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DIARY FOR MARCH.

1. Tues .....Sittings of Court of Appeal, and sittings C. C. of York for trials begin.
5. Sat .....Holt, C.J., died 1710, æt. 68.
6. Sun .....*2nd Sunday in Lent.* Lord Chan. Hardwicke, died 1764, æt. 74. York changed to Toronto, 1834.
13. Sun.. .....*3rd Sunday in Lent.* Lord Mansfield born, 1704.

TORONTO, MARCH 1, 1887.

A NEW work on the Election Laws of the Dominion and of the several Provinces, affecting returning officers and their deputies, the qualification and disqualification of candidates, voting by ballot and *fac similes* of ballots, the law of election agency and of corrupt practices at elections, and the practice and procedure at election trials is announced under the authorship of Mr. Thomas Hodgins, Q.C. The work is expected to be published in time for the election trials arising out of the recent Local and Dominion elections.

UNLAWFUL VOTING AT ELECTIONS.

WE give in this number of the LAW JOURNAL a report of the case of *Reg.* v. *Sturdy*, tried at the Huron assizes of 1882, before Chief Justice Wilson, for the offence of unlawful voting at an election for the House of Commons under the Dominion Elections Act of 1874. The report includes a copy of the indictment—the first precedent of its kind—obtained from the crown counsel at the assizes in question, and the shorthand reporter's notes of the proceedings at the trial.

In the case reported it appears that the defendant had become disqualified as a voter by his removal from the constituency; and, as contended by his counsel, it was only by implication that he was prohibited from voting. The learned judge, however, overruled the demurrer, and held that an unqualified person voting at an election was guilty of an indictable offence. Non-residence is now under the Ontario Franchise Act a universal disqualification at legislative elections; and by 47 Vict. c. 4, s. 4 (O.) all unqualified persons voting at such elections are liable to the following punishment as well as to indictment for misdemeanour: "any person who votes—or induces or procures any person to vote—at such election, knowing that such person has no right to vote at such election, shall be guilty of a corrupt practice, and shall be liable to a penalty of $100."

A question was raised at the late Dominion elections whether deputy-returning officers and poll clerks were disqualified under the comprehensive words of section 11 of the Dominion Franchise Act, which prohibits persons who receive pay for election services voting at an election. It was contended that the deputy of the returning officer came within the disqualifying clause, on two grounds—first as included in the term "Returning Officer," since the Interpretation Act, 31 Vict. c. 1 (D.), provides that words applying to a public officer or functionary by his name of office shall include his "lawful deputy;' and secondly, that the disqualification covered all persons employed for reward in any capacity whatever at the election. It was further contended that poll clerks were within the latter disqualification, and also within the term "clerk," used in the section. We express no opinion on the

questions of law involved in the above contentions, as the elections are now over; and before the next general election the question may be set at rest, either by judicial decision or legislative enactment.

RECENT ENGLISH DECISIONS.

The *Law Reports* for February comprise 18 Q. B. D. pp. 161-314; 12 P. D. pp. 29-45 and 34 Chy. D. pp. 85-216.

PRACTICE—DISCOVERY—INSPECTION OF PROPERTY—CO-DEFENDANTS—ORD. 50 R. 3; ORD. 31 R. 12. (ONT. RULES 398, 222.)

In *Shaw* v. *Smith*, 18 Q. B. D. 193, the Court of Appeal was called on to construe Ord. 50 r. 3 (Ont. R. 398) which provides that it shall be lawful for the court or a Judge upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for (among other things) the inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein. Ord. 31 r. 12 (Ont. Rule 222) provides that "any party" may apply for an order directing "any other party" to any cause or matter to make discovery. Under this last rule it was held in *Brown* v. *Watkins*, 16 Q. B. D. 125, that discovery could not be ordered except as between opposite parties. This action was brought against the defendant, Smith, for breach of a covenant for quiet enjoyment, and against the other defendants for letting down the surface of plaintiff's land by working their mines. Smith obtained an order to inspect the mines of his co-defendants under the plaintiff's lands and the land adjoining thereto. It was contended on the appeal from this order that the court had no jurisdiction to make such an order as between co-defendants, between whom no issue was pending, and the Court of Appeal (overruling the Divisional Court) held that this contention must prevail; *Brown* v. *Watkins* was explained, and the words "opposite party" used in that case were stated to include co-plaintiffs, or co-defendants, as between whom any question was in conflict in the action.

STATUTE OF LIMITATIONS (21 JAC. 1 c. 16)—DEATH OF DEFENDANT PENDING ACTION—FRESH ACTION AGAINST EXECUTORS.

In *Swindell* v. *Bulkeley*, 18 Q. B. D. 250, the Court of Appeal declined to depart from the long established, but what they admitted was a forced construction of the Statute of Limitations, 21 Jac. 1 c. 16, whereby, in the event of a defendant dying, pending an action, the plaintiff has been held entitled to bring a fresh action within a reasonable time, against the deceased defendant's personal representative, notwithstanding that in the meantime the period of limitation under sec. 3 had expired. In this case an action was commenced on a bill of exchange against the acceptor within the six years by the issue of a writ. The writ, however, was not served, and the defendant died before the six years had expired. Before the six years had expired his will was proved. About six months after this, and about a month after the expiration of the six years, the plaintiff brought the present action against the executors, and it was held that it was in time.

Lord Esher, M.R. at p. 253, says:

> The rule was, that where an action was commenced within the period of limitation, and the defendant died, then the plaintiff had a right to bring a new action against the executor or administrator, if he did so in a reasonable time. That is what has happened here.

The court was unanimous that the provisions of the Judicature Act for the continuing of proceedings in the event of the death of a defendant did not warrant any alteration in the interpretation to be placed upon the statute.

PRACTICE—PARTICULARS—ALLEGED FALSE ENTRIES.

None of the cases in the Probate Division seem to require notice here: we therefore proceed to the cases in the Chancery Division. The first to which we think it necessary to call attention is *Newport Slipway Dry Dock Co.* v. *Paynter*, 34 Chy. D. 88. In this case a question of practice is discussed. The plaintiffs had bought a business from the defendants and employed them to manage it, the defendants guaranteeing that the profits would amount to a certain yearly sum. The statement of claim alleged that the defendants had made false entries in the books for the purpose of making the working expenses appear less

than they actually were in order to relieve themselves from their liability on the guarantee. The defendants obtained an order for the delivery of particulars of the alleged false entries. The plaintiffs delivered a list of the items complained of. The defendants moved for further and better particulars. Kay, J., refused the application, but, on appeal, the Court of Appeal held that an entry might be wrong in different ways, and that the mere specification of the entries complained of did not give the defendants sufficient information, and that the plaintiffs must state shortly as to each item the general nature of the objection they made to it.

BANKER—DEPOSIT BY MONEY DEALER OF CUSTOMERS' SECURITIES—NEGOTIABLE SECURITIES—PURCHASE WITHOUT NOTICE.

In *Easton* v. *London Joint Stock Co.*, 34 Chy. D. 95, the question involved was the right of the defendants to hold certain securities which had been pledged with them by a money lender, as against the owner thereof. The plaintiff, S., had given to his co-plaintiff, E., certain bonds which were made payable to bearer, for the purpose of raising money thereon by way of mortgage, and E. deposited the bonds with a money lender named Mozley for the purpose of his raising money on them from joint stock banks. Mozley obtained an advance from the defendants by depositing the securities, together with the securities of other customers, with them. He, Mozley, soon afterward became bankrupt, and the defendants claimed to hold the bonds as security for all the debt due from Mozley to them. It was found by the court that the plaintiff, E., had notice of the course of dealing between Mozley and the defendants, under which he had been accustomed to deposit securities of his customers *en bloc* to secure advances, and it was held that although S. did not authorize E. to deal with the securities otherwise than by way of mortgage, yet as he had executed the transfers in blank, and had handed the bonds to E. transferable by delivery, he was estopped from objecting to the defendants' legal title; and that the defendants having obtained the bonds in the ordinary course of dealing with Mozley, without any reason for suspecting that he was exceeding his authority, were purchasers for value without notice, and were entitled to hold them as security for all the debt due by Mozley to them.

