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DIARY FOR MARCH.

1. Sat. .....St. David's Day.
2. Sun. .....*1st Sunday in Lent.*
4. Tues .....County Court (York) Sittings. Osler, J., appointed, 1879. Court of Appeal Sittings.
6. Thur.....Name of York changed to Toronto, 1834.
9. Sun. .....*2nd Sunday in Lent.*

TORONTO, MAR. 1, 1884.

WE publish in another place an article contributed to the *Albany Law Journal* by an old and valued friend of our own, R. Vashon Rogers, jr., on a subject of general interest. It is pleasant to know that the production of an inhabitant of this "hyperborean" region — a country which seemed to cause a cold shudder to our contemporary during the recent visit of Lord Coleridge—is allowed a place in its well-filled pages. We trust that our namesake will at least give us credit for unselfishness in not keeping the best things of their kind north of the equator to ourselves.

IN *Wansley* v. *Smallwood* the Divisional Court of the Chancery Division recently determined that the hearing of a cause on further directions is not to be regarded as a trial of the action; and that no appeal lies from a judgment so pronounced to the Divisional Court, under rule 510. According to this decision the only forum to which an appeal from such judgments can be made is the Court of Appeal. Appeals from judgments pronounced on further directions, therefore, stand on the same footing as appeals from orders made by a judge in Court on appeals from a master's report, or upon a demurrer, and are governed by the rule laid down in *Re Galerno*, 46 U. C. R. 379; *Trude* v. *Phœnix*, 29 Gr. 426; *McTiernan* v. *Fraser*, 9 P. R. 247.

THE announcement made by Rose, J., on February 20th, in reference to the application in *Lyon* v. *Wilson* for judgment under Rule 324, perhaps may be regarded as a settlement of the questions which have arisen as to the propriety of the order made by Osler, J., in *Kinloch* v. *Morton*, 9 P.R. 38, with reference to an applicant for speedy judgment under Rule 324, being allowed his judgment only on terms of sharing in respect to his execution *pari passu* with any other execution creditors placing writs in the sheriff's hands before the time at which the applicant would be entitled to issue executions, as in a judgment in default of appearance. This precedent has been followed in several subsequent applications for judgment under this rule, though some of the judges have refused to follow it. Notably in the case of *Bank of Commerce* v. *Willing & Co.*, it was recently followed by Wilson, C.J. The plaintiffs there subsequently sought to appeal from the order, so far as the above condition or proviso was concerned, to the Divisional Court, and urged that it was most inequitable that whereas the other execution creditors were not bound by the order and could execute for the full amount of their claims, they would have to content themselves with a ratable share of the assets in the sheriff's hands. The appeal was dismissed on the ground of want of jurisdiction to hear it. In connection with *Lyon* v. *Wilson*, however, Rose, J., has now announced that the judges, or some of them, had agreed henceforth to make

orders under Rule 324 without any such condition, but would scrutinize very closely the material furnished upon such motions, and would not grant judgments, except in extreme cases.

JUST before going to press, the first of the letters on the interpretation of the Federal Constitution, known as the British North America Act, by the Honourable Mr. Justice T. J. J. Loranger, reaches us, and we look forward to a careful perusal of this and any other subsequent letters on the same subject, by the learned author. The motto on the title page, "*Si vis pacem, para bellum*," and the passage in the preface: "It is, in truth, the cause of the Provinces that I have undertaken to defend against an enemy which as yet appears only a spot upon the horizon, but this spot may increase in size, may become a cloud, and the cloud may bring forth a tempest! From out of this tempest may we never see arise . . . Legislative Union," indicates to us what the writer fears, and what he aims at averting. Mr. Loranger writes primarily from a Lower Canadian point of view, and will find many doubtless in other Provinces to concur in his hopes and fears. There are others however who think that a "complete non-conductor of national feeling between the Maritime Provinces and Ontario" is not, in the interests of the whole Dominion, a thing to be preserved at all hazards, and that if some scheme could be found which would without injustice cause a gradual assimilation of discordant elements, a great step in advance would have been taken; but, as we look upon the maintenance of a sound understanding of the proper constitutional relation between the several Provinces and the central power as a matter of vital importance to the future of our country, we shall study Mr. Loranger's dissertations with much interest, and hope hereafter to discuss them at greater length.

APPELLATE DIFFICULTIES.

THE case of *Williams* v. *Corby* (7 S.C.R. 470), which was decided by the Supreme Court as long ago as 1881, but which has been only recently reported, is another of those cases which present a curious conflict of judicial opinion, the net result of the litigation being that five judges pronounced in favour of the plaintiffs, and five in favour of the defendants. Under these circumstances therefore it is perhaps to be considered satisfactory that the ultimate decision was in favour of the defendants, if the conflict of opinion is a true criterion of the doubtful character of the plaintiffs' claim. The case arose out of the purchase by plaintiffs of a cargo of corn on behalf of the defendants as their agents as the plaintiffs contended. The corn was purchased by the plaintiffs and shipped to the defendants as being "at the defendants' risk," and so invoiced by the plaintiffs to the defendants. The plaintiffs however, instead of taking the bill of lading in the defendants' name took it in favour of the person whose name should be written by the plaintiffs on the margin. The plaintiffs drew on the defendants for the price of the corn, and then indorsed the draft (together with the bill of lading, as collateral security) to the Merchants' Bank, with instructions not to hand over the bill of lading, nor allow the cargo to be delivered until the draft was paid. The draft was accepted by the defendants, but on the arrival of the ship the cargo was found to have been damaged on the voyage, and the defendants then refused to pay the draft or accept the cargo. The plaintiffs then sold the cargo, and the action was brought to recover the difference between the amount realized by the sale and the contract price. The case was originally tried before Blake, V.C., who dismissed the plaintiffs' bill, but on appeal to the Court of Appeal his decision was unanim-

ously reversed, while on appeal to the Supreme Court the decision of the Court of Appeal was reversed, Strong, J., however, dissenting. The following Judges were in favour of the plaintiffs: Moss, C. J. A., Burton, Patterson & Morrison, JJ. A., and Strong, J.; those in favour of the defendants being Blake, V.C., Ritchie, C. J., and Fournier, Henry & Gwynne, JJ. The case seems to have turned altogether on the question whether the plaintiffs were to be regarded as acting as principals or agents. The Court of Appeal held them to be merely agents, whereas the Supreme Court agreed with the judge of first instance that they must be regarded as having acted as principals, and that the taking of the bill of lading in the way in which it was taken indicated a clear intention on the part of the plaintiffs not to part with the property in the goods until payment; and, consequently, that in the meantime the goods were (notwithstanding the way they were invoiced by the plaintiffs) really "at the risk" of the plaintiffs—the consignors.

In *Crysler* v. *McKay* the opinion of nine judges was overruled by three judges of the Supreme Court. In the Mercer case four judges of the Supreme Court overruled the opinions of seven judges, and the latter were ultimately held by the Privy Council to have correctly decided the case. Although the mere counting of heads is by no means an infallible test of the probable accuracy of a decision, yet perhaps after all it is a more satisfactory mode of arriving at a decision than leaving the matter to a chance majority in the ultimate Court of Appeal, and we are by no means clear that it would not be a wise provision to make, that the decision of the Supreme Court shall not have the effect of reversing any judgment, unless the total number of judges concurring in the reversal, that is to say in all the Courts, shall exceed in number those who have pronounced in favour of the respondent. If every judge of the Supreme Court was of such transcendent ability that his opinion was infallibly of greater value than those of the judges of first instance, and of the intermediate appellate Court, this might be unwise, but it is paying no disrespect to their Lordships of the Supreme Court to say that men are to be found both in the Courts of first instance and in the intermediate appellate tribunals of this Province, who are the peers in every respect of any members of the Supreme Court bench, and it cannot but be unsatisfactory to any suitor to find that, although he has succeeded in obtaining a large majority of judges in his favour, he has, nevertheless, been worsted in the litigation.

