DIARY FOR SEPTEMBER.

2. Tues. ..Court of Appeal sits.
4. Thur..Napoleon III. deposed, 1870.
5. Frid...Convocation meets.
6. Sat. ..Trinity Term ends.
7. Sun. ..13th Sunday after Trinity.
9. Tues...County Court sittings for York begin.
10. Wed...Mr. Justice Willis died, 1877.
12. Frid...Frontenac, Governor of Canada.
13. Sat. ..Quebec taken by British under Wolfe, 1759.
14. Sun. ..14th Sunday after Trinity. Jacques Cartier arrived at Quebec, 1535.
16. Tues...Atlantic cable opened, 1858.
17. Wed...First U. C. Parliament met at Niagara, 1792.
19. Frid...Lord Sydenham, Gov.-Gen., died, 1841.
21. Sun. ..15th Sunday after Trinity.
24. Wed...Guy Carleton, Lieut.-Gov. and Com.-in-Chief, 1766.
28. Sun. ..16th Sunday after Trinity.
30. Tues...Sir Isaac Brock, Pres. Can. 1811.

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LAW SOCIETY OF UPPER CANADA..........

Canada Law Journal.

Toronto, September, 1879.

As we go to press, we see everywhere around us the tokens of active preparation for the fitting reception of the representatives of royalty in the chief city of Ontario. On our principal streets is seen the rapid metamorphosis of unsightly boards and heaps of evergreens into graceful arches, and gas-fitters, while they reap a golden harvest from the practice of their mystery, almost forget for the moment the ill-omened name of Edison. This is as it should be; and we are glad to learn that the legal profession, as represented by the Law Society, will show no remissness or lack of enthusiasm on this occasion, and that arrangements have already been made whereby the light of intellect, which, we trust, shines steadily in the court-rooms of Osgoode Hall, will be fitly typified by the gorgeous illumination of its windows.

It is a misfortune of editors of Law Journals that sea-serpents, brutal murders, and other well-known literary resources of the dead season are of no possible service to them. During ten months of the year, the work of the law-courts and the contemporary debates of the Legislature afford them an endless variety of topics. July comes and all is changed.

> "Ille terrarum mihi, præter omnes,
> Angulus ridet"

ries the jaded lawyer and rushes off to Murray Bay, or Orchard Beach, or whatever may be the Tarentum of his choice. The lonely caretaker lingers round the courts, the sole personal representative of the majesty of the Law; and in the offices of editors of Law Journals are to be

found the only men who wish the long vacation was over.

The disastrous results of the failure of the Glasgow Bank have given rise to a Bill which has been favourably received by the Imperial Parliament, and appears likely to pass into law in England. This Bill alters the position of unlimited joint-stock banks. It enables the shareholders of such a bank to limit their liability, should they so desire. At the same time, unlimited banks are not obliged to come under its operation; if they think it more to their advantage to remain unlimited, and if the shareholders are willing to face the risks. In the words of the *Saturday Review* :—"An unlimited bank will be able to register itself as a limited bank, and it may, of course, choose any kind of limitation it pleases. It may have half or a third only of its capital paid up, and then, in case of liquidation, the uncalled capital will be payable for the benefit of creditors. But unlimited banks that seek to limit their liability will, under the Bill, have another course open to them. They will be able to register as banks with reserved liability or limited by reserve. In case of disaster, the shareholders will be liable not only for the amount of their shares, but for a further sum, which is always to be a multiple of the amount of each share they hold. Every bank may choose what this multiple shall be. Some banks will choose to multiply by one, and then the reserve liability will be equal to the amount of the share. Others will multiply by two, and then the reserve will be equal to twice the amount of the share."

In his recent speech at the Mansion House, Lord Beaconsfield made the somewhat paradoxical assertion that, in his opinion, no tenure of land could be devised except on the condition of furnishing three incomes from the soil. We are wont to congratulate ourselves upon the fact, that whereas in the mother-country the soil has to support three classes of men—the landlord, the farmer, and the labourer—in Canada and America, the land is mainly in the hands of freeholders cultivating their own land, and therefore has only to furnish one income, in the place of three. If his Lordship is right, however, we are not really so exceptionally fortunate as we suppose. And certainly the way he sets to work to prove his point is most ingenious. First of all, he says, the freeholder has to purchase his land. This he will do, say, by selling out any stock he may hold in the funds, or more probably by borrowing. The first income, then, his land will have to furnish will go towards paying the interest on the money borrowed, or supplying the interest he would otherwise have derived from his moneys invested in the funds. Then, having purchased his farm he must stock it, provide implements, a cart and horse, and build, at all events, some sort of shed. This is the floating capital and demands the second income, which in England is enjoyed by the farmer. Lastly, having purchased and stocked his farm, he and his sons proceed to work it. But they have to be fed and clothed and lodged, and this is the expenditure answering to wages under the system in England. This, then, is the third income which the land is obliged to produce under the tenure of peasant or freehold proprietorship. Lord Beaconsfield, perhaps, scarcely contemplated such a state of things as exists in the Red River Valley so well described by Mr. Vernon Smith in the *Nineteenth Century* for July last. We read of land in that district which produces from 40

to 50 bushels to the acre, whereas, Mr. Smith shows, 30 bushels to the acre of the first crop clears all outlay up to that time, returns the capital invested, and leaves a first-rate fenced farm in a high state of cultivation for succeeding agricultural employment. So, even if the farmer has purchased his land with borrowed money, it would apparently only be for the first year that the first income above mentioned would have to be furnished by it.

The English LAND TRANSFER COMMITTEE have, in their recent Report, made a series of recommendations, which, if carried into effect, will cause a revolution in old-fashioned conveyancing, and produce a state of things more similar to that which exists here and in the other Colonies. They have themselves summarised their recommendations, which include the following: (1) The abolition of the present system of paying for conveyances according to the length of the instrument, and the substitution of a graduated *ad valorem* scale of payments; (2) the compulsory use of short statutory forms; (3) the practical abolition of legal mortgages and deeds of reconveyance, by giving to the holder of a simple charge on land all the remedies at present possessed by the holder of a legal mortgage, either with or without a power of sale (as the parties may desire), and by providing that upon the endorsement on the charge of a memorandum signed by the party entitled thereto, stating that all the moneys due thereon had been satisfied, the charge itself, should *ipso facto*, determine; (4) the appointment of a real representative to the deceased owner of land having the same control over, and power to make title to, freeholds, which a personal representative now possesses in regard to chattels real:—this was urged or approved by every witness examined by the Committee.—(5) The repeal of the Statute of Uses. As to this the Committee report: "Among the various pitfalls for the unwary presented by statutes providing for a state of things which has long since passed away, few have led to more expense or litigation than that stronghold of conveyancing pedantry the Statute of Uses. Your Committee see no reason why it should not at once be repealed." (6) The establishment in England and Wales of district registers of assurances affecting land; (7) the enactment that (except in case of actual fraud on the part of the party registering) every instrument shall rank in priority according to the date of its registration; (8) the localization of the registration of titles, as far as practicable, concurrently with the establishment of district registries for the registration of assurances.

The Committee further report as follows:—

"Your Committee have considered whether the period of commencement of a title which a purchaser under an open contract may require, at present fixed at forty years, might not, in view of the recent Statute of Limitations, be still further shortened. But, as the term in question depends not only upon the time during which claims against land may be kept alive, but upon the estimated duration of human life, during which such claims may remain in abeyance, they believe that such an abridgement cannot be made as long as the rights of reversioners and other persons having future interests are, for the purposes of the Statute, held only to arise when they fall into possession. Whether the latter rule might not be advantageously altered they consider to be a matter for grave consideration." The Committee appear to speak with approval of the Australian system, whereby the title to all land, in-

stead of resting upon an instrument of, perhaps, difficult construction or doubtful validity, starts with an unimpeachable grant from the Crown, following upon an official survey. They, however, are of opinion that it would not be safe to press the analogy between conveyancing in England and conveyancing in the Colonies too far, and state that the universal registration of unimpeachable or absolute titles, which has been found perfectly easy in Australia, would, it is admitted by the strongest advocates of registration in England, be simply impossible.

NEW YORK STATE BAR ASSOCIATION.

We have received the second volume of the Reports of the above Association, which contains the address delivered by the Hon. Samuel F. Miller, Justice United States Supreme Court, at the opening of the second annual meeting, besides many valuable essays and reports of various committees. The object of the Association, as set forth in its constitution, is "to cultivate the science of Jurisprudence; to promote reform in the Law; to facilitate the administration of Justice; to elevate the standard of integrity, honour, and courtesy in the legal profession; and to cherish a spirit of brotherhood among the members thereof." The constitution provides, amongst other things, for the appointment of a Committee on Grievances which may hear all complaints in writing preferred by any member against any other member for misconduct in his relations to the Association, or in his profession, and also any specific complaint which may be made to them by any member in writing, affecting the interest of the legal profession, the practice of law, or the administration of justice, and may report thereon to the Association. It also provides for the appointment of Committees on Law Reform, and on Legal Biography, the duty of the latter being to provide for the preservation among the archives of the Association of memorials of the lives and characters of distinguished deceased members of the bar of the State. Mr. Justice Miller, in his opening address, makes many interesting observations as to legislation in the United States, as it affects the administration of justice in the courts. After remarking that for the first fifty or sixty years after establishing their independence, the American people were too much occupied in perfecting their political organization to turn their attention to the organization of the courts, the learned Judge proceeds to show that the first innovations made upon the established order of things affected the period of office and mode of appointment of the Judges. The Americans, considering the life tenure of office by Judges as a device adopted in England to protect the judiciary from the influence of the Crown, deemed that now that the people were themselves the Sovereign, Judges should, like other public servants, be made to feel their accountability to their masters; and in most of the States the fundamental law was altered, and Judges held office for short periods, and were elected by the Legislature. "Of all the depositaries of political power in this country," says Mr. Justice Miller, "from the people, to whom the most extended right of suffrage has been given, to the executive, whose power is under least restraint, the legislative bodies, jointly and singly, are the most unfit to be trusted with appointments to office." The system only afforded fresh opportunity for what is called "log-rolling." "Log-rolling" is a term derived from the practice of the early settlers in clear-

ing their farms. They cut the trees into large logs, which were then piled up and burnt. The piling, however, required more force than was at the demand of one farmer, and so the custom was for his neighbours to lend their help, while he, of course, was expected to do the same for them. The application of the metaphor to fraudulent combinations among members of legislative bodies is sufficiently obvious. Against this log-rolling system the efforts of the American people have been, for some time, directed. Amongst the earliest reforms in that direction was the transfer of the election of Judges from the Legislature to the people by popular vote; while, as to the tenure of office, the learned Judge informs us that public opinion has undergone, and is still going through, a very decided reaction, and he expresses his satisfaction that such should be the case. The present state of affairs, as regards the higher courts of the States, is given as follows:—

"There are seven States in which life tenure prevails. In one the term is twenty-one years, in another fifteen, in another fourteen, in three it is twelve, and in two it is ten. In the remainder it is six and eight years, with three or four exceptions. So in regard to the manner of appointment. Three States appoint by legislative election, seven by governors and senates, and twenty-eight by popular election." The writer then proceeds to discuss the merits of the system of electing Judges by popular vote, remarking, however, that in America it has not yet been sufficiently long in operation to form a satisfactory opinion on it, and has, moreover, been adopted almost exclusively in connection with short terms of office "about the evil of which," says he, "there can be no question." He, however, clearly shows his own view to be that this system is a dangerous one, especially in cities where the criminals against whom a Judge must enforce the law, if it is enforced at all, exert a very powerful influence. And, apart from abstract reasoning, he appeals to the mode in which the Federal Judiciary are appointed. These, under the Constitution of the United States, have always been appointed by the President, subject to approval by the Senate. And he expresses his opinion that very few American statesmen, however democratic their general views of government may be, have any wish to adopt for the Judges of the United States, the system of popular election. The way Mr. Justice Miller regards the matter is shown by the following passage:—

"The dependence of the judiciary on the appointing power is not dangerous only when the appointment is by a monarch. It is much to be doubted if dependence on the vote of the populace is any less so, if the power is exercised at short intervals. The passions, the prejudices, the hasty impulses of the people, when brought to bear on the judge, are as likely to be unfavourable to the defence of innocence in criminal prosecutions, and to the establishment of an unpopular claim of private right, as the occasional exercise of that influence by a king or governor."

