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THE many friends of Mr. Justice Burton will be glad to know that he is rapidly recovering from his long and tedious illness. His brethren on the Bench, as well as the Bar, to whom he has endeared himself by his uniform courtesy, will be glad to see him again in his accustomed seat.

THE vacancy caused by the death of Mr. Justice Patterson has been filled by the appointment of Hon. George Edwin King, one of the judges of the Supreme Court of New Brunswick. We in this Province are scarcely competent to speak of the wisdom of this choice, but Mr. Justice King is said to enjoy a high reputation in his own Province, and his selection will, we trust, add strength to the bench of our Supreme Court.

WE notice that in the new Registry Act passed at the last session of the Ontario Legislature, and which appears to be intended as a consolidation of the law on this subject, there is no express repeal of the former Acts, R.S.O., c. 114; 51 Vict., c. 17; 52 Vict., c. 19; and 53 Vict., c. 30. Of course, where there is any variance between the new Act and the former Acts, there will be an implied repeal of the former by the later statute; at the same time, it is hard to see why the usual plan of expressly repealing the previous statutes was departed from in this case. At the present time, in order to ascertain the law on this subject, it is necessary to compare the new Act with the previous statutes in order to find out how much, if any, of the former are still operative.

THE *Law Quarterly* regrets that the authorities of the Law School have made their appointments of teachers for a fixed term of three years, a system which has been discarded even by the Inns of Court in England. The writer thus expresses himself: "Those who maintain such a system have their choice of two theories. One is that any practising barrister can teach law. The other is that law cannot or need not be taught at all, and that if law lectureships are established as a sop to public opinion they should be treated as a lucrative perquisite to be passed round among members of the Bar of a certain standing whose time is not fully occupied with practice."

WE trust it may not be necessary in this country to look into the law as to whether a collegiate faculty can be compelled by mandamus to grant a degree to a contumacious student, but it will be of interest to note the decision of *People ex rel. O'Sullivan* v. *New York School*, decided in the Supreme Court of New York. As we learn from the *American Law Review*, the substance of the decision was that colleges are to be governed by the faculty, and not by the students, and that when a student undertakes to dictate to the faculty as to the course to be pursued in the conduct of the institution, and accompanies his dictation with a threat, the faculty may refuse his degree for which he has passed a satisfactory examination, and to which he is otherwise entitled, by way of mere discipline; but while the courts uphold this action in refusing a diploma to the recalcitrant student, they expressed the opinion that he was entitled to a certificate of attendance, and of having passed a satisfactory examination.

THE appointment of Sir Horace Davey, Q.C., to the Lord Justiceship of the Court of Appeal in England, vacated by Lord Bowen, seems to give general satisfaction to the profession. *The Law Journal*, whilst regretting that Mr. Justice Chitty, the Senior Judge of the Chancery Division, was not promoted to fill the vacancy, says that no appointment more intrinsically admirable than that of Sir Horace Davey could not well have been made. The writer continues: "His supreme position among

the equity lawyers at the Bar, his wide and yet minute acquaintance with every branch of jurisprudence, his experience as a law officer of the Crown, his high culture, and his rare intellectual endowments qualified him in every way for the honour that has been conferred upon him. To Sir Horace Davey himself the judicial atmosphere of the Court of Appeal will doubtless be a welcome change from the strain and turmoil of life at the Bar, and the fitful fever of his chequered political career. To the Court of Appeal he will prove a tower of strength. Not the least important circumstance in connection with his appointment is the fact that it at once removes the preponderance which has for some time existed of common law over equity judges in the Court of Appeal, and forms a coign of vantage from which the legal profession and all who are interested in the symmetry and the efficiency of our juridical system may reasonably hope to secure the removal of the same anomaly from the House of Lords, where it has attained to still more startling dimensions."

CONSOLIDATING MORTGAGES.

The right to consolidate mortgages is one sanctioned by courts of equity for the purpose of carrying out the well-known maxim, that "he who seeks equity must do equity." But it would seem that the courts have begun to entertain some doubts whether, after all, in giving a legal sanction to this claim, they have not been acceding to a demand which is not altogether equitable. *In re Raggett*, 16 Ch.D., at p. 119, James, L.J., said: "I am not disposed to extend the doctrine (of consolidation) to any case which I do not find already covered by some authority or logically deducible from what has been laid down by some authority"; and in the recent case of *Re The Union Assurance Co.*, 23 O.R. 627, the Divisional Court of the Chancery Division, adopting this principle, have held that the right of consolidation cannot be set up where a mortgagor, or owner of the equity of redemption, has a legal right to money in the hands of the mortgagee. In that case the London and Canadian Loan and Agency Co. held two mortgages covering different properties. Lang was the owner (by purchase) of the equity of redemption in both properties; he insured the buildings on one of the properties, and

the policy provided that the loss, if any, was to be payable to the mortgagees as their interest might appear. A loss took place, and the mortgagees and Lang both claimed the insurance money, and, both mortgages being in default, the mortgagees contended that the money should be applied in satisfaction of the amount due on the mortgage which covered the buildings which were the subject of the insurance, and that the balance was applicable on account of the amount due on the other mortgage. The insurance company applied to be allowed to pay the money into court, and, upon this application, the Master in Chambers held that the mortgagees were entitled to have the money applied as they claimed, and his decision was affirmed by Robertson, J. On appeal, however, the Divisional Court came to a different conclusion, on the ground that Lang had a legal claim to recover the insurance moneys in the hands of the insurance company, or the mortgagees, and against this legal right the equitable right to consolidate the mortgages could not be set up.

This right of consolidation is purely a creation of equity; and it may well be doubted whether it should ever have been allowed at all. It is really a case of judicial legislation in favour of the money-lenders; and like some other doctrines of equity which might be mentioned, notably that of constructive notice, it is open to argument whether, on the whole, it has not worked injustice rather than the contrary. As a rule, money-lenders are extremely well able to protect their own interests, and do not, except for a consideration which they deem adequate, lend their money on insufficient security; and it, therefore, seems an almost unnecessary stretch of judicial solicitude for their well-being that the courts should say, under any circumstances, that when the money-lender has chosen to lend his money on the security of property A he should also, without any contract on his part to that effect, be virtually entitled to claim security for the debt on property B.