RECENT ENGLISH DECISIONS.

THE bulky December number of the Chancery Division Law Reports, comprising 24 Ch. D., p. 253 to p. 744, contains several important decisions which it is now proposed to notice.

SOLICITOR AND CLIENT—ENJOINING SALE BY MORTGAGEE.

At p. 289 is a case of *Macleod* v. *Jones*, in which, while the general rule in respect of granting injunctions to restrain mortgagees exercising their power of sale is affirmed to be, in the language of Brett, M.R., that a mortgagee "could not be stopped from selling the estate without the mortgagor paying into court, or otherwise securing to him, not what the court might think *primâ facie* was due to him as far as they could ascertain, but without paying into court that which he demanded, subject to a subsequent enquiry," yet it is held there is a difference, where, as in this case, the mortgagee is a solicitor endeavouring to enforce securities against his client. Here the plaintiff had allowed her solicitor to buy up a number of mortgages on her property, and take a transfer to himself, and was

bringing this action to impeach the securities, and to restrain a threatened sale of the property, and now moved for an injunction until the hearing. Brett, M.R., remarks, at p. 295, on the dangerous position in which the solicitor had put himself: "He, the person whose duty it is to settle her (the plaintiff's) affairs—to settle them in the best way for her—puts himself in the position of being one of her creditors; the solicitor who is to advise her makes himself her creditor, and I think that is a very dangerous position. . . That gives the court a jurisdiction over him beyond the jurisdiction that it has over a mere mortgagee. It is the jurisdiction which the Court exercises as between solicitor and client, and I take it the real meaning of it is this: That where matters are called in question as between solicitor and client, inasmuch as the client has thereby lost the advice of the solicitor, the Court steps in and looks for itself, and as far as it can, to a certain extent, acts for the client in a way the solicitor would have done if he had been only solicitor, and expected to give her the advice for which he is paid as solicitor. Therefore, when a solicitor is nominally the mortgagee, and when he assumes to exercise his right to sell as mortgagee, it seems to me the Court has jurisdiction to inquire immediately into the circumstances of the case, and will not allow the solicitor to exercise his unqualified rights as mortgagee, but will only allow him to exercise those rights subject to the control of the Court, and to his doing so in an equitable and fair manner as between a solicitor and his client. Therefore in the present case the Court granted the injunction on the plaintiff paying into Court such a sum as the Court considered would cover the amount actually advanced by the defendant, and amending the writ so as to make it a simple action for redemption and injunction.

Ward of court—Parental authority.

The next case to be noticed is *In re Agar Ellis, Agar Ellis* v. *Lascelles*, at p. 317. The celebrated case, reported in L. R. 10 Ch. D. 49, in which the right of Mr. Agar Ellis to do what he thought best for the spiritual and temporal welfare of his children, despite the promise given by him to his wife before marriage, that the children of the marriage should be brought up as Roman Catholics, was affirmed, will be remembered. When the eldest daughter reached the age of sixteen Mr. Agar Ellis removed his opposition to her practising the Roman Catholic religion, but he insisted upon putting restrictions on her intercourse with her mother on the plea that he believed the mother would alienate her affections from him. The daughter was at this time a ward of Court, but notwithstanding this fact, and that the daughter was over the age of sixteen, the Court refused to intertere. The case is a striking enunciation of the law as to paternal control. The distinction is pointed out between cases where a child is away from the father, and the father endeavours by *habeas corpus* to recover possession of the child, and cases where, as here, the child is under the control of the father and it is sought to interfere with his power of control. The law is thus stated by Brett, M.R., at p. 326-7:—"The law of England is that the father has the control over the person, education and conduct of his children until they are twenty-one years of age. That is the law. If a child is taken away from the father, or if a child leaves the father and is under the control of, or with, other people, then the application for a *habeas corpus* is no part of the law of equity as distinguished from the Common Law of England. It is the universal law of England that if any person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a *habeas corpus*,

and thereupon the person under whose supposed control, or in whose custody the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit but they cannot consent . . . But above the age of fourteen in the case of a boy, and above the age of sixteen in the case of a girl, the Court will inquire whether the child consents to be where it is; and if the Court finds that an infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for *habeas corpus* falls away. I say, if it is the father who applies for the *habeas corpus* the *habeas corpus* is not granted. . . . The law was administered in the same way by a Chancery Judge as by a Common Law Judge. . . The cases of *habeas corpus*, therefore, do not at all apply to the proposition for which they were cited. In the present case they are, of course, inapplicable, because the child is not away from her father—the child is under the control of her father; and this application is not for a *habeas corpus* by the father to restore the child, but the application is for an order of the Court to be made against the father. These cases, therefore, seem to have no application." He then goes on to lay it down that the Court will not interfere with the father in the exercise of his parental authority, except where, by his gross moral turpitude he forfeits his rights, or where he has by his conduct abdicated his parental authority, or where he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court. At p. 334, Cotton, L.J., says:—"It has been said that we ought to consider the interest of the ward. Undoubtedly. But this Court holds this principle—that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child." And this passage may well be supplemented by the concluding passages in the judgment of Bowen, L.J., at p. 338:—"As soon as it becomes obvious that the rights of the father are being abused to the detriment of the interests of the infant, then the father shows he is no longer the natural guardian—that he has become the unnatural guardian—that he has perverted the ties of nature for the purpose of injustice and cruelty. When that case arrives the Court will not stay its hand; but until that case arrives it is not mere disagreement with the view taken by the father of his rights and the interests of his infant, that can justify the Court in interfering."

HUSBAND AND WIFE—INJUNCTION.

In the next case calling for special notice, *Symonds* v. *Hallett*, p. 346, a married woman sought to enjoin her husband from entering the house in which they had for some years after their marriage dwelt together, and which by her marriage settlement had been settled on her to her separate use, free from his control. The plaintiff had instituted proceedings for divorce, or judicial separation against the defendant, who had ceased to cohabit with her, but insisted on the right to go to and use the house when and as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. As said by Bowen, L.J., he "complained of not being allowed the proprietary use of the house." The plaintiff succeeded in ob-

taining an interim injunction from the judge of first instance, and the Court of Appeal now refused to discharge it, though cautiously avoiding a positive opinion on the question of law involved. It was argued in opposition, that separate use was intended by Courts of Equity, to preserve property for the benefit of the wife, but it was never intended to operate so as to interfere with the domestic relations between husband and wife; that any contract, therefore, that either directly or indirectly involves a future separation between husband and wife is void as being against public policy; and that this injunction would cause the marriage settlement in this case to have that effect, and should therefore not have been granted. Cotton, L.J., goes the nearest to expressing an opinion on the law of the case. At p. 351, he says: "Undoubtedly Courts of Equity have said that when property is settled to the separate use of a married women, she is as regards that property to be considered as if she were a *feme sole;* that is so, as regards protecting the property against the interference by the husband; if he wishes to deal with it as his property, and to deprive his wife of the property in it, then undoubtedly Courts of Equity will interfere, and it is their duty so to do. But where it is not interference with the property, assuming it is the property of the wife and that the husband has no right to interfere with it *quâ* property, it is a very different thing to say that she, a married women, can insist on a Court of Equity preventing her husband entering the house . . . My view is this, that the separate use was not created by a Court of Equity in any way to enable a wife to prevent the husband from exercising his rights and duties as an husband, except by preserving property for her. I concur in the view that this injunction ought not to be discharged, on this ground, that, looking at the circumstances of the case and at the facts which we have before us, and the affidavit of the husband, he cannot be considered as desiring to use or to enter this house as a husband, to enjoy the society of his wife, or to consort with her as his wife."

A. H. F. L.

SELECTIONS.

UPSTAIRS AND DOWNSTAIRS TENANTS.

"Birds in their little nests agree." So saith the poet. But men living in the same house do not always so. Some of the grievances suffered from the fellow-lodgers and landlords, and the remedies and attempted remedies therefor, are herein treated of.

