The Canada Law Journal.

VOL. XXVII. APRIL 16, 1891. No. 7.

A VALUED contributor discusses on a subsequent page the question of a substitute for Grand Juries, in view of the article which will be found *ante* p. 4. The appointment of Crown Counsel seems to meet the need, but it may be a question whether the right of appointment should rest with the Province or the Dominion. The functions of the suggested officers are of a semi-judicial character. There should, however, be no difficulty on this score, once it is recognized that the suggested change should be carried into effect.

IN a letter which recently appeared in these columns, a correspondent, referring to the then approaching election of Benchers, took exception to the candidature of a barrister (personally unknown to us), as being unfit for that position. It has been stated to us that the person intended to be referred to in the letter is an esteemed member of the profession in Western Ontario. There must, we think, be some misunderstanding. Coming from the source it did, we did not feel justified in withholding the letter, inasmuch as it would be most undesirable for any one liable to such imputations to hold the honorable position of Bencher. Knowing nothing personally ourselves of this gentleman, we have made enquiry, and the information we have received does not warrant the remarks made in the letter, which certainly would not have appeared in our columns if such information had then been obtainable. We need scarcely say that, if the publication has caused him or his many friends any annoyance, we much regret it.

THE recent election of the thirty benchers of the Law Society has not very materially altered the *personnel* of that body. A strong effort was made to elect members of the Bar who were pledged to assist their brethren in endeavoring to protect the profession against unlicensed conveyancers. The result of this was something, but not very marked. In reference to this subject it is well to understand the difficulty which lies in the way of our obtaining justice from the Legislature, the danger being that the Government might be induced by the pressure of unlicensed conveyancers, who were also members of the House, to deprive the profession of what little advantage they may now possess.

Mr. Meredith has the honour of heading the list, Mr. Moss being next. Mr. Christie, of Ottawa, is the first of those outside of Toronto, closely followed by the popular leader of the Bar at St. Thomas. The new benchers are Messrs. Magee, Strathy, Teetzel, Aylesworth, Watson, Barwick, Douglas, Riddell, and Idington. Those on the previous list and not re-elected are Messrs. McMichael, L. W. Smith, James Beatty, Hector Cameron, Huson W. Murray, J. J. Foy, J. H. Ferguson, T. H. Purdom, and N. Kingsmill. We doubt not that when vacancies

occur, as they do from time to time, some of these whose names have been left off, but who have been in the past hardworking, useful benchers, will be nominated to fill vacancies. Some names not on the list we should have been glad to see there, but there is no name on the list to which exception could be taken, or who is not more or less entitled to the distinction conferred.

The names are as follows: W. R. Meredith, Q.C., Toronto; Chas. Moss, Q.C., Toronto; A. J. Christie, Q.C., Ottawa; Colin McDougall, Q.C., St. Thomas; James Magee, Q.C., London; Donald Guthrie, Q.C., Guelph; B. B. Osler, Q.C., Toronto; Edward Martin, Q.C., Hamilton; Christopher Robinson, Q.C., Toronto; B. M. Britton, Q.C., Kingston; the Hon. A. S. Hardy, Q.C., Brantford; John Hoskin, Q.C., Toronto; the Hon. C. F. Fraser, Q.C , Brockville; H. H. Strathy, Q.C., Barrie; Francis Mackelcan, Q.C., Hamilton; Dalton McCarthy, Q.C., Toronto; John Bell, Q.C., Belleville; G. F. Shepley, Q.C., Toronto; Alexander Bruce, Q.C., Hamilton; J. V. Teetzel, Q.C., Hamilton; A. B. Aylesworth, Q.C., Toronto; G. H. Watson, Q.C., Toronto; Z. A. Lash, Q.C., Toronto; J. K. Kerr, Q.C., Toronto; Walter Barwick, Toronto; Æmilius Irving, Q.C., Toronto; C. H. Ritchie, Q.C., Toronto; Wm. Douglas, Q.C., Chatham; W. R. Riddell, Cobourg; John Idington, Q.C., Stratford.

A CHANGE radical and of importance in regard to the punishment of first offences is about to be introduced into French law. It is in effect the oft-discussed theory of conditional punishment put into practice. When the prisoner is brought up for the first time and convicted, he will be sentenced in the usual way, but the sentence will not necessarily be carried out. If the court should so decide, the execution of the sentence will be delayed, and if the offender keeps a clear record for five years the sentence will lapse. If, however, he should again offend during this period, the old sentence will be revived and a double punishment inflicted. The *Times*, in commenting on it, remarks: "A first offence does not necessarily prove that the offender belongs to what is known as the criminal class. He may have been betrayed into crime under the pressure of special circumstances, or may have given way to sudden temptation by no deliberate choice of his own. To send such a man to gaol may have just the effect which a wise legislature would be most careful to guard against. It may introduce him to a life of crime by the stigma which it puts upon him as a gaol-bird, and by thus making it very difficult for him to earn an honest livelihood at any time afterwards. The new law will work in a direction exactly the opposite. The man who has been let off unpunished, but not unsentenced, will have the strongest possible inducement to keep straight for the future. He will have received a grave warning, and he will know that it will depend upon himself whether the consequences are to end with this. If he has become a criminal, so to say, by accident, the probability is that he will stop short at the first offence." The principle of the intended French system would seem to be the reform of the criminal by preventing his becoming one. Such a method of treatment could not, however, we think, be meted out successfully to certain offences which bear on their face the evidence of a depraved nature, which it would be folly to

imagine could be restrained by a suspended sentence ; neither could it be applied in the case of such crimes as make a man dangerous in the highest degree to society. It will be interesting to note the effect of this system, which, so far as one can foresee, will, if carefully and wisely carried out, tend to the lessening of crime.

CROWN COUNSEL.

(COMMUNICATED.)

In a former issue we discussed the question whether or not Grand Juries are essential in any degree to the due administration of criminal justice, and the conclusion arrived at was that they had outlived their usefulness. We indicated that the duties of the Grand Jury could be better performed and the object sought to be accomplished by the grand inquest more satisfactorily effected by means of a change in the present system of appointing Crown Counsel and by an addition to the duties now devolving upon them. We propose in this article to deal, first, with the question of the mode of appointment of Counsel for the Crown as it stands at present, and, second, to suggest some changes which might place this important factor in the administration of our criminal law on a better footing by giving Crown Counsel the powers requisite to enable them to take the place of Grand Juries.

In dealing with the first branch of the subject, we do not intend to reflect in any way upon the ability or integrity of the gentlemen who are appointed from time to time by the Attorney-General of the Province to conduct Crown business. All who know the Attorney-General, of whatever political stripe they may be, will readily admit that there are few public men as careful, thorough, or conscientious in the administration of the law as Mr. Mowat has proved himself to be, whether as a judge or as the Attorney-General of Ontario. Judging from his long tenure of office and the confidence reposed in him by the electorate for these many years, it can scarcely be denied that the public have grown to regard him as a man to be trusted in small matters as well as great, and his name is taken by the people as a sufficient guarantee that their welfare is safe in his hands. We therefore feel warranted in saying that, as regards the administration of criminal justice, there can be no ground of complaint with reference to the personal efforts of the Attorney-General and his officers ; but, when we come to consider the system itself, we fear we cannot speak so strongly in its favor.

The first great objection to the present mode of appointing Crown Counsel is that it is purely political and of a temporary character only. It is highly desirable that these officers should be permanent and that they should not depend upon the influence of their friends for their retainer. The more permanent we can make our judges and all other Crown officials, the better it will be for all parties concerned in the law and its due enforcement. A man who knows that his position is secure will be more likely to perform his duty in a freer and more independent manner than he whose tenure depends, to some extent at least, on considerations other than the faithful discharge of his official functions. If it is thought a proper thing for judges to hold office for life, subject of course to good behavior, it is equally desirable that officers entrusted with the authority of the Crown, and with power to conduct prosecutions affecting the life

and liberty of the subject, should feel that their future employment was not determined by any circumstance of a political nature or by the possibility of a change of government.

There is also another objection to the appointment of Counsel being of a temporary character. The same Counsel is not, as a rule, assigned to the same court or even the same circuit for two assizes in succession. He therefore finds himself a total stranger to the local surroundings, the local officers of the Crown, and the character of the community where he is expected to perform his duty. These are important things to know, as every Counsel, civil or criminal, will admit, and the want of such knowledge very often milirates against a good Crown officer to the detriment of himself and the prosecution. His appointment, too, is necessarily made only a short time before the opening day of the court. By the time he has communicated with the County Crown Attorney, received the depositions and written again for explanations, the court is upon him, and he finds himself but half prepared to present his case fairly, and perhaps not prepared at all to do battle with some able lawyer and difficult evidence on the other side. As a rule, the depositions give but little information: the fine points of the case do not appear on the face of the evidence taken down by some worthy layman who is very likely accustomed more to the axe than to the pen. The magistrates may be good, substantial men of their neighborhood, but their appreciation of the facts of a criminal case cannot be said to equal their honest intentions to do justice in the premises. The most a Counsel can gather from the papers is a general impression of what the evidence may be, not what it really is. In this connection it may well be pointed out that the turning points in a criminal prosecution do not often appear from preliminary examinations as recorded by the justices, and the Counsel for the Crown has to ascertain, as best he can, and often in a hurried and perfunctory manner, from the witnesses present at the court, just what the real facts are, which state of affairs, it is needless to say, often results in an acquittal when there ought to be a conviction; or in a traverse of a case at considerable expense to the country and a risk of losing by next court what little evidence there is against the offender.

