs from the Johnston lot and put them on the ice within a boom. In 1873, at a town meeting, it was resolved, without any authority, that certain persons appointed by the meeting be empowered to sell and give a warranty deed of lands, called vacant lands, and under that authority they sold to S. P. B. a certain tract of land, the deed of sale being accompanied by a power of attorney empowering S. P. B. to ask, demand and receive compensation and damages from all persons liable for trespasses committed on the lot described in the deed. In 1877, McD. claiming under S. P. B. cut on this tract of land upwards of 2000 trees, 500 of which were cut on the Johnston lot, which he also put on the ice, outside and inside L.'s boom, and then claimed the whole as his own, and resisted L.'s attempts to remove them; whereupon L. took out a writ of replevin, under which, being unable to distinguish them all, he took all he could identify, and enough to make up the number cut on the Johnston lot and elsewhere. The plaintiff recovered; 1 C. L. T. 340.

Held, that McD. had shewn no title in S. P. B. to the Johnston lot, and that acting under him he was a wrongdoer, and that L. being in actual possession of the Johnston lot, the title to the logs cut by them, as well as by McD. rested as soon as cut in L. who was therefore entitled to recover the whole of the logs in this action.

Per Strong, J.—All the party whose logs are intermingled can require,

is, that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed.

Per Henry, J.—Where the goods of two persons are so intermixed that they cannot be distinguished, the law gives the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed.

Rigby, Q.C., for the appellant.

N. B.]

McSORLEY v. MAYOR OF ST. JOHN AND SANDALL.

False imprisonment—Execution for taxes—41 Vict. cap. 9 (N. B.)—Liability of servant of Corporation.

Under 41 Vict. cap. 9 (N. B.), entitled "An Act to widen and extend certain public streets in the City of St. John," the Commissioners appointed to assess the owners of the lands thereby benefited, assessed the benefit to certain land at $419.46 against the appellant as owner. In default of payment, after notice to pay, the respondent S., who was receiver of taxes for the city, issued execution for the amount, and for want of goods the appellant was arrested and imprisoned until he had paid the money to the city. The appellant, though assessed, was not in fact the owner of the land, and he brought the action for false imprisonment and for money had and received, and had a verdict on the first count against both defendants.

Held, reversing the judgment of the Supreme Court, setting aside the verdict, that the execution having been issued by S., a servant of the Corporation, under their control, without any legal authority to justify its issue, and the Corporation having adopted the act of their servant by receiving and retaining the money paid, the verdict in favour of the appellant was right.

Weldon, Q.C., for the appellant.

Dr. Tuck, Q.C., for the respondent.

Exchequer Court.]

REGINA v. DOUTRE.

N.B.—The holding, *ante*, p. 501, as to the effect of the Petition of Rights Act, sec. 8, was per Gwynne, J., and not per Strong, J., as reported. The correction arrived too late for insertion in our last number.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

BARBER v. MORTON.

Appeal—Costs.

The charge for instructions for appeal is $2; for revising proof of appeal book, 10 cents per folio; and for fee settling reasons of appeal in an ordinary case, $5.

In taxing the costs of the appeal in this case allowed to the appellant, the taxing officer reduced to $2 the item of $4 charged for instructions for appeal. He also reduced to 5 cents per folio the charge of 10 cents per folio charged for all work in connection with preparing appeal book, attendances on printer, and revising proof. He also taxed the fee for settling reasons of appeal at $3.

W. Barwick appealed from this ruling, and argued that, there being no item in the tariff of instructions for appeal, he should be allowed by analogy the charge for instructions for suit. He contended that, in order that appeal books may be properly prepared, it was necessary that the solicitor in the cause should give them his personal attention, and that to encourage this there should be a reasonable remuneration for the work; that 10 cents per folio was not unreasonable, as the Supreme Court of Canada had fixed that sum for appeal books in that Court. This he understood was also the unwritten rule of this Court.

E. Douglas Armour, for respondent. An appeal to the Court of Appeal is a step in the cause to all intents and purposes, by virtue of the Court of Appeal Act. There being no item in the tariff for this, there should be allowed only the charges for instructions for an important step in the cause, which is $2. With respect to the charge for revising proof, if the rule was (as was alleged) that 10 cents a folio should be allowed, he submitted thereto.

June, 1882. BURTON, J. There is no item in the tariff for instructions for appeal, unless it is considered as instructions for a step in the cause. The $4 is confined to instructions to sue or defend. It is, therefore, simply a question of whether anything should be allowed, or, by analogy to those proceedings wherein instructions are allowed during the progress of the cause, the fee of $2. I, therefore, decline to interfere. I think there is no reason to interfere with the previous decision in this Court as

to allowing ten cents for revising proof. It is, I think, little enough, if the work is properly done; and, if not properly done, then the Court should adhere to its rule and disallow this charge altogether. I think a fee of $5 would not be unreasonable for revising and settling reasons of appeal in an ordinary case, and that that would be a proper sum to allow here.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 24TH JUNE, 1882.

HARGREAVES v. SINCLAIR.

Slander—Repetition of Slanderous Words—Privilege.

The plaintiff was assistant in the shop of C., a druggist, over which the defendant and her husband, a physician, lived, the latter being C.'s landlord. The defendant having in the presence of a witness, accused the plaintiff of having taken $4 from her trunk, her husband told C. that the plaintiff must be discharged or he would send him no more prescriptions, but it was arranged that the parties should be brought face to face in the presence of the witness for the purpose, as they said, of an investigation. On this occasion the slanderous words were repeated.

Held, that the occasion was privileged.

Bethune, Q.C., for the plaintiff.

Robinson, Q.C., for the defendant.

LA ROCHE v. O'HAGAN.

Sale of vessel—Warranty as to class—Breach of warranty—Loss of vessel uninsured—Measure of damages—Parol evidence, admissibility of.

The defendants purchased a vessel from the plaintiff, who warranted her to class as B 1, and that she would insure for $1,400. The mortgage securing the purchase money contained a covenant to insure for $1,400. The vessel would not class as B 1, even with the expenditure upon her which the plaintiff alleged he had advised the defendants was necessary to bring her up to that class, and they could not insure her for $1,400, but worked her uninsured till she foundered and was totally lost.

Held, that the measure of damages which the defendants were entitled to for breach of the warranty was the amount it would have taken to repair her so that she would have classed B 1.

The warranty was a verbal one, but it was not inconsistent with the written agreement between the parties, and the defendants swore that they would not have given more than $500 or $600 for her uninsured, and would not have executed the agreement without the warranty that she would class B 1.

Held, that the evidence of this warranty was admissible.

Wallbridge, *Q.C.*, for the plaintiff.

Robinson, *Q.C.*, and *W. H. P. Clement*, for the defendants.

GOODYEAR RUBBER CO. v. FOSTER.

Sale of goods—Acceptance—Waiver of excessive consignment.

The defendant, with the knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground, though negotiations took place for a reduction in price, but took into stock 15 out of 25 cases sent. The other 10 cases remained in bond till they were sold to pay duties.

Held, that the defendants had waived any objections as to the excess.

James Pearson, for the plaintiff.

C. H. Ritchie, for the defendant.

WINFIELD v. KEAN.

Malicious prosecution—Reasonable and probable cause—Malice—Misdirection—Substantial wrong—New trial.

In an action for malicious prosecution the want of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action. Therefore, where the learned Judge directed the jury, that they need not trouble themselves with the question of malice except as it might be inferred from want of reasonable and probable cause, and that if the information had been laid without proper cause the result would be that it was laid maliciously,

Held, misdirection.

Per Hagarty, C.J. Though the directions standing alone would not be free from criticism, they should not be detached, but should be read with the whole charge, which, when so read qualified them sufficiently to inform the jury of the law.

Held, also that where there has been a clear misdirection, the Court will not refuse a new trial on the ground that no substantial wrong or miscarriage has been thereby occasioned, even though the damages are not so large as to induce the Court to grant a new trial on that ground, and even though there was evidence which might have sustained the verdict.

Pepler, for the plaintiff.

Lount, *Q.C.*, for the defendant.

LEIGHTON v. MEDLEY.

Lessor and Lessee—Covenant to keep up fences—Removal of fence—Waiver.

Semble, that in this country the removal of a fence on a farm from one place to another is not *per se*, as a matter of law, a breach of a covenant to repair and keep fences in repair; whether it is so or not would be a question of fact under the circumstances of each case.

Where the lessor accepted rent after such a removal with knowledge of it,

Held, a waiver of the forfeiture, if any, and that he could not take advantage of the continuance of the fence in its altered position.

McCarthy, *Q.C.*, for the plaintiff.

EDGAR v. MAGEE.

Bill of exchange—Statute of limitations—Commencement of.

The bill of exchange in this action fell due on the 1st. December, 1875, but was not protested, and the writ was issued on the 1st December, 1881.

Held (CAMERON, J., dissenting), that the statute began to run on the 2nd. December, 1875, and therefore that this action was commenced in time.

Sinclair v. *Robson*, 16 U. C. R. 211 remarked upon.

Per Armour, J. Though the holder of a bill may put himself in a position to commence his action on the day the bill falls due by demanding and being refused payment, and though in that case the statute may commence to run on that day, he is not bound to do so; and if he does not the acceptor has the whole of the day of maturity in which to pay the bill, and the statute does not commence to run until the day after.

Per Cameron, J. Inasmuch as, by C. S. U. C. cap. 42, sec. 15, the bill might have been protested at any time after three o'clock of the day of maturity, it was then overdue and the action was commenced too late.

J. K. Kerr, *Q.C.*, for the plaintiff.

Bethune, *Q.C.*, for the defendant.

THURLOW v. SIDNEY.

Municipal Act—Drainage—Local rate—Award, validity of—Charging lands benefited.

The arbitrators appointed by the plaintiff and defendant municipalities, on an appeal by the defendants from the report of the surveyor, made an award pursuant to the Municipal Act, whereby they adjudged that the deepening of a creek, etc., benefited lands in the defendant municipality, and that the latter should pay therefor $350, but the award did not specify the lands in the Township of Sidney which in the opinion of the arbitrators were benefited by the works, and did not charge the lands to be so benefited with a just proportion of the cost of the works. By section 535 of the Municipal Act, the surveyor is to charge the lands to be benefited by the works with their proportion of the cost. By section 539, the Municipality to be benefited is in case of an appeal and an award against them to raise the money in the same manner as if the majority of the owners had petitioned for the works.

Held, that as the lands were not specified or charged in the award the defendant municipality could not perform their duties under these sections, and therefore that the award was invalid.

J. K. Kerr, Q.C., (*Holden* with him), for the plaintiffs.

Wallbridge, Q.C., for the defendants.

ROBINSON v. HALL.

Mortgage — Payment — Assignment of mortgage — Trespass — Excessive damages.

H. being seised in fee of certain lands, mortgaged them to W., and subsequently sold the minerals thereon with the right to mine to the defendant. The mortgage having fallen into arrear, W. proceeded in ejectment, recovered judgment and issued a writ of hab. fac. poss. The defendant hearing of this, wrote to H. that the mortgage must be paid, that he must give him an order to pay it, and deduct the money so paid from the purchase money of the minerals. Thereupon a memorandum was drawn, whereby it was agreed that the defendant should either pay the mortgage in full discharge thereof or take an assignment of it as a subsequent encumbrancer for the purpose of saving the interest of the said Hall as also of the said H. in the said lands, the amount so paid to be credited and allowed to defendant upon his purchase money of the minerals. The defendant paid the amount due on the mortgage, though his purchase money was not due to H. Afterwards H. put the plaintiff into possession at a rental, and the defendant having obtained an assignment of the W. mortgage and judgment evicted the plaintiff.

Held (Armour, J., dissenting), that the payment by the defendant was in effect a payment by H. whereby the mortgage was satisfied, and as that payment was made for the purpose of saving H.'s interest as well as his own, the defendant would not have been justified in equity in enforcing the mortgage against H. or his assignee the plaintiff, and that the plaintiff was entitled to damages for the trespass.

Per Armour, J. The defendant was entitled either to pay the mortgage in discharge thereof or to take an assignment of it as a subsequent encumbrance; he did the latter; though he was to have been credited with this payment, his own payment to H. was not due, and the credit had not in fact been made; and he had therefore the right to enforce the mortgage.

The plaintiff claimed $500. The jury assessed the damages at $1,500, and the learned Judge at the trial amended the statement of claim accordingly.

Held, that the damages were excessive, and a new trial was granted.

Wallbridge, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

REGINA v. CARLETON.

River between municipalities—Boundary—Middle of main channel—Cummings' Island, County of Carleton—Bridge—Liability to repair.

The Township of Gloucester and the City of Ottawa, which is part of the Township of Nepean, are on the easterly and westerly sides respectively of the River Rideau, and both within the County of Carleton. In the river at this point is situate Cummings' Island, and a bridge extends from the Ottawa side to the westerly side of this island and from the easterly side of the island to the Gloucester shore. A line drawn down the middle of the river would leave the greater part of Cummings' Island on the Gloucester side, but the channel between the island and the Gloucester side is the deeper of the two channels.

Held, that a line so drawn properly ascertained the limit between the adjoining municipalities, for the words "middle of the main channel," used in R. S. O. cap. 5, sec. 10, have their common law signification of the middle of the stream, and therefore the island formed part of the Township of Gloucester, and that part of the bridge from the island to the latter Township was wholly within that Township.

Per Armouf, J. If this be not the true construction, then, as the Legislature was dealing with territorial and proprietary rights, and not with navigation, the words "main channel" mean the widest and not the deepest or most navigable channel, in which case also the island would be wholly within the Township of Gloucester.

The County was found guilty on an indictment for not keeping the bridge in repair, but the indictment described the bridge as being in the Townships of Gloucester and Nepean.

Held, that by 12 Vict. cap. 81, sec. 201, Schedule B 4, the easterly limit of Ottawa is the middle of the river and is coincident with the westerly limit of Gloucester, and that no part of the Township of Nepean lies between Ottawa and the river, and the bridge was therefore wrongly described as being in the two Townships.

Held, also that though this could have been amended at the trial, it could not be amended on this motion, and a new trial was ordered.

Per Cameron, J. The situation of the island in the river should not affect the liability of the Municipality, for the bridge was evidently a County work, being intended to span the whole river and form a way from one bank to the other, the island, which was out of the direct course which the river would otherwise have taken, being used merely for engineering purposes.

Robinson, Q.C., and *Mosgrove*, for the Rule.

Bethune, Q.C., and *Gibb*, contra.

SYMMERS v. LIVINGSTONE.

Sale and delivery of goods—Fixed price—Extra freight—Acceptance by consignee—Liability for extra freight.

The defendant agreed to sell and deliver to the plaintiff tow or paper stock at $40 per ton, deliverable at some point to be named by him to which the rates should be the same as to Boston from the place of shipment in Ontario. He agreed with the Merchants' Despatch Co. to carry the tow at 47c per 100 lbs. to Franklin, N.H. The defendant advised the plaintiff of the shipments as they were made and of the rate of freight and drew for the price and annexed the bills of lading to his draft, which the plaintiff endorsed to a paper company to whom he sold the tow. The Merchants' Despach Co. by an error carried the goods by way of Boston to Franklin and the railway company demanded additional freight on the rate of $40 per ton. The paper company charged the extra freight to the plaintiff who sought to recover it from the defendant.

Held, (Hagarty, C.J., dissenting), that the defendant was not liable as the payment was not a compulsory one, nor at the request of the defendant.

The plaintiff's proper course was to have notified the defendant of the extra charges, and to have obtained his consent to pay them, or in default to have refused to receive the goods as they were not delivered according to contract.

Delamere, for the plaintiff.

Woods, for the defendant.

McLELLAN v. McKINNON.

Conviction—Hard labour—Amendment of sentence by Sessions—Quashing—Conviction—Trespass.

The General Sessions of the Peace have no power under 32-33 Vict. cap. 31, sec. 65, to amend the sentence in a record of conviction, but can hear and determine an appeal on the adjudication of guilt only.

Therefore, where an appeal was taken from a conviction imposing imprisonment with hard labour, and the Sessions amended the record by striking out "hard labour,"

Held, (Cameron, J., dissenting), that they had no power to do so, and that their assuming so to amend the record was not a quashing of the conviction, and therefore an action against the parties for trespass would not lie.

The conviction was for imprisonment with hard labour in default of payment of a fine to be levied by distress. The plaintiff was imprisoned without a distress warrant being first issued. The Sessions amended the record by striking out the adjudication of distraining for the fine.

Per Cameron, J. The defendant could not set up the conviction as amended in justification. The conviction was in effect quashed and there should be a new trial.

H. J. Scott, for the plaintiffs.

Beaty, Q.C., for the defendant.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, MAY, 1882.

REGNIA v. O'ROURKE.

Criminal law—Selection of jurors—Demurrer—Case reserved—Writ of error.

To an indictment for murder the prisoner pleaded a plea challenging the array of the panel, which plea was demurred to and judgment given for the Crown by the learned Judge holding the Court of Oyer and Terminer, who, at the request of the prisoner reserved a case for the consideration of the Common Pleas Division.

Held, that this was not a matter to be reserved under C. S. U. C. cap. 112, and the case was therefore directed to be quashed.

Semble, per Wilson, C. J., that a writ of error was the proper remedy, and that it would lie to either the Queen's Bench Division or the Common Pleas Division, but not to the Court of Appeal.

By the 32 and 33 Vict. cap. 29, sec. 44 (D.) every person qualified and summoned as a juror in criminal cases according to the law in any Province, is declared to be qualified to serve in such Province, whether such laws were passed before or after the B. N. A. Act, subject to any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act. By 42 Vict. cap. 14 (Ont.) and 44 Vict. cap. 6 (Ont.) the mode of selecting jurors in all cases, theretofore regulated by 26 Vict. cap. 44, was changed, and a new method was provided by the Ontario Acts, according to which the jurors in this case were selected.

Semble, that the 32 and 33 Vict. cap. 29, sec. 44 (D.) was not *ultra vires* of the Parliament of Canada, and that the selection made was valid.

Irving, Q.C., for the crown.

Murphy, for the prisoner.

HEWSON v. MACDONALD.

Release of action—Notice of trial after—Setting aside—Appeal to Divisional Court—Rule 414.

In an action for work done and materials provided, etc., to which the defendant pleaded never indebted and payment, on the cause coming on for trial a settlement was effected by the defendant paying the plaintiff

$2,500 and receiving a release from him expressed in general terms to be in full of all demands. Subsequently the plaintiff gave notice of trial without having returned the $2,500, and having refused to do so on the defendant's offer to give up the release on that condition, contending that the said money payment was not the whole consideration for the release, but that the plaintiff in addition was to receive an appointment in the civil service. The Master in Chambers, upon motion of the defendant, set aside the notice of trial and stayed all proceedings on the ground that the release was a settlement of all demands. On appeal, Mr. Justice Armour, on 11th April, reversed the Master's order and permitted the defendant on that day to plead the release, with leave to the plaintiff to reply, and directed the case to be entered for trial on the 17th April. The defendant took out the order and pleaded the release, and the case was entered for trial, but was afterwards withdrawn. At these sittings the defendant moved by way of appeal from the order of Mr. Justice Armour.

Held, that under Rule 414 it was not essential that the appeal should be made within eight days from the making of the order, or that the time for appealing should be extended.

Held also, that the defendant, by taking out the order and taking a benefit under it, would, according to the general rule and practice, have been precluded from moving against it; but that he could do so in this case because it was quite unnecessary to make it as the plaintiff refused the defendant's offer to repay the money and get back the release, and it was not supportable in law, because the plaintiff not having repaid the money was not in a position to repudiate the release, and at the trial would have been estopped; and also because the additional consideration set up being illegal, and the plaintiff being *particeps criminis*, he could not avail himself of it to defeat the release.

Held, also upon the evidence adduced that the defendant never agreed to any such alleged promise.

McMichael, Q.C., and *Ogden*, for the plaintiff.

McCarthy, Q.C., and *Marsh*, for the defendant.

[THE DIVISIONAL COURT, 23RD JUNE, 1882.

ROSENBURGER v. GRAND TRUNK RAILWAY CO.

Railways—Accident—Failure to sound whistle—Evidence—Findings.

Action against the defendants for omission to sound the whistle and ring the bell, pursuant to statute, on approaching a railway crossing, by reason of which the plaintiffs' horse took fright and ran away and injured the plaintiffs.

Held (Wilson, C.J., dissenting), that C. S. C. cap. 66, sec. 104, is not restricted to injuries caused by actual collision, but extends to the case, as here, of a horse taking fright at the appearance or noise of the train.

The jury, in answer to the question, "If the plaintiffs had known that the train was coming, would they have stopped their horse further from the railway than they did?" said "Yes."

Held, that though this was not very definite, yet taken with evidence on which the jury acted, it was sufficient.

Bowlby, for the plaintiffs.

Bethune, Q.C., for the defendants.

MURTON v. KINGSTON AND MONTREAL FORWARDING CO.

Bill of lading—Excess in quantity named therein—Right to—Custom.

The N. & N. W. Railway Co. and G. W. Railway Co. shipped a quantity of wheat from Hamilton to Kingston consigned to the Molson's Bank in care of the defendants. The bills of lading contained the following provision:—"All the deficiency in cargo to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." The quantity described in the bills of lading was 15,338 bushels, while the actual quantity shipped was 15,838 bushels. In shipping the wheat it was weighed in drafts of 500 bushels at a time, and by mistake a draft of 500 bushels was omitted in making up the total quantity shipped. The plaintiff, the carrier, claimed he was entitled to the 500 bushels shipped in excess of that mentioned as shipped in the bills of lading.

Held, that the plaintiff was not entitled to recover, for that, under the circumstances, the provision in the bills of lading had not the effect o giving it to him, nor was there any custom or usage proved showing that he was entitled to it.

Mackelcan, Q.C., for the plaintiff.

A. Bruce, for the defendants.

LONDON AND CANADIAN L. AND A. CO. v. MERRITT.

Sequestration—When issued—Judgment at law—Service out of jurisdiction—Chose in action.

Held, that a writ of sequestration connot issue under Rule 339 on an ordinary common law judgment for a debt recovered before the passing of

the Judicature Act, it not being an order for payment of a specific sum and no day for payment being named in it.

The property attempted to be sequestered was property in the hands of trustees under a will; the remainder of the trust property was out of the jurisdiction. Two of the trustees, one of whom was the judgment debtor, and took a life interest in part of the property, resided within the jurisdiction. The other trustees resided out of the jurisdiction, viz., in St. John, N. B.

Held, that service of a notice of motion, founded on such writ of sequestration, on such non-resident trustees, was sufficient.

Semble, that under the writ of sequestration a debtor's choses in action can be reached.

Arnoldi, for the plaintiffs.

Bain and *W. Seton Gordon*, for the defendants.

CHANCERY DIVISION.

[THE CHANCELLOR, 31ST MAY, 1882.

DAVIS v. WICKSON.

Chattel mortgage—Affidavit of bona fides—Sale of goods mortgaged before execution.

If the word "him" at the conclusion of the affidavit of *bona fides* in a chattel mortgage be omitted, it destroys the security as against an execution creditor who seizes the goods.

Where, however, the mortgagor and mortgagee concurred in a sale of the goods, the property in which ultimately passed to a *bona fide* purchaser for value, without notice, before plaintiff intervened with his execution,

Held, that he was not entitled to make the mortgagee (who also claimed the proceeds of the sale as a prior execution creditor), account for the moneys so made.

W. Francis and *Wardrop*, for the plaintiff.

S. H. Blake, Q.C., W. A. Reeve and *Thomson*, for defendants.

[PROUDFOOT, J. 6TH JUNE, 1882.

MARTIN v. McALPINE.

Preferential judgment—R. S. O. cap. 118—Cognovit—Pressure.

Held, following *Brayley* v. *Ellis*, 1 Ont. R. 119; 2 C. L. T. 147, that a judgment for a *bona fide* debt, signed upon a cognovit which had been obtained from the debtor by pressure, was not impeachable under R. S. O. cap. 118.

Moss, Q.C., and *Hopkins*, for the plaintiff.

S. H. Blake, Q.C., for the defendant.

LAVIN v. LAVIN.

Husband and wife—Post nuptial settlement—Public policy.

It was agreed between a husband and wife, that all moneys then or afterwards received on account of the purchase money of land of the husband's, together with rents of other land, should be invested in the joint names of the husband and a trustee, (after deducting sufficient to purchase a house and lot for the wife, her husband and their family), the income to be applied to the support and maintenance of the husband and wife, and their family. In an action by the wife and trustee to compel payment by the husband of the moneys which he was receiving in contravention of the agreement,

Held, that the same was not against public policy, its effect being merely to secure a permanent provision for the wife and family, and the dominion of the husband being thereby unimpaired.

W. Cassels, for the plaintiff.

Bethune, Q.C., for the defendant.

[14TH JUNE, 1882.

SIEVEWRIGHT v. LEYS.

Trustee and cestui que trust—Auction—Puffer—Trustee's compensation —Right to—Accounts—Appeal from master.

The employment of a puffer is not a ground of complaint by a *cestui que trust*, if he has been employed *bona fide* to protect the property.

Though R. S. O. cap. 107, sec. 44 does not compel the allowance of compensation to a trustee in every case without exception, the course of decision has been that he will be allowed compensation, though he may have so managed the estate as to justify the appointment of a Receiver, and to be deprived of, or even ordered to pay, costs.

Held, therefore, that the mere fact that a balance was found against an executor was not sufficient to disentitle him to an allowance.

Where an executor used moneys of the estate as his own, but did not thereby violate any direction to accumulate the income, which it rather appeared was intended by the testator to be spent,

Held, that he was not chargeable with compound interest.

Quære, as to the propriety of appealing from the master's report on the last question, which would more properly come up on further directions.

DOBELL v. ONTARIO BANK.

Bank agent—Guarantee—Extent of authority—Seal.

R. being liable to deliver to the plaintiff 108 standard hundreds of pine deals, the balance due on a contract, and being indebted to the Ontario Bank, gave the latter a warehouse receipt on 108 standards. It was agreed that the plaintiffs should receive these from the Bank under the contract, if properly culled to their satisfaction. W., the Bank agent at Ottawa, signed in the name of the Bank a guarantee that they should be properly culled, but the seal of the Bank was not attached, and the plaintiffs thereupon paid the Bank the price of the deals. R. then caused them to be shipped to agents at Quebec, who loaded 60 on the plaintiffs' ship before the latter saw them. The plaintiffs having seen the 48 remaining on the dock, disapproved of them, and it was agreed that the 48 standards should be culled and the quality of the whole 108 thus ascertained, in order to save the expense of unloading the 60. A deficiency appeared on the culling.

Held, that the Bank were responsible, for the plaintiffs were entitled to rely upon the ostensible authority of W. and could not be affected by any private instructions from the Board as to the extent of his authority to bind the Bank; that the guarantee did not require the seal of the Bank; and that the Bank having received the money under the agreement should have refunded the whole if asked, or the deficiency, if they repudiated it.

SAYLOR v. COOPER.

Deed, construction of—Consideration—Premises—Way appendant—Way of Necessity—Equitable title—Joinder of parties.

A. H. S. was equitable owner of 18½ acres, landlocked, adjoining the defendant's land. The latter, in consideration of $30 granted to A. H. S. one acre of his land, not adjoining the 18½ acres, and the deed contained the following clause:—"And I further convey the right of way * * to cross my land from the highway * * to the land [18½ acres] owned by A. H. S. * * together with all the appurtenances thereto belonging, to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of A. H. S., his heirs and assigns forever." Subsequently the defendant conveyed to A. H. S. 5 acres, landlocked, adjoining the 18½ acres, and thereafter A. H. S. agreed to sell to the plaintiff the 18½ acres and other lands, and all rights and privileges contained in deeds from C. to A. H. S.

Held, (i) that the true construction of the first deed made the consideration apply to all it professed to grant, and therefore that the grant of the right of way was not gratuitous; (ii) that the word "premises" used in the habendum was wide enough to cover all going before it in the deed, and so the habendum included the right of way which was not merely a personal license to A. H. S.; (iii) that the right of way was appurtenant to the 18½ acres, and was included in the agreement between A. H. S. and the plaintiff; (iv) that the plaintiff had a way of necessity to the 5 acres, as well as a right of way to the 18½ acres of grant.

Held, also, that as a way of necessity can only pass with a grant of the land to which it leads, the equitable owner of the land under an agreement to purchase, should join the owner of the legal estate in an action to assert his right to the way.

[22ND JUNE, 1882.

HOWES v. DOMINION INSURANCE CO.

Mortgagor and Mortgagee—Insurance—Subrogation.

Where there is no covenant and no agreement on the part of a mortgagor to insure, any insurance effected by the mortgagee he is entitled to hold for his own benefit; but where there is such a covenant and the mortgagor is liable for or has paid the premium, the insurance must be considered as effected for his benefit.

Therefore, in a case where the mortgagor paid the premium as owner, and was so described in the application, though the policy contained a clause subrogating the insurance company to the mortgagees in case they paid a loss, and where upon a loss occurring, the mortgage was assigned to the insurance company who paid off the mortgagees,

Held, that the mortgagor was entitled to have the amount of the policy applied in liquidation *pro tanto* of the mortgage debt, and that he was entitled to redeem the mortgage on payment of the balance.

W. Cassels, for the plaintiff.

Martin, Q.C., for the defendants.

DOWNEY v. PARNELL.

Mortgage—Increased rate of interest on default.

A mortgage contained a stipulation that upon default in payment of principal or interest an increased rate of interest should be payable. *Held*, that the plaintiff was entitled to the increased rate upon default.

A mortgage made according to the Act respecting short forms of conveyances, contained a proviso for being void on payment of the principal with interest at ten per cent. per annum, "but should default be made in the payment of the principal money or the interest on any part thereof respectively, then the amount so overdue and unpaid to bear interest at the rate of twenty per cent. per annum until paid." Default was made and the plaintiff claimed the higher rate in this action. The account was being taken before the Registrar, when at the request of the parties the matter was brought before the Court.

Hoyles, for the plaintiff.

J. Hoskin. Q.C., for the defendant.

12th June, 1882. FERGUSON, J.—I have looked at the authorities to which I was referred, *Clarkson* v. *Henderson*, 14 Chy. Div. 348; *Fisher* on Mortgages, 893; *Coote* on Mortgages, 871. I have also read the case of *Waddell* v. *McColl*, 14 Gr. 211, and some of the cases there cited, and I am of the opinion that the proviso in regard to an increased rate of interest contained in this mortgage is not invalid. I think the matter one of contract simply, and that it, the contract, is not in violation of any existing law. I do not think it relievable against, on the ground of forfeiture.

IN CHAMBERS.

[THE CHANCELLOR, 8TH MAY, 1882.

In re DARLINGTON; GROOM v. DARLINGTON.

Administration—Disputed debt.

The plaintiff's claim was for the support and maintenance of the testator's wife. The defendants, the executors, disputed the claim on the ground that it was not shown that the testator's wife was not living apart from her husband under circumstances which would have disentitled her to maintenance, and on the ground that a legacy of $1,500 bequeathed to the plaintiff's wife was intended as satisfaction for any such claim.

Held, that such a claim should be supported by *vive voce* evidence, and that it was a proper case for an action.

Winchester, for the plaintiff.

J. Hoskin, Q.C., for the infant defendants.

Heighington (*Caddick*), for the executors.

[PROUDFOOT, J., 6TH JUNE, 1882.

CAMERON v. LEROUX.

Partition under G. O. Chy. 640—Commission, apportionment of—Guardian ad litem.

Though the greater part of the work in partition suits is done by the plaintiff, who should therefore receive the largest share of the commission, the sum allotted to the guardian *ad litem* should not be measured by the work done in the Master's office alone, inasmuch as the guardian has not merely to carry out his client's instructions, but has, on account of their incapacity, to obtain information for himself and decide for them upon the best course to pursue.

J. Hoskin, Q.C., for the motion.

In re ALLEN; POCOCK v. ALLEN.

Administration by creditor—Suretyship—Changing reference.

The defendant was an agent for the plaintiff in certain transactions, and the testator became surety for him to the plaintiff by an instrument under seal. The defendant became indebted to the plaintiff. The testator devised land to the defendant, and appointed plaintiff and defendant his executors. The plaintiff claimed to be a creditor under the agreement of suretyship, and obtained an order from the Master at Woodstock for administration of the testator's estate, to which was added a clause that if any debt was found to be due to the plaintiff it should be paid by the defendant. On appeal from the local Master

Held, that the order was right.

A motion by the defendant for a change of reference on the ground that the local Master at Woodstock had prejudged the case, was refused, it not being shown that the Master was under any disability from professional or fiduciary relations with any of the parties.

WIGLE v. HARRIS.

Extending time for delivering statement of claim—Ex parte order—Irregularity—Appeal to Judge.

After the time for delivering statement of claim had elapsed, the plaintiff obtained *ex parte* from the Master at Chatham an order extending the time for its delivery, and thereupon filed and delivered it.

Held, that such an order ought only to be made upon notice.

Held, also, that a motion to a Judge in Chambers to rescind the same was properly made under rule 427, and that it was not necessary to apply to the local Master to rescind his order.

E. Douglas Armour, for the appeal.

H. J. Scott, contra.

NORVALL v. THE CANADA SOUTHERN RAILWAY CO.

Appeal to Supreme Court allowed—Costs undisposed of—Costs of Court below.

The plaintiff succeeded in the Court of Chancery, and an appeal to the Court of Appeal was dismissed with costs. The defendants, on appeal to the Supreme Court of Canada, were allowed to amend their answer by setting up a defence not raised before, and upon this the appeal was allowed and the decree reversed, but nothing was said as to costs. A motion was made, to set aside so much of the order making the certificate of the Court of Appeal an order of this Court, as directed the defendants to pay the costs of the appeal to the Court of Appeal.

Held, that the Supreme Court, by making no disposition of the costs of the Courts below, as they might have done, must be assumed to have intended to have allowed the disposition thereof by the said Courts to remain, and therefore that the defendants were not entitled to be relieved from the payment of the plaintiff's costs in the Court of Appeal.

Cattanach, for the motion.

MARTIN v. LAFFERTY.

Absentee—Order to proceed.

Held, affirming the order of the Master in Chambers, that paragraph (*e*) of Rule 45 is not to be extended to all cases under Rule 45, and therefore that in cases other than those within paragraph (*e*) of the Rule an order to proceed is unnecessary.

E. Douglas Armour, for the motion.

[THE MASTER IN CHAMBERS.

McKENZIE v. DWIGHT.

Guardian ad litem — Infant at years of discretion — Right of, to select guardian.

The applicant was an infant approaching his majority and capable of exercising a sound discretion in managing his own affairs. In this action the official guardian was solicitor for the plaintiff, and took out the usual precipe order appointing Mr. Davidson the applicant's guardian *ad litem*. The applicant moved to discharge this order and have appointed as his guardian *ad litem* a solicitor of his own selection in whom he had confidence.

Held, that he was entitled to select his own guardian *ad litem* and the order was made accordingly.

Kingsford, for the applicant.
Plumb, for the plaintiff.
Davidson, in person.

[28TH JUNE, 1882.

PECK v. PECK.

Interim alimony—Application for—Time—G. O. Chy. 489.

An application for interim alimony should not be made till the statement of defence is filed, or till the time for filing it has expired. G. O. Chy. 489 is not repealed, and applies by analogy to statements of defence.

G. M. Evans, for the plaintiff.
Hoyles, for the defendant.

Maritime Court.

Re WIARTON BELLE.

Changing venue.

A collision occurred in the harbour of Owen Sound. The venue in the action was laid at St. Catharines. An *ex parte* order had been made on the application of the plaintiff fixing the place of trial at St. Catharines. The defendant moved to change the venue to Owen Sound.

SENKLER, Co. J., made the order, on the sole ground that the local Judge would be in a better position to try the cause from his practical or easily attainable knowledge of the locality in which the collision occurred. The defendant was put on his undertaking that the assessors (if any) should not be selected from residents in Owen Sound or its vicinity.

McClive, for the motion.

R. Gregory Cox, contra.

(Reported by R. Gregory Cox, Esquire, Barrister-at-Law.)

THE

CANADIAN LAW TIMES.

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PROVINCIAL JURISDICTION OVER CIVIL PROCEDURE.

A CONSIDERATION of this subject must perforce at times be narrowed down to the consideration of the particular measure and the circumstances which gave rise to it. The abstract question, How far does the power of the Local Legislature to regulate procedure in civil matters extend? merely produces the answer to be found in the words of the act itself, viz., they may make laws respecting such procedure in Provincial Courts only. It remains to be ascertained what a Provincial Court is.

Our remarks must therefore be at times directed to the provisions of the particular enactments in question, and at times more general in their scope.

In examining the particular enactments, then, there are two matters which naturally present themselves for comment, viz.:

(1). The legality or constitutionalty of the measures.

(2). Their policy.

Both these matters are fair subjects for criticism, though care must be taken to make them separate and distinct topics.

And first as to their legality.

The Provincial Legislature has power exclusively to make laws in relation to the administration of justice in the Province, including the constitution, maintenance, and

organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those, *i.e.*, Provincial, Courts. What then, is a Provincial Provincial Court? What are its characteristics? How is it to be known?

Ambiguity of the word "Provincial."—The ambiguity arising from the use of the word "Provincial" which is dwelt upon in *The Thrasher Case* manifestly does not arise in construing this clause. As a general rule the word is applied either because the Province is the source whence authority or jurisdiction is derived, or because the authority or jurisdiction, though not derived from the Provincial Legislature, is yet limited by the power creating it to the geographical area of the Province. Any argument founded upon the latter of these reasons is entirely excluded from this discussion. If it be once admitted that the word "Provincial" has reference to the area over which the jurisdiction extends regardless of its origin, it follows that the Provincial Legislature of any Province has jurisdiction over the constitution and organization of all Courts exercising jurisdiction in that Province only, though they originate with the Parliament of Canada, or existed and were continued at the time of, and by, the British North America Act. The Province must also maintain them, and may regulate procedure in civil matters therein. And so the conclusion arrived at in *The Thrasher Case* would be wrong on the showing of the judgments. That this is not the case is evident; for constituting and organizing imply a creative power. The Provinces may constitute, maintain and organize certain Courts. These Courts are Provincial Courts. Therefore a Provincial Court within the meaning of this clause is one which is constituted, maintained and organized by the Provincial Legislature. In other words "Provincial" has reference to the origin of the jurisdiction of the Courts.

The extent of Provincial power to erect Courts.—Having ascertained the general signification of the word "Provincial," the next point for consideration is—What Courts can the Provincial Legislatures establish?

We are justified in assuming that the words of this clause import a creative power; for "constitute" is said to mean to give formal existence, to erect, to produce, to establish; and "organize" is said to signify, to construct, so that one part co-operates with another. But this is immaterial, because wherever the Province has jurisdiction over the constitution and organization of a Court, whether created by it or not, it has also the right to regulate procedure in civil matters therein. But it will appear that our assumption is correct.

It must be observed at the outset that the power to constitute, maintain and organize Courts is an adjunct to the jurisdiction given to the Provinces over the administration of justice. If this number of section 92 had assigned to the Provincial Legislatures "the administration of justice in the Province" without more, there is no reasonable doubt that the Provincial Legislatures would have been entitled thereunder to provide the means or instruments for actively enforcing the law, and, as a necessary adjunct to this, to provide and regulate the procedure to be observed in the administration of justice. It may be answered that if the clause had stopped there, the regulation of procedure would not have been exclusively assigned *eo nomine* to Provincial jurisdiction, and consequently that it would be within the jurisdiction of the Parliament of Canada by force of the words in section 91, "all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." But we think that this argument is sufficiently answered by the words of section 92, which give power to the Provincial Legislatures to make laws "in relation to matters coming within the *classes of subjects*" enumerated. It cannot seriously be contended that "the administration of justice" does not include the power to provide the machinery by which justice is to be administered, *i.e.*, power to erect Courts and regulate procedure therein. A classification of the subjects, "erection of Courts" and "civil procedure" would naturally bring both under the head of "administration of justice." Is the effect narrowed by introducing the succeeding words, which appear to have

been added partly *ex abundanti cautela*, and partly to exclude with certainty the power to regulate procedure in criminal matters? On the contrary, the statute seems expressly to interpret itself upon this point, when the administration of justice is said to *include* the constitution, etc., of Provincial Courts and procedure in civil matters therein.

But how are we to measure the extent to which the Legislatures may go in erecting Courts? The answer appears to be, that they may go to the full extent necessary for the administration of justice in the Province. And we arrive at that result as follows:—The administration of justice in the Provinces is expressly and exclusively assigned to the Provincial Legislatures, and in the same grant is included, by necessary intendment and by express words, the power to create certain instruments, whereby justice is to be administered, *i.e.*, Provincial Courts. Now, if these bodies have been given jurisdiction, to the exclusion of all other bodies, over the administration of justice, and if, in this exclusive power, there is included (as the Act says there is) the power, to the exclusion of all other bodies, of creating certain instruments for the due and full performance of the duties so to them assigned, these instruments must be of sufficient capacity to perform the functions for which they were intended. The administration of justice in a Province would include not the enforcement of all laws passed by the Provincial Legislature only, but all laws in force in the Province, whatever might be their origin.

Though the laws themselves emanate from two legislative powers, one of these powers only is entrusted with the administration of them.

But even supposing that the Provincial Legislatures have power to constitute, organize and maintain only such Courts as are necessary for the enforcement of their own laws, this would include the power to create courts for the adjudication of all questions affecting property, and all actions of debt, damages and breaches of contract—matters for the consideration of Superior Courts. But "the proper notion of a Superior Court in any Province," says the learned

Chief Justice, "seems to be that it is a Dominion Court, assigned by the Dominion to administer the laws in such Province." We contend that the Dominion has nothing to do with administering the laws in the Provinces, that being a function peculiar to the Provincial Legislatures, and the enunciation of this proposition seems to carry its own refutation upon its face. If it be true, then either the whole administration of justice, with the exception of such petty matters as come under the cognizance of Sheriffs' Courts etc. is within the jurisdiction of the Parliament of Canada, notwithstanding the express words of number 14 of section 92, or the whole administration of justice in a Province is to be carried on by means of the petty Courts just mentioned. Our conclusion, then, is that the Provincial Legislatures have exclusive power to constitute, maintain, and organize any and every Court necessary for the administration of justice, *i. e.*, for the carrying into effect of all laws in force in the Provinces, and, by the same law, they have also the power to make laws respecting procedure in all such Courts.

Our contention for the position which we assume is added by a comparison of number 14 of section 92 with number 27 of section 91. By the latter, the Parliament of Canada may make laws respecting "the Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters."

Now the constitution of Provincial Courts of Criminal jurisdiction is by number 14 of section 92 expressly assigned to the Provincial Legislatures, and by number 27 of section 91 is expressly excepted from the jurisdiction of the Parliament of Canada. If the Supreme Court of British Columbia is right in the conclusion that Provincial Courts are such petty Courts as Justices' Courts, Sheriffs' Courts etc., and the Provincial Legislatures can erect none but these, then there is no power in Canada to erect a Superior Court of criminal jurisdiction, *i.e.*, having jurisdiction to carry out the whole criminal Law. The Parliament of Canada cannot create one, because the power is taken away from it by this exception, and *The Thrasher Case* decides that the Provincial

Legislature cannot create a Superior Court. If on the other hand our interpretation of number 14 of section 92 be correct, that the Provincial Legislatures have exclusive power to create Criminial Courts of Superior jurisdiction to enforce the whole Criminal Law, a co-extensive power must be conceded to the same Legislatures in respect of Courts of Civil jurisdiction.

Comparative powers of Canada and Her Provinces over procedure.—We are aware that this conclusion as regards procedure is open to criticism, and seems to be opposed to authority. In *Re Niagara Election case* (*a*) Mr. Justice Gwynne says, "much was said about the constitution, maintenance, and organization of our Courts being exclusively under the control of the Provincial Legislature, including procedure in civil matters in those Courts. These latter words, in the 14th paragraph of the 92nd section of the British North America Act, plainly apply, as it appears to me, to the procedure in those civil matters over which the preceding paragraph, the 13th, gave to the Provincial Legislature exclusive control, namely, 'property and civil rights in the Province,' and do not affect procedure in the case before us, which being a matter over which the Provincial Legislature has no jurisdiction, it could not assume to prescribe a procedure relating thereto." We are at a loss to know why the learned Judge restricts the power to regulate procedure to regulating it in respect of property and civil rights—the expression "civil matters" appearing to us to be contrasted with "criminal matters", rather than to be intended to have any connection with civil rights as that term is used in number 13 of this section. It cannot be denied that under number 12 of section 92, the Solemnization of Marriage in the Province, the Legislature would have power to determine what should be sufficient proof in the Courts of the celebration of a marriage. There is more force in the concluding words of the quotation that number 14 of section 92 does not affect procedure in matters over which the Provincial Legislatures have no

(*a*) 29 C. P. at p. 279.

jurisdiction, and consequently that they cannot assume to prescribe a procedure relating thereto.

It must be readily admitted that they have no power to prescribe a procedure with special reference to any particular matter coming within the jurisdiction of the Parliament of Canada. They have no power, for instance, to prescribe a procedure in Bankruptcy, nor to define the method by which disputed rights in Patents of Invention shall be determined. But that they have the power generally to devise and regulate the procedure which shall be observed in the Provincial Courts in all civil matters, without special reference to any particular classes of subjects, goes without saying; and wherever those Courts are utilized for the purpose of enforcing rights respecting any of the subjects within the legislative jurisdiction of the Dominion, the litigant must, in the absence of a special forum and a special mode of procedure devised by the Parliament of Canada, conform to the practice of the Provincial Courts. It would be a startling proposition to enunciate that the procedure of the High Court of Justice of Ontario could not be utilized for enforcing payment of a promissory note. It would be a desperate defence indeed to set up that bills and notes, being matters over which the Provincial Legislatures had no jurisdiction, the procedure provided by the Provincial Legislature was powerless to affect them. The Courts of Ontario and the Courts of every other Province day by day apply their ordinary procedure to these actions. Are they all wrong? Again, can an author invoke the aid of the High Court of Justice for Ontario and adopt its procedure to prevent an infringement of his copyright? Or can an inventor proceed in like manner to restrain an infringement of his patent? Both authors and inventors have availed themselves of Provincial procedure in Ontario without question, though the subjects, Patents of invention and discovery, and Copyrights, are both matters with which the Provincial Legislatures have no concern.

The fact is, that though procedure may not be provided specially for any subject not within Provincial jurisdiction,

it may be provided for those Courts which have general jurisdiction to enforce laws relating to those subjects.

To the same effect as the *Niagara Election Case* are *Cushing* v. *Dupuy* (*b*), and *Valin* v. *Langlois* (*c*). In the former case it was held, that the Parliament of Canada, when legislating respecting bankruptcy and insolvency, had power to interfere with procedure within the Provinces—it is not said, in the Provincial Courts. And, be it remarked, the procedure, when provided by the Dominion, is attached to the subject of legislation, not to the Provincial Courts, as distinguished from procedure devised by the Provincial Legislature which is attached to the Provincial Courts, not to any subject of legislation. And in the latter case it is said, "that the right to direct procedure in civil matters in those Courts had reference to the procedure in matters over which the Provincial Legislature had power to give those Courts jurisdiction, and did not in any way interfere with or restrict the rights and power of the Dominion Parliament to direct the mode of procedure to be adopted in cases over which it has jurisdiction, and when it was exclusively authorized and empowered to deal with the subject matter." There is nothing in this to detract at all from the force of our reasoning. It rather sustains us. Granted to the Parliament of Canada the power to legislate respecting Bankruptcy and Insolvency; granted the power to define the mode of procedure to be adopted in Insolvency cases; it is not necessary to the full enenjoyment of this power that the domestic arrangements of Provincial Courts should be interfered with. The Dominion has full power to erect an Insolvent Court, an Election Court, or any Court, we presume, for the determination of causes respecting the subjects within its jurisdiction, and to direct the procedure with reference thereto; or it may utilize existing Provincial Courts for that purpose, thereby making them Dominion Courts, and may define the procedure to be observed. But in the absence of Dominion Courts, in the

(*b*) L. R. 5 App. Cas. 409.

(*c*) 3 S. C. R. at p. 15, per Ritchie, C.J.

absence of any enactment utilizing Provincial Courts, how can it be laid down as a proposition of law that the Parliament of Canada may interfere to regulate the procedure in a Provincial Court? First make the Provincial Courts Courts of Canada for the special purposes required, and then the procedure in respect of the particular subject matter may be defined. Granted to the Provincial Legislatures exclusive jurisdiction over the administration of justice in the Provinces, granted to them the power to constitute, maintain, and organize Provincial Courts for the performance of this duty, granted to these Courts the jurisdiction, the duty, to administer justice by executing all laws in force in the Province, whether originating with the Parliament of Canada or with the Legislature of the Province, granted to them the power to regulate procedure in their own Courts, and we must concede to them power to provide a procedure by means of which all civil matters shall be presented for adjudication, whether those matters are the subjects of Dominion or of Provincial jurisdiction. A Province is never obliged to take one step towards an excess of its classified legislative power in performing its functions in the administration of justice. It is not necessary that special procedure for special classes of subjects should be devised. It is sufficient to enact that the procedure in the Provinclal Courts shall be such and such. All litigants seeking the aid of these Courts for the enforcement of any laws whatever must utilize their procedure or machinery as they find it existing. The Provincial Legislatures would thus be acting quite within their own sphere in regulating procedure in Provincial Courts, and yet, inasmuch as those Courts are the recognized instruments for the administration of justice in the Provinces, the power of the Provincial Legislatures to regulate procedure in all civil matters is practically unlimited. For inasmuch as the Parliament of Canada can only regulate procedure in those tribunals which it constitutes for the disposition of special matters for which it is necessary to provide procedure, and these special matters are few, it follows that civil procedure will not receive much attention at the hands of the Federal Parliament.

There is a narrow reading which may be given to this clause, and which we have not lost sight of, but which is in part disposed of by our preceding remarks. It is to treat all that follows the words "administration of justice in the Province" as an exception to the unlimited grant of legislative power over that subject which might be implied from the use of those very general words. It is, in fact, the view adopted in the *Thrasher Case*, though not exactly so expressed.

Thus, the Provincial Legislatures are to make laws in relation to the administration of justice, but this is to include the constitution, etc., of Provincial Courts *only*, and not that unlimited power of creating all courts necessary for the administration of justice which would have been implied from the use of that general phrase unrestricted by the exception. This reading, if not disposed of by the absurdity which it produces with respect to criminal courts, at any rate leaves us without a clue to the intention of the Act as the extent to which the Provinces may go in erecting courts, *i. e.*, as to what is a Provincial court. Isolate the words, "the constitution, maintenance and organization of Provincial Courts," and there is absolutely no means by which they may be construed. What courts can the Provincial Legislatures constitute? Provincial Courts. What is a Provincial Court? One constituted by the Provincial Legislature.

We must travel outside this excerpt from the statute in order to arrive at a clue to its meaning. What are its surroundings? Why was it placed there? If, as has been suggested (*d*), this enactment respecting procedure has reference to the preceding number of the section, viz., property and civil rights, why not have placed it in that number? Thus, "Property and civil rights in the province, including the constitution, etc., of Provincial Courts for determining such rights, and procedure in such courts." Placed where it is,its meaning should be influenced by its surroundings. *Noscitur a sociis.* The administration of

(*d*) *Re Niagara Election Case.* Supra.

justice imports activity in enforcing the laws. For actively enforcing the laws agents and instruments are required. And the whole clause should therefore be construed as including those agents and instruments, as incident to the grant of legislative power, and not as exceptions therefrom.

(*To be continued.*)

EDITORIAL REVIEW.

Specific Performance of Acts of Parliament.

The *Albany Law Journal* of 29th of July says, "A novel and important question was argued last week before our Supreme Court by Attorney-General Russell and Mr. Conkling, involving the right of the people by *mandamus* to compel a public common carrier to transport freight. The question is said to be unprecedented. Mr. Conkling argues that the only remedy is an action of damages by the person offering the freight. As matter of principle and abstract right there should not seem to be much doubt in respect to the question, although as a practical remedy *mandamus* would probably prove rather insufficient. Courts may compel the specific performance of express private contracts and we suppose they may compel the performance of a public duty by a corporation implied as a consideration for its charter."

We await with some curiosity the result of this case though its name is not given. It is not altogether unprecedented, for a case involving a cognate question arose in Ontario, and was decided against the party seeking specific performance of a charter. We speak of *Attorney-General* v. *International Bridge Co.*, 28 Gr. 65.

The Bridge Company was incorporated by Act of the Parliament of Canada, so far as that body could grant the necessary powers, and a separate Company was incorporated by the Legislature of the State of New York, so far as the necessary powers on that side of the line could be granted. The bridge which the Companies were authorized to construct was to be "as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains." The Companies did not construct a carriage way, or any way whereby passengers could pass over

except in railway trains. No attempt was made to construct any other than a railway bridge, and the bridge, as constructed, could not be utilized for anything else than the passage of railway trains. The relator asked that the company be restrained from hindering Her Majesty's subjects from using the foot paths at pleasure on payment of tolls. Spragge, C., said, "That it should have been built for the use of passengers in carriages and on foot, as prescribed by the Act, as well as for railway traffic, must I think be conceded." It appeared that a narrow space at the side of the bridge could be used as a foot path for passengers crossing in single file. By the erection of a fence between this and the railway train, the sense of danger to foot passengers from the passing of trains would be diminished, and, acting upon the above expressed opinion, the learned Judge decreed the right of the public to pass over the bridge on foot and that alterations should be made for that purpose. He said, "The Company was not authorized to build whatever kind of bridge it might think fit, but the Act directed that the bridge to be built should be a bridge 'as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains.' That was the duty cast upon the Company by the Legislature if the Company built the bridge. * * * What has been their duty in this regard, is their duty now. * * * It may be that after all is done that can be done for safety, the crossing of the bridge by foot passengers will not be altogether unattended with danger * * but the danger is not of such a character * * as to make it proper for this Court to refuse to interfere, and to require the defendants to do what, as far as it can be done, they were bound to do under their Act of incorporation for the convenience of the general public."

This decision was reversed on appeal on several grounds; 1 C. L. T. 720. The only one necessary for the disposal of the case was, that, as the bridge extended beyond the limits of the Province, it would be unavailing for the Court to give the public the right to pass over that part which was within its jurisdiction. An opinion was, however,

expressed upon the point in question, and it was held that the act of incorporation was not a contract with the public, but merely gave conditional powers, creating correlative duties; that the act was permissive, and specific performance thereof would not be enforced.

We may expect a different result in the United States where charters of incorporation for commercial gain are not held there, as here, to be laws. Upon our theory the private individual who is injured by the non-fulfilment of the terms of the charter cannot reasonably complain, because he must be supposed to have known how far the law would allow the company to disregard the objects for which it was incorporated. This is not as it should be. The power of a company to deceive and injure persons who rely upon its good faith in observing its charter, is unlimited. In the Ontario case, the inducement to investors to buy land and lay it out into building lots in the vicinity of the bridge, was created solely by the advantages to be offered by a bridge for foot passengers and carriages, which would give ready access to the opposite side of the river. The reasons which induced Parliament to grant such a charter may have been founded solely upon the representations made in respect of these advantages. No attempt whatever, as is shown by the report of the case, was made to construct foot paths or carriage ways. The company constructed a bridge which is incapable of being utilized for those purposes, and the investor is therefore damnified by a depreciation of his property. Though the case does not actually decide the point, we should say, from the holding, that he could not even recover damages. The correlative duties of the bridge company are said to be to the Parliament, not to the public with whom there is no contract. There can be no action on the misrepresentation or deceit of the company, because the Act is permissive, and it cannot be said that by obtaining a permissive charter they represent that they will carry out the whole of its terms. A company represents that it will perform four things, three of which will be of great benefit to the public, a fourth will be a minor benefit to the public, but a benefit to those

immediately interested. On this representation the charter is granted. The company discards all objects except those which immediately benefit its promoters. The deceived public have no redress, though the charter may have been obtained on the ground of advantage to them. That an abstract remedy exists with Parliament, which may forfeit the charter, is not much consolation to the loser.

Take away the foundation of the holding—that this charter is a law, subject to repeal or modification, that it is not a contract with, or a representation to, the public—and hold that it is a contract with them, and an opposite conclusion would be reached. Companies would then apply for charters for those objects only which they actually intended to carry out, and the power to systematically defraud the public would be gone.

We think, with our co-temporary, that "principle and abstract right" are on the side of the deceived public.

Examinations upon the British North America Act.

