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WE have received an answer to the article of F. C. W. on "The Legal Aspect of Disallowance in Old Manitoba," which, however, must stand over till next number.

A RECENT number of the *Law Reports* contains a complete list of the Judges and Law Officers of the Crown who have held office in England for the last twenty-two years. These memoranda of the English judiciary are hereafter to be continued annually in the *Law Reports*.

THE second annual meeting of the County of York Law Association was held at Osgoode Hall on Monday, the 6th day of February. We have received a full report of the meeting, but it was unavoidably too late for this number. We shall have the pleasure of laying it before our readers in the next issue. We may say, however, that the affairs of the Association are in a flourishing condition, and that it is doing valuable work in the interests of the profession and public.

THERE is one commendable thing, says *The American Law Register*, about the deluge of reports which the profession is now suffering from. It will open the eyes of many to the evil of citing every case on a given subject, either in a brief, an opinion, or a legal essay. It may also prevent this kind of citation by furnishing such a mass of possible citations that no man could possibly gather them together. And so we will all come round again to the good old practice of citing our law, *pondere non numero*, which may be freely translated by "leading cases, not the contents of the latest digest."

BY chapter 16 of 50-51 Vict., as our readers are aware, some important changes were made in the *personnel* and jurisdiction of the Exchequer Court. The Supreme Court Judges and Registrar were relieved from all Exchequer work, and provision was made for the appointment of a special judge and special registrar and other officers. George Wheelock Burbidge, Q.C., the Deputy Minister of Justice, was appointed Judge of the Exchequer Court on 1st October, 1887, and was gazetted the same day, and Mr. Louis Arthur Audette, of the City of Quebec, advocate, was appointed Registrar of the Court on the 8th November, 1887. No other appointments in connection with the court have yet been made. Mr. Augustus Power, Q.C., of the Department of Justice, has been acting Deputy-Minister since Mr. Burbidge's appointment as Judge.

INTEREST AFTER DEFAULT.

THE Court of Appeal in affirming the decision of Proudfoot, J., in *Powell* v. *Peck*, 12 O. R., 492, 22 C. L. J. 386, do not appear to have laid down any hard and fast rule, that in no case can interest be recovered at a higher rate than six per cent. under a mortgage, for the detention of the principal beyond the day appointed for payment On the contrary, they appear merely to have proceeded on the well-settled rule, that such interest is, in the absence of any express contract between the parties providing for payment of interest after default, merely recoverable as damages for breach of the covenant to pay at the day named, and that the amount of these damages is discretionary with the jury, or the judge who may be discharging the function of a jury. As to which rule we would remark, *en passant*, that it is a venerable relic which should as soon as possible be relegated to some lumber room that contains many like fusty remains of antiquity.

The case before the Court of Appeal was therefore in substance an appeal from the discretion of the court below, and, acting upon the well understood rule governing appellate courts, that where the appeal is from a matter within the discretion of the judge appealed from, it is incumbent on the appellant to show either that there has been a gross miscarriage of justice, or that the order appealed from is clearly wrong, the court refused to disturb the order appealed from, because the appellant could fulfil neither condition. We believe it will be found, however, that this decision is no obstacle to a judge or jury awarding damages at a higher rate than six per cent. for the detention of money wherever evidence is given to warrant it. It would seem, however, that in the opinion of the Court of Appeal, the rule laid down by Blake, V.C., in *Simonton* v. *Graham*, 8 P. R. 495, is not correct. In that case it was held that *prima facie* damages after default should be allowed at the mortgage rate, but that the person seeking to reduce it might show that such rate was excessive and more than the value of money. This certainly was the reasonable and common-sense rule, and we regret it has not been followed. The judgment of the Court of Appeal appears to throw on the party seeking to recover more than six per cent. the onus of showing that such increased rate is the proper value of money. The evidence pertinent to such an inquiry would appear not to be properly limited to establishing the general value of money in the market, but rather the value of money lent upon security of the kind upon which the money in default is invested. The character of the security is always an important ingredient in determining the rate of interest upon loans, and by detaining the money beyond the time fixed for repayment, the covenantor, in effect, is compelling the covenantee against his will to lend the money for the period during which it is detained, and the security for the money during such detention is often no better, and may be much worse than it was when the original loan was made. The parties certainly ought to be the best judges of their own business as to the rate of interest that should be paid, and it is not desirable that the court should in effect step in and make a new bargain for them. In so far as the view taken by the Court of Appeal tends in this direction, we think the tendency is wrong. The sooner the Legislature puts the law in the way it is supposed to be by laymen, and as it reasonably should be, the better.

REPORTS AND REPORTERS.

IT is stated, I believe, on good authority, that, at the present time, the different Anglo-Saxon communities are producing about six hundred volumes of Law Reports per annum. Ontario, seemingly, has produced her full quota, and apparently the most modest of all the communities is the Mother Country.

The reports of the courts of this Province at the present time, number some five volumes per annum, and, taking into consideration that part of the business of the Supreme Court which relates to litigation from Ontario, the number of reports per annum in respect to the litigation of this Province would be fully six volumes. England, containing as she does, a population of more than ten times that of Ontario and possessing a wealth, with all the manifold causes of litigation which it involves, probably one hundred-fold in excess of the wealth of this Province, issues (aside from Admiralty, Probate, and Crown Cases) but six volumes of reports a year, and one volume of these reports is about half taken up with reports of decisions upon cases from the Colonies. In other words, the yearly number of volumes of the Law Reports of this Province at the present time is equal to those of England, whilst there are more than twice as many cases in the latter. It is obvious that this should not be: either the cases that are reported are too much padded, or many cases are reported which should not be.

I believe that both these evils exist, and have for some years past been increasing. Even in England there is a considerable under-current of feeling amongst the profession that the present reporters are not as efficient as reporters were many years ago, and that existing reports fail in conciseness and in an exact statement of the facts and law to be reported. The same evils exist here in a more aggravated form. The amendment of this is entirely in the hands of the profession, and it is solely on behalf of the profession that I allude to the matter.

I think that two or three volumes a year should be a sufficient number of reports to be issued by the Law Society of this Province. As I understand the matter, no case should be reported in which the decision turns merely on facts, and involves no question of law, unless in a court of last resort, and even then briefly. I further incline to the opinion that cases which involve the construction of documents, including wills, should rarely be reported, and never unless they illustrate or establish some principle of law or canon of construction. Facts should be stated as found. The proper office of a reporter is to record judicial decisions as to the law in reference to the facts so found. I think also that there should not, in general, be any reference to the pleadings, at all events as to their form. The arguments of counsel are often useful, if the case has been carefully prepared, pertinent authorities cited, and a sifting process carefully executed; and in such cases only should the arguments of counsel be reported.

Again, I think that oftentimes even the judgments themselves might be very much reduced in volume by eliminating those portions that are merely *obiter dicta*, or which, referring in detail to the facts of the case, are useless to the

reader, though of value to the litigant. I presume that our judges would gladly submit to a revision of their judgments as delivered if done in a proper and careful manner, at all events any such revision, if authorized, should be submitted to them before publication. A difficulty, however, occurs here, in that this would necessarily cause a delay which would be often inconvenient to the profession. This difficulty could only be met by the reporter and editor having plenary powers to cut and carve the judgments of the judges as might be necessary. These powers, if intelligently and carefully exercised, would be a boon to the profession and might possibly tend, not only to reduce the bulk of the reports, but also to induce more conciseness and definiteness in expression on the part of the judge.

An instance of the evil to which I refer is exemplified in the report of *Wells* v. *Northern Railway Company*, 14 O. R. 594. The learned judge in that case concludes (no doubt correctly) that as the easement or right claimed by the plaintiff was enjoyed from the time of the conveyance of the right of way in question to the defendants, the conveyance being lost, it might be assumed that the deed contained the easement or reservation that had been so enjoyed by the different owners of the property from the date of the conveyance. The learned judge then adds, "or he is entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as a right." The judge, no doubt, was well aware of the fact that a grant of an easement cannot be presumed from use for twenty years only, where, owing to there being an incapacity to grant, such grant would, if made, have been invalid (see *Mills* v. *New Forest Commissioners*, 18 C. B. 60, and *Kochdale Canal Company* v. *Ratcliffe*, 18 Q. B. 287), and may have assumed (contrary, however, to the fact) that in this case there had been a user for the longer period of forty years, by means of which the title of the plaintiff under the Prescription Act to the easement in question would have been good. This *obiter dictum*, apparently based on an erroneous view of the facts, was not necessary for the decision of the case, and should not have been reported.

Again, take the case of *Beam* v. *Merner* (*Ib.* 412). Here we find no less than eleven pages taken up with the head note, statement of facts, statement of the pleadings, and the arguments of counsel. To enable the profession to understand what the facts were, and the points in dispute, this could have been done in two pages, and some portions of the judgments might, I think without loss, have been eliminated. Of the same class is the report of the case of *Mooers et al.* v. *Gooderham & Worts* (*Ib.* 451), which was hardly worth reporting at all.

Again, in the case of the *Dominion Loan Company* v. *Kilroy* (*Ib.* 468), the conceded facts were: That the husband had failed, and could not, in his own name, carry on business; that a mercantile trading was carried on in the name of his wife by himself as her agent, she in no way interfering with the management; that goods were sold to the wife by persons who were well aware that the husband could not carry on trade in his own name. All this is fully stated in the judgments of the learned judges. Why was it necessary to give the facts in detail? In this case five pages of the report are occupied with a statement of the facts and arguments of counsel, no part of which should have been reported.

In the case of *Reddick* v. *The Saugeen Mutual Insurance Company* (*Ib.* 506), we find that no less than nine pages are occupied with a statement of the pleadings and facts. Two pages at the utmost should surely have sufficed for all this, the facts being fully stated in the judgment of the court.

Then take the case of *Cameron* v. *Cameron* (*Ib.* 561). In this case the undisputed facts were that a conveyance had been made by the defendants to the plaintiffs, under a mutual misapprehension of the facts, and without any fraud or deceit practised by the defendants upon the plaintiffs. The only parts of the judgment necessary to report were those portions showing the law to be, that as long as contracts entered into under a mutual misapprehension of facts are executory, such contracts cannot be enforced, even in the absence of fraud or deceit; but when the transaction is consummated, as in this case, by the execution and delivering of the conveyance, the parties must be left to their right as defined by the conveyance itself. It was well that the reported judgment should point out the difference between these two states of facts, referring in the one case to those cases that define the rights of the parties in the case of executory agreements and those cases which define the rights of the parties where a conveyance has actually been delivered, but no other portions of the judgment are of any actual interest to the profession.

