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THAT the Court of Appeal has seen its way to reverse the decision of Street, J., in *Duggan* v. *The London and Canadian Loan and Agency Co.*, 19 Ont. 272, is news which will have been received by investors in stocks with a sigh of relief. This mode of investment has been accompanied hitherto by a singular freedom from liability to stumble into legal pitfalls. It has the merit of ease, inexpensiveness, comparative safety, and expedition. But if it had become necessary to employ a solicitor to investigate the title to stock offered for sale in the market before a transaction could be carried through with safety, that would certainly have had a tendency to take away some of the advantages which have been heretofore considered to attend this class of investments. It is fortunate for investors that the Court of Appeal has been able to come to the conclusion it did; and should the case be carried farther, it is to be hoped its decision may be upheld. The English cases on which Street, J., founded himself have no doubt gone a long way in support of his conclusion; but it has often seemed to us that the equity doctrine of "notice" has been so applied in many cases, both in our own courts and in England, as to lead to anything but an equitable result. The true principle we believe to be this, that *prima facie* the *cestui que trust* should as a rule bear the loss of the misfeasance or malfeasance of his trustee, and that that burthen should not in the absence of positive fraud, or such gross negligence or wilful blindness as of itself is indicative of actual fraud, be thrown by any doctrine of constructive notice upon the shoulders of any third person. The departure from this principle has, we believe, been in many cases productive of great injustice.

THE Court of Appeal at its recent sittings reversed the decision of the Chancery Divisional Court in *Martin* v. *Magee*, 19 Ont. 705. The case had an important bearing on the construction of the Devolution of Estates Act. The facts of the case were somewhat singular. The plaintiff had purchased the land in question at an auction sale. The vendors were the executors of Catharine Sheppard, whose title appears to have been as follows: One H. C. Sheppard, who owned the land, had died subsequently to the Devolution of Estates Act, leaving a will devising the land to his mother, Catharine Sheppard. No conveyance had been made by the executors of H. C. Sheppard either to Catharine Sheppard or her executors; and Catharine Sheppard had died ten days after her son, leaving a will whereby she devised the land to her executors in trust for sale. The sale took place within a year of the death of H. C. Sheppard. The plaintiff objected that the defendants, the executors of Catharine, had no title in the absence of a deed

from the executors of H. C. Sheppard, and the action was brought to recover the deposit. Ferguson, J., before whom the action was tried, treated the objection as a mere "matter of conveyance," holding that the defendants had a right to call for a conveyance of the legal estate from the executors of H. C. Sheppard, and the Divisional Court seemed to have adopted the same view, Boyd, C., who delivered the judgment of the Court, saying, "The land by section 4 devolved upon and became vested in the executors of Sheppard as assets for the payment of his debts. These being paid, or there being no debts, the executors will hold the bare legal estate for the devisee of the land. In other words, subject to the payment of debts, the beneficial interest in the land passes to the devisee, and she can make title as the real owner." This view of the effect of the statute the Court of Appeal were not able to adopt, and the result of the judgment in appeal, as we understand it, is that a devisee under a will has a mere potential right to the land devised and has no saleable title to it until he has obtained a conveyance from the personal representative. How far this principle has been infringed upon by the recent amendment of the Devolution of Estates Act, we are not at present prepared to say.

The decision of the Court of Appeal in this case and of Falconbridge, J., *In re Wilson & The Toronto Incandescent Light Co.*, 20 Ont. 397, bid fair to settle the law on this subject, as we venture to think, in accordance with the principle on which the Act is based. Whether this desirable result has been in any way marred by the recent Act remains to be seen.

THERE is a doctrine prevalent, we believe, in the scientific world that there is a natural tendency in things to continually revert to their original type; the influence of climate, culture, want of culture, or over-culture, want of light or too much light, or a hundred other circumstances, may have the result of producing variations from the original type; but these peculiar circumstances being removed or ameliorated, the tendency is to return to the primal form. It is a curious thing that even in the laws of a people we find the same apparently instinctive tendency to revert to primitive forms of law. We are accustomed to look upon sundry amendments of recent date which have been made in the laws of people of the Anglo-Saxon race as being altogether novel and modern, whereas they are clearly reversions to a distinctively primitive condition of the law. To mention a few of such instances—there is, first of all, the abolition of the rule of primogeniture as conferring superior and exclusive rights of succession to the estate of a deceased parent, and in its place the admission of all the issue of a decedent to equal rights of succession to his estate. Here we have not really the introduction of a new method of succession, but a return to what was really the primitive method—and one which prevailed amongst the Anglo-Saxons until the necessities of feudal service rendered it necessary to depart from it in favor of one which, though less conformable to natural justice, had the merit of greater convenience in effectuating the requirements of the feudal system of tenure. The feudal incidents of the feudal tenure of land were practically abolished as long ago as

the reign of Charles II., and by degrees England and her colonies are slowly and surely reverting to the ante-feudal principles of succession, and not unnaturally so, for those principles rest on the dictates of natural justice. Another notable instance of reversion to the original type is the tendency which has of late manifested itself in English-speaking communities to assimilate the succession to lands with that of goods and chattels. Here, again, it is no new method which has been introduced by our Devolution of Estates Act, but the primitive and original method prevalent among our ancestors. In spite of objections by those lawyers opposed to any change in a system to which they themselves have been accustomed, this revolution has been carried out both in Australia and the English-speaking parts of Canada with the almost unanimous consent of the community. It is somewhat curious that in the United States there has as yet, we believe, been no similar movement.

There, however, we find there is a decided tendency in some quarters to admit women to a much more prominent share than for many years they have been permitted to enjoy in public affairs. This too, if we mistake not, is also a tendency to revert to a former and a more primitive rule. It is quite a mistake to suppose that the present almost total exclusion of women from public positions of dignity and trust was the original rule with our ancestors. Many notable instances may be found in Anglo-Saxon history of women holding positions of great public importance—whether in the Church, as in the case of Hilda the celebrated abbess of Whitby; or in the State, as in the case of many women of rank who were admitted to the councils of the sovereign, and even presided at courts of justice held within their territorial domains. Ideas of this kind are of slow growth, and the experiments which are being made in some of the United States in the way of admitting women to practise and administer the law will no doubt be watched with interest.

EVIDENCE UNDER SUMMARY CONVICTION ACT.

A judgment which will interest those of the profession who practice in Magistrates' courts was lately delivered by Mr. Justice Rose, in the Common Pleas Division, in the case of *Reg.* v. *Hart*, decided last February.

The question the learned judge had to consider was whether, on a prosecution under the by-law of a municipality creating certain offences and punishing delinquents by fine and in default of payment of the same with imprisonment, the defendant was a competent and compellable witness. It was urged, in support of the conviction in this case, that the offence charged, not being a crime, R.S.O., cap. 61, sec. 9, applied, making the defendant a competent and compellable witness. In reply, it was urged that the offence, being punishable by fine, and, in default, imprisonment, was a crime, and that therefore sec. 9, cap. 61, R.S.O., did not apply. The learned judge took the latter view, and holds that wherever an offence is created by any statute, and the party committing it is punishable by fine, and, in default, imprisonment, such person is not a competent witness on his own behalf, nor can he be compelled by the prosecution to give

evidence. Following this decision, it has been urged that parties charged with offences against the Ontario Liquor License Act cannot be witnesses, on their own behalf, or for the prosecution. This contention, in my mind, is not tenable; for the offence charged being a crime, the whole procedure and the evidence to be taken on the trial of such an offence me within the legislative powers of the Dominion Government, and by R.S.C., cap. 106, sec. 114, it is enacted that in any prosecution under that Act (Canada Temperance Act), or any Act mentioned in the 120th Section of said Act, the person opposing or defending, or the wife or husband of such person opposing or defending, shall be competent and compellable to give evidence.

On referring to sec. 120, we find that any Act in force in any Province, respecting the issue of licenses for the sale of fermented or spirituous liquors, will come under the provisions of sec. 114, and that therefore the defendant, under any prosecution for an offence against the license laws of Ontario, and the wife of such defendant, are competent and compellable witnesses. Sections 114 and 120 of cap. 106 were specially inserted for the purpose of enabling such persons to give evidence. The decision, therefore, in *Reg.* v. *Hart* will not prevent the accused or his wife from giving evidence any more than it will prevent the accused in a case of common assault from giving evidence on his own behalf, his rights in such a case being guarded by statutory enactment. I am not aware that the point has ever been raised whether the Ontario Legislature, in enacting in their Liquor License Acts that such and such facts, having been proved, shall be deemed *prima facie* evidence of an offence committed, have or have not exceeded their powers. The judgment above referred to would point to the conclusion that such enactments are *ultra vires* of the Local Legislature.

N. MURPHY.

COLLECTING AGENCIES.

In this day the regular way of collecting debts through the joint aid of a solicitor and the ordinary courts of justice has grown into disfavor, and appears too humdrum and slow for an age of 'phones and cables, lightning expresses and electric cars; and collecting agencies make a specialty of such work, with their defaulters' lists placarded on fences and walls, their large and strikingly conspicuous envelopes containing threatening duns, and their uniformed officials with hatbands marked "Collector," and "Collector of Doubtful Debts."

Therefore with that generosity and disinterestedness for which our liberal profession is so famous, we would give a few pointers to these unlicensed practitioners by reminding or informing them how in other parts of this mundane sphere other barbarians, in other days, have sought to make the dishonest honest and the poor to pay their debts.