He, however, says he does not think the question of the source of their appointment so important as a means of securing honesty, capacity and independence among the judges, as stability in the tenure of office, and in the composition of the Court, and reasonable compensation of the judges. And, on the last point, he strongly expresses his disapproval of the niggardly salaries still paid to many of the judges in the States.

The strong leaning of an eminent American Judge, displayed in this address, towards the system existing in

Canada and the mother-country, namely, the appointment of Judges by the Executive and their tenure of office during good behaviour, is interesting. It is especially so to those who remember Lord Dufferin's speech at the opening of the Provincial Exhibition last September. In that great speech, exerting the privilege of moribund personages, it will be remembered, he gave us the benefit of his parting counsel "before he turned his face to the wall." Referring to the independence of the Judges as one of those principles incident to the British Constitution which, though fully recognised and established, might perhaps be overridden in times of political excitement, unless public opinion exerted itself to maintain them absolutely intact, the Governor-General said:

"Notwithstanding what has been done elsewhere, I do not think that the Canadian people will ever be tempted to allow the Judges of the land to be constituted by popular election. Still, on this continent there will always be present in the air, as it were, a ceratin tendency in that direction, and it is against this I would warn you."

Lord Dufferin then proceeded to dwell on the importance of securing high salaries to the Judges, in the same spirit as does Mr. Justice Miller. On this point he said:—

"In order to secure an able Bar, you must provide adequate prizes for those that are called to it. If this is done, the intellectual energy of the country will be attracted to the legal profession, and you will have what is the greatest ornament any country can possess—an efficient and learned justiciary."

We have only had space to dwell upon one small portion of the contents of this interesting volume. There are contained in it many other valuable dissertations of interest not only to lawyers, but to every intelligent man. We may have an opportunity of referring to some of them in subsequent issues.

ARYAN SOCIETY.

The sudden and rapid expansion of historic studies in the middle of the eighteenth century constitutes one of the great epochs in literature, while the introduction of the comparative method, as Mr. Freeman has observed, marks the nineteenth century, like the fifteenth, as one of the great stages in the development of the mind of man. The application of the comparative method has produced, and is producing, great results in three regions of enquiry, namely, language, mythology, and institutions. It is, of course, in the last of these that the lawyer is more immediately interested, although the three are closely connected, and mutually elucidate each other. And in these days of extended ideas some knowledge of the works of Sir H. Maine and other labourers in the same field may almost be said to be a necessary part of a lawyer's education. Enquiry into the institutions of that Indo-Germanic, Indo-European, or Aryan race from which we claim descent, has already displaced many false theories as to the nature of property and the law of persons, has thrown light upon the direction in which true progress lies, and has furnished us with a stand-point, which we would not otherwise have, wherefrom to judge of the real value of those socialistic and communistic schemes which are attracting so much attention in the modern world. For proof of this we cannot do better than refer to an article on Aryan Society in the *Westminster Review* for July last. The writer brings out very clearly the leading facts which modern enquiry has arrived at as to the institution of the Family, which lies at the basis of Aryan civi-

lization, and as to those village communities, which develop out of the Family, and which present the same general features, whether we look for them in India, or among Teutonic and Scandinavian nations. One of his objects is to point out—what is familiar to every student of the Politics—that some of the main results of modern enquiry in this field were anticipated by Aristotle. Sir H. Maine, Mr. Freeman, and the other modern writers referred to in this article, have shown that if we are to gain a true knowledge of the development of civilization and the history of institutions we must follow the course pointed out in the first book of Aristotle's Politics, and commencing with the Family as the basis, trace its expansion into the village community, from which developed the State, whether in the Greek and Italian form of the City or in the later Teutonic form of the Nation. The fallacy of commencing to trace civilization from an imaginary basis resting on contract, as in the "Social Compact" of Locke, and the "Original Contract" of Hobbes, has been exposed, and the stage of contract has been shown to be the latest, and not the first stage of human progress—the transition having been one from Status to Contract. As Sir H. Maine puts it (A. L. p. 169): "Starting, as from one terminus of history, from a condition of society in which all the relations of persons are summed up in the relations of the Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals."

The theory of the origin of property enunciated by Blackstone and others, resting upon the principles of occupancy enunciated by the Roman Jurisconsults, presupposing as they do not joint but separate ownership, has been proved to be false. Joint ownership was the form which property originally universally took, and, in the words of our writer, "recent investigation has made it extremely probable that, so far from the rights of villagers to commonable lands being the result of unchecked encroachments on the manor of the lord, the enclosure of commons and occupation of waste by the feudal lord are often themselves most unjustifiable encroachments on the ancient rights of village communities."

Our ancestors then lived in village communities consisting of an aggregation of families, each family being controlled in its domestic concerns, solely by that Patria Potestas, which is one of the fundamental points in the early organization of society. Hence arose what Sir H. Maine calls the "international" character of ancient law. Ancient law is scanty because it was only intended as a supplement to the autocratic commands of the Paterfamilias. Its principal object is to regulate the intercourse of corporations, each represented by a single head. One consequence of this system of corporate existence was the doctrine of collective responsibility,—in other words the family was held responsible for the acts of its individual members. As the writer of the article points out, we may, perhaps, trace a survival of this in legal penalties, like attainder of issue, and in those "social penalties" which are still inflicted on the families of persons guilty of heinous crimes. The lands of the village community appear—as in its modern Indian counterpart—to have been usually divided into three parts. First there was the arable land—or the Arable Mark as it is called—in which each householder had a separate lot, which he was obliged to cultivate according to minute rules. Then there were the Pasture Meadows,

the Mark of the township, which though more or less the subject of private occupancy, no family might permanently appropriate. Thirdly there was the waste land or Common Mark, held by the whole community *pro indiviso*. Private proprietary right in the arable land was never admitted. Traditions remain of customs which are still to be observed in Russia and Croatia, of the periodical repartition of lots within the cultivable area, and of the "shifting of the Arable Mark." "As soon as the family lot becomes separate and immovable," says our writer, "the village community is on the way to dissolution."

It was the original intention of the writer in the *Westminster*, as he informs us, to trace the growth of the State out of the village community, exhibiting, in its modern form, the principle of *local contiguity* as a basis for political and social association; a principle which was destined, after passing through many phases, and producing many revolutions, to ultimately supersede the ancient system of blood-relationship as the bond of civilised society. It was, then, his wish to give some account of the growth and history of some of the leading institutions of the Aryan race, of Sovereignty, for instance, tribal, imperial, and territorial, of Nobility, and of Slavery. It is to be hoped that, in a subsequent article, he will find space to complete his scheme. He has, at all events, fully justified his statement that it is impossible fully to understand either the constitutional history, the political system, or the Common Law of England without at least some knowledge of the primitive institutions of the Aryan race.

F. L.

SELECTIONS.

POPULAR KNOWLEDGE OF LAW.

It is often said, and we fear with too much truth, that no people are so ignorant of the laws of their country as the English. The most strange absence of knowledge of elementary legal principles may be met with even among persons of considerable general information, and no one is ashamed to admit a want of acquaintance with special laws, although they may affect the most ordinary human relations. It is an old story how often novelists and playwrights go astray when they bring the law into the working out of their plots. Some one has said that such authors should always keep a legal adviser at hand to save them from the mistakes into which they are so liable to fall. One of our most popular novelists, who is distinguished by the range and accuracy of his knowledge of common things, published a story a few years since in which his hero, an ex-Solicitor-General, commits suicide because, in forgetfulness of a well-known statute, he thought a large property had been left away from his wife which, in fact, descended to her absolutely. Still more recently our interest has been invited to a trial for bigamy in which, in defiance of all principle, the chief witness against the man charged with the offence is the woman with whom his first marriage was said to have been contracted. It is almost an every-day occurrence for newspapers to report the refusal of a magistrate to hear evidence from the first husband or wife, as the case may be, in a charge of bigamy; yet we are favoured with a very clever report of a trial at assizes, in which this objection seems to have occurred to neither Judge nor counsel. When the opportunities of obtaining information are so ample, the lack of of it is all the stranger. In no country are the proceedings of the Court chronicled from day to day with such fidelity and completeness as with us, and nowhere, as it would seem, are they so little turned to account.

It is the dream of many that the study of the law will one day become again what it was accounted in bygone genera-

tions—a necessary part of a liberal education. It is certainly strange to read the details showing how three centuries since noblemen and gentlemen frequented the Inns of Court, in even greater numbers than they frequented the Universities, for the simple purpose of learning something of the laws of the country they might have a share in governing. Since then knowledge of law has become a strictly professional accomplishment, and it will not again become a branch of popular education until the law has been made at once simpler and more scientific in its conceptions and procedure. The efforts of law reformers are directed to these ends; but while we await these great results in the future, we know not why opportunities that are now open to all should be neglected as they are. A criminal trial excites attention through an apparent fascination in crime; why should not the adjudication of civil rights have an attraction of its own as connected with the organization of men in society and the attributes of property in the material objects of possession?
—*Times.*

PASSING OF PROPERTY OBTAINED BY FRAUD.

The Court of Queen's Bench Division, on the first day of the present sittings, had, in the case of *Babcock* v. *Lawson,* to discharge the disagreeable duty of deciding which of two innocent parties should suffer the consequences of a fraud practised upon both. The circumstances of the case made it *sui generis,* otherwise the law relating to the subject was so thoroughly thrashed out in the recent case of *Cundy* v. *Lindsay* that were it not for this the action would no doubt never have been brought. In *Cundy* v. *Lindsay* (38 L. T. Rep. N. S. 574), which came before the House of Lords upon appeal from a decision of the Court of Appeal reversing the decision of the Court of Queen's Bench, the facts were as follows:—A person of the name of A. Blenkarn wrote to the respondents and ordered goods of them, intentionally signing his name in such a manner as to be mistaken for Blenkiron. There was a respectable firm of that name, and the respondents, believing that they were dealing with that firm, forwarded the goods to Blenkarn. Blenkarn had no means of paying for the goods. The appellants afterwards purchased the goods *bonâ fide* from Blenkarn. Held (affirming the judgment of the court below), that the property in the goods had never passed from the respondents, and that they were entitled to recover the value of them from the appellants. In giving judgment the House of Lords laid it down that, in the application of this principle, the settled and well-known rules of law must be rigorously applied, and, with regard to the title to personal property those rules were expressed as follows:—The purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchase the chattel in market overt, he obtains a title which is good against all the world; but if he do not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professes to sell it, the purchaser will not obtain a title as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract, that is to say, a contract which has purported to pass the property from the owner to him, then the purchaser will obtain a good title, even though afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it and to set it aside, because those circumstances will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained. In this case the court held that this was not one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside on the ground of fraud, but a case in which the contract had never come into existence, and accordingly that the property had never passed from the respondents. In a subsequent case that of *Moyce* v. *Newington* (39 L. T.