In England the reports of cases in the Court of Appeal are very much more numerous than the reports of cases in the Divisional Courts and before single judges. In this Province the reverse is the case. Of course cases that indicate judicial opinion in regard to statute law, even in the first instance, should be somewhat fully reported; but as cases of magnitude and doubtful law usually find their way to the Court of Appeal, it is obvious that many of them are needlessly reported in the lower courts. The reports of our Court of Appeal are too full, and much might be eliminated in the direction I have pointed out.

In short, I believe that too many cases are reported, and that the reports themselves are unduly long. The remedy for all this is in the hands of the profession, or rather of the Law Society which represents them.

No doubt it is much easier to give the judgment of the judges precisely as delivered, and to detail the facts, pleadings and arguments of counsel from the statement of the judge, or from the briefs of counsel, and thus avoid a good deal of the labour which a critical condensation and arrangement of the case, such as I have suggested, involves. But if the reports are to be made what they ought to be, this labour must not be shirked.

There are practical difficulties in the way of improvement in the lines indicated, but they should as far as possible be overcome. This can only be done by more time and thought being devoted to the reports, and by the help of the judges themselves. It may be that this increased responsibility cannot reasonably be expected to be assumed by the reporters at their present salaries; and we must remember that in England there are, we believe, two editors and some thirty reporters, but something should be done in the premises. At least let it be understood that the profession desire a more careful selection of the cases to be reported, and a freer hand in striking out unnecessary matter.

LEX.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We now conclude our notes on cases in the first instalment of the Law Reports for December.

WILL—CONSTRUCTION—"PROPERTY AT MY BANK."

In re Prater Desnige v. *Beare*, 36 Chy. D. 473, is a decision of Chitty, J., upon the construction of a will whereby the testator bequeathed "my property at R.'s bank." At his death he had at R.'s bank a cash balance, also certificates of shares, some of which were inscribed in his name, and others payable to bearer. Chitty, J., held that only the cash balance passed by this bequest, because the share certificates were not property at the bank, but merely evidence of title to things out of the bank, and not things in it.

PRINCIPAL AND AGENT—MANAGER OF TRADING COMPANY—PROMISSORY NOTE SIGNED ON BEHALF OF COMPANY.

In re Cunningham & Co., 36 Chy. D. 532, the question was whether a note given by the manager of a trading company, and signed by him "in representation" of the company, was binding on the company? The note was given under the following circumstances: The company in question were importers and traders in tinned ox tongues and other provisions. Hunter, who was appointed to take entire charge of the interests of the company in South America, but having no express power to sign or accept bills or promissory notes on behalf of the company, was desirous of entering into a contract with one Liberos for the supply of ox tongues to the company in South America; but Liberos refused to enter into the contract unless a guarantee was given by some third person. J. C. Simpson agreed to give the guarantee by depositing £1,000 in a bank to the order of Liberos. As an indemnity to Simpson, Hunter gave him the promissory note in question for £1,000, signed by him "in representation" of the company. The company made default in carrying out the contract with Liberos, and, under a power contained in it, the deposit which was paid to him was forfeited. No goods were supplied to the company under the contract. The company never recognized the note, and it was dishonoured at maturity. The company being in liquidation, Simpson claimed to prove the note, but his claim was resisted by the liquidator, and North, J., held that under the circumstances the company were not bound by it, on the ground that the note was not given in order to carry on the business in the ordinary way.

VOLUNTARY GIFT—TRUST—DELIVERY OF PROMISSORY NOTE TO BE HANDED OVER TO THIRD PERSON AFTER DEATH OF MAKER.

In re Richards, Sherestone v. *Brock*, 36 Chy. D. 541, is a decision of North, J. In this case a testatrix made her will in 1873, bequeathing a legacy of £150 to Ellen Harris, who was her domestic servant. In August, 1877, the testatrix made a promissory note for £200, payable on demand to Ellen Harris, and handed the note to the testatrix' solicitor, with instructions to retain it till the

testatrix' death, and then to give it to Ellen Harris, should she remain in the testatrix' service until her death. The testatrix had previously told Ellen Harris that, if she would continue in her service until her death, she would leave in the care of her solicitor a present for her beyond what she might leave to her by her will. Ellen Harris remained with the testatrix until her death, and the note continued in her solicitor's hands, and she had never revoked the directions she had given him about the note. The question was whether there had been a valid gift of the promissory note, and North, J., held that there had; that the solicitor had been constituted a trustee of it, and that he might hand it over on the prescribed conditions being fulfilled, and that Ellen Harris was therefore entitled to prove for the amount of the note against the estate of the testatrix.

MORTGAGOR AND MORTGAGEE—REDEMPTION ACTION—MORTGAGEE IN POSSESSION, OVERPAID—RESTS—COSTS.

Ashworth v. *Lord*, 36 Chy. D. 545, was an action for redemption brought by an assignee of the equity of redemption. The defendants set up the Statute of Limitations, and claimed that a large amount was still due to them. The defence of the statute was overruled, and the usual accounts ordered, and in case it should appear defendants were overpaid, further consideration was adjourned. The result of the accounts showed that the defendants, who went into possession in 1857, had been fully paid in November, 1866, and that a balance of £618 was due from the defendants; and it was held on further consideration by North, J., that the defendants were liable to have the account taken with annual rests from the time the mortgage was fully paid, following *Wilson* v. *Metcalfe*, 1 Russ. 530, and must also pay the costs of the action.

STATUTE OF LIMITATIONS—TENANTS IN COMMON—RECEIPT OF RENTS BY FATHER AS BAILIFF FOR INFANT SON.

In re Hobbs, *Hobbs* v. *Wade*, 36 Chy. D. 553, is a decision of North, J., upon a question arising under the Statute of Limitations. A father became in 1870 tenant in common with his two sons, Samuel and John. John was then an infant, and attained twenty-one in 1877, and died in May, 1884, and his share descended to his brother Samuel. The father and sons were entitled to the estate in the following proportions: The father was entitled to one moiety, the sons were entitled to one-fourth each, but subject to the right of the father to one-half of the rents of their respective shares so long as he remained a widower. In 1870 the father entered into the receipt of the whole rents, and continued in possession for more than twelve years without accounting to his sons for their shares, or acknowledging in writing their title. In February, 1884, the father married again, and in November, 1884, he died; and it was held that as to the one-eighth share to which John became entitled in possession in 1870, his father must be deemed to have been in possession as his bailiff, and therefore Samuel was entitled to the whole of John's share, but that his title to his own one-eighth, to which he was entitled in possession in 1870, was barred by the Statute of Limitations. See *In re Taylor*, 28 Gr. 640.

PRESUMPTION OF DEATH—PERSON NOT HEARD OF FOR SEVEN YEARS.

In re Rhodes, *Rhodes* v. *Rhodes*, 36 Chy. D. 586, the rule laid down in *Re Phene's Trusts*, L. R. 5 Chy. 139, and *Nepean* v. *Doe*, 2 M. & W. 894, that where a person has not been heard of for seven years, though there is a presumption of law that he is dead, there is no presumption that he died at any particular time within the seven years, but the onus of proving the particular time of death is on the person whose title is founded on death at that time, was re-affirmed by North, J.

FOREIGN LAW—SUCCESSION TO PERSONAL ESTATE—DECISION OF FOREIGN TRIBUNAL—COMITY OF COURTS.

In re Trufort, *Trafford* v. *Blanc*, 36 Chy. D. 600, Stirling, J., held that when a foreign tribunal, having jurisdiction in the place of domicile of a deceased person, had adjudicated on the right of succession to his personal estate, the English Courts are bound by, and will follow the adjudication as to personal property in England, to which the deceased died entitled.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—COSTS—DELAY—DAMAGES.

Rowe v. *School Board for London*, 36 Chy. D. 619, was an action by a vendor for specific performance of an agreement made by the purchaser of land, whereby he agreed as part of the consideration to grant within a given time to the vendor a right of way, and to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way, or make a road and sewers until long after the time fixed, and in addition to specific performance the vendor also claimed to recover damages, as the vendor's other land had remained unproductive until the road was made. But Kekewich, J., held that although entitled to specific performance of the agreement, the plaintiff was not also entitled to damages, because the agreement in question was governed by the same rule as a contract to sell real estate, and according to the rule laid down in *Bain* v. *Fothergill*, L. R. 7 H. L. 158, a vendor is not liable for damages for delay unless his conduct is tainted with fraud and bad faith.

DAMAGE—NEGLIGENCE OF PUBLIC COMPANY—ACTION—COMPENSATION—COSTS.

Evans v. *Manchester*, 36 Chy. D. 626, was an action brought to recover damages from a canal company under the following circumstances:—The plaintiffs were the owners of a mill which had been built on the banks of a canal constructed under an Act of Parliament. In consequence of the working of a coal mine the canal and mill had subsided, and water leaked from the canal into the mill, for which injury the plaintiff sought to recover damages, and an injunction. It was found that the canal company might have prevented the damage, and were therefore guilty of negligence. And it was held by Kekewich, J., that though a company authorized by Act of Parliament were not under the same liabilities as a private person, they were, nevertheless, liable for damages if guilty of negligence, and that the canal company were therefore bound to compensate the plaintiff, but he held that the compensation must be recovered in

the way pointed out in the company's Act, and not by action. He therefore simply found that the plaintiffs were entitled to compensation for the damage past, and also that the defendants were liable to make good any damage occasioned by the escape of water from the canal on to the plaintiff's premises consequent on any further subsidence of the canal, and awarded the plaintiff the costs of the action.

SHARES — PLEDGE OF CERTIFICATES — BLANK INDORSEMENT — BROKER — FRAUDULENT TRANSFER — BONA FIDE HOLDER.