Sometimes tenants object to noises made by other occupants of the same house, and ofttimes they have to object in vain, and can obtain no redress either against the landlord or their co-tenants. Where the rooms beneath the complainant's were used by another tenant for purposes of a highly immoral nature, and the frequenters thereof by singing immodest songs attracted a noisy crowd of boys in the street, the court held that this did not amount to an eviction of the complainant, and that he could not insist upon a diminution of the rent because the landlord did not put out the naughty tenant below according to promise. *De Witt* v. *Pierson*, 112 Mass. 8.

Where one tenant has obtained from the landlord the privilege of erecting a sign in front of the house, other tenants in the same building cannot interfere with number one's privileges. And as according to Mr. Justice Fry, of the Chancery Division of the English High Court of Justice, it is in the nature of sign-boards to creak, the court will not interfere when the creaking is not in excess of what is naturally incidental to a sign-board. *Snyder* v. *Hersberg*, 11 Phila (Pa.) 200; *Moody* v. *Streggles*, L.R., 12 Ch. Div. 261. It might have been useful if the learned judge had intimated how often a sign-board might, should or would creak in a day, and in how many notes; the key doubtless would be both high and flat.

About the year 1870 poor Higinson had an infant child—some fifteen months old—which was teething, and consequently sick and fretful. H. also

had a parlour baby carriage in which, to quiet his darling, he was in the habit of trundling his child up and down his carpeted rooms at divers times by day and by night. An unfortunate Mr. Pool had rooms below those in which the baby ruled supreme, and he objected to lying quietly and impassively beneath the juggernaut wheels of the youthful Higinson, so applying to the court he asked that the noise might be stopped. Pool failed to show that the noise was made unnecessarily, or that it was made for any purpose other than soothing the child's sufferings; so the injunction to stop the noise was refused. The court said that occupants of buildings, where there are other tenants, cannot restrain the others from any use of their own apartments, consistent with good neighbourship, and with a reasonable regard for the comfort of others. "If the rocking of a cradle, the wheeling of a carriage, the whirling of a sewing machine or the discord of ill-played music, disturb the inmates of an apartment house, no relief by injunction can be obtained, unless the proof be clear that the noise is unseasonable and made without due regard to the rights and comforts of other occupants." To warrant an interference on the part of the law the noise must produce actual physical discomfort to a person of ordinary sensibilities and must have been unreasonably made. 18 Alb. L. J. 82; 8 Daly (N.Y.) 113.

Lord Justice Mellish also thought that the noise of neighbour's children in their nursery, as well as the noise of a neighbour's piano, are such noises as men must reasonably expect, and must to a considerable extent put up with. *Ball* v. *Ray*, L. R., 8 Ch. 471. Probably both Judge Van Hoeson (who decided against poor Pool), and his lordship were both family men. Suffering humanity however will rejoice that both admitted that there was a limit even to the noise that must be endured from children. *Modus in rebus*, as Lord Kenyon would say.

The law of gravitation, which started Newton thinking by hitting him on the nose with an apple, has frequently proved injurious to tenants occupying lower flats. The question has been frequently discussed whether the landlord, or some person or any person else, is liable for liquids percolating through from upper stories and falling upon, and so injuring the goods, wares or merchandise of sub-servient tenants.

Firstly, let us consider where the landlord can be held responsible because of the rain oozing through or other fluids dropping down. *Carstairs* v. *Taylor*, L. R., 6 Ex. 223, settles that the landlord is not responsible for the peccadilloes or gnawings of rats (if he does not know of their doings, at all events). Taylor rented to the plaintiff the ground floor of a warehouse in Liverpool for the purpose of storing rice. Nothing special was said as to repairs. Taylor occupied the upper floor. The water from the roof was collected in gutters which terminated in a wooden box, resting on the wall and partly projecting over it in the inside; thence the water was discharged by a pipe into the drain. The gutters and box were examined from time to time, and on the 28th of April, when looked at, were found secure, but between that date and the 22nd, a rat or rats wilfully and maliciously—if not feloniously, gnawed, nibbled, bit and ate a hole in that part of the box which projected on the inside of the wall. On the 22nd Jupiter Pluvius was active and a heavy storm occurred and the collected rainwater passed through the hole into the upper floor of the warehouse, and thence obeying the dictates of nature descended to the ground floor, injuring the plaintiff's rice. The Court of Exchequer held that Taylor was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. Kelly, C. B., remarked: "Clearly there is no duty on the occupier above, whether he be landlord or only occupier, to guard against an accident of this nature. It is absurd to suppose a duty on him to exclude the possibility of the entrance of rats from without." (*Ex pede Herculem:* verily the learned chief baron, showed the land of his origin in these last quoted words.) His brother Bramwell evidently thought that he knew the general tactics pursued by these rodents in entering warehouses; he remarked: "It is said that rats can be easily got rid of out of a warehouse, but assuming it to be so, it is no negligence not to take means to get rid of them till there is reason to suppose they are there; and it cannot be said that persons ought to anticipate that rats will enter through the roof by gnawing holes in the gutters."

In Maine it has been held that an action will lie at the suit of a tenant of a store in the lower storey of a building against a landlord, who has the care and control of the upper stories, for an injury to his goods caused by the rain descending through the roof down upon the store below, if the accident happens through the negligence of the landlord in the management of that part of the building under his control. *Toole* v. *Becket*, 67 Me. 544; citing *Priest* v. *Nichols*, 116 Mass. 401. And in New York it was decided that where a landlord, who himself occupied the upper flat, allowed liquids to leak through into his tenant's rooms, he was liable. *Stapenhurst* v. *Amer. Man. Co.*, 15 Abb. Pr. (N. S.) 355.

In Georgia the courts considered that the landlord was responsible to the tenant down below for damages arising from the overflow of a bath tub, *et cetera*, in an upper flat, even though the water-works were properly constructed and another tenant who had access to and had a right to use these modern conveniences was the one whose carelessness caused the injury. But the Court said that the decision would have been otherwise had the proprietor shown that the exclusive possession and user of the bath room had been in a negligent tenant. *Freidenburg* v. *Jones*, 63 Ga. 612; 66 id. 505.

But in Illinois it was decided that a landlord who had not expressly covenanted with his tenant to repair was not liable to pay the damages caused by water, either dirty or clean, coming upon the tenant from above through the carelessness of another tenant or otherwise. *Green* v. *Hague*, 10 Ill. App. 598; *Mendel* v. *Fink*, 8 id. 378. Nor must he pay if the water-pipe suffers a temporary obstruction, if he sends for the plumber as soon as he knows that his labours are required. The law is merciful and requires no man to keep a plumber always on his premises. *Green* v. *Hague*, *supra*. And so in New York: there one A. hired the basement and first floor (according to Cis-Atlantic notions) of a building for a bake shop. The owner entered into an agreement with some builders to make alterations in the upper stories; the work was negligently done and A.'s bake shop was injured by the dust and rain. The owner however was not to blame, and the careless acts of the contractors had been contrary to his wish and advice. The court, when asked to consider the case, gave it as their opinion that the landlord was not liable. *Morton* v. *Thurber*, 85 N. Y. 550.

Now as to the liability of other persons in this direction. It seems clear that if a housemaid, whose duty it is to keep in order an upper room and attend to the lavatory attached to it and wipe out the basin, uses the basin for her own purposes and omits to turn off the water so that it floods the room of another occupant below, then the master of the said domestic will be liable to the gentleman downstairs; and that although the master had expressly forbidden his maid using the basin, and had told her never to leave the tap open. This liability attaches to the master because the servant's acts would be incidental to her employment. Per Grove, J., *Stevens* v. *Woodward*, 6 Q. B. D. 318.

