THE

Canada Law Journal.

VOL. XXX. MAY 1, 1894. No. 8.

WE would call attention to the new series of reports known as "The Reports," published under a council of supervision, of which Sir Frederick Pollock is president. This new series is referred to more fully in our Book Reviews.

WE have arranged for the publication of early notes of the decisions of the Court of Queen's Bench in Manitoba. It is the Province most nearly identified with Ontario, both as to its people, its business relations, and its legislation. Its decisions are, therefore, those most likely to be of interest to the bulk of our readers. That the work will be done promptly and well may, we think, be prophesied from a perusal of those notes which appear in a subsequent page of this number. As will be seen, though they come all the way from Winnipeg, they are brought down to a much later date than those supplied by the reporters of our own courts.

JURISDICTION OF THE COUNTY COURTS.

(*Continued.*)

We have referred to the opinion of Armour, C.J., in *M'Gugan* v. *M'Gugan* that the term "personal action" is a term signifying, as used in the County Court Act, a common law action. This, we think, it must be admitted, is good law as far as it goes; but the learned judge does not say whether, though it be a common law action, the right to recover may not be an equitable one only, and still the County Court have jurisdiction, as pro-

vided in the Administration of Justice Act (36 Vict., c. 8), to which we have before referred.

The case just quoted was a County Court action where the judge held he had no jurisdiction, and made an order transferring the cause to the High Court. To this court the defendant applied to prohibit the County Court judge from transferring the action to the High Court. The contention, of course, was that, if the court below had no jurisdiction to try the action, there was no power to make an order transferring it under s. 38 of the County Court Act. This was prior to 54 Vict., c. 14, permitting a County Court judge to make the order in such a case.

Mr. Justice Rose, who heard the motion, thought that the County Court would have jurisdiction to entertain the action, and, therefore, that the County Court judge had power to make the order transferring the action, and he refused the motion. The defendant appealed, and the appeal was heard before Armour, C.J., and Street, J. The former, in delivering the judgment of the court reversing the judgment of Rose, J., said that the plaintiff's cause of action was one of purely equity jurisdiction, and was not cognizable by the County Court, and he then defined a "personal action" in the words we have given above.

In the case of *Reddick* v. *The Traders Bank of Canada*, 22 O.R. 449, Mr. Justice Meredith says: "It therefore seems to me that, by the Administration of Justice Acts, jurisdiction in equitable cases, where the claim was purely a money demand, was conferred upon County Courts, and that it has not been lost—though the revision of 1877 has not left the matter as plain as it was before; that the words 'all personal actions' include personal actions of an equitable character, where the claim is 'a purely money demand,' as well as common law actions: according with the current of legislation which flows towards increasing, rather than curtailing, the jurisdiction of the inferior courts: See sections 21, 22, 33, 42, and 53 of R.S.O., 1887, c. 47."

The last case on this point—one that we have before referred to—is that of *Whidden* v. *Jackson*, 18 A.R. 439. This was an action in the County Court asking for a declaration of right to rank on an insolvent's estate for $200, money lent by the plaintiff, and it was dismissed for want of jurisdiction. The plaintiff appealed, but was unsuccessful. Burton, Osler, and Maclennan, JJ.A.

concurred in dismissing the appeal, while Hagarty, C.J.O., dissented. The first two concurred in holding that the action was not a "personal action" within the meaning of s-s. 1 of s. 19 of the County Court Act, while Hagarty, C.J.O., held that it was.

We only refer to this case now to point out that, though none of these judges say anything about the equitable *powers* of the County Courts, the point in question not requiring it, yet Osler, J.A., in his judgment says: "The County Courts have now no *original* equitable jurisdiction." (The italics are ours.) It is probable he had in view s. 21 of the Act; but we should have been glad if his attention had been called on the argument to the doubt as to whether s. 4 in the Administration of Justice Act, R.S.O., 1877, c. 49, was still in force as to County Courts or not.

We now come to the third difficulty—and the last one we intend to refer to here. The statute says that in all personal actions, irrespective of the subject-matter of the suit, the jurisdiction extends to $200, but if it relates to debt, covenant, or contract, and is liquidated, etc., to $400; in other words, that in every personal action not relating to debt, covenant, or contract, and liquidated, etc., no more than $200 can be claimed, such action sounding in damages only.

A good deal of controversy has arisen about the meaning of the words "liquidated or ascertained by the act of the parties." We speak, in common parlance, of a debt being liquidated or *paid;* that, certainly, is one meaning of the word, but the one intended is, of course, that given by Blackstone—to settle, to adjust, to ascertain or reduce to precision in amount. "Liquidated" and "ascertained" mean, then, the same thing, and it is quite possible that the draughtsman, while using a strictly legal and apt word, added another to prevent any possible use of the first one except in its legal signification.

It has been argued that the words "act of the parties" are to be referred only to the word immediately preceding, viz., "ascertained," as though there was a comma after the word "liquidated"; but surely there can be no reason for any doubt on this point, for how could an amount be liquidated except by the act of the parties, or by the signature of the defendant?

In this connection we might again refer to the previous forms these words—or rather the words giving increased jurisdiction—take in the several Acts above quoted from.

In 2 Geo. IV., c. 2, the words are "liquidated or ascertained either by the act of the parties, or the nature of the transaction."

In 8 Vict., c. 13, the words are, "Where the amount is ascertained by the signature of the defendant."

In 13 & 14 Vict., the words are the same as in 8 Vict., c. 13.

In 19 & 20 Vict., c. 90, the words are, "Where the amount is liquidated or ascertained by the act of the parties or the signature of the defendant," and these are the words used in R.S.O., c. 47, the Act at present in force.

No doubt the words in 2 Geo. IV., "the nature of the transaction," were found to be too uncertain in their meaning, and so were omitted from the amending Act (8 Vict., c. 13), but that was no reason for substituting "the signature of the defendant" for "the act of the parties."

The next change was made by 19 & 20 Vict., c. 90, where the words "the act of the parties" were prefixed to "the signature of the defendant," thus restoring the words used in the original Act (2 Geo. IV.). It would almost appear as if the retention of these last words was unnecessary, for, though the "signature of the defendant" was not the act of the *parties*, it was the act of one of them, and that the one sought to be made liable. Would not any act of the defendant showing a clear admission of anything that amounted to an account stated be a sufficient compliance with the words of the statute? This seems to have been the view taken by Mr. Justice John Wilson in *Furnival* v. *Saunders*, 2 L.J.N.S. 145, where an entry made by the defendant against himself was held to be a sufficient requirement with the words, "the act of the parties."

This, however, is not the view taken by Osler, J.A., in *Kobb* v. *Murray*, 16 A.R. 503, where he says: "Whether it be by the signature of the defendant, or by the act of the parties, *which means the act of both parties*, the essential thing to give jurisdiction is that the amount shall be *liquidated or ascertained*" (the italics are ours). We cannot but think that when the learned judge used these words, he was speaking with reference to the case then under consideration. The defendant had himself fixed and stated the sum the plaintiff was suing for, but he denied his liability altogether. Had he made the entries of the moneys in question in, say, a ledger account, kept between himself and the plaintiff, to his own debit, although at the time without the knowl-

edge or concurrence of the plaintiff, does it not seem as if he had brought himself within the purview of the statute? Strictly speaking, the act of the parties would seem to mean the joint act, and therefore intending something to be done by them at the same time; otherwise, the words needed to give jurisdiction would be "the *acts* of the parties."

It would appear, then, as if we must accept the delivery of the Court of Appeal (for Osler, J.A., spoke the mind of the court) as laying down the law as settled on this point—that the signature of the defendant is the only act of his that will give jurisdiction apart from the joint act of himself and the plaintiff. The logical result of this must be that the admission of liability by the defendant, otherwise than by his signature, must be accepted and assented to by the plaintiff at the same time. True, the admission by one, and the assent by the other, are separate acts, no matter how expressed; but, if synchronous, they must be considered as the one act, "the act" of the parties. And, if the assent to defendant's admission be postponed to some future time by the plaintiff, it would appear as if there was then no joint act of both parties, so as to give the necessary jurisdiction. This may seem to be refining, but is there any escape from it?

Taking, however, the language of the court in this case, when speaking generally and apart from the particular facts involved in it, we are inclined to think that all that is intended to be laid down is: (1) That there must be a settled sum agreed to by both parties, as though "an account stated." (2) That this sum must be ascertained *before* action brought—that is, that the bringing of the action by plaintiff is not to be considered as his part of the necessary "act." (3) That at the time of the settlement or agreement arrived at there must remain nothing more to be done; that is, that it shall not be necessrry for something else to happen in order to make it possible for the plaintiff to sue; that there must be at the time something *actually due* from one party to the other.

If this is what is intended by the judgment, it seems to be somewhat in conflict with *Watson* v. *Severn*, 6 A.R. 559, where Spragge, C.J., appears to think that "where the acts of the parties enable the court at once, as a mere matter of computation, to ascertain what sum one party has agreed to pay to the other," the lower court would have jurisdiction, "although

oral testimony may be required to establish it." In this case, though both the quantity and price to be paid were both agreed on, and formed the "act" invoked to give jurisdiction, yet the money was not earned till afterwards, and so there was nothing *due* at the time of the "act" relied on.

The same state of things existed in the case of *Wallbridge* v. *Brown*, 18 U.C.R. 158; that is, the amount for which the defendant was liable was not ascertained till some time after the agreement between the parties relied on to give jurisdiction. *Durnin* v. *McLean*, 10 P.R. 295, is a somewhat similar case.

We have above referred to *Reddick* v. *The Traders Bank*, where Meredith, J., says: ". . . According with the current of legislation, which flows towards increasing rather than curtailing the jurisdiction of the inferior courts." Well, it may be so; though, be it remarked, no increase in the general jurisdiction has been made during the last thirty-eight years (since 1856); but whether it be so or not, it would appear as if, on the point we are now speaking of, the current of *decisions* were the other way, if we compare, for instance, *Wallbridge* v. *Brown* with *Robb* v. *Murray*.

From *Allen* v. *The Fairfax Cheese Co.*, 21 O.R. 598, it will be seen that County Courts have jurisdiction to entertain an action by a partner against his co-partners where the claim is a purely money demand, even though this may involve the taking of the whole partnership accounts.

In *Reddick* v. *The Traders Bank (supra)* an action to recover a balance (of less than $200) remaining in the hands of mortgagees after sale of mortgaged premises and satisfaction of their own claim was entertained.

Unlike the limitation imposed on Division Courts, there is no limit to the accounts that may be inquired into in the County Court, provided the balance claimed does not exceed the jurisdiction.

A claim under s-s. 1 of s. 19, not exceeding $200, may be joined with a claim under s-s. 2, provided both together do not exceed $400.