At the same time, the right, such as it is, has been established, and mortgages are now taken to some extent on the faith of the existence of the doctrine, and it may be open to doubt whether, instead of attempting to narrow it down by ingenious legal subtleties, it would not be better to abolish it altogether by statute.

According to this case of *The Union Assurance Co.*, if Lang were driven to an action for equitable relief, then the right of

consolidation would have to b allowed against him; but if he is in a position to maintain a legal, as distinguished from an equitable, action for the money, the right of consolidation cannot be allowed.

This seems a little like an attempt to get rid of a distasteful doctrine by a technicality; and seems, moreover, to offend against The Judicature Act, s. 53, s-s. 12, which provides that when there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail. The rule of equity was that in courts of equity the right of consolidation should be allowed, and the rule of the common law was that it should not be allowed; and yet, in spite of the statute, effect is given to the common law rule.

But it may be said, in answer to this, that the rule of equity was only applicable where relief was sought in equity, and would not have been allowed to be set up in derogation of any common law right of action; but we imagine it would be somewhat hard to find in the books any instance of a common law action for money had and received being successfully brought before The Judicature Act to recover insurance moneys in the circumstances above referred to.

LEGISLATION AND LIMITATIONS.

The perennial and apparently inexhaustible flow of the statutory fountain has often been remarked upon, and the turbid character of the stream is equally noticeable. To take a recent instance as an illustration, we may refer to the Act of the Ontario Legislature, at its last session, entitled "An Act to amend the Act respecting the limitation of certain actions," being 56 Vict., c. 17. This Act is passed with the laudable intention of doing away with the incongruity heretofore prevailing in reference to mortgages, to which the attention of the profession was drawn by the decisions of the Court of Appeal in *Allan* v. *McTavish*, 2 A.R. 278; *Boice* v. *O'Loane*, 3 A.R. 67; and *McMahon* v. *Spencer*, 13 A.R. 430, where it was held that, although an action to recover the mortgaged land must be brought within ten years, as provided by R.S.O., c. 111, yet an action on the covenant for pay-

ment of the debt might still be brought within twenty years, under R.S.O., c. 60.

The object of the recent Act was, apparently, to prescribe ten years as the period of limitation for actions on the covenant. But this design appears to us to have been badly carried out.

The statute amends R.S.O., c. 60, by amending s. 1, s-s. *b*, and adding a sub-section (*h*). This section, as amended, now reads as follows, the amendments being indicated by [ ]:

"1. (1) The actions hereinafter mentioned shall be commenced within, and not after, the times respectively hereinafter mentioned, that is to say: . . . . . .

(*b*) Actions upon a bond or other specialty [except upon the covenants contained in an indenture of mortgage] within twenty years after the cause of such actions arose. . . . . .

[(*h*) Actions upon any covenant contained in an indenture of mortgage *made after the first day of July*, 1894, within ten years after the cause of such actions arise]."

These amendments are not to take effect until the 1st July, 1894. When that day arrives, therefore, it will be seen that, as regards the covenants contained in all mortgages made prior to the 1st July, 1894, all limitations of time for bringing actions thereon will have been removed, because s-s. (*b*), as amended, excludes covenants on mortgages from its operation, and the twenty years' limit therefore ceases to apply to them; and the new sub-section (*h*), which prescribes a limitation of ten years, applies only to mortgages made after the 1st July, 1894.

It is therefore obvious that the amending Act will have itself to be amended at the next session.

While on this subject, we would respectfully suggest that, instead of pursuing the policy of tinkering and patching R.S.O., c. 60, it would be better far to consolidate the law on this subject. Why should the citizens of Ontario have to go to the statute of James I. to find out within what time they are required to bring personal actions? Why, in the name of common sense, should not the whole law on this subject be found in our own statute book? In framing a consolidated Act, attention should also be had to the provisoes of English statutes which have not yet been re-enacted here; *e.g.*, 9 Geo. IV., c. 14, and 19 & 20 Vict., c. 97. Of course, the plan we propose would involve a little more trouble than contriving a plaster to cure the defect in 56 Vict.,

c. 17, we have just pointed out; but it would have the merit of being more statesmanlike and more worthy of the dignity of a legislative body, because it would be bringing into a succinct and accessible shape the whole statute law on this particular subject.

It appears to us that it would be a more scientific arrangement of the law if chapters 60 and 111 of the Revised Statutes had been combined; however, that is a point on which opinions may differ, according as the limitation of time for bringing actions to recover land is looked upon as a part of the law relating to realty, or a mere subdivision of the law relating to the bringing of actions.

CURRENT ENGLISH CASES.

The following cases are noted from the June numbers of the Law Reports and in consecutive order would follow the case of *National Telephone Co.* v. *Baker*, on page 476, *ante*.

WILL—MORTGAGE—EXONERATION OF LAND MORTGAGED FROM PAYMENT OF MORTGAGE DEBT—LOCKE KING'S ACT (17 & 18 VICT., C. 113)—(R.S.O., C. 109, S. 37).

In re Campbell, Campbell v. *Campbell*, (1893) 2 Ch. 206, is a decision of Kekewich, J., under Locke King's Act (R.S.O., c. 109, s. 37). The testator in his lifetime was entitled, subject to the interest of two life tenants, to a sum invested in consols. In order to get the principal money paid over to him by the trustees in whom it was vested, he executed a mortgage on his real estate in favour of the trustees to secure the due payment of the annuity of the two life tenants, and also for refunding the consols if ever required so to do by the trustees. The testator in his will recited the circumstances under which he expected to acquire the consols, and, subject to any charge he might have made on his real estate under the arrangement before referred to, he devised his land to certain uses, and his residuary personal estate in another way. After the testator's death the mortgaged estate was sold, and out of the proceeds the sum of consols was, on the requisition of the purchaser, reinvested in consols in the name of the trustee who had transferred it to the testator and the then surviving life tenant. The latter having subsequently

died, the money which had been thus reinvested in consols was paid back to the executors and trustees of the testator's estate, and was claimed, on the one hand, by the devisees of the real estate of which it was part of the proceeds, and, on the other hand, by the residuary legatees of the personal estate. Kekewich, J., held that the devisees of the realty were entitled to the fund, and that the will and other documents executed to carry out the transaction in reference to the transfer of the consols to the testator disclosed "a contrary instruction" within the meaning of of the statute not to charge the mortgage land with the sums charged thereon; the transaction clearly indicating that the real estate was mortgaged merely as an indemnity to the trustees, and not as a security for the money as a debt or loan.

