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DIARY FOR JUNE.

4. Sat...Easter Term ends.
5. Sun...*Whit Sunday.*
8. Wed...First meeting of Parliament at Ottawa.
12. Sun....*Trinity Sunday.*
13. Mon...County Court Term for York begins.
14. Tues..County Court sitt. (except York) begins.
15. Wed..Magna Charta signed, 1215.
17. Fri.....Burton and Patterson, JJ. Ct. of Appeal, sworn in 1874.
18. Sat....Earl Dalhousie, Gov.-General, 1820. Battle of Waterloo, 1815.
19. Sun...*1st Sunday after Trinity.* County Court Term ends.
20. Mon..Accession of Queen Victoria, 1837.
21. Tues..Galt, J., sworn in C. P., 1869.
23. Thurs. Hudson Bay Co. Territory transferred to Dom., 1870.
26. Sun....*2nd Sunday after Trinity.*
28. Tues...Queen Victoria crowned, 1837.
30. Thurs. Hon. J. B. Robinson, Lt. Gov. of Ontario. P. E. Irvine, Prest. of P. of Canada.

TORONTO, JUNE 1, 1881.

THE Chief Justice of the Supreme Court, Hon. W. J. Ritchie, has been knighted. This dignity is now, we presume, attendant upon this office as it is to certain high judicial positions in England.

WE are glad to see that the dignity of a Companion of the Order of St. Michael and St George has been conferred on Mr. Alpheus Todd, Librarian of the Parliament of Canada, —an old friend and an occasional contributor to this journal. The degree of LL.D. has also been conferred upon him by Queen's College. These honors are worthily bestowed upon one so useful in his generation, and of such high literary attainments.

WE publish in this number of the LAW JOURNAL the report of the Minister of Justice, in pursuance of which the Public Streams Bill, passed last session, has been disallowed by the Governor-General in Council We also publish the first part of an article reviewing the precedents and authorities for such an exercise of the prerogative of veto, which want of space has reluctantly compelled us to divide into two portions.

IN our last number (p. 197), we referred to a case of *McCutcheon* v. *Creswicke* (which should have been cited as *McCracken* v. *Creswicke*) decided by Judge Ardagh, in which he held that a claim on a promissory note for less than $100, but which with interest exceeded that amount, was recoverable in the Division Court. A motion for a prohibition has since been refused by HAGARTY C. J., and the ruling of the Court below sustained.

THE change in the Cabinet at Ottawa makes Sir Alexander Campbell Minister of Justice. We are glad to see a member of the Ontario Bar in this position. It is some years since Sir Alexander was in the active practice of his profession, but his great administrative capacity, his extensive knowledge of constitutional and statute law, combined with the fact that he is a highminded courteous gentleman, will render his reign in his new Department very satisfactory to the public.

MR. JUSTICE GROVE, at a public dinner in England, revived a saying of Lord Bacon's, to the effect that a "talking judge was an ill-tuned cymbal." Our namesake in England quotes the passage in full, as follows:—

"Patience and gravity of bearing is an essential part of justice, and an over-speaking

judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four—to direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory and willingness to speak, or of impatience to hear, or of shortness of memory, or of want of a stayed and equal attention."

A divergence of opinion has occurred in the English Courts, as to copyright of articles published in daily papers. The case relied on for the plaintiff in the last case (*Walker* v. *Howe*), who sought to restrain the republication of such an article, was *Cox* v. *Land and Water Journal*, L. R. 9 Ex. Div. 324. The author of the article was not a party: but, in the plaintiff's affidavit, it was stated that he had been paid by them for his literary services. The Master of the Rolls (we quote from the *Law Journal* Notes of Cases) said he did not agree with the above case, and declined to follow it; and held that the newspaper was a "periodical work" within the meaning of section 18 of the Copyright Act, 1842; and, as it was not registered under the Act, the proprietors could not sue in respect of a piracy. If there were any other copyright in the article, that belonged to the author, and, as the plaintiffs did not sufficiently show they were entitled to the whole copyright, no injunction could be granted on that ground. He therefore refused the motion, with costs.

IF there is one thing more than another that strikes the mind of the Anglo-Saxon lawyer as to the pervadence of his race, it is to receive from all quarters of the globe legal periodicals treating of law, founded on cases decided upon the common law of England. We have Law Journals from England, Ireland, the cities of North America on the Atlantic seaboard, the central points of the continent, and the Pacific coast, from New Zealand and Australia, and so onward. There is a strong family likeness among them all, while they differ as much as members of a family generally do.

These reflections are caused by the appearance on our table of the *Australian Law Times*, now in the second year of its existence. It is, like ourselves, a fortnightly publication, and although containing considerably less matter, is published at the much more comfortable figure of two guineas per annum. We congratulate our cousin upon the vigor he displays, and wish him every success in his enterprise.

The article of most interest in the number before us treats of the law of Banking, consisting in the main of a review of a book on the subject by a Mr. Hamilton, which we could fancy it might be well to get for our Library at Osgoode Hall. It appears that "certain serious divergences of opinion have arisen, and are likely to arise, between the supreme courts of the Australian colonies—divergences which would not long exist if there were an Australian federal court of appeal. Such a court could deal with questions of the kind to which we have alluded much more effectively than the Privy Council; for the practice of banking in Australia and New Zealand is in many respects different from that in England, and some comparatively ignored points of the English law receive here a peculiar prominence. As Mr. Hamilton says in his preface, when modestly introducing his book,—It is believed that there is a complaint, not uncommon amongst bankers and others, that English books when consulted are often found to be perplexing and at times wholly inapplicable and unpractical. This may probably be attributed to the fact that such works apply

to a mode of banking which does not prevail in Australia and New Zealand, where the system in operation is a modification or adaptation of the Scotch, and differs in many striking features from that which is practised in London and generally throughout England. Several instances are given of the variance in practice. Thus, it would appear that in England a banker does not pay a 'stale' cheque —a cheque which is presented a long time after being drawn—without enquiries or instructions; whereas in Australia payment is never refused unless the term prescribed by the Statute of Limitations has run (p. 83). Again, it seems to be the habit in Australia to hand cheques to the ledger-keeper, who marks them for payment before they are paid by the teller; and the important point has been mooted, whether this marking does not operate as an acceptance by the bank and bind it to pay the cheque (p. 68). Moreover, when advances are made, the English practice is to open a 'loan account;' in Australia, the system of 'overdrafts' is most commonly adopted (p. 109). The customer has the advantage in the case of an overdraft of having to pay interest on the sum actually withdrawn only. 'Cash credits" are very popular in the colonies, but are unknown almost in England (p. 116). It is interesting to learn that both in Victoria and in New South Wales a partner in a squatting firm can bind the firm by drawing bills and borrowing money (p. 36). An important point, on which English cases give no light, has been decided by the South Australian Court, which has found that there is a custom in Australia to treat interest as chargeable on overdrafts without any express agreement to pay it (p. 113). And the law relating to branch banks has assumed peculiar importance here; probably, as Mr. Hamilton says, because in England the functions of branch banks are to so great an extent discharged by private bankers carrying on business in partnership (p. 240)."

Now we in Canada can probably see the force of the latter portion of these remarks much better than the orthodox changers of money of Lombard St. As to the difficulties arising from the want of a Federal Court of Appeal, we shall expect, when the annual motion comes up to do away with our Supreme Court, to see the article quoted giving a text to one of those who would seek to save its life.

WHILE the position of our Canadian judges is probably not altogether what it should be, they have reason to congratulate themselves that they are not exposed to the petty annoyances which some of their brethren in the United States are compelled to suffer at the hands of interfering legislators. An Act has recently been passed by the Michigan Legislature requiring the judges of the Supreme Court "to prepare and file a syllabus to each and every opinion by them delivered." This certainly seems a sufficiently impertinent and unwarranted interference with the long-established distinction between the duties of a judge and those of a reporter, but a still more glaring example of what the *Central Law Journal* calls "the indecent methods taken by legislative bodies to get the greatest possible amount of work," is that Californian statute which withholds the salary of any judge who happens to be behind his docket, no matter what the nature of the cases on it may be. On attempts such as these to lower the dignity and add unreasonably to the toils of a judge's life, we heartily endorse the trenchant comments of the journal from which we have already quoted:—

"We know that poorly reported decisions and judicial sloth are grave evils, and we sympathize with any rational attempt to remedy them. But we do not believe that any permanent good purpose can be subserved by attempts on the part of the law-makers to treat benches of reverend judges as if they were gangs of irresponsible and dishonest employees. A good article of professional service must be well paid for, the world over. If good, accurate, faithful reporting is a desideratum, let the legislature pay well, and there will be little difficulty in getting the work well done. If dockets get behind, in many instances more judges and larger salaries will be found an effectual remedy."