PASSING OF PROPERTY OBTAINED BY FRAUD.

Rep. N. S. 535) the contract between the vendor and the fraudulent third person was held to have passed the goods. In that case the plaintiff purchased some sheep in an open market recently established under a local Act, paid a fair price for them, and removed them to his farm. The person from whom he purchased them had obtained them just before from the defendant for a cheque upon a bank which had no account in his name; but plaintiff knew nothing of this. When the cheque was dishonoured the defendant took criminal proceedings against the drawer, and afterwards got him convicted for obtaining the sheep under false pretences. On the day before the conviction the defendant, with a policeman, removed the sheep from the plaintiff's to his own farm, and the plaintiff now brought this action to recover them. The court held that the plaintiff was entitled to recover, holding it to be settled law, that, though a seller is induced to sell by the fraud and false pretences of the buyer, and though it is competent to the seller by reason of such fraud to avoid the contract, yet till he does some act so to avoid it, the property remains in the buyer; and that if he, in the meantime, has parted with the thing sold to an innocent purchaser the title of the latter cannot be defeated by the original seller.

These two cases illustrate clearly the principles which relate to the passing of property obtained by fraud. In the first there was no actual passing of property from the original vendor to the fraudulent third person, so that he could not give a good title to it to the defendant; in the second there was an actual passing of the property and the contract not having been set aside before sale to an innocent vendee the latter was held entitled to keep it. The present case of *Babcock* v. *Lawson* differed considerably in the facts from both these, though the principle upon which they were decided was held equally applicable. The plaintiffs, who are merchants at Liverpool, had lent to another firm of merchants there, their acceptances for the sum of £11,500, on the security of a certain quantity of flour, under a memorandum addressed to the plaintiffs in these terms:—"As security on our part we have warehoused in your name certain lots of flour, and in consideration of your delivering it to us or our order as sold, we undertake to pay you proceeds of all sales thereof on receipt." The plaintiffs paid their acceptances as they became due, and had paid them to the amount of nearly £7,000, and, in the meantime the borrowing firm applied to the defendant to advance them the sum of £2,500 on the security of 1,500 sacks of the flour, which he agreed to do, not knowing that it had already been warehoused as security to the plaintiffs, and stipulating for absolute possession of the flour, and for the power to sell it. In order to give such possession the borrowing firm brought to the plaintiffs a note stating that they had sold to the defendant the 1,500 sacks of flour, the proceeds of which they engaged to pay to the plaintiffs; and thereupon the plaintiffs gave them a delivery order, under which the flour was delivered to defendants, who thereupon advanced the £2,500, and then sold the flour in the Liverpool market for £2,647. The borrowing firm paid only £500 to the plaintiffs, who, being unable to obtain more of the proceeds, sued defendant for the value of their property on the ground that the transfer had been obtained from them by fraud. The court gave judgment for the defendant on two grounds. Assuming—as to which they had doubt—that the contract conferred on the pledgees a special property in the flour, and gave them more than the mere custody, so that they might know of a sale, this was subject to the right of the pledgors to have the flour given up to them on their finding a purchaser, for the purpose of a sale by them as owners without any intervention by the pledgees, and the flour having been surrended intentionally, and the possession parted with, the contract of pledge was, for the time being, at an end. The transaction might as between the pledgor and the pledgee have been revoked as obtained by fraud, so long as the flour remained in the hands of the pledgors; but when, prior to any such revocation, the property in the goods had been transferred by the owners for good consideration to a *bonâ fide* transferee, the defendant, the latter acquired an indefeasible title, and on this ground alone he was held entitled to judgment.

The court thought that the fact that the flour, having been parted with by the plaintiffs with a view to its being sold had been pledged instead, made no difference, inasmuch as it having become revested in the pledgors by the act of the pledgees, the former were as competent to dispose of the goods by way of pledge as by way of sale; and, further, that it would make no difference if the money was advanced by the defendants before the flour was actually delivered.

The court stated also that there was another ground upon which they were of opinion that the defendant was entitled to judgment. That was, that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. Here the borrowers were allowed by the plaintiffs to appear as the ostensible owners of the flour, and to exercise uncontrolled dominion over it. It would therefore be unjust and inequitable that the defendants, who had innocently advanced money on the flour in the ordinary course of commercial dealing, should be sufferers through the improvident conduct of the plaintiffs with the borrowers, or their want of proper caution.

In the case of *Moyce* v. *Newington* the Lord Chief Justice stated that in the American courts the preference given to the right of the innocent purchaser when a contract fraudulently obtained has not been avoided by the original vendor, is treated as an exception to the general law, and as resting on the above principle that where one of two innocent parties must suffer from the fraud of a third the loss shall fall on him who enabled such third party to commit the fraud, and observed that he should rather prefer to accept that view than the reasoning on which the conclusion is based in our own text writers. *Babcock* v. *Lawson* cannot fail to be regarded as an important case as settling a point of law which at first sight does not clearly appear to be settled by previous decisions.—*Law Times.*

O'BRIEN'S DIVISION COURTS MANUAL: Second Edition. Willing & Williamson: Toronto.

We have been favoured with advance sheets of this work. The well-known ability of the author (who is editor of the LAW JOURNAL), and the acknowledged usefulness of his first edition, led us to expect much from this edition, for he entered upon an enlarged field. He has not disappointed us, but has occupied it well. The legislation which has taken place since Mr. O'Brien first annotated the Division Courts Acts, as set forth in the Consolidated Statutes of Upper Canada, chapter 19, and afterwards the Replevin Act, and subsequent Acts, giving jurisdiction to Division Courts, required a new effort, which Mr. O'Brien has put forth well. The amended Division Courts Act of the late Hon. John Sandfield Macdonald, giving the right to garnish debts, required an entire recast of rules and forms. These were framed and settled by the Board of County Judges in July, 1869. Then the revision of the Statutes brought the whole of the enactments into one Act. A second edition of Mr. O'Brien's work was thus a necessity, and the performance does the learned author infinite credit.

There is a careful annotation of almost every provision in the Statutes we have referred to; also of the Replevin Act. The Fence-Viewers' and Water-courses Acts, the Act respecting Education, and the Act respecting Public Schools, in so far as they confer jurisdiction on Division Courts, are also annotated: and there are added chapters on prohibition, certiorari, and mandamus. Supplementary rules and forms of the Judges, with annotations and useful hints to practitioners, are given to officers of the Courts and suitors. An appendix of new forms is added to those framed by the Judges, which will be found to supply a felt want in many respects.

The printing is in clear type, on fair good paper, and the work as a whole is a very creditable Canadian Law Book, reflecting well on the learning and care of the painstaking Editor and those who have assisted him, as well as on the publishers who have executed the mechanical department.

Mr. O'Brien's long acquaintance with these Courts, which his position as Editor of the "Canada Law Journal and Local Courts Gazette" has given him, has peculiarly fitted him for this work. —*London Free Press.*

CANADA REPORTS.

SUPREME COURT OF CANADA.

Crysler v. McKay et al.

This was an appeal, by the defendants, from the judgment of the Court of Appeal for Ontario, dismissing an appeal from a decree of the Court of Chancery. The bill was filed to recover possession of certain lands in the Township of Winchester, the plaintiff claiming title under a tax sale in 1855. The defendants set up that the tax sale was invalid, owing to five years' arrears of taxes not being due when the sale took place; in which view they were sustained by the majority of the court, who allowed the appeal. Several important questions with regard to the validity of tax sales were discussed in the course of the argument, and in the judgments of the learned judges, amongst whom there existed considerable diversity of opinion. We print below the judgment of Mr. Justice Gwynne *in extenso;* it will be found to give an able and exhaustive discussion of a point of great interest and difficulty, viz.: the interpretation of the various statutes passed with a view to remedying defects and irregularities in the proceedings connected with the tax sales. The main scope of the judgment (which was delivered in June last) is to enforce the view held by the learned judge and concurred in by a majority of his colleagues, that the 156th section of the Assessment Act of 1866, corresponding to the 155th section of 32 Vict., cap. 36, Ont., does not make, by lapse of time, a deed upon a tax sale good, when there were no taxes in arrear for the period prescribed by statute before a sale is authorised.

Gwynne, J.—One of the points pressed upon us by the learned counsel for the respondent was, that the 156th section of the Assessment Act of 1866, made the deed under which the plaintiff claims, which was executed by the sheriff upon the 23rd of May, 1857, in pursuance of a sale had in March, 1856, wholly unimpeachable, even though no portion of the taxes for the alleged arrears of which the sale took place, had been due for five years, or even though there was no amount of tax whatever due at all in respect of the land sold. As some of my learned brothers adopt this view, it may be convenient that I should express my opinion upon this point first, before adverting to the ground upon which the court below has based its judgment.

The fair and legitimate conclusion resulting from the judgments of all the Courts in Ontario, upon the construction of the Assessment Acts, both before and since the first enactment of the section referred to, according to my understanding of the reported decisions, is that the section can only be construed to remedy all irregularities and defects existing, when the event, the happening of which the statute has made an essential condition precedent to the creation of the power to sell, has occurred, namely, when some portion of the taxes imposed has been suffered to remain in arrear and unpaid for the prescribed period, which was formerly five years but now three; and that it cannot be construed as supplying the want of that condition precedent to the creation of the power to sell. Sitting as we do here as a Court of Appeal from the Courts in Ontario, speaking for myself, I must say that if I should find a judgment of any of those Courts affirming the position contended for, I should feel it to be my bounden duty to raise my voice for reversal of such a judgment; as one which would be, in my opinion, subversive of all security for property—at variance with the plainest principles of justice—contrary to the whole scope, object and tenor of the Act in which the clause is found, and one which can only be arrived at by disregarding the elementary rule for the construction of all statutes, namely, that the construction is to be made of all parts together, and not of one part only by itself.

In *Hall* v. *Hill*, in the Court of Error and Appeal in 1865, 2 Er. Ap. Rep. p. 374, Richards, C. J. delivering the judgment of the court says: "The Courts in this country have always held that the imposition of taxes on wild lands, and the selling those lands for the arrears of such taxes with the additions and accumulations to the amount of taxes which the Acts require, in effect work a forfeiture of the property of the owner of the lands. In relation to statutes of this class, Turner, L. J., in *Hughes* v. *Chester & Holyhead Railway*, says: this is an Act which interferes with private rights and private interests, and ought therefore, according to all the decisions on the subject, to receive a strict construction so far as these rights and interests are concerned. This is so clearly the doctrine of the court that it is unnecessary to refer to cases upon the subject; they might be cited almost without end."