Another very serious phase of the present state of things is that the evidence brought before the prosecuting counsel is not complete, for the reason that, in many cases, particularly those involving difficult questions of law and which come before the local officer perhaps for the first time in his practice, the requisite practical and experienced knowledge is not possessed by him and cannot be expected of him for the due preparation of the Crown brief. Very often, as we are informed by old Crown officers, the evidence brought forward is not pertinent to the issue, and is otherwise frequently inadmissible. Facts are left unproved, not from want of evidence to sustain them, but by reason of the proper witnesses not having been subpœnaed to prove them. The criminal law practice is not like civil proceedings. No latitude is permitted on the part of the Crown, whilst every indulgence is properly given to the prisoner. He has the benefit of all reasonable doubts. His defence is often permitted to be given in the loosest sort of manner, whilst the Crown is rigidly tied down to unwritten law and

comparatively unknown practice, to such an extent that an inexperienced Counsel may find himself blocked at the very simplest stage of his prosecution. There is, therefore, the gravest necessity for Counsel to be seized of all the facts, to weigh them carefully and considerately, to weed out all that is objectionable, and to be able, by a thorough study and knowledge of his case, to meet the many objections and surprises that are likely to beset his path before he is able to establish a case to go to the jury.

There is still another point to be considered. Every man placed upon his trial for a criminal offence is entitled to be tried fairly. The greatest care should be exercised on the part of the Crown in order that he may not be unjustly convicted, and it is always of the greatest consequence that evidence should not receive greater weight than it is entitled to, and that witnesses should not be allowed to magnify that into an important element against the prisoner which, as a matter of law, may not be of much importance in estimating the guilt or innocence of the accused. On the other hand, it is as clearly the duty of the Crown to see that the prisoner is not improperly acquitted, by reason of the non-production of proper, sufficient, and available evidence. Keeping these two objects in view, it is manifest that the greatest deliberation and care are necessary on the part of Crown Counsel in order that a fair and sufficient trial be had. Many cases are intricate, the evidence is often conflicting, the details frequently of the most minute character, and the feelings of the witnesses themselves require to be thoroughly and cautiously analysed. Clever defences have to be anticipated, lest there be a miscarriage of justice, and in a hundred other different ways, the public interest is to be considered and protected in criminal prosecutions, even where they are of a minor character. Such being the case, it is evident that Crown Counsel should be in possession of all the facts a reasonable time before the trial, and should be thoroughly competent to deal with the case before him in all its different branches.

The criminal law, whilst simple in much of its practice, presents at the same time some of the most difficult questions that can possibly arise in a legal practice. To select, therefore, as a Crown Counsel, a professional man whose engagements are purely of a civil character, except on one or two occasions in each year when he is entrusted with Crown work, is, to say the least of it, a somewhat dangerous proceeding; and there is no doubt that prosecutions which should, in the interest of the State, result in a conviction, collapse, not because the Crown Counsel is a man devoid of ability, but on account of his inexperience in criminal matters. Many additional arguments will suggest themselves to the reader why Crown Counsel should be, not only men of ability, but also of considerable knowledge and of varied practice in criminal prosecutions.

A remedy for all this is suggested. Why should not Counsel be selected for each circuit, and then occupy a position somewhat analagous to the public prosecutor in England? He should be kept informed of all questions likely to arise in the courts Oyer and Terminer within his circuit, and in order that he might be available at all times, his appointment should be a permanent one. He might be paid in fees, as Crown Counsel are at present, and an allowance might

be made for special services, for consultations, etc. If this scheme were adopted, Crown Counsel would go into court with his briefs thoroughly prepared. Good men could always be obtained to act as Counsel, and the conducting of Crown prosecutions could be raised to a very high standard.

As things are now, it does not pay a Counsel of any eminence to engage in Crown work. Take an assize where there are perhaps two criminal cases. The first day is generally lost in examining witnesses, and in consultation with the local Crown officer; perhaps the whole of the second day is taken up with the finding of the bills by the Grand Jury. A long civil case in the meantime intervenes, and counsel is detained until the end of the third or fourth day before he is able to dispose of the Crown business, and for this he receives less than a taxable fee on a civil brief for a few hours, unless one of the cases happens to be the charge of murder. Out of this sum he has to pay his expenses, the result being that he is practically out of pocket by the transaction. We believe that it is a fact that retainers by the Crown are refused from time to time on the ground of prior engagements, which shows that one civil brief at a contemporaneous assize pays better than the whole Crown business at another put together.

There is another feature to be considered in this connection. Whilst the Crown officer is a prosecutor, he is supposed to be semi-judicial in his capacity, and to be in a position to render valuable assistance to the court in determining the guilt of the accused. Under the present system, unless in exceptional cases, the Crown officer can be of very little aid to the trial judge, and we have no doubt that if the judges felt themselves at liberty to express their views, they would concur in what we say in reference to this point.

Coming to the second consideration, we would suggest that Crown Counsel, appointed permanently by the Government, should take the place of grand juries. As we have said, the public have, irrespective of political feeling, full confidence in the present Government that they would make good and careful appointments in this respect. Apart from the integrity and conspicuous ability of the Attorney-General, already referred to, upon whom would mainly fall the responsibility of making the appointments, he would, we are satisfied, be honestly and wisely aided in his selection by the very able men who, amongst his colleagues, are members of the same profession. No one knows better than they do the wants and necessities of the profession, and few men have had the experience they have gained, which is necessary to a wise and prudent choice of men to fill the important position of Crown Counsel. If these gentlemen adopt our suggestion, they will have, we believe, a system of administering justice not excelled in any other country, and the result will be that the Grand Jury will be found to be a needless ornament in the constitution of our courts. There are many reasons to be advanced in favor of our contention. We are disposed to think that the change we suggest would give an efficient and experienced body of Crown prosecutors. These officers would acquire a knowledge of their duty and of the cases before them which they cannot have under the present system, no matter how able or distinguished they may be. There would be no local influences at work in preferring a bill or preventing the presentment of an indictment in a proper case.

Persons charged with crimes would be presented fairly and at the same time protected where protection was found to be necessary. Delays would not occur in the trial of criminal cases. Evidence would, if available, be forthcoming, and where there was no probability of a conviction, the time of the courts would not be taken up, as it now frequently is, with charges which have no foundation except in personal feeling or prejudice. The Crown officers would be properly remunerated, and the Province could afford to pay reasonable fees and still effect a large saving every year to the country. In addition to all this, it must be admitted that an experienced and reputable lawyer is a far better judge of the necessity of a criminal trial in any particular case than a dozen grand juries could be; and if these matters were left entirely in his discretion, there would be fewer presentments due to fear, favor, or affection, and, as a natural consequence, there would exist a higher standard of administration, a better protection afforded to innocent men unjustly charged with crime, and a greater certainty of justice in cases where guilt lies at the door of the accused. The public interest and the welfare of her Majesty's subjects would be amply guarded, and the public treasury would be relieved of a heavy burden incurred in keeping up a system which is centuries behind the present utilitarian age.

We need scarcely add that we are not preferring or even suggesting any charge of inefficiency against the members of the profession who are selected under the present system, but we emphatically urge that a better, cheaper, and far more effectual system can be inaugurated, and we trust that our modest contribution to the grand jury discussion may result in a change either on the lines we have indicated or in some other and better way—if such can be found. Our contention is that some change is necessary, and the best thought we can give to the subject (so far as our present light enables us to judge) leads us to urge a change in the direction we have endeavored to bring before our readers.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(Notes on the March Numbers of the Law Reports—continued).

COMPANY—WINDING UP—CONTRIBUTORY—SHARES ALLOTTED ON FICTITIOUS APPLICATION—PRINCIPAL AND AGENT.

In re Britannia Fire Association—Coventry's case (1891), 1 Ch. 202, was an appeal by executors of a deceased allottee of shares from the decision of Kay, J., holding them liable to be placed on the list of contributories of the company which was being wound up. The appellant's testator had been allotted shares under the following circumstances. His father was a director of the company, and it was agreed between him and the other directors of the company, that for the purpose of making it appear that the whole share capital had been taken up, the shares remaining unallotted should be issued temporarily to the nominees of the directors until applied for by the public, there being no intention that either the directors or their nominees should incur any liability in respect of the shares. The testator's father, without his knowledge or concurrence, applied for shares for his son, the testator, who was accordingly registered as holder of 200 shares.

The son was residing abroad, and he never knew the shares had been applied for or allotted to him, never paid anything on them, and no certificate of allotment was ever issued to him. The father and son both having died, the latter without having recognized his position as a shareholder, the liquidator nevertheless placed his executors on the list of contributories, as Kay, J., held rightly; but the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) reversed his decision, on the ground that the case was governed by the ordinary law of contract, and that though the father of the testator and his co-directors might have made themselves jointly and severally liable on the ground of fraud, yet the facts did not establish any actual contract by the testator to take the shares which would justify placing his executors on the list of contributories.

REAL ESTATE—DEVISE IN TRUST—FAILURE OF HEIR OF BENEFICIARY—LEGAL ESTATE—RIGHT TO CALL FOR CONVEYANCE.

In re Lashmar, Moody v. *Penfold* (1891), 1 Ch. 258, is a decision on a very nice question of real property law. Most practitioners would, we think, be inclined on first impression to come to the same conclusion which Kekewich, J., did; and yet, on further consideration, would probably be willing to admit that that conclusion was wrong. The facts were simple: Peter Lashmar died, leaving a will whereby he devised his reversion in certain lands to trustees for his son Charles in fee, subject to certain life estates. Charles died entitled to the equitable reversion, which he devised to trustees in trust to pay or to permit his widow to receive the rents during her lifetime or widowhood, and after her death or second marriage, upon trust for his son George, his heirs and assigns; and Charles empowered his trustees, with his wife's consent, and after her death during the minority of his son George, in their discretion, to sell the real estate and convey it to a purchaser. Charles' widow and son George both having died, the latter without issue and being illegitimate, and the surviving trustee of Peter being in possession of the estate, the tenants for life, under Peter's will, being also dead, this action was brought by the surviving trustee of Charles' will against the surviving trustee of Peter's will, claiming a conveyance of the legal estate. The question turned on whether under Charles' will the trustees, assuming the testator had a legal estate to devise, took the legal estate. Kekewich, J., though thinking that George took the estate under the devise to him, yet considered that the power of sale subsequently given in the will to the trustees entitled them to the legal estate, and he therefore decided in favor of the plaintiff. But the Court of Appeal (Lindley, Bowen and Fry, L.JJ.) reversed his decision, being of opinion that as soon as the widow of Charles died and George attained twenty-one, the trustees of Charles' will had no further duty to perform and had a bare trust, and therefore the right to call for the legal estate was in the beneficiary under the will and not in the trustees, and therefore the plaintiff, as surviving trustee, had no right to call for a conveyance of the legal estate, though the Court of Appeal admitted that if, as in *Onslow* v. *Wallis*, 1 Mac. & G. 506, on which Kekewich, J., based his decision, the plaintiffs had any duties to perform in reference to the estate, their decision would have been the other way.