The amount claimed does not always settle the jurisdiction. This will sometimes depend on how the claim is framed, whether in *tort* or otherwise. In *O'Brien* v. *Irving*, 7 P.R. 308, a claim of $90 was founded on contract, and so held to be within the jurisdiction of the Division Court. Had it been in tort, as it

might have, it would have been otherwise, and the County Court would have been the proper forum.

Though s. 21 of the Act appears to give very ample equitable powers, yet these must be exercised only as to causes of action within the jurisdiction as defined by s. 19. No *original* equitable jurisdiction is conferred by that section (21); but it appears as if the powers to be exercised must be ancillary, such as granting injunctions, appointing receivers, allowing equitable execution, mandamus, etc. In short, whatever powers the High Court of Justice has to enforce its decrees, orders, and judgments, County Courts have like powers as to all actions within their jurisdiction.

One word more on the subject of what is a "personal action." It must not be forgotten that it is here an action in which a "debt or damages" is claimed, not one in which a *right* to such a sum is sought to be established, as in *Whidden* v. *Jackson (supra)*.

CURRENT ENGLISH CASES.

PRACTICE—DAMAGES CONTINUING, ASSESSMENT OF—ORD. XXXVI., R. 58 (ONT. RULE 680).

Hole v. *Chard Union*, (1894) 1 Ch. 293, brings up the question, what is "a continuing cause of action" within the meaning of Ord. xxxvi., r 58 (Ont. Rule 680)? The Court of Appeal (Lindley, Smith, and Davey, L.JJ.) say that, speaking accurately, there is no such thing, but what is so called is a cause of action which arises from the repetition of acts, or omissions of the same kind as that for which the action was brought. Here the act complained of was the pollution of a stream by sewage, and, the damages having been assessed down to the date of the certificate, the assessment was held to be correct.

WILL—CONSTRUCTION—GIFT TO CHARITY OF SUCH PART OF RESIDUE "AS MAY BY LAW BE GIVEN TO CHARITABLE PURPOSES"—WILL MADE BEFORE MORTMAIN ACT, 1891 (54 & 55 VICT., C. 73); (55 VICT., C. 20 (O.))—DEATH OF TESTATOR AFTER PASSING OF ACT—WILLS ACT, 1837, S. 24; (R.S.O., C. 109, S. 26).

In re Bridger, Brompton Hospital v. *Lewis*, (1894) 1 Ch. 297, the Court of Appeal (Lindley, Smith, and Davey, L.JJ.) have affirmed the decision of North, J., (1893) 1 Ch. 44 (noted *ante* vol. 29, p. 141), holding that where a testator, before the Mortmain Act, 1891 (Ont. Act, 55 Vict., c. 20), had devised to chari-

ties "such part of his residuary estate which may by law be given to charitable purposes," and had died after the passing of the Act, that the Act applied to the devise, and the charity was entitled, not merely to such part of the residue as at the date of the will might by law be given to charitable purposes, but to the whole residue, real and personal, as under the Wills Act, 1837, s. 24 (R.S.O., c. 109, s. 26), every will must be construed as if executed immediately before the death of the testator, unless a contrary intention appear, and that in this case no such contrary intention did appear.

WILL.—CONSTRUCTION—DEVISE OF PREMISES, "AS THE SAME ARE NOW OCCUPIED BY ME."

In re Seal, Seal v. *Taylor*, (1894) 1 Ch. 317, a testator had devised to his wife during widowhood "my residence called Stonleigh House, and premises thereto, as the same are now occupied by me." Some years prior to the will he had let to his two sons, for the purposes of their business, an office standing in the yard of Stonleigh House, and the stable and coach house belonging to the house, except a room over the coach house, to which the only access was through the house. The sons continued in occupation of the parts let to them down to the testator's death. The widow claimed that the words "as now occupied by me" should be rejected as *falsa demonstratio*, and that she was entitled, under the devise, to the whole of the premises; but the Court of Appeal (Lindley, Smith, and Davey, L.JJ.) agreed with Chitty, J., that her contention could not prevail, and that she was not entitled to that part of the premises in the occupation of the sons, and the court could not enter into the question of inconvenience.

INFANT—MAINTENANCE—POWER, OR TRUS.—DISCRETION TO APPLY WHOLE OR PART OF INCOME FOR, OR TOWARDS, MAINTENANCE—DISCRETION OF TRUSTEES —ABILITY OF MOTHER TO MAINTAIN HER INFANT CHILDREN.

In re Bryant, Bryant v. *Hickley*, (1894) 1 Ch. 324, is a case the application of which in Ontario appears to be doubtful. An application was made, on behalf of infants, against the trustees of a will, for an allowance for their maintenance. The will declared that, after the marriage of the testator's widow, the trustees should apply the whole or such part of the income of the expectant share of any child for, or towards, the maintenance,

education, or benefit of such child. The widow of the testator had married again, and was possessed of ample means to maintain the children; but, as one of the trustees of the will consented to the allowance being made, the other trustees refused to consent, being of opinion that the real object of the application was to enable the mother to save money out of her income for the benefit of her present husband, and that the allowance was not, therefore, required in the interest of the children. Chitty, J., under the circumstances, declined to interfere with the discretion of the majority of the trustees; but he based his judgment, to some extent, on the ground that, in England, a mother having separate property is now, by statute, "subject to all such liability for the maintenance of her children as a husband is by law for the maintenance of his children." He does not refer to the statute imposing this liability, and the only one we have been able to find is 33 & 34 Vict., c. 45, s. 14, which makes a married woman having separate estate liable for the maintenance of her children only to the same extent as a widow; and, according to *Douglas* v. *Andrews*, 12 Beav. 310, a widow is only liable for the maintenance of her child where the child has no property of its own. At all events, the statutory obligation does not exist in Ontario; and so far as this decision is based on the ground of a legal obligation on the part of a mother to maintain her children, it appears here to have no application.

POWER OF SALE—REMOTENESS—RULE AGAINST PERPETUITIES.

In re Sudeley & Baines, (1894) 1 Ch. 334, which was an application under the Vendors and Purchasers' Act, the question discussed is whether a power of sale of land on the death of a tenant for life, for the purpose of dividing the estate among those entitled in remainder, at such times as the trustees shall think fit, and without any limitation as to the time within which it is to be exercised, is a valid power, or void as offending against the law against perpetuities. Chitty, J., decided in favour of the validity of the power, holding that it must be exercised within a reasonable time after the death of the tenant for life, and after the property has become absolutely vested in possession, if, on the construction of the particular instrument creating the power, it appears to be the intention of the settlor or testator that it should be so exercised; which intention he found to exist under the will in question.

CONTEMPT OF COURT—CIRCULAR ISSUED PENDENTE LITE—LIBEL—INJUNCTION.

Coats v. *Chadwick*, (1894) 1 Ch. 347, was an action to restrain the infringement of a trade mark. During the progress of the action the plaintiffs issued a circular to the trade warning them of the action, and entering into the merits of the litigation; the defendants moved for an injunction to restrain the plaintiffs from issuing it, or any other calculated to hinder the fair trial of the action. Chitty, J., granted the injunction, holding the circular to be a contempt of court, but saying he would not have granted it if the circular had been confined to warning the trade against infringement or imitation of the plaintiff's trade mark, without discussing the merits or demerits of the case.

DEVISE—CONDITION SUBSEQUENT, REQUIRING RESIDENCE IN MANSION DEVISED—GIFT OVER ON "REFUSAL OR NEGLECT" TO RESIDE—INFANT.

In *Partridge* v. *Par'idge*, (1894) 1 Ch. 351, a devise of an estate was subject to a condition subsequent that every person who should, by virtue of the limitations, become entitled to the same should, within three months next after the death of the first tenant for life, reside in and occupy the mansion house for nine months in every year; and in case any person entitled should "refuse or neglect" to reside in and occupy the house, then the estate was to go to the person next in remainder. On the death of the tenant for life a tenant in tail entered, who complied with the condition: on his death an infant became entitled. North, J., held that the condition was not binding on the infant who thus became entitled, and who did not go to reside in the mansion house, inasmuch as an infant has no power to choose his own place of residence, and could not, therefore, "refuse or neglect" to reside within the meaning of the condition. He was, however, of opinion that, according to the proper construction of the proviso, it only applied to the first taker after the tenant for life, and therefore did not bind the infant at all; but in any event, if binding on him at all, it was not binding during his infancy. He points out in this respect the important distinction which exists between a condition precedent, which would bind an infant, and a condition subsequent such as this, which does not.

Reviews and Notices of Books.

The School Law of Ontario. Comprising the Education Department Act, 1891; The Public Schools Act, 1891; The Act Respecting Truancy and Compulsory School Attendance; The High School Act, 1891, and the amending Acts of 1892 and 1893; with notes of cases bearing thereon, the Regulations of the Education Department, Forms, etc. By William Barclay McMurrich, M.A., one of Her Majesty's counsel, and Henry Newbolt Roberts, of Osgoode Hall, Barrister-at-Law. Toronto: The Goodwin Law Book and Publishing Company (Limited), 1894.

This book comes to us very opportunely. The want of a thoroughly indexed compilation of the School Acts affecting this province has long been felt, and it is now supplied by the editors. The contents are as above set forth, concluding with a very full and apparently well-arranged index.

Trustees and others connected with the administration of the School Law will receive great assistance from this publication. As they well know, the duties imposed upon them are to be found not only in the Public Schools Act, but are scattered through various other statutes in relation thereto, such as the Public Health Act, Free Library Act, etc. Hence the need of a careful gathering of the various provisions affecting our Public School system. The author has carefully brought together and consolidated these, and has provided cross references from one to the other, so as to admit of easy consultation; whilst the forms and the general arrangement of the work are such as to meet the wants of school officers, teachers, Boards of Trustees, giving them a practical book for everyday use.

We notice that the editors express their obligation to the Minister of Education for revising the proof sheets and for many valuable suggestions as to the work.

This is the only compilation of our School Law since the establishment of the system in force in this country, with the exception of the lectures of Dr. J. George Hodgins, which, however, were not intended to and did not meet the need that has been supplied in the present volume. The typography of the book is of the very best description, and reflects great credit upon the publishers as well as the editors.

The Reports, 1893. Edited by John Mews, Barrister-at-Law, with an introductory notice by Sir Frederick Pollock, Bart., London. Published for "The Reports" Company, Limited, by Sweet & Maxwell, Limited, 3 Chancery Lane; Eyre & Spottiswoode, East Harding street. Toronto: The Carswell Company, Limited. Sydney and Melbourne: C. F. Maxwell. New York: Banks & Bros.

Sir Frederick Pollock must be credited with a new departure in law reporting. It will be expected that one so eminent in the field of legal literature will do well and thoroughly whatever he undertakes to do, and there seems to be no reason, judging from the material before us, for apprehending any disappointment in this respect in relation to the series of Reports just launched. They are called "The Reports," and, as he says, are "sent into the world without any adjective at all." They will be cited as "R."