Hon. James McDonald, Minister of Justice succeeds Sir William Young as Chief Justice of Nova Scotia.

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THE NEW VICE-CHANCELLOR.

The appointment of Mr. Thomas Ferguson, Q.C., to the vacant seat on the Chancery Bench has been well received by the profession. He is known very favorably to his brethren at the Bar, and we join with them in congratulating him on his promotion. Though, perhaps, best known to the public up to the present time on circuit, and as a successful advocate before a jury, he is known at Osgoode Hall as a sound lawyer, and will prove a painstaking, industrious, and, we are sure, a very satisfactory judge. Mr. Ferguson will bring to bear on his work a large fund of shrewd common sense; and, having knocked about the world a good deal, has a familiarity with the practical details of work-a-day life, which will be of great use in the position in which he has been placed.

Mr. Ferguson was called to the Bar in Trinity Term, 1862, having studied with the late Henry Eccles, one of the most gifted men that ever entered the ranks of our profession. In March, 1876, Mr. Ferguson received his silk at the same time as the present Chief of his Court. He has, during the past few years, rapidly come to the front as a counsel; and the firm of which he was the head have enjoyed a large share of the legal business of the country.

ANNOTATED EDITIONS OF THE JUDICATURE ACT.

The inevitable necessity that a much legislated for profession should read, mark, learn, and inwardly digest the Judicature Act is gradually forcing itself upon their consideration. It is gratifying to know, however, that learned annotators are doing their best to make the dose as agreeable as possible.

The body of the work prepared by Messrs. Taylor and Ewart, has, through the courtesy of their enterprising publishers, Messrs. Carswell & Co., just been placed in our hands. The sheets of Mr. Maclennan's book have also been sent to us for perusal. Both volumes will be ready for distribution in a few days, and as we presume all sensible people will buy both, we can well leave any comparison as to their respective merits to a critical examination by a critical profession in the long vacation. We cannot pretend in the short time that has been given us to do more than speak of them from a very cursory glance before we go to press.

The alterations made in the nature of the pleadings, and the steps to be taken in an action, are of course fully noticed, explained, and compared with the former practice; and necessarily much of the information is the same in both volumes.

Mr. Maclennan's work is a compact, well arranged volume, though not so bulky as that of Messrs. Taylor and Ewart. In it he treats fully of the new and extensive rules, in regard to the joinder of cases of action, and joinder of parties and pleadings. Some of the most important features in the act must be carried out by means of procedure which is entirely new to the Ontario practitioner, and it is to these that the learned author seems to have devoted special attention. Amongst the provisions for facilitating a plaintiff, we might mention those rules which enable him, where he has specially indorsed his writ, to call upon the defendant to shew cause why judgment should not be signed forthwith before any pleadings have been delivered. Amongst the provisions of benefit to a defendant are those which enable him by counter claim to set up in answer to the plaintiff's claim, any cross demands that he may have, whether liquidated or not, subject only to the discretion of the Court to exclude the counter claim, if it cannot be conveniently disposed of in the action. Again, there are the rules which, to avoid multiplicity of suits, enable a defendant to bring into the action third parties against whom he may have a

claim for indemnity or otherwise, but whom the plaintiff has not made or could not make parties. All these subjects seen to be fully explained, and, so far as we can see, illustrated by references to the English cases. The decisions of our own courts have not been left unnoticed in dealing with practice analogous to that now existing, but all that can be considered as authorities would seem to have been referred to. One very convenient addition which we notice is a Time-table, showing at a glance the times for taking the different steps in an action. The book is made complete as a treatise on the practice of the Courts by the addition of the orders of the Court of Appeal, and the index seems to be all that can be desired.

The edition by Messrs. Taylor & Ewart will, with the appendix, &c., be a well printed volume of some 800 pages. The notes on all questions of practice seem very complete, such, for example, as those on the subject of the powers of the Courts to grant relief to defendants under sec. 16, ss. 4; also as to counter claims, the authors giving a *resumè* of the old law and the cases under the corresponding section in England. This covers eleven pages of closely printed matter. Again, under section 45 the reader is given *in extenso* the sections of the C. L. P. Act and other enactments still in force, with appropriate explanatory notes, thus giving a comprehensive view of the subject. In addition to the Act proper, the Chancery Act, the Attorneys' Act, and the English Trustee Act of 1850 are reproduced, with notes bearing on the general subject of the work—also the general orders of the Court of Chancery remaining in force notwithstanding the passage of the Judicature Act, fully noted; and in connection with this we notice a feature which cannot but be of much practical utility, especially to beginners, a detailed account of the various proceedings in a mortgage suit, amounting in fact to a manual on the subject.

The number of cases referred to in both books is very large, and though this is in itself by no means a proof of the value of the work done, it is evident that the compilations before us show the great industry and research of their authors. As to their ability it is not necessary for us to speak.

DOMINION CONTROL OVER PROVINCIAL LEGISLATION.

The Order in Council coutained in the *Canada Gazette* for May 21st ult., disallowing the "Act for protecting the public interest in rivers, streams, and creeks," being chapter 11 of the Ontario acts for last session, makes the question as to the measure of control that can be constitutionally exercised by the Governor-General in Council over Provincial legislation, of peculiar interest at the present time. The importance attaching to the form in which the constitutional practice in this matter is destined ultimately to mould itself, can scarcely be denied.

The chief sources of authoritative information in regard to it are to be found in two very lengthy returns to the Dominion Parliament, one of which is contained in Can. Sess. Papers, 1870, No. 35, and the other in Can. Sess. Papers, 1877, No. 89.

It is not, however, proposed in this place to refer at all to the question, how far the Governor-General, in determining according to his discretion (under B. N. A., sec. 90), whether bills passed by the Provincial legislatures shall be disallowed, or not, fulfils this function as an Imperial officer, and subject to instructions received from the Secretary of State; or whether he is bound to be guided in all cases by the advice of his ministers, who are themselves responsible to the Dominion House of Commons. On this important point there has been much correspondence between the Imperial and the Dominion Government, but it appears to remain still without authoritative decision (see Todd's

Parliamentary Government in the British Colonies, pp. 331-345).

Assuming that in the exercise of this prerogative, the Governor-General will always, as in the case of the Public Streams Bill, consider it his duty to act by and with the advice of his Privy Council, it remains to consider what precedents and authoritative documents indicate as to the limits of the constitutional exercise of the prerogative of disallowance.

Mr. Todd, in the standard work above referred to, cites a number of precedents to prove that under the B. N. A. Act the control of the Crown over the Provinces of the Dominion is now exercised, not directly by Imperial authority, but indirectly through the instrumentality of the Dominion Parliament, and that it is incumbent upon the Governor-General in Council, in the exercise of his constitutional supremacy, to respect the rights of the Provinces in matters of local legislation, so far as the same are defined by the B. N. A. Act.

It is the second portion of this proposition of Mr. Todd's that it is proposed to examine.

Before the time for disallowance (one year: B. N. A. Act, sec. 90) of acts passed in the first session of the various Provincial Legislatures of the new Confederation had expired, a correspondence took place between the Imperial and Dominion Governments on the question of the exercise of this prerogative.

In a Report dated June 8, 1868 (Can Sess. Papers, 1870, No. 35), Sir John Macdonald, the then Minister of Justice, says :—

"The same powers of disallowance as have always belonged to the Imperial Government, with respect to the acts passed by Colonial Legislatures, have been conferred by the Union Act on the Government of Canada.....Under the present constitution of Canada, the general Government will be called upon to consider the propriety of allowance or disallowance of Provincial Acts much more frequently than Her Majesty's Government has been with respect to Colonial enactments.

In deciding whether any Act of Provincial Legislatures should be disallowed or sanctioned, the Government must not only consider whether it affects the interest of the whole Dominion or not, but also whether it be unconstitutional; whether it exceeds the jurisdiction conferred on Local Legislatures, and in cases where the jurisdiction is concurrent, whether it clashes with the legislation of the general Parliament.

