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THE now somewhat celebrated contempt of court case arising in *Reg. ex rel. Felitz* v. *Howland*, has at last reached a conclusion; the Supreme Court having recently decided by unanimous voice in favor of the appeal of the editor of this journal from the judgment of Mr. Justice Proudfoot, affirmed by the Court of Appeal. As the matter is one of great importance to both the public and the profession, we shall refer to it at length when the judgments of the Supreme Court judges are received.

WE are glad to see that the Government has, after too long a delay and as the result of continued appeals from the Bar and the Press, both legal and lay, brought in a measure to increase the salaries of the judges of the Superior Courts in the various Provinces of the Dominion. The scheme, when finally settled, will be published by us in full. We shall also be compelled to comment on the main reason why this measure of justice was not accorded long ago. It is the same old story of favor to Quebec at the expense of Ontario, as is very evident on an examination of the facts of the case.

WHILST we are pleased to see our judges of the Superior Courts in Ontario receiving an increase of salary, we think something substantial should have been done for the judges of our County Courts, especially as their duties are much more onerous than those of most of the twenty-nine puisne judges of the so-called Superior Court of the Province of Quebec, whose salaries are from $4,500 to $6,000 per annum. In connection with this subject we hope the Ontario Government will recognize the propriety and justice of following the example of the Dominion Government, and increase to a proper amount the present miserably low salaries paid to the Master in Ordinary and Master in Chambers. Both have the work of judges, and they have no interval of rest from continuous and daily judicial labors. It is only reasonable that their salaries should be at least $5,000 each.

THE CONSTITUTIONALITY OF THE QUEBEC JESUIT ACT.

WE propose to continue the discussion on this Quebec Act within the same passionless lines of legal argument and judicial reason as in our former article. The law has no passion or sentiment, and is of no church or political party, but is supreme over all. Only by the light of its words and reason can we be guided to the constitutional rules which control this Act, or learn what is the final judgment and will of the law as to its legislative validity.

In addition to the levy of taxes (Hawkins Pleas of the Crown, p. 59), the Pope in early days asserted a civil jurisdiction as an appellate sovereign over the English government. To prevent this, various statutes were passed. The 16 Richard II, c. 5 (still in force), after reciting that "cognisance of cases belongeth only to the King's Court, in the old right of his Crown," but that divers processes hath been made by the Bishop of Rome, whereby the regality of the Crown was submitted to the Pope, thereupon prohibited all persons from pursuing in the Court of Rome, or elsewhere, any processes, or instruments, or other things whatever, which touch the King, or his realm, or which do sue in any other than the King's Courts "in derogation of the regality of our lord the King."

Another statute (still in force) recites the vigorous protest of Parliament that "the Crown of England which hath been so free at all times, that it hath been in no earthly subjection, but immediately subject to God and none other, in all things touching the regality of the same Crown, should be submitted to the Pope, and the laws and statutes of the realm defeated by him, and avoided at his will, in perpetual destruction of the sovereignty of our lord the King, his Crown, his regality and all his realm."

The statute, 25 Henry VIII, c. 21, has also an important bearing on this Quebec Act, for it expressly prohibits the Sovereign from procuring licenses, delegations, etc., or *any instrument in writing*, from the Bishop of Rome, "called the Pope"; and being binding on the Sovereign, is also binding on her representatives and ministers.

These statutes, says Lord Coke, are declaratory of the ancient or common law of the realm (4 Coke's Inst. 340), and they declare that every encouragement or acknowledgment of the Papal, or a foreign, power, within the realm, is a diminution of the regal authority of the Crown, and is an offence (4 Bl. Com. 110). By the several statutes, 24 Henry VIII, c. 12, and 25 Henry VIII, c. 19 and 21, to appeal to Rome from any of the King's Courts, which (though illegal before), had been connived at; to sue to Rome for any license or dispensation, or to obey any process from thence, were made liable to *præmunire* (*Ibid. 115*). Though the penalties of *præmunire* are now obselete, a wilful contravention of any Act which is not otherwise an offence, may be a misdemeanor.

In dealing with this question of *ultra vires*, it must be borne in mind that "the Government of the Province," mentioned in the Act, is constitutionally Her Majesty the Queen, as representing the corporate and supreme sovereignty of the Empire, for by the B.N.A. Act, the executive government and authority of

and over Canada, is declared "to continue and be vested in the Queen," (s. 9). The agreement with the Jesuit Fathers is, therefore, an agreement with the Crown. And this Quebec Act, if not *ultra vires*, is "an Act which is assented to on the part of the Crown and to which the Crown therefore is a party;" per Lord Chancellor Cairns in *Theberge* v. *Landry*, 2 App. Cas. 108.

The preamble recites without disapproval the claim made by the Pope, that "the Holy Father reserved to himself *the right of settling the question of the Jesuits' estates in Canada.*" This claim by the Pope is the assertion by a foreign potentate, of a right to a temporal sovereignty or jurisdiction over the territorial possessions of the Crown in Canada (for all admit that the Jesuits' estates are Crown property), and seems to have been conceded, for thereupon the Pope gave the following consent, which by being recited in the Act, has obtained executive and legislative sanction in that Province: "The Pope *allows the Government to retain the proceeds* of the sale of the Jesuit estates as a special deposit *to be disposed of hereafter with the sanction of the Holy See.*" Substantially similar claims by former Popes of temporal jurisdiction in England in early days, led to vigorous parliamentary protests and the enactment of the stringent prohibitory Acts to which we have referred.

The preamble then recites a proposition to the Jesuit Fathers for a perpetual concession to the Crown of all property, title and rights in the Jesuit estates, "in the name of the Pope, of the Sacred College of the Propaganda, and the Roman Catholic Church in general," which was accepted with the following conditions as to its being a binding agreement after ratification by the Pope:

"(7.) Any agreement made between the Government of this Province and the Jesuit Fathers will be *binding only in so far as it shall have been ratified by the Pope*, and the legislature of this Province.

"(8.) The amount of the compensation fixed shall remain in the possession of the Government of the Province as a special deposit *until the Pope has ratified the said settlement*, and made known *his wishes respecting the distribution of such amount in this country.*

"Our Corporation will receive the interest upon such deposit at four per cent. from the date of the signification to the Provincial Secretary of the *acte* of the Pope confirming the said arrangement, up to the payment of the capital which is to be made to the persons entitled thereto within six months after the signification to the said Provincial Secretary of *the decision of the Pope respecting such distribution.*"

These provisions, importing the foreign jurisdiction of the Pope into matters affecting civil government in Quebec, are affirmed by the first and second clauses of the Act.

The power thus given to the Pope to ratify the agreement with the Crown implies also the power to negative or veto it.

Considering then these conditions in the light thrown upon them by the extracts we have given from both statute and common law, they obviously suggest the questions: (1) Is it within the constitutional or regal power of the Crown to submit any agreement, respecting its territorial possessions, or respecting any

matter of internal or civil government, to the ratification or veto of a foreign power? And (2), can the Crown constitutionally assent to such foreign power dispensing and distributing a grant of public money, and adjudging who of its subjects are to share and the quantum of their share in the public moneys of which it is the sovereign trustee? And in fairly considering these questions, the name of any other foreign power may be substituted for that of the Pope.

We think both questions must be answered in the negative. The law does not permit the Crown, its ministers, or subjects, or any colonial legislature, to grant or delegate any such authority to any foreign power. To submit any matter of executive government, or any question between the Crown and its subjects to a foreign or alien power, involves an abdication by the Crown of its regal sovereignty as the supreme executive and head of the nation. Such a submission to a foreign power concedes to that power the right to veto as well as to ratify the act of the Crown affecting its own subjects, and is therefore inconsistent with, and destructive of, the ordinary prerogatives of an independent sovereignty.

By the express words of this agreement and Act, there is an attempt to vest in an alien (potentate or cleric, it matters not) a power (1), to ratify or veto an agreement with the Crown; (2), to determine the persons entitled to, and the quantum of their shares in, the $400,000 voted by the Act. The legal vitality and operation of the agreement and of the statute are thus made to depend upon "the *acte* of the Pope." If the Pope vetoe the agreement, the Act becomes null and void. If he neglects or refuses to accept the delegation of power to distribute the $400,000, the Act becomes inoperative. These regal or executive powers granted to a foreign potentate concede to and vest in an alien by his title of sovereignty a right of control and veto in the supreme affairs of a sovereign government, when in the lesser affairs of the political franchise, no rights of voice or vote are allowed to aliens by our own or any other civilized nation.

The ratification or veto of the Pope, and his decision respecting the distribution of public money in Quebec, are to be signified by the written *actes* of the Pope, which when deposited in one of the Public Departments of the Crown in Quebec, will be "instruments in writing from the Bishop of Rome, called the Pope," forbidden by the statute of Henry; and, if carried out, will be the written evidence of a foreign potentate's exercise of executive and temporal jurisdiction over the territorial possessions and moneys of the Crown in this part of the dominions of the Empire. No one will contend that the Pope could lawfully exercise such executive or temporal jurisdiction in England, and if not there, neither can he lawfully exercise it in any of the Provinces of Canada.

Even the short-lived statute 1 & 2 Phil. and Mary, c. 8, which re-established the spiritual supremacy of the Pope in England, may be cited as hostile to the validity of this Quebec Act, for it confirmed the confiscations of monasteries, etc., by prior sovereigns, and provided that the titles of all lands in the realm should be tried and judged in the Queen's Courts and not elsewhere, and declared that nothing in the Act should derogate, diminish, or take away, any prerogative pre-eminences, authorities or jurisdictions of the Imperial Crown of the realm.

We have cited in these articles Imperial statutes which provide that their

enactments shall apply to all subjects of the realm and of the other dominions of the Crown; and by these latter words they are Imperial laws in force in the colonies and can only be varied or repealed by Imperial legislation. It is also a well established rule that the common law of England is the common law of the colonies, and that the Imperial statutes in affirmance of it passsed antecedent to the acquisition of a colony, are i force there (Chalmers' Colonial Opinions, p. 511). So are all Imperial statutes which are manifestly of universal policy (Clark's Colonial Law, p. 15). And the Courts in Lower Canada (now Quebec) have held that as soon as Canada ceased to belong to France, the law of Canada ceased to exist, and the public law of England came in (*Corse* v. *Corse*, 4 L.C. Jur. 314). The Imperial laws we have cited were part of the public law of England at the time of the cession of Canada to the British Crown, and are still in force. The B.N.A. Act, s. 129, exempts Imperial statutes from any right of repeal by the legislative powers of the Dominion or Provinces; and by the 7 & 8 William III, c, 22, now superseded by 28 & 29 Vict., c. 63, all colonial laws repugnant to the Imperial statutes in force in the colony are void and inoperative to the extent of such repugnancy.