On the other side of the globe, where, as the poet hath it, the immense Pacific smiles around ten thousand little isles, lady collectors are used. The *modus operandi* is as follows: Public opinion having decided that the debt is a fair one, a party of women go to the debtor's door and sit them down in silence outside his house (in this they differ from the American female book agent). The news

spreads, friends and sightseers collect; the men, we opine, in surprise at the idea of a number of women sitting dumb; the women, in sympathy with their fellows who are so tried. The crowd, by its presence, ofttimes induces the poor debtor to pay on the first day; if not, the female bailiffs reassemble on the second evening. The company of spectators again appears, anxious to see the end. If this second citation does not cause payment, on the third night sterner measures are adopted; the men, enraged that their wives should be thus compelled to neglect their household duties, come together, set fire to the obstinate debtor's house, seize his pig, smash his canoe, and destroy everything they can lay their hands upon; so the last state of that debtor is worse than the first (*Ten Years in Melanesia*, by Rev. A. Penny).

On this side of the Atlantic and the Pacific, in the days of Cortes and Pizarro, the Muyscas were a tribe of Indians residing in the northern part of South America. Even here default was sometimes made in payment; when that happened the creditor hied him to the owner of a young tiger, or other wild beast bred up as a collecting agent, and bargained with him for his services; the keeper then took the animal and tied it to the door of the recalcitrant debtor, and that unfortunate individual had then to maintain the quadruped and his keeper until the creditor was satisfied (*Helps' Spanish Conquest*, vol. iv., p. 394).

In the good old days in Ireland, according to the Senchus Mor, or The Great Book of the Ancient Law (a book of great antiquity, compiled in, or perhaps slightly before, the eleventh century, as Sir Henry Maine thinks, but said by some to be that very code which was prepared under the influence of Saint Patrick on the introduction of Christianity into Ireland), the chief way of collecting debts or obtaining one's rights against another was by distress. This is the way, we are told, that they did it before the hated Saxon landed upon the Green Isle to vex the natives with his laws: The plaintiff, or creditor, having first given the proper notice, proceeded—if the defendant, or debtor, was a person of chieftain rank—"to fast upon him." The fasting upon him consisted in going to his residence and waiting there for a certain time without food. If the creditor did not within that period receive satisfaction for his claim, or a pledge or security therefor, he forthwith—accompanied by a law agent, witnesses, and others—seized his distress (*Early History of Institutions*, p. 280). But what if there was nothing to distrain, and the debtor simply allowed the creditor to fast on till he starved? Then, according to Sir H. Maine, the debtor had to settle for his conduct in the next world. The Druids believed in the immortality and transmigration of the soul, and so may well have taught that penal consequences in another state of being would follow the creditor's death through the debtor's misconduct, and this doctrine the Christian priest was likely still further to accentuate. One readily sees that this Irish system must have been somewhat difficult to carry into practice if one had a large number of debtors to look after.

The old Brehon way of collecting is identical with a practice diffused over the whole of the East, and which the Hindoos call "sitting dharna." In Persia, when a man intends to enforce payment of a demand by fasting, he begins by sowing some barley at his debtor's door and sitting down in the midst of the

seed, and he means by this that he will stay where he places himself without food either until he is paid or until the barley seed germinates and sprouts and grows and ears and gives him bread to eat (*Early History of Institutions*, p. 297).

Dharna means detention or arrest. The semi-divine legislator of India, Manu, who wrote a lawbook in verse, somewhere between 1280 B.C. and 400 A.D.—the learned are not quite sure when—and Brihaspiti, who wrote a standard Braminical lawbook, named Vyavahara Maqukha, both refer to the practice. This was the way the plan was worked in the latter part of the last century: The Brahmin who adopted this expedient for the purpose of gaining a point which he could not accomplish in any other way proceeded to the door, or house, of the person against whom it was directed, or wherever he might most conveniently arrest him; he then sat down in dharna with poison or a poignard or some other instrument of suicide in his hand, and threatening to use it if his adversary should attempt to molest or pass him, he thus completely arrested him. In this situation the Brahmin fasted, and, by the rigor of the etiquette, the unfortunate object of his arrest had to fast also, and thus they both remained until the institutor of the dharna obtained satisfaction. In this (as he seldom made the attempt without the resolution to persevere) he seldom failed, for if the party thus arrested should suffer the Brahmin sitting in dharna to perish by hunger, the sin would forever lie upon his head. And we are told that if a Brahmin be slain, as many as are the pellets of dust which his blood would make in the burnt-up soil of India, so many are the periods of a thousand years which the slayer must pass in hell (*Manu*, xi. 208). The Indian Penal Code (sec. 508) has forbidden the Brahmins to practise this special mode of oppression any more, and now "sitting dharna" chiefly survives in British India in the exaggerated air of suffering worn by a creditor who comes to ask a debtor of higher rank for payment, and who is told to wait. But it is still common in the native states (*Early History, etc.*, 299—304).

When a Kaffir had a lawsuit or claim against a fellow, he and his friends went in force to the village of the defendant; on their arrival they sat down together in some conspicuous position and awaited quietly the result of their presence. This was the signal for mustering all the adult male residents that were forthcoming; these, accordingly, assembled and also sat down within conversing distance. After a long silence the argument began (*Compendium of Kaffir Laws*, Dugmore, p. 38).

Among the ancient Egyptians—according to that most reliable historian, Herodotus (II. 136)—the levers used for extracting money from debtors were their reverence for ancestors and respect for the sanctity of family tombs. No man was allowed to borrow money without giving in pledge the body of his father, or of his nearest relative, (Herodotus only says "his father," but Sir Gardner Wilkinson presumes to suppose that some fathers did not die conveniently for their mummies to stand security for their impecunious sons, and so he suggests "the relative" idea). If the debt was not paid at the proper time the mummy could be removed, and the debtor was then considered infamous; and as the creditor usually found it much less inconvenient to take possession of the family

tomb than to have the debtor's mummified father in his sitting-room, the debtor could not inter his children or any of his family in the ancestral vault until the debt was paid. If the debtor died without a settlement, the celebration over him of the accustomed funeral obsequies was denied, and he could not enjoy the rights of burial either in the tomb of his ancestors or in any other place of sepulture, according to Herodotus (II. 136), Diodorus (I. 92, 93), and Wilkinson (*Ancient Egyptians*, vol. ii., p. 51). Have we here the origin of post obits? We understand now why all the old mummies were so carefully kept in the land of the Pharaohs.

The mention of two Hindoo lawbooks above leads us to state that we in Canada cannot be too thankful that our Ontario courts are not in the least troubled with citations from the works of the early Redmen—if, indeed, those polysyllabically-named worthies left any works that could be so used. Think of the burdens under which the practitioners in India labor! We are told that "the Mitakshara, the Smriti Chandrika, the Madhaviya, and the Sarasvati Vilasi are the works of paramount authority in the territories dependent upon the government of Madras." Another writer speaks of the books of Kamalakara, Madhaya, and Narayana, as being frequently consulted and cited there; while a third gives high place to what he calls the embodiment of all law, the Manu-Vijaneswareyum. Thank heaven we need only quote the works of Byles and Smith, Coke and Dart, and people blessed with such like names.

R. V. R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for May comprise (1891) 1 Q.B., pp. 549-671; (1891) P., pp. 189-257; (1891) 1 Ch., pp. 573-723.

HUSBAND AND WIFE—SEPARATE ESTATE—DEATH OF WIFE—DEVOLUTION TO HUSBAND JURE MARITI—DEBTS OF WIFE.

On p. 235 *ante*, in our note to *Surman* v. *Wharton*, a correspondent has kindly drawn our attention to the fact that there is a mistake. The last sentence should read as follows: "Even where the wife leaves no children, the husband in Ontario is only entitled to one-half of the property as to which she dies intestate, and subject thereto, the other half devolves as if her husband had predeceased her—R.S.O., c. 108, s. 5; consequently in no case in Ontario would the husband appear to be entitled *jure mariti* as in England." We may observe that the collocation of the statutes on this subject in the Revised Statutes is somewhat inconvenient and liable to be misleading.

PRACTICE—LEAVE TO SERVE OUT OF JURISDICTION—OFFICER ON BOARD QUEEN'S SHIP.

Seagrove v. *Parks* (1891), 1 Q.B. 551, may be referred to, not so much on account of the point of practice which it decides, as for the fact of the Court (Cave and Charles, JJ.) recognizing the principle that so long as an officer is on board of one of Her Majesty's ships he is "within the jurisdiction" of the Court, wherever the ship may be. The application was for leave to serve a defendant out of the jurisdiction, the defendant being an officer on board a Queen's ship on the

Mediterranean station, but which at the time of the application was on the high seas: but it was shown that it would touch at one or other of the coaling ports of the Mediterranean, and ultimately put in at Malta, the chief port of the station. Under these circumstances, for the reason above indicated, the application was refused. In Ontario, leave to serve out of the jurisdiction is not necessary, but after it has been effected it must be allowed. See Ont. Rule 274.

PRACTICE—SERVICE OF WRIT—ACTION AGAINST FIRM CARRYING ON BUSINESS IN ENGLAND—ONE PARTNER DOMICILED ABROAD—SUMMARY JUDGMENT AGAINST FIRM—ENG. RULES 53, 115 (ONT. RULES 265, 739).

