THE

Canada Law Journal

VOL. XXXI. MARCH 1, 1895. No. 4

HON. THEODORE DAVIE, Q.C., of Victoria, has been appointed successor to the late Sir Matthew Bailie Begbie, as Chief Justice of the Supreme Court of British Columbia. Apart from the fact that Mr. Davie was Attorney-General, and therefore, in a sense, entitled to the preferment, his appointment is, we understand, one that is generally approved of by the Bar of the Province.

THE Report of the Librarian at Osgoode Hall, recently issued, shows a total expenditure for the year which is just within the estimate of $8,000. The number of books added to the library during 1894 was 1,454 as against 1,244 volumes, added in 1893. The Librarian calls attention to something which does not reflect credit upon some of those who use the library. It appears that there has been mutilation of some of the books, not to be accounted for even on the theory of gross carelessness, for the injury seems to have been done in some instances with deliberation and for a purpose. It is expected that the extension of the library now in progress will be completed next month.

WE give so much space in this number to the notes of Current English Cases that we are compelled to hold over a valuable article which treats at considerable length on the doctrine of *ejusdem generis* as applied to the construction of documents. We do this, however, with the less hesitation, as we are frequently

told of the great value of these notes, which we need scarcely add are not produced without great labour and at much expense. One of our subscribers, very competent to speak of such matters, for example, in a recent letter says: "The English Cases are well worth the price of THE JOURNAL, without speaking of its other commendable features."

WE recently felt it our duty to call attention to a very objectionable collection circular issued by a Division Court bailiff (see *ante* p. 40). The County Judge to whom we sent the document, as there promised, did his duty in promptly calling his officer to account. The latter, with equal promptitude, wrote a letter to the judge, which is now before us, expressing his sorrow for his misconduct, and promising not to offend again. As the learned judge interceded on behalf of his bailiff, and as the latter has amply apologized, we presume the matter may be allowed to drop. The public as well as the profession are indebted to those who take the trouble of exposing games of this kind. We shall, on our part, be glad to give any assistance in that direction.

DOWER IN MORTGAGED ESTATES.

The Chancery Divisional Court has, at its recent sittings in the case of *Gemmill* v. *Nelligan*, adopted the view which we ventured to express concerning *Pratt* v. *Bunnell*, 21 Ont. 1 (see *ante* vol. 27, p. 449), viz., that the actual decision in that case is not in conflict with the previously well-established rule, that a married woman who has barred her dower in a mortgage is entitled to have the value of her dower in the mortgaged estate estimated on the full value of the amount realized by the sale thereof, where the mortgage is to secure a loan to her husband. It is true that in the judgment in *Pratt* v. *Bunnell* the court assumed to lay down a rule of universal application, to the effect that in all cases where a wife joins in a mortgage her dower must, on a sale by the mortgagee, be estimated only in the surplus. But, as we formerly pointed out, the actual question for decision in that case was this: the mortgage having been given for purchase money, to what extent was the wife dowable? And the actual decision was that in such a case she is dowable only in the

surplus, which is agreeable with the previous authorities. For this reason the Chancery Divisional Court refused to adopt the reasoning of the court in that case where the mortgage was, as in *Gemmill* v. *Nelligan*, given to secure a loan; and have held, notwithstanding, that in such cases the value of the dower is to be estimated, not by the amount of the surplus, but on the total value realized by the sale of the mortgaged property, according to the previous decisions. Leave to appeal was granted, and it is possible that the conflicting views which appear to prevail between the Divisional Courts of the Queen's Bench and Chancery Division may come before the Court of Appeal to determine which of them is entitled to prevail.

INTERNATIONAL LAW AND ITS EXPONENTS.

WE publish in another place a letter from Hon. David Mills referring to an article which appeared in our number for February 1, on the above subject, and though we may not always be able to agree with him, we gladly publish his criticism.

With reference to his statement that counsel was quoting from Sir Travers Twiss "with a view to establish that the possession of the shore of a newly-discovered country gives a title to the whole of the interior to the height of land," we have again examined the shorthand reporter's notes of the argument, and can find no trace of any mention of Sir Travers Twiss, or of his work, or any argument on the point to which our correspondent objects. Our quotation was taken from p. 16 of the sixth day's proceedings, and the notes show that counsel had been citing from the Hudson's Bay charter which granted to the company the rivers within the straits and bay, together with all the lands and territories upon all the countries, coasts, and confines of the seas, bays, lakes, rivers, aforesaid "not already possessed," etc. He was then proceeding to construe the word "granted" in the charter, and commenced by stating that the English had previously taken possession of a considerable portion of the coast, and he was contending that whatever by the rules of International Law they so acquire, the Engish had, when the Lord Chancellor asked "What was that?" To which counsel replied: "I do not know."

Thereupon the Lord Chancellor interposed with a lengthy observation on "different notions" respecting International Law, during which he intimated "you might as well go back to the time at which the Pope was supposed by International Law to be able to give away whatever districts on the world he pleased"; and adding, what appeared to have been irrelevant to the preceding argument: "To say that there is any International Law that gives to a first discoverer of them outh of a river and a certain line of coast, as against all other nations, whether he occupies it or not, or to what extent it is occupied or not, a right to all the country that is watered by any of the rivers that come in there, is a proposition which no amount of modern books will prove."

Thereupon counsel proceeded: "Well, I am not desirous of arguing that question, or expressing any opinion of my own. All that I desire to say is that I find it laid down in the clearest language in the book which my learned friend has referred to, and your lordships will find that confirmed in—

Lord Chancellor; "We really cannot have the laws of the world made by gentlemen, however learned, who have published books within the last twenty or thirty years."

Counsel: "I do not desire to have the laws of the world made in that way."

The proposed quotation was not given, owing, we presume, to the Lord Chancellor's supercilious interruption, and so we are left in ignorance as to the "book" to which counsel desired to draw their lordships' attention.

It seems clear, therefore, that our correspondent is mistaken, and in this instance, like the Lord Chancellor in the Boundary case, he interposes in the discussion of other questions, a sarcastic criticism on Sir Travers Twiss.

The second observation which Lord Chancellor Selborne made, and which we gave in our article, occurred earlier in the argument, and appears in the shorthand reporter's notes, page 6 of the sixth day's proceedings, as follows:

Counsel: "The only other authority I desire to refer your lordships to is the latest work on International Law of Mr. Hall, at page 292, where there is a note which, in my view, is a valuable one setting out the substance of the law—

Lord Chancellor: "Do you think that the authority of such works is greater in proportion to their recency?"

Counsel: "No; I cannot suppose that it is; but it is greater or less in proportion to the standard of the writers."

Lord Chancellor: "These writers repeat each other, and are constantly extending the notion of International Law."

We could quote many other instances of the cynical observations to which counsel were subjected. And, on turning over the pages, another instance appears to have occurred on the third day, when a counsel quoted some observations of Lord Camden, a former Lord Chancellor, made during a debate in the House of Lords on a Bill to repeal the Quebec Act:

Lord Chancellor: "A distinguished person speaking in the House of Lords upon an idea which, without proof, is not to be accepted upon his authority. Do you suppose Lord Camden knew more about it than we do?"

To which counsel retorted: "I do not suppose he knew as much. At all events did not know as much as your Lordships will know when you come to the end of this case."

CURRENT ENGLISH CASES.

(Continued from page 88.

TRADE NAME—PASSING OFF GOODS OF DEFENDANTS AS THOSE OF PLAINTIFF—INJUNCTION.