Williams v. *Colonial Bank*, 36 Chy. D. 659, is an adjudication of Kekewich, J., upon the conflicting rights of a *bona fide* holder of certain share certificates and the true owner thereof, as to their respective rights therein. The owners, in order that the shares might be registered in their own names, signed blank transfers indorsed on the share certificates, and gave them to their brokers, who fraudulently deposited them with the defendants as security for advances, and afterwards become bankrupt. The shares, according to mercantile usage, were treated as securities to bearer, and the defendants took them *bona fide*. The indorsement on the shares, however, were not so attested that the shares could be registered. Under the circumstances it was held that the owners must be taken to have given the brokers authority to deal with the certificates, and that the defendants were entitled to hold them, but that the plaintiffs were not bound to do anything in order to enable the defendants to have the transfers registered; and it was also held that bankers are not bound to make inquiry as to securities passing by delivery, which are deposited with them by brokers as security for advances.

COMPANY — POWER TO BORROW MONEY — IMPLIED RESTRICTION — INVALID CHARGE — POWER OF CORPORATION — ASSENT OF ALL THE MEMBERS.

Wenlock v. *River Dee Co.*, 36 Chy. D. 674, deserves notice for two or three points decided by Kekewich, J., in reference to the powers of incorporated companies. He held that where, by an Act of Parliament, a corporation is empowered to borrow a certain sum of money, a restriction against borrowing more will be implied; and where an Act of Parliament imposes on a company restrictions as to dealings with its property, the assent of every individual shareholder, will not make valid, as against the corporation, that which it is restrained from doing; and where an Act of Parliament made the certificate of certain commissioners conclusive evidence of a valid charge under an Act, such certificate would nevertheless not give validity to a charge created by the company in violation of the Act of incorporation.

SPECIFIC PERFORMANCE — DAMAGES — MARRIED WOMAN — SEPARATE ESTATE.

The only remaining case in the Chancery Division is *Foster* v. *Wheeler*, 36 Chy. D. 695. This was an action for specific performance of an agreement whereby the defendant agreed with the plaintiff that she would enter into an agreement with one Ord for a lease at a certain rent for such time and subject

to such covenants as Ord should approve, and would accept such lease and execute a counterpart. The premises in question were at the time of the agreement, held by the plaintiff under lease from Ord and at the request of the defendant he had moved out of the house. In default of specific performance the plaintiff claimed damages. Kekewich, J., held that the agreement could not be ordered to be specifically performed, but that the plaintiff was entitled to damages.

The second instalment of the Law Reports for December comprises 19 Q. B. D. pp. 685-710,—this merely covers the index of this volume, and one case not necessary to note here:—36 Chy. D. pp. 701-831; and 12 App. Cas. pp. 651-763.

COMPANY—AGREEMENT TO PAY CLAIM IN PAID-UP SHARES—CONTRIBUTORY—SPECIFIC PERFORMANCE OF AGREEMENT TO TAKE SHARES—COSTS—APPEAL, ADDITIONAL EVIDENCE ON APPEAL—BOOKS OF COMPANY.

In re Baranagh Oil Refining Co., Arnot's Case, 36 Chy. D. 702. Subject to confirmation by a meeting of shareholders, it was agreed by directors of a company to give, and by Arnot to accept, fully paid-up shares in satisfaction of his admitted claim against the company for services rendered. At the shareholders' meeting it was subsequently resolved "that a sum of £2,875 be voted to Captain Arnot, which he agreed to take in 575 fully paid-up shares." The agreement was not registered, and there was no sufficient evidence that there had been any distinct allotment or acceptance of shares pursuant to the agreement. The company having become insolvent, the liquidators applied to have Arnot placed on the list of contributories as holder of 575 unpaid shares, but the Court of Appeal (Cotton, Bowen & Fry, L.L.J.), overruling North, J., held that although there had been nothing amounting to a payment in cash by Arnot for the shares, yet that as the company had agreed to give, and he had agreed to take, paid-up shares, he could not be compelled to take unpaid shares, and therefore was not liable as a contributory. But inasmuch as the appeal was decided upon additional evidence, allowed to be given on the appeal, which the court thought ought to have been given in the court below, no costs of the appeal were given. There is another point decided in this case worthy of note, and that is that the books of the company were held to be only *prima facie* evidence of the facts recorded therein, and although the books contained entries tending to show that Arnot had accepted and dealt with some of the shares in question, he was permitted to show that such dealing took place in reference to other shares previously allotted to and paid for by him, and that the numbers were wrongly filled in by a clerk of the company.

PATENT—COMBINATION—INFRINGEMENT—ACQUIESCENCE—ESTOPPEL.

Proctor v. *Dennis*, 36 Chy. D. 740, is an important decision on questions of patent law, in which the Court of Appeal (Cotton, Bowen & Fry, L.L.J.) reversed the Vice-Chancellor of Lancaster. The action was to restrain the infringement of a patent, and was brought against the maker of the infringement and two of

his vendors. The patent was for a combination of known mechanical contrivances producing a new result, and it was held that the omission of the specification to point out what parts are old and what new, would not affect its validity, although if the alleged infringement consisted only in taking part of the combination, it would be necessary that the patentee in his specification should have claimed the part so taken as new; and it was held that the patent was infringed by a machine producing the same result by a combination of mechanical equivalents, with some alterations and omissions which did not prevent the new machine from being one which embraced in substance the patented invention. The vendors claimed that the plaintiff was estopped from proceeding against them, because, hearing that they were going to set up machines of the kind in question, he had gone to them and said they would find his a better machine than that of the maker of the alleged infringement, without giving them any notice that he claimed the latter to be an infringement. The Vice-Chancellor held that this conduct debarred him from relief as against the vendees, but the Court of Appeal were unanimously of opinion that as the vendors did not depose that they were ignorant of the existence of the plaintiff's patent, and there was no reason to believe they were ignorant of it, or that the plaintiff supposed them to be so, what had taken place amounted to neither acquiescence nor estoppel by conduct; and that there was no duty resting on the plaintiff to warn them that in purchasing the other machines they were infringing his patent.

ESTATE TAIL—ENLARGEMENT OF BASE FEE—FURTHER ASSURANCE—SPECIFIC PERFORMANCE OF AGREEMENT BY TENANT IN TAIL—3 & 4 W. 4, c. 74, ss. 19–47—(R. S. O. 1887, c. 103, ss. 23, 36.

In *Banks* v. *Small*, 36 Chy. D. 716, the Court of Appeal (Cotton, Bowen & Fry, LL.J.), unanimously affirmed the decision of Kekewich, J., 34 Chy. D. 415 (noted *ante* vol. 23, p. 164.) In this case it may be remembered it was sought to compel a tenant in tail in remainder who had barred the entail without the consent of the protector of the settlement, to execute a further assurance pursuant to his covenant on the death of the protector, so as to enlarge the base fee previously created into an estate in fee simple. The action was resisted on the ground that the jurisdiction of the court was ousted by 3 & 4 W. 4, c. 74, s. 47; (R. S. O. 1887, c. 103, s. 36), but it was held that notwithstanding this provision the plaintiff was entitled to the relief claimed, and the judgment of the Court of Appeal is valuable as showing the true scope of s. 47. Fry, L.J., thus sums up his conclusion: "I have come, therefore, to the conclusion that the true meaning of this section is to exclude all jurisdiction to treat as effectual in equity under the Act, either on the ground of specific performance, relief against defective execution, or non-execution of powers, or on any other ground, an assurance intended to operate under the Act, which is not effectual under the Act; but that it leaves the jurisdiction of the court with regard to enforcing contracts *against the persons who have entered into them* totally unaffected." In short, according to the view of the Court of Appeal, the statute merely follows in the lines of the old case of *Attorney-General* v. *Day*, 1 Ves. sen. 218, decided by

Lord Hardwicke long before its enactment; in which he held that although a Court of Equity would grant specific performance as against a tenant in tail who had entered into a contract to bar the estate tail, yet it would not do so as against the issue in tail, for they take by a title paramount *in formam doni.*

PRACTICE—AMENDMENT OF PLEADING ALLOWED, NOTWITHSTANDING AN ORDER STRIKING OUT PART SOUGHT TO BE INSERTED WAS UNREVERSED.

The case of *Kurtz* v. *Spence*, 36 Chy. D. 770, seems to lay down a novel and curious precedent in practice. An application was made to Chitty, J., on 12th August, 1886, to strike out part of a statement of claim on the ground that the question raised thereby could not be properly tried in the action. Chitty, J., granted the order, which was not appealed. Subsequently, on the 21st July, 1887, an opinion was expressed in the Court of Appeal that the question raised by the passage struck out could properly be tried in such an action as the present. The plaintiffs then applied to Kekewich, J., to amend their statement of claim by inserting the clause struck out by the order of Chitty, J., which application was refused. The plaintiffs then applied for leave to appeal from the order of Chitty, J., and also appealed from the order of Kekewich, J. The Court of Appeal refused leave to appeal from the order of Chitty, J., but offered to dismiss the action without prejudice to the plaintiffs bringing another; but on the appeal from the order of Kekewich, J., the court allowed the amendment, Fry, L.J., dissenting.

COMPANY—WINDING UP—DIRECTORS—CREDITOR—PAYMENT OF DIVIDENDS OUT OF CAPITAL—DELUSIVE BALANCE SHEETS—AUDITOR, LIABILITY OF.

The case of *Leeds Estate Building Co.* v. *Shepherd*, 36 Chy. D. 787, will, we fancy, be read with a good deal of interest in these days of insolvent banks and companies. It certainly opens up a very serious field for thought, for those who assume the responsible positions of directors and auditors of joint stock companies. It is the old story of directors leaving everything to the auditor and manager, and the manager making out delusive balance sheets, and the auditor and directors certifying them; payments of dividends out of capital, assets over-estimated, followed by the inevitable crash. Stirling, J., held that directors were not justified in leaving everything to the auditor and manager, and were personally liable, jointly and severally, to make good all dividends paid out of capital, and also all sums paid thereout to the directors for remuneration and to the manager in the shape of bonuses, which they were not entitled to unless the company paid a certain dividend; and he also held that it was the duty of the auditor not to confine himself to verifying the arithmetical accuracy of the balance sheets, but that he was bound to inquire into their substantial accuracy, and to ascertain that they contained the particulars specified in the articles of association, and were properly drawn so as to contain true and correct representations of the company's affairs; and that as the improper payments by the directors were the natural consequence of the breach of duty on the part of the manager and auditor, they were also liable in damages to the amounts so paid. The par-

ticulars in which the directors failed in their duty are thus specified by the learned judge:—(1) They never required the statement and balance sheets to be made out in the manner prescribed by the articles. (2) They failed properly to instruct the auditor, or at all events, to require him to report on the accounts and balance sheets in the mode prescribed by the articles. (3) They were content throughout to act on the statements of the manager, without inquiry or verification of any kind other than the imperfect audit of the accounts by the auditor.

