Canada Law Journal.

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DIARY FOR FEBRUARY.

1. Thu.. Examination for Call and Second Intermediate.
2. Fri.... Examination continued.
4. Sun... *Quinquagesima Sunday.*
5. Mon.. Hilary Sittings begin.
6. Tue .. Hagarty, C.J., C.P., sworn in, 1856.
7. Wed .. Ash Wednesday.
9. Fri.... Queen Victoria married, 1840.
10. Sat ... Lord Sydenham Gov.-General of Canada, 1840. R. E. Caron Lieut.-Gov. Quebec.
11. Sun... *Quadragesima Sunday.*
12 Mon.. Last day to move against Municipal Elections.

TORONTO, FEB. 1, 1883.

THE large increase of business in the Court of Chancery is partly shown by the fact, as stated by Mr. Justice Taylor on the occasion hereafter referred to, that in the first twenty years of the existence of the Court of Chancery there were ten volumes of decrees and orders, whilst in the next twenty years there were fifty volumes, many times larger in size, used for similar purposes; and that as to the amount of money in Court, there was an increase from about $150,000 to $3,000,000 in the space of sixteen years.

MR. JUSTICE TAYLOR now makes the third occupant of the Bench who had previously filled the office of Master in Chancery, the other two being the present Chief Justice of Ontario, who held the office from 1837 to 1850, and the present Chancellor of Ontario, who held the office from 1870 to 1873. Both the Chief Justice and Mr. Justice Taylor were promoted directly from the Master's office to the Bench, but the Chancellor had resumed practice at the Bar prior to his elevation.

Considering that there have been but four Masters in Chancery since the office was established, and three of them are now occupants of the Bench, the office of Master of the Supreme Court into which it has been merged, may, perhaps, not unreasonably, be looked upon as a stepping stone to the Bench.

WHERE the judiciary is elective and a man is one day a judge and the next an advocate, it is necessary, we presume, that the temporary occupant of the judicial chair should, so to speak, "keep his hand in" by an occasional rhetorical flight such as is known to be dear to the average American citizen. It is also a comfort to a precedent abiding profession to know that though they may throw themselves away by going on the Bench, they have still "authority" for such bursts of eloquence as that of Speer, J., of the Supreme Court of Georgia, in a case which we find reported in a recent number of the *Central Law Journal.* The question was as to compensation to an owner of land by a railway company precedent to occupancy by them for railway purposes. The learned judge thus concludes his judgment:—

"Here is the home of a man venerable in age, in which he has resided with his family for thirty-eight years, planted by the side of the limpid stream, whose waters he utilizes as they flow. He has gathered around him by industry and toil the fruits and flowers of the season, the comforts and conveniences of a well-arranged and much-loved homestead. Around it cluster the memories of a lifetime, treasured in common with those who have grown under his care from infancy to manhood and womanhood under its broad and protecting shadows. In it he was gently descending to old age, loving that quiet and seclusion to which the heart of the old so strongly cling. But the spirit of the age demands this homestead for its iron track upon which its iron steeds may travel to meet the alleged necessities of trade and travel, or to extend their corporate power and dominion. If the beauty

of this homestead is to be invaded and marred, its comforts to be imperiled and its sweet quiet and seclusion to be broken upon with ringing bells, shrieking whistles and thundering trains—let the corporation, in the language of the Constitution, 'first pay adequate compensation to the owner thereof.' Judgment reversed."

MR. JUSTICE TAYLOR AND THE ONTARIO BAR.

On the 22nd ult. an interesting event took place at Osgoode Hall, consisting of the presentation to Mr. Justice Taylor, the former Master in Ordinary of the Supreme Court, of an address from the Toronto Bar, accompanied with a handsome silver tea service and judges' robes, etc. In the absence from Toronto of the treasurer of the Law Society, Mr. D. B. Read, Q.C., presided. After a few words of congratulation by the chairman to the new judge, and of regret at losing him, the following address was read on behalf of Bar by Mr. Charles Moss, Q.C.:—

"To the Honourable Thomas Wardlaw Taylor, Justice of the Court of Queen's Bench for Manitoba:—

DEAR SIR,—The members of the Toronto Bar here assembled congratulate you on the well earned promotion which, while it will give a judge to the Bench of a sister Province, will deprive Ontario of an officer whom it has been our pleasure to see filling important positions in our Courts for more than sixteen years.

We but state what is well known when we say that the advanced and satisfactory condition of that branch of the Courts with which you were connected, is, to some considerable extent, to be attributed to your judgment, learning and activity.

Nor will you, in leaving us, cease to observe the effect of the work done by the learned judges of our Courts and your own efforts, but will find in Manitoba a Bar trained, to a large degree, in Ontario, and not unfamiliar with the publications which bear your name as author or editor.

We congratulate you on having as a brother judge and chief of the Court, the Honourable Lewis Wallbridge, most worthily called from the Ontario Bar. Nor can we forget that it was from this Bar that his late predecessor was chosen, whose noble work, ending only with his life, was to establish British law over that vast territory where justice, with strong arm and firm voice, 'drills the raw world for the march of mind.'

In bidding farewell we pray that a long and successful career may be yours, and that happiness may attend you and your family.

As some token of remembrance and esteem we beg your acceptance of the accompanying articles. Signed, etc."

Mr. Taylor replied in suitable terms. In the course of his remarks he referred to the most pleasant intercourse which had always existed between himself and the Bar, as well as the other officers of the Court with whom he had been brought in contact, and gave an interesting retrospect of various changes at Osgoode Hall since he had first gone there as an officer of the Court. Reference was also made to the honour he felt at being enrolled in the list of those who have upheld the dignity of our Bench, and to the fact that three Chief Justices of Manitoba had been taken from the Ontario Bar. A large number of the Bar and many personal friends of Mr. Taylor, as also the Chancellor and Mr. Justice Ferguson, were present on the occasion.

NEW ADMINISTRATION OF JUSTICE ACT.

A bill has been introduced at the present session of the Legislative Assembly of Ontario, which requires more than passing notice. The first few sections are devoted to providing for the appointment and duties of an additional judge to the Court of Appeal, who shall assist especially in the work of the Chancery Division when his duties as a justice of Appeal permit. More judicial help is certainly required in the west wing, and things are not in a satisfactory state in the Court of Appeal. As to the appointee (should the bill become

law) we presume some one will be found to fill the position. But the time has gone by unfortunately, thanks, we suppose, to a spirit of false economy or some imagined political necessity, when the Government of the day can command, at the present miserable pittance given to judges, the best talent at the Bar for seats on the Bench.

Section 6 of the above Act is of rather a surprising character, and the more so as the Bill is introduced by the Attorney-General. The section reads as foliows :—

"When in any civil suit or any proceeding in regard to which this Legislature has authority to enact, as hereinafter mentioned, the constitutional validity of any Act of the Parliament of Canada or of the Legislature of Ontario comes into question, the same shall not be adjudged to be invalid *until after notice thereof has been served on the Minister of Justice and the Attorney-General of Ontario*, or at their office respectively."

This notice is to give full information as to the suit, and when it is to be heard, and is to be served six days before the argument, and the Attorney-General is to be entitled then to be heard as of right.

With all due deference it appears to us that there is some question as to the constitutionality of the above enactment, while there seems no question at all as to its practical expediency. No doubt it will be said that it relates merely to a matter of practice, and so is *intra vires*; but what power has the Local Legislature to enact that a judge shall not declare an Act *ultra vires*—say a Dominion Statute—simply because one of the parties has not given a certain notice? What is the Court to do if the question of the validity of an Act comes up in a case and no such notice has been served? Is the invalid Act in such case to be acted upon as though it were valid? If it is *ultra vires* it is illegal, and is as though it had never been passed, yet this Bill apparently contemplates such an Act being enforced by the judges in such cases as we have supposed. If, on the other hand, this is not intended, is the Court, in a case in which the question of the validity of an Act comes before it, (as it may often do incidentally and in an unforseen manner,) to forthwith adjourn the further hearing until the required notice is served? What if such a question arises at *nisi prius*? The directions of the judge to the jury may often be greatly affected by the question of the validity or invalidity of a Statute arising in an action. Supposing, in such case, no notice had been served, is the trial to be forthwith adjourned, the witnesses and parties detained, and costs indefinitely increased, in order that the six-days notice may be served?

We admit, if it were possible or could be so arranged, that it would be very desirable that the Crown should be represented on any argument as to the "constitutional validity" of an Act of either Legislature, but we confess we see no way to get over such difficulties as we have suggested. It would of course be possible to provide that the Crown should pay any extra expense incurred, but that is only a minor detail. We trust this measure will not be passed without full consideration.

RULES OF COURT.

There is one matter, in which it may be doubted whether the changes wrought by the Judicature Act have proved beneficial, and that is with regard to the power to frame Rules of practice.

Prior to the Act, the Judges of the Superior Courts of law, or any four of them, of whom the Chief Justices must have been two, had power to frame rules of practice for the Common Law Courts, and the Court of Chancery had like power with regard to making rules of practice for that Court.