PRACTICE—SHARES IN LIMITED COMPANY—"PERISHABLE CHATTELS"—ORDER FOR SALE PENDING ACTION—ORD. L., R. 2—(ONT. RULE 1133).

Evans v. *Davies*, (1893) 2 Ch. 216, is a decision of Kekewich, J., holding that shares in a limited company are "goods" within the meaning of Ord. l, r. 2 (Ont. Rule 1133), and may be ordered to be sold pending the action when, for "any just and sufficient reason," it is made to appear to the court desirable to have them sold at once. The action was brought by the plaintiff to recover the price of the shares in question, and he claimed an interim injunction to restrain the defendant from dealing with the shares. The defendant made a cross motion for the immediate sale of the shares on the ground that they had gone up in value, and if sold at once would realize sufficient to pay the plaintiff's claim. The court held this to be a sufficient reason for ordering the sale.

PRACTICE—PARTITION ACTION—COSTS OCCASIONED BY INCUMBRANCES ON SHARES.

In *Catton* v. *Banks*, (1893) 2 Ch. 221, Kekewich, J., refused to follow *Belcher* v. *Williams*, 45 Ch.D. 510. The action was for a partition of real estate which was divisible into three shares, two of which were incumbered, and the third unincumbered. North, J., in *Belcher* v. *Williams*, held that each incumbrancer on a share was entitled to costs out of the estate. The result of that decision in this case would have been to give six sets of costs out of the estate. Kekewich, J., however, determined that only one set of costs should be allowed in respect of each share. This seems to agree with the conclusion arrived at by Vankoughnet, C., in *McDougall* v. *McDougall*, 14 Gr. 267.

HUSBAND AND WIFE—TENANCY BY ENTIRETIES—DIVORCE, EFFECT OF, AS TO PROPERTY VESTED IN HUSBAND AND WIFE—JOINT TENANCY—MARRIED WOMEN'S PROPERTY ACT, 1882 (5 & 46 VICT., C. 75)—(R.S.O., C. 132).

In *Thornley* v. *Thornley*, (1893) 2 Ch. 229, a new aspect of the Married Women's Property Act is discussed. By conveyances made both before and after 1882, real property was conveyed to a married woman and her husband. They were subsequently divorced, and the question Romer, J., had to decide was as to the effect of the divorce upon the relative rights of the divorcees in the property so conveyed to them. As to the property conveyed before the Married Women's Act of 1882, the learned judge held that the grantees took as tenants by entireties, and that the effect of the divorce was to convert them into joint tenants. And as to the property conveyed after 1882 he held that the grantees took as joint tenants, and continued so to hold after they had been divorced. The suit was by the ex-wife for an account of rents and profits under the statute 4 & 5 Anne, c. 3, s. 27, and the account was accordingly ordered, as to the property conveyed prior to the year 1882, from the date of the decree absolute for divorce; and as to the property conveyed in and subsequent to 1882 from the date of the husband having had sole possession, which was three years prior to the date of the divorce.

COMPANY—UNLIMITED LIABILITY—MEMORANDUM AND ARTICLES OF ASSOCIATION —WITHDRAWAL OF MEMBERS FROM LIABILITY.

In re Borough Commercial and Building Society, (1893) 2 Ch. 242, was an application by the liquidator of a company being wound up to compel the respondents to pay calls. The application was resisted on the ground that, by the terms of the articles of association, the respondents had ceased to be members of the society, and were therefore not liable as contributories. This raised the question whether such provisions could be legally made in the articles of association, under the Companies Act, in the case of an unlimited company, enabling members to withdraw from membership and liability. The respondents had taken shares in order to become borrowers from the society. They had paid off their loans, and, by the terms of the articles of association, they were entitled to withdraw from membership. Williams, J., held that there was nothing in the Act to make such a stipulation illegal, and he therefore held that the respondents were not liable as contributories.

CONSTRUCTION OF AGREEMENT AND STATUTE.

Jamaica Railway Co. v. *The Attorney-General of Jamaica*, (1893) A.C. 127, was a suit by the Attorney-General of Jamaica, on behalf of the Government of Jamaica and other holders of bonds of the defendant railway company, complaining of certain items as being improperly charged against the income of the railway to the prejudice of second mortgage bondholders. The rights of the parties to some extent turned on the construction placed on the agreement made between the government and the railway company in reference to such bonds, and certain statutes of the Legislature of Jamaica passed to carry such agreement into effect. By the agreement the bonds in question were to be issued with the interest (non-cumulative) dependent on the *yearly* earnings; but by the statute passed to give effect to the agreement, the bonds were treated as *half-yearly* bonds, with interest contingent on *half-yearly* profits. The bonds were, however, issued in the terms of the agreement, and not of the statute; and then by a certificate of the local government the bonds were erroneously certified to be according to the statute. The Judicial Committee of the Privy Council determined that the agreement and the statute must be read together, and that, so doing, they were not necessarily inconsistent with each other, and that the intention was that the account should be taken at the end of each year, and not upon the footing of their being a rest at the end of every half year, and they therefore varied the judgment of the court below, which granted the account on the footing of half-yearly rests. Another question presented for adjudication on the appeal was as to the extent to which purchases of stores could be deducted from the profits, and whether or not the defendants were entitled to debit against income, so far as the bondholders were concerned, the expenses incurred in drawing up, engrossing, and issuing the bonds. Their lordships had no difficulty in deciding that the charges for issuing the bonds were not admissible as against the bondholders; although as to the stores they were unable to determine exactly what ought to be allowed, they were of opinion that such expenditure must depend on what should be found to be fair and reasonable in the interest of all concerned; and that while the company would not be justified in charging an unreasonable expenditure for stores against the income, they were not restricted to charging for only such stores as were actually consumed during each year.

