Canada Law Journal.

VOL. XXI. OCTOBER 1, 1885. No. 17.

DIARY FOR OCTOBER.

3. Sat.....First edition English Bible printed, 1535.
4. *Sun* .....*18th Sunday after Trinity.*
5. Mon.....County Court and Surrogate Term (ex. York). Non-jury Sitting of County Court (ex. York) beg n
8 Thur.....Harrison, C.J., 1875.
10. Sat .....County Court and Surrogate Term (ex. York) ends.
11. *Sun* .....*19th Sunday after Trinity.* Guy Carleton, Governor of Canada, 1774.
12. Mon... ....County Court and Surrogate Term (York) begin.
13 Tues.....Battle of Queenston, 1812.

TORONTO, OCTOBER 1, 1885.

THE pernicious example set some years ago by Vice-Chancellor Mowat in stepping down from the Bench into the arena of party politics has been followed by Judge Thompson, of Nova Scotia, who takes the position of Minister of Justice of the Dominion. For either party after this to refer to the subject would indeed be for the pot to call the kettle black. We presume, therefore, there will be very little said about it. That there is now ample precedent for this descent is a misfortune to the country.

THE following is the appearance that the would-be patriot, whose price for selling his countrymen was thirty-five thousand dollars and probably a great deal less, presents to the intelligent editor of the *Central Law Journal*: "Riel is acting like a thorough poltroon, and the people of French descent in Canada appear to be wasting their sympathies on a most worthless character. After having endeavoured to cast the onus of his late rebellion upon his followers he now sets up the defence of insanity. He who takes up arms for a cause and fails, ought to feel that it is a part of his duty to that cause to die like a man. Even such a wretch as Guiteau could do that."

IT would be an insult to their intelligence to suppose that the efforts made by certain French-Canadians to obtain a commutation or reversal of the sentence which has been most righteously passed upon Louis Riel (not here alluding to any right of appeal he may have), arises from any belief in his innocence, his insanity or any unfairness in his trial. The only possible theory for this action is that he is of the same race or religion as his sympathizers. It therefore, comes to this, that the pardon of a criminal, who deserves hanging if ever a man did—who ought to have been hanged years ago for the cold-blooded murder of a loyal citizen, Thomas Scott —is sought simply because he belongs to the ruling race of one of the Provinces of this Dominion. If he were of any other descent we venture to assert that not one voice from any one of the Provinces would be raised to save him from his most just doom.

DURING the past summer the Law Society have beautified the grounds around Osgoode Hall by the introduction of two or three flower beds. Filled with geraniums and verbenas, these beds have added very much to the beauty of the lawns. It was feared that the flowers would be over-run by dogs, or stolen by thieves. Neither contingency has happened. One individual who attempted larceny was caught and summarily punished, and the offence is not likely to be repeated. We see no reason why flowers should not be more extensively cultivated in the Osgoode Hall grounds. It is well known that the Temple Gardens in London are noted for the annual display of chrysanthemums. Why should not Osgoode Hall

have a similar display? A green-house might be erected at a comparatively small cost, and heated at a very small additional outlay, and by this means the necessary supply of plants could be kept up at no very great expense.

We also noticed in a recent number of the *Law Times*, that the lawn of the Middle Temple is utilized for the playing of tennis. Why could not the west lawn of Osgoode Hall be similarly used? Under proper regulations as to the time within which play should be allowed it could not possibly do any harm, and might prove a source of very great pleasure and amusement to many members of the profession during the summer months. We trust the Benchers will cogitate over the subject and give the matter favourable consideration next year.

LAW FOR LADIES.

A few decisions interesting to the ladies "have been found and made a note of" (according to Captain Cuttle's advice) during the canicular days. Dress is always a fascinating theme to the fair sex, and occasionally the judges consider the subject, not only when the bills of their wives and daughters have to be settled, but when some deep point of law lies hidden in an article of apparel and has to be disposed of. Down in Louisiana it has recently been held that wearing a sun-bonnet in the street is not necessarily an act of negligence. Mrs. Shea owned the bonnet that settled this question. Of the fabric, size and shape of this courted bonnet we know naught. The owner had it on her head and was crossing a street, when the projecting sides prevented her seeing a horse that was bearing down upon her, and she succumbed to the equine. The Court gave her damages for the damage done to her. (*Shea* v. *Reems*, 36 Louisiana 969.)

Some time since (but as revolving years and fashions are bringing in again the article to be alluded to—at least so we are told by sisters in law—it may be well to remind our gentle readers of the fact) it was decided in New York State that the use of crinoline was not an act of neglience, even though it was the cause of the accident complained of. Mrs. Mary Poulin was alighting from a car on Broadway with Mr. P.'s youngest hopeful in her arms: her steel hoop skirt caught upon a nail in the car platform, and she was thrown down and dragged some distance. Her injuries were serious and her fright was great. She sued the car company for compensation; they ungallantly pleaded that the article in question was not a necessary article of female apparel, and that if Mrs. Poulin were determined to wear such expansive balloon-like skirts she ought to have exercised more care than is expected of a man. The Court, however, pooh-poohed the notion; said there was no negligence on the lady's part and that if the railroad company took the money of passengers adorned with crinolines they must see to their safety. (*Poulin* v. *Broadway, etc.*, *R. W.* 34 N. Y., Sup. Ct. 296.)

We wonder whether the ladies fully understand how much wider their rights in the matter of shopping are when they are forced to leave their husbands, than when they live comfortably at home. Judge Blackburn says: "A husband whilst his wife resides with him chooses his own style of living, at least in theory." (The last four words impress one with the conviction that the judge is a married man, and felt that *in foro domestico*, if not *in banco reginæ*, his decisions were ofttimes overruled and reversed.) He quotes old Judge Hide who remarked that "if a woman will have a velvet gown and a satin petticoat, and the husband thinks mohair or farendon for a gown, and watered tabby for a petticoat, is as fashionable and fitter for his quality," who is to

decide the controversy? and Blackburn, J., answers the query thus: "Not the wife, nor a jury, it may be consisting of drapers and milliners, but the husband." "But," continues the judge, "when the husband has without cause turned the wife out of doors, or by his own fault has rendered it impossible for her to reside with him, the rule is changed. The husband is no longer the sole judge of what is fit, but the law gives the wife in such a case authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable. This increase of liability only comes into play when the husband is in fault, and so it is not unjust." (*Bazeley* v. *Forder*, L.R. 3 Q. B. 564; *Manby* v. *Scott*, 1 Sid. 109.)

Lady law students will be relieved to know that fastening important legal papers together by a pin is a sufficient mode of connection, and that it is not less effectual than the old-fashioned lawyer's mode of fastening by a tape. (Sir J. Hannen, *In re Braddock*, 1 P.D. 635.) Mrs. Mary Ann Braddock wrote her own will on two pieces of paper which she attached together by one of these little universal-remedy instruments, and that little act of hers led to the discussion of the matter.

Henry Tudor had so much to do with ladies that he knew the value of good pins, and so, with his consent, his parliament enacted in 1543 that, "No person shall put to sale any pinnes but only such as shall be double-headed and have the heads soldered fast to the shank of the pinnes, well smoothed, the shank well shapen, the points well and round filed, canted and sharpened."

The name of this very much married king suggests matrimony, and Sir James Hannen, of the Probate Division, has lately been giving his views on the marriage contract. His words are: "It appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and a woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman." (*Durham* v. *Durham*, 10 P.D. p. 82.)