As it is of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and *general interests of the Dominion imperatively demands it*, the undersigned recommends that the following course be pursued :—

He, then, proceeds to suggest that all provincial Acts be referred to the Minister of Justice for his report, and that he report separately on those Acts which he may consider :—

1. As being altogether illegal or unconstitutional.

2. As illegal or unconstitutionl in part.

3. In cases of concurrent jurisdiction as clashing with the legislation of the general Parliament.

4. As affecting the interests of the Dominion generally. And also that in such report he give his reasons for his opinions.

This report was approved by the committee of the Privy Council and the Govenor-General, and copies were sent to the several Provincial Govenors.

The Minister of Justice on July 1, 1868, proceeded to report on various Acts passed in the first session of the legislature of Ontario as objectionable, because *ultra vires*.

This report was forwarded by Sir John Young, the Governor-General, to the Secretary of State for the Colonies, at that time Earl Granville, asking him to consider it and take the opinion of the law officers of the Crown.

By a second despatch of the same date the Governor-General points out "the probability of misapprehension and future diffi-

culty if a remedy be not speedily devised and applied for the prevention of uncertainty and possible conflict between rival authorities." He then asks for instructions as to the allowance or disallowance of Provincial Acts.

In the reply of Earl Granville, dated May 8, 1869,—which, however, chiefly concerns the main subject of enquiry by the Governor-General, namely, how far he was to act as an Imperial officer in regard to the disallowance of Provincial acts,—illegality or unconstitutionality are the only grounds alluded to as requiring the disallowance of such acts.

The Parliamentary Returns, indeed, show that by far the greater number of Provincial Acts which have been declared objectionable by the Governor-General in council have been so declared, because they or some of their provisions were not within the jurisdiction of the legislature, but infringed on the domain of Parliament under the B. N. A. Act. This ground of objection seems conceded on all sides, and there is, therefore, no object in dwelling upon it. There is another somewhat similar ground for interference as to which there also appears to be no question, viz., to avoid any inconvenient results, which might arise from a conflict as between the powers conferred on the Dominion Parliament by the B. N. A. Act (sec. 91), and those conferred on the Local Legislatures, in cases where there is, or might appear to be, concurrent jurisdiction. (As to this, see per Ritchie, J., in *Severn* v. *The Queen*, 2 S. C. R., 102, and per Strong, J., ib. p. 109, and Fournier, J., ib. p. 119).

But the returns show clearly that such have not been the only grounds on which the Dominion Government has been in the habit of interfering with Provincial Legislation.

Before alluding to these other grounds, however, it may be observed that the care with which this prerogative should be exercised is insisted on on all sides. The passage quoted above from the Report of the Minister of Justice is an illustration of this. Mr. Todd (p. 343) also points out that in deciding upon the validity or expediency of provincial enactments, the Governor-General in council has no arbitrary discretion, but that (p. 367) "the rights of local self-government heretofore conceded to the several provinces of the Dominion are not, in anywise, impaired by their having entered into a federal compact," and that no infringment upon these rights which would be at variance with constitutional usage, or with the liberty of action previously enjoyed by these provinces when under the direct control of the Imperial Government, would be justifiable on the part of the Dominion Executive. There are also many *obiter dicta* of our judges to the same point. Thus in *Severn* v. *The Queen*, 2 S.C.R. 96 (1878) Sir William Richards said: "Under our system of government, the disallowing of statutes passed by a Local Legislature after due deliberation, asserting a right to exercise powers which they claim to possess under the B. N. A. Act, will always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act is so clearly beyond the powers of the Local Legislature that the propriety of interfering would at once be recognized."

So in the same case Fournier, J., says on p. 119 of the same volume:—

"No doubt this extraordinary prerogative exists, *and could even be applied to a law over which the Provincial Legislature had complete jurisdiction.* But it is precisely on account of its extraordinary and exceptional character that the exercise of this prerogative will always be a delicate matter. It will always be very difficult for the Federal Government to substitute its opinion instead of that of the Legislative Assemblies, in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the Provinces."

In *Leprohon* v. *The City of Ottawa*, 40 U. C. R. 490, Harrison C. J. says:—

"The power of the Governor-General in

Council to disallow a Provincial Act, is as absolute as the power of the Queen to disallow a Dominion Act; and it is in each case to be the result of the exercise of a sound discretion, for which exercise of discretion the executive council for the time being is in either case to be responsible as for other Acts of executive administration."

But, as Mr. Todd remarks (p. 363), though for the most part, this power has been resorted to only in cases wherein the Provincial Legislatures have passed Acts which were unconstitutional, or beyond their legal competency to enact, yet—

"*It has been sometimes invoked, in respect to Acts which contained provisions that were deemed to be contrary to sound principles of legislation, and therefore likely to prove injurious to the interests or welfare of the Dominion.*" (See ib. p. 366.)

It is proposed here to review, briefly, some of the precedents shown in the Parliamentary Returns, which go to justify this last statement.

It is worth while to observe, in the first place, that the deprivation of innocent parties of vested interests by retroactive enactments is mentioned by Draper, C. J., in Re *Goodhue*, 19 Gr. 366 (1872) as affording specially fitting grounds for the interference of the Governor-General in Council. In this case, it will be remembered, the provisions of a certain will were overridden by a private act of the Local Legislature, and one of the trustees named under the will refusing to carry out the provisions of the Act, the validity of the Act (amongst other questions) came before the Court on petition presented by persons interested under the will. At p. 384, Draper, C. J., says:—

"In regard to the absence of a second chamber, it may be further observed, so far at least as estate or private bills are concerned, that as such bills involve ordinarily no mere party political considerations, all those whose interests are or may be touched have a right, in the first place, to expect a careful examination of their contents on the part of the Provincial Executive, and a withholding of the Royal assent if it is found that the promoters of the bill are seeking advantages at the expense of others whose interests are as well grounded as their own. *And further, if from oversight or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such bills are subject to the consideration of the Governor-General, who, as the representative of the Sovereign, is entrusted with authority, to which a corresponding duty attaches, to disallow any law contrary to reason or to natural justice and equity.* So that, while our legislation must unavoidably originate in the single chamber, and can only be openly discussed there, and once adopted there cannot be revised or amended by any other authority, it does not become law until the Lieut.-Governor announces his assent, after which it is subject to disallowance by the Governor-General."

But he concedes that the Act (p. 386) was within the defined powers of the Local Legislature, for it was of a local and personal nature, and related to property and civil right. Nevertheless, he declares in the above passage, that it would have been right and proper for the Governor-General in Council to have disallowed it.

The first precedent immediately bearing on the main subject of this article appears to be that of an Act passed by the Quebec Legislature, in 1868, "To incorporate the St. Louis Hydraulic Company," which was reserved by the Lieutenant-Governor for the assent of the Governor-General. The Company was proposed to be incorporated for the purpose of creating a water-power, by the erection of a dam across the River St. Lawrence. The Minister of Justice, on January 11th, 1869, (Can. Sess. Papers, 1870, No. 35, p. 29), reported as to this Act that,

"As it is a matter of national importance to preserve the navigation of the greatest river in the Dominion from being obstructed, and as it was the opinion of some professional men that the erection of the proposed dam would not only injuriously affect the navigation of the river, *but cause great injury to property on or near its banks*," he had obtained a report from the Chief Engineer of the Department of Pub-

lic Works on the subject. The report then goes on to say:

"The whole tenor of this report shows, that Mr. Page apprehends that the projected work would cause serious charges of a prejudicial character in the navigation of the river, and might be *the means of injuring private property* to an extent which cannot now be calculated. "After such a report, *and without reference to the constitutionality of the Act*, the undersigned is of opinion that it would not be safe, in the public interests, to allow the Bill to become Law."

This report was approved by the Privy Council and Governor-General on July 10, 1868 (ib. p. 28).

This precedent appears to be in point only so far as it refers to injury to private property that would be done if the Act went into force as one reason for its disallowance, thus putting a circumscribed interpretation on B. N. A. sec. 92, sub-s. 13, which gives the Provincial Legislatures the power of exclusively making laws as to "Property and Civil Rights in the Province." That, indeed, this subsection must be understood in a limited sense is insisted on in the judgments in the Supreme Court in *Valin* v. *Langlois*, 3 S.C. 1.

