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DIARY FOR NOVEMBER.

1. Wed.. Second Intermediate Examination. All Saints Day.
2. Thus.. First Intermediate Examination.
3. Fri.... First Intermediate Examination. Draper, C. J., died 1877.
5. Sun... *22nd Sunday after Trinity.* Sir J. Colborne, Lieutenant Governor U.C., 1838.
7. Tue... Primary Examination.
8. Wed.. Primary Examination.
9. Thrs.. Prince of Wales born, 1841.
12. Sun... *23rd Sunday after Trinity.*
14. Tue... Court of Appeal sittings begin.

TORONTO, NOV. 1, 1882.

WE publish in the Law Student's Department the dates of the forthcoming Michaelmas Term Examinations.

THE latest addition to Osgoode Hall Library is a new edition of Wilson's Judicature Act, which will be very welcome. It brings the notes of cases up to June last.

MR. JOHN PEARSON, Q. C., one of the leaders in Mr. Justice Fry's Court, has been appointed to the vacant Judgeship in the Chancery Division of the High Court of Justice in England, caused by the recent resignation of Vice-Chancellor Hall. Mr. Pearson, who was educated at Caius College, Cambridge, was called to the bar at Lincoln's Inn in 1866. The new judge will be liable to go circuit.

AN advertisement of the Law Society recently published in the *Globe* and *Mail*, announces that applications will be received by the Secretary until Wednesday, Nov. 15th next from members of the Bar desirous of being appointed to the office of Practice and Chamber Reporter. A warning is added in accordance with the now habitual and just practice of Convocation, that no application is to be made to any Bencher on the subject.

SUBROGATION OF INSURANCE COMPANIES TO THE RIGHTS OF MORTGAGEES.

HOWES V. THE DOMINION FIRE INSURANCE CO.
KLEIN V. THE UNION FIRE INSURANCE CO.

It is, apparently, a common practice both in this country and the United States, for loan companies to enter into arrangements with insurance companies of the following nature. The loan company undertakes, so far as it is in its power, to cause properties mortgaged to it to be insured in the insurance company under the covenant to insure as collateral security, commonly contained in mortgages. The insurance company in return for this agrees to grant the loan company what are called "unconditional" policies, and to carry this out, a "subrogation" or "unconditional" clause is included in the policies taken out by or through the instrumentality of the loan companies. Such subrogation clauses are worded in some such way as follows:—"It is hereby agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy. It is also agreed that whenever the company shall pay to the mortgagee any sum for the loss under this policy, and shall claim that as to the mortgagor or owner, no liability therefore existed, it shall at once and to the

extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made under any and all securities made by such party for the payment of said debt; but such subrogation shall be in subordination to the claim of the said party for the balance of the debt so secured, or said company may, at its option, pay to the mortgagee the whole of the debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made, an assignment and transfer of said debt, with all securities held by said party for the payment thereof."

The right of the insurance companies to subrogation to the right of mortgagees both when there is and when there is not such a subrogation clause in the policies of insurance, has come before the courts in the United States in several cases and also before our own, though there appears to be little English authority forthcoming on the subject. The most recent instances in which the matter has come up in our own Courts are the cases of *Howes* v. *The Dominion Insurance Co.*, before Proudfoot. J., noted *supra*, p. 264; and *Klein* v. *The Union Insurance Co.*, before Ferguson, J., *supra*, p. 344, neither of which are yet reported in the Ontario Reports. It may be useful, in connection with these decisions, to state what appears to be the principles which govern the subject, referring to such Canadian and American cases as seem most clearly to illustrate them.

The fundamental principle in relation to the subrogation of insurance companies appears to be as follows:—(i) Where the insurance company stands really in the position of a surety by reason of the insurance being one merely of the interest of the mortgagee, there is always a right of subrogation in favour of the insurance company. Thus in *Excelsior Fire Insurarce Co.* v. *Royal Insurance Co.*, 55 N. Y. 343 (1873), it is laid down at p. 359:—"It is settled that when a mortgagee or one in a like position towards property, is insured thereon at his own expense, upon his own motion and for his sole benefit, and a loss happens to it, the insurer on making compensation, is entitled to an assignment of the rights of the insured. This is put upon the analogy of the situation of the insurer to that of a surety." So, too, the same principle is illustrated by *Foster* v. *Van Reed*, in Appeal, 70 N. Y. 19 (1877), a case specially referred to and discussed by Proudfoot, J., in *Howes* v. *Dominion Insurance Co.* See also, per Richards, C. J., in *Reesor* v. *Provincial Insurance Co.*, 33 U.C.R. 358; and also a number of American cases cited in an article in the American Law Register, Vol. 18, p. 737. (ii) But where the insurance company does not stand thus in the position merely of a surety, but rather in that of a principal debtor, the insurance being on the property, and so enuring to the benefit of the mortgagor, as well as of the mortgagee, there is no right of subrogation in favour of the insurance company, *unless a contract to that effect has been agreed to by the mortgagor himself.* Thus in *Waring* v. *Loder*, 53 N.Y. 581, and in *Ulster County Savings Institution* v. *Decker*, 18 S. C. N. Y. 515, the mortgagor had not consented to or ratified any such agreement, and, therefore, there was held to be no right of subrogation. For the general rule is quite clear that the assignee of a mortgagee takes it subject to all equities affecting it in the hands of the mortgagee: *McPherson* v. *Dougan*, 9 Gr. 258; *Elliott* v. *McConnell*,, 21 Gr. 276; *Pressey* v. *Trotter*, 26 Gr. 154; and it is manifest that as against the mortgagee, the mortgagor in the absence of special agreement, is entitled to have the amount paid by an insurance company to the mortgagee on a policy effected for his (the mortgagor s) benefit, credited to him on his mortgage: Wood on Insurance, Ed. 1878, sec. 471.

But in *Springfield Fire and Marine Insurance Co.* v. *Allen*, 18 S. C. N. Y. 389, and in *Klein The Union Insurance Co.. supra* p. 345, in which Ferguson, J., specially refers to

Springfield Fire and Marine Insurance Co. v. *Allen* as a parallel case, as, also, in *Springfield Fire and Marine Insurance Co.* v. *Brown*, 43 N. Y. 389, and it may be conjectured in *Westmacott* v. *Hanley*, 22 Gr. 352, the policy contained a subrogation or unconditional clause, such as is set out above, and it was held that the mortgagor being privy to this agreement as to subrogation, *and having done that which avoided the policy as regards himself*, the insurance company were, on paying the mortgagee his loss, entitled to be subrogated.

In *Howes* v. *The Dominion Insurance Co.*, however, the mortgagor had done nothing to avoid the policy, which was a general insurance of the property, and not merely an insurance of the mortgagee's interest; and, therefore, he was held entitled to be allowed credit on the mortgage in the hands of the insurance company for the amount paid by them to the mortgagees on the policy. For under the subrogation clause, the insurance company is only to be subrogated to the rights of the mortgagees as to payment made on the policy, when it can claim that as to the mortgagor no liability therefore existed; in other words, when the mortgagor has done something to avoid the policy, and the insurance company has paid the mortgagee merely because the policy is unconditional as regards him.

Lastly, seeing that so much depends, as regards subrogation, on whether the insurance is an insurance of the mortgagee's interest only, or of the property generally, and therefore for the ultimate benefit of the mortgagor also, it is interesting to see that in *Howes* v. *The Dominion Insurance Co.*, Proudfoot, J., observes, *supra* 264, that the unconditional clause itself affords some evidence that an interest in the mortgagor was recognised by the contracting parties, and that the insurance company were not merely insuring the debt due the mortgagees.

A. H. F. L.

RECENT ENGLISH DECISIONS.

STATUTE OF LIMITATIONS—FRAUD—JUDICATURE ACT.