If, however, a law student should go into his master's private lavatory and leave the water-tap running, the solicitor would not be liable for the results. This was decided in the case lastly mentioned, which is a very interesting case and one that should be carefully studied by all law clerks. The plaintiff's were booksellers occupying the basement of a house, and the defendants, a firm of solicitors, who occupied the floor above. Water overflowing from the lavatory in the private room of one of the defendant's escaped through the floor to the basement, injuring the bookseller's stock-in-trade. The flooding was caused by a clerk of the solicitors, who, after Woodward had left for the day, had gone into the private room to use the water and left the tap open. The clerk had no right to use the basin, and no business to go into the room after W. had left, and orders to that effect had been given. The jury gave a verdict for £15. When the matter came before the court the learned counsel for the plaintiff expressed his views of the daily routine and general practice of law students; and on the other side what was the duty of such necessary members of society was proclaimed. Candy was for the booksellers; he said: "Here the clerk was in the office during working hours, and it was part of the routine of the day's work to wash his hands. It is the general practice of such clerks to wash their hands in the offices where they are employed. That he was forbidden to do so (go into the private room) is irrevelant. He was acting within the scope of his employment." *Venables* v. *Smith*, 2 Q. B. D. 279. On the other hand, Petheram, Q. C., Dewitt and G. G. Kennedy, remarked in support of the rule for a non-suit, that the principle is well stated in *Whatman* v. *Pearson*, L. R., 3 C. P. 422. Here the clerk was acting for himself, and on his own responsibility. His duty was clearly to keep in his own room and not to wash his hands in the room of his master. Could it have been said that the master would have been liable if the clerk had washed his hands in some tavern near by during office hours, and left the tap there running? The court disposed of the matter by holding that the solicitors were not liable, for that the act of the clerk was not incidental to his employment, and that he was not acting within the scope of his employment. Grove, J., thought he would have come to the same conclusion as that he had arrived at, if there had been no express prohibition in the case, and it had merely been shown that the clerks had a room of their own and a lavatory where they could wash their hands, "then what possible part of the clerk's employment (he continued) could it be for him to go into his master's room to use his master's lavatory, and not only the water, but probably his soap and towels solely for his, the clerk's own purpose? What is there in this in any way incident to his employment as a clerk? I see nothing." His lordship said it was a very nice question.

We wonder what would have been the decision if the clerk had had no basin of his own and been about to go into the Chancery Division of the High Court of Justice on office business, and his fingers were soiled with rummaging among dead suits. Would it not then have been within the scope of his employment and duty to wash his hands in his master's basin, using his master's soap and towels, for verily equity requireth a man to come into court with clean hands.

One Ross (and his partners) occupied a ground floor of a building for business premises, and Fedden the second floor of the same house, each as tenants from year to year. On Fedden's flat there was that necessity of modern civilization invented by Sir John Harrington, and referred to by him in his celebrated tract called "The Metamorphoses of Ajax," and he and his had the exclusive use of it and none others had access thereto. After all parties had closed up on a Saturday evening, water percolated from this private room through the first floor to Ross' premises, causing damage to his stock-in-trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order and failed to close, and the waste pipe being choked with paper. The defects could not have been detected without examination; Fedden did not know of them and had been guilty of no negligence. The matter came before the judges of the Court of Queen's Bench, and they held that Fedden was not liable for the damage as there was no obligation on him to keep the water at his peril. *Ross* v. *Fedden*, L. R., 7 Q. B. 661.

To pass from water to fire. Suppose an upstairs tenant when he enters into possession finds a stove-pipe hole in his floor, and a pipe passing up through it into the chimney in his room, and that it is the way provided by the landlord to enable the tenant below to get rid of the smoke from his fire, and it is necessary for the proper enjoyment by the man downstairs of his apartments; then the entrant if he makes no special contract does not become the absolute possessor of all the space comprised within the four walls of his holding, but only of that subject to the passage and use of the pipe; he takes his room with easement attached or user appurtenant, and if he sever, cut and damage the pipe, and render it unfit for use, so that the smoke from the room below, instead of passing through its proper cylinder into the chimney, escapes from the pipe and fills the room downstairs, the upstairs tenant is a wrong-doer and liable for damages. *Culverwell* v. *Lockington*, 24 C. P. (Ont.) 611.

We find it well established that a tenant on the second flat is entitled to the use of the stairs and passage-way and to the front door; he is not obliged to use either the fire escape or a parachute when he wishes to get in or out of his rooms. Nor is the landlord entitled to lock up at six o'clock, or any other unreasonable hour, or in fact any hour, and refuse to allow the tenant to have a key. This was so held in the case of some lawyers who had their offices on a second story; and the reason is that when a party rents to another premises, he impliedly grants all that is indispensable for their free use and full enjoyment. If the landlord thinks it necessary for any particular reason that the street door should be closed and locked at and between particular hours, he should be careful to insert such a stipulation in his lease or agreement. *Maclennan* v. *Royal Insurance Co.*, 39 U. C. R. 515.

Not only has a tenant of rooms on an upper floor of a house a right of ingress, egress and regress by the front door, but (unless otherwise agreed) he is entitled to use the knocker and to ring the bell attached to the door; and his visitors also have a right to notify people of their desire for admission in either way they choose, and may do so without any fear of an action of trespass being brought against them, no matter how humble their station, and although (as Lord Abinger remarked) at some houses servants ring the bell and persons of superior rank knock. And not only has such a tenant the right to use the stairs but also the bannisters thereof, and further, he is entitled to the benefit of the skylight to enable him to see his way up and down stairs. Lord Abinger decided this in 1835. A plaintiff declared to the effect that he was possessed of four rooms in a dwelling-house on Leicester street, Leicester square (*i.e.*, as the evidence showed, he had rented two rooms on the first floor and two on the second floor of the defendant's house), by reason whereof he ought to have for himself, his family, friends and acquaintances, free access into and out of the said rooms, up and down the stairs and staircase leading to the said rooms, and the benefit of a skylight which before then had lighted the said stairs and staircase, and of a W. C. situated on the first floor of the said dwelling-house, and of the knocker affixed to the street door of the said dwelling-house, and of a bell at the side of the said dwelling-house; yet that the defendant wrongfully bedaubed the bannisters of the staircase with filthy and adhesive matter (only tar, as the evidence showed), blocked up the skylight, removed the W. C., took the knocker from the street door and cut the wire from the bell, whereby the plaintiff suffered immensely. The learned chief baron was against the naughty defendant on all these points, and under his direction the jury awarded the plaintiff £50 damages. *Underwood* v. *Burrows*, 7 C. & P. 26.

The judge was of the opinion that if all these outrageous things had been done to drive the plaintiff away, the defendant might (in order to mitigate damages) have shown that the plaintiff and his family were bad lodgers and that he did these acts to get rid of them.

In a tenement house the landlord must keep the stairs in order. In a Scotch case a child fell through the railing on the staircase, where a bannister was wanting and was killed; the house was occupied by twelve different families, all of whom had access by this one common stair to the various landings on which were their respective apartments. The Court of Session held that it was the landlord's duty to keep the bannisters in repair, and that he could not escape responsibility for the consequences of their being left in a dangerous condition. The owner had to pay damages to the child's father; here however the factor in charge of the property had been warned of the state of the railing. *McMartin* v. *Hannay*, 10 Ct. of Sess. Cas. (3d ser.) 411.

Hedges was the landlord of a house in Red Lion street, Wapping, which he let out to several tenants, to each of whom he said (in effect if not in words): I let you certain rooms, and if you like to dry your linen on the roof you may do so; the roof was flat and covered with lead, having a wooden railing on the outer edge, and one got to it through a low door at the stair-head, about two feet from the rail. Ivay, one of the tenants, went on the roof to remove some linen, he slipped against the railing, and it being out of repair (to the landlord's knowledge) gave way and let him down to the courtyard below, whereby he was injured. Lord Coleridge agreed with the County Court Judge, and was unable to see any liability on the part of the defendant—the landlord; he said that under the contract the tenant took the place as he found it, if he chose to use the roof he did so *cum onere*. If there had be an absolute contract for the use of the roof in a particular way, it might have been that Hedges would have been liable for not keeping it in a safe condition. *Ivay* v. *Hedges*, L. R., 9 Q. B. Div. 80.