There were great expectations in the minds of the profession when the Incorporated Council of Law Reporting inaugurated the new system of reporting which resulted in the "Law Reports." It is claimed, however, by the learned editor of the *Law Quarterly Review* and the eminent writers in that publication that these expectations have not, in all respects, yet been realized. Mr. Justice Lindley, in an article in the above-named *Review*, gave his views as to what the ideal reports should be. We quote some of his words: "The profession does not want reports of cases valueless as precedents, nor reports of complicated facts when a short condensation of them is all that is necessary to understand the legal principle involved in the decision. This observation applies not only to the reports themselves, but particularly to the headnotes of the cases reported. The legal pith of a case, and nothing more, should appear in its headnote. . . . What the profession wants is law, and such facts only as are necessary to enable the reader of the report to appreciate the law found in the case. . . . As regards the time and form of publication, the profession want the reports published as speedily as possible, good print, good paper, a convenient portable size, convenient arrangement of matter, good indexes, and the lowest price consistent with the payment of the expenses of publication."

There is good reason for saying that the Law Reports have been in many cases far from approaching the standard of excellence which was expected of them, and do not meet the require-

ments which Lord Justice Lindley very correctly lays down. The index, one of the most important parts of any work, has been faulty and defective. Again, many cases that should have been reported have been omitted: for example, in 1 Ch. (1892) some twenty-three cases, and in 2 Q.B. (1892) some twenty-nine cases are cited, but are not reported in the "Law Reports." In addition to this, some cases appear which were decided by a judge of first instance, and were either reversed or disapproved by the Court of Appeal, and yet the decision in appeal is not reported.

The same writer also states in the same article that "the multiplicity of Law Reports is a great evil." Sir Frederick Pollock confesses and avoids the charge of multiplying reports, and admits that the burden of proof is on the new series to justify their existence. He has set himself a hard task, but he sets out with a clear idea of what is needed, with the failure of others before him, and with full confidence that what ought to be done in this regard can be done, and is determined to do his best to succeed.

The Council of Supervision for the year 1894 is as follows: Sir Frederick Pollock, Bart., President; A. V. Dicey, Q.C., Vinerian Professor, Oxford; C. M. Warrington, Q.C., M.P.; Sir W. R. Anson, Bart., Warden of All Souls, Oxford; H. Tindal Atkinson, T. Willes Chitty, F. W. Maitland, Downing Professor of Law, Cambridge, Thomas Snow, Barristers-at-Law; and G. M. Clements and W. Showell Rogers, Solicitors. This is a list of names that will command confidence; but as the proof of the pudding is in the eating of it, the profession will have to judge of this series of reports on its merits.

Volume I. contains the decisions of the House of Lords, Privy Council, Probate, Divorce, and Admiralty Division, and Court of Appeal therefrom. Volume II., the decisions of the Court of Appeal on appeal from the Chancery Division, and cases in lunacy. Volume III., the decisions of the Chancery Division. Volume IV., the decisions of the Court of Appeal on appeal from the Queen's Bench Division; and Volume V. the decisions of the Queen's Bench Division, including those on Crown Cases Reserved, and of the Railway and Canal Commission.

We are glad to know that the learned President of the Council states that especial attention will be paid to the elimination of irrelevant matter, and the framing of the headnotes. The endeavour will be "to make the headnote a real note of the points of substance dealt with, not a huddled abridgment of the facts, followed by a bald statement of their result in that particular case," and on this point the Council claims the special and critical attention of lawyers. The headnotes of the "Law Reports" have been entirely too diffuse, and seemed to us too often to be the hasty compilation of a lawyer's clerk rather than the studied result of the work of a barrister.

One great difficulty in reporting has been to give judgments promptly, and at the same time to give those only which are worthy of final preservation. To get over the difficulty, the plan of weekly notes has been tried, but has not been entirely successful. An entirely novel method has been applied in the present series, and it is thus stated in the introductory notice: "The monthly parts as issued contain full reports, but remain subject to revision. The type is kept standing, and at the year's end the final revision takes place. As soon as practicable, but without undue haste, the volumes will be reissued in their definite form, superseding the monthly parts which will have done their work." It will be seen that this plan, which is very comprehensive and full, will necessitate much labour and expense. Judging, however, from the price at which the reports are issued, it will not be a burden to subscribers.

It is the intention of the editors, in reporting, to give a citation of every known report of a case. Whilst this will necessarily extend the references to some length, it will be a great convenience to the profession, but it is stated that it will make it impossible to repeat more than the reference note when a citation is repeated in the course of the same case. This will, perhaps, be found a little awkward at first, but the reader will soon get accustomed to it.

We notice that in the volumes now issued the cases in appeal appear in a separate volume. How this will be in the future we cannot say, but it occurs to us to suggest that it would be a great convenience, and a plan which would save space, to let the report of a case in appeal, whenever possible, follow the judgment in the court below. This could not be done in the monthly parts, but might be generally adopted when the final revision of cases is made.

Whether this new venture will be a success remains to be seen. We venture to think that it will. The work in the volumes before us is excellently well done, and is worthy of all praise, and these reports have, so far, been most favorably received. There is evidence of energy, intelligence, and skill in the work so far, supplemented by a desire to meet the wishes of the profession in all matters of detail, and the scheme is under the supervision of one eminently qualified to make it a success. We may add that "The Reports" Company is said to commence business with ample capital, in the hands of able business men. It may be supposed, therefore, that the enterprise has the prospect of being permanent, a feature of considerable importance to any one making a selection of what reports he will take.

We need scarcely say that these Reports are produced in the very best form, paper and type. It will give great satisfaction if they are issued promptly; one is willing to excuse any defect on this score in the inception of a great undertaking.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

Trinity Term, 1893.

During this term the following gentlemen were called to the Bar:

Mr. D. R. Tate (with honours and bronze medal), and Messrs. Angus McCrimmon, A. B. Carscallen, A. E. Tripp, D. Campbell, S. V. Blake, F. D. Boggs, M. P. Vanderwort, H. D. Smith, J. O. D. Dromgole, G. G. Duncan, H. M. Graydon, W. B. Bentley, W. A. H. Kerr, N. H. McIntosh, R. M. Graham, H. M. McConnell, T. A. O'Rourke, G. S. Bowie, J. F. Smellie, John Isbister, and S. F. Griffiths (special case).

The following gentlemen received certificates of fitness: Messrs. R. J. Sims, A. E. Tripp, G. M. Vance, A. B. Carscallen, H. D. Smith, M. P. Vanderwort, J. H. Coburn, D. Campbell, S. V. Blake, J. F. Smellie, G. S. Bowie, H. M. McConnell, N. B. Eagen, W. B. Bentley.

The following gentlemen were admitted as students-at-law: Graduates: Messrs. D. R. Dobie, A. Haydon, W. W. Richardson, P. E. Wilson, J. L. McDougall, G. S. Faircloth, W. R. P. Parker, L. A. Moore, J. S. Carstairs. Matriculants: F. J. H. McIntosh, T. E. McCracken, F. M. Devine, S. M. Brown, H. Arrell, A. E. Christian, G. H. Draper, F. J. Maclennan, T. J. Murray, D. M. Stewart, J. H. Campbell, A. F. Kerby, V. P. McNamara, J. D. Ferguson, W. Finlayson, W. S. Davidson, Thos. Williamson.

Monday, September 11th, 1893.

Convocation met.

Present, between ten and eleven a.m., Dr. Hoskin, and Messrs. Moss, Barwick, and Ritchie; and in addition, after eleven a.m, Messrs. Kerr, Shepley, and Bruce.

In the absence of the Treasurer, Dr. Hoskin took the chair.

The minutes of the last meeting of Convocation were read, confirmed, and signed by the Chairman.

Mr. Moss, from the Legal Education Committee, presented that committee's Report on the admission of students of the graduate class and the matriculant class.

Ordered, that the gentlemen named be respectively entered as students-at-law of the above classes.

PROCEEDINGS AFTER 11 A.M.

Mr. Moss, from the Legal Education Committee, presented a Report stating certain changes in the curriculum, and the arrangements made as to seating in the Law School, as follows:

The committee have concluded to substitute McLaren on Bills for Chalmers on Bills in the third-year course; to substitute Clement's Law of the Canadian Constitution for British North America Act, and cases thereunder, in the third year; to add Marsh's History of the Court of Chancery to Snell's Principles of Equity in the first year.

The Principal was requested to draft a regulation as to the co-operation of the examiners and lecturers in regard to preparation of examination papers; the curriculum to have inserted in it a note calling the attention of students to the fact that they are subject to examination on the matter of the lectures delivered as well as the text-book.

The committee decided that the final examinations under the Law Society curriculum are to terminate with the examinations to be held before Easter Term, 1894, and it was ordered that notice of this be inserted in the curriculum and THE LAW JOURNAL.

The Report was received.

Mr. Moss, from the same committee, presented a Report: In the case of Mr. A. M. Lewis, that for the reasons stated he be allowed to take the Supplemental examination as prayed, and that the examination, if passed, may be allowed him.

Ordered accordingly.

In the case of Mr. N. H. McIntosh, who prayed that he may be allowed to take his solicitor's examination at the same time as his examination for call. The committee think that, under the circumstances, the petition may be granted, and that, if successful, he may receive his certificate of fitness upon completion of his term of service, and production of further proofs.

Ordered accordingly.

In the case of Mr. Hugel Mabee, who prayed that he may be allowed to write at the Supplemental examination this month, the committee think that, under the circumstances, he may be allowed to do so, but that this leave should be given without prejudice to the question of allowance of the attendance upon lectures.

Ordered accordingly.

Mr. Moss, from the same committee, presented a Report: In the case of Mr. Robert M. Graham, that he may be allowed to present himself as a candidate at the examination for call to the Bar. The committee recommend that he be allowed to write at the examination without prejudice to the action of Convocation with regard to a special petition presented by him.

Ordered accordingly.

The petition of Mr. Stephen Francis Griffiths, of Petrolea, a solicitor of ten years' standing prior to 1889, who prays to be called to the Bar under the Rules in special cases, was read. Ordered, that a special committee, composed of Messrs. Moss, Ritchie, Shepley, and Riddell, be appointed to examine into the regularity of the papers and proofs submitted by the applicant, and to subject him to an examination under the Rules.

A letter from Sir Richard Webster was read, accepting the invitation of the Benchers to luncheon on Friday next.

Convocation rose.

Tuesday, September 12th, 1893.

Present, between ten and eleven a.m., Dr. Hoskin, and Messrs. Moss, Riddell, Strathy, and Macdougall, and in addition, after eleven a.m., Messrs. Britton, Magee, Shepley, Mackelcan, and Kerr.