In *Lysaght* v. *Clark* (1891), 1 Q.B. 552, the practice on the subject of serving a partner on behalf of a firm again came under discussion. In this case two foreigners composed a firm which carried on business in England. One of the firm resided in England; the other was domiciled abroad. A writ against the firm was served on the partner resident in England, and an appearance was entered by him; but there being no defence to the action the plaintiff obtained a summary judgment against the firm under Eng. Rule 115 (Ont. Rule 739). The defendants applied to set aside the proceedings, but the motion was dismissed by Cave and Grantham, JJ., the Court refusing to further limit the application of Rule 53 (Ont. Rule 265), allowing service to be effected on one partner for a firm, to cases like the present, where the business of the firm is carried on, and one of the partners also resides, within the jurisdiction. *Russell* v. *Cambefort*, 23 Q.B.D. 526 (see *ante* vol. 26, p. 8), and *Western National Bank* v. *Percy* (1891), 1 Q.B.D. 304 (see *ante* p. 105), being limited in their application to cases where all the members of the firm reside abroad. In the latter class of cases neither a partner nor a manager can be served for the firm. As we have already remarked, the Rules on this branch of practice seem to need revision.

PRACTICE—DISCOVERY—PRODUCTION—DISCOVERY BEFORE DEFENCE—ENG. RULE 454—(ONT. RULE 508.)

Henderson v. *The Underwriting & Agency Association* (1891), 1 Q.B. 557, was an application by defendant for discovery before defence. The action was on a policy of insurance effected on title deeds during their transit by post from Cadiz to Alexandretta in Syria, against certain perils enumerated in the policy, including perils of transit and conveyance, and thieves. The deeds were lost in transit. The defendants claimed to be entitled to discovery from the plaintiff, and all persons interested in the proceedings and in the insurance, the subject matter of the action, but the Court (Cave and Jeune, JJ.) were of opinion that the defendants were only entitled to discovery in the ordinary form as to documents under Eng. Rule 454 (Ont. Rule 508).

ASSIGNMENT, VALIDITY OF—PUBLIC POLICY—SALARY OF CHAPLAIN TO WORKHOUSE—PUBLIC OFFICER.

In re Mirams (1891), 1 Q.B. 594, the short point decided by Cave, J., is that an assignment of salary made by a chaplain of a workhouse who is paid out of the rates is not invalid as against public policy; that such an officer is not a public officer within the meaning of the decisions. That to make an officer public it is necessary that the officer's salary be paid out of national, and not, as in the present case, out of municipal funds; and the officer must be public in the

strict sense of that term, and that a clergyman having the cure of souls is, as such, in no case "a public officer." "It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary or remote sense."

LANDLORD AND TENANT—LEASE—BREACH OF COVENANT FOR PAYMENT OF RENT—PROVISO FOR RE-ENTRY, CONSTRUCTION OF.

In *Shepherd* v. *Berger* (1891), 1 Q.B. 597, the action was brought by a lessor to recover possession of the demised premises under a proviso for re-entry contained in the lease, to the effect that "if and whenever" any one quarter's rent should be in arrear twenty-one days, and no sufficient distress could be levied, the lessor should be entitled to re-enter. Three quarters' rent was in arrear on 25th March, 1890; on the 25th April, 1890, the lessor distrained, and after the sale of the distress there remained due more than a quarter's rent. On the 25th May the writ issued. The Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), overruling Day and Laurance, JJ., were of opinion that the plaintiff was entitled to succeed by virtue of the words "if and whenever," which Bowen, L.J., considered were tantamount to "if and as often as," and that whenever the two conditions co-existed, viz., a quarter's rent in arrear for twenty-one days, and no sufficient distress, the plaintiff's right of re-entry arose.

SHIP—BILL OF LADING—SHIP-OWNER'S LIABILITY—DEVIATION—"NECESSITY."

Phelps v. *Hill* (1891), 1 Q.B. 605, was an action for non-delivery of goods pursuant to bill of lading of goods shipped in the defendant's vessel. The vessel had started on her voyage, but being overtaken by bad weather was damaged, and had to put back for repairs. She was taken to Bristol, and on her way there was run into by another vessel and sunk. The plaintiffs contended that the deviation rendered necessary for the purpose of repairs was only so far as the nearest port where such repairs could have been properly effected and the cargo properly dealt with, which was either Queenstown or Swansea, either of which places was nearer than Bristol. But the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) were of opinion that where the master, in *bonâ fide* exercise of his judgment, for the benefit of both the ship-owner and the owner of the cargo, chooses a port in preference to a nearer one, the court or jury ought not on light grounds to come to the conclusion that the deviation was unauthorized. The action therefore failed, there being circumstances shown warranting the taking of the ship to Bristol rather than to either of the other ports named.

SHIP—BILL OF LADING—EXCEPTION OF "PIRATES, ROBBERS, OR THIEVES, OF WHATEVER KIND, WHETHER ON BOARD OR NOT, OR BY LAND OR SEA"—THEFT BY PERSONS IN SERVICE OF SHIP.

Steinman v. *Angier Line* (1891), 1 Q.B. 619, was another action for non-delivery of goods, pursuant to a bill of lading, which contained an exception clause whereby the defendants were not to be liable for losses caused (*inter alia*) "pirates, robbers, or thieves, of whatever kind, whether on board or not, or by land or sea, rain, spray, barratry of the master or mariners," etc. The judge at the trial found that the goods in question were stolen, after being shipped, by some or one of the stevedores. The stevedore was, by the terms of the charter-party,

appointed by the charterers, but was paid by and in the service of the ship, and the learned judge (A. L. Smith, J.) was of opinion that a theft by persons in the service of the ship was not within the exception, and gave judgment for the value of the goods in favor of the plaintiffs; and the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) affirmed his decision, differing from the conclusion of the Supreme Court of New York in *American Insurance Co. of N.Y.* v. *Bryan*, 1 Hill 25, where, under a similar exception, thefts by the crew or by whatever person were held to be covered.

SHIP—CHARTER PARTY—CHARTERER'S LIABILITY CEASE ON CARGO BEING LOADED—LIEN FOR DEMURRAGE—DETENTION AT PORT OF LOADING.

Clinch v. *Radford* (1891), 1 Q.B. 525, is another shipping case. The action was by a shipowner against charterers to recover damages for detention at the port of loading. By the charter-party the ship was chartered for a voyage from Newcastle to New South Wales, where she was to load "in the usual and customary manner, a full and complete cargo of coals" to San Francisco, and there to deliver the same, "the cargo to be unloaded at the average rate of not less than 100 tons per working day, . . . or charterers to pay demurrage at the rate of 4d. per ton register per diem, except in case of unavoidable accident . . . the charterer's liability under this charter-party to cease on the cargo being loaded, the owner having a lien on the cargo for the freight and demurrage." The defendants detained the ship in loading sixteen days beyond what was usual and customary. The defendants contended that their liability for detention at the port of loading ceased under the charter-party upon the ship being loaded. Pollock, B., who tried the action, held that the cesser clause did not apply, and on appeal the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) sustained him. The *rationale* of the decision may be gathered from a sentence of the judgment of Fry, L.J.: "The rule that we are *prima facie* to apply to the construction of a cesser clause followed by a lien appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as co-extensive." In the present case the clause giving the lien only applied to demurrage at the port of discharge and did not cover any claim for damages for detention at the port of loading, hence the cesser of liability did not extend to the latter claim.

SOLICITOR—UNQUALIFIED PERSON ACTING AS SOLICITOR.

In re Louis (1891), 1 Q.B. 649, Mathew, J., decided that a process server does not by settling affidavits of service to be made by persons in his employ act as a solicitor.

PRACTICE—COSTS—SPECIAL STATUTE AS TO COSTS—RULES AS TO COSTS DO NOT OVERRIDE STATUTES.

In *Reeve* v. *Gibson* (1891), 1 Q.B. 652, the action was to recover penalties for an infringement of a copyright, which by statute were fixed at 40s. for each infringement and double costs of suit. By 5 & 6 Vict., c. 97, s. 2, all enactments as to double costs were repealed, and instead the parties entitled to such double costs were to receive full and reasonable indemnity as to all costs, charges

and expenses, to be taxed. The plaintiff only recovered £8, whereupon the taxing officer held that the plaintiff had recovered less than £10 in an action for tort within the meaning of s. 116 of the C.C. Act, 1888, and therefore was not entitled to any costs; but the Divisional Court (Wills and V. Williams, J.) made an order for taxation, and the Court of Appeal (Lord Halsbury, L.C., and Lord Esher, M.R.) affirmed the order.

MARRIED WOMAN—SEPARATE PROPERTY—RESTRAINT AGAINST ANTICIPATION—CONTRACT OF MARRIED WOMAN, HOW FAR BINDING—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S 1, S-SS. 2, 3, 4 (R.S.O., C. 132, S. 3, S-SS. 2, 3, 4).

In *Stogdon* v. *Lee* (1891), 1 Q.B. 661, that ever fruitful source of litigation, a married woman's contract, was in question. The action was brought to recover principal and interest due under a covenant made between the defendant and her late husband Philip Lee of the one part, and the plaintiff of the other part. At the time the covenant was made the defendant was entitled under a separation deed made between herself and a former husband, Charles L. Thorpe, of the arrears of a certain annuity covenanted by him to be paid to trustees during their joint lives "for her separate use without power of anticipation," and she was also entitled to a legacy of £5,000 under Thorpe's will. Thorpe died in 1877, and the defendant married in Lee in 1880. By the instrument in which the covenant in question was contained the defendant and her husband charged the arrears of annuity and also the legacy in favor of the plaintiff. Day, J., at the trial awarded judgment in favor of the plaintiff, but the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) unanimously reversed him, on the ground that the defendant at the time of the contract had no "separate estate," *Palliser* v. *Gurney*, 19 Q.B.D. 519 (see *ante* vol. 23, p. 408) being approved and followed. We meekly confess that the more we read the judicial expositions of the Married Woman's Property Act, the less we understand it. Under our own Act, which is not essentially different from the English Act, we thought, until this decision, that it was reasonably clear that when a woman married, all the property she owned at the time of her marriage which was not included in any settlement became upon her marriage, by the operation of the Married Woman's Property Act, her "separate property," and that being the case we should have thought that the arrears of annuity and the $5,000 legacy were therefore both, on the defendant's marriage with Lee, thereby, by virtue of the statute, made her "separate property" by a sort of statutory settlement. But according to this decision it would seem that, in order to render a married woman's contract binding, it is not only necessary that she should have separate property, but it must be separate property by virtue of some settlement and not merely by virtue of the statute. It is true the Court does not say so in terms, but that seems to us to be the effect of the decision; and if so, it is merely an instance of the judicial method of repealing statutes under the pretence of expounding them.