(To be Continued.)

THE JUDICATURE ACT.

We continue the criticisms referred to in a previous page (p. 178), holding responsible therefor the advance sheets of Messrs. Taylor and Ewart's forthcoming work.

ORDER XVII.—1 (*b*). What is the use of filing a copy of the writ? Where the writ was issued a copy was probably filed (see O. III. r. 15), but the word "may" in this latter rule has been substituted for "shall" in the corresponding English rule. The words "if not already filed," should have been inserted as in rule 2 of same order (XVII).

O. XXI. "As soon as either party *has joined issue* * * * * the pleadings shall be decreed to be closed *without any joinder*." etc.

O. XXIV. 5. The old and now inapplicable phraseology crops up here. There is no such thing as a *plea* under the new practice. It is a *statement* of defence: see O. XV. r. 1 (*a*).

Who is the Registrar referred to in O. LVI. r. 3? It cannot mean the Registrar of the Court of Chancery, for he is the Accountant (see O. LVI. r. 6), and it could hardly be intended that the same officer should draw cheques and countersign them.

O. II. r. 5 requires that "every writ of summons, *and every other writ* . . . shall require the defendant to appear thereto in ten days after service." Subpœnas and *fi. fas.* are writs.

Under O. XXXVI. r. 8 any party may apply for such order as he may upon any admissions in the pleadings or the examination of the other party be entitled to. "Any such application may be made by motion as soon as the right of the party applying *to* the relief claimed *has appeared from the pleadings*.

Under O. XXXV. r. 8 "on the argument of an order to shew cause, the counsel of the party supporting the application shall begin, and shall state fully the grounds of the application, and shall have the reply." This will necessitate three speeches from counsel applying for a new trial, and the Court will have to hear the first address repeated a second time before hearing the other side.

O. XLVI. r. 4. Section 17 should be section 19.

O. VII. r. 1 (*e*), is an extraordinary provision, inasmuch as it provides that no matter where a contract is made, or where the plaintiff or defendant resides, an action may be brought in Ontario if the defendant has assets to the value of $200 within the jurisdiction.

By section 43 appeals to the Supreme Court are limited in various ways. Is this *intra* or *ultra vires*? The B. N. A. Act, sec. 101, provides that the Parliament of Canada may provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada." By the Dominion Statute, 38 Vict., c. 11, the Supreme Court was erected, and sec. 17 provides that "subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from *all* final judgments of the highest court of final resort.....now or hereafter established in any province of Canada." The two acts assume to deal with the same subject, and are in conflict.

Form No. 125 is of an order to produce, to be made *in Chambers*. It can be obtained on præcipe. See O. XXVII. r. 4.

Form No. 138, an order made to examine judgment debtor in *Chambers*. Is there need for an order at all? O. XLI. r. 1.

NOTES OF RECENT DECISIONS.

CONTRACT.

An interesting case to mercantile men is that of *Lambe* v. *Hartlaub, et al.*, reported in the *Legal News* (p. 138). The action was to recover the value of a large quantity of teas sold by plaintiff to defendants (not, by the way, "an action to rescind a sale of, &c.," as stated by the reporter). The sale was made in Toronto, in February, 1880, through a Montreal broker, at a certain price, duty paid, delivered in Toronto, the terms of payment being cash on delivery. The goods were shipped to the defendants by G. T. R. Co., duty paid, but were on their arrival in Montreal seized by the Customs' authorities, on the allegation that they were fraudulently entered as a direct importation from Japan; and that thus a less duty was paid than was properly chargeable.

The Government being subsequently satisfied that the goods were properly entered, released them on 6th April, 1880. The defendants sought to avoid the contract, or a reduction in the price, on the ground that owing to the seizure they were unable to carry out a sale they had made on the faith of the purchase from plaintiff, whereby they lost their profit, and had become liable to their vendee. The Court very properly held that the plaintiff must succeed, and that the rights of the defendants, if any, were against the Customs' authorities, and not against the plaintiff, who had made no default.

BANKERS AND GUARANTEE COMPANIES.

The *Legal News* also reports (p. 147) the case *La Banque Nationale* v. *Lesperance, et al.*, which brings up the liability of a surety for a bank official under rather peculiar circumstances. The facts of the case (fully set out in the report) are shortly as follows:—

The Teller of a bank endorsed on a parcel of bank notes the amount which it was supposed to contain. It was subsequently discovered that the parcel was $6,300 short, and it was ascertained that a deficiency of the same amount existed in the Teller's accounts, and had been during several years skilfully covered up and concealed from the knowledge of the authorities of the bank, who had made the usual inspections.

Upon an action brought by the bank on a policy of the defendant, guaranteeing the fidelity of the Teller, and against the defaulter himself, it was *held*, by JOHNSON, J. of the Superior Court, that the Guarantee Company was liable for the deficiency, but only to the extent which occurred after the contract was made.

NUISANCE BY LETTING OFF FIREWORKS.

In *Coombe and Wife* v. *Moore*, the defendant, being an American, on July 4 last, celebrated the anniversary of the declaration of the independence of the United States of America, and invited several friends to his house on the occasion. Part of the entertainment which he had prepared for his guests was a display of fireworks. July 4 was a Sunday; and, when the Sunday had passed, between 12 and 1 o'clock on the morning of the 5th, some fireworks were let off in the defendant's garden. The reports of the fireworks were described by witnesses as having a sound like an explosion; and evidence was given that twelve or fourteen rockets had been let off on the occasion in question. The plaintiffs were aroused by the first report, and Mr. Coombe went down stairs, followed by Mrs. Coombe. While he was in his garden, he saw four or five rockets, the cases and sticks of which fell into his garden. Mrs. Coombe was much alarmed, an attack of hysteria supervened, which was followed by neuralgia. Under the doctor's advice, she went by sea for a trip to Ireland, which improved, though it did not quite restore, her health. The judge submitted two questions to the jury—namely, whether the acts of the defendant were reasonably calculated to interfere with the health of people living in the neighborhood, having regard to people's ordinary habits of life; and whether the injury to the health of Mrs. Coombe was the consequence of the acts of the defendant; and he directed them that the defendant would not be liable for an interference with the comfort of the plaintiffs unless their comfort was so far interfered with as to affect health.—The jury answered the questions which had been left to them, in favor of the plaintiffs, and assessed the damages at one farthing.

We confess to feeling some sympathy for

Mrs. Coombe. She did not know the extent to which American patriotism can go.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO—MAY 16.

CROWE v. STEEPER.

MUNICIPAL LAW.

To change the Common Law by-laws must be distinct in their language. A by-law enacted that certain animals (named) and other breachy cattle should not run at large, and fixed the height of fences. *Held*, that as the by-law did not permit the running of cattle at large, by enacting that some should not, it was held that the plaintiff was liable at Common Law for injury sustained, no matter what the height of the fences fixed by the by-law might have been.

Robinson, Q.C., and *Scane* for the plaintiff.
Bethune, Q.C., *contra*.

CHANCERY.

Blake, V. C.] [May 13.

GILCHRIST v. WILEY.

Demurrer—Equitable garnishment.

The plaintiff, who had recovered judgment against the defendant Wiley, filed a bill alleging that Wiley, being the owner of lands subject to a mortgage, conspired with his co-defendant, whereby a second mortgage was executed by Wiley to one A., who paid the money to the co-defendant, which was held by him as agent or trustee for Wiley. The lands were subsequently sold in a suit by the first mortgagee, and realized sufficient to pay the two mortgages only. The plaintiff proved his claim in that suit in the Master's office, but received nothing. He alleged that he had been led to believe that the mortgage by Wiley to A. was *bona fide*, but had ascertained that such was not the fact; and prayed that the co-defendant might be ordered to pay over the amount paid out of the proceeds of the lands to satisfy the mortgage in favor of A.

Held, that the bill was in effect one to garnish the money due to Wiley in the hands of his co-defendant, and under the authority of *Horsley* v. *Cox*, L. R. 4 Chy., 92, and *St. Michael's College* v. *Merrick*, 1 App. R. 520; 26 Grant, 216, could not be maintained.

J. Reeve, for plaintiff.
Moss, for defendant Wilson.

Spragge, C.*] [May 21.