But the Imperial Act known as the Quebec Act of 1774, seems to be conclusive on this question. By s. 5 of that Act His Majesty's subjects in the province were allowed "the free exercise of the religion of the Church of Rome," subject to the provisions of the Act of Supremacy, 1st Elizabeth c. 1. The Act of Elizabeth thus made part of the law of Canada, revived the statutes of Henry prohibiting the foreign jurisdiction of the Pope, and added a general prohibition that "no foreign prince, person, prelate, state, or potentate, spiritual or temporal," should use, enjoy, or exercise any manner of power, jurisdiction, or authority, within the realm or any of the dominions of the Crown. This Imperial Act is still part of the law of the Province of Quebec.

We think we have now shown our readers sufficient of both common and statute law to enable them to judge how far this Quebec Act is, according to Blackstone, the introduction of a foreign power into this land, the creation of an *imperium in imperio*, and a diminution of the regal authority which constitutionally belongs to the Crown, and therefore *ultra vires* of the legislature of Quebec.

THE GRAND JURY SYSTEM.

ATTENTION has been called to the subject of Grand Juries by Senator Gowan in a most interesting and instructive speech, delivered last month in his place in the Senate. We wish that our space permitted us to reproduce all the remarks of the honorable gentleman. No one in Parliament is better able, and few as competent, to discuss this subject in an intelligent manner from an experimental point of view. Having had nearly forty-one years of continuous judicial service he has had large opportunities of forming an opinion as to whether or not it is desirable to make a change in the Grand Jury system as it at present exists in this Province. As he stated in his address, he has come to the definite conclu-

sion that the Grand Jury has survived its usefulness, and that some system similar to that of the Scotch Public Prosecutor might well take its place.

In 1855, a series of articles appeared in this journal, advocating the passage of a measure which eventually took the form of the County Crown Attorney's Act, which was passed in 1857. This, as Mr. Gowan remarks, was one of the most valuable of the many statutes affecting reform in law procedure which Sir John A. Macdonald has placed on the statute book. All that was said then applies now to the several Provinces where the office of local Crown prosecutor does not exist, and we have no doubt that representatives from those Provinces obtained information from the honorable Senator's speech which will be of infinite value to them.

The learned Senator brought out very strongly various objections to the present Grand Jury system. We shall now refer shortly to the most important.

Mr. Gowan claims, as the fact is, that one of the worst features of the system is its secret and practically irresponsible character, every member of the body being sworn to secrecy before he can act. Open administration of justice, the best guarantee of civil liberty, is wanting; and publicity, the very essence of confidence in judicial proceedings, is guarded against. Individually, the members of the Grand Jury are practically irresponsible, and are often made to serve as a block to proper prosecution and to screen an offender who has been sent up for trial by a magistrate after an open inquiry. It is true that the Crown Counsel has access to the Grand Jury, but here again crops up the difficulty of the body being a secret one; he has necessarily large influence with the Grand Jury, and frequently controls their actions, whilst, at the same time, he personally is not responsible, nor is he amenable to public opinion.

Then again, the Grand Jury is a changing body. Those composing it are not men of judicial experience, or accustomed to the examination of witnesses or the investigation of facts. It is quite possible for an unwilling or partial witness appearing before a number of laymen to suppress facts, and to color statements so as to avert a trial, or to connive with the accused or his friends, and thus to cause injustice to be done.

Another objection arises in this way. In criminal trials before the Petit Jury there is a right of challenge; with the Grand Jury there is none. This objection is thus stated by the learned Senator:

"Another weighty objection to the Grand Jury is this: there is no challenge, such as there is to the Petit Jury. Persons related to, or closely connected with, the prosecutor or the accused, may be on the Grand Jury—personally or politically connected, as friend or antagonist—or persons who have a strong personal or pecuniary interest in the matter to be dealt with, or men who hold and have expressed strong opinions on the case. Such persons, every one will say, ought not to be on the Grand Jury in the particular case. But how is it effectually to be guarded against? The safeguard of full right to challenge wanting—nor is it a sufficient answer to say the verdict of a Petit Jury must be unanimous. The finding of a Grand Jury is by the majority, but who can calculate upon the

influence that may be exerted in a secret tribunal by one or two of its members, moved by prejudice or influenced by unworthy and evil motives?—nor is such a thing improbable of occurrence. To my mind this is a grave objection."

The possibility of mistakes without corrupt motive, though not an inherent evil in the system, is a very frequent occurrence, much more so than would be the case if the investigation were in the hands of a trained legal mind. A number of incidents were mentioned under this head which we have not space to refer to.

The question of expense is also material. It is stated that the cost of Grand Juries is from $40,000 to $50,000 yearly in Ontario, a considerable sum which, we think, might be better spent, though of small moment if there were any real advantage to be gained by the system. In connection with this, the point was made, that if the Grand Jury were abolished it would leave more material from which to select the Petit Jury, the more important body of the two, being the one which finally decides upon the guilt or innocence of the accused.

The advocates of the Grand Jury system bring forward as one of the most important of its advantages the allegation that it is an educator of the people, and that those who serve as Grand Jurymen "gain a certain knowledge of law and a right conception of its salutary influence, which they become agents in diffusing in their neighborhood, and thus inspire the public with more respect for the law and its administration." The answer of the learned Senator to this is well put in the following words: "Perhaps so, and a man in a lifetime may have two or three opportunities for gaining such knowledge; but it must be homeopathic in amount, and it seems to me that the intelligent reader of one of our great dailies, which rarely fail to give full and intelligent reports of important cases, would gain much more information at his own fireside."

Others again who favor the present system do so as they regard it as a great "bulwark of our liberties." It is undoubtedly ancient, and was at one time more or less a representative democratic institution, and it has undoubtedly in years gone by stood between the rights of the people and the arbitrary and tyrannical power of the kings and governments; but as to this the thought of the speaker was, that if this arbitrary power were "ever to raise its hand in the courts or elsewhere, the people of this country would not, I am very sure, fight behind the feeble barricade of a Grand Jury."

The judges of Ontario have been divided in their opinions as to the desirability of retaining the Grand Juries. One scarcely likes to advance an opinion contrary to that held by such a one as the late Chief Justice Draper. Chief Justice Cameron also held the opinion that the Grand Jury should be retained, and others though in the same way. Chief Justice Hagarty thought that that old-fashioned institution of the Grand Jury could not be dispensed with until some very careful substitute was found, which the then law did not present. Chief Justice Harrison, however, on the other hand, declared in favor of their abolition. So also Mr. Justice Gwynne, who thus expressed himself at an Assize in the City of Kingston. We have pleasure in reproducing his remarks as follows:

"Such, however, is our law, that at the busiest portions of the year you are

called from your avocations and private pursuits to render to the country the invaluable service of determining whether the magistrates who have already investigated the cases have or have not grossly perverted their duty, and whether there is, in fact, any sufficient justification for the detention of persons whom they have committed, and for subjecting them to trial for the offence charged. I do not pretend to suggest that the intervention of Grand Juries should not still be maintained in state offences, as a protection to the subject against the tyranny of the Government, if the days for Government acting the *role* of tyrants are not passed away; but to call for their intervention in those cases of crimes against society at large, which are the ordinary subjects for the consideration of Grand Juries, is, to my mind, an absurdity which can only be accounted for by that veneration for antiquity which seems to overshahow in some things the human mind * * * Well, gentlemen, the law calls upon you, twelve at least concurring, to investigate these cases, which have already been so investigated that, as a result, five out of the eight accused are confined in gaol in the custody of the sheriff, and I trust you will find, as indeed I doubt not you will, that the committing magistrates have not been so arbitrary and unjust as to commit the parties without some *prima facie* evidence justifying the putting them on their trial—that, in fact, you will find that their labors have not been in vain, and perhaps you may be induced to enquire whether the service you are called upon to render the public is of that value as to present an equivalent for the inconvenience to which, in your capacity of grand jurors, you are put."

On the other side of the question many of the supporters of the present system say that there would be little difficulty in coming at once to the same conclusion were it not for the difficulty of finding a desirable substitute which could be safely looked to as not only free from the objections so forcibly put by these eminent men, but also which would not be likely to produce as great evils in other directions; in other words, if men could be found in every locality suitable in respect of legal attainments, of good reputation, free from political bias or influence, and who would take a judicial view of the case presented, there would be an end of the argument. The difficulty lies to a great extent, that appointments are made from a purely political standpoint. Some are undoubtedly good, some have reflected no credit on the appointing power.

The motion of the Hon. Mr. Gowan was to call attention to the actual working of the Grand Jury system in connection with criminal procedure, and to the value and importance of the Ontario County Crown Attorney system in the same connection; and the question asked the Government was whether they had under consideration the propriety of submitting a measure to Parliament for the abolition of Grand Juries and the substituting for them some general system of public prosecutors similar to that which exists in Scotland, or the desirability of extending the benefit of the County Crown Attorney system in connection with criminal procedure to all the Provinces in the Dominion. The leader of the Senate, the Hon. Mr. Abbott, in answering the question, stated that the attention of the Government had been directed to this question for a long time past, and

that it was under very serions consideration. He only made the promise, however, that as soon as the tendency of public opinion was such as to justify an attempt to make a change, the Government would be prepared with a measure to substitute for it some system of a more satisfactory, speedy and economical character. It cannot be said that there was anything very definite in this promise. We trust that the Government will take some active steps to ascertain the view of those most competent to express them as to whether or not the change should be made. The views should be ascertained not only of the Superior Court Judges, but also of those of the County Court, as well as of prominent professional men in different localities; and the inquiry should be gone into with an earnest desire to arrive at the true views of the Bench and Bar on the subject.

SOLICITOR AND CLIENT.