The plaintiff's counsel did not quote the law of Moses on this point, Deu. 22, 8, but then on many points the law of Moses does not now hold good in England.—*Albany Law Journal.*

Applications to the Chancery Division for the opinion of the Court under *The Vendors' and Purchasers' Act*, are hereafter to be made on petition, which is to be set down for hearing in Court on a Wednesday; the Judges of that Division having announced that they will not hereafter hear such applications in Chambers.

REPORTS.

ONTARIO.

MUNICIPAL CASES.

TENTH DIVISION COURT—COUNTY OF YORK.

CORPORATION OF BROCKTON v. DENISON.

Arbitrator's fees—No action lies where no award.

Where a corporation brought an action for arrears of taxes, and defendant claimed a set-off of arbitrator's fees for acting as third arbitrator in an arbitration, under a by-law passed by plaintiffs, *Held*, that as no award had been made no action would lie, either at Common Law or under our statute (R. S. O. cap. 64, sec. 12), to recover arbitrator's fees.

[Toronto, Feb. 1, 1884.

The facts of the case sufficiently appear in the judgment of

MCDOUGALL, J. J.: This is an action brought by the corporation of the village of Brockton against the defendant to recover the amount of certain arrears of taxes due by him to the municipality. The amount claimed is $96, but, upon the evidence, the plaintiffs admit that this sum should be reduced to $68; and the defendant does not seriously contest their right to recover the latter sum. The defendant, however says that he has a set-off, or counter claim, against the municipality for $54, being certain charges for arbitrator's fees, and contends that the plaintiffs' claim of $68 should be further reduced by deducting this amount from their claim. The defendants' alleged claim arises in this way. It appears that the municipality proposed opening a new street within their limits, and to that end passed a by-law, No. 39, on the 26th June, 1882. The by-law provided that the width of the proposed new street should be *sixty* feet instead of *sixty-six* feet, as required by section 545 of the Consolidated Municipal Act of 1883. This by-law the council of Brockton passed without first obtaining the permission of the County Council, as required by the Act whenever a local municipality desires to open a street of less width than sixty-six feet. The by-law was consequently bad. Acting, however, upon the assumption that the by-law was valid, the plaintiffs passed a second by-law, No. 42, on the 28th August, 1882, appointing an arbitrator on behalf of the municipality; and the principal property owner on the line of the proposed street, a Mr. Mallon, also appointed an arbitrator. These appointments were made under the provisions of

the Municipal Act, for the purpose of fixing the amount of compensation to be paid Mr. Mallon for the land required for the proposed new street The arbitrators so appointed met and duly appointed the defendant herein as the third arbitrator, pursuant to sec. 390 of Municipal Act. The three arbitrators met a number of times, but early in their proceedings doubts appear to have been cast upon the legality of the by-laws, under which they were acting, and they never actually took any evidence or made any award in the matter referred to them. It appears that counsel was consulted, and the arbitrators were told that they had no power to do anything under the by-law or under the submission made to them. The council of Brockton, it is sworn, (though not established by strictly legal evidence,) subsequently repealed by-law No. 39, which was the by-law opening the street, and steps are now being taken, it is alleged, to pass a valid by-law by petitioning the County Council for leave to open a *sixty* foot street as contemplated by the invalid by law. It is also proved that the plaintiffs have paid their own arbitrator his fees for his lost time and attendance in connection with the abortive reference. The defendant contends that the plaintiffs are liable to him also for his arbitration fees for like services in the same matter, as third arbitrator duly appointed, the failure of the proceedings being caused by their not complying with the plain statutory directions.

At Common Law an arbitrator had no right of action for his fees. His remuneration, it is said, like that of a physician or barrister, is to be left to the option of his employers, and could not be enforced by action (Russell on Awards, 2nd ed. 450). Where, however, there is an express promise to pay he may maintain an action, for the taking upon himself the burthen of the reference is quite a sufficient consideration (*Hoggins* v. *Good* 3 Q. B. 466). The only protection that an arbitrator would appear to have for his costs was his lien upon the award, and this was the only security upon which he could rely for the satisfaction of his claim; and it is well known that the practice is not to deliver up an award until payment of the arbitration charges.

Under our statute, however, in reference to the costs of arbitration (R. S. O. cap. 64), an arbitrator is given a right of action for his fees, but this is only under certain conditions, and upon his observing certain formalities. Section 12 of that Act is as follows: "In all cases where *an award has heretofore been or is hereafter made* the arbitrator making the same may maintain an action for his fees upon such award, *after the same have been taxed*, which taxation may be made at the instance of the arbitrator, upon notice to any party to the reference against whom he may afterwards bring such action; and in the absence of an express agreement in respect thereof the arbitrator may maintain such action after such taxation against all the parties to such reference jointly and severally."

Now, in this case, there are three or four insuperable difficulties in the way of the defendant succeeding upon his contention:

1st. The by-law under which he was to act was invalid, and all proceedings thereunder were therefore clearly irregular.

2nd. An award was never, in fact, made.

3rd. No express promise to pay these fees was alleged or proved; hence no action lies at Common Law.

4th. Even if there had been an award there has been no taxation of his fees, which is a condition precedent to his right to recover under our statute.

I must, in view of these facts, and for the foregoing reasons, disallow the defendant's set-off, and direct judgment to be entered in favour of the plaintiffs for the sum of $68 and costs.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

Quebec.]

ELECTION PETITION.

MAGNAN ET AL. v. DUGAS.

Election Petition — Bribery — Corrupt intent — Appeal on matters of fact.

Among other charges of bribery and treating which were decided on this appeal was the following:—

One Mireau, a blacksmith, who was a neighbour of the respondents, had, in his possession for two years several pieces of broken saws, which the respondent had left with him for the purpose of making scrapers out of them on shares. A few days prior to nomination the respondent went into Mireau's shop with a scraper he wanted to be sharpened, and told

him to keep the old pieces of saw he still might have. The scrapers were worth, in all, about two dollars ($2), and were of no use to the respondent. No other conversation took place afterwards between the parties. The Judge who tried the case found that there was no intention on the part of the respondent to corrupt Mireau.

Held, that the Supreme Court on Appeal will not reverse upon mere matters of fact the judgment of the judge who tried the case, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that his judgment is not only wrong, but erroneous; that the evidence in this case in support of the charge of bribing Mireau as well as of the other charges of bribery and treating was not such as would justify an Appellate Court in drawing the inference that the respondent intended to corrupt the voters.

Pagnuelo and *St. Jean*, for appellants.

Pelletier and *Marlet*, for respondent.

Nova Scotia.]

WOOD v. ESSON.

Obstruction in navigable waters below low water mark—Nuisance—Trespass—Pleadings.

In an action in tort brought by E. et al. against W. for having pulled up piles in the harbour of Halifax below low water mark, driven in by them as supports to an extension of their wharf. W. pleaded *inter alia* that "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had the right of having free and uninterrupted access from and to Halifax harbour, to and from the south side of said wharf with steamers etc.; and because certain piles and timbers placed by plaintiff's in said waters interfered with his rights, he (defendant) removed the same." At the trial there was evidence that the erections which E. et al. were erecting for the extension of their wharf did obstruct access by steamers and other vessels to W.'s wharf.

Held, on appeal (reversing the judgment of the Supreme Court of Nova Scotia) that, as the Crown could not, without legislative sanction, grant to E. et al. the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and that W. had shewn special injury, he was justified in removing the piles, which were the trespasses complained of.

W. Graham, Q.C., for respondent.

R. Sedgewick, Q.C., for appellant.

Nova Scotia.]

ATTORNEY-GENERAL v. FLINT.

30 Vict. ch. 8, sec. 156—Intra vires—Vice-Admiralty Court—Jurisdiction of.

By the 156 section of the Inland Revenue Act, 31 Vict. ch. 8, the Dominion Parliament conferred jurisdiction to entertain suits and prosecutions for the recovery of penalties and forfeitures imposed by the section on the Superior Courts of law of the provinces and the Court of Vice-Admiralty.