ARBITRATION—BY-LAW PROVIDING FOR ARBITRATION.

In *Walker* v. *General Mutual Building Society*, 36 Chy. D. 77. This was an action brought by a member of the defendant society who claimed to have (under the provisions of the by-laws) withdrawn from it, to recover payment of the subscriptions he had paid on his shares and for the appointment of a receiver. Under the by-laws it was provided that the subscriptions should be repaid to a withdrawing member "provided there shall be sufficient funds available;" and also that the board should have power to determine all disputes between the society and any member or person claiming an account of any member, and that if the party should be dissatisfied with their decision the matter should be referred to arbitration. The society declined to pay the plaintiff, on the ground that they had not sufficient funds on hand, the plaintiff claimed that they had. On the motion of the plaintiff for a receiver, the preliminary objection was taken that the jurisdiction of the court was ousted by the by-law providing for arbitration. The plaintiff waived any objection on the ground that the defendant had not moved to stay the proceedings, and the Court of Appeal (Cotton, Bowen & Fry, LL.J.), held, affirming North, J., that though the plaintiff as a retired member might be in some sense a creditor, he was still so far a member as to be bound by the rules, and that the dispute must be referred to arbitration.

We proceed now to the appeal cases:—

PATENT—CHEMICAL PROCESS—SPECIFICATION.

In *Badische* v. *Levinstein*, 12 App. Cas. 710, the House of Lords determined that a patent for producing colouring matters for dyeing and printing by a chemical process was valid, and their Lordships reversed the decision of the Court of Appeal, 29 Chy. D. 366, noted *ante* vol. 21, p. 315, and restored the judgment of Pearson, J., 24 Chy. D. 156. Lord Halsbury, L.C., says that the chief reliance of the respondent was placed upon an argument as new as it was unsound, and for which he thought there was not the least judicial authority. This argument, he said, was: This thing is not new, because things of the same sort in analogous chemical relations had been discovered; people ought to have discovered it, or were on the brink of discovering it; therefore this true and first inventor only completed by one step the route to which chemical discoveries had been tending without his aid. Such a principle applied to patent law, he considered, would be fatal to the rights of all inventors.

PRINCIPAL AND AGENT—SALE OF AGENT'S OWN PROPERTY TO PRINCIPAL—NON-DISCLOSURE OF INTEREST.

Cavendish v. *Fenn*, 12 App. Cas. 653, was an application by a shareholder of a company in liquidation to compel a director to account for alleged breach of trust, on the ground that the director had allowed the company to purchase a property in which he had an interest, and at a price far exceeding the alleged value. The application, in the opinion of the House of Lords, failed on the evidence, and on this ground the decision of the Court of Appeal (29 Chy. D. 795) was affirmed by their Lordships; and their Lordships further considered that it was doubtful whether the appellant, whose shares were fully paid up, and who failed to show that he would have any pecuniary interest in the result, had in any case any right to invoke the assistance of the Court.

SHIP—MASTER—BILL OF LADING—ERROR IN DATE OF SHIPMENT, LIABILITY OF MASTER FOR.

The short point decided by the House of Lords in *Stumore* v. *Breen*, 12 App. Cas. 698, was, that the employment of a ship's broker at a foreign port to procure a cargo and adjust terms for its carriage does not give the broker any implied power to relieve the master, when signing the bills of lading presented to him, from seeing that the dates of shipment are correctly stated therein; and that for breach of this duty the master is, notwithstanding the employment of the broker, liable to the owners. The Lords reversed the Court of Appeal and restored the judgment of the Divisional Court.

TRUSTEE—INVESTMENT—HAZARDOUS SECURITY.

Learoyd v. *Whitley*, 12 App. Cas. 727, was an appeal from the Court of Appeal in the case *In re Whitley & Whitley* v. *Learoyd*, 33 Chy. D. 347, noted *ante* vol. 23, p. 29. Trustees invested the trust fund on a mortgage of a brickfield, with buildings and machinery and plant affixed to the soil, being advised by competent valuers that the property was a good security for the amount invested, such valuation being based on the business being a going concern. The business came to an end, the property depreciated in value, and the money invested could not be realized from the security. The Lords held the trustees liable to make good the loss, on the ground that the security was in fact a speculative trading venture, the propriety of investing in which the trustees were bound to exercise their own judgment upon, and could not delegate to others; and though they had acted *bona fide*, they were nevertheless liable.

ARBITRATION—MISTAKE OF ARBITRATOR IN LAW—REVOCATION OF SUBMISSION—JURISDICTION OF COURT TO GIVE LEAVE TO REVOKE SUBMISSION.

East and West India Dock Co. v. *Kirk*, 12 App. Cas. 738. In this case a reference was pending between the parties in respect to matters in difference which arose in the execution of a contract, which by the terms of the contract were required to be referred to an arbitrator. The arbitrator received evidence

which was objected to as tending to vary a contract in writing, and other evidence which in one view of the contract was inadmissible, but admissible in another. The party objecting then applied to the court under 3 & 4 W. 4, c. 42, s. 39, (see R. S. O. 1887, c. 53, s. 16), for time to make the submission. The Divisional Court and the Court of Appeal refused the application, but the House of Lords held that the court had power to give leave to revoke a submission when it appeared that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction, and that this power should be exercised unless the parties agreed to the arbitrator stating the questions arising, as to the admissibility of the evidence, in a special case for the opinion of the court.

PRACTICE—APPEAL NEW TRIAL—JURISDICTION OF COURT OF APPEAL TO REVERSE A VERDICT, ORD. 58, R. 4, (ONT. R. 321).

In *Toulmin* v. *Millar*, 12 App. Cas. 746, the action was tried by a jury and a verdict given for the defendant, a new trial was ordered by the Divisional Court on the grounds of misdirection, and the verdict being contrary to the weight of evidence. The Court of Appeal held that the verdict was against the weight of evidence, and under Ord. 58, r. 4 (see Ont. R 321), instead of ordering a new trial assessed the plaintiff's damages at £676 19s. 6d., and ordered judgment to be entered for him for that sum. There are cases in our own courts in which a similar practice has been followed, *e.g.*, *Stewart* v. *Rounds*, 7 App. R. 515, *Lancey* v. *Brake*, 10 O. R. 428. Lord Halsbury, L.C., in giving judgment, though not expressly deciding the point, expressed grave doubts as to its propriety, their lordships being of opinion that the judgment of the Court of Appeal was wrong on the facts, reversed the decision. On the point of practice Lord Halsbury said: "I doubt very much whether Ord. 58, r. 4, gives any such jurisdiction as the Court of Appeal claimed to exercise in finding a verdict for themselves, and actually assessing damages for breach of a contract."

Notes on Exchanges and Legal Scrap Book.

AMERICAN BAR ASSOCIATION.—We have received the report of the tenth annual meeting of the American Bar Association, which was held at Saratoga Springs, New York, on the 17th day of August last and the two following days. The report is a handsome volume of some 450 pages. The discussions which took place and the addresses which were delivered are instructive, serving as they do to show the directions in which leading members of the legal profession in the United States think that changes should be made. As a guide to legislators, the opinions of those who are so intimately acquainted with the working of the law in practice, should be of great value.

AN OLD WARRANT.—The original warrant on which John Bunyan was arrested and imprisoned when he wrote the "Pilgrim's Progress," is said to have been recently found in England. It covers half a sheet of foolscap, and in it Bunyan is described as a "tynker."

LETTER-PRESS COPIES.—A curious question in regard to the law of evidence arose in Iowa, on the trial of an agent for embezzlement. The question arose whether letter-press copies of the defendant's letters, containing statements of his accounts with his employers, could be put in as evidence to prove the commission of the offence alleged. No effort was made to show that the original letters could not be produced. It was held that letter-press copies are but copies, and cannot be introduced if the originals are not accounted for.

LIABILITY OF OWNERS OF REAL ESTATE.—In the State of Delaware, in *Diamond Slate Iron Co.* v. *Giles*, reported in the *National Law Review*, it was decided that, while the owner of real estate is not bound to provide safeguards for wrong-doers, he is bound to take care that those who come upon his premises by express or implied invitation are protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited person had no reason to look for. The invitation to come upon dangerous premises, without stating the danger, was culpable, and an injury resulting from it is deserving of compensation in the case of the servant of the person extending the invitation, as in any other case.

CONTEMPT OF COURT.—In a case reported in our American exchanges the defendant was a party to certain actions in the Supreme Court of Montana. While some of these actions were *sub judice*, he caused a telegram to be published in a newspaper of the city in which the court was sitting. This telegram falsely alleged that certain persons, whose names were given, had made a wager that, owing to the influence of adverse claimants, the Supreme Court would reverse its decision in the earlier of these cases. These had been decided in favour of the defendant, and the questions involved in the actions still pending were substantially the same as were formerly decided. Notwithstanding a disclaimer on oath by the defendant of any intention to treat the court with even the slightest contempt, his statement was not accepted, but it was held that the publication was a contempt. His motive was a corrupt one, viz., to improperly influence the court. The case is peculiar, mainly as an illustration of the influences against which an elective judiciary must be careful to guard, if the scales of justice are not to incline unfairly to one party or another. A judge who is naturally thinking of his chances of re-election may fairly be supposed to be amenable to the influence of public opinion, and if he is a conscientious man, there may be an unfair rebound in the opposite direction.

A SLANDER SPOKEN IN A FOREIGN LANGUAGE.—In the case of *McLeod* v. *McLeod*, tried at Sherbrooke, in the Province of Quebec, and reported in *The Legal News*, the plaintiff had used language in speaking of the defendant which was *prima facie* slanderous. It appearing, however, that the words complained of were spoken in Gaelic, it was objected that, inasmuch as Gaelic is a foreign language, it is not sufficient to set forth the alleged slander by means of an English translation, but that the very words used should be set forth, accompanied by a translation and evidence of its accuracy. The conclusion arrived at was that while there was no Quebec case in point, the English and American authorities undoubtedly sustained the objection. It did not appear that the defendant had used the words set forth in the declaration, but rather that he used certain other words which, when translated into English, may have the same meaning. The action was accordingly dismissed.