PRACTICE—COSTS—APPEAL FOR COSTS—ADMINISTRATION ACTION.

Williams v. *Jones*, 34 Chy. D. 120, was an action brought by a residuary legatee against an executor and trustee for administration alleging certain misconduct. On taking the accounts, it appeared that the defendant before action had given a correct account of the capital, but that in the accounts he had rendered of the income he had not accounted for nearly as much as he ought. The special charges of misconduct, however, were not substantiated. Kay, J., ordered that the plaintiff's costs relating to the income account and the defendant's costs of the rest of the action should be taxed and set off against each other. The plaintiff appealed; but it was held that the order was not appealable, for that the costs of a hostile action seeking to charge the defendant with costs on the ground of acts of misconduct, were not within the old rule of the Court of Chancery that the plaintiff in an administration action was entitled to costs out of the fund, unless there were special grounds for depriving him of them, but were in the discretion of the Judge.

CHOSE IN ACTION—EQUITABLE ASSIGNMENT.

The only point for which we think it necessary to mention *Gorringe* v. *Irwell India Rubber Company Works*, 34 Chy. D. 128, is that a memorandum delivered by a joint stock company to their creditors to the following effect: "We hold at your disposal the sum of £425 due from Messrs. C. & Co. for goods sold and delivered by us to them up to 31st Dec., 1884, until the balance of our acceptance for £660 has been paid," was held to constitute an immediate equitable assignment of the debt of £425, and was valid as against the assignors without notice to C. & Co.

Bowen, L.J., says at p. 135.

> The rule that notice of the assignment of a chose in action is necessary is a rule as between the different incumbrancers; but there is no necessity for such notice as between the assignor and the assignee.

The fact that the company was ordered to be wound up before notice of the assignment was given to C. & Co. was held to make no difference in the right of the assignees, and it was held that it was not a disposition of the company's property made between the commencement of the winding up and the order for winding up, within sec. 153 of the Companies Act, 1862.

Recent English Decisions.

Tenant for life—Remainderman—Repairs—Power of sale—Discretion of trustee.

In re Courtier, Coles v. *Courtier*, 34 Chy. Div. 136, some questions of interest arose as to the relative rights of a tenant for life and remainderman. A testator gave leaseholds, some of which were for short terms, to two trustees, one of whom was his wife, upon trust for his wife for life, and after her death upon trust that the whole should be sold, and the proceeds divided between four persons: and he authorized his trustees, if they should think it advisable, to sell his short leaseholds, and to invest the proceeds and allow his wife to receive the income during her life.

The leaseholds were in bad repair at the testator's death. The widow kept them up in the same state of repair, but declined to do more than this. The remaindermen sought to compel the widow personally to maintain the leaseholds in such a state of repair as to satisfy the covenants of the lease, so as to avoid forfeiture, or else to concur in selling the short leaseholds. But the Court of Appeal held (affirming Bacon, V.-C.) that the widow was under no obligation to put the premises in such a state of repair as to comply with the terms of the leases. And although the widow had become the surviving trustee the court held that it had no power to interfere with her discretion by ordering a sale of the leaseholds without her consent.

With regard to the first point, Cotton, L.J., thus lays down the law at p. 139:

> It is said that if the widow is to have the right to possess the leaseholds in specie during her lifetime she is bound to spend her money in putting them into sufficient repair to satisfy the covenants of the leases. I think that there is no such obligation on her. She is not bound to the landlords under the covenants: the trustees are bound, and it is their duty to repair the houses in accordance with the covenants in the leases out of the corpus of the estate. There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits. She is to enjoy the leaseholds in specie, but she is under no covenants to repair, and there is nothing, in the will to show that the testator intended her only to have the net rents after making provision for the liabilities that arose in the testator's lifetime. . . . . The appellants relied on *Re Fowler*, 16 Chy. Div. 723. But that was a very different case, and the question which arose there does not arise here. Here it is not a question whether the trustees are bound to keep up the houses, but whether the tenant for life is bound.

As to the second point, he says at p. 141:

> It is clearly settled law that where the trustees have a power, as distinguished from a trust, although the court will prevent them from executing the power unreasonably, it will not oblige them to exercise it.

Mortgage—Foreclosure—Moneys in hands of receiver.

In *Coleman* v. *Llewellin*, 34 Chy. Div. 143, the plaintiff had obtained a judgment for redemption or foreclosure, and for the appointment of a receiver. The judgment provided that any persons redeeming, or, in the event of foreclosure, the plaintiff, should be at liberty to apply for payment of the funds in court or in the hands of the receiver. At the date appointed for redemption there was money in court, and in the hands of the receiver paid under a mining lease since the report. North, J., had held that the plaintiff must have a new account taken, and a new day appointed for redemption; but the Court of Appeal considered the special provision in the judgment as to the moneys in question distinguished the case from *Jenner-Fust* v. *Needham*, 32 Chy. D. 582, by which North, J., considered the case governed, and overruled his decision, holding the plaintiff entitled to a final order, and to payment of the moneys in court and in the hands of the receiver without any further account.

Directors—Payment by directors of debt due to themselves—Preference—Debenture holder.

In *Hilmott* v. *London Celluloid Co.*, 34 Ch. D. 147, the plaintiffs were mortgage debenture holders of a joint stock company, whose mortgages provided that they should be a charge upon all the property of the company, but that the company might, in the course of its business, deal with the property charged as the company should think fit. The action was brought against the directors and company to compel the former to account for a sum of £3,000 which they had received under the following circumstances: The company was indebted to the directors for advances. In September, 1884, the company's premises were burned down, and an insurance company admitted their liability to pay £3,000 in respect of the damage. The directors held a meeting, passed a resolution for commencing an action against the company for their advances, and for instructing the company's

solicitors to appear for the company, and consent to an immediate judgment, which was done. A garnishee order was then obtained against the insurance company, under which the £3,000 was paid to the directors, and applied in part payment of the debt due to them by the company. It was held by the Court of Appeal (affirming Bacon, V.-C.) that the transaction did not constitute a fraudulent preference, and that as it was a payment of a just debt while the company was a going concern, it was a dealing by the company in the course of business within the condition of the debentures.

SOLICITOR'S LIEN—FUND RECOVERED—PRIORITY OF LIEN—DISCHARGED SOLICITOR.

In *Re Wadsworth, Rhodes* v. *Sugden*, 34 Chy. D. 155, Kay, J., held, following *Cormack* v. *Beisly*, 3 D. G. & J. 157, that when a solicitor is discharged by the client in an action before judgment, and the action is continued by another solicitor, and a refund recovered therein, the lien of the latter solicitor for his costs is entitled to priority over that of the discharged solicitor.

WILL—EXERCISE OF SUPPOSED POWER—ELECTION.

In re Brooksbank, Beauclerk v. *James*, 34 Chy. D. 160, is an illustration of a somewhat curious phase of the doctrine of election, which Courts of Equity have established. In this case a testatrix, assuming herself to be entitled to a power of appointment, which in fact she did not possess, by her will assumed to exercise it in favour of certain named persons, and by the same will gave to J., one of the persons entitled to the property she had assumed to appoint, certain other property over which she had a right of disposal. It was held by Kay, J., that the devisee, J., was bound to elect whether he would take under or against the will, and if under the will, he must confirm the appointment.

VENDOR AND PURCHASER—CONTRACT BY TESTATOR TO SELL LAND—DEFECTIVE TITLE—CONVERSION.