(*Continued from p. 105.*)

IN *Bellew* v. *Russel*, 1 B. & B. 96, the grant of a leasehold made by a deceased client to his solicitor, was impeached by the former's representatives. The lease in question was made by the client to the solicitor while the relation subsisted, in consideration of a bond for £1,000, which was subsequently released, the solicitor re-demising the property to the client, for the lives of himself and his wife, at a nominal rent. The solicitor was a relative for whom the client entertained great affection, the latter being on bad terms with the rest of his relations, who had harrassed him with law suits. The client survived the granting of the lease for seven years and acquiesced in it. Lord Chancellor Manners upheld the gift, but in doing so he said: "If the transaction had been between persons connected only as attorney and client, and impeached in the lifetime of McDermot (*the client*), it could not have stood, nor will I say that relief would have been denied his representative, but looking at the real situation and the conduct of McDermot from 1789 to 1796 respecting this transaction, I do not think I impugn any principle or disturb any decision by refusing the plaintiff relief against this deed." In short, he treated the matter as being a mere preference by the client of one relative whom he liked, to others who had disobliged him. In both of these last two cases it will be noticed that the solicitor was related to his client, and this fact was doubtless the primary inducement to the making of the gifts. But so strict is the general rule which precludes a solicitor from taking a gift from his client, that where the relationship of solicitor and client exists, it is held to be sufficient to rebut the presumption of a gift being an advancement from a parent to a child which might otherwise arise. Thus in *Garrett* v. *Wilkinson*, 2 D.G. & Sm. 244, the facts were that a mother and aunt of a deceased solicitor had placed two sums of money in his hands to invest, and with their consent he invested the whole of the money upon the security of a bond in which he was named as sole obligee. This bond he handed over to his mother and aunt, with a memorandum

stating that he held the money, the interest on which he agreed to pay them during their respective lives. There was some evidence that the money was invested in this way for the purpose of making a gift of the money to the solicitor after the death of the mother and aunt, in order to save probate and legacy duty, but this was denied. Knight Bruce, V.C., held that although the general rule is that when an investment is made by a parent in the name of the child, it is *prima facie* evidence of an advancement, and the burthen of proof is on the party denying the gift, yet as the son was in this case solicitor for his mother, the fact of that relationship neutralized, or prevented the application of, that rule in the present case.

While the law precludes the solicitor from accepting gifts from his client, *inter vivos*, it is equally jealous in protecting the client's representatives, after his death, from being prejudiced by testamentary dispositions in favor of a solicitor by whom the will is drawn, for where a solicitor draws a will under which he takes a benefit, the Court will not presume that the testator knew its contents, but the solicitor must be prepared to establish by evidence that the testator did so, but it is not absolutely necessary that the evidence should be direct, provided there is sufficient circumstantial evidence ; *Raworth* v. *Marriott*, 1. My. & K. 643. The fact that a solicitor is himself a residuary devisee in a will prepared by himself for a client, seems to have been considered by Buller, J., to be almost decisive evidence of fraud, but Lord Eldon, while admitting the circumstance to be one calling for a considerable degree of jealousy on the part of the Court, nevertheless, in the absence of any other evidence of fraud, refused to set aside the will ; *Paine* v. *Hall*, 18 Ves. 475. In *Hindson* v. *Weatherill*, 5 D.G.M. & G. 300, a solicitor to whom his client had given a note for £1,000, prepared the client's will, whereby the gift was confirmed, and a devise of land was also made to the solicitor ; Stuart, V.C., made a decree declaring the solicitor to be a trustee of these gifts for the next of kin and heir at law of the testator ; 1 Sm. & G. 604 ; but on appeal, Knight Bruce & Turner, L.L.J., though much pressed with the case of *Seagrave* v. *Kirwan*, hereafter referred to, reversed this decree, there being evidence that the testator knew and approved of the contents of the will. In the later case of *Walker* v. *Smith*, 29 Beav. 394, Sir John Romilly, M.R., referring to the case of *Hindson* v. *Weatherill*, said that in his opinion gifts of legacies do not stand on a different principle from gifts *inter vivos ;* but he considered that case well decided on the ground that any suspicion of undue influence by the solicitor was sufficiently removed by the deliberate statement proved to have been made by the testator to a third person, an independent and disinterested witness, showing that he knew and approved of the contents of the will ; and in the case before him he upheld legacies of £500 each to the solicitor, his wife, son, and daughter, on the production of the testatrix' instruction for her will in her own handwriting, and in the absence of any evidence showing that the solicitor had exercised any uudue influence over the testatrix ; but in the same case he set aside a gift of £500 of stock made by the client to the solicitor during her lifetime. But he says : " Undoubtedly if she had called in a third person who had

no interest in the matter, and said, 'I have deliberately given this £500 to Mr. Smith for the benefit of himself and his children, or for his own benefit exclusively,' then I should have upheld the gift." This is a mere *obiter dictum*, and it seems in view of the case of *Tyars* v. *Alsop*, *supra* p. 100, to be questionable law. But in a later part of his judgment he makes this pertinent observation: "It is to be obesrved that the strict burthen of proof lies on the recipient of the bounty. He must prove every point of the case, not only the transfer, but that the transfer was meant to be made to him beneficially"; and see *In re Holmes*, *Woodward* v. *Humpage*, 3 Giff. 337.

In *Seagrave* v. *Kirwan*, Beatt. 157, Sir Anthony Hart, when Lord Chancellor of Ireland, laid down that when a solicitor prepares a will or a deed for a client, the law imputes to him a knowledge of all the legal consequences to result, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit may arise to himself from the instrument so prepared, and if he fail to do so, equity will deprive him of it; and he held that a solicitor who had prepared a will wherein he was named as executor, and omitted to advise his client, that he would, as executor, become beneficially entitled to the undisposed of personalty, was trustee thereof for the next of the kin,—and this principle may be considered to be established by the highest authority in *Bulkley* v. *Wilford*, 2 Cl. & F. 102, where, upon a contract for sale of *part* of an estate, the purchaser requiring a fine to be levied, the vendor employed an attorney, who was his heir presumptive, to levy the fine, and the attorney advised the levying of a fine upon the *whole* estate without telling the client the effect of it. The fine was levied and the vendor died without declaring its uses, and without republishing his will whereby he had devised the whole estate to his wife, in consequence of which the will was revoked. The attorney claimed the estate as heir, but it was held that he was trustee of it for the widow, and in the House of Lords it was held that the attorney's alleged ignorance of the effect of the levying of the fine, and his omission to inquire whether his client had made a will, were such professional ignorance and neglect as afforded a ground, independently of the ground of fraud, for holding him to be a trustee for a third person of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person; and see *Nanney* v. *Williams*, 22 Beav. 452. The same principle also prevents a solicitor from benefiting himself at his client's expense by any act done by the client by his advice. This may be illustrated by the case of *Bayley* v. *Wilkins*, 3 J. & L.T., 630, where a solicitor having advised his client, who was the heir and personal representative of a deceased debtor, to buy up an incumbrance on the estate for less than the sum due on it, without informing him that his purchase would accrue to the benefit of the solicitor, who was also an incumbrancer on the estate; and it was held that the heir was entitled to the full amount of the incumbrance as against the solicitor, Lord Chancellor Sugden saying: "The question is whether the plaintiff by his representations induced the defendant to become the purchaser of this prior incumbrance, and to believe that he was to have the benefit of it. If he did, he cannot insist that he himself is entitled to the benefit of the purchase."

Voidable gifts and transactions between solicitor and client may be subsequently ratified, but the ratification must take place under such circumstances as would constitute a valid gift if then made for the first time. A subsequent confirmation deed executed after the relationship had ceased, and when the client is acting under the advice of another solicitor, is undoubtedly sufficient to confirm a previous void gift: *De Montmorency* v. *Devereux*, 7 Cl. & F. 235; but where the confirmation deed is executed while the relation still subsists, it is useless; and where the transaction which it purports to confirm was fraudulent, it will be regarded as a mere continuation of the fraud: *Dunbar* v. *Tredennick*, 2 B. & B. 304. And a confirmation by will, will be equally useless, unless it can be shown that the testator knew that the transaction was voidable and had resolved, knowing its invalidity, to confirm it. Thus, where a sale was made by a client to his solicitor under circumstances which rendered it invalid, and the client by codicil devised the land to the solicitor in confirmation, it was nevertheless held to be invalid and the attempted confirmation of no effect: *Waters* v. *Thorn*, 22 Beav. 549. In that case Sir John Romilly, M.R., remarked: "To make the case of *Stump* v. *Gaby* (see *supra* p. 101) apply, it ought to appear that she (*the testatrix*) knew that case was one which could be successfully contested by her, and that, so knowing, she had resolved to give the property to Mr. Bowker (*the solicitor*), and to confirm the sale."

The jealousy with which the law regards all gifts made by clients to their solicitors extends to other transactions between them. A solicitor may sell property to, and may purchase property from, his client, but such transactions do not stand on the same footing as do those between parties between whom no such relationship exists. In one of the latest cases on the subject of purchases by a solicitor from his client, it is said the Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of showing that the bargain is, generally speaking, as good as any that could have been obtained by due diligence from any other purchaser: and that the Court in dealing with such a case has to consider the circumstances of the employment and judge of the amount of influence exercised: *Pisani* v. *Attorney-General*, 5 P.C. 516. In that case the purchase was sustained, it appearing that the solicitor was not the general or confidential adviser of the client; but the Judicial Committee refused to award costs to the solicitor, though successful in the litigation, because he had not insisted on the employment of an independent solicitor.

In the older case of *Gibson* v. *Jeyes*, 6 Ves. 271, Lord Eldon says: "An attorney buying from his client can never support it unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger; that must be the rule. If it appears that in that bargain he has got an advantage which, with due diligence, he would have prevented another person from getting, a contract under such circumstances shall not stand." So also in *Savery* v. *King*, 5 H.L.C. 655, Lord Cranworth says: "When a solicitor purchases or obtains a benefit from a client,

a Court of Equity expects him to be able to show that he has taken no advantage of his professional position, that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interests as he would have done in the case of the client dealing with a stranger." The remarks of Kindersley, V.C., in *Tomson* v. *Judge*, 3 Drew. 306, which we have already cited, are to the same effect, and show that in the event of the transaction being impeached the onus of establishing its fairness lies upon the solicitor.