RIGHT OF WAY.—In *Whaley* v. *Jarrett*, in the Wisconsin Supreme Court, the defendant had a right of way over land belonging to the plaintiff. This right was based on a deed granting "easement of travel and private road privilege." It was held that the plaintiff had a right to erect gates at each end of the way for the protection of his land, such gates being sufficiently wide and conveniently hung, and not interfering with the reasonable enjoyment by the defendant of his right of way. The court thought it settled that, if the land-owner is not restrained by the terms of the grant of a right of way across lands used for agricultural purposes, he may maintain fences across such way, if provided with suitable gates. It is a principle of law that nothing passes as an incident to the grant of an easement, but what is requisite to the fair enjoyment of the privilege. The reasonable use and enjoyment of the way, the court maintained, is quite consistent with the right of the plaintiff to maintain proper gates at the ends of the lane for the protection of the land.

HOW TO GET OUT OF A STEAMSHIP BERTH.—A variety of opinion appears to prevail among Her Majesty's judges, as evidenced by the case of *Andrew* v. *Little*, upon the grave question how to get out of a berth at sea. Mr. Justice Grove appears to think that one must get out anyhow, because he proposed to nonsuit a lady who complained that she was allowed only a chair to step upon. The Master of the Rolls and Mr. Justice Day appear to think that the right way is front foremost, while a learned judge, who is ex-president of the Alpine Club, and who ought to know, declared that he should have hesitated long before deciding whether to get out forwards or backwards when the ship was rolling. The jury were for the lady, who had stepped out forwards on the top rail of a chair which the stewardess had put for her, and had fallen out and hurt herself. The prevalent opinion on the bench shows how civilization has blunted the prehensile faculty in man. We venture to say that there is not an omnibus conductor in London who will not affirm confidently that the right way to come

down from the top of an omnibus is with the face inwards, and they have not abandoned this view since the very general substitution of a staircase for a ladder. The attitude is not dignified, and would be inadmissible on the Matterhorn, where the eyes have to be used; but it is favoured by arboreal apes, the schoolboy climbing trees, and the hodman carrying loads. Whether a lady whose mode of leaving her berth is by stepping forward on the top rail of a chair is entitled to recover damages from the owners of the steamboat is one of those great questions which, like Mr. Jackson's thumb, seems specially reserved for the consideration of the House of Lords. It will then be for the Lords to say whether placing a chair beside a berth for a lady to step on is evidence of negligence proper to be left to a jury.—*Law Journal* (Eng.)

THE LAND OUR NEIGHBOURS LIVE IN.—We had in Missouri two notorious outlaws, brothers, named respectively Frank James and Jesse James. Their history was a long series of murders, train robberies, express robberies, bank robberies, horse-stealing, and other like crimes. One of them was assassinated by one of his "pals" in pursuance of an arrangement to which the Governor of the State seems to have been a party. He received a large reward for his crime, offered by the railroad companies on whose trains most of the depredations had been committed. He therefore pleaded guilty to an indictment for murder, was sentenced, and immediately pardoned by the Governor. The other brother, after remaining a fugitive in another State for a considerable time after this, finally concluded that he would come back to Missouri, cast himself upon the mercy of the people among whom he was so popular, face the music, get acquitted if he could, and thereafter live an honest life. He came back, and one of the most serious crimes he had to face was the charge of murder at Gallatin, Mo. A judge of the Supreme Court Commission vacated the judicial seat temporarily for the purpose of defending him as his counsel. He seems to have got clear of all the indictments against him either by acquittals or dismissals. The other day he visited St. Louis, and in the Criminal Court called upon the gentleman who had been his counsel. The judge of the Criminal Court is reported to have complaisantly come down from the bench to be introduced to the outlaw. He thereafter visited the Court of Criminal Correction, and the judge of this court was not ashamed to take him to dinner. He ought now to be elected Governor. Misssouri can do no less for him.—*American Law Review.*

AMERICAN DIVORCES.—In the Divorce Division on Tuesday, Sir James Hannen delivered a reserved judgment in the case of *Thompson* (otherwise *Turner*) v. *Thompson*. The petition was that of the wife, Mrs. Georgiana Turner, a British subject domiciled in England, for a divorce from Mr. Charles Peter Thompson, a citizen of the United States, and connected with the marine service. The marriage took place at St. Jude's, Southsea, on the 7th of November,

1872. They lived together in England until January, 1873, after which they went to America. In February, 1879, she instituted proceedings in the United States for a decree dissolving the marriage, and was successful. Afterwards she returned to England, and instituted proceedings here for the purpose of having her marriage declared null and void. Mr. H. B. Deane appeared for her, and when the case came before Mr. Justice Butt, he raised the question of jurisdiction, contending that if the marriage was absolutely dissolved by the decree of the United States, then there existed no marriage between the parties upon which this court could be called to pronounce any opinion, his lordship directing that the case be argued by the Queen's Proctor. The arguments were heard before Sir James Hannen, who reserved his judgment. Sir James Hannen now said he was of opinion that this court had no jurisdiction, in the sense that the marriage was duly and absolutely dissolved by the decree in the United States court, and therefore there was no marriage existing between the parties to be dissolved and declared null and void by this court. The husband was domiciled in the United States, and after his marriage the petitioner took up her permanent abode in that country, and completely acquired a domicile there. Her suit, consequently, would be dismissed.—*Keble's Gazette* (Eng.).

SUPPLY OF INTOXICATING LIQUORS TO CLUBS.—The decision of Mr. Justice Stephen and Mr. Justice Charles in *Evans* v. *Hemingway*, some time ago, is an illustration of the application of the law of licensing to clubs. On proof of the supply of intoxicating liquors, and the passing of money, it lay on the defendant to show that the place was a club. It has always been assumed by the Inland Revenue and in the courts that proprietary clubs are equally exempt with members' clubs. The exemption of members' clubs is clear, because the liquor is the member's own, and he contributes towards funds of his club to the extent of what he orders, and does not buy the liquor. The statute requires that there shall be a sale. There is no sale in members' clubs; but is there a sale upon which a conviction may be obtained in a proprietor's club? The better opinion appears to be that there is not, because clubs like Boodle's and White's could not take out a license—at all events not a spirit license—if they wished, not being intended to be kept as places of public resort. In this state of the law the justices in the case in question may well have been puzzled to know what points they ought to find as a basis for the decision of the Queen's Bench. Eventually, in answer to a somewhat leading question of the court, they found that the arrangements representing the establishment as a club was a pretence. If by this they meant that the place was not a club at all, there was no more to be said, but they went on to say that, "in fact the manager was the proprietor of the establishment," which may mean merely that it was a proprietary club. The court evidently took the former view of the finding, and the case cannot be considered to decide that all proprietary clubs must take out a license.—*Law Journal* (Eng.).

THE ABOLITION OF CAPITAL PUNISHMENT.—C. H. Eaton, D.D., in the *Criminal Law Magazine*, examines the grounds on which capital punishment should be retained or abolished. The natural conservatism of humanity retards changes in laws which have worked more or less successfully for centuries; but experience and widening intelligence at last reveal their defects, make their enforcement more difficult, and suggest the remedy. Such a time, Dr. Eaton thinks, has come in the history of capital punishment. The classes of offences for which the death penalty is inflicted have become fewer, and in some parts of the world the penalty of death has been abolished. The article in question first reviews the arguments in favour of capital punishment. These are, he thinks, mainly three.

The first of these recognizes, with Blackstone, "the revealed or divine law, which is part of the law of nature directly expounded by God." The behest of that law is, "Whoso sheddeth man's blood, by man shall his blood be shed." In the Mosaic law the penalty of death is applied to many offences, and the *lex talionis* pervades the Jewish code. It is argued that this code was of but local and temporary application, and is not binding on us. That may be granted; but if divine wisdom prescribed laws which inflicted the death penalty, then there must have been states and conditions of society in which it was wise and humane to inflict capital punishment, and that, too, for a considerable variety of offences. If so, then it surely rests on the advocates for the abolition of capital punishment to show that we have so far departed from the states and conditions in which divine wisdom required the death of the transgressor for the good of the community, that we can afford to ignore these precepts of the Mosaic law. Dr. Eaton has gone but a small way towards meeting the force of the argument based on the Jewish civil law, when he has shown that it is no longer binding on us. It was the best possible law for the community for which it was designed. It remains for him to show wherein our circumstances and character differ so radically from those of the Israelites that its penalties are no longer applicable to any crimes, no matter how heinous that may be committed among us. That task he has not attempted.

The second argument reviewed is that capital punishment is essential to the protection of society. It is admitted that as the law of self-defence permits man to kill his assailant when his own life is in danger, so, on the same grounds, society—an association of men—may protect itself. But the influence of sympathy for the culprit is so strong, say those who are opposed to capital punishment, that nothing but the evident hand of necessity can justify the destruction of one human being by another. Is not this sympathy often misplaced? The innocent victim of the criminal, and society at large, are the true objects of sympathy. If there was less notoriety given to the sayings and doings of the condemned criminal, and less publicity to the pity, rather than sympathy, which may be properly felt for him, his punishment would be more effective as a preventive measure than it now is. We confess that we fail to see that the writer of the article referred to above has established his contention that the adequate protection of society can be attained without the death penalty.

In dealing with the deterrent power of punishment, the article in question says that it is not true that the terrors of the gallows keep men from crime. It is asserted that the testimony from all parts of the world is conclusive that crime diminishes with the mildness of the laws. This assertion may easily be met by a *reductio ad absurdum*. If the amount of crime is in direct ratio to the severity of the penalties inflicted for it, why not diminish all penalties until they become purely nominal? Would crime then disappear, or would it increase? There is much wisdom in the Aristotelian doctrine of the mean. Undue severity begets sympathy for the criminal whose sufferings are so out of proportion to his crime, and it becomes almost impossible to secure convictions. Popular sentiment will not assist the enforcement of a law which inflicts death for an ordinary theft, and it fails through its very severity. On the other hand, when the punishment errs toward undue leniency, it fails to deter from violations of the law, and, consequently, to protect society. Imprisonment, doubtless, is an effective punishment for some offences; but what influence to restrain from the commission of murder can it have on the inmates of our prisons? And murder within the walls of our prisons is of not unfrequent occurrence.