Powell v. *Birmingham*, (1894) 3 Ch. 449; was an action to restrain the defendants from passing off their goods as those of the plaintiff. The plaintiff and his predecessors in trade had for thirty-four years made and sold a sauce under the name of "Yorkshire Relish," these words being printed upon labels on the bottles and upon wrappers. Down to 1893 no sauce but that of the plaintiff's was in the market under the name of "Yorkshire Relish," but about that time the defendants began to place on the market a sauce which they also called "Yorkshire Relish." This name they also printed on the labels placed on the bottles and the wrappers, but the labels differed in their general appearance from the plaintiff's, and there was a statement on the defendants' labels and wrappers that the sauce was made by them. Upon a motion for an interim injunction, evidence was given by a chemist who had analyzed both sauces that there was

a wide difference between them. The plaintiff was not entitled to the words "Yorkshire Relish" as a trade mark, and an attempt on his part to register it as such had failed. Stirling, J., while conceding that the plaintiff had no exclusive right to use the name "Yorkshire Relish," nevertheless was of opinion, after a careful review of the authorities, that they established that the maker of a secret preparation, or a patented article, may, while the secret remains undiscovered or the patent is unexpired, obtain an injunction to restrain the sale of goods of a different kind under the name by which the article or preparation is known, and he therefore restrained the defendants until the trial from using the words "Yorkshire Relish" as descriptive of, or in connection with, any sauce or relish manufactured by them, or any sauce or relish sold by them and not being the plaintiff's manufacture, without clearly distinguishing such sauce or relish from the plaintiff's; and with this order the Court of Appeal (Lindley, Lopes, and Davey, L.JJ.), though admitting the case was one of difficulty, declined to interfere. This case takes up fifteen pages of the reports, and is one that we should have thought had been better left unreported, at all events until the result of the trial is seen.

COMPANY—WINDING UP—CONTRIBUTORY—PARTNERSHIP—SIGNATURE OF MEMORANDUM BY ONE PARTNER—SEPARATE APPLICATION FOR SHARES BY FIRM—DIRECTOR—QUALIFICATION SHARES.

In re Glory Paper Mills Co., (1894) 3 Ch. 473; 7 R. Nov. 123, is another decision on that frequently-ventilated question of the liability of a director for qualification shares. The circumstances of this case were somewhat peculiar. Demster, a member of a firm who had arranged to become agents of the company, signed the articles of association of a company in his own name for 100 shares, which were the qualification of a director, and he was appointed one of the first directors. The firm had acted as agents in forming the company, and were desirous of being appointed agents for the company, and the memorandum was signed in order to carry out this arrangement. It was accordingly agreed between the directors and the firm that the firm should take 100 fully-paid-up shares, and should be appointed agents at a commission. The firm signed an application for 100 shares, which were allotted to, and paid for, by them. The com-

pany did not call on Demster to take up 100 shares in his own name, but treated the shares allotted to his firm as satisfying his signature to the memorandum, and his qualification as a director. Nearly seven years afterwards the company was wound up, and Demster was placed on the list of contributories in respect of 100 shares; Vaughan Williams, J., thought rightly so, but the Court of Appeal (Lindley, Lopes, and Davey, L.JJ.) came to a different conclusion, and ordered his name to be struck off, being of opinion that there was but one agreement to take shares, and not two, as it appeared from the evidence that Demster's signing the articles of association was in performance of the arrangement that his firm should be the agents of the company, and his subsequent application in the name of the firm was part of the same arrangement.

MORTGAGE—CONSOLIDATION—ASSIGNMENT OF EQUITY OF REDEMPTION PRIOR TO UNION OF MORTGAGES.

In *Minter* v. *Carr*, (1894) 3 Ch. 498; 7 R. Dec. 124, the Court of Appeal (Lord Herschell, L.C., and Lindley and Davey, L.JJ.) have, in affirming the decision of Romer, J., (1894) 2 Ch. 321 (noted *ante* vol. 30, p. 636), given the stamp of their approval to the proposition that, where two mortgages are made to different persons on different properties, and before such mortgages become united in one hand, the equity of redemption in either of the properties is conveyed by the mortgagor to a third person, the right to consolidate the mortgages is defeated, and such third person is entitled to redeem the property of which he owns the equity of redemption, without redeeming the other property also. We may observe that Lindley, L.J., speaks more favourably of the equitable doctrine of consolidation than other judges have done in recent years, and declares it to be "fair and just," but he agrees that the application of the doctrine in *Vint* v. *Padget*, 2 DeG. & J. 611, where it was held to apply as against a purchaser of the equity of redemption in two properties, who had notice that they were subject to two mortgages, but who acquired his right before they became united in one hand, is very difficult to justify. Davey, L.J., however, did not share his doubts as to that case.

OPTION TO PURCHASE—CONVERSION—INTESTACY.

In re Isaacs, Isaacs v. *Reginall*, (1894) 3 Ch. 506; 8 R. Nov. 260, the equitable doctrine of conversion is discussed, which has

ceased to have the same importance in Ontario since the Devolution of Estates Act. In this case a testator leased certain freehold property in his lifetime, and by the lease gave the option after his (the lessor's) death to purchase the fee. The lessor having died intestate, and the lessee having elected to purchase the fee, the question submitted to Chitty, J., was whether the personal representative or heir-at-law of the lessor was entitled to the purchase money, and he desided the question in favour of the personal representative.

ADMINISTRATION—EXECUTOR—UNEXECUTED TESTAMENTARY DOCUMENT—DEBT, CANCELLATION OF.

In re Hyslop, Hyslop v. *Chamberlain*, (1894) 3 Ch. 522; 8 R. Nov. 273, an attempt was made to graft an exception on the well-known rule of equity which prevents a debtor who is appointed executor of his creditors' estate from relying on such appointment as a release of his debt. In this case, in addition to appointing the debtor his executor, the creditor left a letter of instructions to him stating that the debt from the executor was cancelled. This letter was not communicated to the debtor in his lifetime, and was not properly executed as a will. North, J., held that it could not be regarded, and was inadmissible as evidence of cancellation of the debt, though he said he thought it might have been different if the letter had been communicated to the debtor in the testator's lifetime.

VENDOR AND PURCHASER—INTEREST ON PURCHASE MONEY—WILFUL DEFAULT OF VENDOR — VENDOR AND PURCHASER ACT, 1894 (37 & 38 VICT., C 78), S. 9 —(R.S.O., C. 112, S. 3)—DAMAGES—COMPENSATION.

In re Wilson and Steens, (1894) 3 Ch. 546; 8 R Nov. 240, was an application under the Vendor and Purchaser Act (see R.S.O., c. 112, s. 3) in which two points were discussed. First, whether a vendor who had omitted to take the necessary steps to procure admittance to copyholds, so as to enable him to convey the legal estate to the purchaser, and thereby caused delay in the completion of the contract, had been guilty of wilful default so as to exonerate the purchaser from payment of interest, except such as his money had actually earned, during the period of the delay thus occasioned; and North, J., held that it was wilful default on the part of the vendor, notwithstanding that part of the delay was attributable to the lord of the manor; and that the

purchaser was relieved from the payment of interest as claimed by him. The second point was whether, under the Act, it was competent for the court to order the vendor to pay damages for losses occasioned by the delay in completing repairs to the property purchased, for loss of an opportunity of getting rid of the purchaser's present house, and by loss of an opportunity of letting part of the purchased property. North, J., was of opinion that although the Act does authorize the court to award damages when the same consist of interest or expenses of investigating title, which are matters merely of computation or taxation, yet it does not authorize the court to award damages of an extraordinary character, such as were claimed in the present case, and he therefore dismissed this part of the application without prejudice to any action by the purchaser for damages. We may observe, however, that *In re Laitwood*, noted in 92 L.T. Jour. 257, a claim for compensation for removal of fixtures was allowed by Kekewich, J., under the Act.

PRACTICE—PARTITION—ACTION FOR PARTITION—PARTIES—MORTGAGEE.

In *Sinclair* v. *James*, (1894) 3 Ch. 554; 8 R. Nov. 237, North, J., decided that a tenant in common whose interest is subject to a mortgage, whether paramount or created by himself, is not entitled to bring an action for partition of the estate as against the mortgagees; and, mortgagees having been joined as defendants in such an action, it was dismissed by North, J., as against them. But it would seem that though the tenant in common who has created a mortgage on his share may not be entitled to partition as against his mortgagee, yet the existence of such a mortgage cannot interfere with the rights of the other tenants in common to partition, and where the action is brought by any of them the mortgagee of a share would be a proper party. But, according to this case, where a mortgagor is plaintiff, the only ground on which he can join his mortgagee as a defendant is for the purpose of redeeming him.

WILL—POWER TO APPOINT AMONG "RELATIONS" OF ILLEGITIMATE PERSON.