Held, that sec. 156, 31 Vict. ch. 8, is *intra vires* of the Dominion Parliament; that although the Vice-Admiralty Court of the Province of Nova Scotia is not a Provincial or Dominion Court, the jurisdiction confered upon it by the section 156, may be lawfully assumed by the Vice-Admiralty Court.

Valin v. *Langlois*, 3 S. C. R. I. followed.

R. Sedgewick, Q.C. and *Burbridge*, for appellant.

No one appeared for respondent.

CHANCERY DIVISION.

Proudfoot, J.] [Jan. 9.

MACDONALD v. MACLENNAN.

Will—Construction—Trust for maintenance and education—Duration thereof—"Steadiness."

A testator by his will, dated May 31st, 1872, after several specific bequests, gave the residue of his real and personal estate to his trustees upon trust to pay to each of his daughters, Josephine and Louise, for life, the annual allowance of $800 each, which they were then

receiving; and to pay for the education, maintenance, and ordinary requirements of his son George, and then proceeded: "And I direct my trustees in their discretion, if they find my son George deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate, and if my said trustees are satisfied as to his steadiness they are to treat my said son George in respect to the said allowance in the same manner as my said daughters, Josephine and Louise. . . . It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct."

Held, that George was only entitled to his maintenance and education during minority, for there was nothing in the will to indicate an intention to extend the trust for maintenance and education beyond that period.

Held, also, that George was not entitled to any annual allowance in addition to his maintenance and education during his minority, though the amount which might be paid him after attaining majority, as an annual allowance, was unlimited, resting on what the trustees in their discretion might deem warranted by the estate. For by treating George the same as Josephine and Louise the testator referred only to the mode of payment, and the power of disposing of the principal, not to the amount of the allowance.

It could scarcely be imagined that the testator conceived it probable or possible that the trustees could, upon inspection, satisfy themselves of the steadiness of a boy of twelve years old (George's age at the death of the testator). Time must elapse before such a conviction could be attained, before the character could be formed and a reasonable degree of certainty as to its stability reached, and it is not straining language to infer that this undefined time should cover the whole period of minority.

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

N. W. Hoyles, for the trustees.

C. Robinson, Q.C., and *Lefroy*, for the defendants, other than the trustees.

Ferguson, J.] [Jan. 28.

MCLACHLAN V. USBORNE—MCGEE V. USBORNE.

Will—Power to appoint new trustees—Payment to persons no longer trustees—Husbands as trustees—40 Vict. c. 8, s. 30—R. S. O. 107, s. 30.

A testator, by will dated June 27th, 1871, devised certain properties to H. F. M., J. H. M., and D. M., their heirs and assigns, as tenants in common, and charged the same with $100,000 (which he designated the trust premises), to be paid by them to C. M. and to his daughters, H. R., and J. M., share and share alike, through their mother, M. M., his wife, as trustee, as therein mentioned; and after sundry provisions, he directed that at the death of his wife, M. M., the said "trust premises" should be held by the said H. F. M., J. H. M., and D. M. and their survivors on the trusts of his will, "unless my said wife shall have previously appointed, by will or otherwise, any other person or persons to be a trustee in her place, which I hereby authorize and give her power to do."

To secure the amount payable to M. M. as trustee, as aforesaid, the plaintiff, who then represented the whole of the devised estate, gave a mortgage, dated Oct. 6th, 1877, and also, at the same time, secured to her a certain mortgage made by one McG.

On Nov. 5th, 1873, M. M., by indenture reciting the will, professed to nominate and appoint L. R. and J. U. to be trustees in her place under the will, and granted them the trust moneys and property.

Afterwards by deed poll of Oct. 6th, 1877, M. M. again appointed L. R. and J. U. to be trustees in her place, and assigned them the mortgage of that date given to her by the plaintiff.

By two payments, one on Oct. 6th, 1877, and one on May 25th, 1881, $66,666 was paid to M. M. by the plaintiffs, they contending she was trustee under the will, notwithstanding any alleged appointment by her of L. R. and J. U. M. M. paid over to L. R. and J. U. the amount of the first of these payments, but not of the second.

The plaintiffs now claimed that they had discharged the whole of the mortgage money due under their mortgage to M. M. of Oct. 6th,

1877, and claimed a discharge thereof from J. U. and L. R.

Held, that the power given by the will to M. M. to appoint a trustee in her place did not authorize her to appoint in her life time, and only authorized her to appoint "by will or otherwise" a trustee to be such after her death, and neither the appointment of Nov. 5th, 1873, nor that of Oct. 6th, 1877, was authorized by the will.

Held, also, that R. S. O. c. 107, s. 30 could not be invoked to authorize either appointment, for this enactment did not come into force till Dec. 31st, 1877, subsequently to the transactions in question.

Held, however, that under the provisions of 40 Vict. c. 8, s. 30, assented to on March 2nd, 1877, the appointment of Oct. 6th, 1877 was a good and valid appointment.

It is not correct to say that 40 Vict. c. 8, s. 30 has no application in the case of a trustee appointed before the passing of the Act who desires to be discharged from his trust. It has such application.

Moreover, the fact that the new trustees so appointed as aforesaid were the husbands of the *cestui que trustent*, whereas the testator obviously intended that the legacies given to his daughters should be free from the control of any present or future husband, did not make the appointment bad, although it might be that if the court were appointing trustees of the fund, the husbands of the *cestui que trustent* would not be appointed.

The statute is very broad in its language, and a trustee who has from the beginning been a sole trustee has under the Act the same position and power as a last retiring trustee, or a sole surviving trustee.

Semble, that 40 Vict. c. 8, s. 30 is prospective and not retrospective in this sense, that it would not make valid the appointment of trustees made prior to its passing without authority.

J. Bethune, Q.C., *W. Cassels*, Q.C., and *Walker*, for the plaintiffs.

Gormully, for the defendants.

COMMON PLEAS DIVISION.

SUTHERLAND v. PATTERSON.

Guarantee—Promissory Note.

The defendant wrote to the plaintiff, and, after referring to J. S., the person whom he desired to assist, said: "he informs me how that I could help him by pledging myself to you that you might give him a letter of credit on Montreal; and I now say if you will assist him in that way to $7,000 or $8,000, that I will become responsible to you for the like amount in any manner you may wish, as I am fully satisfied that John will protect and take care of any one who would be generous enough to assist him."

Held, not a continuing guarantee.

An instrument in the following form was signed by the defendant:—

"Three years after date I promise to pay to the order of J. S., $5,000 at the office of Mr. A. S., Canifton, value received. This note is given as collateral security for a guarantee of $5,000 given to J. S. by A. S."

Held, not a negotiable promissory note.

Bethune, Q.C., for the plaintiff.

Northrup (of Belleville), for the defendant.

BROOKE v. MCLEAN.

Wall—Erection on plaintiff's land—Damages—Trustee.

The plaintiff was the surviving trustee under the will of one J. B., of certain land, on which was erected a two-storey brick house, the westerly wall of which formed the boundary of defendant's land. L., who owned the land immediately adjoining plaintiff's land on the west, leased the same to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall; inserting joists therein, and building on the said wall so as to raise it two stories higher, thereby weakening plaintiff's wall. F. mortgaged to a building society, who, in default, sold to the defendant.

Held, that the plaintiff under O. J. Act, Rule 95, was entitled to maintain an action as representing the estate without making the *cestui qui trust* parties; and that he was entitled under the circumstances to a decree that the defen-

dant should desist from further using in any way whatever the said wall built on the top of the plaintiffs said wall, or the ends of the joists which he had put in the plaintiff's wall.

Held also, that the plaintiff was entitled to recover as damages the expense of removing the said wall so erected on his wall, which were assessed at $105, and the damages occasioned by his wall being weakened which were assess at $10, making in all $115; but that the plaintiff could not recover damages for the loss of a sale of the property by reason of erection, etc.