His lordship evidently considers that while being led to the hymeneal altar, a young lady can be shy, nervous and absent minded, without its being a necessary inference that she is *non compos mentis*. (Ib. p. 90.) Sir James has been eavesdropping and listening to the unguarded utterances of young men and maidens, and then has mounted the bench and sat upon them—for he says, with all the weight of ermine and horsehair: "It is to be observed that it is not unusual at the present day for young men and women to apply such terms as 'dreadful' and 'awful,' without any nice consideration of their fitness." *O tempora! O mores!* His opinion of the education possessed by the women of the upper classes is not flattering to the aristocracy of England. In speaking of the beautiful but unfortunate Countess of Durham, he remarked: "I think it appears from her letters that she was a person of low intellectual powers; but she was capable of receiving the ordinary education of young ladies of her class." (Ib. pp. 88, 84.)

In a recent case a gentleman complains that, when his proposal of marriage was accepted, the young lady did not return his kiss. (Ib. p. 88.) But what is a kiss? asked a paper lately; and then replied, the question can only be answered by experience, and quoted a case in which the Judge of the County Court of Lambeth, England, held that a kiss was not a legal consideration. A surgeon in Lambeth

kissed a workingman's wife; the husband valued the sweetness taken at £5; and the surgeon gave an I. O. U. for that amount. A month after date an action was brought upon this document, but the judge promptly ruled there was no consideration, and gave a verdict for the amorous son of Æsculapius. Did this lay down a general principle, or is every case to be decided upon its merits? Certainly there are kisses and kisses. (30 *Albany L. J.* 81.) A kiss has frequently been held to be an assault, and it is sometimes a source of substantial damages. Miss Cracker sued a railway company because one of the conductors had kissed her in the car; and she recovered a verdict of $1,000, upon the ground that it is a carrier's duty to protect his passengers against all the world. (*Cracker* v. *C. & N. W. Ry.* 36 Wis. 657.)

Elizabeth's parliament declared that "all persons fayning to have knowledge of Phisiognomie or like Fantasticall Ymaginacions" should "be stripped naked from the middle upwards and openly whipped until his body be bloodye." (39 Eliz. c. 4.) Anne modified the punishment; two of the Georges said that all such persons were to be deemed rogues and vagabonds, and were liable to be publicly whipped, or sent to the house of correction until the next sessions. (13 Anne, c. 23; 17 Geo. II., c. 5; 5 Geo. IV., c. 83.) Yet, notwithstanding these dread penalties, if we had been acquainted with Mrs. Cloyes while she was still a spinster fancy free, and if we had been endued with any knowledge of "phisiognomie" or the art of discriminating character by gazing on a person's outward appearance, we should certainly have warned her against the mean wretch that tempted her into the state of matrimony. He, contemptible man that he was, gave her his cheque for $400 as a wedding-gift. Of course this generous donation was placed among the wedding presents to be gazed at, talked about by the wedding guests and duly chronicled in the morning and evening papers. Afterwards, they twain having become one flesh, this man—whose manhood might have been rattled in an empty chestnut shell—declined to pay the cheque, and successfully defended an action thereon. The Court, in giving judgment in his favour, said: "A subsisting contract to marry is not a legal consideration for new contracts afterwards entered into between the parties, unless the new contract formed part of the consideration for the contract to marry. When the cheque was delivered the contract to marry was a valid and subsisting contract. The action cannot be maintained upon the theory that the cheque was a valid 'gift.' The word 'gift' signifies an actual transfer *in presenti* of property without consideration. The cheque does not transfer *in presenti* to the payee $400, or any part of the funds standing to the credit of the drawer upon the books of the drawee. No specific property was transferred by the defendant to the plaintiff. It was a naked promise. The cheque being without consideration cannot be sustained. (Byles on Bills, 13th ed. 126). There is a broad distinction between the gift of the cheque or obligation of a third person and the gift of the donor's promise to pay." (*Cloyes* v. *Cloyes*, 36 Hun, 145.)

After reading such a case one is delighted to find that a husband must pay his wife's funeral expenses, no matter how much money she may have left nor to whom she may have left it. Even though a third person gets her money and assists in the direction of her funeral, the husband must pay for it all. (*Sears* v. *Gidday*, 41 Mich. 590.) And he cannot claim reimbursement from her estate for either the expenses of interment or of a monument which he may have erected over her ashes. (*Smyley* v. *Rees*, 53 Ala. 89; S. C. 25 Am.

Rep. 598.) Indeed, should the undertaker recover his charges from the wife's executor, as he may, yet the latter may in his turn recover from the husband. (*Darmody's Case*, Leg. Int., March 7, 1879.) And the Courts seem inclined to hold that a burial merely conforming to the requirements of public decency may not be sufficient, but that it should be suitable to the position of the husband. (*Smyley* v. *Rees*, *sup.*; *Jenkins* v. *Tucker*, 1 H. Bl. 90.)

Apparently the only way for a husband, if he has anything, to avoid paying for the funeral of his wife is for him to die first (sometimes this is a real gain to the wife and her estate); then the principle that the husband's death revokes the wife's authority to bind him comes into play, and his estate gets free of these expenses. (*Lawrill* v. *Kreidler*, 3 Rawle., Pa. 300.)

All this is for our lady readers, whose name is Legion. R. V. R.

RECENT ENGLISH DECISIONS.

The August number of the *Law Reports* comprises 15 Q.B.D. pp. 193-314; 10 P.D. pp. 129-137; 29 Chy. D. pp. 565-749, and 10 App. Cas. pp. 351-437.

MORTGAGE—TRADE FIXTURES.

The right of a mortgagee to fixtures placed on the mortgaged premises, was held in *Sanders* v. *Davis*, 15 Q. B. D. 218, not to extend to fixtures placed by a tenant of the mortgagor who held under a lease made subsequently to the mortgage. This is the decision of a Divisional Court composed of Pollock, B., and Manisty, J. It was conceded that in the absence of any express reservation to the contrary, if the fixtures had been placed by the mortgagor himself on the premises they would have passed to the mortgagee; and it seems a somewhat doubtful proposition, that the mortgagor can give his assignee a privilege which he did not possess himself. This case should be read in connection with the decision of Pearson, J., in *Tottenham* v. *Swansea*, 52 L. T. N. S. 738.

STATUTE OF FRAUDS, S. 17—ACCEPTANCE OF GOODS.

The construction of s. 17 of the Statute of Frauds, that ever fruitful source of litigation, is the subject of discussion in *Page* v. *Morgan*, 15 Q.B.D. 228. The defendant had purchased a quantity of wheat by sample; a number of sacks were delivered under the contract at his premises, and he opened the sacks and examined their contents to see if they were equal to sample, and immediately after gave notice to the seller that he refused the wheat as not being equal to sample; and the question was, whether there had been an acceptance by the defendant sufficient to satisfy the statute. The Court of Appeal affirming the Divisional Court of the Queen's Bench Division, held that there had. The learned Master of the Rolls, adopting the principle laid down in *Kibble* v. *Gough*, 38 L.T.N.S. 204, said:—

"There must be under the statute both an acceptance and actual receipt, but such acceptance need not be an absolute acceptance—all that is necessary is an acceptance which could not have been made, except upon admission that there was a contract, and that the goods were sent to fulfil that contract."

CONTRACT—MARRIED WOMAN—M. W. PROPERTY ACT, 1882.

The English Married Women's Property Act, 1882, is, as was to be expected, giving rise to a plentiful crop of cases. It will be remembered that prior to that Act it had been determined in *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, and other cases, that a married woman's contract only bound such separate property as she had at the date of the contract and continued to have at the time judgment was recovered against her. To remove this absurdity from the law was one of the objects of the English Act, and of our own recent statute (47 Vict. c. 19, O.). In the case of *Turnbull* v. *Forman*, 15 Q. B. D. 234, the Court of Appeal have, however, determined that the provisions of the statute directed to this object (viz., s. 1, ss. 3, 4) have not a retrospective operation, so that as to contracts made by a married woman prior to our statute 47 Vict., the old rule laid down in *Pike* v. *Fitzgibbon* still holds good.

LANDLORD AND TENANT.

In *Hogg* v. *Brooks*, 15 Q.B.D. 256, the Court of Appeal affirmed the decision of Matthew, J., noted *ante* p. 169.