In that case, in the Court of Queen's Bench, 22 U.C. 584, Draper, C. J. referring to the Assessment Act, when pronouncing the judgment of the court says: "We must confess, we more readily concur with what was said in *Doe* v. *Reaumore*, 3 O. S. 247, the operation of this statute is to work a forfeiture; an accumulated penalty is imposed for an alleged default and to satisfy the assessment charged together with this penalty, the land of a proprietor may be sold, though he may be in a distant part of the world and unconscious of the proceedings. To support a sale made under such circumstances. *it must be shewn that those facts existed which are alleged to have created the forfeiture, and which are necessary to warrant the sale.*" In *Payne* v. *Goodyear*, 26 U. C. p. 451, Draper, C. J. says: "The primary, it may be said *the sole,* object of the Legislature, in authorising the sale of land for arrears of taxes, *was the collection of the tax.* The statutes were not passed to take away lands from their legal owners; but to compel those owners who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorised, to pay, by the sale of a sufficient portion of their lands;" and again at p. 452, the *power* to sell land *was created in order to collect the tax.* In *Connor* v. *Douglas*, in the Court of Appeal, 15 Gr. at p. 463, Richards, then C. J. of the Court of Common Pleas (the Court of Appeal then consisting of all the Judges of the Superior Courts), referring to the above language of the court in *Doe* v. *Reaumore*, draws a distinction between matters of procedure and other matters thus: he says: "The judges could not have intended their language to apply to a mere defective or informal advertising of the land"—"the language referred to," quoting *Doe* v. *Reaumore* as above, he goes on to say, "may well apply to all these matters creating a charge on the property; fixing, as it were, the burden on it, and rendering it liable to be sold, when the charge has once been fixed on the land, *and the period* has elapsed after which it may be sold; then the subsequent matters as to how it may be sold, the manner of selling, advertising, &c., to a certain extent cease to be mandatory, and are in fact but the mode pointed out by the statute *how* the property is to be sold, *which by all the requirements of law,* before the officer was directed to sell it, had been made liable to sale." and referring to the judgment of the Court of Common Pleas in the then recent case of *Cotter* v. *Sutherland*, he says at p. 464, "I think the language used by my brother Adam Wilson, in *Cotter* v. *Sutherland*, in the Common Pleas, is correct, and may be properly applied and laid down *as the rule* in those cases, viz.: We should require strict proof that the tax has been lawfully made, but in promoting its collection, we should not surround the procedure with too unnecessary or unreasonable rigour;" and again he says: "I would refer to the language used by the learned judge from pages 405 to 408 inclusive; the conclusion aimed at is that, under these Acts, there are certain things which must be strictly adopted, otherwise the whole proceeding following them must be void—there must have been an assessment in fact—and made by the properly authorised body—the writ must be directed to the sheriff and be returnable at the time named." And again, these are essential "elements in the constitution of any valid tax sale—there must be charges rightly created on the land—there must be a power rightly conferred upon the sheriff to sell it—the sale must not be without some reasonable and sufficient notice, nor sooner than he is authorised to sell; nor otherwise than by public auction." The learned Chief Justice then, while concurring in the above language, guards himself from being supposed to hold that there may not be in some instances, some other ingredients required, than those stated, to make the sale valid. Draper, C. J. with whom Mowat, V. C. concurred, repeated his opinion that the Tax Sale Acts are to be treated as penal in their character, leading to forfeiture, and that therefore they should be construed strictly. We have in this judgment an affirmation by the Court of Appeal of the views expressed by the Court of Common Pleas, in *Cotter* v. *Sutherland*, with the single exception that whereas the Court of Common Pleas did not incline to regard the Tax Sale Acts as of a penal character, the Court of Appeal seemed to regard them in that light. However, Mr. Justice Wilson delivering the judgment of the Court of Common Pleas, in *Cotter* v. *Sutherland*, 18 C. P. Ap. 389, affirms the law imperatively to be that the owner must be a defaulter for the prescribed period of years before his land can be sold. He regards the lawful imposition of the tax as creating a judgment debt, to satisfy which alone the law authorises a sale. In either view of the statute, namely, whether it be regarded as penal or as creating a debt in the nature of a judgment, the Acts sanction no sale, except to realize arrears of taxes actually imposed, some portion of which has been suffered to remain in arrear for the prescribed period. We have here then the clearest judicial enunciation of the scope object and intent of those Acts.

In *Hamilton* v. *Eggleton*, 22 C. P. 536, the Court of Common Pleas held that sec. 155, of 32nd Vict. ch. 36, which is identical with sec. 156, of the Assessment Act of 1866,

does not make valid a deed executed upon a sale as for taxes in arrear, when, in fact, no taxes were in arrear at the time of the sale. In a matter which appears to me of such great importance, I may be excused for referring to a portion of the reasons given for that judgment, although it was pronounced in my own language, with the full concurrence, however, of my brother Judges. After pointing out the several clauses of the Assessment Acts, and shewing their scope to be, as laid down by other Judges in the cases which I have here quoted above, the judgment proceeds: "The whole object of the Acts, and the whole machinery provided, being for the purpose of enforcing the payment of arrears of taxes, and the only authority to sell conferred by the Act being in case of there being such arrears due out of the land and unpaid, there can, I think, be no doubt that the 155th sec. of 32 Vict., corresponding with the 156th sec. of the Act of 1866, relates only to deeds given in such cases as were in pursuance of a sale contemplated by the Act, namely: a sale for the purpose of realizing payment of taxes in arrear and unpaid; the only deed authorised to be given, being a deed in pursuance of a sale which was authorised only in the event of there being taxes in arrear and unpaid, the natural construction is, that this 155th section, like all other parts of the Act, relates to the like object, namely: that which the Act authorised, not to an event not at all authorised or contemplated by the Act, viz: a sale of lands in respect of which there were no arrears of taxes due, the owner of which had never been in any default which called for or justified the intervention of the Act. The object of the clause relied upon, in my opinion, was, as its language appears to me plainly to express, and as is consistent with the whole tenor of the Act, to provide that, when lands became liable to be sold for arrears of taxes, and were sold to recover such arrears, a deed should be given in pursuance of such sale. Such deed should not be questioned for any irregularity or defect whatever unless within a prescribed period; but it would be contrary to the whole scope of the Act" (which it is to be borne in mind was merely an Act to amend and consolidate the several Acts respecting the assessment of property) "to hold that the object of the clause was to make good after a period of two years, a deed given under circumstances in which the Act had not authorised or contemplated any sale at all taking place, in which, in fact, the very purpose for which alone a sale was contemplated was wanting." In that judgment, attention was also drawn to the provisions and effect of an Act, 33 Vict. c. 23, to which, however, I propose now to draw more particular attention.

That Act was passed for the express purpose of making valid sales known to be absolutely invalid, and it enacted that: In cases where lands which were liable to be assessed had been sold and conveyed under colour of the statutes, for taxes in arrear, and the tax purchaser at such sale had, prior to the 1st day of November, 1869, gone into and continued in occupation of the land sold or of any part thereof, for at least four years, and had made improvements thereon to the value of $200, or in lieu of such occupation, shall have paid at least, eight years' taxes charged on the land since the sale, such sale should be deemed valid, notwithstanding any omission, insufficieney, defect, or irregularity whatsoever as regards the assessment or sale, or the preliminary or subsequent steps required to make such sales effectual in law; *Provided* always, that the statute should not apply among other cases, to the following, namely: In case the taxes for non-payment of which the lands were sold had been fully paid before sale; and it was further enacted that nothing in the Act contained should affect the right or title of the owner of any lands sold as for arrears of taxes, or of any person claiming through or under him, when such owner at the time of such sale was in occupation of the lands, and the same has since been in the occupation of such owner or of those claiming through or under him. Now, is it conceivable that the Legislature would have passed this Act, so passed for the express purpose of making invalid sales, valid, but which excluded from its operation the case of there being no taxes in arrear at the time of the sale, which was the case of *Hamilton* v. *Eggleton*, and the case of the true owner continuing in occupation from the time of the sale, and which, in cases in which it did operate, only made valid sales which had been followed by actual occupation by the tax purchaser for the full period of four years, accompanied by an outlay of $200 in improvements, or in lieu of such occupation by the payment of taxes accrued due for eight years subsequent to the sale; if there was then a statute in existence having the effect as is now contended (for this is the bald contention), that even in a case where the owner of property may have continued in possession, regularly paying all taxes both before and since the sale, and where consequently no taxes whatever were in arrear, nevertheless, if in such case a sale should take place and a deed be given, as occurred in *Hamilton* v. *Eggleton*, the mere lapse of four years from such wrongful and inexcusable sale should divest the true owner of his property, although he had never been in default, and may have had no knowledge whatever of the sale until, after the lapse of the four years, the purchaser at such invalid sale

should proceed to evict him? To my mind, I must confess that this statute appears to involve a legislative recognition that the Assessment Act of 1866 is not open to the construction contended for.

What a state of society would ours be—what a reproach would it be, not upon our system of jurisprudence only, but upon our state of civilization, if we should be obliged judicially to declare that such is the frail tenure upon which property and civil rights are held in the Province of Ontario? Let us consider for a moment longer the proposition contended for, that we may be thoroughly familiar with the aspect of the proposition which is asserted in the name of an Act of the Legislature. Lands are liable to assessment whether they are resided upon or not. Those not resided upon, when the owner is not resident within the municipality (or is unknown if residing within the municipality) are assessed upon a separate roll called the "Non-resident Land Roll." Those upon which the owners reside are assessed against the resident owners personally. Now as to the latter class, first. He may pay his taxes regularly to the proper officer every year—may carefully preserve all his receipts. He may never have been in default at all, and yet, as in *Hamilton* v. *Eggleton*, his land may be sold behind his back without his knowing anything about it; he may continue in possession after the sale, paying his taxes regularly as before, until after a number of years he finds he is no longer the owner of his own land, the fee simple estate therein having, as is contended, passed to a stranger by the mere lapse of two years now—formerly it was four years—from the committal by a municipal officer of an unwarranted act which is called "a Sale under a Power." This may be done without any notice whatever to the owner, for as advertisement of the sale is part of the procedure only, and as the clause (according to the contention and as conceded) cures all defects in procedure, the sale may have taken place without having ever been advertised and without the owner, who was in no default, having ever had any notice whatever that his land was about to be or had been offered for sale. Then the owner of lands assessed upon the Non-resident Land Roll knows that the law permits him to suffer the taxes upon his land to fall in arrear now for three years, formerly it was for five years, subject merely to the payment by him for that accommodation of compound interest at ten per cent. per annum. Knowing this to be the law, and in perfect confidence in its integrity he makes his arrangements accordingly—his business takes him abroad for three years. He returns before the expiration of the third year, in time to pay up all arrears with the accumulated interest within the period prescribed by the law, and he finds that immediately after he left the Province his whole property consisting of a valuable estate had been offered for sale without any authority of law by a municipal officer as for one year's taxes due before he left, when in fact none was in arrear, and that a deed had been executed by the municipal officer to a stranger, and that more than two years have elapsed since the sale and he is told by the courts of law where he seeks redress that his case is helpless—that notwithstanding he was never in default, and that the act of the municipal officer was inexcusable and unwarranted, still the lapse of two years from the committal of that unwarranted act has had the effect of divesting him of his estate and of vesting it in the person to whom the municipal officer so wrongfully, and without any legal authority, had executed a deed purporting to convey it. Surely if ever there was a case in which judicial astuteness should, if necessary, be called into action to avoid such a construction, it is this; but, in my opinion, no astuteness is necessary, for the proposition seems to my mind to be so shocking that I never could feel myself to be justified in imputing to the Legislature an intent so arbitrary—so subversive of civil liberty and of the right of the subject to the full enjoyment of his property, as such a construction would imply, unless I should find the intent expressed in language which admits of no other possible construction, and from which there is no possibility of escape. But it is said that unless this construction be given to the Act the maxim of law "*omnia presumuntur rite esse acta*" would be disregarded. The clause relied upon and other similar clauses in other Assessment Acts, form the best commentary upon the inapplicability of such a maxim; for it was the repeated illegal acts committed by the public officers in the conduct of those sales which formed the sole excuse for the enactment of those clauses. However, the rights of property are too sacred to be left to the mercy of this maxim, which never claimed to apply to the giving jurisdiction to deprive a man of his estate. Even in the case of a sale under an execution issued out of the Superior Courts it is necessary that there should be a judgment obtained against the owner of the land in order to support a transfer of his estate under the execution. Here the contention is that neither a judgment nor anything analogous to it is necessary. The maxim, too, only purports to operate "*donec probetur in contrarium*," whereas the construction sought to be put upon the Act, in which the clause in question is found, asserts the right to pass an estate by the mere lapse of two

years from the committal of an act *proved* or *admitted* to have been at the time it was committed, illegal and wholly unwarranted. If this construction should be established, the first fruits of that decision would be to divest the true original owner of the land, which was the subject of litigation in *Hamilton* v. *Eggleton*, of his estate which the judgment in that case, so long as the construction it put upon the Act is maintained, secured to him, for the action there having been ejectment it is not final, and the party who there claimed under the wrongful deed may bring a new action and recover the estate from the rightful owner if a new construction should be put upon the Act by this Court.

