Canada Law Journal.

VOL. XXII. NOVEMBER 15, 1886. No. 20.

DIARY FOR NOVEMBER.

15. Mon...Michaelmas sittings of Q. B. & C. P. Div. H. C. J. begin. T. B. Macaulay, 1st C.J. of C. P. 1849.
17. Wed..Appointment of election Judges on rota. Ld. Chan. Erskine died 1823, æt. 73.
21. Sun...22*nd Sunday after Trinity.* J. Elmsley, 2nd C. J. of Q. B., 1796.
27. Sat....Michaelmas sittings of Q. B. and C. P. Div H. C. J. ends.
28. Sun...*Advent Sunday.*
30. Tues..Moss, J. A., appointed C. J. of Appeal, 1877.

TORONTO, NOVEMBER 15, 1886.

MISTAKES IN BOUNDARIES.

WE are induced by a perusal of the recent case of *Roan* v. *Kronsbein*, 12 O. R. 197, to come to the conclusion that it would be a very reasonable thing if the courts were empowered, in cases of that kind, to award damages in lieu of giving a judgment for the recovery of the land. The action was brought for the recovery of a strip of land a few inches wide. It appeared that Mrs. Hart, the owner of lot 13, built a house, which, on a survey being subsequently made, was found to encroach seven and a half inches on the adjoining lot 12. The owner of lot 12 and Mrs. Hart then entered into an agreement in the year 1851, whereby it was agreed that Mrs. Hart should not be disturbed during her lifetime, but that on her death the owner of lot 12 should be entitled to claim the part of his lot encroached on. This agreement was never registered. Mrs. Hart died within ten years before the action was brought. The defendant had purchased the house and lot formerly occupied by Mrs. Hart, in ignorance of the agreement made by her, and of the fact of there being any encroachment. The case of the defendant was particularly hard, because, buying as he did, a house that had been erected for upwards of thirty years, he not unnaturally assumed that it was impossible for any one to object that it encroached on the adjoining lot. Even if the agreement had been registered, which it was not, the defendant would not have been likely to have had notice of it, because he was buying lot 13 and would not, in the ordinary course of business, be likely to examine the title of lot 12 to which the agreement related. In such a case it appears to us that it would be eminently proper that the courts should have a discretion to award damages in lieu of a judgment for the recovery of the land, involving, as the latter would, the destruction of the defendant's building. This principle has been already recognized by the legislature in R. S. O. c. 40, s. 40, whereby the court is enabled, in lieu of awarding an injunction to restrain the breach of a covenant contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, if it thinks fit to award damages to the party injured, in addition to, or in substitution for, such injunction or specific performance. Some provision of that kind, it appears to us, is wanted in reference to actions for the recovery of land.

MORTGAGEES AND THE STATUTE OF LIMITATIONS.

BY the recent decision of the Court of Appeal in *Newbould* v. *Smith*, 55 L. T. N S. 194, it has been in substance determined to be the law that a payment to a mortgagee, in order to be sufficient to prevent the Statute of Limitations from run-

ning against him, in favour of the owner of the equity of redemption, must be made by the person entitled to the equity of redemption. The payment relied on in that case had been made by the original mortgagor, but as it turned out that prior to his making it he had assigned his equity of redemption in the mortgaged property, it was held that the payment did not prevent the running of the statute in favour of the owner of the equity of redemption.

This decision makes it apparent that it is unsafe for a mortgagee to suffer his mortgage to remain overdue for a period exceeding ten years, relying simply on the fact of the interest being punctually paid; and even the making of a periodical search to ascertain that no assignment of the equity of redemption has been registered would not obviate the difficulty, because an unregistered assignment of the equity of redemption would be just as efficacious to destroy the effect of a payment by the signor as though the assignment were registered. It has been gravely suggested that nothing short of taking actual possession within every ten years will absolutely protect a mortgagee from the operation of the Statute of Limitations.

It may be observed that the statute R. S. O. c. 108, s. 22, is altogether silent as to the person by whom a payment, sufficient to prevent the statute from running, is to be made. It simply says:—"Any person entitled to or claiming under a mortgage of any land, may make an entry or bring an action at law or suit in equity to recover such land at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action or suit first accrued." It will thus be seen that the effect of the judicial interpretation of this section has been very considerably to narrow the language actually used. There had been a previous decision of the Court of Appeal in the same direction; thus it was held by the Court of Appeal in *Harlock* v. *Ashbury*, 19 Chy. D. 539, that payment by a tenant of part of the mortgaged premises of his rent to the mortgagee did not keep alive the mortgagee's right as against the rest of the mortgaged premises. As to the particular part in respect of which rent is paid, that of course operates as a taking of possession, but as regards the rest of the mortgaged estate it has no effect. According to Jessel, M.R.:—"Payment within the meaning of the statute must be payment made by a person who is liable to pay," and as the tenant was not liable to pay the mortgage debt or interest, the court said his payment of rent could not be deemed to be a payment on account of of the mortgage debt and interest; although in the ultimate account between the mortgagee and mortgagor the rents received might have to be applied in reduction of the mortgage debt. On the other hand, in *Chinnery* v. *Evans*, 11 H. L. C. 115, the House of Lords determined that payment by a receiver appointed adversely to the mortgagor was a sufficient payment to prevent the statute running against the mortgagee in favour of the mortgagor. These cases decided that the payment to be effectual to prevent the running of the statute must be made by a person "liable to pay"; but *Newbould* v. *Smith* appears to us to have laid down a somewhat different rule, by saying that the person paying must, at the time the payment is made, be actually interested in the equity of redemption, and it would seem that "liability to pay" is, after all, if *Newbould* v. *Smith* is well decided, not necessarily an ingredient; because in that case the assignee of the equity of redemption does not appear to have been "liable

to pay" the mortgagee, there being no privity between them, and yet it was because the payment was not made by him that it was held to be ineffectual to stop the running of the statute. We notice that in *Newbould* v. *Smith* Lopes, L.J., denies that the payment was made by a person "liable to pay." We may perhaps not quite appreciate the sense in which the learned judge uses that term, but it would certainly seem that as the original mortgagor remained liable to pay the mortgage debt, notwithstanding his assignment of the equity of redemption, so a payment by him was a payment by a person who was "liable to pay." It is possible, however, that the learned judge had in view the fact that the mortgagor was only liable on a simple contract for the mortgage debt, and that more than six years had elapsed when the payment in question was made by him; and in that sense was not "liable to pay" had he chosen to plead the statute of limitations.

But perhaps after all the true criterion by which to judge of the sufficiency of a payment as a bar to the statute, is not so much whether it was made by a person "liable to pay," as whether it was made by a person competent to give an acknowledgment of title. This rule is stated both in *Chinnery* v. *Evans* and *Harlock* v. *Ashbury*, "payment is not a payment within the statute unless it amounts to an acknowledgment," and judged by that rule the question as to whether the payment was made by a person "liable to pay" becomes immaterial.

Notwithstanding some doubts which have been expressed as to the correctness of the decision in *Newbould* v. *Smith*, we are inclined to think it is well grounded in principle, and there can be no doubt that it is a decision that mortgagees will do well to keep in mind.

RECENT ENGLISH DECISIONS.

The *Law Reports* for October comprise 17 Q. B. D, pp. 493-602, and 33 Chy. D. pp. 1-175.

LANDLORD AND TENANT—DISTRESS—THIRD PARTY.