Of course this system which in practice had worked excellently before the Act, could not be suffered to continue after the practice of these Courts had been assimilated. To have continued it, would inevitably have led very

soon to the creation of differences in practice, which the aim of the Act was not only to abolish, but prevent in future.

While, however, it is plain that it would have been in the highest degree inexpedient to have permitted each Division to frame rules for its own particular Division, there may be a question whether the scheme which has been adopted is the best that could have been devised.

As we read the Judicature Act there are three, and there may be four, rule-making bodies. *First*, under section 54, ss. 1: The Chief Justices, the Chancellors and the Justices of Appeal, or a majority of five of them, and a majority of the puisne judges of the High Court may together make Rules; under this section, there must be at least nine judges concurring, of whom five, as we have said, must be taken from among the Chiefs, the Chancellor, and the Justices of Appeal. *Second*, under section 54, ss 5: the Chief Justice of Ontario, and the Justices of Appeal, or a majority of them, may make rules and orders for the Court of Appeal; *Third*, under the same sub-section: The Judges of the High Court, as regards matters in the High Court, have all the powers which the Judges of the Court of Chancery, and the Superior Courts of Law formerly had, for the regulation of the practice of those Courts. *Fourth*, under sec. 55, the Lieutenant-Governor in Council may authorize the Chief Justices and the Chancellor to make rules.

The first and fourth mentioned bodies are, it would seem, intended to make Rules for the Supreme Court. The second of them has power merely to make Rules for the Court of Appeal; and the third would seem to have power merely to make Rules for the High Court of Justice, or any Division thereof.

With regard to the power of the Judges of the High Court to make Rules, it seems somewhat doubtful how it must be exercised. The former power to make rules for the Superior Courts of Law, we have seen, was vested in the Judges of those Courts, or a majority of them, of whom the Chief Justices must have been two (R. S. O. c. 49, s. 45), and in the case of the Court of Chancery, the power was vested in the Court of Chancery *eo nomine*. The effect of the 5th sub-section of section 54, is, apparently, simply to vest in the whole body of Judges of the High Court (not a mere majority of them), the powers formerly vested in the Judges of the Superior Courts of Law, and the Court of Chancery for making rules.

It may, therefore, be a question whether in order validly to frame rules for the High Court of Justice, it is not necessary that all the Judges of the High Court should concur.

With regard to Rules of the Supreme Court, it seems clear that there must be at least nine Judges concurring, of whom five must be taken from among the Chief Justices, the Chancellor, and the Justices of Appeal. If this be correct, then a question naturally arises what is the effect of Rules which are purported to be promulgated as Rules of the High Court and Supreme Court respectively, which have, apparently, not received the sanction of the necessary number of Judges.

The Rules of the High Court of 22nd and 25th August, 1881, were not sanctioned by all the Judges of the High Court, Proudfoot, J., being absent on the 22nd, and Proudfoot and Armour, JJ., being absent on the 25th. Then, again, the Rules promulgated as Rules of the Supreme Court, passed on the 17th March, 1882, did not receive the sanction of the necessary nine Judges, nor yet were there present a majority of five Judges taken from the Chief Justices, the Chancellor, and Justices of Appeal: the Chief Justice of the Q. B., and the Chancellor, and Burton and Patterson, JJ.A., alone being in attendance.

Thirteen Judges, or even the minimum number of nine, we think, are rather too many to dispose efficiently of matters of this kind. And we believe it is an open secret that there

is often great difficulty in securing harmony of opinion as to any proposed new Rule.

Nor do we think this is to be wondered at, when we remember the different systems of practice and the different legal traditions to which the various members of the body of Judges have been accustomed in the past. The Equity section naturally look with fondness on their former practice, and would fain see any further additions or changes in the practice tending in that direction; while the Common Law section naturally enough have predilictions in favour of the old Common Law methods, with which they are more familiar. The natural result is a want of unity of purpose. But for this, a new tariff of disbursements, adapted to the practice under the Judicature Act which is urgently needed, and which, we believe, has been a long time in process of incubation, would have been hatched before this. There is a further objection to the present system, arising from the difficulty in getting so large a body of Judges together for a sufficient time for the purpose of the necessary consultation and deliberation. This must always prove a source of delay in passing necessary rules under the present system.

Not only is there a difficulty about getting Rules passed, but there seems an equal difficulty in getting them published. It is an old saying that "what is everybody's business is nobody's business," and we fear this has something to do with this matter. In England we see that the task of making new Rules has been delegated to a committee of Judges, and until some such system is adopted in Ontario, we do not believe that the making of new Rules will ever be satisfactorily accomplished. The ideas of individual judges, like those of ordinary mortals, are sometimes crude, and need the friction of other minds to reduce them to practical working. But this needful attrition of mind could be exercised just as efficiently by the rule-making body being reduced to three or four individuals.

Another advantage of the method we suggest, would be that more regard would be had to the system of practice established, or to be established under the Judicature Act as a whole, and there would be less danger of crude suggestions of individuals passing into Rules of Court without proper deliberation, or thorough understanding of all their bearings.

We are also inclined to think that a standing committee of this kind might, from time to time, receive valuable suggestions both from the members of the profession, and from the officers of the Court who are practically engaged in working the Act, and who are often more familiar with defects, and the best mode of remedying them, than any Judge can be.

We doubt very much whether the system provided for by section 55 of the Judicature Act will be found to work satisfactorily in practice. The qualities necessary for the position of a Chief Justice, or Chancellor, do not necessarily include the qualification for making Rules of practice, and we are inclined to think a selection by the Judges themselves of a small number from their own body, of those best adapted for this kind of work, would be found more satisfactory.

LAW SOCIETY.

MICHAELMAS TERM, 46 VICT., 1882.

The following is the *resume* of the proceedings of the Benchers during Michaelmas Term, published by authority:—

During this term the following gentlemen were called to the bar, namely:—Alfred Henry Clarke, Joseph A. Culham, Alexander Armstrong Hughson, Charles Edward Jones, Edward Robert Cameron, Frederick W. A. G. Haultain, George Benjamin Douglas, James William Elliott, John McSweyn, James Pitt Mabee, W. R. Cavell, Henry Bogart Dean, Frederick E. Redick, John Christie, Thomas P. Coffee, William Reginald Armstrong.

The following gentlemen received certificates of fitness, namely:—R. S. Cassels, J. C. Delaney, E. R. Cameron, A. H. Clarke, James Thompson, A. A. Hughson, A. Foy, J. W. Elliott, F. H. King, G. B. Douglas, T. P. Coffee, F. W. A. G Haultain, A. E. W. Peterson, J. Christie, C. McVittie, L. E. Dancy, E. A. Lancaster.

The following gentlemen passed their first intermediate examination:—A. Carruthers (1st scholarship), J. A. Valin (2nd scholarship), A. H. Coleman, G. Wall, T. C. Milligan, F. R. Powell, H. F. Jell, A. McKellar, A. M. Dymond, W. E. McKeogh, P. H. Simpson, R. J. Dowdall, H. Morrison, C. R. Atkinson, A. E. Kennedy, J. E. O'Meara, A. G. F. Lawrence, S. D. Biggar, A. Skinner, D. Alexander, and J. Douglas.

The following gentlemen passed their second intermediate examination, namely:—D. K. McKinnon, J. Gordon Jones, F. H. Phippin, J. W. Delaney, W. J. Thurston, W. T. Allan, J. A. McIntosh, W. A. Proudfoot, R. A. Coleman, W. S. Murphy, A. W. Murphy, Wm. Cook, G. Bolster, S. T. Scilly, A. Carswell, J. E. Bullen, F. M. Yarnold, D. T. Symons, and J. B. Fischer.

Messrs. McKinnon, Phippen, and Delaney were awarded respectively the first, second and third scholarships; Mr. J. G. Jones was declared to be not eligible on the ground that he was a barrister-at-law.

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

GRADUATES.—John Edward Kennedy, David A. McMichael, Ernest Frederick Gunther, James Smith, John Ross, Archibald S. Campbell, Josiah James Godfrey, R. B. Beaumont, James Walker Shilton, Henry C. Fowler.

MATRICULANTS.—W. A. Bell, F. C. Payne, Alexander Patrick Macdonell, S. W. Carson, A. C. Paterson, W. L. M. Lindsay, James T. Doyle, H. Guthrie.

JUNIORS.—W. D. Gregory, G. N. Weekes, C. J. Atkinson, W. H. Easton, C. Fitch, W. P. Torrance, W. S. Hall, T. M. Bowman, T. A. Ayearst, and J. M. Musson.

ARTICLED CLERK.—Mr. J. M. Quinn was allowed his examination as an articled clerk.

Monday, Nov. 20th.

Present—The Treasurer and Messrs. Cameron, Martin, Ferguson, Bethune, Moss, Foy, Kerr, Mackelcan, Robertson, Read, Leith, Crickmore, Maclennan, J. F. Smith, L. W. Smith, Hoskin, Bell, Britton, McMichael, Murray, McCarthy, Irving.