Dr. Hoskin, in the absence of the Treasurer, was called to the chair.

The minutes of the last meeting of Convocation were read, confirmed, and signed by the Chairman.

Mr. Moss, from the Legal Education Committee, presented the Reports on the examinations for call and certificate of fitness, that the gen-

tlemen named are entitled to be called to the Bar forthwith, and that the gentlemen named are entitled to receive their certificates of fitness forthwith.

The Reports were adopted and ordered accordingly.

Mr. Moss, from the same committee, presented their Report on the third-year Law School examination held in Easter Term last, also their Report on the Supplemental Examinations, which wer adopted and ordered accordingly; also in the case of Mr. S. V. Lake, that his deficiency consists of one lecture on Criminal Law. The Principal certifies that d.ng the School term of 1891-92 (being the term next succeeding that in which the deficiency occurred) the petitioner voluntarily attended three-fourths of the third-year lectures delivered on criminal law, for which attendance he was not entitled to credit as part of his School work. He has therefore attended a much larger number of lectures on that subject than he was required to attend. The Principal further certifies that his conduct in the School has been uniformly good, and recommends that his attendance be allowed as sufficient; and your committee recommend accordingly that his attendance upon lectures be allowed as sufficient, and that he be called to the Bar forthwith.

Mr. Moss, from the same committee, reported that the result of the pass and honour examinations shows that Mr. D'Arcy Rupert Tate, who passed the School examination in the third year, and competed for honours, received the requisite number of marks entitling him to honours, his ranking being second on the list of those who passed with honours.

The committee find that Mr. Tate is in due course, and is entitled to receive a bronze medal.

Ordered for immediate consideration and adopted.

Ordered, that the gentlemen named be called to the Bar.

Mr. Moss further reported the candidates entitled, and those recommended, to receive certificates of fitness as solicitors.

Report adopted, and ordered accordingly.

Mr. Moss, from the same committee, reported as follows:

In the case of Mr. J. F. Smellie, that he passed his final examinations in the Law School last Easter, and his papers were in other respects correct and regular, but he could not then be allowed his examination, as his attendance upon lectures had not been certified to by the Principal. He did not give notice for call in time for this term, but prays that he may be called notwithstanding lateness of notice. The Principal has now reported on his deficiency in lectures, which was one lecture on Practice, and further reports that his general attendance and conduct were good. The committee recommend that the notice given for this term remain posted in the several places prescribed by the Rules until the last meeting day of this term, and that he be then called, provided no objection appear in the meantime.

Ordered for immediate consideration, adopted, and ordered accordingly.

PROCEEDINGS AFTER 11 A.M.

The Special Committee to which was referred the application of Mr. S. F. Griffiths for call to the Bar under the Rules respecting call in special cases reported the necessary papers and proofs to entitle him, upon passing the prescribed examination, to be called to the Bar, the publication of notice of his application, and that Mr. Griffiths has passed a satisfactory examination. The committee recommend that the slight irregularity in

publication of the notice should be waived, and that Mr. Griffiths be called to the Bar.

Ordered for immediate consideration, adopted, and ordered accordingly.

The gentlemen named in the minutes were then called to the Bar.

A communication from Mrs. King, of Montreal, in which she complained of the conduct of a solicitor, was read. Ordered, that proceedings thereupon be postponed, pending the action of the Finance Committee, and that Mrs. King be informed that the matter will receive the attention of the Law Society.

The motion, of which notice was given on 27th June, 1893, to reduce the number of reporters, was, by consent, postponed until the last day of term.

The motion, of which notice was duly given on 27th June, 1893, to repeal a certain portion of the Rule relating to the Retirement Fund, was, by consent, postponed until the last day of term.

Convocation adjourned.

Friday, September 15th, 1893.

Present: Messrs. Martin, Hoskin, Moss, Mackelcan, Aylesworth, Bell, Watson, Riddell, Bruce, Meredith, and Shepley.

In the absence of the Treasurer, Dr. Hoskin was, on motion, called to the chair.

The minutes of the last meeting of Convocation were read, confirmed, and signed by the Chairman.

Mr. Moss, from the Legal Education Committee, presented a Report in the case of Mr. G. S. Bowie, who presented a special petition praying that he might, in the event of his passing the third-year examination, be called to the Bar and receive a certificate of fitness. The committee recommend that the petition be granted, and that the petitioner's name be changed from the matriculant class to the graduate class, that his service under articles and his attendance on lectures be allowed as sufficient, and that he be called to the Bar and receive a certificate of fitness.

The Report was adopted and ordered accordingly.

Mr. Moss, from the same committee, presented a further Report on the candidates for admission.

The Report was adopted and ordered accordingly.

On motion of Mr. Watson, the consideration of the further interim Report of the Special Committee on the Fusion and Amalgamation of the Courts was ordered to stand until the next meeting of Convocation.

The Chairman read a communication to him from the President of the High Court of Justice, which was received and referred to the Special Committee on Fusion of the Courts to report upon at the next meeting, as follows:

Subject to any inherent difficulty in working out details systematically, the Judges are willing to attempt fusion on the following lines:

(1) Weekly sittings of one Judge in Chambers and Court for the transaction of all business in all Divisions according to Rules 210 and 211, but it is feared that all the work cannot be done by one Judge.

(2) With the present organization and machinery of the different Divisions, and the distribution of official work as now existing it would appear to be inconvenient, if not impracticable, to change the constitution of the separate Divisional Courts.

(3) Trials of country cases at four circuits each year, of which two will be for jury (including criminal causes) and two for non-jury trials. In the less important towns only two courts each for the disposal of all trials. In the more important towns, one or more additional courts to be held. The Judges to sit according to rota.

(4) The same system of trials to extend to Toronto, but with more frequent courts.

Mr. D. B. Read's letter to Mr. Moss, relating to his book entitled "Lives of the Judges," was read. It was resolved that the Society cannot purchase the remainder of the edition.

The motion as to the reduction of the number of reporters was deferred until next meeting.

On the petition of Mr. Thomas Williamson, a matriculant of Trinity College, Dublin, ordered that consideration thereof be postponed until next term.

By consent, Mr. Shepley moved the first reading of a Rule, as follows:

Where it shall appear that two or more Benchers are to be elected on the same day by Convocation, or that two or more appointments to the same office (*e.g.*, Lecturers, Examiners, or Reporters) are to be made on the same day by Convocation, each Bencher voting shall have as many votes on each ballot as there are vacancies to be filled or appointments to be made, provided that on no ballot shall any Bencher cast more than one vote for any one person.

The Rule was read a first time.

Convocation adjourned.

Friday, September 22nd, 1893.

Present, the Treasurer, and Messrs. E. Blake, Moss, Ritchie, G. Guthrie, Mackelcan, Meredith, Douglas, Osler, Strathy, Hoskin, Kerr, Martin, Hardy, Bruce, Watson, and Barwick.

The minutes of the last meeting of Convocation were read, confirmed, and signed by the Treasurer.

Mr. Moss, from the Legal Education Committee, presented a Report in the case of Mr. J. F. Smellie, recommending that his examination and attendance on lectures be allowed, and that he be called to the Bar.

The Report was adopted, and ordered that Mr. Smellie be called to the Bar.

Mr. Moss, from the same committee, presented a Report in the case of Mr. John Isbister, recommending that his second intermediate examination passed by Mr. Isbister be allowed to him as of Michaelmas Term, 1892, and that his third-year examination and attendance on lectures be allowed, and that he be called to the Bar.

The Report was adopted, and ordered that Mr. Isbister be called to the Bar.

Mr. Moss, from the same committee, presented a Report:

In the case of Mr. Hector McKenzie McConnell, recommending that he do receive his certificate of fitness forthwith.

On the petition of Mr. Nassau Brown Eagen, recommending that he do receive his certificate of fitness.

In the case of Mr. William Bledden Bentley, recommending that production of the certificates be dispensed with, and that he do receive his certificate of fitness.

In the case of Mr. Lyman Aubrey Moore, recommending that he be admitted as a student-at-law of the graduate class.

In the case of Mr. John Stewart Carstairs, recommending that he be entered on the books as a student-at-law of the graduate class.

In the case of Mr. Arthur R. J. Sullens, recommending that his notice be ordered to stand and remain posted in the usual places prescribed by the Rules until the first day of next term, and that further consideration of his case be deferred until the completion of his papers and production of proper proof of his having passed the prescribed examination.

The Report was adopted and ordered accordingly.

Mr. Moss, from the same committee, reported on the special petitions of Messrs. L. M. Lyon, C. C. Hayne, D. S. Storey, recommending that their notices be allowed to remain in the usual places prescribed by the Rules until the first day of next term, and that, provided no objection be made in the meantime, their applications do stand for consideration until next term.

In the case of Mr. Nassau Brown Eagen, recommending that his notice do remain posted until the first day of the next term, and that he be then called, provided no objection appear in the meantime.

The Report was adopted and ordered accordingly.

Dr. Hoskin, from the Discipline Committee, reported, in the case of Mr. T. B., who has advertised himself as a barrister, although not actually such:

That the complaint had been considered, and, in view of a statement and explanation made by Mr. B., the committee suggest that they be excused from further proceeding with the investigation at present.

The Report was adopted.

The gentlemen named in the minutes were then presented and called to the Bar.

Mr. Watson, from the Special Committee on the Fusion and Amalgamation of the Courts, reported as follows:

(1) In pursuance of the direction made in Convocation on the 15th inst., your committee has considered the resolution passed by the Judges and submitted to Convocation, and, with regard thereto, begs to present a further Report.

(2) Your committee regards with satisfaction the fact, as indicated by the resolutions, that the Judges of the High Court of Justice recognize the necessity of the fusion and amalgamation of the three Divisions of the court, and are disposed to co-operate in completion.

(3) Your committee is of opinion that further recommendations should be made with regard to the resolutions, first, that Rule 211 should be abrogated, and that provisions should be made for a daily sitting of a judge in court for the hearing of all court motions, whether by way of appeal, petition, or otherwise, and that a judge should also sit separately each day for the hearing of Chamber motions.

(4) With regard to the second resolution, your committee would respectfully call attention to the fact that the official staff of the various Divisions is apparently abundant, and, it is believed, quite sufficient to perform the official duties consequent upon the reorganization referred to, and that if such reorganization was directed it would be a matter of detail only reassigning the several officers and fixing their respective duties, and that such change is quite practicable, and when made would be much more convenient, and, for the reasons suggested in previous reports, your committee would urge the necessity for one Divisional Court, with fortnightly sittings, constituted of three judges.

(5) Your committee also regards with particular satisfaction the resolution to amalgamate the circuits, and suggests that provision should be made for determining, prior to the Commission Day, the rights of the parties to have a trial with or without a jury.