ADMIRALTY—COLLISION—DELAY IN INSTITUTING ACTION IN REM—MARITIME LIEN—STATUTE OF LIMITATIONS—INTEREST ON DAMAGES.

The *Kong Magnus* (1891), P. 223, was an action *in rem* in the Admiralty Court against a foreign vessel to enforce a claim of lien for damages for a collision.

The collision took place in April, 1878, and the action was not instituted until January 8th, 1889. The defendants set up by their defence that since the collision there had been important changes of interest in the ownership of the vessel; that it had been frequently at ports within the jurisdiction since the collision; and that by reason of the plaintiff's laches in bringing the action the defendants were not now in a position to produce proper evidence to establish their defence; and they claimed that it was unjust and inequitable that the plaintiffs should be allowed to continue the action, and that the plaintiff's claim was barred by their delay in prosecuting it. Sir James Hannen, P., held that there was no Statute of Limitations applicable, and that no period of limitation had been laid down by judicial decision, and that the principle the Court was guided by in such cases was to look to the particular circumstances of each case and see whether it would be inequitable, taking the lapse of time, the loss of witnesses and evidence, and the change of property, etc., into account, to entertain a suit of the kind or not. He therefore allowed the action to proceed; subsequently by consent the action was stayed on the terms of the defendants paying to the plaintiffs one-half the damages sustained, and a reference was directed to ascertain the amount. The registrar fixed the amount at £1504 12s. 9d., with interest at 4 per cent., from the 1st May, 1878, until paid. The defendants then appealed against the allowance of interest, but Sir Charles Butt, P., upheld the registrar's finding on that point, holding that according to the rule in admiralty cases the damages for a collision bore interest from the date of the collision until paid.

PRODUCTION OF DOCUMENTS—DOCUMENTS IN POSSESSION OF SOLICITOR.

O'Shea v. *Wood* (1891), P. 237, was an action to propound a will. The defendants applied to compel the plaintiff to produce documents in the possession of her solicitor, who had also been solicitor for the testatrix, and which documents were private books, etc., of the solicitor, containing entries and memoranda relating to the testatrix and her affairs. The application was refused by Jeune, J., as also an application to permit the administrator *ad litem*, to inspect and take copies of them for the defendants.

PROBATE—WILL—MISTAKE—NAME WRONGLY INSERTED AS LEGATEE—GRANT OF PROBATE OMITTING NAME OF LEGATEE.

In the goods of Boehm (1891), P. 247, an application for probate of a will with the omission of a name, which had been inserted by mistake, was made to Jeune, J. The testator had given directions for his will, and among other legacies he directed that two sums of £10,000 each should be set apart to be settled for his two daughters, Georgiana and Florence. By the mistake of the conveyancing counsel, Georgiana was named in the will as the legatee of both sums, and the name of Florence was omitted altogether—who was consequently left apparently unprovided for. An epitome of the will had been read to the testator, and it was clear he had signed it under a mistake; the engrossment had never been read over. Counsel for Georgiana consented to the proposed omission. Jeune, J., granted probate omitting the name of Georgiana as legatee of one sum of £10,000, leaving it for a court of construction to say how the will should be construed with that omission.

PROBATE—WILL—EXECUTOR ABSENT FROM THE COUNTRY—POWER OF ATTORNEY—GRANT OF PROBATE TO ATTORNEYS.

In the goods of Barker (1891), P. 251, an application for probate was made by the attorneys of an executor under the following circumstances. The principal had gone abroad in 1890, expecting to be absent two years, and he had left a power of attorney in favor of the applicants in general terms, enabling them to act for him about all his business and concerns of every kind as fully as he himself could do. The testator died in 1891 while the principal was still absent. Letters of administration with the will annexed was granted to the applicants.

PROBATE—TWO WILLS—PROPERTY IN ENGLAND AND CANADA.

In re Seaman (1891), P. 253, the testator had property in England and Canada, and had made two wills, one confined exclusively to the property in England, and the other to the property in Canada. Probate was granted of the English will on an affidavit being filed exhibiting a copy of the Canadian will; and an affidavit was also required showing that the movable chattels bequeathed by each will were actually at the time of the testator's death in the country to which the will which disposed of them referred.

Notes on Exchanges and Legal Scrap Book.

A JUROR AS A WITNESS.—The unusual incident of calling a juror from the jury-box to testify in the case on trial occurred yesterday in Supreme Court Circuit. The plaintiff, Emil Brusnitz, claimed $10,000 damages from the Netherlands Steam Navigation Co., for injuries he received in March, 1889, while a passenger in the second cabin of the steamer Leerdam. By a lurch of the vessel, Brusnitz was thrown heavily against an iron socket which projected above the deck, dislocating his shoulder. Edward A. Levy, one of the jurors, so impressed the counsel for the defence by the questions he put to witnesses, as to his knowledge of the subject matter, that he was called as an expert on strapping and shifting of cargoes. The Court allowed the juror to testify, against plaintiff's objection.—*Daily Record.*

STENOGRAPHERS' DIFFICULTIES.—Mr. Button, the stenographic reporter for the Parnell Commission, gives his opinion of forensic orators as follows: "The man who thinks clearly, and who expresses himself in respectable English, is not difficult to report. One of the most difficult of speakers to report is Sir Richard Webster. He is utterly careless as to the manner in which his sentences are constructed, and he talks very rapidly. Sir Richard is a trained athlete, and therefore a long-winded man; a sentence that would prostrate any other orator is to him mere child's play. Now, so far as a newspaper is concerned, the *ipsissima verba* of Sir Richard Webster's speeches do not matter much; his ideas can generally be put more neatly and effectively by the reporter himself. But the official shorthand-writer, be he Mr. Button or one of his three assistants, is bound to secure every word. He is forbidden either to touch up sentences or to im-

prove a man's style. To the official shorthand-writer, therefore, Sir Richard Webster has proved one of the fastest, as well as one of the most difficult speakers heard at the Parnell Commission Court. Sir Henry James is as voluble a speaker as the Attorney-General—he is possibly even more voluble—but then his elocution is remarkably clear and distinct."—*The Green Bag.*

SUPREME COURT OF THE UNITED STATES.—It is likely that there will be several changes in the personnel of the Supreme Court within the next two or three years. Justice Field is seventy-four years of age, while Justice Bradley, his junior in point of service, is three years his senior in age. Either could have retired on full salary for life. Two years hence the like right will be open to Justice Blatchford, who, at that time, will be ten years a member of the court, and seventy-two years of age. The probability therefore is, that the Supreme Court will contain more new faces within the next few years than it gained in any other equal period in the present decade. There seems to be something in service on that bench which is favorable to longevity. Few of its members have reached it until attaining middle life, yet the instances in which service has been extended to more than a quarter of a century are not rare. John Marshall, of Virginia, and Joseph Story, of Massachusetts, exceeded that limit nearly ten years, while the service of John McLean, of Ohio, and James M. Wayne, of Georgia, continued thirty-two years; that of Bushrod Washington, of Virginia, thirty-one years; of William Johnson, of South Carolina, thirty years; of Roger B. Taney, of Maryland, and of John Catron, of Tennessee, twenty-eight years; and of Samuel Nelson, of New York, twenty-seven years. Marshall heads the list in this respect, his service extending over thirty-four years.—*Central Law Journal.*

CAN A MURDERER ACQUIRE A TITLE BY HIS CRIME?—A decision which brings about a just result, but upon wrong grounds, is commonly mischievous as a precedent. A pertinent illustration of such mischief is to be found in *Shellenberger* v. *Ransom* (Nebraska, 1891), 47 N.W.R. 700, in which case *Riggs* v. *Palmer*, 115 N.Y. 506, was treated as a controlling authority. In the New York case a young man murdered his grandfather, in order to prevent a revocation of the latter's will, in which he, the grandson, was the principal beneficiary. Being convicted of the crime and sentenced to imprisonment for a term of years, he still claimed the property as devisee. The majority of the court, however, decided in favor of the testator's heirs, treating the will as revoked by the crime of the devisee. Two judges, dissenting, were of opinion that the will was not revoked, and that the grandson should keep the property in spite of his crime.

It seems possible to agree with the dissenting judges, that there was no revocation of the will, and also to agree with the majority of the court, that the grandson could not retain the property. By a familiar equitable principle, one who acquires a title by fraud or other unconscionable conduct is not allowed to keep it for himself, but is treated as a constructive trustee for the benefit of the victim of his fraud, or, if he be dead, for his representatives. Accordingly, full effect might have been given to the will, and yet the devisee, as a constructive

trustee, might have been compelled to surrender his ill-gotten title to the testator's heirs. In cases like *Riggs* v. *Palmer*, where the controversy is between the criminal and the representatives of his victim, the view here suggested and the view of the court may lead to a different mode of procedure; but they accomplish the same practical result. But directly opposite results are caused in cases where the controversy is between a *bonâ fide* purchaser from the criminal and the representatives of his victim. If no title passes from the deceased to the murderer, his purchaser gets none, however innocent. But if the murderer gets a title, although as a constructive trustee, an innocent purchaser from him will acquire a title free from the trust. This distinction was involved in *Shellenberger* v. *Ransom*.