Mr. Maclennan, from the Reporting Committee, presented their report, recommending that one reporter only be appointed, at an increased salary, to report the Practice Cases.—Adopted.

A rule carrying out the above report was read a first time and was ordered for a second reading on the 21st instant.

Mr. Maclennan laid on the table the returns of the reporters.

Mr. Robinson's letter on the subject of the Triennial Digest was referred to the Reporting Committee, with instructions to report to Convocation.

A letter from Judge Benson was received, resigning his seat as a Bencher.

Messrs. Read, Martin and Moss, were appointed a Committee to enquire and report what, if any, vacancies have occurred on the Bench by non-attendance or otherwise.

The Report of the Finance Committee, recommending a case as to the legality of the By-law refusing discount on water rate on exempted properties, was adopted.

In answer to the communication from the Mayor of Toronto, Messrs. Read and J. F. Smith were appointed delegates to represent the Law Society upon the Semi-Centennial Celebration Committee.

Mr. J. McWhinnie's petition was granted.

The letter from Mr. James B. O'Brian preferring a charge against a solicitor was read, and referred to the Discipline Committee.

Mr. Moss presented report of Committee on Vacancies.

Ordered, that a Call of the Bench be made for Friday, Dec. 1st, for the election of two Benchers, in the room of Messrs. Benson and Lemon, whose seats are vacated.

Mr. Leith was appointed to the Legal, Education, and Discipline Committees.

Tuesday, Nov. 21st, 1882.

Convocation met.

Present—The Treasurer, and Messrs. Irving, Hoskin, Crickmore, Ferguson, Foy, Kerr, J. F. Smith, Leith, Martin, McCarthy, MacKelcan, Murray, Read, Britton, Bethune, Maclennan, Robertson, Beaty, Pardee, Cameron, and Moss.

Mr. Leith was added to the Library Committee.

On motion of Mr. Crickmore, the last clauses of the Report concerning Mr. Knapp's case were adopted.

Mr. Crickmore moved for leave to introduce a rule based on the said clauses.

The rule was read a first time, and ordered to be read a second time on Saturday, 25th inst.

Mr. Crickmore moved to postpone the election of Examiners to next Easter Term.—Carried.

Mr. Read, pursuant to notice, moved, seconded by Mr. Murray, That it be an instruction to the officers of this Society, that if they have any complaint to make, or grievances they wish redressed, the proper course is to bring the same before Convocation, by memorial or petition, in order to their investigation by Convocation.—Unanimously carried, and ordered to be entered on the journals

Mr. Crickmore moved the adoption of the Report of the Committee as to Leith's "Williams on Real Property."

Mr. MacKelcan moved in amendment, that the words "Leith's Edition" be inserted after the words "Real Property, Williams" in the curriculum, which was adopted.

The letter of W. E. Grace, complaining of the conduct of a solicitor was read, and referred to the Discipline Committee.

The rule as to the appointment of a Practice Reporter, was read a second and third time, and passed.

Mr. T. T. Rolph was appointed Practice Reporter.

Law Society.

Mr. Foy gave notice that he would on Saturday next, the 25th inst., move that a committee be appointed to consider some means of putting an end to unlicensed persons acting as conveyancers, and conducting proceedings for sale under powers contained in mortgages; also to consider means to prevent persons who are not barristers-at-law from appearing as agents or advocates in those cases in the Division Court which were not within the jurisdiction of such Court prior to the Division Courts Act, 1880.

Saturday, Nov. 25, 1882.

Convocation met.

Present—The Treasurer, and Messrs. Maclennan, Read, Crickmore, Murray, J. F. Smith, Leith, Foy, Bethune, Ferguson.

The Rule as to applicants for Certificates of Fitness of the class contemplated by section 3 of chap. 140 of the Revised Statutes of Ontario, was read a second and third time, and passed.

On motion of Mr. Murray, the rule amending Rule No. 126 was read a second and third time, and passed.

On motion of Mr. Foy, moved pursuant to notice given last day, Messrs. Britton, Hoskin, L. W. Smith, Bethune, J. F. Smith, were appointed a committee to deal with the matters mentioned in the notice.

Mr. Murray moved, pursuant to notice, to introduce a by-law to establish a fund for the benefit of the widows and orphans of barristers, attorneys, and solicitors, to be called the Law Benevolent Fund.

Mr. Maclennan moved in amendment that the subject of the establishment of such a fund be referred to a select committee, composed of Messrs. Murray, Read and the treasurer.—Carried.

Mr. Maclennan, from the Reporting Committee, presented the Report of the Committee, which was received and read.

Friday, Dec. 1st, 1882.

Convocation met.

Present—The Treasurer, and Messrs. Crickmore, Martin, Hoskin, Murray, Irving, Britton, Read, J. F. Smith, Moss, Foy, MacKelcan, McCarthy, Cameron, L. W. Smith, McMichael.

Mr. Hoskin, from the Committee on Discipline, on the charge made by Mr. O'Brian against a solicitor, reported that a *prima facie* case had been made for enquiry.

The Report was read and received, ordered for immediate consideration, and adopted.

Ordered, that the charge made, and the papers connected therewith, be referred to the Discipline Committee to enquire into and report thereon in the customary manner.

On motion of Mr. Irving, seconded by Mr. Crickmore, Ordered that Mr. Walter Read be appointed Solicitor to the Society.

Adam Hudspeth, Q.C., was elected a Bencher in place of T. M. Benson, Q.C. Mr. Guthrie, Q.C., was elected in place of Mr. Lemon.

Mr. Britton on his notice of motion for the day, moved that the subject of completing the furnishing of the Sociey's rooms be referred to the Finance Committee, with power to act.—Carried.

The seventh clause of the Report relating to the triennial digest was adopted.

Mr. Guthrie took his seat as a Bencher.

Saturday, Dec. 9th, 1882.

Convocation met

Present—The Treasurer, and Messrs. Crickmore, Murray, Ferguson, Irving, Moss, J. F. Smith, Maclennan, Foy, Read, Cameron, McMichael, and Bethune.

Mr. Crickmore presented the Report of the Legal Education Committee on the subject of the examinations, which was received and read.

The Report was ordered to be considered clause by clause.

The Report was adopted.

Mr. Crickmore moved for leave to bring in a rule based on the Report.

Ordered accordingly.

The rule was read a first time.

Ordered for a second reading at the next meeting of Convocation.

Mr. Crickmore moved that the examiners be instructed to act on the said Report at the next examinations as to the conduct of the next examinations in all respects save as to the times at which they are to be held, these to remain for next term as at present.

Ordered accordingly.

Mr. Moss presented a report from the committee on the reference as to unlicensed conveyancers, etc., which was received and read, and ordered for immediate consideration.

Mr. Read moved that the further consideration of the report be adjourned until the next meeting of Convocation.—Carried.

Mr. Crickmore, from the Committee on Legal Education, reported on the petition of Charles Seager for leave to go up for his Certificate of Fitness, recommending that his service be allowed.

The report was ordered for immediate consideration.

Mr. Murray moved that it be referred to the Legal Education Committee to enquire into the circumstances under which Mr. Seager has been practising since the expiration of his Articles, and that the consideration of the report be adjourned.—Carried.

On the consideration of the 6th clause of the report of the Reporting Committee touching the proposed advance to Mr. Hodgins,

Ordered, that it appearing that four parts (being within 80 pages of the whole work) have been issued and distributed, two thousand dollars be advanced to Mr. Hodgins as soon after the first of January as funds are available.

Mr. Moss moved, seconded by Mr. Ferguson, that Mr. Guthrie be appointed on the Legal Education Committee in the place of Mr. Lemon, and Mr. Hudspeth on the County

Library Aid Committee in the place of Mr. Benson.—Carried.

Tuesday, Dec. 26th, 1882.

Present—The Treasurer and Messrs. Crickmore, Read, Maclennan, Mackelcan, Foy, Murray, Martin, McCarthy, Irving, Moss, Bethune, J. F. Smith, Cameron.

The report of the Finance Committee of this date was adopted.

The report of the Library Committee of this date was read as follows and was adopted :—

REPORT.

The whole expenditure on Library account for the year 1881 amounted to $3,625.49.

The whole expenditure on same account for the current year, up to 15th December, 1882, amounts to $2,130.78, and up to 31st December instant, the accounts to be paid and not yet presented will not, it is expected, make the expenditure for this year beyond $2,800 in the whole.

The Committee beg leave to bring to the notice of Convocation the continued generosity of Mr. Nathaniel C. Moak, Councillor-at-Law, Albany. The Library has been supplied by him with a copy of his valuable series of English Reports, now numbering thirty volumes, which themselves can only be purchased at a cost of $180, and he continues to forward to the Society a volume from time to time as published, and he has also presented his edition of "Underhill on Torts" to the Society, "Lowenstein's Trial," and some other works of interest.