Proceeding with the July numbers of 9 Q. B. D., the next case requiring notice is *Gibbs* v. *Guild*, p. 59, in which the decision of Field, J., in the Court below, noted *supra*, p. 145, is affirmed by the Court of Appeal. The action was for damages for fraudulent representations alleged to have been made by the defendant, whereby the plaintiff was induced to purchase certain worthless shares in a Company, and the point of law raised by the pleadings may be recalled by referring to p. 154 *supra*. Lord Coleridge, C.J., and Brett, L.J., now held that the decision of Field, J., was correct. Both Judges agreed that the cause was one which before the Judicature Act might have taken the form either of a common law action or of a proceeding in equity; and that, in the former case the Statute of Limitations would, so far as existing authorities were a guide, have been held a bar, but in the latter case, not; yet that since the Judicature Act they were bound to see what the Court of Equity would have done, and apply that relief, although the action had been carried on in a common law division. The judgments are of special interest by reason of the remarks they contain on (i.) the way Courts of Equity dealt with the Statute of Limitations; (ii.) the effect of the Judicature Act. As to (i.), Lord Coleridge repudiates the notion that Courts of Equity engrafted an exception upon the Statute of Limitations, in the sense that they altered the terms of the Statute. He says:—"I understand the Courts of Equity to deal with the Statute of Limitations, as they deal with every other legal right, whether existing by statute or common law, not by abrogating it, but by saying, on principles well understood in these Courts, that in some particular cases it is unjust that the party should be allowed to exercise those rights" Brett, L. J., appears to take the same view. He says: "In cases in which the only remedy was in the Court of Equity,

but where the transaction was such as was within the meaning of the Statute of Limitations, it is admitted, and cannot be denied, that the Courts of Equity, whether by analogy or whether they considered themselves bound by the Statute, . . did recognise the binding authority of the Statute of Limitations, and if there were nothing else but the cause of action, and the cause of action had arisen more than six years before the commencement of the suit, the Courts of Equity interpreted the Statute of Limitations precisely in the same way as Courts of Law did. But assuming that the Statute of Limitations would be binding, the Courts of Equity, on doctrines of their own, sometimes applied, if other circumstances arose, a particular kind of equity. . . They said, if the existence of the cause of action given by the defendant was fraudulently concealed by the defendant from the plaintiff until a period beyond six years, then they would not allow the defendant to prevent the plaintiff from supporting his right to his remedy on the ground that the Statute was a bar." And it is here that Holker, L. J., differs from his colleagues, and so arrives at a contrary conclusion on the whole case. He says: "I think the authorities show that, *wherever there was a proceeding in equity which came within the description of the proceeding mentioned in the Statute of Limitations*, there the Courts of Equity held themselves to be just as much bound by the strict language of the Statute as the Courts of Law were, for Acts of Parliament are omnipotent, and are not to be got rid of by declarations of Courts of Law or Equity. . . In the case of a proceeding *not within the Statute of Limitations*, where the question has arisen whether the Statute shall run from the perpetration of a fraud or from its discovery, the Courts of Equity have said the Statute shall run from the discovery. . . The present case is in effect *an action on the case* to recover back money obtained by fraud, and it is proposed to declare by a decision of a Court of Justice that the rule which the Statute of Limitations has established shall be done away with, and that where that Statute of Limitations says that the Statute shall begin to run from the arising of the cause of action, this Court is to declare that instead of that the Statute shall begin to run from the discovery of that fraud. I am, therefore, unable to concur with the other members of this Court that the judgment should be affirmed." The above seems to bring into a clear light the important point of law in which Holker, J. dissents from the other Judges, which is not obvious from a first reading of the case, and is in no way indicated in the head-note. As to (2), space only permits the remark that the ground is taken by Brett, L. J., and the same view seems implied in the other judgments, that the Judicature Act has not altered the rights and remedies of any person—and does not repeal or alter the effect of any Statute which was applicable before to a particular case."

LANDLORD AND TENANT—NEGLIGENCE.

In *Ivay* v. *Hedges*, p. 80, it appeared that the defendant, being owner of a certain house, let apartments in it to lodgers, and allowed them the privilege of using the roof, which was flat, for the purpose of drying their linen. The roof had a rail round the edge, which, as the landlord knew, was out of repair. The plaintiff, one of the lodgers, went on to the roof to remove some linen, slipped, and the rail breaking, fell through to the court-yard below, and was injured. The Divisional Court now held no liability rested on the landlord. Lord Coleridge, C. J., says: "If there had been an absolute contract for the user of this place in a particular way, it might be that the defendant would have been liable for not keeping it in a safe condition. But if the contract was, as we must take it to be—I let you certain rooms, and if you like to dry your linen on the leads you may do so; in that case the tenant takes the premises as he finds them. No case has been cited in the English Courts which has the least bearing on the matter."

Recent English Decisions.

BILL OF EXCHANGE—ILLEGAL CONSIDERATION—COMPOUNDING FELONY.

Of the next case, *Flower* v. *Sadler*, p. 83, it need only be said that it is on the same lines, and follows the principle adopted in *Ward* v. *Lloyd*, 7 Scott, N. R. 499, both cases enforcing the proposition that when there is a debt actually due, though incurred under circumstances which might subject the debtor to a criminal prosecution at the hands of his creditor, as *e.g.* in the case of a defaulting agent, the mere use of language by the creditor, threatening prosecution, is not alone sufficient to vitiate the security shortly afterwards given by the debtor to the creditor, on the ground of their constituting an illegal agreement compounding a felony, or on the ground that they were obtained by threats—and this though the creditor did as a matter of fact, after receiving them, abstain from prosecuting.

COSTS—INTERLOCUTORY PROCEEDINGS—STAY TILL PAYMENT.

In the next case, *Morton* v. *Palmer*, p. 89, it appeared that an action had been tried and resulted in a verdict for the plaintiff. The Divisional Court refused to grant a rule *nisi* for a new trial, but the Court of Appeal granted a rule absolute for a new trial, the costs of the first trial to abide the event, and the rule continued, "And it is further ordered that the plaintiff do pay to the defendant or his solicitor the costs of this appeal, and of the application to the Divisional Court to be taxed by the Master. The costs of the motions were taxed but not paid, and the defendant thereupon applied to a Master for *a stay of proceedings till the costs should be paid*, and the Master made the order, which was confirmed by a Judge at Chambers. The Divisional Court now held that the Master had no right to interpolate a condition which the Judges of the Court of Appeal did not impose. Cave, J., says:—"It was first contended that the defendant is entitled to such stay as a matter of right, and that we have no discretion to refuse it. I cannot accede to this argument . . . Mr. Harrison says that this right has been recognized and acted upon in the Court of Chancery. But on looking at the cases he was referred to, I cannot find that any such rule has ever been laid down or even suggested. It was next contended that, in the exercise of our discretion, we ought to stay proceedings until these costs have been paid." He then refers to cases shewing the former practice in Courts of Chancery and Common Law, and says: "The principle of the practice in each Court was the same, viz., that if a litigant had brought an action or made a motion against another and had failed he should not bring a fresh action or renew his motion until he had paid the costs of the previous proceeding. This practice, however, is no justification for our making such an order in this case. The plaintiff here is not seeking to try over again something in which he has failed before. . . I am of opinion that there is no rule of practice which could justify us in doing what the Court of Appeal has not done, and making his right to go to a second trial conditional on his paying those costs."

Passing by *The Queen* v. *Ganz*, p. 93, which is an interesting case relating to the proper construction of the extradition treaty between the United Kingdom and the Netherlands, the next case arresting attention is *Pulling* v. *Great Eastern Railway Co.*, p. 110.

DAMAGE OF INTESTATE'S ESTATE FROM INJURY TO HIS PERSON.

Here an administrator sued a railway company for damages on the ground that his intestate was, through their negligence, run over by an engine, whereby he incurred medical expenses and loss of wages, whereby his personal estate was dimished in value. A demurrer to the statement of claim was now upheld, Denman, J., saying, with the concurrence of Pollock, B.: "I do not think we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim, "*actio personalis moritur cum persona.*" To a certain extent

that doctrine has been justified. . . But none of the authorities go so far as to say that, when the cause of action is in substance an injury to the *person*, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. . . There is no decision which supports the proposition that, because in consequence of an injury to his son the person injured is put to expense, the case is brought within the category of cases to which 4 Edw. III. c. 7 applies."