A father murdered his daughter in order to inherit her property, and, four days later, sold the property to a third person. The court, reading into the Statute of Descent a disinheriting clause, as the majority of the Court in *Riggs* v. *Palmer* had read into the Statute of Wills a revocation clause, decided that the daughter's property did not descend to the father, because of his crime, and consequently declined to consider the question of the purchaser's good faith, although this should have been the cardinal point of the case. It is believed that the so-called fusion of law and equity is largely responsible for such decisions as those under discussion. The advantages of vesting a court with both legal and equitable powers are not to be denied. But when the doctrines of equity are no longer administered in a separate court, it is all the more important not to lose sight of the fundamental distinction between law and equity—a distinction as eternal as the difference between rights *in rem* and rights *in personam*.—*Harvard Law Review*.

UNANIMITY OF THE JURY.—Dissatisfaction with the working of the jury system seems to be increasing. It is no longer looked on with the admiration and respect that made it a most precious right in the eyes of our ancestors. One of their prominent grievances against King George was, as they said in the Declaration of Independence, "depriving us, in many cases, of the benefits of trial by jury." The Constitution guaranteed these benefits in criminal cases, and the amendment proposed at the first session of the first Congress secured the same privilege in civil cases. Though the civil provision has been held to apply only to the Federal courts, the right is established in all the State and lower courts, except in cases involving trifling amounts. From that day to this the spread-eagle orators of the country have seldom failed to boast of "trial by jury" while extolling the institutions of liberty.

Nevertheless, the incapacity of ordinary jurymen to deal intelligently with many of the intricate cases developed from the complexity of modern society has led to a natural substitute for the old system, in the shape of referees, auditors or arbitrators, who by general education or special training may be presumed to be qualified to unravel the particular case at issue. Judging by the increase in number of references, this method is growing in favor. Certainly it often saves both expense and delay, each of them important considerations in

modern litigation. Nevertheless, Judge Dwight Foster, not many years ago, wrote that he was "firmly persuaded that the verdicts of juries are, as a rule, more satisfactory to all concerned—parties, counsel and intelligent observers—than the awards of arbitrators or referees." Thus it will be seen that as to this remedy opinions differ, but at the same time that its partial success, as shown by its spread, proves the need of a remedy of some sort.

Another step in the same direction is the practice in many courts of dispensing with the jury and letting the judge decide questions of fact provided neither party to the suit calls for a jury. The chief objection made to this is that a judge should invariably be the decider of law and not of fact. Judge Foster said that he had been "less frequently, seriously and permanently dissatisfied with the verdicts of juries than with the decisions of judges on similar points." Judge Robert C. Pitman has made another point against compelling the Court to try questions of fact, in the matter of "the danger of thus impairing the confidence of litigants in its impartiality," for "all understand that the judge does not make but declares the law, but in deciding facts he must necessarily judge and weigh parties and witnesses." Yet Judge Pitman testifies that in Massachusetts this works satisfactorily.

The simplest and most logical way of increasing the justice of civil decisions, if we grant that justice can have any comparative degree, is possibly not the substitution of something else for the jury, but the removal of the requirement for unanimity of the jury. Very eminent authorities have long disapproved of this requirement in civil cases. Bentham styled it a system of "perjury enforced by torture," a description somewhat hyperbolical, but based on the facts. Hallam called it "that prosperous relic of barbarism." The experts appointed by Parliament in 1850 on the courts of common law said: "It seems absurd that the rights of a party in a question of a doubtful and complicated nature should depend on his being able to satisfy twelve persons that one particular state of facts is the true one." They proposed that after twelve hours, the opinion of nine of the jurors should prevail. Lord Campbell, many years after, introduced a bill to carry such a measure into effect, but it did not pass.

In a recent article in *Current Comment*, General Thomas Ewing has forcibly presented the arguments against unanimity, which he thinks is unsustained by either reason or experience, though he admits that in criminal cases it is a just and necessary safeguard of liberty. The presumption is that the accused is innocent, and to rebut it the proof of his guilt should exclude all reasonable doubt, not only in the minds of the majority, but of each and every one of the jurors. But, he says, there is no presumption in a civil action that the plaintiff is wrong. Where the verdict cannot, in the nature of the case, be a compromise, as in an action of ejectment or on a promissory note, disagreements of jurors result from the corruption or dullness or prejudice of a small minority. In almost all other cases the verdict is a compromise forced by a small minority and accepted by a large majority as only better than a mis-trial, a compromise founded on no testimony or principle, generally not representing the judgment of any single juryman.

The strongest argument for unanimity is that which insists upon the great value of giving to each juryman a veto power that insures for his opinion a fair consideration in the deliberations of the jury-room. In reply to this it is urged that the same end should be accomplished by providing only a unanimous verdict would be received for several hours after the jury had been sent out. As General Ewing recalls, when the present jury system was young, unanimity was obtained by fining the obstinate minority or by punishing the whole jury, as by driving them in open carts from one assize to another. More recently was devised the plan of imprisoning them, often without food or water, until cold, hunger, thirst or fatigue compelled the weak or ill or mean-spirited to commit moral perjury by assenting to a verdict against their consciences. "Why a unanimous verdict thus obtained was better than a majority verdict, no one has attempted to tell."

The opinion seems to grow that sooner or later we are coming to the majority verdict. Judge George C. Barrett has well pointed out that the demand for such a change will be greater as juries improve and as the difficulty in securing conscientious unanimity increases. It is hard enough for twelve strong men, in this enlightened age, to agree upon almost any debatable subject. Many argue, therefore, that if three-quarters or two-thirds, or even a bare majority, can come to a decision where a measure of damages is to be fixed, that is all that can reasonably be asked.—*Bradstreet's* (Amer.), taken from *Irish Law Times.*

COLONIAL JUDGES IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.—As promised at the conclusion of the article under the above heading in our last issue, we reproduce one on this subject by Mr. Stanley Leighton, M.P., which appears in *Imperial Federation* of May 1st:

"Many men have been talking for a long time about Imperial Federation. Discussion is good—nay, even indispensable—but already some are complaining that 'we are getting no forrader.' Our colonial system, which worked indifferently well years ago, still remains without material alteration. It cannot be denied that some slight improvements have been made. The Colonial Office is no longer a department of the War Office, but a self-centred office, presided over by a Cabinet Minister; but in other respects our method of carrying on the official relations between the Mother Country and Colonies has been little altered. The Mother Country waits for the Daughter States, the Daughter States wait for the Mother.

"*Festina lente* is an excellent motto; but there is another motto quite as relevant—'Not to advance is to recede.' It is the object of this article to indicate how a gentle advance towards more perfect Imperial Federation may be made, on judicial rather than on political lines. It seems that at the present moment an unambitious step forward may be safely taken without alarming the most cautious. It was nigh sixty years ago, when William the Fourth was king, that an Act of Parliament was passed to reconstruct the Court of Appellate Jurisdiction, not of the United Kingdom only, but of the whole Empire. The

preamble of that Act declares, amongst other things, 'Whereas from the decisions of various Courts of Judicature in the East Indies, and in the Plantations and Colonies and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council; and whereas matters of appeal or petition to His Majesty in Council have usually been heard before a Committee of the Whole of His Majesty's Council, who have made a report to His Majesty, whereupon final judgment or determination hath been given of His Majesty; and whereas it is expedient to make certain provisions for the more effectual hearing and reporting on appeals to His Majesty in Council and on other matters,' etc., etc.; and the Act proceeds to provide that certain persons should form the Judicial Committee of the Privy Council, and amongst these that His Majesty may nominate 'two members, who shall have held the office of judge in the East Indies or any of His Majesty's dominions beyond the sea,' and that they are to receive an allowance out of the Consolidated Fund.

"Is it not an extraordinary fact that as regards our Colonies the wise provision of the last generation has been neglected? Indian judges have always sat upon the Judicial Committee, but room has never been found for Colonial judges.

"No one who has had any acquaintance with the powerful judicial minds which the Canadian, the South African, and the Australian groups of Colonies have produced, can say that there are not to be found amongst them men able to hold their own with the judicial commissaries of England, Scotland, and Ireland. Why have not some of them been invited to a seat in this great tribunal? Their presence would strengthen the Court; it would give confidence to the suitors; it would make obvious the link of Imperial connection, which is illustrated by the appeal to the Sovereign in Council. The sentimental interest which their presence would excite would be powerful. But more useful would be the practical results.