In re Deakin, Starkey v. *Eyres*, (1894) 3 Ch. 565; 8 R. Nov. 294, a testator had by his will given all his property to his wife for life, and thereafter a moiety of his residuary estate to his

wife's "relations," as she might direct. The testator's wife was known to him to be illegitimate, but he also knew that after her birth her parents married and had several legitimate children, and that the testator's wife was always recognized as their child by her parents, and no difference was made by them between her and their legitimate children. The widow of the testator appointed the property among the children of her natural brothers and sisters, one of these children was the illegitimate child of a sister; and of one the parent, who was the widow's natural brother, was alive. Stirling, J., held that the power was one merely of distribution among those who would have been the wife's next of kin at the time of her death if she had been legitimate, and that it was therefore validly executed so far as the appointment was in favour of such persons; but as to the share appointed to the illegitimate child of the sister, and the share appointed to a son of one of her natural brothers who was living, the appointment was void, as such persons were not within the class in favour of which the power could be exercised.

TENANT FOR LIFE—REMAINDERMAN—SHARES IN COMPANY—ACTION TO TAKE NEW SHARES IN LIEU OF DIVIDEND—PROCEEDS OF NEW SHARES, WHETHER CAPITAL OR INCOME.

In re Malam, Malam v. *Hitchens*, (1894) 3 Ch. 578; 13 R. Jan. 178, the point in controversy between a tenant for life and remainderman was whether a certain fund was to be deemed capital or income. The fund in question arose under the following circumstances: A testator died entitled to certain shares which he bequeathed to his widow for life, and after her death to divide amongst others. After his death the company resolved to increase its capital, and offered to the shareholders the option of accepting new shares in lieu of dividends on the shares held by them. The trustees of the will exercised the option, and allowed the new shares to be allotted to the tenant for life. Upon the evidence Stirling, J., held that the company intended to distribute its profits as dividends, and not to capitalize them; and that the tenant for life was only entitled to so much of the value of the new shares as represented the dividend applied by the trustees in taking them up, and that the balance of the value of such new shares formed part of the capital of the testator's estate.

INFANT—CONTRACT BY INFANT TO TAKE SHARES—REPUDIATION OF CONTRACT BY INFANT DURING INFANCY—COMPANY—WINDING UP—RIGHT OF INFANT TO RECOVER MONEY PAID UNDER INVALID CONTRACT.

Hamilton v. *Vaughan*, (1894) 3 Ch. 589; 8 R. Dec. 228, was an action by an infant to recover money paid by her on an application for the allotment of shares in a company, she having subsequently withdrawn her application and demanded back the money paid by her. The shares had been allotted to her, and her name placed on the register. The company having been ordered to be wound up, her claim to recover the money paid was resisted by the liquidator. Stirling, J., held that as there had been a total failure of consideration, and the plaintiff had derived no benefit from the contract, she was entitled to recover the amount paid, *i.e.*, to prove for the amount in the winding-up proceedings.

SPECIAL POWER OF APPOINTMENT—WILL—GENERAL BEQUEST TO OBJECTS OF POWER—EXECUTION OF POWER—EVIDENCE.

In re Huddleston, Bruns v. *Eyston*, (1894) 3 Ch. 595; 8 R. Sept. 120, a testatrix having a special power of appointment by deed or will over personal estate in favour of her children, by her will directed that "all my property of every kind" should be divided among her children in certain shares, but made no reference to the power. Kekewich, J., held that the will was not an execution of the power, and that evidence was not admissible for the purpose of showing the condition of the testatrix's estate, in order to establish that by the words used in the will referring to her property she must have intended to execute the power. It may be well to note that in the case of a general power to appoint as a testator might think proper, a will in the above form would, unless a contrary intention appeared by the will, be a good execution of the power under R.S.O., c. 109, s. 29.

WILL—BEQUEST TO NEXT OF KIN "AFTER THE DEATH OF A."—LIFE ESTATE BY IMPLICATION.

In re Springfield, Chamberlin v. *Springfield*, (1894) 3 Ch. 603; 8 R. Sept. 124, Kekewich, J., holds that although under a bequest "after the death of A." to the testator's next of kin, according to the statute, A. takes an estate for life by implication, according to the reasoning of Cotton, L.J., in *Ralph* v. *Carrick*, 11 Ch.D. 873, as applied to the case of a devise after the death

of A. to the testator's heirs, yet where, as in this case, the bequest is not to the next of kin, but to some only of the persons who constitute that class, no estate by implication is given to A.

WILL—GENERAL POWER—EXECUTION OF POWER—CONVERSION—FRENCH WILL—WILLS ACT, 1837 (1 VICT., C. 26), S. 27—(R.S.O., C. 109, S. 29).

In re Harman, Lloyd v. *Tardy*, (1894) 3 Ch. 607; 8 R. Oct. 117, a domiciled French woman having a general power of appointment by will over certain realty which had been sold, and the proceeds of which were in the hands of trustees, made a French will, whereby she gave "all her properties and chattels" to the defendant absolutely. The question was whether this bequest could be deemed an execution of the powers under the Wills Act, 1837 (1 Vict., c. 26), s. 27 (R.S.O., c. 109, s. 29). Kekewich, J., decided that whether the will was regarded as an English or French will, it was sufficient to operate as an execution of the power, and he considered that the property being, in fact, in hand as personalty would pass under a bequest of all the testatrix's personal estate, notwithstanding that by the application of technical rules the character of realty might be attributed to the fund.

RAILWAY COMPANY—COVENANT WITH LANDOWNER—TRANSFER OF UNDERTAKING TO NEW COMPANY, SUBJECT TO THE COVENANTS AND OBLIGATIONS ENTERED INTO BY THE TRANSFERORS—LIABILITY OF NEW COMPANY—SPECIFIC PERFORMANCE.

In *Fortescue* v. *Lostwithiel R.W. Co.*, (1894) 3 Ch. 621; 8 R. Nov. 264, Kekewich, J., decided that where a railway company which had entered into covenants on the purchase of land, and as part of the consideration therefor, to maintain certain accommodation works for the benefit of the vendor, and thereafter, under the provisions of a statute, transferred this undertaking to a new company, "subject to the obligations and liabilities" of the old company, that the covenantee was entitled to maintain an action against the new company for the specific performance of the covenants entered into with him by the old company.

WILL—CONSTRUCTION—"DIE WITHOUT LEAVING MALE ISSUE"—ESTATE—FEE TAIL—FEE SIMPLE—WILLS ACT (1 VICT., C. 26), S. 29 (R.S.O., C. 109, S. 32).

In re Edwards, Edwards v. *Edwards*, (1894) 3 Ch. 644; 8 R. Nov. 218, a testator devised land to his two sons subject to a gift-over in case they, or either of them, should die "without

leaving any male issue." The question was whether the words "without leaving any male issue" came within the provisions of the Wills Act, 1837 (1 Vict., c. 26), s. 29, (R.S.O., c. 109, s. 32). Kekewich, J., held that they did, and that they must be construed as meaning not an indefinite failure of issue, but a want or failure of male issue in the lifetime, or at the time of the death, of the sons, and that their devisees respectively took an estate in fee simple, subject to an executory devise over in the event of their deaths without leaving any male issue. In thus construing the will the learned judge followed an Irish case, *Upton* v. *Hardman*, Ir. R. 9 Eq. 157.

INJUNCTION—COVENANT NOT TO DISMISS.

In *Davis* v. *Foreman*, (1894) 3 Ch. 654; 8 R. Dec. 203, the plaintiff sought to enforce, by injunction, a covenant made by the defendant not to dismiss him from his (the defendant's) employment, claiming that the principle of *Lumley* v. *Wagner*, 1 D.M. & G. 604, applied; but Kekewich, J., declined to accede to that view of the law, and held that the covenant, though in this case negative in form, was really affirmative in substance, and equivalent to a contract to continue the plaintiff in the defendant's service, the breach of which could not be prevented by an injunction.

EASEMENT—LIGHT AND AIR—UNFINISHED HOUSE—TIME FROM WHICH PRESCRIPTION RUNS—PRESCRIPTION ACT, 1832 (2 & 3 W. 4, C. 71), SS. 3, 4.