In *Holman* v. *Loynes*, 4 D.G., M. & G. 270, a solicitor was engaged by a client to sell property by auction. Part of the property was sold, and sixteen months after the completion of the sale, during which time there was no employment of the solicitor professionally, the solicitor bought from the client a portion of the unsold property. The consideration mentioned in the deed was stated to be paid, but it really consisted in part of a debt due by the client to the solicitor, and in part of an annuity agreed to be paid to the client, for an amount which the balance of the purchase money would obtain for a healthy life: but it turned out that the client was a person of intemperate habits; and it was possible that an annuity for a larger sum might, under the circumstances, have been obtainable, and the sale was therefore set aside. But when the transaction is perfectly fair at the time it takes place, and no concealment, misrepresentation, or undue influence has been exercised by the solicitor, the transaction cannot be impeached successfully; and the mere fact that the property has subsequently very largely increased in value affords no ground for invalidating the transaction: thus, in *Edwards* v. *Meyrick*, 2 Ha. 60, a solicitor had purchased an estate from his client, which increased considerably in value after the purchase, owing to a railroad, then contemplated, having been established in the neighborhood, by which means coal mines on the estate were made available; but it was held that this was a mere speculative advantage, the communication of which to his client the solicitor would not be bound to prove, the parties being in the same situation with reference to the means of forming an opinion upon it; and the sale was upheld, though part of the consideration was made up of costs due by the client; and so also, in *Kingsland* v. *Barnewall*, 4 Br. P.C.C. 154, leases for long terms of different parts of a client's estate made to his confidential adviser were upheld on its being shown that the purchase money was nearly equal to the value of the land, and that the lessee had been exceedingly serviceable to the lessor, who had died without impugning the transaction in any way: see also *Montesquieu* v. *Sandys*, 18 Ves. 301. The fact that one of the parties to a transaction is a solicitor, and the other has no legal advice except from that solicitor, it would seem is not of itself enough to invalidate a transaction between them: in *Edwards* v. *Williams*, 32 L.J. Chy. 763, a solicitor was applied to by a person with whom he had had no previous dealings to obtain an advance upon an annuity; he failed to procure the advance from any third party, and thereupon advanced the amount required himself and took a transfer of part of the annuity; he rendered a bill for his services, the amount of which was deducted from the money

advanced. The vendor had no independent advice. Eleven years afterwards the vendor attempted to impeach the transaction, but it appearing that the sum advanced was a fair price, and that no advantage had been taken of the vendor, the transaction was upheld. Knight Bruce, L.J., is reported to have said on appeal: "Nor would he view the case as strictly between solicitor and client. It happened, it was true, that one of the parties was a solicitor, and the other of them had no legal advice except from that solicitor; but there had existed no previous relation of solicitor and client between them, and therefore that confidence which was the basis of the rule of the Court in similar cases did not appear to have existed, and his lordship could not consider that this case came within that rule: "*Ib.* 765.

On the ground of public policy, it has been held that an attorney cannot validly purchase from his client a claim for damages after verdict, and before judgment, in an action which he is carrying on for his client, though his name does not appear as solicitor on the record: *Simpson* v. *Lamb*, 7 Ell. & Bl. 84; and see *Hall* v. *Hallett*, 1 Cox 34.

When a purchase by a solicitor from his client cannot be maintained as a purchase, either in consequence of inadequacy of price, or other want of fairness, the property will be ordered to stand as a security for what, on a proper account, may appear justly due from the client to the solicitor: *Wood* v. *Downes*, 18 Ves. 120.

While it is clear that a solicitor may purchase property from his client, provided he can show that the transaction was perfectly open and fair, it is equally clear that if he is employed by a client to sell, he cannot, without his client's full consent, himself become the purchaser. This proposition is established by the highest authority: *Austin* v. *Chambers*, 6 Cl. & F. 37, where a transaction of this kind was set aside after the lapse of two years: see also *Lees* v. *Nuttall*, 1 R. & M. 53; *Ex. p. James*, 8 Ves. 337: and he cannot evade this rule by taking the conveyance to a third party. "If, instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction to stand must be open and fair and free from all objection," per Lord St. Leonards, L.C., *Lewis* v. *Hillman*, 3 H.L.C. 607.

What has been said in regard to purchases by a solicitor from his client applies equally to sales by solicitors to their clients. A solicitor is not prevented from selling to his client; but he must be prepared, if the transaction is attacked, to show that it was perfectly fair and just, and not induced by any misrepresentation or undue influence. As a solicitor may not buy from his client surreptitiously, so neither may he sell to him in that way. Thus, where a solicitor was jointly interested with others in certain property, which he advised his clients to buy, without disclosing his interest, it was held that he was trustee for his clients, of his share of the profits of the transaction: *Tyrell* v. *Bank of London*, 10 H.L.C. 26. But where solicitors sold to a company, whose formation they had promoted, certain property at a profit, and the transaction was perfectly fair and

above board, a bill by the liquidators of the company to compel them to account for the profits, was dismissed by Sir John Romilly, M.R.: *The Masons Hall Co.* v. *Nokes*, 22 L.T.N.S. 503.

A solicitor, besides being prevented from purchasing from his client surreptitiously, is also prevented from making use of his knowledge acquired in the service of his client, in order to purchase for his own benefit outstanding interests in property in litigation in which his client is concerned; and if, in violation of his duty, he attempt to do so, he will be held by the Courts to be a trustee for his client of the property so purchased, subject only to his lien for the price paid for it: *Wood* v. *Downes*, 18 Ves. 128; *Carter* v. *Palmer*, 8 Cl. & F. 657; and the same restriction also extends to the solicitor's clerk, as appears from the case of *Hobday* v. *Peters*, 28 Beav. 349, where a mortgagor consulted a solicitor in reference to the mortgage, and he turned her over to his clerk to assist her gratuitously; and the clerk, by reason of information derived during such employment, bought up the mortgage for less than half the amount due on it, and he was held by Sir John Romilly, M.R., to have bought as trustee for the mortgagor. But when the Court is not satisfied that the confidential relationship in fact existed at, or previous to, the time of the purchase, it cannot be disturbed: *Kilbourn* v. *Arnold*, 6 App. R. 158; and see *Edwards* v. *Williams*, *supra*.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE *Law Reports* for January comprise 22 Q.B.D., pp. 1-128; 14 P.D., pp. 1-17; and 40 Chy. D., pp. 1-79..

CONSTRUCTION OF STATUTE—"CARRY ON BUSINESS."

Graham v. *Lewis*, 22 Q.B.D. 1, may be useful to note, as it involves the construction of a statute giving an inferior court jurisdiction over persons who carried on their business within the city of London. The defendant was a clerk employed by a solicitor at his office which was within the city of London, and it was held by the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) that the defendant did not "carry on business" there within the meaning of the statute. Lord Esher, M.R., puts the case in a nutshell when he says: "I think that those words mean to describe a person managing or conducting his own, and not somebody else's business. He must either manage or conduct a business of his own, or the business which is managed or conducted for him must be his own."

PRACTICE—WRIT SPECIALLY INDORSED——RULES ORD. 3, r. 6, ORD. 14 (C. R. 245, 739.)

Bickers v. *Speight*, 22 Q.B.D. 7, the writ of summons was indorsed with a claim by the plaintiff as assignee of an I. O. U. for money lent. An application having been made for him to sign final judgment under Ord. 14 (C. R. 739) and

refused, the case was appealed to the Divisional Court (Lord Coleridge, C.J. and Wills, J.), and a preliminary objection was taken that the indorsement was not a "special indorsement" within Ord. 3, r. 6, (C. R. 245.) This objection was overruled, the Court holding that the indorsement would have been sufficient under the C.L.P. Act, 1852, and was therefore good now. Lord Coleridge says: "If sufficient particulars are stated to bring to the mind of the defendant knowledge as to what the plaintiff's claim is, there is a good special indorsement," but this, of course, must be understood to be limited to those causes of action which under the rules, may form the subject of a "special indorsement."

PRACTICE—SOLICITOR AND CLIENT—ACTION ON UNTAXED BILL—LEAVE TO SIGN JUDGMENT UNDER ORD. 14 (C. R. 739)—FORM OF ORDER.

Smith v. *Edwardes*, 22 Q.B.D. 10, was an action by a solicitor to recover the amount of an untaxed bill. The plaintiff moved for leave to enter judgment under Ord. 14 (C. R. 739), and it was held that where the client admits the retainer and only disputes the propriety of the charges, an order to enter judgment may be made after appearance and before taxation, and a question being raised as to the proper form of order in such a case, the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) settled that it should direct a taxation of the bill pursuant to the statute, and that the plaintiff on the taxation should give credit for all sums received by him from or on account of the defendant, and that the plaintiff should be at liberty to sign judgment for the amount of the master's allocatur. The order which had been made giving the plaintiff liberty to sign judgment "for the amount indorsed on the writ, subject to taxation, and costs to be taxed," was therefore varied accordingly.

CRIMINAL LAW—HUSBAND AND WIFE—COMMUNICATION OF VENEREAL DISEASE TO WIFE—ASSAULT.

In *The Queen* v. *Clarence*, 22 Q.B.D. 23, which was a Crown case reserved, the prisoner was indicted for "unlawfully and maliciously inflicting grievous bodily harm" on his wife. The facts of the case were that the prisoner being at the time, to his own but not to his wife's knowledge, afflicted with a foul disease, had sexual intercourse with her, whereby he communicated the disease to her, which was the offence for which he was indicted and convicted. The Court (Lord Coleridge, C.J., Wills, A. L. Smith, Mathew, Stephen, Hawkins, Day, Manisty & Field, JJ., and Huddleston and Pollock, BB.) were of opinion that the conviction could not be supported. The Court was not, however, unanimous in its conclusion, as Hawkins, Day, and Field, JJ., dissented from the rest of the Court; and Lord Coleridge came with reluctance to the conclusion of the majority. The reasons for quashing the conviction appear to turn more on the supposed evil consequences which might flow from a contrary decision, by the possible extension to other cases of a like principle; but in the coming years, when the ladies have ascended the bench of justice, they will probably see the matter in a very different light, if indeed they do not sooner get the legislature to meet out punishment to husbands who have so little regard for their marital obligations.

CRIMINAL LAW—LIBEL—LETTERS PROPOSING IMMORAL INTERCOURSE.

In *The Queen* v. *Adams*, 22 Q.B.D. 66, another Crown case in which the interests of the fair sex were also involved, we are glad to see that the Court (Lord Coleridge, C.J., and Manisty, Hawkins, Day and A.L. Smith, JJ.) were able to come to a conclusion entirely satisfactory to the cause of morality. A young woman being desirous of getting a situation, advertised therefor in the *Daily Telegraph*, directing answers to be sent to a certain address. The prisoner in reply sent to this address a letter proposing that the advertiser, who was a virtuous and respectable woman, should enter into illicit intercourse with him; the letter was received by a relative of the advertiser, who, without showing it to the latter, handed it over to the police. The Court were unanimously of opinion that the letter constituted a defamatory libel calculated to provoke a breach of the peace, and affirmed the conviction.

LANDLORD AND TENANT—COVENANT BY LESSEE TO PAY RENT—ASSIGNMENT OF LEASE—SURRENDER OF PART OF PREMISES BY ASSIGNEE, EFFECT OF ON COVENANT OF LESSEE.