SANSON v. NORTHERN RAILWAY COMPANY.

Nuisance—Injunction—Acquiescence.

The plaintiff was owner of a steam vessel plying on Lake Couchiching, and accustomed to run into the River Severn, where it leaves the lake, and to lie in a basin beside a wharf at Washago. The defendants, in extending their line of railway, constructed a bridge across the river which completely obstructed the entrance, and caused special damage to the plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge, which was somewhat too small for its intended purposes. Some correspondence took place while the bridge was being built, between the plaintiff personally and through his solicitor, and the defendants' general manager, in the nature of protests, but the bridge had been in use for several years without action on the part of the plaintiff, when the bill was filed praying that it might be declared a nuisance, and that the defendants might be ordered to abate it.

Held, that by the delay in taking action, and otherwise, there had been unequivocal acquiescence in the defendants' action, and the bill was therefore dismissed with costs.

D. McCarthy, Q.C., and *Pepler*, for plaintiff.
Walter Cassels and *Boulton* for defendants.

Spragge, C.] [May 21.

NELLES v. WHITE AND O'NEIL.

Tax sale—Assessment, validity of—Description—Certificate of sale, effect of—Possession fraudulently obtained.

A parcel of land called Lot One in one survey and Lot Four in another was assessed variously as "1, 4," "1 and 4," "1 and part 4," "part 1 and 4," which, however, did not mislead.

* The following cases were heard by the present Chief Justice of Ontario, whilst Chancellor.

Held, that though these irregularities indicated want of care and accuracy in the officers of the municipality, they did not invalidate the assessment, as the land was sufficiently pointed out. *McKay* v. *Chrysler*, 3 S. C. R. 474 distinguished. *Held*, also, that the words "be the same more or less" following the description of the quantity of the land improperly inserted in the Sheriff's deed might be rejected as surplusage.

The Sheriff's certificate of the sale is made for the purpose of giving the purchaser certain rights in order to the protection of the property until it is redeemed or becomes his absolutely, and forms no part of his title, and its absence does not invalidate the Sheriff's deed.

The plaintiff was assignee in insolvency of H., who bought from the purchaser at the Sheriff's sale. H. leased to and put T. in possession, and had some small buildings put on the land. Subsequently the defendant, O'Neil, made untrue representations to T., which induced him to quit possession; whereupon O. went in and occupied, claiming under defendant W., who, he alleged, had an interest in the land. W., by his answer, adopted O.'s possession, and claimed under conveyance from the Crown, but failed to prove his title.

Held, following *Doe Johnson* v. *Baytum*, 5 A. & E. 188, that the possession so fraudulently obtained by O. did not entitle him to put the plaintiff on proof of his title.

Boyd, Q. C., and *Kew*, for plaintiff.

S. White and *G. C. Gibbons*, for defendant.

Spragge C.] [May 21.

WATSON v. DOUSER, *et al.*

Mortgage—Priority—Unpaid purchase money—Incumbrance.

C., being the equitable owner of land, contracted by writing (registered) to sell to the defendant on 13th February, 1877. Part of the purchase money was paid down. C. obtained an order on 17th April 1878 vesting the land in him—there were two mortgages on the registry prior to one in favor of the Loan Company. On the 17th May the defendant gave an order on the Loan Company to pay the proceeds of the loan to their local agent, who was informed by one J., a solicitor who had control of the two prior mortgages, that they were paid off and that he would get them discharged. Thereupon the agent paid C. the balance of his unpaid purchase money, and C. on 25th May, 1878, conveyed to defendant. The Loan Company's mortgage was dated the 15th May and registered the 25th May.

Held, on appeal from the Master affirming his report, that the Loan Company could not stand in C.'s place and claim priority in respect of his lien for unpaid purchase money over the prior mortgagees, following *Imperial L. & S. Co.* v. *O'Sullivan* 8 Pr. R. 162.

The Loan Company's mortgage contained this clause, "and it is hereby declared that in case the Company satisfies any charge on the lands the amount paid shall be payable forthwith with interest, and in default the power of sale hereby given shall be exercisable, and in the event of the money hereby advanced or any part thereof being applied to the payment of any charge or incumbrance, the Company shall stand in the position and be entitled to all the equities of the person or persons so paid off."

Held, that this provision could not effect prior mortgagees who were no parties to it, and *quære* whether it would apply to the discharge of unpaid purchase money which does not constitute charge or incumbrance in the proper meaning of those terms.

Boyd, Q. C. for plaintiff.

Moss, for the Loan Company.

Spragge C.] [May 21.

SMITH v. THE MERCHANT'S BANK.

Insolvency—Bills of Lading—Warehouseman—Warehouse receipts.

By the Act 34 Vict. ch. 5 (D) it is not necessary to the validity of the claim of a bank under a warehouse receipt, that the receipt should reach the hands of the bank by endorsement: the bank itself may make the deposit and receive from the warehouseman the receipt.

A bank had discounted for a trading firm, on the understanding that a bill of lading of a quantity of coal shipped to the firm would be transferred to the bank as collateral security, which was accordingly done, and the bank secured from one of the partners, who was a wharfinger and warehouseman, his receipt for

the coal as having been deposited by the bank. The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvent, and filed a bill impeaching the validity of the receipt. It appeared that the insolvents had mixed the coal with other coal, and had sold some of it, and that all the coal in the premises was not sufficient to answer the quantity comprised in the receipt. Under these circumstances it was *held*, that the bank had a right as against the assignee—as it would have had against the insolvents—to hold all the coal in store of the description named in the receipt, and also to payment out of the money, the proceeds of the coal which had been sold.

D. McCarthy, Q.C., and *Kingsford*, for plaintiff.

C. Robinson, Q.C., and *J. F. Smith*, for defendants.

Spragge, C.] [May 21.

MOORE V. BUCHNER.

Arbitration and award—Jurisdiction—Time for enforcing award—Costs.

In answer to a bill to enforce an award, the defendants submitted to the Court a number of matters as objections to the award, and asked a reference back to the arbitrator with certain instructions, or a reference to the Master as to the matters in dispute. At the hearing on bill and answer, the defendant objected (1), to the jurisdiction of this Court, the submission providing that the submission and award should be made a rule of the Queen's Bench or Common Pleas.—(2), that the filing of the bill was premature, the time for moving against the award not having expired.

Held, that a proceeding to enforce an award must be taken after the time for moving against it has elapsed.

Held, also, that the objection to the jurisdiction would have prevailed if properly taken, as the parties to the submission had agreed upon their *forum;* but the defendant having submitted to the jurisdiction by his answer, and himself asked the intervention of the Court, could not now be heard to object.

It appearing that there was no reason for filing a bill instead of proceeding in the usual way,

Held, that the plaintiff was entitled only to such costs as he would have been entitled to if he had proceeded to enforce the award under the statute.

McClive, for plaintiff.

Plumb, for defendant.

Spragge. C.] [May 25.

ROSS V. POMEROY.

Statutes of limitations—R. S. O. cap. 108.

The plaintiff, administrator of a mortgagee, filed his bill against the mortgagor on or before 20th October, 1864. After service, and on 15th November, 1864, an arrangement was entered into between the parties, whereby the plaintiff took notes for the mortgage money, the first payable 1st June, 1866, and the others in the six following years. Proceedings on the mortgage were then suspended. Pomeroy made a payment in June, 1867, and died 16th July, 1869. The notes were not paid. The suit was then, on 29th August, 1879, revived against the infant heir of the mortgagor.

Held, that the plaintiff was barred by R.S.O. cap. 108, sec. 23, but in case of the plaintiff's desiring to obtain the benefit of a judgment recovered against Pomeroy, the bill was retained as against the infant defendant, as he would be a proper party in a proceeding against Pomeroy's personal representative.

Maclennan, Q. C., for plaintiff.

Plumb, for defendant.

Boyd, C.] [May 18.

MCLELLAN V. MCLELLAN.

Election—Dower—Provision by will.

A testator devised to his widow his "house and orchard for herself and her children as long as she may live;" and to his son, *Duncan*, all his right, title, and interest, in and to the said land, and all implements thereon, "at the death of my wife, as aforesaid, on condition that he shall provide for her the necessary comfort and supplies for her board and maintenance, he, my son, Duncan, holding possession of the land rom the time of my decease, subject to the proviso aforesaid."