Recent English Decisions.

VENDOR AND PURCHASER—RESTRICTIVE COVENANTS—NON-DISCLOSURE OF—RIGHT TO RESCIND.

In *Nottingham Patent Brick Co.* v. *Butler*, 15 Q.B.D. 261, Wills, J.. deals with the right of a purchaser to rescind a contract for sale on discovering restrictive covenants affecting the property not disclosed by the vendor, and contained in deeds which he was not bound to produce. Notwithstanding certain conditions of sale, and the provisions of the English Conveyancing Act of 1881, the learned judge held that the purchasers were entitled to rescind the sale, and recover their deposit.

BILL OF SALE—AFTER ACQUIRED CHATTELS—LEGAL AND EQUITABLE ESTATES—JUD. ACTS, 1873 & 1875.

The case of *Joseph* v. *Lyons*, 15 Q.B.D. 280, turns on the effect of a bill of sale whereby a jeweller for valuable consideration assigned to the plaintiff his after-acquired stock in trade, subject to a proviso for redemption; but before the plaintiff took possession of the after-acquired stock, the jeweller pledged it with the defendant, who had no notice of the plaintiff's bill of sale. The action was brought by the plaintiff to recover the property, but it was held by the Court of Appeal, reversing the judgment of Huddleston, B., that the defendant had the better right because the bill of sale only passed an equitable interest and not the property in the after-acquired goods, and that this interest could not prevail against the owner of the legal title without notice. It was contended that the effect of the Judicature Acts was to abolish the distinction between law and equity, but Lindley, J., dealing with that argument says:—

"Certainly that is not the effect of those statutes, otherwise they would abolish the distinction between trustee and *cestui que trust*. In the present case the defendant has the legal title, and he has not had either express or even constructive notice of the plaintiff's equitable title."

WILL—CONSTRUCTION.

The Court of Appeal in *Limpus* v. *Arnold*, 15 Q.B.D. 300, affirm the decision of the Divisional Court—noticed, *ante* vol. 20, p. 335—Cotton, L.J., dissenting.

LANDLORD AND TENANT—DISTRESS—ENTRY.

The Divisional Court (Field and Manisty, JJ.,) in *Crabtree* v. *Robinson*, 15 Q. B. D. 312, decided that an entry may be made into a house by a landlord for the purpose of distraining, by further opening a window which is partially open. Manisty, J., who gave judgment, says at p. 314:—

"The cases seem to result in this: that to make an entry the latch of a door may be lifted though the door be closed; but that in the case of a window, entry can only be made if the window is to some extent open, and that for the purpose of entry in such cases the window may be further opened."

This concludes our review of the cases in the Queen's Bench Division. Neither of the cases in the Probate Division calls for any observation. We now proceed to consider the cases in the Chancery Division.

BILL OF COSTS—TAXATION AFTER PAYMENT.

The first case to be noted is *In re Boycott*, 29 Chy. D. 571, in which the Court of Appeal reversed the order of Bacon, V.-C., directing a taxation of a solicitor's bill after payment, on the ground of the absence of special circumstances justifying the order. Mortgagees were proceeding to sell the mortgaged estate, the mortgagor found a transferee. On the 1st September the mortgagor's solicitor wrote proposing to complete the transfer on the 3rd September. The mortgagee's solicitor subsequently proposed the 10th September for completing the transfer. On the 9th September he delivered his bill, amounting to £450, to the mortgagor's solicitor who wrote complaining that it was excessive. On the 13th the transfer was completed and the bill of costs paid, the mortgagee's solicitor refusing to deliver up the deeds except on payment. A written protest was delivered to him by the mortgagor's solicitor, and he then expressed his willingness to reconsider his bill if any item were shown to be erroneous; but said nothing to the effect that it was to be treated as open to taxation. The mortgagor applied for taxation, alleging pressure and overcharges, but not referring to any specific item of overcharge. Both Cotton and Fry, LL.J., were of opinion that as the shortness of time between the delivery of the bill and the time fixed for completion did not arise from any act of the mortgagee's solicitor, but was owing only to the mortgagor's desire for speedy completion, there was no pressure such as to justify taxation, though the case would have been otherwise

if the mortgagees had been pressing for a settlement. Bowen, L.J., however, dissented, and was in favour of directing a taxation, considering that the mortgagee's solicitor had taken advantage of the inconvenience which would have resulted from delay which, in his opinion, amounted to a special circumstance.

AGREEMENT TO ASSIST IN AN ILLEGAL BUSINESS.

The case of *Davies* v. *Makuna*, 29 Chy. D. 596, although turning on the construction of certain acts of parliament having merely local operation, is nevertheless deserving of notice as establishing an important general principle. The plaintiff, who was disqualified by statute from practising as a medical practitioner, carried on that business, and engaged the defendant to assist him, and the defendant bound himself not to practise in the same town for five years after the close of the engagement. The action was brought to restrain the defendant from violating this contract. But the Court of Appeal, reversing the decision of Pearson, J., held the agreement to be illegal. The Court, however, seem to have been of opinion that if the plaintiff had merely carried on the business of a medical practitioner by means of duly qualified assistants without himself acting personally, that the case would have been different, and the plaintiff under such circumstances might have been entitled to an injunction.

VENDOR AND PURCHASER—CONDITIONS OF SALE—RIGHT TO RESCIND.

The Court of Appeal in *Dames* v. *Wood*, 29 Chy. D. 626, affirm the decision of Bacon, V.-C., 27 Chy. D. 172, which we noted *ante* Vol. 20, p. 416. Property had been sold subject to a condition that if the purchaser should take any objection or make any requisition which the vendor was unable or unwilling to comply with, the vendor might rescind the contract. Requisitions were delivered which the vendor refused to comply with, the purchaser insisted on them, and the vendor then rescinded the contract. The purchasers objected to the rescission and withdrew the requisition, and expressed their willingness to complete, but the Court held that the purchaser could not thereby prevent the rescission of the contract.

BONUS DIVIDEND—CAPITAL OR INCOME—TENANT FOR LIFE AND REMAINDERMAN.

The case of *In re Bouch*, *Sproule* v. *Bouch*, 29 Chy. D. 635, is a decision of the Court of Appeal reversing a judgment of Kay, J. The question in controversy arose as to the relative rights of a tenant for life and remainderman to certain bonuses and additional shares in a company allotted in respect of shares of which the tenant for life was only entitled to the income. The shares in question formed part of the residuary estate of a testator which was bequeathed in trust for his widow for life. After the testator's death a reserve fund of £100,000 and an "undivided profit fund" of £36,070, more than half of which arose from profits earned before the testator's death, were distributed by the company among the shareholders as a bonus dividend, and certain new shares were created and allotted to the existing shareholders in proportion to the number of shares held by them, on which £7 10s. was to be paid on each share on allotment. The trustee under the will accepted the shares, and paid the call thereon out of the bonus dividend. After the death of the tenant for life, the question arose whether the new shares, having been paid for out of the bonus dividend, were the property of the deceased tenant for life's estate, or whether the remainderman was entitled thereto. Kay, J., held that the bonus dividend and the new shares were capital, but the Court of Appeal now determine that there is no rule that where a sum, whether called bonus or dividend, is distributed by a company among its shareholders it must, if it is paid out of the accumulated profits of past years, be treated between tenant for life and remainderman as capital. The real question is whether the company, having the power of distributing its profits as dividends or of converting them into capital, has taken the former or the latter course.

VENDOR AND PURCHASER—DEFECTS IN TITLE—LICENSE TO ASSIGN.