Collis v. *Laugher*, (1894) 3 Ch. 659; 8 R. Dec. 238, was an action to restrain the defendant from obstructing the plaintiff in the enjoyment of an easement of air and light in respect of two ancient windows, and it became necessary to determine from what time such an easement begins to be enjoyed, so as to bring the enjoyment within the Prescription Act. Romer, J., holds that the time begins to run in the case of new buildings from the time the window spaces, in respect of which the easement is claimed, are completed, and the building properly roofed in, although the window sashes and glass may not be put in or the interior of the building finished until some time afterwards. In connection with this case we may observe that although R.S.O., c. 111, s. 36, prevents an easement of light from being acquired by prescription after March 5th, 1880, it says nothing about air, and

it may become a question whether under a claim to an easement of air the provision of that section may not, in effect, be defeated.

COPYRIGHT—SERIES OF STORIES IN PERIODICAL—INFRINGEMENT—RIGHT TO SUE FOR INFRINGEMENT—COPYRIGHT ACT, 1842 (5 & 6 VICT., C. 45), SS. 2, 3, 18, 19.

Johnson v. *Newnes*, (1894) 3 Ch. 663; 8 R. Sept. 160, was an action for infringement of a copyright. The plaintiff was the author of a series of stories published in a periodical, in which he retained the copyright; he registered the series of stories, stating as the date of the first publication the date when the first part was published in the periodical. It was held by Romer, J., that under s. 19 of the Copyright Act (5 & 6 Vict., c. 45), the effect of this registration was to protect all the subsequently published parts of the series, and that the plaintiff could sue for infringement though the stories had not been previously published by him in a separate form.

BUILDING ESTATE—LESSEES OF BUILDING ESTATE—RESTRICTIVE COVENANTS—COVENANTS AGAINST BUILDING AND ANNOYANCE—ERECTION OF TRELLIS SCREEN—INJUNCTION.

Wood v. *Cooper*, (1894) 3 Ch. 671; 8 R. 177, was an action to enforce a covenant made by the defendant with the plaintiff, whereby he covenanted not to erect without the lessor's consent "any building whatsoever," except certain which were specified, and also would not do on the demised premises any act, matter, or thing which might be an annoyance to any other tenant of the lessor. Without the plaintiff's consent the defendant erected a trellis screen, which interfered with the light of the windows of another tenant of the plaintiff. Romer, J., held that the screen was "a building" within the meaning of the covenant, and that it was also an "annoyance," as it interfered with the enjoyment of the adjoining premises; and he granted a mandatory injunction for its removal.

COMPANY—ARTICLES OF ASSOCIATION—DEBENTURE IRREGULARLY ISSUED

In *Davies* v. *Bolton*, (1894) 3 Ch. 678; 8 R. Nov. 277, the question was whether a debenture of a company issued irregularly, and not in accordance with the articles of association, was valid. One of the articles provided that any debenture bearing the common seal, and i[illegible]ed for valuable consideration, should bind the company, notwithstanding any irregularity touching the

authority of the directors, officers, or servants of the company to issue the same. The debenture in question was issued in satisfaction of a debt due by a company to a director, and to enable him to transfer it to the plaintiff, to whom he was indebted. Prior to the issue of the debenture a copy of the articles of association was furnished the plaintiff's solicitor. The articles required the seal of the company to be affixed in the presence of two directors, or of one director and the secretary. The debenture was sealed with the seal of the company, and signed by the director in whose favour it was issued and the secretary, and was handed over to the plaintiff and accepted by him in satisfaction of the director's debt to him. By the articles no director was to vote in respect of any matter in which he was personally interested, and the plaintiff made no inquiry whether any other directors had authorized the issue of the debenture. Williams, J., though of opinion that the debenture had not been regularly issued, nevertheless decided that the irregularity was cured by the provision in the articles above referred to. It was contended that the debenture was not issued for valuable consideration because the debt due by the company, which bore interest at six per cent., was not due when the debenture issued, but as the debenture only bore interest at five per cent. the learned judge held the change in the rate of interest constituted a valuable consideration. He also held that the plaintiff was not affected with notice of the irregularities by reason of his solicitors having been furnished with a copy of the articles before its issue.

COMPANY—DIVIDEND—DIRECTORS' PERCENTAGE ON NET PROFITS—ILLUSORY PROFITS—INTEREST.

In re Peruvian Guano Co., (1894) 3 Ch. 690; by the articles of association of a company it was provided that after certain sums had been paid 10 per cent. of the residue of the net profits should be paid as remuneration to the directors, and the ultimate residue of net profits should be applied in paying such dividend on the ordinary shares, or in such other manner as a general meeting might determine. In December, 1882, the balance sheet showed a net profit for the half year of £11,493, but a supplemental balance sheet was prepared showing the net profit to be £176,493, which increase was caused by transferring £165,000 from the suspense account to the profit and loss account, that amount being *bona fide*, estimated to be the profits

of certain transactions then in litigation. This supplemental balance sheet was approved at a general meeting, and it was resolved that £135,243, treated as the residue of net profits, should be dealt with in accordance with the above-mentioned provisions of the articles, but though a 10 per cent. dividend was paid to shareholders thereout the balance was not distributed prior to the voluntary winding up of the company, which commenced in 1893. All the creditors having been paid in full, some of the directors now claimed to be paid their share of the 10 per cent. of the £135,243, and their claim was resisted on the ground that, owing to the unsuccessful result of the litigation, the assets on which the supposed net profit of £165,000 had been based had proved worthless, and that in the result the dividend declared in 1882 could only be paid out of capital. Wright, J., however, was of opinion that as the general meeting had approved of the dividend, and that it was not impossible for reasonable men, in the condition of the company's affairs in 1882, to take the view that the value then placed on the assets was justified, the directors were entitled to the percentage on the £135,243 as claimed by them, but that they were not entitled to any interest thereon.

TRAMWAY—PURCHASE OF UNDERTAKING BY LOCAL AUTHORITY—VALUATION OF TRAMWAY.

Edinburgh Street Tramway Co. v. *Edinburgh*, (1894) A.C. 456; 6 R. Nov. 19, was an appeal from the Scotch Court of Sessions, which involved the same point as that in *London Street Tramway Co.* v. *London*, (1894) 2 Q.B. 189 (noted *ante* vol. 30, p. 625), and in which an appeal was argued at the same time, and which is reported (1894) A.C. 489. The point involved in both cases was this: a local authority was empowered to take over a tramway on payment of the value thereof at a valuation, and the question was on what principle the valuation was to be based. The House of Lords (Lord Herschell, L.C., and Lords Watson, and Shand, Lord Ashbourne dissenting) held that the word "tramway," as used in the Act authorizing the purchase, was not equivalent to "undertaking," and meant the structure laid down on the highway and nothing more, and its value must be measured by what it would cost to construct at the date of sale, subject to a deduction for depreciation, and that rental value or profits must not be taken into considerat on.

Reviews and Notices of Books.

The Manitoba School Question, being a compilation of the Legislation, the Legal Proceedings, the Proceedings before the Governor-General in Council. An historical account of the Red River outbreak in 1869 and 1870, its causes, and its success, as shown in the Treaty—the Manitoba Act—and a short summary of Protestant Promises. By John S. Ewart. Toronto: The Copp, Clark Company (Limited), Publishers, 1894.

The subject-matter of Mr. Ewart's book again comes before the public as a great political question, and it is not, under the circumstances, desirable that we should now discuss it, as the legal points have been settled by judicial decision of the highest tribunal.

We would recommend those who desire a proper understanding of the question involved to read a compilation which seems to contain all information on the subject to date of issue.

Mr. Ewart naturally looks at it from the standpoint of his clients, the Roman Catholic minority of Manitoba, and he has thrown himself to their case with great enthusiasm. His first sentence very properly states that the first requisite for a proper understanding of the Manitoba School Case is familiarity with the statutes, which he gives in full. He then narrates the proceedings taken to test the validity of the Provincial Statutes above referred to, in the case of *Barrett* v. *City of Winnipeg*. The case of *Logan* v. *City of Winnipeg* is also referred to at length, with the Privy Council decisions in both cases. Then follow the various petitions to the Dominion Government, and the action of the Government thereon.

Part II. gives the most important of the letters, lectures, and articles which have from time to time appeared on the school question, a collection which will now become of revived interest.