Held, that the widow was not entitled to the provision made for her by the will, and also to dower out of the land devised, but that she was put to her election in respect thereof.

Hoyles, for plaintiff.

J. Hoskin, Q. C., and *A. Hoskin*, Q. C., for defendants.

Boyd, C.] [May 11.

FENELON FALLS v. VICTORIA RAILWAY CO.

Demurrer—Municipality—Railway Act—Trespass.

The plaintiff, a municipal corporation, filed a bill, seeking to restrain the defendants, a railway company, from trespassing, by running their track along one of the streets of the municipality, without the consent thereof, thus impeding the traffic, in contravention of the Railway Act, C. S. C. ch. 66, sec. 12, ss. 1.

Held, that by virtue of the Municipal Act, there is such power of management, control, &c., bestowed upon municipalities, and such a responsibility cast upon them, as to justify them in intervening on behalf of the inhabitants for the preservation of their rights.

Semble—But for the language of SPRAGGE, V. C., in *Guelph* v. *Canada Co.*, 4 Gr. 656, where he says, "I think the suit is not improperly constituted," that the proper frame of the suit would have been by way of information in the name of the Attorney-General, with the corporation as relators.

Hodgins, Q. C. for plaintiffs.

Cattanach, for defendants.

Proudfoot, V. C.] [May 16.

HATHAWAY v. DOIG.

Injunction — Practice — Irreparable damage—Restraining nuisance—Public nuisance.

Although a man may be engaged in a perfectly legitimate trade or calling, he will not be permitted to carry on the same in such a manner as to cause a nuisance or unreasonable inconvenience to his neighbors, and in order to obtain an interlocutory injunction to restrain his so doing, it is not necessary for the plaintiff to show that the damage is irreparable. Therefore, where a man was engaged for some time in a thickly inhabited part of the city of Toronto, in the manufacture of gas receivers and was in the month of Feb., 1881, engaged in contracts for the manufacture of vessels which required the joining together of boiler plates by rivetting, which created so great a noise as to render the occupation of the plaintiff's house, distant only about fifteen feet from the factory, difficult, and whereby the wife of the plaintiff, who was the owner of the house, was kept in a nervous state of health, and a bill was filed in April, the Court [PROUDFOOT, V. C.], upon an interlocutory application, restrained the defendant from "continuing his works so that the noise cause a nuisance to the plaintiff."

The fact that the nuisance, if a nuisance at all, was alleged by the defendant to be a public nuisance, and should be moved against by the Attorney-General, formed no ground for refusing relief to the plaintiff, although the property on which the injury was inflicted was the property of the wife of the plaintiff, not his own.

Blake, Q. C., and *Moss* for plaintiff.

Maclennan, Q.C., and *McCarthy* for defendant.

Proudfoot, V. C.] [May 17.

CAMPBELL v. MOONEY.

Will, construction of—Devise in trust to sell—Power to mortgage—Family—Children.

A testator devised all his landed property, or his interest therein to be held by his executors until his youngest child came to maturity, but should it appear to his executors to be to the advantage of the infant members of his family to dispose of his real estate, or his interest therein, "they might dispose of it by sale;" and gave them all power and authority vested in himself to dispose of the same, holding the proceeds for the benefit of his widow and infant members of his family; and as soon as the youngest child came of age he desired that a suitable provision should be made for his widow, and that all his property be sold, if not previously disposed of, and the surplus divided amongst his family. He named his wife and two others as executors, but his widow alone proved the will; the other two renounced.

Two of the children came of age, and they joined the widow in creating a mortgage in favor of the plaintiff to raise money wherewith to pay a balance of money due the Crown on the land devised.

Held, that under the words of this devise the power to sell did not authorize the creation of a mortgage by the executors; but that so far as the interests of the widow and of the two adult children were concerned, the mortgage bound them; and that the money raised by the mortgage, having been expended in the payment of a balance of purchase money due on the devised land, must be considered as salvage

money, and the persons making the advance therefore entitled to a charge on the lands.

The word "family," in the connection in which it was used by the testator, meant "children."

COMMON LAW CHAMBERS.

Hagarty, C. J.] [May 14.

IN RE MCCRACKEN V. CRESWICK.

Division Court Act, 1880—Prohibition—Jurisdiction—Interest—Promissory note.

Plaintiff sued on a promissory note for $73.14, dated 1st April, 1875, payable six weeks after date, with interest at seven per cent. The principal and interest together amounted to $103.44.

Held, that under the Division Court Act, 1880, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of the defendant, and the above claim could therefore be recovered in a Division Court.

Holman, for plaintiff.

Perdue, for defendant.

Hagarty, C. J.] [May 20.

IN RE DRINKWATER V. CLARRIDGE.

Division Court—Negotiable instrument—Judgment—Mandamus.

In a suit in a Division Court upon a negotiable instrument, where the defendant does not dispute the claim, the plaintiff is entitled to enter judgment for the amount claimed, without the production or filing of the instrument sued upon.

Stonehouse, for plaintiff.

Perdue, for the Division Court Clerk.

REVIEWS.

PRINCIPLES OF THE CRIMINAL LAW.—A concise exposition of the nature of crime, the various offences punishable by the English law, the law of criminal procedure, &c. &c., by Seymour F. Harris, B. C. L., M. A. Second Edition. Revised by the author and F. P. Tomlinson, M. A., of the Inner Temple London. Stevens & Hagues, Law Publishers, Bell Yard, Temple Bar, London, 1881.

The first edition was only published in 1877. It was received with much favor, being a compact, clearly expressed statement of the subject treated of. As we have already noticed this excellent work we shall not now speak of it at any length. The last edition does not differ materially from the first. The most important act passed in England within the purview of the book since 1877 is the Summary Jurisdiction Act, 1879. This is discussed in the chapter on summary convictions. In other respects the necessary corrections appear to have been made to make the book accord with such other changes as have been made.

THE LAW AND PRACTICE OF JOINT STOCK COMPANIES, UNDER THE CANADIAN ACTS, by Charles Henry Stephens, of the Montreal Bar, Author of the Quebec Law Digest. Toronto, Carswell & Co., Law Publishers, 1881.

This book assumes to be "a practical treatise on the law of Commercial and Joint Stock Associations, in the form of a commentary on the Canada Joint Stock Companies Act, 1877; with which is included most of the other Companies' Acts, both general and local; as also a number of forms relating to the management of such companies."

The author commences with an introduction, which is interesting as an historical resumè of the birth and growth of corporations and companies. He then speaks of joint stock companies, in reference to their definition, promotion, formation, incorporation, organization management, and dissolution. This introduction is, we think, the best part of the book.

The author claims to aim chiefly at conciseness. Were it not for this announcement, we should have thought that the style was somewhat diffuse, and that a sermonizing strain occasionally appears, not in keeping with the practical, concise treatment of the subject required.

We could easily, however, overlook faults of this kind, and occasional amplifications of abstract propositions which nobody denies, and which swell the volume without any compensating advantage, were not statements made which are so misleading as to shake our confidence in other matters which very probably would, on examination, prove to be accurately annotated. For example, section 15 of the Joint Stock Companies Act, 1877, provides that "the directors may at any time *within* six months after the passing of any such resolution (as to an application for supplementary letters patent), petition the Governor," &c. The author, after a dissertation as to the disasters likely to follow from a company's "launching out into enterprises other than those for which it was formed," thus speaks of the provision alluded to (p. 150): "As an additional safeguard it is provided that a period of *six months must elapse* from the time of the passing the resolution, *before* the petition may be presented, thus giving to all interested ample opportunity for deliberation," &c. The unhappy solicitor who might follow the author and not the Statute, would find no comfort in the fact, when turned round, and told that the petition should have been presented *within*, and not *after*, the six months had elapsed. This is not a case of doubtful construction, but mere carelessness, almost unaccountable.

Whilst a candid criticism compels us to refer to these defects, there is much in the book that will be of use. A large number of cases are referred to, and it is a great help to have a convenient arrangement of the subjects treated of. The mere typographical execution is good, but the proof has been carelessly read, at least in this, that cases cited are given in various kinds of type, and there is no uniformity in the citations, which do not appear to have been verified, as there are various mistakes in names, nd some of them are unintelligible.

LAW STUDENTS' DEPARTMENT.