"There are many codes of law which prevail over the world-wide dominions of our sovereign lady. Mohammedan and Hindoo law in India, Chinese law in Hong Kong, Roman Dutch law in the Cape and in British Guiana, the Code Napoleon in the Mauritius, and the old French law in Canada. This list by no means exhausts the varieties of law and practice which are to be found throughout our Colonies. With the exception of two retired Indian judges, the Court which tries these cases on appeal is composed entirely of men selected from our Courts, unfamiliar with any other codes and constructions but our own. Comparatively few people know anything about this Court, which, nevertheless, is the most remarkable tribunal that the world has ever seen, with a jurisdiction the most widespread; a Court which is, indeed, the outward and visible sign of the 'Imperium Brittanicum' in its most positive form. We certainly do not magnify ourselves; we hardly make use of our most natural opportunities. When the new Law Courts were built, no one ever thought of providing a suitable chamber for the Supreme Court of Appellate Jurisdiction of the whole Empire! If you ask where this Court holds its sittings, no one will be able to tell you. You will be referred to Whitaker's Almanack. But even Whitaker is at a loss

here. To those whom it may concern, then, let it be known that if they turn from Whitehall up Downing Street, and inquire at the first door on the right, they will probably find a porter who, in response to their enquiries, will point with his hand to a narrow staircase. On the first floor they will observe a painted hand pointing "to the Court," and if they proceed further they will find themselves in an upper chamber. Half a dozen old gentlemen will be discovered ''ting in ordinary morning dress round a table, and two or three barristers in wigs will be chatting to them. There is no accommodation for the public, but if they are lucky, and the attorneys' clerks are inclined to be civil, they will be able to sit with them on a bench and listen.

"If they cast their eye over the cause list, the names of the cases will convey the best idea of the vastness of the jurisdiction which is exercised here without display and without notice. Englishmen might be prouder than they are in the possession of such a court. They might make more of it for themselves and their Colonies. Some of the judicial reputations made in the Australias, or New Zealand, or in Africa, or in Canada, would add breadth and dignity, and possibly knowledge, to decisions pronounced by judges now exclusively English and Indian. There are many forms of federation, union, alliance, call it what we will, which may govern the future relations of the Great and the Greater Britain—commerce, defence, political representation, social fellowship, submission to one supreme court of appeal, all these are separate elements, distinct in themselves, which help to make up complete incorporation. At the present moment the line of easiest advance appears to be the judicial, and the manner of development is clearly by the Statute of the 3rd and 4th William IV., c. 41; that is to say, by the representation of the Colonial judicature on the Judicial Committee of Her Majesty's Most Excellent Privy Council."

JURIES AS THEY WERE AND ARE.—There are curious things to be told regarding juries, both as to their ancient and modern history. Valuable as the institution is, we have little or no certain knowledge of its origin. Not only have the Normans, the Saxons, the Gauls, the Romans, and even the Trojans, in turn had ascribed to them the honor of being the inventors of the system, and in turn been dispossessed of it; but some writers, acting like those foolish old testators who make a point of leaving their money to persons already having more than they know what to do with, declare that to Alfred the Great—a sovereign already lauded as the inventor of half the noblest institutions of England—the entire credit of the whole matter is due.

Whoever was the inventor, or what the period of the birth of the system, it is quite certain that very few traces of it are to be found anterior to the reign of Henry II. From the time of William to that of Henry II., the mode of administering justice was very simple. In civil cases a little hard swearing on one side or the other soon settled the matter; while as to criminals, by "fighting it out," a far more speedy result was, we doubt not, obtained, than is arrived at in our courts of justice at the present day. In Henry's reign, however, the simplicity

of all judicial proceedings was much broken in upon by the passing of a famous statute, usually called the Grand Assize. This statute ordained that in all cases in which the ownership of land, the rights of advowson, or the claims of vassalage came in question, four knights of the county should be summoned who joined with them twelve men, neighbors of those whose rights were in dispute, who should hear from them, upon their oaths, the truth of the matter in question. If these twelve could not agree in the tale they told the knights, the minority were dismissed, and others chosen in their stead; and this was repeated until twelve men were found whose tale was uniform: and then according to it judgment was given.

This singular mode of adjudicating appears to have ever since been held in great estimation; for although other species of trial by jury soon after sprung up, the Grand Assize was not set aside, but continued to be put in practice now and then down to the year 1838, when, for the last time, four knights, girt with their swords, and twelve recognitors, met in the Court of Common Pleas at Westminster, and were addressed by the Lord Chief-Justice Tindal as "gentlemen of the Grand Inquest and recognitors of the Grand Assize." The institution was shortly after abolished by Act of Parliament.

During the time of Edward I. the jury system was greatly improved, and to a certain extent resembled that of the present day. Knights of the shire were summoned by the sheriff—the origin of the present grand jury—twelve of whom had to be unanimous in *presenting* the guilt of a prisoner to the petty jury who were to try him. The petty jury, indeed, differed from a modern one in one important particular; for those composing it, after being sworn to act truly, heard no evidence from others, but each separately delivered a verdict founded on his own knowledge of the matter, and was thus a witness as well as a juryman. If the twelve could not agree, the minority were, as in the Grand Assize, turned aside, and others chosen in place of them, and this was done until the twelve presented a uniform verdict.

It may amuse the reader to know that the first civil matter tried by a jury, properly so called, of which any record has descended to us, was an action by the parson of Chipping-Norton against another parson for turning him out of his house on a Sunday.

It was not until the time of Henry VI. that witnesses were allowed to be called to inform the consciences of the jury respecting the matter in dispute, and not until so late as the reign of Anne that witnesses for a prisoner were heard upon oath.

The position of jurymen in "the good old times" must have been one of no ordinary severity. The fundamental rule was that the twelve men must agree in order to form a legal verdict. Why twelve were chosen in preference to any other number does not appear; and the only explanation, if it may be called one, is that of Sir Edward Coke, who says that twelve "is a number in which the law delighteth." In order then to get these twelve men to agree, all kinds of manœuvres were used. At first the practice of adding fresh jurymen, and turning away those who would not agree with the majority, technically called "afforcing," was adopted; but this was attended with the expense of so much time and

trouble as to be almost useless. Then it became the custom to heavily fine those who would not agree with the majority, and this shortened matters a good deal; subsequently the verdict of the majority was taken, dissentients being fined or imprisoned; and at last the practice was adopted which has descended to the present day, of confining the sacred twelve alone, without meat drink, or fire, until the verdict was satisfactory.

In some of our old law books we meet with very amusing accounts of unfortunate jurymen being detected in attempting to evade this very stringent measure, and their peccadilloes seem always to have met with severe chastisement.

Thus, in Hilary term, 6 Henry VIII., we have a long account of a motion in the King's Bench to arrest a judgment obtained at the previous assizes, on the ground that the jurors had "improperly eaten and drank"; and, says the report, "upon examination it was found that the jury had after long consideration agreed, and returning to the court-house to give in their verdict, they saw Read, C.J., in in the way *running to see a fray*, and they follow him, and all ate bread and drank a horn of ale; and for this every one was fined forty shillings, but the pit had his judgment stand upon their verdict." The report does not inform us what fine was inflicted upon the learned judge for leaving the judgment-seat "to see a fray."

In another case of *Mounson* v. *West*, about the same period, the jury had been absent so long to consider their verdict that "the court did suspect, and gave commandment that a trusty man should search them, which was done, when some had figs in their pouches, and some had pippins, and some did confess that they had eaten of figs, and some that they had pippins, but they had not eaten thereof; whereupon after great and solemn advice and consideration, they who had eaten of the figs were fined £5 each, and they who had pippins, of which they had not eaten, forty shillings each."

Shortly afterward the Court of Queen's Bench declared that for "a juryman to have sweetmeats in his pocket was a high misdemeanor, punishable by fine or imprisonment, or both."

It was not, however, on the score of eating when he should have been fasting alone that the juryman's life was a hard one; if the judge considered that their verdict was against evidence, they might be punished with loss of all their personal property, might be imprisoned for a year, and were ever afterward considered infamous; while the amount of bullying to which they were exposed, both from the judge and from the counsel, would scarcely be credited at the present day. They were threatened, laughed at, and even taunted with being accessory to the prisoner's guilt, if they hesitated about giving the desired verdict. After enduring all this uncomplainingly for some hundred years, we find juries about the middle of the sixteenth century suddenly attempting to throw off the disgraceful shackles with which they had been for so long loaded. The first important case on record in which a jury boldly stood out against the judge is that of Sir Nicholas Throckmorton, tried at Guildhall in 1554.

Throckmorton was indicted for high treason, and, after a shamefully one-sided trial, the jury were almost *directed* to find him guilty. After a long absence from

the court they returned and deliberately pronounced a verdict of "Not Guilty." "Upon this," says the reporter, "the Lord Chief-Justice remonstrated with them in a threatening tone, saying, 'Remember yourselves better. Have you considered substantially the whole evidence as it was declared and recited? The matter doth touch the queen's highness and yourselves also; take good heed what you do." When he had finished, Whetston, the foreman, said: "My Lord, we have found him not guilty, agreeable to our consciences; and so say we all." But the jury suffered grievously for their honesty; the court committed all twelve to prison; four were discharged on humbly admitting they had done wrong; but of the remaining eight the Star Chamber adjudged that three of them should be fined £2,000 each, and the other five £200 each. So much for impartiality in the sixteenth century.

Throckmorton's jury had, however, broken the ice, and others were not slow in following their example; and for more than one hundred years after, battles were being continually fought between judge and jury with ever-varying results. In poor Mrs. Leslie's case the judge (Jeffreys) gained the day; on William Penn's trial the jury stood firm and triumphed; but the most glorious example of their success was shown upon the trial of the seven bishops in 1688, from which period we may date the decline of the arbitrary authority which the judges had before exercised.

While our modern jury system is a vast improvement over that which has preceded it, still it must be admitted that many glaring defects still remain in this noble institution. The composition of our juries is a matter which must cause a vast deal of reflection to the thinking man. Cases involving questions requiring the utmost intelligence for their consideration are often submitted to men possessing not even ordinary reasoning powers; and criminal matters, even involving as they frequently do the lives of fellow creatures, whose guilt or innocence can only be determined upon by disentangling with the utmost nicety the most conflicting evidence, are intrusted to men often of very limited endowments.