In *Baynton* v. *Morgan*, 22 Q.B.D., 74, the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) affirmed the decision of the Queen's Bench Division (21 Q.B.D., 101) noted *ante* vol. 24, p. 426. The plaintiff demised premises to the defendant for a term of years, and the defendant covenanted to pay the rent; the defendant assigned the term, and the assignee surrendered a part of the demised premises. The plaintiff brought his action against the original lessee on the covenant to recover the amount of the apportioned rent, for the part of the premises not surrendered. It was contended for the defendant that the legal effect of a surrender of part of the premises was to discharge the covenant of the lessee entirely, and also that the lessee became a surety for his assignee, and that by the surrender his rights were altered without his consent, and therefore he was discharged. But the Court of Appeal, without calling on counsel for the plaintiff, held the plaintiff was entitled to recover, the Court being of opinion that the contract was not one of suretyship, but a direct contract to pay the rent, and that no surrender of part of the demised premises could have the effect of putting an end to the term, and that therefore the covenant remained in force. The plaintiff submitted to an apportionment, but it is not very clear from the judgment of the Court that he would not have been entitled to recover the whole rent if he had claimed it.

PRACTICE—COSTS—JOINT DEFENDANTS IN ACTION OF TORT—DEFENDANT'S SEVERING IN HIS PLEADING—VERDICT AGAINST DEFENDANTS—COSTS OF SEPARATE PLEADING—TAXATION.

Stumm v. *Dixon*, 22 Q.B.D. 99, is a case upon a question arising on a taxation of costs. The action was one of tort against two defendants. They paid money into Court; the plaintiff denied its sufficiency, one of the defendants obtained leave to amend by severing in his defence and setting up other defences. At the trial the plaintiff succeeded against both defendants with costs. On the taxation the taxing officers taxed the costs occasioned by the defendant's severing in his defence against him only, and not against his co-defendant, and the Divisional

Court (Lord Coleridge C.J., and Manisty, J.) held that the taxing officer was right. It was admitted by the Court, however, that there was no authority on the point, which seems singular, as it is a state of facts which one would think cannot have been of very infrequent occurrence.

BILL OF EXCHANGE—FORGERY OF NAME OF PAYEE—PAYEE A FICTITIOUS PERSON—BANKER

Vagliano v. *The Bank of England*, 22 Q.B.D. 103, is a case which is calculated to make some stir in banking circles, inasmuch as it establishes a principle affecting the liability of banks in paying forged paper, which is calculated to cause very considerable hardship. The action was brought to obtain a declaration that the defendants were not entitled to charge against the defendant certain forged bills of exchange which they had paid under the following circumstances: One V. was a foreign correspondent of the plaintiff who was in the habit of drawing bills of exchange on the plaintiffs in favor of C.P. &. Co. A clerk of the plaintiffs forged bills in the name of V. in favor of C. P.& Co., and presented them in due course of business to the plaintiffs, and procured their acceptance; he then forged C.P. & Co's indorsement and got the amount of the bills paid over the counter by the defendants. This scheme was carried on until the fraudulent clerk had actually received $357,500, and the question in the action was whether the plaintiffs or the defendants were to lose this enormous sum. Charles, J., decided that the defendants must shoulder the loss. In the first place he holds that the payees being an existent firm, the acceptance in their favor could not be regarded as in favor of fictitious or non-existing persons, and therefore payable to bearer; and in the next place he held that the plaintiffs had not been guilty of such negligence as to be the proximate cause of the loss. It will thus be seen that it is not enough for a bank to be satisfied that a bill of exchange presented for payment bears the *bonâ fide* acceptance of its customer, but it must also assume the responsibility of seeing that the signature of the payee is genuine. An acceptor is, however, estopped from disputing the genuineness of the signature of the drawer; see *Phillips* v. *Im Thurn*, L.R. 1 C.P. 463.

SALVAGE—AGREEMENT TO ATTEMPT TO TOW—PAYMENT FOR WORK DONE.

Proceeding now to the cases in the P obate Division, the first requiring notice is *The Benlarig*, 14 P.D. 3. This was an action for salvage. It appeared that the master of the defendant's ship had requested the master of the plaintiffs' ship to tow his vessel to Gibraltar, which the latter agreed to do. After towing the vessel 130 miles the hawsers broke and the plaintiffs' vessel left her, and she was subsequently towed into Gibraltar by another vessel. At the time the plaintiffs vessel was employed, the defendant's vessel, which with its cargo was worth £78,000, was in a disabled condition. It was held by Butt, J., that the plaintiffs were not entitled to a salvage reward, but were entitled to remuneration for the service rendered in fulfilment of their contract, which was fixed at £400.

NULLITY—MARRIAGE WITH A DECEASED WIFE'S SISTER.

Andrews v. *Ross*, 14 P.D. 15, brings into prominence the difference which now exists between the law of marriage in Canada and the mother country. In this

case the plaintiff, in 1876, went through the form of marriage with the husband of her deceased sister. The action was brought to have the marriage declared a nullity, and though at first expressing some reluctance to do so, Butt, J., came to the conclusion that notwithstanding the plaintiff had gone through a form of marriage which she knew to be void, she was nevertheless, according to the cases in the Ecclesiastical Courts, entitled to the decree she asked.

WILL—GIFT TO ATTESTING WITNESS—POWER TO SOLICITOR TO MAKE PROFESSIONAL CHARGES—WILLS ACT (1 VICT. C. 26) S. 15—(R.S.O. C. 109, S. 17.)

Proceeding now to the cases in the Chancery Division, *In re Pooley*, 40 Chy. D. 1, is the first calling for remark. In this case a testatrix appointed a solicitor one of the executors and trustees of her will, and declared that any trustee who should be a solicitor should be entitled to charge for all business done in relation to the estate as if he had been a solicitor employed by the trustees. The solicitor-trustee was one of the attesting witnesses, and Stirling, J., following the decision of Chitty, J., *In re Barber*, 31 Ch. D. 665, held that he was not entitled to any profit costs for business done by him for the estate, because this right could only arise under the will, and by the Wills Act, s. 15 (R.S.O. c. 109, s. 17), this benefit was invalidated as being a gift to a witness. This decision of Stirling, J., was affirmed by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.)

COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—DIVISIBLE COVENANT—LIFE POLICY—CONDITION IN POLICY AGAINST ASSIGNMENT.

In re Turcan, 40 Chy. D. 5, was an appeal from Sir H. Bristowe, V. C., of the County of Lancaster. By a marriage settlement the settlor covenanted to settl his estate and interest in any property of, or to which, he should become possessed, or entitled, during the marriage, by devise, bequest, purchase, or otherwise. He afterwards effected some policies of insurance on his life, one of which was subject to a condition "that it should not be assignable in any case whatever." The settlor was drowned and the policies were paid to his executors, but were now claimed from him by the trustees of the settlement. The Vice-Chancellor held the policies to be bound by the covenant and directed the money to be paid over to the trustees, and this decision was affirmed by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) Some doubt was expressed by Cotton, L.J., as to whether the Court would specifically enforce a covenant to settle all a man's estate, but he held that this being an application to enforce the covenant only as against one class of property, that the covenant was divisible and might be enforced, and that the policies came within the definiton of property acquired "by purchase," and that although the condition against assignment contained in one of the policies prevented transferring the legal title to it, it did not prevent the insured transferring his beneficial interest.

WILL—CONSTRUCTION—"DIE WITHOUT LEAVING ISSUE."

In re Ball, Slattery v. *Ball*, 40 Chy. D. 11, is a case arising upon the construction of a will. The testator bequeathed personal estate in trust for Keith

Ball for life, and after his death, for Robert Ball and the heirs male of his body and in case Robert Ball died without leaving issue male, for John Ball. Robert Ball died in the lifetime of Keith Ball, having had only one son, who predeceased him without issue. North, J., held that the gift over to John Ball took effect, and the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), affirmed him, holding that the cases where "leaving" had been construed as "having" in order to prevent a previous vested gift from being divested, did not apply where it was plain that the vested gift was in some event to be divested; a decision of Bacon, V.C., in *White* v. *Hight*, 12 Chy D. 751, to the contrary, was over-ruled.

TRUSTEE ACT, 1852—(15 & 16 VICT. C. 55) S. 2—WILFUL REFUSAL OR NEGLECT OF TRUSTEE TO CONVEY.

The short point decided by North, J., *In re Mills*, 40 Chy. D. 14, is simply this, that a refusal by a trustee to convey is not wilful within the meaning of the *Trustee Act*, 1852 s. 2, if the title of the person asking for the conveyance is disputed and the trustee entertains a *bona fide* doubt as to it, and an application by the *cestui que trust* for a vesting order was refused. The Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) affirmed the decision.

ANCIENT LIGHT—PRESCRIPTION—USER—STATUTE OF LIMITATIONS—(2 & 3 W 4, C. 71), SS. 3. 4—(R.S.O. C. 111, S. 35.)

Cooper v. *Straker*, 40 Chy. D. 21, has now less interest for lawyers in Ontario, since the passing of 43 Vict., c. 14, s, 1 (now R.S.O. c. 111, s. 36), than it would have had before the passing of that Act, which virtually abolishes the acquisition by prescription of rights to the access of light, but inasmuch as it saves such rights acquired by twenty years' user before 5th March, 1880, it is still as regards the latter an authority. In this case, Kay, J., holds that the owner of a building having windows with movable shutters which were opened at pleasure for the admission of light, acquires a right to light under sec. 3, of the Prescription Act, (R.S.O. c. 111, s. 35), at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, and if there is no interruption of the access of light over the neighboring land, as is contemplated by R.S.O. c.111, s. 37. The learned judge also holds that if it be found that the window openings have remained unchanged for twenty years, and that the shutters were so constructed as to open and close at the pleasure of the owner of the building, the onus is thrown upon the owner of the neighboring land to prove that the right has not been acquired, and that it is not necessary to the acquisition of the right that the user should have been continuous.

WILL—CONSTRUCTION—WIFE—LIFE INTEREST TO FUTURE WIFE OF LEGATEE—DIVORCE, EFFECT OF.

In re Morieson, Hitchins v. *Morieson*, 40 Chy. D. 30, is a good illustration of how judges of first instance sometimes jump over decisions of co-ordinate tribunals with which they do not happen to agree. In this case a testator bequeathed a share of his residuary personal estate in trust for his son for life,

and after his decease in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman, from whom he was divorced, and died without marrying again. The divorced wife claimed the income under the will under the authority of *Bullman* v. *Wynter*, 22 Chy. D. 619. In that case Fry, J., had held that a husband who had been divorced from his wife on his own petition, was entitled on her death to a legacy bequeathed to the wife for life and then "in trust for any husband with whom she might intermarry, if he should survive her, for his life." Kay, J., felt he was not bound by that case because the words of the gift and the facts of the case "were not identical," and though we think that the views Kay, J., on the law applicable to the case, are clearly preferable to those of Fry, J., we are nevertheless somewhat doubtful whether the reasons he gives for refusing to follow *Bullmore* v. *Wynter*, are altogether tenable, because if no decision of a co-ordinate tribunal is to be regarded as a binding authority, unless the facts are identical, that must give judges of first instance a much wider latitude of decision than our system of law contemplates, the result of which may be to bring some branches of law into a state of chaos, from which only an appellate tribunal can extricate it. Judges, however, must often, as in the present case, be troubled with the fear of putting a suitor to the unnecessary expense of an appeal, by following a decision which they consider is obviously wrong, but we are inclined to think that this consideration is more than counterbalanced by the evil effects which must result, if it comes to be considered an axiom that no decision of a tribunal of first instance can be regarded as an authority except in cases where all the facts "are identical." *Bullmore* v. *Wynter* appears to have been one of those "hard cases" in which a judge succumbs to the temptation to make "bad law."