The Committee have no doubt that Convocation will be prepared to acknowledge Mr. Moak's liberality suitably, nevertheless they have experienced some difficulty in suggesting the manner of doing so acceptably as well as appropriately.

Mr. Moak's library is so vast and complete that there are no additions required, and the Committee can only propose that the Secretary of the Society be directed to furnish Mr. Moak with a regular supply of the Ontario and Dominion Reports as issued from time to time.

The Library has been opened at night for the winter session since 1st November last.

The average attendance during Michaelmas Term has been 22 each night, and about 12 or 13 out of term.

The attendants are by no means the same persons every night, and the number of individuals who have participated in the use of the Library may be said to be about 72 since the first of November, of whom 18 are of the degree of barrister-at-law.

The Rule as to examinations was read a second time as follows ;—

From and after Hilary Term, 1883, the Primary Examinations shall commence on the Tuesday in the third week next before each term, instead of in the second week as at present provided.

2. From and after Hilary Term, 1883, the Intermediate Examinations shall be held in the second week next before each term, and the examinations for Call and Certificate of Fitness shall be held in the first week next before each term.

3. To entitle any candidate to go in for Honors, he must obtain the number of marks as at present provided by Rules 58 and 91, and those only who are students and in their regular years or course of study, are to be entitled to be passed with honors, unless in any particular cases Convocation shall see fit to award them.

4. To entitle any candidate to pass without an oral, he must obtain at least 55 per cent. of the aggregate marks obtainable upon the written examination papers ; and if he shall obtain not less than 50 per cent. of them, he shall be entitled to go in for an oral.

5. For the oral examinations each examiner shall prepare three questions (in addition to the papers already required of him), before the commencement of the written examinations ; and at least two examiners shall be present during the oral examinations. Any candidate who shall obtain 33 per cent. of the aggregate of the marks obtainable upon the oral, may be entitled to pass ; and those who pass on the orals are not to be ranked according to merit, but alphabetically.

6. Two examiners must, without fail, be present during the whole time of the written examinations for pass ; and before the printing the examiners shall meet and submit to each other the proposed questions to be given at each examination.

7. Before the examinations each examiner shall assign and mark a value to each question on his own papers ; and a copy of the questions so marked shall be returned to Convocation with the report ; and each examiner shall mark opposite to each answer to his own papers, in numbers, the value he shall assign to it ; and all the answers so marked shall be returned with the examiners' report, together with copies of the questions used on the orals.

8. The First Intermediate Examinations shall commence on Tuesday, at the hour and in the manner provided by sub-sections 2 and 5 of Rule 47. The results are to be declared at 12 noon on Wednesday. The orals to be held at 2 o'clock p.m. of the same day, and the results to be declared immediately after. The Honor Examinations to be held on Thursday.

9. The Second Intermediate Examinations shall commence on Thursday, at the hour and in the manner provided as aforesaid. The results are to be declared at 12 noon on Friday. The orals are to be held at 2 p.m. of the same day, and the results to be declared immediately after. The Honor Examinations to be held on Saturday, and the reports of the examiners upon all the Intermediate Examinations are to be sent to the Secretary on the following Monday.

10. The Examinations for Certificate of Fitness shall commence on Tuesday, and the Examinations for Call shall commence on Wednes-

day at the hour, and shall be conducted in the manner already provided, and the results of the examination for Certificate of Fitness are to be declared at 2 p.m. on Wednesday, the results of the Examination for Call are to be declared at 2 p.m. on Thursday. The orals for both Call and Certificate of Fitness are to be held at 2.30 p.m. on Thursday, and results are to be declared immediately after, and on Friday at 9.30 a.m., the Honor Examinations in connection with Call are to be held. The reports of the examiners upon the Examinations for Call and Certificate of Fitness, and for Honors in connection with Call, are to be handed in to the Secretary not later than 3 p.m. on the Saturday before Term.

11. A rota of elected Benchers shall be prepared by the Secretary, who is to notify two Benchers whose turn it is according to the rota to attend, or to provide a substitute to attend on one of the oral examinations, so that at least one Bencher may be present at each of the oral examinations.

12. All parts of existing rules inconsistent with this rule, are repealed in so far as they are inconsistent therewith.

The rule was read a third time, and was passed.

The report of the Committee on the subject of unlicensed conveyancers, agents for powers of sale and Division Court suits, the consideration of which was adjourned until to-day, was brought up.

Mr. Moss, Chairman of the Committee, reported a correspondence with the Attorney-General.

Mr. Murray moved that the report be amended by inserting the words "the second day of next Term," in lieu of the words "26th December inst.," which was carried.

Mr. Moss moved the adoption of the report as amended.

The letter from A. G. McMillan, from San Francisco, as to a certificate of standing, was read, also the draft certificate.

Ordered, that the seal be affixed to the certificate as amended.

Convocation adjourned.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

MCLAREN v. CALDWELL.

R. S. O. cap. 115, sect. 1—Construction of non-floatable streams—Private property.

Appeal from the Court of Appeal of Ontario, whereby a decree of the Court of Chancery in favor of the plaintiff, (appellant), was reversed. By the decree of the Court of Chancery the defendants, (respondents), were restrained from interfering with the plaintiff's user of certain streams where they pass through the lands of the plaintiff, and which portions of said streams where declared to be, when in a state of nature, not navigable or floatable for saw logs, or other timber, rafts and crafts.

On appeal to the Supreme Court of Canada on the question at issue between the parties, viz.:—Had the appellant the legal right to prevent, as he sought by his bill to prevent, the respondents driving their logs through his lands, and in doing so to utilize the improvements owned by him on and along the streams in question, or are those streams part of the public highway, and therefore open to the free use of the respondents in common with the appellant and the public generally?

Held, that the learned Vice-Chancellor who tried the case having determined that upon the evidence adduced before him, the streams, at the *locus in quo*, when in a state of nature, were not floatable without the aid of artificial improvements of one kind or another, and such finding being supported by the evidence in the case, the appellant had at common law the exclusive right to use his property as he pleased, and to prevent respondents from using as a highway the streams in question where they flowed through appellant's private property.

2nd. *Held* also, (approving *Boale* v. *Dickson*, 13 U. C. C. P. 337), that although, by 12 Vict. c. 87, sect. 5, it is enacted "that it shall be lawful for all persons to float saw logs and other timber, rafts and crafts down all streams in Upper Canada during the spring, summer and autumn freshets, etc.," such legislation (re-enacted by ch. 115, R. S. O. sect. 1,) extends only to streams as in their natural state would, without improvements during freshets, permit saw logs, timber, etc., to be floated down them, and that the portions of the streams in question, where they pass through appellant's land, were not within said ch. 115, R. S. O. sec. 1.

Decree restored.

Cameron, Q.C., *Dalton McCarthy*, Q.C., and *Creelman*, for appellant.

J. Bethune, Q.C., and *Church*, Q.C., for respondents.

THE QUEEN v. MEAL.
(Crown Case Reserved.)

Indictment—Misjoinder of counts—evidence.

An indictment contained two counts, one charging the prisoner with murdering M. I. T. on the 1st November, 1881; the other with manslaughter of the said M. I. T. on the same day. The Grand Jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

Held, (affirming the judgment of the Supreme Court of New Brunswick,) that the indictment was sufficient. The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death the prisoner had knocked his wife down with a bottle. She fell against the door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards, and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side.

Held, (affirming the judgment of the Court *a quo*), that there was evidence to leave to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner, and that the evidence of violence committed within a year was properly received.

Lash, Q.C., for appellant.

M'Leod, Q.C., for the Crown.

GRAND JUNCTION RAILWAY CO. v. COUNTY OF PETERBOROUGH.

Municipal by-law — Validity of — Remedy—Action at law and not by mandamus—34 Vict. c. 48 (O.)—Construction of.

This was an appeal from the Ontario Court of Appeal, reversing the rule of the Court of Queen's Bench granting a writ of *mandamus*, commanding the corporation of the County of Peterborough to issue debentures for $75,000 and interest, in accordance with the terms of a certain by-law respecting the said Grand Junction Railway Company and the Peterborough & Haliburton Railway, alleged to have been passed by the County Council, and adopted by the ratepayers. The Grand Junction Railway Company was amalgamated with the Grand Trunk Railway of Canada. The former railway not having been built within the time directed, its charter expired. In May, 1870, an Act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railroad Co., but gave it a slightly different name, and made some changes in the charter. On the 23rd November in the same year, the ratepayers of the defendant municipalities voted on a by-law to grant a bonus to the plaintiff company, construction of the road to be commenced before the 1st May, 1872. The by-law was read twice only. At the time when the voting took place on the by-law, there was no power in the municipality to grant a bonus. On the 15th February 1871, the Act 34 Vict. c. 48 (O.) was passed, which declared the by-law as valid as if it had been read a third time, and that it should be legal and binding on all persons as if it had been passed after the Act. On the same day of the same year, c. 30 was passed, giving power to municipalities to aid railways by granting bonuses. The 37 Vict., c. 43 (O.) was passed, amending and consolidating the Acts relating to the plaintiff company. Time for completion was extended by 39 Vict. c. 71 (O.).