The following are some of the Examination Papers of Hilary Term, 1881:

FIRST INTERMEDIATE EXAMINATION.

Williams on Real Property.

HONORS.

1. A. is entitled to an estate in remainder upon the decease of B, during whose life C. is tenant. A. believes B. to be dead, but is unable definitely to ascertain whether or not such is the fact. What course would you advise him to adopt?

2. State shortly the effect of the two statutes of Elizabeth as to fraudulent and voluntary conveyances.

3. By what means can property be granted so that upon the grantee doing some act another person shall acquire a title to the lands?

4. Into what three kinds may incorporeal hereditaments be divided? Give an example of each.

5. A. leases to B, who covenants to pay rent, B. assigns to C, and C. to D. Who is now liable to the rent? Explain.

6. What doctrine of law formerly deterred lessors from granting licenses to their lessees to commit a breach of some covenant, a breach of which by the terms of their lease would give a right to re-enter? What is now the law upon the subject?

Mercantile Law, &c.

HONORS.

Discuss the question of the necessity for a request in order to make a complete contract. Answer as fully as you can.

2. Give, after Smith, the general rules as to the way in which a contract ought to be evidenced and construed.

3. State as fully and particularly as you can, the remedies which one partner has against another in reference to partnership transactions.

4. Distinguish between a pledge and a mortgage, and write short notes on the rights of a pledgor and pledgee, respectively.

5. The holder of a note dated at Toronto, made by A. payable to the order of B., and endorsed by him, hands it to you for suit. What

considerations should govern you in determining whether or not you should sue both A. and B. in the same action, and what inquiries should you make in order to determine the liability of the party or parties to be sued? Answer as fully as possible, referring briefly to the purport of any statutory enactments in any way involved in your answer.

6. In an action on a contract in which A. B. and C. are joint contractors, A. and B. alone are sued, because the right of action against C. is barred by the Statute of Limitations; A. and B. plead in abatement the non-joinder of C. In what ways may the plaintiff meet this defence? Answer fully, giving reasons for your answer.

SECOND INTERMEDIATE.

Equity Jurisprudence.

1. Explain and illustrate the jurisdiction of equity in ordering the cancellation and delivery up of documents.

2. Define "Accident," and explain what must be established in order to give a Court of Equity jurisdiction.

3. Explain the remedy by injunction, and state what is the object of the process.

4. What is a *donatio mortis causa*, and in what respects does it differ from (1) a legacy, or (2) a gift *inter vivos?*

5. In what cases will a settlement made in consideration of the wife's equity to a settlement be binding against the husband's creditors?

6. Where a "conversion" is directed, what acts of the owner of the property to be converted are sufficient to lead to an inference that he intended to possess such property according to its actual state and condition.

SECOND INTERMEDIATE.

PASS PAPER.

Books III. and IV. Broom—Underhill on Torts, &c.

1. A. and B. are fellow servants working, chopping wood for a farmer, C. By carelessness and want of skill A. severely wounds B. with an axe. Is C. liable to B. for damages for the injury? Explain fully the principle (if any) applicable in such a case.

2. Discuss to what extent is it true that a tort may become merged into a felony. Answer fully.

3. Define Robbery and Larceny respectively?

4. What do you understand by *intention* in criminal law? How is it proved?

5. Define Trover. What is the legal effect on the property in the goods of the recovery of a verdict by plaintiff?

6. To what extent is a husband liable for the torts of his wife? Discuss briefly.

SECOND INTERMEDIATE.

Contracts.

1. Give examples arising out of our law of the terms of express contract being varied or overridden by the *lex loci.*

2. Define "*consideration*" in cases of contract. Write short notes on the effect of its presence or absence in various kinds of contracts.

3. What is the legal effect of a verbal contract (*a*) for a year's service to commence at a future day, (*b*) a contract to enure "so long as the defendant shall think proper," (*c*) a contract which is to be performed on one side but not on the other within a year. Give reasons in full for your answer.

4. Explain the expression that *choses* in action are not assignable, and give exceptions to the rule.

5. Mention the various purposes for which evidence of usage or custom may be offered in connection with the interpretation of written documents.

6. Where under the present practice accounts and inquiries are directed in a Common Law case to be taken by a Master in Chancery, what are the proper steps to be taken, and how and when are appeals from the Master to be disposed of? Answer fully.

CORRESPONDENCE.

Marriage with Deceased Wife's Sister.

To the Editor of THE CANADA LAW JOURNAL :—

SIR,—I am glad to observe, by the article in your issue for 1st May, on the present state of the Marriage Law, that you contemplate a further discussion of questions affecting the marital relation, which will probably engage the attention of the Dominion Parliament ere long.

In my communication on the subject of Marriage with a Deceased Wife's Sister, which appeared in your magazine on 1st April, I stated that such an alliance was "as unlawful in Canada as it is in England ;" although I was free to admit that in Canada, at present, it was in the power of anyone so disposed, to disregard this prohibition with impunity. A writer in the *Canada Law Times*, for 1st May, impugns the accuracy of this statement. He contends, with much apparent plausibility, that my position is untenable, on the ground that, for the lack of competent judicial authority to set aside such marriages, they cannot be invalidated in this Dominion.

Notwithstanding this obvious defect in our system of jurisprudence, I must adhere to the assertion that an alliance of this description is "unlawful in Canada." Whatever opinions may be entertained as to the propriety of legalizing them, there can be no doubt that nothing short of positive legislation could accomplish this result, for as the law now stands, such alliances are directly forbidden.

The supreme authority of the Imperial Parliament extends over all parts of the realm : and until the Crown and Parliament of the Mother Country has sanctioned a deviation from the public law of the empire, by colonial legislation, on any matter of common concern, the law as defined by imperial legislation must everywhere prevail.

Marriage is a relation which claims to be of equal obligation in all parts of the realm. It must, therefore, be governed by the common law of the empire, at least until a special local law, sanctioned by the supreme authority, has been enacted.

The views of Her Majesty's Government on this subject were well expressed by the Duke of Newcastle, when Secretary of State for the Colonies, in a despatch to the Governor of Victoria, dated 19th February, 1861, announcing the disallowance by the Crown of a local act concerning divorce. His Grace remarks that "the formal *mode* of contracting marriages is no doubt a fit subject for the discretion of Colonial Legislatures, because, as a general rule, no difference of mere form can render a marriage bad in any part of Her Majesty's Dominions which is valid in that part where it was contracted. The case, however, is very different in respect to the *essential conditions* of marriage. Whatever the effect of a colonial law may be within a colonial jurisdiction, I believe it to be at least most doubtful whether a marriage wanting in these conditions can be made valid in England by any colonial law; and if this be not the case, if the validity of such marriages and divorces is confined, at most, to the colony in which they take place, the greatest embarrassments might result from the prevalence of different laws in different parts of the empire. Marriages, legally contracted in one colony, would be inoperative for all legal purposes in another." * * * "Children, legitimate in one part of the empire, might in another find themselves incapable of inheriting their parents' property anywhere else. In fact, it is impossible to foretell the distress, insecurity, and litigation which might arise from such a state of things. These evils would not be confined to the colony whose legislation had given birth to them—they are essentially imperial. The probability of such evils renders it the duty of the Home Government, as far as its power extends, to maintain throughout the empire that essential uniformity in the law of marriage which alone can effectually prevent them."

These conclusions were uniformly adhered to by the Imperial Government up to the year 1861. They are confirmed by an Imperial Statute passed in 1865, to remove doubts as to the validity of certain colonial marriages, which expressly declares that the benefits of this act shall not extend to give effect—outside of the colony wherein it took place—to any marriage which had not been contracted "according to the law of England." And they agree with the provisions of the Upper Canada Statute, 11 Geo. IV., c. 36, which authorizes ministers of

various denominations within the province to solemnize marriage "between any two persons, neither of whom is under any legal disqualification to contract matrimony" :—such "legal disqualification" being nowhere defined except in the Imperial Statute-book.