In view of the many constitutional questions which arise upon the construction of our charter of confederation, is it not a desirable thing that the Act should be placed upon the curriculum as one of the subjects for students to read? A study of this instrument of government forms a most important part of the education of every Canadian lawyer, and to the practitioner questions are frequently put, requiring a careful consideration of its terms. It would be almost impracticable for students to follow up the decisions of all Courts upon the Act; but there are several leading cases, in which general principles are laid down for the construction of the Act, which are accessible to all students, and which might be read with great advantage. We must not forget M. Doutre's work upon the subject which is as much within the reach of students as any of their present text books. At any rate, no one can dispute this, that every student of our law should read our constitution once and again, until he is familiar with every section of it. It should be his aim to examine every Act of the Parliament of Canada, and of the Legislature of his Province in the

light of the Act. And he would do well to supplement his reading on this subject by a careful perusal of the authoritative American works upon constitutional law. We should be glad to see the Law Society of Upper Canada taking an intelligent step in the direction of fostering such studies, by putting the Act on the course for, say, the second intermediate examination. An examination upon the Act itself and certain specified cases thereon might be requried for call to the Bar.

As we are advancing at a rapid pace, close attention requires to be bestowed upon the studies of aspirants to fame in our profession. It would not be amiss, for instance, to amend the curriculum of the Law Society of Upper Canada, by adding to the statutes upon the second intermediate examination the Acts which amend them.

Section 28 of R. S. O. cap. 107, has been so liberally amended by 42 Vict. cap. 21, that a perusal of the former enactment alone is positively misleading as to the state of the law; and yet it remains alone upon the course.

Regina v. Hodge—Regina v. Frawley.

The result of the appeals in these two cases (notes of which we print *postea*,) is a genuine surprise, we think, to the whole profession—excepting, perhaps, the Attorney-General, who must have had some faith in his position. We may say, without disparagement to the learned Judges of the Court of Appeal, that we are glad to see that the cases, or one of them at least, will be taken to the Supreme Court of Canada.

The question was presented point blank, Can the Provincial Legislatures delegate their legislative powers? And point blank came the answer, They can. The License Commissioners in each municipality have therefore power to make all sorts of laws respecting the regulation of the liquor traffic, including the imposition of penalties for the infraction of their resolutions. It is plain that each batch of Commissioners, being an independent body, may make such laws (for laws they now are) as they think fit for their own municipality. Under R. S. O. cap. 181, sec. 3, every

"city, county, union of counties, or electoral district, as the Lieutenant-Governor may think fit," has its License Commissioners. And therefore, in every city, county, union of counties, or electoral district, as the Lieutanant-Governor may think fit, there may be a separate and distinct code of laws, varying in severity according to the degrees of intemperance with which ideas of temperance in the various municipalities are marked. Little did the framers of the British North America Act think when they penned the charter of Canada that, instead of two Legislative bodies having jurisdiction in each Province, they were establishing a legislative body in "each city, county, union of counties, or electoral district, as the Lieutenant-Governor might think fit."

The Status of Local Judges.

Constitutional questions are rife. We understand that the legality of some of the provisions of the Judicature Act, respecting the duties of the County Court Judges as Local Judges of the High Court, has been questioned, and is *sub judice*. How this may be affected by the fact that all the County Court Judges have been gazetted Local Judges of the High Court of Justice, is worthy of consideration.

NOTES OF RECENT DECISIONS.

Chamberlain v. *Armstrong*, 2 C. L. T. 150; *Martin* v. *Lafferty*, *Ibid.* 359. The doubt raised by the *semble* in the former case must now be considered as settled. In that case the point was not necessary for the disposal of the case. In the latter, it came expressly before the Court for decision. The rule in question has a history. The Common Law Procedure Act, before 1874, did not provide for such a case as that which rule 45 (*e*) was intended to meet. Sections 43, 44 and 45 of C. S. U. C. cap. 22, provided for procedure against absentees. By section 44 the plaintiff had to show to the Court that he had a cause of action which arose in Ontario, or that it was in respect of a contract made therein, that service had been effected or reasonable efforts in that direction had been made, and that the defendant wilfully neglected to appear, or was living out of Ontario in order to defeat his creditors. He was then allowed to proceed, upon such terms as the Court might direct. But he had to prove the amount of his damages before obtaining judgment. Section 45 of 37 Vict. cap. 7 was designed to supplement the powers granted by the Common Law Procedure Act. Under that section the plaintiff had to show a good cause of action, that the defendant had assets in Ontario to the value of $200 at least, that service had been effected or reasonable efforts made in that direction, that the defendant wilfully neglected to appear; and the plaintiff might then proceed upon such terms as the Court might think fit, though the contract was made without Ontario and the breach occurred

within it, or though the cause of action arose wholly without Ontario if the action were upon a judgment. But the plaintiff must in this case also prove his damages before obtaining judgment. The only difference between these two enactments is that the former provided for cases wherein the cause of action arose in Ontario, or in respect of a breach of a contract made therein; while the latter applied to cases where the contract was made without Ontario though the breach occurred within it, or when the cause of action arose wholly without Ontario if the action was upon a judgment. The *practice* in each case was the same. Whatever might be the cause of action, the same procedure was to be observed against absentees. When the statutes were revised, the latter section was placed after the former under the sub-heading "Absentees," and they were kept separate and distinct in the Consolidation. The practice therefore remained the same. In every case against an absentee the plaintiff had to prove his debt or damages. When the Judicature Act came into force, Rule 45 (*e*) provided a new procedure, whereby service was to be allowed in the cases enumerated in the Rule. These cases include the cases which were provided for by the Common Law Procedure Act supplemented by 37 Vict. cap. 7, sec. 45. Paragraph (*b*) provides for the case of a contract made within Ontario. Paragraphs (*c*) and (*e*) are the identical case for which section 45 of 37 Vict. cap. 7 was passed split into two parts. By *Martin* v. *Lafferty* it is only necessary for the plaintiff to prove his debt or damages when the defendant has assets within Ontario to the value of $200. Now, if we are to judge of the intention of the Legislature in this Rule by its original intention in passing the 37 Vict., we must come to the conclusion that it intended the plaintiff to prove his debt or damages in cases under paragraph (*c*), where there has been a breach within Ontario of any contract wherever made—the identical case provided for by Section 45 of 57 Vict. cap. 7—as well as in cases under paragraph (*e*). It was also necessary, as we have seen, for the plaintiff, formerly, to prove his case, in cases under paragraph (*b*). Now the Legislature in Rule

45 have included in one section these and other cases, and have appended the same words which are to be found in the former enactments governing several of the cases set out in the rule, which cases are distinguished by lettered paragraphs. Does this division into lettered paragraphs show an intention to abandon the principle upon which the former safeguards were directed to be observed before allowing judgment to go? The grouping of the several cases in one Rule would ordinarily indicate the intention to make all of them subject to the same procedure. The fact that they are separated into paragraphs by distinguishing letters is a weak argument against this intention. It is difficult to suggest a reason why a plaintiff should be obliged to prove his claim, debt, or damages, because the absentee has assets in Ontario, and the case is not within the formerly enunciated cases, while he is not required to prove his claim, where the subject matter of the action is land in Ontario under paragraph (*a*). In the antecedent legislation, the principle upon which it proceeded was that, as against a non-appearing absentee, the plaintiff had to prove his claim. Now under *Martin* v. *Lafferty*, he has not to prove his claim against a non-appearing absentee except where the ground of proceeding against him is that he has assets in Ontario.

It may be said that a new procedure has been provided by the Judicature Act, for intimating to absentees the cause of action, by Rule 46 (*a*), which requires the statement of claim to be served with the writ of summons; and it may be argued therefrom, that this advertises the absentee of the cause of action, whereas under the old practice he got a writ only, without any endorsement to show him for what he was being sued; and that, having been presented with the facts relied upon by the plaintiff, and having concluded not to dispute them, it is useless for the Court to ask the plaintiff for proof. But to this it may be answered that the defendant gets a statement of claim with the writ in cases coming under paragraph (*e*) of Rule 45, as well as in other cases. And if the argument above noticed had influenced the Legislature in drawing up the Rule, it would

have operated to induce them to dispense altogether with proof of claim, debt or damages against an absentee where the Court was satisfied that service had been effected. This is therefore evidently not the ground of the enactment as is has been construed. And any other ground it is difficult to suggest.

However, as the cases now stand, the matter must be considered as settled, and we may be pardoned for reopening the subject as it is not without interest to practitioners.

REVIEW OF EXCHANGES.

Albany Law Journal.—24th June, 1882.

Rules relating to Opinion Evidence, by JOHN D. LAWSON. 1. A farmer cannot give his opinion as to matters of general observation and experience. 2. The opinions of farmers on matters peculiarly within their knowledge are admissible. 3. But otherwise, where the matters are better known to persons in other occupations. 4. The opinions of farmers concerning the value of land or its products or damage thereto, are admissible. 5. But they cannot assess damages—this is the province of the jury. 5. But to give an opinion as to the value of property the witness need not have seen or been acquainted with the particular thing. 7. The opinion of a farmer as to the value of land is confined to its value for farming purposes. These rules appear to be self-evident, but cases from which they are deduced are cited under each rule. They all proceed, as the learned writer says, on the general ground that the witness is speaking of a matter, concerning which he has peculiar means and sources of information not enjoyed by persons engaged in other and different occupations.

Ibid.—1st July, 1882.

Boundary—Side of road. "The vagueness and uncertainty of the law is curiously illustrated by two recent and nearly contemporaneous decisions in Maine and New York, on the question whether a grant bounded by the side of a road extends to the centre. In *Low* v. *Tibbetts*, 72 Me. 92, this was held in the affirmative; in *King's Co. Fire Ins. Co.* v. *Stevens*, N. Y. Court of Appeals, it was decided in the negative." After citing several cases, the learned writer concludes:—"It is evident from this contrariety and confusion that no general rule can be derived from the decisions. The rule of New Jersey and Pennsylvania, that nothing short of express words explicitly excluding the highway can have the effect of limiting the grant to the margin, is the most reasonable. This should be adopted by statute." The contrary view has in effect been adopted by the Municipal Act in Ontario, R. S. O. cap. 174, secs. 487 and 489.

Ibid.—8th July, 1882.

Relinquishment of Parents' right of custody of child to third person, concluded in the following number. "The Courts have of late gone to great lengths in implying a consent by the father to a relinquishment of a more or less permanent character, in favour of others than the mother." In *Verser* v. *Ford*, 37 Ark. 27, an infant daughter, whose

mother had died at its birth. was taken by the mother's parents, with the father's assent, and supported by them till she was three years old. The father had remarried. An application for the custody of the child was refused. In *Lyons* v. *Blenkier*, Jac. 245, a father's long consent and inferior means was the ground for refusing to restore to him his children of 19, 14 and 12 years respectively. In *The King* v. *Isley*, 5 Ad. & Ell. 441, the children were ordered to be delivered to their guardians appointed by their father's will. In *Mayne* v. *Baldwin*, 1 Halst. 454, it was held that the care and custody of minor children is a personal trust in the father, and he has no general power to dispose of them to another. So, in *People* v. *Mercein*, 3 Hill 399, held that the relinquishment can be only for a temporary or specific purpose. In *Chapsky* v. *Wood*, 26 Kans. 650, the Court laid down several propositions. The father is the natural guardian, and is *prima facie* entitled to the custody of his minor child. A child is not in any sense like a chattel, subject matter for absolute and irrevocable gift or contract. The father cannot, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody. A parent's right to the custody of a child is not an absolute and uncontrollable right. Where there has been long acquiescence by the father in the child's living with others, his right to its custody will depend upon whether it will promote the welfare of the child. In *Roberts* v. *Hall*, 2 C. L. T. 256, it was held that an agreement to relinquish a child was contrary to public policy and illegal.

Ibid.—22nd July 1882.

Course of Employment.—The master is only liable for the consequences of the servant's act when it is in the course of his employment. The test of the master's responsibility is not whether the act was done according to his instructions, but whether it was done in the prosecution of the business that the servant was employed to do. A number of cases are cited, illustrative of this distinction.

Dentists, by R. VASHON ROGERS, JR. A semi-humorous article upon the liability of Dentists for malpractice, &c., and the rights and liabilities of their victims.

American Law Register.—June, 1882.

The Action for Malicious Prosecution of a Civil Suit, by JOHN D. LAWSON. The American authorities are examined in order. Those are first taken up in which the action has not been sustained, and then those in which it has been held to lie, and in conclusion the learned writer says, "the weight of authority appears to be against the right of action for the unfounded and malicious prosecution of an ordinary civil action. * * * * * * But while the weight of authority denies the action, the weight of reason allows it. * * * * * * Take away the reason upon which the English cases stand, viz.:—that the defendant's damages are assessed to him by his judgment for costs, and what remains to stand in the way of a remedy by action? Nothing at all. The English cases admit the wrong; they do not deny that for any sub-

stantial and special damage outside the costs of the defence, the defendant may recover in this form. * * * It is said that, if such suits are generally allowed, litigation will become interminable, for every unsuccessful action will be followed by another, alleging malice in the prosecution of the former, and, secondly, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defence, In answer to the first objection it is enough to say that the action will never lie for an unsuccessful prosecution unless begun and carried on *with malice and without reasonable cause.* * * * The second argument fails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights—the plaintiff having taken his case into Court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege."

American Law Review.—June, 1882.

What Shall be Done with the Reports? by JAMES L. HIGH. The learned writer gives a table of reports showing the number of volumes in the English language including the various English colonies amounts to be 5,232. Of these the United States furnish 2,944, or more than half. England, Scotland and Ireland are responsible for 1,844, Canada, excluding French Reports, for 198, India for 186 and the remaining British possessions for the residue. Digests, leading cases, law periodicals, and periodical reports are excluded from the calculation.

Extortionate Traffic Rates, by ADELBERT HAMILTON. "The books abound in dicta that common carriers can exact only a reasonable compensation for their services." Instances are given of extortionate charges. "What is a reasonable traffic rate? It is said that the stockholders of a railway have a legal right, not to whatever income the possession of a monopoly enables them to extort from the public, but only to such an income as will suffice to pay the current expenses of repairing, keeping open, and operating the road, rolling stock, and other accessorial instruments of conveyance—depots, delivery wagons etc—and pay them, besides, a reasonable interest or profit upon their money invested. If this be true (and it is believed) reasonable traffic rates are such rates as, if charged upon the traffic, will produce the desired income." This course was adopted for arriving at the reasonableness of tolls in *Int. Bridge Co.* v. *Canada Southern Railway Co.*, ante, p. 212. In *Southern Ex. Co.* v. *Memphis etc. R. Co.*, 8 Fed. Rep. 799 it was held that the court had power to fix rates. But in the same case and others in appeal, *South. Ex. Co.* v. *St. Louis etc. R. Co.*, 10 Fed. Rep. 21, 869 it was said, "while I doubt the right of the Court to fix in advance the precise rates which the express companies should pay and the railway companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company and, after it is rendered, to ascertain the necessary compensation

and compel its payment. A similar, though more clearly defined distinction was made by Proudfoot, V. C. in the *International Bridge Co.* v. *Can. South. Railway Co.*, 28 Gr. 114 at p. 131, where he says tersely, "The determination of what would be a reasonable compensation to be charged in the future and for all time to come would appear to be a legislative function: to ascertain the amount for the past, a judicial function." A railway charge is said to be compound in its nature and to embrace the price of several services, viz. Insurance premium, railway companies being insurers; Toll, or the price for passing over the track; Transportation price, or freight strictly so called; Terminal charges, *i. e.* for storage, delivery, or collection of goods or either terminus.

Preferred Stock. ANONYMOUS. *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159 is considered. The English decisions have denied the power to create preferred stock by act of the officers or vote of a majority of the stockholders. It may however be done by gaining the consent of all the stockholders, and of course by a modification of the charter. But where the majority of the shareholders have affected to create preferred stock, it is not necessarily a void proceeding. Where third persons have invested in it, relying upon the action of the Company, it is too late to assail the validity of the proceeding.

Central Law Journal.—16th June, 1882.

The Rights and Duties of a Bailee toward Rival Claimants of the Goods, by F. R. MECHEM. If the bailee wrongfully refuses to deliver the goods to the bailor, he is guilty of a conversion of them, and is liable to be mulcted in damages. If, on the other hand, an adverse claimant demands them, the bailee's refusal to deliver them is also a conversion, in case his title should prove to be the better one. Where the bailee can ascertain the true owner he may lawfully deliver the goods to him, and such delivery will be a good defence to any action by the bailor. Kent states the rule as follows:—The depository is bound to restore the deposit upon demand to the bailor from whom he received it, unless another person appears to be the owner. But where the bailee cannot ascertain the true owner he must either interplead, or obtain security from the party to whom he delivers the goods. Story says in a case of the kind mentioned the bailee cannot compel an interpleader. Kent says the right exists in all cases in which conflicting claimants of the same debt or duty have interfered, and apprised the depository of their demand upon him for their deposit. The result is that if the bailee receive such proof of the claimants title that he feels safe in acting upon it, he may deliver the goods to the claimant, and if the claimant prove to be the true owner, and to be entitled to the goods, such delivery will be a good defence to an action by the bailor. If he cannot satisfy himself, and while claiming no interest in the goods himself, and standing ready to deliver them whenever he may do so safely, is threatened with vexatious suits by rival claimants, it seems he may have his bill of interpleader to determine who is the party entitled to the goods, and to whom he may safely deliver them.

Ibid.—*23rd June*, 1882.

Statutory Provisions for Leasing Railroads, by W. H. WHITTAKER. Contracts of lease made by Railway Companies without legislative authority have been held *ultra vires* both in England and the United States. When legally leased, the lessee is primarily liable for all injuries committed by its road. The lessee is in general bound by the prohibitions and limitations contained in the charter of the lessor company. The statutes of several States as to the leasing of roads are then noticed.

Ibid.—*7th July*, 1882.

Profert of the Person, by HENRY WADE ROGERS. "Can the Court order a person accused of crime to make profert of his person—to submit to a compulsory examination of his person—or would this be, in effect, compelling him to give evidence against himself, and therefore a violation of his constitutional rights?" In *Jacob's Case*, 5 Jones 259, held that a defendant could not be compelled to exhibit himself to the jury to enable them to determine his *status* as a free negro. This was approved in subsequent cases. In *Garrett's Case*, 71 N. C. 58, a defendant was compelled to exhibit her hand to a doctor. The actual condition of her hand was held inadmissible evidence, though it was said that what the witnesses saw when they inspected the hand was admissible. But in Nevada a defendant was compelled to exhibit his arm in order that it might be ascertained whether he had tatoo marks thereon—the question of identity being raised. The ground on which the case was put was this: that the criminal is protected, not for the purpose of evading the truth, but because it was thought that a defendant might give testimony that was not true in order to save himself. The reason does not include the case in question—the actual fact being beyond the defendant's control to misrepresent. Civil cases in which it is held necessary that the parties should submit to an inspection of their persons as then discussed.

Expert Evidence in Insanity Cases, by ADDISON G. MCKEAN. After some remarks upon the subject the learned writer says:—"Courts are very slowly ascertaining the fact that expert testimony can with no more safety be relied on, than can the testimony of witnesses who make no pretensions toward expertness, and who speak from nothing but observation."

Ibid.—*14th July*, 1882.

Parent and Child, by CHAS. A. BUCKNAM. The parental relation must be considered to have for its true basis natural guardianship. The learned writer says, that independent of statutes, parents are not obliged to sustain their minor children. Probably all that is meant by the Courts when they say that parents are obliged to support their minor children is, that as between them and a city or town, they are liable, if able to support. The learned writer does not show upon what ground the city or town is bound to support his children. The liability of parents for debts of their children is discussed, as well as the right to relinquish children's services.

Ibid.—*21st July*, 1882.

Conduct Punishable as Contempt of Court, by A. J. DONNER. A number of cases are discussed as to what is contempt and how punishable.

Equitable Mortgage by deposit of Title Deeds.—The American and English rule, by WM. ARCHER COCKE. The American authorities are reviewed. Some States allow and some deny the practice.

Ibid.—*28th July*, 1882.

Alteration of written Instruments, by WM. L. MURFREE, JR. Instances are given of alterations which are material and destroy the character of the instrument. The restoration of an instrument by erasing the alteration will not revive the liability of the parties on it. Secus where the alteration was honestly made. There are three events in which the plaintiff cannot recover upon the original consideration for which the instrument afterwards vitiated by alteration was given :—(1) when the alteration was fraudulently made by him or at his instance, (2) when the alteration was honestly made and without fraud, yet the effect is such that the rights of third parties will be prejudiced if the plaintiff be permitted to withdraw from the position assumed by such alteration, (3) where the original consideration of the contract between the parties, upon which it is sought to recover, has been merged in the consideration of the instrument altered, in consequence of the fact that the latter was under seal.

Irish Law Times.—*8th April*, 1882.

Presumptions of Life, Death, and Survivorship, continued and concluded in two following numbers. Death may be presumed or inferred to have happened within the seven years if the inference is deduced from well authenticated facts of such a nature as almost to preclude the possibility of a mistake. In this age postal facilities, the telegraph and newspaper advertising are elements which must enter into a question of this kind. As to presumptions of survivorship, the provisions of the Code Napoleon are cited. By the Civil Code of Holland the presumption is that all persons who perish together die at the same moment, and that there is no transmission or succession from one in favour of the other. The same in Prussia, and so by the Mahometan law of India. At one time in England it was said that where several persons have perished in the same catastrophe the presumption was in favour of the survival of the strongest. Many cases are found however seeming to support the position that simultaneous death will be presumed. There is a presumption that one survived, but which, is to be ascertained by evidence, tne probabilities varying according as the facts of each case vary.

Ibid.—*29th April*, 1882.

Equitable Mortgage by Deposit of Title Deeds, continued and concluded in two following numbers: The deposit of title deeds even without verbal communication, is *per se* evidence of an agreement executed

for a mortgage of the estate. If there be no memorandum parol evidence may be admitted to explain the matter of such deposits. Such a mortgage does not constitute a breach of a covenant not to "mortgage, sell, assign, or otherwise part with" an indenture of lease, or the premises thereby demised. The provisions and effects of the Registry Laws are then discussed.

Ibid.—*20th May*, 1882.

Contract of Carriers of Goods, concluded in the following number. A railway company, carrying live animals, are not insurers thereof, and in the absence of any evidence of negligence or proof of the cause of injury to the animals, will not be liable to damages for such injury. Where there were two rates for carriage at the higher of which the carriers undertook their ordinary duties, but at the reduced rate they were to carry at owner's risk exempt from all liability not occasioned by the wilful misconduct of their servants acting within the scope of their authority, and were to be exempt from liability for injuries caused by fear or restiveness of animals, it was held, that this condition covered only cases in which the injury arose from the fear or restiveness created by transit with its ordinary accompaniments, and without any negligence or default on the part of the carriers; such, for instance, as contiguity to the engine, noise of the engine, whistling, etc., and did not cover a case where a horse was injured in consequence of a platform having been rendered unfit for the transit of the horse along it, by reason of its being crowded at the time with goods. Akin to this is the case of *G. T. R. Co.* v. *Fitzgerald*, 1 C. L. T. 449; 5 S. C. R. 208, decided by the Supreme Court of Canada, (wrongly called by our learned cotemporary the Supreme Court of Ontario). In another case a condition that no claim in respect of goods would be allowed unless made within three days after delivery was held to apply to inanimate goods and not to cattle, and not to be unreasonable.

Ibid.—*10th June*, 1882.

The effect of the death of an Accoptor of a Bill of Exchange, blank as to Drawer's Name. Story, referring to the law of agency says, "when the act to be done must be done in the name of the principal, and not in that of the agent, the authority is extinguished by the death of the principal, because it has become incapable of being so executed. * * when the act, notwithstanding the death of the principal, can and may be done in the name of the agent, there seems to be a sound reason why his death should not be deemed to be a positive revocation under all circumstances." Where an instrument in the form of a bill of exchange is accepted, with a blank space for the drawer's name, a *bona fide* holder, on his personal representation, is entitled to fill up the blank as drawer, and thus make the instrument a complete bill of exchange: *Re Duffy, Dutch* v. *O'Leary*, 14 Ir. L. T. Dig. 8, followed by *Carter* v. *White*, 51 L, J. Chy. 465.

Law Journal.—*15th April*, 1882.

Overdue Cheques. A case of *The London and County Bank* v. *Groome*, reported in the April number of the Law Journal Reports is discussed.

"The case narrowed itself into the question of law whether a cheque eight days old is taken subject to equities." *Held*, that it is not necessarily taken subject to the equities, but that it is a question of fact for a jury whether the holder took it under such circumstances as ought to have aroused his suspicions.

Ibid.—13*th May* 1882.

Counter-claim on Counter-claim. In *Toke* v. *Andrews*, reported in the May number of the Law Journal Reports, to a statement of claim for rent, the defendant pleaded that he was entitled to an outgoing valuation, which he claimed by counter-claim, though it had accrued since the issuing of the writ. On the day of the delivery of the counter-claim, the plaintiff was entitled to another instalment of rent, which he accordingly claimed by counter-claim to the defendant's counter-claim. It was held by Field, J. and Huddleston, B. that the plaintiff was entitled so to counter-claim.

Ibid.—20*th May*, 1882.

The Acknowledgment of Wills. In *Blake* v. *Blake*, reported in the May number of the Law Journal Reports, a woman having drawn her own will and received instructions as to the execution, called in two witnesses, and concealing the will and signature with a piece of blotting paper said, according to one witness, "we have all our little wishes, and this is one of mine," but according to the other, "this is a little whim of mine." The witnesses, if they may so be called, signed. *Held*, not an acknowledgment, because the witnesses did not see her signature, nor did she say that her signature was on the paper, or that the paper was her will.

Agreements for the Sale of Land. *Shardlow* v. *Cotterill*, reported in the May number of the Law Journal Reports concerned the description of the thing sold. There were two documents in this case, "Received of Mr. Arthur Shardlow the sum of 21*l.* as deposit on property purchased at 420*l.* at 'Sun' Pinxton. Mr. George Cotterill, Pinxton, owner." Signed by the auctioneer. "The property duly sold to Mr. Arthur Shardlow butcher, Pinxton, and deposit paid at close of sale." Signed by the auctioneer. The latter was written at the foot of the conditions of sale. It was held that the two documents could be read together, and that the property was sufficiently described.

In *Marshall* v. *Berridge*, in the same number, there were two documents, one especially referring to the other, which contained all the terms for an agreement for a lease except the date as to which the term was to commence. The principal document signed by both parties was itself dated. It was held that there was no sufficient description of the thing sold.

Ibid.—3*rd June*, 1882.

Surviving Causes of Action. *Kirk* v. *Todd*, reported in the June number of the Law Journal Reports, is discussed. The writ, issued 7th April, 1880, was for an injunction and damages for the pollution of a

stream, and was against "John Todd & Sons." Appearance, by Mr. Todd, sole representative of the firm. On 11th June, 1881, after issue joined, the defendant died. On 3rd November, 1881, an *ex parte* order was made, allowing the plaintiff to make his executors defendants. At the trial the executors objected that the action could not proceed against them, and the objection was allowed. It was held, under 3 & 4 Wm. IV. cap. 42, that an action of tort to real or personal property can be brought against executors in respect of the act of their testator, only when the act complained of was done within six months before his death.

Ibid.—*10th June*, 1882.

Limitation Legal and Equitable. In *Gibbs* v. *Guild*, reported in the June number of the Law Journal Reports, the question arose as to the effect upon the Statute of Limitations of the enactment in the Judicature Act, that where there is a conflict between the rules of law and equity, the latter shall prevail. Lord Justice Holker was of opinion on the construction of the Statute of Limitations alone, that it began to run from the cause of action itself, and not from its discovery. However, the Equity Judges have allowed suits to be brought after the statutory limit had been passed, where concealment of the wrong was shown; and the question is whether this rule is now to prevail. This case decides that it must. The learned writer remarks:—"There is now no limit after which a man can feel safe from an action, so long as the plaintiff alleges not only that the defendant has injured him, but that he has concealed the injury from him. Such an action is possible twenty or thirty years after the event—in fact, there is no limit. This state of the law cannot be expedient, while admitting that the fraudulent concealment of an injury ought to give the injured man a longer period in which to enforce his rights, yet there ought to be an absolute limit to which there is no exception. The man who does not find out that he has been wronged for seven or eight years is either little alive to his own interest, or there is not much reality about his wrongs. In either case his interests do not deserve maintaining."

Southern Law Review.—December—January, 1881-82.

Liability of real estate for the debts of deceased persons, by Hon. J. G. WOERNER, concluded in the following number. The subject is introduced by a short historical sketch of the feudal system. The reason why personalty goes to the personal representative and land to the heir is pointed out. The early and modern courts of testamentary jurisdiction are touched upon. Many American statutes and cases are cited illustrative of the proceeding to obtain sale.

Exemplary Damages, by SAMUEL MAXWELL. "Damages" is defined. Some cases are cited showing the established practice to be to allow punitive or exemplary damages in some cases. The learned writer then "endeavours to point out the injustice, if not unconstitutionality, of the rule allowing the same." Amongst other cases are cited those which hold that exemplary damages cannot be recovered in an action for an

injury which is punishable by indictment. In such cases the State vindicates her own wrongs, and the vindication should not be the result of a suit in favour of a private individual. It is shown to be an admitted principle of the cases allowing exemplary damages that they are in excess of the actual damage sustained. The Constitutions of the United States and the several States do not permit the taking of private property from its owner to be given to another, even where full compensation is made. Should that be attempted, the act would be unconstitutional and void; "yet they are practically giving the property of one citizen to another, and that, too, without any compensation whatever, by giving damages in excess of the injury sustained."

Accused persons as witnesses in their own behalf, by JAMES A. KELLOGG. If the accused testify he occupies a double position. As the accused, his general reputation cannot be drawn in question, and the presumption of good character remains with him. As a witness, he may be impeached the same as other witnesses. The difficulties encountered in cross-examination on account of this are pointed out.

Insanity as a Defence, by L. W. KEPLINGER. A philosophical article in which Guiteau receives due attention.

Dies non Juridicus, by THOMAS W. PEIRCE. Under 29 Car. II. cap. 7, a man, though prohibited from following his ordinary calling on Sunday, may buy or sell otherwise and the sale will not be void to prevent recovery of the price. A note given otherwise than in the exercise of the ordinary callings of the parties is not void. In Vermont it is held, that contracts void because made on Sunday may be ratified. It has been held, that a notice of protest of commercial paper delivered on Sunday is a nullity. The English authorities hold that such a notice is to be considered as received on Monday. A will made on Sunday is good. It has been held, in Pennsylvania that a marriage celebrated on Sunday was valid, though as to a settlement executed on that day the Court was divided. Judicial acts cannot be performed on Sunday.

Ibid.—February-March, 1882.

Exemplary Damages for Injuries to Property, Fraud, &c., by SAMUEL MAXWELL. After citing a number of cases illustrative of the doctrine of punitive damages, the learned writer proceeds to show that if such damages are a fine or punishment the defendant is convicted without due criminal process; if merely an excess of the actual damages sustained by him, he has been deprived of his property without compensation—in either case the proceeding being unconstitutional.

Western Jurist.—April, 1882.

Circumstances in which a married woman having no separate estate may act as a feme sole, by S. D. T. The rule at common law as to the wife's disability is stated, followed by the exceptions therefrom. The conflict of authority in England is traced down to *Mar-*

shall v. *Rutton*, 8 Term R. 545, which is said to have settled the law in England. Some of the American Courts hold also, following this case, that nothing short of banishment, abjuration or other civil death or disability or something tantamount thereto, will render a married woman liable to be sued as a *feme sole*.

Validity of unrecorded chattel mortgages as against creditors, by EMLIN MCCLAIN. A review of some cases upon this subject of notice to creditors of unregistered instruments.

Ibid.—May, 1882.

Negligence and mismanagement of a party's own Counsel as ground for a new trial, ANONYMOUS. The occasion of the article was the granting of a new trial in a capital case, because the prisoner had been defended by an attorney whose conduct displayed such a degree of ignorance and imbecility that the Court were of opinion that the prisoner could not have been worse defended if his case had been in the hands of an idiot or lunatic. The attorney is the accredited agent of the client who is concluded by his act where no fraud or unfairness is made to appear. The client is generally bound by the attorney's consent, and the negligence of the latter will be imputed to his client. An exception was made where a prisoner was convicted of an offence of which he had been formerly acquitted, the attorney having failed to find a record of acquittal because it was not indexed. In New York it is held that relief will be granted, and the client will not be left to his remedy against the negligent attorney. Failure to take objections or exceptions will not entitle the party to a new trial. Absence of Counsel will, under certain circumstances. It may be generally stated that if the party has been obliged, through no fault or want of diligence of his own or his Counsel, to go to trial without Counsel. a new trial will granted. Abandonment of a case by the attorney is not ground for a new trial unless the client has not had time to employ another. Merits must be shown in every case. English and American cases are cited.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.] [30TH JUNE, 1882.

REGINA v. HODGE.

License Commissioners' resolution—Delegation of legislative powers—Powers of Provincial Legislatures.

The defendant sold intoxicating liquor to a child under fourteen years of age, and for this offence and for keeping a billiard room open and allowing the table to be used during prohibited hours, contrary to the resolution of the License Commissioners for Toronto, passed by virtue of the power given to them by R. S. O. cap. 181, ss. 3, 4 and 5, was convicted.

Held, that the Provincial Legislature has the sole power to pass laws for the infliction of penalties or imprisonment for the enforcement of a law of the Province, in relation to a matter coming within a class of subjects with which it alone has power to deal; and this being a subject over which the Provincial Legislature has exclusive jurisdiction, the above Act was not *ultra vires*.

Held, also reversing, the judgment of the Queen's Bench, 46 U. C. R. 141; 1 C. L. T. 424, that the Provincial Legislature, having supreme power to make laws respecting those matters exclusively assigned to it, had power to delegate its authority to the License Commissioners.

Mowat, Q.C., *A.-G.*, and *Bethune*, Q.C., for the Crown.

J. K. Kerr, Q.C., and *S. H. Blake*, Q.C., for the respondent.

REGINA v. FRAWLEY.

B. N. A. Act, construction of—Powers of Provincial Legislatures to enforce laws—Imprisonment—Hard labour.

The B. N A. Act, being an instrument of government, must not be construed strictly, nor must the meanings of single words be resorted to in gauging the extent of the expressed legislative powers.

The power to make laws, for enforcing the laws respecting those subjects exclusively assigned to the Provincial Legislatures, is inherent in those bodies *dehors* number 15 of sec. 92.

The word "imprisonment" used in number 15 of sec. 92 does not *ex vi termini* exclude the imposition of hard labour.

Held, therefore, reversing the judgment of the Queen's Bench, 46 U. C. R. 153, that the Legislature of Ontario has power to impose the punishment of hard labour in addition to that of imprisonment.

Mowat, Q.C., A.-G., Robinson, Q.C., and *Hodgins, Q.C.*, for the Crown.
McMichael, Q.C., for the respondent.

C. P.]

TURLEY v. BENEDICT.

Lease, construction of—Ejectment.

A. B. leased to D. B., his father, certain lands for life, to have, work and enjoy the land; but should the father be incapable of taking charge of the place in his after years, as it should be done by good husbandry, then the son to govern the lands as seemed best to him; and if the father became incapable of manual labour he was to be supported by the son; and it was agreed that, with the exception of the son, the father was to have peaceable and quiet enjoyment. The father's estate was sold by the sheriff to the plaintiff, who brought ejectment against the son, who was in possession working the farm. The jury found that the father, before the son re-entered, had became incapable of taking charge of the land as it should have been done by good husbandry.

Held, reversing the judgment of the Common Pleas, 31 C. P. 417; 1 C. L. T. 214, that the son had the right to possession of the land pursuant to the terms of the lease, and therefore the plaintiff failed.

Dickson, Q.C., for the appellant.
Bethune, Q.C., and *Clute*, contra.

C. P. D.]

BROWN v. SWEET.

Interpleader—Chattel mortgage—Loan—R. S. O. cap. 95, sec. 13—Common solicitor—Notice.

The trustees of a church while being sued by the defendant passed a resolution authorizing the borrowing of $400 "to enable the Board to

defray urgent claims," and reciting that it was found necessary to give security to the lender. The plaintiff, who was one of the trustees, thereupon advanced them money, and took a chattel mortgage on every movable article contained in the church. The mortgage was drawn by the partner of the general solicitor of the trustees, who was defending the pending action; but neither solicitor was called as a witness. In an interpleader issue between the chattel mortgagee and the judgment creditor the learned Judge found for the defendant.

Held, (Burton, J. A., disagreeing, but not dissenting), affirming the decision of the Common Pleas Division granting a new trial, that the mortgage was not invalid within the meaning of R. S. O. cap. 95, sec. 13, and the fact that it included all the movable property of the mortgagors was not sufficient to convince the Court of any fraudulent intent in making it.

Held, also, that knowledge of the pending proceedings against the trustees at the suit of the defendant could not be imputed to the plaintiff by reason of his mortgage having been drawn by the partner of the trustees' solicitor.

Bethune, Q.C., and *Fitch*, for the appellant.

J. K. Kerr, Q.C., and *W. F. Walker*, for the respondent.

FULL COURT OF CHANCERY.]

JELLETT v. ANDERSON.

Ferry, disturbance of—License to ferry—Construction of.

Letters patent to the town of B. to establish a ferry recited that the town had petitioned for a license for one ferry, "from B. to A." The grant was to establish a ferry "between the town of B. to A." In pursuance of this the town of B. leased the ferry "to and from the town of B. to A."

Held, affirming the judgment of the Court below, 1 C. L. T. 331, affirming the judgment of Spragge, C., 27 Gr. 411, that this phraseology, though not free from doubt, was sufficiently certain to entitle the plaintiff to ferry from shore to shore.

A. was a township stretching ten or twelve miles along the shore opposite B. The grant did not provide for a specific landing place, but this was left to the town of B. to fix. The point fixed in A. was a reasonable and convenient one. The defendant commenced running a ferry-boat from A. to a point about two miles west of B., the necessity for, and greater convenience of, which to the public, had not been established, the only inducement offered being a lower fare than the plaintiff's.

Held, affirming the decision of the Court below, that the plaintiff was entitled to restrain the defendant from disturbing him in the exercise of his franchise. Hagarty, C. J., dissenting.

Bethune, Q.C. and *Moss*, Q.C., for the appellant.

Robinson, Q.C. and *J. R. Kerr*, Q.C., for the respondent.

SPRAGGE, C.]

SMITH v. GOLDIE.

Patent of invention—New application of old combinations.

The plaintiff claimed as his invention for purifying flour during the process of mauufacturing it, a bolt or sieve of cloth, through which a current of air was made to pass upwards by means of an air chamber and a fan or its equivalent, and, in order to keep the bolt from becoming clogged with flour, a brush or series of brushes arranged to traverse the under surface of the bolt. The air chamber and the fan in combination with the bolt were admitted to be old; and it appeared that one B. had patented a machine used in making a preparation called semolina, in which the same brush appliance was used in keeping open the meshes of a sieve through which the meal passed downwards.

Held, affirming the judgment of Spragge, C., that the plaintiff's invention was not patentable.

Ferguson, Q.C., and *Howland*, for the appellant.

W. Cassels and *W. Ball* for the respondents.

BOYD, C.]

CHAPMAN v. ROGERS.

Accommodation notes—Notice—Payment at maturity by third party—Equities.

T. was a member of the firm of W. N. R. and Co., and on ascertaining that R., his partner, was improperly using the firm name, dissolved the partnership and agreed with R. that he should take all of R.'s assets, including his interest in the firm of W. N. R. & Co., in consideration of which he covenanted to pay and save harmless R. from all debts and obligations due by the firm of W.N.R. & Co., including all such obligations as had been made partnership obligations by R., whether rightly so made or not, and certain scheduled debts of R.'s. Two notes made by the plaintiff for the accommodation of R., and endorsed by R. in the firm name, were held by a Bank where they had been discounted. T., knowing this, paid them at maturity.

Held, affirming the judgment of the Chancellor (Burton, J.A., dissenting), that the payment must be considered as satisfaction within the terms of the agreement, that T. took the notes on payment subject to the equities attaching to them as accommodation notes, and that the plaintiff was therefore not liable to T. upon them.

Bethune, Q.C., and *Walkem, Q.C.*, for the appellant.

Britton, Q.C., *Black* and *Machar*, for respondents.

BLAKE, V.C.]

EMMETT v. QUINN.

Lease, construction of—Short Forms Act—Covenant to build, and rebuild in case of fire—Assigns not named—Covenant running with the land.

In a lease pursuant to the Short Forms Act, the statutory words, "That the said (lessee) covenants with the said (lessor)," preceded the covenants, two of which were as follows:—"And also that he will erect * * upon the said demised premises a * * dwelling house * * and at the end or other sooner determination of the term * * he will leave the said buildings and all buildings and fences erected by him upon the said premises thereon, and the said property shall be the property of the party of the first part." "And that in the event of the said buildings being destroyed by fire during the said term he will immediately rebuild to an equal amount * * ." The lease was assigned with the assent of the lessor to M., who built pursuant to the covenant, mortgaged to the defendant, and, on the buildings being destroyed by fire, rebuilt them. Thereafter, the defendant sold under the power in his mortgage to N., who again mortgaged them to the defendant. The premises were thereupon again destroyed by fire.

Held, reversing the decision of Blake, V.C., 26 Gr. 420, that the statutory words of covenant, in the absence of words making them expressly applicable, had not their statutory meaning when read with covenants not statutory, and therefore the above quoted covenants applied to the lessor and lessee only, and not to their assigns.

Held, also (Patterson, J.A., dissenting), that the covenants to build and rebuild, being in respect of something not in *esse* at the time of the demise, did not run with the land, assigns not being named.

Maclennan, Q.C., and *McClive*, for the appellant.

P. McCarthy and *W. Cassels*, for the respondent.

CAMERON v. CAMPBELL.

Legacy, assent to—Trust—Executors—Statutes of Limitations.

A testator bequeathed to his executors a sum of money to be invested, the interest to be applied in trying to discover his brother, and in case they should find him within five years after the decease of the testator, to pay him the legacy. If not, then to pay the same to M. C. The amount of the legacy being outstanding, the executors took a bond for it, and obtained the assent of M. C. to its terms, and the defendant C. received the moneys paid on the bond and applied them to his own use. M. C. became entitled to the legacy by the lapse of the five years without discovery of the testator's brother.

Held, affirming the decree of Blake, V.C., 27 Gr. 307, that the acceptance of the bond for the amount of the legacy and the obtaining the consent of M. C. to its terms were acts of assent whereby the executors con-

stituted themselves trustees, and therefore the right to recover the fund was not barred by the Statutes of Limitations.

Held, also, that C. was chargeable with interest on the amount received from the time it came to his hands.

Moss, Q.C., and *G. H. Watson*, for the appellants.
Robinson, Q.C., and *Smith*, Q.C., for the respondent.

PROUDFOOT, V.C.]

PARKHURST v. ROY.

Designation of legatee—Bequest to Foreign State—Trusts—Accumulation of income.

A testator domiciled in Ontario, and having personal property there and in the United States of America, directed his executor to realise his estate and pay and deliver the residue after payment of funeral and testamentary expenses to the Government and Legislature of the State of Vermont, to be disposed of as should seem best, having regard to a recommendation thereinafter contained to carry the trusts into effect for the benefit of the Common or District Schools of the State.

Held, affirming the decree of Proudfoot, V.C., 27 Gr. 361, that there was a sufficient designation of the State of Vermont as the legatee to entitle the State to take the bequest, and that it was no objection that it was for the benefit of, or to take effect in, a foreign country.

Held, also, that the objection that the State could not be made amenable to the Courts of the State, and therefore there would be no supervision over the trusts, should not prevail, for it must be assumed that a sovereign state would do nothing to violate a trust; and at any rate it appeared that the Legislature was not in fact to assume the trust, but was to appoint trustees who would be amenable to the Courts.

The will directed that the profits to arise from the investment of funds, some $203,000, should be added to the principal until the whole sum should be sufficient to pay each county in the State $100,000.

Held, that this direction did not invalidate the bequest.

W. Cassels and *Black*, for the appellent.
Bethune, Q.C., *Moss*, Q.C., and *Hardy*, Q.C., for respondents.

GRAND JUNCTION RAILWAY CO. v. MIDLAND RAILWAY CO.

Railway Charter, renewal of—Conveyance of land—Descriptio personæ.

The P. & C. L. R. Co., incorporated in 1855 by 18 Vict. cap. 194, had acquired the land in question as part of their road bed. In 1865, its charter expired, the road not having been put in operation. In 1866, 29

& 30 Vict. cap. 98, was passed, by which the road was to be sold at auction, the Act of Incorporation revived, and the time for completing the railway extended for five years from the passing of the Act, and there was a further provision for sale under order of the Court of Chancery. Within the five years a conveyance was executed to the defendant company, which took possession, but did not use the land till a short time before suit. In 1872, the C. P. & M. R. & M. Co. filed a map and book of reference of a proposed extension of their line over the land in question, and constructed part of their road thereon, but ceased in 1873. In 1880, under 43 Vict. cap. 54 (Ont.), the C. P. & M. R. & M. Co. leased to the plaintiff Company the land in question, and the action was brought to recover possession thereof.

Held, affirming the judgment of the Court below, that the partial construction of their road by the C P. & M. R. & M. Co. in 1872 was an Act of trespass, that the defendant Company under the reviving Act and conveyance in pursuance thereof acquired a title to the land, that the power to sell by order of the Court of Chancery was permissive merely, that their right to the land was not forfeited by non-completion of the work on the land within the five years, and therefore that the plaintiff Company should not succeed.

The deed to the defendant Company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed.

Held, a sufficient *descriptio personæ*.

H. Cameron, Q.C., and *Moss* for the appellants.

E. Blake, Q.C., and *W. Cassels* for the respondents.

RICKER v. RICKER.

Trustee and cestui que trust—Permission to trustee to bid—Effect of—Purchase by trustee—Depreciating Property.

The plaintiff being mortgagee of land of his testator, and being also devisee in trust under the will, took proceedings for sale of the mortgaged premises against the defendant, an infant, and a legatee under the will, alleging that the latter was entitled to the equity of redemption. A decree was made declaring the rights of the parties, and of the legatees under the will, directed the usual administration of realty and personalty, and on consent of the plaintiff ordered a sale of the mortgaged premises to satisfy the mortgage debt, the residue to be applied in payment of the charges created by the will. The conduct of the sale was given to the guardian *ad litem*, and the plaintiff was allowed to bid. The decree was not taken into the Master's office for three years, and just prior to the reference the plaintiff leased the lands at a low rental for five years. The sale was made subject to the lease, and also to the mortgage, the amount due upon which was not stated in the advertisement. The plaintiff arranged with the tenant, who wanted the place as he said, that he (the tenant) should not bid at the sale as he (the plaintiff) could buy the place cheaper, and

afterwards he would let the tenant have it for the same price as he paid for it. It was stated at the sale that the amount due on the mortgage, subject to which the land was put up, was from $1,200 to $1,500 or thereabout, and that the costs were about $450. As a matter of fact the debt and costs were only $1,638.64. The plaintiff purchased the land at $1,878, a sum below its value, and sold it to the tenant for $2,500.

Held, (i) reversing the judgment of Proudfoot, V.C., 27 Gr. 576, that the privilege granted to the plaintiff of bidding at the sale was to protect his own interest as mortgagee, and that it did not absolve him from the duty which, as trustee, he owed to the infant defendant; (ii) that the sale should not have been a sale of the equity of redemption, but should have been a sale of the land itself; (iii) that the plaintiff's conduct at and about the sale, whereby he was enabled to make a profit at the expense of the infant *cestui que trust*, would have invalidated the sale if the property had remained in his hands, but, the lands having passed into the hands of an innocent purchaser, the plaintiff should be charged with the outside selling value of the land at the time of the sale, or should pay to the plaintiff the amount payable under the will.

Robertson, *Q.C.*, for the the appellant.

W. Cassels, and *Duff*, for the respondent.

PROUDFOOT, J.]

HARVEY v. G. T. RAILWAY CO. AND G. W. RAILWAY CO.

Parties—Joinder—Rule 94.

The plaintiff shipped goods from St. John, Quebec, to Dundas, Ontario, by way of the defendant Railway Companies' lines, and they arrived at their destination in a damaged state. The plaintiff, being in doubt as to which Company was liable, joined both as defendants.

Held, affirming the order of Proudfoot, J., who affirmed the order of the Master in Chambers, 9 P. R. 80; 1 C. L. T. 659, that the case came within Rule 94, and that the plaintiff had the right to make both Companies parties.

McMichael, *Q.C.*, for the G. W. R. Co., who appealed.

J. K. Kerr, *Q.C.*, for the G. T. R. Co.

Muir, for the plaintiff.

C. C. PEEL.]

NIXON v. MALTBY.

Lease—Action for rent—Surrender in law.

Action for one year's rent on a covenant in a lease for three years. The defendant harvested the crops on the farm, and they, together with the barn and stable, were burned before the expiration of the year, for which he received some insurance money. He then left the place, and the plaintiff ploughed and put in a crop. The plaintiff applied to the defendant several times for rent, and the defendant said he had no money and had not got his insurance money. There was evidence that a proposition had been made to leave the matter to arbitration.

Held, affirming the judgment of the Court below, that the acts of the plaintiff did not amount to an eviction, and that there was no evidence to support a surrender in law, and therefore that the plaintiff was entitled to recover.

James Fleming, for the appellant.
Laidlaw, for the respondent.

High Court of Justice.

COMMON PLEAS DIVISION.

[OSLER, J., 30TH JUNE, 1882.

WHITELEY v. McMAHON.

Arbitration—Severability of award—Costs—Evidence taken in absence of parties.

Under a submission to arbitration certain matters in controversy existing and pending between A. W., J. W. and M. in relation to the amounts due and paid on a certain mortgage made by M. to the T. & L. Co., and as to the proportion of said mortgage paid by the said parties to the company were submitted to the arbitrators. They made their award by which they found that M. had paid the T. & L. Co. the amount he agreed with A. W. to pay on the mortgage, and had overpaid his proportion by $627, in which sum A. W. was indebted to him; that A. W. should pay that sum to him on or before the 1st June, 1882, and should also pay the costs of the reference, viz.: $35.

Held, that the finding as to costs was an excess of the power of the arbitrators, but that it was severable from the rest of the award; and that the arbitrators in other respects had not exceeded their powers.

Held, however, that the award was bad and must be set aside, as it appeared that the arbitrators had received the evidence of one of the parties in the absence of the others after the arbitration was supposed to be closed.

Bethune, *Q.C.*, and *Garvin*, for the applicants.
Shepley, contra.

MACDONALD v. HENWOOD.

Malicious prosecution—Setting criminal law in motion—Trespass—Evidence —New trial.

Action for malicious prosecution and tespass. The information which was drawn out by the magistrate on what he said the defendant told him, was that the plaintiff took and carried away a quantity of oats in which the defendant had a joint interest, without their knowledge or consent and contrary to their wishes according to the best of their knowledge and belief. The magistrate on the information caused the plaintiff to be arrested and committed to goal to await his trial on the charge. The defendants did not tell the magistrate the whole facts, viz: that the plaintiff had originally been put in possession of the oats under an agreement that he was to thresh them and take the straw in payment, and that, as he contended, he subsequently became the purchaser. Also when the plaintiff was before the magistrate, on his solicitor objecting that no criminal offence was charged, P., one of the defendants, acting for himself as well as for the other defendant, stated that in order to have the charge investigated he would charge plaintiff with stealing. The magistrate however did not appear to have heard this, and did not act upon it, also when the plaintiff was put in charge of the constable and committed to gaol the defendants were present. At the trial the plaintiff was non-suited.

A new trial was granted with leave to the plaintiff to amend his statement of claim, which stated that the defendants had changed the plaintiff with felony, so as to state the true facts, and so as to enable the question to be presented whether on such facts a cause of action arose.

The new trial was also granted because there seemed to be evidence to connect the defendants with the trespass.

Pepler, for the plaintiff.
Lount, *Q.C.*, for the defendants.

CHANCERY DIVISION.

[PROUDFOOT AND FERGUSON, JJ., 22ND JUNE, 1882.

FOULDS v. HARPER.

Mortgage—Statutes of Limitations—Disabilities—Equity of redemption not divisible.

Section 43 of R. S. O. cap. 108 relates to mortgage cases; and therefore the infant children of a deceased mortgagor entitled to redeem the mortgage have five years after attaining majority within which to commence proceedings.

As long as the right of redemption exists in any of the parties entitled to the equity of redemption, it enures for the benefit of all. Therefore, where some of the children of a deceased mortgagor were adults and some were infants, and the adults, if they had been the only children, would have been barred by the Statute of Limitations, but the infants would not,

Held, reversing the Decree of Blake, V.C., that the right of the infants to redeem kept alive in its entirety the right to redeem the whole mortgage.

W. Cassels, for plaintiffs.

Street, for defendant rehearing.

[WILSON, C.J., AND FERGUSON, J., 29TH JUNE, 1882.

NORVALL v. THE CANADA SOUTHERN RAILWAY CO.

Appeal allowed—Costs undisposed of—Effect of, on costs of Court below.

Held, reversing the judgment of Proudfoot, J., in Chambers (*ante*, p. 358), that where the Supreme Court of Canada reversed the judgment of the Court of Appeal which was in favour of the plaintiff, but said nothing as to costs, the plaintiff was as a necessary consequence deprived of the costs of the Court below.

CUNNINGHAM v. THE CANADA SOUTHERN RAILWAY CO.

Appeal—New trial without costs—Effect of, on costs of Court below.

The Supreme Court of Canada directed a new trial between the parties without costs, reversing the judgment of the Court of Appeal which was in favour of the plaintiff.

Held, that this placed the parties at a stage prior to the appeal to the Court of Appeal at which they were to commence again, that neither party could have a claim against the other for any costs incurred after that stage and up to the time of the judgment of the Supreme Court, and therefore the plaintiff was expressly deprived of his costs of the appeal to the Court of Appeal.

NEW BRUNSWICK.

In the Supreme Court.

[JUNE, 1881.

Ex parte McCLEAVE.

Canada Temperance Act, 1878—*City, within meaning of—Licenses—Expiration of.*

The Town of Moncton in the County of Westmorland, was incorporated by Act of Assembly, whereby the whole local government of the town, and the exclusive power to grant licenses for, and to regulate the sale of spirituous liquours in, the town, was vested in the Town Council. The County of Westmorland was afterwards incorporated as a Municipality. "The Canada Temperance Act, 1878," provided that the proceedings for bringing the Act into force in any county or city should be by petition to the Governor-General of at least one-fourth of the electors of any county or city, on which a proclamation might issue for taking a poll of the votes for and against the petition. By section 96, if the petition was adopted by the electors of the county or city named therein, and to which the same related, the Governor-General in Council might, by order in Council, declare "That the Act shall be in force and take effect in such county or city, from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will

expire." A petition from the requisite number of electors in the County of Westmorland having been presented to the Governor-General, and a vote having been taken adopting the petition, an order in Conncil was made, declaring that the Act should be in force and take effect in the County of Westmorland from and the day on which the annual or semi-annual licenses for the sale of liquors then in force in the said county expired. At the time this order in Council issued, there were licenses for the sale of liquors in force in Moncton, granted by the Town Council, and in the County of Westmorland, granted by the Municipality, such licenses expiring at different periods.

Held, by Allen, C.J., and Duff, J., (King, J., dissenting), that Moncton is a city within the meaning of the Canada Temperance Act, and as no separate vote of the ratepayers of the town had been taken, the order in Council bringing the Act in force in the County did not apply to Moncton.

Per King, J. Moncton is not a city within the meaning of the Act and the Act came in force in the County, including Moncton, on the termination of the latest expiring licenses either in the town or county.

The licenses granted by the Town Council of Moncton expired on the 15th December, 1880. A by-law of the Municipality declared that all tavern licenses should expire at the annual meeting of the council, which was the third Tuesday in January. Licenses were granted by the Municipality on the 24th January, 1880, for one year.

Held, per Weldon and Wetmore, JJ., that even if the Act were in force in Moncton, such licenses would not expire till the 24th January, 1881, and that the Canada Temperance Act would not be in force in Moncton till that day.

Per King, J. The licenses should be read in connection with the by-law, and they would not run for 365 days from their issue, but would expire at the annual meeting of the Municipality (the 18th January. 1881), and therefore a conviction for selling liquor in Moncton on the 23rd January was sustainable.

Ex parte KANE.

Certiorari—Judge, Supreme Court—Review—New Trial.

A *certiorari* will not be granted to bring up the proceedings in review before a Judge of this Court, under the Consol. Statutes, cap. 60, the proper remedy being by motion to set aside the order. (Wetmore, J., dissenting).