The arguments relied on against capital punishment are the uncertainty of its infliction, its violation of the sanctity of life—the very principle which it is intended to defend—and, finally, the frequent execution of the innocent. The first and the last of these have force rather against the system of trial adopted, and the law governing the evidence on which a prisoner is to be convicted, than against the nature of the penalty to be meted out to certain crimes. In this country they are entitled, we venture to assert, to but little weight. As regards the second of these grounds, the surgeon inflicts pain for the very purpose of saving the patient from greater and more enduring misery. Does he thereby violate the very principle which he is supposed, as his special function, to uphold? In exactly the same way it is necessary for the state to take life in some instances, that the sanctity of life may be thereby more firmly established.

Correspondence.

THE LAW OF DIVORCE.

TO THE EDITOR OF THE CANADA LAW JOURNAL:

Dear Sir,—I have read your article on divorce, in the January number of the CANADA LAW JOURNAL, with much interest. Having had occasion in the course of my experience in conducting applications for divorce before the Senate, to pretty thoroughly search the past cases for precedents, I have to say that there is one case on record of a petition to proceed *in formâ pauperis*, namely, that of Mrs. Campbell, in 1879. Her petition was granted, and she eventually obtained, after a severe struggle, an Act granting a separation similar to a judicial separa-

tion, under the present English Divorce and Matrimonial Act. In that case it was laid down that the applicant should, before presentation of the petition for a bill of divorce, present a petition making out a case for being allowed to seek a divorce without complying with the rule of the house respecting payment of fees. The petition would then be sent to the committee on standing orders for consideration, and report to the house whether the rule should be suspended. The privilege, when granted, is of no great benefit to the applicant, as the remission of the fee of $200 takes off but a small part of the applicant's expense. The advertising of the application in the *Canada Gazette*, and two local papers, the fees and travelling expenses of the petitioner and witnesses to and from Ottawa, and their hotel expenses while there, together with the fees of the local and the Ottawa solicitor, are really the substantial part of the expense.

Assuming that the costs of an action for a decree from a Court of Divorce, were one established in Canada, would be about equal to the costs of an ordinary contested Superior Court action down to judgment, I doubt if the costs would be much less than those attending the obtaining of a Parliamentary Divorce. In the cases in which I have been employed I have kept a record by items of the work done in each case, and the sum total, exclusive of the Government fees, printing, advertising, travelling and hotel expenses, amounts to about the costs of a contested action in the High Court of Justice.

I trust, however, that your timely article will be the beginning of an agitation which will eventually result in the establishment of a Divorce Court for this Province at least. The weak point of the present system is not the expense, but the uncertainty as to law and evidence, which results from matters of a strictly legal character being dealt with by laymen and a few members of the legal profession, who are unable to view such applications in a calm judicial spirit. The honourable gentlemen of the Senate assume to conduct proceedings incidental to divorce in a judicial as well as a legislative character, but the occasion is rare indeed that they ever rise to the former level.

A glance at the debates and journals of the House in the Campbell case will disclose bursts of passion and partizanship happily unparalleled in judicial circles. Frivolous technicalities of which country fence-viewers would not be guilty are frequently interposed. The religious convictions of a large number of the members of both houses also prove a stumbling block, as no argument, legal or otherwise, can successfully refute them. The really only redeeming point in the system is the suppression from the public of the evidence taken by the Select Committee.

Yours truly,

Ottawa, January 27th, 1888. J. A. GEMMILL.

DIARY FOR FEBRUARY.

1. Wed....Sir Edw. Coke, born 1552. C. C. non-jury sittings in York. Barristers' Examination.
5. Sun.....*Sexagesima Sunday.* W. H. Draper, and C. J. of C. P., 1856.
6. Mon.....L. S. Hilary Term begins, H. C. J. sit. begin.
7. Tues.....Maritime Court sits.
10. Fri.....Canada ceded to G. B., 1763. Union of Upper and Lower Canada, 1841.
11. Sat.....T. Robertson appointed to Chy. Div., 1887.
12. Sun.....*Quinquagesima Sunday.*
15. Wed.....Ash Wednesday.
16. Thur.....Chy. Div. H. C. J. sits. end.
18. Sat.....L. S. Hilary Term ends. H. C. J. sits. end.
19. Sun.....*Quadragesima Sunday. 1st Sunday in Lent.*
21. Tues.....Supreme Court of Canada sittings begin.
24. Fri.....St. Matthias.
26. Sun.....*2nd Sunday in Lent.*

Reports.

COUNTY COURT OF THE COUNTY OF YORK.

[Reported for the CANADA LAW JOURNAL.]

TRADERS' BANK *v.* MCCONNELL & CO. CITY OF TORONTO, GARNISHEE.

Creditors' Relief Act*—*Attachment before any writ in sheriff's hands.

Where a judgment creditor obtained an attaching order in certain garnishee proceedings and duly served the same, and, before the return of the garnishee summons and the making of the final order for payment over, certain other judgment creditors placed writs in the sheriff's hands, who, however, had not levied thereunder until after the final order for payment over was made,

Held, on motion by the garnishee for an interpleader, that the attaching creditor was entitled to payment over by the garnishee of the money, and that the case did not come within the provisions of the Creditors' Relief Act.

[MACDOUGALL, Co. J.—February 3, 1888.

This was a motion made before the judge of the County Court of the County of York for an order in the nature of an interpleader order under the following circumstances:—On January 10th, the Traders' Bank recovered judgment against T. McConnell & Co. for $251.50 debt and $12.92 costs, and, having ascertained that the City of Toronto was indebted to the defendant on January 14th, the Traders' Bank obtained the usual attaching order and issued the same, and served it on that day on the City of Toronto. The garnishee summons contained in the order was made returnable on January 19th. On January 18th certain judgment creditors placed an execution in the sheriff's hands against T. McConnell & Co. On January 19th the Traders' Bank obtained the usual order for payment over on return of the garnishee summons and duly served the same upon the City. On January 20th the execution creditors, who placed writs in the sheriff's hands against T. McConnell & Co. on the 18th as above mentioned, served a notice on the City of Toronto, requiring it to pay any moneys in its hands belonging to T. McConnell & Co. to the sheriff, to be distributed under the Creditors' Relief Act, and on the 21st day of January the City of Toronto served notice of this motion upon the Traders' Bank, and also upon the said execution creditors who had placed writs in the sheriff's hands. No writs were placed in the sheriff's hands against T. McConnell & Co. prior to January 18th, 1888. The motion came up for argument upon the 26th of January, 1888.

A. H. F. Lefroy, for the Traders' Bank:—Our rights were fixed at the date of the issue and service of the attaching order. At that time no one had a *locus standi* under the Creditors' Relief Act as there were no writs in the sheriff's hands, much less had anything been levied by him under any writs. It is right on principle that a judgment creditor's rights should be fixed as of the date when he obtains an attaching order, because the only reason for not making an absolute order for payment over at once is that the garnishee may have some cause to show, and if in the event it turns out that the garnishee had no cause to show, the judgment creditor should not be prejudiced by a delay, which the event has proved to have not been required by the justice of the case. The authorities also bear out the proposition that the date of the attaching order is the date when the rights of the judgment creditor to the debt become fixed as against the judgment debtor and all claiming under the judgment debtor. *Tapp* v. *Jones*, L. R. 10 Q. B. 591; *Love* v. *Blackmore*, L. R. 10 Q. B. 485; *Ex parte Joselyne in re Watt* L. R. 8 Ch. D. 327, the last two of which were cases of a judgment creditor claiming against a trustee in bankruptcy, and very analogous to this case. The judgment creditors necessarily claim under the judgment debtor: *Martin* v. *Boulanger*, L. R. 8 App. Cas. 296. See also *Mac-*

fie v. *Pearson*, 8 O. R. 745, and the recent decision of Mr. Justice Ferguson in *Stuart* v. *Gough*, 23 C. L. J.

Akers, for the execution creditors:—The Creditors' Relief Act specially provides that any one attaching a debt shall do so for the benefit of the creditors generally (s. 37, ss. 3). So long as the money is not actually paid over it must go to the sheriff, *Dawson* v. *Moffatt*, 9 O. R. 484. To hold otherwise is to defeat the intention of the Creditors' Relief Act.

Bowes, for the City of Toronto.

MACDOUGALL, Co. J.—This is an application to me to direct an issue to try the right to certain moneys in the hands of the City of Toronto, owing to the judgment debtor.

The facts are as follows:—The Traders' Bank recovered a judgment on the 10th day of January, 1888, and on the 14th day of January applied for an attaching order, which was duly served on the garnishees on the same day. On the 18th of January Chisholm & Co. recovered a judgment against the same defendant, and placed an execution in the sheriff's hands for the amount of the same. On the 19th of January the attaching order was made absolute by me; on the 20th of January the execution creditor served a notice upon the City of Toronto requiring it to pay any moneys in its hands belonging to the judgment debtor to the sheriff, to be distributed under the provisions of the Creditors' Relief Act. The attaching creditor having issued execution against the City under these proceedings on January 21st, the solicitor for the City now applies to me to direct an issue to settle the rights of the parties. It is contended on the part of the Traders' Bank, that as no money has been levied by the sheriff, the provisions of the Creditors' Relief Act do not apply, and that they had become entitled to the funds attached by them, so far as the judgment debtor is concerned, the moment the attaching order was served, and they urge that the reason time is allowed to elapse to enable the garnishees to appear in attachment proceedings, is only to enable them to show the state of accounts between themselves and the judgment debtor, to claim any privilege of set-off or other reduction, should the fact be that the debt due by them did not equal the claim of the judgment creditor. But if the fact was that an indebtedness to the judgment debtor existed, equal to or greater in amount than the attaching creditor's claim, then the service of the attaching order *nisi*, and not the making of the final order, settled the rights of all parties. In the present case the attaching order *nisi*, was served before any execution was in the sheriff's hands.

The case of *Low* v. *Blackmore*, L. R. 10, Q. B. 485, and *Ex parte Joselyne*, L. R. 8 Ch. D. 327, were cited to show that in England it has been held that the service of the attaching order *nisi*, bound the funds, and cut out even the trustees in bankruptcy, who became such under an order made subsequent to the date of such service. It was also referred to in *Macfie* v. *Pearson*, 8 O. R. 745, in our own courts, in which it was held that the provisions of the Absconding Debtor's Act, prevailed as against the Creditors' Relief Act, the proceedings under the first-mentioned Act being antecedent to executions coming into the sheriff's hands. Judge ROSE, in that case, held that the provisions of the Creditors' Relief Act did not apply until moneys had been levied under the writs in the sheriff's hands, or, in other words, the mere placing of a writ of execution in the sheriff's hands, of itself, did not cause the Creditors' Relief Act to operate.