Held, (1) that the effect of the Statute 34 Vict. c. 48 (O.), apart from any effect it may have of recognizing the existence of the Railway Co., was not to legalize the by-law in favour of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, therefore, the appellants could not recover the bonus from the defendant.

Per GWYNNE, J. (FOURNIER and TASCHEREAU, JJ., concurring).—That as the undertaking entered into by the municipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in which delivery of the debentures to trustees on behalf of the company, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is, in the Province of Ontario, by actions at law or in equity under the provisions of the statutes in

force there regulating the proceedings in actions, and not by summary process by motions for the old prerogative writ of *mandamus*, which the writ of *mandamus* obtainable upon motion without action, still is.

Appeal dismissed with costs.

C. Robinson, Q.C., and *H. Cameron*, Q.C., for the appellants.

Bethune, Q.C., and *Edwards*, for the respondents.

FRECHETTE v. GOULET.

(Megantic Election.)

Preliminary objections—Onus probandi.

In this case a petition was presented by the respondents complaining of an undue election and return for the County of Megantic at the last election for the House of Commons. The petition was met by preliminary objections, in which the sitting member alleged, *inter alia*, that the petitioners were not electors, nor qualified to vote at the election in question, etc. A day was fixed for the hearing of the preliminary objections at Arthabaska, when Mr. Justice Plamondon held that the *onus probandi* was on the defendant (present appellant), to support his preliminary objections, and no evidence being offered by either party, dismissed them with costs.

On appeal to the Supreme Court of Canada,

Held, (per FOURNIER, HENRY, and GWYNNE, JJ.,) following the practice adopted by the Superior Court of Quebec, sitting as an Election Court in the case of *Duval* v. *Casgrain*, that the *onus probandi* was on the party alleging preliminary objections.

Contra, RITCHIE, C.J., and STRONG and TASCHEREAU, JJ.

The Court being equally divided the appeal was dismissed without costs.

Crepeau and *Gormully*, for appellant.

Irvine, Q.C., for respondent.

GRANT v. BEAUDRY.

Action for false arrest against magistrate—Notice—C. S. L. C. ch. 101, sect. 1.

David Grant, who was the plaintiff in the first instance, was Grand Master of the Orange Order in Montreal during the troubles of 1877-78. As such he was arrested for disturbing the peace, and brought an action against Mayor Beaudry for false arrest.

The notice given by appellant's attorney to the respondent was as follows:—

To the Hon. J. L. Beaudry, Mayor of Montreal,

SIR,—We give you notice that David Grant of the City of Montreal, salesman and trader, will claim from you personally the sum of ten thousand dollars damages, by him suffered from the abuse made of your authority in causing his arrest illegally and for no cause on the twelfth day of July last (1878), and that unless you make proper amend and reparation of such damages within a month, judicial proceedings will be adopted against you. Yours, etc.,

(Signed) Doutre, Branchaud & McCord,
Advocates for Plaintiff

Montreal, 19th October, 1878.

The Superior Court dismissed the action for want of proper notice. This judgment was confirmed on appeal to the Court of Queen's Bench, (P.Q.,) but the Court went further, and stated that Grant was properly arrested, being a member of an illegal association.

On appeal to the Supreme Court of Canada,

Held, that the notice was insufficient, and that an expression of opinion as to the legality or illegality of the Orange association would be extra judicial and unwarranted.

Appeal dismissed with costs.

Doutre, Q.C., for appellant.

R. Roy, Q.C., for respondent.

CALDWELL ET UX. v. THE STADACONA FIRE INSURANCE CO.

Policy—Proofs of loss—Waiver—Estoppel—Insurable interest—Surrender.

This was an action upon a fire policy by appellant against respondent company. The policy was under seal, and purported to be effected in favour of the appellant Samuel Caldwell. It contained, however, a provision in the following words:—"Loss, if any, payable to George R. Anderson, Esq." One of the conditions provided that the company might require the policy "to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a ratable proportion for the unexpired term thereof of the premium received for the insurance." Another condition required particulars and proofs of loss within five days after such loss or damage has occurred. And another condition is in these words:—"None of the foregoing conditions or

stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement on the policy, signed by the manager of this company for Canada." The defences pleaded *inter alia*, that the amount of loss was payable to Anderson; that there had been a breach of condition requiring proof of loss to be delivered within five days: that the policy had been delivered up and cancelled, and the risk terminated. To the plea of non-delivery of proofs, plaintiff replied a waiver of the conditions in that respect, to which the defendants rejoined that the waiver was not in writing as required by the conditions.

The policy was issued on the 10th August, 1875, and while in force the appellants conveyed the property on which the insured building was erected, to one T. B. in fee, who on the next day conveyed the same to the appellant Sarah C. Caldwell in fee. On 30th June, 1877, the respondent's agent at Halifax, sent to Anderson, who held the policy for his security as mortgagee, a circular to the effect that the company had cancelled the policy, adding that "the unearned premiums will be returned hereafter." Anderson handed the policy to the agent, who was also agent for the Western Assurance Company, telling him he wanted to be insured in that company, and the respondents from that date held it, or until it was produced by them on the trial. The unearned premium was not returned or offered to be paid. While in this position the fire occurred. At the suggestion of the agent, the putting in of proofs was deferred, to allow him to communicate with his head office, and ultimately they were furnished, and received with objection, and retained by the agent. Plaintiff got a verdict for $4,000 and interest. The Supreme Court of Nova Scotia on a rule *nisi* to set aside the verdict, made it absolute on the ground that though a waiver of the requirements of the ninth condition as to delivery of proofs of loss within five days had been sufficiently made out, if parol evidence had been admissible, yet that the twelfth condition requiring waiver to be expressed in writing by endorsement on the policy applied, and there had been no such waiver in writing.

On appeal to the Supreme Court, in addition to the defences above stated, it was urged that the appellant Caldwell had not, at the time of loss, an insurable interest in the property by reason of his change of interest arising from the alienation in favour of his wife by means of the conveyance to B., and the reconveyance to the latter.

Held, (1) (reversing the judgment of the Supreme Court of Nova Scotia), that as the agent of the company had requested the respondent to delay putting in the proofs of loss, the company were estopped from setting up as a defence the 12th condition requiring that a waiver of condition No. 9 should be in writing.

(2) That although the insured, during the currency of the risk, had alienated his interest in the property insured, still at the time of the loss he had such an interest by reason of being seised of an estate in fee simple in right of his wife, as to entitle him to recover.

FOURNIER, J., dissenting, on the ground that the sending of the circular by the company, and the compliance with the terms of the circular by the assured by giving up the policy to the company's agent, had effected a surrender.

Appeal allowed with costs.

Gormully, for appellant.
Casgrain, for respondent.

FARMER v. LIVINGSTONE.

The Dominion Lands Act, 35 Vict. c. 23, sec. 33, sub-sects. 7 and 8—Patent, validity of—Bill—Equitable or statutory title—Demurrer.

This was an appeal from a judgment of the Court of Queen's Bench (in Equity) for the Province of Manitoba, reversing on re-hearing the judgment of Mr. Justice Miller, allowing with costs the demurrer of the appellant (defendant) to the bill of complaint of the respondent (plaintiff,) and overruling the said demurrer with costs.

The plaintiff, in his bill of complaint, alleged in the 6th paragraph as follows:—

"Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein and procured proper affidavits according to the Statute whereby he proved to the satisfaction of the Dominion lands agent in that behalf (and the plaintiff charges the same to be true), that the said defendant Farmer had never settled on or improved the said lands assumed to be homesteaded by him or the land herein in question, but had been absent therefrom continuously since his pretended homesteading and

pre-emption entries, and thereupon the claim of the defendant Farmer under the said entries became and were forthwith forfeited, and any pretended rights of the defendant Farmer thereunder ceased, and the plaintiff thereunder on or about the 8th May, 1875, and then and there with the assent and by the direction of the Dominion lands agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit according to Form "A" mentioned in 35 Vict. cap. 23, sect. 33, and did make and swear to an affidavit according to Form "B" mentioned in sect. 33, sub-sect. 7 of the same Act, and did pay to the same agent the homestead fee of $10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the Statute and the regulations of the Department, and that the Statute said, 'Upon making this affidavit and filing it and on payment of an office fee of ten dollars (for which he shall receive a receipt from the agent) he should be permitted to enter the lands specified in the application,' and thereupon and in pursuance thereof and in good faith the plaintiff did forthwith enter upon said lands and take *actual* possession thereof, and has ever since remained in actual occupation and occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate $1,000."

To this bill of complaint defendant demurred, assigning as cause, "That the plaintiff hath not, in his bill, shown any interest or right to the lands therein mentioned, or any title to attack the patent of the defendant, and therefore hath not, in and by his said bill, made and stated a case as entitles him to any relief against this defendant."