A Judge has no power to order a new trial in a review case, unde Consol. Stat. cap. 60, sec. 43. (Weldon and Palmer, JJ., dissenting).

Ex parte FAHEY.

Consol. Stat. cap. 60, *sec.* 45—*New trial in review under—County Court Judge—Certiorari.*

A *certiorari* will lie to bring up the proceedings in review had before a County Court Judge under Consol. Stat. cap. 60, if he had no jurisdiction to make the order. (Weldon, J., dissenting).

Per Weldon, J. The order of a Judge in a review case is final.

A Judge has no power to order a new trial in a review case under Consol. Stat. cap. 60, sec. 45. (Weldon and Wetmore, JJ., dissenting).

[FEBRUARY, 1882.

THE CARLETON, CITY OF SAINT JOHN, BRANCH RAILROAD COMPANY, APPELLANTS v. THE GRAND SOUTHERN RAILWAY CO., AND JOSEPH N. GREENE, RESPONDENTS.

(Equity Appeal.)

Railway Company—Right to grant running powers over its line to another Company—Power of Railway Company to contract after the time limited by Act of incorporation—Specific performance of contract—When equity will enforce—Lease—Entire rent reserved—Consideration illegal in part.

The Grand Southern Railway Company was incorporated by 35 Vict. cap. 47, (passed 11th April, 1872,) for the purpose of constructing a railroad from the city of Saint John to Saint Stephen, the capital stock to consist of at least $2,000,000 and the liability of the stockholders restricted to the amount of stock they held; $50,000 of the stock subscribed to be paid in before the operations of the company commenced; and that to entitle the company to the privileges of their charter the construction of the road should commence within three years, and should be *bona fide* continued from year to year, so that the whole be completed within eight years from the passing of this Act. No stock having been paid in under this Act, the time for commencing the construction of the road was extended by 37 Vict. cap. 85; but the time for completion remained as before, and the company was authorized to commence the construction of the road as soon as $20,000 of the stock was "subscribed" for. $24,000 was subscribed for, but only $1240 was paid in. The company did not complete the road within the time limited (11th April, 1880), and the Legislature refused to extend the time. On the 20th January, 1876, the company contracted with the Government to construct the railway mentioned in the Act of incorporation; to commence work by the 31st December following, and to complete the road by the 11th April, 1880, the Government having power to termin-

ate the contract by a six month's notice, unless the company gave satisfactory proof that the work would be completed within the time limited. In January, 1879, the Government gave the company a notice under the terms of agreement.

By Act 33 Vict. cap. 39, the Carleton Branch Railway Co. was incorporated for the purpose of constructing a railway from the west side of the harbour of St. John to The European & North American Railway near Fairville, with power to take and hold land, &c., and provided that lands taken by the company should be held as lands taken and appropriated for highways. On the 30th April, 1880, the Grand Southern Railway Company (respondents) entered into an agreement with the Carleton Branch Railway Company (appellants), whereby the appellants granted to the respondents for a term of fifteen years the right to connect their railway with the appellants' railway, and to run their trains over it, and to lay down sidings, &c., and also demised to the respondents certain lots of land, with the right to build station houses and freight houses on one of the lots; reserving to the appellants for the land demised, and the rights and privileges granted, an annual rent. It was also agreed that, if during the fifteen years the respondents could not use the track on the Carleton Branch railway, for certain specified causes, they (respondents) might build a track for their own use along-side of the appellants' railway, with necessary earth works, &c. And in case such track was constructed the respondents should pay the appellants a certain specific rent per annum, for so long thereafter as they should use the land for that purpose, and that they should have the right to use and maintain the second track at the especial rent for 999 years.

The respondents filed a bill, alleging that on the 2nd June, 1880, they commenced to grade their line of railway so as to connect with the Carleton Branch Road, but were prevented by the appellants. The Bill prayed that it might be declared that the Carleton Branch Railway Co. was bound to perform and execute the agreement entered into with the respondents, and should be enjoined from preventing or obstructing the respondents from uniting their railway with the appellants' line, and from interfering with or hindering the respondents from passing with their locomotives, &c., over the appellants' road, in accordance with the agreement of the 30th April, 1880. An injunction order having been granted in the terms of the prayer:

Held, on appeal, by Allen, C.J., and Duff, J., (Weldon, J., dissenting),

1. That the bill was, in effect, a bill for specific performance of an agreement, and before the Court would enforce it, it must be satisfied that there was no reasonable ground to contend that the agreement was illegal, or against the policy of the law.

2. That the agreement of the 30th of April, 1880, having been entered into after the time limited by the Act incorporating the Grand Southern Railway Co. for the completion of the road, was *ultra vires*, and void.

3. That the agreement was not such a one as a Court of Equity would attempt to enforce; and whether it was valid or invalid, in view of the

financial condition of the Grand Southern Railway Co., it was not an agreement which the Court ought to be active in enforcing.

4. *Semble.* That though the Carleton Branch Railway Co. might grant to another company a right to connect with their railway, and have running power over it, it had no power to grant to another company a right to construct a separate track along-side of its own line, or to make such a demise of its lands as purported to be made in the agreement of 30th April, 1880.

5. That if the demise of the lands to the Grand Southern Railway Co. was illegal, it vitiated the grant of the easement or running powers over the Carleton Branch Railway, because one entire rent was reserved in respect to both; and the legal part of the consideration could not be severed from the illegal part.

Per Weldon, J. As the effect of the injunction order was merely to preserve the *status quo*, until the rights of the parties could be determined on hearing, the appeal should be dismissed.

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PROVINCIAL JURISDICTION OVER CIVIL PROCEDURE.

HAVING premised that the Provinces are entrusted with the administration of justice, that they have power to erect Provincial Courts and that these Courts must be instruments adequate to carry out the scheme by which the administration of justice is exclusively assigned to the Provinces, and that the Provincial Legislatures may therefore create Superior Courts; and having also premised that the Provincial Legislatures have the exclusive right to regulate procedure in those Courts, that is, to attach to the Courts a universal practice for all subjects coming before them, while the Federal Parliament has power to attach to its own subjects of legislation a procedure by which they must be tried in the Provincial Courts, and may also erect Courts and regulate procedure therein for the carrying out of its special laws; having, we say, premised this much, it will be profitable before proceeding further, to ascertain how far these views are supported by authority.

We turn naturally to *Valin* v. *Langlois* (*a*), upon which the Judges to a great extent relied in *The Thrasher Case*, as being a case of high authority, in which the point was a necessary element of the decision. In order to facilitate our enquiries we shall state several propositions, partly enunciated in,

(*a*) 3 S. C. R. 1.

and partly implied by, our previous remarks. They are as follows :—

(i) The Supreme and Superior Courts, existing at the time of confederation and continued by the British North America Act, are Provincial Courts.

(ii) The Provincial Courts exist for the administration of all laws, both Federal and Provincial, except those for the enforcement of which special Courts have been provided.

(iii) Therefore, the Provincial Legislatures have power to erect all courts necessary for the adequate administration of justice in the Provinces.

(iv) They have power to attach procedure to the Provincial Courts generally, or to each of their exclusive subjects of legislation in particular.

(v) All matters for which procedure has not been specifically provided, when litigated therein, must conform to the general procedure attached to the Provincial Courts.

(vi) The Parliament of Canada has the right to attach a special procedure to any subject under its legislative control; but has no power to interfere directly with the general procedure attached to the Provincial Courts.

(vii) The Parliament of Canada may indirectly interfere with the procedure in the Provincial Courts, by adding to the functions of the latter the duty of administering its special laws by means of specific procedure provided therefor.

(viii) The Parliament of Canada may erect Courts, separate and distinct from the Provincial Courts, and regulate procedure therein for the enforcement of its special laws.

(ix) The Parliament of Canada cannot provide a procedure for subjects exclusively under Provincial legislative jurisdiction.

Corollary. By the process of attaching specific procedure to each subject of Federal jurisdiction, or by erecting Courts to enforce all its special laws, the Parliament of Canada has power to leave the Provincial Courts existing for, and their procedure applicable to, the subjects of Provincial legislative jurisdiction only.

We proceed then to ascertain,

The effect of decided cases upon the subject.—The first proposition is directly at issue with that part of the decision in *The Thrasher Case*, which holds, that the Supreme Court of British Columbia, by virtue of its original constitution, is not a Provincial Court. But of that, hereafter.

In the meantime, we shall consult the authorities, bearing directly upon the proposition as stated, and, if we find that they sustain it, we shall either dispense with the question as affected by section 129 of the British North America Act, or enter upon a discussion thereof forearmed.

Valin v. *Langlois*, being of such high authority, we might pass by cases in the lower Courts, were it not that they have been referred to in the principal case.

In *Re Niagara Election Case* (*b*), the constitutionality of the Dominion Controverted Elections Act, 1874, came into question. By this Act, 37 Vict. cap. 10, the existing Supreme and Superior Courts of the several Provinces were utilized by the Dominion for the purpose of trying controverted election cases. The procedure by which these cases were to be brought to trial was provided by the Act.

Section 3 is as follows :—"In this Act, and for the purposes thereof, the expression, 'the Court,' as respects elections in the several Provinces hereinafter mentioned, respectively, shall mean the Courts hereinafter mentioned, or any Judges thereof, viz :—

1. In the Province of Quebec, the Superior Court for that Province ;

2. In the Province of Ontario, any of the following Courts, viz :—The Court of Error and Appeal, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Chancery, and the Chancellor, and Vice-Chancellors of the said Court, for that Province ;

3. In the Province of Nova Scotia, the Supreme Court of that Province ;

(*b*) 29 cap. P. 261.

4. In the Province of New Brunswick, the Supreme Court of that Province;

5. In the Province of Manitoba, the Court of Queen's Bench for that Province;

6. In the Province of British Columbia, the Superior Court of Civil Justice of that Province;

7. In the Province of Prince Edward Island, the Supreme Court of Judicature for that Province."

The preliminary objections alleged, amongst other things, that the "constitution, etc., of this honourable Court (c), as a court of civil and criminal jurisdiction is exclusively within the legislative authority of the Legislature of the Province of Ontario, etc." It was admitted by all parties, and by the Court itself, that the then Court of Common Pleas for Ontario, a Court existing prior to, and continued by the British North America Act, was a Provincial Court within the meaning of number 14 of section 92. The whole discussion would otherwise have been meaningless. At page 288, Wilson, J., says:—"The Act of 1874 * * has expressly authorized the *Provincial Courts* to dispose of these election matters, etc." Again, at page 289: "The Legislature of this Province had therefore alone the power to define and limit the jurisdiction of the four Courts named in the Dominion Act of 1874; and it has done so by the different statutes which create and govern these respective Courts." And at page 294, he says:—"In submitting these contested elections to the *Provincial* tribunals, so far as relates to the Courts of Queen's Bench, Chancery and Common Pleas, the Dominion Parliament has merely transferred certain civil rights, over which the Parliament had formerly exclusively jurisdiction to the *Courts which had a general jurisdiction over all civil rights* before the passing of the Act, or which have since acquired it." The holding in the case was, that, though the Court of Common Pleas for Ontario was a Provincial Court, the Federal Parliament had the right to utilize it for the trial of election cases, according to the procedure prescribed by the Act.

(c) The Court of Common Pleas for Ontario.

In *Valin* v. *Langlois*, which was also relied on to a great extent in *The Thrasher Case*, a similar result was arrived at.

The Court from which the appeal in this case was taken was the Superior Court of the Province of Quebec, the Court named in sub-section 1 of sec. 3 of 37 Vict. cap 10. The point in this case was the same as that in *Re Niagara Election Case*. It was objected that the same statute was *ultra vires* in interfering with procedure in a Provincial Court, within which designation the Court appealed from was embraced. In the Act itself, and in *Valin* v. *Langlois*, the Supreme and Superior Courts enumerated in section 3 of the Act are invariably called "Provincial Courts." We transcribe a few passages from the judgments in that case, which show unmistakably that they are considered to be Provincial Courts within the meaning of number 14 of section 92 of the British North America Act. For instance, at page 18 of the report, the learned Chief Justice calls them Provincial Courts. So, at page 27, he says the Dominion Controverted Elections Act, 1874, "utilizes for that purpose [for the purpose of a Dominion Court] the Provincial Courts and their Judges." Here is a direct, and we may say a binding decision, that the Superior Court of Quebec is a Provincial Court. So, at page 22, he twice speaks of the existing Supreme and Superior Courts as Provincial Courts; and again, at page 28, he speaks of the Parliament adding to their jurisdiction as Provincial Courts. At page 31, he says, "The judges cannot sit in controverted election matters under the general jurisdiction of their respective Courts, * * but they act as Election Judges appointed by and under the Act, outside of and distinct from the jurisdiction they exercise in their respective Provincial Courts, which is left untouched by this Act."

Sections 46, 47 and 48 of the 37 Vict. cap. 10, are grouped under the sub-heading, "Reception, expenses and jurisdiction of the Judge." Referring to these, the learned Chief Justice says, at page 32, "The Judge is to be received not as a Judge of the Superior Court in that character, but as a Judge of the Election Court, in like manner as if he were about to hold a sitting at *nisi prius*, or a sitting of the

Provincial Court of which he is a member, showing that the Legislature did not contemplate that he was then actually about to sit as a member of the Provincial Court, but as being about to try an election petition; and when about to do this he is to be treated as if he were about to hold a sitting of the Provincial Court of which he is a member," and so on. It will be observed that the expression "the Provincial Court of which he is a member," so often used, is a quotation from section 46 of the Act. And at page 33, it is said, "So, in like manner, are the witnesses treated as being subpœnaed, sworn and treated, not as being actually within the jurisdiction of the Provincial Courts, etc." And again, "Such tribunal [the Election Court so established] is very clearly distinguished from the Provincial Courts."

Mr. Justice Fournier, likewise, speaks of these Courts as Provincial Courts, Provincial tribunals (*d*).

Mr. Justice Henry, in presenting the question for decision, at page 66, says, "It is objected that in so dealing with it [the subject of the trial of election cases] as to give to the Provincial Courts power to try them, and in framing procedure, it [the Parliament of Canada] has trenched on the prerogative of the Local Legislatures to which were committed the right to deal with * * 'the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts'." And at page 68, he says, "In cases where the machinery in the Provincial Courts is defective for the trial of contested elections, the Local Legislature has clearly no power to supply it." And again, at the same page, "Parliament, then, having, as I have endeavoured to maintain, plenary powers over the whole subject, had it the power to impose on the Provincial Courts the duty of trying contested elections?"

Mr. Justice Taschereau, at page 71, in the introductory part of his judgment, says, "This question has been so fully and ably discussed, not only by my brother Judges

(*d*) At pages 49, 50 and 51.

who have just delivered their opinions, but also in the Provincial Courts * * ." Not to multiply quotations, we refer for further instances of the like designation of these Courts to pages 69, 72, 73, 74, 80 and 81.

In every instance in which the expression "Provincial Courts" has been used in *Valin* v. *Langlois* and in *Re Niagara Election Case*, it refers expressly to the Superior Courts named in section 3 of the Dominion Act, 1874. The latter case must be regarded as an express decision that the Court of Common Pleas for Ontario was a Provincial Court within the meaning of the British North America Act. Though this would not have been binding on the Supreme Court of British Columbia, it is difficult to see why *Valin* v. *Langlois* should not have been. It is a direct decision that the Superior Court of Quebec is a Provincial Court. And the Supreme Court of Civil Justice in British Columbia, being named with the others in section 3 of the Act which was in question in *Valin* v. *Langlois*, must necessarily be embraced in the same category. In fact, there is the expression of opinion by the Parliament of Canada, in section 46 of the Act that that Court is a Provincial Court.

It is not necessary to refer to the report of the case before the Privy Council, further than to say, that the Lord Chancellor, while referring in most complimentary terms to the argument of Mr. Benjamin on a motion for leave to appeal, said that he had no doubt whatever but that the decision of the Supreme Court of Canada was correct, and that there was not a sufficient *prima facie* case made out to warrant the giving of leave to appeal. In delivering judgment, his Lordship also referred to the Courts in question as Provincial Courts.

We may conclude that the first proposition stated is supported by the authority of decided cases.

(To be continued.)

HAVE THE PROVINCIAL LEGISLATURES POWER TO LIMIT APPEALS TO THE SUPREME COURT OF CANADA ?

The supremacy of Parliament has long been a favorite doctrine of the English constitutional lawyers. It has not, however, remained unchallenged even in our own day, while in fact, it was almost, if not quite, disregarded in the days when prerogative stood for law and our Kings were practically sovereigns, instead of being, as they now are, a mere constituent element of the sovereign body. In early times, when Parliament was spoken of as supreme, it was usually meant to indicate the power of the three Estates of the Realm, when acting in concert, as distinguished from the personal authority of the King, but at the present day the term is more frequently employed to indicate the supremacy of the Legislative over the Judicial power (*a*).

Blackstone is among the most pronounced supporters of parliamentary supremacy. Speaking of the Parliament, he says :—"It can in short do everything that is not naturally impossible; and, therefore, some have not scrupled to call its power by a figure rather too bold, the omnipotence of Parliament. True, it is, that what Parliament doth, no authority upon earth can undo" (*b*). And he adds :—"So long, therefore, as the English Constitution lasts, we may venture to affirm that the power of Parliament is absolute, and without control" (*c*). De Lolme has humorously put the same doctrine by asserting that, "It is a fundamental principle with the English lawyers that Parliament can do everything, but make a woman a man, and a man a

(*a*) See paper read before The Juridical Society, in 1867 (page 305). "On Blackstone's Theory of the Omnipotence of Parliament."

(*b*) 1 Blk. Com. 161.

(*c*) 1 Blk. Com. 162.

woman" (*d*). Other authorities, however, maintain the power of the Courts to pronounce upon the validity of all Acts of Parliament (*e*). Coke tells us that, "It appears in our books that in many cases the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void, for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void" (*f*). And Chief Justice Hobart says that "even an Act of Parliament made against natural equity—as to make a man a judge in his own case—is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*" (*g*).

Chancellor Kent, remarking upon this conflict of authority, says, "When it is said in the books that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the Courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the law giver, that any very unjust or absurd consequence was within the contemplation of the law. But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English law as to the binding efficacy of the statute. The will of the legislature is the supreme law of the land and demands perfect obedience" (*h*).

(*d*) In a note of Mr. Christian to Blk. Com. 161 this saying is attributed to De Lolme, but we have been unable to find it in that writer's work on the Constitution of England.

(*e*) See the paper read before the Juridical Society, already referred to, where there is a most caustic review of Blackstone's doctrine upon this point.

(*f*) *Dr. Bonham's Case*, 8 Co. 234.

(*g*) *Day* v. *Savadge*, Hob. 87. See also, per Chief Justice Holt, in *City of London* v. *Wood*, 12 Mod. 687: "If an Act of Parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void Act of Parliament; . . . an Act of Parliament can do no wrong, but it may do several things that look pretty odd."

(*h*) 1 Kent's Comm. 447. And see per Willes, J., in *Lee* v. *Bude, etc., Ry. Co.*, L. R. 6 C. P. 582. And see per Cockburn, C.J., in *Queen* v. *Keyn*, L. R. 2 Ex. D. 152, 160 and 207, and per Brett, C.J., in *Niboyet* v. *Niboyet*, L. R. 4 Prob. D. 20.

Whatever doubt may exist as to the power of the Courts to question the validity of Imperial Statutes, there can be no doubt that our Courts are both able and bound to inquire into the validity of the Acts of our Dominion Parliament and Provincial Legislatures, whose powers are limited and whose functions are defined within the four corners of a written constitution. Some of the results of this limitation of legislative power, coupled with the multiplication of our legislative bodies, are seen in the conflict of authority between these bodies and the clashing of jurisdictions, or assumed jurisdictions, which are already sufficiently numerous to attract grave attention. It is true that our Constitution has, in the power of disallowance given to the Governor-General in Council, provided one means of lessening the evil, but this provision does not furnish us with an unerring rule; for, while the power has been exercised with respect to legislation that was undoubtedly constitutional, it has, without doubt, on the other hand, failed to arrest attempted legislation which was *ultra vires* of the legislative body that brought it forth.

It is submitted that section 48 of the Ontario Judicature Act (*i*) falls within the latter class. This section provides that no appeal shall lie to the Supreme Court of Canada without the special leave of such Court or of the Court of Appeal, unless the title to real estate or some interest therein or the validity of a patent is affected; or unless the matter in controversy exceeds the sum or value of $1000," etc. (*j*). The Supreme Court Act (*k*), on the other hand, enacts that, subject to the limitations and provisions therein made, "An appeal shall lie to the Supreme Court from all final judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction, now or hereafter established in any Province of Canada, in cases in which the Court of original jurisdiction is a Su-

(*i*) 44 Vict. cap. 9.

(*j*) As to the construction of such an Act, when validly made, and the mode of determining the amount in controversy, see *Macfarlane* v. *Leclaire*, 15 Moore P.C. 187, and cases there cited; also *Joyce* v. *Hart*, 1 S. C. R. 321; *Gordon* v. *Ogden*, 3 Peters 33, and *Smith* v. *Honey*, 3 Peters 469.

(*k*) 38 Vict. (D.) cap. 11 sec. 17.

perior Court," and a Dominion Statute (*l*) declares the meaning of the Supreme Court Act to be that all decisions of any Superior Court made in any judicial proceeding in the nature of a suit or proceeding in equity—"are and always have been the proper subjects of appeal to the said Supreme Court, subject, however, to the provision in the said Act contained that an appeal shall lie only from the highest Court of final resort in the Province" (*m*). If these latter statutes are, as we think there is no reason to doubt, within the legislative power of the Dominion Parliament, it is then apparent that the Ontario Legislature has attempted to deprive litigants of what in many cases is a highly valued right, the right of appeal, when they believe that they have suffered a legal wrong. The clause in question is merely shorn of some of its strength, without being rendered innocuous by the gracious permission accorded to the litigant to beg leave from the Supreme Court of Canada or the Court of Appeal that he may enjoy as a favour the benefit of that which the Dominion Statute has granted to him as a right.

The draft of the Judicature Act printed for distribution before its final enactment refers to R. S. O. cap. 38, sec. 49, as a precedent for the section in question, presumably upon the supposition that if the Parliament of the late Province of Canada had power to limit the right of appeal to the Queen in Council and thereby limit a royal prerogative, the Provincial Legislature would have an *a fortiori* right to limit appeals where no prerogative was affected. An Act of the Legislative Council and Assembly of Lower Canada somewhat similar in effect to the Act of the late Province of Canada which is relied upon as a precedent, was passed upon by the Privy Council and the validity of the Colonial Act was upheld. That Act (*n*) provided that

(*l*) 42 Vict. cap. 39, sec. 13.

(*m*) In *The Grand Trunk Ry. Co.* v. *The Credit Valley Ry. Co.*, reported at p. 337 of Doutre's Constitution of Canada, Taschereau, J., held that it was *ultra vires* of the Dominion Parliament to pass an Act allowing appeals from any other Courts than the Court of final resort in each Province.

(*n*) 34 Geo. III. cap. 6.

with certain exceptions the judgment of the Lower Canada Court of Appeal should be final in all cases where the matter in dispute should not exceed the sum or value of £500. It had already been provided by the Imperial Statute, (*o*) commonly called the Canada Act, that His Majesty by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper and Lower Canada should have power to make laws for the peace, welfare and good government thereof, such laws not being repugnant to that Act, and that all such laws being passed by the Legislative Assembly of either of such Province respectively, and assented to by His Majesty, or in his name, by the Governor or Lieutenant-Governor of such Province should by virtue of and under the authority of the Imperial Act be valid and binding to all intents and purposes whatsoever within the Province in which the same should be passed. The question of the validity of the Lower Canadian Act came before the Privy Council, in the case of *Cuvillier* v. *Aylwin* (*p*), when its validity was upheld, upon the grounds that the Colonial Act, having been duly assented to, had the same effect within the Colony, by virtue of the Canada Act, as if it had been an Imperial Statute. The case arose upon an application to a committee of the Privy Council for special leave to appeal in a case involving less than the amount limited by the Canadian Statute. The Court said: "The King has no power to deprive the subject of any of his rights (*q*), but the King, acting with the other branches of the Legislature, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights. This petition must therefore be dismissed" (*r*).

(*o*) 31 Geo. III. cap. 31.

(*p*) 2 Knapp P. C. 72.

(*q*) It is a prerogative right of the Crown to grant, and a right of the subject to prosecute, an appeal to the King or Queen in Council from the judgments of the Courts of any Colony, whatever the amount at issue, and this right cannot be taken away without the express words of an Act of Parliament to which the Crown has given assent. See *The Queen* v. *Allo Paroo*, 5 Moore P. C. 296; *Re The Lord Bishop of Natal*, 3 Moore P. C. (N. S.) 156. And see Forsyth's Constitutional Law, 378.

(*r*) This case is opposed to the current of modern authority, the effect of which appears to be that Colonial Legislatures may take away the right

Even had the case of *Cuvillier* v. *Aylwin* remained unimpeached to the present day, and were it now held that a Colonial Statute could take away the royal prerogative of hearing appeals in Council at pleasure, such a holding would refer to the Act of a Colonial Parliament, and it would still be more than doubtful if an Act of any of our Provincial Legislatures could have any such effect (*s*).

It may be that if the Legislature were to delegate any of its functions to the Courts of the Province it could effectually bar an appeal to the Supreme Court, or the Privy Council from a judgment given in the exercise of such delegated function, as such a case would probably fall within the rule laid down in *Théberge* v. *Landry* (*t*), in which application was made for leave to appeal to the Privy Council from a judgment of the Superior Court of Quebec upon an election petition by which the applicant had been unseated for corrupt practices. By the Quebec Controverted Elections Act, 1875, the power of deciding controverted election cases, which formerly belonged to the Legislative Assembly, was conferred upon the Superior Court, and it was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. Leave to appeal was refused by reason of the peculiar nature of the jurisdiction delegated to the Superior Court. The decision was carefully and distinctly rested upon the ground of the peculiarity of the subject matter. It was there said, speaking of the Acts of 1872 and 1875: "They

of appeal to the Privy Council, save the royal prerogative of hearing appeals at pleasure. See *Re Louis Marois*, 15 Moore P. C. 189, and *Johnston* v. *The Ministers and Trustees of St. Andrew's Church*, L. R. 3 App. Cas. 159.

(*s*) In support of the view that the Provincial Legislatures are not Parliaments, and that they can in no way interfere with the royal prerogative, see sections 17 and 69 of the B. N. A. Act. *Per* Taschereau, J., in *Lenoir* v. *Ritchie*, 3 S. C. R. 622 and 625. *Per* Gwynne, J., S. C. 635. "Nothing can be plainer, as it seems to me than that the several Provinces are subordinate to the Dominion Government, and that the Queen is no party to the laws made by those Local Legislatures." And see *arguendo* in *Mercer* v. *Attorney-General*, 5 S. C. R. 542, 543, 552 and 553. "Are Legislatures Parliaments? by Fennings Taylor, cap. II. Todd's "Parliamentary Government in the British Colonies," 462 and 463. See *contra*, *arguendo* in *Mercer* v. *Att'y-Genl.*, 5 S. C. R. 588 to 592, and 604 to 609. "The Powers of Canadian Parliaments," by S. J. Watson, chapters XXI. and XXII.

(*t*) L.R. 2 App. Cas. 102.

are not Acts constituting, or providing for the decision of, mere ordinary civil rights; they are Acts creating an entirely new, and, up to that time, unknown jurisdiction in a particular Court of the Colony, for the purpose of taking out (with its own consent) of the Legislative Assembly, and vesting in that Court that very peculiar jurisdiction, which up to that time had existed in the Legislative Assembly, of deciding election petitions and determining the *status* of those who claimed to be members of the Legislative Assembly," and consequently it was held that in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council.

The question which we have set for ourselves at the beginning of this paper does not involve the effect of the Royal Prerogative, nor does it come within the rule of *Théberge* v. *Landry;* its answer depends upon the interpretation of our Constitution, the British North America Act, which redistributes among the law-making bodies of the Dominion the aggregate of the powers formerly possessed by its constituent Provinces, together with such other powers as were considered necessary for carrying out the scheme of Confederation. Section 101 of that Act empowers the Parliament of Canada, notwithstanding anything in the Act contained to "provide for the constitution, maintenance and organization of a General Court of Appeal for Canada."

Section 92, sub-sec. 14, enables the Provincial Legislatures to exclusively make laws in relation to "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including procedure in civil matters in those Courts."

It will be observed that in both sections the scope of the power conferred is indicated by the words "constitution, maintenance and organization" (*u*). The word "constitution"

(*u*) We will not discuss the question raised by the British Columbia Court in the *Thrasher Case*, as it has been fully discussed elsewhere.

is defined in Worcester's Dictionary as "the body of fundamental laws as contained in written documents or established by prescriptive usage which constitutes the form of government for a nation, state, community, association or society." It is defined in the Imperial Dictionary as "a system of fundamental rules, principles and ordinances for the government of a state or nation, either contained in written documents or established by prescriptive usage." It is submitted that the word as used in the above quoted sections carries with it the power to grant, define and limit the jurisdiction, and regulate the procedure of the Courts therein referred to, and thereby give to them a portion of their form of government, which latter is treated in the above definition as equivalent to their constitution. If section 101 of the British North America Act, empowers the Dominion Parliament to grant, define and limit the jurisdiction of the "General Court of Appeal for Canada" therein referred to, this fact will go far towards supporting the validity of the Dominion Statutes already referred to, whereby jurisdiction is given to the Supreme Court to hear appeals in certain cases in which the Judicature Act says no appeal shall lie. If the word constitution as thus used carries with it the power to limit the jurisdiction of the Supreme Court of Canada, such a power is of course inconsistent with the existence of a like power in the Legislatures, and the section of the Judicature Act under consideration is really an attempt on the part of a Provincial Legislature to set a limit to the jurisdiction of the Supreme Court of Canada, or at any rate to make the exercise of that jurisdiction conditional upon certain procedure being first taken *in that Court*, in either of which cases it is an interference with powers exclusively vested in the Dominion Parliament. There can be no doubt that upon the proper construction of the British North America Act the power there granted to the Dominion Parliament to provide for the constitution,

could scarcely be dealt with within the limits of our present article. It, of course, has an important bearing upon the question which we have set for ourselves, but for the purposes of this paper we shall assume that the Ontario Judicature Act deals only with "Provincial Courts," except in so far as it attempts to limit the jurisdiction of the Supreme Court of Canada.

maintenance and organization of a General Court of Appeal for Canada carries with it a power to render that Court effective, and that Court cannot be rendered effective as a Court of Appeal unless jurisdiction be given to it to hear appeals from the Provincial Courts, for it will scarcely be contended that the "General Court of Appeal for Canada" was intended solely for the hearing of appeals from the additional Dominion Courts mentioned in section 101. If the Provincial Legislatures have the power to place any restrictions upon the right of appeal to the Supreme Court of Canada they have the power to make those restrictions practically prohibitive of all such appeals, and it cannot be assumed to have been intended by the Act that those Legislatures should be able to thus render non-effective the General Court of Appeal for Canada by wresting from it its jurisdiction and rendering its utility and power, to use the phraseology of Coke, "less than a dream of a shadow or a shadow of a dream" (*v*).

It cannot be contended that the exclusive power conferred upon the Local Legislatures by sec. 92, sub-sec. 14, to make laws in relation to procedure in civil matters in the Provincial Courts will justify sec. 43 of the Judicature Act; for, even admitting that a power to make laws in relation to procedure, would authorize a law limiting, or taking away the right of appeal, yet, it would only do so while the appeal was a matter of *procedure in the Provincial Courts*, but after a case has been pronounced upon by the Court of last resort in the Province, any further appeal to a Court without the Province, as the Supreme Court is, ceases to be a matter of procedure in the Provincial Courts.

If the powers here asserted to belong to the Dominion Parliament shall in any way appear to conflict with the powers rights and privileges granted to the Provinces or their Legislatures, then the latter must give way. That this is so, is manifest from the judgment of the Privy Council in *Cushing* v. *Dupuy* (*w*), where it was held that

(*v*) 7 Co. 53.
(*w*) L. R. 5 App. Cas. 409.

the Dominion Parliament had power under sec. 91, sub-sec. 21, British North America Act, to pass the Insolvent Act, notwithstanding that it interfered with procedure and with property and civil rights within the Provinces, in relation to all of which the Act gives to the Provincial Legislatures the exclusive power to make laws (*x*). The Court say:—"It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to be presumed, indeed, it is a necessary implication that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as a general law relating to those subjects might affect them" (*y*).

A recent decision of the Privy Council furnishes us with a rule, which, when read together with the rule laid down in *Cushing* v. *Dupuy*, will enable us to determine whether any given Act is within the powers of any of the Provincial Legislatures. It is there said that "the first question to be decided is whether the Act impeached falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the Provinces: for if it does not it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., Whether, notwithstanding, this is so, the subject of the Act does not also fall within one of the enumerated classes of

(*x*) Sec. 92, sub-secs. 13 and 14.

(*y*) p. 415.

subjects in section 91 (*z*), and whether the power of the Provincial Legislature is or is not thereby over-borne" (*a*).

The application of this rule to the case in hand is obvious when we point out that the only class of subjects enumerated in section 92, which could be held to empower the Provincial Legislatures to limit the jurisdiction of any Court whatever, is the class enumerated in sub-section 14 of that section, which has already been quoted, and that section 101 confers express power upon the Dominion to provide for the constitution maintenance and organization of a general Court of Appeal for Canada. That any *prima facie* power of the Ontario Legislature to pass section 43 of the Judicature Act is over-borne by section 101 is we think made sufficiently plain in the preceding part of this paper.

The gravity of the issues that might spring from the conflicting legislation which we have noticed is well illustrated by an American case. The Supreme Court of the United States awarded a writ of error to the Court of Appeals of Virginia upon a judgment in that Court, and the judgment of the Court of Appeals was reversed and the cause remanded, and the Court of Appeals below were required to cause the original judgment which had been reversed in that Court to be carried into execution. The Court of Appeals, when the case came back to them, resolved that the appellate power of the Supreme Court of the United States did not extend to that Court, and that so much of the Act of Congress as extended the appellate jurisdiction of the Supreme Court to that Court was not warranted by the constitution, and that the proceedings in the Supreme Court were *coram non judice* in relation to that Court; and they consequently declined obedience to its mandate. A writ of error was awarded upon the refusal, and the case came up again before the Supreme

(*z*) We assume that section 91 is mentioned merely because it happens to contain an enumeration of the chief powers conferred upon the Dominion Parliament, but that the meaning of the rule includes section 101, or any other section which confers express authority upon the Dominion Parliament.

(*a*) *Citizens Insurance Co.* v. *Parsons*, L. R. 7 App. Cas. 109. And see *Dobie* v. *The Temporalities Board*, L. R. 7 App. Cas. 149.

Court of the United States, in a case in which the judgment of the Court below drew in question and denied the validity of the Statute of the United States, authorizing an appeal from a State Court (*b*).

Kent in his commentaries (*c*), says with reference to this case :—"A graver question could scarcely have arisen in that Court, or one involving considerations of higher importance and delicacy, or more deeply affecting the permanency and tranquility of the American Union. In the opinion which was delivered the Court observed that the constitution unavoidably dealt in general language, and did not enter into a minute specification of powers, or declare the means by which these powers were to be carried into execution. This would have been a perilous and difficult, if not an impracticable task; and the constitution left it to Congress, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interest should require." The judgment of the Court of Appeals in Virginia rendered on the mandate in the cause, and denying the appellate jurisdiction of the Supreme Court was reversed by the latter Court, and the judgment of the District Court in Virginia, which the Court of Appeals had reversed was affirmed. The Supreme Court did not think it necessary to discuss or decide the question whether that Court had authority to issue the compulsory process of mandamus to the State Court to enforce the judgment of reversal, but Kent referring to this says, "If the appellate jurisdiction be founded, as it no doubt was in that case, upon a solid basis, it would seem to carry with it, as of course, all the coercive power incident to every such jurisdiction, and requisite to support it."

A. H. MARSH.

(*b*) *Martin* v. *Hunter*, 1 Wheaton 304.
(*c*) Lecture 15.

FUSION OF LAW AND EQUITY IN MANITOBA.

The Manitoba Statute 38 Vict. cap. 12, sec. 2, declared that the Court of Queen's Bench for that Province should possess and exercise all the powers and authorities as by the laws of England are incident to a Supreme Court of record of Civil and Criminal jurisdiction, and, in all matters civil and criminal, should have and exercise all the rights, incidents and privileges possessed and exercised by any of Her Majesty's Superior Courts of Common Law at Westminster, or by the Court of Chancery; the Court of Probate, or any civil or criminal court in England, on 15th July, 1870. It also declared (sec. 1) that "the said Court of Queen's Bench shall hold plea in all manner of actions and suits and proceedings, cause and causes of action, suits and proceedings, whether at law, in equity, or probate, or howsoever otherwise, as well criminal as civil, real, personal and mixed, or otherwise howsoever; and may and shall proceed in all such actions, suits, proceedings and cases, by such process and course of proceedings as are provided by law; and the said Court of Queen's Bench may and shall hear, decide and determine all issues of law or of fact when the issue of fact is submitted to it by law; and the said Court may and shall decide all matters of controversy relative to property and civil rights both legal and equitable, according to the laws existing or established and being in England, as such were, existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this Province; and all matters relative to testimony and legal proof in the investigation of fact and the forms thereof, and the practice and procedure in said Court of Queen's Bench may and shall be regulated and governed by the rules of

evidence and the modes of practice and procedure as they were, existed and stood in England on the day and in the year aforesaid, except as the said laws and the said rules of evidence, and the said practice and procedure, and the forms thereof may have been already changed or altered, by any Act or Acts of the Legislature of Manitoba already passed, or that shall hereafter be passed, or by any rule or rules, order or orders of Court, lawfully made, or that shall hereafter be made."

Two distinct forms of practice prevail in this Court—common law actions being brought according to the practice in force in English Common Law Courts when the above Act was passed, while the practice of the former Court of Chancery for Ontario has been adopted in equity cases. Hitherto, only purely equity matters have been litigated in the Equity side of the Court; and a very general opinion prevailed among members of the bar that a demurrer for want of equity would lie to a bill filed in the equity side upon a purely common law cause of action. This opinion was founded upon the decision of the Supreme Court of Canada, in *Farmer* v. *Livingstone* (*a*), where Gwynne, J., held that an equitable defence could not be set up in an action of ejectment in Manitoba. This case was decided upon the ground that the practice in ejectment, as it existed in England on 15th July, 1870 (which practice was in force in Manitoba when this case was decided) did not admit of an equitable defence being set up in such an action. Nothing in the judgment, however, was said as to the practice in actions other than ejectment.

The point lately came before Chief Justice Wood, in a case of *Boultbee* v. *Shore*, judgment in which was delivered a few days ago. This was an action for the specific performance of an agreement for the sale of land. An agent of the defendant had sold the lands in questions to the plaintiff on 18th November, 1881, and the agreement for sale was registered in the Registry Office on the 28th of the same month. A few days after this sale, the defendant,

(*a*) 5 S. C. R. 221.

although aware that his agent had sold the land, personally entered into an agreement to sell the same land to another party for a larger price, and a deed to this third party, dated 21st September, 1881, but which was actually prepared and executed after 18th November, 1881, was registered on 29th November, 1881. On the 19th December following, the plaintiff filed his bill for the specific performance of the agreement entered into with him, or for damages caused by its non-performance. At the hearing, counsel for the defendant contended that prior to Lord Cairns' Act (*b*) relief by way of damages could not be given by a Court of Equity in a suit for specific performance, and since that Act, only when the Court had jurisdiction to award some equitable relief at the time of the filing of the bill. Here, the defendant had conveyed away the land before the bill was filed. A bill for specific performance therefore would not lie, and damages could only be recovered in an action at law.

The learned Chief Justice, in an elaborate judgment, in which he reviewed the constitution and history of the Court of Queen's Bench in Manitoba since its establishment, held that that Court has power, as it is constituted, to grant any relief, common law or equitable, to which the parties may be entitled, no matter in what form, as regards pleadings, the action may be brought before the Court. In arriving at this decision the learned Chief Justice proceeded mainly upon the authority of *Larios* v. *Gurety* (*c*).

The full effect of the decision in *Boultbee* v. *Shore* may be shown by a short extract from the judgment:—"The Judicature Act of 1873 (*d*) is not in force in this Province, but we have in force—in so far as the jurisdiction of the Court of Queen's Bench is concerned, the only and sole Superior Court in this Province—what is equivalent to that Act as to merging and fusing in this Court all common law, equity and probate jurisdiction of the several Courts of

(*b*) 21 and 22 Vict. cap. 27.
(*c*) L. R. 5 P. C. 346.
(*d*) 36 and 37 Vict. cap. 66.

law, equity and probate as they were and existed in England on 15th July, 1870; and with respect to specific performance, and the giving of damages in substitution therefor, or in lieu thereof, in whole or in part, it occupies precisely the same position, and possesses the same powers and jurisdiction as the High Court of Justice and the Court of Appeal at this moment occupy and possess under the Judicature Act in England * * * The Court of Queen's Bench is not a court having mere equity jurisdiction, nor a court having mere common law jurisdiction, so as in fact to form two distinct courts, under one name, having separate and independent jurisdiction of law and equity, as distinct systems of jurisprudence, but one court, combining and blending within itself, as one court, equity, common law, probate and every other jurisdiction possessed and exercised by all or any of the superior courts of law, equity and probate in England on 15th July, 1870."

It is understood that both the other Judges concur in the opinion expressed by the Chief Justice in the above judgment.

W. E. PERDUE.

WINNIPEG, 21*st August*, 1882.

EDITORIAL REVIEW.

Justices of the Peace.

We hear it rumoured that the validity of all Commissions of the Peace issued by the Government of Ontario is to be tried.

The question will be interesting as well as important.

"Justices of Peace are Judges of Record appointed by the King under the Great Seal of England to be Justices within certain limits for the conservation of the peace, and for the execution of divers things comprehended within their commission, and within divers statutes committed to their charge. The constituting of justices of peace is inherent and inseparable from the Crown; and because this, amongst other prerogatives and authorities, had been severed therefrom, 'to the great diminution and detriment of the royal estate of the same, and the hindrance and great delay of justice,' as speaks the statute of 27 Hen. 8, cap. 24, it was thereby enacted, that no person should have any power or authority to make any justices of peace, but only the king and his heirs, nor was nor is his power to be delegated; for that the king cannot grant a man power to make justices of the peace had been previously declared in 20 Hen. 7. 7, as in the case of the Liberty of St. Albans;" Bac. Abr. Tit. Justices of Peace. In a note to this text attention is directed to the fact that a great part of the conservators of the peace was in the election of the people, and that it was not till the 1 Edw. III. cap. 16, that the appointment of them was translated to the Crown.

In *Jones* v. *Williams*, 8 B. & C. 762, there is a *semble* that since the statute of Hen. VIII. the king cannot delegate the power of creating justices.

The question will, of course, depend upon the construction of the British North America Act. The right will no doubt be claimed by the Provinces under number 14 of section 92 of the Act giving the Legislatures power to make laws relating to the administration of justice in the Provinces, or under number 4 of the same section providing for the appointment and payment of provincial officers. The power cannot be claimed, however, by any legislature, for it is a prerogative of the Crown, which has no provincial representative, and which forms no part of the local executive. Section 69 of the British North America Act, whereby it is enacted that, "There shall be a Legislature for Ontario, consisting of the *Lieutenant-Governor*, and of one House, styled the Legislative Assembly for Ontario," is in striking contrast with section 17, which declares that "there shall be one Parliament for Canada, consisting of the *Queen*, and Upper House, styled the Senate, and the House of Commons." The Lieutenant-Governor is an officer of the Government of Canada by virtue of section 58. The point has already received some consideration in *Lenoir* v. *Ritchie*. 3 S. C. R. 575, where a very strong opinion was pronounced against the right of the Lieutenant-Governor to appoint Queen's Counsel, and where the above sections received a construction.

The question of how far the Legislature of the Province can appoint officers of justice similar to justices of the peace, will of course arise in connection with this point. By number 4 of section 92 they have power to make laws in relation to "the establishment and tenure of Provincial offices and the appointment and payment of Provincial officers." As to this, Taschereau, J., says, in *Lenoir* v. *Ritchie*, at p. 626, respecting the office of Provincial Queen's Counsel, "It is a new Provincial office under the name that has been created in Nova Scotia, and nothing more. The Legislature had, in my opinion, full power and authority to do so. They can create Provincial officers for the administration of justice, and call their officers by any name they choose. There can be Provincial officers known as Nova Scotia Queen's Counsel just as well as there

can be Provincial officers known as Quebec Knights, Ontario Baronets, or Manitoba Lords." So the Provincial Legislatures might create officers of the peace who might as well be known by the ancient, as any other, name. But, if it should appear that they are not in reality Justices of the Peace, who must be appointed by the Governor-General as the representative of the Crown, a new name would have to be adopted.

Fusion of Law and Equity in Manitoba.

We print in this number a short notice of a case of *Boultbee* v. *Shore*, decided by the learned Chief Justice of Manitoba, which shows that the practical effect of the statute constituting the Court of Queen's Bench is to fuse law and equity in that Province. At an early day in the history of the Province, a blow has thus been struck at the attempt to establish in a Province with one Superior Court a bifurcated system of jurisprudence. The fortunate suitor is now in no danger of becoming impaled upon the wrong horn.

The good sense of the decision cannot be too highly commended. The interpretation of the law may with safety be left to the Supreme Court of Canada, if the unsuccessful litigant feels inclined to carry the case thither. The benefit to suitors cannot be too highly appreciated. They will enjoy all the advantages of a fusion of law and equity, without the disadvantage and expense attendant upon a construction of various successive statutes, designed to eradicate gradually the errors which have crept into an established system, and to build out of old materials a new structure harmonizing in all its parts. Having only one Court, the difficulty of readjusting the machinery of justice is not presented to the Legislature.

We see nothing now to prevent the filing of bills in the Court of Queen's' Bench in Manitoba which pray all the reliefs and remedies to which a mortgagee is entitled upon default made in payment of his mortgage. We hope that our learned contributor, whose experience in Ontario as

a practitioner and a Practice Reporter, will bring that interesting question before the Court at the first opportunity.

Specific Performance of Acts of Parliament.

We referred in our last regular number to an Editorial note in the *Albany Law Journal*, respecting a case then pending in the Supreme Court of New York, involving the right of the public to compel a common carrier to carry freight.

In the issue of the 5th August the learned editor remarks that the learned Judge before whom the question was argued had refused the *mandamus*, "regarding himself as bound by the General Term decision in *People ex rel. Ohlen* v. *N. Y. L. E. & W. R. Co.*, 22 Hun 633, and not considering the present application as distinguishable because made by the Attorney-General without a relator." The learned Editor goes on to say, "We still think there is some force in the argument that a public carrier, a corporation, creature of the State, may be compelled to fulfil its obligations to the citizens, without resort to the expensive and dilatory process of suit for damages. Perhaps the argument would not apply to an individual carrier."

BOOK REVIEWS.

Chapters on the Law relating to the Colonies. To which is appended a topical index of costs decided in the Privy Council on appeal from the Colonies, the Channel Islands and the Isle of Man, reported in Acton, Knapp, Moore, the Law Journal reports and the Law Reports, to July, 1882. By CHARLES JAMES TARRING, of the Inner Temple, Esquire, Barrister-at-Law. London: Stevens & Haynes, 1882.

One would naturally expect to find in a work like the present a complete statutory history of each of Great Britain's Dependencies. And one would also naturally suppose that the author would have made himself intimately acquainted with those Imperial Statutes which compose the framework of the constitutional histories of the Colonies. Turning to the chapter on Imperial Statutes relating to the Colonies, we find no distinction whatever made between Old Canada, under the Canada Act of Geo. III. and the Union Act of Victoria, and Canada under the British North America Act. And but for a passing reference to Canada, as at present constituted, in the chapter on the classification of Colonies with respect to legislative powers, no attempt is made to explain her present composition. The 14 Geo. III. cap. 83, which might have been described by its title, "An Act for making more effectual provision for the Government of the Province of Quebec in North America," is cited as "Defining Province of Quebec." The 31 Geo. III. cap. 31, commonly known as the Canada Act, or, in Canada, as the Constitutional Act, is treated almost with contempt—as.

38-40, 43-45, alone being referred to—as relating to parsonages and grants of lands. No one would gather from this that the Act was a new charter for the Province of Quebec, that "parsonages" in fact referred to the endowment of rectories and clergy reserves, and that "grants of lands" referred to the sections of the Act establishing the tenure of free and common socage. The 3 & 4 Vict. cap. 35, the Act of Union of Upper and Lower Canada is omitted entirely, such statutes as the Acts relating to the Canada Company and the Bishopric of Quebec being deemed more worthy of insertion.

Of the treatise itself there is little to be said. It does not pretend to be exhaustive, and will not bear critical examination. The text is too general in its terms, and not only does it not apply to those Dependencies which have legislative bodies of their own, but it may be absolutely misleading, where no exception of such Colonies is made, and where no reference to their charters is vouchsafed.

The absence of any attempt to explain or elucidate the constitution of any one Colony or Dependency possessing one seems to us to defeat the very object for which such a work should be written. The relation of each Possession to Great Britain, the measure of their respective law-making powers, the laws relating to copyright and extradition, are all questions of significance to the British Empire as a whole and to the Parliament of Great Britain in particular, but they are conspicuous for their absence from a place in this book.

"In the Colonies there are no Inns of Court," and it might have been added, there is neither St. Paul's Cathedral nor the Irish question. The contrary would have astonished us quite as much as to have been told that Osgoode Hall was in London. The existence of any like bodies or societies is entirely ignored in the statement that advocates and attorneys have always been admitted in the Colonial Courts by the Judges. The method of appointing Judges and the powers of amotion are as

meagrely touched upon as possible, and convey little or no information.

By far the best part of the book is that which is called the Topical Index of Cases. The head-lines of the various reported cases, on appeal from the several Colonies, are arranged under the name of the respective Colonies, with the reference to the report.

India is not treated of. And yet one of the most important cases to those Colonies possessing legislative powers of their own comes from that dependency. *Regina* v. *Burah*, L. R. 3 App. Ca. 889, respecting the delegation of legislative powers by a derivative law-making body, is destined to play an important part in measuring the length to which those bodies may go in conditional legislation.

McDougall on Torts and Negligence. Toronto: Rowsell & Hutchison, 1882. This neat little work, which now appears in book form, is composed of law lectures on the above subjects, delivered to the law students of Toronto at Osgoode Hall by Jos. E. McDougall, Esq., Barrister-at-Law, Examiner to the Law Society of Upper Canada on Criminal Law and Torts, and reported and published by J. C. Mabee, Esq., Student-at-Law. We have referred to this work on previous occasions as the several numbers appeared, and need say no more now than that we are much pleased to see it in binding with a good analytical index. The numerous cases cited make it a convenient handy book for reference to the state of Ontario case law.

The Ontario Law List and Solicitors' Agency Book. Ninth edition. Toronto: J. Rordans & Co., 1882.

This work is well known in Ontario, and has been for years the book of reference for the purpose for which it has

been compiled, Morgan's Dominion Legal Directory and Hodgins' Ontario Legal Directory being more modern. The Manitoba Law List, a short essay on the Ontario Judicature Act, and Notices of the various Ontario Courts precede the Directory itself.

The essential point of a directory is that it should be correct. We are sorry to say we cannot attribute that quality to the list of Toronto Barristers and Solicitors; and, if this list, which is most easily compiled, cannot be depended on, how can we depend upon the rest? A reference to pages 57 and 62 will show that Mr. Rordans claims the right of creating Queen's Counsel, as well as do the Provincial Attorneys-General, while a glance at page 63 indicates the exercise of the correlative right of reducing silk to stuff. At page 58 is the name and late address of a gentleman some time deceased. The composition of several firms is wrongly stated, and three or four names and addresses are given whose owners have long since left the Province.

BOOK RECEIVED.

Analytical Tables of the Law of Real Property, drawn up chiefly from Stephen's Blackstone, with Notes. By CHARLES JAMES TARRING, of the Inner Temple, Esq., Barrister-at-Law, author of Chapters on the Law relating to the Colonies. London: Stevens & Haynes, 1882.

REVIEW OF EXCHANGES.

Albany Law Journal.—5th August, 1882.

"Ordinary Prudence" in False Pretences. In *Bowen* v. *State*, 9 Baxt. 45, it is said, "If 'ordinary caution' is to have its influence in the application of the law, it must be such ordinary caution, as we may naturally and reasonably expect to exist under the circumstances and conditions of life of the person practised upon. The question is, what caution is he capable of exercising?" In *Commonwealth* v. *Grady*, 13 Bush 285, where a man represented that his land was free from incumbrances and procured money on the faith of that representation, held not indictable, because the means of detection was at hand in the public records. For a civil case of a like nature, see *Barr* v. *Doan*, 45 U. C. R. 491; 1 C. L. T. 178, where, in an action of deceit for that the defendant represented a mortgage which he sold to the plaintiff to be a second mortgage instead of a fourth, it was held that the plaintiff was under no obligation to examine the title in the Registry Office, and that his omission to do so was matter for comment only, and the Court refused to disturb a verdict for plaintiff. Many English and American cases are cited, showing the rule to be that it is not necessary that the pretence or representation should be such that ordinary care or common prudence could not have guarded against it. Wharton's illustration is the best to show that the relative capacities of the parties must be the test. He says (2 Cr. L. § 1188), "To obtain from a jeweller money by exhibiting a spurious jewel might not be within the Statute, while it would be within the Statute for the jeweller to offer the same spurious stone to an ignorant customer."

Rules Relating to Opinion Evidence, by JOHN D. LAWSON. In insurance cases the following rules are stated and illustrated. 1. Opinions on questions of insurance are admissible when they proceed from persons specially skilled therein. 2. But the opinion of one qualified as required by Rule 1 is admissible only where the subject of inquiry involves a question of skill.

Ibid.—19th August, 1882.

Presumption as to Liability of Successive Carriers. "In *Marquette, etc., R. Co.* v. *Kirkwood*, 45 Mich. 51, it was held that when one of a continuous line of carriers is sued for injury to goods, there is no presumption that he received them in good order, but the fact must be

affirmatively proved by the plaintiffs." After referring to some other cases, the learned writer says, "When the goods are delivered by the owner to the first carrier, of course it is easier for him than for the carrier to prove their condition, but after that, the contrary is the fact. At all events, the carrier may protect himself by stipulation * *. We regard the Michigan case as substantially unsupported by authority, and as inconvenient and dangerous in principle."

Ibid.—26th August, 1882.

Rules relating to Opinion Evidence, by JOHN D. LAWSON. As to insurance cases the learned writer continues with Rule 3. The opinion of a witness, qualified under Rule 1, if given (*a*) on a question of law, or (*b*) on an inference which it is the province of the jury to draw from the facts, is inadmissible. 4. The opinions of persons qualified under Rule 1 are admissible on the question (*a*) whether certain facts would, if known to the insurer, have increased the premium, but (*b*) not whether they would have increased the risk. 5. But the opinion admissible under Rule 4 (*a*) must be directed to the conduct of the trade generally, and not to that of a particular individual of the trade. 6. The opinion of persons qualified under Rule 1. that matters outside the contract would have influenced them, had they been aware of them, are irrelevant. 7. The meaning of the terms used in insurance polices may be explained by experts where (*a*) the word is susceptible of a technical meaning, and is so construed (*b*) by general usage and not by the practice of a particular insurer. 8. Technical words are to be construed according to their meaning at the place the policy was effected and the property located. 9. In a life insurance case the opinion of a physician as to the cause of the death of the insured is admissible. 10. A witness testifying to matters of opinion may be impeached by proof that upon a former occasion he had expressed a different opinion. 11. An opinion not founded on science but on morals or ethics is inadmissible.

American Law Register.—July. 1882.