The case of *Ellis* v. *Rogers*, 29 Chy. D. 661, is another decision of the Court of Appeal in which they affirm the judgment of Kay, J., but on different grounds to those assigned by that learned judge. The action was brought by a vendor against a purchaser to recover dam-

ages for breach of contract to purchase an interest in certain lands. A railway company agreed to demise to the plaintiff the land in question, which they had acquired under their compulsory powers. The plaintiff was restrained from assigning without license. The property formed part of an estate which, prior to its acquisition by the railway company, had been sold in lots subject to certain restrictive covenants for the benefit of the owners of the different lots. The conveyance to the company was made subject to these restrictive covenants. The plaintiff agreed to sell his interest under the contract to the defendant, who at the time knew of the restrictive covenants, but erroneously supposed they were extinguished. The plaintiff was ignorant of the existence of these covenants. The defendant, having subsequently discovered that the restrictive covenants still bound the property, objected to the title. The plaintiff's solicitors replied that the purchase by the railway company had extinguished them, which was not the case. The plaintiff had not obtained a license to assign. The defendant having refused to complete his contract, the action was brought. Kay, J., was of opinion that the failure of plaintiff to procure a license to assign precluded his recovery, as he was never in a position himself to complete the contract. But the Court of Appeal, while supporting the judgment of Kay, J., dismissing the action, did so on the ground that the purchaser had a *prima facie* right to a good title free from the restrictive covenants, and that in order to deprive him of that right it was necessary to show that at the time of the contract he knew that a good title could not be made. The point on which the Court of Appeal proceeds is thus stated by Cotton, L.J.:—

"It might under some circumstances have been necessary for us to decide on which of the two grounds the right to a good title rests, whether it depends on an implied term in the contract, or is a collateral right given by the law. But in the present case I think we need not decide that question, for, whatever be the foundation of the rule it is necessary, in order to bring a case within the exception, that there should be knowledge on the part of the purchaser that he cannot get a good title. Here such knowledge is not shown. It is true that the purchaser knew of the covenants, but he believed that they were done away by the company's taking the land under their compulsory powers. The vendor knew nothing of the covenants. The purchaser knew of them but thought that they had been discharged, so that both parties were contracting on the footing that a good title was to be made, and as a good title cannot be made the purchaser is not bound."

PURCHASE BY TENANT FOR LIFE OF REVERSION—REMAINDERMAN.

The case of *Phillips* v. *Phillips*, 29 Chy. D. 673, is an important decision of the Court of Appeal overruling Bacon, V.-C. A tenant for life of certain household property purchased the reversion, and the question was whether he was entitled to hold it for his own benefit, or whether the purchase enured to the benefit of the remainderman. Bacon, V.-C., decided in favour of the tenant for life, but the Court of Appeal were of opinion that the purchase enured to the benefit of the remainderman. Brett, M.R., says at p. 681:

"It is a well-established doctrine of a Court of Equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where the tenant for life has purchased the reversion. This is, no doubt, an extension of the principle; but I think that it is an extension which we ought to sanction."

VENDORS' AND PURCHASERS' ACT—INTEREST PAID BY MISTAKE.

The short point involved in *In re Young & Harston*, 29 Chy. D. 691, is that under the Vendors' and Purchasers' Act, which enables a vendor and purchaser to apply in a summary way to a judge in chambers in respect of "any question arising out of, or connected with, the contract," a purchaser who by mistake has paid interest on his purchase money, cannot apply in a summary way to recover it back, but must bring an action.

REGISTRY ACT—SHARE OF PROCEEDS OF SALE OF LAND—INCUMBRANCER—PRIORITY.

In the case of *Arden* v. *Arden*, 29 Chy. D. 702, Kay, J., disposes of a question of priority arising under the Middlesex Registry Act, the learned judge holding that that Act is intended to apply only to dealings at law or in equity with the land itself; and that therefore an incumbrancer upon a share in the proceeds of real estate in Middlesex devised in trust for sale obtains no priority over other incum-

brancers by prior registration; and that the priorities are regulated by the date at which the incumbrancers give notice to the trustee.

COMPANY—DEBENTURES—MORTGAGE—PRIORITY.

Wheatley v. *Silkstone Coal Co.*, 29 Chy. D. 715, is a decision of North, J., upon a question of priority arising between the debenture holders of a joint stock company and certain mortgagees. The debentures purported to charge the undertaking and the hereditaments and effects of the company with the payment of the sums mentioned in the debentures respectively, to the intent that the debentures might rank equally as a first charge on the undertaking, hereditaments and effects of the company. After the issue of these debentures the company deposited title deeds with the plaintiff as security for an advance, and by a written agreement charged the property comprised in the deeds with the payment of the loan. North, J., held that the plaintiff was entitled to priority over the debenture-holders. The reason of the judgment may be gathered from the concluding paragraph, where the learned judge says:—

"In this case I find that the debenture is intended to be a general floating security over all the property of the company, as it exists at the time when it is to be put in force; but it is not intended to prevent, and has not the effect of in any way preventing, the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course; and inasmuch as I find that the ordinary course of business, and for the purpose of the business, this mortgage was made, it is a good mortgage upon, and a good charge upon, the property comprised in it, and is not subject to the claim created by the debentures. I find also that the first charge referred to in the debentures is fully satisfied by being the first charge against the general property of the company at the time when the claim under the debentures arises and can have effect given to it."

The foregoing case may be considered in connection with that of *Re Horne & Hellard*, 29 Chy. D. 736, when a company had issued debentures for £500,000, by which they charged their property "to the intent that the same charge shall, until default in the payment of the principal or interest to accrue due or become payable in respect of the said sum of £500,000 or some part thereof, be a floating security upon the undertakings, works and property of the company, not hindering sales or leases of, or dealings with any of the property or assets of the company in the course of its business as a going concern." The company having afterwards contracted to sell some of their land, the purchaser required evidence that there had been no default in payment of the principal or interest of the debentures, and it was held by Pearson, J., that he was entitled to this evidence.

CREDITORS' DEED—TIME FOR EXECUTING.

The only remaining case in the Chancery Division is that of *Re Meredith*, *Meredith* v. *Facey*, 29 Chy. D. 745, in which Pearson, J., determined that creditors who had failed in a contest which they raised claiming priority over a creditors' deed, could not afterwards be allowed to execute and take the benefit of the deed.

REPORTS.

CANADA.

ASSESSMENT CASES.

CANADIAN PACIFIC RAILWAY COMPANY V. HARRISTON.

Assessment Act s. 26—Land of railway company—How to be assessed.

[Guelph, July, 1885.

The assessment of the railway company's property in Harriston was as follows:—Station and outbuildings, $1,500; land occupied by roadway and station, eight and a-half acres, $1,200. The land occupied was part of two farm lots within the municipality assessed at $32 and $22 per acre respectively, being a strip bounding on the south the said lots and next to an unopened road allowance which was assessed at $137 per acre. South of the road allowance the next original farm lot was laid out into quarter acre town lots assessed at $100 per lot.

The evidence showed that there were no buildings on the farm lots in question of any value, and that some four acres of said lots leased by the railway until 1884 had been surrendered to the owner in 1885. These four acres up to 1884 were

assessed at $100 per acre; but in 1885 on their reverting to the original owner they were only assessed at $32 per acre.

On an appeal to the county judge by the company Mr. MacMurchy (Wells, Gordon & Sampson) for the appellants contended that the roadway should only be assessed on the basis of the lots in which it actually lay, and that the assessment of the town lots or unopened road allowances, none of which was intersected by the railway, should not be regarded in arriving at the assessment contemplated by the Act R. S. O. c. 180, s. 26, sub.-s. 1. He referred to *G. W. R. Co.* v. *Rouse*, 15 U. C. Q. B. 168; *Re Midland Railway Co.* and *Uxbridge*, 19 C. L. J. 330, 347.

Ebbels, for the respondents, contended that the clause in the statute should be construed as meaning that the assessment of the town lots, etc., adjoining the roadway should be taken into account as well as the lots in which the roadway actually was located, and that inasmuch as the railway had, to some extent, stopped the progress of the town northwards and prevented town lots being laid out north of the track the railway should be assessed on the basis of town lots being laid out on both sides of the track.