Held, (reversing the judgment of the Court of Queen's Bench, Manitoba), that the plaintiff had no *locus standi* to attack the validity of the patent issued by the Crown to the defendant, as he had not alleged a sufficient interest or right to the lands therein mentioned, within the meaning of sub-sections 7 and 8 of sec. 23 of the Dominion Lands Act, there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the Crown. Demurrer held good.

Appeal allowed with costs.

J. Bethune, Q.C., for appellant.
McCarthy, Q.C., for respondent.

CHAPMAN v. TUFTS ET AL.

Unstamped bill of exchange—42 Vict. cap. 17, sec. 13—Knowledge—Question for Judge.

Appeal from the decision of the Supreme Court of New Brunswick, refusing a motion to set aside the verdict and enter a non-suit. The action was brought by the respondents against the appellant to recover the amount of a bill of exchange. It appeared that the draft when made, and when received by respondents, had no stamps; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought; and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and that they immediately put on double duty stamps.

The bill was received in evidence, leave being reserved to the defendant to move for a non-suit; the learned judge stating his opinion that though as a fact, the plaintiff knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880.

Held, that the questions as to whether the holder of a bill or draft has affixed double stamps upon such bill or draft so soon as the unstamped state of the bill was brought to his knowledge within the term of 42 Vict. cap. 12, sec. 13, is a question for the Judge at the trial, and not for the jury.

2. That the "knowledge" referred to in the Act is actual knowledge, and not imputed or presumed knowledge, and that the evidence in this case showed that the plaintiff acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880.

Davies, Q.C., for the appellant.
Travis, for the respondents.

CHANCERY DIVISION.

Boyd, C., and Ferguson, J.] [Dec. 16, 1882.

ARNOLDI v. O'DONOHOE.

Costs—Taxation—Solicitor and client—Special circumstances—Delivery of bill.

On 20th July, 1877, a firm of barristers and solicitors who had been employed by a solicitor to perform professional services, rendered their bill for services so performed.

On 30th May, 1878, the solicitor to whom the bill was rendered, wrote claiming a reduction of the bill on the ground of over charge, and also on the ground that the work had been agreed to be done for half fees. No notice was taken of this letter.

In February, 1882, an action was commenced in the County Court on this bill, and judgment entered for default of appearance. This judgment was by consent subsequently waived, and the action in the C. C. discontinued, and a bill for further services rendered since July, 1877, was then delivered on 27th July, 1882. In this bill was included an item, "To amount of judgment entered 19th July, 1882, $268.67, for previous accounts rendered." An action was then commenced in the Chancery Division for the amount of the two bills.

On the trial of the action, judgment was given for the amount of the first bill as rendered, and also for the amount of the second bill, subject to taxation.

Held, on appeal to the Divisional Court, that neither the existence of a controversy as to the terms on which the business was done, nor the continuance of the employment after the delivery of the first bill, were special circumstances entitling the solicitor to a taxation of the first bill after the lapse of a year.

Held, also, that the reference in the second bill to the amount claimed for the first bill, was not a re-delivery of the first bill.

O. Howland, for plaintiff.

O'Donohoe. Q.C., defended in person.

Proudfoot, J.] [Dec. 16, 1882.

MILLER v. BROWN.

Mortgagee and mortgagor—Statute of Limitations — Acknowledgement— Consolidation of mortgages—Registry Act.

D. H. being owner of certain land in Toronto, on 18th Dec. 1850, executed a mortgage thereon to A. Cruickshank, which mortgage on 12th June, 1851, was assigned to J. H. Cameron, trustee for A. L.

D. H. also on 3rd May, 1851, executed a mortgage jointly with Cruickshank on certain land in the Township of Reach, to A. McDonald, who, on 17th January, 1852, assigned the mortgage to J. H. Cameron, as trustee for A. L

On 22nd June, 1852, Cameron being then holder of both of the above mentioned mortgages, D. H. conveyed the equity of redemption in the Toronto lands to the plaintiff, which conveyance was duly registered. At that time there also existed a mortgage on these lands to one P. McGill, prior to that assigned to Cameron, which prior mortgage the plaintiff subsequently paid off. The plaintiff, when he received the conveyance from D.H., had no notice of the mortgage held by Cameron on the lands in Reach.

In 1862, Cameron went into possession of the Toronto lands. On 11th May, 1871, he wrote and sent a letter in the following terms to the plaintiff:—"Toronto, 11th May, 1871. Dear Miller—The amount due to me in Nov. 1853, on the Hunter mortgages was as follows: First Mortgage, £112 10*s.* 0*d.*; interest, £10 2*s.* 6*d.* Second Mortgage, £450 0*s.* 0*d.*; interest, £64 15*s.* 0*d.* Insurance, £36 0*s.* 0*d.* = £676 2*s.* 6*d.* No part of that sum has since been paid to me, and the rents I have received have nearly kept down the interest. Yours truly, J. H. Cameron. R. B. Miller, Esquire."

In June, 1876, the plaintiff commenced this action at law against the defendant Brown, who claimed both as purchaser from Cameron and also by possession, for recovery of possession of the Toronto lands. On 8th Sept., 1879, the action was transferred to the Court of Chancery. On 20th June, 1880, a decree for redemption was pronounced, with a direction to make the representative of A. L., and the representatives of Cameron, parties in the Master's office.

On 29th Oct., 1880, the Master made an order adding A. L.'s representative as parties in his office. This order was served on 5th Nov., 1880.

On 15th March, 1882, on application of the representatives of A. L. and of Cameron, an order was made allowing them to put in an answer to the cause. They accordingly put in

an answer setting up defences which had previously been pleaded by Brown, to the effect that the plaintiff was barred by the Statute of Limitations; or, if not, that he could only redeem on payment of what was due on both mortgages.

Held, that the letter of 11th May, 1871, was a sufficient acknowledgement of title, and gave a new starting point from which the Statute of Limitations would begin to run, and that the plaintiff's action having been commenced against the representatives of A. L. and Cameron, on 5th Nov., 1880, the Statute of Limitations was not a bar to the plaintiff's right to redeem.

Held, also, that the right to consolidate the mortgages was an equitable right, incapable of registration, and was, therefore, prior to the Registry Act of 1865, a right which could have been enforced against the plaintiff, but that the Registry Act of 1865, s. 66, and the Registry Act 1868, s. 68, were retrospective in their operation, and had extinguished this right as against the plaintiff, who claimed under a registered deed without actual notice: (*Bell* v. *Walker*, 20 Gr. 558; *Gray* v. *Ball*, 23 Gr. 390 followed. *McDonald* v. *McDonald*, 14 Gr. 133. dissented from.

Moss, Q.C., for plaintiff.

S. H. Blake, Q.C., (*Morphy* with him), for defendant.

Proudfoot, J.] [Dec. 16, 1882.

SCOTT v. GOHN.

Will—Codicil—Construction—Substitutional gift—Revocation of bequest—Cumulative bequests.

A testator, by his will, dated 11th January, 1856, directed his residuary estate to be sold, and as to one-fourth made the following disposition: "To my daughter Emily (the plaintiff) the legal interest on one-fourth of the remainder of the proceeds of my estate, to be paid to her yearly and every year during her natural life, and after her death the said one-fourth to be equally divided among her surviving children when the youngest arrives at the age of 21 years, or any portion of it may be paid sooner if my executors think it proper or necessary to do so." By a codicil, dated 4th April, 1858, he devised as follows:

"I, Peter Stiver, etc., do hereby will and bequeath to my daughter Emily Scott (the plaintiff) and her heirs, that share or division of my estate, as referred to in a former will, in land, composed of the North East part of lot No. 7, 3rd concession, Markham, and to be by admeasurement 50 acres."

Held, that the codicil had the effect of entirely revoking the bequest of the one-fourth share of the residue, given by the will to the plaintiff and her children, and must be read as made in substitution of that bequest; and that it made no difference that the devise in the codicil was of land, whereas the bequeath in the will was of money.

Held also, that the plaintiff took the fee in the land devised, and that her children took no estate therein.

D. McCarthy, Q.C., and *Reeve*, for the plaintiff.

S. H. Blake, Q.C., for defendant Catherine Miley.

Ferguson, J.] [Jan. 8.

GAGE v. CANADA PUBLISHING CO.

Trade mark—Fraud—Injunction—Partnership—Retiring partner.

The plaintiff and the defendant Beatty carried on partnership together, from the 1st May, 1877, to the 28th August, 1879, and during the partnership the defendant Beatty prepared a series of head-line copy books, which were extensively advertised, and by the exertions of the firm widely sold, and which in consequence acquired a great reputation, and large profits were realized from their sale. These books were styled on the covers "Beatty's system of practical penmanship," and were generally known and sold to the trade as "Beatty's Copy Books" and "Beatty's Copies." The firm had registered the books as copyright, but nothing was claimed in the action by the plaintiff by virtue of the copyright.