Proceeding to the consideration of the cases in the Queen's Bench Division, the first which demands attention is *Clarke* v. *The Millwall Dock Co.*, 17 Q. B. D., 494, in which the Court of Appeal affirms the decision of Pollock, B., that things belonging to a third person which are on the demised premises for the purpose of being wrought up or manufactured by the tenant in the way of his trade are not privileged from distress by the landlord for rent, unless they have been sent or delivered by such third person to the tenant for that purpose. In this case the tenant had contracted with a third party to build a ship for the sum of £8,000. The ship was commenced and nearly completed by the tenant on the demised premises, and all the instalments due on the contract had been paid as they accrued due. The materials for building the ship were supplied by the tenant. The ship was seized in distress for arrears of rent due in respect of the shipyard where the vessel was being built. The court (Lord Herschel, L.C., Lord Esher, M.R., and Fry, L.A.), were unanimously of opinion that it was essential, in order to exempt goods from liability to distress for rent, that they should have been "sent or delivered" to the tenant for the purpose of being dealt with in "the way of his trade or employ," and that as the materials for building the ship in question had been neither sent nor delivered by the person claiming the ship it was therefore not exempt from distress.

"MAINTENANCE," ACTION FOR—CHARITY.

Harris v. *Brisco*, 17 Q. B. D. 504, is an action in which the plaintiff claimed to recover damages on the ground of the defendant having been guilty of the offence known to the law as "maintenance." The defence was that the defendant had maintained the party in the action referred to out of motives of pure charity. This action had been dismissed, and Wills, J., was of opinion that it had been wantonly and unreasonably brought, and he therefore held that the defence of the defendant having acted from motives of charity formed

no defence; but on appeal this decision was reversed. Fry, L.J., who delivered the judgment of the court, having after an examination of the dicta of judges and the statements of text writers, come to the conclusion that charity is an excuse for maintenance, and while observing that no case could be found in which the defence of charity had been previously set up in any such action, he proceeds to say at p. 513:—

But if the law be correctly laid down in the passages we have cited, it appears to us to follow that the limitation put on the meaning of the word "charity" by Wills, J., cannot be maintained. He requires that charity shall be thoughtful of its consequences, shall be regardful of the interests of the supposed oppressor as well as of the supposed victim, and shall act only after due, and upon reasonable and probable cause. If we were making new law and not declaring old, it would, in our opinion, be well worthy of consideration whether such a limitation of the doctrine that charity is an excuse for maintenance would not be wise and good. But is it not an anachronism to suppose any such view of charity to have been present to the minds of the judges of the reign of Henry VI.—a view which even now is present only to the minds of a select few, and does not commend itself to a large portion of the kind-hearted and charitable amongst mankind? To say that charity is not charity unless it be discreet appears to us to be without foundation in law.

CRIMINAL PRISONER - IMPRISONMENT UNDER ORDER—STATUTORY OFFENCE HOW FAR A "CRIME."

The case of *Osborne* v. *Milman*, 17 Q. B. D. 514, is useful as throwing light on a question often discussed as to how far a statutory offence can be regarded as a "crime." The plaintiff in the action had been imprisoned under an order made against him upon a summary application for practising as a solicitor without being duly qualified. The defendant, who was the gaoler into whose custody the plaintiff had been committed, treated him as a criminal prisoner—a class of prisoners which a statute defined as being "any prisoner charged with, or convicted of, a crime." The present action was brought for false imprisonment and trespass, and the question was whether under the circumstances the plaintiff was "a criminal prisoner." Denman, J., came to the conclusion that though the offence was one for which the plaintiff might have been indicted and convicted, in which case he would have been "a criminal prisoner," yet as his imprisonment had been ordered upon a summary application without indictment he was not a criminal prisoner.

MASTER AND SERVANT—MISCONDUCT OF SERVANT—DISMISSAL OF SERVANT.

In *Pearce* v. *Foster*, 17 Q. B. D. 536, the Court of Appeal affirmed the judgment of Grove, J., holding that the defendants, who were merchants, were justified in dismissing the plaintiff from their employment as a confidential clerk, before the term of service for which he had been engaged had expired, on the ground of their having discovered that he had been engaged in gambling to an enormous amount in "differences" on the Stock Exchange.

INTERPLEADER—RIGHT OF EXECUTION CREDITOR TO SET UP A JUS TERTII.

The case of *Richards* v. *Jenkins*, 17 Q. B. D. 544, is a decision of a Divisional Court, composed of Wills and Grantham, JJ., on appeal from a county court judge, in an interpleader issue. The question for the court was whether an execution creditor was entitled to defeat the claim of the claimant to certain goods seized in execution, by showing that the claimant had become bankrupt, and that his right to the goods in question had passed to his assignee. The court, after a careful review of the authorities, held, reversing the judgment appealed from, that the execution creditor was so entitled. In Mr. Cababe's book on Interpleader the rule he deduces from an examination of the authorities is "that although the execution creditor can set up a *jus tertii* against the claimant, yet the claimant cannot set up a *jus tertii* against the execution creditor." This view is to a certain extent supported by the present case, and we doubt not that it is the correct rule whenever the goods in question are seized in the possession of the execution debtor. We are disposed to doubt, however, whether that is the rule when the goods are seized in the possession of the claimant, *e.g.*, where goods in the actual possession of A are seized in execution as being the goods of B, in such a case we should be inclined to think A would be entitled to set up a *jus tertii* as against the execution creditor.

If, as Wills, J., puts it in *Richards* v. *Jenkins*, the decision in that case and in the other cases cited, is in substance a legitimate application of the maxim, *potior est conditio defendentis*, it would seem to follow that the rule stated by Mr. Cababe is subject to the limitation we have suggested.

Recent English Decisions.

Marine insurance—Non-disclosure of facts known to agent.

Blackburn v. *Vigors*, 17 Q. B. D. 553, is an important decision of the Court of Appeal upon a point in the law of marine insurance. The case was shortly this: the plaintiffs were anxious to secure insurance on a ship which was some days overdue. They accordingly instructed their usual agents to procure the insurance, and in the course of their employment these agents learned some important information casting grave doubts upon the ship's safety. These agents were unable to secure the insurance, and, without communicating to the plaintiffs the intelligence they had received, recommended them to apply to certain other brokers to procure the insurance, which the plaintiffs accordingly did, and through these brokers the insurance on the ship, "lost or not lost," was effected, to recover which this action was brought; neither the plaintiffs nor their agents who actually effected the insurance having any notice of the information acquired by the agents first employed. The defendants contended that the policy was void by reason of the non-disclosure of the information obtained by the agents who were first employed by the plaintiffs. The majority of the Court of Appeal (Lindley and Lopes, LL.J.) held that the policy was void; but Lord Esher, M.R., dissented, agreeing with Day, J., who tried the action. The following passage from the judgment of Lopes, L.J., embodies the views of the majority of the court:—

> I fail to see why in principle there should be any distinction between the case where the insurance is effected by the agent who obtained the information, and when it is effected by another agent employed about the insurance. In both cases the assured, by a suppression of what ought to have been communicated to him, obtains an insurance which he would not otherwise have got. The underwriters are as much misled in the one case as in the other. In both cases there is a misconduct on the part of the agent of the assured; in both cases the underwriters are free from blame. It seems to me unjust and against public policy that a person through whose agent's fault the mischief has happened, should profit to the detriment of those who are in no way in fault.