The only point we think it necessary to notice in *Re Thomas, Thomas* v. *Howell*, 34 Chy. D. 166, is that relating to the equity doctrine of conversion. A testator had entered into a contract to sell a parcel of land, and died before completion. The title was found bad as to a large part of the property, and the trustees of his will cancelled the contract. It was held by Kay, J., that the contract having proved abortive did not effect an equitable conversion of any of the property comprised therein.

Kay, J., says on this point, at p. 170:

> The title being bad at the time of the testator's death, and not having been accepted by the purchaser in the testator's lifetime nor since his death, and the contract itself having been rescinded because of its invalidity, I am of opinion that the contract did not effect any conversion of the estate in equity.

PRACTICE—IRREGULARITY—SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.

In *Petty* v. *Daniel*, 34 Chy. D. 172, Kay, J., held that irregularities in proceedings might, if the court sees fit, under Ord. 70, r. 1 (Ont. R. 473) be condoned. And also that a summons or notice of motion to set aside proceedings for irregularity should state the several objections on which the applicant intends to insist (see Rule 107, T. T. 1856, Holmested's Rules and Orders, p. 523). An order for an attachment had been obtained on proceedings which the court held to be irregular, and the defendant had been arrested thereunder, but under the circumstances the court refused to set aside the order; but in the exercise of its discretion discharged the defendant from prison, making no order as to costs.

VENDOR AND PURCHASER—CONTRACT—STATUTE OF FRAUDS—VENDOR—COSTS.

The case of *Jarrett* v. *Hunter*, 34 Chy. D. 182, is somewhat similar in its circumstances to *Wilmot* v. *Stalker*, 2 Ont. R. 78. The action was for specific performance of a contract for the purchase of lands. The memorandum in writing stated that "G. S. Lawson, as the solicitor for the vendor, and the said R. Hunter, do hereby respectively agree to and with each other to complete the sale agreeably to the conditions." The name of the vendor was not disclosed, but one of the conditions of sale provided for the delivery of an abstract of title commencing with a specified deed. It was proved that at the auction at which the defendant purchased, Lawson informed him that he (Lawson) was the beneficial owner of the property. But it was held by Kay, J., that the contract was invalid under the Statute of Frauds for omitting the name and description of the vendor; and that the deeds mentioned in the abstract re

ferred to in the conditions of sale could not be looked at for the purpose of supplying the defect. He further held that the parol statement at the time of the sale as to Lawson being the beneficial owner did not cure the defect in the written contract; it was, nevertheless, a ground to induce the court to withhold costs from the defendant.

SPECIAL POWER OF APPOINTMENT, EXERCISE OF—GENERAL DEVISE—WILLS ACT (1 VICT. C. 26), S. 27. (R.S.O. C. 106, S. 29.)

In *Re Mills*, *Mills* v. *Mills*, 34 Chy. D. 186, Kay, J., had to consider the effect of the Wills Act s. 27 (R. S. O. c. 106 s. 29), in regard to special powers of appointment; and he held that the question whether a special power of appointing real estate is exercised by a general devise, where the testator had neither at the date of his will nor of his death any real estate of his own, is one of intention to be inferred from the words of the will and from the surrounding circumstances at the date of it, having regard to the enlarged operation given by the Wills Act to a general devise, and he came to the conclusion that the mere making of a general devise by a testator, though having no real estate of his own, does not sufficiently indicate an intention of exercising a special power of appointing real estate, notwithstanding that objects of the power happen to be included among the devisees.

STATING ACCOUNTS, DIRECTED BY JUDGMENT.

The plaintiffs in *Exchange and Hop Warehouses* v. *Association of Land Financiers*, 34 Chy. D. 195, brought the action against the defendant company, which was in liquidation, for the rescission of a contract which the plaintiffs had entered into for the purchase of certain property of the defendant company. The judgment set aside the sale, and directed accounts of the amounts expended by the plaintiffs in respect of the property, which the defendants were ordered to pay, and the plaintiffs were declared to have a lien for the purchase money, and what might be found due on the taking of the accounts, and on payment thereof the plaintiffs were to discharge their lien. The plaintiffs applied to stay the taking of these accounts on the ground that the amount that would be found due would be far in excess of the value of the property and the defendant's assets only consisted of £40, and that they were quite unable to redeem. North, J., ordered the taking of the accounts to be stayed, unless the defendants chose to give security for the plaintiffs' costs of taking them.

LIBEL—INJUNCTION—INJURY TO TRADE—ERRONEOUS STATEMENT OF EFFECT OF A JUDGMENT.

Hayward v. *Hayward*, 34 Chy. D. 198, was an action to restrain the publication of an alleged trade libel. We have seen from the case of *Macdougall* v. *Knight*, 17 Q. B. D. 636, (noted *ante* vol. 22, p. 395), that the publication of a judgment of a Court of Justice by one of the parties interested is not a libel. This case, however, shows that a garbled statement of the effect of a judgment may be a libel, the publication of which the court will restrain by injunction. The plaintiffs and defendants were rival traders in the same kind of business—the names of their respective firms being similar though not identical, and the defendants, in 1885, brought an action to restrain the present plaintiff from representing his firm to be the original firm of R. H. & Sons. At the trial, this part of the action was dismissed with costs, the judge being satisfied that the plaintiff had never made the alleged representations, but that, on two or three occasions, the plaintiff's agent, without his knowledge or concurrence, had done so, and that the plaintiff had repudiated this representation as soon as he knew it, and at the trial he offered by his counsel to give an undertaking that he would never make such a representation. The judge desired that this undertaking should be inserted in the judgment. The plaintiff assented, and it was accordingly inserted.

In 1886 the present defendants distributed a printed circular, which stated that they were the original firm, and after giving the title of the former action, headed by the word "Caution," proceeded: "By the judgment the defendant was ordered to undertake not to represent that his firm is, or that the plaintiff's is not the original firm of R. H. & Sons. Messrs. R. H. & Sons, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the action." North, J. held that this was not a fair statement of the judgment, and that it was a libel injurious to the plaintiff's trade, and that it was not privileged, that the defen-

dants had published it maliciously, and that the plaintiff was entitled to an injunction restraining its further publication with costs. The plaintiff's damages were fixed at £5.

APPOINTMENT OF NEW TRUSTEES—ADDITIONAL TRUSTEE—TRUSTEE ACT, 1850, s. 32.

In *Re Gregson's trusts*, 34 Chy. D. 209, North, J., held that under sec. 32 of the Trustee Act, 1850, the court has jurisdiction to appoint an additional trustee, even though there is no vacancy in the trusteeship.

In *Re Hetherington*, 34 Chy. D. 211, he also held that when under the trusts of a will, different parts of the testator's property were subject to distinct trusts, but in a certain event the trusts would coalesce, that there was power to appoint separate sets of trustees for the different parts of the property.

PAROL CONTRACT BY TESTATOR—CONVERSION.

The only remaining case to be noted is *In re Harrison, Parry* v. *Spencer*, 34 Chy. D. 214, in which it was attempted to apply the doctrine of *Fraynev. Taylor*, 33 L. J. Chy. 228. A testator agreed verbally to sell land and received a deposit. The residuary devisee contracted in writing to sell the land to the same purchaser at the same price, to be paid partly by the deposit. The question was whether this was an adoption by the residuary devisee of the contract of his testator so as to effect a conversion of the land into personalty, relating back to the testator's lifetime. North, J. decided that it was not.

REPORTS.

ONTARIO:

ELECTION LAW.

REG. V. STURDY.

Misdemeanour — Demurrer — Unlawful voting at election: an indictable offence—37 Vict. c. 9 (D.)

A person who does an act which a statute on public grounds has prohibited generally is liable to an indictment for misdemeanour; and it is not necessary that the statute should prohibit such act in express language.

The defendant's name appeared on the Voters' List used at the election of a member of the House of Commons, but before such election he lost his right to vote, but voted at the election without having at the time he so voted the qualifications prescribed by law.