In 1879 Beatty retired from the firm, his interest having been purchased by the plaintiff for $20.000—the interest of the firm in the series of copy books being then one of its chief assets. Beatty afterwards, at the solicitation of his co-defendants, the Canada Publishing Company, and in consideration of a royalty to be paid him on the sales, and with the express purpose of enabling the defendant company to publish copy

books to be called "Beatty's," prepared another series of copy books which differed slightly from those published by the plaintiff, but the Court inclined to the opinion that the differences were merely colourable. These new copy books were styled on the covers "Beatty's new and improved head-line copy book," and were proved to be, and to have been intended to be, in such a form and in such a cover as to lead the public to believe the books were the books published by the plaintiff, and were so published and sold by the defendant company, to the injury of the plaintiff's business.

Held, that the plaintiff had not acquired the right to use the word "Beatty" as a trade mark, but,

Held also, that the conduct of the defendants in publishing their books was fraudulent and collusive, inasmuch as they intended, by simulating the plaintiff's books, to deprive him of profits he would otherwise have made, and that the plaintiff was therefore entitled to a perpetual injunction, restraining the defendants from advertising, publishing or selling, or offering for sale, the book "Beatty's new and improved head-line copy book," in and with its present cover, or in any other form, or cover, calculated to deceive persons into the belief that it was the plaintiff's book.

S. H. Blake, Q.C., and *W. Cassels*, for the plaintiff.

C. Robinson, Q.C., and *Davidson*, for the defendants the Publishing Company.

J. Bethune, Q.C., and *C. Moss*, Q.C., for the defendant Beatty.

Proudfoot, J.] [Jan. 10.

CHRISTOPHER V. NOXON.

Joint Stock Company—By-law—Annual meeting — adjourned retinue — Shareholders — Voting—Calls—Forfeiture for non-payment of calls—Allotment of stock by directors to co-director — Estoppel—parties—Evidence—Costs.

A general annual meeting of the shareholders of a joint stock company was held pursuant to a resolution moved by one of several plaintiffs, on another day than that provided by by-law.

Held, that the plaintiff moving the resolution, was estopped from objecting to the regularity of the meeting on that ground, and that his co-plaintiffs by joining in the action were estopped by the conduct of their co-plaintiff.

A shareholder of a company who was in default in payment of his calls, was refused the right of voting on the ground that his stock had been sold by the sheriff, although no transfer had been made in the books of the company.

Held, that the default in payment of calls was of itself a sufficient ground for excluding him from voting, and that such ground might be relied on to justify the rejection of his vote, although not the ground assigned at the time.

By law 4 authorized a call on stock. By-law 5 purported to repeal by-law 4. Both by-laws were confirmed at a general meeting.

Held, the call authorized by by-law 4 could be made.

Where a call was made for the alleged purpose of liquidating debts due by the company,

Held, that the necessity of making the call was a matter affecting the internal economy of the company, which could not, in the absence of fraud, be enquired into at the instance of a dissatisfied shareholder.

Held, also, that the directors were under no obligation to assume any personal liability in order to keep the liabilities of the company, for payment of which the call was made, afloat until they could be paid out of the earnings of company, even though such a course were practicable.

Business which could not have been entertained at a specialgeneral meeting of a company cannot without due notice be entertained at any adjournment of that meeting.

Thus, where a special general meeting of a company was called to ratify a by-law providing for the appointment of five directors, and the by-law was affirmed, and the meeting adjourned, and afterwards and before the holding of the adjourned meeting, the directors passed a by-law reducing the number of directors to three,

Held, that it was not competent, in the absence of any notice of this business being brought up at the adjourned meeting to ratify this by-law at the adjourned meeting.

Held, also, that a by-law authorizing the forfeiture of stock for non-payment of calls, passed by a board of three directors, in pursuance of an invalid by-law reducing the directorate from five to three, was also invalid.

Held, also, that a power to forfeit must be strictly construed.

Held, also, that to an action impeaching the validity of a by-law reducing the number of directors, the company was a proper party.

The allotment of stock by directors to one of their nnmber, for the purpose of raising funds to pay off liabilities of the company, even though it have the effect of giving a preponderance of control of the company to the allottee, is not *per se* void. Where such an allotment was made, and the shareholders knew of it, but no objection to the allotment was made, except by a minority, on the ground that the issue of the stock was unnecessary.

Held, that the shareholders could not afterwards object to the allotment on the ground of its giving an undue control over the company to the allottee.

Held, also, that to ratify such a transaction, it was not necessary that all shareholders should assent to it, but that it was sufficient that a majority did so.

Where a plaintiff failed to establish his right to relief on certain of the grounds on which his action was based, although some relief was granted, it was under the circumstances granted without costs.

Evidence of an alleged agreement contemporaneous with, and qualifying, and at variance with a written agreement between the same parties, held inadmissible.

S. H. Blake, for the plaintiffs.

Moss, Q.C., for the defendants other than the Company.

Wells, for the defendants the Company.

Boyd, C.] [Jan. 12.

KILROY v. LYONS.

Will—Execution of will—Fraud—Onus probandi—Suspicious circumstances.

In an action to impeach the validity of a will purporting to have been executed on 2nd November, the plaintiff swore that the signature was not in the hand writing of the testator, and it was also proved that neither of the subscribing witnesses was at the house of the deceased on the day the will impeached bore date, and a letter was produced written at the instance of one the witnesses, dated the 4th November, in which it was stated that the deceased had not then made any arrangements about his affairs. And four other witnesses also proved that the deceased had made statements after the date of the alleged will, from time to time, up to the time of his death, to the effect that he had made no will and had not settled his affairs. One of the subscribing witnesses, although duly subpœnaed by the plaintiff, attended and was at the Court House on the day of the trial, but subsequently absented himself before he could be examined as a witness in the action; and an opportunity was given by the Court to the defendents to produce the other subscribing witnesses for examination, which they did not avail themselves of.

Held, that a sufficient *prima facie* case had been made invalidating the will, and that the *onus* of establishing its validity was cast upon the defendants.

Morton for plaintiff.

Sol. White, for defendant.

Boyd, C.] [Jan. 12.

GRIP PUBLISHING CO. v. BUTTERFIELD.

Patent—Patent for improvement—Infringement—Injunction—Combination—Non user of one of the parts of a combination.

Where there is an original invention and an improvement is made upon it, a patent may be taken out for the improvement, and then, by getting a licence from the patentee of the original invention, the inventor of the improvement may work the whole process.

But a valid patent cannot be obtained for an improvement which is in fact merely one of the several modes in which the invention may be carried out, although one not actually mentioned in the original patent.

A patentable improvement must be something in addition to the first invention and not merely a description of a better mode of applying the first invention.

Thus where the plaintiff had obtained a patent for a counter check book with "a black leaf bound in with the other leaves but next to the cover," and the defendant then patented improvements consisting of (*a*) the attaching of the black leaf to a membrane, and (*b*) the binding of the leaves of the book together by an elastic band,—(*c*) and also in his specifications described the black leaf as bound "between the lower leaf and lower cover."

Held, that the defendent was not justified in

using with his alleged improvements, *a* and *b*, the alleged improvement *c*, which was a mere description of another mode of applying the first invention, and that the plaintiff was entitled to a perpetual injunction restraining him from so doing.

Held also, that the omission by the plaintiff of an immaterial element in his invention from the articles manufactured under his patent, did not affect his right to an injunction as against the defendant.

W. Cassels, for plaintiff.

Moss, Q.C., and *Kingsford*, for defendant.

Ferguson, J.] [Jan. 15.

GREEN v. WATSON.

Patent right—Sale of right to territory—Covenant to warranty and defend—Breach.

The plaintiffs covenanted with the defendants that B. would warrant and defend them in the manufacture of a patented machine within certain territory, in which they granted them the exclusive right to manufacture it, and that if B. neglected to protect and defend, then the royalty should cease. And defendants covenanted to pay a royalty therefore so long as they continued to manufacture.

Held, that the plaintiffs had not bound themselves that B. should prosecute with success all who infringed on the patent within the territory, but that he should protect them against all having a right to manufacture who should do so within the territory.

Held, also, that on breach of the plaintiff's covenant, the defendants might continue to manufacture without paying the royalty.

Morphy and *Cassels*, for plaintiff.

Bethune, Q.C., and *Barwick*, for defendants.

Ferguson, J.] [Jan. 15.

EMERY v. EMERY.

Alimony—Separation—Wife's neglect to return.

A wife who owned the house in which she lived with her husband, ordered him to leave it with threats of violence, and they lived separate for some years, the husband going to the United States of America, and becoming domiciled there. The wife knew of the husband's place of residence in the States, but did not offer to go to him.

Held, that she was not entitled to alimony. Where evidence might have been given at the trial, but was withheld by defendant's counsel, the Court refused a subsequent petition for leave to offer the same.

J. H. Ferguson, for plaintiff.

W. Cassels, for defendant.

Ferguson, J.] [Jan. 15.

HARPER v. CULBERT.

Mortgagor—Mortgagee—Power of sale—Execution creditor—Frudulent conveyance—Champerty—Maintenance.