(6) Your committee desires to urge its previous recommendation with regard to the number of sittings of the court, especially in Toronto and other cities, for the trial of non-jury cases. At the last sitting of the court in Toronto the learned judge was unable to dispose of any of the non-jury cases entered for trial, numbering in all about one hundred.

(7) Your committee expresses the earnest hope that assistance will be forthcoming from every quarter to promote and complete the fusion of the Divisions as presented in the previous Reports.

Ordered for consideration forthwith.

The 1st and 2nd clauses were adopted.

The 3rd clause, dealing with the first resolution of the Judges, was amended, and adopted as amended.

The following was substituted in lieu of the 4th clause:

With regard to the second resolution, your committee, while recognizing that there may be difficulties in the way of making the change in the Divisional Courts recommended in the committee's former report, is still respectfully of the opinion that these difficulties, in so far as they arise from the present organization and machinery of the different Divisions, and the distribution of official work, would not, upon further examination, be found to stand in the way of the desired change, or to involve more than a comparatively simple redistribution of work among a clerical staff which your committee believes to be amply sufficient.

The 5th, 6th, and 7th clauses were adopted, and the Report, as above amended, was adopted.

Mr. Shepley moved, seconded by Mr. Barwick: That copies of the Report of the Fusion Committee, as amended and passed by Convocation, and of this resolution, be forwarded to the Judges, and that it be respectfully suggested that they should make it convenient to meet the Committee on Fusion (which is hereby continued), with a view to the preparation and passing of Rules to carry out the changes in question. Carried.

Mr. Meredith moved, seconded by Mr. Bruce: That it appearing by the papers of Mr. Thomas Williamson that he is a matriculant of Trinity College, Dublin, and has passed his second and third years' examinations at that university, and has also been admitted by Trinity College, in this Province, as a third-year undergraduate, within four years, and his qualifications being, in the opinion of Convocation, the equivalent of those required by the Rules, Mr. Williamson be, under the special circumstances, admitted as a student at-law of the matriculant class on paying the proper fees, and in other respects complying with the Rules. Carried.

Moved by Mr. Watson: That each Bencher voting shall have as many votes on each ballot as there are vacancies to be filled or appointments to be made, provided that on no ballot shall any Bencher cast more than one vote for any one person.

The following gentlemen were then elected Examiners: Messrs. J. H. Moss, M. H. Ludwig, A. C. Galt, and W. D. Gwynne. It was then resolved that the salaries of the Examiners be paid, until otherwise ordered, quarterly, on January 1st, April 1st, July 1st, and October 1st of each year, the first payment to be made on January 1st, 1894.

Mr. Barwick then moved the first reading of the Rule to amend the Retirement Fund Rule, as follows: "By striking out the first paragraph thereof, and inserting in lieu thereof the following: 'On and after the 22nd day of September, 189., a fund shall be formed for the retirement of each of the officers of this Society, exclusive of the lecturers and examiners, subject to the conditions and qualifications herein contained.'"

The Rule was read a first time, and was ordered to be read a second time on the second day of Michaelmas Term.

Mr. Martin gave notice that on the second day of next term he would move that the Rules relating to the Retirement Fund be repealed.

Mr. Watson, from the Finance Committee, presented a Report, as follows:

Convocation having on the 26th day of May referred to this committee the question of executing a release of the Society's claim (if any) to certain property in the City of Winnipeg, belonging to the estate of Mr. T. B. Phillips Stewart, your committee have duly considered the matter, and, after making enquiries, have resolved to recommend that the Society do execute such conveyance or release of the said property as may be approved by the solicitor.

The Report was adopted.

Mr. Watson moved that the motion to reduce the number of the reporters, and to introduce a Rule to that effect, be referred to a Joint Committee composed of the Finance and Reporting Committees, the chairman of the Reporting Committee to be the convener of such Joint Committee, and that the advertisement to be inserted calling for applications for the offices of editor and reporters do not bind Convocation to appoint any of such officers; also that the advertisement, subject to the approval of the Treasurer, be inserted, as usual, two weeks before Michaelmas Term.

Convocation adjourned.

J. K. KERR,
Chairman Committee on Journals.

DIARY FOR MAY.

1. Tuesday.....Supreme Court of Canada sits.
2. Wednesday..Battle of Cut Knife Creek, 1885. J. A. Boyd, 4th Chancellor, 1881.
3. Thursday....Ascension Day. Law School closes.
4. Friday .....Mr. Justice Henry died, 1878.
6. Sunday.....*Sunday after Ascension Day.* Lord Brougham died, 1868, aged 90.
8. Tuesday.....Ct. of Appeal sits. Gen. Sess. and Co. Ct. sittings for trial in York. Exam. for Certificate of Fitness (last).
9. Wednesday..Examination for Call (last).
12. Saturday....Battle of Batoche, 1885.
13. Sunday.....*Whitsunday.*
14. Monday.....First illustrated newspaper, 1842.
18. Friday.....Montreal founded, 1642.
20. Sunday.....*Trinity Sunday.*
21. Monday.....Easter Term begins. Convocation meets. Confederation proclaimed, 1867.
22. Tuesday.....Earl of Dufferin, Governor-General, 1872.
24. Thursday....Corpus Christi. Queen Victoria born, 1819.
25. Friday.....Convocation meets. Princess Helena born, 1846.
27. Sunday.....*1st Sunday after Trinity.* Habeas Corpus Act passed, 1679. Battle of Fort George, 1813.
28. Monday.....Hon. C. A. Kirkpatrick, Lieut.-Governor, Ontario, 1892.
29. Tuesday.....Battle of Sackett's Harbour, 1813.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [March 3.

BALL *v.* TENNANT.

Assignments and preferences—R.S.O., c. 124, s. 4—Assignment for benefit of creditors—Several property of partners—Covenant of indemnity—Creditors—Execution of assignment by.

An assignment under R.S.O., c. 124, for the general benefit of creditors, made by the members of a trading partnership, in the words mentioned in s. 4, vests in the assignee all the properties of each of the partners, several as well as joint, including a covenant to indemnify one of the partners against a mortgage, which covenant vests under the term "property."

Where such an assignment has been acted upon by the creditors, it is not open to the objection, even if made by an execution creditor, that no creditor executed it.

Cooper v. Dixon, 10 A.R. 50, distinguished.

N. F. Davidson for the plaintiffs.

R. U. Macpherson for the defendant.

Div'l Court.] [March 3.

JOHNSON *v.* GRAND TRUNK RAILWAY CO.

Railways—Accident at crossing—Negligence—Findings of jury—Release of cause of action—Settlement pending action—Validity of—Trial of issue as to.

In an action to recover damages for the death of the plaintiff's husband, who was killed at a railway crossing by a train of the defendants, the jury found that the engine bell was not rung on approaching the highway, nor kept ringing until the engine crossed it; that the deceased did not see the train approaching in time to avoid it, and that he had no warning of its approach; and assessed damages at $1,000.

Held, that the plaintiff was entitled to judgment upon these findings, notwithstanding that the jury, to a question whether the deceased, if he saw the train approaching, used proper care to avoid it, answered, "We don't know."

After the action was at issue, an agreement was made between the defendants and the plaintiff, the latter an ignorant person, and without the advice of her solicitor, or other competent advice, whereunder she received $500 from the defendants, and executed a release under seal of the cause of action. She afterwards repudiated the agreement, and paid back the $500. At the trial the defendants set up the release.

Held, upon the evidence, that the release was ineffectual.

Held, also, that it was not necessary that a separate action should be brought to try the validity of the release.

Emeris v. *Woodward*, 43 Ch.D. 185, distinguished.

S. Livingstone for the plaintiff.

Osler, Q.C., for the defendants.

Div'l Court.] [March 3.

FOWELL *v.* CHOWN.

Patent for invention—R.S.C., c. 61, s. 46—Rights of prior manufacturer.

Section 46 of the Patent Act, R.S.C., c. 61, does not authorize one who has, with the full consent of the patentee, manufactured and sold a patented article for less than a year before the issue of the patent to continue the manufacture after the issue of the patent, but only to use and sell the articles manufactured prior to the issue of the patent.

E. G. Porter for the plaintiff.

Osler, Q.C., and *Clute*, Q.C., for the defendant.

Div'l Court.] [March 3.

TRIMBLE *v.* LANKTREE.

Statute of Frauds—Contract not to be performed within a year—Executed contract.

The Statute of Frauds does not apply to a contract which has been entirely executed on one side within the year from the making, so as to prevent an action being brought for the non-performance on the other side.

And therefore where the plaintiff delivered sheep to the defendant within a year from the making of a verbal contract with the defendant, under which the defendant was to deliver double the number to the plaintiff at the expiration of three years,

Held, that the contract was not within the statute.

W. L. Walsh for the plaintiff.

A. H. Hughson for the defendant.

Div'l Court.] [March 3.

ROGERS *v.* DEVITT.

Sale of goods—Contract—Payment of price—Right of property—Right of possession—Trespass—Trover—Amendment—Account.

A chattel mortgage was made to the plaintiffs by a firm of traders, covering wood then on certain premises, and thereafter to be brought thereon. Subsequently the mortgagors made two contracts with the defendant, by which he was to get out wood for them and place it upon the premises at a specified price, fifty per cent. of which was to be paid every month on all wood got out during that month, and the balance in cash upon and according to a measurement to be made by the mortgagors before a specified time. The defendant got out and delivered a quantity of wood upon the premises, and, before the time specified, a measurement was made by himself and the respective agents of the plaintiffs and the mortgagors, and the wood measured was then marked with the plaintiffs' mark. On the following day he wrote to the mortgagors asking payment of the balance due him according to the measurement. The mortgagors, three weeks later, made an assignment for the benefit of creditors, and, just before they did so, gave the defendant a written acknowledgment of a debt due him on account of the wood, "which it is agreed and understood he is to hold the wood measured by us for until it is paid for." Subsequently the defendant took away portions of the wood so marked and measured, and the plaintiffs brought this action, alleging a wrongful seizure and conversion of the wood, and claiming the value of it.

Held, that there was an appropriation to the contracts by the assent of the defendant and mortgagors, of the wood measured and marked, the property in which thereupon became vested in the mortgagors, and through them in the plaintiffs; but the vesting of the property did not vest the right of possession without payment of the price, and therefore the plaintiffs could not maintain trespass or trover for the wood taken; but were entitled, upon amendment of the pleadings, to a decree declaring them entitled to the property in the wood, and to possession upon payment of the amount due to the defendant, and to make him account for so much of the wood as was not received by them.

Shepley, Q.C., for the plaintiffs.

J. T. Sproule for the defendant.

Chancery Division.

MEREDITH, J.] [March 16.

TENNANT *v.* GALLOW.

Fraudulent preference—Voluntary transfer—Subsequent sale to innocent purchaser—Following proceeds thereof.