BANKERS—DEPOSIT OF SECURITIES BY BROKER—FOREIGN BONDS PAYABLE TO BEARER—NEGOTIABLE SECURITIES—MEASURE OF DAMAGES.

Simmons v. *London Joint Stock Bank* (1891), 1 Ch. 270, is a very important decision on a question of mercantile law. The plaintiffs had deposited with a broker named Delmar a number of bonds and certificates of shares, etc., which the Court of Appeal assumed in the defendants' favor were negotiable securities. Some of these securities Delmar, without authority, sold, and others of a like character were bought by him and substituted in their place. All these bonds, certificates, etc., including the substituted ones, were entered in Delmar's books as belonging to the plaintiffs, the particular bonds or certificates being indicated therein by their numbers, or by other sufficient identification. Delmar, in order to secure an advance to himself, deposited the plaintiffs' bonds, etc., together with the securities of other customers, with the defendants. The defendants subsequently sold some of the plaintiffs' securities in part discharge of Delmar's debt to them. The present actions were brought to compel the defendants to deliver up such of the plaintiffs' securities as they still retained, and to account for the proceeds of those which they had sold. On the trial it appeared from the evidence that the bank officials assumed that the securities were not the property of Delmar individually, but of his customers; that brokers were accustomed to borrow money for their clients on the securities in their hands, and that they did this, not by borrowing on the securities of each client separately, but by borrowing on the securities of divers customers which they held, *en bloc*; and that the bank did not actually know that any one else was interested in the securities deposited by Delmar, and never asked any questions, assuming that he was acting within his authority, the defendants' manager admitting that he considered no useful purpose would be answered by making inquiry, because the honest customer would be offended, and the fraudulent one would give a satisfactory though false reply. Under these circumstances, Kekewich, J., held that the plaintiffs were entitled to the relief claimed; and on the question of damages, he held that the plaintiffs were not entitled to the value of the bonds which had been sold, at the highest market price which they had reached while in the defendants' hands, but only to what had been actually realized for them, with interest from the date of sale at four per cent. The plaintiffs were also held entitled to all dividends and income on the bonds, etc., sold or unsold, which the defendants had received. The Court of Appeal (Lindley, Bowen and Fry, L.JJ.) affirmed the decision of Kekewich, J., on the main question, no appeal being had on the question of damages. Whether the securities in question were in fact negotiable securities in the technical sense seems doubtful, and the judgment of the Court of Appeal points out that though an instrument may be framed so as to pass the benefit of the contract thereby evidenced by delivery to bearer, yet that alone does not constitute it "a negotiable instrument" in the technical sense, so that a *bonâ fide* transferee, without notice, would take any better title than his transferror had; but for the purpose of the decision the point was assumed in the defendants' favor, that the instruments were in fact negotiable securities. The assumption that a broker may raise money on deposit of his customers' securities in his

hands *en bloc*, without express authority, even though such securities be negotiable instruments, is, according to the Court of Appeal, without foundation in law; and whenever a bank has any reason to believe that the securities tendered by a broker as a security for an advance are not his own property, it is incumbent on the bank to make inquiry into his authority to raise money on such securities, at the peril of being called to account by the rightful owner in case the broker is acting without authority.

INFANT—SETTLEMENT BY INFANT—EXERCISE BY INFANT OF GENERAL POWER OF APPOINTMENT—FAILURE OF LIMITATIONS—RESULTING TRUST—INFANTS' SETTLEMENT ACT, 1855 (18 & 19 VICT., C. 43), SS. 1, 2 (ONT. JUD. ACT, S. 32).

In re Scott, Scott v. *Hanbury* (1891), 1 Ch. 298, an infant who was illegitimate, having a general power of appointment, by a settlement made on her marriage, with the sanction of the Court under the Infant's Settlement Act, 1855 (Ont. Jud. Act, s. 32), executed the power in favor of the trustees of the marriage settlement upon trust for herself for her separate use during the joint lives of herself and husband, with remainder to the survivor for life; and after the death of the survivor in trust for the children of the marriage, and in default of children as she (the wife) should appoint, and in default of appointment, if she should survive her husband, in trust for her absolutely; and if her husband should survive her, in trust for such persons as under the Statute of Distributions would have become entitled thereto at her death had she died possessed intestate and unmarried. The lady died under age, leaving no issue, and without having made any other appointment; being illegitimate, there was no one who could take under the ultimate limitation of the settlement. The husband, who survived his wife, claimed the trust fund as her administrator, and North, J., held that he was so entitled. It was contended that under s. 2 of the Infants' Settlement Act, 1855, the wife having died under age, the appointment made by the settlement was void, but this view was negatived, North, J., holding that the provisions of that section applied merely to settlements made by tenants in tail, that the settlement indicated an intention to exercise the power so as to make the property absolutely the settlor's own, and on failure of the ultimate limitation there was a resulting trust for the settlor, and therefore the husband was entitled.

COMPANY—WINDING UP—STAYING SEQUESTRATION—LANDLORD—LEAVE TO PROCEED NOTWITHSTANDING WINDING-UP ORDER—(R.S.C., C. 129, SS. 16, 17).

In re Wanzer (1891), 1 Ch. 305, was an application by a liquidator in a winding-up proceedings to set aside a sequestration issued by a Scotch landlord to enforce his hypothec for rent due by the company. North, J., held that the sequestration was void (see R.S.C., c 129, s. 17), but it appearing that the landlord's hypothec gives a security on the goods on the demised premises, he gave leave to proceed with the sequestration (see R.S.C., c. 129, s. 16), unless sufficient security was given for the rent for the current year, including a period previous to the winding-up order, on the terms of the landlord paying the costs of the motion.

PRACTICE—ORDER ON THIRD PARTY TO ATTEND AND PRODUCE DOCUMENTS—OBJECTION BY THIRD PARTY TO PRODUCE—ORD. XXXVII, R. 7 (ONT. RULE 580).

In re Smith, Williams v. *Frere* (1891), 1 Ch. 323, it was held by North, J., that under an order directing a person not a party to the action to attend and produce documents, though unqualified in its terms, it is nevertheless open to such person to raise any legal objection to the production of any document which he would be entitled to take upon being served with a *subpœna duces tecum*. He also held that under Ord. xxxvii, r. 7, production ought not to be ordered for the purpose of private inspection, but only in reference to some proceeding in the action, and that the order may be made *ex parte*. We may note that the Ont. *Rules* do not appear to contain any exact counterpart of the English *Rule* above referred to. Ont. *Rule* 580, however, contains a similar provision for the purpose of obtaining production on any motion; but it would appear from the cases that, though the English *Rule* is more general in its terms, it is intended to have no wider application than the Ont. *Rule* 580.

SOLICITOR AND CLIENT—RETAINER—TRUST FUND, IMPROPER INVESTMENT OF—BREACH OF TRUST—NEGLIGENCE OF SOLICITOR—LIABILITY OF PARTNERS—ACTIO PERSONALIS MORITUR CUM PERSONA.

In *Blyth* v. *Fladgate* (1891), 1 Ch. 337, the plaintiffs claimed to recover against a firm of solicitors and the personal representatives of a deceased member of the firm for loss of trust funds, occasioned by an improper investment thereof made by one of the partners who was also one of the trustees of the fund. The fund in question was standing to the credit of the firm at their bankers when the money was invested by the partner, Smith. At this time there were no trustees of the fund, but Smith and two others were subsequently appointed trustees, and never repudiated the transaction. The work was done by Smith, but the firm received payment therefor out of the trust funds. In an action against the trustees, they were held to be jointly and severally liable to make good the loss sustained. The property not having been sold or the trust funds replaced, the beneficiaries in the present action sought to make the firm of solicitors and the personal representatives of the deceased partner liable for the loss of the funds on the ground of negligence, though Smith's partners had not any knowledge of the property at the time when the mortgage transaction was carried out. Stirling, J., held that the trust funds having been in possession of the firm with notice of the trusts, they could only discharge themselves from liability by showing that they were duly applied in accordance with the trusts; that though the trustees had adopted the investment, that would not discharge the solicitors from liability for negligence if they had knowledge that the investment was one which could not be properly made by duly constituted trustees; and this knowledge he held they had, as they were bound by the action of Smith, acting as a member of the firm and within the scope of his authority; that the liability of the members of the firm was not merely joint, but several, and therefore that the recovery of judgment against Smith did not discharge the other members of the firm. He also held the claim to arise against the firm *ex contractu*, and as founded on an implied promise to exercise reasonable care and skill as solicitors;

and therefore the estate of the deceased member of the firm was liable. He also held that the solicitors and the representatives of the deceased partner were bound to indemnify the co-trustees of Smith against this liability to the beneficiaries, and that Smith was therefore not entitled to contribution from his co-trustees.

WILL—CONSTRUCTION—CHARITABLE GIFT—CY-PRÈS.

In re Slevin, Slevin v. *Hepburn* (1891), 1 Ch. 373, a testator by his legacy gave a number of legacies to various persons, using the introductory words, "I bequeath the pecuniary legacies following." He then gave a number of legacies, using the introductory words, "I bequeath the following charitable legacies," and amongst such last-mentioned legacies was one to an orphanage voluntarily maintained by a lady at her own expense, which was in existence at the time of the testator's death, but was discontinued shortly afterwards, and before the assets were administered. The question for Stirling, J., was: What was to be done with this legacy? He held that as the gift was to a private institution, maintained at the expense of an individual, the Court could not, on failure of the particular charity, apply the legacy *cy-près*, and, secondly, that no general charitable intention could be inferred from the introductory words, and the legacy therefore fell into the residue.