Again it is said that, in these cases, the innocent purchaser should be protected, but I cannot see that he, however innocent, has any greater claims upon our sympathy than the innocent owner of the property, who would be cruelly wronged if the purchaser in the given case should succeed. In a matter so affecting the rights of property there is something more to be considered than which party is most entitled to our sympathies. That is a question with which we, as expounders merely of the law, have nothing to do. What the owner of the property submits to our jurisdiction is—whether or not the language used by the Legislature warrants the construction that the mere lapse of two or four years from the committal by a municipal officer of an utterly illegal and unwarranted act (whether such act was fraudulent, or only done in ignorance, or by mistake is all one to the owner) can have the effect of divesting the true owner who was in no default whatever to the municipality, and who had been guilty of no breach of any law, of his estate in real property.

In *Proudfoot* v. *Austin*, 21 Gr. 566, the plaintiff, who was a purchaser at a tax sale, rested his case upon the Sheriff's deed alone. Blake, V. C., held this to be insufficient, and that the 155th sec. of 32 Vict. ch. 36, only applies where there was an arrear of taxes at the time of sale; *and, where* there has been an actual sale—he adds—"I think, therefore, that the plaintiff should have shewn that at the time of the sale there were some taxes due *and* that an actual sale did take place," and he remitted the case for further evidence. This sentence extracted from the learned Judge's judgment by no means implies that he was of opinion that it was not necessary that some part of the arrears should be due for the period prescribed by the statute, he was simply adjudicating that the Sheriff's deed alone was not sufficient, but that proof of arrears of taxes *and* of an actual sale for such arrears under the provisions of the statute was necessary to be given.

This judgment is no more authority for the contention that an arrear, for any shorter period than the statute had prescribed, would be sufficient than is the expression in the judgment of the court in *Hamilton* v. *Eggleton*, viz.: That the section refers "only to cases of deeds given in pursuance of sales where *some* tax upon the land sold was in arrear."

When the evidence should be offered, would arise the question whether what was offered was sufficient. Upon this point I have referred to the records of the court in *Proudfoot* v. *Austin*, and I find that, upon the 11th and 25th of June, 1875, the Vice-Chancellor took the further evidence which his judgment at the hearing had directed to be given, and that then the treasurer of the county produced the several collectors' rolls for the years 1852, '53, '54, '55, '56 and '57, shewing arrears of taxes charged upon the lands for each of those years to the respective amounts, following in the order of the years, and which still remained due when the sale took place in 1858, viz.: £1 9 5½; £3 6 7½: £4 7 4½; £19 5 7½; £18 18 5½; and £19 7 2, and it was upon this evidence and evidence of the sale that a decree was made in favour of the plaintiff, upon the 28th of June, 1875.

In *Kempt* v. *Parkyn*, 28 C. P. 123, the Court of Common Pleas held that the section under consideration did not cure the defect, that no part of the tax was in arrears for the period prescribed by law, viz.: 5 years in that case before the treasurer's warrant, under which the sale took place issued.

In the case now in review before us, Mr. Justice Patterson delivering the judgment of the Court of Appeal says, that he does not wish to throw any doubt upon the construction, thus put upon the clause in the Court of Common Pleas, although he might have had some hesitation in arriving independently at that reading of the words, "sold for arrears of taxes"—he adds, however, language amply approbatory of the decisions as just and sound. He says, and this is the language of the court, "I see nothing objectionable in principle nor unreasonably restrictive of the beneficial operation of the clause, in holding that while it cures defects in procedure, either in the formal assessment of the land or in the steps leading to, and including, the sale, its operation is excluded when it appears that the substantial basis of liability on the fact that a portion of the tax on the land had been overdue for the period prescribed by the law, under which the sale took place, is wanting."

This language involves a complete affir-

mation by the Court of Appeal of the judgment in *Hamilton* v. *Eggleton*, and *Kempt* v. *Parkyn;* for if the construction which, in those cases, is put upon the section is "unobjectionable in principle," and is not unreasonably restrictive "of the beneficial operation of the clause," then the canons of construction imperatively direct that this construction which is reasonable, wholesome and unobjectionable in principle, must be preferred to a construction such as that now contended for, which is unreasonable, unjust and mischievous in the extreme, inasmuch as it would without, any shadow of reason, deprive a man in no default whatever, and guilty of no breach of any law, of his legal rights in real property without any value or consideration whatever.

In *Nicholls* v. *Cumming*, reported in the 1st vol. of the reports of the judgments of this court, I find language relating to this same Assessment Act, confirmatory of that quoted from the several cases which I have above referred to, and conclusive as it appears to me, upon the clause now under discussion. The question there arose under the 61st sec. of this Act, 32 Vict. ch. 36, which enacts that the Assessment Roll as finally passed by the Court of Revision, and certified by the clerk as passed, "*shall be valid and shall bind all parties concerned, notwithstanding any defect or error committed in, or with regard to such roll.*" Upon the roll so passed and certified, a party appeared to be assessed for $43,400 00, who had had delivered to him an assessment slip, stating his assessment to be only $20,900.

It was contended that this 61st section made the roll, as passed, binding, and conclusive upon the party. I find, however, at p. 419 of the report, this language in the judgment of the court, "I think it more consistent with justice that the fundamental rule which ought to prevail is, that the provisions that the Legislature has made to guard the subject from unjust or illegal imposition, should be carried out and acted on." And again, at p. 422, "When a statute derogates from a common law right and *divests a party of his property* or imposes a burthen on him, every provision of the statute beneficial to the party must be observed; therefore it has been often held that Acts which impose a charge or a duty upon the subject, must be construed strictly, *and it is equally clear that no provision for the benefit or protection of the subject can be ignored or rejected.*" And again at p. 427: "It needs no reference to authorities to authorise the proposition *that, in all cases of interference with private rights of property in order to subserve public interests, the authority conferred by the Sovereign (here the Legislature) must be pursued with the utmost exactitude, as regards the compliance with all pre-requisites introduced for the benefit of parties whose rights are to be affected.*" And the court held accordingly that the 61st section applied only when pre-requisites ordained by previous clauses had been complied with. This case as it appears to me, if it stood alone, ought to be conclusive authority in this court, that the essential pre-requisite which the statute ordains shall occur before the power to sell conferred by the statute comes into being, should occur to enable the clause in question to apply—that the coming into existence of the power to sell, under the conditions prescribed in the statute, is an essential element in every deed authorised or confirmed by the statute.

But it is said that the judgment of the Court of Appeal in *Jones* v. *Cowden*, 36 U. C. 495, is at variance with, and that, therefore being the judgment of a Court of Appeal it in effect reversed, the judgment in *Hamilton* v. *Eggleton*. If that were the effect of the judgment in *Jones* v. *Cowden*, it ought, in my opinion, to be reversed here, for the reasons which I have already given, but in truth *Jones* v. *Cowden* has never been regarded as at variance with *Hamilton* v. *Eggleton*, or as an adjudication upon the point now under discussion. If it had been, *Kempt* v. *Parkyn* would not have been decided as it was; nor, in the case now under review before us, would the Court of Appeal itself have expressed itself in the terms it has of the judgment in *Hamilton* v. *Eggleton*, and *Kempt* v. *Parkyn*. The court, on the contrary, would naturally have felt itself bound by *Jones* v. *Cowden*, and would have decided this case upon the short point as to the construction of the clause, and have so got rid of the difficulty with which it seems to have been pressed in arriving at the conclusion that there was direct evidence of there having been some portion of tax in arrear for five years, sufficient to support the sale. A reference, however, to *Jones* v. *Cowden* will shew that neither did the point which arose and was adjudicated in *Hamilton* v. *Eggleton*, nor that which arose and was adjudicated in *Kempt* v. *Parkyn*, arise in *Jones* v. *Cowden*. The sale took place in 1839, for arrears of taxes to 1st July, 1837, made up as follows:

	£	s.	d.
200 acres at 1s. 8d per acre, under 59 Geo. 3, ch. 8, sec. 5, road tax 2s. 1d. which for eight years amounted to..	£0	16	8
Add 50 per cent. under 9 Geo. 4th, ch. 3. s. 4	0	8	4
	£1	5	0
Then an assessment of 1d. to the £ on 209 acres at 4s. per acre under 59 Geo. 3rd, ch. 7, sec. 3, 3s. 4d. per acre for 8 years	£1	6	8
Add 50 per cent	0	13	4
Total..	£3	5	

The evidence was, that the Clerk of the Peace on the 12th July, 1837, certified to the Quarter Sessions, that there was the sum of £3 5s. due on the lot for eight years ending 1st July, 1837. The chairman made an order that a warrant for sale should issue, and the warrant was issued. Wilson, J., in his judgment in the Queen's Bench says: "There is no reason to doubt that the land was actually, though perhaps, not formally, taxed."

Now, as to the £1 5s., that was a tax clearly charged upon the land, being a tax directly imposed by statute. So that the amount was certainly due and for the eight years, whether the 1d. in the £ was properly charged or not. There was no evidence as in *Cotter* v. *Sutherland*, that it was not. The certificate of the Clerk of the Peace that it was charged upon the land, if not conclusive evidence upon that point, would be sufficient *prima facie* evidence. When the learned Judge says, that *perhaps it was not formally taxed*, he was alluding, no doubt, to his knowledge of the practice which used to prevail rather than to anything in the evidence shewing it not to have been formally taxed. It was, he says, *actually* done. There was, however, no question that the £1 5s for road tax was due and in arrear for the proper time, and the sale did take place to realize the £3 5s arrears of taxes, all of which was certified by the proper officer to have been imposed upon the land, £1 5s of which was completely imposed by statute directly. There was no suggestion that anything appearing in the evidence raised a presumption as, it is contended, the evidence in the case now before us does, that this charge had been paid before the sale. The case, therefore, had all the elements to support a sale, which *Hamilton* v. *Eggleton* and *Kempt* v. *Parkyn* pronounce to be necessary, and for this reason *Hamilton* v. *Eggleton* appears to have been referred to for the purpose of distinguishing it. There were, however, in *Jones* v. *Cowden*, objections taken to the inefficiency of the advertisement of the sale. In the Court of Appeal we have not, unfortunately, the judgment of the Chief Justice Draper, which, although written, appears to have been mislaid. He, certainly, was not in the habit of going out of the way to overrule, or to cast a doubt upon, a judgment of a court upon a point not even necessary for the decision of the case before him, and which, in fact, the evidence in the case before him did not raise. If Blake, V. C., had changed the opinion which he had then but recently expressed in *Proudfoot* v. *Austin*, he surely would have pointedly intimated that change, and he could not have thought it necessary shortly afterwards to take, as he did, the further evidence in *Proudfoot* v. *Austin*, and base his decree upon such further evidence; but that he had not changed his mind, appears from the fact that he bases his judgment expressly upon the ground that it was shewn, sufficiently in his opinion, that at the time of the sale there were taxes in arrear, and as I have already shewn, these taxes were due for the period then required. The judgment of Burton, J., wherein he says, that by reason of the 155th section of the Assessment Act, it was not open to the defendants to impeach the sale by reason of the alleged *irregularities* which were urged against it, must be confined to the objections as to the irregularities in the advertisement of the sale, and cannot be extended to refer to a matter which did not exist, and which, therefore, did not call for adjudication, as the case was argued upon the assumption that there did sufficiently appear to be taxes in arrear for the period necessary to warrant a sale.