DREW, Co.J., allowed the appeal reducing the assessment of the land to $230 being the average $27 obtained from the farm lots in question. He held that the statute was imperative and that the roadway must be regarded as so much land belonging to the farm lots in question, and should be assessed accordingly.

IN RE LAVEN AND ST. THOMAS.

Assessment Act sec. 33—Salaried officer of railway company having business all along the line—Where to be assessed.

[St. Thomas.

Appeal from the Court of Revision of the City of St. Thomas.

This appellant resided in Hamilton. He was a salaried officer of the Michigan Central and Canada Pacific Railway Companies. He had an office where the headquarters of his department were situated at Toronto, but his duties were not confined to that city, but were performed as occasion required all over the lines of the above railway.

HUGHES, Co.J.—The appellant is not assessable in Hamilton, where he resides, at all, unless he is required to perform duties or discharge functions of his office there.

He comes to St. Thomas to perform duties as occasion requires, more or less frequently, during the season of summer excursions. St. Thomas is the headquarters of the Canada Southern Railway, which has been leased to and is operated by the Michigan Central Railroad Company, a foreign corporation, and he comes to these headquarters to perform that part of his duties occasionally.

In the absence of any certificate of his being otherwise assessed under the provisions of the 33rd section, I think he is rightfully assessed in respect of the amount of his salary at any of the municipalities in which he does not reside but performs duties, and St. Thomas being one of these the assessment is right.

Appeal dismissed with costs,

NINTH DIVISION COURT, LEEDS AND GRENVILLE,

JOLIFFE v. BOARD OF EDUCATION OF SCHOOL SECTION NO. 6 IN TOWNSHIP OF YONGE AND ESCOTT REAR.

High school master's salary—Release from engagement—Vacation.

[Brockville.

This is an action in which plaintiff sought to recover the sum of $41.66 as balance of salary claimed to be due him as head master of the high school at Farmersville in the County of Leeds.

The facts appeared to be that plaintiff was engaged by defendants for the year 1884 at a salary of $1,000 per annum. No document under seal was executed, but a resolution of the Board was passed. The Board was a union Board. The plaintiff, desiring to obtain another situation sent to the trustees a letter dated 23rd July, 1884, resigning his position, such resignation to take effect on the 30th August then next. By resolution of the Board, passed at a meeting held on the 23rd July or shortly afterwards, the resignation was accepted. According to the evidence the question of salary was discussed orally by the plaintiff and some of the trustees. At the meeting Mr. Saunders, one of the trustees, says plaintiff said: "he would leave whole matter of salary with Board. He was asked how much he would take and answered $650. We were willing to give $600. Afterwards I said we would give $625." Another trustee swore that the plaintiff said he was entitled to the whole of the vacation. Mr. Saunders said he was only entitled to $600. The plaintiff said he would leave the matter with the Board, and after more conversation said he would take $650. Mr. Brown, another member of the Board, swore that there was a difference of opinion among the trustees as to allowing plaintiff to go;

that plaintiff as he arose to go said: "I will leave it with the Board" and passed out. Mr. Boddy swore that the plaintiff said he would leave what they should do as to his resignation to the Board; that this referred to remuneration. Mr. G. P. Wight, another trustee, swore that plaintiff said he would "leave it to the generosity of the Board what he was to receive for vacation"; that it was agreed that $600 would cover the time he had taught and a portion of the vacation, and at the next meeting of the Board it was resolved to give him $25 on account of vacation—the $625 to be in full.

MACDONALD, Co. J.—If the decision of the case rested merely upon the resignation and the acceptance thereof, I would decide in favour of the plaintiff—owing to the terms of such resignation and acceptance. Section 161 of chapter 204 of the Revised Statutes of Ontario (which enacts that "all agreements between trustees and teachers, to be valid and binding shall be in writing, signed by the parties thereto, and sealed with the corporate seal of the trustees") only applies to public school teachers. Without at all deciding whether or not this enactment could be successfully pleaded in bar of an action brought by a public school teacher who had without such an agreement completed a term of teaching and was seeking by such action to recover the agreed salary, it certainly does not apply to a high school teacher, nor can the provisions of sections 153 and 154 of chapter 204, or of sections 13 and 14 of chapter 205, in any way be strained to support such a contention. Indeed I do not remember that it has been stated that they do. The enactment which appears to bear upon the employment of high school masters is sub-section 11 of section 39 of chapter 205, while under the provisions of section 50 of the same Act, "every master or teacher of a high school or collegiate institute shall be entitled to be paid his salary for the authorized holidays occurring during the period of his engagement with the trustees, and also for the vacations which follow immediately on the expiration of the school term during which he has served, or the term of his agreement with such trustees."

I say again that if the decision of the case rested merely upon the resignation and the acceptance thereof, I would decide in favour of the plaintiff. But such is not the case. The plaintiff was under engagement for all of 1884. He sought to be released and put himself into the hands of the trustees. Instead of refusing to let him go they acceded to his request and decided to allow him his salary for a portion of the vacation. This all appears very reasonable, and I do not think the plaintiff is justly entitled to recover more than the sum allowed by the trustees. He appears to rely, to some extent at least, on the fact that public moneys were given to the trustees to be applied towards salaries, and that he is entitled to recover all moneys so given which were allotted for a head master, or for him (as case may be), for the term during which he was employed. I think he received a good deal more than the amount of the moneys, (other than local sums), granted for him, and at any rate this is a case of a bargain made between the trustees and teacher in which the latter virtually says: "relieve me from my contract" and "I leave it to you to say what I shall receive for the vacation," and I do not think he can, after the Board has acted upon his request in such manner as was done in the case, be permitted to recover any further amount. Judgment for defendants with costs.

GENERAL SESSIONS OF THE PEACE.

MORISON V. ASHMAN.

BIRMINGHAM V. ASHMAN.

Recognizance — Who to decide sufficiency of an appeal to sessions—Adjournment of appeal from one session to another.

[Lindsay.

Appeal to General Sessions from two convictions.

After notice of appeal moved and recognizance filed, counsel for respondents proposed to prove that the sureties were not sufficient. Counsel for appellant objected and contended that the Court to whom the appeal is made has no right to enquire into the sufficiency or insufficiency of the sureties but it was a matter wholly within the jurisdiction of the justice who took the recognizance. The learned judge allowed counsel for respondents to examine sureties and found as a fact that the sureties were not sufficient, and subsequently

DEAN, Co. J., *held*, that the justice taking the recognizance was the proper person to decide on the sufficiency of the sureties and the court appealed to had no right to enquire into the matter.

By 33 Vict. (Dom.) cap. 27, sec. 1, ss. 3, power is given to the Court if necessary from time to time by *order endorsed* on the conviction or order to adjourn the holding of the appeals from one sitting to another or others of the said Court.

The hearing of the appeals in these cases were noted in the learned judge's book and also in the clerk of the peace's book as being adjourned until the next sessions but no order was endorsed on the back of the conviction. On objection being taken that the hearing of the appeals was not properly adjourned and that the court could not proceed.

DEAN, Co. J., *held*, relying on *Rush* v. *Bobcaygeon* 44 U. C. Q. B. 199, that the objection was well taken, and that he could not hear the appeals or make any order as to costs or otherwise.

Martin, & Hopkins (Lindsay), for respondents.
A. F. Sinclair (Cannington), for appellants.

ENGLAND.

RECENT PRACTICE CASES.

RE GYHON, ALLEN v. TAYLOR.

Preliminary accounts and inquiries—Rules 1883, *Ord.* 15 *r.* 1 *(Ont. Rule O.* 86, 87*)*.

Under Ord. 15 r. 1. (*Ont. Rules* 86, 87) only common accounts and inquiries can be directed, and not accounts and inquiries the right to which depends on the plaintiff establishing a case for them at the hearing.