An insolvent debtor, for the purpose of defeating the plaintiff's claim against him, by voluntary deed conveyed the equity of redemption in certain lands to another creditor, who, as previously arranged with the grantor, sold the property to an innocent purchaser, and applied the proceeds to payment of all encumbrances on the property, and all his own debts and those of certain other creditors of the grantor, and of a commission to himself in respect to the sale, and paid over the final balance to the grantor.

Held, that the plaintiffs had no right of action against the fraudulent grantee to recover any part of the purchase money.

Masuret v. *Stewart*, 22 O.R. 200, and *Cornish* v. *Clark*, L.R. 14 Eq. 184, distinguished.

W. R. Riddell for the plaintiff.

Miller, Q.C., for the defendant Gallow.

Common Pleas Division.

Div'l Court.] [Dec. 30, 1893.

BENJAMIN *v.* FAIRGRIEVE.

Bills of exchange and promissory notes—Notes given for patent right—Endorsement of words, "Given for patent right"—Necessity for, as between maker and payee.

At the time of the formation of the firm of F. & C., F. was indebted to the plaintiffs in his personal account, and, to induce C. to join in giving the firm notes therefor, F., at the plaintiff's suggestion, assigned to C. an half interest in a patent right held by him.

Held, under s-s. 4 of s 30 of the Bills of Exchange Act, 53 Vict., c. 33 (D.), that the words "Given for a patent right" should have been written across the notes; and, in the absence thereof, the plaintiffs could not recover thereon.

James Parkes and *McKay* for the plaintiffs.

Moss, Q.C., and *Thompson* for the defendant.

Div'l Court] [Dec. 30, 1893.

GORDON *v.* DENISON ET AL.

Criminal law—Warrant to compel attendance of witnesses.

The plaintiff, a barrister, having been subpœnaed to give evidence for the prosecution in a criminal case before a police magistrate, attended at the time

named, but, on the case being adjourned, did not then attend, and the case was further adjourned. The prosecutor forthwith laid an information on oath before the magistrate that the witness was a material one, and that it was probable he would not attend to give evidence, upon which the magistrate issued a warrant addressed to the chief constable, or other police officer, etc., and to the keeper of the common jail of county and city, directing them to bring the witness before him on the date of the adjournment, some five days distant. The witness was forthwith arrested by two police officers and brought to the office of one of the police inspectors, and, on his refusing to answer the questions usually put to criminals, except those as to his name and address, the inspector ordered him to be searched, which was done, and his personal property, consisting of a watch and chain, some money, and private memorandum book, were taken from him, the latter being opened and read by the inspector. He was then taken to the cells, where he remained some twenty minutes, when he was brought before the magistrate, and, on his giving his personal undertaking to appear on the day named, he was liberated. In an action against the police magistrate and the police inspector,

Held, reversing the judgment of ROSE, J., at the trial, that, the magistrate having jurisdiction by virtue of s. 62 of R.S.O., c. 174, to issue the warrant, he incurred no liability, even though he may have erred as to the sufficiency of the evidence before him, and on which he acted.

The court disagreed as to the defendant Stephen, MACMAHON, J., being of the opinion that the judgment of ROSE, J., should be affirmed, namely, that the inspector had no authority to direct the examination and search of the witness and his commitment to the cells, and he was, therefore, liable therefor; while GALT, C.J., was of opinion that he was protected under s-s. 2 of s. 1 of R.S.O., c. 73, as he was acting in the execution of his office, and no malice was shown.

Held, also, that there was no necessity for setting aside the warrant before bringing the action.

Quære: Whether s. 62 authorizes the issue of the warrant or its enforcement an unreasonable length of time before the day named for the attendance of the witness.

Quære, also: Whether, in an action of this kind, questions can properly be submitted to the jury, or whether they should be directed to find a general verdict.

Osler, Q.C., for the plaintiff.

T. D. Delamere, Q.C., and *Oliver Macklem* for the defendant Denison.

Herbert Mowat for the defendant Stephen.

Div'l Court.] [Jan. 6.

GRAHAM *v.* CANADA LIFE ASSURANCE COMPANY.

Insurance—Married women—Assignment of policy—Validity of.

A husband, on the 24th December, 1878, and 16th of May, 1880, effected two policies of insurance on his life for the benefit of his wife, and died in 1892. On the 26th of October, 1886, the wife assigned the policies to P., as collateral security for the payment of a note for $500, made on the same day by

the husband in favour of P., and endorsed by the wife, but on the express agreement that certain of the husband's property should be returned to him.

Held, that P. was entitled to recover the amount due him by virtue of the assignment.

McKibbon v. *Feegan*, 30 C.L.J. 33, commented on.

Darling v. *Rice*, 1 A.R. 43, distinguished.

W. R. Riddell for the plaintiff.

Wallace Nesbitt and *Street on* for the defendants.

Div'l Court.] [Jan. 6.

BROWN *v.* DEFOE.

Warehouseman—Collapse of warehouse through undiscovered defect—Dry rot—Liability.

A building erected for a billiard table manufactory, and used as such for nine years, was converted into a warehouse and used as such for about nine months, when it collapsed through the breaking of a beam supporting the ground floor, occasioned by there being dry rot in one of the beams, and a quantity of goods stored therein was damaged. No negligence was shown in the construction of the building or the selection of the material used therein, or in not discovering the existence of the dry rot; and except therefor the building would have been capable of sustaining the weight put upon it.

In an action for the damages sustained to the goods warehoused in the building,

Held, that the defendant was not liable.

W. H. Blake for plaintiff Ashdown.

J. E. Irwin for Brown.

A. C. Macdonell for Page.

W. R. Meredith, Q.C., for the defendant.

Div'l Court.] [March 3.

GRANT *v.* ARMOUR.

Hire of goods—Agreement to return—Contract—Damage occasioned by unforeseen accident—Liability.

Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance of the contract has become unexpectedly burdensome or even impossible.

Where, therefore, the defendant had hired the plaintiff's scow and pile driver, etc., at a named price per day, and to be responsible for damages thereto, excepting the engine and ordinary wear and tear, until returned to the plaintiff, and while in the defendant's custody, by reason of a wind storm of unusual force, almost amounting to a hurricane, they were driven from their moorings and damaged:

Held, that the defendant was liable for the damages thus sustained, notwithstanding they were occasioned by an unforeseen accident, the plaintiff being liable also for the rent while the scow, etc., were being repaired.

Taylor v. *Caldwell*, 3 B. & S. 826, followed.
Harvey v. *Murray*, 136 Mass. 377, approved.
D. Macdonald for the plaintiff.
R. M. Macdonald for the defendant.

Div'l Court.] [March 3.

FRASER v. BUCHANAN.

Provisional judicial district—Order of Master for trial of action therein—Subsequent judgment of High Court judge—Jurisdiction of Master—Appeal to the Court of Appeal and not Divisional Court.

In an action brought for damages to the plaintiff's house situated in a provisional judicial district, an order was made by the Master in Chambers, assuming to act under the Unorganized Territories Act, R.S.O., c. 91, directing that the issues of fact be referred to the district judge, reserving further directions and questions of law arising at the trial for the disposal of a judge in single court. Notice of trial was given for the District Court, and the case heard by the district judge, who made certain findings of fact, assessed the damages, and directed judgment to be entered for the plaintiff. The plaintiff moved for judgment on such findings before a judge in single court, the defendant at the same time appealing from the judgment or report, whereupon the judge disposed of both motions, directing judgment to be entered for the plaintiff for the amount found by the district judge.

On appeal to the Divisional Court,

Held, that, apart from the question of the jurisdiction of the Master to make the order, as the parties had treated it as valid, and the subsequent order of the judge in single court remained unreversed and unappealed, the court would not interfere; that if the question of the jurisdiction of the Master were involved, the appeal should be to the Court of Appeal.

English for the plaintiff.
Aylesworth, Q.C., for the defendant.

Div'l Court.] [March 3.

MCLEOD v. WADLAND.

Mortgage—Payment off of prior mortgages in ignorance of a third mortgage—Right to be declared third mortgagee—Laches—Acquiescence.

The plaintiff paid off two prior mortgages on certain lands, and procured their discharge, taking a new mortgage to himself for the amount of the advance in ignorance of the fact of the existence of a third mortgage. Shortly afterwards he ascertained the fact of the existence of such third mortgage, when, believing the land to be sufficient to pay off both mortgages, he notified defendant, the third mortgagee, he would pay his off, and the defendant, relying thereon, took no steps to enforce his security. Subsequently, on the property becoming depreciated and the mortgagor insolvent, the plaintiff brought an action to have it declared that he was entitled to stand in the position of first mortgagee.

Held, that the plaintiff, by his acts and conduct, had precluded himself from asserting such right.

Brown v. *McLean*, 18 O.L. 533, and *Abell* v. *Morrison*, 19 O.R. 669, distinguished.

Aylesworth, Q.C., for the plaintiff.

Kapelle for the defendant.

Div'l Court.] [March 3.

O'CONNOR *v.* HAMILTON BRIDGE COMPANY.

Workman's Compensation for Injuries Act—Dangerous machinery—Absence of guard—Negligence—Factory Act.

A drilling machine, manufactured by a well-known manufacturing company, and the same as those used for many years, was put up by the company for the defendant in his factory. The plaintiff, acting under the orders of the defendant's foreman, was oiling the shaft on which the drill worked, when his clothes caught in a projecting screw, and he was injured. The machine was not in motion when the plaintiff received his orders, but at the time of the accident was working with great rapidity, having been put in motion, without the foreman's knowledge, by a fellow-workman. The machine had only been in use a few days, and the defendant was not aware of its being in any way dangerous.

In an action for the damages received by the plaintiff, the jury found that the accident was caused by the defendant's negligence, and without any negligence on the part of the plaintiff.

On appeal to the Divisional Court, the court was equally divided.

Per GALT, C.J.: There was no evidence of negligence to submit to the jury, either at common law or under the Workman's Compensation for Injuries Act, nor any liability under the Factory Act.

Per ROSE, J.: There was evidence of negligence both at common law and under the Workman's Compensation for Injuries Act; the want of a guard, as required by the Factory Act, constituted such negligence at common law, and the absence of such guard being also a defect in the condition or arrangement of the machinery within the Workman's Compensation for Injuries Act.

G. Lynch-Staunton for the plaintiff.

Osler, Q.C., and *Walker*, Q.C., for the defendant.

BOYD, C.] [Oct. 21, 1893.

SIMMONS *v.* SIMMONS.

Benevolent societies—Endowment certificate—Change of beneficiary—Evidence of.

An endowment certificate for $1,000, issued in 1889 by the Canadian Order of Foresters to a member, and payable on his death, half to each his father and mother, contained a provision that, should there be any change in the name of the payee, the secretary should be notified, and an endorsement thereof made

on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate, which she deposited in a trunk used by both in common.