No one unused to the proceedings in our criminal courts would believe what strange exposures of the ignorance of our jurymen now and then take place. Prisoners have before now been declared guilty and recommended to mercy on the ground that the jury were not *quite sure that they did it*. A jury at Cardigan found a man guilty of arson *with £20 damages*. Another set of "clodhoppers," trying a man for murder, and being much confused by the judge telling them that upon the same indictment, if not satisfied as to the capital crime having been committed, they could find the prisoner guilty of manslaughter, just as they could on an indictment for child-murder find a woman guilty of concealing the birth—after deliberating for a long while, found the man *guilty of concealing the birth of the deceased*. A few years ago a poor woman was tried at an assize town in South Wales for the murder of her infant. The jury appeared to listen to the case with the utmost attention; but what was the general astonishment when, upon the conclusion of "summing up," the foreman addressed the judge with: "My Lord, I wish to say that I am the only man on the jury *understanding English*." Of course nothing could be done in such a case; the prisoner had been given

into their charge, and they were bound to convict or acquit her. The foreman had therefore to explain the case to his brother-jurymen, and it is hardly necessary to say that the woman was acquitted.

A still more ridiculous instance of jury ignorance occurred some years ago on the Western Circuit. A man was indicted for burglary; the proofs were so clear against him, he having been caught in the act, that it was presumed that no defence would be attempted. His counsel, however, made a long and flaming speech, and protested that *he* believed the man to be innocent. The judge told the jury that it was unnecessary for him to sum up, as they could have but one opinion. After conferring a moment, the jury turned round and deliberately pronounced a verdict of "Not Guilty," to the amazement of every one in court. Of course the prisoner was, without further question on the case, discharged. On inquiring of a juryman the reasons which influenced them in giving so curious a verdict, the following reply was elicited: "Well, sir, we be most on us P—— men, and though the Lunnon judge said *he* thought the prisoner were guilty, *our recorder* (who was the man's counsel) said *he* thought he warn't, and we like to stick up for our recorder!"

Of course it is at all times easier to point out defects than to suggest remedies; but for the grievances we have mentioned, the cure seems simple and obvious. In all cases involving important questions or the life of a fellow creature, allow *special* juries, consisting of men who, from their education and position in society, are enabled to understand all the bearings of the case, and pronounce a verdict thereupon in a much more satisfactory manner than any *common* jury could do. —*Chambers' Journal.*

Reviews and Notices of Books.

The Dominion Law Index, embracing all the legislation of the Dominion Parliament, and such unrepealed Provincial enactments, and Imperial statutes, treaties and orders, as bear a special relation to Canada, down to and including the year 1890. By Harris H. Bligh, Q.C., editor of "The Consolidated Orders in Council of Canada," and Walter Todd, Private Bills Department, House of Commons. Toronto: Carswell & Co., Publishers, 1891.

This index, which appears to be very exhaustive, includes all the Acts of the Dominion Parliament, repealed and unrepealed, public and private; also the Acts of the several Legislatures of the Provinces which were in force at the time of Confederation.

Documents Illustrative of the Canadian Constitution. Edited with Notes and Appendixes, by William Houston, M.A., Librarian to the Ontario Legislature. Pp. xxii. 338. Toronto: Carswell & Co., 1891.

This collection of documents has at least the merit of novelty. Nothing very like it has ever come under our observation, the nearest approach to an analogue being Stubbs' "Select Charters and other Illustrations of English

Constitutional History." From the vast accumulation of documents fairly entitled to be called "constitutional" a selection had to be made on the basis of some general principle, and in our opinion the editor has acted wisely in confining his choice to those of international and Imperial origin. He has included among the appendixes a few Canadian documents, such as the statutes introducing English law and trial by jury into Upper Canada in 1792, but their presence there cannot mislead, and will be helpful to the student of the Canadian constitution. He will find himself usefully aided also by the general index to the whole volume, including the appendixes, and by the somewhat novel chronological table of events in Canadian and United States history. It should always be borne in mind by the Canadian student that the pre-revolutionary history of the American colonies belongs quite as much to Canada as it does to the United States, a fact which the editor emphasizes in his preface. The chronological table, it may be added, includes events so recent as the appointment of the present Governor-General of Canada in 1888, and the election of the present President of the United States in 1889.

Though Mr. Houston omits all documents belonging to the French *régime*, he has rendered good service to Canadian history by including the French as well as the English texts of the articles of capitulation of Quebec in 1759, and of Montreal in 1760. Both series of articles will well repay careful study in both languages. He has gone as nearly as possible to the original authorities in order to get trustworthy texts, and he has added to these, as to the other documents, much useful historical information in the shape of "Notes." For all practical purposes, these notes contain a history of Canada from the treaty of Utrecht to the present time, perhaps none the less interesting or instructive for being served up in detached fragments appended to the passages of the text they are intended to elucidate. It may be added that he has given with great minuteness, and, so far as we can see, with great accuracy, abundant references to the sources from which he obtained his own information. If writers and editors were more careful than they are to do this, much trouble to later investigators would be saved, and a far more valuable service would be rendered to the reading public. Nothing is more irritating to a student than to have a quotation thrust under his notice as impliedly authentic and authoritative without any hint as to the source from which it is taken.

One of the most interesting sections of the collection—for the documents naturally group themselves—is that relating to "Representative Institutions in the Maritime Provinces." Commencing with the Treaty of Utrecht in 1713, and ending with the Commission to Governor Carleton, in virtue of which the self-governing United Empire Loyalist colony of New Brunswick was constituted in 1784, these documents enable one to trace the development of parliamentary government outside of Imperial parliamentary enactments. The first parliaments, in what was Canada before Confederation, were created by the Constitutional Act of 1791, seven years subsequent to the constitution of New Brunswick, twenty-two years subsequent to the constitution of what is now Prince Edward Island, and thirty-three years subsequent to the inauguration

in Nova Scotia of a parliament which has enjoyed a continuous existence to the present day. The creation of these parliaments by means of Governors' Commissions places them at once in the same class with the colonial parliaments in what is now the United States, some of which were in existence, as Mr. Houston's chronological table shows, for a good deal more than a century before the Nova Scotian parliament was established. The correlation of these early events throws a flood of light on many things in Canadian history that would otherwise have been obscure.

Two documents in this collection are worthy of more attention than the cursory reader may think of giving them. Lord Mansfield's judgment in the Grenada case in 1774, and the Colonial Laws Validity Act of 1865. Each of these is in its own way a charter of colonial liberties, and when read in Mr. Houston's frame-work of historical annotation they afford a most interesting and instructive subject for comparative study. No better illustration of Lord Mansfield's marvellous historical erudition and legal acumen can be found in the law reports than this celebrated judgment, which ought to be read in connection with his equally celebrated parliamentary speech in 17 , in support of the right of the British Parliament to tax the Colonies. Both judgment and speech are models of conciseness, which jurists and statesmen of the present day would do well to imitate.

Mr. Houston has ventured to give, in an "Introduction," his own opinions as to the best method of teaching history, and some applications of his general principles to the treatment of these documents. He insists uncompromisingly on the necessity of substituting "seminary" treatment for the practice of lecturing, in order that the student may have a chance to form his own opinions instead of taking the lecturer's opinions ready-made. Perhaps it may be possible to press this contention too far, but it is safe to say that some "seminary" practice should be afforded to the student of history, and also to the student of law. Any system of training which does not develop the reasoning powers must be pronounced defective. The contention that this series of documents should be studied chronologically backward has much to commend it. If a student is to get over only part of the ground, then the most important document is the British North America Act; and it is quite true that the more modern documents do throw very helpful light on those that precede them. The views so energetically advocated in the introduction may not prevail *in toto*, but they can hardly fail to modify the practice of schools and colleges.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—On page 189 of *Clarke's Magistrates' Manual* is a form of an "accusation," under the "Speedy Trials Act," corresponding to an indictment in cases before the ordinary criminal court. Can you or any of your contributors tell me

the authority for this form? Was it originally prescribed by any legislative authority, or any rule framed by judges having the authority given them by enactment of the Legislature of Old Canada? In my county the record only has been used since the provisions of the "Speedy Trials Act" were applied to the Maritime Provinces, repeating the charge in the body of it in another shape in cases where an additional count would be necessary.

Nova Scotia. LEX.

[The form referred to is taken from that used in *Cornwall* v. *The Queen*, 33 Q.B. (Ont.) 106, as are also other similar forms.—ED. C. L. J.]

MARRIAGE LAWS IN NORTH-WEST.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—An important question which is likely to engage the attention of jurists in the near future is the legitimacy of so-called marriages solemnized after the Indian customs of our aborigines. With the natives it is a marriage in good faith. The intending husband buys the squaw from her father, generally by presenting him with a horse or two, to compensate him for the loss of the society of his daughter, as it were. The father grunts an assent, which all the inmates of the tepee endorse by treating the newly-made husband as a very near and dear relative. From the native standpoint, it is a real *bonâ fide* marriage. But the wily white man does not so regard it. He adopts this plan to get possession of the Indian woman with the consent of her relatives, but does not intend to make her his wife in good faith. He afterwards keeps her or drives her away from his habitation, as suits his interest or his caprice.

Now, can a white man, after contracting such a marriage, legally repudiate his so-called wife and legally contract another marriage? This is being attempted constantly in the North-West Territories. I see reported at least one case decided by an Ontario judge which pronounces the child of such a marriage legitimate, namely, Sara Jane Robb, daughter of the late Geo. Robb, of Kingston, Ont., who was judicially declared legitimate and thereby entitled to inherit some $20,000 left by her father.