On the other hand, Lord Esher, M. R., while strenuously denying any legal duty on the part of the agent to have communicated the information to his principals, as to the argument founded on public policy, observes, at p. 570:—

> It seems difficult to see how public policy can be affected by any circumstances relating to the power between the parties of enforcing or repudiating a contract of insurance any more than of any other contract; and, secondly, it seems difficult to reconcile the interference of the doctrine of public policy in the case of a contract of insurance on ship or goods, lost or not lost, one step beyond affirming that the parties who are allowed by law to enter into this hazardous and well-nigh gambling speculation of whether a loss has or has not already happened, must be equally informed, or equally ignorant.

Practice—Service of writ out of jurisdiction—Order limiting plaintiff's right to recover at the trial.

Thomas v. *Hamilton*, 17 Q. B. D. 592, is a decision of the Court of Appeal on a point of practice. The defendant having applied on motion to set aside an order authorizing the service of notice of the writ out of the jurisdiction, on the ground that the cause of action was not one in which the writ could properly be served out of the jurisdiction: the judge who heard the motion, being doubtful on the affidavits used, whether or not there had been any breach of the contract sued on within the jurisdiction, refused the application, but ordered that the plaintiff's claim should be limited to the recovery of the price of goods in respect of which it might appear at the trial, that the writ could have been properly served out of the jurisdiction. The Queen's Bench Divisional Court had set aside this order, but the Court of Appeal held that it was rightly made.

Larceny—Ordering restitution of proceeds of stolen goods (32 & 33 Vict., c. 21, s. 113, D.).

In the case of *The Queen* v. *The Justices of the Central Criminal Court*, 17 Q. B. D. 598, a Divisional Court composed of Lord Coleridge, C.J., and Cave, J., determined that, under the Imperial Statute, 24 & 25 Vict., c. 96, s. 100, (from which the Canadian Act, 32 & 33 Vict., c. 21, s. 113, is taken, and which provides for restitution of stolen property), the court may not only order restitution of the stolen property in specie, but may also order the payment over of the proceeds of it, where it has been sold. As to the manner in which this jurisdiction should be exercised, it may be useful to refer to the following observations of Lord Coleridge:—

> An application for the restitution of property stolen or obtained by false pretences is rightly made to the court before which the felon or misdemeanant is convicted: and, if the goods have been sold, an application may be made for restitu-

tion of the proceeds, which, if they are in the hands of the criminal or of an agent, who holds them for him, it should be granted. If the person holding the proceeds does not hold them for the criminal, it should not be granted.

The question came before the court, upon motion for a *certiorari*, and it was objected that the order in question was wrong in point of law; but the learned Chief Justice points out that that is an objection which can only be taken by way of appeal, and not upon application for a *certiorari*, on the ground of excess of jurisdiction.

A discussion of some other questions affecting the restitution of stolen property will be found *ante*, vol. 19, p. 198.

PRIORITY BETWEEN EQUITIES—NEGLIGENCE—SEAL.

Turning now to the cases in the Chancery Division, *The National Provincial Bank of England* v. *Jackson*, 33 Chy. D. 1, demands a passing notice. This action was a contest for priority between a mortgagee by deposit and the beneficial owner of the estate, who had, through the fraud of the mortgagor, been induced to execute a conveyance to him of the property affected by the mortgage, and the Court of Appeal held that the mortgagees, having had constructive notice of the fraud, were guilty of negligence, and that they must, therefore, be postponed. It was also determined, that although a legal mortgage cannot be postponed to a subsequent equitable mortgagee, on the ground of any mere carelessness or want of prudence, yet this rule does not apply as between two equitable claims. A question also arose, whether a deed of reconveyance executed by the mortgagor to the defendants was a valid deed, it having only a ribbon to which the seal is usually affixed, but not any seal or impression; and it was held that the deed was invalid for want of a seal.

COMPANY—CONTRACT WITH TRUSTEE FOR INTENDED COMPANY—RATIFICATION.

In re Northumberland Avenue Hotel, p. 33, Chy. D. 16, a written agreement was entered into between W of the one part and C as trustee for an intended company to be called the N. Company of the other part, whereby it was agreed that W, who was entitled to a building lease, would grant an under-lease to the company, and that the company should erect buildings. The company was registered on the following day. The articles of incorporation adopted the agreement made by W with C, and provided that the company should carry it into effect. No fresh agreement with W was signed or sealed on behalf of the company, but the company took possession of the land, expended money in building on it, and acted on the agreement which they considered to be binding on them. The company having failed to complete the buildings, the original lessors of W re-entered, and the company went into liquidation. In these liquidation proceedings W claimed damages against the company for breach of the agreement; but it was held by the Court of Appeal (affirming Chitty, J.,) that the agreement having been entered into before the company was in existence, was incapable of ratification by the company, and that the acts of the company having been done under the erroneous belief that the agreement between W and C was binding on the company, were not evidence of any fresh agreement having been entered into between the company and W on the same terms as the agreement between W and C, and therefore, W could not succeed.

RECTIFICATION OF AGREEMENT—MONEY PAID UNDER PROCESS OF LAW—RES JUDICATA.

Caird v. *Moss*, 33 Chy. D. 22, is a case deserving attention. The plaintiffs had built a ship for B, and a considerable sum had remained due to them for the price, for which they had a lien on the ship. The defendant made advances to B, and an agreement was entered into between the three parties that the plaintiffs should sell the ship, and pay the defendant and themselves the amounts due out of the proceeds. The agreement was obscure, and left it doubtful whether or not the plaintiffs were entitled to pay themselves in priority to the defendants. The ship was sold, and the defendant sued the plaintiffs for an account of the proceeds; in this action the plaintiffs made no claim for a rectification of the agreement, and it was held that, according to its proper construction, the defendant was entitled to be first paid. The plaintiffs paid the defendant in accordance with the order of the court, and then brought the present action to have the agreement re-formed. The defendant pleaded that the agreement had been executed, and the money paid, under the order

of the court and that the plaintiff was, therefore, entitled to no relief. Kay, J., held that the plaintiff was entitled to proceed with the action, on the ground that it was not *res judicata*; but the Court of Appeal reversed this decision, holding that, although it is true the case was not *res judicata*, yet that the plaintiffs might have set up the claim to have the agreement re-formed before the action brought against them by the defendant was concluded, and not having done so, they were now too late, and the action was, therefore, dismissed.

Cotton, L.J., says at p. 34:—

> Now was it open to the present plaintiffs to raise this question during the pendency of the former suit? Clearly it was They might not have been able to raise it in that action, but they might have commenced an action for the purpose, and the court would not have disposed of the former action while the new one was pending. It would be against the principles on which Courts of Equity act, to allow an action for rectification to be commenced at so late a stage as that at which the present action is brought. . . . Here, nothing remains to be done under the contract, if it should be varied. Mr. Hastings suggested that, if it were rectified, the plaintiffs might bring an action for damages. I think there is nothing to give the plaintiffs such right of action. The defendants obtained in the former action a judgment which was right on the materials then before the court, and the present is an attempt to get back money paid under a judgment, which is not impeached for fraud, and, in my opinion, such an action cannot be allowed to proceed. I agree with Mr. Justice Kay, that there was no *res judicata*; but an attempt to re-form a spent agreement, and recover the money which has been paid under it, cannot be allowed.

LUNATIC—MORTGAGE OF LUNATIC'S ESTATE TO PAY ANCESTOR'S DEBTS.

The only other case to be noted is *In re Fox*, 33 Chy. D. 37, in which the Court of Appeal authorized the committee of a lunatic, who was entitled to a moiety of an estate in fee, to join in a mortgage with the owner of the other moiety for the purpose of raising a sum of money to pay off certain debts of the lunatic's ancestor, for which the land was liable; but directed the mortgage to be framed so that the lunatic's moiety should only be liable for a moiety of the mortgage debt and interest, and so that it should not be liable for any default of the co-owner of the estate in payment of the other moiety of the principal and interest; and the court declined to authorize the committee to enter into any covenant on behalf of the lunatic for payment of either the principal or interest of the mortgage debt.