The last case in this number of the Queen's Bench Division still remains to be briefly noted.

SALE OF RIGHT OF ENTRY—32 HEN. 8, C. 9, S 2—R.S.O. C. 98 S. 5.

The name of the case is *Jenkins* v. *Jones*, p. 128, and the Court of Appeal had to decide in it, whether a *bona fide* right of entry to land could be validly sold by one who had never been in possession. On the one side it was argued, such a sale was illegal by reason of 32 Hen. VIII, c. 9, s. 2; on the other side it was argued that rights of entry could be thus sold since Imp. 8-9 V., c. 106, s. 6, (R.S.O. c. 98, s. 5). Section 2 of the Act of Hen. VIII. enacts that no person shall buy or sell any pretenced rights or titles, or take, grant or covenant to have any right or title of any person in or to any lands, except such person who shall so sell, grant, covenant or promise the same, their ancestors, or those by whom they claim have been in possession of the same, or of the reversion or remainder thereof, or taken the profits for one year before the said bargain, covenant, etc., on pain of forfeiture of the lands in question. Cotton, L. J., in delivering the judgment of the Court, discusses the meaning of this Statute of Henry VIII. by the light of the authorities, and shows that it was only in affirmance of the common law, and arrives at this conclusion: "All dealings with right of entry, except by release to the person in possession, were previously to 8-9 Vict. c. 106, dealings with 'pretenced' rights and titles within the meaning of the Act of Henry VIII. But the Act of the Queen has enabled rights of entry to be conveyed, and since that Act a right or title, good in fact—that is, not fictitious—is not a 'pretenced' title within the Statute, simply because it is a right of entry. . . Although in our opinion it is incorrect to say that 8-9 Vict. c. 106 has repealed 32 Henry VIII. s. 2, it has this effect, that the deed of July, 1877 (by which the right of entry was conveyed), cannot be considered as dealing with a 'pretenced' right or title within the meaning of that Act."

The remaining July numbers of the Law Reports, at present unreviewed, comprise 7 P. D. p. 101-117; and 20 Ch. D. p. 229-441.

WILL—ACKNOWLEDGMENT OF SIGNATURE.

The first of these comprises a single case, viz., *Blake* v. *Blake*. In this case it appeared from the evidence of the two witnesses to a certain will, that they neither of them could see the signature of the testatrix, a piece of blotting-paper being placed over the last sheet of the will, terminating below where the testatrix signature was afterwards found to be. The Court of Appeal held unanimously, though with much regret, (affirming the President), that this was no will. The opinions of the Judges turn on the point that the witnesses did not see the signature of the testatrix. Jessel, M. R., says:—"I think it is clear that this will was not signed in the presence of either witnesses . . . The question then arises whether the testatrix acknowledged her signature before the witnesses. What is in law a sufficient acknowledgment under the statute? What I take to be the law is correctly laid down in Jarman on Wills, fourth edition, p. 108, in the following terms:—'There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will;' and I may add, in my opinion, it is not sufficient even if

the testator were to say:—'My signature is inside the paper,' unless the witnesses were able to see the signature." He then proceeds to discuss the cases on the point. Brett, L. J., says:—"It has been brought to this, where the witnesses cannot see, have no opportunity of seeing, the signature, it is immaterial what the testator says, there cannot be an acknowledgment; but that when the signature is there, and they see or have the opportunity of seeing it, then if the testator says, this is my will, or words to that effect, that is sufficient acknowledgment, although he does not say this is my signature."

DICTUM—OVERRULING PRIOR DECISIONS.

In this judgment of Brett, L.J., moreover, he says:—"It is a point which must be decided upon the statute itself, and even if twenty cases decided that it would be a sufficient acknowledgment, if we were clearly of opinion that according to the true construction of the statute it would not do, we should not be bound by those cases. Where there have been several decisions, or a series of decisions, upon any statute, I should dread to overrule those decisions or that series of decisions, but still we should be compelled so to do if we thought that those decisions were not in accordance with the statute. But in this case we have no long line of decisions one way; there seem to be conflicting decisions, and we must according exercise our own judgment on the question independently, almost, if not quite, of every former decision."

Proceeding now to the July number of the Chy. D., the first case requiring notice is *In re Baker, Collins* v. *Rhodes*, p. 230, the substance of which may be briefly stated thus:—

EXECUTORS—DEVASTAVIT—LACHES.

Mrs. Seaman died in 1869, and at that time her son-in-law was a specialty creditor upon her estate for £500, and had been since March 14, 1860. One Wish was her sole acting executor, and he, though aware of the existence of the debt, instead of providing out of her estate funds to meet the liability on this specialty, left her estate, consisting entirely of shares in a bank which *had since failed*, unconverted. Now, in 1879, *i. e.* after a lapse of more than 18 years, the son-in-law's executors strove to recover from Wish the amount of the debt. The Court of Appeal held they had a right to do so Jessel, M.R., says:—"The Judge, in treating the mere non-suing by a specialty creditor for a period of 18 years to be such negligence as to disentitle him to succeed in his claim now, came to a wrong decision." And Lush, L.J., to the same effect, says:—"It is new to me that a specialty creditor who takes no steps to recover his specialty debt for 18 years can be held guilty of negligence so as to lose his right to payment when he is allowed by the statute 20 years within which to recover his debt."

POWER TO LEASE—TENANT TO DO "NECESSARY REPAIRS."

The next case, *Fowler* v. *Barstow*, is on a point of practice, and will be found noted among the recent English Practice Cases, *supra* p. 136. In the next case, *Truscott* v. *Diamond Rock Boring Co.*, p. 251, the point was this:—A settlement of house property gave power to the trustees to demise or agree to demise all or any of the messuages "to any person or persons who shall improve or repair the same, or covenant or agree to improve or repair the same, or shall expend or agree to expend such sum or sums of money in improvement thereof respectively as shall be thought adequate for the interests therein respectively." The trustees agreed to let a house on the terms of a letter by which the tenant undertook "to do necessary repairs," and the question was whether the agreement satisfied the terms of the power. The Court of Appeal unanimously held that it did. Jessel, M.R., says:—"The word 'necessary' is not material, for it only expresses that repairs are required. If repairs are wanted at all they are necessary, and if they are not wanted a tenant under an agreement to repair would not be bound to do anything; the agreement, therefore, is in substance simply an agreement that the tenant

shall repair. The case is, therefore, within the words of the power. Is it within the substance? I am of opinion that it is. It imposes on the tenant the burden of doing all repairs which are required, and that includes all the repairs which, but for the agreement, the landlord would be obliged to do. I think this is what the power intended. It has been urged that it was the intention of the power that the lessee should put the property in repair at the commencement of his tenancy. That is satisfied by an agreement to do repairs, for such an agreement means that the tenant shall do all repairs which are requisite during the continuance of his tenancy, and includes putting the property in repair. The agreement, therefore, satisfies the requisitions of the power in substance as well as in form." Brett, L.J., says :—"I cannot agree that 'improve' and 'repair' are equivalent terms, and that the power, when it speaks both of repairing and improving, means that the lessee would in every case be bound to improve the property. Taking the words in their natural sense they mean that the landlord is to be freed from doing the repairs which a landlord usually would have to do. Usually a landlord gives the premises to the tenant in good repair, and if there are no special stipulations the tenant is bound to do some repairs, the others must be done by the landlord if done at all . . . Would a lease, to be drawn up according to the terms of this agreement, contain such a covenant as the power requires? The lessee is to do 'necessary repairs.' Mr. Justice Chitty seems to have thought that this only applied to a very limited class of repairs, but I think it must mean all such repairs as would be necessary to enable the landlord to hand over the property to a new tenant in substantial and tenantable repair. Therefore I think that the terms of the agreement satisfy the requirements of the power."