Expert testimony—Scientific testimony in the examination of written documents, illustrated by the Whittaker case, etc., by R. U. PIPER, concluded in the following number. "Expert" is defined. "Scientific or expert testimony * * would include the investigation and ascertainment of certain classes of facts and their statement in fixed terms. This definition thus far involves no conclusion or opinion on the part of the expert as to the relation or bearing of such facts in a given case. It places this class of testimony on the same ground as all other testimony in this respect. This, as I have said in a former paper, would seem to be the true position of the expert witness in all those cases where it requires no special learning or skill to understand the bearing of the ascertained facts. It happens in a large number of cases in which the expert witnesss is called to testify, perhaps in all of the class under discussion, that an intelligent juror is just as capable of coming to a correct conclusion in the premises as to the bearing of the facts as the expert himself, and it certainly seems as absurd to call for his (the expert's) opinion in such cases as is

deemed to be the fact in respect to the ordinary witness." Some remarks are made upon whether it is proper to admit evidence that certain writing is in a feigned hand. The remarks of some Judges as to the disagreements of experts are made the subject of criticism, the tables being turned upon those who are expert in the law by applying their own remarks, *mutatis mutandis*, to the diversity of opinion which prevails. E. g. putting Lord Campbell's opinion as that of the doctors:—"We do not mean to throw any reflection upon the noble Lord or upon judges in general. We dare say that they are all very respectable gentlemen, and do not mean to give an opinion that is incorrect, but really this confirms the opinion we have entertained that hardly any weight is to be given to the opinions of lawyers or learned judges, especially as regards matters belonging to their particular profession. And as to scientific testimony, they come, in most cases, with a bias in their minds in regard to it, depending upon their want of technical knowledge in the premises. From this same want of special knowledge outside of their profession comes this absurd classification of expert testimony, in which all varieties are placed in the same category, so that when a seeming discrepany occurs in one case they declare, *ex cathedra*, that *all* such testimony, that is the 'evidence of what are called scientific witnesses,' should have 'hardly any weight given to it.'" It must be remarked, however, that where experts disagree, as they generally do, it is hard to expect a jury to agree. If twelve experts were put upon the jury, we presume they would disagree as they do in the witness box. And yet they are admitted as the best able to deal with such questions. A unanimous jury must be of higher capacity than the experts or else the great part of the expert evidence must be unreliable. The learned writer then enters into a discussion and examination of the expert evidence taken in the Whittaker case, illustrating his own views by wood cuts of specimens of handwriting, etc.

Criminal Law Magazine.—July, 1882.

The doctrine of materiality in the Law of Perjury, by GEORGE CHASE, LL.B. Numerous expressions are cited, such as "material to the issue, and therefore prejudicial to some person," "material to the point of inquiry," "legally material to the charge," as to which it is pointed out that they leave it doubtful whether the false evidence is deemed "material" because it is *relevant*, or because it is *of special weight and consequence*. The words "material and relevant" may simply express the same idea, or the one may refer to the *importance* of the evidence—the other to its *pertinency*. The first branch of the subject is "Evidence deemed relevant, and therefore material, though inadmissible on other grounds than non-relevancy." Thus, if secondary evidence be received of the contents of an instrument, without its being shown that the primary evidence cannot be procured, perjury is committed, if the testimony be false. An examination of other cases leads to the following conclusion upon this head:—"It appears, therefore, from these several cases, that the materiality of evidence is to be determined from its own essential nature, as related to the fact in issue or point of inquiry. If the evidence be such in its own nature as the law deems relevant, as being an appropriate means

of proving or disproving, or rendering probable or improbable, the matter to be established, then, though it be inadmissible in point of form, or as tending to criminate a witness, or as contrary to some rule of public policy, or for other like reasons, it is material, if it is actually admitted, or, though withdrawn, is offered in such a form as to mislead the judge by inducing him to admit it. In either case, the evidence, if false, tends to abuse the administration of justice, which from early times has been declared to be the gist of the offence of perjury. The relevancy or probative force of the evidence gives it its harmful tendency, and such tendency is enough, for the evidence need not be actually used." "Evidence deemed relevant, and therefore material, such evidence being also admissible" is next treated of. Of this the only important subdivision is "evidence circumstantially material." Where the evidence forms a link in the chain it is material, though it be not directed to the issue itself. As in a trial for murder, where an *alibi* is set up, if any false evidence be given with respect to this, it is material. Evidence corroborating or making more credible the substantial part of the evidence is material, as where a man, in an action of trespass, swore that he knew that the sheep which broke into the close were the defendant's because they bore a mark which he knew to be the defendant's mark, which was false, held material; "for the giving such special reason for his remembrance could not but make his testimony more credible than it would have been without it." But where A. was charged with stealing a cow, and attempted to prove that he bought it from B., and a witness swore that he was present at the purchase, and answered to a question as to his residence that he lived near B., when in fact he lived in another State, held not material. "If the witness lived a hundred miles off and was present at the sale, he was a competent witness to prove it; if he lived within fifty yards, and was not present, he could know nothing of the matter." Evidence aggravating or mitigating damage or punishment is material. "Evidence deemed irrelevant, and therefore immaterial, though it may be admitted." The mere fact of its admission cannot render it material. If the question is in regard to a person's sanity, and a witness starts out with a story about taking a journey to see such a person, and swears falsely about some circumstances of the journey, this is wholly immaterial. False evidence in affidavits, etc., and in preliminary examinations before the trial of an action, and other like cases, is then dealt with. Where an applicant for naturalization falsely swore in his affidavit to a matter which the law declared should not be provable by his own oath, no perjury was committed. When the law requires averments in the affidavit which are falsely sworn to the offence is complete, though the affidavit is insufficient to effect the purpose for which it was made without additional proof. The affidavit need not be used, for the perjury is complete as soon as the oath is taken.

THE CANDAIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

EXCHEQUER COURT.]

McLEAN v. REGINAM.

Petition of Right—Liability of Crown on Parliamentary Contract—Departmental printing contract—Mutuality.

The suppliant claimed, under a contract made with H., a clerk of the House of Commons, on behalf of the Parliament of Canada and the Government, to be entitled to *all* the parliamentary and departmental printing.

Demurrer by the Crown.

Held, (Taschereau and Gwynne, JJ., dissenting), reversing the judgment of Henry, J., that the Crown was not liable under the contract made with Parliament.

Held, also, affirming the judgment of Henry, J., that the suppliants being bound to do *all* the departmental printing, the Crown was bound to furnish them with all the work of that nature required to be done.

H. S. Macdonald and *Gormully*, for the suppliants.

Lash, Q.C., and *Hogg*, for the Crown.

THE MERCHANTS' BANK v. REGINAM.

Petition of right—Slide dues—Liability of chattel mortgagee for value without notice for arrears.

R. S., being indebted to the suppliants, had executed two chattel mortgages on his logs and timber, dated respectively 12th December, 1867, and 11th May, 1877. On 15th May, 1877, R. S. became an insolvent, and in

1878 the Equity of redemption in the logs and timber was released to the suppliants by the assignee. In June, 1877, R. S., being indebted to the Crown for arrears of slide dues, agreed to pay $2 per 1,000 feet, board measure, on all lumber to be shipped by him through the slides. The suppliants had no notice of this agreement. In 1878, when the suppliants began to ship the lumber in question, the collector of slide dues refused to allow it to pass the slides without payment of the $2 per 1,000 feet agreed upon by R. S. After payment under protest of a portion of this, the logs were finally seized by the collector, on the premises of R. S.

Held, (Strong and Taschereau, JJ., dissenting), reversing the judgment of Gywnne, J., that R. S. could not be considered as the agent of the suppliants for the purpose of creating a lien on the logs and timber for dues to the Crown; and that there was no evidence of a contract for a general lien on the timber in the hands of the suppliants who were mortgagees for value without notice.

Held, therefore, that the suppliants were liable only for the statutory dues of twenty-six cents per 1,000 feet, board measure, on all logs and timber going through the slides.

Bethune, Q.C., and *Gormully*, for the suppliants.

Lash, Q.C., and *Hogg*, for the Crown.

ONTARIO.]

OLIVER v. DAVIDSON.

Will, construction of—Legacy—Condition.

A testator, by the third clause of his will, devised and bequeathed the residue of his estate to his wife, four sons and two daughters, subject to the condition that they all should unite in paying to the executors the money for the legacies to two of the sons, Alexander and Duncan. By the 4th clause he bequeathed legacies to Alexander and Duncan. By the 5th clause he devised two lots of land to his sons Douglas and Oliver, and after giving several legacies to his daughters, he proceeded, "and further, that Alexander and Duncan work on the farm until the legacies become due." Alexander left the farm before the legacies became due and engaged in mercantile pursuits.

Held (Henry, J., dissenting), reversing the judgment of the Court of Appeal, 1 O. L. T. 721, that the construction of the paragraph containing the bequest to Alexander and Duncan must be based upon a consideration of the whole will, and that the intention, thus apparent, was that Alexander's right to receive the legacy was conditional upon his remaining on the farm and working on it.

Bethune, Q.C., for the appellant.

A. Bruce, for the respondent.

THE M. C. UPPER.

Collision—Negligence—Contributory negligence—Apportioning damages.

The "M. C. Upper" was moored on the East side of the dock at a port on Lake Erie and had dropped her anchor some distance out, in continuation of the direct line of the East end of the wharf, thus bringing her cable directly across the end of the wharf from east to west. The cable was not buoyed, nor were any measures taken for informing incoming vessels of its position. The "Erie Belle" made the wharf in safety, but in backing out she came in contact with the anchor of the "M. C. Upper" and was damaged. The learned Judge of the Maritime Court who tried the cause found that both vessels were to blame, and directed that each should pay one half of the damages sustained by the "Erie Belle." Both parties appealed.

Per Ritchie, C.J., Fournier and Taschereau, JJ. On the evidence the damage was caused solely by the negligence of the "M. C. Upper."

Per Strong, Henry and Gwywne, JJ. The accident happened through no fault of that vessel.

The Court being equally divided, both appeals were dismissed without costs, and the judgment of the Maritime Court affirmed.

Robinson, Q.C., for the owners of the "M. C. Upper."

McCarthy, Q.C., for the owners of the "Erie Belle."

THE GARLAND.

Jurisdiction of Maritime Court—R. S. O. cap. 128—Action by personal representative.

The plaintiff's child, a minor, was killed in a collision between two vessels which occurred by the negligence of "The Garland."

Held (Taschereau, J., dissenting), on appeal from the Maritime Court of Ontario, that that Court has no jurisdiction, apart from R. S. O. cap. 128 (Lord Campbell's Act), in an action for personal injury resulting in death, and therefore the plaintiff had no *locus standi*, not having brought her action as the personal representative of the child.

Per Fournier and Henry, JJ. The Maritime Court of Ontario has jurisdiction to entertain an action *in rem* when brought by the personal representative.

H. J. Scott, for the appellant.

McCarthy, Q.C., contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

HARRIS v. MUDIE.

Statutes of Limitations—Trespassers.

Held, in construing the Statutes of Limitations (Cameron, J., dissenting), that, though a person having a supposed or defective paper title to a lot and making an entry thereon, is thereby in constructive possession of the whole, a mere trespasser must be taken as against the true owner to be in occupation of those parts only, which he actually cultivates, or has enclosed; and occasional acts of trespass upon other parts will not suffice to extend his possession by implication.

High Court of Justice.

QUEEN'S BENCH DIVISION.

MULRENNAN v. PAFFARD.

Capias—Arrest—Defendant's means invested abroad—Evidence of intention.

The defendant had no property in Ontario except a small piece of land heavily encumbered, some shares pledged for a loan, and his household furniture; but he had sent a sum of money to be invested in Minnesota, U. S. A. Pending this action, his son, a citizen of the United States, with the defendant's collusion, commenced and prosecuted to judgment and execution an action for a sum which all the defendant's means in Ontario would not satisfy. The defendant was arrested, and on a motion to discharge the defendant it was

Held, that, as the defendant's ties to Ontario were slight, and as his interests in Minnesota were much greater, and as he showed an intention to defeat the plaintiff's claim in Ontario by preferring his son, the evidence was sufficient to justify the arrest.

The facts of this case appear fully in the judgment.

R. Gregory Cox appeared for the plaintiff.

Rykert, Q.C., was for the defendant.

20th June, 1882.—SENKLER, LOCAL JUDGE.—Upon the 3rd February, 1882, I granted an order to hold the defendant to bail in the sum of $820.45, being the amount found to be due from him to the plaintiff in this action by the Judge presiding at the Assizes held at Hamilton in the preceding month, and a writ of *capias ad respondendum* was issued, and the defendant arrested thereon on the fourth of February.

Upon the 9th February, I granted a summons on the application of the defendant for an order rescinding the order made by me to hold the defendant to bail, and setting aside the writ of *capias* issued thereon with costs, also, ordering the bond to the sheriff of the county of Lincoln to be delivered up to be cancelled, and discharging the defendant out of custody, on the ground that the plaintiff's affidavit does not disclose the information on which he grounded his belief that the defendant was about to quit Ontario, as therein stated, and on the ground, that the facts and circumstances stated in the affidavit filed do not show any reasonable or probable cause for believing that the said defendant was about to quit Ontario, or on the ground that there was no reasonable or probable cause for believing that the said defendant was about to quit Ontario.

This summons was enlarged until the 3rd March, by consent, to enable the plaintiff to cross-examine the makers of some of the affidavits upon which it was granted, and cause was shewn to it on the 6th March.

The application to rescind my order and set aside the writ of *capias* on the ground that the affidavit does not shew facts which should have satisfied me that the defendant was about to quit Ontario, is one which should be made to the full Court (*a*). I could only set aside the order and writ on the ground of some irregularity in them or the affidavit. I have the power under R. S. O. cap. 50, sec. 36, to discharge the defendant out of custody in a proper case, and can therefore entertain that part of the application, and in so doing must consider the facts shewn on the original affidavit as well as the new facts shewn in the subsequent affidavits filed, and the examinations had upon them.

The facts or statements in the original affidavit, which induced me to make the order to hold to bail, were as follows:—

The defendant on the 23rd November, 1880, made the note sued on in this action. It was for $1,000, payable six months after date to the

(*a*) *Damer* v. *Busby*, 5 P. R. 386; *Diamond* v. *Cartwright*, 22 C. P. 496; *Robertson* v. *Coulton*, 9 P. R. 16.

plaintiff, with interest at eight per cent. Upon the 14th December, 1880, he paid the plaintiff $250 on account of it, but has paid nothing since. Issue having been joined on the 21st September, 1881, the case was entered for trial at the Lincoln Assizes, held the following month before Mr. Justice Morrison, when it was put off by him until the Hamilton Assizes, held in January last. The case was tried at Hamilton on the 16th January, 1882, before Mr. Justice Armour, who found in favour of the plaintiff for $820.45, but directed that judgment should not be entered until the fifth day of the following term.

On the 11th January, 1882, a writ of summons was issued from the office of the Deputy Clerk of the Crown at Welland against the defendant Frederick Paffard at the suit of his son, Walter H. Paffard, a resident of Brooklyn, N. Y., the solicitor being Mr. Rykert, who was the counsel for the defendant at the trial of this suit. A copy of the writ was served on the defendant on the same day (11th January) by a clerk of Mr. Rykert's. On the 12th January, an appearance was entered for the defendant by Mr. A. G. Brown, his solicitor in the present case. A statement of claim was filed on the 13th January—and no statement of defence being put in, judgment was entered against the defendant for $4,048.46 debt, and $23.43 costs on the 26th January, and execution issued against both goods and lands of defendant on the same day, and placed in the hands of the sheriff of Lincoln on the 27th January.

The sheriff seized all defendant's household furniture, goods and chattels, and advertized the same for sale on the 8th February.

The goods do not exceed in value $1,000, and from enquiry, plaintiff is unable to find any other property owned by defendant in the county of Lincoln, or elsewhere in the Province.

Plaintiff believes that the judgment was recovered collusively and fraudulently, and solely for the purpose of preventing his recovering the amount due him.

Defendant has no real estate in the Province, and although reputed to be a man of means, his money is not invested in a way to be available on execution.

The defendant stated in his examination in this action that he had received from the sale of the St. Catharines Pulp and Paper Company the sum of $5,400 in cash, and promissory notes for a further amount, making together the sum of $7,823.56, and that he had handed the whole of said cash and notes to Calvin Brown, formerly of St. Catharines, solicitor, but now residing in Minneapolis, in the State of Minnesota, to invest the same for him in the United States.

Plaintiff believes that defendant has placed his money and property beyond the reach of the process of this Court. He also swears that he believes that the defendant, unless forthwith apprehended, is about to quit Ontario, with intent to defraud him of his debt.

The last statement, although usually inserted in affidavits to hold to bail as a proof of the *bona fides* of the plaintiff in making the application is not one on which a Judge can act.

From the statements made (outside of the plaintiff's belief), I was satisfied that the judgment recovered by Walter H. Paffard was so recovered by the aid of the defendant, with the object of having the property of the defendant liable to execution seized before the plaintiff could obtain judgment in this action, and of thus preventing the plaintiff's realizing anything on his judgment; that the defendant had removed the greater portion (if not all) of his moneys and securities to the State of Minnesota, for the purpose of being invested there, and keeping the same beyond the reach of process of this Court; and taking into consideration these facts, and also that the defendant had no real estate in Ontario, and no special ties here, I thought that there was good cause for believing that, unless forthwith apprehended, he was about to quit Ontario, with intent to defraud the plaintiff of his claim.

Upon the present application a number of affidavits have been filed by the defendant. Some of the deponents have been cross-examined on them, and affidavits have been filed in reply.

The affidavits filed by the defendant are produced with the view of shewing that he had no intention of quitting Ontario, that the judgment in his son's favour was based on a *bona fide* debt, that he still owns both real and personal property in Ontario, and that his investments in Minnesota were made with a legitimate object, viz., to realize a large debt owing to him by Calvin Brown, and not with the intent of injuring the plaintiff.

The defendant swears that he has no intention of qnitting Ontario, and supports this by affidavits made by his wife, Mr. Rykert, his counsel, Mr. A. G. Brown, solicitor, and by Dr. Goodman, and J. E. Beeton, all of whom swear that they are intimately acquainted with the defendant, and do not believe that he has any idea of quitting Ontairio.

The defendant's own denial is not a circumstance on which much weight can be placed according to the authorities (*b*). The other affidavits, no doubt, express truly the views and opinions of the persons making them; but it is worthy of notice that all these persons except the defendant's wife reside at St. Catharines at a distance of twelve miles from where the defendant resides, the town of Niagara, and their means of information were derived entirely from the defendant's own language and actions.

The defendant swears positively that he is really indebted to his son in the amouut for which the latter obtained judgment against him. He does not seem to have kept any regular books of account shewing his transactions with his son, and his account is not so satisfactory as it might have been, and no affidavit is made by the son. It is, however, shewn that some money was sent to St. Catharines by his son, and I do not see any reason to seriously doubt the truth of his statement in this particular. On the material before me I should come to the conclusion that the indebtedness of defendant to his son is not satisfactorily impeached. I did not in making the order to hold to bail, give much weight to the charge

(*b*) *Delisle* v. *Derand et al.*, 3 Pr. R. p. 109.

that the judgment was fraudulent. If it was so, the plaintiff's remedy was of another kind; he could have taken proceedings to set the judgment aside as a fraud upon him. If, however, the claim of Walter H. Paffard was *bona fide*, there does not seem to be any objection to the defendant allowing him to obtain a judgment by default, or even assisting him to obtain such judgment, and thus obtain priority over the plaintiff; but the defendant's so doing was evidence of his intention to deprive the plaintiff so far as he could of the means of obtaining payment of his claim, and it was in this view that I thought it of importance, and this view of it has not been answered.

The property which the defendant claims that he still holds in Ontario consists of seventeen acres in Grantham, and of sixty-seven shares of stock in the Security, Loan and Savings Company of St. Catharines.

The seventeen acres of land are subject to a mortgage for $1000 principal and some unpaid interest, the total amount being between $1100 and $1200, according to the affidavit of Mr. Miller. Mr. Miller swears that he has made enquiries as to the value of this land, and that it is not worth more than $1275. Mr. James W. Johnson swears that he formerly owned this land, and sold it to Calvin Brown, who sold to defendant, and he says that in his opinion it is not worth more than $75 an acre, which would be $1275 for the whole. Mr. Johnson lives near the land, and he says he is familiar with the value of land in the vicinity. On the other hand, the defendant says his interest in the land is worth $2000 at least, and Mr. Rykert says the land is worth $200 an acre. There is nothing probably on which opinions differ more than upon the value of land, and it is impossible to say what the land will eventually sell for. It is, however, clear, that it would not be safe for me to treat it as representing much surplus over the mortgage if, a year hence, the plaintiff should endeavour to sell it under execution.

The shares of stock are of the par value of $100 each. The defendant recently sold some other shares in the same Company at a premium of eight per cent. The defendant, in his cross-examination, says that fifty shares are held as security for a loan of $5000, advanced to him, and that the remaining seventeen are pledged as collateral security for a mortgage for $2000 owed by Mr. F. W. Macdonald.

If this mortgage is paid by Mr. Macdonald, these seventeen shares will come back to defendant; and, assuming that they are worth eight per cent. premium, would be worth $1836; the same rate of premium upon the fifty shares would amount to $400, making the total value of the defendant's interest in the stock $2236. The judgment obtained by the defendant's son is for $4071.89 debt and costs, upon which the proceeds of the sale of defendant's goods and furniture is to be applied. The affidavit of the sheriff filed shews that these were sold for about $850, and there will be a balance of $3200 remaining unpaid of this judgment, more than enough to sweep away the interest of defendant in this stock.

The above calculation is made upon the statement of the defendant as to the position of the stock, and upon the supposition that the mortgage for $2000 will be paid by Mr. Macdonald. Mr. Richard Miller, in his

affidavit, says that he is informed, on enquiring of the Company, that the sixty-seven shares are all pledged for the $5000 loan, and also as security for a mortgage for $6000 made by the St. Catharines Pulp and Paper Company, which puts the matter in a less favourable light. He says that he was informed that the defendant had four other shares which were encumbered to their full value. Taking, however, the view most favourable to the defendant, it is evident that the judgment of Walter H. Paffard would absorb all the defendant's interest in these shares, and that nothing would be left available to the present plaintiff out of them, and consequently no property, either real or personal, is shewn out of which the plaintiff has any likelihood of realizing his debt.

The remaining question is as to the removal by the defendant of his means from Ontario to Minnesota and his investing them there.

The defendant admits that he handed to Mr. Calvin Brown the moneys and notes received by him on the sale of the St. Catharines Pulp and Paper Company's property to Macdonald & Company. He says he did this because Mr. Brown, who was then removing to Minnesota, owed him a large amount, and as he saw no chance of being repaid this, unless he assisted him to get into business there, he risked the comparatively small amount in the hopes of recovering the larger. Mr. Calvin Brown had acted as his solicitor for many years, and had the management and control of his funds, and had become indebted to him in a considerable amount. The loan of $5,000 mentioned before, to secure which the defendant had pledged either fifty or sixty-seven shares of the St. Catharines Security, Loan and Savings Company, had been obtained by the defendant to give to Calvin Brown, and Brown had transferred to the defendant certain stock in the St. Catharines Pulp and Paper Company. I am unable to say with certainty whether this was given as a payment on Brown's liability to defendant or as security for the same, but it is not a matter of much importance.

From the pleadings in this action and from the discussion on the motion, it appears that the plaintiff had a claim for $1,000 upon the Pulp and Paper Company, which it was understood he was to be paid or secured when the property of the Company was sold to Macdonald & Company. When the sale took place all the money and notes that Macdonald & Company gave, were handed over to the defendant, who thereupon gave the plaintiff the note now sued on. The defendant contended that he had been misled by false statements of the plaintiff as to the amount of the liabilities of the Company and had to pay out larger sums than he was led to understand he would have to pay, and he claimed to have been victimized by the plaintiff. The learned judge who heard the case found against the defendant, and I must now consider his defence to be untrue. It is evident that he ought to have paid the plaintiff out of the moneys or notes he recovered from Macdonald & Company. Instead of doing so he has removed all these means to a foreign country and beyond the reach of the process of this Court.

The defendant swears that his whole indebtedness unsecured outside of the present claim does not exceed two hundred dollars. I do not see in

any of his affidavits or examinations any reason given why he has not endeavoured to obtain the means from Calvin Brown to pay the plaintiff.

The defendant has one son (Walter) in Brooklyn, N. Y., another in British Columbia. I do not understand that he has any children in Ontario.

The following facts appear clear and undisputed. Defendant has no real estate in Ontario except the equity of redemption in the seventeen acres in Grantham. The means he received from the Pulp and Paper Company (out of which plaintiff ought to have been paid) have been sent by the defendant beyond the reach of the process of the Court. Through the co-operation of defendant, his son has been enabled to recover judgment earlier than the plaintiff (although the action was commenced only four days before this action was tried), and to cause execution to issue against all the property in this country belonging to defendant, and absorb it all, and leave nothing liable to the plaintiff, unless perhaps the equity of redemption in the seventeen acres (although there will be a balance of Walter Paffard's attaching on this), which equity of redemption will very likely be entirely or nearly unproductive.

It is true that the plaintiff has not shewn that any person has told him the defendant was about to leave Ontario; but although this is generally done, it is not absolutely necessary, and when a defendant is a shrewd man it may be impossible to obtain such a statement. I think the facts shew that the defendant has made every effort to avoid being obliged to pay a debt which I must assume to be an honest one—that his ties to Ontario are very slight—that his present interests are much stronger in Minnesota than in Ontario, and that there is good and probable cause for believing that he is about to quit Ontario.

I refer to the remark of Draper, C.J., in *Terry* v. *Comstock* (*c*), and to *Kidd* v. *O'Connor* (*d*), in support of the view I take.

I therefore discharge the summons granted by me on the 9th of February last, with costs to be costs in the cause to the plaintiff; but to give the defendant an opportunity of putting in special bail, the order discharging the summons is not to be taken out until Saturday next, and is to bear date of that day.

(Reported by R. Gregory Cox, Esq., Barrister-at-Law.)

(*c*) 6 U. C. L. J. 235.
(*d*) 43 U. C. R., at the foot of page 201.

CHANCERY DIVISION.

[THE CHANCELLOR AND FERGUSON, J., 29TH JUNE, 1882.

HARDING v. CARDIFF.

Municipal by-law—Effluxion of time for moving against—Non-registration —Taking possession of land.

A municipal by-law for opening a road, passed on 22nd June, 1878, was not attacked till 20th December, 1880, when this suit was commenced. The plaintiff, though alleging that it was irregular in not being under seal, not properly registered, and because the defendant municipality had themselves abandoned it, had nevertheless with this knowledge abstained from moving against it within the year prescribed, and had appointed an arbitrator to act for him in assessing compensation thereunder.

Held, that there was no jurisdiction to interfere with the by-law which had become absolute by effluxion of time, and that though the non-registration might prevent the by-law from becoming effectual, it did not enlarge the time for moving against it.

Held, also, that a municipal corporation may, under R. S. O. cap. 174. sec. 509, enter upon land required by the corporation before compensation is made.

Moss, *Q.C.*, and *Beck*, for the plaintiff.

W. Cassels and *J. B. Dixon*, for the defendant.

In re WOODHALL.

Administration—Costs—Appeal.

The costs of an administration matter will not be directed to be paid out of the estate, unless the proceedings have been taken with some show of reason, and with a proper foundation for the benefit of the estate, or has resulted in such a benefit.

Therefore, were the plaintiff acted precipitately in instituting proceedings, and all parties other than himself had been satisfied with the administration of the estate, no fault was found with the executors, and no benefit accrued to the estate,

Held, that the plaintiff should pay the costs.

Held, also, that the question of a residuary legatee's costs is an appealable matter.

Stonehouse, for the plaintiff.

J. Hoskin, Q.C., for infants.

Sheppard, for adult defendants.

[WILSON, C.J., AND PROUDFOOT, J., 22ND JUNE, 1882.

McGEE v. CAMPBELL.

Insolvent Act of 1875—Omission of assets from schedule—Avoiding discharge for fraud.

C. held certain N. R. Co. stock on the agreement that if he should give it a marketable value he should retain one half absolutely. He had not succeeded in doing so when he became an insolvent. Pending the insolvency he prevailed on the owners to permit him to retain one-quarter of the stock as a compensation for his unsuccessful efforts.

Held, reversing the decision of Spragge, C., 1 C. L. T. 276, that C.'s contingent beneficial interest under this agreement passed to his assignee and should have been inserted in his schedule of assets.

During the absence of the President of the C. V. R. Co., C. performed the duties of the office, and the Company appropriated a sum of $6,120 as compensation for his services, payable as C. required it. It was spoken of as a gratuity and was designed by the Company to relieve the necessities of C.'s family, and not to go to his creditors.

C. held ten shares of the stock of this Company, on which ten per cent. had been paid, and one hundred and sixty shares paid in full. They were said to be of little or no value. C. placed the ten partly paid shares in his schedule, but not the remainder.

Held, reversing the judgment of Spragge, C., *ubi supra*, that the money compensation and the shares were assets of C., and should have been placed in his schedule; and that the omission to do so and to place the N. R. Co. stock therein was such a fraudulent concealment of assets within the meaning of the Insolvent Act of 1875, as rendered the final order discharging him void.

C. was a member of a firm who had assigned as well as the individual members thereof. All the foregoing omitted assets belonged to C.'s private estate.

Held (Proudfoot, J., disagreeing but not dissenting), that the discharge, so far as it affected C. only, should be vacated on the foregoing grounds, and that the surplus, if any, should go to the partnership creditors, for which purpose the partnership insolvency might be opened up.

Held, also, that the assignee was not a necessary party to this suit.

Semble, per Wilson, C.J., that it is the confirmation of the discharge by the Judge that acquits the insolvent, and not the discharge granted by the creditors, unless, it may be, when all of them join in the deed.

S. H. Blake, *Q.C.*, and *W. Francis*, for the plaintiff.

Maclennan, *Q.C.*, for the defendant C.

D. McCarthy, *Q.C.*, *Foster* and *Rae* for other defendants.

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CANADIAN LAW TIMES.

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PROVINCIAL JURISDICTION OVER CIVIL PROCEDURE.

THE *effect of decided cases upon the subject (continued).*—(ii) The Provincial Courts exist for the administration of all laws, both Federal and Provincial, except those for the enforcement of which special Courts have been provided. This, the second of the propositions which we enunciated at page 410, *antea*, may in like manner be supported by the cases upon which we have drawn so largely for authority. The opinion of Mr. Justice Wilson expressed in *Re Niagara Election Case* (*a*) is to the effect that in the absence of any special procedure provided by the Federal Parliament for the prosecution of petitions under the Dominion Controverted Elections Act, 1874, the Provincial Courts, of their inherent powers, could frame rules of procedure therefor. He says, "If the Parliament had enacted that after the passing of the Act, 37 Vict. cap. 10, all controverted parliamentary elections should be tried in the Courts having general and original jurisdiction over civil rights, or in other election cases in the Province in which the elections were held, and had provided no procedure for that purpose, the Courts of Queen's Bench and Common Pleas could, in my opinion, have entertained these parliamentary elections and tried them by *quo warranto*, or by an information in the nature of a *quo warranto*, or it may be by the exercise

(*a*) 29 C. P. at p. 292.

of their own original and inherent power they might, and by their statutory power they could, have provided a mode of procedure applicable to the case."

This view has been confirmed by *Valin* v. *Langlois* (*b*) with less qualification than that annexed to it by Mr. Justice Wilson. That part of the head-note pertaining to this branch of the subject is as follows:—"*Held*, that, upon the abandonment by the House of Commons of the jurisdiction exercised over controverted elections, without express legislation thereon, the power of dealing therewith would fall, *ipso facto*, within the jurisdiction of the Superior Courts of the Provinces by virtue of the inherent original jurisdiction of such Courts over civil rights." Under the expression "civil rights" fall without question many subjects of legislation which are the peculiar property of the Federal Parliament. "The regulation of Trade and Commerce," "Navigation and Shipping," "Bills of Exchange," "Weights and Measures," "Interest," "Legal Tender," "Bankruptcy and Insolvency," are mentioned by Henry J., as coming within the colloquial meaning of civil rights, though not intended by the British North American Act to be included in the technical signification of the phrase (*c*). Indeed the passage just quoted is sufficient evidence of this. For controverted election matters, though hinted at as civil rights, are dealt with by the legislative body in respect of which the controversy arises, or its appointee, by virtue of an inherent power in it to deal with its own affairs. And this to such an extent as enables it to exercise supreme powers in respect thereof. See *Théberge* v. *Landry* (*d*), where the right to limit appeals in controverted election cases was conceded to the Legislature of Quebec.

The learned Chief Justice of Canada, at page 18 of the report of *Valin* v. *Langlois*, says, "I think the Parliament of the Dominion * * had a perfect right * * to confer on the *Provincial Courts* power and authority to deal

(*b*) 3 S. C. R. 1.
(*c*) 3 S. C. R. at p. 64.
(*d*) L. R. 2 App. Cas. 102.

with the subject matter as Parliament should enact; that the legislation, being within the legislative power conferred on them by the Imperial Parliament, their enactments in reference thereto became the law of the land, which the Queen's Courts were bound to administer." More explicit still is the dictum of the learned Chief Justice, at page 19, where he says, "These Courts [the Supreme and Superior Courts] are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislature, respectively. They are not mere local Courts for the administration of the local laws passed by the Local Legislature of the Province in which they are organized. They are the Courts which were the established Courts of the respective Provinces before confederation, existed at confederation, and were continued with all laws in force, as if the union had not been made, by the 129th section of the British North America Act, and subject,as therein expressly provided, 'to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Provinces, according to the authority of the Parliament, or of the Legislature under this Act.' They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislature, provided always such laws are within the scope of their respective legislative powers." And again at page 20, he says, "If it is *ultra vires* in the Dominion Parliament to give these Courts jurisdiction over this matter, which is peculiarly subject to the legislative powers of the Dominion Parliament, must not the same principle apply to all matters which are in like manner exclusively within the legislative power of the Dominion Parliament; and if so, would it not follow, that in no such case could the Dominion Parliament invoke the powers of these Courts to carry out their enactments in the manner they, having the legislative right to do so, might think it just and expedient to prescribe. If so, would it not leave the legislation of the Dominion a dead letter till Parliament should establish Courts throughout the Dominion for the special administration of the laws

enacted by the Parliament of Canada: a state of things, I will venture to assume, never contemplated by the framers of the British North America Act, and an idea to which, I humbly think, the Act gives no countenance; on the contrary, the very section authorizing the establishment by Parliament of such Courts, speaks only of them as 'additional Courts for the better administration of the laws of Canada.' It cannot, I think, be supposed for a moment that the Imperial Parliament contemplated that until an appellate Court, or such additional Courts, were established, all or any of the laws of Canada enacted by the Parliament of Canada, in relation to matters exclusively confided to that Parliament, were to remain unadministered for want of any tribunal in the Dominion competent to take cognizance of them."

Fournier, J., to the like effect, says, at page 60, "Section 129 gives it [the Parliament of Canada] the right to require the Provincial Courts to execute the law in question, as well as the other Federal laws adopted within the limits of its powers."

And Henry, J., says, at page 64, "Legislation by the Dominion Parliament on such subjects [regulation of trade and commerce, navigation and shipping, bills of exchange, etc.,] is legitimate and binding, and the Provincial Courts are bound to determine the 'civil rights of parties' in the Province solely by it."

It is difficult to imagine an expression of opinion on our subject more antagonistic to the result in *The Thrasher Case* than that which we have taken from *Valin* v. *Langlois* as the unanimous judgment of the Court, and from the Dominion Controverted Elections Act, 1874. Great stress is laid by the Supreme Court of British Columbia upon the results that would ensue, if the Local Legislatures were so to weight the Judges with the administration of local laws, that they would be hampered in the performance of the duties which might be required of them by the Dominion authorities. Glancing back, however, at the authorities which we have cited we find a most conclusive answer to this, without

questioning the possibility that such a state of affairs might arise. In the Act just mentioned we have found that the very Court which so expressed its fears has been called by the Parliament of Canada a Provincial Court, and so has been recognized by the Dominion as subject to local legislation (*e*).

But adopt for a moment the view taken by the Supreme Court of British Columbia that the Provincial Courts are Sheriffs' Courts, and such like. Assume that section 46 of the Dominion Controverted Elections Act, 1874, comes before that Court for construction. "The Judge shall be received and attended at the place when he is about to try an election petition under this Act * * in the same manner * * as if he were about to hold a sitting at *nisi prius*, or a sitting of *the Provincial Court of which he is a member*." Adhering to the decision in *The Thrasher Case*, are we to infer that a sheriff can try an election petition, or that gold commissioners and coroners can hold sittings at *nisi prius*, by virtue of being members of Provincial Courts?

Even more directly in contrast with the holding in *The Thrasher Case* is the expression of the Chief Justice of Canada of his opinion as to the status of the Supreme and Superior Courts, of which the Supreme Court of British Columbia is one. "They," he says [*i.e.* Provincial Courts], "are not mere *local Courts* for the administration of the local laws passed by the Local Legislature of the Province in which they are organized." *Au contraire*, the Chief Justice of British Columbia says, "It seems as clear as words can speak, that the procedure handed over to be provided for by the Local Legislature is the procedure in * * the Provincial Courts [*i.e.* Courts of Justices of the Peace, Coroners' Courts, Gold Commissioners' Courts, Sheriffs' Courts, etc]. When such *local Courts* suggested themselves to the framers of the British North America Act as possible, the question arose, 'What is to be done about procedure in

(*e*) See *antea*, pp. 412, 414.

these Courts?' In the Superior Courts the Judges, we know, have power to make rules; but in these Courts who shall settle their practice? And Parliament said, 'Let the Local Legislature decide that' " (*f*). The issue between these two learned Judges then is plainly and unequivocally stated. It is affirmed on the one side by the Supreme Court of British Columbia, that Provincial Courts are "local Courts," merely designed for the administration of petty Provincial laws. This is denied on the other side by the Supreme Court of Canada, where it is alleged that Provincial Courts are not "local Courts," but are Courts existing for the full and adequate administration of all laws in force in the Province whether of Federal or Provincial origin. And the issue must be decided in favour of the Supreme Court of Canada.

The exception to the proposition under discussion is a necessary qualification thereof, and forms of itself an independent proposition which we have enunciated as number viii.

The third proposition, to repeat it, is as follows:— Therefore, the Provincial Legislatures have power to erect all courts necessary for the adequate administration of justice in the Province.

This is self-evident now, authority and reason being in favour of the first two enunciations. Its truth besides is involved in those passages which we have taken from the judgments in *Valin* v. *Langlois*. If the position there taken by the learned Chief Justice be correct, that in the interval between the natal moment of United Canada and the erection of Courts by the Dominion Parliament for the enforcement of its laws, there would have been no tribunals having jurisdiction to enforce Federal laws if the Provincial Courts had not that jurisdiction; if that were a state of things never contemplated by the framers of the Charter of Confederation, and an idea to which the Act gives no countenance; then those instruments which the framers of

(*f*) *Antea*, p. 321.

the Act did contemplate as existing for the enforcement of all laws, and which the British North America Act countenances as existing for that purpose, must perforce have been, and must continue to be, adequate instruments, and all that are necessary, for the administration of justice in the Provinces, until the Dominion Parliament shall choose to provide new and *additional* Courts for the *better* administration of the laws of Canada.

Fourthly, the Provincial Legislatures have power to attach procedure to the Provincial Courts generally, or to each of their exclusive subjects of legislation in particular.

The first part of this proposition is merely a repetition of the words of the enactment itself relating to the subject.

The second part is a deduction from the decision in *Cushing* v. *Dupuy* (*g*). In this well known case, the validity of the Insolvent Act of 1875 and amending Acts was upheld, notwithstanding that procedure within the Province was interfered with. Up to this time, if there had been any doubt as to the place of residence of the power to interfere with procedure in civil matters, it lay in favour of the Provincial Legislatures. This opinon, in fact, gave rise to the discussion in *Cushing* v. *Dupuy*, and there it was expressly held that the power of the Federal Parliament to legislate in respect of a certain subject matter included the power to regulate procedure in respect thereof. Sir Montague Smith, in delivering the judgment of the Judicial Committee, said, "It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing *some mode of special procedure* for the testing, realization and distribution of the estate, and the settlement of the liabilities of the insolvent. *Procedure must necessarily form an essential part of any law dealing with insolvency.* It is therefore to be presumed, indeed, it is a necessary implication, that the Imperial

(*g*) L. R. 5 App. Cas. 409.

Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as a general law relating to those subjects might affect them."

If this be the case with the Federal Parliament, which, by so legislating, is guilty of a necessary partial interference with the exclusive powers of the Provincial Legislatures, how much more clearly is it within the jurisdiction of the Provincial Legislatures to annex to their peculiar subjects of legislation special procedure for the enforcement of their laws respecting the same, when in so doing they do not entrench upon any specified subject of Federal jurisdiction. To the same effect are *Re Niagara Eleetion Case* (*h*) and *Peak* v. *Shields* (*i*). Indeed, if it be expressly stated that the Provincial Legislatures have exclusive power to make laws respecting procedure in civil matters in the Provincial Courts, it must be conceded that they may use this power according to their discretion, and until it is shown that the power is limited to annexing one general procedure to the Courts only, they are entitled to provide as many different procedures as they may deem expedient for the purpose of administering the laws which they make.

To proceed to the fifth proposition. All matters for which procedure has not been specifically provided, when litigated therein, must conform to the general procedure attached to the Provincial Courts.

The truth of this proposition is involved in that of number ii. And it is demonstrated by the authorities cited *antea* p. 457. In fact, matters which are litigated in the Provincial Courts are either the subject of Federal or Provincial laws. If a Federal law comes before a Provincial Court for administration, then we have the authority of the Supreme Court of Canada for saying that that Court must execute the law, and the authority of Mr. Justice Wilson,

(*h*) *Supra.*

(*i*) 31 C. P. 112; S. C in appeal, 1 C. L. T. 718.

that, if it has no procedure applicable, and the Parliament of Canada has provided none other, the Court may form a procedure of its inherent curial power or by virtue of its statutory right. If, on the other hand, we adopt what we must call the extreme view, that Provincial Courts exist only for enforcement of Provincial laws, we must still assume that the Legislature intended those laws to be administered according to the practice of the Courts which were provided for their execution.

(vi) The Parliament of Canada has the right to attach a special procedure to any subject under its legislative control; but has no power to interfere directly with the general procedure attached to the Provincial Courts.

The only thing to be noticed in the latter part of this proposition is that procedure in the Provincial Courts is not *directly* subject to Federal legislation. The Courts while retaining their ordinary procedure for all matters not specifically provided for may yet be indirectly affected in the matter of procedure as we shall see in considering the next proposition.

As to the first part of proposition vi, the passage already cited (*j*) from *Cushing* v. *Dupuy* is our authority for its truth. The sentence which we have italicized in the quotation from this case may be applied, *mutatis mutandis*, to any special subject of Federal jurisdiction. Procedure, for instance, must necessarily form an essential part of any law dealing with Bills and Notes. Hence the Parliament of Canada may prescribe a special mode of proceeding on a promissory note, just as it may provide a special procedure for winding up an Insolvent's estate. Many instances of the actual exercise of this power by the Parliament of Canada are to be found on the Statute Book, and some are referred to by the learned Chief Justice of Canada in *Valin* v. *Langlois*, at pages 22 *et seq.* The Customs, Inland Revenue, Public Works, Trade Marks, Patents of Invention, have all been so dealt with. And though these instances are not put forward by the learned Judge, as determining

(*j*) *Ante*, p. 462.

or confirming the right of the Parliament of Canada so to legislate, they are yet instances of the utter helplessness of the Federal Parliament in respect of those subjects with which it alone has the right to deal, if this power be not conceded to it. The Federal Government would, without this power, be placed in the same position as that in which it was attempted to be placed by the defendants in *Leprohon* v. *City of Ottawa* (*k*), which is dealt with by Patterson, J.A., as follows:—Quoting Chief Justice Marshall, he says, "He puts it thus, 'But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would be to banish that confidence which is essential to all government.' The appeal to confidence which the Supreme Court held to be ineffectual, does not possess, in my judgment, any greater weight when advanced in our tribunals. There is no security that in the exercise of a power which is capable of being used to the detriment or embarrassment of the Central Government, the Provincial Legislature will always be guided by a judicious regard for the harmonious working of all the departments of the Constitution." Laws would lie dead without procedure and machinery for enforcing them. And, adopting Mr. Justice Patterson's view, the Federal Parliament is therefore not to be at the mercy of the Provincial Legislatures, relying only upon the confidence that, the laws once passed, adequate means will be provided by the Provinces for their enforcement. It lies with the Parliament of Canada, it is true, to permit their laws to be executed by the Provincial Courts according to their procedure, for which purpose, as much as for the administration of local laws, they exist, as we have cited authority to shew: but *non constat* that the jurisdiction of the Federal Parliament is ousted.

(vii) The Parliament of Canada may indirectly interfere with the procedure in the Provincial Courts, by adding to the functions of the latter the duty of administering its

(*k*) 2 App. R. 522.

special laws by means of specific procedure provided therefor.

This proposition is so closely connected with the preceding one that it requires but little proof. It was the opinion of Ritchie, C.J., expressed at page 18 of the report of *Valin* v. *Langlois*, that whether the Dominion Controverted Elections Act, 1874, established Dominion Courts or not, the Parliament of Canada had a perfect right to confer on the Provincial Courts power and authority to deal with the subject matter of its legislation as Parliament should enact.

And Fournier, J., at page 60, says, "Thus, the question seems to be reduced simply to one whether the Federal Parliament has the power, which has been so emphatically and energetically denied to it by some honourable Judges, whose opinion I greatly respect, to impose new duties on Provincial Judges and tribunals, and even to extend their jurisdiction, if necessary. I regret to be obliged to say that on this subject I entertain an opinion diametrically opposed to theirs."

And Henry, J., says, page 69, "The contention is, that as the constitution, maintenance and organization of Provincial Courts with the procedure therein in civil matters is given by sub-section 14 of section 92 (*l*), the Dominion Parliament cannot, directly or indirectly, add to their functions or duties, or in any way add to the scope of their jurisdiction. I cannot draw any such conclusion from the Imperial Act. In the legislation as to the large majority of the subjects comprised in the twenty-nine specifically and unquestionably given by section 91 to the Dominion Parliament, the power is found of directly adding to the functions, duties and jurisdiction of those Courts."

And Taschereau, J., at page 76, says :—"In my opinion, for the administration of its laws, Parliament can either have recourse to the Provincial Courts already in existence, or create new Courts, as it chooses. But, says the appel-

(*l*) There is evidently an omission here. The reading plainly should be, "section 92 to the Provincial Legislatures, the Dominion, etc."

lant, the administration of justice, including the Constitution, etc., of Provincial Courts * * is vested in the exclusive powers of the Provincial Legislatures, and under that section, the Dominion Parliament cannot in any way increase or decrease, give or take from, or in any manner interfere with the jurisdiction of the Provincial Courts. This, in my opinion, is a radically and entirely false and erroneous interpretation of sub-section 14 of section 92 of the Act, and I think that it is an interpretation altogether opposed to the other parts as well as to the spirit of the Act, and which, if it was to prevail, would lead to serious consequences."

Gwynne, J., though of opinion that it would be incorrect to speak of enlarging the jurisdiction of the Provincial Courts, still thought that the Parliament of Canada might add "an additional subject to those entertained by the Courts in the exercise of their ordinary jurisdiction, * * * and * * * that the prescribing the manner in which the jurisdiction so transferred shall be exercised, that is to say, prescribing the procedure to be adopted, constitutes no invasion of, nor any interference whatever with, the powers and jurisdiction conferred by the British North America Act upon the Local Legislatures."

The eighth proposition, that the Parliament of Canada may erect Courts, separate and distinct from the Provincial Courts, and regulate procedure therein for the enforcement of its special laws, has the sanction of the 101st section of the Confederation Act, by which that Parliament is empowered, in addition to providing for a Court of Appeal, to establish "any additional Courts for the better administration of the laws of Canada." The power thus given to the Federal Parliament is self-evident. It is frequently referred to in *Valin* v. *Langlois*, and receives the amplest construction that the words will bear. The result of that case, in fact was that the Dominion Parliament had established Dominion Courts, in which the Judges of the Provincial Courts sat, exercising a jurisdiction, however, totally separate and distinct from that of the Provincial Courts of which they were members.

With the plenary powers enjoyed by the Federal Parliament of erecting Courts for the administration of the laws passed by it for the peace, welfare and good government of Canada, and of prescribing in what manner its laws shall be administered by the Provincial Courts when left to be so administered, it does not derogate from the grant of such plenary powers to require the Parliament of Canada to abstain from interfering with the subjects of legislation exclusively assigned to the Provincial Legislatures; and so we conclude with our ninth proposition.

The inference from the propositions which we have enunciated is plain, and is, we think, truly expressed in our corollary. As long as the Federal Parliament is content to pass laws, without exercising its undoubted right of prescribing the manner in which they shall be enforced, the Provincial Courts may, and must, execute them as best they can, providing procedure therefor if they do not already possess suitable machinery; and so far the Provincial Courts exist for the administration of the bulk of existing laws of whatever origin. So the Provincial Courts might have entertained controverted election cases upon the simple abandonment of jurisdiction by the House of Commons, and that, according to their existing procedure. But when a procedure was provided for such cases, when Dominion Courts were erected, albeit with the material of the Provincial Courts, for the execution of this law, there was one subject at least withdrawn from the Provincial Courts as such. And so each subject of Federal jurisdiction may in turn be dealt with, until Federal laws in their entirety are administered by Dominion tribunals, according to a procedure or procedures emanating from the same power which created them. The Parliament of Canada has thus plainly the power to withdraw from the Provincial Legislatures the bulk of the administration of justice leaving to the Provincial Courts the administration of those laws only which are exclusively within Provincial jurisdiction. It is a power, however, by inference. And the consummation of this power lies in the power pointed out by Mr. Justice

Taschereau (*m*) to virtually deal the death blow to the Provincial Courts, or control their organization and constitution, by refusing to name or pay the Judges. The subordinated powers of the Provincial Legislatures in this respect have also been noticed by Mr. Justice Gwynne, who says that, "The constitution of the old Courts in existence at the time of Confederation cannot be abolished or altered without the assent of the Dominion Government to the Act passed for that purpose by the Provincial Legislature. No new Courts can be constituted, or when constituted, be abolished or altered without the like assent" (*n*). The organization of a Court is not complete without Judges, and so in reality the controlling power lies ultimately with the Federal authorities.

(To be continued.)

(*m*) *Valin* v. *Langlois*, 3 S. C. R. at p. 81, *ad fin.*
(*n*) *Re Niagara Election Case*, 29 C. P. at p. 280.

EDITORIAL REVIEW.

The Jurisdiction of the High Court of Justice in Election Cases.

The judgment upon the motion to strike out the preliminary objections to those petitions which were filed in the High Court of Justice, whereby the motion is dismissed and the objection is practically sustained, must commend itself to every one, as at least fraught with good sense, if the soundness of the result be doubted. As long as the Dominion Controverted Elections Act 1874 remains in force, we presume it does not require very acute powers of reasoning to demonstrate that it must be obeyed. The Provincial Legislature could have no power at all to repeal the Dominion Controverted Elections Act, or any part thereof, or to legislate in respect of Dominion Controverted Elections, nor did it attempt to do so. Even supposing that it had the power to substitute the High Court of Justice for any one of the Courts assigned by the Dominion Act to try election cases, and to this extent to repeal or modify the Dominion Act, it has expressly disclaimed any such attempt by the 10th and 87th sections of the Ontario Judicature Act.

The question of jurisdiction would never have arisen if the Ontario Judicature Act had not been passed; and we think that those sections of it which we quote leave Dominion Election petitions in the same plight as if the Act had never been passed, even supposing that the Ontario Legislature could affect them.

Section 10 enacts that, "from and after the commencement of this Act the several jurisdictions vested in the said High Court of Justice shall cease to be exercised, except in the name of the said High Court of Justice, as provided by this Act, *save as otherwise in this Act provided.*"

It is otherwise provided by section 87 that, "nothing in this Act, or in the Schedule thereto, affects, or is intended to affect, the practice or procedure in criminal matters, or *matters connected with Dominion Controverted Elections, etc.*" Leaving out of consideration, then, the question of the power of the Legislature of Ontario to modify the Dominion Act, it has shown the very best intentions not to transgress in that respect. For the reading of the two sections above quoted, when paraphrased, plainly declares that the jurisdiction of the several Superior Courts, of which the High Court of Justice is composed, shall continue to be exercised in respect of Dominion Controverted Elections, which the Act was not intended to affect.

If the cases should ever reach the Supreme Court of Canada, on the question of disputed jurisdiction, we presume that that Court would adhere to its ruling in *Valin* v. *Langlois*, 3 S. C. R. 1. It is true that opinion was divided in that case as to whether the Dominion Controverted Elections Act, 1874, established the Superior and Supreme Courts of the Province as Dominion Courts, or merely utilized them as existing Provincial Courts by adding to their functions the duty of trying election cases. But in either case the result must be the same. If they are Dominion Courts by virtue of that Act, the Provincial Legislature has nothing to do with them. As Dominion Courts they must remain subject to Federal legislation only. If on the other hand they were merely Provincial Courts exercising the additional duties assigned to them by the Parliament of Canada, no power but that which imposed those duties can take them away. If it be possible for the Provincial Legislature to do this indirectly by legislating the Courts out of existence, then there is no Court in which a Dominion Controverted Election petition can be filed. The old Superior Courts, we will say, are gone. And the Federal Parliament has never given power to the High Court of Justice to try such cases. But, as we have said, no such question can really arise, for the matter is left just as if the Ontario Judicature Act had never been passed.

The case is a very apt illustration of the several jurisdictions of the Federal and Provincial Legislatures over civil procedure, and furnishes material assistance to us in our examination of that subject.

The Court of Appeal.

The Court of Appeal, after meeting to deliver a few judgments, has again adjourned in order that its members may go circuit, having first handed over to the Common Pleas Division for hearing and disposal the pending County Court appeals. This is a very solemn farce. Theoretically the chief business of the Court of Appeal is, or is supposed to be, hearing appeals. Additional, but subordinate to, this work is the duty which is imposed upon them of going circuit. Theoretically the chief business of the Divisions of the High Court of Justice is *nisi prius* work, and the reviewing in full Court of the *nisi prius* decisions. Additional, but subordinate to this work is the duty which is imposed upon them of sitting in the Court of Appeal to fill vacancies, they being *ex officio* Judges of that Court. Practically, the Court of Appeal occasionally hears appeals, but very regularly adjourns with a heavy docket untouched in order that its Judges may help to transact the *nisi prius* business. As long as all the Judges were busy and appeals remained undisposed of, there was no great anomaly in the existence of arrears of business. But it does seem a little too absurd for the Judges of the Common Pleas Division, whose *prima facie* work is *nisi prius* business, and who are only *ad hoc* Justices of Appeal to hear and dispose of twenty-one County Court appeals assigned to them by the Court of Appeal, while the Court of Appeal whose *prima facie* work is the hearing of appeals, adjourns in order that its members may go circuit.

In the meantime appeals are being brought from time to time with good average rapidity, and, if a change does not take place at once, there will be such a heavy docket of arrears in the Court of Appeal, that it will offer the greatest inducements to very litigious suitors to bring appeals simply for the purpose of delay. Before the arrears of business

become so great as to form a morsel for scandal mongers, the remedy should be applied. It is easy at the present time to forecast the future; and we conceive it to be the duty of our Legislators to mark the course that events are taking and prevent a block of appellant business. Relieve the Court of Appeal from circuit work at once and allow them to dispose of the arrears of business. If the evident policy of the Judicature Act, as interpreted in *Re Gallerno and Rochester*, 46 U. C. R. 379; 2 C. L. T. 35, is to be faithfully pursued, this course will become even more necessary than it is now, if that be possible.

Marmion.

There is, at the present moment, no better advertized work in the Province of Ontario than Scott's "Marmion." Placed upon the curriculum of the Public Schools by the Minister of Education, a great number of copies were sold to the youth of Ontario, no less than fifteen thousand, it is stated, having found their way into their hands. Suddenly the work is taken off the course of study, on the ground that it is immoral.

The position which the learned Minister has placed himself in will require all his legal acumen to defend. He proves himself either ignorant or immoral. He, the Minister of Education, can hardly plead that he was ignorant of the contents of "Marmion." And if not ignorant, he wittingly placed before the youth of Ontario an immoral work, and commanded the teachers of public schools to instruct them in it. But the Minister, in interdicting the public teaching of Scott's poem, is only increasing the imaginary evil which he proposes to abate. He has allowed fifteen thousand copies of the poem to be purchased by pupils, who, in addition to their parents and guardians, will immediately read and re-read "Marmion", to find out where the evil lies. And prurient curiosity, once aroused, will, if we mistake not, produce such a run on booksellers for "Marmion," that the study of that most noble poem will only be outdone by the consequent admi-

ration and love for one of the greatest and best men that ever wrote English.

The work is one of the subjects for matriculation examination at Osgoode Hall, and therefore we have a right to interest ourselves in it. We shall expect the Minister of Education and his colleagues (except the sole lay Minister), all of whom are Benchers, to attend the next meeting of Convocation, as the apostles of morality, and remove the poem from the curriculum, with the exception of "the last words of Marmion," in which all students at law should be thoroughly instructed.