Held, that he was guilty of a criminal offence, and was rightly indicted as for misdemeanour.

[Wilson, C.J.—Huron Assizes, October, 1882.

In this case the defendant was indicted for the offence of "unlawful voting" at an election of a member of the House of Commons of Canada. His name appeared on the list of voters used at the election as tenant of the lot mentioned in the indictment; but before the final revision he gave up his tenancy and removed out of the electoral district, and thereupon lost his qualification to vote. He voted at the election after taking the elector's oath.

The indictment was as follows:—

CANADA, County of Huron, *To Wit.* } The Jurors for our Lady the Queen, upon their oath, present that on the eighteenth day of May, in the year of our Lord, one thousand eight hundred and eighty-two, the Governor-General of Canada, by his writ of election in that behalf issued under the great seal of Canada, duly appointed one Benjamin Wilson, of the town of Wingham, in the county of Huron, to be returning officer for the electoral district of the west riding of the said county of Huron, and therein commanded him, the said Benjamin Wilson, to cause an election to be made, according to law, of a member to serve in the House of Commons of Canada for the said electoral district of the west riding of the county of Huron, and therein further commanded him to cause the nomination of candidates at such election to be held on the thirteenth day of June in the year aforesaid; and, thereupon, in pursuance of such writ of election, the said Benjamin Wilson, being duly qualified as such returning officer, caused the said nomination of

candidates to represent the electors of the said electoral district, as aforesaid, to be duly held on the said thirteenth day of June in the year aforesaid, in the manner and form required by law; and thereupon one Robert Porter and one Malcolm Collin Cameron were duly nominated as the candidates to represent the said electors as aforesaid in the manner and form as required by law; and at such nomination a poll of the duly qualified elector as aforesaid was duly demanded in that behalf, and thereupon the said Benjamin Wilson, as such returning officer, granted the said poll, and fixed the twentieth day of June in the year aforesaid as the polling day for holding the polls at the several polling stations in the several polling districts within the said electoral district of the west riding of the county of Huron in the manner and form required by law, and thereupon the said Benjamin Wilson as such returning officer as aforesaid, by a commission under his hand, duly appointed one James Addison to be the deputy-returning officer for polling district number one, in the town of Goderich, being a polling district within the said electoral district, as aforesaid, there to take the votes of the electors of the said electoral district lawfully qualified to vote at the polling station of the said polling district number one, as aforesaid, according to law, on the twentieth day of June in the year aforesaid. And the said James Addison, being duly qualified as such deputy returning officer, as aforesaid, duly took and received the votes of the electors of the said electoral district at the polling station of the said polling district as aforesaid on the said twentieth day of June in the manner and in the form required by the statute in that behalf.

And the jurors aforesaid, upon their oath aforesaid, do further present that John L. Sturdy, afterwards, to wit, on the said twentieth day of June in the year aforesaid, at the polling station of the said polling district number one, in the said town of Goderich as aforesaid, unlawfully, wilfully, knowingly and deceitfully came before the said James Addison as such deputy returning officer as aforesaid, as a legally qualified elector of the said electoral district of the west riding of the county of Huron as aforesaid, and then and there unlawfully, wilfully, knowingly and deceitfully did vote at the said election as a legally qualified elector as aforesaid, to wit as the tenant of part of lot number one hundred and twenty four in the town of Goderich, in the said electoral district of the west riding of the county of Huron, and as being then at the date last aforesaid, a resident within the said electoral district as aforesaid. Whereas in truth and in fact he said John L. Sturdy, when he so unlawfully, wilfully, knowingly and deceitfully came before the said James Addison as such deputy returning officer as aforesaid, and did vote at the said polling station in the said polling district as aforesaid, on the day and year last aforesaid, was not then in fact or in law the tenant of the said part of lot number one hundred and twenty four in the said town of Goderich, in the said electoral district. And whereas in truth and in fact the said John L. Sturdy, when he so unlawfully, wilfully, knowingly and deceitfully came as aforesaid, and did vote at the said polling station in the said polling district as aforesaid, on the said twentieth day of June, in the year of our Lord, one thousand eight hundred and eighty two, was not then a resident of the said electoral district of the west riding of the county of Huron as required by law. And, whereas in truth and in fact the said John L. Sturdy, at the time of his so voting as aforesaid, was not a qualified elector as aforesaid, and had no lawful right whatever to vote at the said election.

The demurrer was as follows:

And the said John L. Sturdy, in his proper person, cometh into court here, and having heard the said indictment read, saith that the said indictment and the matters therein contained in manner and form as the same, are above stated and set forth are not sufficient in law, and that he, the said John L. Sturdy, is not bound by the law of the land to answer the same, and this he is ready to verify. Wherefore, for want of sufficient indictment in this behalf, the said John L. Sturdy prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

Joinder.

Hodgins, Q.C., for the Crown.

B. L. Doyle, for the defendant, before pleading, asked to be allowed to raise some objections to the indictment.

WILSON, C.J.—I will allow you to demur to the charge in the indictment, with liberty afterwards to plead if necessary.

Doyle.—My ground is that the indictment shows no offence in law. The election statutes of the Dominion create no such offence as is covered by the indictment. The Dominion Elections Act, 1874, does not make unlawful voting an offence; nor does it forbid it. [WILSON, C.J., Does it allow it?] It does not expressly allow it; and there is nothing in the criminal statutes creating such an offence. There is, in the Ontario Elections Act, an express provision prohibiting such voting in Ontario elections. [WILSON, C.J., What is the general rule applicable to statutory enactments in such cases? Is it not that where a statute prohibits a thing, that

it is indictable if the prohibited thing is done? You will find in the case of *Reg.* v. *Buchanan* 8 Q. B. 883, s. c. 10 Jur. 736, the doctrine laid down expressly, that whenever a person does an act which a statute on public grounds has prohibited generally—and it is not necessary to prohibit it in express language—he is liable to an indictment]. There is nothing in the statute prohibiting it; it is only by implication that it can be contended it is prohibited. [WILSON, C.J., If that is the only point, I think I should rule against you, unless you wish to look at the case of *Reg.* v. *Buchanan*].

Hodgins, Q.C., for the Crown, contended that an indictment would lie. The election laws only gave to persons possessing defined qualifications the right to vote at elections: an unqualified person voting was therefore guilty of an unlawful act and a contravention of the statute. And though there was nothing in the election or criminal laws expressly prohibiting such unlawful voting, the Interpretation Act (31 Vict. c. 1, D.), provided that any wilful contravention of any Dominion Act, which was not made an offence of some other kind, should be construed to be a misdemeanour and punishable accordingly.

WILSON, C.J.—I think the decision in *Reg.* v. *Buchanan*, *supra*, applies; and I shall therefore give judgment for the Crown on the demurrer, and I will allow the defendant to plead over.

The defendant thereupon pleaded "Not Guilty"; but after a conviction for perjury in taking the election oath, he subsequently withdrew his plea and pleaded guilty.

The learned judge then sentenced him to pay a fine of $30 on the conviction for perjury, and another fine of $30 on the conviction for unlawful voting, and to be imprisoned in the common jail for three days concurrent, and until the fines were paid.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

Nova Scotia.] [Feb. 15.

SOVEREIGN FIRE INSURANCE CO. v. MOIR.

Insurance.

A policy of insurance on the respondent's property contained the following provisions:

"In case the above described premises shall, at any time during the continuance of this insurance, be appropriated, or applied to, or used for the purpose of carrying on, or exercising therein any trade, business, or vocation denominated hazardous or extra-hazardous . . . unless otherwise specially provided for, or hereafter agreed to by this company in writing, or added to or endorsed on this policy, then this policy shall become void."

"Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby unless the change is promptly notified in writing to the company or its local agent."