CONTEMPT OF COURT—OBSTRUCTION TO PUBLIC JUSTICE—ABUSE OF JUDGE IN NEWSPAPER—POWER OF CROWN TO REMIT SENTENCE.

In re Special reference from Bahama Islands, (1893) A.C. 138. This was a matter specially referred to the Judicial Committee of the Privy Council by the Secretary of State for the Colonies, and the committee was constituted of eleven judges, including the Lord Chancellor. An editor of a newspaper in the Bahamas had published a letter from an anonymous correspondent containing a libel on the Chief Justice of that colony, but it was not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law. The Chief Justice summoned the editor before him, and required him to give up the letter or to disclose the name of the author of the letter, both of which the editor refused to do, whereupon the Chief Justice fined him £40, and committed him to prison during pleasure for the publication, and also sentenced him to a fine of £25 or imprisonment for the refusal to disclose the name of the writer of the letter. The governor of the colony released him. The questions the Judicial Committee were called on to decide were: (1) Whether the publication of the letter was, in the circumstances, a contempt of court? and they decided it was not; (2) whether the Chief Justice had any legal right to require the editor to give up the manuscript of the offensive letter or the name of the writer? and they decided he had not; and (3) whether the governor of the colony had, under his commission, power to remit the sentence which had been imposed? and they decided that he had. The committee abstained from giving any reasons, and confined themselves simply to answering the questions propounded for their consideration. The conclusion of the Privy Council in this case seems rather to favour the view taken by Morrison, J., in the celebrated case of *Regina* v. *Wilkinson*, 41 U.C.R., 47.

INTERNATIONAL LAW—FOREIGN JUDGMENT—PENAL ACTION—DISTINCTION BETWEEN PUBLIC AND PRIVATE PENALTIES.

Huntington v. *Attrill*, (1893) A.C. 150, is a decision of the Judicial Committee upon an appeal from the Ontario Court of Appeal, the judges of that court having been equally divided in opinion. The action was brought upon a judgment recovered in the State of New York. The action in which the judgment was

recovered in New York was to recover a debt due by a company of which the defendant was a director, and for which, by a law of that state, he was made personally liable for having made false representations. The defendant set up as a defence that the judgment sued on was for a penalty, and therefore, the action being of a penal character, ought not to be entertained by the court of this Province. Street, J., who tried the action, gave effect to this defence, and Burton and Maclennan, JJ.A., agreed with him. Hagarty, C.J., and Osler, J.A., thought the action was not a penal action within the principles of international law, and that the action was maintainable. With the latter view the Privy Council agree, and in the judgment of the committee, delivered by Lord Watson, the distinction is drawn between penalties imposed by statutes for the benefit of the state and penalties imposed for the benefit of private individuals; and while the former are held to come within the class of penal actions which cannot be enforced in a foreign country, the latter are held not to come within that category. It may be noted that the decision of the Supreme Court of Maryland in *Huntington* v. *Attrill*, 70 Mar. 191, in which precisely the same question was raised, and in which that court adopted the opposite view, is dissented from by the Privy Council.

LAND TRANSFER ACT—EASEMENT—OMISSION OF EASEMENT FROM CERTIFICATE—ABANDONMENT OF EASEMENT—EVIDENCE.

James v. *Stevenson*, (1893) A.C., 162, although an appeal from the Supreme Court of Victoria, is deserving of attention as bearing on the construction of the Ontario Land Titles Act (R.S.O., c. 116), which is to some extent founded on the Australian Act, and intended to give effect to a similar system of land transfer. The dispute in this case was in reference to a right of way which the plaintiffs claimed by express grant to their predecessors in title. In the certificates of title which had been granted both of the plaintiffs' land and the defendants' land no mention was made of this easement, and two questions were presented for decision on appeal. First, whether the evidence of abandonment of the right of way was sufficient; and, second, whether the omission of any mention of the easement from the certificates of title defeated the plaintiffs' claim thereto. The evidence on the first point merely established non-user by the plaintiffs and user

by the defendants for farm purposes of portions of land subject to the easement when the easement was not required; but their lordships held that the abandonment being a question of intention the evidence was insufficient to establish such intention to abandon either the entire right, and was also inconclusive to prove an abandonment of portions thereof. With regard to the omission of any reference to the easement in the certificates of title: although the Victoria statute requires the registrar to specify any subsisting easement as an incumbrance affecting the land, yet, notwithstanding, the Judicial Committee agreed with the colonial court that the omission of the registrar to enter the easement on the certificate of the title of servient tenement did not bar the claim thereto. We may observe that easements under the R.S.O., c. 116, s. 24, need not be specified in the certificate of title, but the land is subject to all subsisting easements unless the contrary is stated.

PRINCIPAL AND AGENT—POWER OF ATTORNEY—POWER TO BORROW—INDORSEMENT OF BILLS "PER PRO."

Bryant v. *La Banque du Peuple*, (1893) A.C. 170, is an appeal from the Court of Queen's Bench of Quebec. Two points are decided, viz., that where a person deals with an agent knowing him to be such (and the indorsation of bills "per pro" is a sufficient intimation that the indorser is acting as agent), then it is his duty to ascertain the limits of such agent's authority, and that a power of attorney authorizing an agent to make contracts of sale and purchase, charter vessels, and employ servants, and as incidental thereto to do certain specified acts, including indorsement of bills and other acts for the purposes therein aforesaid (but none of which included the borrowing of money), does not authorize such agent to borrow on behalf of his principal, or bind him by contract of loan, such acts not being necessary for the declared purposes of the power. And, secondly, that where the agent is acting ostensibly within the terms of his power, then a person dealing with him *bonâ fide* for value is not affected by the agent's having acted fraudulently in the exercise of his power. In short, to adopt a passage from the judgment of the Court of Appeal of the State of New York in *President, etc., of the Westfield Bank* v. *Cornen*, 37 N.Y.R. (10 Tiff.) 322, approved of by the Privy Council: "Whenever the very act of the agent is authorized by

the terms of the power, that is, wherever by comparing the act done by the agent with the words of the power the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts. . . . The apparent authority is the real authority." Perhaps to the words "good faith" should be added "and for value," which, we take it, is also a necessary element.