If this is not done for consistency's sake, we see only one way in which the learned Minister can escape from the position he is in, and he is welcome to our advice. In the next *Ontario Gazette* publish the following order in Council:—In the order in Council which forbids the teaching of "Marmion" in public schools on the ground that it is immoral, for "immoral" read "immortal."

Regulation of Steamboats carrying Passengers.

The loss of the "Asia" has revived the discussion, which died away as similar calamities passed from recollection, as to the best method for insuring the greatest measure of safety to passengers who travel by water on our great lakes by the enforcement of some law which will not bear too hardly upon the ship-owners. In the opinion of some, none but such vessels as are fit for sea-going should be allowed to carry passengers. In the opinion of others, any vessel should be allowed to carry passengers which has passed the Government inspection as to state of repair and equipments. But whatever may be the correct opinion as to the build or equipment of vessel, no law will ever accomplish the purpose of a life-saving law which permits vessel-owners or masters to sail their course and hold their vessels out to the public as fit for the carriage of passengers, one moment after they are found to be defective.

The difficulties attendant upon making and administering an adequate measure are not small. Frequent

inspection is absolutely necessary. The means to enforce immediate compliance with the requirements of the law should be summary. And in the absence of power to the inspector immediately to prevent the vessel from continuing to run upon infraction of the law, some method of announcing to the public her unseaworthiness should be adopted, so that any one travelling by water might have the means of ascertaining before going on board that he is venturing on an unseaworthy vessel, and that he does so entirely at his own risk. The travelling public know but little about the certificates which are at present required to be posted up in a conspicious part of the boat, and those who do know of them have no means of ascertaining their existence upon any boat without first taking passage thereon.

Presumptions of Survivorship.

All artificial presumptions of survivorship, where several persons perish in the same calamity, based upon strength, age and sex, have been subjected to a severe criticism by the sad tale of the loss of the "Asia," in a storm on Lake Superior during the past month. The occupants of the boat which contained the two survivors had equal chances of life. But if we take into consideration the fact that the captain and mate, who were in this boat, had in their favour constitutions inured to hardship, their chances were infinitely greater than those of the passengers in the same boat. Yet out of the whole number, two passengers, a mere boy and a mere girl, survived, the remainder of the boat's load sinking from sheer exhaustion or being killed by blows from the gunwale of the boat as it capsized. If it has happened once, so that it is capable of actual demonstration, that a woman has survived the whole number of a ship's crew and passengers, how often may it not have happened when incapable of demonstration that a woman has been the last to die in such a case. If all the passengers and crew had been lost on the vessel when she foundered, it might have been said that the chances of survivorship were in favour of the crew as against the passengers, and in favour of the male passengers as against the female.

But the facts of this occurrence are such as to set at defiance all attempts to formulate any presumption which has a preponderance of reason in its favour. An arbitrary rule is all that can be arrived at; and the most reasonable one seems to be that which now appears to be the rule in our law, that where it is necessary or important to ascertain or consider which of two relatives survived, and there is no evidence respecting the circumstances of the calamity, it will be considered that both perished together.

Unprofessional Conduct.

We print elsewhere in this number a letter, complaining of the unprofessional conduct of a solicitor.

As a rule, we do not believe in the efficacy of anonymous letters respecting such matters, inasmuch as they often proceed from *animus* or revenge, and form a convenient means of assailing an adversary without disclosing his name, who cannot therefore reply without being told that "if the cap fits, he had better wear it." We would be disinclined to believe that such conduct could have been conceived, practised and persisted in by a solicitor, if the truth of the facts related was not vouched for by our correspondent, who assures us that they are absolutely true, and upon whose assurance of truth we give them publicity.

It is, without question, matter for the serious consideration of the Benchers, and should occupy their attention without delay; and we recommend those who are in a position to establish the facts to bring the matter promptly before the Benchers. For the honour of the profession all such conduct should be punished severely.

The Benchers and the Reporters.

Because the Reporters did not hand in a most formal report of the state of the reporting, the Committee on Reporting have stopped their salaries for three months.

We presume the learned gentlemen read the reports, and we therefore presume that they are aware that the reporting is at present kept as nearly done up to date as possible. The work, then, being done, and the salaries

earned, the latter are withheld, because the Reporters do not formally tell the Committee on Reporting what they know already—on a pure technicality, in fact. If the formal report of the state of the reporting is a matter of vast importance, its return could have been *compelled* by withholding salaries till it was made. But from our knowledge of the Reporters we can cheerfully testify that compulsion need not have been resorted to.

The New Benchers.

The seats of Mr. Richards, Q. C., and Mr. Bell, Q. C., having become forfeited by non-attendance, Mr. Leith, Q. C., was elected in the place of Mr. Richards, and Mr. Bell was re-elected.

We think that it is a little too great a compliment to a gentleman who has forfeited his seat to re-elect him, and a little too antagonistic to the spirit of the Act to vote for keeping a seat vacant, which the action of the Benchers practically amounts to. Mr. Bell, however, may not accept the vote as a compliment; for it is quite open to him to regard it as a hearty approval of his conduct in absenting himself.

BOOK REVIEW.

Analytical Tables of the Law of Real Property, drawn up chiefly from Stephen's Blackstone, with Notes. By CHARLES JAMES TARRING, of the Inner Temple, Esquire, Barrister-at-Law, author of "Chapters on the Law relating to the Colonies." London: Stevens and Haynes, 1882.

These tables will be found extremely useful to the student of real property law. They enable him to grasp almost at one glance a comprehensive idea of the relations which the manifold interests in land bear to each other, with the characteristics of each. Appended to the tables are short but useful explanatory notes. The book will form a useful supplement to the standard text books on the law of real property.

CORRESPONDENCE.

Unprofessional Conduct.

To the Editor of the Canadian Law Times:

SIR,—Believing that the columns of your Journal, already so rapidly advancing in favour, will find place for the following facts, I venture to bring before your notice, and that of the Profession generally, a few facts concerning a practitioner in the thriving town of ——, and would inquire, after reading the statements I make, which are rather within than outside of the real facts of the case, what do you think of him? I might premise that this very same gentleman, not many years ago, took occasion to complain to a committee of the Benchers of the conduct of a respectable legal firm in the same town, because they, as he alleged, settled a suit in which he was engaged on one side, without his knowledge and consent. He asked that the committee should severely censure this firm for their alleged unprofessional conduct. The Benchers, after enquiring into the facts, found his charges not sustained, and dismissed the case. The writer, however, would like to ask of the Benchers if this selfsame individual is not deserving of their severest censure, or if he is a fit or proper person to be a solicitor?

Now, for my facts. About the month of August last, a well-known firm of R. & Co., doing a large and extensive business in the town of ——, and having extended business relations and mutual accounts with many of the merchants of ——, became embarrassed. Rumours as to their solvency having got abroad, a certain creditor placed his claim for suit in the hands of this solicitor, whom I will call by the pseudonym of J. S.

Here was J. S.'s opportunity. He went to several parties to whom the firm of R. & Co. were indebted, and

succeeded in inducing them to put their claims in his hands for suit. I will not say whether this would have been proper, even if those parties had been his own clients: that would have been some excuse at any rate. But the facts were that these parties were not his clients, but had their own solicitors, who ordinarily attended to their business. However, J. S. approached them in this wise:—"Give *me* your claim. You know my brother-in-law is solicitor for E., one of the firm of R. & Co., and I have consequently the inside track of all the other lawyers, and will be able to get judgment for you at an earlier date than any one else; and first execution is a material consideration in the present state of the law, etc., etc., etc."

The "brother-in-law" proved a good card, and some seven parties placed their claims in the hands of J. S. Do you think this fair or professional conduct? I could give you some other instances of his conduct in this matter, equally glaring, but one more will suffice. He got a claim from a certain party as above, went to a member of the firm of R. & Co., and ordered him to instruct his solicitor to enter an appearance for him, so that J. S. could move to sign judgment under Rule 80. This R. refused to do, and J. S., in a rage, said, "If you don't I will put you in gaol." R. laughingly told him to go on, but was somewhat astonished when J. S.'s client took out a *summons* (not a *warrant*, remember,) against him for obtaining goods under false pretences. The matter has been from time to time enlarged at J. S.'s request, and R. does not hesitate to say that the whole thing is an attempt of J. S.'s to make him pay the claim of his client in full in preference to the claims of other creditors whose writs were prior in point of time.

A last instance. The other day, being desirous of examining the defendant in an action which he was prosecuting, he went to the sheriff with the appointment, and told him that he would give it to him for service if he, the sheriff, would accept it on this condition, which he mentioned to the sheriff:—"If I succeed in this case I will pay you for the service of this appointment, should I lose you

are to get nothing." The sheriff unfortunately could not see it in that light; and having finally convinced J. S. that he never did business on a speculative basis, the disgusted practitioner was perforce obliged to serve the appointment himself. Now, Mr. Editor, I have taken up much of your space, but surely not too much to expose such conduct. The Solicitor's name I send you privately, and, while asking you to observe secresy with regard to the author of this communication for the present, I can only say that my name can be used before the Benchers, or for any purpose save the gratification of J. S.'s curiosity as to the authorship hereof. Indeed I may mention that the members of the bar here are, at the present time, considering whether it would not be proper for them to bring his conduct before the Law Society in a formal manner, with a view to his expulsion from the ranks of the Society.

Yours, etc.,

A MEMBER OF THE —— LAW ASSOCIATION.

REVIEW OF EXCHANGES.

American Law Review.—July, 1882.

Conflict of Laws and Bills of Exchange, by A. V. DICEY. After pointing out that the drawers, acceptors, makers and endorsers of bills of exchange and promissory notes each enter into separate and distinct contracts, and after pointing out the nature of these several contracts, the learned writer says that the principles adopted by the English Courts for determining the validity and effect of a contract in any case where a conflict of laws arises admit (if all limitations and exceptions foreign to the purpose of the article be omitted) of being summed up in two formulas. First formula—"The formal validity of a contract is to be determined wholly by the law of the country where the contract is made (*lex loci celebrationis*). The formalities that are required for a contract by the law of the country where it was made are both sufficient and necessary for its validity in England." Second formula—"The incidents or effects of a contract are to be determined by the law to which the parties intended, or may be presumed to have intended, to submit themselves. Hence, (if there are no special circumstances indicating another intention), 1, where the contract is to be performed in the country where it is made, or where there is no definite or fixed place, the incidents of the contract are to be determined by the law of the country where the contract is made, (*lex loci celebrationis*); 2, where the contract is made in one country, and is to be performed in another, the incidents of the contract are to be determined, at any rate, so far as the performance is concerned, by the law of the country where the contract is to be performed, (*lex loci solutionis*)." The reason why these conclusions may, till the arguments for them are fairly weighed, be considered open to question, are it is said twofold; *First*, a bill is often spoken of as one contract; having one place of performance, whereas, it is, in fact, an instrument embodying several contracts, having, it may be, several different places of performance. *Secondly*, the judges, by adhering to the formula *lex loci contractus* have concealed both from themselves and others the deference really paid by them to the *lex loci solutionis*. The writer then asks and answers the following questions: First question—What is the law governing the liability of an acceptor to an indorser under an indorsement not in the form required by the law of the country where the indorsement is made? Second question—By what law is the right to notice of dishonor to be governed? Third question—By what law is the payment of interest by way of damages to be governed?

Support, Lateral (Adjacent) and Subjacent, by HUGH WEIGHTMAN. This is an examination of the now celebrated case of *Angus* v. *Dalton*, and contains a collation of American cases upon the points involved therein.

The Proximate Cause of Death in Accident Insurance Policies, by HORACE W. MONCKTON. Cites English cases.

Ibid.—August, 1882.

Proof of Handwriting, by JOHN D. LAWSON. This is apparently the first of a series of articles upon the subject mentioned, and treats very fully of the proof of handwriting *by witnesses*.

The Specific Performance of Contracts for the Sale of Shares in Corporations, by A. G. BULLOCK. Cites English and American cases bearing upon the doctrine laid down in *Duncuft* v. *Albrecht*, 12 Sim. 189 that Courts of Equity will enforce the specific performance of contracts for the sale of shares in a company, where the shares are limited in amount, and are not always to be had in the market.

Ibid.—September, 1882.

Charter Parties, by ORLANDO F. BUMP. This is apparently the first of a series of articles upon the subject, and discusses The Form of Charter Parties; Two kinds of Charter Parties; Construction of Special Terms; Letting on Shares; Effect of a Demise; Effect where mere Contract of Affreightment; Who may make a Charter Party; Liability of Agent; Cesser of Liability; Subsequent Modifications; Bill of Lading; Rights of Owner and Consignee; Subsequent Assignment; Who may Sue; Distinction between Representation and Warranty; Term of Charter Party; Description of Vessel; Seaworthiness.

Promoters as Corporate Fiduciaries, by ADELBERT HAMILTON. The learned writer says "The substance of the law is, that promoters are corporate fiduciaries. Transactions with their companies wherein they deal honourably, with full disclosure, and without seeking to influence the action of the corporator, will be upheld. But transactions in which they suppress or misrepresent material facts, or otherwise deceive the company, or corruptly control its action, are fraudulent, and the company may elect either wholly to set aside such transactions, or to recover the promoter's secret profits, less, however, his reasonable expenses; but he is not entitled to any commission. The company will not be debarred from recovering because some of its stockholders who will receive part of the secret profits sought to be recovered from the promoter, were associated with him in the fraud: and finally the company is entitled to a liberal time in which to investigate the fraud, and assert its rights."

Law Magazine and Review.—February, 1882.

Notes on early German and English Land Laws, by FREDERICK POLLOCK, M.A., L.L.D. Discusses the early land tenures, distinguishes between the two great heads of Folkland, (*ager publicus*) which was afterwards known as *terra regis* or Crown Land, and Bocland or land held by individuals in full ownership and capable of being conveyed by book or charter; notices the existence of "common land" held in common for pasture and the like by townships and other communities; *Æhel* or heir lands which were lands of inheritance held in severalty by customary titles and derived originally as it is presumed out of common land; and laenland or land held by a tenant from a landlord at a rent; and discusses the incidents of these various tenures, their relations the one to the other, and the mode of conversion from one tenure to another.

The Preliminary Investigation of Crime, by JOHN KINGHORN. Gives an historical account of the legal machinery for the preliminary investigation of crime from the early days of Frankpledge, when the community was bound in its own interest to present all law breakers for trial and the preliminary investigation was therefore unnecessary, down to our own day of Grand Juries.

Constitutions of the Old and New World. Has something to say about various constitutions in various parts of the world, but the most interesting part is that which deals with some phases of the American constitution, and more especially with the conflict of State Rights and Federal Rights.

The Italian Foreign Minister on Extradition, by C. H. E. CARMICHAEL, M.A. Gives the substance of a state paper on extradition by Signor Mancini.

Ibid.—May 1882.

The Family Laws of England and Islam, by PROFESSOR RUMSEY. Points out the hardships and injustice that not uncommonly result from the English laws, as to both real and personal property, and as to the domestic relations, and suggests that a leaf might be taken with advantage from the Mohammedan laws on the points.

Evidence of Foreign Laws, by SIR SHERSTONE BAKER, BART. Cites authorities, and treats of the proper mode of proving foreign laws both written and unwritten.

Suzerainty, Mediaeval and Modern, by CHARLES STUBBS, M.A., L.L.D. Writers and other authorities on International law are not at all agreed as to the powers, rights and duties of Vassal States. Sir Evelyn Wood defines their position to be such, "that the country is to have entire self government as regards its own interior affairs, but that it cannot take action against or with an outside power without permission of the Suzerain." Other authorities hold that the Suzerain is not necessarily precluded from

interfering in the internal affairs of the Vassal State. The writer defines the internal rights referred to as the right to determine and organize the constitution; the right to maintain order, sometimes called the right of police; the right of property or domain, so far, at all events, as it relates to the possession of territory; the right of legislation; of plenary and criminal jurisdiction, in which may be included the right of remission and pardon; the right of appointing magistrates; of coining money; levying taxes; regulating ranks and such like; and the international rights are the rights of legation or embassy; the right to negotiate and conclude treaties and alliances; the right of war, neutrality and peace; and the right of domain —that is, of acquiring and alienating property; all the rights in fact which concern relations with other States. A State may profess feudal Vassalage to a foreigner, and yet as it seems, be considered an independent Sovereignty, and within the pale of International Law, but in such a case the Suzerainty would be merely nominal. The relations between the Vassal and the Suzerain may of course be regulated by compact between the parties, "but without express conditions, Vassal States, since they are considered to be *de facto* Sovereign, possess in full all the rights consequent on the attributes of Sovereignty, with the simple restriction against the exercise of the same in any manner derogatory to the rendering of the fidelity, service and respect due to their Suzerains. * * * Where the Suzerainty is not plainly nominal, as the abstract Sovereignty is in the Suzerain, the Vassal State cannot exercise any rights not expressly granted to it, it matters not whether under compulsion or no, without encroaching on the Sovereignty of its Suzerain." The writer sums up thus: "Briefly recapitulating the results obtained from the consideration both of practice and principle, it will appear that Vassal States are of two distinct classes, nominal and real, that from both classes there are due to the Suzerain certain feudal duties; that these duties in no way interfere with or modify the exercise of the rights possessed by the Vassal States; that these rights include, in the case of nominal Vassalage, both all external and all internal rights by reason of the nominal Vassal being in every way a Sovereign; that in case of real Vassalage (the class including every Vassal State lacking a single Sovereign right), the rights by reason of non Sovereignty of the Vassal, include none that are exterior, and only those interior rights which are expressly granted by the Suzerain, and that the special duties engendered by the peculiar relationship are on the part of the Vassal, fidelity, service and respect, and on the part of the Suzerain, the obligation to protect and defend the Vassal, the duties being correlative and mutual." In view of events now taking place in Egypt, the questions discussed in this paper are of especial interest at the present time.

Notes on Early English Land Law, by FREDERICK POLLOCK, M.A., LL.D., is a continuation of an article in the former number, and treats of Villenage, Villain Tenure and Copyholds.

Ibid.—August, 1882.

The Channel Tunnel from the point of view of National Law, by H. J. W. COULSON. Views from a legal standpoint a question that

has already been fully discussed in its military and political bearings. The learned writer sets for himself and answers three questions—1st, What is the law of nations as to property in and possession of the bed of the sea? 2nd, What are the recognised limits seawards of the territory and jurisdiction of a State? 3rd, What means of protection and defence is a nation entitled to adopt for the purposes of self-preservation?

The Criminal Liability of the Hundred, by F. W. Maitland, M.A. Treats the matter historically for the purpose of showing that the institution took its rise before the Roman Conquest. In connection with this article, read "The Preliminary Investigation of Crime" in the February number of the same Magazine.

The United States Supreme Court on Bills of Lading. Gives the judgment of the Supreme Court of the United States in *Pollard* v. *Vinton*.

Scrutin De Liste, as modified by the Italian Parliament, by AVVOCATO TOMMASO TITTONI. Describes and explains the provisions of an Act recently passed by the Italian Parliament relative to electoral procedure.

The Law of Nations in Peace and War. Notes a number of recent pamphlets, essays, books, new editions and other writings upon the subject-matter in question.

Southern Law Review.—April-May, 1882.

The Rights of Bona Fide Purchasers of Under-due Negotiable Paper secured by Mortgage, by GEO. W. MCCRARY. The learned writer says, "It is now well settled that the mortgage is only an incident to the debt, and passes with it to the assignee. No formal assignment of the mortgage is necessary. The debt is the principal thing, and the mortgage is an accessory, so that the assignment of the debt passes all the mortgagee's interest in the mortgaged property, whether the assignment be before or after the forfeiture. * * * The cases of doubt and difficulty arise where, as between the original parties to the mortgage there is a question as to its validity, or as to its force and effect; independent of any question affecting the note, or where a third party claims the mortgaged property, and denies the authority of the mortgagor to fasten a lien upon it. In such cases to what extent can the innocent *bona fide* purchaser of the note before due, be regarded as an innocent purchaser of the mortgage also, and entitled to protection accordingly against equities existing as between the original parties? * * * In several of the States it is held, that the assignee of a negotiable note, secured by mortgage, takes the latter, as he would any other *chose in action*, subject to all the equities which subsisted against it while in the hands of the original holder. The argument in support of this doctrine is, that a mortgage is, in its nature, a non-negotiable instrument, and that the rights of the parties to it cannot be fixed and determined by the law merchant. * * * On the other hand,

it is held by the Supreme Court of the United States and by the Courts of last resort in a large majority of the States that an assignee for value of a negotiable note, secured by a mortgage, before due and without notice, takes the mortgage, as he does the note, free from existing equities between the original parties. It is said in support of this doctrine, that the note being the principal thing, imparts it character to the mortgage." The writer assumes the latter proposition to be the correct one, and suggests some general rules defining and limiting the rights of parties to such transactions.

The Law for Playwrights, by E. B. CALLENDER. The writer discusses the law of dramatic copyright, both at Common Law and as affected by Statute. He concludes that the representation of a dramatic work upon the stage is not a publication which will deprive the author or his assignee of this right of property. He upholds the opinion that reporting a play from memory is a piracy that will be restrained. He also inclines to the opinion that mere vocal utterances ought not to be the *sine qua non* of a dramatic composition, and that pantomimes, spectacular representations and other plays made up wholly of scenic effects and stage directions are proper subjects of copyright.

The Capture of Mason and Slidell, by CHARLES R. GRANT. This paper takes us back some twenty years to the time when an American sloop of war stopped a British ship (the *Trent*), while pursuing a lawful voyage from one neutral port to another on the high seas and beyond the municipal jurisdiction of the captor's sovereign, and forcibly took from her, among others, Messrs. Mason & Slidell, who were commissioners of the Confederate States of America, *en route* to Europe. The public excitement produced by this seizure, and the imminence of war induced thereby, have become matters of history, while the various nice questions of international law involved have been a fruitful source of discussion by text-writers and jurists. Mr. Grant sustains the position taken by Great Britain in the affair, and considers the result as a triumph of the principles of international law that had long been contended for by America.

Damages for Corporal Injuries to Minors, by J. M. GRANT. Considers the question by whom action may be brought, and what is the proper measure of damages in such cases.

The Western Jurist.—June, 1882.

Pooling Contracts. Cites English and American cases, and shows that while the current of English authority is in favor of the validity of such contracts between rival and *quasi* public corporations such as railway companies, the current of American authority is against their validity on the ground that they are opposed to public policy. The ground of the English doctrine is thus stated by Sir W. Page Wood, V.C.:—"With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. I find no

indication, in the course taken by the legislature, of an intention to create competition by authorising various lines. From my own experience in Parliamentary Committees, I should rather be disposed to say that the legislature wisely inclined to avoid authorising the construction of two lines which would necessarily compete with one another. It is a mistaken notion that the public is benefitted by pitting two railway companies against each other till one is ruined, the result being at the last to raise the fares to the highest possible standard. The legislature protected the public in a different way, by a provision limiting the maximum of tolls to be taken, and, with respect to fares, it guarded against excessive profits by an enactment that in the event of the profits reaching ten per cent. the treasurer may revise the scale of fares, and that the Board of Trade may, under certain conditions, purchase the line. Except by fixing a maximum rate of tolls, and, as far as practicable, a maximum amount of profit, the legislature has imposed no conditions in favor of the travelling public. I cannot have any doubt that it is competent for a railway to abstain altogether from carrying. If a company enters upon the carrying business, it is bound to carry on equal terms for all; but I find in the Acts no obligation upon a company to become carriers, except as to the mails and the Queen's troops." The American doctrine is thus expressed by Biddle, J. "A railroad company is a *quasi* public corporation. It depends on the public for its support, and the public depends on it for its accommodation. Powers are granted to it which are denied to individuals, or partnerships, or other corporations, as those for producing, manufacturing, commercial or monetary purposes. It has privileges which are denied to other common carriers, such as lines of ship, steamboats or stage coaches or other means of the carrying trade. It exercises the right of eminent domain, which is an attribute of sovereignty. The power of taxation, as in the case before us, is often invoked in its aid. It is therefore bound by reciprocal obligations to the State and owes reciprocal duties to the public. It must not make contracts beyond its chartered powers, or perform acts injurious to the public, or pursue a course in contravention of public policy. It is created, sustained and protected by the law, and wields powers with which private enterprise cannot compete; it must therefore obey the law, keep within its powers, pursue in its general course, the end and design of its creation." Another American Judge, speaking of the same subject, says:—"The association being secured against internal defection and external encroachments, and the members having thrown their concerns into stock, to derive an income in proportion to the number of shares they hold, and not according to their merit and activity in business, and safe against the reduction of compensation that would otherwise follow accommodations and want of skill and attention, the public interest must necessarily suffer grievous loss."

Contracts by Correspondence, by CHARLES B. ELLIOTT. The following general rules are enunciated, and cases fully cited in support thereof:—Rule 1. When an offer has been made, and a *letter of acceptance mailed* within a reasonable time the contract is complete. Rule 2. The *recall* of an offer sent by mail, in order to be of any effect, *must reach the*

party to whom it is addressed *before an acceptance is mailed.* Rule 3. An acceptance, in order to complete a contract, must be unconditional, and in accordance with the terms of the offer.

Ibid.—July, 1882.

Dower in Iowa. Trials of dower at common law as affected by the Statutes of Iowa.

Ibid.—August, 1882.

Torts of Married Women, by EDWIN G. MERRIAM. Cites English and American cases.

The Right to the Custody of Children, by S. D. T. Cites English and American cases, and treats the subject under the following headings:—Legal Right of the Father; not an Absolute Right; may Part with it by Contract; may Waive it by his Conduct; Rights of the Father as against the Mother; Rights of Widowed Mother; Rights of Widowed Mother cease on re-marriage; Right of Mother of Illegitimate Child; Rights of Persons standing *in loco parentis;* Paramount Rights of the Child; when the child will be permitted to elect; none of these Rights an Absolute Test; Principles and Practice in *Habeas Corpus* cases of this character. See also two articles in the *Albany Law Journal*, 8th and 15th July, reviewed ante, p. 382. See also *Roberts* v. *Hall*, 2 C. L. T., 256, reversed on re-hearing, *postea*, Occasional Notes.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Dominion Election Cases.

ONTARIO.] [CAMERON, J., SEPTEMBER, 1882.

In re NORTH YORK ELECTION CASE.

Dominion Controverted Election—Jurisdiction of High Court of Justice.

A petition under the Dominion Controverted Elections Act, 1874, against the return of the member elect to serve in the House of Commons for North York, was filed in the Common Pleas Division of the High Court of Justice, and a preliminary objection was taken by the respondent to the jurisdiction of the Court. On a motion to strike out the preliminary objection,

Held, that there was no jurisdiction in the High Court of Justice to entertain the petition; but that the Courts of Appeal, Queen's Bench, Common Pleas and Chancery for Ontario, the Courts named in the Dominion Controverted Elections Act, 1874, are still existing Courts for the trial of such petitions; and that the objection to the jurisdiction was properly taken by preliminary objection.

McCarthy, Q.C. and *Osler*, Q.C., for the petitioner.
Robinson, Q.C. and *Moss*, Q.C., for the Respondent.

NOVA SCOTIA.] [RIGBY, J.

In re KING'S COUNTY ELECTION CASE.

Presentation of petition—Special circumstances or difficulty in effecting service.

In this case Mr. Justice Rigby granted an order extending the time of service on an *ex parte* application of the petitioner. The petition had

been presented on the 5th August and handed to the sheriff to be served on the 8th August. The application to extend the time which was made on the 16th August, the time for service having expired on the 10th, set out that diligent inquiries had been made for the respondent after the 8th, but it did not appear that anything had been done between the 5th and the 8th of August. On this ground the order for extending the time was attacked as having been improvidently granted, and the validity of the presentation was also questioned, the petition having been handed to the Prothonotary on the street who on the same day filed it in his office. Judgment was delivered by

RIGBY, J., 26th September, 1882.—The only grounds in the rule nisi which if sustained, would entitle respondent to have the petition set aside, are those under which it was contended before me, that the words "presented" and "presentation" in ss. 7 and 8 of the "Dominion Controverted Elections Act, 1874," had a peculiar significance, and that the statute was not complied with, unless the petitioner, or at least some person specially commissioned by him for that purpose, attended with the petition within the office of the clerk, within the specified time, and there delivered it to the clerk: and because in this case the latter had received it from Mr. Henry in the street, it was not delivered at the office of the clerk, nor was Mr. Henry empowered to present it, and if he was that power could not be delegated by him to Mr. Holmes, and therefore it had never been "presented to the court."

I am unable to arrive at such a conclusion; for it seems to me that the requirements of s-s. 3 of s. 8 of the Act have been literally followed and the petition delivered at the office of the clerk during office hours. If a petition signed by a qualified petitioner has with his consent been so delivered, I consider both the letter and the spirit of the Act have been fulfilled. This construction would give a reasonable and ordinary meaning to the language used by the Legislature, and if anything more formal was intended, I think more specific language would have been used. Mr. Henry, when he handed the petition to the clerk, also handed to him the notice of his appointment as petioner's agent under the 9th Rule, and it has been shown that with the authority of the petitioner he was then on his way to deliver the petition at the office of the clerk. The clerk having undertaken himself to be the means of conveying it to his office, and Mr. Henry having consented to his doing so, and it having been shewn that it was really delivered there by Mr. Holmes within office hours of that day, it would be as unreasonable to say that there was no presentation, as if Mr. Henry had handed it to the clerk on the outer side of the latter's office door, and the clerk had then retired within the office and delivered it there.

One of the grounds upon which the order made by me on the 16th of August last for extending the time for service of the petition, etc., and the service made thereunder were attacked, is that "the said order was improvidently granted and without sufficient cause shown." This ground, it seems to me, must prevail, unless the affidavits of the petitioner and Sheriff upon which the order was granted, establish the existence, during the period within which the papers could have originally been served of

"special circumstances or difficulty in effecting service," by which service was prevented. It appears from the affidavits that the petition was presented at the office of the Clerk on Saturday the 5th of August, and handed to the Sheriff to be served on the 8th day of the same month; and that subsequently *to the latter date* diligent enquiries had been made for the respondent, but that he could not be found nor his whereabouts ascertained, and that personal service could not in consequence be effected. The affidavits are silent in reference to the period which elapsed between the day of the presentation and the delivery to the Sheriff for service. If the papers had been delivered to him for service on the Monday *non constat* but that they could have been served within the five days. I do not think it was sufficient to shew "special circumstances or difficulty in effecting service" on and after the 8th of August, more than on and after the 10th of August; nor do I see why if those affidavits are sufficient, an order for extension might not with equal reason be upheld, where the papers had only been handed to the Sheriff on the last day on which they could be served; or even after the time had elapsed, and no reference made in the affidavits on which it was granted as to the intervening time. For these reasons I am of opinion that the order of the 16th August and the service thereunder must be set aside and the order *nisi*, to that extent, made absolute with costs.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[BURTON, J.A., 9TH SEPTEMBER, 1882.

INTERNATIONAL BRIDGE CO. v. CANADA SOUTHERN RAILWAY CO.

Motion to disallow a bond filed by the defendants (appellants), to secure the amount found due the plaintiff, pending an appeal to the Privy Council. The bond was in the form given in Rule 36 O. J. A., with some further recitals.

It was objected that the condition of the obligation ought to be read "do and shall effectually prosecute such appeal *and* pay," etc., instead of "*or* pay," as given in the form, and also that the condition should be to pay

"what had been found due by the Court appealed from," instead of "such costs and damages as shall be awarded."

Burton, J., held that *or* was the correct word to use, and that "effectually prosecute" meant "successfully prosecute," but disallowed the bond on the second objection, holding that the proper condition must be found based upon the language in R. S. O. cap. 38, sec. 27, sub-sec. 4.

Liberty was given to file new security.

Cassels for plaintiffs (respondents).
Crooks, Q.C., contra.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[OSLER, J., 5TH JUNE, 1882.

MILLAR v. HAMELIN AND WIFE.

Statutes of Limitations—Acknowledgment—Estoppel.

Hamelin, being seised of land subject to a mortgage to L. dated 14th October, 1863, and to one to M. dated 12th January, 1864, made an assignment to W. on 22nd November, 1866, under the Insolvent Act of 1864. On 28th January, 1868, Hamelin obtained his discharge; on 27th January, 1869, he obtained from M. an assignment of M.'s mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale in the mortgage to F. H. to the use of his wife, his co-defendant. On 12th April, 1869, L. assigned his mortgage to Mulholland, who, on 28th March, 1873, assigned it to W. In 1879 Hamelin, having procured assignments to himself of a number of the claims against his insolvent estate, presented a petition signed by himself to compel W. to wind it up. He alleged that Mulholland held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 20th April, 1880, of all the right title and interest of the insolvent in the land, and the advertisement further stated that the purchaser would acquire only such title as the vendor had as assignee. Hamelin attended at the sale, and objected to the sale of the land and bid for the same, and the plaintiff became the purchaser and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to Hamelin as assignee of the claims against his estate. Hamelin and his wife remained in undisturbed possession from his discharge in insolvency.

Held, that Hamelin was not estopped from setting up a title by possession by reason of the manner in which the sale was brought about; that the acknowledgment of the L. mortgage by Hamelin's petition was not sufficient to stop the running of the Statute, because by assignment of the

M. mortgage to Hamelin, and the latter's conveyance under the power to his wife, she became, and was, at the time of the petition, the owner of the equity of redemption, and was not affected by her husband's acknowledgment, and therefore the plaintiff failed.

P. O'Brien, for the plaintiff.

E. T. Dartnell, for the defendants.

[OSLER, J., 5TH SEPTEMBER, 1882.

In re BRONSON & THE CITY OF OTTAWA.

Railway—Point of commencement—"From," meaning of—Eminent domain—Expropriation of lands already devoted to public purposes.

The Charter of the C. A. R. Co., reciting in the preamble that the line of Railway which it was proposed to construct would afford the shortest and most convenient connection between the Cities of Ottawa and Montreal, authorized the Company to construct their track *from* the City of Ottawa.

Held, that they had the right to enter the City and construct from a point within its limits.

The City passed resolutions providing for a lease of right of way to the Company over lands expropriated by the City for waterworks purposes under 35 Vict. cap. 80 (O).

Held, that, though, *prima facie*, the only right intended to be conferred on a company is that of expropriating the private property of individuals or corporations, and not property already devoted to public uses, or already expropriated under other Acts, yet under some circumstances, the right to make such expropriation might exist, and if so, then the City would have the corresponding power to convey. And as the applicants had not shown to the Court that circumstances did not exist under which the Railway Company could take the land, the Court would not assume that the City had committed a breach of trust in passing the resolutions.

The railway was to cross certain streets at a grade different from that required by the Railway Act, but the resolutions provided that the streets should be graded up to the railway.

Held, unobjectionable.

Robinson, *Q.C.*, and *Christie*, for the motion.

McCarthy, *Q.C.*, and *Gormully*, contra.

[CAMERON, J., 22ND SEPTEMBER, 1882.

In re THE TOWNSHIP OF SARNIA & THE TOWN OF SARNIA.

Extending limits of Town—Arbitration—Drainage assessment—Award against Township invalid.

A portion of the Township of Sarnia was added to the Town of Sarnia by proclamation of the Lieutenant-Governor. The former Municipality was indebted to the Province of Ontario for certain drainage works, under the provisions of R. S. O. cap. 33, which works had benefitted certain roads in the Township. The arbitrators, in settling the matters of dispute between the two Corporations, were of opinion that the drainage assessment was not a proper subject of arbitration, and made their award without adjudicating thereon.

Held, that the award was invalid, for the drainage assessment was an ordinary debt, payable out of the general funds of the Township, under R. S. O. cap. 33, to which the Town of Sarnia should contribute a just proportion, under R. S. O. cap. 174, sec. 53.

The award as made directed the Township to pay a certain sum to the Town.

Held, bad; for the only terms upon which the acquisition of adjacent lands can be had by a Town are contained in R. S. O. cap. 174, sec. 53, which only authorizes a payment by the Town to the Township or County.

Robinson. Q.C., for the award.
Aylesworth, contra.

CHANCERY DIVISION.

[DIVISIONAL COURT, 7TH SEPTEMBER, 1882.

ESSERY v. COURT PRIDE.

Provident Society—Expulsion of member—R. S. O. cap. 167.

In the case of charitable and provident societies incorporated under the statute empowering them to provide for the discipline and management of their own affairs, one of the members should not be allowed to litigate his grievances with the society in the courts until he has exhausted every possible means of redress outside of the courts, according to the principle laid down in *Field* v. *Court Hope*. 26 Gr. 475.

All that is required in these cases is to see that the party complaining is a member of the society, and that the matter in dispute is one relating to the internal economy of the organization, and provided for by its rules and regulations. In such a case the jurisdiction of the courts is practically ousted until all expedients furnished by the conventional code of laws have been resorted to.

Held, in this case, inasmuch as it appeared that the plaintiff did not follow the rules prescribed by his society, and exhaust all the remedies provided thereby, but prematurely filed the present bill to restrain the society from expelling him, the decree of the court below dismissing the bill should be affirmed with costs.

R. M. Meredith, for the appellants.

W. P. R. Street, for the respondents.

O'DONOHOE v. WHITBY.

Solicitor—Negligence—Costs—Sale under mortgage—Notice—R. S. O. cap. 104.

On a proper construction of the power of sale contained in the Act respecting short forms of Mortgages, R. S. O. cap. 104, alternative modes of service of notice of the intention to exercise the power are permitted. The service may be, (i) personal; (ii) at the mortgagor's usual place of residence within the province; or (iii) at his last place of residence within the province. It cannot be the intention of the Act that service may not be effected at the mortgagor's usual or last place of residence, unless he is out of the province, because that would be to import a restriction into the statute, which is not fairly deducible from its language.

Held also (reversing the judgment of Proudfoot, J.), that even presuming the proper construction of the statute to be as last mentioned, yet the wording of the statute is doubtful, and it by no means follows that there was any want of skill, or any negligence on the part of a solicitor who failed to inform his client that service of the said notice at the mortgagor's usual or last place of residence within the province, would be useless if the mortgagor was still in the province. If the solicitor, taking a contrary view of the meaning of the statute, told his client that in order to exercise the power of sale, notice had to be served at the usual or last place of residence of the mortgagor in Ontario, he did all that in law he was required to do. If he went further, as in this case, and pursued investigations as to where that place was, then it becomes a question of evidence whether he shewed such negligence in the discharge of this self-assumed duty as should disentitle him to tax costs as against his client. In the present no such negligence was made apparent.

Held further, where the services of a solicitor are rendered at the instance of the client with the like knowledge of the matters of fact as the solicitor, the onus is on the client to establish negligence, ignorance or want of skill, by reason of which alone and entirely the services have been utterly worthless.

Moss, *Q.C.*, for the appellant.

Fitzgerald, for the respondent.

FRASER v. THE GORE DISTRICT INSURANCE CO.

Insurance—Payment of premium—Waiver—Onus.

This was an action brought to recover the amount secured by a certain policy of fire insurance, which the plaintiff alleged had been duly renewed so as to cover the date of the occurrence of the loss. The defendant company was an Ontario company, and the agent with whom the dealing as to insurance took place, was a local agent of the company. The policy ran out on June 1st in each year, unless renewed. The fire took place in September, 1881. There was no payment of cash at the end of the year preceding that in which the fire occurred, or afterwards, but the following arrangement was made between the company's agent and the husband of insured:—In April, 1881, the husband undertook to make a set of harness for the agent, who agreed to pay him for the harness partly in cash, and to pay the balance to the insurance company as the consideration of the renewal receipt. The agent expected to get the harness by June, 1881, but did not get it till the following October or November after the fire. Nevertheless the agent, having received a renewal receipt from the company, gave it to the plaintiff on August 3rd, 1881. No entry of the transaction was to be found in the books of either party to it. The agent did not pursue his usual course of debiting the company with the premium as if paid by him or payable by him, and failed to make a return of this policy as renewed in a statement sent by him to the head office, in August, 1881, after he had delivered the renewal receipt to the plaintiff. After the fire the agent sent forward the amount for the premium, which the company forthwith returned, and repudiately liability.

Held (affirming the judgment of Patterson, J., who had non-suited the plaintiff), that the above was an invalid transaction, inasmuch as no course of dealing was proved which would tend to mislead the plaintiff or work an estoppel against the company, and no evidence was offered that the company knew of their agent receiving anything else but money for the payment of premiums.

Held also, if payment is made out of the usual course, it lies on the person who sets up the exceptional mode of payment to shew the authority of the agent to bind his principal. Any doubt that exists as to the sufciency of the payment should be given against the person dealing with the agent, as he always has the power of protecting himself by applying at head-quarters.

Maclennan, Q.C., for the plaintiff.
Moss, Q.C., for the defendant.

ROBERTS v. HALL.

Adoption of child—Promise to make a will.

Held (reversing the judgment of Ferguson, J., 2 C. L. T. 256), (i) That the question was not now whether the contract originally would have been

enforceable by the court in specie; and inasmuch as the engagement had been faithfully performed by the father and the child on their part, any objection that there was in the agreement itself for want of mutuality could not be allowed to prevail at this stage. The agreement having so far been acted upon as to have altered the status of the plaintiff, and that by the act of the Halls, a new equity had arisen, and the defendants must be precluded from disputing with the plaintiff their liability to perform their part of the agreement. For where the plaintiff has fully performed his part, then if the court can enforce in specie the part which remains to be done by the defendant, it will do so, unless the agreement in question be illegal and contrary to public policy.

(ii) The agreement now in question is not illegal as against public policy, or otherwise. For although the general rule is indisputable that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which as a parent the law casts upon him, is illegal and contrary to public policy, yet this only means that the court will not allow or assist a father to make an arrangement which will preclude him from acting according to his judgment and discretion in the most advantageous manner for the welfare of the child. Therefore, in those exceptional cases in which the control of the father may be injurious to the child, or where it is for the advantage of the child that the parental superintendence should not exist, or where the father agrees to *foris-familiate* the child out of regard for his welfare, in view of benefits, pecuniary or otherwise, bestowed or expected, such a contract may be justified. And the facts shewed the present to be one of these exceptional cases. The benefit of the child is the foundation of both the rule and the exception. And although, in such cases, the court requires to be satisfied that there are solid considerations for the infant to be taken into account, and not merely expectations, before coming between the parent and the child, yet in cases where the father is not seeking to regain the custody of the child, this is not a necessary element in determining whether such an arrangement is contrary to public policy.

(iii) *Held*, therefore, on the whole case, the plaintiff was entitled to a declaration that the property, real and personal, of which the deceased died possessed is impressed with a trust in her favour.

Dictum of Court of Appeal in *Alderson* v. *Maddison*, L. R. 7 Q. B. D. 181, dissented from.

(iv) *Held* further (affirming the judgment of Ferguson, J.), that the plaintiff had the right of suit in her own name.

W. Cassels, for the plaintiff.

Robb, for the defendant.

[9TH SEPTEMBER, 1882.

McTIERNAN v. FRASER.

Appeal from single Judge—Divisional Court—Court of Appeal.

An appeal from the report of the Master at Ottawa was decided by Proudfoot, J., on 29th June, 1882. The cause was heard and decree made before the Judicature Act came into operation. The plaintiff then appealed to the Divisional Court.

Held, that the cause was not distinguishable from *Re Galerno*, 46 U. C. R. 379; 2 C. L. T. 35, and that the appeal should have been to the Court of Appeal and not to the Divisional Court.

S. H. Blake, Q.C., for appellant.
Bethune, Q.C., contra.

[OSLER, J., 5TH SEPTEMBER, 1882.

THE TOWNSHIP OF PEMBROKE v. CANADA CENTRAL RAILWAY.

Railways—31 Vict. cap. 68, sec. 10 (D)—Acquiescence by corporation—R. S. O. cap. 174, sec. 277.

Suit by the corporation of the Township of Pembroke seeking for a *mandamus*, commanding the defendants to remove their railway from off a certain highway in the unincorporated village of Campbelltown, and for an injunction, on the ground that the defendants had constructed their railway along the said highway without the leave of the plaintiffs, and contrary to the provisions of the Railway Act of 1868, 31 Vict. cap. 68, sec. 10 (D), to which Act the defendants were subject.

Held, on the evidence, that the corporation had sufficiently granted leave to the company to carry their railway along the highway, by a certain resolution passed by them in 1876, to the effect that, "The railway company be notified to fill up the deep ditch on both sides of the track on the street, and have proper crossings put down at each cross street." The court held that this amounted to an admission that the defendants were lawfully in occupation of the street, coupled with a request to put it into better condition.

All that the Railway Acts require is that "leave shall be obtained" from the proper municipal or local authorities before a railway is carried along an existing highway. Such leave may be granted at any time, whether before, during, or after the construction of the railway. Although, moreover, the most proper way to grant such leave would be by by-law, yet it may also be granted by resolution. R. S. O. cap. 174, sec. 277, enacting that the powers of Township Councils shall be exercised by by-law, must be construed as referring only to the exercise of the powers of the Council

under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another legislature.

Held, also, that apart from this, the plaintiffs had acquiesced in the acts complained of, and a corporation may be bound by acquiescence as an individual may. The plaintiffs had power to grant or refuse leave to do what they were now complaining of, and the evidence shewed that they stood by while the railway was being built, on the assumption that it was assented to by them, and they had allowed it to be operated for four or five years without objection; moreover, by the resolution above referred to, they had recognised what had been done and procured further expenditure by the defendants.

Moss, Q.C., and *W. R. White*, for the plaintiff.

J. H. Metcalf for the defendants.

[FERGUSON, J., 15TH SEPTEMBER, 1882.

O'BRIEN v. O'BRIEN.

Donatio mortis causa—Husband and wife—Deposit receipt—Foreign Probate—Parties.

The deceased held a deposit receipt by which a Bank acknowledged the receipt from him and Bridget O'Brien (his wife) of $2,800, "for which we are accountable to either, with interest, etc." About a week before his death he gave his wife the key of a trunk in which he kept the receipt, and told her to bring him a wallet, which being done, he took therefrom the receipt and gave it to his wife, saying, "Remember, Biddy, there is $2,800 here; keep it for your own use; there is enough in the box to bury me, and this is for your own use." She took the receipt and kept it.

Held, that the gift was complete.

The deceased left a will, which was proved in New Brunswick, but not in Ontario, under which the plaintiff claimed the $2,800. The executors were defendants.

Semble, that the estate of the deceased was not sufficiently represented to enable the plaintiff to have obtained a judgment, even if the trusts of the will had been in her favour.

Donovan, for the plaintiff.

S. H. Blake, Q.C., for defendant.

SMITH v. THE TOWNSHIP OF RALEIGH.

Municipality—Drainage by-law—Diversion of moneys received thereunder—Injunction—Completion of works within reasonable time.

A by-law was passed in September, 1880, by the defendants for the construction of a drain, pursuant to the Municipal Act, for the benefit of certain

landowners and ratepayers, of whom the plaintiff was one. No time was fixed for the completion of the works, which were not finished when this action was commenced, in April, 1882, and the plaintiff suffered loss, which he would not have suffered had the works been diligenty prosecuted.

Held, that the defendants were bound to have completed the work within a reasonable time, and not having done so, they should now be ordered to complete the same.

Held, also, that the plaintiff had the right to bring the action, and that it was not necessary or proper to make the Attorney-General plaintiff.

The defendants, under a resolution of their Council, had expended some $90 of the moneys received by them under the by-law in works not mentioned therein or in the engineer's plans.

Held, that the moneys so received were impressed with a trust, and that the defendants were bound to expend them in the manner directed by the by-law only, that the defendants should be ordered to account for the moneys received by them, and to refund the $90 diverted by them, and that they should be enjoined from any further diversion of the same moneys.

Moss, Q.C., for the plaintiff.

Pegley, for the defendants.

RUMOHR v. MARX.

Execution—Seizure of mortgage in hands of assignee—Realizing upon—R. S. O. cap. 66.

The plaintiff assigned to the defendant a mortgage upon real estate as collateral security for two sums of money lent by the defendant to the plaintiff for which he took the latter's promissory notes. The defendant procured an assignment to himself of a judgment against the plaintiff, and the Sheriff seized the mortgage which the plaintiff had assigned to the defendant, the latter handing it to him for that purpose, in order to realize the excess of its value above the amount of the notes. The plaintiff then offered to pay the notes, and demanded an assignment of the mortgage, which the defendant refused unless the judgment was also paid.

Held, that the seizure was unauthorized, and that the mortgage was not, at the time of the seizure, belonging to the person against whose effects the writ of execution was issued, within the meaning of R. S. O. cap. 66, sec. 28.

Held, also, that the Sheriff could not realize upon a mortgage seized as upon a chattel, the only authorized way being by suit at maturity pursuant to the above section.

M. Wilson, for the plaintiff.

Douglas, for the defendant.

WHITNEY v. TOBY *et al.*

Insolvent circumstances—Preference—Pressure.

L. & Co., being in insolvent circumstances, went to A. and asked him to procure discounts for them, offering certain bills and notes, and also offered to sell to him some stock in trade. A., instead of handing over the proceeds of the discounts, kept part, and instead of buying the stock in trade, offered to sell, and sold it for L. & Co., and kept part of the proceeds, and applied it on L. & Co.'s indebtedness to him. The mode of carrying out the transactions in each case was suggested by A., and L. & Co. were obliged to consent, though at first asking for a return of the whole of the proceeds.

Held, that there was no intent on the part of L. & Co. to give A. a preference in fraud of other creditors, by transferring the bills and notes and stock in trade, the methods by which A. obtained the payments out of these transactions having been suggested by A. and acquiesced in by L. & Co. on account of pressure.

S. H. Blake, Q.C. and *Thomson*, for the plaintiffs.

McCarthy, Q.C., and *Foster*, and *Maclennan, Q.C.*, for several defendants.

WITHROW v. MALCOLM.

Re-issued patent—Validity of—Novelty—Burden of proof.

A re-issued patent must be for the same invention as was the patent surrendered, and the re-issue can include no new invention, though the claim may be enlarged. Where, therefore, the specifications and drawings relating to the surrendered patent were read in connection with the claims relating to the re-issued patent, and all that was claimed for the re-issued patent appeared in the specifications and drawings relating to the original patent, with the exception of a few designating letters,

Held, that the re-issued patent was valid though the claim was enlarged; and that the lapse of about a year between the original and re-issued patents was not so great a delay as to prejudice the inventor.

Held, also, that where the defendants disputed the novelty of the invention, the *onus* lay upon them to show how it had been anticipated, the allegation of the grant and production of the Letters Patent by the plaintiff being a sufficient *bona fide* case.

J. E. McDougall and *Shepley*, for the plaintiff.

W. Cassels, for the defendant.

PLUMB v. STEINHOFF.

Action for recovery of land—Unskilful survey—Damages—R. S. O., cap. 51, sec. 29.

The plaintiff recovered from the defendant in this action a strip of land, which the defendant had improved in consequence of an unskilful survey. The improvements consisted of dyking and ditching, and the placing of an engine and a wind-mill on the land to keep it dry by pumping, which process had to be resorted to every year, but did not make the land very productive. The engine was laid upon blocks and kept in place by its own weight. In assessing the damages the learned Judge did not allow for the whole expenditure which had proved to a great extent useless, and being of opinion that the engine was not a fixture would not allow its value nor the costs of its removal, but assessed the damages at the difference between the value of the land in a state of nature and its value at the beginning of the action.

Moss, Q.C. and *W. Nesbitt*, for the plaintiff.

C. R. Atkinson, for the defendant.

KEITH v. FENELON FALLS.

School Board—Defaulting Treasurer—Surety—Liability of.

The Municipal Council of Fenelon Falls, under a by-law for the purpose, raised money by way of loan on debentures payable in ten years, for the purpose of enlarging the school house. The by-law also provided for levying a special rate to pay the interest, $200, and Sinking Fund, $250, per annum. Pursuant to requisitions of the School Board the moneys were for some years paid over to D., the Secretary-Sreasurer of the School Board, who became a defaulter in respect of these and other school funds. The plaintiff was a surety in D.'s bond for the performance of his duties, which recited his appointment, and that security was required for the due and faithful performance of his duties, and was conditioned therefor and for the accounting of all moneys which should come into his hands as Secretary-Treasurer. On the default becoming known the plaintiff attended two meetings of the Board, and at the request thereof executed a mortgage for the amount alleged to be due to D., but he did not know that the debenture moneys were included.

Held, that it was not a part of D.'s duty as Secretary-Treasurer to receive the debenture moneys, or to receive and pay the interest, or to receive and be the custodian of the Sinking Fund, and that the plaintiff as his surety was not liable for his default in respect of these moneys.

Held, also, that the mortgage having been executed under a mistake the plaintiff was entitled to an account to ascertain the true amount.

McLennan, Q.C., and *Riordan*, for the plaintiff.

S. H. Blake, Q.C., and *Barron*, for defendants.

IN CHAMBERS.

[THE MASTER IN CHAMBERS, 8TH SEPTEMBER, 1882.

WALLACE v. WHALEY.

Reference—Powers of Local Masters.

The following order of reference was made at the trial of the cause: "Upon hearing the solicitors on both sides, and by their consent, I order that all matters in difference in this cause between the parties in this cause be referred to the certificate of the local Master, etc., with all powers, as to certifying and amending, of a Judge of the High Court, and that the costs of the suit and of the reference be in the discretion of the Local Master."

The Master found on every issue between the parties, and exercised his discretion as to the costs, and concluded his report as follows:—"All which I humbly certify and submit to this honourable Court." But the report did not contain any order on any party to pay according to the findings or the costs.

Upon this report the defendant signed judgment, and this was a motion by the plaintiff to set the same aside.

Held, that the signing judgment was proper, as the Master had acted as an arbitrator under the Common Law Procedure Act, whose decision was final, and not as an official of the Court under ss. 47 or 48 O. J. A.

Shepley, for the motion.
Clement, contra.

[11TH SEPTEMBER, 1882.

LUCAS v. ROSS.

Special endorsement—Rule 80.

Held, that the plaintiff was not entitled to judgment, under Rule 80, where the writ was specially endorsed as follows:—"The plaintiff's claim is for the price of goods supplied. The following are the particulars, $621.06 for money payable by the defendant to the plaintiff for goods bargained and sold and delivered by the plaintiff to the defendant, and interest thereon from 25th July, 1882.

Aylesworth, for the motion.
Holman, contra.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[WILSON, C.J., GALT AND OSLER, JJ., 23RD SEPTEMBER, 1882.

C. C. BRANT.]

GRANT v. VANNORMAN; BACON *et al.*, GARNISHEES; KINNEY, CLAIMANT.

Insolvent Debtor—Preferential Assignment—Pressure—R. S. O. cap. 118.

V., a practising solicitor, and clerk of the Peace and County Attorney, having been ordered to pay over certain moneys, or in default be struck off the rolls, made an assignment every quarter of his emoluments as County Attorney, to certain solicitors, in trust for K., to whom he had been ordered to pay the moneys, at the same time telling them that he would leave it to them to hand him back such part as they chose for his expenses of living. Upon this they drew his fees and handed back a portion to V., for his expenses of living, and kept alive the order against V. by enlarging it from time to time with V.'s consent. Subsequently, V. recovered a judgment for a client, upon which costs were taxed to him, and these costs he also assigned to the solicitors in trust for K.

Held, affirming the judgment of Senkler, Co. J., sitting for the Judge of the County Court of the County of Brant, that the existence of the order against V. for payment over to K., was sufficient pressure to prevent the several assignments from being considered as fraudulent preferences within the meaning of R. S. O. cap. 118.

C. C. BRUCE.]

HUNTER v. VANSTONE.

Interpleader—Claimant barred—Removal of goods by claimant—Action for recovery thereof—Estoppel.

The defendant was claimant in an interpleader matter in a Division Court and appeared therein once. The matter was adjourned, but the claimant filed no claim, nor did he appear upon the adjournment; and the learned Judge thereupon barred him and ordered him to pay the costs. Pending the interpleader summons the defendant, the claimant, removed the goods seized and the bailiff brought this action to recover them.

Held, affirming the judgment of the Court below, that the adjudication of the learned Judge of the Division Court upon the interpleader matter was conclusive and estopped the defendant from denying a seizure by the bailiff.

H. J. Scott, for the appellant.

McCarthy, Q.C., for the respondent,

C. C. HALDIMAND.]

LAMBIERE v. SCHOOL TRUSTEES.

Public School Trustees—Meeting—Agreement to engage Teacher.

At a regularly called meeting of School Trustees, at which two out of three were present, it was agreed that the plaintiff should be engaged as a school teacher for the ensuing year, at a salary of $350, but the terms of the engagement were not settled. There was no adjournment of this meeting, and no notice was given to the absent Trustee of any other meeting. The other two Trustees subsequently signed an agreement separately from each other engaging the plaintiff for the year, under which she entered upon her duties, but was discharged before the year had elapsed.