COMPANY—WINDING UP—PRACTICE—COSTS.

The next case requiring notice is *re General Financial Bank*, p. 276, on account of the point of practice, and of the decision as to costs in reference to the winding up of companies contained therein. The point as to practice relates to the appointment of official liquidators, (cf. R. S. O. c. 5, s. 8, subs. 3,) and is shown by the following passage of the M. R.'s judgment :—"I have indicated for years past that the practice was settled that the Court ought not to make an order on the hearing of a winding up petition for the appointment of an official liquidator, but that this should be done in Chambers . . . I thought this was the settled practice, and I wish to lay down for the future that it ought to be so, and that it is the opinion of the Judges of the Court of Appeal, which every Judge of first instance ought to follow." The point as to costs is given clearly and sufficiently in the words of the head-note thus :—A creditor who presents a petition for winding up in ignorance of a prior petition, is entitled to his costs up to the time when he has notice of the prior petition, but if he then proceeds he will not be allowed his further costs, unless he has good reason to suppose that the other petition is not *bona fide*, in which case he is justified in proceeding and may be allowed his costs.

Proceeding now to *ex parte Reynolds*, p. 294, that case is found, in the language of the M. R., to comprise a question of general importance, viz., "Whether, when a witness objects to answer a question put to him on the ground that the answer to it may tend to criminate him, the mere statement of his own belief that it will tend to criminate him is sufficient to excuse him from answering; or whether the Judge is entitled to decide, not merely accepting the witness' statement, whether the proposed question has really a tendency to criminate him, or may fairly be considered, under all the circumstances of the case, as having that tendency. The Court of Appeal now upheld Bacon, C. J., in deciding in favour of the latter alternative. The M.R., who delivered the principal judgment, declares the law to be correctly stated in *Reg.* v.

Boyes, 1 B. and S. 311, where Lord Cockburn, L.C.J., says :—"To entitle a party called as a witness to the privilege of silence the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We, indeed, quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. . . Subject to this reservation a Judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril."

The next case, *Turner* v. *Hancock*, p. 303, has already been noted among recent English Practice Cases, *(supra* p. 342,) so far as it is a decision that the costs of a trustee are an appealable matter notwistanding the Judicature Act; but there is a *dictum* of the M. R., at p. 305, which may be noticed here.

COSTS OF TRUSTEES—TENDENCY OF MODERN DECISIONS.

He says :—"It is not the course of the Court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust. The earlier cases had the effect of frightening wise and honest people from undertaking trusts, and there was a danger of trusts falling into the hands of unscrupulous persons who might undertake them for the sake of getting something by them."

RAILWAY COMPANY—ACCOMMODATION WORKS.

Wilkinson v. *Hull Ry. Co.*, p. 323, it does not seem necessary to dwell upon. It decides that land required by a railway company for accommodation works, are lands required for the purposes of "the undertaking" or "of the railway," within the meaning of the *Imp. Railways' Clauses Consolidation Act.* It also decides that every work which a railway company is empowered to do, not merely what it is compelled to do, is a purpose of the undertaking. But our General Railway Act, R. S. O. c. 165, does not appear to contain similar words, and in sect. 9, subs. 2, it empowers railway companies to take of any corporation or person any land "necessary for the construction, maintenance, *accommodation*, and use of the railway;" and the wording of the Dominion Consolidated Railway Act, 1879, (sect. 7, subs. 2,) is similar. So also it seems unnecessary to notice at any length the case of *re Great Britain Mutual Life Ass. Society*, p. 351. In that case, on a petition being presented for the winding up of a life insurance company, an order had been made directing a scheme to be prepared for the reduction of the contracts of the company. This order was made under Imp. Life Assurance Companies Act, s. 22, the theory of which enactment is, that if the company is insolvent the Court may reduce the contracts instead of making a winding up order; and the question was at what time the contracts to be included in the scheme for reduction were to be ascertained. But our Act respecting the winding up of Joint Stock Companies, 41 Vict. c. 5, does not appear to contain any similar enactment.

FRAUDULENT DEED—13 ELIZ. C. 5.

At p. 389, however, is a case, *re Johnson, Golden* v. *Gillam*, which seems to call for more particular mention. In this case, by a deed of gift, J. granted farming property in trust for her daughters, in consideration of which they covenanted to pay the debt "incurred by J. up to the date of the deed in connection with the working and management of the said farm," and to maintain J. J. had no other property than that comprised in this deed, and the plaintiff's debt not having been incurred by J. in connection with the farm, was defeated by the deed. The question was whether the deed was or was not valid under 13 Eliz. c. 5. Fry, J., held that it was valid, for that the circumstances showed that the

intention of the parties was to make a perfectly honest family arrangement, under which the daughters were to undertake the burden of paying their mother's debts, and in consideration of that to take immediately that farm which, in all probability, they would otherwise have received by will upon their mother's death. He cites with approval the language of Kindersley, V.C., in *Thompson* v. *Walker*, 4 Drew 628, where he says:—"The principle now established is this, the language of the Act being that any conveyance of property is void against creditors if it is made with intent to defeat, hinder or delay creditors, the Court is to decide in each particular case whether on all the circumstances it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder or delay his creditors." Later on he meets three objections to the validity of the deed which it seems well to notice, (i.) he says:—"It is said, and said truly, that a person must generally be taken to intend the result of his acts. That is often, but by no means always true, because, although no doubt the immediate and main result of our acts must be the object of our intention, there are many collateral results of acts which are not only not objects of our intention, but against our wish. There are many unintentional results of unintentional acts." (ii.) He says:—"It is said that with respect to many creditors who are included in the covenant, they are defeated and delayed, because before the execution of the deed they had a right against the property, and after the execution of the deed they would only have a right to the enforcement of the covenant. But that is the result of almost any dealing. If I am indebted and sell my estate, my creditors lose their right of proceeding against the estate, and can only proceed against the purchase money." (iii.) He says:—"It appears plain that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a *bona fide* and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the Court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud, and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case."

WILL—CROSS EXECUTORY LIMITATION—IMPLICATION.

In re Hudson, p. 406, is an important case inasmuch as Kay, J., there deduces from the authorities and tabulates the rules which govern the implication of cross executory limitations in wills. In the will in question there was a cross-limitation upon failure of any *stirpes* to the other *stirpes*, but the cross-limitations between the individuals of the same *stirps* were not complete so as to cover every possible event; and in the event which had actually happened there would have been an intestacy as to part of the estate, if the Court had refused to fill up the gap by implying a cross-limitation as required. Kay, J., held that the cross-limitation might be implied, and after reviewing the authorities he deduces from them the following rules:—

(i.) Cross executory limitations in the case of personal estate, like cross-remainders of real estate, are only implied to fill up a hiatus in the limitations, which seem from the contest to have been unintentional.

(ii.) They cannot be implied—as of course cross-remainders could not—to divest an interest given by the will.

(iii.) The existence of other cross-limitations between different persons does not prevent the implication.

(iv.) But where such express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention."

He then gives various instances in which such a gap in the limitation occurs, viz.:—

(a) Where there is a gift to several named

persons for their respective lives as tenants in common, and a gift over after the death of the survivor.

(b) Where, in a similar gift, there are limitations over of the shares of the tenants for life to their respective children or issue for limited interests, as for life or in tail, and then a gift over on failure of issue of them all.

(c) And generally where, there being such a gift over, the preceding limitations do not provide for every event except that contemplated by the gift over, but leave some gaps which would occasion an intestacy as to part of the estate.

RAILWAYS—SUPERFLUOUS LANDS.

The two remaining cases in this number do not require special notice here; one is a decision under the Bankruptcy Act, and the other, *Hobbs* v. *Midland Ry. Co.*, p. 418, is concerned with certain enactments relating to the superfluous lands of railways which do not appear included in our railway Acts. The effect of the decision is to show that the mere fact of a railway company purporting to convey away lands acquired by them for the purpose of their undertaking, is not conclusive to show that the lands so conveyed are superfluous lands within the meaning of sect. 128 of the Imp. Land Clauses Consolidation Act, 1845.