When the insurance was effected the insured premises were occupied as a spool factory, and it was described as a spool factory in the application. During the continuance of the policy a portion of the building insured was used for the manufacture of excelsior, but the fact of its being so used was not communicated to the company or its local agent. A loss by fire having occurred, the company resisted payment on the ground that the manufacture of excelsior on the premises avoided the policy under the above conditions.

On an action to recover the insurance the plaintiff obtained a verdict, the jury finding, in answer to questions submitted on the trial, that the manufacture of spools was more hazardous than that of excelsior, and that the risk was not increased by adding the manufacture of excelsior in the building. The Supreme Court of Nova Scotia sustained the verdict.

Held, reversing the judgment of the Court below, that as the manufacture of excelsior was, in itself, a hazardous business, the introduction of it into the building insured would avoid the policy under the first of the clauses above set out, even if the jury were right in their finding that it was less hazardous than the manufacture of spools.

Held, also, that the addition of the manufacture of excelsior to that of spools in the said premises was a change material to the risk and avoided the policy under the second clause above recited.

Henry, Q.C., for appellant.

Borden for respondents.

Nova Scotia.] [Feb. 16.

MARSHALL v MUNICIPALITY OF SHELBURNE.

Onus probandi.

In an action on a bond against the sureties of the defaulting clerk of the Municipality of Shelburne, the defence raised was that the bond was not executed by them as it had no seals attached when the sureties signed it.

Held (HENRY, J., *hesitante*), that as the plaintiffs had proved a *prima facie* case of a bond properly executed on its face, and had not negatived the due execution of the bond, it being quite consistent with his evidence that it was duly executed, the onus of proving want of execution was not thrown off the defendant, and as neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the defendant, plaintiffs were entitled to recover.

Borden, for the appellants.

Sedgewick, Q.C., for the respondents.

Nova Scotia.] [Feb. 17.

PICTOU BANK v. HARVEY.

Contract.

On July 14th, 1884, H. forwarded a lot of hides from Halifax, addressed to J. L., Pictou, the bill of lading specifying that they were to be carried to Pictou station. H. had been selling hides to L. for three or four years. An invoice was sent to L. for the price of the hides at the rate previously paid, and L. sent H. a note for the amount which was discounted. The course of dealing between H. and L., was for H. to receive a note for the amount according to his own estimate of weight, etc., and if there was any deficiency to allow L. a rebate on a final settlement.

This lot of his was put off at Pictou landing and remained there until August 5th. On that day L. sent his lighterman to Pictou Landing for some other goods, and he, finding the hides there, took them in his lighter and brought them to L.'s tannery with the other goods. The next day L., on being informed that the hides were at the tannery, had them put in the store of D. L., whom he told to keep them for the parties who sent them, there being at the time, other hides of L. in the said store. The same day, August 6th, L. sent a telegram to H. as follows:—"In trouble. Have stored hides. Appoint some one to take charge of them." H. immediately came to Pictou, and having learned what L. had done, expressed himself as satisfied. He did not take possession of the hides, but left them where they were stored, on L.'s assurance that they were all right.

On August 6th a levy was made under an execution of the Pictou Bank against L. on all L.'s property that the sheriff could find, but these hides were not included in the levy. On August 12th L. gave the bank a bill of sale on all his hides in the store of D. L., and the bank, on indemnifying D. L., took possession of the hides so shipped by H. and stored with D. L. In a suit by H. against the bank and D. L.,

Held (affirming the judgment of the court below), that the contract of sale between L. and H. was rescinded by the action of L. in refusing to take possession of the goods when they arrived at his place of business, and handing them over to D. L. with directions to hold them for the consignor, and in notifying the consignor who acquiesced and adopted the act of L., whereby the property and possession of the goods became re-vested in H., and there was, consequently, no title to the goods in L. on August 12th, when the bill of sale was made to the bank.

Sedgewick, Q.C., for the appellants.

Borden, for the respondents.

COURT OF APPEAL.

IN RE MACKLEM AND THE COMMISSIONERS OF THE NIAGARA FALLS PARK.

Construction of will—Forfeiture—Vis major—Expropriation.

T. C. S. devised his estate of Clark Hill with the islands, lands and grounds appertaining. M.'s grandmother, by her will, directed her executors to pay him $2,000 a year so long as he should remain the owner and actual occupant of Clark Hill, "to enable him the better to keep up, decorate and beautify the property known as Clark Hill and the islands connected therewith."

Held, that the expropriation, under an Act of the Legislature, of part of the Clark Hill estate, did not in any way affect M.'s right to this annuity; and therefore in awarding compensation to M. for the lands expropriated the arbitrators properly excluded the consideration of a contemplated loss by M. of this annuity.

A failure by M. to reside and occupy would be in the nature of a forfeiture for breach of a condition subsequent, and his right to the annuity would continue absolute until something occurred to divest the estate which must be by his own act or default; the *vis major* of a binding statute could not work a forfeiture.

Upon the evidence the court refused to interfere with the amount of compensation awarded.

Irving, Q.C., for the Park Commissioners.

Robinson, Q.C., and *Street*, Q.C., contra.

CHANCERY DIVISION.

Boyd, C.] [Nov. 4, 1886.

DAWSON V. MOFFATT ET AL.

C. S. U. C. c. 73—Marriage settlement—Wife's after acquired personal property.

It is evident from the scope of C. S. U. C. c. 73, that notwithstanding any marriage settlement, any separate personal property of any married woman acquired after marriage, and not coming under or being affected by such settlement, shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without a settlement.

W. Nesbitt, and *F. C. Moffat*, for the wife.

C. L. Ferguson, for husband's creditors.

Ferguson, J.] [January 8.

HYMAN V. HOWELL.

Assignment for creditors—Costs of attacking a fraudulent preference—Making good to the estate moneys spent on useless legal proceedings.

W., on March 7th, 1884, assigned all his estate by deed to B., himself a creditor of W., on trust for the creditors of W.

On March 18, 1884, at a meeting of creditors held by B., it was resolved with B.'s consent that M., an execution creditor of W., should bring an action on behalf of all the creditors of W., to contest the validity of a certain chattel mortgage made to H. & Co. by W., prior to the above assignment to B. M. accordingly brought the action, the costs of which the creditors agreed should be borne by the estate. H. & Co. were not present at the meeting. The action was dismissed with costs, and B. paid the defendants H. & Co.'s costs of that action, and also the costs of the solicitor who acted for M., out of the moneys of the estate, $462 in all.

H. & Co., being large creditors of W., now brought this action, asking that the executors of M. should pay the $462 to B. to be distributed among the creditors of W.

There was no evidence of M. or his executors having requested B. to pay the $462 of costs.

Held, that as to the $300 costs paid to M.'s solicitor, no request on M.'s part to B. to pay this to the solicitor could be implied, for M. did not retain the solicitor or manage the proceedings, but merely allowed his name to be used as plaintiff, because it was thought the action could not succeed with B. as plaintiff, and M. was not liable to the said solicitor as to those costs, and therefore the plaintiffs failed as to their sum.

Held, also, that the plaintiffs could not succeed as to the balance, $162, for there could be no reasonable doubt that they knew these

moneys, which were paid to them by B. as their costs of defence, were moneys of the estate of which B. was trustee, and must be held to have assented to its being so paid. See *Dillon* v. *Raleigh*, 13 A. R. 53, at pp. 67, 68.

Gibbons, for the plaintiffs.

Lash, Q.C., for the executors of M.

Barber, for the defendant B.

Proudfoot, J.] [January 8.

HATTON v. BERTRAM.

Will—Construction—Passing of afterward acquired property—Devise of estate by name—Subsequent additions—Completion of building commenced by testator.