Held, that this was not sufficient to displace the terms of the contract as manifested on the face of the certificate; and further, so far as the mother was concerned, she was amply protected, 53 Vict., c. 39, s. 5 (O.), which applied to the certificate in question, creating a trust in her favour.

Clute, Q.C., and *John Williams* for plaintiff.

W. B. Northrup for the defendants.

ROSE, J.] [Jan. 20

ALEXANDER *v.* CORPORATION OF THE VILLAGE OF HUNTSVILLE.

Municipal corporations— By-law exempting manufactory— Right to repeal.

A by-law passed under s. 366 of R.S.O., c. 184, which authorized the exemption of a manufacturing establishment for a period of not longer than ten years, exempted the lands, etc., used in the applicant's business for a period of ten years from the date at which the by-law came into effect.

Held, that the by-law was valid; that the words "manufacturing establishment" included land and everything necessary for the purposes of the business; and that the period of exemption was within the time limited by the statute; and also that, during such limited time, and in the absence of any acts on the part of the persons in whose favour the by-law was passed justifying the repeal thereof, the repeal would be illegal.

A ground relied on for the repeal of the by-law was that the applicant had erected more than two dwelling-houses on the exempted lands, whereby, under the terms of the by-law, the exemption ceased. This was done through oversight, and, on the applicant's attention being called thereto, and on his undertaking to pay taxes thereon, a by-law was passed agreeing thereto, and validating the original by-law; but, through inadvertence, this by-law was not sealed. The dwellings were subsequently assessed, and the taxes paid on them.

Held, that the corporation, by their acts and conduct, were precluded from now setting this up as a breach of the by-law.

A further ground of appeal was the erection of electric light poles and supplying electric light, but, under the circumstances set out in the case, this was also overruled.

W. F. Meredith, Q.C., and *J. B. Clarke*, Q.C., for the applicant.

F. E. Hodgins, contra.

MACMAHON, J.] [Feb. 5.

MANGAN *v.* CORPORATION OF WINDSOR.

Municipal corporation—Contract for construction of sewer—Power to put on men, etc., to hasten the work—Construction of contract and specifications.

A contract for the construction of a sewer, between the corporation of the town and the plaintiff, provided for its construction within a limited time, but

which was extended by resolution of the council, and again informally extended for a further period. The contract provided that, if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ and place on the work such force men and teams and procure such materials as might be deemed necessary to complete the work by the day named for the completion, and charge the cost thereof to the plaintiff; and by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension of time, exercised the powers above conferred.

Held, that, under the contract, the power conferred could only be exercised during the time for the completion of the work or its extension thereof, but under the specifications, even after such time; and, therefore, even if they could not avail themselves of the second extension as granted informally, the powers would be properly exercised under the specifications.

A claim by the plaintiff that the defendants caused the amount stipulated for the payment of the work to be exceeded by the employment of more men, etc., and the payment of larger wages than was necessary, was found against him.

Wallace Nesbitt and *Morton* for the plaintiff.

Clement for the defendants.

Practice.

ROBERTSON, J.] [March 19.

IN RE HAWKINS.

Costs—Trusts and trustees—Discharge of trustee—Petition—Passing accounts—Inquiry as to liability of trustee.

Upon a petition by a surviving trustee under a will to be discharged from the trusteeship, it appeared that a trust fund created by the will had become impaired, and a reference was directed to take an account of the dealings of the trustees with the fund. The Master reported that a portion of the fund had been lost in the hands of the petitioner's deceased co-trustee, and that the estate of the latter was liable therefor. Upon appeal, the report was sent back to be amended by charging the petitioner with the portion of the fund so lost by his co-trustee.

Held, that the inquiry as to the petitioner's liability having resulted unfavourably to him, he must bear the costs of it; but was entitled to receive out of the fund his costs of the petition and of bringing in his accounts; and, upon payment of the amount found due by him and of the costs awarded to be paid by him, to his discharge.

Hoyles, Q.C., for the petitioner.

Swabey for the adult respondents.

A. J. Boyd for the infant respondents.

BOYD, C.] [March 27.

MURRAY *v.* BROWN.

Discovery—Criminal conversation—Particulars—Affidavit of denial—Examination of plaintiff's wife—R.S.O., c. 61, s. 7.

In an action of criminal conversation, after pleading and examination of the plaintiff for discovery, particulars of the matters complained of should not be ordered except upon a full and satisfactory affidavit of the defendant showing his innocence and ignorance of the ground of complaint, and an affidavit merely stating, "I deny that I ever debauched, assaulted, or alienated the affections of the plaintiff's wife," is not sufficient.

Keenan v. *Pringle*, 28 L.R. Ir. 135, followed.

In such an action there is no power, having regard to R.S.O., c. 61, s. 7, to order the examination of the wife for discovery as to the alleged acts of adultery.

M. G. Cameron for the plaintiff.

C. J. Holman for the defendant.

BOYD, C.] [March 27.

SWAIN *v.* MAIL PRINTING CO.

Security for costs—Libel—R.S.O., c. 57, s. 9—Merits—Privilege—Defence.

On the application, under R.S.O., c. 57, s. 9, for security for costs in an action of libel, the judge is not to try the merits of the action. If it appears on the affidavits filed by the defendants that there is a *prima facie* case of justification or privilege, and that the plaintiff is not possessed of property sufficient to answer costs, the statute is satisfied, and security should be ordered; it is not for the judge to pass upon disputed facts disclosed in conflicting affidavits filed against the application.

DuVernet for the plaintiff.

Swabey for the defendants.

BOYD, C.] [March 27.

MORROW *v.* MCDOUGALD.

Evidence—Foreign commission—Material on application for—Staying trial.

Where an application for a foreign commission is made before issue joined, and it is not certain what the issues will be, the party applying must disclose the nature of the evidence to be given by the foreign witness, that the court may gauge whether it is likely to be material and necessary.

Smith v. *Greey*, 10 P.R. 531, explained.

And where issue had been joined two months before the sittings for which the plaintiff gave notice of trial, and the defendant applied five days before the sittings for a commission to examine a foreign witness upon an affidavit simply stating that the witness was necessary and material, and he was advised and believed he could not safely proceed to trial without his evidence, and, while

not explaining the delay, stating that the application was made in good faith and not to delay, a Judge in Chambers refused to interfere with a Master's order for a commission and a staying of the trial, except by directing that the trial should take place on the return of the commission, in an adjoining county.

Shepley, Q.C., for the plaintiff.

Douglas Armour for the defendant.

ROSE, J.] [March 29

CASEY *v.* MORDEN.

Costs—Taxation—Fee paid on settling bond—Tariff B.

A disbursement charged in a bill of costs of $1 paid in stamps to an officer of the court upon settling a bond was disallowed upon appeal from taxation.

Such a fee is not authorized by Tariff B. annexed to the Consolidated Rules under the item, "Every reference, inquiry, examination, or other special matter."

Douglas Armour for the plaintiff.

J. M. Clark for the defendant.

MANITOBA.

COURT OF QUEEN'S BENCH.

TAYLOR, C.J.] [March 28.

BRAUN *v.* DAVIS.

Garnishee order—Money payable to defendant and another jointly—Foreign company carrying on business within the jurisdiction—Administration of Justice Act, R.S.M., c. 1, s. 21—Branch or agency of company.

This was an appeal to a single judge from an order of the referee dismissing a summons taken out by defendant to set aside a garnishing order. The garnishees were the Northern Assurance Co. and the United Fire Insurance Co., and the moneys sought to be attached were payable on a loss by fire which had taken place of property insured by them.

The following were the objections taken by the defendant:

(1) That according to the terms of both policies the insurance moneys were payable to the defendant and his wife jointly.

(2) That neither company could be said to be carrying on business in this Province, so as to be treated as within the jurisdiction of the court.

The plaintiff contended that the first objection was not open for the defendant to take, but that it should be left for the garnishees to suggest that some other person was entitled to the money. With regard to the second objection, it appeared that the head office for Canada of the Northern Assurance Co. was in Montreal; that it had no office in this Province, but certain persons here received applications for insurance, which were sent to the head office, where they were accepted or rejected. The local agents had power to grant an

interim insurance until the decision of the head office should be known, and to receive the first premiums. The policy was issued at Montreal, the renewal premiums were payable there, and the amount insured was also payable there. In the case of the United Fire Insurance Co. the policy was issued at Winnipeg; to be valid, it had to be countersigned by the agent of the company at Winnipeg, and it purported to be so.

Held, that the garnishee order must be set aside as to both companies, on the ground that the moneys sought to be attached were payable to the defendant and his wife jointly. (*Macdonald* v. *Tacquah Gold Mining Co.*, 13 Q.B.D. 535); and that this objection was open to the defendant.

Held, also, that as to the Northern Assurance Co. it could not be said to be carrying on business within this Province, and was, therefore, not within the jurisdiction of the court for the purpose of garnishee proceedings, under the authority of *McArthur* v. *McDonnell*, 1 M. R. 334; *Munn* v. *London and N.W.R.*, 1 C.B.N.S. 325, *Parker* v. *Odette*, 14 C.L.T. 95; *Brown* v. *London and N.W.R.*, 4 B. & S. 326.

But that the United Fire Insurance Co. was within the jurisdiction of the court, as it was carrying on business through an agency here.

Appeal allowed, and garnishee order set aside.

Hough, Q.C., for plaintiff.

Perdue for defendant.

DUBUC, J.] [April 2.

HUGHES v. RUTLEDGE.

Ejectment—Evidence of default in payment of mortgage—Evidence of possession—Payment of taxes equivalent to possession.

The plaintiff claimed possession of the lot of land in question by conveyance in 1874 from the patentee of the Crown. The defendant set up that the plaintiff had mortgaged the lot in 1875, that default had been made in payment of the mortgage, that the mortgagees had, in 1887, sold the lot under the power of sale in the mortgage to A. F. Eden, and that he, defendant, had, in 1891, entered into an agreement to purchase the lot from Eden's successor in title, and had in June, 1892, taken possession of the property, put a fence around it, and erected a dwelling upon it. The plaintiff's contention was that all claim under the mortgage was barred by the Statute of Limitations, and that it must be presumed to have been satisfied, and that possession taken in 1892 could not avail to restore the rights of the mortgagees, or of any person claiming under them.

Under the terms of the plaintiff's mortgage, he was to have quiet possession of the land until default in payment. There was no direct evidence of default of payment, but a notice of intention to exercise the power of sale in the mortgage was produced, dated November 20th, 1876. This notice was in the usual form. It had endorsed on it a certificate of service on the plaintiff by a bailiff, since deceased, whose handwriting was proved. The conveyance under the power of sale was proved, dated June 16th, 1877, and some entries showing that there had been a mortgage sale were produced from a solicitor's docket.