Part III. is retrospective, the text being "Manitoba Act as a Treaty—Protestant Promises."

A perusal of the pages before us make it clear, at least so far as the events which led to the outbreaks in the Northwest and resultant conflicts, that there are, as usual, two sides to the question. As to what should now be done is a matter which politicians must discuss and settle.

Correspondence.

INTERNATIONAL LAW.

To the Editor of THE CANADA LAW JOURNAL :

DEAR SIR,—In an article under the caption, "International Law and its Exponents," you adversely criticize observations made by Lord Chancellor Selborne, during the progress of the argument upon the Ontario Boundary Case. I think that Lord Chancellor Selborne's observations, which you quote, are not open to the attack which you make upon them ; nor do I think that he can be fairly charged with having snubbed the counsel in the observations which you quote. What Lord Selborne aimed to do, and what I think he did very effectively, was to show that where a rule of International Law was well settled in the practice of a nation, it could not be altered by a text-writer setting up a different rule. It is important to bear in mind the doctrine of England in this respect, in order to fully appreciate the point which his lordship makes. Permit me to quote from your article, in which you say that "certain passages from the works of learned commentators on International Law were cited by counsel in support of the propositions of that law which the learned counsel was seeking to enforce on the consideration of their lordships ; whereupon Lord Chancellor Selborne administered the following decided snub to both commentators on International Law and the counsel who quoted from them : 'We really cannot have the laws of the world made by gentlemen, however learned, who have published books within the last twenty or thirty years.' Subsequently, when the counsel proposed to cite a passage from Hall's International Law, the same judicial dignitary stopped him by asking, 'Do you think the authority of such works is greater in proportion to their recency ?'"

I have not the report of the argument in the case before me, but, if I am not mistaken, the authority which the counsel was quoting was Sir Travers Twiss, with a view to establish that the possession of the shore of a newly-discovered country gives a title to the whole of the interior to the height of land, however distant. This was the contention of the French in the last century, and it was the contention of the United States in its con-

troversy with Spain in reference to the western boundary of Louisiana. John Q. Adams, in his correspondence with the Spanish Minister, refers to the controversy which had arisen in the last century between the English and French, in which correspondence, he declares, the French had completely established the proposition of public law for which they contended, and this observation of John Q. Adams has been quoted by Wheaton, obviously without verification, and has misled every text-writer since.

I have read over, I believe, every despatch between England and France upon the subject, and Mr. Adams has misstated the admissions made, and the conclusions to be drawn from that correspondence. The English Government repudiated the doctrine that the possession of the sea coast gave a right to the country to the land's height. And they equally repudiated the doctrine that the land's height was a political barrier, when it was not an absolute physical barrier, to the progress of settlement. The French claimed the valley of the St. Lawrence to the land's height upon the south. The English denied that there was any rule of International Law warranting such a pretension, and claimed the country from the sea to the bank of the St. Lawrence and of Lake Ontario. The French claimed the valley of the Ohio on the ground of discovery. The English had extended their settlements to the base of the Alleghany mountains on the east, and had begun settlements on the western slope. They claimed the country westward to the Wabash on the grounds of self-preservation, contiguity, and the rapid progress of settlement. When in possession of the shores of Hudson's Bay, while Canada belonged to France, they never once suggested the height of land as a boundary between them.

At the very time that the Ontario boundary dispute was being argued, the Government of England, of which Lord Selborne was a member, was engaged in a controversy with Portugal over a similar question, in which they maintained that the possession of the sea coast did not give, by international law, the sovereignty of the country to the land's height. This has always been the doctrine of the English Foreign Office, and it was not surprising that Lord Selborne should assert a rule uniformly adhered to by the government of his country against writers of text-books who set out a different rule. In what

instance has the rule quoted from Sir T. Twiss been followed? The best illustration to be found anywhere of the settled practice is presented in South America. The eastern coast was largely in in the possession of Portugal, the northern and western coasts were in the possession of Spain. Was Portugal's claim to the valley of the Amazon and of the whole country to the summit of the Andes recognized? The boundaries of Bolivia, Peru, Ecuador, Colombia, Venezuela, answer the question in the negative. Between Portugal and Spain the English rule is recognized. Among text-writers, Bluntschli repudiates the rule that the possession of the sea coast entitles the state that holds it to claim the territory to the land's height in virtue of such possession. He points out that, upon the eastern continent, colonization progressed from the heights of the interior towards the sea, and not from the sea towards the interior, and the rule historically would be in favour of the interior elevation rather than the shore. The interruption of Lord Selborne was very pertinent, because any recognition of the doctrine quoted would have been a recognition of the authority of Sir T. Twiss to alter the rule of public law as accepted and settled by British statesmen for two centuries.

Yours truly,

DAVID MILLS.

London, February 20th, 1895.

[We refer to the above letter in another place. See *ante* p. 115.—ED.]

Proceedings of Law Societies.

COUNTY OF YORK LAW ASSOCIATION.

ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR 1894.

To the Members of the County of York Law Association.

GENTLEMEN,—The Trustees of the association submit to the shareholders and members their ninth annual Report.

There are at present 405 members of the association, and 348 have paid their fees for the year 1894. During the year nineteen practitioners became members, five members died, and eight members severed their connection with the association by removal from the county or resignation, and one member, Mr. W. R. Meredith, Q.C., was appointed to the Bench. An unusual number of members have not paid their annual fees. A list of their names is appended to this Report.

There are now 2,611 volumes in the library, 209 volumes having been added during the year, made up as follows:—Reports, 102 volumes; Text books, Digests, and Statutes, 65 volumes; Bound periodicals, 26 volumes; donations, 16 volumes.

The most important addition during the year comprised 52 volumes of the Law Times Reports, which completed a set of this valuable publication, and 26 volumes of the American and English Encyclopædia of Law.

The value of the books in the library is now estimated as follows: Reports and Statutes, $6,517.37; Text-books, $2,339.12; Periodicals, $1,234.70; total, $10,091.19.

The work of noting the Reports and Statutes has been continued during the year, and, in consequence, the library has, under the care of the association's efficient librarian, become of the highest value to the members. Following a custom of our past presidents, a portrait of Mr. Lash, Q.C., president for the year 1893, has been presented to the association by Mr. Foy, Q.C., the retiring president.

The most important event which has marked the history of the Bar since the last annual meeting is the recent conference of the Legislation Committee of Convocation with the representatives of the County Law Associations of the Province, summoned to consider proposed changes in the practice and procedure of the courts. The County of York Law Association has, since its foundation, endeavored to foster and bring about a unity of action of the whole Bar of the Province in urging upon the two Governments wise and necessary changes in the law. It has been difficult to convince the outer Bars that this association has never had as its object the unnecessary centralizing of business in Toronto. The Trustees have always entertained the opinion that decentralization, in the sense in which it is understood in the sister Province of Quebec, is contrary to the interests of suitors and the public, and, therefore, necessarily contrary to the interests of the whole Bar; but the Trustees of this association have always been of opinion that, in fairness to suitors and the outer bars, a large part of the formal work in litigation should be conducted in the counties where the solicitors on both sides in any litigation reside. The codification and remodelling of Rules in 1888 was principally the work of a committee of this association. The committe having

in charge that codification was composed of representatives of all the associations, but in consequence of the expense to be incurred by other associations in sending their representatives to Toronto, where the meetings were necessarily held, the work fell principally on the members of this association who were members of the joint committee. The Rules promulgated in 1887 comprised, at the time, the best system of procedure in any country where the English system of law prevailed, and have formed a model for many changes in practice and procedure in other Provinces. That system went far to meeting the desires of the outer Bars in localizing matters of procedure. This association has, as time passed on, urged upon the Council of Judges other changes, all believed to be in the public interest, and all based on the result of careful consideration, and the experience of those best qualified to judge of the necessity for the suggested changes, but these changes have not been adopted, or have only been in part adopted, and that without calling on the Trustees for explanations of the requests for the recommended changes, resulting often in confusion, as has been pointed out by a member of the Board in a recent number of a legal periodical.