REPORTS

RECENT ENGLISH PRACTICE CASES.

LYELL v. KENNEDY.

Imp. O. 19, r. 15—Ont. Rule 144.
Discovery under Judicature Act.

[Feb. 15, C. A.—L. R. 20 Ch. D. 484.

Per JESSEL, M.R.—This is simply an action to recover land and mesne profits by a legal title, and then the question comes to this: could there have been a bill of discovery filed in aid of such an action if it had been brought before the Judicature Act? The answer to that is to be found in the judgment of the Court of Exchequer, in the case of *Horton* v. *Bott*, 2 H. & N. 249 [where it is held not to exist]. . . We have now to proceed under the Judicature Act, which makes no distinction between equitable and legal actions. Still, this being an action for the recovery of land by a legal right, is exactly the old action of ejectment in substance though not in form. The Judicature Act makes an alteration of procedure merely, and not an alteration of the law, and if there was no right to file a bill of discovery or to administer interrogatories before the passing of the Judicature Acts, there is no such right now.

Per BRETT, L. J.—If neither by the Common Law Procedure Act nor by the Rules in Equity could a plaintiff in an action of ejectment before the Judicature Act have obtained by means of interrogatories any discovery for the defendant in order to support his own title, he cannot do so now. The judges, in framing the rules under the Judicature Act, took particular pains, as is manifest from Imp. O. 19, r. 15 (Ont. r. 144) to maintain the rights of persons in possession of land in this country to stand possessed of it until persons who claim to dispossess them prove their own title entirely by their own means. That is a question of high policy with regard to the possession of property in England, from which it never was intended that the Judicature Act should in any way derogate.

HOLKER, J., concurred.

[NOTE.—*The Imp. and Ont. rules are identical. R. S. O. c. 50, s. 156, and G. O. (Ch.) 138 gives the right to examine parties before trial, and the remarks of the M. R. would seem to apply to our Judicature Act as much as to the English.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[Sept. 9.

MILLS v. KERR.

Assignment for benefit of creditors—Partnership creditors—Separate creditors.

The judgment of the Court below (32 C.P. 68) holding that an assignment for the benefit of partnership creditors only was void, as being a

preference of partnership creditors over separate creditors, affirmed on appeal.

S. H. Blake, Q.C., for appeal.

Rose, Q.C., contra.

BAILLIE v. DICKSON.

Promissory note—Notice of dishonour—Renewal—Principal and agent.

The note upon which this action was instituted had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal.

Held, that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note.

Where the holder of a note employs a notary to protest the same at maturity, it is his duty to give the notary all the information that he is possessed of as to the names and residences of the endorsers. Therefore, where the signature of an endorser was so peculiar that no one unacquainted with it could decypher it, and the notary when protesting it made, as near as may be, a *fac simile* of the signature, and so addressed the notice of dishonour to "Belleville, P. O.,"—meaning, as he said in the evidence, "Province of Ontario,"—and the notice never reached the endorser.

Held, that the endorser was released.

Bethune, Q.C., for appeal.

Geo. Kerr, contra.

IN RE RUSSELL, AN INSOLVENT.

Insolvency—Discharge of insolvent—Concealment of assets.

A deed of composition and discharge was executed by creditors, and they had been paid the amount of composition. The insolvent, however, had not executed such deed, so that it was incapable of confirmation.

Held (per BURTON, J. A.), that the insolvent might still move for his discharge under the Act of 1875.

A retention by an insolvent of portions of his estate, and the concealment thereof by him must, to come within section 56 of that act, be wilful and fraudulent.

BEAVIS v. MCGUIRE.

Conveyance for value—Hindering or delaying creditors—13 Elizabeth, c. 5.

The defendant M. created several mortgages on his property, in each of which his wife joined to bar her dower upon the promise of M. that he would convey other property to her. Finally M. sold the equity of redemption, when the wife claimed the conveyance of the other land, which M. then conveyed to a trustee for her benefit.

Held, (affirming the decision of PROUDFOOT, J.), that such conveyance in trust was not voluntary, although the effect of it was to delay creditors in recovering their debts; and it having been shown to be a *bona fide* transaction, it could not be impeached under 13 Eliz. c. 5.

Moss, Q.C., and *Beck* for appeal.

S. H. Blake, Q.C., contra.

ADAMSON v. ADAMSON

Grant, Construction of—Statute of Limitations.

Two several lots were conveyed to G. and A. respectively, to the use of G. and A., their heirs and assigns, as joint tenants and not as tenants in common.

Held, that the grantees took the respective lots in severalty.

Held also (affirming the judgment of SPRAGGE, C., 28 Gr. 221), upon the facts there stated, that the tenant of an equitable tenant for life, in setting up the Statute of Limitations against the equitable remainderman, could not be allowed to compute the time during which he had been in possession prior to the death of the tenant for life.

Per BURTON, J. A.—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee.

The provisions of the Statute of Limitations as regards equitable estates considered.

Per PATTERSON, J. A.—Under the circumstances appearing in this case the plaintiff was entitled to recover in respect of the equitable estate.

Bethune, Q.C., and *Moss*, Q.C., for appeal.

Mowat, Q.C., and *Maclennan*, Q.C., contra.

NELLES v. BANK OF MONTREAL.

Insolvency—Unjust preference.

The decree of BLAKE, V. C., 28 Gr. 449, affirmed on appeal.

Rose, Q.C., and *McDonald*, for appeal.

Street, contra.

THE QUEEN EX REL. GRANT v. COLEMAN.

Quo warranto—Municipal elections—Appeal.

The Judge of the County Court ordered a writ of *quo warranto* to test the validity of the election of an alderman; and subsequently, before appearance entered to the writ, set aside all proceedings in the matter for irregularity. The relator thereupon applied in Chambers for a *mandamus* to compel the County Judge to try the case, when the presiding Judge (HAGARTY, C. J.) refused the writ; and on motion in *banc* the Court affirmed his ruling (see 8 P. R. 497, 46 U. C. R. 175). Whereupon the relator appealed to this Court, which appeal was dismissed, on the ground that the Judge in Chambers had not power to review the order of the County Judge if he had authority to make it; and if it could be reviewed the application should have been to the Court, not to a Judge in Chambers as here; and under all the circumstances the appeal was dismissed without costs.

The writ of *quo warranto* having been issued and served, the County Court Judge had not power to set it aside.

McMichael, Q.C., for the appeal.

Aylesworth, contra.

NEILL v. THE TRAVELERS INS. CO.

Accident policy—Voluntary exposure to risk.

An appeal from the Court of Common Pleas, who ordered a non-suit after verdict for the plaintiff (31 C. P. 394). The Court being equally divided, the appeal was dismissed with costs.

Per HAGARTY, C. J., and CAMERON, J.—The evidence shewed that the deceased had voluntarily gone unnecessarily into a place of danger.

Per BURTON, and PATTERSON, JJ.A.—In an action upon an accident policy, the company were bound to show a breach of the conditions in the policy, and that the party insured had voluntarily exposed himself to unnecessary danger; that in a case where there was evidence of the insurance and death by accident, it was one proper for the jury, and if the evidence adduced by the defendants was not sufficient to prove the defence as raised on the pleadings, the verdict should have been for the plaintiff; and under the circumstances a new trial should have been directed.

One of the conditions of the policy was that the insured should not stand or walk on a railway track.

Per HAGARTY, C.J., and CAMERON, J.—Such condition was broken by the insured being on a railway tract in a buggy.

Per BURTON and PATTERSON, JJ.A.—Such condition was intended to apply to the case common in Canada of persons using the railway tracts as roadways, and could not be considered as applying in every case of an accident to the insured while on such track.

S. H. Blake, Q.C., and *G. H. Watson* for appeal.

Robinson, Q.C., contra.

MACDONALD v. WORTHINGTON.