PAYMENT TO SUSPENSE ACCOUNT WITH CREDITOR—EFFECT OF.

In *Commercial Bank* v. *Official Assignee of Wilson Estate*, (1893) A.C. 181, it became necessary to determine, in bankruptcy proceedings, what was the legal effect of a debtor having paid to his creditor a sum of money to be held by the latter to the credit of a suspense account, but with power to the creditor to appropriate the same whenever he thought fit to the discharge *pro tanto* of the debt due by the debtor. Their lordships of the Judicial Committee were unable to agree with the Supreme Court of New South Wales, and decided that until actual appropriation by the creditor the sum so deposited was not to a payment on account of the debt, and that the appellants were consequently entitled to prove for the full amount of their debt, irrespective of the sum to the credit of the suspense account, against the estate of a bankrupt surety who was not a party to the agreement.

PRACTICE—APPEAL—PLAINTIFF'S RIGHT TO APPEAL—APPEALABLE AMOUNT, HOW TO BE ASCERTAINED.

Mohideen v. *Pitchey*, (1893) A.C. 193, was an action to recover property valued at Rs. 4050, and also mesne profits which brought the total amount claimed up to Rs. 5850—the amount for which an appeal will lie is Rs. 5000. The court below refused leave to appeal on the ground that the value of the property in dispute was only Rs. 4050, but the Privy Council held that the mesne profits claimed must also be taken into account, and that the plaintiffs were therefore entitled to appeal.

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PRACTICE—DISCOVERY—INSPECTION OF DOCUMENTS—WINDING UP—EXAMINATION OF WITNESSES UNDER THE COMPANIES ACT, 1862, S. 115 (R.S.C., C. 129, S. 81).

North Australian Territory Co. v. *Goldsborough*, (1893) 2 Ch. 381, was an action brought by the liquidators of the plaintiff

company, which was being wound up, in which the defendant claimed the right to inspect certain depositions taken previously to the commencement of the action, under the provisions of the Companies Act, 1862, s. 115 (R.S.C., c. 129, s. 81). Kekewich, J., held the depositions to be privileged, and the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) affirmed his decision on the ground that such depositions are taken merely for the purpose of obtaining information to enable the liquidator to decide as to the propriety of bringing or continuing an action, and are privileged from production.

STATUTE OF LIMITATIONS (3 & 4 W. 4, C. 42), S. 5—(R.S.O., C. 111, S. 5; S-S. 12; S. 23)—PAYMENT BY TENANT FOR LIFE—EQUITY OF REDEMPTION.

Dibb v. *Walker*, (1893) 2 Ch. 429, is a somewhat analogous case to that of *Trust & Loan Co.* v. *Stevenson*, 20 App. R. 66. The question was whether a payment of interest due on a mortgage made to the mortgagees by a tenant for life of the equity of redemption under a settlement made by the mortgagor prevented the Statute of Limitations running in favour of those entitled to the equity of redemption in remainder. The tenant for life had entered into a covenant, by way of further security to the mortgagee, to pay the interest accruing due during her lifetime, and it was contended that her payments must be attributed to the discharge of her liability under this covenant, and that she was under no legal liability to pay under the original mortgage; but Chitty, J., was clear that the tenant for life was the proper person to pay the interest, apart from any covenant given by her, and that her payments prevented the running of the statute in favour of the remaindermen.

BILL OF EXCHANGE—PROTEST FOR BETTER SECURITY—ACCEPTANCE FOR HONOUR OF DRAWERS—COMMISSION FOR ACCEPTANCE FOR HONOUR—NOTARIAL EXPENSES, WHAT RECOVERABLE—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61), SS. 51, 97.

In re English Bank, (1893) 2 Ch. 438, bills of exchange had been accepted by a company which went into liquidation before they became due; they were then protested for better security, and subsequently accepted for the honour of the drawers. On maturity the acceptors for honour paid the bills and the expenses of the protest for better security, and charged the drawers with a commission for making the payment. The drawers claimed to

prove for the costs of this protest and commission as part of their claim against the company; but Chitty, J., held that they were not entitled under the Bills of Exchange Act to recover those sums from the acceptors.

NUISANCE—OBSTRUCTION TO HIGHWAY.

In *Barber* v. *Penley*, (1893) 2 Ch. 447, the plaintiff was a lodging-house keeper, whose house adjoined a theatre kept by the defendant. At this theatre a popular play was being acted which caused great crowds of playgoers to assemble in the street for a couple of hours before the theatre opened, waiting for admission, and thereby obstructing the highway. The action was brought to restrain the nuisance, but pending the action the nuisance was abated through the intervention of the police. North, J., held that the plaintiff was justified in bringing the action, but as the nuisance had been abated he made no order except that the defendant should pay the costs. In his judgment will be found an elaborate review of the authorities bearing on the point in issue. His conclusions, we observe, do not meet with the approval of our contemporaries, *The Law Journal* and *The Law Times*. They take the view that such obstructions to thoroughfares are simply matters for the police to deal with, and they deride the notion that they come within the province of a Court of Equity.

Notes and Selections.

DRUNKENNESS AND CRIME.—Drunkenness, as we know, is no excuse for crime. If it were so, you might as well, as a learned judge once observed, shut up the criminal courts, because drink is the occasion of most of the crime committed; but on the question of intention, of the *mens rea*, drunkenness must now be deemed a material consideration, notwithstanding the strong remarks of Park and Littledale, JJ., on Holroyd's, J., ruling in *Reg.* v. *Grindley* (1 Russ. Cr., 5th ed., 115). "If the prisoner was so drunk as not to know what she was about," said Jervis, C.J., on a charge of suicide, "how can you say she intended to destroy herself?" This was the case in *H.M. Advocate* v. *Kane* (3 White's