J. C. devised to J. B., G. E. S., and J. F. D. all his property and effects, real, personal and mixed, upon trust to hold "that part of my property known as Walkerfield, being the property I now reside upon, containing fifty acres more or less, until the same shall be sold by them as hereinafter provided for the use and behoof of my daughter E. M. C., so long as she may desire that the same should remain unsold, and should she desire the same to be sold, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter directed, with regard to the sum of $40,000 hereinafter directed to be set out." He then directed his trustees to set apart the sum of $40,000 to be held by them upon certain trusts, and also a certain further sum to provide an annuity of $1,200 for his wife, and provided that after the said two funds should have been set apart, the residuary estate should be divided among his nephews and nieces, and lastly, he gave to his trustees "full and absolute power to sell and dispose of all his lands (Walkerfield, if sold in my daughter's lifetime, to be sold with her consent only) at such time or times, and in such manner as to them may seem best."

The will was made on September 10th, 1879; and J. C. died December 18th, 1885. After making the will, on June 27th, 1883, J. C. purchased five acres, and on September 21st, 1883, another five acres, forming a block of ten acres of which one corner nearly coincided with one extremity of a diagonal of "Walkerfield." On November 22nd, 1884, he sold a piece of about three and one-third acres of Walkerfield.

In his lifetime, J. C. entered into a contract in writing for the erection of a dwelling house on "Walkerfield" which was not completed at his death, and since his death the executor had paid to the contractor and architect certain sums in respect to it.

Held, (1) that the daughter was tenant for life of Walkerfield, and after her death her children took the proceeds of sale as she might appoint, and in default of appointment equally, and in default of children the residuary legatees took: (2) that the ten acres subsequently purchased passed under the devise of "Walkerfield," the evidence clearly showing that he bought it to form part of Walkerfield: (3) that the funds to build the house must come out of the residue.

Moss, Q.C., for the plaintiff.

Lash, Q.C., for the adult defendants.

Maclennan, Q.C., for the infant defendants.

Proudfoot, J.] [January 8.

BAIN v. MALCOLM ET AL.

Will—Agreement giving effect to unexecuted will—Deficient estate—Retainer—Set-off.

J. R. endorsed notes for the accommodation of J. R. The holders received out of the estate of J. R. after his death 60 cents in the dollar, leaving $3,500 unpaid. B., the executor of J. R., paid this. J. R., who died January 1st, 1884, left all the residue of her estate, real and personal, to be equally divided, share and share alike, between J. R., J. F., and J. B. Shortly before her death, J. R. had another will prepared, but died without executing it. There was a residuary clause in this latter will of all her property, directing a division of it into four equal parts, one share of which was to be given to J. R.

On January 4th, 1884, all persons interested in the residuary devises in these two wills, signed a written agreement on the back of the intended will, that they accepted the distribution of the estate of J. R. provided for in the latter unexecuted will.

By his own will, executed on February 13th, 1884, J. R. directed that the estate of J. R.,

"so far as I am interested therein," be divided according to the said agreement signed by him on January 4th, 1884.

Held, (1) B., the executor of J. R., had a right to retain out of the residuary share of her estate assigned by the will of J. R., the full balance due on the said accommodation notes, although J. R.'s estate was insolvent.

R. S. O. c. 107, s. 30, abolishing the right of retainer in case of a deficiency of assets, does not affect the question.

(2) The agreement of January 4th, 1884, was binding on J. R., and was binding on his executor, and could not be impeached by his creditors.

Bruce, Q.C., for the plaintiff.

Kittson, for the defendant.

Galt, J.] [January 12.

THOROLD MANUFACTURING CO. v. IMPERIAL BANK.

Banks and banking—Action to recover amount of cheque—Indorsation—Company.

Action to recover the amount of a cheque made payable to the order of the plaintiffs, and alleged to have been paid by the defendants without the proper endorsation of the plaintiffs.

The by-laws of the plaintiffs' company provided that all moneys should be received by the treasurer, and deposited by him to the credit of the company, and drawn out on cheques made by the secretary, and countersigned by the treasurer.

It appeared that the property of the company belonged almost entirely to R. B. M. who was president and treasurer, and whose son R. D. M. was secretary.

On the occasion when the cheque was given, R. D. M. had gone to the makers of the cheque to receive the money for certain goods supplied to them by the plaintiffs, and had received the cheque, which he endorsed in the name of the plaintiffs, signing his name as secretary.

It appeared that on several previous occasions he had done the same thing with cheques drawn on the defendants, and who, therefore, had no reason to believe that he was exceeding his authority, and it also appeared that he had acted as general agent of the plaintiffs' company.

Held, that the plaintiffs could not recover, and the action must be dismissed.

Osler, Q.C., for plaintiffs.

Cox, for defendants.

PRACTICE.

Ferguson, J.] [February 10.

RE CHRISTIE, CHRISTIE v. CHRISTIE.

Appeal—Forum—Divisions of High Court—Sec. 25, O. J. A.

Held, that the setting down in the Common Pleas Division of an appeal from a master's report in an action in the Chancery Division, was, having regard to sec. 25, O. J. A., a nullity, and could not avail the appellants to make their appeal in time. *Laidlaw* v. *Miller*, 11 P.R. 335, not followed.

P. McPhillips, for the appellants.

E. Douglas Armour, for the respondent.

Proudfoot, J.] [Jan. 10.
Chy. Div'l Ct.] [February 23.

POWELL v. PECK, ET AL.

Leave to appeal—Discretion—49 Vict. ch. 16 sec. 39 (O.).

Leave was given to appeal from the decision of Proudfoot, J., 12 O. R. 492, as to the rate of interest after maturity in mortgage cases, because of the importance of the question involved and of conflicting decisions. An appeal now lies to the Divisional Court from a discretionary order, by virtue of 49 Vict. ch. 16 sec. 39 (O.), but that enactment has not altered the rule that a very strong case must be made out to induce the court to reverse such an order.

Beck, for the defendants.

E. T. English, for the plaintiff.

Boyd, C.] [February 14.

COMSTOCK v. HARRIS.

Discovery—Examination of party resident out of jurisdiction—Appointment and subpœna—Conduct money—Convenience—Production of books—Staying action.

When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment and subpœna, as in the case of resident litigants, is sufficient to compel his attendance; and it lies upon the party so served to object at the time to the payment made for conduct money.

It is not reasonable that books in constant use in business should be brought into the jurisdiction from a foreign country for the purposes of an examination, unless the examiner in the course of the examination rules that they are necessary.

Upon failure of the plaintiff to attend for examination, pursuant to subpœna and appointment served upon him, the action should not be stayed till he does attend; it is sufficient to impose a stay for a definite time.

Langton, for the plaintiff.

Holman, for the defendant.

Mr. Dalton, Q. C.] [February 15.

DOMINION S & I. CO. v. KILROY.

Interpleader—Order to produce—Locality—Motion for irregularity, grounds of.

After delivery of an interpleader issue a party may take out on *præcipe* an order for production of documents by the opposite party.

Such order should issue, and the record should be passed in the principal office of the court in Toronto, as no locality is pointed out by the proceedings in interpleader. A notice of motion to set aside a proceeding for irregularity should show, or refer to affidavits showing, what the irregularity is; and where a notice was deficient in this respect, the motion was dismissed, but without costs, as the objection advanced on the return of the motion was well taken.

J. R. Roaf, for the plaintiffs.

Aylesworth, for the defendant.

Boyd, C.] [February 16.

ADAMSON v. ADAMSON.

Writ of assistance—R.S.O. c. 66, s. 11.

The application of R.S.O. c. 66 is not limited to purely common law actions pending in those courts before the Judicature Act, but extends to all writs of execution; and a writ of assistance, in execution of a decree of the Court of Chancery for the recovery of land, is a writ of execution within the meaning of s. 11 of that Act, and does not remain in force after one year from the teste, if unexecuted, unless renewed.

Maclennan, Q.C., for the plaintiff.