Partnership articles, Construction of—Ownership of stock—Law of Quebec—Reformation of articles.

The plaintiff and defendant M., having on hand large contracts to fulfil, enterted into partnership with the defendant W., under the style of J., W. & Co. The articles of agreement, which were drawn in the Province of Quebec, declared that the plant, which the plaintiff contributed to the partnership, should become the property of the said firm, that is to say, the one half thereof shall revert to and belong to the plaintiff and defendant M., and the other half to W. The law of Quebec was found to be that if nothing were provided by the articles as to ownership of the plant, it would be taken out of the partnership at the conclusion of the same by the party who had contributed it, before division of profits. The plaintiff and the defendants M. all swore that the intention was that they should receive credit for the plant as their property in the accounts of the partnership. It was shown also that in the treaty for the partnership, inventories of the plant were drawn and its value was discussed, the plaintiff putting it at $57,130, W. at $40,000. The notary who drew the articles swore that if it had been intended to make a

transfer of the property in the plant, he would have expressed such intent more explicitly. The book-keeper swore that the plaintiff had claimed credit in the books for the plant from the first; teat in discussing the matter with W. a reason had been suggested for not immediately giving such credit thar the plant was under mortgage.

Held, that upon a true construction of the articles of partnership as drawn, the plant was withdrawn from the operation of the law of Quebec as proved by its ownership being expressly provided for by the instrument; but that the evidence given by the parties other than W. was clear and satisfactory; that a mistake had been made in drawing the same, and that the articles should be reformed so as to entitle the plaintiff to credit for the plant in taking the accounts; and on this ground the judgment of the Court below was reversed.

McCarthy, Q.C., for the appellant.

Bethune, Q.C., for defendant in same interest.

S. H. Blake, Q.C., and *W. Cassels*, for the respondent.

IN RE HILL.

Insolvent Act of 1875—Application for discharge—Non-disclosure of cause of insolvency—Defective books.

The insolvent, nine months before his insolvency, stated to the contestant that he had a surplus of $40,000. When he failed it appeared that there was a deficiency of nearly that amount, the difference not being satisfactorily accounted for. He did not produce all his books, but it was shown that they were kept in such a manner that the true state of his affairs could not have been ascertained therefrom. The cash book was never balanced, no balance sheet was made out, bills were discounted which did not appear in any of the books, and goods were transferred from one establishment to the other (the insolvent having a wholesale and retail place of business) without entry.

Held [reversing the order of the Judge below, granting a discharge to the insolvent], (i) that, though an insolvent is guilty of the offence of not fully, clearly and truly stating the cause of his insolvency, that is no ground for refusing the discharge, even after the conviction for the offence; (ii) the omission to keep any books prevents the Judge from granting a discharge, whether the intent was fraudulent or not; but (iii) when they have been kept, it is not essential on the one hand that they should be kept in the most approved form, nor are they sufficient on the othe hand, however carefully kept in some respects, if they fail to exhibit the insolvent's true position; (iv) that the evidence in the case disentitled the insolvent to his discharge.

Liberty to apply was given on the insolvent's producing the remainder of his books.

CHANCERY DIVISION.

BOYD, C.] [Oct. 25.

RE DEFOE.

Trustee and cestui que trust—Statute of limitations—R. S. O., c. 108, s. 5, subs. 8.

Petition under Quieting Titles Act.

Petitioner was let into possession of the land in question by his father, in 1870, in such circumstances as in law constituted him tenant at will to his father, and so continued till 1878, when his father died, leaving a will, by which this property was devised to trustees—"upon trust to demise and lease or otherwise manage and employ the land in such manner as they should deem best, and to pay the rents, issues, and profits to the petitioner for his life, and thereafter to sell the land and invest the proceeds for the benefit of the son's widow and children. This devise was made known to the son after the father's death, but he did not by word or act refuse to take the beneficial life estate devised to him. He continued in possession ostensibly as before, and now claimed that the Statute of Limitations had perfected his title to the lands as against the beneficiaries under the will.

Held, (reversing the decision of the Referee of Titles at Stratford) that after the testator's death, the statute ceased to run in favour of the petitioner's possessory claim, inasmuch as his possession thereafter was that of *cestui que trust* rightfully there by virtue of his equitable life estate under the will.

For (i) on the view of the facts most favourable to the petitioner, he neither accepted nor declined the life devise, but remained passive—and this being so, the presumption that he accepted must prevail, inasmuch as the devise for

life was *prima facie* a beneficial one, giving him, as it did, for his life absolutely, that to which otherwise he had acquired no title. And (ii) the fact of the legal estate being devised to trustees for the use of the petitioner for life, did not materially affect the result,—inasmuch as (*a*) even if it could be rightly considered that on the death of the testator a new tenancy at will as between the trustees and the petitioner was created by implication, nevertheless an additional period of ten years would have to run before the fresh right of entry thus accruing would be barred; but (*b*) sect. 5, subs. 8 of R. S. O. 108, declares that no *cestui que trust* shall be deemed a tenant at will to his trustee in the meaning of the next preceding subsection, and this being so, there is no *terminus a quo* for the period of limitation, and such a case is not covered by the statute.

Gerrard v. *Tuck*, 8 C. B. 231 followed.

J. Fleming, for the appellant.

J. Idington, for the respondent.

BOYD, C.] [Oct. 25.

TRINITY COLLEGE v. HILL.

Opening foreclosure—Innocent purchaser.

When there has been a final order of foreclosure of property mortgaged—although, while yet the mortgagee retains the property, it is not impossible to have the foreclosure opened in circumstances when it would involve great hardship to refuse relief, and the delay is satisfactorily accounted for—yet no case has gone beyond that, and it is a salutary rule to adopt in this country, where land is regarded as an article of commerce, that the claim of the mortgagee to the equitable interference of the Court is forfeited, if before his application the rights of purchasers intervene.

Views expressed by Van Koughnet, C. in *Platt* v. *Ashbridge*, 12 Gr. 107, preferred to the dicta of the M. R. in *Campbell* v. *Holyland*, L. R. 7 Ch. D. 173.

Van Koughnet, for the College.

Bain, for the petitioner.

Hoyles, for the purchaser.

BOYD, C.] [Oct. 25.

YOUNG v. ROBERTSON.

Specific performances—Demurrer for misjoinder of parties—Judicature Act.

Where a demurrer is raised to a statement of claim in an action for specific performance, on the ground that there is no agreement shewn between the parties, whereupon the defendant is made liable to the plaintiff, it is enough if in any aspect of the case the plaintiff may be entitled to some relief.

In the present case the owners of the property contracted to be sold were married women, but they joined their husbands as co-plaintiffs in the action for specific performance of the contract, and a demurrer being raised *ore tenus* on the ground that the suit was wrongly constituted,

Held, inasmuch as the ground of the objection rested on the doctrine of misjoinder of parties, which is not now a ground of demurrer under the practice established by the Judicature Act, an amendment of the record as to parties might be allowed; and it was allowed accordingly on payment of a $5 costs.

Werderman v. *Societe Generale d' Electricite*, L. R. 19 Ch. D. 250 followed.

W. Cassels, for the demurrer.

W. Nesbitt, contra.

[NOTE.—*Werderman Societe* v. *Generale d'Electricite*, is noted in this Journal, *supra*, p. 18.—EDS. L. J.]

Boyd, C.] [Oct. 25.

RE O'BRIEN.

Foreign administration—Private international law—Removal of proceedings from Surrogate Court to this Court—Peremptory writ.

One B. dying domiciled in Portland, Maine U.S.A., R., a creditor of her estate, obtained letters of administration there. Subsequently, S., as appointee of R., and with his consent, applied here for letters of administration to be granted to him by the Surrogate Court here. E., however, residing at Toronto, and as next of kin to B., also applied here for letters of administration to B.'s estate. B. was at the time of her death entitled to certain monies now in this Court. S. now applied to have the matter transferred from the Surrogate Court into this Court, or for a writ of prohibition to the judge of the Surrogate Court preventing him granting

letters to E., and a mandamus, ordering him to grant letters to S.