SELECTIONS.

CRITICISING JUDGES.

We reprint by request an article entitled "Are judges above criticism," and find no difficulty in answering the question. If ever there was a "divinity that doth hedge a" judge, and secure him against public animadversion, that protection has surely been withdrawn. The privilege is now freely used by the press and the public, of criticising not only the formal and *ex-cathedra dicta* of the courts, but their minor and incidental rulings and every exercise of that elastic and indefinite power denominated judicial discretion. And this is as it should be. There is no reason why judges should not be held to a responsibility to public opinion not less stringent than that of political officers. Indeed, as judges hold their offices, if not by a life tenure, at least for a long term of years, and as their removal from office can rarely be effected by impeachment or otherwise, and only in cases of flagrant offences, the reason is stronger for their responsibility to public sentiment, than for that of the political officer who must needs face his constituents, within a year, or two, or three, and stand or fall upon the account he ca· then give of his stewardship.

Of course we will not be understood as saying that judges should be swerved or controlled in their judgments by popular sentiment. On the contrary, quite the reverse. They should declare the law, and adminster justice irrespective of all outside influences. While their duty in this respect is plain, the right of the public to criticise and discuss their performance of it is equally clear. In many minor matters however, judicial notice may well be taken of lay criticism. If a judge is too slow, permits unnecessary delays, allows cases to go over from term to term, or if he falls into the opposite error, forces counsel to premature trial of their cases, and thereby produces a plentiful crop of appeals, writs of error and reversals, it is well that his fault should be fully ventilated in newspapers or anywhere else. And if a judge is tyrannical or peevish, or impatient, any one may well say so. In England, lately,

a judge upon the bench took exceptions to the conduct of a solicitor, lost his patience, which seems however to have been no very great loss, and fell to scolding like a very Billingsgate fishwoman. The principal legal journals of London commented in unmeasured terms on the scandalous scene, and in the name of the profession, tendered their sympathy to the aggrieved solicitor. Upon faults such as these, and they are not uncommon, the public may and should comment freely, but if a judge honestly and faithfully strives diligently to do his whole duty, he is entitled to the commendation of the community, however distasteful to the feeling or adverse to the interests of the people his rulings may be. The recent proceedings in California against the judges of the Supreme Court of that State, upon which we commented some weeks ago, is a striking illustration of the extremes to which a people may be carried by an adverse ruling on a point of great public interest. Not only was the legislature convened in extra session for the avowed purpose of repealing out of office the Judges who made the obnoxious decision, but charges of imbecility, physical and mental, were preferred against two of the judges in aid of the nefarious project of removing from office, judges confessedly upright because they expounded the law the way they understood it. Judges ought to be subject to fair criticism of their official acts, but surely they should hold their offices free from such perils as those which environed the California judges.—*Central Law Journal.*

LIBEL—PRIVILEGED COMMUNICATIONS.

The following are the head notes of two cases reported in the *American Law Register* for August last:—

Briggs* v. *Garrett.—Citizens and voters have the constitutional right publicly to discuss and canvass the qualifications of candidates for public office, and information honestly communicated by one citizen to others at a public meeting, to the effect that a candidate for such office had been charged by a reputable citizen with grave misconduct, is a privileged communication, and the person communicating such information is not liable to an action for libel therefor, although the charge was false in fact and its falsity could have been discovered by inquiry.

Such communication being privileged, legal malice is not inferrible, and on the trial of a civil action for libel against the party who made the communication the court is justified, in the absence of proof of actual malice, in entering a nonsuit.

The fact that reporters of the public press were present at the meeting at which such privileged communication was made is immaterial.

At a meeting of a body of citizens of Philadelphia, styled the "Committee of One Hundred," assembled for the purpose of considering the merits of candidates for public office, a letter reflecting severely upon the character of one of the judges of the Common Pleas, who was a candidate for re-election, by statements subsequently acknowledged to be wholly untrue, was, by order of the chairman read by the secretary, and appeared at length the following day in the daily papers. *Held*, that the communication being based upon probable cause, was proper for discussion at such a meeting, and the court will not reverse a judgment of nonsuit entered in an action for libel brought against the chairman of the meeting.

Bronson v. *Bruce.*—Charges of crime which are false, made in a newspaper against a candidate for Congress, though made without malice and in an honest belief of their truth, are not privileged communications; but if they were published in good faith, after reasonable and proper investigation, this fact may go to mitigation of damages.

The editor then discusses them as follows:—

The above cases form an important addition to the literature upon the interesting question therein discussed. In the case of *Express Printing Co.* v. *Copeland*, recently decided by the Supreme Court of Texas, and reported in 24 Am. Law Reg. (N. S.) 640, the rule was laid down, that where a person consents to become a candidate for public office conferred by a popular election, he should be considered as putting his character in issue so far as respects his qualifications for the office; and that whatever pertains to the qualification of the candidate for the office sought is a legitimate subject for discussion and comment; but statements and comments made must be confined to the truth, or what in good faith and upon probable cause is believed to be true, and the matter must relate to the suitableness or unfitness of the candidate for the office.

A careful study of that case convinced us of its correctness and it is unnecessary to repeat what we there said. The principal case of *Briggs* v. *Garrett* lays down substantially the same doctrine as the case above referred to, and we do not understand the dissenting judges to question this principle. Their contention was only that the question of good faith, belief in the truth of the statement and the existence of actual malice, were questions for the jury. Mercur, J., said: "It may be asked, are the people to be prevented from criticising and discussing the conduct, character and qualifications of a candidate for office? Undoubtedly they are not. They must, however, confine themselves within the limits of truth, or permit a jury to pass upon their good faith and motive when they make a false charge:" Starkie, Slander 110.

The case of *Marks* v. *Baker*, 28 Minn. 162, referred to by the court in *Briggs* v. *Garrett*, is of more than ordinary interest in this connection. In that case the plaintiff was treasurer of the city of Mankato, and a candidate for re-election. The defendants, being residents and tax-payers of said city, published a communication in a newspaper published in said city, of which they were editors and proprietors, charging or insinuating that the plaintiff had, as appeared by certain official reports, failed to account for city funds which had come into his hands as such treasurer, and that (as plaintiffs claimed) he had embezzled a portion of such funds; and it was held that such publication, if made in good faith, was privileged.

The case of *Crane* v. *Waters*, 10 Fed. Rep. 619, also supports the doctrine of *Briggs* v. *Garrett*. In that case Lowell, J., said: "The modern doctrine, as shown by the cases cited for the defendants, appears to be that the public has a right to discuss, in good faith, the public conduct and qualifications of a public man, such as a judge, an ambassador, etc., with more freedom than they can talk with a private matter or with the private conduct of any one. In such discussions they are not held to prove the exact truth of their statements, provided they are not actuated by express malice, and that there is reasonable ground for their statements or inferences, all of which is for the jury."