A mortgagee of shares of the proceeds of the residuary real and personal estate of a testator who died in 1872 brought an action for administration of the estate, alleging mis-application by one of the trustees of moneys raised by mortgage of parts of the testator's estate on equitable mortgage. The plaintiff applied under Ord. 15 r. 1 for common accounts in an administration suit, and also for inquiries as to mortgages of the real estate and as to advances to the trustees.

Held, plaintiff not entitled to the inquiries as to mortgages and advances to trustees.

[C. A.—29 Chy. D. 834.

COTTON, L. J. . . . "The two special inquiries for which the plaintiff asks do not come within that description (*i.e.*, accounts and inquiries necessary in an administration suit), but point to alleged breaches of trust which ought to be determined at the hearing. These are not within the rule, and nothing could now be directed but ordinary administration accounts."

NOTE.—*Query*, how far this case is an authority for the construction of Ont. Rules 86, 87, see Chy. Ord. 220, Holmested's R. & O., p. 103.

DE LA POLE v. DICK.

Solicitor—Service of notice of appeal.

An order on further consideration was made for the payment of money by a defendant into Court: the plaintiff appealed from the order. The defendant went abroad, and notice of the appeal was served on his solicitors.

Held, that as the order appealed from had not been worked out, the defendant's solicitors still represented him, and that service of the notice of appeal on them was sufficient.

[C. A.—29 Chy. D. 351.

COTTON, L.J.—" . . ROLLE, C.J, lays down in *Lawrence* v. *Harrison*, Sty, 426, a principle on which we may act. He says: 'The only question is whether the warrant of attorney be determined by the judgment given in the suit wherein he was retained; and I conceive it is not, for the suit is not determined, for the attorney after the judgment is to be called to say why there should not execution be made out against his client, and he is trusted to defend his client, as far as he can, from the execution.' According to that principle, until the judgment is worked out, there is a duty imposed on the solicitor on the record, to defend his client against any improper steps taken for the purpose of enforcing the judgment. Until that time, therefore, the solicitor on the record must be taken, as between him and the opposite party, to represent the client, unless the client not only discharges him, but substitutes another solicitor on the record." . . .

BOWEN and FRY, LL.J., concurred.

GARNHAM v. KIPPER.

Preliminary accounts—Rules S. C. 1883, *Ord.* 33, *r.* 2 *(Ont. R.* 244*)*.

In an action for foreclosure against several other mortgagees the plaintiff insisted she was entitled to priority to the defendants on the ground of notice and fraud. On the application of the plaintiff, under Ord. 33, r. 2 (Ont. R. 244), KAY, J., made an order directing an inquiry as to the priorities, and an account of the amount due to the incumbrancers,

Held, order must be discharged as Ord. 33, r. 2 does not authorize the whole questions in a cause to be tried in Chambers; but only authorizes the Court to direct before trial accounts and inquiries which would otherwise have been directed at the trial.

[C. A.—29 Chy. D. 566.

FRY, L.J.—" . . . When questions are raised which ought to be decided at the trial they are not proper to be sent to Chambers. What the order intended was to authorize inquiries which would otherwise have been directed at the trial, to be directed before the trial."

COTTON and BOWEN, LL.J., concurred.

CARSHORE v. NORTH-EASTERN RY. CO.

Third party—Claim of indemnity—Rules S. C. 1883, *Ord.* 16, *r.* 48 *(Ont. Rules* 107, 108*)*.

In giving leave to serve notice of claim for contribution or indemnity on a third party, the Court will only consider whether the claim is *bona fide*, and whether, if established, it will result in contribution or indemnity. It will not on the preliminary application determine whether the claim is valid.

[C. A.—29 Chy. D. 344.

NOTE.—See Ont. Rules 107, 108. Under the latter Rule a defendant may serve notice of claim for contribution, etc., without leave, but the above case is an authority as to the propriety of giving such a notice, and as to the principle on which the Court would act on motion to set aside the notice.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS.

Divisional Court.] [September 5.

McLEAN v. SHIELDS ET AL.

Foreign judgment—Non-resident—Absence of notice of personal application to set aside judgment—Effect of.

To an action on a foreign judgment recovered in the Court of Queen's Bench, Manitoba, against S. and L., the defendant S. set up as a defence that he was not at, or during the time the proceedings were being taken to recover the judgment, nor has he since been a resident of, or domiciled within the said Province of Manitoba, and he was not served with any process or notice of the said action, nor had he any notice whatsoever of any proceedings in said action, nor had he any opportunity of appearing in the said action and defending the same; and the said judgment was obtained in his absence and without his knowledge.

Held, following *Schisby* v. *Westenholz*, L. R. 6 Q. B. 155, a good defence to the action.

S., on hearing of the judgment having been obtained against him, instructed counsel to move the Court in Manitoba to have it set aside; but the application was refused on the ground that it was too late.

Held, that this did not preclude him from contesting his liability in the action herein.

Watson, for the plaintiff.

Tilt, Q.C., for the defendant.

Wilson, C.J.] [September 22.

FOX v. SYMINGTON.

Interpleader—48 Vict. ch. 14 sec. 6, sub-sec. 3—Protection of bailiff.

The 48 Vict. ch. 14 sec. 6, sub-sec. 3, provides that the judge of the Division Court in interpleader proceedings shall adjudicate between the parties, or either of them, and the officers or bailiff, in respect of any damage or claim of or to damage arising or capable of arising out of the execution of the process by such officer or bailiff, and make such order in respect thereof, etc., as to him shall seem meet.

Held, this is for the protection of the officer or bailiff only.

CARSON v. VEITCH.

Assessment Act—Right to deduct taxes—Demand of taxes—Assessment, sufficiency of—Failure to distrain for taxes—Right to collect.

By sec. 21 of the Assessment Act, R. S. O. ch. 180, "Any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner or previous occupant," unless there was an agreement to the contrary. By sec. 12 the assessment roll must contain, amongst other things, "Column 8, number of concession, name of street, or other designation of the local division in which the real property lies; column 9, number of lot, house, etc., in such division; column 10, number of acres or other measure shewing the extent of the property." In this case the name of the street and the measure of the property was given, but not the number of the lot, etc., except an arbitrary number adopted by the assessment department for their convenience; and it appeared that a person would be unable by looking at the roll, without making enquiries, to discover the property. Prior to the defendant's entry, B. was assessed as owner and had received for the three prior years a notice of assessment or assessment slip similar in form to the assessment herein. The only demand here was the leaving of the assessment slip. In an action for an illegal distress for rent, the plaintiff claimed that no rent was due by reason of his having paid the taxes,

Held, that sec. 21 does not authorize the occupant to voluntarily pay the taxes; but that he can only deduct same when they can be recovered from him and also from the owner; and as under *Chamberlain* v. *Turner*, 31 C. P. 460, which was followed and adopted, there was no legal demand (as required by sec. 92) upon which a distress could have been founded, there was no legal claim to pay the taxes and therefore to deduct them from the rent.

Quære, as to the sufficiency of the assessment.

Quære, also whether, where there is a sufficient distress upon the property, and the municipality by its own laches puts it out of its power to distrain, sec. 100 applies so as to give the right to collect by action.

J. Reeve, for the plaintiff.

Bigelow, for the defendant.

PRACTICE.

Court of Appeal.] [May 12.

PAWSON ET AL. v. MERCHANTS' BANK ET AL.

Equalizing business—Rule 545, O. J. A.—Transferring actions—Jury notices—Exclusive jurisdiction of chancery.

Held, that Rule 545, O. J. A., was not intended to interfere with the power of transferring actions from one Division of the High Court to another, nor with the right to give a jury notice in a proper case, nor with the existing modes of trial of particular actions, nor is that its effect upon its true construction.

Held, also, that it does not amend, modify, or repeal section 45, O. J. A.