The many alterations and amendments to the Consolidated Rules of 1887 necessitate a reconsolidation, and it is recommended that Convocation be requested to urge the Attorney-General of the Province to secure from the Bar a Report similar to that made in 1886, embodying a codification of the Rules which would ensure simplicity of procedure and speed in determination of actions. The recent agitation in the press has been conducted, no doubt, in great part, with a political object, and few, if any, suggestions of value have been made by those who are conducting the agitation, which has been marked by much want of knowledge of the true facts. Thus, for example, it has been urged that the Divisional Courts should be abolished as unnecessary appendages, as courts which form unnecessary appellate tribunals of an intermediate type, which increase the expense of litigation and delay beyond reason the ultimate awarding of justice to suitors. A reference to the following table will make it perfectly plain how erroneous is this opinion, and will show that the Divisional Courts in the vast majority of cases form the ultimate Court of Appeal :

	1892.	1893.	1894.
Writs issued in the three Divisions of the High Court.	7346	7002	Not ascertainable.
Actions entered for trial in the three Divisions.....	1327	1374	"

	1892.	1893.	1894.	Total.
Appeals from trial decisions to the Divisional Courts.	157	218	207	582
Appeals from orders to the Divisional Courts..... ..	65	86	66	217
Appeals in other matters to the Divisional Courts....	77	62	59	198
Total.....	299	366	332	997
Appeals to the Court of Appeal :				
From judgments of Divisional Courts on appeal from trial decisions.....	29	40	48	117
From other decisions of Divisional Courts.....	11	7	10	28
Direct from trials.....	41	60	44	145
From County Courts.....	42	52	33	127
From Surrogate Courts, Police Magistrates, Division Courts, etc,, etc.....	20	12	17	49
Total.....	143	171	152	466

From this table it appears that during the years 1892, 1893, and 1894, of 582 appeals to the Divisional Court from decisions at trials, there were no further appeals from 465 of these decisions.

It would be advisable in the interests of suitors to limit the number of appeals, but any step which will take away the right to appeal to Divisional Courts is not in the interest of suitors. Those courts have, as is apparent from the preceding table, formed important appellate courts, and the expense of an appeal to a Divisional Court is small.

The convention which recently met in Toronto will, it is believed, unite in making many valuable suggestions for the simplification of procedure, but, above all, the members of this association are to be congratulated that the proceedings of that conference have in great part completed the work begun by this association in bringing about the most cordial feelings between the outer Bars and the Bar of Toronto. The Trustees of this association trust that meetings of such a conference may be of annual occurrence in the future.

No action has been taken upon the recommendation contained in last year's report with regard to the early publication of the Provincial Statutes, and the Trustees suggest that Convocation be again requested to invite the attention of the Attorney-General to the delay involved in not printing the Provincial Statutes in the form adopted for the Dominion Statutes. If this were done, the subject of complaint could easily be remedied.

In reference to the resolution passed at the last annual meeting, referring to the Board the consideration of the question suggesting an increase of the fees payable by law students to the Law Society, the Trustees, after due consideration, came to the conclusion that they could not recommend at the present time any increase in those fees

The Trustees record the deaths during the year of the following members: D. McMichael, Q.C.; W. A. Reeve, Q.C. (Principal of the Law School); F. P. Henry, John Downey, and A. E. Swartout.

The particulars required by the By-laws accompany this Report, as follows:

(1) The names of members admitted during the year.
(2) The names of members at the date of this Report.
(3) A list of books added to the library during the year.
(4) A detailed statement of the assets and liabilities at the date of this Report, and of the receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the Report of the auditors will be submitted for your approval. The librarian's Report on the work of the year is also submitted. All which is respectfully submitted.

J. J. Foy, *President.*
Walter Barwick, *Treasurer.*

December 31st, 1894.

The following officers were elected for the year 1895: President, J. A. Worrell, Q.C.; Vice-president, R. M. Wells, Q.C.; Treasurer, Walter Barwick; Secretary, A. H. O'Brien; Curator, E. D. Armour, Q.C.; Historian, D. B. Read, Q.C.; Auditors, Messrs. R. J. Maclennan and W. D. McPherson; Trustees, Messrs. W. N. Miller, Q.C., E. F. B. Johnston, Q.C., A. MacMurchy, W. H. Blake, W. P. Torrance; Committee on Legislation Messrs. John Hoskin, Q.C., LL.D., E. D. Armour, Q.C., Beverley Jones, Jas. S. Fullerton, Q.C., W. H. Blake, D. W. Saunders, Douglas Armour, and E. T. English.

DIARY FOR MARCH.

1. Friday.....St. David.
3. Sunday.....*1st Sunday in Lent.*
5. Tuesday.....Court of Appeal sits. County Court Jury and Non-Jury Sittings in York. York changed to Toronto, 1834.
10. Sunday.....*2nd Sunday in Lent.* Prince of Wales married, 1863.
13. Wednesday....Lord Mansfield born, 1704.
16. Saturday.....Queen Victoria made Empress of India, 1876.
17. Sunday.....*3rd Sunday in Lent.* St. Patrick.
18. Monday.....Arch. McLean, 8th C.J. of Q.B. Sir John B. Robinson, C.J. Court of Appeal, 1862.
19. Tuesday.....P. M. S. Vankoughnet, 2nd Chancellor U. C., 1862.
23. Saturday.....Sir George Arthur, Lieut.-Gov. of U. C., 1838.
24. Sunday.....*4th Sunday in Lent.*
25. Monday.....Annunciation.
26. Tuesday.....Bank of England incorporated, 1649.
28. Thursday.....Canada ceded to France, 1632.
30. Saturday.....B.N.A. Act assented to, 1867. Lord Metcalf Gov.-Gen., 1843.
31. Sunday.....*5th Sunday in Lent.* Slave trade abolished by Great Britain 1807.

Reports.

ONTARIO.

ASSESSMENT CASES.

IN RE CONFEDERATION LIFE ASSOCIATION.

Assessment—Income of life assurance companies—Interest earned on reserve taxable as income—Effect of 57 & 58 Vict. (D.), c. 20, s. 12.

Upon an appeal of a life company from the assessment as income of interest earned upon investments of their reserve funds, it was contended that by R.S.C., c. 124, s. 35, as amended by 57 & 58 Vict. (D.), c. 20, s. 12, the company was compelled by law to set apart an amount equal to 4½ per cent. interest upon the amount of the reserve required to be held by the company under the R.S.C., c. 124; that this was a compulsory payment, and, therefore, it was proper that such sum should be deducted from the interest earnings of the company for the year, and only the balance of the amount earned for interest assessed as income, citing *Peters* v. *St. John*, 21 Sup. Ct. 674.

Held, that the statute did not appropriate *eo nomine* the interest earned by the reserve fund, and direct such interest to be set apart. The statute only directed that out of interest earned by the company a sum equal to 4½ per cent. on the amount of the reserve shall be added to the reserve.

Held, also, that the amendment of R.S.C., c. 124, s. 35, by 57 & 58 Vict. (D.), c. 20, s. 12, does not alter meaning or legal effect of the original statute; the language used only more clearly expresses the intentions of the legislature. The County Judge's judgment upon the same point in 1893 (prior to amendment of statute) affirmed.

Appeal dismissed and assessment of whole interest earnings without the deduction claimed confirmed.

[TORONTO, February, 1895—MCDOUGALL, Co.J.

This was an appeal from the assessment as income of the sum received by the Confederation Life Association upon the interest received by them from their investments; and incidentally it was sought to secure a reconsideration by the learned judge of his judgment pronounced in 1893, settling the basis upon which the assessment of the income of the company should be levied.

Snow for the Association: In order to ascertain the Association's net income for assessment purposes all receipts during the year, consisting of premiums, interest on investments and rents, should be taken into account and the following deductions made therefrom: (1) cash paid for death losses; (2) cash paid for matured endowments; (3) cash paid for annuities; (4) cash paid for surrendered policies; (5) expenses; (6) amount required to bring the Reserve Fund (taking into consideration the increased risks which has been taken during the year) up to the standard required by the Insurance Act; (7) amount paid to participating policy-holders in pursuance of their contract with the company, and the balance only, if any, is liable to be assessed as the net income of the Association for the year. The company should be assessed as a partnership or unincorporated company. Interest derived from investments to the extent of 4½ per cent. is required by law to be set apart and added annually to the Reserve Fund and to this extent the sum so set apart was a liability.