Rep. 386). The prisoner in a fit of drunkenness had kicked his wife to death, but knew nothing about it, and the jury, under the guidance of Clark, L.J., found it only culpable homicide. There is clearly, however, such a thing as a drunken intention, where malice exists, though the brain is besotted (*Reg* v. *Doherty*, 16 Cox C.C. 308), and this kind of intention makes the drunkard as guilty in the eye of the law as if he had been sober. This is much the more the common state. Delirium tremens is a diesease, and recognized as such by law, but drunkenness is a voluntary species of madness. Is there much difference in point of moral responsibility between the drunkard and the Malay who maddens himself with bhang, and then runs *amok*, murdering all he meets? The law cannot afford to coquette with theories of physiological irresponsibility. And how can the blank of subsequent memory prove that intention and malice were not present when the act was done?—*Law Quarterly.*

VOLUNTARY CONFESSIONS.—"The general maxim that confessions ought to be voluntary is," says Stephen, J., "the old rule that torture for the purpose of obtaining confession is (and has long been) illegal in England." It is, in fact, a corollary from the generous principle of English criminal law, "Nemo tenetur prodere se ipsum." This scrupulous fairness towards prisoners is characteristic of our law, and highly commendable; and quite consistently with it our law recognizes that there are such things as moral thumbscrews, that a man may be trapped or threatened or cajoled into criminating himself. When there is suspicion of such a thing, it leaves it to the discretion of the presiding judge to admit or exclude the alleged confession. This is not all, but from this root (that the confession must be voluntary) has grown up a highly artificial rule of evidence based, as so many of our rules of evidence unfortunately are, on a distrust of juries and their sagacity. "It would be dangerous," it has been said, "to leave such evidence to them"; "it comes in too questionable a shape to be worthy of credit," and so forth. The result is that what Earle, J., called "the best evidence when well proved" is too often excluded. A chairman mildly exhorts a defaulting secretary that "it will be the right thing to make a statement," *Reg.* v. *Thompson* ('93, 2 Q.B. (C.C.R.) 12), and the court treats

the secretary's consequent confession as if it had been wrung from him on the rack. Most persons will agree with Park, B., that the rule "has gone quite too far, and that justice and common sense have too frequently been sacrificed at the shrine of mercy." The time is past when rules of law could be defended on the bare ground of precedent.—*Law Quarterly.*

Correspondence.

THE LAW SOCIETY.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Twenty-six years have now elapsed since the Province of Upper Canada exchanged its name for that of "Ontario," and yet to this day the Law Society of this Province still retains its original name of "The Law Society of Upper Canada." As a body corporate it is obliged to retain the name by which it is incorporated until it has obtained the sanction of the Legislature to make a change; but is it not about time that the Legislature should be asked to authorize a change of name, so that the Society may hereafter be known by the name of "The Law Society of Ontario," which it actually is, and not by the name of the Law Society of a place which has no longer any legal or geographical existence?

The preservation of the old title of "Upper Canada" is confusing to outsiders, and it seems to me high time that it was laid aside.

JUNIOR.

BENCH AND BAR.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—There are at the present time three judges of the High Court who are resident out of Toronto. This fact often results in much inconvenience to those who have business before them. A high legal functionary recently observed, as to one of them, that the effort to do business with him was like trying to do business with a comet. They appear suddenly on the scene, and as suddenly disappear. They seem to assume that as soon as they

have descended from the bench they can depart from Toronto with a clear conscience. In order to facilitate their departure, they suddenly and unexpectedly appoint unusual hours for the sitting of the court in which they preside, occasioning thereby great annoyance and inconvenience to counsel and solicitors, and they occasionally adjourn their courts before the accustomed hour in order to catch a train to convey them to their distant abodes. Moreover, although a judge is supposed to take all the business of a week, it occasionally happens that a premature departure from Toronto before the week is over imposes on another judge work which they themselves ought to have discharged.

PRACTITIONER.

[We are not aware that the inconvenience is so great as our correspondent declares it to be, and the remarks are not, we think, applicable at least to all of the judges apparently referred to. We doubt not, however, that, the matter being called to their attention, any cause of complaint will be removed. We observe that R.S.C., c. 135, s. 4, s-s. 5, provides that the judges of the Supreme Court shall reside at Ottawa, or within five miles thereof. It may be deserving of consideration as to whether there should not be a similar provision with regard to the judges of the High Court here. It goes without saying that the personal convenience of the judges should yield to that of the public.—ED. L.J.]

ASSIGNMENTS BY INSOLVENTS.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—The leading article in your issue of 16th September as to assignments by insolvents has greatly interested me. If R.S.O., c. 124, and similar Acts in the other provinces, are finally held *ultra vires* (which I think is certain), a number of cases will arise which will be very embarrassing to give an opinion on. Your article deals simply with future assignments and the state of the law regarding them, independent of the Acts referred to. What about insolvent estates which have been partially dealt with? For instance, what would be the rights of the parties in the following case? A. makes an assignment to B.,

which is registered under the Act, but not executed by any of the creditors. Subsequently one of the creditors petitions to have C. appointed assignee in place of B., and an order is made appointing C. C. then proceeds to get in the estate, and has partially done so. One of the debtors, however, refuses to pay C., on the ground that his appointment as assignee is void, the Act being *ultra vires*. It seems quite clear that C. cannot recover the debt. Can B. then proceed to recover it without first taking steps to have the order appointing C. set aside? What is the position of B. with regard to moneys collected by C. and in his hands? Should he apply to have the order appointing C. set aside? The position of B. is an embarrassing one. As none of the creditors have executed the deed, it would appear that by *Garrard* v. *Lauderdale*, and *Johns* v. *Jones*, 8 Ch.D. 844, he is not responsible to them.

There is, however, considerable doubt as to what circumstances will render a deed irrevocable and create a trust in favour of creditors (see Lewin on Trusts, 8th edition, p. 515, *et. seq.*, where the cases are collected and discussed). B. is, however, without doubt, responsible to A. Is he, then, bound at the request of A. to take steps to execute his trust? or is he protected by the order superseding him? is he liable to A. for negligence if he does nothing? I can find no cases that throw any light on the subject; but perhaps you or some of your readers may know of some. My own opinion is that although the order superseding him is void, B. is not bound to apply to set it aside unless he wishes, and is not bound to take any steps to get in the estate. A., however, can apply to set the order aside, and if he does so the responsibility of B., as assignee, revives. I am,

Yours truly,

COUNTRY SUBSCRIBER.