Held, also, that the exclusive jurisdiction of the Court of Chancery in section 45 means its jurisdiction as exercised generally in dispensing equity, and not its exclusive, as distinguished from its auxiliary jurisdiction.

The action was brought on behalf of the plaintiff and other creditors to set aside an alleged fraudulent transfer of notes, etc., made to his co-defendants by the debtor, and for an injunction to restrain the defendants from negotiating them. The defendants served a jury notice, which PROUDFOOT, J., struck out.

Held, that this was such an action as would, before the O. J. A., have been within the exclusive jurisdiction of the Court of Chancery, and therefore it fell within section 45, and should be tried without a jury.

The practice as laid down in *Bank of B. N. A.* v. *Eddy*, 9 P. R. 468, is still the proper practice.

The question whether the order of PROUDFOOT, J., was appealable was not determined, as the appeal was dismissed.

Robinson, Q.C., *Hoyles* and *Wallace Nesbitt*, for the appellants.

Shepley, for the respondents.

Rose, J.] [June 19.

HAY v. PATERSON.

Ca. sa.—Execution—R. S. O. ch. 69.

A defendant arrested and imprisoned under a *ca. sa.* is a debtor in close custody in execution within the meaning of R. S. O. ch. 69.

Shepley, for the plaintiff.

Walter Read, for the defendant.

Mr. Dalton, Q.C.] [Sept. 9

LONDON AND CANADIAN L. AND A. CO. v. MORPHY.

Action in High Court—Interpleader issue sent to County Court—Order postponing trial, where made—44 Vict. ch. 7, sec. 1 (O.).

Where an order made in an action in the High Court of Justice directs the trial of an interpleader issue in a County Court. all proceedings from the completion of the order sending the issue to the County Court until final judgment must, by the provisions of 44 Vict. ch. 7, sec. 1, O.) be taken in the County Court.

A motion made in Chambers in the High Court of Justice to postpone the trial of an issue so directed was refused without costs.

G. W. Meyer, for the motion.

Mr. Bristol, Howland, Arnoldi & Ryerson, contra.

Chy. Div.] [Sept. 11.

HICKEY v. STOVER.

Divisional Court—Appeal—Time expired—Rules 522 and 523, O. J. A.

The defendant desired to appeal to the Chancery Divisional Court from the judgment at the trial pronounced on the 19th June, 1885. The judgment was not drawn up and settled till after Long Vacation, when it was too late by Rule 522, O. J. A. to set the cause down for the sitting of the Divisional Court, beginning on the 3rd Sept., 1885. Rule 523, however, required the application to the Divisional Court to be made at the first sittings, which begins not less than ten days after the pronouncing of the judgment.

Held, that the time for appealing began to run from the 19th of June, and, notwithstanding the regulation that no cause is to be set

down for hearing by the Divisional Court, until the judgment in appeal is drawn up and settled, that the neglect to draw up the judgment did not extend the time for appeal.

But, as there was a *bona fide* intention of appealing, instructions had been given, the defendant lived in Texas, the judgment was complex, and the defendant had only twelve days exclusive of vacation to have it settled and the case entered, leave to appeal was granted on payment of costs.

J. Maclennan, Q.C., for the defendant,
Matthew Wilson, for the plaintiff.

Distinguished Rogers v. Ross, 12 P. R.

Mr. Dalton, Q.C.] [Sept. 11.

RADMORE v. ELLIOTT.

Money paid into Court by defendant—Retaining money in Court—Rules 215 and 217, O. J. A.

The defendant paid money into Court in part satisfaction of the plaintiff's claim under Rule 215 O. J. A., but also disputed part of the plaintiff's claim. The defendant then applied under the words in Rule 217, "unless otherwise ordered by a judge" to have the money so paid in retained in Court to abide the event of the action, alleging that, if he succeeded in his defence, he could not recover costs from the plaintiff who was, he alleged, insolvent.

Held, that this would be in effect ordering security for costs, and the motion was refused,

Shepley, for the motion.
Haverson, contra.

O'Connor, J.] [Sept. 14.

SCOTT v. WYE ET. AL.

Married woman—Judgment—R. 80, O. J. A.—47 Vict. ch. 19, O.

Held, that the "Married Women's Property Act, 1884" (47 Vict. ch. 19, O.) is not retrospective.

A motion under Rule 80, O. J. A. for judgment upon a promissory note against a married woman was dismissed in April, 1883, and was now renewed, fourteen months after the passing of the Act of 1884.

Held, that that Act made no change in the law which could assist the plaintiff, even if the matter were *res integra*.

Turnbull v. *Forman*, 15 Q. B. D. 234, followed.
W. H. P. Clement, for the motion.
J. F. Smith, contra.

Ferguson, J.] [Sept. 14.

ROSS v. CARSCALLEN.

Setting aside judgment—Trial—Judge in Court at Toronto—Rule 270, O. J. A.

When the action came on for trial at Chatham the plaintiff together with his counsel and witnesses was absent, and the judge presiding at the trial pronounced judgment for the defendant.

Held, that the same judge had power under Rule 270, O. J. A., when sitting afterwards as the Court at Toronto, to set aside the judgment at the trial.

Hilliard v. *Arthur*, 10 P. R. 281, distinguished.
Raymond, for the plaintiff.
Moss, Q.C., for the defendant.

Mr. Hodgins, Q.C.] [Sept. 18.
Ferguson, J.] [Sept. 21.

RE ROGERS, ROGERS ET AL. v. ROGERS ET AL.

Master's office — Jurisdiction — Reference under order of Master-in-Chambers—Disputed lease—Fraud—Trial of issue—Rule 256, O. J. A.—Who should be plaintiff?

Held, that on a reference for partition or sale of lands directed by the Master-in-Chambers, the Master-in-Ordinary had no jurisdiction to try the question of the validity of a lease under seal from the intestate, set up as a ten years' lease by one of the heirs-at-law, who claimed that the lands should be sold subject to his lease; some of the other heirs-at-law disputing the validity of the lease, and alleging that it was either a five years' lease or that there had been a fraudulent alteration of the sealed instrument, there being an alteration in a material part apparent on the face.

The reference was adjourned till after the trial of the question raised, and an issue was directed by a Judge in Chambers, under Rule 256, O. J. A., to be tried at the next sitting for the trial of actions in the Chancery Division; the lessee to be plaintiff in the issue.

Shepley, for the plaintiff and lessee.

J. Hoskin, Q.C., for the infant defendant.

E. B. Brown, for the defendants who disputed the lease.

Ferguson, J.] [Sept. 19.

RE LEWIS, JACKSON v. SCOTT.

Disputed will case—Trial by jury—Heir-at-law—Exclusive jurisdiction of Chancery—Character of issues.

The heir-at-law, in an action where he disputes the will, has not now an absolute right to a trial by jury in this Province.

An action to establish a will removed from a Surrogate Court to the Court of Chancery is one over which the Court of Chancery had, at the time of the passing of the O. J. A., exclusive jurisdiction, and a motion to the Court to have the issues in such an action tried by a jury is included in the practice mentioned in sec. 45, O. J. A.

Issues raised on the following pleas, viz.: that the will was not executed in due form, that the testator was not of sound mind, undue influence, fraud, that the testator was labouring under certain delusions, were *held* not of such a character that they should be sent to be tried by a jury.

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

Holman, for the plaintiff.

Mr. Dalton, Q.C.] [October 2.

BRYCE, MCMURRICH & Co. v. SALT.

Judgment—Indian—C. S. C. ch. 9—Indian Act, 1880 (D.).

An order was granted under Rule 80 for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve.

Held, that since the repeal of C. S. C. ch. 9, there is nothing to prevent an Indian suing and being sued, although, by the Indian Act of 1880, sec. 77 (D.), the judgment will not bind any property of the Indian except that described in sec. 75.

Urquhart, for the plaintiffs.

Holman, for the defendant.

CORRESPONDENCE.