H. L. Drayton, contra: Interest derived from investments is expressly assessable by the Assessment Act, and no exemption is made. The Association are liable to be assessed upon this sum. The obligation imposed by the Dominion Insurance Act does not exempt the Association from taxation on this interest.

McDOUGALL, Co.J.: I have no reason to change the opinion I expressed in my judgment in 1893; and, as the propriety of the assessment made thereunder is now being considered by the Court of Appeal, until that court determines the question adversely to the opinion I then expressed, I must adhere to it.*

The only additional question that arises upon this appeal, and which I feel bound to consider, is the fact of an amendment made in the Dominion Insurance Act in 1894. R.S.C., c. 124, is amended by 57 & 58 Vict. (Do.), c 20, s. 12. Section 35 of the Insurance Act is repealed, and a new section 35 is substituted. The new section reads as follows:

"In computing or estimating the reserve necessary to be held in order to cover its liability to policy-holders in Canada, each company may employ any of the standard tables of mortality as used by it in the construction of its tables, *but there shall be set apart and credited to such reserve in each year on of the interest earned in the year a sum equal to four and a half per cent. per annum on the amount of the reserve as at the end of the preceding year, together with such further additions from premiums received during the year, if any, as shall be necessary to bring the reserve up to the standard provided by subsection 25 of this Act. Provided, that in no case shall a company be required to maintain a reserve in excess of that provided for by the said subsection 10 or section 25 of this Act* ——."

The words in italics are in lieu of the following words, "*And any rate of interest not exceeding four and a half per cent. per annum.*"

It is contended that the words in the new section impose a liability upon the company different or more exacting than that imposed by the words in the original section. The language of the former section directed the reserve to be computed according to standard tables of mortality, with 4½ per cent. per

* Judgment has just been given by the Court of Appeal, confirming the opinion given by the learned Judge of the County Court. *Ed. C. L. J.*

annum added. The new section simplifies this language, but, in my opinion, says the same thing, with this change, that in computing their reserve they shall add to it annually a sum equal to interest at the rate of 4½ per cent. per annum upon such reserve; and if the aggregate result obtained should be, according to the mortality tables, insufficient, they must make up such deficiency by adding to it enough funds from premiums received during the year to bring the reserve up to the required amount. The object of this is to establish and maintain a fund or reserve sufficient in amount, according to the standard tables of mortality, to cover the liabilities to policy-holders in Canada for the year in respect of which the calculation is made.

The old section said that interest should be added at the rate of 4½ per cent. The new section says that, from the interest earned in the year, interest to the extent of 4½ per cent. on the amount of the reserve shall be added.

I can see no difference in the legal effect of the language used. The latter section is more explicit, and indicates how any shortage or deficiency is to be met, namely, from premiums received during the year, a point upon which the original section was silent.

I am referred to the case of *Peters* v. *St. John*, 21 Supreme Court of Canada 674, as being a decision that exempts from taxation the sums so alleged to be set apart by the amended Insurance Act. I do not read the case as so deciding. I think that that case can be looked upon as determining only that in ascertaining what the net profits of a branch office are, where the Assessment Act in force in that Province imposes a tax in respect of net profits derived from premiums, portions of such premiums applied in a particular way as required by the Insurance Act must be deducted from the gross receipts of premiums received by such branch office before the net profits of the branch office derived from such premiums can be determined.

It has been decided in *New York* v. *Styles*, 14 Appeal Cases 381, that in reference to participating policy-holders who by virtue of their contracts are members of the company, the profits arising from the operations of the Act, so far as they arise in respect of that class of policy-holders, are not income, and are not taxable as such. In other words, that where higher rates of premium have been charged to such policy-holders than are required to carry their policies, the excess of premium so charged is not income, and can be returned to such policy-holders without becoming liable to an income tax. It is not really a profit, but an overcharge, and is literally a rebate. In the same case it was held that all income derived from investments of all premiums or other money, paid to them in the United Kingdom, or invested in the United Kingdom or abroad, and, as to the latter, when such income is received in the United Kingdom, is taxable as income.

To put this expression into plain language, it is, in effect, that so much of the premiums as are actually retained by the company, and invested by it for the purposes of the company, become, in effect, the capital or principal fund of the company; and interest earned by such investment of such fund is income, and is liable to an income tax.

If I was right in 1893 in holding that interest earned upon the investments of this company is income, and is taxable as such in Ontario, I fail to see how the language of section 12, chap. 20, of the Dominion statute of 1894 alters

the liability of the company. It does not declare that such interest is not income. And if it did do so, I very humbly submit the opinion that any such legislation would be *ultra vires* the power of the Dominion Legislature. It does not declare that it shall not be taxable under enactments of the Local Legislature. Such a provision would also be beyond the powers of the Dominion Legislature to enact.

The Act declares simply that the reserve which the company must have in hand must be improved annually by 4½ per cent. interest on the amount of such reserve; and that if the reserve itself is insufficient in amount, according to the standard mortality tables, when so improved the deficiency must be made up from premiums received from policy-holders in the current year.

The judgment I delivered in 1893 has been confirmed by the opinion of Mr. Justice Ferguson, who holds that interest on investments is income. And I do not find in the amended Dominion statute any direction that the interest actually earned by the investment of the actual funds which may make up the reserve is directed *eo nomine* to be added to the reserve. The direction to the company is that *out of the interest earned by the company* a sum equal to 4½ per cent. on the amount of the reserve shall be added to the reserve.

In the *Mersey Dock* v. *Lucas*, 8 Appeal Cases 891, a statute directed that the moneys received by the dock from dues and other sources of revenue should be applied in payment of expenses, interest upon debts, construction works, and management of the estate, and that the surplus should be applied to a sinking fund for the extinguishment of the principal of all the debts, and that after such extinguishment the rates should be reduced, and that, except as aforesaid, the moneys should not be applied for any purpose whatsoever; and that nothing should affect their liability to parochial or other local rates. There it was held that this direction of the statute did not prevent such surplus from being liable for income tax. Here is an express direction that the surplus should be applied in a certain way, and not otherwise. But the court held that these words were only directory, and that there must be read into the statute that such surplus was only to be so applied after all charges imposed by law or the revenue had been first discharged.

In the case of life insurance companies, if the sum earned for interest after making all proper deductions, and one of such proper deductions would be taxes paid in respect of income, then such deficiency is directed to be made up from premiums received in the year. The very fact that a possible deficiency is provided for in this manner indicates, to my mind, that the legislature anticipated that the interest earned by the company might possibly not amount to a sum equal to 4½ per cent. on the proper reserve, or that such interest fund might be depleted from other proper causes, and to meet any such contingency provision is made to supply the loss from another source of revenue.

I think the language of Mr. Justice Ferguson is still applicable, notwithstanding the amendment to the Insurance Act in 1894. He says: "I do not see that the interest arising from the investments of the reserve fund is appropriated by law to the purposes of the necessary increase of the fund"; and again: "I do not see, nor does it anywhere appear before me, that by law the the interest arising upon the investment of it must be appropriated to the purpose of its increase"; and again: "They are not obliged by law when they

receive interest arising from investments of the fund or parts of it to apply such interest directly to the increase of the fund, however proper and commendable it would be to do so."

I am of the opinion, therefore, that this appeal should be dismissed and the assessment confirmed. As to the proper figures to be inserted upon the roll, I will accept a statement from Mr. Macdonald, the actuary, as to the income of the company under the different heads as set out in my former judgment in this matter, and reduce or increase the actual assessment made in the present year to the amount indicated in any such statement.

The assessment was subsequently confirmed at $188,000.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [Feb. 16.

MAXWELL *v.* CLARK.

Prohibition—County Court—Practice—Jurisdiction.

This was an appeal from the decision of Mr. Justice Dubuc, refusing a writ of prohibition to restrain a County Court from proceeding further in an action against the defendant.

The action was brought in the County Court of Killarney upon a promissory note made by the defendant, dated and payable at Winnipeg, but sworn to have been made within the judicial division of Killarney. The writ was served upon the defendant in the Province of Ontario, where he resided. The only defence stated in the dispute note was payment, but at the trial before Judge Prudhomme, who was presiding at that court at the request of Judge Walker, the regular judge of the court, counsel for the defendant objected to the jurisdiction, on the ground that the cause of action did not arise within the judicial division of Killarney, and the defendant did not reside there, but he offered no evidence. Leave was asked to insert this defence in the dispute note, but this was refused. A verdict was afterwards entered for the plaintiffs.