Held, reversing the judgment of the Court below, that the agreement was invalid under R. S. O. cap. 204, sec. 97, which declares that "no act or proceeding of a School Corporation which is not adopted at a regular or special meeting of the Trustees shall be valid or binding on any party affected thereby, &c."

Robinson, Q.C., for the appellant.
Hardy, Q.C., for the respondents.

C. C. HALTON.]

BENNETT v. G. T. RAILWAY CO.

Contributory negligence—Non-suit.

The plaintiff's servant was in charge of an omnibus at the defendants' station, and was in such a position, at a distance of 9 feet from the track, that he could not see an approaching train. Without going forward to ascertain if the track was clear, he got on the omnibus and drove off. When he reached the track the train was within four feet of him, and as he crossed it collided with the omnibus. It was not shewn whether or not the engine driver had signalled his approach. The learned judge of the County Court non-suited the plaintiff at the close of his case.

Held, following *Dublin, &c., R. Co.* v. *Slattery*, L. R. 3 App. Cas. 1,155, that the learned Judge should not have withdrawn the case from the jury.

Schoff, for the appellant.
J. K. Kerr, Q.C., for the respondent.

C. C. NORFOLK.]

AUSTIN v. DAVIS.

Tavern Keepers—Supplying Liquor to Habitual Drinker after Notice Forbidding—Liability for Servant's Act—"Suffering to be Delivered"—R. S. O. cap 181, sec. 90—Assessment of Damages—Discretion of Judge below.

The plaintiff, whose husband was in the habit of drinking intoxicating liquors to excess, gave notice to the defendant, a licensed tavern-keeper, pursuant to R. S. O. cap. 181, sec. 90, not to supply her husband with liquor. Defendant forbade his bar-keeper to serve the plaintiff's husband with intoxicating liquors, notwithstanding which, the bar-keeper did serve him.

Held, reversing the judgment of the Court below, that the defendant was liable for the act of his servant in the ordinary course of his employment, which liability he could not rid himself of by forbidding him to do the wrongful act, and that he had "suffered to be delivered" to the defendant intoxicating liquor within the meaning of the Act.

Held, also that the finding that the bar-keeper did serve intoxicating liquor to the plaintiff's husband not being moved against, the mere fact that the plaintiff moved against the verdict, on other grounds did not authorize the defendant to dispute the correctness of the finding.

Held, also, that the damages were discretionary with the Judge who tried the case, who still had power to assess them, and the Court refused to follow *Denny* v. *Montreal Telegraph Company*, 3 App. R. 628, and remitted the case to the Court below for assessment of damages.

C. C. OXFORD.]

STEWART v. ROUNDS.

Setting aside verdict of jury—Entering verdict for opposite party.

The plaintiffs delivered to R. some cultivators to be sold by him as their agent for cash or good notes, and the defendant being aware of the fact of the agency, took three in exchange for a buggy, which R. sold and retained the proceeds of sale. The jury found for the defendant in an action of trover, and the learned Judge of the County Court set aside the verdict and directed it to be entered for the plaintiff.

This Court, in affirming the decision, remarked that upon the evidence the learned Judge might have directed the jury to find for the plaintiff, and that according to authority he could enter the verdict which he afterwards did, though unquestionably that power must be most sparingly and cautiously exercised.

Robinson, *Q.C.*, for the appellant.
Macbeth, for the respondent.

C. C. SIMCOE.]

BUIST v. McCOMBE, *et al.*

Damage feasant—Distress—Illegal sale—Liability of participant in—Cattle running at large—Lawful fences.

The defendant McC. distrained upon the plaintiff's cattle damage feasant, but abandoned the seizure. He afterwards seized the same cattle again damage feasant the following night and impounded them. The poundkeeper put them up for sale irregularly, and the evidence showed that the second distress was in reality for the first trespass, the seizure for which had been abandoned. The plaintiff forbade the sale, but the defendant McC. ordered it to proceed. The learned Judge of the County Court held that the poundkeeper had irregularly sold the cattle, and that the plaintiff was entitled to a verdict against him, but not against McC., who was not aware of the irregularity.

Held, reversing the decision of the learned Judge as to McC., that by taking part in an illegal proceeding he became liable equally with the poundkeeper; and that he should have informed himself of the legality of the proceeding before giving instructions to sell.

There was not a lawful fence between the plaintiff's lands and McC.'s; and the Township by-laws prohibited cattle from running at large.

Held, though it was not necessary to decide the point, that it was the duty of the owner of cattle to keep them from his neighbour's land at his own risk. *Spafford* v. *Hubbell*, Rob. & Jos. Dig. 1517, explained.

Osler, Q.C., and *A. D. Cameron*, for the appellant.

H. J. Scott, for the respondent.

C. C. VICTORIA.]

McLEAN v. PINKERTON.

Chattel Mortgage—Filing—Sunday—Time—Future Advances—Payment deferred beyond year—Validity of.

Held, affirming the judgment of the Court below, that, notwithstanding Rule 457, where the last of the five days within which a chattel mortgage should have been filed fell on a Sunday, the filing on Monday was too late.

The chattel mortgage in question, besides covering a subsisting debt, provided for future advances, if necessary, of goods and merchandise, to enable the mortgagor to "carry on business."

Held, that it was within the sixth section of the Chattel Mortgage Act, which affects mortgages for future advances, to enable the borrower to "enter into and carry on business," and that it, at any rate, required registration in respect of the subsisting debt.

The clause for future advances provided for payment "on demand at any time within one year from the date hereof, or such other time as the parties may agree thereto."

Semble, that the clause was void, since the parties might extend the time for payment beyond the year, whereas the Act restricts the time to one year.

C. C. WATERLOO.]

STOESER v. SPRINGER.

Title from fraudulent Vendee—Purchaser without Notice before Disaffirmance.

T. sold a horse, buggy and harness to M., who gave promissory notes, which proved to be worthless. T. tendered them back and demanded his property. M. told him to rest contented and he would bring him his property, or satisfaction. T. then resumed possession of the notes, but

afterwards sued out a writ of replevin for the goods and delivered it to the sheriff. Before the writ was executed M. disposed of the goods to the plaintiff, who had no notice or knowl dge of the manner in which they had been obtained, and who brought trover against the sheriff.

Held, affirming the judgment of the County Court, that there had been no disaffirmance by T. of the transaction with M., so as to revest the property in him, the delivery of the writ of replevin to the Sheriff, without more, being insufficient; and that the plaintiff therefore took a good title to the goods.

McCarthy, Q. C., for the appellant.
J. K. Kerr, Q. C., for the respondent.

C. C. WELLAND.]

JAMES v. BALFOUR.

Promise to pay debt of another—Consideration for promise—Statute of Frauds.

So long as the original debtor remains liable, a promise by another to pay the debt must be in writing, even though made upon valuable consideration

The defendant, after buying A's. stock in trade, induced the plaintiff to enter into his service, by promising to pay the plaintiff the arrears of wages due to him by A., in whose employment he had formerly been. In an action upon the promise for such arrears,

Held, reversing the judgment of the Court below, that the promise should have been in writing.

C. C. YORK.]

MUTTON v. DEY.

Sale of Lumber—Inspection—Time.

The defendant agreed with the plaintiffs in writing, as follows:—"I, the undersigned, agree to deliver S. S. M. & Co., 40 M. ft. Black Ash, with mill culls out, F. O. B. vessel on Cornwall canal, @$10 per M. ft. Also 10 M. ft. Soft Elm, @$10 per M. ft., F. O. B. vessel on Cornwall canal, to be delivered in June, 1881, the lumber now on stick and part seasoned." The plaintiffs accepted in writing.

Held, affirming the decision of the Court below, that the plaintiffs were not entitled to inspect the elm with a view of rejecting culls.

Held, also, that time was of the essence of the contract and that the defendant was not bound to deliver the lumber in September, the plaintiffs not having had a vessel ready to receive it in June.

Rose, Q.C., for the appellants.

J. E. McDougall, for the respondent.

ELLIS v. THE MIDLAND RAILWAY CO.

Contract—Impossibility of performance.

The plaintiff was employed by the defendants as master of the steamer *Idyl-Wild*, for the season of 1877, at a salary. The vessel was burned before the season was over, and the plaintiff had at that time received more than a proportionate part of the salary for the time which had then elapsed.

Held, that, by the destruction of the vessel, the contract was at an end, and that the plaintiff could not therefore recover the balance of the salary agreed upon for the season. The point having been taken for the first time upon the argument in appeal, the appeal was allowed without costs.

REES v. McKEOWN.

Boarding House keeper—Lien—R. S. O. cap. 174.

Replevin for goods detained by the defendant, who claimed a lien for a sum due by the plaintiff for board and lodging, under R. S. O. cap. 147, sec. 2. The defendant was a locomotive engineer, and at times accommodated several boarders in his house for remuneration. The learned judge of the County Court found that the defendant was not a boarding house keeper within the meaning of the Act. The Court, though expressing the opinion that they would have found differently, dismissed the appeal, but without costs, as there was evidence bearing the other way which the learned Judge of the County Court relied upon.

Bigelow, for the appellant.

Donovan, for the respondent.

High Court of Justice.

CHANCERY DIVISION.

[FERGUSON, J., 15TH SEPTEMBER, 1882.

KLEIN v. THE UNION LOAN CO. *et al.*

Mortgagor and Mortgagee—Insurance by latter—Assignment of Mortgage to Insurance Company on loss—Subrogation.

The plaintiffs mortgaged their mill property to the Union Loan Company, and on the existing policy lapsing without renewal, the latter Company insured in the plaintiffs' name with the Union Fire Insurance Company under a special agreement with the latter attached to the policy, the substance of which was, that the loss if any was payable to the Loan Company; that the acts of the mortgagor or owner should not invalidate the policy, nor should the occupation of the premises for more hazardous purposes than those permitted by the policy; the mortgagees were to notify the Insurance Company of any change of ownership or increase of risk as soon as it came to their knowledge and pay the increased premium; and whenever the Insurance Company should pay the mortgagees any sum for loss, and should claim that they were under no liability to the mortgagor, they should be subrogated to the right of the mortgagees under all securities held by them, such subrogation to be subordinate to the claim of the mortgagees for the balance, or that the Insurance Company might at its option pay the whole debt and take an assignment of securities. There had been a change of ownership when the Insurance was effected but the Loan Company were not aware of it, and there were prior insurances, of neither of which facts were the Insurance Company notified, whereby the conditions of the policy in respect of these matters were broken. A fire occurred, whereupon the Insurance Company paid the mortgage debt and took an assignment of the mortgage. The plaintiffs brought this action on the policy, claiming to have the mortgage discharged upon payment of the balance.

Held, that by suing thereon they had adopted the policy in all its terms; that the Insurance Company were entitled to hold the same under their agreement as a subsisting security for the amount paid the Loan Company; and that they were entitled to judgment on their counter claim on the mortgage, with costs of an undefended mortgage action.

S. H. Blake, Q.C., and *Woods*, for the plaintiff.
Bethune, Q.C., and *F. E. Hodgins*, for the Insurance Co.
Rose, Q.C., and *J. H. McDonald*, for the Loan Co.

THE

CANADIAN LAW TIMES.

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PROVINCIAL JURISDICTION OVER CIVIL PROCEDURE.

EXTENT *of Federal power to erect Courts.*—We have already referred to the power which the Federal Parliament has of erecting Courts, separate and distinct from the Provincial Courts, and of regulating the procedure therein, for the enforcement of Federal laws. But the question touching the full extent of the Federal power to erect Courts has not as yet been approached. It is not certain that this power is limited to erecting Courts for the enforcement of Federal laws. There is but little authority to be found upon the subject, as the occasion for dealing with it judicially has not yet arisen. In propounding the question, we are aware that we are going very far into the realms of speculation. We confine ourselves, therefore, to a critical analysis of the wording of the Act, and hazard no opinion for or against the question, though our inclination is in favour of a very extensive power.

The extent of this power depends chiefly upon the construction of section 101 of the British North America Act. That section declares that, "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada." There is a dictum refer-

ring to this section in *Valin* v. *Langlois* (*a*) by Chief Justice Ritchie, but a sentence of over a page in length tends rather to obscure the learned Judge's meaning than to enlighten us upon the construction of the clause. He says, "The establishment of additional Courts for the better administration of the laws of Canada was primarily intended to apply, when deemed necessary and expedient, rather to the general laws of the Dominion than to matters connected with the privileges, immunities and powers of the Senate and House of Commons, etc." As the phrases "laws of Canada" and "laws of the Dominion" are interchangeable terms, the proposition involves a fallacy. It is upon the meaning of the term "laws of Canada" that we want an expression of opinion. As far as we can ascertain the learned Judge's meaning, however, he seems to assert that the power was given for the purpose of enabling the Dominion to enforce Federal laws only, and that it was not intended that it should be exercised in taking away from the existing Courts the duty of administering the laws of the land.

A contrary, or rather a more extended, view seems to be entertained by Fournier and Taschereau, JJ., as expressed in their judgments in the case in question. The former, in dealing with the argument that the Provincial Courts could not execute Federal laws, refers to section 101. At page 51, he is reported to have said, "It (*i. e.*, the Parliament of Canada) would have found itself, therefore, during such interregnum (*i. e.*, between confederation and the meeting of Parliament) under the impossibility either of protecting its properties or of collecting its revenues, recourse to the Provincial Courts being forbidden. But this argument is answered by alleging that such a great mistake has not been committed; that, on the contrary, by section 101, the Government of Canada is invested with the power of creating a Court of Appeal and additional tribunals for the better administration of its laws; that ample powers in this respect were given to it, precisely because the exclusive power of organizing tribunals for the Provinces was

(*a*) 3 S. C. R. at pp. 14 *et seq*.

reserved to the Legislatures, and that thus the two Governments have each their peculiar and exclusive rights of creating tribunals. In my opinion, section 101 does not justify this conclusion. It does not in terms establish a judicial power; it only gives the right to establish, as circumstances and requirements might demand, a Court of Appeal and *additional* tribunals for the *better execution* of the laws. According to the terms of this section, there were tribunals already existing for the execution of Federal laws, since this power is given to be exercised only 'from time to time,' in the words of the section, that is to say, in the event of the existing tribunals becoming, for any reason, incapable of executing the Federal laws. If this section was not intended to recognize the existence of a Federal judicial power, it would have been differently drawn—it would have been just as easy to have directed the immediate creation of a Court of Appeal, or of any other tribunal, as to have allowed their creation at some future time. If this was not done, it was, doubtless, because the judicial power, whose existence was preserved by section 129, was recognized as being still sufficient for the requirements of the country for a long time, and the power to create new tribunals was prudently left to be exercised in the future according to circumstances."

It is to be noticed, in the first place, that there is in this passage a flat denial that ample powers were given to the Federal Parliament, because the exclusive power of organizing tribunals for the Provinces was reserved to the Provincial Legislatures, and that thus the two Governments would have each its peculiar and exclusive rights of creating tribunals, *i. e.*, presumably, that each should have power to erect Courts to enforce its own laws, in order that neither might be dependent upon the other for that purpose. And the amplification of this denial, in the page following, hints that the power granted by section 101 was intended to enable the Parliament of Canada to erect Courts, supplementary, it is true, to the Provincial Courts, but with co-extensive powers in the administration of justice.

More remarkable is the opinion of Mr. Justice Taschereau

with respect to the same question. At page 75, he says. "The constitution, maintenance, and organization of Provincial Courts of criminal jurisdiction is given to the Provincial Legislatures, as well as the constitution, maintenance, and organization of Courts of civil jurisdiction, yet, cannot Parliament, in virtue of section 101 of the Act, create new Courts of criminal jurisdiction, and enact that all crimes, all offences, shall be tried exclusively before these new Courts? I take this to be beyond controversy. Yet, would not that be altering, diminishing, in fact, taking away all the Provincial Criminal Courts' jurisdiction?" This vigorously expressed opinion, it must be confessed, is an extreme one. It is more worthy of note than either of the others, because number 27 of section 91 expressly excepts from the legislative powers granted to the Federal Parliament the right to make laws respecting the constitution of Courts of criminal jurisdiction, which power is exclusively assigned to the Provincial Legislatures. With respect to Courts of civil jurisdiction, no exception is made in section 91; and the argument upon section 101 may well reach to the extent, at least, that it gives to the Federal Parliament power to erect all Civil Courts, except *Provincial Courts*, which are, by number 14 of section 92, exclusively within the jurisdiction of the local Legislatures; but with respect to Courts of criminal jurisdiction, while the power to constitute, maintain, and organize Provincial Courts of criminal jurisdiction is exclusively assigned to the Provinces, the exception in number 29 of section 91 extends, not only to Provincial Courts of criminal jurisdiction, *eo nomine*, but in general terms to "Courts of criminal jurisdiction." From this we have already (*b*) drawn the inference that the whole administration of criminal justice was intended to be placed in the hands of the Provinces. Hence, we say, this opinion is the more remarkable as an indication of the power of the Federal Parliament under section 101. But this expression of opinion loses a great deal of its value when read in connection with a dictum of

(*b*) At page 365.

the same learned Judge in *The Grand Trunk R. Co.* v. *The Credit Valley R. Co.* (*c*), where he says, "In my opinion such a construction must be put upon this clause of the constitutional Act as must the least interfere with the exercise of the powers so expressly given to the Provincial Legislatures in the other parts of the Act."

As far as authority goes, therefore, we are left without an explicit opinion as to whether this section authorizes the Parliament of Canada to erect Courts of original jurisdiction which shall have jurisdiction to administer Provincial as well as Federal laws.

The doubt as to the operation of the section arises from the use of the phrase, "laws of Canada." If the reading had been "for the better administration of justice," there would have been no doubt. The Provincial Legislatures may establish Courts for the administration of justice in the Provinces; but, notwithstanding this, the Federal Parliament shall have power to establish Courts for the better administration of justice. But the term used is ambiguous, and may mean either the Federal laws, which, however, is denied by Mr. Justice Taschereau (*d*), or the whole sum of laws in force within the territory known as Canada, whether operative in any particular section or in the whole Dominion, and whether of Federal or Provincial origin.

The Supreme Court of Canada, which has been erected in pursuance of this section as the General Court of Appeal for Canada, and the Provincial Courts, both take cognizance of all laws, whether Federal or Provincial.

If the proposed Federal Courts are to be additional to the Supreme Court, and *ejusdem generis* with it, as far as the better administration of the laws of Canada is concerned, then the laws, which are to be administered by the former, are those which are taken cognizance of by the latter. The Supreme Court does not exist for the purpose of hearing appeals on Federal laws only. Thus, the expression "laws of Canada" would mean, in this section, all laws which

(*c*) *Doutre*, Const. Can. 337.
(*d*) *Ante* p. 515.

the Supreme Court of Canada takes cognizance of, and would include Provincial laws.

Again, "Canada," in the expression General Court of Appeal for Canada, does not mean Canada as distinguished from any one of the Provinces, but Canada as including or composed of the several Provinces. Is not the word used in the same sense in the expression "laws of Canada"? and does not that expression mean the laws of Canada as including the laws of the several Provinces, and not the laws of the Parliament of Canada, as distinguished from Provincial laws?

Again, the Provincial Courts, as we have seen, take cognizance of all laws, both Federal and Provincial; they administer such of the laws of Canada as are in force in the Province. If it can be said that the whole number of Provincial Courts throughout Canada are administering the laws of Canada in their respective Provinces, was it not the intention of the Parliament, when it provided for Federal Courts to perform this work better, to give them cognizance of the same laws when the occasion should arise for their creation? If the proposed Federal Courts are to be additional to the Provincial Courts, are they not to be *ejusdem generis* with them with respect to the laws which they administer?

It is to be observed also that the draftsman had in his mind some existing instruments which were to administer the laws of Canada, and that it was necessary to provide for an improved machinery when occasion should arise. Now, there was, of course, at that time, no tribunal which was detailed for the administration of Federal laws, as distinguished from Provincial laws; nor, with the exception of the Election Courts and the Exchequer Court, is there any such tribunal now existing; nor is there any indication elsewhere in the Act of an intention that such tribunals should be established. And if no such machinery was, in the first instance, expressly mentioned or provided for, it is straining a construction to say that the draftsman inserted a clause for improved machinery. In other words, the

administration of Federal laws alone, as distinguished from Provincial laws, having nowhere been provided for, it cannot be said that their *better* administration was intended to be provided for by this section. Does not the reserve power with respect to this particular subject lie with the Federal authorities, as it admittedly does in general?

If there had been an intention to establish Federal Courts for the administration of Federal laws, and Provincial Courts for the enforcement of Provincial laws, is it not more than probable that it would have been effectuated, in plain and distinct terms, in sections 91 and 92, where the respective powers of the legislative bodies are distributed, or in a similar manner?

In endeavouring to find a meaning for the phrase "laws of Canada," we must see how the Parliament uses the name "Canada," and what was the aim and policy of the Act. It is to be remarked that the sections which provide constitutions for the Provinces and those which distribute the legislative powers are the only parts of the Act tending towards disintegration. The object of the Act was consolidation, union, centralization. Our colonial history marks it as a compromise between a complete legislative union and a total disintegration of the component parts of the Dominion, the intention being to arrive as nearly at the former state as possible. There is, therefore, in the Act a movement from disintegration towards unity; insomuch that the legislative powers of the Provincial Legislatures are reserved by way of exception from the otherwise unlimited grant to the Parliament of Canada of a power to make laws for the peace, order and good government of Canada—not Canada as an ideal constitutional union, composed of distinct individual contracting sovereignties, but Canada, as a physical entity, a fusion into one country of the pre-confederate Provinces, whose arbitrary boundaries limit the sections into which it is divided for the administration of local affairs. It is for the still closer amalgamation of the English Provinces in the future that section 94 of the Act was framed. The central authority is strengthened by conceding to it the absolute power to disallow

Provincial Acts. The Federal authorities have complete control of the Judiciary, except the Judges of the Courts of Probate in Nova Scotia and New Brunswick; and where the Parliament of Canada and the Provincial Legislatures have concurrent jurisdiction, the latter must give way to the former. Is it of this Canada that the Imperial Parliament speaks when it uses the term "laws of Canada"? Or had it in mind the intention of establishing a disintegrating power with respect to the judiciary and the administration of justice, placing it in the power of the Provinces to perpetuate the elements of disunion which the Act was designed to eradicate?

We must not forget the terms in which Mr. Justice Gwynne speaks of the power which the Federal authorities have over the administration of justice indirectly, by virtue of their power to disallow any Act respecting it which does not meet with their approval, and by virtue of their right to appoint the judiciary. We refer to the *Niagara Election Case* (*e*), where His Lordship says, "The constitution of the old Courts in existence at the time of Confederation cannot be abolished or altered without the assent of the Dominion Government to the Act passed for that purpose by the Provincial Legislature. No new Court can be constituted, or when constituted, be abolished or altered without the like assent. No doubt, the right to constitute and organize Courts of Justice is by the British North America Act vested in the Provincial Legislature, except in so far as participation in such organization is by the same Act reserved to the Dominion authorities. Now, as it seems to me, Courts for the administration of justice would be very imperfectly organized without Judges. They form a very important constituent in the organization of Courts, and, until their appointment, it cannot be said with accuracy that the Courts are completely constituted and organized. As the appointment, then, of the Judges rests with the Dominion Government, and the power to remove them is vested in the Dominion Parliament, and as no alteration

(*e*) 29 C. P. at p. 280.

in their constitution can be effected without the assent of the Dominion Government to the Act of the Provincial Legislature passed for that purpose, it would be more consistent with the frame of our constitution, as it appears to me, to speak of all newly erected Courts as being constituted and organized by the united action of the Dominion and Provincial authorities."

The power granted to the Parliament of Canada by the 101st section is, however, a reserve power. As said by Mr. Justice Taschereau, it is to be used when the occasion arises; and the indication is that, even in the event of the creation of such Courts, the Provincial Courts are not to be abolished, the Federal Courts being intended as *additional* instruments for the better administration of the laws.

Constitution and organization of Provincial Courts.— The Supreme Court of British Columbia is the heir, as Mr. Justice Crease puts it, of the jurisdiction, status, and authority of the Supreme Court of Civil Justice of Vancouver Island. That Court was originally constituted by Imperial authority, and its Judges held commissions under the Royal Sign Manual. Of these, we believe, two survive, viz., The Chief Justice, Sir M. B. Begbie, and Mr. Justice Crease. The remaining members of the present Court received their commissions from Canada. Inasmuch, then, as the present Court was not originally constituted and organized by the present Province of British Columbia, and inasmuch as the Judges are officers of Canada, and are paid by Canada, the Supreme Court held that it was not a Provincial Court within the meaning of number 14 of section 92 of the British North America Act.

We propose to consider the meaning of the phrase "constitution, maintenance and organization."

We have seen that each Province has power to erect Supreme and Superior Courts for the administration of justice in the Province. By section 96 the Governor-General has the power to appoint the Judges to these Courts. If, then, a Province erects a system of judicature, creating Superior Courts for the administration of justice in the

Province, and prevails upon the Federal authorities to appoint Judges thereto, it seems to us very manifest that, in order to determine what the constitution of the Courts is, and in what manner the parts are put together so as to make an organic whole, we must consult the Act which creates them. The utmost that can be urged against this view is, that the Provincial Courts are jointly constituted and organized by the Dominion and Provincial authorities, as stated by Mr. Justice Gwynne in the *Niagara Election case* (*f*). Does the fact that the Judges are appointed by the Governor-General detract from the power to create Superior Courts, and withdraw them from the operation of the phrase under consideration? We should say not, and for the following reasons. If the Superior Courts were all within the legislative jurisdiction of the Federal Parliament, it is plain that the latter part of section 101 would never have been enacted. It is also plain that the power to appoint Judges to their own Courts would have been inherent in the Federal authorities without legislative enactment, and section 96, giving them that power, would have been superfluous. There is no express enactment granting power to the Federal Government to appoint Judges to the Supreme Court of Canada, erected pursuant to section 101, yet no one doubts the validity of the commissions of the Judges. Nor is there any express power granted to these same authorities to appoint Judges to the proposed Federal Courts spoken of in section 101, yet no one doubts that the power exists by implication to appoint Judges to the Courts when they are created. So, we contend, would the power to appoint Judges to the Provincial Courts have been included in the grant of power over the administration of justice, and the constitution, etc., of those Courts, but for the fact that this power is especially granted to the Governor-General. It is, therefore, to be regarded as an exception from the powers granted by number 14 of section 92, which might, in connection with section 96, be read, "The administration of justice in the Province, including

(*f*) *Ante*, p. 520.

the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, excepting the appointment thereto of the Judges of the Superior, District and County Courts, but including procedure in civil matters in those Courts." If, then, the fact is that the appointment of the Superior Court Judges is an exception from the power which would otherwise have belonged to the Provincial Legislatures, it is not a fair element to introduce into an argument as an indication that the Provinces do not constitute and organize the Courts which they plainly have the power to erect. It is also to be observed, that no express power is given to any constituted authority to appoint the Judges of the Courts of Probate in Nova Scotia and New Brunswick. By what authority, then, are they appointed? Plainly the power remains to the Provincial authorities, either under number 14 of section 92, or under section 129, which provides for a continuance of existing laws, Courts, and officers. If that be so, then it is confirmatory of the position we contend for with respect to the Superior Court Judges. For, would not the power to appoint the latter have resided with the same authorities for the same reasons, but for this section 96?

We have confined ourselves so far to the case of a system of judicature deriving its origin from Provincial legislation since Confederation. But the Supreme Court of British Columbia complains that it is not the material which the Provincial Legislature has the right to utilize in the construction of new Courts. The learned Judges maintain that when the Province entered Confederation its Courts and Judges became at once subject to the Federal authorities; that its Imperial constitution and organization took it out of the meaning of number 14 of section 92. That depends upon the construction of section 129 of the Act.

With great respect for their Lordships, we maintain that it is not absolutely necessary that a Court should have been originally constituted by the Province in order to be within its jurisdiction. It seems to be sufficient that it should be a Court of a class or species which the Province could con-

stitute and organize. Its nature upon entering Confederation assigns it a place in the legislative jurisdiction of Canada. Section 129 enacts that, "All laws in force in Canada, Nova Scotia, or New Brunswick, at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject, nevertheless (except with respect to such as are enacted by, or exist under, Acts of the Parliament of Great Britain and Ireland), to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act." Upon entering Confederation, the pre-confederate Province of British Columbia became extinct. But for this section, probably, nothing but its soil would have been acquired by Canada. When it became a Province of Canada it became subject to the divided jurisdiction of the British North America Act. Its laws became subject to repeal or alteration, and its Courts and officers to abolition (to use the words of the Act), either (i) by the Parliament of Canada, or (ii) by the Legislature of the new Province, "according to the authority of the Parliament or of that of the Legislature under this Act;" *i. e.*, as we understand this section, according as the Act has given authority or jurisdiction to the Parliament of Canada, or to the Provincial Legislature, in the distribution of legislative power, to deal with the class within which the subject might fall. We cannot do better than refer to the construction which the judicial committee of the Privy Council has placed upon this section. In *Dobie* v. *The Temporalities Board* (*g*), Lord Watson, in delivering the judgment of their Lordships, said, "But that enactment is qualified by the provision that all such laws, with the exception of those enacted by the Parliament of Great Britain, or of the United Kingdom of Great Britain and

(*g*) L. R. 7 App. Cas. at p. 147.

Ireland, shall be 'subject to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Provinces, according to the authority of the Parliament or that Legislature under this Act.' The powers conferred by this section upon the Provincial Legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the Province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. In order, therefore, to ascertain how far the Provincial Legislature of Quebec had power to alter and amend the Act of 1858 incorporating the Board for the management of the Temporalities Fund, it becomes necessary to revert to sections 91 and 92 of the British North America Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the Legislatures of the respective Provinces have the exclusive rights of making laws." In order to ascertain where the power resides to directly legislate with respect to the Court in question, it becomes necessary to revert to sections 91 and 92, and with these sections before us we are to proceed in the manner pointed out in *The Citizens' Insurance Co.* v. *Parsons* (*h*). "The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the Provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the Provincial Legislature is or is not thereby overborne." The first question, in dealing with the enactment in question, is, Does it fall within any of the

(*h*) L. R. 7 App. Cas. at p. 109.

classes of subjects enumerated in section 92? Plainly, it falls within number 14 of section 92, "The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts." True, answers the pre-confederate Court, the administration of justice is within the power of the Provincial Legislature to deal with, but this Court is not a Provincial Court, and so is not *prima facie* within its authority. But what is there to indicate whether it is a Provincial Court or not? There must be some test in sections 91 and 92. If we follow the rule in *Parsons'* case, we are now to look at section 91, and see whether the Act in question falls within one of the classes of subjects enumerated therein. There is not one which can be said to embrace it. There is nothing respecting the administration of justice or the constitution of Courts in the whole section, with the exception of number 27, which deals with criminal law and procedure, and excepts from the powers of the Federal Parliament thereby granted the right to constitute Courts of criminal jurisdiction There is an indisputable intention in the Act that, in the immediate future of Canada, the administration of justice was to be dealt with by the Provinces and by the Provincial Courts; and therefore the existing Courts at the time of Confederation take their places amongst the instruments for the administration of justice, and are classed as Provincial Courts, and subject to the legislative control of the Provincial Legislatures. The existing Courts, upon entering Confederation, could not take their places as Federal Courts, for section 101 indicates, as we have endeavoured to show, that the power in the Federal Parliament of erecting Courts is a reserve power—a power to be exercised in the future, when the occasion arises for the better administration of the laws. And the fact that this power is to be exercised notwithstanding anything in the Act, is proof conclusive that there is something in the Act which would have prevented the exercise of the power but for this section. What that is is difficult of ascertainment, unless it is number 14 of section 92.

(To be concluded.)

EDITORIAL REVIEW.

The Status of an ad hoc Court of Appeal.

Without questioning the right of the Chief Justice of Ontario and the Judges of the Common Pleas Division to erect the latter into a Court of Appeal, which interesting question we leave to those who are more directly affected by their decisions, we would reflect a little upon what weight is to be given to the decisions rendered, which are published *ante* pp. 505 *et seq.* Though County Court cases, some of them are of no little importance. We might instance *Grant* v. *VanNorman*, *Lambiere* v. *School Trustees*, *Austin* v. *Davis*, *McLean* v. *Pinkerton*, *Stoeser* v. *Springer*, and *James* v. *Balfour*. The first of these, if not cited in the next case that occurs under R. S. O. cap. 118, will at least form a most useful "coach" in advising upon the most efficacious way to obtain a preference. We must not be understood as speaking of cases exactly parallel to it, which we hope, for the honour and comfort of the profession and public, will be rare, but of cases proceeding upon a like principle. *McLean* v. *Pinkerton* is the only, and will henceforth be the leading, authority upon its subject matter. And *Austin* v. *Davis* will be cited and cited, whenever the question of damages comes before a Divisional Court or the Court of Appeal.

What weight will these cases have before the various Courts? Are they to be regarded as binding upon the Divisional Courts of the High Court of Justice? Or, are they to be regarded merely as the decisions of a Court of co-ordinate jurisdiction? Is the Queen's Bench Division still to be at liberty to perpetuate its difference of opinion from the Common Pleas Division upon chattel mortgage questions, as evidenced aforetime in *Feehan* v. *Bank of*

Toronto, 19 U. C. R. 474, where the Court of Queen's Bench held that the registration of a chattel mortgage caused it to relate back to its date, while the Court of Common Pleas, in *Feehan* v. *Bank of Toronto*, 10 C. P. 32; *Shaw* v. *Gault*, *Ibid*, 236; *Haight* v. *McInnes*, 11 C. P. 518, persisted in holding that the registration did not cause it to relate back to its date until the Legislature stepped in and made that the law? Or is the Common Pleas Division to steal a march upon the Queen's Bench Division, and anticipate any little difference of opinion by delivering a decision binding upon all Courts in the Province? If the same questions should again come before the same learned Judges sitting as a Divisional Court of the High Court of Justice, are they to be bound by their former decision as a Court of Appeal, though they may believe they have good reason for changing their views?

Again, were they bound to follow the rulings of the Court of Appeal, or were they at liberty, as the Court of Appeal, to overrule the former decision of that Court, as in *Austin* v. *Davis*, *ante* p. 507? Are the other Divisions to follow the decision in *Denny* v. *Montreal Tel. Co.*, 3 App. R. 628, as the binding decision of a higher Court than that which decided *Austin* v. *Davis*, or are they to follow the latter case as the latest decision of the Court of Appeal?

More interesting still is the enquiry, whether the Court of Appeal itself will elect to follow *Denny* v. *Montreal Tel. Co.*, in which they reversed the Queen's Bench and disregarded *Austin* v. *Davis*, or follow the latter case as their latest decision? If the Judges of the Queen's Bench Division had happened to sit by the same authority as those of the Common Pleas Division in this case, would they have been justified in adhering to their decision in *Denny's* case, and overruling the decision of the Court of Appeal, which had formerly overruled them?

These questions, besides being interesting, are of importance. Whoever advised the appeal in *Austin* v. *Davis* no doubt relied upon *Denny's* case to have the damages assessed finally by the Court of Appeal, if the appeal were successful.

Instead of this, on account of the unexpected *personnel* of the Court which hears his client's appeal, there is to be a new trial, with the chances of a prolongation of the litigation by further motions and appeals.

The Late Chief Justice of Manitoba.

Suddenly, in the midst of his labours, the Honourable Edmund Burke Wood, Chief Justice of Manitoba, has been taken away. He was in many respects an extraordinary man, though we do not think he possessed the attributes of greatness. His unusual abilities would, but for his erratic disposition, have made him a leader amongst men. At the bar he rose rapidly, and was a successful man. In politics, he displayed a talent for finance which gained for him the Treasurer's portfolio in the first Ministry of the Province of Ontario. How, when such Treasurer, he found it his duty to rise in his place in the House, and condemn the policy of the Ministry to which he belonged, is part of the history of the Province of Ontario. How his erstwhile political opponents, recognizing in him the gift of impartiality in the superlative degree, made him a Chief Justice, is part of the history of the Province of Manitoba.

During his Chief Justiceship many and rapid changes have taken place in his Province. From a sparsely settled country of no pretensions and doubtful expectations, it has become in some parts thickly inhabited, and with a future full of the most sanguine hopes. Upon his Lordship's accession to the Bench, the Bar of the Province was in its infancy. We are told that the whole Province contained but two copies of Archbold's Q. B. Practice, which contains the practice supposed to be observed—one belonging to the Chief Justice *in esse*, and the other to a Chief Justice *in posse*. Now, the Bar numbers over a hundred, according to *Rordan's Law List*, almost all of whom practice in Winnipeg, in which city are several valuable law libraries.

The decisions of the late Chief Justice have never been reported, though many of them were upon important matters. At this date we hear rumours of their intended publication. Our regular number for September, *ante* p.

428, contains a few remarks upon one of them—perhaps the most important decision for the Province that has yet been delivered.

For those who were disposed to criticise adversely the judicial career of Chief Justice Wood, it will be well to remember that it fell to his lot to do the chopping, slashing and clearing, so to speak, of a new country. And if the work was not ornamental or artistic, it was at least useful. His death, though much to be regretted, puts a welcome end to the proceedings upon the petition for his removal which was pending in Parliament.

Legal Education.

A student at law, who has not been "ploughed," finds some fault at another page with the system of examining adopted by the Law Society of Upper Canada. If the examiners were to adopt his views, and examine at large upon contracts without requiring or expecting a hard and fast answer from a particular text book, the complaints of nine-tenths of the examinants would be that, not having been examined from the prescribed book, they had not had a fair examination. If a book is prescribed for pass work, the examiner must adhere to it, however much other authors, or himself, or even the students, may disagree with the author's conclusions.

We think our correspondent's remarks, however, might very well be considered in dealing with the honour examinations. As they stand at present, the examiners are to examine candidates for honours upon the same subjects as are prescribed for pass, embracing the same number of questions, with the same aggregate value of marks obtainable in each subject. The result is, that the pass examination is merely a trial heat for the candidates for honours, who immediately thereafter run over the same course.

With respect to the want of facilities for giving vent to original ideas, our correspondent may take the word of this present writer for it, that there are more exuberant originalities to be found in one average batch of examination papers than in whole volumes of *Punch*. And he is assured

that the "loose arguments" which many candidates use, and the "unsatisfactory conclusions" which a few unfortunate gentlemen arrive at during every examination at Osgoode Hall, far outstrip the defects of a like nature in Pollock on Contracts.

For serious originalities upon subjects of interest, our pages are open to our correspondent, who, we are glad to see, is enthusiastic about his profession.

Unprofessional Conduct.

We publish two letters upon this subject, one from the writer of the communication which appeared in our regular October number, and the other from a gentleman who adopts as his pseudonym the letters which were used to designate the solicitor alluded to.

With respect to the letter of apology, it commends itself for its frankness and openness. It is all that could be expected of the writer from either the solicitor or the Profession at large. And, for our own part, we think it all the more honourable in that it has come from him unasked, and immediately upon discovering that he had been deceived. For ourselves, we regret that this journal was made the means of giving the original letter publicity; but, as the writer of the letter declares that its contents must be withdrawn, as being without sufficient foundation, no one can possibly be injured; for, if no such facts exist no one has been guilty of unprofessional conduct. The profession at large alone suffers from the suggestion that such conduct could be found in its ranks.

With respect to the letter of denial, signed J. S., we may say that we have not, nor hath, nor have any person, or persons for us, or by our order, or on our behalf, written an anonymous, or any, postal card, insulting or otherwise, to the writer of J. S.' letter, and that we or they are not in any manner responsible for so unjustly connecting him with the charges made. He has sufficiently established by his letter that he is not the guilty solicitor, if indeed that

is not sufficiently established by a denial that the facts ever existed. Still, he has the right to publish his disclaimer; and so have the eleven hundred and one other solicitors in Ontario, for whose disclaimers we shall keep our pages open if they wish; but we warn them that the correspondence must *then* positively cease.

Attempt to Influence Jurors.

We learn from the Daily Press that an attempt was made to unlawfully influence a juror during the present autumn circuits. The offender, who is, it appears, a Justice of the Peace, was promptly fined $50 and imprisoned for twenty-four hours, but we have not yet heard that his commission has been revoked, and we think he may therefore congratulate himself upon getting off so easily. An attempt to influence a jury unlawfully is as heinous an offence as an attempt to poison a well, and there is no danger of administering too severe a punishment. With great respect for the learned Judge who imposed the sentence, we think a more severe one would have done no harm. We suppose, inasmuch as there has been found a man ready to risk the consequences of approaching a juror, there will again be found men who will do likewise, if they see any probability of succeeding. And the example of $50 and twenty-four hours' incarceration might, to some such men, appear a mere bagatelle where a large sum or a human life was at stake. In the meantime, we may be thankful that such attempts are extremely rare; but would it not be as well to isolate the jury from the opening of a case to the rendering of the verdict?

It occurs to us that we have lately seen it proposed by our American cousins, that the possibility or probability of jurors being bribed should be an element for consideration in framing jury laws. It is urged that the verdict should be the verdict of a majority; for, while a disagreement, at least, can be procured by "fixing" one juror, the same operation would be too herculean a task if it had to be performed upon a majority.

The Law School at Osgoode Hall.

The winter session of the Law School at Osgoode Hall has commenced. The subjects for the lectures have already been made public. There is a much larger attendance this session than there was at the last. We are not aware to what direct cause this is owing, but the fact that the lectures are delivered in the evening instead of in the morning, may have something to do with it. The students must recollect that it was at their own solicitation that the school was re-established, and the lecturers expect, as a return for their labours in preparing and delivering their lectures, an encouraging attendance.

CORRESPONDENCE.

Unprofessional Conduct.

To the Editor of the Canadian Law Times:

DEAR SIR,—I find that in writing to your Journal about the alleged unprofessional conduct of a practitioner I accepted what was hearsay evidence. Further inquiry on my part failed to substantiate the charges, and I now beg to apologize to the practitioner in question, and to express my regret at having made the charge. I was not, however, animated by any personal motive. The design of the letter was to draw the attention of the Benchers to the evil of "touting" for business, which is becoming a feature of late, at least in outside places. Finding, however, that I would take up too much space in one letter, I first narrated what I believed to be facts, and intended to comment at further length at a future date. However, having accepted what I find to be second-hand information, I beg now to make a retraction, and trust that this will do away with any annoyance caused.

Yours truly,

THE WRITER OF THE LETTER.

October, 1882.

To the Editor of the Canadian Law Times:

SIR,—A letter in the October number of your Journal has been brought to my notice by an anonymous and insulting card through the post office.

I have been informed that the writer's published remarks refer to me, and I now beg leave to say that the writer is not correct in his statements.

I deny that I went to parties to obtain their claims for suit, as stated by the writer.

I also deny that I made use of the language to R., as stated. I had no conversation with him about criminal proceedings whatever, nor did I make use of any threat to him.

I have written to the proper officer of the Law Association to which I belong, asking to have the matter inquired

into. And, in conclusion, would say that I hardly think it fair on your part, Sir, to reflect on my conduct, until you had given me an opportunity of replying to the charge.

Yours, etc., J. S.

Legal Education.

To the Editor of the Canadian Law Times:

DEAR SIR,—May I ask room in your pages for a protest against the present system of law examinations.

I suppose, so far as the Law Society is concerned with legal education, its objects may be sufficiently described as being: (*a*) The general advancement of legal knowledge and education in the profession, and (*b*) To test this knowledge in candidates for admission to the Bar in accordance with a certain prescribed standard. With these objects in view, the Law Society prescribes certain text-books for study, and certain examinations to be passed by all such candidates. Examinations are, admittedly, extremely unsatisfactory tests of knowledge, but still, what we may presume to be the *ultimate* objects of the Law Society in this respect—viz., to promote as far as possible a high standard of legal knowledge—should not be lost sight of, or confused with the *immediate* object of these examinations, as tests of the minimum knowledge in candidates for admission.

It seems to me that these ultimate objects might be furthered, without in any way interfering with the immediate objects of the examinations, by some changes in the present system, by which the examination is strictly confined to certain prescribed text-books, and so becomes a test of the student's knowledge of the particular text-book only—not of his general knowledge and grasp of the subject. No one can, of course, deny that if you want to test a man's knowledge of *Snell's* Principles of Equity, the best way to do it is to examine on that work alone; but then this examination should not necessarily be considered a test of his knowledge of the subject of Equity Jurisprudence at large. Nothing can be more demoralizing to a broad comprehensive view of any subject than slavish adherence

to any particular text-book; and, to a certain extent, it seems to me that the present system of law examinations has a decided tendency in that direction. It is true that different text-books are prescribed at the different examinations, but the point is that each examination is so strictly confined to the particular set of text-books prescribed for it, that students are practically discouraged in making a comparison of results, and the examination is useless as a test of the student's grasp and power of balancing different theories, or of any original ideas which in some cases he might not unreasonably have been expected to form. To illustrate my meaning: Broom's Common Law (2nd Intermediate) treats the subject of contracts in an entirely different way from Pollock on Contracts (Call); but no one, I fancy, on being asked at the Second Intermediate to mention the elements of a contract, would be expected (or even allowed) to depart from the "request, promise and consideration" given by Broom, however unsatisfactory such an arbitrary and artificial arrangement may have appeared to him; while, on the other hand, at the examination for call, all questions on contracts would be expected to be answered solely by Mr. Pollock's conclusions, though no great amount of legal acumen is necessary to find loose argument and unsatisfactory conclusions in his work on contracts.

The difficulty, even if recognized, is no doubt very hard to deal with, but, if certain text-books must be prescribed, surely something might be done by the examiners to encourage an intelligent study of them, instead of that slavish adherence which is now only too prevalent. At the Final Examinations, the system which is largely in vogue at the University of Toronto, of simply *recommending* certain text-books for study and reference, and then examining on the subject, without being bound to adhere to the views of any particular author, might with advantage be adopted by the Law Society.

Yours truly,

STUDENT-AT-LAW.

Toronto, 6th October, 1882.

REVIEW OF EXCHANGES.

Albany Law Journal—2nd September, 1882.

Negligently signing Negotiable Note. If the signer can read, but depending upon the representations as to the character of the instrument, signs without reading, he is bound by it in the hands of a *bona fide* holder. If he is unable to read, he must demand to have the paper read to him; if misread by the payee's agent, he is not bound. Where the signer read one paper to himself while another read aloud what purported to be a copy, and he signed, retaining the one which he did not read, which was not a note, held that he was liable on the other, which was a note, in the hands of an innocent holder. A good many cases are cited, all American, which do not agree entirely in principle. In connection with this, see *Burrows* v. *Leavens*, 1 C. L. T. 697.

Ibid.—9th September, 1882.

Duty towards infant trespassers on dangerous premises, etc. English and American cases are cited on the subject.

Ibid.—16th September, 1882.

Conveyance of Easements by Implication. Concluded in the following number. A collection of cases, English and American, upon dams and mill sites, and similarly openly visible property; underground drains and similar non-apparent appurtenances; and rights of way. *Pyer* v. *Carter*, 1 H. & N. 916, by the way, is cited without mentioning the important case of *Wheeldon* v. *Burrowes*, L. R. 12 Chy. D. 31, in which it was disapproved of and dissented from.

Ibid—23rd September, 1882.

Malice in actions for Slander and Libel, by CHARLES M. PLATT. "Our present object," says the learned writer, "is first to show that in actions of slander and libel malice is essential, or (what is the same thing) that an allegation of malice in the complaint is material, or (what is the same thing) that a general denial puts it at issue; secondly, to show from what confusion of thought and expression the contrary doctrine arises; thirdly, to point out certain corollaries of this proposed discussion."

Ibid.—7th October, 1882.

Covenant not to re-engage in business—Covenantee's discontinuance of business. The English doctrine is stated, that the agreement not to carry on business is not void because not limited to the time that the covenantee might carry on the business. This is combatted by a writer in the *Western Jurist*, whose position is assailed.

Rules relating to Opinion Evidence, by JOHN D. LAWSON. As to art and artists, the learned writer proceeds, Rule 1. Upon questions relating to the arts or sciences, persons who have made the subject matter of enquiry the object of particular study and attention, may give their opinions in evidence. Rule 2. But mere opportunity for observation, without special study and attention on the part of the witness, is insufficient to qualify him as an expert within Rule 1. Rule 3. The opinion of a specialist in another but kindred branch, may be admissible.

Ibid.—14th October, 1882.

Common Words and Phrases. The following words and phrases are defined :—About, Accident, Appropriated, At, Conveniences, Deposit—Expose, Disorderly House, Domestic purposes, Dwelling-house, Family, Dram-shop, Drift-stuff, Indecent, Speed, Lives, Load, Lost, Machinery of a saw-mill, Mail.

American Law Register, September, 1882.

The adoption of the Common Law by the American Colonies, by RICHARD C. DALE. An exhaustive review of cases in which it has been decided that the Common Law so far as it suits the requirements of the States was introduced. It is also shown that the Common Law exists in the Western States as having a common origin formed from colonies which constituted a part of the same empire. A similar presumption prevails as to the existence of the Common Law in those States which have been established in territory acquired since the Revolution, where the territory had no law of its own. As to Ecclesiastical law, it has been decided in some cases that the civil Courts have jurisdiction of cases in which rights of person or property are involved, which in England are solely within the jurisdiction of the Ecclesiastical Courts. The United States, as a Federal Government, have no Common Law.

Ibid.—October, 1882.

The Right to Counsel in a Criminal Case, by HAMPTON L. CARSON. A historical retrospect of the cases in which the right was denied, and its subsequent growth.

American Law Review.—October, 1882.

Charter-party, by ORLANDO F. BUMP. Continued from the preceding number. The learned writer treats of Repairs when Contract of Affreightment; Repairs when Charter-party is a demise; Well-manned; Place of Vessel; Time of Sailing; The Voyage; Condition Precedent; Lighters; Cargo; Full Cargo; Damages for failure to furnish a full cargo; Stowage; Diligence in sailing; Liability of owner; Damages against owner; Penalty; Time when obligation to load or discharge commences; Place of discharge; Time for loading or discharging; Demurrage; Damage in the nature of demurrage.

Canada Law Journal.—1st September, 1882.

Allowance of Interest. ANONYMOUS. Mercantile instruments bear interest from maturity only in the absence of agreement to the contrary. Upon all instruments bearing interest after they mature interest should be allowed at the same rate as the debt bore before maturity, if it were

reasonably within the contemplation of the debtor and creditor that the rate contracted, for which the debt was maturing would be the rate after maturity as well. Solicitors are entitled to interest on their bills if demanded when rendered.

Ibid.—*15th September*, 1882.

The Value of Children. ANONYMOUS. A semi-humorous article, citing cases of assessments of damages for injuries to children.

Ibid.—*1st October*, 1882.

Promise to make a Will—Roberts v. Hall. This case which was recently decided by the Chancery Division, *ante*, p. 497, is discussed, and some other cases are cited.

Central Law Journal.—*4th August*, 1882.

Irregular Indorsers of Promissory Notes, by JOSEPH H. JOYCE. The law of the various States is exemplified by the citation of numerous cases.

Books of Science as Evidence, by F. R. MECHEM. Cases are cited, showing that such books are not admissible as evidence, though they may form the foundation of the knowledge and opinions of scientific witnesses, who should be called. But a book may be produced to disprove the statement of a witness that it contains, or does not contain, what he alleges it does not or does. An expert when testifying may cite authorities, and refresh his memory, by referring to them; but he should state the matter as his opinion, and not read extracts from the books.

Ibid.—*11th August*, 1882.

The Rights of Pew-holders, by JAMES A. SEDDON. The right of a pew-holder is not an easement. In all the States, except Pennsylvania, pews are real estate. In Massachusetts, a devise of all a testator's real estate carried a pew. A contract for sale of one is within the Statute of Frauds. The right of a pew-holder is an incorporeal one. Where a church was erected on leased ground, with a privilege of selling the building at the end of the lease, the pew-holders were entitled a share of the proceeds of the sale. A reconstruction of the interior of the church, on account of dilapidation, destroys the titles to the pews. Our own cases on pews are *Ridout* v. *Harris*, 17 C. P. 88, and *Brunskill* v. *Harris*, 1 E. & A. 322.

Ibid.—*18th August*, 1882.

Record of Deeds, when Notice, and of what, by T. W. PEIRCE. The American law upon the subject is illustrated.

Ibid.—*25th August*, 1882.

Rights and Liabilities of the Owner, Hirer and Driver of Horses, by JOHN W. SNYDER. A driver must use ordinary care: he is not bound to keep on the ordinary side of the road, but if he does not he is bound to keep a better look out than usual. The liability of the master for his servant's acts is then treated of. A son driving his father's carriage

is considered as in the father's employment. Where one hires a horse the relationship of master and servant is not established. The hirer of a horse is bound to feed and water him, and exercise the ordinary care required of a bailee for hire, and he must keep to the contract and not drive in a different direction, or in another way than it permits.

Ibid.—1st September, 1882.

The Law of Escrows, by C. B. ELLIOTT. The subject is treated generally and historically; the instrument must be a complete contract, excepting delivery, which must be to some third person; no particular words are necessary; no formal second delivery is necessary unless the necessity is created by the words of the first; no title is acquired by a delivery before performance of the conditions; the delivery of an escrow will not take a sale out of the Statute by Frauds, the terms of the contract not appearing from the deed, but the conditions may have to be proved by parol.

Specific performance of Parol Contracts relating to Lands, by ISAAC N. PAYNE. The subject is treated upon admissions of the defendant and part performance.

Ibid.—8th September, 1882.

Telegrams and Telegraph Companies, by R. F. STEVENS, JR. A Telegraph Company is liable for delivering a wrong message by mistake of its operator. It cannot limit its liability to an unreasonable extent, so as to exempt it from damage for gross negligence. A stipulation that the Company will not be liable for errors and delays in transmission and delivery, etc., and should only be bound to return the amount paid by the sender is against public policy, so far as it undertakes to protect the Company from liability, on account of the negligence, or fraud of its agents. There is authority contra. They are responsible for loss occasioned by delay in sending a message if they undertook to send it in time.

Criminal Law Magazine.—July, 1882.

Jurors as Judges in Criminal Cases, by HON. DECIUS S. WADE. The subject of the inquiry is, Does the Judge, in charging the jury in a criminal case, authoritatively declare the law of the case, or are the jurors rightfully judges of both law and facts? Very ancient authorities are cited to show that the office and power of jurors was judicial, and that they could take upon themselves to judge both of the law and the fact. Early and modern American authorities are cited to the same effect. The learned writer then says, that the foundation of the doctrine rests upon two facts: First, that the jurors have the *power* to disregard the law as given them in charge by the Court; and second, that if they do so disregard the law, and acquit the defendant, there is no remedy, for no man shall be twice put in jeopardy for the same offence. The learned writer adversely criticises the doctrine.

THE

CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Dominion Election Cases.

ONTARIO.] [CAMERON, J., 20TH OCTOBER, 1882.

In re RUSSELL ELECTION CASE.

Dominion election case—Jurisdiction of High Court of Justice, Ontario—Entitling of petition—Delivery to officer of Court of Queen's Bench—Security—Mode of depositing.

The Dominion Controverted Elections Act, 1874, designated the Court of Queen's Bench as a Court for the trial of controverted election cases. By the Ontario Judicature Act, 1881, sec. 3, the Superior Courts in Ontario were consolidated into the High Court of Justice, of which the Queen's Bench formed the Queen's Bench Division, which High Court, with the Court of Appeal, formed the Supreme Court of Judicature. By sec. 10, the jurisdiction of the several Courts vested in the High Court of Justice ceased to be exercised except in the name of the said High Court. By sec. 58, the officers of the Queen's Bench were attached to the corresponding Queen's Bench Division to perform the same duties as nearly as possible. The petition in this case was styled, "In the Queen's Bench, High Court of Justice, Queen's Bench Division," and was delivered to an officer of and in the office of the Queen's Bench Division, with whom and in which the business of the Court of Queen's Bench had formerly been transacted, without any special directions to him. The officer receiving it entered it in the procedure book of the Queen's Bench Division.

Held, following the *North York Election Case, ante*, p. 490, that the Court of Queen's Bench is still an existing Court for the presentation and

trial of Dominion Controverted Election Petitions, and is not the same Court as the Queen's Bench Division, which is a branch of the High Court of Justice, and not a distinct Court.

Held, also, that the words "High Court of Justice, Queen's Bench Division," added in intituling the petition, might be rejected as surplusage; and, therefore, the petition had been properly presented in the Queen's Bench.

Held, also, that the act of the officer in entering it in a wrong book should not prejudicially affect the petitioner.

Semble, that payment into the Canadian Bank of Commerce of $1,000 in Dominion notes, under a direction from the accountant of the Supreme Court of Judicature, is not a compliance with the Act which requires a deposit of the notes or gold with the officer who receives the petition.