PRINCIPAL AND AGENT—EMPLOYMENT BY PAROL OF AGENT TO BUY LAND—DENIAL OF AGENCY—PURCHASE BY, AND CONVEYANCE TO, AGENT—PRACTICE—PLEADING—STATUTE OF FRAUDS—AMENDMENT.

James v. *Smith* (1891), 1 Ch. 384, involves two points, one of law and the other of practice. The action was brought claiming that the defendant had been employed by the plaintiff to purchase a house for him, and that the defendant had purchased the house but taken the conveyances in his own name, and the plaintiff claimed a declaration that the defendant was trustee of the house for, and should be ordered to convey it to, the plaintiff. The defendant by his statement of defence, denied the facts alleged by the plaintiff, and stated that he intended to rely on the 4th section of the Statute of Frauds. Kekewich, J., held that the 7th section of the Statute of Frauds afforded a defence to the action, but not the 4th section; but he held the defendant could not rely on the 7th section because he had by his defence only claimed the benefit of the 4th section, and he refused to permit an amendment; but on the facts he found in favor of the defendant, and dismissed the action, but without costs.

SHIP—MANAGING OWNER—SHIP'S HUSBAND—SECRET PROFIT.

In *Williamson* v. *Hine* (1891), 1 Ch. 390, Kekewich, J., held that a managing owner of a ship is not entitled to retain or to charge against the ship, in the absence of any special bargain so to do, any profit for himself by way of commission or otherwise for procuring charters or freights, whether he be a shipbroker or procures them himself, or employs another broker for the purpose, because the procuring of charters and freights is part of the duty of a managing owner.

SHIP—COLLISION—FOG—ALTERATION OF HELM.

The Vindomara v. *The Haswell* (1891), A. C. 1, was an appeal from the Court of Appeal (14 P. D. 172) in which the House of Lords affirmed the decision of the Court below, holding that there is no hard and fast rule that where two steamships in a fog are approaching one another so as to involve risk of collision, neither ship ought to alter her helm until the signals of the other give a clear indication of her direction, but that each case must depend on its own circumstances, and these may afford reasonable ground for believing what the direction must be.

SHIP—DAMAGE—WHARF—WHARFINGER, LIABILITY OF.

In *Tredegar* v. *The Calliope* (1891), A. C. 11, the House of Lords overruled the decision of the Court of Appeal (14 P.D. 138), see *ante* vol. 25, p. 557, holding that on the evidence the injury to the ship was caused by the captain and pilot attempting to berth her alongside the wharf at a time of the tide, when it was not safe to do so for a vessel of her draught and trim, and therefore that the inequalities in the bed of the river adjoining the wharf were not the immediate cause of the injury.

SHIP—CHARTER PARTY—PAYMENT OF HIRE OF SHIP TO CEASE UNTIL SHIP IN AN EFFICIENT STATE.

In *Hogarth* v. *Miller* (1891), A. C. 48, the case turned upon the instruction of a charter-party, which provided that the appellants should maintain the vessel in a thoroughly efficient state in hull and machinery, and that in the event of a break-down, etc., whereby the ship was stopped for more than 48 consecutive hours, the payment of hire should cease until the vessel should be again in an efficient state to resume service. The vessel was disabled on a voyage to Harburg, and she had to put back to the port of Las Palmas. By arrangement between the parties she was towed by tug from Las Palmas to Harburg, the expense of the tug being treated by agreement as general average on cargo, ship, and freight. On her arrival at Harburg the cargo intended for that port was discharged, the ship's steam winches being available. The House of Lords (affirming the Court of Session) held that the appellants had no claim for hire during the voyage from Las Palmas to Harburg, the ship not being independently efficient for the voyage; but, varying the decision of the Court of Session, they held that the appellants were entitled to hire for the time occupied in discharging the cargo at Harburg, as the ship was in an efficient state for that particular employment.

LIBEL—PRIVILEGED COMMUNICATION—ONUS PROFUNDI—MISDIRECTION.

In *Jenoure* v. *Delmege* (1891), A. C. 73, the Judicial Committee of the Privy Council on the appeal from the Supreme Court of Jamaica, in an action for libel, lay down that there is no distinction between one class of privileged communication and another, that wherever the communication is privileged it is necessarily implied that the occasion of the communication being made rebuts the inference that the defendant was acting *malâ fide*, and the jury having been told, on the trial, that the existence of privilege was contingent upon

whether in their opinion the defendant honestly believed his volunteered communication to be true, and that the burden of proof on that point was on him, it was held by the Privy Council that there was misdirection, and a verdict for the plaintiff was set aside and a new trial ordered. The libel complained of in this case was a letter written by the defendant to an Inspector of Constabulary, stating that he had been informed that a poor woman had died in labor in consequence of want of medical attendance, and that the plaintiff, a medical man, had been applied to to attend to her, and had refused to go unless paid his fee, and that such cases were by no means an uncommon occurrence, and requesting him to inquire into the matter and report the case to the proper authority. The defendant was in fact a justice of the peace, but the Privy Council held that nothing turned upon that, because "to protect those who are not able to protect themselves is a duty which every one owes to society." The judicial committee of the Privy Council adopt the language of Cotton, L.J., in *Clark* v. *Molyneux*, 3 Q.B.D. 237, which was not brought to the attention of the colonial Court. He said in reference to a privileged communication: "The burden of proof lay upon the plaintiff to show that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that those communications were privileged, but that the defendant must satisfy the jury that what he did he did *bonâ fide*, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."

Notes on Exchanges and Legal Scrap Book.

AN ARREST OF JUDGMENT EXTRAORDINARY.—Talking the other day with one of our grave and reverend seniors of the law, he related the following:—About forty years ago an indictment for murder was laid against some colored man in the western part of Upper Canada. Fortunately for the prisoner, the Crown counsel and the judge who presided at the trial were all somewhat green on the subject of pleading in criminal cases. During the trial the narrator of the anecdote took occasion to look at the indictment, and pointed out to the prisoner's counsel a fatal defect in it. The prisoner was found guilty of murder; whereupon his counsel moved in arrest of judgment on the ground pointed out. The learned judge who presided at the trial decided to reserve the case for the opinion of his brother judges. Accordingly the record and other papers were transmitted to Toronto. Some delay took place in bringing the matter on for argument, and in the meantime the indictment was knocking about with other papers in the possession of the judges' clerk. When the case at length came up for debate the last page of the indictment (which was written on paper), and which contained the most important part of the indictment, was missing. What had become of it, whether it had become food for the mice,

or been applied to other ignoble purposes, no one could tell. A half a loaf is said to be better than no bread, but a half an indictment is hardly sufficient to hang a man on, and so the prisoner was discharged. For many years afterwards it became the invariable rule to write all indictments for capital offences on parchment.

THE VAGLIANO CASE.— . . . . "Longa decem tulerunt fastidia menses." After nine months' consideration and reconsideration, the Lords have at last given judgment in the *Vagliano Case*. It was generally expected that the decisions of the Courts below would be reversed, and that their lordships would not be unanimous. Six judges against two have held that the loss on the bills of exchange, so ingeniously forged by the convict Glyka, must be borne by Messrs. Vagliano. In a question of such importance, it is too early to discuss in detail the conclusions arrived at by the noble and learned lords. We are disposed to think that the majority of the profession regard the decision with disapprobation, and the effect of this protracted litigation can hardly be considered satisfactory when we find that, taking all the trials together, there is actually a majority of judges in favor of the respondent Vagliano, viz., Mr. Justice Charles, five out of the six members of the Court of Appeal, and two law lords, as against Lord Esher and six law lords.

It is clear, from a perusal of the judgments, that all the judges were, by no means, influenced by the same considerations. The three elements which form the basis of the decision were: (1) Negligence generally on the part of Vagliano, and a conduct of his business which facilitated the frauds; (2) the doctrine of *estoppel;* and (3) the language of the Bills of Exchange Act, 1882, s. 7, subs. 3. To these, perhaps, may be added, as Lord Bramwell suggested, a dislike of the case of *Robarts* v. *Tucker* (20 Law J. Rep. Q. B. 270). Lord Selborne and Lord Macnaghten relied mainly on the first ground; the second was emphasised by the Lord Chancellor, who spoke of Vagliano by his letters of advice to the bank and acceptance, giving the bills as against himself, "qualities which, in their inception, they did not possess," "a genuineness" which did not otherwise belong to them. Lord Herschell took great pains to show that the persons named as payees on the forged bills were "fictitious" persons within s. 7, subs. 3 of the Act, notwithstanding that they were the names of well-known existing persons, who were actual correspondents of Vagliano. Lord Selborne expressly declined to take this view, of which Lord Bramwell's criticism is characteristically trenchant and vigorous. But Lord Selborne did expressly say that *Robarts* v. *Tucker*, in which a banker who had paid a bill on which the indorsements were forged had to lose his money, was not to be extended; and Lord Macnaghten devoted a considerable part of his concise and luminous judgment to distinguishing the case before the house from *Robarts* v. *Tucker*. Lord Bramwell's judgment was in his pithiest and most amusing style. He applied with great force what Mr. Grote calls the "cross-examining *elenchus* of Socrates" to Lord Herschell's verbal dialect, on which he remarks, "That beats me." He concludes his judgment with what looks like an afterthought—a farewell

Parthian shaft of sarcasm against his colleagues. He remarked that the head-note of his and Lord Field's opinion might be expressed in the most abstract form—viz., "A banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer"—whereas the opinions of the majority would have to be in a strictly concrete form, dealing with the facts of the particular case. The criticism is just—but not conclusive; logic and symmetry are not final *criteria* of truth. But it certainly is more satisfactory to be able to apply some definite principle, such as that enunciated by the learned lords.—*Law Journal.*

ELECTION OF A LAYMAN AS A JUDGE.—At a recent election of a Judge in a district of the State of Kansas, the Farmers' Alliance candidate was elected to fill the office. There is no reason surely, under our neighbors' system, good or bad as it may be, of electing their Judges, why the candidate of any one section of the community might not be as capable a man as the candidate of any other section; but in this particular case it so happens that the gentleman in question, although of admitted high character, is not a lawyer. Such an event could not happen in any country but that of the neighboring republic, where equally surprising things are of daily occurrence, as witness the recent case of a pardon given an offender on condition that he abstain from the use of intoxicating liquors. It does not appear that this man was elected by way of a joke, as was the case in a neighboring State, where a woman was elected mayor in order to show that such an event was possible, although there is nothing, we believe, in the Constitution of the United States which imposes a business or technical qualification on any official, except the State Engineer and Surveyor, who must be a "practical engineer." The election above referred to is, we think, the first instance in which a layman has been chosen, and it is probable that the country will await the result of his decisions before electing other men who in a higher court would probably be so absolutely incapable as to necessitate their removal: and the question as to whether incapacity from want of education is sufficient to remove such an official is a very wide field for discussion. Possibly our neighbors in such a case would avoid the difficulty by retiring him with a pension. We append an apparently genuine letter to the *American Law Review,* we presume from one of the "Allianse":

HOUSE OF REPRESENTATIVES,
TOPEKA, KANSAS, January 15th, 1891.