Bain, Q.C., for the Sheriff of Peel.

Chan. Div.] [February 21.

RE RAINY LAKE LUMBER CO.

Appeal—Divisional Court—Winding-up proceeding—45 Vict. ch. 23 s. 78.

Pending proceedings under an order for the winding-up of a company under 45 Vict. ch. 23, (D.), the Union Bank filed a petition praying that the liquidator might be ordered to deliver up certain lumber claimed by the bank. The petition came on to be heard before a judge in court, and was adjourned by him for the sake of convenience before the judge holding the Port Arthur Assizes, who heard the evidence orally and pronounced judgment thereon.

Held, that the proceeding at Port Arthur was not the trial of an action, and therefore, and also having regard to the provisions of 45 Vict. ch. 23 s. 78, that no appeal lay to the Divisional Court.

George Bell, for the Union Bank.

J. R. Roaf, for the liquidator.

C. P. Div.] [February 21.

HUNTINGTON v. ATTRILL.

Action on foreign judgment—Staying proceedings—Appeal in foreign country.

An action on a foreign judgment was stayed, pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed

by the foreign court. Terms as to diligence in prosecuting the appeal, and preservation of the defendant's property in Ontario in *statu quo* were annexed to the order.

Kingsmill, and *H. Symons*, for the plaintiff.

Robinson, Q.C., and *Aylesworth*, for the defendant.

Mr. Dalton, Q.C.] [February 21.

IRVING v. CLARK.

Costs, security for—Order against one of two plaintiffs.

The rule that security for costs should not be ordered, where it could only be against one of two or more plaintiffs, does not now universally govern, since the law as to the joinder of plaintiffs has been changed by Rule 89, O. J. A.

Quære, whether the rule was ever applicable to the ordering of security for costs against a plaintiff who is insolvent, and not having any beneficial interest, is put forward by another person.

And where one plaintiff was suing to enforce a mechanic's lien, and the other to set aside a sale of the same property, security for costs was ordered against one alone.

S. R. Clark, and *R. A. Dickson*, for the defendants.

Dewart, for the plaintiffs.

CORRESPONDENCE.

MOTIONS FOR NEW TRIALS.

To the Editor of the CANADA LAW JOURNAL:

I observe an article in your issue of the 1st of January in reference to motions for new trials, and pointing out the difference in the practice of the different divisions of the Supreme Court of Judicature for this Province.

Why should there be any difference as regards the effect of a finding by a jury, and the subsequent entry of judgment by the court from the case where the court itself finds the fact and enters the judgment, so far as the subsequent rights of the litigants are concerned? In jury cases, unless a certificate be obtained from the presiding judge, for immediate execution, the entry of judgment is postponed until the following term, while in non-jury cases judgment may be entered at once by the successful litigant, unless the entry of judgment be stayed by the presiding judge until the following term. The practice should be uniform.

The judge would in all cases stay the entry of judgment upon proper terms until term.

If the suggestion I throw out were adopted, there would be no necessity for orders *nisi* for new trials, and an application for either a new trial, or for a judgment in terms different from that entered by the judge at the trial, would then in all cases be by notice of motion. May I also point out that the practice of holding in the country different sittings for the Common Law and Chancery Divisions should at once cease? The whole trouble arose from the timidity of Attorney-General Mowat in framing the Judicature Act, and the somewhat unreasonable timidity of the judges in adopting the changes introduced by that Act. There is no reason in the world why the Chancery Division should not be what it professes to be—a Division of the High Court—and not, as it in reality now is, a separate court. I think the time has arrived when the judge who takes the Hall work should take everything that ordinarily comes before a single judge. He would, perhaps, be hard worked, but the entire work is within the compass of an industrious judge, devoting five days of the week at least to that purpose.

Yours,

LEX.

LIMITATION OF ACTIONS.

To the Editor of the LAW JOURNAL:

The point raised by Mr. Langton in your issue of February 1st has occurred no doubt to most of the profession, and I avail myself of your invitation to convey to your readers the view I have formed upon the subject.

It is somewhat strange that the point has not been raised before in the courts of this Province. *Allan* v. *McTavish*, 2 App. Rep. 278, is certainly inconsistent with *Sutton* v. *Sutton*, 22 Ch. Div. 511, and *Fearnside* v. *Flint*, 22 Ch. Div. 579, and I think that the judgment of Moss, C.J., in the first of above cases is inconsistent with his reasoning in the case of *Boyce* v. *O'Loane*, 3 App. Rep. 167, as I shall hereafter point out.

Our first duty is to look at the exact words of the statute which limits the recovery of certain claims to a period of ten years after the right accrues. Section 23, cap. 108 R. S. O., is as follows:

CORRESPONDENCE.

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten (twelve) years next after a present right to receive the same has (shall have) accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has (shall have) been paid, or some acknowledgment of the right thereto has (shall have) been given in writing, signed by the person by whom the same is (shall be) payable, or his agent, to the person entitled thereto or his agent; and in such case no action or suit or proceeding shall be brought, but within ten years after such payment or acknowledgment or the last of such payments or acknowledgments if more than one was made or given."

And if we insert in this section the words that I have enclosed in brackets, substituting twelve for ten years, and eliminating the obvious words from our Act, we have the corresponding section in the Imperial Act, the two sections being practically identical, with the exception that the period of limitation in England is twelve years. The only difficulty that arises in the construction of this statute is in reference to the word "judgment," and as Chief Justice Moss points out in *Boyce* v. *O'Loane*, it is a probable conjecture that the word was introduced *per incuriam* by the draftsman of the Act not appreciating the different effect that a judgment may have in relation to the lands of a debtor in England and in this province. In England a judgment becomes a lien upon the lands of a debtor by a procedure called docketing, which binds the lands of a judgment debtor throughout England, no matter where situate, and by means of a writ of elegit the judgment creditor may have delivered to him the lands of the judgment debtor to enable him to obtain satisfaction of his judgment. It will be observed, therefore, that the moment a judgment in England is docketed, it becomes from that moment a charge upon the debtor's lands, and by virtue of section 58, cap. 57, 37 and 38 Vict. (Imperial Act) such judgment becomes effete at the expiration of twelve years. There is nothing rendering it obligatory upon the judgment creditor to docket the judgment, and this peculiar attribute only attaches to the judgment from the moment of docketing. I should surmise that proceedings can, in England, be taken to realize a judgment from the debtor's lands the moment it is docketed, and therefore that moment the judgment creditor has a present right to receive such judgment within the meaning of the section I refer to.

Some effect, however, must be given to the word "judgment" in the section in question in the Act in force in this province. I may here point out that Moss, C.J., thinks it clear that the word "judgment" in our Act (and thus far agreeing with English decisions) refers to judgments having the quality of binding lands. A judgment in this province becoming a charge upon lands by the aid of a *fi. fa.* placed in the hands of the sheriff in the county in which the lands of the debtor lie or are supposed to lie, and from the moment that the writ of *fi. fa.* lands is received by such sheriff, the debtor's lands are in such county bound by the judgment, but it is not necessary for the judgment creditors to issue and place in a sheriff's hands such writ of *fi. fa.* lands, and where the debtor has no lands of course he will not do so. May not the proper interpretation of this section of the Act be that in regard to judgments which by the judgment creditor have been so made a charge upon the debtor's lands the statute affects such judgments, and at the end of ten years from the time the creditor has a present right to receive the fruit of his judgment it will be deemed to be satisfied, and that period of course will be twelve months from the period the writ reaches the hands of the sheriff, at which latter period a sale of the debtor's lands may be had? If my view of the statute be correct, then every difficulty is seemingly removed as regards the interpretation of this section. If the judgment creditor does not see fit to cause his judgment to become a charge upon the debtor's lands, he will still have twenty years in which to bring an action upon his judgment, and so full effect can be given to section 1, sub-section (b) cap. 61 R. S. O., enacting that an action may be brought upon a debt, bond or other speciality within twenty years after the cause of such action arose. And this explanation removes the difficulty suggested by Mr. Langton in reference to proceedings to enforce a judgment upon which writs of execution have been issued after the judgment is more than fifteen years old (see section 330, cap. 50 R. S. O.).