Bethune, Q.C., for the petitioner.

McCarthy, Q.C., and *Creelman*, contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B.] [23RD SEPTEMBER, 1882.

REGINA *ex rel.* GRANT v. COLEMAN.

Quo warranto—Municipal election—County Court Judge—Setting aside writ—Appeal.

A County Court Judge directed the issue of a writ of *quo warranto* returnable before himself, to test the validity of the election of an alderman. Before appearance he set aside all proceedings for irregularity.

Held, dismissing the appeal from the Queen's Bench affirming the order of Hagarty, C.J., refusing a mandamus to compel him to try the case, 8 P. R. 497; 46, U. C. R. 175; 1 C. L. T. 387, that there was no power to review the order of the County Court Judge if it was within his jurisdiction to make it; if it could have been reviewed, the application should have been to the Court, and not to a Judge in Chambers, as in this case; if the order, however, was not within his jurisdiction, a mandamus to compel him to try the case was properly moved for, but the relator, on other grounds, was not entitled thereto; and in any case the appeal should be dismissed, but without costs.

Per Patterson, J.A. The County Court Judge having made an order for the writ, and the writ having issued and having been served, he had no power to set it aside.

McMichael, Q.C., for the appellant.

Aylesworth, for the defendant.

BAILLIE v. DICKSON.

Promissory note—Notice of dishonour, sufficiency of—Renewal—Satisfaction.

The judgment of the Court below, 46 U. C. R. 167; 1 C. L. T. 423, was affirmed.

The note in question was not stamped according to law, and it was argued that it could not therefore be a payment or satisfaction of a note of which it was a renewal.

Held, that the plaintiff, knowing the character and value of the unstamped note, and accepting it for the paper which he held, could not be heard to argue this, especially as he had declared upon it as a promissory note.

Bethune, Q.C., for the appellant.

Geo. Kerr, jr., for the respondent.

C. P.]

NEILL v. THE TRAVELLERS' INS. CO.

Accident policy—Voluntary exposure to unnecessary danger—Nonsuit—Onus of proof.

On appeal from the judgment of the Court below directing a nonsuit, 31 C. P. 394; 1 C. L. T. 60, the Court was equally divided.

Per Hagarty, C.J., and Cameron, J. The evidence showed that the deceased had voluntarily and deliberately gone unnecessarily into a place of danger.

Per Burton and Patterson, JJ.A. There should be a new trial, for the onus lay upon the defendants to establish a breach of the condition that the deceased had voluntarily exposed himself to unnecessary danger, and the plaintiff was not bound to disprove this as part of his case. If there was any evidence to support the case it was proper for the jury; and if the evidence offered by the defence was not sufficient to establish the defence that the deceased had voluntarily exposed himself to unnecessary danger, the verdict should have been for the plaintiff.

There was a condition in the policy against standing or walking on a railway track.

Per Hagarty, C.J., and Cameron, J. The deceased had broken this condition by being upon the railway track in his buggy.

Per Burton and Patterson, JJ.A. The condition was directed against the well known practice in this country of using railway tracks as highways, and did not refer to every instance of accident to the assured while he might be on a railway track.

S. H. Blake, Q.C., and *G. H. Watson*, for the appellant.

Robinson, Q.C., for the respondents.

MILLS v. KERR.

Assignment for benefit of creditors—Restriction to partnership creditors.

Held, affirming the judgment of the Court below, 32 C. P. 58; 1 C. L. T. 428, that a deed of assignment for the benefit of creditors, made by a partnership, and expressed to be for payment of partnership debts only, was void as preferring partnership to separate creditors.

S. H. Blake, Q.C., for the appellant.

Rose, Q.C., for the respondent.

SPRAGGE, C.]

ADAMSON v. ADAMSON.

Grant, construction of—Equitable estates—Statute of Limitations.

A grant of Whiteacre to G., and Blackacre to A., to the use of them, their heirs and assigns, as joint tenants, and not as tenants in common.

Held, that G. and A. took the respective estates in severalty.

Held, also, affirming the judgment of the Court below, 28 Gr. 221; 1 C. L. T. 183, upon the facts there stated, that the tenant of an equitable tenant for life, in setting up the Statute of Limitations against the equitable remainder-man, could not be allowed to compute the time during which he had been in possession prior to the death of the tenant for life.

Per Burton, J.A. An equitable owner cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name, but is still compelled to use the name of the trustee.

The provisions of the Statute of Limitations, respecting equitable estate summarized.

Per Patterson, J.A. The plaintiff was entitled to recover in respect of his equitable estate.

Bethune, Q.C., and *Moss, Q.C.*, for the appellant.

Mowat, Q.C., *A.-G.*, and *Maclennan, Q.C.*, for the respondent.

BLAKE, V.C.]

NELLES v. BANK OF MONTREAL.

Insolvent Act of 1875—Unjust preference.

M. had a line of discount with the defendants of $20,000, for which $5,000 of collaterals were deposited as security; and long before his insolvency, he increased his indebtedness to the defendants, upon the express understanding that more collaterals were to be deposited. The transaction whereby the last collaterals were assigned to the defendants, took place more than thirty days before the insolvency, and was impeached by M.'s assignee.

Held, affirming the decision of the Court below, that the transfer to the defendants, of the securities as collaterals was valid, the plaintiff having failed to establish that M. contemplated insolvency.

Held, also, that the want of knowledge by the defendants' manager would not have availed the defendants, if the insolvent had, in fact, made the transfer in contemplation of insolvency.

Another transfer had been made to the Bank within thirty days of the insolvency, which was also impeached, but upon the faith of which the Bank had made advances to M. exceeding the value of the securities so transferred, which would not otherwise have been made.

Held, that, as the Bank had not thereby obtained an unjust preference, the transaction could not be impeached.

Rose, *Q.C.*, and *J. H. McDonald*, for the appellants.

Street, for the respondent.

PROUDFOOT, V.C.]

BEAVIS v. MAGUIRE AND WIFE.

Conveyance for value—Hindering creditors—13 Eliz. cap. 5.

The male defendant mortgaged his property several times, and finally sold the equity of redemption. His wife barred her dower in each mortgage under an agreement with her husband, made on the first occasion, that he would convey other property to her. Upon this claim being reiterated on the sale of the equity of redemption, the husband conveyed other land to a trustee for her. The effect was that the plaintiff, a creditor of the husband, was delayed and hindered in recovering his debt.

Held, affirming the decision of the Court below, that the conveyance to the wife's trustee was not voluntary, and as the transaction was found as a fact to have been honest and without intent to defraud creditors, it could not be impeached under 13 Eliz. cap. 5.

Moss, *Q.C.*, and *Beck*, for the appellant.

S. H. Blake, *Q.C.*, for the respondent.

MACDONALD v. WORTHINGTON.

Partnership articles, construction of—Ownership of stock—Law of Quebec—Reformation of articles.

The plaintiffs and defendant M., having on hand large contracts to fulfil, took the defendant W. into partnership. The articles of agreement, which were drawn in the Province of Quebec, declared that the plant which the plaintiffs contributed should "become the property of the said firm of J. W. & Co., that is to say, the one-half thereof shall revert to and belong to [the plaintiffs], and the other half to W." The law of Quebec was proved to be that if nothing were provided by the articles as to ownership of the plant, it would be taken out of the partnership at the conclusion.

of the same by the party who contributed it before division of profits. The plaintiffs all swore that the intention was that the plaintiffs should get credit for the plant as their property in taking the accounts of the partnership. It was shown also that, on the treaty for the partnership, inventories of the plant were drawn, and its value was discussed, the plaintiffs putting it at $57,130, W. at $40,000. The notary who drew the articles swore that if it had been intended to make a transfer of the property in the plant he would have expressed such intent more explicitly. The bookkeeper swore that the plaintiffs had claimed credit in the books for the plant from the first, that he had, in discussion with W., assigned as a reason for not immediately crediting the plaintiffs that the plant was under mortgage.

Held, that upon a true construction of the articles of partnership as drawn, the plant was withdrawn from the operation of the law of Quebec as proved, its ownership being expressly provided for by the instrument, but that the evidence given by the plaintiffs was clear and satisfactory that a mistake had been made in drawing the same and that the articles should be reformed, so as to entitle the plaintiffs to credit for the plant in taking the accounts; and the judgment of the Court below was reversed.

McCarthy, Q.C., for the appellant.

Bethune, Q.C., for defendants in same interest.

S. H. Blake, Q.C., and *W. Cassels*, for the respondent.

Co. J. STORMONT, D. & G.] [BURTON, J.A., 23RD SEPTEMBER, 1882.

In re RUSSELL.

Insolvent Act of 1875—*Discharge under section* 64—*Retention and concealment of estate—Negligence in keeping books—Onus of proof as to.*

Where a deed of composition and discharge had been executed by creditors who had received their composition, but had not been executed by the insolvent, and was therefore incapable of confirmation,

Held, that the insolvent was not thereby precluded from moving for his discharge under section 64 of the Insolvent Act of 1875.

The retention and concealment of some portion of the insolvent's estate and effects, to be within the meaning of section 56 of that Act, must be a wilful and fraudulent retention.

The onus is on the contestant in opposing a discharge to show that there were no books or defective books kept. The insolvent kept only a day-book, the contents of which were not shewn, and though negligence in keeping books, within the meaning of section 57 of the Act, might be imputable to the insolvent, effect was not given to the objection coming from a creditor who had received his composition.

Co. J. CARLETON.]

In re HILL.

Insolvent Act of 1875—Application for discharge—Non-disclosure of causes of insolvency—Defective books.

The insolvent, nine months before his insolvency, stated to the contestant that he had a surplus of $40,000. When he failed it appeared that there was a deficiency of about that amount, the difference not being satisfactorily accounted for. He did not produce all his books, but it was shown that they were kept in such a condition that the true state of his affairs could not have been ascertained therefrom. The cashbook was never balanced, no balance sheet was made out, bills were discounted which did not appear in any of the books, and goods were transferred from one establishment to the other (the insolvent having a wholesale and a retail place of business) without entry.

Held, reversing the order of the Judge below granting a discharge to the insolvent, (i) that, though an insolvent is guilty of the offence of not fully, clearly and truly stating the causes of his insolvency, that is no ground for refusing the discharge, even after a conviction for the offence; (ii) the omission to keep any books prevents the Judge from granting a discharge, whether the intent was fraudulent or not; but (iii) when they have been kept, it is not essential, on the one hand, that they should be kept in the most approved form, nor are they sufficient, on the other, however carefully kept in some respects, if they fail to exhibit the insolvent's exact position; (iv) that the evidence in this case disentitles the insolvent to his discharge. Liberty to apply was given on the insolvent procuring the remainder of his books.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[CAMERON, J., 20TH OCTOBER, 1882.

REGINA v. BENNETT.

Canada Temperance Act, 1878—Information—Several offences—Amendment after close of case—Order in Council, proof of—Evidence—Constitutional law—Power to appoint Justices of Peace.

Held, that an information which includes the three distinct offences of keeping for sale, selling, and bartering, intoxicating liquors, which are prohibited by section 99 of the Canada Temperance Act, 1878, contravenes 32 & 33 Vict. cap. 31, sec. 25, which provides that every information shall be for one offence only. But

Held, that such an information may be amended by striking out all the offences charged except one; and that such an amendment may be made after the case has been closed and reserved for decision, inasmuch as the

accused is thereby relieved from answering the charges struck out, and is not prejudiced in his defence respecting that on which the conviction is based.

Held, also, that a Magistrate cannot take judicial notice of Orders in Council or their publication, without proof thereof by production of the Official Gazette, and therefore that a conviction was bad, which was made without such evidence that the Canada Temperance Act, 1878, was in force in the county pursuant to the terms of section 96 thereof.

The defendant swore that he did not sell any intoxicating liquor on the day charged. The recipient of some liquor sold on that day named it in his evidence for the defence, but there was no evidence that it was an intoxicating drink, the evidence for the Crown only showing that it resembled intoxicating liquor.

Held, that there was no reasonable evidence on which to found a conviction for selling intoxicating liquor.

Held, also, that the Legislature of the Province of Ontario had power, under number 14 of section 92, B. N. A. Act, to pass R. S. O. cap. 71, providing for the qualification and appointment of Justices of the Peace

McCarthy, Q.C., and *Fullerton*, for the defendant.

Irving, Q.C., for the conviction.

COMMON PLEAS DIVISION.

[HAGARTY, C.J., 27TH OCTOBER, 1882.

SCOTT v. CREIGHTON.

Action to recover land—Demurrer.

Upon a demurrer to the statement of defence in action for the recovery of land on the ground that, though the plaintiff's title from the Crown was confessed, a sufficient avoidance was not set up, the defendant being in possession,

Held, that a demurrer will not lie in an action to recover land except for impertinence, notwithstanding the Judicature Act.

H. W. M. Murray, for the demurrer.

Ogden, contra.

CHANCERY DIVISION.

[THE CHANCELLOR, 11TH OCTOBER, 1882.

SWAISLAND v. DAVIDSON.

Promissory note—Negotiability—"Not to be sold"—Alteration of material part—Negligence—Suspicious circumstances.

Two promissory notes made by the defendant to A. C. or bearer, each endorsed "This within note not to be sold," were given to A. C. for a patent right. The plaintiff, a private banker, acquired both notes at dif-

ferent times, at a great reduction from their face value. The first one purchased had had the word "not" erased from the endorsement, which the plaintiff saw, and the second bore no endorsement, the end on which it had been written having been torn off without defacing the instrument.

Held, that the endorsement formed a material part of each note and restricted their negotiability, and the alteration and excision of the respective endorsements vitiated the notes, and discharged the defendant from liability thereon.

Held, also, that the defendant was not negligent in writing the endorsement where it could be torn off without affecting the face of the instrument, the doctrine of negligence not applying to perfected instruments.

Held, also, that the plaintiff was not an innocent holder, for the circumstances under which he took the notes, and their appearance singly and upon a comparison, were such as should have excited suspicion, especially in an expert in dealing with negotiable paper.

STUART v. TREMAINE.

Preferential assignment—Title under same—R. S. O. cap. 118—Creditors' remedy thereunder.

A preferential assignment within R. S. O. cap. 118, gives a good title to the assignee as against the insolvent debtor, and is voidable only at the election of creditors, and if the latter do not obtain execution against the insolvent debtor while the property is in the hands of the preferential assignee, the latter can make a good title to a purchaser for value.

The plaintiff's remedy under the statute is to have any obstruction removed which impedes the operation of his writs of execution upon the insolvent debtor's goods, but he is not entitled to make the preferential assignee his debtor and cause him to account for the proceeds of his sale of the goods.

In this case the preferential assignee had applied the proceeds of sale of the goods to the claims of creditors of the insolvent debtors other than the plaintiff.

Held, that on these facts the plaintiff was plainly not entitled to a payment of the sum over again for his benefit. The principle of *Churcher* v. *Cousins*, 28 U. C. R. 549, explained and the case distinguished.

[25TH OCTOBER, 1882.

TRINITY COLLEGE v. HILL.

Foreclosure—Effect of—Purchaser of foreclosed Estate—Opening Foreclosure.

While the mortgagee retains property which he has foreclosed, the foreclosure may be opened under circumstances of great hardship if the delay

is satisfactorily accounted for; but any claim of the mortgagor to the equitable interference of the Court is forfeited, if before his application a purchaser has intervened.

Vankoughnet, for the plaintiffs.

Bain, for the defendant.

YOUNG v ROBERTSON.

Agreement for lease—Specific performance—Demurrer—Married woman—Misjoinder.

The plaintiff offered in writing to lease to defendant or his assigns certain lands. The defendant accepted in writing and directed the lease to be made the H. C. Co., to whom he had agreed to assign his rights, for which Company he was about obtaining letters patent of incorporation, and he asked if this would be satisfactory. When applied to afterwards as to whether the lease should be drawn in his favour or that of the H. C. Co., the defendant replied, refusing to accept the lease, and stating that he had assigned his interest to one R. in the United States of America, who, it was alleged, was a man of no means. The plaintiffs claimed specific performance of the agreement to lease or damages.

Held, on demurrer to the statement of claim, that whether the H. C. Co. had been incorporated or not the acceptance of the defendant remained enforceable against him.

The owners of the property were married women and their husbands were joined as parties.

Held, on a demurrer *ore tenus* for misjoinders of parties, that that is not now a ground of demurrer, but the record was allowed to be amended.

W. Cassels, for the demurrer.

W. Nesbitt, contra.

In re O'BRIEN.

Administration by creditor at domicile—Ancillary letters—Right of next of kin.

The intestate, having been adjudged to be entitled to a fund in Ontario, paid into this Court (*O'Brien* v. *O'Brien*, *ante* p. 500), died while domiciled in the State of Maine, U. S. A., leaving her surviving several next of kin, one of whom, the contestant, lived in this Province. There was no estate in Maine, but letters of administration were granted there to R., a creditor, the next of kin not having been cited. The Judge of the Surrogate Court of the County of York, Ontario, having intimated his intention of refusing ancillary letters to the applicant as the attorney of R., and of granting them to the contestant as next of kin, application was made to remove the matter into this Court, or for a writ of prohibition to prevent the issue of letters to the next of kin, or for a mandamus to compel their issue to the applicant.

Held, that, though in cases of testacy the general rule is that the grant of administration by the country of the domicile governs the discretion of the foreign Court in decreeing administration to the same person, the rule is not invariable, and it does not necessarily apply to cases of intestacy where those entitled have been passed over by the Courts of the domicile; that the next of kin were entitled as of right to administration, and, they not having been cited before the Maine Courts, the grant of administration in Ontario was purely in the discretion of the Judge of the Surrogate Court, which would not be interfered with by a peremptory writ.

Held, also, that there was no such case of contest as would justify the removal of the matter to this Court.

O'Sullivan in person, for the motion.

Donovan, contra.

In re DEFOE.

Quieting Titles Act—Assent to devise implied—Equitable tenant for life—Possession—Statute of Limitations.

The petitioner had been in possession of the land as tenant at will for eight years prior to the death of his father, who devised the land to the contestants "upon trust to demise and lease or otherwise manage and employ the land in such manner as they should deem best, and to pay the rents, issues and profits" to the petitioner for life, and thereafter to sell the land for the benefit of his widow and childen. The petitioner was aware of the devise, and remained in possession without disclaiming. He now claimed that the titles of the contestants and his co-beneficiaries were extinquished by his own possession.

Held, reversing the certificate of the Referee at Stratford, that the petitioner must be presumed to have accepted the devise, that his retention of possession after knowledge of the devise must be attributed to his rightful title under the will, and that the relation of trustee and *cestui que* trust having been thus established between the contestants and the petitioner, without a denial of the former's right, the operation of the Statute of Limitations was excluded.

Fleming, for the appeal.

Idington, Q.C., contra.

[FERGUSON, J., 23RD SEPTEMBER, 1882.

SWAINSON v. BENTLEY.

Bequest of support and maintenance—Charge upon lands.

A testator devised to J. S. and C. S. 100 acres of land each, subject to the legacies bequeathed, which were made a charge thereon, and bequeathed to each of the plaintiffs small legacies, "and also their support and main-

tenance so long as they or either of them remain at home with the said J. S. and C. S."

Held, reversing the finding of the Master at Whitby, that the support and maintenance of the plaintiffs was a charge upon the lands; that the plaintiffs might for sufficient reason cease to live upon the land, and still be entitled to such support and maintenance.

S. H. Blake, Q.C., for the appeal.

Rae, contra.

[26TH SEPTEMBER, 1882.

McDONALD v. OLIVER *et al.*

Contract for public works—Engineer's certificate—Condition precedent to payment.

The defendants O. D. & Co. contracted with the Government of Canada to perform certain works; payment to be made "within ten days after an estimate of the engineer or officer in charge shall have been received by the Minister of Public Works, specifying the amount of work done to the satisfaction of the Minister." The defendants O. D. & Co. sublet part of their contract to the plaintiff, who agreed to fulfil the conditions by which O. D. & Co. were bound; payment to him to be made within twenty days after the estimate of the engineer had been put in to the Minister of Public Works and a copy served upon O. D. & Co.

Held, that the obtaining of the certificate and service upon O. D. & Co. were conditions precedent to the plaintiff's right to recover for work done under the contract.

It was agreed by the plaintiff, the defendants O. D. & Co., and the defendants M. Bros., that the moneys due the plaintiff should be paid to M. Bros. as often as the estimates were received from the engineer, and that, upon the completion of the contract, O. D. & Co., should pay M. Bros. for supplies before paying the plaintiff anything.

Held, that the intention was that M. Bros. should intercept payment by O. D. & Co. to the plaintiff, and if nothing were found due to the plaintiff, M. Bros. could recover nothing under the contract.

W. Roaf, for the plaintiff.

Bethune, Q.C., for the defendants.

[3RD OCTOBER, 1882.

BANK OF MONTREAL v. HAFFNER.

Mechanics' lien—Suit by prior lien holder—Effect as to lien subsequently arising.

A suit had been brought on the 14th February, 1878, by the W. E. Co. to establish a mechanics' lien. The plaintiffs in this suit claimed a lien, assigned to them by the G. F. & M. Co., who, under an agreement dated

24th June, 1878, did certain work and labour for and supplied materials to the owners subsequent to the latter date. The plaintiffs in their suit were made parties in the Master's office in the suit by the W. E. Co., but did not prove any claim. They subsequently brought this action to establish their priority over a mortgage made by the owner to the W. E. Co., assigned to one W., on the enhanced value of the property.

Held, following *Wallbridge* v. *Martin*, 2 Ch. Cham. 275, that it was not necessary to make the plaintiffs parties to that suit of the W. E. Co., and that their inaction therein was no bar to their bringing this suit.

McCarthy, Q.C., for the plaintiffs.

W. Cassels, for the defendants.

MOORE v. MELLISH.

Will, construction of—General charge of debts and legacies—Purchaser not to see to application of purchase moneys.

The testator directed that his funeral expenses and debts should be paid by his executors and that the residue, which should not be required for that purpose, should be disposed of as thereinafter directed, and he bequeathed a legacy to M. W., "to be paid out of my estate," in a certain manner, and after bequeathing some other legacies to be paid out of his estate, he devised and bequeathed the residue of his real and personal estate to W. W., whom he appointed his sole executor. There was no more personalty than would pay the debts and funeral expenses. W. W. went into possession of the lands and paid part of M. W.'s legacy and the latter assigned the balance to the plaintiff. W. W. mortgaged the land to the plaintiff, registered the will, and subsequently conveyed the equity of redemption to L. B. and by various conveyances it became vested in the defendant, who paid the plaintiff's mortgage. The plaintiff now claimed the balance of M. W.'s legacy out of the land.

Held, that the legacies were charged upon the land; but that, the charge being a general one of debts and legacies, the purchaser from W. W. was not bound to see to the application of the purchase money, and therefore that the defendant took a good title to the land, free from the charge of the balance of M. W's legacy.

Moscrip, for the plaintiff.

E. Martin, Q.C., for the defendant.

FLETCHER v. NOBLE.

Division Court—Foreign plaintiff—Security for costs.

Held, that, under section 244 of the Division Courts Act, a Judge of a Division Court can order security for costs to be given by a foreign plaintiff.

Hands (*Murray & Barwick*), for the plaintiff.
Gould, for the defendant.

[THE MASTER IN CHAMBERS, 10TH OCTOBER, 1882.

SCOTT v. FERGUSON.

Statement of claim—Date of writ.

Held, that the mention of the date of the issue of the writ of summons in the statement of claim is essential under Rule 128. Leave to amend.

Murray, for the plaintiff.
Creighton, for the defendant.

[13TH OCTOBER, 1882.

CANADA PERMANENT L. & S. CO. v. FOLEY.

Action for recovery of land—Place of issue of writ.

Held, that a writ for the recovery of land may be issued from the proper office in any county without reference to the locality of the land, but that the trial must take place in the county where the land lies.

C. J. Leonard, for the plaintiffs.
H. J. Scott, for the defendant.

[18TH OCTOBER, 1882.

BLAIN v. BLAIN.

Irregularity—Motion against—Setting out grounds.

Held, that, upon a motion to set aside a proceeding for irregularity, the notice of motion need not specify the irregularity complained of, if it sufficiently appears from the affidavits and papers filed in support of the motion.

H. Cassels, for the motion.
Hodgins, Q.C., contra.

[19TH OCTOBER, 1882.

ABELL v. KIRK.

Changing place of trial—Fair trial.

Action to recover the price of a steam threshing-machine. Counter-claim for breach of warranty that the machine would do good work and would not throw sparks so as to endanger adjacent buildings, etc. The defendant moved to change the place of trial from Toronto to Barrie, on the ground that the cause of action and of the counter-claim arose in the County of Simcoe, and shewed, on affidavit, a decided preponderance of convenience in favour of Barrie. The plaintiffs opposed the change, on the ground that, owing to the pendency of other similar suits, in which a large number of persons resident in the County of Simcoe were interested, and in which three of the principal law firms of Barrie were engaged, a fair trial could not be had at Barrie before a jury; and he filed 37 affidavits from residents of the County of Simcoe, averring that, in the opinion of the deponents, there would not be a fair trial of the action by a jury at Barrie, but giving no reasons for such belief. The plaintiff having offered to pay the extra expense of the defendant's witnesses attending at Toronto instead of Barrie,

The Master refused to change the place of trial, and dismissed the motion. Costs to be costs in the cause.

C. R. W. Biggar, for the plaintiff.

W. A. Reeve, for the defendant.

(Reported by C. R. W. Biggar, Esq., Barrister-at-Law.)

NEW BRUNSWICK.

In the Supreme Court.

COLWELL *et al.*, APPELLANTS, AND ROBINSON *et al.*, RESPONDENTS.

Equity—Appeal papers—When to be printed—Entry of cause—Application to strike cause off docket—Rule of Hilary Term, 1881—Practice.

The Court (Wetmore, J., dissenting), refused to strike a cause off the Equity Appeal paper by reason of the appeal papers not having been printed and filed as required by rule of Hilary Term, 1881, when good cause was shewn for the delay.

MAGNER v. HUTCHINSON.

THE SAME v. SULLIVAN.

Executor—Separate actions for penalty for not proving will—Stay of action.

Where separate actions for not proving a will were brought against two executors, under the Rev. Stat. cap. 136, sec. 10 (Consol. Stat. cap. 52, sec. 11), the proceedings in one action were stayed till after judgment in the other. (Wetmore, J., dissenting).

Ex parte HACKETT.

Canada Temperance Act—Certiorari—In what cases taken away—Section 111—Construction of—Penalties under section 110—How recoverable.

Held, per Allen, C.J., Duff and King, JJ. (Weldon, Wetmore and Palmer, JJ., dissenting), that by section 111 of the Canada Temperance Act a *certiorari* is taken away in all cases of conviction against Part II. of the Act, except where there is an excess or want of jurisdiction.

Per Wetmore and Palmer, JJ. The *certiorari* is not taken away where the conviction is before two Justices of the Peace, but only where it is before the officers named in section 111.

Per Allen, C.J., Wetmore, Duff, Palmer and King, JJ. The convictions, etc., mentioned in section 111 related to offences against Part II. of the Act, and not to the offences created by section 110.

Per Allen, C.J., Duff and Palmer, JJ. The penalties for offences under section 110 were not recoverable by summary conviction, but by action of debt.

Per Allen, C.J., Duff and King, JJ. As a *certiorari* would still lie in some cases, *e. g.* excess or want of jurisdiction, etc., the recognition of the *certiorari* in section 118 was not inconsistent with the prohibitory words of section 111.

Per Wetmore and Palmer, JJ. As the *certiorari* was not taken away by section 111 where the conviction was before two Justices of the Peace, the 118th section might apply to such cases.

DICKIE v. THE WESTERN ASSURANCE CO.

Marine Insurance—Loss or damage—Limitation of time within which to bring action for recovery of—Condition—Pleading.

A policy of marine insurance provided that all losses and damages which should happen should be adjusted and paid in sixty days after proof of loss and adjustment; and that no suit or action against the company for

the recovery of any claim under the policy should be sustainable unless such suit or action be commenced within twelve months next after any loss or damage occurred. In an action on the policy, the defendants pleaded that the loss or damage to the vessel did not occur within twelve months before the commencement of the action. Replication, that the loss, without the plaintiff's fault, was not adjusted till a certain day, and that the action was brought within twelve months thereafter.

Held, on demurrer, that the plea stated a good defence, and that the replication was no answer to it.

PRINCE EDWARD ISLAND.

Magistrate's Case.

[FITZGERALD, Q.C., STIPENDIARY MAGISTRATE, 19TH OCTOBER, 1882.

REGINA v. ANONYMOUS.

Examination on charge of robbery—Admissibility of evidence for the defence before a magistrate.

In this case the prisoner was arrested on suspicion of having stolen money.

After evidence for the prosecution was taken down, application was made by Counsel for the prisoner for leave to examine witnesses on his behalf. Counsel for the prosecution contended that the statute 32 & 33 Vict. cap. 30, under which the examination was held, did not give the magistrate power to hear such evidence. Sec. 25 of of said statute apparently gives the magistrate power to summon only such witnesses as are likely "to give material evidence for the prosecution," and sec. 36 gives him power to bind by recognizance witnesses to give evidence against the party accused. The 32 & 33 Vict. is almost a transcript of the Imperial Statute 11 & 12 Vict. cap. 42. Previous to this statute the duties of magistrates as to the examination of witnesses were regulated by 1 & 2 Ph. & M. cap. 13, 2 & 3 Ph. & M. cap. 10, and 7 Geo. IV. cap. 64. The first of these enacted that the magistrate should "take the information of them that bring him of the facts and circumstances thereof"; the second enacts that he should take "the information of those that bring him of the facts and circumstances thereof"; and the 7 Geo. IV. required the magistrate to take an information on oath "of those who shall know the facts

and circumstances of the case." The 11 & 12 Vict. cap. 42, sec. 17, requires the magistrate "to take the statement on oath or affirmation of those who know the facts and circumstances of the case," and put it in writing. In the 26th edition of *Burns' Justice*, published in 1831, some four years after the passing of 7 Geo. IV., we find it written to the effect that witnesses may be examined for the defence in the same way as for the prosecution. Chitty, in his Criminal Law, published in 1847, seems to be of the same opinion. Russel on Crimes, published in 1877, is very decided on this point. See his remarks on the taking of depositions by Magistrates under the 11 & 12 Vict. cap. 42, page 496. See also Lord Denman's charge to the grand jury at Taunton, delivered one year after the passing of the 11 & 12 Vict. In *Rex* v. *Fuller*, 7 C. & P. 269, it was held that it was the duty of the Magistrate to return the depositions of witnesses called by the prisoner to prove an *alibi*, and Lord Denman, in *Rex* v. *Smith*, explicitly declares the admissibility of witnesses on behalf of the defence.

The Russel Gurney Act, passed in England in 1867, enacts that the Justice shall, in all cases before he commits for trial, take the statement on oath or affirmation of all witnesses called by the accused person, and under this Act witnesses for the defence are now regularly examined in England. Cockburn, C.J., in the recent case of *Regina* v. *Carden*, L. R. 4 Q. B. D. 6, clearly shows that the hearing of the defendant's witnesses can in no way interfere with the Magistrate's duties.

Held, by the Magistrate that he was directed "to take the statement on oath or affirmation of those who know the facts and circumstances," directions ample in his opinion to include all evidence, no matter where it came from, which enabled him the better to judge, "whether the testimony is sufficient to put the accused party upon his trial."

The Magistrate, therefore, admitted all evidence tendered by the accused in this case which was material to the enquiry.

Malcolm McLeod, *Q.C.*, for the Crown.

Louis H. Davies, *Q.C.*, for the prisoner.

(Reported by Hector C. McDonald, Esquire.)

THE

CANADIAN LAW TIMES.

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PROVINCIAL JURISDICTION OVER CIVIL PROCEDURE.

MAINTENANCE *of Provincial Courts.*—We have segregated this part of the phrase "constitution, maintenance and organization," used in number 14 of section 92 of the British North America Act, because the Supreme Court of British Columbia laid great stress upon the fact that the Judges of the Superior Courts are paid by the Dominion Parliament, as indicating the legislative jurisdiction to which those Courts are subject (*a*). The payment of the Judges is treated as almost co-extensive with the maintenance of the Court—whatever that term may mean. It was argued, as we have seen, that maintenance of the Court meant something more than the payment of the Judges—that it meant the maintenance of all the officers of the Court, Registrars, etc., providing Court-houses, etc. The answer given to this argument was that the Registrar should be paid by the Dominion. That follows, however, only upon the assumption that the Court is a Dominion Court.

In dealing with an existing Court as we find it, we contend that existing facts as we find them should have their respective values fairly assigned to them. And the fact that the Province pays all the other officers of the Court except the Judges, and in other ways bears the

(*a*) *Ante*, p. 322.

burden and expense of maintaining the Court, without question from its own Government, or protest from the Federal Government, is surely a fact of sufficient importance to be dealt with in some other way than by saying, "I have always thought that the Registrar and officers were part of the Supreme Court, and ought to be designated and maintained by the Dominion authorities alone. * * But it does not seem to govern the present question." We contend that, if the existing state of affairs at all affects the question, the fact of the Province bearing this expense has a great bearing upon the question—a greater bearing than the manner of payment of the Judges. In 1868, the Legislature of Ontario expressed great anxiety respecting the welfare of the Superior Court Judges, and in the Supply Bill enacted that there should be paid to each of the Judges of the Superior Courts a sum of one thousand dollars annually. The Minister of Justice promptly reported against the legality of this enactment, which was thereupon disallowed. If it be an improper thing for the Judges to be in the pay of the Province, so would it be an improper thing for the staff of officers to be similarly paid, provided the Court were a Dominion Court; and the Federal authorities, watchful over these affairs, have so far ignored any such impropriety of conduct in the Provincial Government of British Columbia and the officers of the Court; from which it may most reasonably be inferred that they consider the expenses attendant upon the Court in question to be properly defrayed by the Province.

We have said that if existing facts have any bearing upon the question at all, this fact of payment of all the expenses of the Court, save the Judges' salaries, by the Province, has a greater bearing upon it than the fact of the payment of the Judges' salaries by the Federal Parliament. Why? Because the salaries of the Judges of the Superior Courts are paid by the Parliament of Canada under the special provisions of section 100 of the British North America Act. These payments are not made by virtue of any jurisdiction which the Parliament of Canada has over Federal Courts or touching the adminis-

tration of justice. Inasmuch, then, as the payment of the Judges by the Federal Parliament is not founded on the reason that their Court is a Dominion Court, so neither does the fact of their payment by the Federal Parliament of itself make the Court a Dominion Court. This fact of payment has no significance whatever in a consideration of the question, except to show that the payment is a burden thrown by section 100 upon the Parliament of Canada, which, presumably, it would not otherwise have had to bear; just as the appointment of the Judges is a privilege and a duty cast upon the Governor-General by section 96, which he would not otherwise have exercised and discharged. The duties required of the Provincial Legislatures by number 14 of section 92 would, we presume, have included as well the duty of paying the Judges' salaries as the duty of appointing the Judges, but for section 100 (*b*). Using the same argument with respect to section 100 which we used with respect to section 96, we may infer that it forms an exception from the duty cast upon the Provinces by number 14 of section 92, of maintaining their own Courts completely; and, therefore, that that part of number 14 of the section might, in connection with section 100, be read as follows:— "The administration of justice in the Province, including the * * maintenance * * of Provincial Courts * * except the payment of the salaries, allowances and pensions of the Judges, which shall be fixed and provided by the Parliament of Canada * * but including, etc." If, then, this is a clear exception from the duties cast upon the Provinces to administer justice and maintain Courts, it is out of the question to urge it as a fact, upon which an argument can be founded, in favour of the view that the Courts in which these Judges sit are therefore maintained by the Federal Parliament.

Of as little value in this argument is the fact that the salary of the Registrar of the Court is provided by the Province. If the Court is a Dominion Court, the assumption by the

(*b*) *Regina* v. *Bennett*, *ante*, p. 547, where Cameron, J., held that the Legislature of Ontario had power under this clause to provide for the appointment of Justices of the Peace.

Province of the expenses of maintaining it cannot make it a Provincial Court. Cause and effect are thus confounded. It is the character of the Court that determines where the burden of maintenance shall lie—it is not the fact of maintenance that determines the character of the Court. The characters of the Courts must first be determined in some other way than by the fact of payment of their officers; and we submit our former remarks upon that branch of the subject for whatever value they may have.

We propose, however, shortly to glance at the subject apart from the above considerations. Was the British Columbia Court right in assuming that maintaining means defraying the expenses of the Court? So it is treated, as far as we can judge from a perusal of the lengthy judgments in *The Thrasher Case*. In fact, if we mistake not the meaning of their Lordships, they have treated the term almost as signifying the payment of the Judges alone.

It will be readily conceded that a Court consists not of the Judge or Judges thereof only, but of all the officers who are necessary for the administration of the proceedings therein (*c*). Even attorneys are officers of the Courts in which they are admitted, and as such have certain rights and privileges (*d*). The constitution and organization of a Court, therefore, means something more than providing for the office of a Judge, or appointing him to hear causes. It plainly includes the construction, and proportioning of one part with another, of the whole machinery necessary for instituting actions, determining the questions at issue, and executing the judgments delivered upon the rights of the litigants. The maintenance of a Court, one would say, must then mean something more than the mere payment of the officers, and, with due respect, we say certainly more than the mere payment of the Judges. We propose to ascertain some of the significations which attach to the word "maintenance," according to its application to particular circumstances.

(*c*) Bac. Abr. Tit. Courts (A), (E).
(*d*) Bac. Abr. Tit. Attorney (G), (H).

The word, unlike many technical terms which have no other than their technical sense in the science of the law, is a common English word, which has often been selected, no doubt, for its etymological and colloquial signification, as the most adequate expression for the state of facts which it was intended to describe. We consequently find it used in various ways. Its meaning, as given in the Imperial Dictionary, is (in addition to sustenance, subsistence *et hoc genus omne*), continuance, security from failure and decline, preserving, keeping in a particular state or condition, etc. Its signification may be further illustrated by contrasting it with its antonyms as well as by consulting its synonyms. Some of the former are, drop, abandon, discontinue, weaken, subvert, suppress. If we may be permitted to substitute for the word any one of its synonyms, the sense of the phrase under consideration would not be materially changed. If we substituted for it any one of its antonyms, in stating in a proposition the action of the Legislature with respect to the Court, it would plainly evidence a breach of the duty imposed upon the Province by this number of section 92.

But are these colloquial significations proper to be substituted for, or attributed to, the word, in the connection in which it is here used?

The words "maintain" and "maintenance" have been before the Courts at various times for construction, perhaps oftener than we have been able to ascertain. In *Abbott's* Law Dictionary (*e*), it is said, "maintain, maintenance, are used in their vernacular sense of continue, keep up, supply the need of, support, in deeds, statutes, wills, etc., drawn into construction before the Courts." The term "support and maintenance" is a familiar one, and the coupling of the word support with the word maintenance is a sufficient index of its signification when so used. But its only meaning is not to afford sustenance or the means of subsistence. It has no single ascertained meaning which may be assigned to it without reference to the context. It was not a technical term originally, but has acquired a quasi-

(*e*) Tit. Maintenance (2).

technical signification by familiar use in connection with affording illegal support to a law suit. The context, therefore, determines its meaning. If it were a technical term, its technical signification would be already well ascertained. If maintenance means "paying" or "affording the means of subsistence to," we may substitute either of these terms for it in the clause in question. The clause would then read, "the constitution, paying and organization of Provincial Courts." Now, "Court" must here mean "Judge," if "paying" is to have its ordinary signification assigned to it. But it plainly does not, for it would be absurd to speak in the same breath of constituting and organizing the Judges as well as paying them. If "Court" does not mean "Judge," then "paying" is not the proper synonym for "maintenance" in this place. For it is as absurd to speak of paying a Court as it is to speak of constituting or organizing a Judge.

The word "maintenance" is perhaps most frequently used in the sense of fostering an action or suit. It is defined as follows, "where one officiously intermeddles in a suit * * by assisting either party with money, or otherwise" (*f*). And, as instances of maintenance otherwise than by furnishing money, we find, under the same title, that one may maintain an action by assisting another by friendship or interest in procuring counsel without expense, or by persuading or endeavouring to persuade a man to be of counsel for another *gratis*, or by opening evidence to the jury, or giving evidence officiously without being called upon to do it, or by speaking in a cause as one of counsel with a party. And a juror is guilty of maintenance who solicits a Judge to give judgment according to the verdict. It is idle to say that maintenance has here a technical signification, derived solely from its use in the science of the law. It is used in its vernacular sense of aiding (literally, "giving a hand," the word being derived from *manus* and *tenere*), continuing, keeping up, sustaining, helping; but its early and constant use in con-

(*f*) Bac. Abr. Tit. Maintenance.

nection with the illegal fostering of law suits has given it a quasi-technical meaning in this sense.

Again, the phrase "make and maintain" is frequently used with reference to railways and other structures. The word "maintain," when used in such a sense, would naturally mean to keep unimpaired the structure in its original state, so as to answer its original purpose, by repairs, improvements, etc. "Make and maintain" and "maintain and make," when applied to railways, are both construed in *Sevenoaks, etc. R. Co.* v. *London, etc. R. Co.* (*g*). Under power to "maintain" a railway and works, it was held in that case, that reasonable improvements, consistent with the purpose of the undertaking, were included.

In *Cameron* v. *Wellington, etc. R. Co.* (*h*) to "make and maintain" a farm crossing was held to mean to construct the crossing and continue it as such; not to close it up or impair it, or so change it as to alter its character as a farm crossing, and to keep it in repair.

In *Edinburgh, etc. R. Co.* v. *Campbell* (*i*), to "maintain" was held in effect to mean to preserve things as they were.

And in an American case of *Rhodes* v. *Mummery* (*j*), a statute prescribing that partition fences "shall be maintained throughout the year, equally by both parties," is not limited to repairs simply, but applies as well to the rebuilding of a fence destroyed by fire.

It is evident, from the foregoing, that "maintenance" does not mean "defraying the expenses of," simply. That is but one of the vernacular meanings of the word, and one to be determined solely by the context.

It is also evident, from the several cases which we have cited, that where the word has come up for construction before the Courts, its meaning has likewise been determined from the context, or from the state of circumstances to which it has been applied. Even in its most technical

(*g*) L. R. 11 Chy. Div. 625.
(*h*) 28 Gr. 327; 1 C. L. T. 185.
(*i*) 9 L. T. N. S. 157.
(*j*) 48 Ind. 216.

sense, viz., maintenance of an action, it comprehends all species of aid or support in carrying on the litigation, of which the furnishing of money is only one. There is nothing, therefore, either in its vernacular or quasi-technical signification, to warrant us in assuming that in any case in which the word may happen to be used by the Legislature, it means defraying expenses solely, or even *prima facie*. That it may well include defraying the expenses of a work, structure, or Court, is indisputable, for no maintenance could be afforded in any such case without expense. If, however, the Province could, by possibility, procure a Registrar to give his services *gratis*; if it could procure the remainder of the staff, necessary and usual for a Court, *gratis*; if it had the use of buildings *gratis*; if, in short, it were not necessary for the Legislature to vote any money in the supplies for the administration of justice, and yet if, notwithstanding this, the Courts were kept in working order, it could not be questioned, we think, that the Province would be maintaining its Courts, and it would no less be performing its duty in that respect, if it were able to perform it without the expenditure of money. As long as they filled the offices by the appointment of the necessary officers, upon death or retirement of former officers, as long as they provided Court houses and all the paraphernalia connected with the Courts, so that causes might be instituted, brought to issue, tried, and the judgments executed, they would be "continuing," "supporting," "preserving," "not suffering to fall into decay," the Courts which they originally constituted, or had the power to constitute and organize.

And the word "maintenance," as we have hinted plainly, derives its meaning in this clause from the context. Constitution and organization imply creating and proportioning the parts. Maintaining, when joined with them, must mean continuing or preserving the originally constituted Court and the proportions between the parts. Where "maintain" is coupled with "make"—or its equivalent in this sense, "construct"—as to "make (or construct) and maintain" a railway, it plainly means to continue the

structure as originally made, with such repairs and improvements as are necessary to preserve the identity of the work as a railway, and to keep it in a condition to perform the functions of a railway. So, to constitute, maintain and organize a court means plainly, in our opinion, to create, with duly proportioned parts, a Court in the fullest sense of the word, and to continue it in working order, so as to preserve its identity as a Court of the kind originally constructed, and that, too, in a condition to perform the functions of a Court, and so to continue it by the appointment to vacancies of the proper officers, the providing of necessary buildings, and the defraying of the expenses necessary for those purposes. The mere providing of so much money yearly to meet estimated expenditure would not be maintaining the Court, if vacancies were not filled by the appointment thereto from time to time of the necessary officers. If offices were allowed to remain vacant, if buildings, etc., were not provided, if, in other words, the requisites for carrying on the administration of justice were not forthcoming, so that causes could not be tried, then the Province would (to use the antonyms of maintaining) be "abandoning," "weakening," "discontinuing," "subverting," or "suppressing" those Courts whose constitution and organization were placed under its immediate care, and which it was bound to maintain, and thus would be guilty of a clear dereliction of the duty imposed upon it by the clause in question, though it might regularly pay the officers who might remain at their posts, and vote annually sums to meet the estimated expenditure upon all the offices, as if they were in working order.

It remains to deal with one more point in connection with this part of the discussion. Assuming "maintenance" to mean "payment" solely, the clause should be read, "the constitution and organization of Provincial Courts, and the support and maintenance, or payment, of their officers." But it is pointed out in *The Thrasher Case* that number 4 of section 92 especially provides for "the establishment and tenure of Provincial offices and the appointment and *payment* of Provincial officers." It is held by

their Lordships that the Provincial Courts within the meaning of number 14 of the section are those whose Judges are Provincial officers, appointed and paid by the Provinces. The manifest consequence is that there are two clauses presented to us, both, according to their Lordships, providing for the payment of the officers of Provincial Courts, viz., number 4, which provides especially for their payment, and number 14, which provides, by the ambiguous term "maintenance," for the same thing. This result is inevitable, upon that reasoning, and, to our mind, disposes completely of the contention that "maintenance" means "payment." For, if we turn to other clauses of sections 91 and 92, we find that wherever the Parliament means to provide for payment of salaries or allowances, it expressly and unequivocally says so, and where it means to provide for the keeping up of any establishment, it uses the word "maintenance." For instance, number 8 of section 91 provides for fixing and providing the salaries of civil and other officers of the Government of Canada. All officers appointed by the Government of Canada are, we presume, within the meaning of this clause. Numbers 11 and 28 of section 91 provide for the establishment and maintenance of Marine Hospitals and Penitentiaries respectively. Now, it can hardly be contended that the meaning of the word "maintenance" in either of these clauses is payment of the officials appointed by the Government of Canada to the charge of these establishments. But it can most reasonably, and, we think, most successfully, be contended that the Warden of a Penitentiary or the Governor of a marine hospital would be paid his salary under the express terms of number 8 of the section.

Similarly, number 4 of section 92 provides for the payment of Provincial officers generally. Numbers 6 and 7 provide for the establishment, maintenance and management of Prisons and Hospitals, etc., respectively, for the Provinces. And here, we also contend, that, by the use of the word "maintenance," the Parliament did not intend to provide for the payment of the officers of these various establisments, but for keeping them in efficient working

order, inasmuch as aspecial clause provides expressly for the payment of all Provincial officers. Why number 14 of section 92 should be construed upon a different principle is not shown, nor do we, with great deference to the British Columbia Court, think it susceptible of proof.

Judges are Dominion Officers.—Effect on their Courts.—It is said in *The Thrasher Case* that because the Superior Court Judges are officers of Canada and are paid by Canada, that they are in no way subject to Provincial jurisdiction; that their being Dominion officers removes also the Courts in which they sit from Provincial jurisdiction; and that the assignment of various duties to them by the Legislature of the Province would so interfere with their duties as Dominion officers that the Federal authorities would be in effect deprived of their services; and that, pursuing the reasoning in *Leprohon* v. *City of Ottawa* (*k*), the Provinces have no right to fetter the officers of Canada, and to hamper them in the performance of Federal duties.

Some of these questions have already received consideration in these papers.

The effect of section 129, which continues existing laws and officers subject to the new jurisdictions created by the British North America Act, according to the classification of legislative power, has already been partially touched upon; and the interpretation by the Privy Council of this section has been cited to show that the construction placed upon it by the British Columbia Court was to some extent erroneous. But touching the *status* of pre-confederate Judges, there can be no difference of opinion as to the jurisdiction under which they are personally brought by sections 96, 99, 100 and 129. The special provisions of sections 96, 99 and 100 of the Act assign them a place as officers of Canada immediately upon their introduction into Confederation by section 129. As far as the office of Superior, District, or County Court Judge is concerned, or the *status* of the incumbent of the office, there is no neces-

(*k*) 40 U. C. R. 478; reversed on appeal, 2 App. R. 522.

sity to call in the aid of the exact rule laid down by the Judicial Committee of the Privy Council. That rule, in the absence of sections 96, 99 and 100, would have brought the Judges within the jurisdiction of the Provincial Legislatures, as their offices and duties are solely connected with a class of subject exclusively assigned to those bodies. But, adopting the principle of the rule, we look through the whole Act, and find that they are not under the immediate operation or effect of either of the sections 91 and 92, but come under the operation of the special provisions of sections 96, 99 and 100.

Similarly the operation of section 130 would unquestionably (we venture to say, notwithstanding the opinions of the learned Judges of the British Columbia Court,) have made those Judges Provincial officers, *i.e.*, officers within the jurisdiction of the Provinces, but for sections 96, 99 and 100. For that section, 130, makes officers of Canada of those officers of the pre-confederate Province whose duties existed in respect of matters other than those coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces; while those officers whose duties existed in respect of matters coming within the classes of subjects assigned exclusively to the Provincial Legislatures are beyond doubt Provincial officers. To illustrate our meaning. In the Province of Upper Canada, there existed, say, Crown Land officers and Postmasters. Upon the natal day of Confederation, the Postmasters became officers of Canada, their duties being "in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures," while the Crown Land officers became officers of the Province of Ontario by virtue of being employed in connection with the "management and sale of the public lands belonging to the Province," a subject exclusively assigned to the Provinces by number 5 of section 92.

So, in our opinion, would the Judges have been assigned to their proper legislative jurisdiction but for the operation of the special clauses respecting the judiciary.

We cannot, we confess, follow the reasoning of the Court, which leads to the conclusion that because the Judges, upon entering confederation, became officers of Canada, therefore the Courts over which they preside are Dominion Courts. The nature of their office, and the duties for which they are detailed, must be taken into consideration. They are expressly assigned by the Federal Authorities to offices, the duties relating to which are prescribed by the Province, exercisable within the Province, and in every respect Provincial. They are, in a word, Federal officers, with Provincial jurisdiction. Their duties may vary, according as the requirements of the Provinces change, and according as these requirements are, in the opinion of the Provincial Legislatures, to be fulfilled by a change in the means of administering justice. The Judges are appointed to Courts whose constitution and organization are wholly within the jurisdiction of the Provincial Legislatures, whose kaleidoscopic legislation may seriously affect their labours and duties. They are appointed to do such work and perform such duties as the Provinces may require of the Provincial Courts. This being so, it is a fair subject for discussion, and not one to be summarily dismissed, whether the Judges of the Superior, District, and County Courts are not subject to the limited inferential jurisdiction of the Provincial Legislatures, resulting from their undoubted plenary powers over the constitution and organization of the Courts of which those Judges are members. If application had to be made to the Federal authorities for a modification or extension of the Judges' commissions every time a change was effected in the constitution and organization of the Provincial Courts, the Provincial Legislatures would be almost crippled in going about their plainly defined duties. Nevertheless, the Provinces have not any jurisdiction over the Judges themselves or their tenure of office, but rather over the Courts of which they are members. A Judge being commissioned solely as a Judge of a Court of original jurisdiction, *quære*, whether a Provincial Legislature, in constituting a Court of Appeal by an Act subsequent to the commission, could validly require or

authorize a Judge of the Court of original jurisdiction to assist in performing the duties of the Appellate Court. But, on the other hand, a system of judicature being established originally by Provincial enactment, consisting of a Court of Appeal and a Court of original jurisdiction, and the Judges of the Court of original jurisdiction being required thereby to act as Appellate Judges on occasion, *quære*, whether a Judge, subsequently commissioned solely as a Judge of that Court of original jurisdiction, could not, by implication, validly discharge, as occasional duties, the functions of an Appellate Judge which are incident to the office which he accepts, and *quære*, also, whether he would not, by accepting the office, render himself liable to the jurisdiction which the Provincial Legislature has to change the constitution and organization of the Courts or system of Courts to which he has been appointed, and so to curtail or enlarge his duties, so long as the Court to which he was appointed remained in existence.

We have seen that, although the Provincial Legislature can deal with the Courts, their jurisdiction and duties, they cannot, in any manner, affect the tenure of office of the Judges (*l*).

Apparently, then, the Judges are subject to Federal jurisdiction solely, as regards their tenure of office. They are inferentially subject to Provincial jurisdiction, as regards their duties.

The conclusions that our observations lead to are, that the appointment and payment of the Superior, District and County Court Judges by the Governor-General, do not make the Courts of which they are members Dominion Courts.

Personnel of the Supreme Court of British Columbia.— Though the fact that the Chief Justice and Mr. Justice Crease hold commissions under the Sign Manual is one that adds dignity to their positions, we cannot see that it affects the issue. If it has any bearing on the case it has a most

(*l*) *In re Squier*, 46 U. C. R. 474; 2 C. L. T. 100.

disturbing influence. For a Court constituted of two Judges appointed by Imperial Commission, and two appointed by the Governor-General, is beyond the powers of description, if it be necessary at once to assign it its place under the British North America Act and announce its origin. The fact is, the Imperial Commissions were continued by Imperial enactment, but that Imperial enactment placed the Court to which those Judges belonged under one legislative jurisdiction, and themselves under another. "We must take the Confederation Act," says Hagarty, C.J., "as a wholly new point of departure" (*m*). The Imperially Commissioned Judges enter a new sphere and become subject to a new Imperial Act, and hence the honourable lineage of the Court has no bearing upon the question of what jurisdiction it is now subject to.

Delegation of Legislative Functions.—Acting upon the authority of *Regina* v. *Burah* (*n*) and *Regina* v. *Hodge* (*o*), the Supreme Court of British Columbia held that the Legislature of the Province had no power to delegate to the Lieutenant-Governor in Council the functions which it possessed of making laws, and that the provisions of the Act which affected to give that power with relation to procedure was *ultra vires*. Since *The Thrasher Case* was decided *Regina* v. *Hodge* has been reversed on appeal (*p*). What the decision of the British Columbia Court might have been if the decision of the Court of Appeal for Ontario had been before them, we cannot, with certainty, say. But we may imagine, from passages in the judgments, that they would have refused to follow it, *Regina* v. *Burah* being their warrant for such action.

The subject can hardly be said to be an open one in this Province since the decision of the Court of Appeal, though we exercise our journalistic privilege of criticizing that decision. We confess to a strong inclination to the view adopted by the Court of Queen's Bench, that if laws are to

(*m*) *Leprohon* v. *Ottawa*, supra.
(*n*) L. R. 3 App. Cas. 889.
(*o*) 46 U. C. R. 141; 12 C. L. T. 424.
(*p*) 7 App. R. 246; 2 C. L. T. 393.

be made for the Province, they must be made by the body to which the Imperial Parliament granted the power. We hope to be able to refer more at length to the subject at a later date; but having doubted the decision of the Court of Appeal, we give shortly the reasons for so doubting.

The gist of the decision may be shortly stated. It depends (1) upon the alleged supremacy, or rather sovereignty, of the Provincial Legislatures within the classes of subjects exclusively assigned to them. (a) "The limits of the *subjects* of jurisdiction are prescribed; but within those limits the authority to legislate is not limited" (*q*). "Reading the powers granted in section 92, with the exceptions where they occur in section 91, the Local Legislature is absolute and supreme over those subject matters, with as ample power to legislate in respect of them as the Imperial Parliament, and without any possibility of interference by the Dominion Legislature" (*r*). "The Provincial Legislatures, as I have shown, within their respective spheres, are absolutely supreme" (*s*). (b) "It is therefore necessary that the Provincial Legislature should possess plenary power in relation to all these subjects * * * the propriety of changes in any shape made, not to be challenged by any other legislature authority, and the power to make them being limited only by the rule, whether the law making the change is within the class of subjects legislation upon which is assigned to Provincial Legislatures" (*t*).