Eds. American Law Reryou:

In your last knumber you praesume to speak disparraging of Bro. McKay, the farmer's allianse judge. You say with A snear, he can jedge good enough for Us. You forgit that menny of the moast emmenent Judges and Staitsmen commenst as farmers. Youer bioggrafy of Judge Miller shoes that a Man mey bea a grate Judge an yit no verry littel about lor when first commensin. if you was in Bro. McKays coart no dout you woud git the verry kind off jestis you doant want. he kin jedge good enogh for all sech as you. How Is it in youer Big sitties Doant you putt upp the judishel nominashuns at publik orkshun and bortter them auf to the Highest bider? Hevent you sed this time en agin? My Loryer sez you hev. Doant vou kno thet ef A Yeller Dog was nommenated For supream jedge on the demmokat tikkett in Missoory an Cheaf gustise Marshel

ware nomenaited on the republekin tiket the Y. D. wud bea Elektid by a strait Party voat? and ef the repeblikins in Saint Louis ware to nomenate a reggilar jackass woudent the Sante Lous duch all cum upp to the skratch and Elect Him. hesent the republekens allus hed a Niggur on thare tikket at every St. Lous elekshen? Bro Mekkay ken tak kare of R R companyes and the Trusts, en you had beter taik cair oph youer Subskripshen List in Kanses. Goa on and Drink yore Sante Lews Bear pison and all, but let onset peaple aloan. wea kansas pharmers doant wont enny moar Border Ruphenism in ourn d wea wunt have itt.

Yours So, So, A KANSAS FARMER.

P.S. Excuse mistaiks I hev to be a leetle equinomikel untel were get the procriation bill past then I intend to heve a Privet Sectary.

LIABILITY FOR FALSE IDENTIFICATION.—Bankers have long wanted more light upon the question of the liability of a party who identifies a stranger as Mr. So and So, where the identification turns out to be false, and the bank has suffered loss. Such cases are not infrequent. Payees of drafts and other instruments are often strangers at the bank of payment, and call upon accommodating friends, known to the bank, to identify them. Sometimes the friend is deceived, and makes a wrong statement of identity. If he made such a representation, knowing its falsity, no question would exist as to his liability for the injury. But where, without fraudulent intent in fact, and acting under a mistaken belief, he asserts that he knows the party to be of such a name, and the bank, itself ignorant, acts on the assertion to its injury, will the asserter be liable when the statement proves untrue? The banking community is at last favored with a precedent on this question from the Supreme Court of Colorado (*Lahay* v. *City National Bank of Denver*). A party stated to a bank that, the holder of an instrument was the payee therein named. The bank, thereupon, paid the money. The statement turned out erroneous, and the bank was compelled to pay the money over again to the real payee. It sued the party making the statement. He attempted to shield himself behind the general rule that, in an action for deceit, a party making a false statement must be shown to have had knowledge of its falsity in order to be held, and contended that as it was not so shown he was not liable. The court, however, upholds the liability, saying: "To the general rule requiring a party relying upon false representations to show not only that they were false, but that the party making the same knew such to be the case, there are some exceptions; as when one, as in this case, positively assures another that a certain statement is true, preferring at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, he cannot be allowed to complain because another has placed too much reliance upon the truth of what he himself has stated. In this case the bank was adjudged not only entitled to recover the amount paid, but also costs and counsel fee paid in unsuccessfully defending a suit by the real payee, of which it had given the party who made the representation notice. This decision should be welcomed by bankers as a progressive step in the line of increasing definiteness in the law regarding liability of third persons for identifications. The general principles which underlie the action of deceit are now

applied to the particular case of identity at bank, and a party who makes a positive statement as to the identity of a person, which the bank relies on to its injury, may be made liable although he may not have known of the falsity of the statement when he made it. Aside from the instruction which this case affords to bankers, it is useful, furthermore, to those who are called upon to accommodate customers, patrons, or supposed friends, by identifying them at the bank, by showing them the liability incurred in making positive statements of identity which turn out erroneous, and thus teaching the necessity for the exercise of care and caution before making such statements.—*Banking Law Journal.*

RAILWAY COMPANIES AND PASSENGERS.—An interesting action for personal injuries brought against a railroad company has lately been decided by the Supreme Court of Alabama (*Montgomery & E. R'y Co.* v. *Stewart*, 8 Southern Reporter, 708). A passenger was waiting at a station, and the incoming train merely slackened up without coming to a stop. While the train was thus moving at the rate of about two miles an hour, the conductor cried "all aboard!" Said passenger thereupon endeavored to board the train, and, while he was making such effort, the speed was suddenly accelerated, whereby he was injured. The Court held that under the circumstances the passenger was not negligent in attempting to get on the train, and that the company were liable. The following is from the discussion on this point: "The situation created by defendants' servants, as averred and as supported by the tendencies of the evidence, was in itself an invitation to those waiting at the station for the train to get aboard of it, and in the nature of an authoritative assurance that it was safe for them to do so. Confessedly the train ought to have stopped, was signalled to stop, recognized the signal, and slowed down to a speed of not exceeding two miles an hour in partial obedience to it. Confessedly, also, it did not stop, nor were any indications given of a purpose on the part of those in control of it to come to a full stop, but, on the contrary, a tendency of the evidence goes to show that no intention to fully stop was evinced or even entertained, and to all appearances the only opportunity meant to be afforded plaintiff to get on was such as he might enjoy from the maintenance, while passing the station, of the low rate of speed to which the train had been reduced. That a situation, so to speak, or an aspect of affairs, may be produced by trainmen, which will as fully import an invitation or direction to action on the part of passengers as would oral instructions by employees, we do not doubt (*Solomon* v. *Railway Co.*, 103 N.Y. 437, 9 N.E. Rep. 430). That if the jury found the facts stated above, and which are alleged in the complaint, to exist, they would have been authorized to find further that an invitation to the plaintiff to board the train was involved in them is equally clear. So finding, it follows as a matter of course, the danger not being obvious, that plaintiff was not negligent in making the attempt to get on the slowly moving train. Authorities *supra*. Moreover, if the facts referred to were found by the jury, they involved and served to impose another important duty upon defendants' employees, with respect to the knowledge that they must have

that no passenger is in a position of danger before the accelerating the movement of the train. Ordinarily, the duty of trainmen in that connection is performed when the train is brought to a standstill for a length of time which is reasonably sufficient to enable passengers to get on or off by the exercise of due care and diligence on their part; when this is done, there is no duty resting on employees to see and know that passengers desiring to alight have done so, or that persons desiring to take passage are safely on board (*Raben* v. *Railway Co.*, Iowa, 35 N.W. Rep. 645; *Straus* v. *Railway Co.*, 75 Mo. 185, and 86 Mo. 421; *Railway Co.* v. *Williams*, Tex., 8 S.W. Rep. 78; *Railroad Co.* v. *Peters*, Pa., 9 Atl. Rep. 317). Where, however, a reasonable opportunity is not afforded by holding the train stationary for passengers to get on and off, but they are invited and expected to do so while the train is moving at a low rate of speed, a different rule ought to, and in our opinion does, obtain. An invitation thus conveyed implies, at least, an assurance that the momentum will not be increased until all persons desiring to come aboard have done so, and imposes a correlative duty on those in charge of the train not to increase the speed without knowing that no person intending to act on the invitation is so situated as to be imperilled thereby."—*New York Law Journal.*"

THE OFFICE OF A JUDGE.—In view of the difficulty recently experienced in England in inducing a Judge of the High Court to resign a position which he was unable on account of failing abilities to fill, the following from the *Justice of the Peace* will be read with interest by those who have an inclination to inquire into the powers by which such an officer can be removed:

"We may take for our text the following passage from the letter of the First Lord of the Treasury, which was lately published amongst the correspondence on this subject in all the leading daily papers, viz.: "The only course of action open to Government in the case of a judge whose conduct merits removal is by address to the Crown in both Houses of Parliament. The Constitution has very properly made the judges absolutely independent of the Government of the day, which, so far as they are concerned, possesses no paternal or disciplinary authority; and any member of Parliament is equally entitled to move an address with any member of the Government. But this power should obviously only be exercised with abundant specific proof of the necessity to the public interest of that course."