With reference to the principal case of *Bronson* v. *Bruce*, it seems to us that the learned judge who tried the case at *nisi prius* made a very clear and concise statement of the law as it seems to be established by the weight of modern authority. It seems to us that the learned judge who delivered the opinion of the appellate court has drawn a picture of the evils flowing from the rule laid down in the court below, rather more lurid than the facts will warrant. He says, "Under such a rule the advocates of both or all candidates would let fly their poisoned shafts of defamation and charges, to be met by counter-charges, until the bewildered voter, not knowing who or what to believe, must of necessity shut his eyes to the fitness and character of the candidates and join the ranks of the party whose banner bears the inscription 'Principles not men?'" Qualified as is the doctrine of the court in this case by the rule relating to the mitigation of damages, it is, on grounds of public policy, impossible to deny that it is a reasonable rule; but the old rule laid down in the case of *King* v. *Root*, and other similar cases approved by the court in the principal case is one which, as it seems to us, will not ultimately prevail in this country; and we are not aware that a more satisfactory state of morality on the part of the public press exists in New York and other States adhering to that doctrine than in Pennsylvania, Minnesota, and other States adopting the rule laid down in *Briggs* v. *Garrett*. Upon the whole, it seems clear that the weight of modern authority supports the rule laid down in *Briggs* v. *Garrett*, and that so long as trial by jury is preserved, there is no immediate danger of the subversion of the social fabric from the general adoption of the rule of this case.

THE EVILS OF CASE-LAW.

ONE evil connected with modern law practice, which has been much commented on of late years, and which is universally admitted to exist, may be defined as case-law practice. And while I do not entertain any such chimerical idea, as to suppose that this association can do much towards the abatement of this evil, it is still true that the best way by which to

secure its abatement, is to understand fully how and why it arose, how it has come to be what it is—so that having learned thus much, we will be in a position to create, or aid in creating, a public sentiment adverse to it, such that those who are competent to deal with it, and have more or less power to control it, shall be stimulated to take it in hand.

Much and perhaps most of our modern law is judge-made law, by which I mean, that it rests for its original authority on decisions of the courts, rather than on statutory legislation. In such judge-made law, I include for my present purpose—though perhaps not with the utmost accuracy—the larger part of what we know as the common law of ancient date, and also those customs and usages which originate in the growth and development of our modern civilization, and which the courts necessarily adopt as governing rules in fixing the rights of parties who may have acted thereunder. I also include in the term judge-made law, those requirements of the law which result from the application of common law or other necessary rules of construction to the large body of statutes which emanate from our legislative bodies. As is well-known, and as is often necessarily the case, such statutes are unintelligible or ambiguous, or even contradictory, unless resort be had to extraneous or outside sources for aid in ascertaining their meaning. And when such aid is called in, as it often must be, then a new body of law is created with which the skilful practitioner must to a greater or less extent familiarize himself.

Now the work of the lawyer, in part, is to apply the law of the land, whether it be statutory or judicial law, to the facts of his case, provided there be any settled law applicable thereto; and if there be not, then to secure, if he can, the creation of new or hitherto unmade, or at least unformulated law, such as will be best, and most effectually protect or vindicate the just rights of his client, and in doing so, promote the ends of justice. In either case two courses are open to him: one is to keep in mind the principles of right and wrong which theoretically, at least, underlie all law, and apply those principles to the facts under consideration, and thereby seek a righteous verdict of adjudication. In this work previous decisions, in so far as they apply, are an obvious, important and desirable aid, for the reason that they indicate the conclusions which previous judges have reached on the consideration of like questions, under conditions presumptively, at least, favourable to a just decision.

The other course is, to leave out of consideration entirely, or give but little weight to the underlying principles of right and wrong, and to look through prior decisions to see if one or more cannot be found which, either in the plain meaning of the language used, or by a distortion, or perversion, or stretching of such language, will secure a favourable result. This latter course is one that commends itself to certain classes of practitioners:

1st. To the new beginner, especially if he feels, as he naturally may, a little timid or distrustful of his ability to argue his case on its merits.

2nd. To the lazy practitioner, for it is much easier to read up what the judges have decided, and to make a real or fanciful application of such decisions to the case in hand, than it is, by extensive reading, hard study, diligent application and close reasoning, to convince the court of the justness of the case presented.

3rd. Case-law practice also commends itself to those members of our profession, of whom I am sorry to say there are some—though none perhaps in Pittsburg—who care little or nothing for a just decision, but who look only to winning the case. And in this class I include the dishonest, unscrupulous and tricky practitioner—the *shyster*, in short—and also the practitioner who works only for fees.

And right here I may say that, in my opinion, a lawyer who works only for fees is neither a good lawyer nor an honest man. Such I believe to be, in part, the origin of the evil of case-law practice. And the remedy thus far is easily suggested:

1st. To discountenance the lazy and to compel them, if possible, to argue cases on principle, rather than on authority, which, of course, only the courts can do; and still further, to train them while students, so that they shall learn sound principles first, and how to state and apply them, and then how to cite and apply authorities afterwards. And this remedy

should be applied vigorously in the office training of law students, law clerks, junior partners and associate counsel of small experience. To this extent the remedy is in our own hands.

As regards the unscrupulous and tricky practitioner, and he who works only for fees, the remedy is less easy of application; but it lies obviously in the direction of rooting out such characters, so far as it can be done, who are already members of the bar; cultivating a high standard of professional morals, such as may lead them to mend their ways, and still further to exercise the utmost care and diligence that none such, or as few as possible, be permitted or allowed to enter the profession. And this remedy, to be efficacious, requires the conjoint action or co-operation of the judges, the examining committees, and of every reputable member of the profession.

But the origin of the evil of case-law practice does not end here. Every practitioner demands—and the judges, for reasons which it is not now necessary to discuss, have yielded to the demand—that a written opinion shall, if possible, be prepared and filed in each and every case adjudicated. The consequence is that we are flooded with law reports, the mass of which is, or is likely soon to be, perfectly appalling. In this country alone, and saying nothing of foreign countries, which are continually contributing to the already overflowing stream, we have about two hundred and fifty courts and tribunals, the opinions of whose judges are regularly reported. The amount of legal literature thus thrown onto the market, and tumbled into our law libraries, is simply frightful, not only in its amount, and also in the quality of it, but for the reason that it fearfully aggravates and promotes the evil tendency to look to and rely on adjudicated cases rather than on sound principles.

(To be continued.)

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [August 31.

BOULTON v. BLAKE.

Lease—Covenant to pay rent and taxes—Conveyance away of part of the leased premises—Assignment by lessee—Action for a part of the rent and taxes—Apportionment—Eviction—Local improvement—Taxes—Additions to taxes in arrear.

J. B. leased certain lots A, B, C, D, F and F, with *other* lands, to the defendant. E. R. C. also at the same time leased lot G and *other* lands to defendant. E. R. C. then conveyed his reversion in lot G to J. B., and J. B. conveyed away the *other* lands mentioned in his lease to S. A. H. Defendant assigned all his interest in both leases to J. S. McM., and J. S. McM. assigned all his interest in lots A, B, C, D, E, F and G to J. C. Both J. S. McM. and J. C. paid rent to J. B., and after his death to his executrix, the plaintiff. The rent of lots A, B, C, D, E, F and G fell in arrear, and the taxes also were left unpaid. Plaintiff then recovered judgment in an action of ejectment against J. C., and took possession of the lots.

In an action to recover the unpaid rent and taxes accrued on these lots before the recovery in ejectment, in which it was contended that as the action was brought against the original lessee, who had assigned the lease and was one on the covenant resting in privity of contract and not in privity of estate, there could not be an apportionment of the rent to these lots, it was

Held, following *The Mayor, etc., of Swansea v. Thomas*, L. R. 10 Q. B. D. 48, that the rent was apportionable, and the plaintiff was entitled to recover.

Held, also, that there was no eviction of the defendant by the lessor.

Held, also, on the evidence, that although defendant might be a surety for the assignee, there was no release of the assignee, and consequently no discharge of the surety.