(2) It depends upon the equality of the legislative powers of the Provincial Legislatures, when exercisable, with those of the late Province of Canada. "It is to be remembered that that Legislature [of United Canada] had no more power to delegate power upon that subject of legislation [municipal institutions] than had the Legislature of Ontario after Confederation" (*u*). "I wish to add that I fail to see any grounds for a distinction in this respect between the powers

(*q*) At p. 251.
(*r*) At p. 274.
(*s*) At p. 276.
(*t*) At p. 252.
(*u*) At p. 254.

of a Parliament or Legislature acting under the constitution given to us by the B. N. A. Act and those conferred under the Constitutional Acts of 1791 and 1840, and numerous cases are to be found in which those Legislatures delegated their authority" (*v*).

(3) It depends upon the inferential power in the Provincial Legislatures to do all that is necessary for putting their laws in force. (a) "The B. N. A. Act confers a constitution; distributively as to powers of legislation; and with those powers necessarily all that was needful to make those powers effectual" (*w*). (b) "But no part of his judgment [Lord Selborne's judgment in *Regina* v. *Burah*] countenances the idea that a legislative body may not delegate to others authority to make rules, orders, by-laws, or whatever may be necessary to carry into effect the enactments of the Legislature itself" (*x*).

(1) (a) It is true, that though the subjects are limited, the authority to legislate upon them is not limited; *i. e.*, the authority of the appointed legislative body. This implies the existence of a power to give the authority and a power to designate the body which shall exercise that authority. The appointee of the authority to legislate cannot dispute its grantor's right to designate the body which shall make laws, by itself assuming to designate another body for a similar purpose. The admission of authority in its grantor is a denial of authority in itself, unless the grant carries the right. Otherwise, the creature of the Act would have the right to vary or repeal the Act. But, granted that the authority to legislate upon a limited class of subjects is exclusive; *non constat* that the Legislature is absolutely supreme or sovereign. Supremacy within bounds is a contradiction in terms. It implies the existence of the power which assigned limits to it, and which must therefore be supreme over it. The Provincial Legislatures, on the face of their charter, have two superiors; their natural father, the Imperial Parliament, and their guardian assigned to them by

(*v*) At p. 279.
(*w*) At p. 252.
(*x*) At p. 254.

the Imperial Parliament, namely, the Federal Government, with its discretionary power of disallowance. (b) The test given in the above quotation is only a test of the power of the Provincial Legislature when it has itself made a law. When it has not made a law itself, but has appointed another body to make that law, the question is not, was the power to make that law within its jurisdiction? but, was the power to appoint that other body to make a law one of the classes of subjects legislation upon which was assigned to it?

(2) We agree with this proposition. But the power of the Parliament of the Province of Canada should have been first gauged before adopting it as a standard by which to measure the power of the Provincial Legislatures under the British North America Act. We maintain that until it is shown affirmatively that the Parliament of the Province of Canada could lawfully create a body with legislative functions, the fact that it did assume to do so is of no moment. If the fact that it did so proves that it had power to do so, then the action of the Legislature of Ontario is a sufficient measure of its own power. But the fact that the Parliament of the Province of Canada did delegate its functions was no indication of its power, which is (in the absence of judicial decision) an unknown quantity. Therefore, its equivalent, the power of the Legislature of Ontario to delegate its authority, is also an unknown quantity. Nothing more results from a comparison.

(3) (a) In order that this proposition may be absolutely true, it is necessary for the Court to show that, in order to enjoy in full their powers of legislation, the Provincial Legislatures must have subordinate bodies to assist them either in making the laws or in enforcing them. If the Legislature had authority to empower the License Commissioners to make the law which they did, the Legislature had power to make that law itself. Having power to make the law itself, the existence of a subordinate body appointed by the Legislature was not necessary for the full enjoyment of its legislative functions by the Legislature, nor was

ence of License Commissioners necessary to ren-

der the legislative powers effectual in this respect any more than a similar body is required as a means of rendering other functions of the Legislature effectual. It therefore, had not the power to create the subordinate legislative body. (b) This proposition assumes, first, the existence of an enactment of the Legislature, and, secondly, a body deputed, or an instrument employed, to carry that enactment into effect. In the case in question, there was no complete law which required an instrument to carry it into effect. The Legislature deputed the License Commissioners to make the law regulating the liquor traffic. The Commissioners were not, therefore, the instrument for carrying into effect the law of the Legislature, and therefore the case does not come within the proposition stated. Assume, as the proposition states it, an enactment, and a by-law passed by the appointee of the Legislature to carry the enactment into effect. To constitute an offence against the law, there should plainly be a breach of the enactment itself, and not a breach only of the by-law carrying it into effect. Assume that the License Commissioners' by-law was an instrument for the carrying into effect of the law of the Province. Then the breach for which the defendant was convicted was on the showing of this proposition not a breach of the enactment itself, but a breach of the "rule, order, by-law, or whatever [was] necessary to carry into effect the enactment of the Legislature itself." It was, therefore, not a law of the Province which was infringed, but a by-law for carrying that law into effect.

For these reasons which do not by any means, in our humble opinion, exhaust the supply of argument against the decision, we say it may be doubted whether the decision of the Court of Appeal is correct on this point.

But did the Legislature of British Columbia, in fact, attempt to delegate its power to make laws respecting the procedure? If procedure is not substantive law, as urged in *The Thrasher Case*, then the Legislature had no power to make rules of procedure. But it did not affect to do this at first. It made a law that rules of procedure should be framed by the Lieutenant-Governor in Council. The Lieutenant-

Governor in Council then made the rules. The Act which afterwards confirmed these rules might be *ultra vires*, if the Legislature could not exercise judicial functions, and if this is a judicial function. But what matter, if the first law relating to procedure were valid, under the authority of which the Lieutenant-Governor in Council made the rules. The law-making power was, therefore, not delegated.

In opening the discussion upon the subject, we presented two matters for consideration. The first was the legality or constitutionality of the measures which gave rise to *The Thrasher Case;* the second was the policy of the measures (*y*). As to the first head, though it was not originally intended to have dilated so at length upon it, the subject, apparently small at first to the casual distant glance, assumed vaster proportions on a nearer approach. At first, apparently of interest to British Columbia alone, it becomes, upon examination, a matter of importance to every Province of the Dominion, and to the Dominion itself. The recent Dominion Controverted Election Cases in this Province exemplify this. As far as they go, or as far as it was necessary for them to go, they confirm the view which we have advocated respecting the correlative rights of the Parliament and the Legislatures to deal with the administration of justice. As these cases, or some of them, go to the Supreme Court of Canada, these questions must for the present remain open questions. We therefore submit our remarks as the result simply of conscientious and diligent study of the Charter of Confederation, and the authorities which we have upon its construction, our only excuse for the length to which the papers have extended being the engrossing nature of the subject and its universal importance.

Touching the policy of the British Columbia statutes which raised the questions there is little to be said. It was not a subject for judicial consideration, though it is legitimate matter for journalistic criticism.

A policy which puts into the hands of the Executive the

(*y*) *Ante* p. 361.

full and absolute control of the Bench, so that a Judge cannot sit either in Court or Chambers without the leave of the Executive Council, so that a change in pleading, practice, or procedure cannot be made without the same leave, so that an order, decree, or judgment cannot be re-heard or appealed from but by the same leave, so that the privileges of Counsel are to be in the hands of ministers instead of those of the Court, so that the allegiance of solicitors is due to a partisan Cabinet instead of the Courts in which they practice—a policy, we say, which, in fact, puts Bench and Bar into the pocket of the Attorney-General, is too sublime for impudence, too daring for prudence, too fearful for safety. It makes the Bench and Bar the puppets of a political showman. Such a scheme could only originate in placid consciousness of sublime virtue, or in its extreme opposite.

We might suggest a case in which the power might be useful to a politician, an article of whose creed is that safety of party and safety of country are interchangeable terms. Suppose a law to exist whereby provincial controverted election cases were to be tried by a full Court only, or that it were necessary, for some other reason, that the full Court should pass their opinion upon them before the judgment could be executed. Suppose the petitioner against an election to be required to bring his case on before the full Court within one year, unless the time were extended beyond that period by the full Court. Suppose a very critical period, in which a general election to the Legislature will be very disastrous to the ministerial party, and therefore to the country. Suppose some extreme means to have been used for securing the safe but illegal return of the ministerial candidates—justifiable, of course, when done *pro patriâ*. Suppose the Attorney-General for the time being determines, for the good of his country, that there must be no election cases tried—at any rate against ministerial candidates. He and his colleagues meet together and pass an order in Council (similar to the one which brought about the argument in *The Thrasher Case*, whereby the full Court was directed to meet but once a year), which

order in Council should direct that the full Court should not sit for two years, or until further ordered. Suppose all the election petitions to fail, by reason of their not being brought before the full Court within a year, and by reason of the time not having been extended by the full Court. The seats would thus be secured to the Government for that Parliament. Or, suppose an order in Council should be drawn, merely directing that the Judge taking the evidence in such cases should return the same to the House, without giving judgment, to be there dealt with. It may be urged that that would be *ex post facto* action, and very improbable. But the plaintiff in *The Thrasher Case* was the victim of an *ex post facto* rule. It might be urged that there is no safety from such an event in any case, because whitewashing Acts have been passed before this, and might be passed again, to effect such a purpose. True, there is that danger—but then an order in Council is so much easier and quieter a way than facing a House. At any rate, whatever use might be made of the power, it is a fearful weapon to place in the hands of the Council.

EDITORIAL REVIEW.

The Junior Benchers.

At the election of Benchers we advocated, as well as lay in our power, the total disregard of any distinguishing line between senior and junior members of the Bar in choosing the thirty elective Benchers. Four gentlemen were chosen by the supporters of this movement to represent their views, and, notwithstanding strenuous opposition, they were duly elected. A number of subjects requiring attention at the hands of the Benchers were promised consideration and practical dealing with by these candidates. Their policy embraced the re-establishment of the Law School, the opening of the Library at Osgoode Hall in the evenings, the adoption of some course to ensure legitimate solicitors' work to solicitors and to prevent about three-fourths of the conveyancing from being done by laymen. It remains to be seen how far the supporters of these candidates have been justified by their subsequent action.

In the first place, all the vapouring about the want of qualification through youth and inexperience has received a very just rebuke by the placing of the names of the gentlemen in question on most of the working committees.

The Law School was re-established shortly after the election, experimentally, for two years; and from the increasing attendance we see no reason why it should not be established upon a more permanent basis.

The Hall library is now opened in the evenings, and a very fair number of both students and barristers avail themselves of the privilege of attendance.

Thus, two of the pledges have been fulfilled; and, in time, we do not see why the third important matter should not be successfully dealt with. It is beyond question the most difficult matter of all to bring to any successful result.

We speak of debarring laymen from conveyancing, Division Court practice, and, in short, from practising generally as solicitors in non-litigious work. With respect to a great deal of this work, a remedy is in the hands of the Law Society, if they choose to adopt it. It is an open secret that a great many laymen who call themselves "conveyancers" advise upon wills, draw the necessary papers for taking out probate, and in fact do take out probate. Such conduct is a contempt of Court and punishable as such. Cases of the kind are frequently brought to notice, but the Benchers make no move in the matter. We may be wrong in our views of these matters, but we certainly think that the Law Society should instruct proceedings to be taken in every such case for the due punishment of the offender. Plenty of information is at hand, if they desire it, and committals could be procured in every case. Besides benefitting the public, they would thus turn into its legitimate channel enough business to make it worth a country solicitor's while to live—a thing very difficult for him to accomplish just now, and therefore not yielding him much enjoyment.

The evil that arises from such a state of affairs is aggravated to an extent little appreciated by the issue of commissions to laymen to take affidavits. These documents are, as a rule, framed and hung up in the offices of their possessors, who can point with pride to the signatures of two Judges and the seal of the Court as indisputable evidence of the unlimited personal confidence which the Court places in the commissioners. They are generally supposed to be duly qualified by their commissions to transact all sorts of legal business, and as they do business very cheaply, they can flourish where a solicitor will starve. The time for the indiscriminate issue of commissions is past, the country is pretty well populated, and it is hard to find a village where there is not a solicitor. The necessity for these commissions has therefore ceased, and the commissions should be revoked. At any rate the evil may be to some extent lessened by refusing the issue of any more such commissions, except in districts where there is not a solicitor within a certain radius, and then upon the express

condition that it should be revoked when the necessity for its existence ceased.

The conveyancing question is more difficult to deal with, and as yet we have heard nothing of an attempt to have the grievance remedied. But we do not despair, and we shall be very much disappointed if the ingenuity of the profession is to be baffled.

One important matter not included in the policy of the Junior Benchers, but in which they have been actively engaged, has received attention and has resulted in a measure of even justice between our English brethren and ourselves. Formerly, English Barristers and Solicitors enjoyed advantages here which Canadian Barristers and Solicitors did not enjoy in England. The journals of convocation show that the old rules relating to the call and admission of Barristers and Solicitors in the United Kingdom have been rescinded. The rules now in force permit a solicitor who has been in active practice in England for seven years to be admitted in Ontario without examination. No other person is provided for, and therefore we presume that no Barrister from the United Kingdom can be called here as of right.

BOOKS RECEIVED.

Das Englische Recht und Das Römische Recht als erzenguisse Indo-Germanischen Völker, Vortrag, gehalten vor dem Deutschen Gesellig—wissenschaftlichen Vereine Von New York, am. 15 Februar, 1882, Von J. Bleecker Miller. New York: E. Steigen & Co., 1882.

Destruction of our Natural Law by Codification, by J. Bleeker Miller, of the New York Bar. New York: printed by H. Cherouny, 1882.

REVIEW OF EXCHANGES.

Albany Law Journal.—28th October, 1882.

Negotiable Instrument—Time of Payment. Some cases are cited illustrative of the views held as to payment of notes expressed upon their faces to be payable conditionally or at a time not fixed by the note itself.

Promissory Note Payable on or before a Specified Day. A case of *Mahoney* v. *Fitzpatrick* is discussed, in which the Supreme Court of Massachusetts held that an instrument was not a negotiable promissory note, if it was payable in the alternative at a specified future time or earlier at the option of one of the parties.

Ibid.—4th November, 1882.

Evidence of Defendant's Good Character in Civil Action. Generally such evidence cannot be given, though where intention is the point in issue and the proof consists of slight circumstances, it may be given.

Rules Relating to Opinion Evidence, by JOHN D. LAWSON: As to mechanics and workmen, Rule 1. Mechanics and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible. Sub-rule 1. An expert, under rule 1, may give an opinion as to (a) the length of time it would take to do a certain amount of work, or (b) the proper method of performing it, or (c) the value of labour or materials. Sub-rule 2. Nautical men are experts on the question of care in marine cases. Sub-rule 3. And railroad men as to questions of railroad management.

Ibid.—11th November, 1882.

Burden of Proof as to Testator's Sanity. Some cases showing the differences of opinion upon the point whether sanity is to be presumed and insanity proved, or whether sanity must be affirmatively proved by the propounders of the will.

Rules Relating to Opinion Evidence, by JOHN D. LAWSON. Mechanics and Workmen (continued). Rule 1. Mechanics and workmen cannot testify as experts as to matters not of technical skill. Rule 2. Ordinarily, a person following one department of trade is not an expert as to matters relating to another department. Rule 3. But a person of experience in the calling to which the inquiry relates, is an expert as to the inquiry, (a) even though it is not his occupation, or (b) having once been so has been abandoned by him for another and different one.

Ibid.—*25th November*, 1882.

Duress by Threat of Imprisonment of Third Person. In *Harris* v. *Carmody*, 131 Mass. 51, it was held that a father may avoid a mortgage which he was induced to execute by threats of prosecution and imprisonment of his son. Other cases are cited.

Compulsion, by LEOPOLD LEO. Whether a pharmacist is bound to compound drugs at night, in answer to an application at the night bell, forms the subject of a dialogue between pharmacist and applicant profusely emphasized by the citation of ancient authorities.

Ibid.—*2nd December*, 1882.

Slander—Imputation of Crime. A number of cases are cited showing that there must be a direct imputation of crime, and giving instances of expressions which have been construed by the Courts in actions of slander.

Validity of Divorces upon Constructive Process of other States against Residents of New York. I. by LUCIEN B. CHASE. "It has long been believed to be the law of the commonwealth, that a divorce is void here when had in another State by a resident thereof according to its laws against a resident of New York, who has neither appeared nor had due personal service of process upon him. * * It is proposed to show here that the divorce is valid elsewhere; further, that the doctrine that it is void in New York is unsound in principle and controlling authority, and that our Courts, except in *People* v. *Baker*, 76 N. Y. 78, if even that case does, have never in fact authoritively promulgated it. For clearness, let the proposition be stated: 'A divorce is valid in New York when had in another State by a resident thereof, according to its laws, against a resident of New York, who has neither appeared nor had due personal service of process upon him.'"

Criminal Law Magazine.—*September*, 1882.

Argument of Counsel in Criminal Cases, by DAVID D. SHELBY. The learned writer says: "The very nature of judicial proceedings requires that the Court should regulate and control them, This necessarily includes the power, in all cases, to determine the question as to what shall be admitted in argument, the degree of invective to which a counsel can go, and the time during which the argument shall continue." And he mentions a case in which counsel for the prisoner attempted to speak against time, to save the life of his client, by the expiration of the term of the Court. Cases are cited upon the question of limiting counsel as to time; the manner in which the respective counsel should conduct themselves, and restrictions upon their manner of speech, are treated of.

Irish Law Times.—15th July, 1882.

Solicitor's Lien for costs on "Property Recovered or Preserved." Concluded in the following number. The 23 and 24 Vict. cap. 127, sec. 8, enacts that "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, etc., it shall be lawful

for the Court or Judge, before whom any such suit, etc., has been heard, etc., to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, etc." The cases upon this useful provision are collated.

Ibid.—29th July, 1882.

Presumptions of Life and Death. Concluded in the following number. Cites some peculiar cases in which the presumption of death rests upon doubtful circumstances.

Ibid.—12th August, 1882.

Right to Costs out of Particular Estate or Fund in Litigation. Continued and concluded in two following numbers. A good many cases, English, Irish and American, are cited upon the subject, and it is noticed that by G. O. LV. r. 1, in England (Rule 428 in Ontario) the right to such costs is especially preserved. English, Canadian and American cases are cited as to costs when the subject matter of the suit has been settled before litigation, and as to appeals for costs.

Ibid.—2nd September, 1882.

Privilege of Witnesses as to Criminating Questions. Continued and concluded in five following numbers. At one time it was *vexata quæstio* whether a witness was bound to answer when the answer might subject him to civil liabilities; otherwise now by Statute. The privilege is the witness', not that of the counsel. If he answers at all he must disclose the whole transaction. The privilege may cease by the liability ceasing, as where an offence is barred by Statute of Limitations, but not where the witness has been pardoned. Numerous cases, English, Irish and American are cited upon the various phases of this subject.

Law Journal—17th June, 1882.

Spectators at a Prize Fight. In *Regina* v. *Conly*, the majority of the Court for the consideration of Crown Cases Reserved, held, that to prove a defendant to have been at a fight and looking on, without other evidence, is not enough to justify a conviction for aiding and abetting the fight. The case is then discussed.

The Judgment against a Firm. The case of *in re Young, ex parte Young*, 51 L. J. Chy. 141, is discussed in connection with the later case of *Jackson* v. *Litchfield & Sons*, reported in the June number of the L. J. reports. We can quite agree with the learned writer who says, "It is sometimes more convenient to sue individual partners rather than the firm, and when the firm is sued the issue of execution requires much caution in the present confused state of the rules, and absence of authority." We might go further, and say the provisions of the Judicature Act on this point had better be avoided altogether, if the practitioner's object is to secure payment of his client's debt, and not to attempt to obtain an interpretation of the rules at the latter's expense.

Ibid.—24th June, 1882.

Mortgagee and the Statute of Limitations. In *Heath* v. *Pugh*, reported in the June number of the L. J. Reports, it was held that a mortgagee who had obtained foreclosure within twenty years from bringing an action of ejectment was entitled to recover, overruling the decision that, as twenty years had elapsed from the date of the mortgage, and there was no proof of the payment of interest, the Statute of Limitation applied. The chief point in the case is its determination that the mortgagee, by foreclosure, obtains a new title as absolute owner.

References at Nisi Prius. Referring to a recent case, the learned writer says, "It is now laid down emphatically that a cause cannot be referred at Nisi Prius merely because it is likely to be troublesome, and does not resolve itself into one or two simple questions of fact."

Ibid.—1st June, 1882.

The Alteration of Bank Notes. "When Lord Coleridge decided that an alteration in the number of a bank note did not affect its validity in the hands of an innocent holder, the decision was very generally accepted as reasonable and convenient. The Court of Appeal, consisting of the Master of the Rolls and Lords Justices Brett and Cotton, have now overruled that decision. * * The question was, What was the extent of the rule avoiding written documents if altered in a material particular? No other reason for the rule is given but that it is for the prevention of frand, when it is obvious that the extent of the rule must depend largely on the consideration of the kind of fraud aimed at, and the manner of its prevention. * * The result is that the words of Lord Coke, intended to apply to a most solemn instrument, which would ordinarily repose in a muniment chest for the whole term of its existence, are now applied to a document which may pass through fifty persons' hands in the course of a day."

Ibid.—8th July, 1882.

Collision between two Ships of the same Owner. Where two ships belonging to the same owner collided, and specie which was carried in one was lost, a verdict for the full value of the specie was obtained against the owners. "If it is a defence, when two ships belonging to the same owner come into collision, to say that the ship carrying the goods was not in the wrong, but the other, why would there not equally be a defence when there is a collision between two trains on a railway?"

Ibid.—15th July, 1882.

Rectifying Mistakes in Wills. A case in which the word "forty" had been inserted in a will instead of "four hundred," in describing the testator's shares, is discussed. The will was admitted to probate, the word "forty" to be omitted wherever it occurred.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Dominion Election Cases.

ONTARIO.] [CAMERON, J., 20TH OCTOBER, 1882.

In re WEST HURON ELECTION CASE.

Dominion Controverted Election—Preliminary objections—Allegation of undue influence by Provincial Government—Allegation of agency—Sufficiency of—Striking off votes where seat not claimed.

Held, following the *North York Election Case*, *ante*, p. 490, that the High Court of Justice has no jurisdiction in Dominion controverted election cases.

Allegation—that "the Government of the Province of Ontario, in the interest and on behalf of" the respondent, used undue influence to secure his return. Objection—that no agency is alleged, and because no such agency, if alleged, could in law exist.

Held, that this objection should be left to be disposed of by the Judge at the trial.

Held, also, that a petition need not state the grounds that invalidate an election so as to be free from objection on special demurrer, but should show facts the existence of which would invalidate the election; and *semble*, that evidence of agency could be given under the allegation objected to.

Allegation—that forty persons whose names were not on the voters' lists, and who were not entitled by law to vote, did vote, and voted for the respondent. Objection—that the charge is not available because the seat is not claimed for the defeated candidate, and because the matter alleged cannot be proved, viz., that the forty votes were cast for the respondent.

Held, that, though this objection came within the *East Elgin Election Case*, 4 App. 412, there appeared to be too much doubt about the question

to strike out the allegation; for *semble*, that a person who has voted without a right to do so is not entitled to the protection of the statute as to secret voting, and that an elector should not be prevented from showing that the elected member obtained his majority through bad votes.

McCarthy, Q.C., and *Creelman*, for the petitioner.

G. F. Shepley, contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[PATTERSON, J.A., 24TH NOVEMBER, 1882.

McCRAE v. WHYTE.

Appeal bond—Time for allowance—Motion for leave to appeal—Delay.

Judgment was delivered in this case on the 24th March, 1882. On the same day a motion was made for leave to appeal to the Supreme Court of Canada, there being no appeal without such leave. Leave to appeal was granted on 1st May, 1882, and the appeal bond was filed on 22nd May, 1882. A motion was made for allowance of the bond.

Held, that, since the delay in granting leave to appeal, which prohibited the appellant from filing his bond within one month from the giving of the decision, was that of the Court, the appellant should not be prejudiced thereby, and that the time for filing the bond should therefore run from the 1st May, the day on which leave to appeal was granted.

J. H. Macdonald, for the motion.

Hoyles, contra.

High Court of Justice.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 11TH NOVEMBER, 1882.

In re HALL.

Extradition—Ashburton Treaty—Forgery—Uttering.

The prisoner was a clerk in the office of the Comptroller of Newark, New Jersey, his duty being to make proper entries of moneys received for taxes in the official books of the Comptroller provided for that purpose. Having received a sum of money for taxes, he entered the correct amount at first, and then erasing the true figures, he inserted a less sum, with intent to benefit himself by the abstraction of the difference between the two, and to deceive the Comptroller and the Municipality.

Held, that the offence was forgery at common law, for which the prisoner was liable to be extradited under the Ashburton Treaty.

Per Proudfoot, J. Uttering is not necessary to constitute the crime of forgery, but if it were, the forged entry in books of the public character of those in question would be published as soon as made. The offence with which the prisoner was charged is forgery within 32 & 33 Vict. cap. 19, ss. 26, 45.

Fenton, for the State of New Jersey.

Murphy, for the prisoner.

[THE CHANCELLOR, 15TH NOVEMBER, 1882.

GUEST v. GUEST.

Alimony—Foreign marriage and divorce—Adultery—International law.

Credit should be given to a foreign decree of divorce pronounced in the country in which the marriage was celebrated by a court having jurisdiction, where there is no evidence that the proceedings were collusive or conducted contrary to natural justice, and the cause alleged therein, viz., adultery, is such as to entitle the party injured to a severance of the marital relation wherever Christianity is accepted.

Therefore, where the husband set up such a decree as a defence to an action for alimony,

Held, that the action should be dismissed.

DARLING v. DARLING.

Foreign Commission—Return.

A commission was issued to examine witnesses in England, pursuant to Order xxxiii. in the form given in the Schedule to the Rules of Court, the 1st February being named as the return day. Upon application, the Master in Ordinary made the following order:—"I extend the time for the return of the commission peremptorily to the 24th February." The witnesses were examined on the 24th February, but the commission and evidence did not reach the Master's office until sometime afterwards.

Held, that the effect of the Master's order was to extend the time of return to the 24th February, up to which time the commissioners had the right to take evidence; and the commission having been executed and posted within that time, there was no irregularity because of the necessary delay occasioned by its transmission from the foreign country.

Held, also, that the attendance of all parties before the commissioners on the 24th February, when the evidence was taken, was a waiver of any objections that the evidence was not returned to the Master's office by the 24th February.

[22ND NOVEMBER, 1882.

O'CONNOR v. ANDERSON.

Will, construction of—Devise of realty—Power to sell—Implied power to Mortgage.

A testator gave all his real and personal property to his wife for life, and thereafter to his son, with power to the wife to sell the personalty, provided she afforded a home for all the children till they attained 18 years of age, and appointed his wife and the plaintiff his executors. He added, in a separate clause, "if, through sickness or poverty, my wife is sore embarrassed, and F. O'C. (the plaintiff) thinks it advisable to sell my real estate, she is to have the liberty."

Held, that the intention of the testator was primarily to have a home kept for the children, with power to sell the farm, if necessary, in order to effect this purpose; and that the exercise of this power, by mortgaging the real estate in a case of actual distress, and so preserving the home and the benefit of the land, was not repugnant to the intention of the testator.

The plaintiff paid the mortgages upon the land when due.

Held, that he was entitled to be recouped his outlay, with interest and costs, by a sale of the land.

McCARDLE v. MOORE.

Action for administration by creditor—Costs—Administrator ad litem—Payment to.

Where an action was brought for general administration of an estate by a person having a claim on interest only in the hands of the executors, no costs were awarded for or against the executors, because the ordinary summary proceedings would have been sufficient, and the executors had properly performed their duty in respect of the principal money.

The original plaintiff, a lunatic, died pending the proceedings. The plaintiff's costs, between solicitor and client, were directed to be paid out of the interest recovered, but payment of the surplus to the administrator *ad litem* was refused.

FOLEY v. CANADA PERMANENT L. & S. Co.

Infant, mortgage by—Acquiescence—Ratification—Lien for salvage money.

The plaintiff's father being entitled to the patent from the Crown of certain lands upon payment of the amount due the Crown, died on 14th December, 1873, having devised the land (subject to mortgages created by him) to his wife for life, during widowhood, with remainder in fee simple to the plaintiff. The plaintiff, while a minor, on the 20th February, 1878, joined with his mother in a mortgage of the lands to the defendants, who, out of the proceeds of the loan, paid the existing mortgages and the amount due the Crown. The loan was for the benefit of the plaintiff, whose remainder was thereby preserved. On 19th April, 1880, the plaintiff came of age, according to the evidence, but alleged that he came of age on 16th March, 1881. On 10th January, 1881, he and his mother executed a mortgage to the L. & O. I. Co., in order to pay off part of the defendants' mortgage, but no money was advanced on this, and it was discharged. On 25th August, 1882, the testator's widow died. On 7th September, 1882, the plaintiff's solicitor demanded of the defendants a release of the mortgage, on the ground of the plaintiff's infancy when it was executed. On 23rd September, 1882, the defendants' agent served a notice of sale on the plaintiff, who said he was not able to pay, that he would like to pay it if he saw a way to pay it, and that he would try to do it. On 30th September, 1882, this action was brought.

Held, that, though the mortgage was originally voidable, it was valid until repudiated; that the plaintiff's execution of the mortgage to the L. & O. I. Co., and his conversation with, and admissions to, the defendants' agent, were a recognition of his liability on the defendants' mortgage, and, coupled with his inaction during the period between his coming of age and the institution of this action, disentitled him to claim the privilege of disaffirmance.

Held, also, that, in the event of the plaintiff's success, the defendants would have been entitled to liens upon the land for the money, in the nature of salvage, paid by them to the Crown and to the prior mortgagees out of the proceeds of their loan to the plaintiff and his mother.

[PROUDFOOT, J., 8TH NOVEMBER, 1882.

GILLIES v. McCONACHIE.

Will, construction of—Charities—Mixed fund—Cy près administration of funds—Jurisdiction.

A gift to a charity out of a mixed fund is valid, if there be enough pure personalty to answer the bequest.

The testator, who was a minister of the United Presbyterian Church of North America, after bequeathing $1,000 to that church, proceeded:—"I give for a Jewish mission the sum of $1,000, to that church which is sound and evangelical in doctrine and pure in worship, using in songs of praise the inspired book which can unite all nations, Jews and Gentiles, in all ages, etc." The witnesses said that this description could only apply to one other church besides that to which the testator belonged; but it did not appear that his church had a mission to the Jews, or was willing to apply the legacy for that purpose.

Held, that the testator intended the bequest for his own church, and a reference was directed to enquire as to the mission, etc.

"To the pious, poor, converted Jews, that meet together for the reading of the Scriptures, for their instruction and mutual edification, I leave $1,000. * * The balance of my estate I leave to the poor and destitute, to supply their temporal wants in food and raiment."

Held, that the first bequest was a good charitable bequest, and that the second was also good, so far as the residue consisted of pure personalty, and were not void for uncertainty; that there should be enquiries whether any such Jews were to be found, whether there were any poor in the congregation of which the testator was pastor who needed assistance, or whether he had any poor relatives.

Held, also, that as to the bequests to the Jewish mission and the pious, converted Jews, if the above church would not accept the former, or if no such pious Jews should be found, the Court would administer the funds *cy près*.

There were no trustees of the funds appointed, but the testator appointed executors.

Held, that it was their duty to pay the legacies, and, therefore, that the administration should be by a scheme before the Master, and not by the Crown.

D. A. Creasor, for the plaintiffs.

Platt, for the Church.

Creasor, Q.C., for the widow.

J. K. Galbraith, for the next of kin.

HOPKINS v. HOPKINS.

Will—Invalid devise—Possession—Statute of Limitations.

A devise of land to J. H., in fee simple, was void on account of J. H. being a witness to the will. The devise was subject to a lease, which had nearly twelve years to run from the death of the testator, as to which the testator directed that the rent payable thereunder should be paid, one-half to J. H., the other half to his executor, to be invested, and principal and interest paid to J. H. as the executor might think he required the money. The executor, assuming the devise to be valid, paid the rent to J. H. The latter, several years after the testator's decease, executed a deed of the land to C. H., who thereafter, received the rent through J. H. with the privity of the executor. C. H. went into possession after the expiration of the lease.

Held, (i) that the direction as to the rents was void, as they were not a bequest to the executor, but belonged beneficially to J. H.; (ii) following *In re Goff*, 8 P. R. 92; *In re Taylor*, 28 Gr. 640, that the rights of the true owners, some of whom were infants, had been barred by the receipt of the rents by J. H. and C. H.

IN CHAMBERS.

[22ND NOVEMBER, 1882.

ROSENSTADT v. ROSENSTADT.

Alimony—Adultery—Pleading—Particulars.

In an action for alimony, the statement of claim contained the following paragraph:—"The plaintiff alleges and charges adultery on the part of the defendant as a further ground for relief in the premises."

Held, on appeal from the local Master at Hamilton, reversing his decision, that the defendant was entitled to particulars of the acts of adultery intended to be given in evidence under the above allegation, that they should be furnished him within one month, that the plaintiffs evidence should be limited to the particulars at the trial, and that, in default of particulars being delivered, no evidence should be given under the general charge.

H. Cassels, for the appeal.

Mackelcan, Q.C., contra.

TILT v. KNAPP.

Judicial sale—Standing conditions—Default of purchaser—Re-sale—Forfeiture of deposit.

The applicant, a purchaser at the sale herein of a parcel of land, paid to the vendor's solicitors for payment into Court ten per cent. of his purchase money, under the standing conditions of sale, one of which was as follows: "If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon shall be forfeited, and the premises may be re-sold, and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter." The applicant failed to complete his purchase, and the property having been re-sold brought twenty five dollars more than the applicant's bid.

Held, that the deposit was absolutely forfeited under the above condition, and that the applicant would not have been entitled to a return thereof in any result of the re-sale; but as the deposit covered all expenses and costs incurred by the re-sale, the applicant was relieved from payment of the costs of the re-sale which had been taxed against him under the order therefor.

Held, also, that there is no difference in this respect between a judicial sale and a sale under private contract.

Where there is a deficiency on a re-sale, and a deposit has been made which is forfeited, the Court will apply the deposit *pro tanto* to reduce this deficiency, and order the balance to be paid by the defaulter.

E. Douglas Armour, for the purchaser.

H. Cassels, for the plaintiff.

Hoyles and *Moffatt*, for several defendants.

Harcourt, for the guardian *ad litem*.

[CAMERON, J., 25TH NOVEMBER, 1882.

FLEMING v. HALL.

Sheriff's fees—Poundage.

On a motion to reduce the fees of the Sheriff of Bruce, on the ground that, where the amount realized was between $1,000 and $4,000, the Sheriff was entitled to only three per cent. on the sum realized,

Held, affirming the decision of the Master in Chambers, that the following are the proper charges of the sheriff for poundage:—Where the amount realized by him is $1,000 or under, six per cent.; where the amount is over $1,000 and under $4,000, six per cent. on the first $1,000 and three per cent. on the excess above $1,000; where the amount is $4,000 or over, six per cent. on the first $1,000, three per cent. on the excess up to $4,000, and one and one-half per cent. on the remainder.

W. H. P. Clement, for the motion.

Allan Cassels, contra.

[THE MASTER IN CHAMBERS, 14TH DECEMBER, 1881.

HOPKINS v. SMITH.

Costs of day.

The practice of giving costs of the day is superseded by the Judicature Act, since, if the plaintiff fails to set the case down, the defendant may do so, and then costs are in the discretion of the Judge at the trial.

The Master in Chambers has now no authority to make an order for such costs.

Holman, for the motion.

J. H. Macdonald, contra.

[3RD NOVEMBER, 1882.

GOWANLOCK v. MAVIS.

Chancery Division—Exclusive Equity jurisdiction—Mode of trial—Jury notice.

An action for the reformation of a lease is an action within the exclusive jurisdiction of the late Court of Chancery.

Held, therefore, that, under section 45 of the Judicature Act, the trial should be before a Judge, and that a jury notice was irregular, and should be struck out.

Clement, for the motion.

H. J. Scott, contra.

[7TH NOVEMBER, 1882.

TURNER v. KYLE.

Seduction—Discovery—Examination of witness before trial—Special circumstances—Rules 224 and 285.

In an action of seduction, the defendant moved for an order for the examination before trial, under Rule 224, of the plaintiff's daughter, as a person for whose immediate benefit the action was brought. The plaintiff and defendant had both been examined. The plaintiff did not know, or pretended that he did not know, anything about the alleged seduction, and denied any knowledge of his daughter's having had a child. The defendant denied the alleged seduction, all knowledge of the girl, her name, and any alleged occasion. He had been asked where he was at a certain time, but, on the advice of his solicitor, refused to answer, and a motion to compel him to attend at his own expense and answer the question had been refused.

Held, that the defendant, having exhausted all the regular and ordinary means of obtaining discovery without effect, was entitled to have the plaintiff's daughter examined for the purpose of discovery, under Rule 285, in order that he might be informed of the case which he would have to meet at the trial.

Fenton, for the motion.

A. McDougall, contra.

[8TH NOVEMBER, 1882.

LLOYD v. WALLACE.

Judgment to recover land—Costs—Trust funds underdue—Garnishment—Rule 366.

Held, that a judgment in action for the recovery of land awarding costs is a judgment within the meaning of Rule 366, and the costs may be garnished.

Held, also, following *In re Cowan's Estate*, L. R. 14 Chy. Div. 638, that money in the hands of trustees not yet due to the *cestui que trust* may be garnished.

Black, for the plaintiff.

Gould, for the judgment debtor.

Malloy, for the garnishees.

[14TH NOVEMBER, 1882.

HENDRIE v. NEELON.

Examination of witness before trial—Discovery--Rule 285.

Where a party applies for the examination of a witness before trial, under Rule 285, it is not sufficient to show merely that the examination will materially benefit him; it must be shown that he has unsuccessfully used the regular and ordinary means of obtaining discovery, or some other special reason must be given why the witness should be examined out of the regular course instead of at the trial for the first time.

Eddis, for the motion.

NOVA SCOTIA.

In the Supreme Court.

[McDONALD, C.J., AND McDONALD, SMITH, JAMES AND WEATHERBE, JJ., 16th DECEMBER, 1881.

FLETCHER v. CHISHOLM.

Relief of insolvent debtor—Appeal Court irregularly organized—Certiorari quashed.

A debtor was imprisoned on process issued out of the County Court, and was brought before commissioners who ordered his discharge. An appeal was taken to a Court organized under the Act of 1880, cap. 2, sec. 111, but the order, though made by the Clerk of the County Court, was signed by him as prothonotary. The proceedings were brought up by *certiorari*, and a rule taken to quash the *certiorari*, on the ground, amongst others, that, as the special Court had not been regularly organized, it had no jurisdiction, and *certiorari* would not lie.

Held, that the *certiorari* must be quashed.

[McDONALD, C.J., AND McDONALD, JAMES AND WEATHERBE, JJ., 17TH DECEMBER, 1881.

DE WOLFE v. HOLMES.

Opening judgment by default—Accounting for delay—Defence on merits.

Judgment by default was set aside in an ejectment suit, where the affidavits disclosed a defence on the merits, without alleging in terms that the defendant had a defence on the merits. And the want of a plea was accounted for by the defendant's attorney swearing that in consequence of an appeal from an order for security for costs in the cause, and of several papers in the cause being served on his counsel in Halifax, he was misled as to the position of the cause, and that it was in a position in which judgment could be marked until a levy was made on defendant's property. Plaintiff's attorney, in reply, swore that the rule absolute setting aside the order for security had been forwarded for service on defendant's attorney, and that, for this and other reasons which he detailed, the statement of the attorney as to his having been misled could not be true.

Held, (Wetherbe, J., dubitante), that the appeal from the judgment, setting aside the default, must be dismissed.

[McDONALD, C.J., McDONALD AND WEATHERBE, JJ., 17TH DECEMBER, 1881.

McDONALD v. VAUX.

Appeal from County Court.

Where a cause was tried at the County Court Chambers, 5th December, 1879, judgment pronounced, 25th December, 1879, and a motion for appeal made on the last day of the January term of the County Court, 1880, which was refused,

Held, that the appellant had not brought himself within the terms of the County Court Act, 1877, and that the appeal from the decision of the County Court Judge refusing the appeal must be dismissed.

[McDONALD, C.J., AND McDONALD, SMITH, JAMES AND WEATHERBE, JJ., 17TH DECEMBER, 1881.

BROOKFIELD v. SYMES.

Relief of insolvent debtor—Appeal from Commissioners.

Defendant was imprisoned in the County jail, under process issued out of the County Court, and detained under an order of Commissioners for the relief of insolvent debtors. An application was made to this Court *in banc*, for a summons to have the prisoner brought up by way of appeal.

Held, that the Court had no jurisdiction to hear the case, not having met within ten days from the date of the order from which the appeal was sought.

[SMITH, JAMES AND WEATHERBE, JJ., 21ST DECEMBER, 1881.

GREENFIELD v. YORKE.

Insolvent Act of 1875—Liability of attaching creditor for costs of official assignee.

The defendant placed a writ of attachment in the hands of the plaintiff as official assignee under the Insolvent Act of 1875, and, after the creditors' meeting, gave defendant notice of taxation. Defendant attended the taxation, and at his instance some of the items were struck off. The balance of the amount, as taxed by the Judge for the costs of the official assignee down to the appointment of the creditors' assignee, defendant promised to pay. An action was brought by the plaintiff for the amount, and judgment was given for the plaintiff by the County Court Judge, which, on appeal, was reversed, judgment being entered below for defendant.

[McDONALD, C.J., AND SMITH, JAMES AND WEATHERBE, JJ., 23RD DECEMBER, 1881.

BOSSOM v. COOMBES.

Motion to strike off cause—Papers not on file—Appeal in cause originating in Magistrate's Court—Amount in dispute under $40.

A rule *nisi* was taken out on 2nd April, 1881, to strike a cause off the docket, on the grounds that the papers were not on file, and that the cause

had originated in the County Court, and the amount in dispute was less than $40, being only $10.50. It was shown by affidavit, on the argument of the rule, that the reason why the papers were not on file was that an application was pending in the Court below to amend the minutes. The rule *nisi* was, after argument, discharged. Another rule *nisi* was taken out on 14th December, 1881, to strike off the cause and dismiss the appeal on the same grounds as before. The papers were not on file at the time of taking out of the rule *nisi*, but were filed before the argument.

Held, that this was not sufficient, and that the appeal must be dismissed.

[SIR WM. YOUNG, C.J., DESBARRES, SMITH AND JAMES, JJ., 23RD DECEMBER, 1881.

GISBONE v. CAPE BRETON CO. (LIMITED).

Rule referring to Court evidence to be taken before Master—Jurisdiction to hear cause.

A cause was tried at Sydney, and not concluded when the Court adjourned. A rule was then made, consented to by the counsel and attorneys of both parties, ordering that, in addition to the evidence taken before the Court, further evidence should be taken at Sydney before a Judge, or a person named in the rule, and at Halifax before a Master, in the manner set out in the rule; that all the evidence should be filed with the prothonotary at Halifax, and the cause should be heard upon such evidence before the Court sitting *in banc* at Halifax, and that the Court should have power to refer any matter of account in said cause to a master or referee for his report, which report the Court might confirm, reject or utilize, as it should see fit, and enter up judgment for either of the parties; and it was further ordered that the Court should have power to make all and any orders, and do all things necessary for the purpose of finally disposing of the cause.

Held, that the Court had no jurisdiction to hear the cause under the rule.

[MCDONALD, C.J., AND MCDONALD, SMITH, JAMES AND RIGBY, JJ., 7TH JANUARY, 1882.

MCDONALD v. MCDONALD.

Order made by Judge returnable before presiding Judge on circuit rescinded.

A rule to set aside pleas was made by a Judge returnable before "the presiding Judge of this honourable Court at Guysborough" on the first day of the ensuing October term there, and was argued on the first day of the term after the opening of the Court. Judgment was reserved, and afterwards, at Halifax, the learned Judge who heard the argument made an order absolute setting aside one of the pleas, and then resigned.

Held, that the order must be rescinded, on the ground that it was made returnable in Court.

[McDONALD, C.J., AND JAMES, WEATHERBE AND RIGBY, JJ., 12TH JANUARY, 1882.

ANNAND v. BRENNAN.

Contract to advertise for a year—Advertisement discontinued—Rescission.

Plaintiff declared on a contract to publish an advertisement for defendant for a year, to occupy a stipulated place, for $200 per annum, defendant to have the privilege of changing the advertisement. Previous to the expiration of the year, defendant ordered the advertisement to be discontinued. No further advertisement was published for defendant, and the space was filled with other matter.

Held, that plaintiff was entitled to recover for the whole year, including the period during which the advertisement was not published.

[McDONALD, C.J., AND JAMES, WEATHERBE AND RIGBY, JJ., 10TH JANUARY, 1882.

JOHNSTON v. McLEAN.

Entry of appeal.

Appellant allowed to enter cause on payment of costs of rule to dismiss appeal for non-entry where the failure to enter it resulted from misunderstanding between counsel engaged.

[McDONALD, SMITH AND WEATHERBE, JJ., 14TH JANUARY, 1882.

BLACK *et al.* v. BARSS.

Non-joinder—Suit by two out of three obligees—No allegation of the death of the third obligee.

A bond was made to three obligees, one of whom had died before the action, which was brought by the surviving obligees and the executrix of the deceased obligee. At the trial plaintiffs' counsel obtained leave to strike out the name of the executrix. There was no allegation in the writ of the death of one of the obligees, but evidence of the fact was given at the trial.

Held, that the omission in the writ was fatal, and that the verdict by consent for plaintiffs must be set aside.

[RITCHIE, E.J., AND McDONALD, JAMES AND WEATHERBE, JJ.

JOHNS *et al.* v. BARBOUR *et al.*

Conveyance by insolvent of all his property for benefit of creditors—Effect as respects judgment subsequently recorded—Injunction to restrain sale under judgment—Cloud on title—Apparently good title.

Rogers & Co., on the 10th of May, assigned all their individual and partnership property, both real and personal, to a trustee, for the general

benefit of their creditors, and executed at the same time a deed in trust to him of their lands, which was recorded 12th of May. Defendants entered a judgment against Rogers & Co. on the 15th of May, which was recorded the next day. On the 17th of May, a writ of attachment was issued against Rogers & Co., under the Insolvent Act of 1875, and in June creditors' assignees were appointed, to whom the trustee subsequently conveyed the lands, which were afterwards sold to certain of the plaintiffs, who conveyed to others of the plaintiffs in trust to secure the purchase money to the creditors' assignees. Defendants proceeded to advertise and sell the land under execution, and plaintiffs sought to restrain them by injunction.

Held, that, as between the parties to it, the deed from Rogers & Co. to the trustees was valid, and that it was open to the creditors' assignees, if they considered it for the benefit of the estate, to have the property conveyed to them by the trustee; that the judgment creditor never obtained any lien on the property under his judgment; but that, although the Court would restrain a judgment creditor from selling property, even under a judgment that would convey no title to the purchaser, and where the creditor only proposed to sell the right, title and interest of the judgment debtor, yet it was incumbent on the plaintiffs to show that the cloud on their title was caused by what was apparently a good title, though in fact defective, and that, in the present case, defendants had not an apparently good title, as the first deed from Rogers & Co. appeared to convey the title.

WEATHERBE, J., concurring, limited his opinion with reference to the effect of the deed from Rogers & Co. to the trustee to the case of a naked conveyance by the insolvent for the benefit of the creditors.

[McDONALD, C. J., AND McDONALD AND RIGBY, JJ., 7TH NOVEMBER, 1882.

BRENNAN v. JACK.

Insolvent Act of 1875—Use and occupation—Implied contract.

Defendant was assignee, under the Insolvent Act of 1875 and amending Acts, of one McCleeve, who, prior to his insolvency, had leased certain premises from the plaintiff. The action was for the use and occupation by defendant of these premises in continuing to keep thereon certain machinery belonging to the estate. There was uncontradicted testimony to the effect that defendant was about to sell the machinery, but refrained from doing so at the plaintiff's request, the latter making an offer for the purchase of the same, contingent upon obtaining his discharge (his estate being also in liquidation). The agreement to purchase having fallen through,

Held, that, for the period during which the machinery remained upon the premises, subject to the contingent agreement above referred to, no contract to pay for use and occupation could be implied.

McDONELL *et al.* v. McMASTER.

Registry of deed—Delivery—Insufficient direction—Setting aside verdict.

Hugh McM., by deed dated 18th June, 1856, conveyed certain real estate to his son Ronald McM., who, on 3rd October, 1874, subsequent to his father's death, conveyed by way of mortgage to P. S. all and singular the estate, right, title, interest, claim, property and demand which he (R. McM.) had in, to, etc., the land owned by his father in his lifetime. The mortgage having been forclosed, the mortgaged premises were bought in by P. S., the mortgagor, whose executors brought ejectment against the defendant, Hugh McM., a brother of Ronald, who claimed a tenancy in common of the premises, on the ground that the deed first mentioned was never executed, and that the mortgage to P. S., therefore, only conveyed the individual interest of R. McM., as one of the heirs of his father.

The only evidence of the deed in dispute adduced by plaintiffs was a certified copy from the Registry of Deeds for the County where the lands lay. It did not appear by whom it was left for registry, and the evidence of R. McM., the grantee, indicated that he was ignorant of its existence when the mortgage was given.

Held, that the finding of a paper, purporting to be a deed, in the Registry books is not of itself *prima facie* evidence of the due execution of an original deed, such execution including such a delivery as to satisfy the rule of law. The plaintiffs having failed to prove delivery, and the Judge who presided at the trial having failed so to instruct the jury, the verdict for plaintiffs must be set aside with costs.

[McDONALD, C.J., AND JAMES AND RIGBY, JJ., 7TH NOVEMBER, 1882.

DWYER v. GASPER.

Setting aside verdict.

Verdict set aside, costs to abide the event, on the ground that the jury had decided the issues submitted to them without giving sufficient weight to the evidence.

McRAE v. DUNLOP.

Assessment of damages—Liability of Sheriff for escape—Misdirection.

In an action against a sheriff for allowing a party arrested under a writ of *capias* to escape from his custody, the defendant allowed judgment to pass against him by default. Damages were assessed before a coroner's jury, who were directed, "that if they came to the conclusion that the sheriff allowed the party to escape through any negligence in taking the proper precautions to prevent such on his part, they were bound to find the full amount, or at least heavier damages, etc."

Under these instructions, the jury found for the plaintiff for the full amount.

The case came up on a rule to set aside the assessment for misdirection.

The measure of damages, in the opinion of the Court, being the value of the custody of the debtor, and that being dependent upon the probability of the creditor obtaining payment of his debt by means of it,

Held, that there was clear misdirection.

[McDONALD, C.J., AND JAMES AND RIGBY, JJ., 7TH NOVEMBER, 1882.

Re ASSESSMENT OF JAMES CROWE.

Assessment—Limitation of Powers of Municipal Councils—Amendment.

The power of Municipal Councils to hear and determine disputed assessments is subject to the same right of appeal to the County Court that existed previously to the passage of the County Incorporation Act of 1879 from the decisions of the Sessions.

On the hearing of an appeal to the County Court against a specific item of an assessment, it is not competent to the Court to entertain an application by the appellee to amend, alter or vary the assessment in items not challenged before the Municipal Council.

McDONALD v. FRASER.

Affidavit for capias—Cause of action—Bail.

writ of summons and attachment against defendant as an absent or absconding debtor was issued in the County Court district, on an affidavit sworn and order granted in another district. The cause of action disclosed was an amount due upon a promissory note, with interest from date, but plaintiff, in the affidavit upon which the capias issued, added the words, "for expenses in connection with said note," and the writ was endorsed for the full amount, including such "expenses."

Held, that the words "for expenses in connection with said note" were bad for "uncertainty;" but as there was authority to enable the Court or Judge to require bail only for the amount for which the affidavit established a good cause of action, the defendant was not entitled to his discharge.

Semble (McDonald, C.J., dissenting). The law does not require that a commissioner should "grant" or "allow" writs of capias or attachment. It is not essential that the endorsement should be signed by the commissioner, but merely that the amount sworn to should be endorsed.

In Re ESTATE OF GEO. SMITHERS.

Award—Executors—Settlement of Estate.

G. S. died, having by his last will appointed M. S. executrix, and G. T. S., who had been a partner in his business, executor of his estate. Disputes having arisen between the executrix and executor relative to the estate, all matters in difference between them were referred to arbitrators, who heard the matters in dispute and made an award thereon.

Held, overruling the decree of the Judge of Probate, that, on the final settlement of the estate, G. T. S. was not estopped by the award so made, the creditors, legatees and next of kin cited to appear on the final settlement not having been parties to the award. No previous arrangement of executors among themselves, friendly or otherwise, however full and explicit, can take away the right of the "creditors, legatees, or next of kin" to demand an independent investigation.

Vice-Admiralty Court.

[RITCHIE, E.J.

THE SYLPH.

Derelict—Salvage.

The schooner *Finance*, while on a fishing voyage, fell in with the schooner *Sylph*, the wind blowing heavily and the sea being very rough. The latter had both masts gone, her rigging on her deck, and was lying helpless in the trough of the sea. In response to signals of distress, the *Finance* lay to, and, at great risk, took off the captain, crew and passengers of the *Sylph*, with all their effects, and the schooner's papers, chronometers, flags, charts, etc. The captain had no intention of returning to the vessel. The wind being too high to do anything then, the *Finance* stood by until it had abated, and then taking the other in tow, brought her into Shelburne Harbour, a distance of ninety miles.

Held, that the *Sylph* was practically derelict, and the value of vessel and cargo having been appraised in Shelburne at $1,800, that the salvors should receive one-half that sum, viz., $900.

(Reported by Jas. M. Oxley, Esq., LL.B., Barrister-at-law.)

NEW BRUNSWICK

Supreme Court of Canada.

[ALLEN, C.J., WETMORE, KING AND WELDON, JJ., FEBRUARY, 1882.

HALL v. McFADDEN.

Intercolonial Railway—Negligence of Conductor—Accident to passenger—Right of action—Contributory negligence.

Plaintiff having a first class ticket from Sussex to Penobsquis by the Intercolonial Railway, a Government Railway, intended going to Penobsquis (her

home) by the mixed freight and passenger train, which was due to leave Sussex at 1.47 p.m. The train on that day was an unusually long one, and when the passenger cars were brought to the platofrm the engine was across the public highway. When the train came in it was brought up so that the forward part of the first class car was opposite the platform. It was then about ten minutes after the advertised time of departure. Plaintiff was standing on the platform, when the train came in, but did not then get aboard. The conductor of the train (the defendant) got off the train and went to a hotel for dinner. While he was absent, the train was, without his knowledge, backed down, so that only the second class car remained opposite the platform. The jury found that the first class car did not remain at the platform long enough to enable plaintiff to get on board. The defendant, after finishing his dinner, came over hastily (being behind time, and therefore in somewhat of a hurry) called "all aboard," glanced down the platform, saw no person attempting to get on board, crossed the train between two box cars to signal the driver to start (it being necessary to cross the train in order to be seen by the driver, owing to a curve in the track) and almost immediately the train started. The 124th regulation for government of the Intercolonial Railway, prescribes that conductors must not start the train while passengers are getting on board, and that they should stand at the front end of the first passenger car when giving the signal to the driver to start, which the conductor did not do in this instance. Plaintiff and a lady friend, F., who was going by the same train, were standing on the platform, and when they heard the call "all aboard," they went toward the cars as quickly as they could. F. got on all right, but plaintiff (who had a paper box in her hands), in attempting to get on board, caught the hand rail of the car, when she slipped, owing to the motion of the train, and was seriously injured. The jury found that the call "all aboard" was a notice to passengers to get on board.

Held, that, although the plaintiff's contract was with the Crown, the defendant owed to her, as a passenger, a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury. But, per WELDON, J., that the defendant having brought the first class passenger car to the platform, it then became (by the regulations) under the control of the station master, and defendant was not liable for starting the train from the position it had afterwards been placed in; also, that it was plaintiff's duty to have gone on board as soon as the train came to the station.

INDEX OF SUBJECTS.

[Ed., *following a title, denotes that it will be found in the* EDITORIAL REVIEW; Ex., *that it will be found in* REVIEW OF EXCHANGES; L. A., *that it is a leading article.*]

A

B

C

D

E

F

G

H

I

J

L

M

N

O

P

Q

R

S

T

U

V

W

INDEX-DIGEST OF CASES

NOTED, DIGESTED AND REPORTED IN THIS VOLUME.

A

B

C

D

E

F

G

H

I

J

L

M

N

O

P

Q

R

S

T

U

V

W

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