If we now take up the English decisions bearing upon this point, we will find them all consistent. The first case in which a similar question was discussed was the case of *Hunter* v. *Nockolds*, 1 Mac. G. 640, in which Lord Chancellor Cottingham decided that when the Legislature enacted that only six years' arrears of rent could be collected this period was not extended, although the creditor held the personal covenant of the debtor, and notwithstanding the fact that under ordinary circum-

stances an action could be brought upon a covenant until the lapse of twenty years.

In *Sutton* v. *Sutton*, 22 Ch. Div. 511, the Court of Appeal in England held that when a mortgage became extinguished after the lapse of twelve years from the time it became payable the personal covenant of the mortgagor contained therein was also extinguished with the debt, though in the case of an action brought upon the ordinary covenant of the debtor the creditor would have the full period in which to bring his action. *Pearnside* v. *Flint*, 22 Ch. Div. 579, merely states the law to be that it makes no difference whether the covenant in aid of the mortgage debt is contained in the same instrument or in a separate instrument, and that the same result follows. From these decisions we may infer that while in ordinary cases an action may be brought upon a covenant within twenty years from the maturity of the debt, yet when the covenant is in aid of a charge upon lands it ceases to have validity the moment the right to enforce the charge ceases to exist. If this view of the law be correct, no doubt *Allan* v. *McTavish* was not well decided. Strange to say, Chief Justice Moss in the latter case refers to *Hunter* v. *Nockolds*, and, I think, fails to appreciate the effect of the decision, and seems to have supposed that this latter case decides that an action may be brought upon the covenant in aid of a rent charge, after the charge was deemed to be satisfied by the statute in question, although the case decided directly the contrary. However *Boyce* v. *O'Loane* is well decided, as there is nothing in the case to indicate that the judgment there referred to had ever been made to charge upon lands by means of a *fi. fa.*, and Moss, C.J., expressly says on page 173: "Having regard to the ordinary meaning of the language, and to the opinions I have quoted, the conclusion would seem to be that if there were no judgments operating as charges upon lands the section did not affect judgments at all—in other words, that there was no subject-matter to which that part of the section was applicable, and that no period of limitation was prescribed for judgments not forming a charge upon lands."

It is not amiss to point out that at one time judgments in this province were by means of certificates given by the officer who entered the judgment and the registration of such certificates available against the lands of the debtor without the aid of a writ of *fi. fa.* lands. See section 275, cap. 22 Con. Statutes of U. C.

W. H. MCCLIVE.

FLOTSAM AND JETSAM.

INTERRUPTIONS OF COUNSEL.—The Irish bull is sometimes introduced into this country with the most gratifying effect. Baron Dowse, of the Irish Exchequer, let loose some famous specimens when he sat in the House of Commons. Replying to a question relating to some sectarian celebration in Derry, he is reported to have said: "These celebrations, sir, take place at an anniversary, which occurs twice a year in Derry." The other evening we encountered an equally well-developed example of the bull. A member of the English Bar, an Irishman, well known in society for his many amiable qualities, was discussing a current topic with considerable animation. He was occasionally interrupted by one of the company, and at length became irritated, he addressed his friend with much dignity, and said: "You can interrupt me, surr, when I'm done spaking."—*Pump Court.*

Law Society of Upper Canada.

OSGOODE HALL.

MICHAELMAS TERM, 1886.

The following gentlemen were called to the Bar, viz.:

November 15th.—Robert Stanly Hays, Wellington Bartley Willoughby, Frederick Stone, Trevussa Herbert Dyre, Franklin Montgomery Gray, Edward Arthur Lancaster, Lorenzo Clarke Raymond, Delos Rogest Davis, John Michael Macnamara, Henry Clay, Eudo Saunders, Archibald McAlpine Taylor, Alexander Fraser.

November 16th.—William James Tremeear, John Robertson Millar, David Alexander Givens, George Francis Burton, Henry Smith Osler, Walter Stephens Herrington, Duncan Ontario Cameron, Osric Leander Lewis, Francis McPhillips, Frederick George McIntosh, Archibald McKechnie, Edward Ellis Wade.

November 20th.—Donald Calvin Hossack.

December 4th.—Herbert Henry Bolton.

The following gentlemen were granted Certificates of Fitness, viz.:

November 15th.—A. M. Denovan, A. M. Taylor, O. L. Lewis, W. B. Willoughby, F. Stone, W. S. Herrington, R. Vanstone, R. F. Sutherland, A. Fraser, S. McKeown, C. B. Jackson, D. H. Cole, R. H. Pringle, A. B. Cameron, E. W. Boyd, F. E. Titus.

November 16th.—A. W. Wilkin, F. M. Gray, G. F. Burton, W. J. Tremeear, D. B. S. Crothers, H. G. Tucker, J. J. Smith.

November 20th.—H. Morrison, H. W. Bucke, F. G. McIntosh, N. J. Clarke, J. R. Shaw.

December 4th.—H. J. Dawson.

The following gentlemen passed the First Intermediate Examination, viz.:

M. H. Ludwig, with honors and first scholarship; J. M. Palmer, with honors and second scholarship; E. H. Britton, with honors and third scholarship; S. A. Henderson, with honors; and Messrs. J. H. Hunter, S. D. Lazier, R. G. Smyth, H. H. Johnston, J. T. McCullough, A. Collins, E. E. A. DuVernet, H. Harvey, J. Irving Poole, G. C. Gunn, W. A. Skeans, R. L. Elliott, R. M. Macdonald, W. Pinkerton, G. D. Heyd, O. Ritchie, W. L. B. Lister, M. C. Bigger, R. L. Gosnell, H. E. McKee, R. O. McCulloch, F. J. Travers, H. F. Errett, M. F. Muir.

The following gentlemen passed the Second Intermediate Examination, viz.:

F. A. Anglin, with honors and first scholarship; W. S. Hall, with honors and second scholarship; J. T. Kirkland, with honors and third scholarship; N. F. Davidson and A. Morphy, with honors; and Messrs. T. Scullard, H. S. W. Livingston, F. P. Henry, R. R. Hall, A. Saunders, F. A. Drake, H. R. Welton, J. M. Quinn, J. Y. Murdoch, A. F. May, W. L. M. Lindsay, D. R. Anderson, T. Browne, R. J. Maclennan, H. B. Smith, W. S. Turnbull, R. K. Orr, T. A. Wardell, H. N. Roberts, A. E. Trow, A. C. Camp, H. M. Cleland, W. W. Jones.

The following gentlemen were admitted into the Society as Students-at-Law:

Graduates.—Bidwell Nicholls Davis, Robert Elliott Fair, Lennox Irving, Ralph Johnston Duff, Donald Roderick McLean, James Wilson Morrice.

Matriculants.—Frederick Billings, George Davidson Grant, William Alexander Baird, Henry John Deacon Cooke, Christopher Lucy, Louis Vincent McBrady, John Flemington Tannahill, Robert Talbot Harding, Alexander Robertson Walker, William Henry Williams.

Junior Class.—C. P. Blair, C. F. Maxwell, W. F. Langworthy, J. A. Harvey, G. B. Wilkinson, J. McBride, H. C. McLean, F. R. Blewett, J. B. Pattullo.

Articled Clerks.—T. H. Lloyd, J. Lennox, H. W. Maw.

CURRICULUM.

1. 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 on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

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

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to mark obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cicero, In Catilinam, I. Virgil. Æneid, B. I. Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33)
1890	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, in Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

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.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

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.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

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

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; 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.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.