WILL—CONSTRUCTION—SPECIAL POWER OF APPOINTMENT.

In re Cotton, *Wood* v. *Cotton*, 40 Chy. D. 41, North, J., had to consider whether a power of appointment had been executed. A testatrix devised, bequeathed and appointed her residuary estate, including all property over which she should have at her death a power of appointment, on trust, after payment thereout of debts, testamentary and funeral expenses, to apply so much as the trustees should think fit of the income during the minority and spinsterhood of her only child, a daughter, for her maintenance, and to accumulate the surplus; and on the daughter attaining twenty-one, or marrying, the whole to her for life, with remainders over. The question was whether this was a valid execution of a special power which the testatrix had to appoint property among her children, settled in default of appointment on such children at twenty-one or marriage. North, J., held that the nature of the trusts declared by the will for the payment of debts and to accumulate the surplus, being contrary to the purposes for which alone the appointment could be made under the special power, sufficiently indicated that it was not the intention of the testatrix to execute the special power, and he therefore declared that there had been no execution of it, and that the property passed in default of appointment as provided by the settlement.

VENDOR AND PURCHASER—CONDITION OF SALE—MISDESCRIPTION—MEASURE OF COMPENSATION.

In re Chifferiel, Chifferiel v. *Watson*, 40 Chy. D. 45, was an application under the Vendors and Purchasers Act, to determine the question of the measure of compensation to which a purchaser was entitled for the misdescription in the particulars of sale, which had described a road over the land as "made up," whereas it was only partly made up; and North, J., held that the proper measure of compensation was not what it would cost to make up the road to the extent represented, but the difference between the value of the property as it existed at the time of the sale and the value it would have had if the road had been "made up" as represented.

RECEIVER AND MANAGER OF BUSINESS—SALE BY COURT—INJUNCTION—RESTRAINT OF TRADE.

In re Irish, Irish v. *Irish*, 40 Chy. D. 49, a business had been carried on by a receiver and manager for ten years under the direction of the Court, and it having been directed to be sold, and a proposal to purchase on condition that the receiver and manager should be bound to refrain from soliciting orders from, or doing any business with the present customers, an application was made for an injunction restraining the receiver accordingly, but North, J., refused the motion, holding that the Court has no power to restrain the carrying on of trade except in enforcement of a covenant to that effect, and that the receiver and manager having accepted his employment without any such obligation being imposed on him, the Court had now no jurisdiction to impose it on him. This case would therefore seem to show that when a receivership of a going concern is likely to be of long continuance, it is desirable that some such condition should be imposed on the receiver on his taking office, otherwise the ultimate sale of the business may be seriously prejudiced.

COMPANY—WINDING UP PETITION—WITHDRAWAL OF PETITION—COSTS.

In re Paper Bottle Co., 40 Chy. D. 52, North, J., held that when a petition for winding up is withdrawn by the petitioner, each set of shareholders, and each set of creditors appearing, whether to oppose or support the petition, is as a general rule entitled to a separate set of costs, even where the petition is presented by the company itself.

DIARY FOR MARCH.

1. Fri.....St. David.
3. Sun .....*Quinquagesima Sunday.*
5. Tue .....Court of Appeal sits. Gen. Sess. and Co. Ct. Sittings for trial in York. Holt, C. J., died 1710 æt. 65.
6. Wed .....Ash Wednesday. First day of Lent. York changed to Toronto, 1834.
10. Sun .....*Quadragesima Sunday.*
13. Wed.....Lord Mansfield born 1704.
17. Sun .....*2nd Sunday in Lent. St. Patrick's Day.*
18. Mon .....Arch. McLean 8th C. J. of Q. B. 1862.
24. Sun .....*3rd Sunday in Lent.*
28. Thu .....Lord Romilly appointed M. R. 1851.
30. Sat.....B. N. A. Act assented to 1867. Reformation in England began 1534
31. Sun .....*4th Sunday in Lent.*

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

MUIR *v.* CARTER.

Appeal—Matter in controversy—Bank shares—Actual value—Opposition—Shares held "in trust"—Substitution—Res judicata.

In this case the appeal arose out of an opposition filed by the appellant to the seizure of thirty-three shares of Molson's Bank stock, part of a larger number seized under a writ of execution to levy $31,125 and interest, pursuant to a judgment obtained in a suit of *Carter* v. *Molson*. The par value of the stock was $50 per share, equal to $1,650; but it was shown by affidavit, to the satisfaction of the learned Chief Justice of the Court of Queen's Bench of the Province of Quebec, that at the time the opposition was filed and the appeal brought, the shares were worth $2,500. The Chief Justice therefore allowed the appeal.

On a motion to quash for want of jurisdiction on the ground that the value of the matter in controversy did not amount to $2,000,

Held, that under sec. 29 of the Supreme and Exchequer Courts Act, the sum or value of the matter in controversy determined the right to appeal, and such value was the actual value of the shares, which was properly established by an affidavit to be over $2,000.

TASCHEREAU, J., dissenting, on the ground that the right to appeal was governed by the statutory value of the shares, $50 per share, and not by their market value.

The appellant, as curator to the substitution created by the will of the late Hon. John Molson, by his opposition, claimed that the shares seized were the property of the substitution. The respondent contested the opposition, pleading *chose jugee*, and that the stock never belonged to the substitution.

At the trial it was proved that the shares had been purchased, when A. Molson was solvent, with moneys belonging to the substitution, and had been entered in the books of the bank as shares belonging to "A. Molson, Esq., in trust;" that he subsequently dealt with them as his own property and pledged them, but that at the time of the seizure the shares had been retransferred to the account of A. Molson in trust for E. A. M., *et al.*

It was also admitted that the interest on these shares had been previously seized; and that, upon an oposition filed by A. Molson as institute under the will, and upon petitions to inte. ene filed by E. A. M. and E. A. M., *et al*, claiming that the interest being interest on shares forming part of 640 shares belonging to the estate of the late Hon. J. Molson, was not arrestable for A. Molson's debts, the Privy Council dismissed the opposition and rejected the petitions to intervene, but stated that anything decided with regard to the validity of the substitutions would not be binding upon the petitioners as *res judicata*: *Carter* v. *Molson*, 10 App. Cas. 674.

On appeal to the Supreme Court it was

Held, reversing the judgment of the Courts below, that the plea of *res judicata* was not available.

2. That the words "in trust" import an interest in somebody else, and that the evidence clearly establishes that the present appellant as curator to the substitution is the owner of the *corpus* of the shares in question.

Sweeny v. *Bank of Montreal* (12 App. Cas. 617) followed.

Appeal allowed with costs.

Laflamme, Q.C., for appellants.

H. Abbott, Q.C., for respondent.

DANSEREAU *v.* BELLEMARE.

Patent—Carriage-tops—Combination of elements—Novelty.

In an action for damages for the infringement of a patent called "Dansereau's Carriage-Tops," consisting in the combination of

a carriage-top made in folding sections, as described in the specifications, with posts arranged to turn down, the defendant (D.) present, appellant pleaded *inter alia* that there was no novelty, and that the invention was well known and had been in use for a considerable time. At the trial, after considerable evidence had been given for both parties, the judge appointed two experts to examine and compare the carriage-tops of four carriages made by D., and alleged by B. to be infringements on his patents; and also to examine the carriage-top of one carriage in the possession of one C. A. D., alleged to be made on the same principle as B.'s invention, and to have been in use long prior to B.'s patent. One of the experts, a solicitor of patents, reported in favor of B.'s invention, showing the difference between B.'s carriage and C. A. D.'s, and in what consists the improvement. The other, a carriage maker, reported that B.'s carriage was an improvement on C. A. D.'s carriage, but both agreed that D.'s carriages were infringements of B.'s patent. The judge awarded respondent $100 damages, and enjoined D. not to manufacture or sell carriages in infringement of B.'s patent.

On appeal to the Court of Queen's Bench (appeal side), that Court held that the patent for the infringement of which the respondent seeks by his action to recover damages from D. disclosed no new patentable invention or discovery.

On appeal to the Supreme Court of Canada, it was

Held, reversing the judgment of the Court below, RITCHIE, C.J., and GWYNNE, JJ., dissenting, that the combination was not previously in use and was a patentable invention.

Appeal allowed with costs.

Geoffrion, Q.C., for appellant.

St. Pierre, for respondent.

GILBERT *v.* GILMAN.

Appeal—Payments by instalments—Rights in future—Supreme and Exchequer Courts Act, s. 29, s.s. "b."

A judgment of the Court of Queen's Bench for Lower Canada (appeal side), in an action for $1,339.36, being for the balance of one of the money payments which the defendant was to pay to the plaintiff every year so long as certain security given by the plaintiff for the defendant remained in the hands of the Government, is not appealable.

The words, "where the rights in future might be bound," in sub-sec. "b" of sec. 29 of the Supreme and Exchequer Courts Act, relate only to "such like matters" as are previously mentioned in said sub-section.

Appeal quashed with costs.

C. Robinson, Q.C., and *Archibald*, Q.C., for appellants.

Irvine, Q.C., for respondents.

LEWIN *v.* HOWE.

[Nov. 17, 1888.

Mortgagor and mortgagee—Foreclosure — Sale subject to lease—Lease of mortgaged lands without assent of mortgagee.

In a foreclosure suit the Judge in Equity of New Brunswick directed the mortgaged premises to be sold, subject to a lease, to one of the defendants, made after the execution of the mortgage and without the consent of the mortgagee.

On appeal to the Supreme Court of Canada,

Held, that the decree was bad in directing the lands to be sold subject to said lease, and the case should be sent back to the Judge in Equity for a decree directing a sale of the mortgaged premises generally. Appeal allowed.

Weldon, Q.C., and *Gormully*, for appellants

C. A. Palmer, for respondents.

[Dec. 22, 1888.