Held, also, following *Barnes* v. *Bellamy*, 44 U. C. R. 303, that the rent accrued from day to day, and was apportionable in respect of time accordingly.

Held, also, that under the wording of the covenant to pay "all taxes, rates, duties, and assessments whatsoever . . . now charged, or hereafter to be charged, upon the said demised premises," the defendant was liable for local improvement taxes and for the additions made under the Assessment Act, year by year, to the amount of the taxes in arrear or additions made by the municipality.

Moss, Q.C., for the plaintiff.

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

O'Connor, J.] [September 2.

THOMPSON ET AL. v. GORE ET AL.

Marriage settlement—Consideration for—Voluntary act—Fraud on creditors.

In an action brought by T. K. & Co. on behalf of themselves and all the other creditors of J. G., against J. G., his wife, J. G., and J. K. B., the trustee, to set aside a marriage settlement, by which J. G., a day or two before his marriage, had settled the greater part of his property on his wife, in which it was shown that the relations between J. G. and his wife before the marriage were very little short of those of husband and wife, and that she would have accepted a proposal of marriage without hesitation, without any condition of a marriage settlement, and that J. G. was in insolvent circumstances, of which fact she must have been aware, and that the settlement was purely voluntary on the part of the husband, and that the wife knew nothing of it until she was asked to sign the deed,

Held, that the settlement was not the consideration or part of the consideration of the marriage, and that it could not stand.

Commercial Bank v. *Cook*, 9 Gr. 524, and *Columbine* v. *Penhall*, 1 Sm. & G. 228, referred to and followed.

Fraser v. *Thompson*, 1 Gif. 49, distinguished.

G. T. Blackstock and *T. P. Galt*, for plaintiffs.

Lash, Q.C., and *Falconbridge*, Q.C., for defendants.

Proudfoot, J.] [Sept. 21, Sept. 29.

RE SIMMONS & DALTON.

Electoral Franchise Act—Revising Officer—Mandamus—Notice to voter—Notice to Revising Officer—Jurisdiction of Provincial Courts to issue mandamus.

A Revising Officer, under the Electoral Franchise Act, 48 and 49 Vict. c. 40, having declined to entertain the application of S. to have the name of D. struck off the voters' list, on the ground that the notice to D. provided for by sec. 26 of the Act was not proved, and that the notice to the Revising Officer provided for by the same section was not duly served on or given to him in time.

On an application for a mandamus to the Revising Officer, athough it appeared no copy of the notice to D. was kept, and no notice was served to produce the original, it was shown by two witnesses that a notice to D., filled up on a printed form with his name, address and the objection to his vote, had been mailed to him by a prepaid registered letter on June 26 for the sitting of the Revising Officer on July 12 following, and the certificate of registration was produced, although the witness had no distinct individual knowledge of the particular notice to D., and that such evidence had been given before the Revising Officer.

Held, that in the absence of evidence to the contrary, such proof was sufficient. The notice to the Revising Officer was left with his clerk at his office, during the absence from town of the Revising Officer, on Monday, June 28, and on his return on the afternoon of that day he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally; but he said that what was done was sufficient.

Held, that the last day for service for the sitting of the final revision to be held July 12 was Sunday, June 27, but that under sec. 2 sub-sec. 2 of the Act the time was extended and S. had all the next day, and that the notice was well given on Monday.

Held, also, that the service of the notice on the clerk of the Revising Officer was, under ss. 19 and 26, a sufficient "depositing with" the Revising Officer to satisfy the statute, and the conduct of the Revising Officer amounted to

an adoption of the action of the clerk, and was equivalent to personal service, if such were required by the statute.

It was contended that the Revising Officer was an appointee of the Dominion Government, and that his sittings were sittings of a court of record, and that there was no jurisdiction in a Provincial Court to issue a mandamus to him.

Held, that the Dominion Parliament had by the Electoral Franchise Act interfered with civil rights in this Province, and made no provision for a court to superintend the conduct of the officials; and, following *Valin* v. *Langlois*, 3 S. C. R. 1, that until such a court is created, the Provincial courts, by virtue of their inherent jurisdiction, have a right to superintend the discharge of their duties by any inferior officer or tribunal.

Held, also, that the Revising Officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and in holding that notice to produce the notice to D. should have been given, which were not findings of fact, and such mistakes or errors are not such decisions to prevent the granting of the writ of mandamus. If he had found, as a matter of fact, that notice was not given to D., there might have been some difficulty in interfering with his conclusion.

The *Centre Wellington case*, 44 U. C. R. 132, referred to and distinguished.

Aylesworth, for the motion.

Osler, Q.C., and *O'Neill*, contra.

Divisional Court.] [September 22.

MERCHANTS' BANK OF CANADA v. MCKAY ET AL.

Mortgage—Security for indebtedness—Sureties—Change of original securities—Release of sureties.

K. & Co. were customers of the plaintiff's, and gradually accumulated a liability of about $26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for the payment of all bills, notes and papers upon which K. & Co. were then liable, together with all substitutions and alterations thereof, and all indebtedness in respect of the same, being a continuing security, notwithstanding any change in the membership of the firm. The bank did business with K. & Co. in two different ways—one by discounting K. & Co.'s customers' notes, in which case their rule was to notify the customers that they held their notes; and another by discounting K. & Co.'s own notes, and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers.

At the time the mortgage was given, all the notes held by the bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co.'s notes. K & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitution nearly all the notes held at the date of the mortgage had been replaced by K. & Co. (in renewals and substitutions) by forgeries, and that the amount of the discounts of K. & Co.'s notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the bank to foreclose the mortgage the mortgagors claimed they, as sureties, were discharged by the bank's action.

Held, that the bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability, so far as they were prejudiced by the conduct of the bank. *Prima facie*, the bank is liable to the extent of the face value of the securities surrendered, but they can reduce that by evidence as they may be advised.

Rae, for the plaintiffs.

Moss, Q.C., and *Stewart*, for the defendants.

Divisional Court.] [September 22.

Assignment for benefit of creditors—Chattel mortgage—Proof of consideration—Onus of proof—New trial.

In an interpleader action where the plaintiffs were a chattel mortgagee and an assignee for the benefit of creditors of the judgment debtor to try the right to the proceeds of the goods sold by the sheriff, the assignee was examined and showed that he was a brother and an employee of the assignor, and that all the money he had collected under the assignment had been used by him in carrying on the assignor's business, and not in payment of creditors, and the mortgagee put in and proved the chattel mortgage, but gave no evidence of a debt due or of pressure used. On this the judge charged the jury that in his opinion there was no evidence of a debt or of pressure, and that if they believed the assignment was made for the purpose of defeating or delaying creditors it was bad, and he refused to allow the consideration to be proved after the plaintiffs closed their case, and the jury brought in a verdict for the defendant. On a motion to enter a verdict for plaintiffs, or for a new trial, it was

Held, *per* BOYD, C.—The plaintiffs proved enough to cast the burthen of attack on the defendant. Proof of the mortgage duly executed showed that the property and title to the goods passed from the judgment debtor to the mortgagee before the seizure. The execution creditor should displace this ownership by showing want of consideration or other reason. Suspicion would not justify the conclusion that the mortgage was a voluntary instrument contrary to its purport. There is no evidence that the wife knew of the husband's insolvency, and concurred with him in an attempt to gain a preference at the expense of the other creditors.