J. B. Clarke, for the plaintiff.

W. Cassels, Q.C. and *A. C. Galt*, for the defendant.

REGINA v. MATHESON.

Conviction—Playing at game of faro—Recovery of penalty by action—12 Geo. II. ch. 28; 27 Geo. III. ch. 1.

The defendant was convicted by the Police Magistrate of the City of Toronto, for playing at a game of cards called faro, contrary to the statute, 12 Geo. II. ch. 28, and fined £50 stg. or ten days imprisonment.

Held, that under the subsequent Act, 27 Geo. III. ch. 1, prosecutions before justices of the peace were put an end to, and in lieu thereof the penalty was to be recovered by an action of debt, etc.

The conviction was therefore quashed.

Quære, whether the defendant could not have been convicted under the provisions against gambling in the Municipal Act, 46 Vict. ch. 18, sec. 490, sub-sec. 33, and the by-law in force in municipality.

Fenton, for the crown.

McMichael, Q.C. and *Bigelow*, for the defendant.

BRADLEY v. MACINTOSH.

Libel—Production of documents relating to public service—New trial.

In an action for libel and slander, the plaintiff's counsel insisted on the production of certain anonymous letters written by the defendant to the Ontario Government, relating to the licensing of a public-house. The Head of the proposed department declined to produce the letters on the ground that their production would be injurious to the public service, and they were therefore privileged. The learned judge at the trial, as plaintiff's counsel insisted on the production, ordered them to be produced, but stated that if the court should hold that the production was not compellable, any verdict recovered would go for nothing. The letters were then produced and read. The learned judge told the jury that the letters were not evidence of libel, because they were priviledged, but that they would be looked upon as evidence of malice on the slander count.

Held, that the question whether the production of documents is injurious to the public service, must be determined not by the judge, but by the head of the department having the custody of the papers, and if he is in attendance, and states as his opinion that the production of the documents would be injurious to the public service, the judge ought not to compel the production of them.

Under the circumstances the court set aside the verdict and granted a new trial.

J. K. Kerr, Q.C., for the plaintiff.

Delamere, for the defendant.

DONOVAN v. HERBERT.

Trespass—Possession.

The actual occupation of land by a person who has the legal title is not necessary to enable him to maintain trespass. It is sufficient if he enter upon the land so as to put himself in legal possession of it.

The plaintiff, the owner of certain land entered thereon and put up a board which stated that the land was for sale.

Held, that this was an act, which showed the intent of the plaintiff to be, to claim the land as owner, and constituted a sufficient entry to vest the legal possession in him, to enable him to maintain trespass.

The defendant in this action claimed that he acquired a title by possession.

Held, that the evidence, set out in the case, failed to establish such possession.

McMichael, Q.C., for the plaintiff.

McCarthy, Q.C., and *O'Donohoe*, Q.C., for the defendant.

PAGE v. PROCTOR.

Contract—Sale of rails—"Ordinary sections"—Right of selection—Parol evidence—admissibility of—Usage of trade.

The plaintiffs in the beginning of January, 1880, had purchased through C. & G., of Montreal, a quantity of rails, and, requiring 2,000 tons more, negotiations were entered into between H., plaintiff's agent, C. & G., and defendant, which resulted in an advice note being signed on 14th January by C. & G., addressed to defendant advising him that they had sold to plaintiffs on defendants' account 2,000 tons of rails (56 lbs.), etc., at £8 18*s.* 9*d.* sterling per ton, payment to be made in London against documents. Credit to be then opened with approved bankers in favour of the defendant's agent. The defendant who was then in Montreal signed a sale-note on similar terms to above. The sale was immediately communicated to plaintiffs, who signed a confirmatory note, adding the words that the makers were to be either Ebbville or Moss Bay; and wrote across the face that the rails were to be 56 lbs., ordinary section and specification. This confirmatory note was not communicated to defendants until after this action was brought. The credit was opened by plaintiffs in accordance with the contract. The plaintiffs and defendant were dealers in, and not manufacturers of, rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbville for the manufacture of rails of a section known as "Hamilton and North-Western," and which came within the terms "ordinary sections," which embraced a number of different kind of sections, and these were the rails which the defendant intended delivering to plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary sections," and when they discovered that the defendant's rails were Hamilton and North-Western they endeavoured to get defendant to change the section, which defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and to be paid for under the credit, and it was not until after that that they notified defendant of their refusal to accept, contending that under the contract they had the right to select the rails.

Held, that even if the terms of the confirmatory note were embraced in the contract, the contract did not *per se* give the plaintiffs the right of selection; and that parol evidence was not admissible to shew that by usage of trade they had such right; but, even if admissible, the evidence failed to establish such right, and especially so as the parties were dealers and not manufacturers, and in view of plaintiff's conduct. The contract was therefore performed by the section delivered.

Hector Cameron, Q.C., and *Bethune*, Q.C., for the plaintiffs.

Robinson, Q.C., and *McCarthy*, Q.C., for the defendant.

NELLES v. MULLBY.

Assignment for creditors—Partnership and separate creditors—Execution of assignment—Omission of goods therefrom—Preference.

Under an assignment in trust for creditors the assignee now decided to distribute the proceeds of the property assigned, "rateably and proportionably among all the creditors of the assignees, in payment and satisfaction, as far as possible, of their just debts, having due regard to the rights of partnership creditors and private creditors, and distributing the same as between them according to law."

Held, assignment valid: that it provided for the payment of both partnership and separate creditors out of the respective estates appointed for that purpose according to law, and what that means is well known in insolvency proceedings: in administration of estates in the public courts: in the execution of writs by the sheriff; and in every days' proceedings under trust and composition deeds.

The assignment was executed by one of the partners for a co-partner under verbal instructions from the co-partner before leaving for England to sign for him if an assignment became necessary; and also under a cablegram received from him while in England to same intent.

Held, that though authority to execute a deed must be by deed, this would not apply to the goods in the assignee's store of which

the assignee took actual possession, as without it verbal authority would be insufficient; nor for like reason would goods warehoused for, and held by a bank, where the assignee notified the bank, of the assignment, and they agreed to hold the surplus for the assignee after payment of the bank's claim.

Held also, that the omission of some part of the assignee's estate from the assignment does not render it invalid.

Held also, the postponing the assignment until certain favoured creditors had obtained judgment deed execution did not invalidate the assignment.

Gibbons, for the plaintiff.

Street, Q.C., for the defendant.

PRACTICE.

Ferguson, J.] [Sept. 2, 1883.

EDWARDS v. PEARSON.

Costs—Costs in the cause—Taxing officer—Rule 442 O. J. A.

When costs are made costs in the cause by an order of the Master in Chambers, a taxing officer cannot disallow them under the powers vested in him by Rule 442, O. J. A.

Dominion, etc., Co. v. *Stinson*, 9 P. R. 177 distinguished.

Black, for the plaintiff.

Hoyles, contra.

CORRESPONDENCE.

CLERK'S FEES ON TRANSMISSION OF PAPERS TO THE JUDGE.

To the Editor of the LAW JOURNAL.

SIR,—Sometime since I was speaking to you about a question of clerks charging fee of twenty-cents, under item 23 of the tariff of 1880, as established by the County Court Judges as the fees to be charged by clerks, and you kindly said you would insert any remarks I might wish to make in one of your issues.

The case in which I wish you to give an opinion, is one of this kind: You are aware that rule 161 of O'Brien's Division Court Manual of 1879, page 323, reads thus: "When upon the application of any plaintiff having an unsatisfied judgment in his favour, a transcript of the entry of such judgment under section 139, or a transcript of the judgment under section 142 of the Act, is issued from the Court in which the judgment has been recovered, an entry thereof shall be made by the clerk in the Procedure Book, and no further proceedings shall be had in the said Court upon the said judgment, without an order from the judge."