Held, failing any proof as to the law in Maine, it must be assumed to agree with the law here, according to which the Court will not grant administration to a creditor, so long as one having a better claim, as is the case with the next of kin, is willing to act; and, inasmuch as the next of kin did not appear to have been cited before the Court in Maine, the *status* of the creditor or of his appointee who obtained administration there, was not such as to compel the Surrogate judge here to pass over the next of kin.

The appointment of a creditor as administrator is not as of right, but rests in the discretion of the judge who appoints, and that cannot be interfered with by any peremptory writ, such as asked for in this case. *Browne* v. *Phillip*, noted Ambl. 416, followed. *Re Hill*, L.R. 2 P and D. 90, distinguished.

Held also, the above facts did not show such a case of conflict as would justify removing the matter of contention from the Surrogate Court into this Court.

D. A. O'Sullivan, for the application.

J. A. Donovan, contra.

LAW STUDENTS' DEPARTMENT

MICHAELMAS EXAMINATIONS.

The following are the dates of the forthcoming Michaelmas Examinations:

Primary—Tuesday, Nov. 7th.

Graduates and Matriculants present themselves on Thursday, Nov. 9th, at 10 a.m.

First Intermediate—Tuesday, Nov. 14th.

Second Intermediate—Thursday, Nov. 16th.

Solicitor—Tuesday, Nov. 14th.

Barrister—Thursday, Nov. 16th.

Every candidate for Call or Certificate of Fitness, who shall have omitted to file all his papers and pay his fees, on or before Nov. 4th next, will be required to present a special petition and pay a fee of $2.00.

CORRESPONDENCE.

Married Women's Act.

To the Editor of the LAW JOURNAL.

Can a married women, living with her husband and not carrying on any separate business from her husband, but having separate estate and married since 4th May, 1859, contract with reference to her separate estate? The courts have held that when she makes a contract, not as agent of her husband, she contracts in reference to the separate estate, if she have any, and that she is liable. I have not seen the point raised as to *coverture* in connection with the Married Women's Property Act in any case before the courts, and until such point is raised I am of opinion that a married women being, in consideration of law under the coercion and dominion of her husband, and consequently having no legal capacity to assent to a contract, either respecting his property or her own, can not contract because she has no separate existence: see *Marshall* v. *Rutton*, 8 T. R. 545; *Lewis* v. *Lee*, 3 B. & C. (291)

R. S. Ont. c. 12, has not made any provision to remove any disability—and coverture is a disability,—and so long as any one is under a disability they have no power to contract. Sec. 20, c. 125 R. S. Ont., only provides, as I understand it, for any debt or contract arising out of her separate business or her separate estate, or for any debt which she may have contracted before coverture; but not to any private debt which the wife may contract, nor as the agent of the husband, or in reference to his separate estate. Having doubt on this question I would like to hear the opinion of some other student, or some gentlemen learned in the law, on the subject.

LEX.

Pembroke, Oct., 1882.

British Columbia Legal News.

To the Editor of the LAW JOURNAL.

SIR,—It is a subject of surprise and regret to some of your readers in British Columbia that you obtain so much inaccurate information respecting the administration of Justice in that province, particularly as the information is generally understood at Victoria to emanate from a very high source.

CORRESPONDENCE.

Ex. gr. At p. 224 "One of your Readers" states that "We, as a Bar, almost without exception, concur in the main point of the judgment" on the constitutional questions in the *Thrasher Case*. The fact is the reverse, as your correspondent must have known if he had really been, as his letter implies, a practitioner. Then, towards the close of his communication, he says that this constitutional judgment is now, he hears, under appeal; whereas the fact is that no such appeal has been attempted—perhaps because neither party had any interest in prosecuting it, perhaps because no appeal lies.

I observe that you now announce, (p. 314), "on what (you) consider good authority, that some of the chief and more influential Q.C.s in England, after studying with care the judgment . . have given their opinion that the B. C. judges have satisfactorily made out that the Supreme Court of British Columbia is a Dominion and not a Provincial Court within the B. N. A. Act 1867, s. 92, par. 14." Assuming that you have not been misinformed upon this point, as you certainly have been upon several others, I respectfully submit that the announcement is worthless unless you give the names of the learned counsel and their opinions in full.

In the interests of truth and justice you will, I am confident, give the same publicity to this communication as to those to which it refers.

VERAX.

Victoria, Oct. 7th, 1882.

[WE have not the slightest hesitation in publishing the above. Our correspondent will, however, oblige by giving "particulars" under the first count of his indictment. Those that he gives are not sufficient to maintain it. As to the first point, we are glad, if the writer of the letter referred to by our correspondent was mistaken, to have the mistake corrected. As to the second, we did not speak of our own knowledge, but simply related an *on dit*. It is quite possible that opinions have been given both ways. However, as the "announcement is worthless," there is, of course, an end of the matter. The best thing our correspondent can do is to send us a letter occasionally on British Columbia legal news. We are anxious to give all the information we can, and will find space for any well considered suggestions or temperately expressed sentiments.—EDS. L. J.]

Unlicensed Conveyancers.

To the Editor of the LAW JOURNAL.

SIR.—It may seem to you and to some of your readers that this question is almost exhausted? But I am of opinion that it is only by continuous and persistent agitation that country lawyers will ever obtain justice. In the village where I am trying to make a living there is one other practising barrister and four so-called conveyancers. The charge we make for drawing a deed and searching title is $3.00 in ordinary cases—not a very extravagant rate, you will say, when compared with city offices. Our adversaries will undertake the work for $1.00, and tell the unfortunates who patronize them that there is no need in any case to investigate the title. The result is that while regular practitioners are straining to keep body and soul together, these sharks get all the work, which makes a very nice addition to land surveying, insurance, Division Court clerkship, etc. Where is the justice in making us pay exhorbitant fees, hedging us in by inexorable rules of professional etiquette, and when our hands are thus tied allowing these men to rob our children of their food.

You are probably aware, Sir, that shortly before the last election for Benchers a circular, addressed particularly to the country members of the professton, was sent out asking for opinions on this question, and stating that it was the intention of the Benchers to move in the matter. But what did they do? No sooner were they elected than it was moved in the next term that it was very inexpedient to do anything in the premises. Inexpedient for whom? Toronto men and cowards who sit in the House of Legislature. What was that circular but a bribe to catch the vote of the long-suffering country lawyer; unworthy of the authors of it when not followed by something like an attempt to carry out its proposals. The Benchers are not alone to blame, the cowardice of the Government stands as much in the way as the inaction of our representatives.

I for one will not sit quietly under the wrong. This is the last year in which I shall pay fees to a society from which I derive no benefit. After that I shall make all the money I can by every means available. If I must compete against men protected by the law and the Law Society, I want a fair field and no favour—let me cut the cords that tie me hand and foot.

CORRESPONDENCE.

Is the Law Society a farce or a reality? I spent four years in the University and three in the Law Society School, besides a large sum paid in fees—for what? to be placed on a lower footing financially than men who cannot tell the meaning of a Short Form of Conveyance, but can manage to stop the holes left by the printer.

If I advertise my business the Benchers soon see that I am brought back to gentility and starvation. If I attempt to add to my limited income by any other business off comes my gown.

It is not only conveyancing that these men do, but a general practice, using their clients names they prepare Surrogate papers, give advice, and make collections under terror of a flaming heading such as "Notary Public and Commissioner in B. R., etc.," or "Official Assignee and Justice of the Peace," and several other Government-bestowed titles.

How is it that this is the only country under Heaven where such a state of things exists? If you call it freedom, make the freedom a little more general; take away the restraints, abolish the fees and the fence. If we have bought a legal education and must compete with men who have none and no restraints, let us fight with our hands free. Take either horn of the dilemma, I care not which, but let the present anomaly end. This question is a vital one to the public, whose interests are identical with the profession's, as I could easily prove did space permit. But I will conclude, thanking you for your space and past earnest advocacy of our cause.