I had never heard that the *Bank of Toronto* v. *Fanning*, in Appeal, 18 Gr. 391, was supposed to be an authority in favour of the plaintiff upon the point now before us, until I heard my brother Strong's judgment here to-day; if I had, it would have been easy to shew that it does not affect this case any more than *Jones* v. *Cowden* does. The result is, that, in all the reported cases since the first enactment of the clause under discussion, which have been decided in favour of the purchaser, it was proved that the event, upon the happening of which alone, the power of sale comes into existence, has occurred, and that, in the only cases in which that event did not appear to have occurred, the title of the original and true owner has been upheld. Both authority and principle concur then in laying down the law to be, as this court should take this, the earliest opportunity of affirming it to be, that the section under discussion does not remove an infirmity arising from there not appearing to have been at the time of the sale some portion of the tax due which has been in arrear for the period prescribed by law before the sale—that the section covers all mere defects of form which may have occurred in the procedure to impose an assessment actually charged against the land, and all irregularities and defects in the execution of the power, but cannot, upon any principle of justice be construed to supply or cure the want of that condition precedent, the existence of which is essential to the carrying into execution of the power, namely: that some portion of the tax imposed was in arrear for the period prescribed by law, and was still unpaid at the time of the sale.

The Court of Appeal has held that this condition has been fulfilled in the case before us; it is necessary, therefore, to dispose of that point also.

The plaintiff claimed title under a deed bearing date the 28th May, 1857, executed by the Sheriff of the United Counties of Stormont, Dundas and Glengarry, in pursuance of a sale made by the sheriff on 1st March, 1856, for arrears of taxes alleged to have been due in respect of the piece of land sold up to 31st December, 1854. The years for which these arrears were charged to have become due, were the years 1846. 1847, 1848, 1849, 1850, 1852, 1853, and 1854. The contention of the defendant was, that there was no evidence of any rate having been imposed upon the land in question (which was wild unoccupied land), for the years 1846 to 1850 inclusive, under 59 Geo. 3, ch. 7.

It was also contended by the defendant that certain matters appearing in a book produced by the treasurer of the counties raised a presumption that in the year 1851, all taxes charged for the preceding years were paid, and that no sufficient evidence rebutting that presumption was offered. The effect of this contention, if well founded, would be that the sale in 1856 was illegal, for the reason that no part of the taxes in respect of which the sale took place was due for five years.

The learned counsel for the appellant contended that the judgment in *Cotter* v. *Sutherland*, upon the construction of 59th Geo. III., ch. 7, and the wild land rate thereby authorized, was erroneous, and desired to bring that judgment in review before us in this case; but it is unnecessary to express any opinion upon that point, for the reason that, as was conceded in argument, and as appears by the Statute 59 Geo. III. ch. 8, sec. 3, the road tax therein mentioned was, by the Statute itself, without doubt, rated and charged upon the land, and the question we have to determine is whether or not there was sufficient evidence of that tax, or of any part thereof, remaining unpaid for five years when the sale took place. for the 16 Vict. ch. 182, sec. 55, and subsequent sections, authorized the sale of land for arrears of taxes whenever a portion of the tax upon any land has been due for five years.

Now that the tax imposed by 59 Geo. III. ch. 8, sec. 3, for road tax became and was a statutory charge upon the lot in question for the years from 1846 to 1850, inclusive, I think there can be no doubt; but, in order to understand the point raised by the defendant, viz., that the evidence offered by the plaintiff raised a presumption of payment in 1851 of all previous charges, it is necessary to refer to the 13 & 14 Vict. c. 67, which came into operation upon the 1st of January, 1851.

The 46th section of this Act directed the treasurers of the several counties in Upper Canada, on or before the 1st of January, 1851, to make out and submit to the municipal council of the county a true list of the lands in their counties, respectively, on which any taxes shall then remain unpaid, and the amount of taxes due on each lot or part of lot, both for taxes chargeable under the wild land assessment law and for assessments imposed under by-laws of the municipal councils, and that the said arrears should be certified to the clerk of the proper locality by the county clerk, and should be added to the Assessment Roll for the year 1851. and collected in like manner; and, by the 33rd section, it was enacted that it should be the duty of the clerk making out any collector's roll to forward immediately to the county treasurer a copy of so much of the said roll as should relate to taxes on the lands of non-residents. The same 33rd section enacted that every collector, upon receiving his collection roll, should proceed to collect the taxes therein mentioned, and, for that purpose, should call at least once on the party taxed, or at the place of his usual residence, if within the township, and should demand payment of the taxes charged on the property of such person. Provided always that the taxes upon lands of non-residents in any township might be paid to the county treasurer, who, on being thereunto required, should receive the same and give a receipt therefor, and that such county treasurer should keep an exact account of all sums so received by him, and should pay over the same to the treasurer of the township to which they should respectively belong. Then the 34th section enacted that, in case any party should refuse or neglect to pay the taxes *imposed upon him* for the space of fourteen days after demand, the collector might levy the same by distress and sale of the goods and chattels *of the party who ought to pay the same.* Then the 38th section enacted that the collector should receive the tax on any lot of land separately assessed, or upon any undivided part of any such lot, provided the person paying such tax should furnish in writing a statement of such undivided part, showing who is the owner thereof. Then, by the 42nd section, it was enacted that, if any of the taxes mentioned in the collector's roll should remain unpaid and the collector should not be able to collect the same, he should deliver to the township treasurer and to the county treasurer an account of all the taxes remaining due on the said roll, shewing opposite to each separate assessment the reason why he could not collect the same, by inserting the words "non-resident" or "no property to distrain," as the case might be.

Then the 45th section enacted that the county treasurer should prepare a list of such lands in each township, &c., &c., upon which any taxes should remain due at the time of the collector making his return, distinguishing in separate columns and opposite the respective lots the amounts due for county rates and the amounts due for township rates. The Treasurer of the United Counties was called as a witness upon behalf of the plaintiff, and he testified that taxes at the rate of 1*d*. in the £. for the wild land tax under 59 Geo. III., ch. 7, and ⅛*d*. per acre under 59 Geo. III.. ch. 8, were charged upon the land, and in arrear and unpaid in the years 1846 to 1850 inclusive, and he produced a book which I understand to have been his *non*-resident land roll book, but which did not appear to have the yearly entries made in it in the manner directed by the statute. In this book, opposite to the lot, viz., 15 in 9th concession, in columns headed respectively with years 1846, '47, '48, '49, were blanks instead of the rate for each year. The Treasurer stated that these blanks indicated, as he swore also the fact was, that no taxes were paid to him for those years. In a column headed with the year 1850 were two entries, thus :—

£1 0 3
£1 0 3
———
40/7

These entries were said to represent the amounts as returned to the municipal council in the schedule furnished by the treasurer, in pursuance of the above quoted directions contained in 13 & 14 Vict. ch. 67, as due upon the N. and S. halves of the lot respectively. In the column under 1851, there was no entry; evidence was given to the effect that in 1851 the whole lot was assessed to one Alex. McDonald, although in 1850 he had been assessed for the N. ½ only. In the years from 1852 to '60, both inclusive, the S. ½ was returned as "non-resident." In the columns headed 1852 and '53 were entered the taxes rated and imposed for those years only. Now upon the evidence it was contended that it must be presumed that, in 1851, all arrears had been collected by the township collector, upon whose roll under 13 & 14 Vict. ch. 67 the arrears had been placed for the purpose of being so collected. The treasurer, as I understand the evidence, had in his office the roll as returned by the collector, which should have shown whether he had or had not been paid those arrears, and he also swore that he had a book in his office in which payment of the arrears, if made in 1851, would appear, which book he had not brought to court with him. The objection, as it appears to me, is not so much one of presumption of payment arising from entries in the book produced as an objection to the sufficiency of the evidence to show that at the time of the sale there remained unpaid an arrear of tax for the period necessary to warrant a sale, in the absence of the collector's roll for the year 1851, and of the book which the treasurer said he had in his office; for if payment was made to the collector in 1851 of the arrears as charged to the year 1850 and entered upon his roll, there were not arrears due for the prescribed period to warrant the sale. It certainly seems to have been great negligence upon the part of the plaintiff and of the treasurer I think also (whose duty it was to produce the best evidence the case admitted of; and which the treasurer swears he had in his office) that such evidence was not produced to establish the fact beyond all doubt. In a case where a plaintiff claims title under a power of sale, such as the power in these cases is, the court should, I think, be very particular in requiring the clearest evidence that the right to exercise the power arose before they adjudge a man to be divested of his estate, unless the law forbids any particular evidence as *prima facie* sufficient in the particular case, and if the case had stopped here I should be decidedly of opinion that the collector's returned roll should have been produced, and that the case should have been adjourned to another day if that was necessary, as was done in *Proudfoot* v. *Austin*, to have enabled the treasurer to produce the rolls; and I gather from Mr. Justice Patterson's judgment that this was his opinion also, for he rests his judgment in favour of the plaintiff, upon the effect of the statute 16 Vict. c. 182, the 51 and 53 sections of which imposed upon the treasurer the duty of keeping a book in which he should enter from the returns made to him by the clerk of the municipality, and from the collectors' rolls returned to him any tax unpaid, and the amounts so due, and he was required, upon the 1st of May in every year, to complete and balance his books by entering against each piece of land, the arrears, if any, due at the last settlement, and the taxes of the preceding year, which might remain unpaid, and to enter thereon the total amount, if any, charged on the land at that date, and to add 10 per cent. thereto each year.

The main object, no doubt, which the Legislature had in view, in requiring the book to be kept by the treasurer, was as well to serve the convenience of the public who had an interest in the matters so required to be entered, as for preserving evidence of the charges against the lands. Such entries so made by a public officer in discharge of a duty imposed upon him by

statute are always received as a *prima facie* evidence of the matters so entered.

The treasurer testified to his having performed the duty thus imposed, and that, in the book which he did produce, he entered under the years 1853 and 1854 as directed, the result, and he moreover pledges his oath to the belief in the correctness of the entries so made; to make which he had necessarily occasion to refer to the rolls in his office, including that of 1851. The entries so made show the amount entered on the collector's roll of that year as still unpaid in 1853 and 1854. This evidence, therefore, unless and until displaced, shows that there remained still as a charge upon the land, so much at least of the amount as consisted of the road tax imposed by 59 Geo. 3, ch. 8, and the accumulations thereon for interest, so that a sale was warranted within the provisions of the statute, as some portion of the tax charged upon the land was due and in arrear for the required period.

No attempt was made to displace this evidence, which no doubt would have been, if it could have been done, for this reason I am of opinion that the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

Somerville v. Laflamme.

(Judgment of Taschereau, J.,* translated by E. D. A.)