If this is a sample of the interpretation put upon such marriages by our courts, our libidinous friends in the Territories have got caught in the trap which they had set for the poor, ignorant savage, whom they beguiled and, as they thought, degraded. Being remote from much legal intelligence, we Nor'westers are in the dark considerably as to this matter, and would be much obliged were one or more of your able contributors to elucidate this subject in the columns of THE JOURNAL for the benefit of non-professional as well as professional readers.

FIAT JUSTITIA.

North-West Territory.

DIARY FOR JUNE.

1. Mon.....First Parliament in Toronto, 1797.
4. Thur.....Lord Eldon born, 1751.
5. Fri.....Battle of Stony Creek, 1813.
6. Sat.....Easter Term ends.
7. Sun.....*2nd Sunday after Trinity.*
8. Mon.....County Ct. Sitgs. for Motions in York. Surrogate Ct. Sittings. First Parliament at Ottawa, 1866.
10. Wed.....County Ct. Sittings for trial, except in York.
11. Thur.....St. Barnabas. Lord Stanley Governor-General. 1888.
14. Sun.....*3rd Sunday after Trinity.*
15. Mon.....Civil Assizes at Toronto. Magna Charta signed, 1215.
16. Tues.....Battle of Quatre Bras, 1815.
18. Thur.....Battle of Waterloo, 1815.
19. Fri.....Battle of Blenheim, 1704.
20. Sat.....Accession of Queen Victoria, 1837.
21. Sun.....*4th Sunday after Trinity.* Longest day.
22. Mon.....Slavery declared contrary to the law of England, 1772.
24. Wed.....Midsummer day. St. John Baptist.
25. Thur.....Sir M. C. Cameron died, 1887.
28. Sun.....*5th Sunday after Trinity.* Coronation of Queen Victoria, 1838.
29. Mon.....St. Peter.
30. Tues.....Jesuits expelled from France, 1880.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[May 12.

DUGGAN *v.* LONDON & CANADIAN LOAN & AGENCY COMPANY.

Shares—Pledge—Transfers "in trust"—Repledge by first pledgee—Redemption.

The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company "in trust." The managers were also brokers, and were as brokers carrying on speculations for the plaintiff, and he transferred to them as security for the payment of margins certain other shares in the same company, the transfer being in the same form "in trust." Subsequently the loan company were paid off by the brokers at the plaintiff's request, but the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier "in trust," and from time to time changed the loan to other banks and financial institutions, each transfer being made to the manager "in trust." An allotment of new shares was taken up by the then holders at the request of plaintiff. After this the brokers, on the security of the old and new shares, obtained a loan from the defendants of a much larger amount than the amount due by the plaintiff to the brokers, the shares being transferred by the then holders to the defendants.

Held, reversing the judgment of STREET, J., 19 O.R. 272, that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers, and that the form of transfer "in trust" to the holders who transferred to the defendants was not in itself sufficient to put the defendants on enquiry as to the brokers' title, but might fairly be interpreted as meaning that the various transferees were holding the shares "in trust" for the respective institutions.

E. Blake, Q.C., and *Oliver Howland*, for the appellants.

McCarthy, Q.C., and *J. K. Kerr*, Q.C., for the respondent.

IN RE LONG POINT COMPANY *v.* ANDERSON.
IN RE LONG POINT COMPANY *v.* DUNCAN.

Prohibition—Division Court—Error in law.

Prohibition will not lie to a Division Court merely because a judge has erred in his construction of a statute where the judge does not by this error in construction give himself jurisdiction he does not in law possess.

Judgment of the Queen's Bench Division, 19 O.R. 487, reversed.

McCarthy, Q.C., and *W. M. Douglas*, for the appellants.

C. E. Barber for the respondents.

REDMOND *v.* CANADIAN MUTUAL AID ASSOCIATION.

Insurance—Life insurance—Assessments—Forfeiture—Waiver.

Where a mutual insurance company have without objection received payment of assessments after the proper date for their payment, they are not thereby debarred from insisting on a subsequent occasion upon the strict observance of the conditions of the company as to payment when they give notice that they intend so to insist and there is no conduct on their part tending to mislead the insured.

Judgment of the Queen's Bench Division reversed.

Watson, Q.C., for the appellants.

F. A. Anglin for the respondent.

MARTIN *v.* MAGEE.

Vendor and Purchaser—Title—Devolution of Estates Act—R.S.O. (1887), c. 108.

Under the Devolution of Estates Act the legal estate in the deceased's land vests in his legal personal representative, and the beneficial owner—whether the debts of the deceased are paid or not—cannot make a good title without a conveyance from the legal personal representative.

Judgment of the Chancery Division, 19 O.R. 705, reversed.

E. D. Armour, Q.C., and *D. Macdonald*, for the appellant.

Hoyles, Q.C., and *J. Chisholm*, for the respondent.

EDMONDS *v.* HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgagor and Mortgagee—Interest—Insurance—Application of—R.S.O. (1887), c. 102, s. 4.

Under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced.

Where insurance moneys are received by a mortgagee under a policy effected by the mortgagor pursuant to a covenant to insure contained in a mortgage made pursuant to the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold the insurance moneys in reserve as collateral security while any portion of the mortgage moneys is unpaid.

Judgment of the Queen's Bench Division, 19 O.R. 677, varied.

W. R. Meredith, Q.C., and *John Crerar*, Q.C., for the appellants.

Aylesworth, Q.C., and *P. C. Macnee*, for the respondents.

GRIFFITH *v.* CROCKER.

Debtor and Creditor—Accounts—Appropriation of payments.

Appropriation of payments is a question of intention, and where a creditor takes security for an existing indebtedness and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold and crediting him with moneys received, there is no irrebutable presumption that the payments are to be applied upon the original indebtedness.

Judgment of STREET, J., reversed.

J. H. Coyne for the appellant.

Gibbons, Q.C., for the respondent.

HIGH COURT OF JUSTICE.

Chancery Division.

BOYD, C.] [April 20.

LASBY *v.* CREWSON.

Will—Construction—Direction to divide estate into impossible fractions—Carrying out intention notwithstanding difficulty of particular words used.

A testator devised as follows: "When my youngest son is of the age of eighteen years, my estate . . . shall be divided among my children then living; that is to say, to each of my sons I leave two-thirds, and to each of my daughters one-third of all my estate and effects."

When the youngest son attained eighteen years there were twelve children living, seven daughters and five sons.

Held, that in order to carry out the clear intention, notwithstanding the apparent difficulty caused by the particular words, the above devise should be construed to mean that each son's portion should be double that of a daughter.

D. Guthrie, Q.C., and *J. Watt*, for the plaintiff.

McMurchy for P. R. Loscombe.

N. G. Bigelow for Williams & Williams.

D. Burke Simpson, *G. W. Field*, *T. P. Coffee* and *J. A. Mowat* for other parties.

FERGUSON, J.] [May 9.

RE WANSLEY AND BROWN.

Vendor and purchaser—Religious body—Dispersed congregation—Trust not ended—Trustees—Sale by—Sanction of county judge—R.S.O., c. 137, s. 14, s-ss. 1, 2, and 3—Corporate succession.

In an application under the Vendor and Purchaser Act, R.S.O., c. 112, in which the trustee of a congregation which had separated and ceased to exist was making title to lands belonging to the said congregation but useless for its original purpose,

Held, following *Attorney-General* v. *Jeffrey*, 10 Gr. 273, that the trust had not come to an end.

Held, also, that the sanction of sale and the approval of the deed by the County Judge, as provided for by R.S.O., c. 237, s. 14, s-s. 3, is sufficient in lieu of all that is required by s-ss. 1 and 2.

Held, also, that the Statute 9 Geo. 4, c. 2, s. 1, created in the trustees "the corporate attribute of succession," and so created them a corporation, and that under the deed in question they took an estate in fee simple and had power to sell.

Walter Read for the vendor.

Lash, Q.C., for the purchaser.

STREET, J.] [May 11.

HAGAR *v.* O'NEILL ET AL.

Mortgage—Illegal and immoral consideration—Purchase money of a house of ill-fame—Knowledge of—Participation in—Legal title—Payment of amount due.

In an action on a mortgage given in part payment of the purchase money of a house of ill-fame the defendants set up that the consideration was illegal and immoral.

Held, that in order to establish such a defence the defendants must show more than a knowledge of the plaintiff of the immoral trade carried on on the premises and a belief that it would be continued; they must show something done in furtherance of the immoral purpose or some consent to or participation in it.

Held, also, that even if the consideration was tainted with illegality, although the plaintiff could not recover it by action, she having obtained the legal estate by the mortgage as security for the purchase money was entitled to possession by virtue thereof, and the only way in which the defendants could retain possession was by payment of the balance of the purchase money and costs.

R. G. Smyth for the plaintiff.

John G. Holmes for the defendants.

Flotsam and Jetsam.

IN a town up north an ex-judge is cashier of a bank. One day recently he refused to cash a check offered by a stranger. "The check is all right," he said, "but the evidence you offer in identifying yourself as the person to whose order it is drawn is scarcely sufficient." "I have known you to hang a man on less evidence, judge," was the stranger's response. "Quite likely," replied the ex-judge, "but when it comes to letting go of cold cash we have to be careful." —*Central Law Times.*

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C. Z. A. LASH, Q.C.

JOHN HOSKIN, Q.C. J. H. FERGUSON, Q.C

F. MACKELCAN, Q.C. N. KINGSMILL, Q.C.

W. R. MEREDITH, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.