Per PROUDFOOT, J.—That the mortgage might be valid if given for a present advance of money for carrying on the business or other proper purpose, and that insolvency would not be a circumstance shifting the onus of proof, and that the production of the mortgage would be *prima facie* evidence, and that as the jury had found the evidence sufficient to justify their verdict that the assignment was not honestly made, the verdict should not be interfered with on that point, but as the plaintiff, the trustee, appeared to have been misled, and was refused leave to supplement his evidence, a new trial should be granted to him.

E. Furlong, the trustee, plaintiff in person.

F. Fitzgerald, for the assignee plaintiff.

I. Parks, for the defendant.

Proudfoot, J.] [September 29.

POWELL v. PECK ET AL.

Mortgage—Rate of interest—Payment into court—Court rate of interest—Rate of interest after maturity of mortgage—Contract or damages.

A made a mortgage to B which matured June 1, 1880, and bore interest at 8 per cent. per annum. During certain legal proceedings in which A disputed his liability to pay the balance due on the mortgage, the money was paid into court, where it remained until April, 1886, when it was paid out to B, who had succeeded in establishing his right to it. The Master, in taking the accounts between the parties, allowed no interest on the money paid in, and B got it with the usual rate of interest allowed by the court, which was less than the rate provided for in the mortgage; but he allowed interest on the mortgage after its maturity at the rate therein provided up to December 22, 1886, the time appointed for payment, and certified that he allowed it as a matter of contract, and not as damages.

On an appeal and cross appeal from both of these findings, it was

Held, following *Sinclair* v. *The Great Eastern Ry. Co.*, L. R. 5 C. P. 391, that A should pay interest beyond the court interest, and, following *St. John* v. *Rykert*, 10 S. C. R. 278, that 8 per cent. was not payable after June 1, 1880, but only the legal rate. *McDonald* v. *Elliott*, 12 O. R. 98, referred to and distinguished.

Delamere, for plaintiff.

Beck, for defendants.

PRACTICE.

Ferguson, J.] [Nov. 1.

DEVEREUX v. KEARNS.

Partition—Dowress as applicant—Allotting—Sale.

A person entitled to dower, though not assigned, is entitled to maintain proceedings for partition.

Rody v. *Rody*, 17 C. L. J. 474, overruled. But, where one only of several is desirous of partition, the proper proceeding is to have part allotted to him, leaving the others to hold jointly or in common.

Hobson v. *Sherwood*, 4 Beav. 184, followed. In the present case, as the plaintiff, a dowress, had already taken proceedings under the Dower Act to have her dower assigned, and confessedly only applied for a partition with the object of having a sale of the land, which the other parties interested opposed, the application for partition was refused, with costs.

W. Creelman, for the plaintiff.

J. Hoskin, Q.C., for the infant defendant.

Langlois, for the adult defendants.

Ferguson, J.] [Nov. 1.

RIDDELL v. MCKAY.

Security for costs—Rules 429, 431, O. J. A.

Where no reason was shown for reducing the amount of security required by a *præcipe* order for security for costs, issued under Rule 431 O. J. A., an order amending the *præcipe* order by reducing the amount to $200, the security to be in the form of money paid into court, was reversed on appeal.

Held, that the provisions of Rule 429 O J. A., do not so apply as to authorize the reduction of the security required by Rule 431 O. J. A.

Aylesworth, for the defendant.

W. H. P. Clement, for the plaintiff.

Wilson, C.J.] [Nov. 2.

RE WALSH v. ELLIOTT.

Prohibition—Division Court—Amount—Liquidation.

The plaintiff sued in a Division Court for $114, $75 on a promissory note and $39 on a bill of costs, of which the amount was not ascertained by any act of the defendant.

Held, that the claim was within the competence of a Division Court.

Vogt v. *Boyle*, 8 P. R. 249, applied and followed.

J. B. Clarke, for defendant.

Shepley, for plaintiff.

Wilson, C.J.] [Nov. 5.

RE PAQUETTE.

County judge, jurisdiction of—Prohibition—48 Vict. ch. 26 sec. 6 (O.)—Persona designata.

A judge of a county court, acting under the authority of 48 Vict. ch. 26 sec. 6 (O.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the judge made an order for the issue of a writ of attachment against the first assignee for contempt.

Held, that the judge, in acting under this statute, was not exercising the powers of the county court, but an independent statutory jurisdiction as *persona designata*, and had therefore no power to direct the issue of a writ of attachment; and prohibition was directed.

Aylesworth, for the first assignee.

Shepley, for the second assignee.

Wilson, C.J.] [Nov. 5.

MEWCOMBE v. MCLUBAN.

Order after action dismissed—Statement of claim—Extending time—Master in Chambers, jurisdiction of—Rule 462, O. J. A.

An order of the 4th October, 1886, extended the time for delivery of statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed, with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action.

Held, that notwithstanding the dismissal of the action, an order could properly be made under Rule 462 vacating the judgment and further extending the time for delivering the statement, and the Master in Chambers had jurisdiction to make such an order.

H. Symons, for defendant.

J. B. Clarke, for plaintiff.

Mr. Dalton, Q.C.] [Nov. 10.

SEYMOUR v. DEMARSH.

Local venue—Foreclosure—Possession—Ejectment—Rule 254 O. J. A.

An action by a mortgagee for foreclosure, payment and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254 O. J. A., and the venue need not therefore in such an action be laid in the county where the lands lie.

Hoyles, for defendant.

H. J. Scott, Q.C., for plaintiff.

CORRESPONDENCE.

THE REGISTRY ACT—WEIR v. NIAGARA GRAPE CO.

To the Editor of the Law Journal:

SIR,—I have perused an article in the last number of the LAW JOURNAL, in reference to *Weir* v. *Niagara Grape Company*, 11 O. R. 700. I do not altogether agree with the views expressed there; and as I think it not undesirable that a temperate criticism of the judgments of our courts should be given to the profession in your periodical, I will take the liberty of expressing my views in reference to this particular action.

Section 74 of the Registry Act in effect postpones, as fraudulent and void, any instrument prior in date to any other subsequent instrument which is first recorded, and which is held in good faith and for value and without actual notice of the prior instrument. There is nothing in that section making it incumbent upon a court to direct that such an instrument shall be cancelled and the registration thereof vacated.

In reference to the powers of the court to deal with instruments which have been executed and delivered between parties, I conceive the doctrine to be this, that any instrument that has been delivered for a fraudulent or improper purpose—quite aside from the Registry Act—may by the court be declared to be void, and the registration, if necessary, to be vacated. This doctrine is equally applicable whether titles are recorded or not; but there are perhaps occasions, where the title is a recorded one, in which the court would interfere, and yet would not interfere where the title is not a recorded one. It is also equally clear that the court will not remove as a cloud upon the title—even where titles are recorded—if the conveyance be void upon its face. No danger can result from its existence even if removed. His Lordship, Mr. Justice Armour, refers to the case of *Buchanan* v. *Campbell*, 14 Gr. 163, where the court refused to set aside such conveyance, from the simple fact that, upon a perusal of the deed (as the law then was), no interest passed by it as against the plaintiff; and the same general principle is well exemplified in the case of *Hurd* v. *Billington*, 6 Gr. 145, where it was quite obvious in looking at the power of attorney that the party who executed the deed on behalf of the grantor under the power of attorney had not the requisite authority. In these cases apparently neither the execution nor the registration of the instruments was otherwise than in good faith, and the court did not simply see fit to interfere.