The clear and precise statement of all the facts of the case and the contentions of the parties which the Chief Justice of this Court has just made, relieves me altogether from referring to them.

We all agree in saying that, of all the charges made against the respondent on account of his conduct and that of his agents, before and during the election which is in question in this cause, there is but one which can at this moment attract our attention, namely, that pointed out by the Chief Justice; and consequently the question is to ascertain whether the said Placide Robert, the alleged agent of Mr. Laflamme, was in truth such agent or not, and whether he has done an act statutably corrupt by the Elections Act of the Dominion of Canada. What did this man Placide Robert do? This shortly: Wishing to obtain from Mr. Laflamme employment or office for his brother-in-law, Edouard Honoré Ouellette, he asks the defendant, about a year before the election, which is in question in this cause, was in contemplation, to endeavour to procure employment for his brother-in-law, Ouellette, saying to him, that he thought that that would please the family of Pierre Paré, whose son-in-law Ouellette was. Mr. Laflamme said to him that he would think of it and that he would recollect this man, and would try to procure a place for him if a vacancy should occur. Mr. Laflamme repeats that several times, and even up to a period of from two to three weeks before the election. As judges, in the first instance, we find no serious charge to make against the respondent for having used this language—very natural towards one of his constituents, for it is beyond doubt that a representative can and may see to the well-being of the inhabitants of his county in general, and I say that to deny to a representative the patronage of his position, would be an absurdity. Note that the promise is made without condition, without promise of its fulfilment. We are all of opinion then that the respondent has incurred no responsibility in this respect; but later on this gentleman, Placide Robert, acting of his own accord solely, said several times to his brothers-in-law of the Paré family, at the approach of the election, that they had better not vote, and that advantage might be taken of their voting to refuse to procure a place for Ouellette. Here then we have the charge made against Mr. Laflamme on the ground that Placide Robert: 1. had procured some members of his family to abstain from voting or from using their influence in favour of the opposing candidate. 2. That Placide Robert was the agent of Mr. Laflamme and could compromise him.

I am of opinion that Placide Robert did not commit a corrupt act in saying confidentially in his family circle "that it would be better for them not to vote." He was expressing only an idea, an opinion, more or less rational; he was making no threat on Mr. Laflamme's part, he was doing only that which every sensible man would do in the privacy of his family, to the welfare of which he might wish to contribute as a good-natured son and brother.

I consider that to preserve the purity of elections, we need not penetrate into the bosom of families and strive to find a crime in the very natural expression in a man's home of the desire to see his brother receive a trifling employment. If we were to construe such observations, such counsels as equivalent to corruption, I will ask how many of our elections would be sheltered from such charges?

In my opinion, there are wanting in these counsels of Placide Robert, to constitute them a corrupt practice, several elements, namely, threats, rude upbraidings, exaggerated expression of the consequences of the conduct of his family, and above all, the information given to this family that Mr. Laflamme had made the promise only on the condition that they should abstain from voting. I see nothing of the kind in the evidence. I see there but the delibera-

tions between relatives desirous of protecting themselves. I remark on the brief, the proof that this M. Edouard Honoré Ouellette never received office. Consequently I am of opinion that Placide Robert has not committed an act of corruption in his conversations above related, and that he has not caused the defendant to incur any legal responsibility, even supposing that he could be considered as his agent.

Being of opinion that Placide Robert did not commit acts reprehensible in a legal point of view, it is useless for me to discuss the question of agency, and in consequence I am of opinion that the appeal should be dismissed with costs against the appellants.

* [We have inserted the above translation of one of the judgments in a well-known election case, thinking that it will not be without interest to those among our subscribers who may be unacquainted with the language of the original, which will be found at p. 291, 2 Sup. Ct. Rep.]

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR AUGUST, SEPTEMBER, AND OCTOBER, 1878.

(*Concluded.*)

Nuisance.—See Negligence.

Nullity.—See Husband and Wife, 2.

Parties.—See Trust, 3.

Partition.

The Partition Act (31 & 32 Vict. c. 40) provides that, at the request of one part owner for partition, there shall be a public sale, unless the other part owner can show good cause why some other course should be taken. Plaintiffs owned three-sixteenths of property in a town where improvements were going on, and applied for a public sale. Defendant, who owned the remaining thirteen-sixteenths, opposed it, and offered to buy the portion of plaintiff's at a valuation. *Held*, that there should be a valuation in chambers of the three-sixteenths, instead of a public auction of the whole. *Drinkwater* v. *Radcliffe* (L. R. 20 Eq. 528) considered.—*Gilbert* v. *Smith*, 8 Ch. D. 548.

Pleading and Practice.—See Libel, 3; Trust, 3.

Policy.—See Insurance, 1.

Precatory Trust.—See Will, 2.

Principal and Agent.—See Contract, 1, 2.

Principal and Surety.—See Surety.

Privileged Communications.—See Libel, 1.

Promise.—See Limitations, Statute of, 2.

Proximate Cause.—See Bills and Notes, 1 Negligence.

Quarry.—See Waste.

Realty and Personalty.—See Will, 1.

Residue.—See Will, 3, 6.

Sale.

A contract of sale provided, that if the purchaser should make any objection or requisition in respect of the title, or of any other matter which the vendors should be unwilling, by reason of expense or otherwise, to comply with, they should be at liberty to annul the sale, and the purchaser should receive back his deposit. The vendors failed to show any title whatever, and claimed to annul the contract and to return the deposit. *Held*, not competent, and that the purchaser could have the deposit, and an inquiry for damages. —*Bowman* v. *Hyland*, 8 Ch. D. 588.

Statute.

Where persons played a game called Puff and Dart, which consisted in blowing a small dart through a tube at a target, and the players each put in 2d. entrance money, and the money was used to buy a dead rabbit, which was the prize of the game, *held*, (Cockburn, C. J., in doubt), that the players were guilty of "gaming," within the Licensing Act, 1872, 35 & 36 Vict. c. 94).—*Bew* v. *Harston*, 3 Q., B. D. 454.

Surety.

The plaintiff leased to B. a farm of 234 acres, and pasturage for 700 sheep, which went with the farm, from year to year, from April 10, 1873, rent payable half-yearly. B. gave a bond, with the defendant and others as sureties, that he would re-deliver the sheep in as good order and number as when he took them, and, if there was any deterioration, damages should be assessed. November 9, 1875 plaintiff gave B. notice to quit on April 10, 1876, or at such time as the notice should be a good notice for. It was admitted that the notice was insufficient to end the lease on April 10, 1876. April 8, 1876, B. refused to obey the notice to quit, and it was withdrawn, and an agreement was made between him and the plaintiff that B. should surrender a certain field, and the rent should be reduced £10 yearly. Under this modification, B. continued tenant until October 5, 1876. Plaintiff gave

him due notice to quit April 10, 1877. Before then B. went into bankruptcy, and his trustee took possession, and surrendered it to plaintiff March 29, 1877. It turned out that the flock had deteriorated, and that the field surrendered would have supported a certain number of sheep. The judge left it to the jury to say whether the new arrangement between B. and the plaintiff made any material change in the capacity of B. to keep the sheep in good order, and to return them without deterioration; and also the jury found that it did not. *Held*, that the negotiations between B. and plaintiff had not created a new tenancy, but (BRETT, L. J,, diss.) that the modification in the terms of the lease, by the surrender of the farm and the reduction of the rent, ought to have been made known to the sureties; and that it was for them, and not for a jury to say whether that modification had materially affected their liability, by lessening the ability of B. to keep the flock intact, and that they were discharged from liability.—*Home* v. *Brunskill*, 3 Q. B. D. 495.

TRADE-MARK.

The plaintiff, M., published a work entitled "Hemy's Royal Modern Tutor for the Pianoforte," not copyrighted. It had a great circulation. The defendant, W., employed Hemy to prepare an edition of an old work, formerly in repute, called "Jousse's Royal Standard Piano-forte Tutor," and it was issued under the title, "Hemy's New and Revised Edition of Jousse's Royal Standard Piano-forte Tutor." The word "Hemy's" was in much larger type, and more conspicuous on the cover and title-page than any of the other words. *Held*, that an injunction should be granted to restrain the use of the title-page and cover, and of any title-page and cover calculated to lead the public to believe they were purchasing plaintiff's publication.—*Métzler* v. *Wood*, 8 Ch. D. 606.

TRUST.

1. A testator gave his residue to trustees to sell out and invest in parliamentary funds and real securities. It was, however, provided that the trustees for the time being might "sell out, transfer, or otherwise vary or alter, all or any of the said trust moneys, funds and securities, and invest the same" in any other funds or securities whatever. The trustees put the property into £3 per cent. annuities; but their successors afterwards sold these out, and invested in Egyptian bonds and Russian railway bonds, transferable by delivery; and each trustee took one-half of them to keep. One of them absconded with the portion in his hands, and the bonds greatly sunk in value. *Held*, that the trustees were authorized by the will to change the investment as they did; but that the remaining one was responsible for the portion of the property made off with by the other.—*Lewis* v. *Nobbs*, 8 Ch. D. 591.

2. A testator left his residue in trust for J. and others, his children, the provisions to vest in them at his death, and be paid six months thereafter. Notwithstanding this period for payment, "I provide and declare that it shall be lawful to, and in the power and option of, my trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so the payment ....as aforesaid in the case of all or any of my children,....and to apply the interest or annual produce of the same during the . . . postponement to or for behoof of such children . . . or by deed under their hands to retain said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorized to appoint, with all . . . the powers . . . belonging to themselves, . . . so tnat my children, . . . or any of them . . . nay draw . . . only the . . . annual proceeds of their respective provision during their lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children and their issue, on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges.' J. received the annual income on his share from the trustees from 1871 to 1876, and also a part of his capital. The respondents then got judgment against J., and proposed to arrest the balance of J.'s capital in the trustees' hands, and apply it in payment of their debt. After the action was brought, but before the judgment, the trustees executed a deed to themselves, to pay the interest to J. for life and the fee to his children, and resolving to hold the balance as an alimentary fund for J. and his family. *Held*, reversing the opinion of the Scotch court, that the trustees' discretion was complete) both as to principal and income, and the creditors had no claim on

either. Effect of testing clause considered extrajudicially.—*Chambers* v. *Smith*, 3 App. Cas. 795.

3. L. bequeathed the residue to R, J., and I., trustees, to pay the income to his wife for life, and then to invest £850, and to pay the income of £500 thereof to his daughter, M., for life, and at her death for her children ; and to pay the income of the other £350 to his daughter, B., for life, and at her death to stand possessed of the amount for her children. If M. died without issue, her share should go and be divided among L.'s other children, in like manner as their original shares were given them. Testator died in 1854, his wife in 1856, and M. in 1859, without issue. Thereupon B. became entitled to the income of one-third of M.'s £500, or £166 13*s*. 4*d*. in addition to her own, *i.e.*, to the income of £516 13*s*. 4*d*. R. advanced B. £50, and paid her interest upon £350 from the death of the wife, and on £466 13*s*. 4*d*. from the death of M. He died in 1863, and his executors continued the payment until 1874, with the knowledge of those interested in R.'s estate. There was among L.'s property a mortgage for £1,200. Between his death and the death of R., £700 of this was paid off in instalments. After the death of R., one of his executors received the other £500 in instalments. The receipts for the £700 were sometimes signed by R. alone, sometimes by R. and the other executors. For the £500, the receipts were signed by one of R.'s executors, "for the executors of L." R.'s executor paid J. one-third of the £500, I. one-third, and kept one-third himself. In 1877, B. began an action against the executors of R. to have the £516 13*s*. 4*d*. and the back interest restored out of R.'s estate. It was objected that L.'s other trustees should be joined. I. was in New Zealand, and J. had died. *Held*, by Fry, J., that the other executors were not necessary parties, and that B. could recover. On appeal, the point as to the parties was waived. *Held*, that B. could recover.—*Wilson* v. *Rhodes*, 8 Ch. D. 777.