It is generally known at the present day that the commissions of the judges run *quamdiu se bene gesserint*. "We owe this important provision to the Act of Settlement; not," says Hallam, "as ignorance and adulation have perpetually asserted, to His late Majesty Geo. III." (Hallam, Const. Hist. 2, 545). Amongst the provisions of section 3 of the Act of Settlement, 12 & 13 Will. 3, c. 2, it is enacted that "judges' commissions shall be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the addresses of both Houses of Parliament it may be lawful to remove them." From this it has been at times hastily assumed that judges' commissions were not, previously

to the Act of Settlement, in the form thereby provided. Such, however, is not the case. The provision which we have quoted from the Act of Settlement was not, indeed, contained in the hasty and imperfect Bill of Rights. Hallam says that "in the debates previous to the Declaration of Rights, we find that several speakers insisted on making the judges' commissions *quamdiu se bene gesserint*, that is, during life or good behavior, instead of *durante placito*, at the discretion of the Crown." "The former," he continues, "is said to have been the ancient course till the reign of James I." (Hallam, Constitutional History, 2, 544). In Cobbet's Parliamentary History the only expression of the kind is attributed to Sir Richard Temple in the further debate on the state of the nation, January 29th, 1688-9. (5 Parl. Hist. 54). Foss more carefully confines himself to observing that "it has generally been supposed that, up to the end of 1640, the judges were always appointed *durante bene placito*; but several instances occur previously of their patents being *quamdiu se bene gesserint*. It is sufficient to mention the late one of Chief Baron Walter, whose elevation to the bench in 1625 was in that form, and who refused to be dismissed in 1630 without a *scire facias*, 'whether he did so *bene se gerere* or not.'" (Foss, Judges, 6, 210). And, although the patents of Cromwell's judges were in the same form, yet that did not prevent the Lord Protector from removing Newdigate, J., from the Upper Bench in 1655, "for not observing the Protector's pleasure in all his commands." But there is no doubt at all that it was the judicial scandals of the reign of Charles II. and James II. that led to the particular provision in the Act of Settlement above cited. *Durante bene placito* was substituted for *quamdiu se bene gesserint* in all the later patents of Charles II.'s, and in all the patents of James II.'s judges, the fact being particularly noticed by Siderfin, the reporter, in the case of Sir Richard Rainsford on his promotion as a justice of the King's Bench in 1669. (1 Sid. 408.) No hesitation was exhibited in these times in removing those judges who were deemed too honest and conscientious, and in raising others to the judgment seat who were likely to prove supple instruments of the ruling powers. (Foss, Judges, 7, 4.) And the result of this was neatly summarised by Lord Chancellor Jeffreys (a good authority, as he himself appointed the majority of them), when he said to Lord Clarendon, "As for the judges, they are most of them rogues." (Foss, Judges, 7, 201.) The judges appointed in the reign of King William III. were all appointed by patents *quamdiu se bene gesserint* so that the Act of Settlement only confirmed that practice at the close of the reign, but the death of that king was the occasion of the establishment of the principle that, notwithstanding the Act of Settlement, the existing patents were determined by the demise of the Crown. In this respect the law was altered by the statute 1 Geo. 3, c. 25, at the earnest recommendation of the king himself. So that now the law as to the tenure of the office of a judge is, and has been since 1760, that he is appointed by the Crown by patent *quamdiu se bene gesserint*, such patent not being determined by the demise of the Crown, but the holder being removable on an address from both Houses of Parliament. As regards English judges the modern enactment is section 5 of the Supreme Court of Judicature Act, 1875, whereby it is provided that all the judges of the High

Court of Justice and of the Court of Appeal respectively, with the exception of the Lord Chancellor, shall hold their offices as such judges respectively during good behaviour, subject to a power of removal by Her Majesty, on an address presented to Her Majesty by both Houses of Parliament.

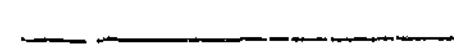
We believe, however, that the only occasion since the Act of Settlement in which it was moved in Parliament that an address should be presented to the Crown for the removal of a judge from his office was in the case of an Irish judge, Mr. Justice Fox, in 1804-6. He had been appointed one of the justices of the Court of Common Pleas in February, 1800, and, in the summer of the year 1803 (memorable for the insurrection of July, involving the murder of Lord Kilwarden, the Lord Chief Justice of the King's Bench), he went as one of the judges of assize on the North-West Circuit in Ireland. With reference to his conduct at the assizes held at Lifford and at Inniskillen on this circuit in fining several magistrates and jurymen, three several petitions were laid before the House of Lords in May and July, 1804. (Lords' Journals, 44, 558, 642, 644; Cobbett's Parliamentary Debates 2, 475, 785, 786, 925.) The Marquis of Abercorn, who brought forward the first petition, expressed a hope that proceedings would have followed on the part of the Government. However, the Government did nothing, and upon the matter being again brought forward, June 27, 1804, the Lord Chancellor (Lord Eldon) said: "When that great improvement in the constitution, the independence of the judges, took place, it was enacted that they should be removable only on an address to His Majesty from both Houses of Parliament. There was also another mode in which a judge, who had misconducted himself in the exercise of his office, might be proceeded against, and that was by impeachment by the Commons before that House. As this was the only instance since the Revolution in which charges had been brought forward against a person filling so sacred, important and dignified a situation as that of one of the judges of the land, sworn to administer the laws with truth and impartiality, he thought their lordships could not be too circumspect in the observance of those forms which the example of this case would operate hereafter as a precedent." (Cobbett, Parl. Deb. 2, 852.) Articles of complaint were consequently formulated and presented, grounded on the petitions above referred to. (Cobbett, Parl. Deb. 2, 950.) However, the Parliament was prorogued before the matter was disposed of. But in the following session it was again brought forward (Cobbett, Parl. Deb. 3, 22), and the same petitions were again presented, when Lord Eldon, repeating his former remarks, pointed out that the question must ultimately be "whether the facts alleged against Mr. Justice Fox were such as to call upon their lordships to concur in an address for his removal." (Cobbett, Parl. Deb. 3, 46.) The Lords appointed a committee to consider the matter. (Lords' Journals, 45, 14, 21; Cobbett, Parl. Deb. 3, 58, 144, 571.) This committee appear to have sat from time to time and heard evidence, but the matter went over to another session. At the beginning of the next session the former proceedings were vacated as incontestably irregular, and, on the motion of Lord Eldon, a resolution was passed declaratory of the general principle upon which the House had, up to that time,

proceeded in the case, viz., for the purpose of enabling the House to determine whether they ought to offer an address to His Majesty concerning the conduct of Mr. Justice Fox, and subsequently the House resolved itself into a committee of the whole House to investigate the matters of complaint on that footing. (Cobbett, Parl. Deb. 5, 2; Lords' Journals 45, 181.) But the order for this committee was afterwards discharged, it being suggested by Lord Hawkesbury that the most proper and regular course of proceeding was that an address should be moved to His Majesty embodying the facts upon which the charges were founded, and then that the whole should be referred to a committee of the House for the purpose of affording a regular opportunity of proving at the bar the allegations stated in the address. (Cobbett, Parl. Deb. 5, 35.) Accordingly, on the 22nd May, 1805, it was moved that an address should be presented for the removal of Mr. Justice Fox from his office (Cobbett, Parl. Deb. 5, 45), and the matter was referred to a committee of the whole House; on May 28 and 29, a very interesting debate took place respecting the form and manner in which Mr. Justice Fox should be allowed to attend, which resulted in a resolution that if Mr. Justice Fox should think proper to attend the committee of the whole House during the proceedings, he ought (not having received a writ of summons) to be accommodated with a chair below the bar, and it was also resolved that all parties might be heard by counsel. (Lords' Journals, 45, 219; Cobbett, Parl. Deb. 5, 126, 139.) Mr. Justice Fox accordingly attended the opening proceedings before the committee, habited in his judicial robes, and was placed in a chair below the bar. (Cobbett, Parl. Deb. 5, 154.) The committee sat several times and heard a quantity of evidence in support of the charges, but no cross-examination was allowed. (Lords' Journals 45, 253, 295; Cobbett, Parl. Deb. 5, 165, 175, 184, 242, 324.) Lord Auckland on June 17, 1805, made a motion for the postponement of further proceedings, which, if carried, would virtually have ended the matter, but it was negatived after debate, Lord Auckland recording a protest because amongst other reasons some of the charges amounted to charges of crime or misdemeanor, and he was not satisfied that the clause of the Act of Settlement respecting the removal of judges from their offices in consequence of the joint addresses of the two Houses of Parliament meant, or could be construed, to take the judges from the protection of the general law of the land. (Lords' Journals, 45, 319; Cobbett, Parl. Deb. 5, 424.) Then a bill was brought in to continue the proceedings until the next session. (Cobbett, Parl. Deb. 5, 446, 620, 635.) The matter lingered on through the next session. (Cobbett, Parl. Deb. 6, 12, 176, 249) until at last, on June 13, 1806, Mr. Justice Fox petitioned the House to consider his case, stating the hardship of delay, which petition was considered on the motion of Lord Grenville, June 19, 1806, that further proceedings should be adjourned practically *sine die*, that is to a day when the House would, in all probability, not meet. Lord Eldon opposed the motion, but the Lord Chancellor (Lord Erskine) supported it. It was finally agreed to by 25 Lords against 16, Lords Abercorn, Hardwicke, Eliott, Hawkesbury, and Longford, recording a protest upon the journals of the House. (Lords' Journals, 45, 715; Cobbett, Parl. Deb. 75[illegible]

Mr. Justice Fox, subsequently, continued to exercise his judicial functions unmolested for the space of 10 years till 1816, when he resigned owing to failing health.

As a constitutional precedent, the case has but little value. It goes to confirm the spirited protest of Lord Chief Justice Holt, who, upon a complaint to the Lords being preferred against him for what was alleged to be an undue exercise of his judicial functions, replied that he was bound to exercise his judicial functions according to law and the best of his judgment, and that his conduct was not examinable before their Lordships. The case of Mr. Justice Fox shows what difficulties the Lords might easily land themselves in by attempting to investigate complaints against the judges without the concurrence of the House of Commons, and it shows that certainly, at that time, it was not considered that the Government of the day had any special power or duty in the matter.