After the sale the mortgagees and those claiming through them, including the defendant, paid the taxes on the lot from 1882 to the present time.

Held, that service of the notice in question was sufficiently proved by the entry in the handwriting of a deceased person, made in the usual course of business; that, under the circumstances, default in payment was sufficiently proved.

Held, also, that as the plaintiff had done nothing to assert his title or his right of possession from the time of the mortgage sale up to the issue of the writ of ejectment, a period of over fifteen years, and as defendant and those through whom he claimed had paid the taxes for over eleven years, and defendant was in actual possession before suit was brought, defendant had, under the Statute of Limitations, acquired a good title to the land. Nonsuit entered.

Hagel, Q.C., and *J. D. Cameron* for plaintiff.

Howell, Q.C., and *Machray* for defendant.

DUBUC, J.] [April 2.

BURDETT *v.* CANADIAN PACIFIC RAILWAY CO.

Railway company—Common carrier—Negligence—Liability as warehouseman—Notice of arrival of goods—Reasonable time.

Appeal from County Court.

The plaintiff's claim was for the loss of goods shipped to him at Emerson over the defendants' railway, which were destroyed by fire while still in the car. The car arrived at noon on 30th June, 1893.

According to the evidence of the station agent who was called as a witness for the plaintiff, it was customary for consignees to take delivery of goods directly from the car and to remove them the same day as they arrived, and he only sent post-cards notifying them of the arrival of their goods to those who removed them themselves, but in the case of those who usually employed a drayman he only gave a verbal notice to either Brooks or Hill, the two draymen who did such work, "that there was some freight to be delivered." On this occasion he gave such a notice to Hill. It did not appear that the plaintiff had received the notice, but he had no reason to expect any other or better kind of notice. He was out of town that afternoon, and the fire took place during the following night. It was supposed that it originated in the furnace of the elevator, which was burned down, and the car standing near was also consumed.

The plaintiff claimed that the defendants were liable as common carriers; and, if not, that they had been guilty of negligence in placing the car so near the elevator and away from the freight shed. The judge of the County Court found the defendants guilty of negligence, and entered a verdict for the plaintiff.

Held, that under the circumstances the customary verbal notice to the drayman was sufficient notice to the plaintiff of the arrival of the goods, and that a reasonable time had elapsed for such notice to reach the plaintiff and for him to remove the goods; that the transitus was at an end, and the liability of the defendants as common carriers had ceased; and that the fire took place after

this, and the evidence did not warrant the finding that the defendants had been guilty of negligence in leaving the car where they did; they were not liable for the loss of the goods in question.

Appeal allowed with costs.

Forrester for the plaintiff.

Aikins, Q.C., for the defendants.

Full Court.] [April 4.

SIMPSON *v.* STEWART.

Devolution of Estates Act—Proof of executors' title in ejectment—Probate sufficient evidence of will—Evidence of death—Evidence of identity.

This was an action of ejectment tried at the last Fall Assizes at Portage la Prairie. The plaintiff claimed title under a patent from the Crown to Alexander Smith, who lived in Scotland, and died there in 1891, and under his will, which made the plaintiffs his executors, and of which ancillary probate had been granted by the Surrogate Court here.

The plaintiffs produced the patent and the probate, and gave some oral evidence of the identity of the patentee with their testator, and of their own identity, and of the death of the patentee. The defendant claimed under a tax sale deed which he put in and by length of possession, but no other evidence to support these claims were given, and his counsel relied on his objections to the plaintiffs' evidence. These objections were as follows:

(1) That in an action of ejectment the plaintiff claiming under a will must produce and prove the original will or a properly certified copy of it, and that it was duly executed so as to pass real estate.

(2) That sufficient evidence had not been given to prove the identity of the patentee, and of the executors and the death of the patentee.

Plaintiffs had a verdict, and the defendant appealed.

Held, that the Devolution of Estates Act, R.S.M., c. 45, s. 21, taken together with the Manitoba Wills Act, R.S.M., c. 150, s. 20, and the Surrogate Courts Act, R.S.M., c. 37, ss. 17, 18, 20, and 22, have made such a change in the old law that the probate of a will is the necessary and only admissible evidence of the title of the executors claiming in ejectment. The statute vests the land in the "personal representative" as such, and the executors are not clothed with that character until probate is granted to them.

Held, also, that slight evidence of identity of the parties in such a case will be sufficient when the names are identical, and that the evidence given in this case was ample.

Appeal dismissed with costs.

Perdue for plaintiffs.

Howell, Q.C., *J. D. Cameron*, and *James* for defendant.

TAYLOR, C.J.] [April 9.

MCMILLAN *v.* WILLIAMS.

Statute of Frauds—Title to land—Jurisdiction of County Court—Pleading.

Appeal from the County Court of Deloraine.

The plaintiff's claim was for a balance of purchase money of real estate sold under a verbal agreement.

The defendant had paid $200 cash, and was to pay the remaining $100 when plaintiff furnished the title.

There was a dispute between the parties as to the nature of the title which defendant was to accept for part of the property.

In his dispute note defendant denied his indebtedness, and also set up his version of the agreement, and that the plaintiff had not completed the title. He also claimed that the County Court had no jurisdiction.

At the trial plaintiff proved that he had furnished the title he had agreed to furnish according to his version of the agreement; but defendant gave evidence in support of his version of it.

Plaintiff had a verdict for the full amount of his claim and interest thereon.

Held, that to oust the jurisdiction there must be a *bona fide* dispute as to a matter of title; and as the County Court judge had found a verdict for plaintiff, it must be assumed that he had decided that there was no *bona fide* dispute as to any question of title, and the appeal as to this point failed; but,

Held, also, that the appeal must be allowed with costs, on the ground that there was no agreement in writing signed by the defendant on which he could be sued for the purchase money of land, although the deed had been delivered; that this objection was open to defendant under his defence of "not indebted," although it did not appear whether it had been raised at the trial or not.

Cocking v. *Ward*, 1 C.B. 858; *Foster* v. *Reeves*, (1892) 2 Q.B. 255, followed.

Haggart, Q.C., for the plaintiff.

Patterson for the defendant.

TAYLOR, C.J.] [April 11.

WARK *v.* CURTIS.

Demurrer—Contract under seal signed by one partner in firm's name without authority from the other partner—Parties to action—Breach of warranty as to authority.

The defendant demurred to the third count of the plaintiff's declaration, which set out an agreement under seal between Martin & Curtis, of the one part, and David Wark, of the other part, whereby Wark agreed to cut and saw into lumber the timber on certain parcels of land, and Martin & Curtis agreed to pay therefor on certain terms, that the defendant executed the agreement in the firm name of Martin & Curtis, of which he was a member, but had no authority from Martin to use his name in making and executing it, of which want of authority Wark had no knowledge, but that the defendant acted therein on his own authority only; also that Wark performed a large part of

the work to be done, and was always ready and willing to complete the contract on his part, but that the defendant had not paid for the work done which he accepted, and has without cause refused to allow Wark to continue the work and complete the contract, and has prevented and discharged him from the further performance and completion of the same. An assignment of the agreement to the plaintiff was then alleged, and $2,000 damages claimed under the court.

Joseph Martin, for defendant, contended that the plaintiff's only remedy under the circumstances alleged would be an action of deceit for damages for the breach of an implied warranty that defendant had the authority of Martin to enter into the contract, and that any action on the contract would have to be against both partners.

Hagel, Q.C., for plaintiff.

Held, that the defendant could not be sued alone upon such contract, and since upon the facts alleged Martin was not liable upon it the plaintiff's only remedy would be an action for damages for breach of the implied warranty as to authority.

Elliot v. *Davis*, 2 B. & P. 338, distinguished.

Semble: If the contract had not been under seal, defendant might have been sued alone upon it.

Pollock on Contracts, 103; Lindley on Partnership (5th ed.), 282.

Appointments to Office.

SUPREME COURT JUDGE (NEW BRUNSWICK).

James Alfred Van Wart, of the City of Fredericton, in the Province of New Brunswick, Esquire, one of Her Majesty's Counsel learned in the Law, to be a Puisné Judge of the Supreme Court of the Province of New Brunswick, *vice* the Honourable Mr. Justice Palmer, resigned.

COUNTY COURT JUDGES.

County of Peel.

Duncan McGibbon, of the Town of Milton, in the County of Halton, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-law, to be Judge of the County Court of the County of Peel, in the said Province of Ontario, *vice* His Honour Judge A. F. Scott, resigned.

Duncan McGibbon, Esquire, Judge of the County Court of the County of Peel, in the Province of Ontario, to be a local Judge of the High Court of Justice for Ontario.

CORONERS.

County of Kent.

Anthony Rayburn Hanks, of the Town of Blenheim, in the County of Kent, Esquire, M.D., to be an Associate-Coroner within and for the said County of Kent.

County of Middlesex.

Malcolm McIntyre, of the Town of Strathroy, in the County of Middlesex, to be Bailiff of the Sixth Division Court of the said County of Middlesex, in the room and stead of T. O. Currie, resigned.

County of Bruce.

John Haughton Gimby, of the Town of Wiarton, in the County of Bruce, Esquire, M.D., to be an Associate-Coroner within and for the said County of Bruce.

County of Ontario.

Hugh Smith Bingham, of the Village of Cannington, in the County of Ontario, Esquire, M.D., to be an Associate-Coroner within and for the said County of Ontario.

BAILIFFS.

County of Essex.

John S. Middaugh, of the Village of Kingsville, in the County of Essex, to be Bailiff of the Third Division Court of the said County of Essex, in the room and stead of George Malott, resigned.

Obituary.

MR. W. A. REEVE, Q.C.

As we go to press we learn, with much regret, of the sudden death of Mr. William Albert Reeve, Q.C., Principal of the Law School in connection with the Law Society of Upper Canada. His death, at the age of 52, was very sudden, resulting from heart disease.

Mr. Reeve was a graduate of the University of Toronto, and was subsequently a student in the office of Mr. Stephen Richards. In 1864 he commenced practice in Napanee, and was for many years County Crown Attorney for Lennox and Addington. In 1882 he removed to Toronto, entering the firm of Beatty, Chadwick, Thomson & Blackstock. In 1884 he commenced practice again on his own account. In 1889 he was chosen by the Benchers as Principal of the Law School, then being reconstructed.

Mr. Reeve was a great favourite with the students, and did the responsible work assigned to him as head of the Law School with zeal, intelligence, and industry, and to the entire satisfaction of the Bench, who will have great difficulty in finding one so competent for the vacant position. He was a thorough lawyer, with the faculty of imparting what he knew to the students. His strong point was his intimate knowledge of criminal law, and in this branch of the law he had few in this Province to equal him.