The defendant Culbert, being mortgagee of of certain lands under a mortgage made by one E. J. Jackson in March, 1880, sold the lands under a power of sale, and realized more than sufficient to pay the mortgage debt.

The plaintiff's assignors, on 2nd May, 1879, had placed an execution against the mortgagor's lands in the hands of the sheriff, issued on a judgment recovered against the mortgagor.

On 28th November, 1878, however, the mortgagor had conveyed the equity of redemption to one Irwin, who, on 17 February, 1879, had conveyed it to the mortgagor's wife, Isabella Jackson; both these conveyances were voluntary.

On 1st March, 1879, one Mitchell recovered a judgment against E. J. Jackson and one Glennie, on a promissary note made by Jackson and endorsed by Glennie. On 9th September, 1879, Glennie paid the judgment and took an assignment thereof. Glennie then commenced a suit to set aside the conveyances to Irwin and Isabella Jackson as fraudulent, as against the creditors of E. J. Jackson.

Both the plaintiff's assignor and Glennie were served with notice of the exercise of the power of sale. The plaintiff's assignor paid no attention to it, nor did the plaintiff or his assignor make any claim to the surplus until after it had been paid over, but Glennie agreed to discontinue the suit to set aside the conveyances, on receiving from Isabella Jackson her consent or order authorising Culbert to pay his claims out of the surplus. This order or consent was given and the claims paid.

Held, that although the conveyances whereby the equity of redemption was vested in Isabella Jackson might be voidable for fraud, yet until they were declared void the mortgagee was en-

titled to treat them as valid, and to apply the surplus accordingly.

Held also, that the plaintiff was entitled to no relief, either as against Culbert or Glennie, in respect of the moneys paid to Glennie.

Held also, that an absolute assignment of a *chose in action*, for less than its apparent value, is not open to objection on the ground of its savouring of champerty or maintenance, because the assignee thereby acquires the right to attack a transaction by the debtor as being fraudulent.

J. Maclennan, Q.C., for the plaintiff.

J. Bethune, Q.C., for the defendant.

Ferguson, J.] Jan. 15.

SIMPSON V. CORBETT.

Administration — Account — Illegitimacy — Escheat — Grantee of crown — Provincial Government — Executor — Trustee — Statute of Limitations — Parties.

C. M. died in 1869, entitled to real and personal estate, which by will he devised and bequeathed to his two illegitimate children D. and E., and in the event of either dying, the share of the one dying was to go to the survivor. The defendant was appointed executor of the will and guardian of D. and E. who were infants. Both D. and E. died in 1871, D. having survived E. The defendant afterwards paid up a mortgage outstanding upon the realty, and took a conveyance of the land from the mortgagor to himself in fee.

The plaintiff on 24th July, 1880, procured a grant from the Crown under the great seal of the Province of Ontario, of the real and personal estate of which D. died entitled, upon certain trusts therein set forth, and as such grantee, on the 20th Oct., 1880, procured letters of administration to D.'s estate.

Held, that the plaintiff as such administrator was entitled to an account of the defendant's dealings with the real and personal estate of C. M.

Held, also, that although the original mortgagee might, in the events which happened, have become entitled to hold the mortgaged lands freed from the equity of redemption, yet that the defendant standing in a fiduciary relation to the lands in question, could not set up the title acquired from the mortgagee adversely to the plaintiff, and that he was trustee thereof for the plaintiff.

Held, also, that notwithstanding *Attorney-General* v. *Mercer*, 5 S. C. R. 538, the plaintiff's right to an account as administrator of D.'s estate, was not affected by the alleged invalidity of the grant to him of the escheated estate.

Held, also, that the Statute of Limitations was no bar to the action.

Held, also, that neither the *cestui que trust* named in the grant from the Crown, nor the Attorney-General for the Dominion, were necessary parties

Maclennan, Q.C., for the plaintiffs.

Bethune, Q.C., for the defendants.

Boyd, C.] [Jan. 23, 24.

KITCHING V. HICKS.

Interlocutory injunction — Conflicting decisions.

Upon a motion for an interlocutory injunction restraining the payment of money, until the trial, it appeared that there was a decision affecting the legal question involved, in favour of the plaintiff, which was at variance with the *dicta* contained in a judgment given in an earlier case, which was not cited.

Held, that under the circumstances it was proper to grant an interlocutory injunction preserving the property *in medio* until the trial.

Whether an assignee for the benefit of creditors can successfully dispute a prior chattel mortgage on the ground of its not having been registered, *Quere*: see *Boynton* v. *Boyd*, 12 C. P. 334; *Re Coleman*, 36 U.C.Q.B. 559.

Jan. 23, 1883.

Hoyles, for plaintiff, moved to continue an injunction restraining defendant Clarkson from parting with $800 of assets realized by him from the estate of his co-defendants, of which he is assignee for the benefit of creditors.

Akers, for defendant Clarkson, contended that the injunction should not be continued on the ground that the plaintiff claimed title to the property in question under an unregistered agreement in the nature of a chattel mortgage, which, he contended, was void as against the assignment to Clarkson. He referred to *Boynton* v. *Boyd*, 12 C. P. 334, and other cases.

Hoyles. — The assignee Clarkson has no *locus standi* to dispute the plaintiff's mortgage, which was valid between the parties, and could not be disputed by the assignee, who was not a purchaser for value. He relied on *Re Coleman*,

36 U. C. Q. B. 559; *Bank of Montreal* v. *McWhirter*, , 17 C.P. 506. Judgment reserved.

January 24th.

BOYD, C.—In the present state of the law, the safest course to adopt on the present application is to continue the injunction until the hearing. It is evident that views of Draper, C.J., in *Boynton* v. *Boyd*, 12 C.P. 334, though not essential to the disposition of that case, are at variance with the views expressed in *Re Coleman*, 36 U. C. Q. B., in which the earlier case does not appear to have been cited. If it be that the *dicta* of Draper, C.J., are law, then the agreement to hold the goods as security in the case, not being registered would be invalid as against the subsequent assignment for the benefit of creditors. But if not, then in another aspect of the case which is not at present presented, it may be that the privilege claimed by the plaintiff cannot be enforced as against any of the creditors of Hicks intervening in that character, as I held in *Park* v. *St. George*.. As against a voluntary assignee, it may be that the plaintiff can succeed: as against a creditor prejudiced by the unregistered agreement, it may be that the plaintiff will fail. But this aspect of the case is not at present before the Court, so that I content myself with holding the fund *in medio* that the rights of all parties may be better disposed of at the trial. Costs of this motion will be reserved till then.

Moss, Q.C., for the plaintiff.

Akers, for the defendant.

PRACTICE CASES.

Hagarty, C.J.] [Sep. 15, 1882.

IN RE PRESCOTT ELECTION PETITION.

Election petition—Presentation of.

Held, that under 37 Vict. ch. 10 (Can.), the filing of an election petition in the local registrar's office at L'Orignal was not a presentation within the requirements of the statute.

Bethune, Q.C., for the motion.

A. Cassels, contra.

Osler, J.] Nov. 13, 1882.

RE SIMPSON AND THE JUDGE OF THE COUNTY COURT OF LANARK.

Voters' list—Notice—R. S. O. ch. 9. Sec. 9

A notice required by sec. 9 R. S. O. ch. 9, to be given by a voter or person entitled to be a voter making a complaint of any error or omission in the voters' list should be subscribed to by the person complaining, or his agent.

The question of the validity of the notice may be raised on the hearing of the complaint.

Holman, for the motion (*ex-parte*).

Ferguson, J.] [Nov. 23, 1882.

RE COLTHART.

Dower—Lunatic—Infant—44 Vict. (O.) ch. 14 sec. 5.

The mother of an infant whose estate was being sold under the provisions of R. S. O. ch. 40, ss. 75-83, was a lunatic, and confined in the London Asylum.

FERGUSON, J., made an order under 44 Vict. ch. 14, sec. 5, barring the mother's dower.

Hoyles, for the application.

Osler, J.] [Jan. 18.

MYERS V. KENDRICK.

Examination—Judgment debtor—Rule 366—369 O. J. A.

The plaintiff was nonsuited in the action, and the defendant recovered judgment against him for his costs of defence.

Held, that the plaintiff was not a judgment debtor within the meaning of Rule 366 O. J. A., or sec. 17 R. S. O. chap. 49, or sec. 304 R. S. O. cap. 50.

The defendant had obtained the usual appointment from an examiner, and served the plaintiff with a copy, together with a copy of a subpœna, at the same time exhibiting the original subpœna.

Held, that an original appointment, signed by the Judge or officer, must be served under Rule 369 O. J. A., on the person to be examined.

Held, also, that an examination of a judgment debtor under R. S. O. cap. 49, sec. 17, or under R. S. O. cap. 50, sec. 304, can only take place under a rule of Court, or Judge's order.

Semble, the provisions of sec. 304, R. S. O. cap. 50, have been superseded by the O. J. A. and Rules.

Aylesworth, for motion.

Clement, contra.