Under this rule an application was made to a judge *ex parte*, on affidavit for leave to proceed in the home county, in a suit where the transcript had been sent to Hamilton for enforcement, and had been returned to the home Court, say at Toronto, *nulla bona*, the defendant having moved back to the original county where he was served. The plaintiff, wishing to proceed, made the necessary affidavit that the judgment was unpaid, and the defendant again in the county where he was originally served, and got the judge's order in Chambers endorsed on said special affidavit. The plaintiff took the affidavit to the clerk's office, and asked him to enter the judge's order as endorsed upon the affidavit, allowing further proceedings to be taken in the original Court, and tendered the clerk fifteen cents for the entry of the order, but the clerk demanded twenty cents for the transmission of the affidavit to the judge independant of the said fifteen cents.

The clerk would not enter the order unless he was paid this extra twenty cents, and the plaintiff paid the twenty cents, under protest, to the clerk.

Now you will see that the affidavit referred to was never in the clerks hands, nor transmited by him in any way, nor was the judge's order obtained through his procurement. He did not earn the twenty cents by any act which he had done; the only act done on his part being the entry of the judge's order, endorsed on said affidavit. The question involved is: Has a clerk the right to charge under said item 23 of the tariff of 1880, twenty cents for work which in fact he never did, and is a plaintiff in the Division Court obliged to take every affidavit in which he makes a chamber application, to the clerks office first, and have him transmit the affidavit to the judge for his order, and pay him twenty cents for this particular transmission?

You will easily see that there are many chamber applications which may be made to the judge on the spur of the moment, as for instance, for a garnishee order (which was in fact the cause of the application in this particular case), or in a case of an application for an order to replevy goods where there is no danger of losing them, or in the case of an application for an order for substitutional service. Is a plaintiff in such cases obliged to leave

his papers with the clerk to transmit to the judge? or if not left with the clerk to transmit, has the clerk a right to charge twenty cents for work which he really never did, and which of course must come out of the defendant's pocket if he chooses to do so?

Your opinion in the LAW JOURNAL is respectfully requested concerning this matter, as it is one of public importance, and seriously affects defendants, and would put plaintiffs or attornies acting for them to a very great inconvenience, and often to the danger of loss.

You will see that item 23 refers principally to the transmission of transcripts, and would cover cases like applications for a new trial where papers are required to be left with the clerk.

CHARLES DURAND,

Toronto, Feb'y 18th, 1884.

CIRCUITS.

SPRING CIRCUITS.

EASTERN CIRCUIT.

The Hon. Mr. Justice Rose.

PEMBROKE	Tuesday	11th March.
PERTH	Tuesday	18th March.
CORNWALL	Tuesday	25th March.
OTTAWA	Tuesday	1st April.
L'ORIGNAL	Tuesday	22nd April.

MIDLAND CIRCUIT.

The Hon. Mr. Justice Patterson.

KINGSTON	Monday	31st March.
BROCKVILLE	Monday	7th April.
NAPANEE	Monday	14th April.
BELLEVILLE	Monday	21st April.
PICTON	Monday	5th May.

VICTORIA CIRCUIT.

The Hon. Mr. Justice Cameron.

BRAMPTON	Monday	10th March.
WHITBY	Monday	17th March.
PETERBOROUGH	Monday	24th March.
LINDSAY	Monday	31st March.
COBOURG	Thursday	10th April.

BROCK CIRCUIT.

The Hon. The Chief Justice of the Common Pleas Division.

ORANGEVILLE	Tuesday	11th March.
WOODSTOCK	Tuesday	18th March.
STRATFORD	Tuesday	25th March.
GODERICH	Tuesday	1st April.
WALKERTON	Tuesday	8th April.
OWEN SOUND	Tuesday	15th April.

NIAGARA CIRCUIT.

The Hon. Mr. Justice Osler.

MILTON	Monday	31st March.
CAYUGA	Monday	7th April.
WELLAND	Monday	14th April.
ST. CATHARINES	Monday	21st April.
HAMILTON	Monday	28th April.

WATERLOO CIRCUIT.

The Hon. Mr. Justice Armour.

BARRIE	Tuesday	11th March.
GUELPH	Tuesday	18th March.
BERLIN	Tuesday	25th March.
BRANTFORD	Wednesday	2nd April.
SIMCOE	Monday	7th April.

WESTERN CIRCUIT.

The Hon. Mr. Justice Burton.

ST. THOMAS	Monday	31st March.
SARNIA	Tuesday	8th April.
CHATHAM	Monday	14th April.
SANDWICH	Tuesday	22nd April.
LONDON	Thursday	1st May.

HOME CIRCUIT.

The Hon. The Chief Justice of the Queen's Bench Division.

1. CIVIL COURT	Tuesday	18th March.
2. CRIMINAL COURT.	Tuesday	22nd April.

CHANCERY SPRING CIRCUITS.

TORONTO.

The Hon. Mr. Justice Proudfoot.

TORONTO	Thursday	24th April.

WESTERN CIRCUIT.

The Hon. The Chancellor.

STRATFORD	Monday	17th March.
GODERICH	Thursday	20th March.
WOODSTOCK	Thursday	17th April.
LONDON	Tuesday	22nd April.
SARNIA	Tuesday	20th May.
SANDWICH	Friday	23rd May.
CHATHAM	Wednesday	28th June.
WALKERTON	Wednesday	4th June.

HOME CIRCUIT.

The Hon. Mr. Justice Proudfoot.

BRANTFORD	Monday	10th March.
SIMCOE	Friday	14th March.
ST. CATHARINES	Wednesday	19th March.
WHITBY	Monday	24th March.
BARRIE	Thursday	27th March.
OWEN SOUND	Wednesday	2nd April.
GUELPH	Monday	7th April.
HAMILTON	Monday	14th April.

EASTERN CIRCUIT.

The Hon. Mr. Justice Ferguson.

BELLEVILLE	Wednesday	26th March.
COBOURG	Thursday	3rd April.
PETERBOROUGH	Tuesday	8th April.
LINDSAY	Monday	14th April.
OTTAWA	Tuesday	29th April.
CORNWALL	Monday	5th May.
BROCKVILLE	Thursday	8th May.
KINGSTON	Tuesday	13th May.

Law Society of Upper Canada.

OSGOODE HALL.

MICHAELMAS TERM, 47 Vict., 1883.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law, namely:—

Graduates—Thomas Francis Lyall, William George Hector McAllister, Charles Joseph McCabe, John Shaw Skinner, Walter Stephen Harrington, Francis Norman Raines.

Matriculants—Donald Reginald Anderson, Edward Peel McNeil, Charles Elliott, Isaac Benson Lucas, William Francis Bannerman, Frederick Bernard Featherstonhaugh, David Stevenson Wallbridge, Frederick Clarence Jarvis, Ira Standish, William Patrick McMahon.

Juniors—Ashman Bridgman, Hugh Crawford Rose, Colin McIntosh, Walter A. Thrasher, David Alexander Dunlop, Francis Brown Denton, Magloire Raoul Routhier, Heber Stuart Warren Livingston, John Alexander Chisholm, Paul Jarvis, Marcus Herbert Simpson, Thomas Scullard, John Harper.

The following gentlemen were called to the Bar, namely:—

George Kappele, honour man and gold medalist; Cornelius Arthur Masten, Robert Alexander Porteous, James Arthur Mulligan, John Soper McKay, William John Taylor, Thomas Chapple, Charles Macdonald, Rufus Adams Coleman, Chaucy Giles Jarvis, Fernando Elwood Titus, Archibald James Reid, Alexander Mackenzie, William Henry Barry, Edwin Bell, William John Wallace, John Johnstone Anderson Weir, James Garbutt, Ferguson James Dunbar.

BOOKS AND 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 Somervilles 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 Promisory 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 Gov-

ernment 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. I, containing the introductions and rights of Persons; Pollock on Contracts, Story's Equity Jusisprudence; 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.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions impowered 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:

Hiliary 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 Hiliary, 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 Thursday 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 year, 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