I was also referred to a clause in the Creditors' Relief Act, being s. 37, ss. 3, of the new revision, which enacts "that a judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors." This provision can only apply, however, to cases within the provisions of the Creditors' Relief Act, or, in other words, when the Act, by the entry of the sheriff in his books, has been brought into operation.

I may refer to s. 45, ss. 1 and 2, of the English Bankruptcy Act of 1883, an Act passed since the decision in *Ex parte Joselyne*, which expressly provides for the case of creditors attaching before the issue of the order in bankruptcy, enacting, that until the attached money is actually paid over, the trustee can claim the same for the benefit of creditors.

I must hold, therefore, in view of the authority of the cases above cited, that the service of the attaching order upon the garnishees effectually secured the moneys to the amount of the attaching creditor's debt. The provisions of the Creditors' Relief Act do not apply, and therefore I can direct no issue. The motion will be dismissed, but as the point appears to be a new one, I will make no order as to costs.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Common Pleas Division.

Divisional Court.]

BUSH *v.* FRY.

Replevin—Factors' Act, R. S. O. c. 121, s. 2, 4, 5—Agent entrusted—Sale of goods—Property passing.

Replevin—F., a music teacher at Beardstown, Illinois, wrote K. & Co., of Chicago, that he had a customer named J. to whom he could sell a piano, and desiring them to ship one in their own name to be subject to their order, but F. to pay freight charges in case of no sale, and return the piano to plaintiff, he, F., simply to act as their agent. K. & Co. not having the style of piano required, handed F.'s letter to plaintiff's piano manufacturers in Chicago, who, after communicating with F., shipped a piano to Beardstown, consequent to their own order, but to be delivered to F. on payment of the freight. The piano was delivered to F. at Beardstown, and its receipt acknowledged in a letter to plaintiff. It was then shipped by F. to Virginia City, Ill., and from there to F. at Toronto, under the assumed name of R., and was thence pledged by F., under such assumed name, with defendant D., a pawnbroker, to cover an amount loaned by D. to pay the charges as well as a further advance—F. representing that he intended opening an agency for the sale of pianos. The piano was taken by D. to his own premises where it remained until replevied.

Held, that there was no sale to F. of the piano, as it never was intended that the property should pass to him.

Held, also, that F. was not an agent within the meaning of the Factors' Act, R. S. O. c. 121, s. 2, 4, 5, so as to enable him to pledge the piano nor per ROSE, J., was he an agent entrusted.

A. Macdougall and *W. Nesbitt*, for the plaintiff.

Urquhart, for the defendant

Divisional Court.]

COCHRANE *v.* HAMILTON PROVIDENT LOAN SOCIETY.

Ejectment—Judgment for default of defence—Estoppel.

Action for breach of an alleged agreement made between plaintiff, as mortgagor, and defendants, as mortgagees, whereby, in consideration of the plaintiff having given defendants a chattel mortgage on certain property, defendants agreed to extend the time for payment of the mortgage for one year from the 1st of April, 1882. The defence was that on the 17th of June, 1882, the defendants brought ejectment against the present plaintiff, setting up that by said mortgage on default of payment of the mortgage moneys, the present defendants should be entitled to take possession of said lands, alleging default, and by reason thereof the present defendants claimed possession, that the present plaintiff did not plead any defence to the action, and for default of any defence; on the 30th September, judgment for possession was recovered.

Held, that the judgment so recovered estopped the present plaintiff from now maintaining this action.

J. B. Clarke and *Stone*, for the plaintiff.

Muir and *Wallace Nesbitt*, for the defendants.

Divisional Court.]

TILL *v.* TILL.

Husband and wife—Wife living apart—Husband in possession of wife's land—Recovery of possession by wife—Claim for rent and occupation.

Under the O. J. Act, s. 25, ss. 2, a judge sitting elsewhere than in a Divisional Court is to decide all questions properly coming before him, and is not to reserve any case, or any point in a case, for the consideration of the Divisional Court.

On the trial of an action the pleadings were admitted to state the facts, and what was called "a special case on the pleadings" was reserved for the opinion of the judges of this court. On the case coming before the Divisional Court it was held that the special case, as such, could not be entertained; but the application was

directed to be turned into a motion for judgment under rule 323, or on the pleadings and admissions under rules 315 and 321.

The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning the lands in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for $2,000, which he expended in improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession and for use and occupation. No demand was made prior to service of the writ.

Held, following *Donnelly* v. *Donnelly*, 9 O. R. 673, that the plaintiff was entitled to possession, but she was only entitled to recover for the use and occupation since the service of the writ.

Held, also, that the defendant could not claim for the moneys expended on the land.

J. b. Hand, for plaintiff.

N. Murphy, for defendant.

Rose, J.]

REGINA *v.* EDGAR.

Canada Temperance Act, 1878—*Conviction for second offence—Enquiry as to previous conviction—Necessity for first dealing with subsequent offence, s.* 115—*Peremptory effect of—Certificate of previous conviction—Mode of drawing conviction.*

Sec. 15 of the Canada Temperance Act, 1878, which provides for the case of a previous conviction, requires that the magistrate "shall in the first instance inquire concerning such subsequent offence only, and if the accused is found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted."

Held, that the language of the section is peremptory; and, therefore, to give a magistrate jurisdiction thereunder to enquire as to a previous conviction, he must first find the accused guilty of the alleged subsequent offence.

In this case, which was a conviction for a second offence, this was not done, and the conviction was therefore quashed.

Quære, whether a certificate of a previous conviction is sufficient *prima facie* evidence of the identity of the accused with the person of the same name previously convicted. Convictions should be drawn with care so as to specify that the offences are against the second part of the statute.

Aylesworth, for defendant.

Delamere, contra.

Rose, J.]

BOOK *v.* BOOK.

Probate—Validity of—Right to question.

The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper Surrogate Court. The defendant denied the validity of the probate, by reason of the mode of proof and the invalidity of the will.

Held, on demurrer, that the defence was bad; that when it is desired to attack the validity of a probate issued by a Surrogate Court having jurisdiction, and when the person on whose death the administration was issued is really dead, it must be done in an independent proceeding with the proper parties before the court.

Irwin v. *Bank of Montreal*, 38 U. C. R. 375, followed.

Quære, whether the application must be to the Surrogate Court or not.

Lash, Q.C., for plaintiffs.

Moss, Q.C., contra.

Divisional Court.]

HEINTZMAN *v.* GRAHAM.

New trial—Weight of evidence—Costs.

Replevin for a piano delivered to defendant, as alleged by plaintiffs, under an agreement that the piano was received by defendant on hire for twenty-four months, at $5 a month, with right of purchase at $265—$15 cash and balance by instalment, and until the purchase money was paid, the piano to remain the plaintiff's property; that default was made in the payments, and that plaintiffs were entitled to take possession of same. The defendant stated that she purchased the piano, no mention being then made of the agreement, which was subsequently signed without defendant's

authority by her daughter. The defendant was unable to read or write, though of fair business capacity. The evidence, as urged by the plaintiffs, shewed authority from defendant to sign, and also satisfaction by her. The jury found for the defendant.

The court, not being satisfied with the finding, directed a new trial with costs to the succesful party in the cause.

Delamere, for the plaintiffs.

D. O. Cameron and *F. McPhillips*, for defendant.

Falconbridge, J.]

ANGLO-CANADIAN CO. *v.* WINNIFRITH.

Copyright—Proof of copyright—Domicile—Right of benefit of statute—Knowledge of copyright—Costs—Damages.

Motion for an injunction to restrain defendants from importing and selling, or offering for sale, in Canada, certain musical compositions of which plaintiffs claimed the copyright. The evidence as to copyright was that of the plaintiffs' manager, who stated on affidavit that plaintiffs were a company incorporated under the English Companies' Act, for securing Canadian copyright in musical compositions, and to acquire the protection of the Canadian Copyright Act, 1875, having their registered office in London, Eng., and their Canadian office at Toronto, and stating in a schedule to his affidavit the names of the said compositions and the dates of copyright.

Held, that for the purposes of the injunction, there was sufficient evidence of copyright.

It was objected, on the hearing, that the plaintiffs' domicile was in England, and not in Canada; and therefore the plaintiffs were not entitled, under s. 4, to the benefit of the Act, and that by s. 32 it should have been shown that defendants imported the publications with knowledge of plaintiffs' right.

Held, that there was nothing in the objections as to domicile, for if they were assignees there, there was no restriction to the right to obtain copyright so far as domicile or citizenship was concerned; but, if they were the authors, then the domicile was in London, where the head office is, and that is certainly a part of the British possessions within the meaning of the Act. In either case the plaintiffs were entitled to the sole and exclusive right of publishing and vending the said works in Canada.

Held, also, that it was not necessary to show that the publications were imported with knowledge of plaintiffs' right, though that would be important on the question of costs and damages.

The defendants appeared to have innocently imported the books, and, on being made aware of the infringement by the service of the writ, expressed regret, and though they did not offer to undertake to discontinue the infringement, they stated in evidence that such was their determination.

Held, that the injunction must be granted, and had the defendants simply appeared on the motion, admitted the plaintiff's rights, and consented to the injunction, no costs would have been imposed, but as defendants had contested the plaintiffs' rights, and thus, to a certain extent, justified the plaintiffs' course, the plaintiffs were entitled to the costs.

Bain, Q.C., for the plaintiffs.

Hector Cameron, Q.C., for the defendant

Chancery Division.

Full Court.] [Dec. 21, 1887

SIMMONS *v.* SHIPMAN.

Title of possession—Successive occupiers without mesne conveyances.

Held, reversing the decision of O'CONNOR, J., that to bar the true owner, and to give a possessory title to land under the Statute of Limitations, the fact of actual possession is the material thing, and this possession must be of a continuous character by successive occupants claiming in some sufficient way under each other, but it is not necessary that this possession should be strengthened or corroborated by intermediate conveyances. The Act speaks of possession without reference to conveyances. It is not correct to say that whenever in an action for the possession of land the plaintiff seeks to show a title by length of possession by himself or those through whom he claims, he must in order to succeed be able to show a deed or writing from each former occupant or

possessor to the occupant or possessor next succeeding him, or inevitably fail in his action.