But as to instruments recorded after the instrument held by the person seeking the aid of the court, which may or may not have been executed before the plaintiff's instrument; in my humble opinion it would not be proper in all cases that the court should direct the registration of such instruments to be vacated. The judgment of the court as to this point in *Truesdall* v. *Cook* is an *obiter dictum*, and may have been stated somewhat too broadly. In the case of *Dynes* v. *Bales*, alluded to by Mr. Justice Armour, the instrument was, I think, dated, delivered and recorded after the instrument held by the plaintiff, who prayed for the vacation of the registration of such instrument. I should submit, in my humble judgment, considering the importance that is attached to recorded instruments in this country, that when the instrument has been executed and recorded from idle or improper motives, or where no possible injury could possibly occur from such cancellation, and vacation of registration of such instrument as a matter of record—in all such instances—I should conceive, it would be proper for the court to direct such instruments to be cancelled, and such registration to be vacated. Mr. Justice Armour cites a case—apparently within the scope of section 74, where certainly it would be a grievous wrong for the court so to act—that is the instance of A making a mortgage to B, and subsequently another to C, who takes his mortgage without notice of the prior mortgage, records it before B records his prior mortgage, and advances the full consideration, when the property might be well worth both mortgages; and I do think that the judgment of the court in the action

I am discussing hits the nail upon the head when it decreed that the instrument second in point of time had priority over the instrument first in point of date, though subsequently recorded.

There seems in this action to be some obscurity about the facts which, I think, indicate that when the plaintiff purchased the property he was not aware of the existence of the vines in question. Undoubtedly Kievell must have been aware of the agreement at the time he conveyed the property, and either acted fraudulently or, at all events, carelessly in not disclosing its existence. If the plaintiff had been aware of the existence of the vines in question, and not aware of the existence of the agreement, and was thereby induced to pay a larger consideration for the property than he otherwise would have paid, I cannot see why he should not retain the vines without accounting in any way to the defendants. His position appears to be precisely as if a building had been erected upon the property in question for the consideration of the construction of which the builder held an unrecorded mortgage. I cannot think, in the latter case, that the holder of the unrecorded mortgage would have any claim whatever against the vendee, and I should think that the same result would follow here, but as apparently the plaintiff here has alleged nothing of the kind, I think it must be assumed that the real facts would show that he purchased the property in question, unaware of the existence of the vines in question. Now, if that be the case, why should the defendants not receive compensation for their vines? The plaintiff has received something of considerable value for which he has paid in reality nothing, and it is not entirely unlikely that he, with that disregard of the law of *meum* and *tuum*, which characterizes many of our race, thought the opportunity not an unfit one for retaining the vines, and getting rid of the lien, and especially so as the relief that the defendants mainly relied on was the right to remove the vines. I cannot see, however, why the plaintiff should be called upon to perform the agreement which he never entered into, and which might operate as an injustice to him unless he were offered by the court (of which there is no evidence) the option of allowing the defendants to remove the vines, or be subjected (if the court might think proper under the circumstances to award against him) to the terms of the agreement.

If that were the case, and he had the option of giving up the vines, or of accepting the agreement, if the court had power so to direct that relief to the plaintiffs, he could not complain.

In the absence of any such offer to him, I should think the proper remedy would have been to refer to some officer of the court, to ascertain, without costs to either party, how much the property had been enhanced in value by the existence of the vines in question; in other words, what the plaintiff would have realized from the vines in question after making all just allowances.

SEARCHER AFTER TRUTH.

FLOTSAM AND JETSAM.

A STRANGE STORY.—Here is another Russian legacy case. A rich Russian lady bequeathed 400 roubles for the support and comfort of the dearest favourite of all her dogs. One of the servants was appointed the dog's guardian so long as it should live, but if the dog should survive its guardian then the care and charge should pass to another servant. The dog is now dead, and, according to the provisions of the will, the servant who had conscientiously fulfilled her duty to the dog for several years comes in for the 400 roubles, the interest of which, it appears, had been sufficient to keep the dog in ease and comfort. The residuary legatee, however, has not been permitted to settle down to the enjoyment of the 400 roubles without a challenge. The other servant mentioned, in view of probabilities or possibilities, demanded half the money on the pretence that the will declared that "descendants" of the dog were to share in the benefit of the legacy, and she was in possession of a "child" of the dead dog. But the guardian of the bequeathed dog avers that her charge died "childless." So the Russian lawyers and law courts have set to work, and are doing their best not only to swallow up the 400 roubles, but also to appropriate to themselves many more roubles from each of the litigants.—*Ex.*

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—*Sept. 6th*—John Murray Clarke (Honours and Gold Medal); William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, George Henry Kilmer, Francis Cockburn Powell, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Thomas Urquhart, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Johnson, William H Wardrope, Francis Edmund O'Flynn. *Sept. 7th*.—Thomas Joseph Blain (who passed his examination in Trinity Term, 1885), William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John Dowdall, John Carson, Richard Vanstone, George Edward Evans, Charles Bagot Jackes. William Hope Dean; and *Sept. 17th*, William Robert Smythe (who passed his examination in Hilary Term, 1886). The following gentlemen received Certificates of Fitness to practise as Solicitors, namely:—John Murray Clarke, George Hutchison Esten, Wm. Smith Ormiston, Wm. Chambers, Alex. McLean, Robt. George Code, Henry Smith Osler, Edward C. S. Huycke, Wm. John McWhinney, Wm. Murray Douglas, Chas. True Glass, Robt. Charles Donald, Herbert Mcdonald Mowat, Francis Edmund O'Flynn, Lawrence Heyden Baldwin, J ll Dalzell, Lyman Lee, Augus McCrimmon, nald D. Gunn, Joseph Coulson Judd, Heber Hardley Dewart, John Wesley White, Alex. David Hardy, Wm. Mansfield Sinclair, Hubert Hamilton Macrae, John Geale (who passed his examination in Hilary Term, 1886, also received his Certificate of Fitness). The following were admitted into the Society as Students and Articled Clerks, namely:—

Graduates.—George Ross, John Simpson, George Wm. Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin Macdonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Roswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont, Charles Elliott.

Matriculants of Universities.—William Johnston, Samuel Edmund Lindsay, Nelson D Mills.

Junior Class.—Richard Clay Gillett, Alexander James Anderson, George Prior Deacon, Louis A. Smith, Andrew Robert Tufts, William Wright, Kenneth Hillyard Cameron, Harry Bivar Travers, John Alfred Webster, Thomas James McFarlen, William Elijah Coryell, John Henry Glass, Albert Henry Northey, Archibald Alexander Roberts, Charles B. Rae, George S. Kerr, William Egerton Lincolm Hunter, Francis Augustus Buttrey, Frederick Thomas Dixon, Hector Robert Argue Hunt, Daniel O'Brien, Franklin Crawford Cousins, Thomas Alexander Duff, William G. Bee, Stephen Thomas Evans, William Mott, Thomas Arthur Beament, and John Alexander Mather was allowed his examination as an Articled Clerk.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- 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.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

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.
1884—Souvestre, *Un Philosophe sous le toits.*
1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

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.

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; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor 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. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' 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 examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

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 Socity 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, six 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 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.

9. 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.

10. 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.

11. 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.

12. Articles and assignments must be filed with either 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.

13. 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.

14. Service under articles is effectual only after the Primary examination has been passed.

15. 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 vear and his Second in the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. 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.

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

18. 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.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	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

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 133.)
- 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. (vv. 1-33)

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

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.

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

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.
Critical reading of a Selected Poem:—
1886—Coleridge, Ancient Mariner and Christabel.
1887—Thomson, The Seasons, Autumn and Winter.
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.
1886, 1888, 1890 — Souvestre, Un Philosophe sous le toits.
1887, 1889 — Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

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

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, 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.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.