DIARY FOR OCTOBER.

1. Sunday.....*18th Sunday after Trinity.* Wm. D. Powell, 5th C.J. of Q.B., 1877. Meredith, J. Chy. D., 1890.
2. Monday.....Co. Ct. sitts. for motions, and sitts. of Sur. Cts., except in York.
3. Tuesday.....Co. Ct. sitts. for non-jury cases and sitts. of Surrogate Courts, except in York.
7. Saturday....Henry Alcock, 3rd C.J. of Q.B., 1802.
8. Sunday.....*19th Sunday after Trinity.* Sir W. B. Richards, C.J.S. Ct., 1875. A. A. Harrison, 11th C.J.Q.B., 1875.
9. Monday.....County Ct. sitts. for motions, and sitts. of Surrogate Cts. in York. De la Barre, Gov., 1682.
11. Wednesday..Guy Carleton, Governor, 1774.
12. Thursday....America discovered, 1492. Battle of Queenston Heights, 1812.
15. Sunday.....*20th Sunday after Trinity.* English Law introduced into U.C., 1791.
16. Monday.....County Court sittings for non-jury cases in York.
22. Sunday.....*21st Sunday after Trinity.*
23. Monday.....Lord Lansdowne, Gov.-Gen., 1883. Last day for notice for Call.
24. Tuesday.....Supreme Ct. of Canada sits. Sir J. H. Craig, Gov.-Gen., 1807.
27. Friday.....C. S. Patterson, J. of Sup. Ct., 1888. Jas. Maclennan, J. Ct. of Appeal, 1888.
29. Sunday.....*22nd Sunday after Trinity.*
31. Tuesday.....All Hallow's Eve.

Reports.

ENGLAND.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present: The Earl of Selborne, Lord Hobhouse, Lord McNaughton, Lord Morris, and Sir Richard Couch.

[Reported for THE CANADA LAW JOURNAL.]

CORPORATION OF TORONTO *v.* ATTORNEY-GENERAL OF THE DOMINION OF CANADA.

Municipal law—Water rates--Power of city to fix—Discount allowed to ratepayers, but not to others.

On a motion for leave to appeal from the judgment of the Supreme Court (see *ante* p. 223), the decision there given reversing the judgment of the Court of Appeal (18 O.R. 622), and of FERGUSON, J. (20 O.R. 19), was affirmed, and the motion made on behalf of the City of Toronto for leave to appeal was refused with costs.

[COUNCIL CHAMBER, WHITEHALL, July 29.

This was a petition for special leave to appeal from the judgment of the Supreme Court of Canada, as above set forth.

Mr. *C. Robinson*, Q.C., and Mr. *C. R. W. Biggar*, Q.C., of the Canadian Bar, appeared for the petition.

Mr. *Francis Gore*, for the Attorney-General of Canada, *contra*

Mr Robinson, Q.C.: This, my lords, is an application by the city of Toronto for leave to appeal from the judgment of the Supreme Court of Canada. The city of Toronto, in 1873, was authorized by statute to construct waterworks for the use of the city, under the superintendence of commissioners. These works were constructed, and, at a later period, by 40th Vict., cap. 39, they were transferred to the city of Toronto. All the powers of the commissioners as to the waterworks were transferred to the city. The works were constructed out of moneys borrowed by the city, to be repaid by the rates. In the city of Toronto there are a very large number of properties which take water, and which are exempt altogether from taxation. There is a very long list in the Assessment Act of buildings exempt from taxation; and it appears that the annual revenue derived by the waterworks from properties exempt from general taxation amounts to about $137,000, and of this about $2,000 is contributed by buildings belonging to the government of Canada. The other buildings are composed of educational institutions, and so on. [The learned counsel then read sections 1 and 12 of 35 Vict., cap. 79, Ont.] The city has never acted under section 12. I mean they have never compelled any one to pay for water unless they took it. They are also authorized to give a discount for prompt payment. The system upon which they have proceeded is, in some cases, by meter; in others by assessing a sum upon each house, charging so much to those who consume the water, and allowing a discount. But they have declined to allow this discount to those who are exempt from all other city taxation, on the ground that they have contributed nothing to the expense of building the waterworks, and it would be unreasonable therefore to give them the same advantage and to supply the water to them at the same price as they do to the others. The question is simply as to their right to do that. There is no question of fact in dispute.

The learned trial judge decided in favour of the city, saying that, in his view, this was not a tax, or in the nature of a tax. There were two contentions on the part of the defendants. In the first place they said: "All our property is exempt from taxation. This is a tax. When you charge us with this water you are taxing us, and, taxing us, you must tax us equally with all other people." In the next place they said: "Whether it is or is not a tax—when you are authorized to fix the price paid for water your prices must be equal to every one. That is a presumption to be applied and to be attached to the statute."

THE EARL OF SELBORNE: Is that the form the second point would take? I observe there is power to allow discount for prepayment. Would not the objection be that if discount were allowed it should be equal to all who would have to pay?

Mr. Robinson: That would be putting it in another form, but it would be the same thing. They contended that we must treat all people equally, both in what we charge them and in what we allow them by way of discount. Those were the two contentions on the part of the defendants. The learned trial judge said he did not regard this as a tax at all; he regarded it simply as a sale of goods by the city, for which they were entitled to charge such price as they might think reasonable, subject, of course, to the universal rule that all

by-laws must be reasonable—in other words, not oppressive and unreasonable; and to the argument that it was unfair, he said he thought it was quite sufficient answer that those who got the discount had contributed largely to the purchase and construction of these waterworks, to which those who were exempt from taxation had contributed nothing, and that he thought practically that what was claimed by the defendants was a discrimination in their favour.

THE EARL OF SELBORNE: It practically makes those to whom the discount is not allowed pay twice as much as anybody else for water?

Mr. Robinson: It does. You must remember this is not for the support of the government in any general sense. It is the payment for the expense of and in support of this particular matter. The waterworks have been built at the expense of several millions of dollars, contributed by the general ratepayers.

THE EARL OF SELBORNE: There seem to be two points: one, whether it was a tax; and the other, whether they could allow a discount in favour of some favoured persons.