The legality of certain doubtful marriages, heretofore contracted in the colonies, pursuant to colonial legislation, was confirmed by the Imperial Act of 1865, above-mentioned. But before the Imperial law, which is applicable to this subject in all parts of the empire, can be changed in any colony, it is indispensable that express legislation shall have taken place in the particular colony, and that the sanction of the Crown shall have been given to the same. This has in fact been done, within the past ten years, in various parts of the British dominions, by colonial enactments, authorizing, within the limits of the respective colonies, marriage with a deceased wife's sister. Similar power was conferred by the British North America Act of 1867, upon the Parliament of Canada to deal with all questions in relation to "Marriage and Divorce." But hitherto the Canadian parliament has refrained from passing any such measure. I am therefore warranted in saying that we are still governed, on this subject, by the general law of the Mother Country, and that until the Dominion Parliament shall enact to the contrary, alliances with a deceased wife's sister are "as unlawful in Canada as they are in England."

ALPHEUS TODD.

Ottawa, 28th May, 1881.

The following is a copy of the report of the Minister of Justice on the River and Streams Bill :

DEPARTMENT OF JUSTICE,
OTTAWA, May 17th, 1881.

I have the honor to report with respect to an Act passed by the Legislature of the Province of Ontario at its last session, intituled :—"An Act for protecting the public interests in rivers, streams, and creeks."

Application for the disallowance of this Act has been made by Mr. Peter McLaren, of the town of Perth, lumber manufacturer, on the ground in effect that the Act in question deprives him of vested private rights without compensation, and practically reverses the decision of the Court of Chancery, in a case brought by him against one Caldwell, whereby Mr. McLaren's exclusive right to the use of improvements erected by him or those through whom he claims on certain streams in the Province of Ontario was established by a decree of the court.

The Act by its first section declares that all persons have, and always have had, during the spring, summer, and autumn freshets the right to float and transmit saw logs, &c., down all rivers, creeks, and streams, in respect of which the Legislature of Ontario has authority to give this power, and in case it may be necessary to remove any obstruction from such river, creek, or stream, or construct any apron, dam, &c., down the same, it shall be lawful for the persons requiring to float down the saw logs, &c., to remove such obstruction, and to construct such apron, dam, &c.

The second section declares that in case any person shall construct in or upon such river, creek, or stream any such apron, dam, etc., or shall otherwise improve the floatability of such river, creek, or stream, such persons shall not have the exclusive right to the use or control thereof; but all persons shall have a right to use them, subject to the payment to the person who has made such constructions and improvements of reasonable tolls.

The third section extends the operations of sections one and two to all rivers, creeks, and streams mentioned in the first section, and to all constructions and improvements made therein, whether the bed of the river, etc,, or the land through which it runs, belongs to the Crown or not.

The fourth section empowers the Lieutenant-Governor-in-Council to fix the amounts which any person entitled to tolls under the Act shall be at liberty to charge on saw-logs, &c.

The fifth section extends the previous provisions of the Act to all such constructions and improvements as may hitherto have been made, as well as to those hereafter constructed.

The sixth section gives to all persons driving saw logs, &c., down the streams, the right to go along the banks.

The seventh, and last section, declares that if any suit is now pending, the result of which will be changed by the passage of this Act, the court may order the costs of the suit to be paid by the party who would have been required to pay the costs if the Act had not been passed.

It is tolerably clear that this section refers specially to the suit of McLaren against Caldwell above referred to. It appears that Mr. McLaren is the owner of certain streams and improvements on streams which he makes use of for the purpose of floating down saw logs from the timber limits from which he takes the same for the purposes of his business as a lumber manufacturer.

Mr. Caldwell is also a lumber manufacturer owning timber limits in the neighborhood of those owned by Mr. McLaren.

He attempted to float his logs down Mr. McLaren's streams and through his improvements. To prevent his doing so, the suit in chancery above referred to was instituted, and a decree was made declaring Mr. McLaren exclusively entitled to the use of the streams and improvements and restraining Mr. Caldwell from floating his logs down the same.

That case has been appealed to the Court of Appeal. The effect of the Act now under consideration must necessarily be to reverse the decision of this suit.

Had this Act, instead of giving to any person desiring to make use of the streams the right to use the same upon payment of certain tolls absolutely expropriated the whole ownership of the streams for the public use, and provided a means of compensating the owners for the property so taken from them, it would be less objectionable in its features.

The effect of the Act as it now stands seems to be to take away the use of the property from one person and give it to another, forcing the owner practically to become a toll-keeper against his will, if he wishes to get any compensation for being thus deprived of his rights.

I think the power of the Local Legislature to take away the rights of one man and vest them in another, as is done by this Act, is exceedingly doubtful, but assuming that such right does in strictness exist, I think it devolves upon this Government to see that such powers are not exercised in flagrant violation of private rights and national justice, especially when, as in this case, in addition to interfering with the private rights in the way alluded to, the Act overrides a decision of a court of competent jurisdiction by declaring retrospectively that the law always was, and is different from that laid down by the court.

In reporting upon a reserved bill of the Prince Edward Island Legislature in 1876, the then acting Minister of Justice reported to Council, and his Excellency was advised to withhold his assent from the bill, one of the grounds being that the bill was retrospective in its effect; that it dealt with the rights of the parties then in litigation, and that there was no provision saving the rights of private parties.

On the whole I think the Act should be disallowed. I recommend, therefore, that the Act passed by the Legislature of Ontario at its last session, intitule l: "An Act for Protecting the Public Interests in Rivers, Streams, and Creeks," be disallowed.

(Signed)

JAMES MCDONALD,
Minister of Justice,
per J. A. M.

THE LATE LORD BEACONSFIELD.

It is stated, on the authority of Mr. Ralph Disraeli, that the late Lord Beaconsfield, after serving for a certain time as articled clerk in the Old Jewry, entered as a student of Lincoln's Inn and kept several terms, although he was not called to the bar. 'J. C. B.' states that Lord Beaconsfield 'became nominally a pupil of his cousin, the late eminent conveyancer, Mr. Nathaniel Basevi, who told me, some years afterwards, that "Ben Disraeli" showed no liking for law, and generally occupied himself at chambers with a book, brought somewhat late in the day by himself. The work I remember as having been particularised was Spenser's "Faerie Queene," bound in green morocco."' Mr. George H. Parkinson, of the Central Office, Royal Courts of Justice, has published the following extract from his diary of 1852, when he was clerk to Baron Parke:

'Saturday, June 12, 1852.—Mr. Disraeli, the new Chancellor of the Exchequer, came down about two, to be sworn in. He was quite alone; and Davis, the usher, showed him into the judges' private room, where I happened to be arranging some papers. I placed him a chair, and said I would go and tell the judges he had arrived. In a few minutes they came in—Lord Chief Baron Pollock, Barons Parke, Alderson, Rolfe, and Platt. All seemed to know him, and all talked and laughed together. His new black silk robe, heavily embroidered with gold bullion fringe and lace, was lying across a chair. "Here, get on your gown," said Baron Alderson; "you'll find it monstrously heavy." Oh, I find it uncommonly light," said the new Chancellor. "Well, it's heavy with what makes other things light," said the Lord Chief Baron. "Now, what am I to say and do in this performance?" was the next question. "Why, you'll first be sworn in by Vincent, and then you'll sit down again; and if you look to the extreme left of the first row of counsel you will see a rather tall man looking at you. That is Mr. Willes out of Court, but Mr. Tubman in Court; and you must say, 'Mr. Tubman, have you anything to move?" He will make his motion and when he sits down you must say, 'Take a rule, Mr. Tubman,' and that will be the end of the affair."

'The ushers were summoned, and all marched to the Bench—Baron Platt as junior baron first, Mr. Disraeli last, immediately preceded by the Lord Chief Baron, Mr. Vincent, the Queen's Remembrancer, administered the ancient oath in Norman-French, I think. Mr. Tubman (afterwards Mr. Justice Willes) made some fictitious motion, was duly desired to "take a rule," and the Chancellor and barons returned to the private room. "Well, I must say you fellows have easy work to do, if this is a specimen," said Mr. Disraeli. "Now don't you think that, or you'll be cutting down our salaries," replied one of he judges. "Take care of that robe," said Baron Alderson; "you can leave it to your son when the Queen makes him a Chancellor." "Oh, no; you've settled that business," said the new Chancellor; "you'd decide that was fettering the Royal prerogative." There was a general roar at this witty allusion to a very important case just decided in the House of Lords, in which the Peers had held that a large monetary bequest by the late Earl of Bridgewater to his son, on condition that he should obtain the title of Duke within a certain time, was void, on the ground that it was a fettering of the Royal prerogative.'