In the matter of a question submitted by the Railway Committee of the Privy Council for Canada, under sec. 19 of the Railway Act (51 *Vict.*, *c.* 29, 1888), *upon the following case:*

Under chap. 5 of the Statutes of Manitoba (passed on the 30th day of April, 1888) the Railway Commissioner of that Province is constructing a railway known as the Portage Extension of the Red River Valley Railway from Winnipeg to Portage la Prairie, both places being within the Province of Manitoba, and he has made application to the Railway Committee of the Privy Council of Canada, under sec. 173 of the Railway Act of 1888 (Canada), for the approval of the place at which, and the mode by which, it is proposed

that the said Portage Extension shall cross the Pembina Mountain branch of the Canadian Pacific Railway (the said branch being part of the Canadian Pacific Railway) at a point within the said Province. Whereupon the following question is submitted:

Is the said Statute of Manitoba, in view of the provisions of chap. 109, Revised Statutes of Canada, particularly sec. 121 thereof, and in view of the Railway Act of 1888, particularly secs. 306 and 307, valid and effectual, so as to confer authority on the Railway Commissioner in said Statute of Manitoba mentioned, to construct such a railway as the said Portage Extension of the Red River Valley Railway crossing the Canadian Pacific Railway, the Railway Committee first approving of the mode and place of crossing, and first giving their directions as to the matters mentioned in secs. 174, 175 and 176 of the said Railway Act?

In answer to the said question, this Court, having heard counsel for the Province of Manitoba, and also for the Canadian Pacific Railway Company, is unanimously of opinion that the said Statute of Manitoba is valid and effectual so as to confer authority on the Railway Commissioner in the said Statute of Manitoba mentioned, to construct such a railway as the Portage Extension of the Red River Valley Railway crossing the Canadian Pacific Railway, the Railway Committee first approving of the mode and place of crossing, and first giving their directions as to the matters mentioned in secs. 174, 175 and 176 of the said Railway Act.

Dated the 22nd day of December, 1888.

E. Blake, Q.C.; *C. Robinson*, Q.C., and *Clarke*, for C. P. Railway.

O. Mowat, Q.C.; *Martin*; *D. McCarthy*, Q.C., and *F. Langelier*, Q.C., for Manitoba.

MANITOU... ...RTGAGE CO. *v.* THE BANK OF MONTREAL.

[Feb. 8, 1889.

Partnership—Buying and selling lands on speculation—Lands considered in equity as personalty—Cheque—Payable to order of three—Indorsed by one—Right of bank to pay—Acquiescence by drawer—Monthly statements.

R., K. and M. formed a partnership for the purpose of buying and selling lands on speculation. R. held a power of attorney from M. authorising him to buy, sell and mortgage, and use M.'s name in so doing. R. negotiated a loan with the Manitoba Mortgage Co., and assigned as security certain mortgages given to the three partners, and executed the assignments in M.'s name as his attorney. A cheque for the amount of the loan was drawn by the Mortgage Co., payable to the order of R., K. and M., which cheque was delivered to R., who indorsed it in his own name and as attorney for the other payees, and received the cash. M. afterwards successfully defended a suit by the Mortgage Co. on the covenants in the assignments of mortgage, his defence being that he had received no benefit from the proceeds of the cheque given to R. The company then sued the bank on which the cheque was drawn for the amount of the same, as an unpaid balance of his deposit in said bank.

Held, 1. That lands acquired by partners engaged in buying and selling lands on speculation are, in equity, considered as personalty, and may be so dealt with by the partners.

2. That from the nature of the business, R. had power to effect the loan and make an equitable assignment of the mortgages, which a Court of Equity would compel the other partners to clothe with the legal estate.

3. That R., having such power and having a right to receive cash for the loan, could use the names of his partners in indorsing the cheque, and the bank was justified in assuming that he did so for the purposes of the partnership business and in paying it on such indorsement.

Held, also, that the company, having for two years received monthly statements from the bank in which the cheque so paid affected his balance on deposit, must be considered to have acquiesced in the payment, R. having failed in the meantime, and the position of the bank as to recourse against him being altered for the worse. Appeal dismissed.

Ewart, Q.C., for the appellants.

Robinson, Q.C., for the respondents.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [March 5.

PETERSON *v.* THE QUEEN.

Petition of right—Waiver by the Crown—Jurisdiction.

The Superintendent General of Indian

Affairs, on July 30th, 1880, sold to P. certain lots of land, being part of the Indian Reserve at Sarnia, for $1000, the sale being subject to the condition that P. would, within nine months from the date of sale, erect thereon buildings for manufacturing purposes. One-fifth of the purchase money was paid at the date of the sale; and in August, 1881, although the condition to erect buildings had not been performed, W., the Indian Agent at Sarnia, received the balance of the purchase money from P., stating to him, however, that the sale would not be complete until such condition was complied with.

Held, that the acts of officers of the Crown may constitute a waiver by the Crown, and that the receipt of the balance of the purchase money was, under the circumstances, a waiver of the time within which the condition was to be performed, but not of the substance of the condition.

Quære: Has the Court jurisdiction to declare that a suppliant is entitled to have letters patent issued to him? *Clarke* v. *The Queen* (per SIR WM. J. RITCHIE, C.J., in the Exchequer Court), unreported; *The Canada Central Railway Company* v. *The Queen*, 20 Grant 289, and *The Attorney-General of Victoria* v. *Ettershank*, L.R. 6 P.C. 354, referred to

Petition dismissed, without costs.

S. H. Blake, Q.C., and *J. Adams*, for suppliant.

Wallace Nesbitt, for Crown.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Full Ct.] [Feb. 4.

REGINA v. WASON.

Constitutional law—51 V., c. 32 (O.)—Ultra vires—B.N.A. Act, s. 91, par. 27—Criminal law.

Held [STREET, J., dissenting], that the Act of the Ontario Legislature, 51 V., c. 32, "An Act to provide against frauds in the supplying of milk to cheese or butter manufactories," is *ultra vires*, as coming within the class of criminal law reserved exclusively to the Parliament of Canada by the B. N. A. Act, s. 91, par. 27.

Per ARMOUR, C.J., the primary object of this Act is to create new offences and to punish them by fine, and in default of payment by imprisonment, and this is its true nature and character.

Per STREET, J.—The punishments imposed by the statute are directed to the enforcement of a law of the Provincial Legislature relating to property and civil rights in the Province; the offences created by it formed no part of the criminal law previously existing, and the apparent object is to protect private rights rather than to punish public wrongs.

E. B. Edwards, for defendants.

C. J. Holman, for complainant.

E. F. B. Johnston, for Attorney-General.

STREET, J. [Feb. 15.

In re FARLINGER AND VILLAGE OF MORRISBURG.

Municipal corporations — By-law — Bonus to manufactory—51 V., c. 28, s. 16—Registration, R.S.O., c. 184, s. 351—Debentures, R.S.O., c. 184, s. 342, s.s. 1.

A by-law granting a bonus to a manufacturing industry was passed by the municipal council of a village on the 29th October, 1888, after having been submitted to and approved by the electors. It provided on its face that it should take effect on 1st December, 1888. For this and similar by-laws an annual levy was required of an amount exceeding ten per cent. of the total annual municipal taxation of the village.

Held, that although the by-law was in contravention of s.s. 4 of s. 16 of 51 V., c. 28, yet, having regard to the provisions of s. 1, and by the operation of s. 16, s.s. 5, the by-law was withdrawn from the effect of s.s. 4.

2. That s. 351 of R.S.O., c. 184, is merely directory; and the by-law having being passed by a council having jurisdiction to pass it, all the conditions entitling them to pass it having been performed, their power to

pass it not having been improperly exercised, and the by-law itself being in substantial compliance with the provisions of the Act, it would not be proper to declare it invalid for non-registration under a section which does not declare that a non-compliance with its provisions shall have that effect.

3. That the object of s.s. 1 of s. 342 of R.S.O., c. 184, is to prevent the burthen of the debt incurred by borrowing money to pay the bonus from being irregularly distributed or unduly postponed to later years; and that the by-law in question, which provided for the raising of $25,000 by the issue of twenty debentures for $2,006.10, to fall due one in each year for twenty years, "it being estimated that the sale of such debentures will realize the said sum of $25,000," and for levying $2,006.10 in each year by a special rate, substantially complied with s.s. 1 of s. 342.

J. B. Clarke, for applicants.

S. H. Blake, Q.C., and *Fullerton*, for village.

Div'l C't.] [March 7.

Re CRAWFORD *v.* SENEY.

Prohibition—Division Court—Title to land.

The plaintiff agreed to sell to the defendant a parcel of land for $1,750, of which $10 was paid on the execution of the written agreement. The agreement contained no provision as to possession, but the defendant went into possession as the purchaser. The plaintiff was unable to make title, and the defendant continued in possession for a considerable time.

The plaintiff brought a Division Court action for use and occupation. The defendant set up that the contract had not been rescinded when he gave up possession, and that he never became tenant to the plaintiff nor liable to pay rent.

Held, that the plaintiff was bound to prove a contract, express or implied, to pay compensation for the use and occupation, and in order to do so it may have been necessary to show when the contract of sale went off; but that was not a bringing of the title into question so as to oust the jurisdiction of the Division Court.

2. That in prohibition the Court must be satisfied that the title really comes in question; it is not enough that some question is raised by the defendant's notice.

Purser v. *Bradburn*, 7 P.R. 18, distinguished.

Order of STREET, J., striking out jury notice, reversed.

Watson, for appeal.

McSweyn, *contra*.

STREET, J.] Feb. 19.

In re PRYCE AND CITY OF TORONTO.

Municipal corporations—Damages to land by construction of pavement—Method of estimating—Increase in value—Set-off.

In an arbitration under the arbitration clauses of the Municipal Act a land-owner claimed that certain lands had been injuriously affected by the construction of a block pavement.

Held, that in estimating the land-owner's compensation the arbitrator should set off against the land-owner's claim for damages sustained, the increase in the value of the land arising from the construction of the pavement in which this land shared in common with all the other lands benefited, and not merely such direct and peculiar benefit as accrued to this particular land.

Re Ontario & Quebec R.W. Co. and *Taylor*, 6 O.R. at p. 348, and *James* v. *Ontario & Quebec R.W. Co.*, 12 O.R. at p. 630, followed.

J. E. Robertson, for land-owner.

C. R. W. Biggar, for city.

Div'l C't.] [March 8, 1886.

PURDOM *v.* NICHOL.

Principal and surety—Promissory note—Novation—Partnership.

The plaintiff in 1875 indorsed a promissory note for the accommodation of the defendant, Nichol, and the latter delivered it as collateral security to mortgagees of his freehold.

The mortgagees procured the defendant, Baechler, to enter into partnership with Nichol, and threw off $1,000 of their mortgage debt, releasing their original securities and taking a new mortgage from both defendants for $1,000 less than the amount of their claim. This was in 1876. In 1879, when the note fell due, the plaintiff paid the amount to the

mortgagees, who applied it in reduction of their mortgage debt. At the time the plaintiff paid he did not know of Baechler's connection with the matter.