I am yours,

A SUFFERER.

[As we have said before, the reasons why an attorney or solicitor in the country should take out his certificates are very few in these days, and practitioners in the country are beginning to find this out, and thus it may become a more serious question for the Law Society than it at present supposes. At the same time we fully recognize the peculiarities of the situation which render it extremely difficult for the Benchers to apply any remedy. The obstacle is the silly prejudice in the popular mind against the profession, which is magnified and utilized by certain members of the Local Legislature for their own selfish purposes, and the leaders of both sides seem weak enough to be swayed by the incorrect representations and clamour of interested men who happen to have for the time political influence. We had hoped that one occupying the high position of the present Attorney-General, who we believe is honestly endeavouring to do what he thinks right, and who is backed by such an overwhelming majority, would have taken a firm stand in this matter, and aid those who are being pillaged by an invading army. We cannot but think that a full representation to him, if not already made, would induce him to see that right is done in the premises.—EDS. L.J.]

Division Courts—Judgment debtor—Means and ability to pay debt.

To the Editor of the LAW JOURNAL.

SIR,—I had a judgment debtor up before the Judge for examination. The debtor upon his examination admitted he was under no expense whatever; that his wife, who owned the place, provided him with everything he needed; that he worked at home when he pleased, but did not work out; that he had no means of any kind: his wife lives, as does the debtor, on the wife's farm. Would the Judge be justified in making an order for a monthly payment under such circumstances? The Judge declined as debtor had no visible means to pay? If not how can a man who owes a debt be made to pay it? A man who can work and wont, I think ought to be made, so he may pay his debts. An answer will oblige.

CREDITOR.

THE question put by our correspondent is an interesting one, and at first sight might seem not to come within the wording of the Statute. But a full consideration of the spirit of the enactments for the protection of creditors, under section 182 of the Division Courts Act, leads us to the conclusion that it was probably intended to be covered by that provision. The facts are not fully stated, and it is quite possible that the debtor might come within sec. 4 (*a*). But however that may be, we are inclined to agree with the learned Judge of the county of Simcoe, who, under circumstances similar to those above stated, has more than once committed judgment debtors who were able but not willing to work. He took the ground that the health and strength which the Creator has given a man are means and ability which he ought to employ to-

wards the payment of his debts, and if he fail to use these gifts he came within the provision of the Statute, and therefore liable to commitment on default. This was, perhaps, a "free translation" of the Statute, but a very sensible and righteous one, and there will be few to quarrel with it. There were, if we remember correctly, some other incidents in the cases referred to (coming under sub-sec. 3) which also influenced the learned Judge, but the view he expressed as to the words "means and ability to pay the debt" must meet with commendation, and we hope may sometimes be put in force for that unfortunate class of suitors known as "the poor creditor." We do not well see how a Judge's order in such a case could be disturbed, and the class of men mentioned by our correspondent ought to be reached in some way. If they are to escape altogether it should be known.—EDS. L. J.]

New County Court Tariff.

To the Editor of the LAW JOURNAL.

SIR,—A new tariff is badly needed for the County Court, as under the Judicature Act many proceedings have to be taken for which no allowance is made.

I understand that a new tariff was framed and submitted to the Judges for approval. Where is it now? Is it on or under the table?

ANXIOUS SOLICITOR.

Hamilton, Oct. 21st, 1882.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Processions in the streets.—*London L. J.*, Sep. 2.

Negligently signing negotiable note.—*Albany L. J.*, Sept. 2.

Duty toward infant trespassing on dangerous premises.—*Ib.*, Sep. 9.

Conveyance of easement by implication.—*Ib.*, Sep. 16, 23.

Covenant not to re-engage in business—Covenantee's discontinuance of business.—*Ib.*, Oct. 7.

Partnership—Implied power to bind the firm by negotiable paper.—*Central L. J.*, Oct. 20.

Witnesses criminating themselves.—*Justice of the Peace.*

Habeas Corpus—Custody of infant.—*Ib.*, Oct. 13.

Privilege of witness as to criminating questions. —*Continued—Irish L. J.*, Sep. 30.

Argument of counsel in criminal cases.—*Crim. Law. Mag.*

FLOTSAM AND JETSAM.

CHANGES ON THE BENCH IN QUEBEC.—The retirement of Mr. Justice Mackay has opened the way to an arrangement long anticipated, namely, the translation of Mr. Justice Doherty from Sherbrooke to the District of Montreal—the scene of his old trials and triumphs at the Bar. Judge Doherty was appointed to the bench in 1873, and during several years has had considerable experience in the St. Francis District. He is an energetic and conscientious judge, and will, we feel sure, enter upon the duties of his new position with a determination to discharge them faithfully. Mr. Brooks, Q.C., of Sherbrooke, succeeds to the vacany created in the St. Francis District.—*Legal News.*

In Germany a solicitor sent his bill of costs for business done. In the bill relating to a suit of divorce, he charged the lady one item, thus: "Further, 30 sous for being awoke in the night, and having thought over your matter.

Lord Chief Baron Pollock was one of the most dexterous imitators of handwriting, and used to amuse himself by sending letters in other people's names and handwriting, so correct that the person imitated would swear to its being his own work. Many practical jokes arose out of this little amusement.

Justice Maule was singularly dexterous in picking locks, and which he could not only open but close again, with no other appliance than a stout piece of wire. He had acquired the art by the frequent loss of his keys when at the bar. He used to tell the story how upon one occasion he astonished a country locksmith who had been called in and pronounced a portmanteau beyond his skill, and which the judge opened with ease.

Vice-Chancellor Wickens amused himself with binding books, at which trade he was an adept, and had all the elaborate tools and machines to expedite his work, and he turned out his volumes in masterly style.—*Curiosities of Law and Lawyers.*

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1882.

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

Messrs. John Donald Cameron and Charles Walker Oliver, with honors; and Messrs. John Campbell Ferrie Bown, Charles Joseph Leonard, Ernest Edward Kittson, Victor Alexander Robertson, Loftus Edwin Dancy, J. Hamilton Ingersoll, Henry Walter Hall, Robert Abercrombie Pringle, John Calvin Alguire, Frederick, Augustus Knapp, John A. Robinson and James Martin Ashton.

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates—Spencer Love Francis Robert Latchford, John Alfred McAndrew, Henry Walter Mickle, Alfred Mitchell Lafferty, Charles True Glass, Arthur Eugene O'Meara, Angus McMurchy, Edward George Graham, Robert Hall Pringle, Smith Curtis, Willoughby Staples Brewster, John Frederick Grierson, Edward Kirwan C. Martin John Shilton, Christopher Robinson Boulton, Fenwick Williams Creelman, William Hume Blake, Francis Wolferstan Goodhue Thomas, William Morris, Alexander Clive Morris, David Fasken, James Baird, Frederick C. Wade, Geo. Sandfield Macdonald, George Goldwin Smith Lindsay, Alfred Herman Gross.

Matriculants—Joseph Stockwell Walker, George Ira Cochrane, D'Arcy DeLessart Grierson, Edward James Barrow Duncan, Francis Hall, John Franklin Wills, Henry Parker Thomas, William Francis Johnston, Thomas Atkins Wardell, William Howard Hearst, Norman McDonald, W. J. Millican, John McKay, Robert C. LeVisconte.

Juniors—Herbert Alfred Percival, John Healy Reeves, James S. Chalk, John Henry Alfred Beattie, Wesley Byron Lawson, Henry Newbolt Roberts, Frank Foley Lemieux, James Percy Moore, James Herbert Sinclair, George Herbert Dawson, Neil McCrimmon, John Young Murdoch, Gordon Joseph Leggatt, George Henry Hutchison, George Luther Lennox, Richard Alexander Bayley, Edward Albert Crease, Joseph H. Jack, John Williams Bennett, Malcolm McLean, William George Burns.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 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 year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

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. & III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—
1882—The Deserted Village.
The Task, B. III.