McMichael, Q.C., and *W. H. Jones*, for the plaintiff.

Britton, Q.C., for the defendant.

Practice.

Court of Appeal.] [May 11, 1887.

CITY OF TORONTO *v.* TORONTO STREET RAILWAY CO.

Appeal—Injunction—Staying operation of—R. S. O. c. 38, s. 27.

Held, that the operation of an injunction awarded by a judgment of the court below was stayed pending an appeal to this court, after the perfecting of the security on appeal, by virtue of R. S. O. c. 38, s. 27.

McCarthy, Q.C., for the appellants.

Robinson, Q.C., for the respondents.

Chy. Divisional Court.] [Dec. 2, 1887.

CLARRY *v.* BRITISH AMERICA ASSURANCE CO.

Reference—Ontario Judicature Act, s. 47—Actions on fire insurance policies—Accounts.

Where in actions upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account, but the defendants disputed their liability, and issues of fraud, misrepresentation and concealment of facts were raised upon the pleadings.

Held, that an order referring all the issues in the actions to a referee for inquiry and report was improperly made, and that the plaintiff was entitled to have a trial in the ordinary way.

Laidlaw, Q.C., and *Kappele*, for the plaintiff.

McCarthy, Q.C., and *Wallace Nesbitt*, for the defendants.

Chy. Divisional Court.] [Dec. 7, 1887.

WATT *v.* CLARK.

Settlement of action—Powers of solicitor—Instructions from client.

After the trial of an action had been postponed at the assizes and the defendant had left the assize town, his solicitor and counsel effected a settlement with the plaintiff, which was given effect to by the entry of a verdict and judgment by consent. The solicitor admitted that he was not instructed, but relied on his client adopting the settlement, which was, in the solicitor's opinion, a favourable one. The client said that he had instructed his solicitor not to settle in the way he did.

Held, that the defendant was entitled to have the verdict and judgment set aside, and a new trial on payment of costs.

H. J. Scott, Q.C., for the defendant.

Aylesworth, for the plaintiff.

C. P. Divisional Court.] [Dec. 23, 1887.

DUNDAS *v.* DARVILL.

Interpleader—Liability for costs of execution creditor not contesting claim.

A banking corporation, one of several execution creditors made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant in the event of the latter not succeeding in the issue.

Held, that the Corporation was not, under these circumstances, liable to contribute to the costs of the issue; but nevertheless was properly made a party to the issue, and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods.

Aylesworth, for the Molsons' Bank.

Lash, Q.C., for the other execution creditors.

Mr. Dalton, Q.C.] [Dec. 30, 1887.

PARKER *v.* HOWE.

Attachment of debts—Dividends on insolvent estate.

A judgment creditor seeking to garnish funds due to his judgment debtor by S., served an attaching order upon the assignee of S. under an assignment for the benefit of creditors. At the time of the service the assignee had in his hands the greater part of the moneys belonging to the estate of S., but had not declared a

dividend; and, before he did so, but after the service of the attaching order, the judgment debtor assigned to G. the dividends coming to him from the estate of S.

Held, that the judgment creditor was entitled as against G. to the dividends from the insolvent estate based upon the amount that was in the hands of the assignee when the attaching order was made.

McCraney v. *McLeod*, 10 P. R. 539, explained and followed.

A. H. Marsh, for the judgment creditor.

Aylesworth, for the claimant.

Miscellaneous.

"WHAT made you steal that water-proof cloak?" demanded the judge. The culprit whispered: "I was trying to lay up something for a rainy day."

DELIVERY OF THE CONSIDERATION.—We have recently read of a deed in consideration of natural love and affection, the receipt of which is hereby confessed and acknowledged.

A RARE OCCURRENCE.—A barrister once said to Douglas Jerrold, in great indignation, "I have just met a scoundrelly barrister!" "What a coincidence," was the quick reply of the famous wit.

BURGLARY INVOLVES A BREAKING.—*Law Professor:* What constitutes burglary? *Student:* There must be a breaking. *Professor:* Then, if a man enters your door and takes five dollars from your vest pocket in the hall, would that be burglary? *Student:* Yes sir. Because that would break me.

A PERIPATETIC JUDGE.—Constable Hefferman went to arrest Jas. Walker, of Elderslie, who keeps a groggery on the roadside, five miles from Chesley. James took to the woods, and Patrick took after him. After a hot chase James surrendered, and was lugged along to the roadside, where police magistrate Vanstone sat in his buggy, calmly viewing the race. His Worship tried him on the spot, convicted him without the right of appeal, and fined him fifty dollars and costs. It is a great convenience to delinquents, thus to keep a travelling court.—*Ex.*

RURAL Magistrate—"Prisoner, you are charged with—ah—loitering about in a suspicious manner, without any ostensible employment. How do you obtain a living?" Prisoner—"Your Wusship, I'm engaged in the manufacture of smoked glasses for observing eclipses, an industry,"—(solemnly)—"an industry, your Wusship, which involves protracted periods of enforced leisure!" (Discharged with a caution.)

WOMEN AS JURORS.—In an after-dinner speech at a meeting of the Ohio Bar Association, Judge Harris, in speaking of whether women should not serve as jurors, said he had had experience. He had been an associate justice all through his married life. He came home once late at night with an important case upon his mind. His wife inquired what was worrying him. He replied that he was undecided in regard to a case, in which was involved a bank, and a pretty woman whom he knew. His wife at once replied that there was no question at all, the bank ought to have it. The judge thinks that the strong prejudices of ladies unfit them for acting as jurors.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for January 28th and February 4th contain Peasant Properties in France, 1787-1887, and Rome and Malaria, *National;* Manxland: its Laws and Customs, *Westminster;* The Time it Takes to Think, *Nineteenth Century;* Mademoiselle Aisse, and Right and Wrong, *Fortnightly;* Notes by a Naturalist, *Cornhill;* Wm. Powell Frith, R.A., *Temple Bar;* The Story of the Assassination of Alexander II., *Gentlemen's;* Pictures at Sea, *Macmillan's;* Philologists *versus* Critics, *English Illustrated;* Secret Chambers, an Unvarnished Picture of Peking, The Explosion at Amoy, and The Power and Speed of Flight in Birds, *St. James';* The Attractiveness of London, *Spectator;* Christmas Island, *Nature;* The Centenary of the Times, *Times;* with instalments of "Richard Cable," "Cass," and "Such Pity as a Father hath," and poetry. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

MICHAELMAS TERM.

The following gentlemen were called to the Bar during Michaelmas Term, 1887, viz:—*Nov. 21st*—George Watson Holmes, Herbert Langell Dunn, Roderick James Maclennan, James Albert Page, Francis Foley Lemieux, Edward Holton Britton, Alexander Robert Bartlet, Robert James Leslie, Herbert Hartley Dewart, Robert Cleugh LeVésconte, D'Arcy de Lessert Grierson, William John Millican, George Filmore Cane, Horace Osmond Ernest Pratt, Richard Alexander Bayly. *November 22nd*—Abner James Arnold, William Percy Torrance. *November 26th*—William Arthur John Bell.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz:—*November 21st*—E. H. Britton, R. C. Le Vésconte, R. J. Maclennan, G. F. Cane, R. A. Bayly, G. R. O'Rielly, E. S. Wigle, E. A. Crease, A. F. May, G. J. Leggatt, R. H. Dignan, J. H. A. Beattie, E. Considine, A. D. McLaren, H. N. Roberts, H. Macbeth. *November 22nd*—A. Stevenson. *November 26th*—J. C. Grant, A. R. Bartlet, R. J. Leslie, G. W. Holmes, W. D. Gregory, W. A. J. Bell, G. A. Payne, J. P. Lawless, J. Y. Murdoch. *December 2nd*—W. P. Torrance, J. M. Quinn. *December 10th*—C. E. Weeks.

The following gentlemen passed the First Intermediate Examination, viz:—J. F. Orde, with honours and first scholarship; C. E. Burkholder, with honours and second scholarship; W. H. Hunter, with honours and third scholarship; A. Constantineau, with honours; and Messrs. J. Ross, D. Hooey, R. A. Widdowson, E. S. B. Cronyn, J. Webster, A. C. Sutton, M. Routhier, W. L. Morton, T. W. Horn, A. J. J. Thibodo, H. A. Simpson, A. H. Wallbridge, W. A. Smith, A. B. McCallum, J. F. O'Brien, C. Elliott, J. H. Hegler, J. Miller, H. W. Macoomb, W. P. McMahon, J. A. Ritchie, M. Scandrett, W. C. Smith.

The following gentlemen passed the Second Intermediate Examination, viz:—J. A. V. Preston, with honours and first scholarship; A. Collins, with honours and second scholarship; C. D. Scott, with honours and third scholarship; and Messrs. F. W. Carey, G. C. Gunn, W. E. Tisdale, R. G. Smyth, H. Harvey, R. L. Elliott, J. H. Hunter, R. M. Macdonald, C. McIntosh, J. F. Edgar, R. M. Thompson, J. F. Woodworth, C. A. Ghent, S. D. Lazier, W. G. Burns, H. Miller.

The following candidates were admitted as Students-at-law, viz:—*Graduates*—F. J. Fulton, J. J. Maclennan, T. B. Gash, J. McEwen, T. D. Law, J. F. Carmichael, C. B. Dupuis, W. Davis. *Matriculants*—A. E. Scanlon, H. T. Berry, J. E. Bird, W. J. Boland, W. I. Dick, W. Farnham, J. F. Jeffery, M. P. McDonagh, J. A. Oliver, R. S. Robertson, W. F. Scott, J. G. Shaw. *Juniors*—H. G. Hamilton, D. E. Stuart, G. A. Kingston, H. F. Gault, A. L. Malone, H. M. McConnell, J. F. McMaster, H. E. A. Robertson, T. H. Lloyd, T. W. McGarry, E. Harley, L. B. C. Livingstone, T. B. Martin. *Articled Clerk*—W. J. McCamon.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM

For 1888, 1889, and 1890.

Students-at-Law.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

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

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888 / 1890 Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination 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.

Trinity Term, 1887.