Held, that the plaintiff was entitled to recover against both defendants for the amount paid as money paid at their request.

This judgment was reversed by the Court of Appeal, 15 A.R. 244, but was affirmed and restored by the Supreme Court of Canada.

Moss, Q.C., for plaintiff.

S. H. Blake, Q.C., for defendant, Baechler.

Chancery Division.

FERGUSON, J.] [Jan. 18.

NELLES *v.* ONTARIO INVESTMENT SOCIETY.

Corporations—Shareholder—Misrepresentation—Rescission of contract for shares.

Action by a shareholder of the Ontario Investment Association to have it declared that his subscription for shares had been obtained by fraud and misrepresentation, and that it was not binding upon him, and for other relief.

It appeared that in 1882 the said Association had amalgamated with the Superior Loan and Savings Society, and under the terms of the amalgamation the shareholders in the latter became entitled, on payment of a premium of 17 per cent., to an equivalent number of shares of the former.

It was thus the plaintiff became entitled to his shares in the Association, having previously been a shareholder in, and manager of, the Superior Loan and Savings Society; and he was an assenting party to the amalgamation, which he now attacked as *ultra vires*, and brought about by misrepresentation and fraud. It was proved that there were many material misrepresentations in a certain report of the Association, dated December 31st, 1881, which had been an important factor in bringing about the assent to the amalgamation by the Society, and in inducing the plaintiff to subscribe for the shares in the Association, and that the plaintiff had not become aware of their falsity until shortly before bringing this action. It was not shown that the Association was insolvent or on the eve of insolvency.

Held, that the plaintiff was entitled to a rescission of the contract made by his subscription for stock in the Association.

Practice.

FALCONBRIDGE, J.] [March 6.

In re NELSON.

Costs—Taxation—Appeal under rule 854.

The practice upon appeals from pending taxations of costs to the Master in Chambers or the Master in Ordinary under rule 854 should be simple and inexpensive; there is no necessity for a formal order or a counsel fee upon such an appeal.

It is not desirable that any taxation should come more than once by way of appeal before a judge; and where there was an appeal pending the taxation to the Master in Ordinary, and an appeal from his order to a Judge in Chambers, the latter was ordered to stand over till after the close of the taxation.

Haverson, for appeal.

Nelson, contra.

Q.B. Div'l Ct.] [March 7.

BUNBURY *v.* MANUFACTURERS' INS. CO.

Jury notice—Second trial—Rules 670, 671.

This action was entered for trial at the Toronto Autumn Assizes, 1888. Before it was reached the solicitors agreed that the trial should be put off until the January Assizes, and at their request the clerk of assize struck the case off the list for the Autumn Assizes. No notice for jury had been given, and the assent of the Court was not obtained to the postponement of the trial.

Rule 670 provides that where an action has been entered for trial, it may be withdrawn by either the plaintiff or defendant upon producing to the proper officer a consent in writing signed by the parties, but not otherwise except by order.

Held, that the object of this rule was to entitle the defendant to insist upon the trial of a case which the plaintiff had entered being proceeded with, unless the Court should give the plaintiff leave to withdraw it; and what took place here was not a with-

drawal within the meaning of the rule; and the action, having been entered for trial, and not having been tried or disposed of, remained to be tried, and under rule 671 might be set down for trial and notice thereof given for any subsequent court without payment of any further fee.

The plaintiff, before the January Assizes, filed and served a jury notice. R.S.O., c. 44, s. 78, s.s. 2, provides that a party to an action desiring to have it tried by a jury shall, "at least eight days before the sittings at which the action is to be tried," file and serve a notice therefor. R.S.O., c. 52, s. 148, provides that no record containing issues to be tried by a jury shall be entered for trial unless the fee of $3 required by that section be first paid.

Held, that rule 671 was not intended to overrule s. 148, but was only aimed at protecting litigants from being required to pay a new fee for entering their actions for trial a second time, and not to relieve them from the payment of any other usual fees. The plaintiff had the right to give the jury notice for the January assizes, paying the jury fee and annexing the jury notice to the record at the time of setting down.

Order of ROSE, J., striking out jury notice, reversed.

C. Millar, for plaintiff.

T. P. Galt, for defendants.

Appointments to Office.

DEPUTY CLERK OF THE CROWN AND PLEAS, ETC.

Frontenac.

A. McGill, of Kingston, to be Deputy Clerk of the Crown and Pleas, Clerk of the County Court, and Registrar of the Surrogate Court for the County of Frontenac, *vice* John Fraser, deceased.

CORONER.

Glengarry.

A. L. McDonald, M.D., of Alexandria, to be an Associate Coroner for the County of Glengarry.

DIVISION COURT CLERKS.

Wellington.

Lewis R. Adams, of Maryborough, to be Clerk of the Seventh and Twelfth Division Courts of the County of Wellington, *vice* Lucius R. Adams, resigned.

Lambton.

W. W. Stover, of Sombra, to be Clerk of the Fourth Division Court of the County of Lambton, *vice* Peter Cattanach, deceased.

BAILIFFS.

Parry Sound.

A. McDonald, of Strong, to be Bailiff of the Seventh Division Court of the District of Parry Sound, *vice* D. Grummet, resigned.

Kent.

John M. Little, of Blenheim, to be Bailiff of the Fourth Division Court of the County of Kent, *vice* John Little, deceased.

John M. Burk, of Blenheim, to be Bailiff of the Fourth Division Court of the County of Kent, *vice* John Little, deceased.

Victoria.

G. Manning, of Fenelon, to be Bailiff of the Second Division Court of the County of Victoria, *vice* J. Austin, resigned.

Miscellaneous.

A NEW VOLUME.—The one hundred and eightieth volume of *Littell's Living Age* opens with the first number of January. During the long existence of this standard weekly magazine its value has constantly increased, and it can hardly be dispensed with by the American reader who wishes to keep informed in the work of the best writers and thinkers of the day.

The first number of the new year has the following table of contents:—Style, by Walter Pater, *Fortnightly Review*; The Future of Westminster Abbey, by Archdeacon Farrar, *Contemporary Review*; Irish House-keeping, and Irish Customs in the Last Century, *Blackwood*; The Beothuks of Newfoundland, by Lady Blake, *Nineteenth Century*; Society Poets, *Temple Bar*; My Ride to Sheshouan, *Blackwood's Magazine*; Which Wins? *Murray's Magazine*; The Circuits, *Spectator*; The Submission of Great Britain to Queensland, *Economist*; The Training of Kings, *Spectator*; with choice poetry and miscellany. This, the first weekly number of the new volume, is a good one with which to begin a subscription. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

HILARY TERM, 1889.

During the above Term the following gentlemen were called to the Bar, viz.:—*February 4th*—Michael Herman Ludwig, with honours, and gold medal; Malcolm Wright, William Charles Fitzgerald, John Frederick Gregory, William Samuel Bagsley Hall, James Robinson, Joseph Tweedale Kirkland, William McBeth Sutherland, Arnold Morphy, William Ernest Hastings, William Heber Campbell, Donald Livingston Sinclair, Charles Alexander Ghent, Colin McIntosh, William Edgett Tisdale, Frank William Carey, Franklin Smoke, Alexander Gray Farrell, Heber Stuart Warner Livingston, Samuel W—— McKeown. *February 5th*—John Wesley Ryerson, John B—— McColl, Archibald Weir. *February 9th*—Christopher Robinson Boulton, David Stevenson Wallbridge.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.:—*February 4th*—A. Morphy, W. E. Tisdale, W. E. Fitzgerald, J. F. Gregory, F. B. Denton A. Saunders, R. Ruddy, F. Rohleder, J. B McColl, D. S. Wallbridge. *February 5th*—F Smoke, J. W. Coe, C. McIntosh, A. F. Lobb. *February 9th*—E. H. Jackes.

The following candidates passed the Second Intermediate Examination, viz.:—A. W. Anglin, with honours and first scholarship; J. B. Holden, with honours and second scholarship; J. H. Denton, with honours and third scholarship: R. E. Gemmill, J. F. Orde, with honours; and M. Murdoch, A. Constantineau, A. J. Armstrong, F. J. Roche, W J. Williams, H. Armstrong, W. L. E. Marsh, J Agnew, J. J. O'Meara, F. L. Webb, A. E. Slater, D. W. Baxter, C. Stiles, H. Macdonald, E. S. B. Cronyn, W. Carnew, R. S. Chappell, R. Barrie, J. R. Layton, J. A. Webster, E. G. P. Pickup, A. C. Sutton, A. F. Wilson, R. A. Widdowson, I. Greenizen, A. M. Macdonell, J. A. Ritchie, T. W. Horn, N. Mills, H. P. Thomas, A. Elliot, P. K. Halpin, J. F. Hare, J, Knowles, A. Purdom.

The following candidates passed the First Intermediate Examination, viz:—W. G. Owens, with honours and first scholarship; N. Simpson, with honours and second scholarship; R McKay and J. J Warren, with honours and one-half of third scholarship to each; W. Campbell, N. B. Gash and C. P. Blair, with honours; and R. Parker, O. Watson, W. Da s, A. B. Armstrong, F. R. Martin, L. A Smith, K. H. Cameron, A. A Smith, J. McBride, A. R. Walker, J. G. Farmer, S. A. C. Greene, P. E. Ritchie, A. S. Burnham, R H. McConnell, P. A Malcomson, S. F. Evans, C. B Rae, R A. Hunt, A. A. Roberts, W. C. McCarthy, F. W. Wilson, J. McEwen, F. C. Cousins, J. H. D. Hulme, C. J. Lucy, T. B. P. Stewart, W. H. Williams.

The following candidates were entered and admitted as Students at-law and Articled Clerks, viz.:—*Graduates*—William Henry Doel, Cyril Haughton McGee. *Matriculants*—George Augustus Harcourt, Frederick Davy Diamond, John Daly Hamilton, David Plewes. *Juniors*—James Clayton Haight, John Ewart Irving, Willard Leroy Phelps, John Sutherland McKay, George Henry Donogh Lee, Albert Forester McMichael, Charles Francis Ellerby Evans, Robert Bradford, Benjamin Tureaund. *Articled Clerks*—George Johnston Ashworth, William Edward Vincent Kelleher.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of pres-

entation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows :—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, the affidavit attached to articles must state date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, for 1889 and 1890.

Students-at-Law.

1889. Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
Cicero, In Catilinam, I.
Virgil, Æneid B. V.
Cæsar, B. G.d,I.) 33.)

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

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

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

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

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

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

RULE re SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O. 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.