The rule for prohibition called upon Judge Prudhomme and the plaintiffs to show cause why prohibition should not issue, and the objection was taken for the first time before the Full Court that the rule should have called upon the regular judge of the court for the time being.

Held, that the rule should have been directed to the regular and duly appointed judge of the court for the time being, and not to another judge who

had merely acted for the regular judge at that particular trial, and who was now *functus officio*. This objection, however, was not raised on the application before Mr. Justice Dubuc, and the court did not decide whether it should give effect to it, but affirm the decision that the writ should be refused upon the following grounds:

Where want of jurisdiction of the inferior court does not appear upon the face of the proceedings, and the application for prohibition is not made until after the judgment or verdict in that court, the applicant is not, as of right, entitled to the writ, but the Superior Court has a discretion to refuse prohibition, if it seems to it inequitable to grant it.

The 114th section of the County Courts Act, R.S.M., c. 32, provides that "no defence shall be allowed at the trial or hearing except such as shall be stated in the dispute note, unless the judge shall otherwise order, to the end that justice may be done between the parties," and the 112th section shows that want of jurisdiction is one of the grounds of defence that should be taken by the dispute note. The claim was not a large one, and the plaintiffs had apparently gone to considerable trouble and expense to meet the defence of payment raised in the dispute note, and the defendant had in no way accounted for his failure to raise the objection to the jurisdiction by his dispute note, or to come into this court before judgment and ask for prohibition.

Upon these grounds, the court exercised its discretion and affirmed the decision refusing the writ of prohibition.

Crawford, Q.C., for the plaintiffs.

Clark for the defendant.

SEPARATE SCHOOL ELECTION.

MOSGROVE, J.J.] [Feb. 6.

REG. EX REL. HUDSON *v.* LAVOIE.

Separate School trustee—Election—Deputy to take votes.

The Board of School Trustees of the Roman Catholic Separate Schools for the City of Ottawa having appointed a returning officer, the latter received the names of the candidates, but appointed some one else to take the vote, which was done, the respondent receiving the majority of votes.

On an application to the County Judge to avoid the election, it was

Held, (1) That this appointment of a deputy was *ultra vires*.

(2) That a complainant is not obliged to prove his status.

And the election was set aside.

J. W. W. Ward for the relator.

N. A. Belcourt for the respondent.

MANITOBA.

COURT OF QUEEN'S BENCH.

GILLIES *v.* COMMERCIAL BANK.

McEWAN *v.* HENDERSON.

Judgments of Mr. Justice Killam (see *ante* vol. 30, pp. 480 and 742) sustained.

FULLERTON *v.* BRYDGES.

Decision of Taylor C.J. note *ante*, volume 30, page 661, affirmed with costs.

Obituary.

F. J. JOSEPH, ESQ.

Mr. Frank John Joseph, whose sad and sudden death we recorded in our last number, was the only son of Mr. John Joseph, who was at one time private secretary of William Wilberforce, and also of Sir James Stephen, Under Secretary to the Colonies. This Mr. Joseph accompanied Sir Francis Bond Head to Canada, as his civil secretary, in 1835. Shortly after his arrival, he married the eldest daughter of Mr. Justice Hagerman, and the subject of this notice was their only son, being born in 1837.

Mr. Joseph was an LL.D. of Toronto University, and was called to the Bar of Upper Canada in 1865. For many years past, however, he was not engaged in the active practise of his profession, having been appointed by the Honourable John Sandfield Macdonald as Assistant Law Clerk of the Legislative Assembly, which office he held until his death.

In 1876 he assisted Mr. Christopher Robinson, Q.C., in the preparation of Digest of the Ontario cases, known as "Robinson and Joseph's Digest," a continuation to which Mr. Joseph has published from time to time, to the great convenience of the profession. Mr. Joseph was also associated with the late Chief Justice Harrison in the preparation of his Municipal Manual, subsequent editions of which have since been published by Mr. Joseph himself. He also compiled a very useful edition of the By-laws and Statutes of the City of Toronto. He was for many years one of the examiners of the Law Society of Upper Canada.

Thus, though a man of retiring disposition, and taking no part in public matters, his life was one of great usefulness to the profession. He was generous and unselfish in character, courteous in manner. Though he lived much by himself he had a large circle of friends, as was shown by the number who attended his funeral, conducted at St. James' Cathedral, where he was a constant attendant.

Appointments to Office.

SUPREME COURT JUDGES.

British Columbia.

The Honourable Theodore Davie, of the City of Victoria, in the Province of British Columbia, one of Her Majesty's Counsel learned in the law, to be Chief Justice of the Supreme Court of British Columbia, *vice* Sir Matthew Baillie Begbie, deceased.

COUNTY COURT JUDGES.

City and County of St. John, N.B.

James Gordon Forbes, of the City of St. John, in the Province of New Brunswick, Esquire, one of Her Majesty's Counsel learned in the Law, to be Judge of the County Court of the City and County of St. John, in the said Province of New Brunswick, *vice* His Honour Benjamin Lester Peters, deceased.

County of Renfrew.

Thomas Deacon, of the Town of Pembroke, in the Province of Ontario, Esquire, one of Her Majesty's Counsel learned in the Law, to be Junior Judge of the County Court of the County of Renfrew, in the said Province of Ontario.

Thomas Deacon, Esquire, Junior Judge of the County Court of the County of Renfrew, in the Province of Ontario, to be a Local Judge of the High Court of Justice of Ontario.

SHERIFFS.

County of Renfrew.

William Moffatt, of the Town of Pembroke, in the County of Renfrew, Esquire, to be Sheriff of the Provisional Judicial District of Nipissing, *pro tempore*.

CLERKS OF THE PEACE.

District of Nipissing.

Arthur George Browning, of the Town of North Bay, Esquire, Barrister-at-Law, to be Crown Attorney and Clerk of the Peace, in and for the Provisional District of Nipissing.

POLICE MAGISTRATES.

County of Elgin.

Hugh H. McDiarmid, of the Town of Aylmer, in the County of Elgin, Esquire, to be Police Magistrate in and for the said Town of Aylmer, without salary, in the room and stead of William A. Glover, Esquire, resigned.

DIVISION COURT CLERKS.

County of Elgin.

Samuel MacColl, of the Township of Dunwich, in the County of Elgin, Gentleman, to be Clerk of the Fourth Division Court of the said County of Elgin, in the room and stead of A. N. C. Black, removed.

County of Lennox and Addington.

Alfred Knight, of the Town of Napanee, Gentleman, to be Clerk of the First Division Court of the County of Lennox and Addington, in the room and stead of George D. Hawley, resigned.

County of Lincoln.

John Roszel, of the Township of Gainsborough, in the County of Lincoln, Gentleman, to be Clerk of the Third Division Court of the said County of Lincoln, in the room and stead of Isaac Springstead, deceased.

DIVISION COURT BAILIFFS.

County of Elgin.

Malcolm C. Leitch, of the Village of Dutton, in the County of Elgin, to be Bailiff in the Fourth Division Court of the said County of Elgin, in the room and stead of Duncan McGregor, such removal and appointment to take effect on, from and after the first day of April next.

County of Haliburton.

Willet J. Austin, of the Village of Haliburton, in the Provisional County of Haliburton, to be Bailiff of the Second Division Court of the said Provisional County of Haliburton, in the room and stead of J. Stothart, resigned.

County of Peel.

John W. Smith, of the Town of Brampton, in the County of Peel, to be Bailiff of the First Division Court of the said County of Peel, in the room and stead of William Broddy, deceased, and also of George Broddy, who has been acting *pro tempore*.

County of Welland.

John Urlocker, of the Town of Thorold, in the County of Welland, to be Bailiff of the Fifth Division Court of the said County of Welland, in the room and stead of Lanson Theal, deceased.

County of Brant.

George S. Wait, of the Village of St. George, in the County of Brant, to be Bailiff of the Third Division Court of the said County of Brant, in the room and stead of David B. Wood, resigned.