Will.

1. J., by his last will, said : "I give and bequeath unto my wife . . . all my household goods and furniture and implements of household, farming-stock, cattle, growing crops, and other my effects in and about the house and upon the farm and lands in my occupation ; . . . and also all my ready money and money out at interest, and . . . mortgages, bonds, bills, book debts, &c., and all other my personal estate, property, chattels, and effects whatsoever and wheresoever, to which I am now seized, possessed, or entitled to, or may hereafter acquire and can hereby dispose of, to hold the same unto my said wife, . . . her executors, administrators and assigns, . . . absolutely, and I do hereby devise all real estate" . . . held on mortgage to her ; . . . "but the money secured on such mortgages shall be considered as" personal estate. "I also devise" to her "all . . . estates . . . vested upon me in any trust." The testator left estates in fee. *Held*, that these did not pass by the will.—*Jones* v. *Robinson*, 3 C. P. D. 344.

2. A gift of all a testator's property to his wife, "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," *held*, to be an absolute gift to the wife, free from any trust.—*Lambe* v. *Eames* (L. R. 6 Ch. 597) followed ; *Cormick* v. *Tucker* (L. R. 17 Eq. 320) and *Le Marchant* v. *LeMarchant* (L. R. 17 Eq. 414) impugned.—*In re Hutchinson*, 8 Ch. D. 540.

3. S. made a legacy to A. and one to B., and then said : "Lastly, I give my sheep, and all the rest, residue. money, chattels, and all other my effects, to be equally divided among my brothers," naming them. He appointed his brothers executors. He left real estate. *Held*, that it passed to his brothers under this clause.—*Smyth* v. *Smyth*, 8 Ch. D. 561.

4. A testator gave several charitable legacies, including one of £1,000 to a hospital in N., and then said : "I direct that my executors shall apply to any charitable . . . purposes they may agree upon, and at any time, the residue of the personal property, which by law may be applied to charitable purposes, remaining after the payment of the legacies." By a codicil, he gave another £1,000 to the hospital at N. The executors voted to give the residue under the above clause to that hospital. *Held*, that the directions to the executors in the gift were so vague as to render it invalid, and the residue went to the next of kin.—*In re Jarman's Estate. Leavers* v. *Clayton*, 8 Ch. D. 584.

5. H., by his will, devised, *inter alia*, his manor-house of D., and all his "messuages, tenements, lands, and hereditaments situate at or within D., and then in the occupation of

J.," and all his lands situated at S. G., then or late in the occupation of S. He had three farms situated wholly or partly in the parish of D., two of them in the occupation of J. Of the first, the farm-house and eight closes were in D.; the remaining close was in I., separated by a hedge. Of the second, the farm-house and eight closes were in D.; the remaining three closes were in K., separated from D. by a road. The third was entirely in D. and in the occupation of G. He had two farms at S. G., one in the occupation of S., and the other in the occupation of J. The parish church of D. was within a few feet of the line between D. and K. There was evidence that the farms would be much injured by dividing them on the parish lines. *Held*, that the devise of lands situate at or within D., and in the occupation of J., included the entire farms so occupied, though partly in other parishes, and that the devise of "all" the lands in S. G. in the occupation of S. did not include a farm there in the occupation of J.—*Homer* v. *Homer*, 8 Ch. D. 758.

6. W. directed his debts to be paid out of his personal estate, and, if that proved insufficient, the real was to be sold. All the rest and residue of his personal estate he bequeathed to his daughters. By a codicil he made some alteration in the disposition of his real estate, and then said: "As to all moneys that may be left after my decease, I give and bequeath the same unto my children, W. J., and M.," to be invested in a mortgage, the income to be paid them for life, and, "after their decease," to testator's grandchildren. *Held*, that this clause in the codicil applied only to cash actually in hand at the testator's death, and, subject to that, the residuary clause in the will proper conveyed the residue. —*Williams* v. *Williams*, 8 Ch. D. 789.

7. A testator devised to trustees three freehold houses in trust for his two daughters, either to live in or to let for their joint benefit; and, should either of them die without issue, one of the houses should be sold, and the proceeds divided equally between the other and testator's surviving sons. But, in case either daughter should have a child, then such child should have its mother's share of the rents and profits of the three houses after its mother's decease. One daughter died without issue, and one house was sold, and the proceeds divided as directed in the will. Finally the other daughter died, also without issue. *Held*, that the daughters were joint tenants in fee, subject to executory gifts over in the event of issue. The event having never happened, the survivor was entitled to the whole in fee from the death of her sister.—*Yarrow* v. *Knightly*, 8 Ch. D. 736.

See DEVISE; TRUST, 1, 2, 3.

WORDS.

"*At or within.*"—See WILL, 5.

"*Gaming.*"—See STATUTE.

"*Moneys that may be left after my Decease.*" —See WILL, 6.

"*Person.*"—See CORPORATION.

REVIEWS.

THE PRINCIPLES OF EQUITY, intended for the use of Students and the Profession. By Edmund H. T. Snell, of the Middle Temple, Barrister-at-Law. Fourth Edition. To which is added an Epitome of the Equity Practice. By Archibald Brown, M.A. Edin. and Oxon., and B. C. L. Oxon., of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1878.

No words of ours are needed to commend a new edition of "Snell's Equity" to the profession. The fact that it has passed through four editions within a decade is a sufficient mark of the esteem in which this standard work is held. We believe, too, that we echo the sentiments of every "student," in the more technical and restricted sense of that term, when we say that no book in the curriculum prescribed by the Law Society has afforded him more pleasant and profitable reading than the work in question. The lamented author seemed throughout to have kept steadily in view the requirements of his former comrades, and thus while the work is undoubtedly of great value to the young practitioner, its lucid arrangement and perspicuous style have given it a character and excellence peculiarly its own in the eyes of those who have not yet been privileged to pass beyond the outer circle of the Temple of Justice.

The changes in equity practice in England introduced by the Judicature Acts

have rendered a new edition of this work necessary, and made the office of the editor by no means a sinecure. He seems to have done his work carefully and well, and to have justified the statement which he makes in his preface that he has "generally worked up the language and the contents of the book to the level of the new procedure . . . . and to the present state of the law." At the same time we are glad to observe that he has altered little or nothing in the general character impressed on the work by the original author.

The special feature of the present edition is an epitome of the equity practice under the Judicature Acts, which the editor has added as a second book to the "Principles of Equity" which formed the sole subject of the preceding editions. This epitome takes up about 130 pages, and is separately indexed. It appears to be a carefully compiled digest of the new practice, and will, no doubt, be found useful by students and practitioners in the mother country. It is, however, of little or no value in this province, at present, and our readers will probably agree with us in thinking the increased size of the volume a somewhat dubious benefit. The "Practice," however has been kept entirely distinct from the "Principles of Equity," in this edition, and will, therefore, in no way interfere with the separate study of the latter. On the whole we may repeat with emphasis the words used by us in reviewing a former edition of this work—"we know of no better introduction to the 'Principles of Equity.'"

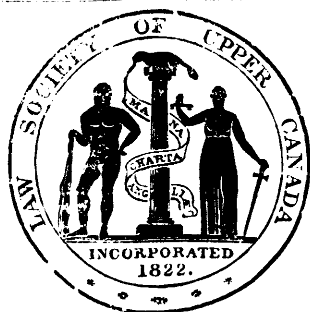
The Consolidated Railway Act, 1879 (42 Vict., cap. 9): With an Index and Synopsis of its Provisions. By R. J. Wicksteed, of the Law and Translation Department, House of Commons. Ottawa: Brown Chamberlin, Law Printer to the Queen.

This publication is in the form of a neat pamphlet, and, as might be expected from its title and the name of its author, will be found exceedingly useful, and, indeed, indispensable to those who are called on in any way to deal with the Law of Railways in the Dominion. Members of the legal profession, at all events, scarcely require the authority of a Carlyle to convince them of the value of a good Index, and we are sure that the one furnished in this publication by Mr. Wicksteed will meet with their approbation, and save the expenditure of no little time and trouble on their part. We may add that the Queen's Printer at Ottawa has charge of the sale and distribution of the edition.

FLOTSAM AND JETSAM.

Copyright in Canada.—In Montreal, on June 16, a seizure of copies of the ninth volume of the new edition of the "Encyclopædia Britannica" was made, at the instance of Messrs. A. & C. Black, of Edinburgh, in the following circumstances:—Messrs. Black had entered into an arrangement with Messrs, Scribner and Sons, of New York, whereby the latter were to reprint the work in question for the supply of the United States and Canada. As the law of neither of these countries recognises such an arrangement, a Philadelphia firm also reprinted the work and disposed of it over the whole North American continent. On discovering this, the Edinburgh publishers caused copyright to be obtained in Canada under the Act 38 Vict. c. 88 of the Dominion, for several important articles contained in the ninth volume of the "Encyclopædia," and it is on the strength of these articles being found in the volume issued by the Philadelphia firm that the seizure has been made.—The Law Journal, August 2, ult.

Let us try to arrive next at an idea of the size of this territory, which but nine years since was the property of "the Company of Adventurers of England trading into the Hudson's Bay," and whose charter, granted in 1669 to Prince Rupert and nineteen other gentlemen, made them despotic rulers over half a continent on the easy terms that two elks and two black beavers should be paid to the Sovereign whenever he should come into the district. This enormous territory thus easily disposed of, and the value of which for agricultural and mining purposes is unsurpassed, the last and best acquisition of the Dominion of Canada, comprises, as near as can be calculated, 2,984,000 square miles, whilst the whole of the United States south of the international boundary contains 2,933,600 square miles. Including the older portions of Quebec, Ontario, and the Maritime Provinces, Canada measures 3,346,681 square miles, whilst all Europe contains 3,900,000.—*Nineteenth Century*, July, 1879.



Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 42ND VICTORIÆ.

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

Thomas Stinson Jarvis.
Thomas Taylor Rolph.
Louis Adolphe Olivier.
Malcolm Græme Cameron.
George Edgar Millar.
Nicholas Dubois Beck.
Walter J. Breakenridge Read.
Emerson Coatsworth, Jr.
John Morrow.
James Carman Ross.
Alphonse Basil Klein.
Edward George Ponton.

The names are given in the order in which they appear on the Roll, and not in the order of merit.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

John Dickinson, B.A.
John McLaurin, B.A.
Antoine P. E. Panet, B.L.

Matriculants.

Charles Reginald Atkinson.
John McCullough.
George William Ross.

Articled Clerks as of Hilary Term.

William Barr.
Edward Utton Sayers.
John Angus McDougal.
James A. Scott.
William Grayson.
John Lawson.
Francis Henry Butler.

Articled Clerk as of Easter Term.

Andrew Joseph Clark.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1–300; or,
Virgil, Æneid, B. II., vv. 1–317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

CLASSICS.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1–300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1–300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1–300.
Virgil, Æneid, B. I., vv. 1–304.

Translation from English into Latin Prose.

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

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical analysis of a selected poem :—
1879.—Paradise Lost, Bb. I. and II.
1880.—Elegy in a Country Churchyard and The Traveller.
1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.
Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.
Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year. —Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year. —Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only.*