The lack of other precedents has been ascribed to the paternal influence of the chiefs of the old courts of Queen's Bench, Common Pleas, and Exchequer over their puisne brethren, and to the fact that the constitution of the courts in that way rendered it easier for his fellows readily to observe a failure of power in any particular judge, and to use their influence with him to retire in time. But that argument will not entirely cover the ground, for it manifestly has less force with regard to the chiefs themselves, and no application at all to the cases of the Vice-Chancellors and Chancery judges. And yet in England only, and during only the earlier part of the reign of Her present Majesty, certainly, two Chief Justices and two Vice-Chancellors retired, owing to confessed increasing infirmities, without any outside power put upon them to do so, and even amid general and sincere expressions of public regret. . . ."



DIARY FOR APRIL.

1. Wed......Prince Bismarck born, 1815.
5. Sun.......*1st Sunday after Easter.* Canada discovered, 1499.
6. Mon......County Ct. Sittings for Motions. Supreme Ct. Sittings.
7. Tues......County Ct. Non-Jury Sittings, except in York. Great fire in Toronto, 1847.
8. Wed .....Hudson Bay Co. founded, 1692.
12. Sun.......*2nd Sunday after Easter.*
13. Mon .....County Court Non-Jury Sittings in York.
14. Tues.....Princess Beatrice born, 1857.
15. Wed.....President Lincoln assassinated, 1865.
17. Fri........Ben. Franklin died, 1790.
18. Sat.......First Newspaper in America, 1704.
19. Sun.......*3rd Sunday after Easter.*
20. Mon......Last day for Call and Admission notices.
21. Tues......Exchequer Court sits at Montreal.
23. Thur.....St. George's Day.
24. Fri.. ......Earl Cathcart, Governor-General, 1846.
25. Sun.......St. Mark.
26. Sun.... *4th Sunday after Easter.*
27. Mon.....Toronto captured (Battle of York), 1813.
28. Tues......Exchequer Court sits.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[March 10.

RE ALLENBY AND WEIR, SOLICITORS.

Solicitor and client—Costs of unnecessary proceedings—Disallowance of Proceedings by writ of summons where summary application sufficient—Administration order.

The decision of ROBERTSON, J., 13 P.R. 403, affirmed; BURTON, J.A., dissenting.

Bain, Q.C., for the appellants.

William Davidson for the respondents.

MCINTOSH *v.* MOYNIHAN.

Sale of land—Statute of Frauds—Memorandum in writing.

An acceptance in writing by the owner of land of a written offer therefor, addressed to him, but unsigned by any purchaser, and without any purchaser being named or described therein, is not a sufficient memorandum to satisfy the statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer.

Bain, Q.C., for the appellant.

J. E. Robertson and *O. A. Macklem* for the several respondents.

MCCRANEY *v.* MCCOOL.

Partnership—Dissolution—Pending Contract.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 19 O. R. 470, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 20th and 21st of January, 1891.

McCarthy, Q.C., and *M. J. Gorman*, for the appellants.

Aylesworth, Q.C., for the respondents.

March 10th, 1891. The Court dismissed the appeal with costs, agreeing with the reasons for judgment given in the Court below.

IN THE MATTER OF THE CENTRAL BANK OF CANADA.

NASMITH'S CASE.

Company—Banks and banking—Winding-up Act—Shares—Subscription for—Transfer of—R.S.C., c. 120, ss. 20, 29, 70, 77.

This was an appeal by Nasmith from the judgment of BOYD, C., reported 16 O.R. 293, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 25th and 26th of September, 1890.

A. C. Galt for the appellant.

W. R. Meredith, Q.C., and *F. A. Hilton*, for the respondents.

March 10th, 1891. The Court dismissed the appeal with costs, holding that the main questions involved in the appeal were concluded by the judgment in *Baines' Case*, 16 A.R. 237, and upon the points not fully discussed in that case agreeing with the reasons for judgment in the Court below, and with those given in the judgment of the Master-in-Ordinary, reported 25 C.L.J. 238.

SAWYER *v.* PRINGLE.

Sale of goods—Conditional sale—Default—Seizure—Re-sale—Right to sue for deficiency.

After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due and that the vendors should be at liberty to resume possession, nothing being

said as to resale, the vendors seized the machine and re-sold it, and, after crediting the proceeds, brought this action to recover the balance of the original price.

Held [MACLENNAN, J.A., dissenting], that by the re-sale the original agreement had been put an end to, and that the plaintiffs had no right of action.

Per MACLENNAN, J.A. The vendors became in effect mortgagees of the machine, and on default in payment were entitled forthwith to sell and then sue for the unpaid balance.

Hoyles, Q.C., and *J. Chisholm* for the appellants.

J. M. Clark and *C. H. Widdifield* for the respondents.

PAISLEY *v.* WILLS.

Specific performance—Want of title—Repudiation.

This was an appeal by the defendant from the judgment of the Common Pleas Division, reported 19 O.R. 303, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 16th of January, 1891.

Bain, Q.C., for the appellant.

Shilton for the respondent.

March 10th, 1891. The Court dismissed the appeal with costs, agreeing with the reasons for judgment given in the Court below.

TOWNSHIP OF SOMBRA *v.* TOWNSHIP OF CHATHAM.

Municipal corporations—Drainage—R.S.O. (1887), c. 184, s. 569, et seq.

The burden of extra or unforseen expense in connection with drainage works, such as, *e.g.*, damages recovered because of negligent construction, must be borne by the ratepayers originally assessed for the cost of the works, and not by the general funds of the municipality.

Pegley, Q.C., for the appellants.

W. R. Meredith, Q.C., and *Kittermaster*, for the respondents.

MCNAMARA *v.* KIRKLAND.

Mechanics' lien—Proceeding to realize—R.S.O. (1887), c. 126, s. 23.

A defence filed by a lienholder within the period mentioned in s. 23, c. 126 of R.S.O. (1887), in an action by the owner of the property to set aside the lien, is not a "proceeding to realize the claim" within the meaning of that section, though a counter-claim, if properly framed and a certificate thereof duly registered, might be.

S. R. Clarke for the appellant.

Watson, Q.C., and *H. C. Fowler*, for the respondent.

CAMPBELL *v.* THE KINGSTON & BATH ROAD COMPANY.

Tolls—Road company—Lease of tolls—R.S.O. (1887), c. 159.

A company incorporated under "The General Road Companies Act," R.S.O. (1887), c. 159, may validly lease a toll-gate and the right to collect tolls thereat, and are not liable for the lessee's acts done quite apart from the contract and not under or in obedience to it or by the instructions or direction of the company.

Britton, Q.C., and *L. [illegible]gton*, Q.C., for the appellants.

McIntyre, Q.C., and *Lyon*, for the respondent.

[March 26.

BARRY *v.* ANDERSON.

Mortgage—Power of sale—Assigns—Short Forms Act, R.S.O. (1887), c. 107.

A mortgage made in alleged pursuance of the Short Forms Act contained the following provisions as to sale:—"Provided that the said mortgagees on default of payment for on month may, on ten days' notice, enter on and lease or sell the said lands; and provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice; and also that any contract of sale made under the said power may be varied or rescinded; and also that the said mortgagees, their heirs, executors, administrators and assigns, may buy in and resell without being responsible for any loss or deficiency on re-sale."

Held [BURTON, J.A., dissenting], that the power of sale could be validly exercised by the assigns of the mortgagees.

In re Gilchrist and *Island*, 11 O.R. 537, and *Clark* v. *Harvey*, 16 O.R. 159, considered.

W. Cassels, Q.C., and *T. P. Coffee*, for the appellants.

Moss, Q.C., and *T. P. Galt*, for the respondents, the Chadwicks. *A. H. Macdonald*, Q.C., and *W. Macdonald*, for the respondents, the Andersons.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Feb. 2.

MOORE *v.* JACKSON.

Husband and wife—Separate estate of woman married in 1869—Lands acquired before and after 1st July, 1884—R.S.O., c. 132, s. 7—R.S.O., c. 134, s. 3—Tenancy by the curtesy—Sale of separate estate, subject to.

The effect of R.S.O., 1877, c. 125, s. 3 (now R S.O., c. 132, s. 4, s-s. 2), is to deprive the husband of any estate, by the curtesy or otherwise, *during the life of the wife*, in lands to which the section applies.

By s. 5 of 47 Vict., c. 19 (now R.S.O., c. 132, s. 7) the *jus disponendi* was given to the married woman, and by it lands acquired by her after the 1st July, 1884, became her separate estate.

The amendment made by s. 22 of 47 Vict., c. 19 (now embodied in R.S.O., c. 134, s. 3), enabled the married woman to dispose of her real estate without regard to the date of her marriage or of the acquisition of the property; but under it she can convey her own estate only, and not any estate to which her husband may be entitled by the curtesy after her death; while under s. 7 o. c. 132 she can convey free from his estate by the curtesy.

Where a woman, married in 1869, acquired by conveyances from strangers lands in Etobicoke in 1879 and 1882, and lands in Parkdale in March, 1887, and was in the lifetime of her husband sued upon promissory notes made after March, 1887,

Held, that all the lands were her separate estate liable for her debts; but the Etobicoke lands were subject to the possible right of her husband to hold them after her death for his life, in case he survived her, as tenant by the curtesy, and that subject to this possible estate of her husband they were liable to be seized and sold for the satisfaction of the plaintiff's claim.

J. R. Roaf for the plaintiff.

E. D. Armour, Q.C., for the defendants.

Chancery Division.

FERGUSON, J.] [February 17.

RE WILSON AND HOUSTON.

Vendor and purchaser—Conditions of sale—Taxes due up to time of sale—Who to pay.

A mortgagee under two mortgages sold the land under the power of sale in the second mortgage, and by his conditions of sale stipulated amongst other things that he was selling merely all his estate or interest under the second mortgage, subject to the first and interest; that if second mortgage was taken for part of the purchase money it should be a first claim after the first mortgage and interest; that if no objection were made within a certain time, vendor's title to be held good and accepted by purchaser and vendor entitled to the consideration, and that the first mortgage could be paid off.

Held, that the taxes due up to the date of the sale should be paid by the vendor.

E. D. Armour, Q.C., for the vendor.

W. M. Douglas for the purchaser.

Full Court.] [February 18.

HALL *v.* HALL.