ULTRA VIRES.

To the Editor of the LAW JOURNAL:

SIR,— Of necessity there have arisen within the short period of eighteen years a considerable number of very important constitutional questions affecting the welfare and good government of our young Dominion. Not only have there been many decisions of the Courts of final resort both in Canada and England, interpreting different parts of our constitution, but there have been several books written—some very learned and some not remarkably so—in which more or less light has been thrown on the difficult questions involved.

The motto on the title page of the "Letters on the Federal Constitution by the Hon. Mr. Justice T. J. J. Loranger," *Si vis pacem, para bellum*," taken along with the tone which one finds pervading the whole, sufficiently indicates the standpoint from which he has written, viz.: that of a French-Canadian extremely zealous for his country, which is not Canada, but Quebec, and alarmed for the permanence of "*nos institutions, notre langue, et nos lois.*" Hence his conclusions are in some respects rather consonant with what he, in common with most Liberals, thinks ought to be the constitution on this or that point than with the result of a calm judical analysis of the language of the British North America Act itself.

A more pretentious work has appeared somewhat later, whose author, on the other hand, exhibits in every page an overweening conceit and in many a too manifest desire to cut down the powers of the local legislatures. Look at the motto on *his* title page: "Of course, recognizing as I do that the bishop possesses a discretion in this matter, I most fully admit that he is vastly more capable of exercising it well than I am. But the way he does exercise it is subject to criticism, even by those less competent than himself, in the same way as the opinion and sentences of this Court may and ought to be and are criticised by laymen." *Per* Bramwell, L.J., in *Reg. v. Bishop of Oxford*, L. R. 4 Q.B.D., 556, in Court of Appeal of England." It serves to indicate the spirit in which the author has approached the consideration of the points involved all through the work. Without having one tenth part of Lord Bramwell's attainments as a jurist or any fraction of Lord Bramwell's modesty and deference, he undertakes to sit in appeal from, to ridicule and then to try and cut up the judgments and decisions of the highest authorities, both in Canada and England, always excepting

those of the present Chief Justice of the Supreme Court whom he goes out of his way often to bespatter with fulsome adulation. His pages too, are full of turgid involved periods, wearisome redundancy and badly constructed sentences. In fact his composition is far worse than his ideas, which to do him justice are in many branches of the subject, in my opinion, very clear and correct; and, notwithstanding the serious and numerous faults in the work, there can be no doubt that its arguments are often cogent and convincing and its conclusions sound. That Mr. Travis has not only written from the standpoint of a Federalist in the sense in which Mr. Justice Loranger uses that term but that he has also written as an *advocate* for maintaining the paramount power of the Dominion Parliament as against the power of the Provincial Parliament must be quite clear to any impartial reader of his book.

To be a good, judge a man, who being a Tory or Grit but yesterday, and notwithstanding his elevation to the bench, still feeling strong sympathy with one or other of those great parties, must sink his party sympathies entirely, and must be able to decide between man and man or between Province and Dominion, entirely unaffected by his former feelings and associations, and so with the author who undertakes to give the public the proper interpretation of so all-important a statute as the one before us. As for myself I am confident that what follows, whether it shall be sound or unsound reasoning, whether the conclusions at which I have arrived are correct or erroneous, will at all events be far from any political bias and the result of the best considerations which my poor powers are capable of.

The readers of the LAW JOURNAL need not be afraid that I am going to write a book on this subject. My idea is merely to discuss briefly a few of the questions that have come up, not in any scientific or set order, but just as they occur, or as I may have the presumption to think I can throw some light upon them. For example: take the much-debated problem of the proper limitations of the jurisdiction of the respective Parliaments upon subjects excepted out of a larger class of subjects.

"Marriage" is a subject assigned to the Dominion. "The solemnization of marriage in the Province" is assigned to the Province. Mr. Travis contends that the Dominion can make a general law respecting marriage, which would affect the solemnization of marriage in every Province, and that thereafter no Provincial Legislature could legislate so as to repeal the Dominion law on the subject. This is an instance of his excessive zeal for the maintenance of the paramount power of the Dominion and in this in my opinion he is clearly wrong. There is a clear principle by which this question can be decided and I will state it a little further on.

The subjects of "Property and Civil rights in the Province" are assigned exclusively to the Provincial Legislature, but "Bankruptcy and Insolvency," "Copyrights," "Patents of Invention," "The regulation of trade and commerce," "Weights and Measures" and other subjects which are all branches or sub-classes of the general subject of "Property and Civil rights" are assigned exclusively to the Dominion.

The Dominion Parliament can undoubtedly legislate effectually on all these sub-classes and its jurisdiction occupies their whole territory, so to speak, and the local Legislature cannot in any manner trench upon them,

These two examples will suffice to illustrate my principle, which is this, that when a general subject is given to either Legislature, and an exception or sub-class is taken out of it and given to the other Legislature, the authority of the latter is supreme and exclusive within that excepted class Therefore the Dominion can in no way legislate to affect the solemnization of marriage in any Province. A portion of territory is as it were fenced off and the Dominion, whilst it may roam unchallenged over the rest of the territory, must not encroach on this in any way whatever.

"Marriage and Divorce" are themselves parts of the larger class of "Civil Rights in the Province" and so the Provincial Legislature must be careful not to trench upon them in any way.

"The criminal, law except the constitution of Courts of criminal jurisdiction," is assigned to the Dominion, and so the constitution of such Courts is a subject within the absolute control of the Province, and no matter how much the Dominion may legislate upon criminal law and criminal procedure, it is powerless to enact one word which shall affect the constitution of the Courts. By legislating on Bankruptcy and Insolvency or Interest or Patents, the Dominion necessarily legislates respecting property and civil rights in the Province, but that does not matter, the former being exceptions carved out of the general subject of property and civil rights.

If this principle is applied to the determination of other points similarly arising, I think it will be found to furnish a safe rule and one which is consistent with what our friend Mr. Travis is pleased to refer to so frequently as the "well-decided cases." I hope to be able in future numbers to point out some of the statutes of the respective Parliaments which in my opinion are *ultra vires* and to give my reasons for so thinking.

Winnipeg. GEORGE PATTERSON.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1885.

During this term the following gentlemen were called to the Bar, namely:—

Messrs. Donald Malcolm McIntyre, with honours and gold medal; Robert Smith, John Macpherson, William Edward Middleton, John Tytler, Robert William Evans, Robert Victor Sinclair, Ernest Joseph Beaumont, James Redmond O'Reilly, George Eldon Kidd, James Chisholm, Robert Ormiston Kilgour, William Avery Bishop, Francis Gilbert Lilly, Donald Macdonald, William Beardsley Raymond, Christopher Conway Robinson, Charles Creighton Ross, John Thomas Sproule, Arthur Byron McBride. These names are arranged in the order in which the candidates appeared before Convocation for call.

The following candidates were admitted as students-at-law, namely:—

Graduates—Alexander Gray Farrell, William Henry Williams, Herbert Read Welton.

Matriculants—Samuel Storm Martin, James Henry Cooper.

Juniors—J. A. Fleming, W. G. Richards, R. M. Graham, J. P. Dunlop, W. G. Green, J. D. Lamont, C. Stiles, J. H. Denton, W. J. Whiteside, S. B. Arnold, W. Kennedy, J. R. Layton, W. L. Hatton, W. J. Williams, H. Armstrong, H. W. Ross, R. G. Pegley, A. H. Wallbridge, M. K. Cowan, J. J. Drew, M. Murdoch, G. H. Muntz, C. E. Lyons and F. C. Hastings.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- 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 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.

1884.
- 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.
- 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. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

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.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

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.

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.

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 Jusisprudence; 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 Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

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 Socity 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, six 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 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 n 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.

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

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

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. (vv. 133.)
- 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. (vv. 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:—
1886—Coleridge, Ancient Mariner and Christabel.
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; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and 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.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.