Donatio mortis causâ—Delivery of keys of box and rooms containing valuables.

Decision of ROSE, J., reported 20 O.R. 16[illegible] reversed.

Per FERGUSON, J. I have seen no case in which the gift and delivery of the keys have been held a good gift *mortis causâ* of the property, and it appears to me that what is meant by the cases in which the delivery of the key is held sufficient is this, that where the words of the gift reach the property itself; in other words when the property is, without doubt, the subject of the gift according to the words of gift, and then, instead of delivering the property, the key of the trunk or box, in which it was delivered, this may do.

Bicknell for the defendants (appellants).

Holman for the plaintiff.

ROBERTSON, J.] [February 26.

MITCHELL *v.* LISTER.

Partnership agreement—Receiver—Failure of partners to agree as contemplated by articles.

An agreement of partnership contained the following clause: "That at the expiration of

this co-partnership the parties hereto shall appoint some fit and proper person to get in all outstanding accounts, and to settle and adjust the partnership concerns."

The co-partnership had become determined by notice under the articles, but the partners could not agree upon a fit and proper person to act under the above clause.

One of the partners now moved for an order appointing a receiver.

Order made that unless the parties could agree within three days one of themselves should act as receiver, C.M. should be appointed as such.

Worrell, Q.C., for the motion.

Armour, Q.C., contra.

BOYD, C.] [March 17.

RE LYNN.

LYNN *v.* THE TORONTO GENERAL TRUSTS COMPANY.

Will—Devise—Insurance certificate or policy—Declaration under R.S.O., c. 136, s. 5.

A testator by his will devised an insurance certificate or policy to the defendants as his executors, for the benefit of his wife and children.

Held, that the will was a sufficient declaration under R.S.O., c. 136, s. 5, and that creditors were not entitled to the proceeds.

Huson W. M. Murray, Q.C., for the creditors.

E. T. Malone for the executors contra.

Practice.

Q.B. Div'l Court.] [March 6

MEYER RUBBER CO. *v.* RICH.

Arrest—Intent to leave Ontario—Intent to defraud creditors.

The defendants left the State of Pennsylvania and came to Ontario with the intent of defrauding their creditors. They stayed some time in London, Ontario, and left there with their wives, by train, booked for Toronto. One of their creditors left London by the same train, and while on the train, between London and Hamilton, he heard one of the wives say to her husband that she wondered what time they should reach Montreal. While waiting at Hamilton for the Toronto train, the creditor obtained an order for the defendants' arrest, and they were there arrested.

Held, upon the evidence, that the defendants intended to leave Ontario with the intent of defrauding their creditors.

Per ARMOUR, C.J., and FALCONBRIDGE, J.: That the defendants having come into Ontario with the intent of defrauding their creditors, and their intention being to pass through it, they must be held to have been quitting Ontario with intent to defraud their creditors.

Per STREET, J. That the mere fact of the defendants having absconded to this province to defraud their creditors elsewhere did not afford any evidence of their intention to abscond from this province to defraud the same creditors, so as to justify an order for their arrest upon their arrival here; but the circumstances of the case led to the conclusion that the defendants were about to leave the province.

Robinson, Q.C., and *C. J. Holman*, for the plaintiffs.

Osler, Q.C., and *Teetzel*, Q.C., for the defendants.

C.P. Div'l Court.] [March 6.

SCRIPTURE *v.* REILLY.

Third party—Rules 329, 332—Landlord and tenant—Covenant for quiet enjoyment—Order dismissing third party from action.

The plaintiff and defendant occupied adjoining shops under leases from the same landlord, the plaintiff having the prior lease. The plaintiff brought this action to restrain the defendant from obstructing his light and view; and the defendant served a third party notice upon the landlord, claiming, under a covenant for quiet enjoyment, to be protected against the plaintiff's claim.

Held, that the defendant could not call upon his landlord to defend him against an unfounded claim; but if the plaintiff's claim was well founded, it was by reason of an easement expressly or impliedly granted by his lease, and the defendant took subject to such easement, and could not claim that the landlord covenanted with him for quiet enjoyment of that which did not pass under his lease; and, therefore, whether the plaintiff's claim was well or ill-founded, the landlord was not a proper party to be called on for indemnity under Rule 329.

Thomas v. *Owen*, 20 Q.B.D. 225, followed.

Held, also, that upon a motion by the defendant under Rule 332 for directions as to the mode of trial, where a third party had been

notified under Rule 329, it was proper to make an order dismissing the third party from the action, without any motion on his part.

A. Hoskin, Q.C., for the plaintiff.

W. N. Miller, Q.C., for the defendant.

Shepley, Q.C., for the third party.

Q.B. Div'l. Court.] [March 6.

CATTON *v.* GLEASON.

Discovery—Particulars—Slander of title to goods—Damping auction sale.

In an action for slander of title to goods, the statement of special damage was that by reason of the utterances of the defendant to a crowd of persons assembled at an auction sale which he had advertised a large number of them withdrew from it, and the goods which were sold at it brought less money than they would otherwise have done.

Held, that the plaintiff should not be required to give particulars of the names of the persons who would have given for each article, in respect of which damage was claimed, a larger price than was realized at the sale; all that he could reasonably be required to particularize was the amount to which his sale had been damped.

Roswell for the plaintiff.

Bristol for the defendant.

BOYD, C.] [March 7.

IN RE ROSS AND STOBIL.

Costs—Land Titles Act, R.S.O., c. 116, ss. 74, 127, 137; Rule 16 (2)—Powers of local Master of Titles—Costs as between solicitor and client—Costs as of a court motion—Discretion—Appeal late.

A local Master of Titles has power by virtue of ss. 137 and 74 of the Land Titles Act, R.S.O., c. 116, in ordering that a caution be vacated, to direct payment by the cautioner of costs as between solicitor and client; and by Rule 16 (2) of the rules in the schedule to the Act has power to give a special direction that costs as of a court motion may be taxed.

And where a Master in his discretion so ordered, a Judge in Chambers refused to interfere, more especially as the appeal was late and could only be entertained as an indulgence.

Masten for the cautioner.

W. M. Douglas for the registered owner.

FERGUSON, J.] [March 25.

ABELL *v.* MORRISON.

Leave to appeal—Extending time—Justice of the case—Undisputed facts—Discretion—Reversing previous order.

Upon an application to extend the time for an appeal to do justice in the particular case is above all other considerations; and the expression "the justice of the case" means the justice of the case upon the undisputed facts of it.

And where the plaintiff desiring to appeal to the Court of Appeal from the judgment of the Chancery Divisional Court, 19 O.R. 669, was two months and twelve days late in filing his appeal bond, and offered no sufficient excuse for his delay, but asked to have the time extended as an indulgence, and it appeared that if the plaintiff were to succeed in his contention in the case he would obtain and have at the expense of the defendant more than he could have had under his contract,

Held, that the justice of the case was against the plaintiff; and that an order of the Master in Chambers extending the time for appealing, though a discretionary order, was so clearly wrong that it should be reversed.

Langton, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendant, G. Morrison.

Chy. Div'l Court.] [March 26.

IN RE BLAIR.

Infants—Past maintenance—Discretion—Special circumstances.

Applications for past maintenance of infants rest in the discretion of the court.

Where the infants' brother-in-law, a farmer, had lodged and fed them, but expended nothing for their clothes or education, during a period of two years and a half previous to applying for maintenance, knowing all the time that they were entitled to money in court, and a Judge in Chambers refused to allow anything for past maintenance, but made a more liberal allowance for the future than he would otherwise have done,

Held, that, dealing with the case on its special circumstances and having regard to the discretion exercised, the Judge's order should not be disturbed.

W. H. Blake for the applicant.

J. Hoskin, Q.C., for the infants.

OSGOODE HALL LIBRARY.

(Compiled for THE CANADA LAW JOURNAL.)

Latest additions:

American Railroad and Corporation Reports, by John Lewis, vol. 1, Chicago, 1890.

Bingay (Geo., Q.C.), Nova Scotia County Court Manual, Toronto, 1891.

Buckley (H.B.), Companies Acts, 6th edition, London, 1891.

Emden (A.), Digest for 1890, London, 1891 (2 copies).

Folkard (H.C.), Law of Libel and Slander, 5th ed., London, 1891.

Garrett (E.W.), Law of Nuisance, London, 1890.

Greenwood (H.), Practice of Conveyancing, 8th ed., London, 1891.

Hale (Sir M.), History of the Common Law, 6th ed., by C. Runnington, London, 1820.

Hansard Debates, vols. 341-8, London, 1890.

Higgins (C.), Law of Patents, 2nd ed., London, 1890.

Kerr (J.M.), Law of Homicide, New York, 1891.

Kerr (R.M.N.), Students' Blackstone, 11th ed., London, 1890.

Law Times, Index to vols. 51-60, London, 1890.

May (J.W.), Law of Insurance, 3rd ed., 2 vols., Boston, 1891.

McArthur (C.), Marine Insurance, 2nd ed., London, 1890.

Palmer (F.B.), Shareholders and Directors' Legal Companion, 11th ed., London, 1890.

Scrutton (T.E.), Law of Copyright, 2nd ed., London, 1890.

Sharp & Alleman's Lawyers and Bankers' Directory, 9th year, January ed., Philadelphia, 1891.

Snow (T.), The Annual Practice, 1890-91, London, 1891.

Statutes, Chronological Table and Index, 11th ed., 1235-1889, London, 1890.

Stephen (L.), National Biography, vol. 25 (Harris-Henry I.), London, 1891.

Stone (S.), Justices' Manual, 26th ed., by G. B. Kennett, London, 1891.

Sutherland (J.G.), Statutes and Statutory Construction, Chicago, 1891.

Widdifield (C.H.), Taxation of Costs, Toronto, 1891.

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C. Z. A. LASH, Q.C.
JOHN HOSKIN, Q.C. J. H. FERGUSON, Q.C.
F. MACKELCAN, Q.C. N. KINGSMILL, Q.C.
W. R. MEREDITH, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers:
E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.