Mr. Robinson: The question of reasonableness is said in the judgment not to arise. It is not admitted, but it is said that the question of the reasonableness or unreasonableness of what we are doing does not arise, but that, as a matter of law, we are bound to treat all people equally, both in what we charge and in what we allow by way of discount, and that the fact of their not contributing anything—by which, in point of fact, they get the water for much less than the others do—has nothing to do with the question.

THE EARL OF SELBORNE: Other city taxes ought not to be taken into account, surely, in this question about the water rate.

Mr. Robinson: Suppose, for instance, other people, not including these people who are exempt from taxation, had paid half the cost of the waterworks, it would be very reasonable to say to them: "You, having done that, shall get the water at a cheaper rate than those who have done nothing towards the cost of the waterworks." That is, in substance, the state of the case here. In the Court of Appeal it was unanimously decided in favour of the city, affirming the judgment of the trial judge. In the Supreme Court that judgment was reversed, the late Mr. Justice Patterson dissenting, and saying that he could see no reason to doubt the correctness of the judgment. The judge who delivered the judgment of the Supreme Court was Mr. Justice Gwynne. I put it on the broad ground that I have stated. It is, of course, a matter of the gravest importance, for this reason, that it necessitates the readjustment of the waterworks; that is to say, if we are to receive £10,000 or £20,000 less each year by way of revenue from the waterworks by being compelled to allow this discount, of course it must be charged *pro rata* on others; and, although this decision involves only a comparatively small amount, it does practically involve an annual sum of about $54,000. That is, I think, all that is to be said.

LORD HOBHOUSE: What were the grounds which the Supreme Court put it upon?

Mr. Robinson: The judgment of the Supreme Court put it simply on the ground of equality; that is to say, they said: "You must charge the same price to all."

THE EARL OF SELBORNE: The action was only brou ht to recover an alleged overpayment on account of the discount not being allowed for the government buildings; so that, in truth, the only question is whether it was *intra vires* to charge the government 100 per cent. in circumstances under which other people were only charged fifty per cent.

Mr. Robinson: I submit it cannot be *ultra vires* to do that, under the circumstances.

THE EARL OF SELBORNE: Where is the authority to deal unequally? It says: "To make by-laws for the general management of the waterworks, and for the collection of the water rents and rates, and for fixing the time and times of payment, and when the same shall be payable, and for allowing a discount for prepayment." All the other terms of that clause imply that all people are to be treated equally, and without partiality or preference; do they not?

Mr. Robinson: I have read to your lordships the exact words of the statute, which sa , substantially, the Board of Commissioners for the time being shall regulate the distribution and use of water in all places, and for all purposes where the same may be required, and from time to time shall fix the price for the use thereof.

THE EARL OF SELBORNE: Does it mean they may charge A. B. different terms from C. D.?

Mr. Robinson: No.

THE EARL OF SELBORNE: Can they give a preference under those words to a particular individual, or to a class of persons?

Mr. Robinson: I submit that it is reasonable to do so, and, if it does not result in any real irregularity, they have a right to do so.

THE EARL OF SELBORNE: How can it be reasonable if we are to have regard to the question of supply of water, apart from everything else? They might say they were entitled to charge a particular individual for some reason which they thought sufficient at a greater rate than any others. How can it make a differnce whether it is a public body, or the Crown, or individuals?

Mr. Robinson: None; except that, not being a public body, they are exempt from taxation, and thus have contributed nothing.

THE EARL OF SELBORNE: I want to see whether that is a good ground. I want to see what the other taxation has to do with this legislation. Is there any reference in this water legislation to other city taxes?

Mr. Robinson: No; what it has to do with it is that the other taxation, to which these bodies have contributed nothing, went, to a large extent, in fa , to provide these waterworks.

THE EARL OF SELBORNE: Surely that is a thing which comes out of the general funds which come into their hands for this purpose, to supply water. I understand you to say that the Crown is exempt from taxation upon the principle that the taxing acts do not affect the Crown?

Mr. Robinson: The Crown is a very small unit in the number of people exempt from taxation. We exempt all educational institutions, and a vast number of others.

THE EARL OF SELBORNE: It is an indirect way of making them pay taxes from which they are exempt, is it not?

Mr. Robinson: I can only put it as I have put it.

THE EARL OF SELBORNE: That is the sole question. Two courts have decided that point in your favour. The Supreme Court reversed their decision and decided it against you.

Mr. Robinson: Yes. The result is far-reaching. The city have proceeded on the principle that they are at liberty to make such arrangements as may seem reasonable with regard to the price of water. Take large factories, for instance. It is an object with them to induce people to take water. I believe they have felt themselves at liberty to make special arrangements with very large factories taking a very large quantity. If they are not allowed to do anything of that sort, but must treat all equally, of course it makes a very material difference.

LORD MORRIS: What does it say about rebate?

THE EARL OF SELBORNE: They might by a by-law allow discount for prepayment. That is the language of the Act of Parliament. I should suppose that they ought to have one equal rate applicable to all consumers of water.

Mr. Robinson: I think I have stated the precise point.

Mr. Biggar and *Mr. Gore* were not called upon.

(Their lordships deliberated for a few minutes.)

THE EARL OF SELBORNE: Their lordships are of opinion that the judgment is so plainly right that leave to appeal ought not to be given in accordance with the rule laid down in the case of the *La Cite de Montreal* v. *Les Ecclesiastiques du Seminaire de St. Sulpice de Montreal*, 14 App. Cas. 660.

Mr. Gore: I am instructed to ask for the costs of the opposition to the petition.

THE EARL OF SELBORNE: Yes.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

Div'l Court.] [Sept 16.

ALDRICH *v.* ALDRICH.

Division Court—Jurisdiction—Action on a Superior Court judgment for alimony—R.S.O., c. 51, s. 70 (b).

Judgment of FERGUSON, J., reported 23 O.R., at p. 374, affirmed.

The Division Court Act, R.S.O., c. 51, s. 70, class (*b*), gives jurisdiction to those inferior courts upon all claims of debt where the claim does not exceed

$100. Debt thus generally used is sufficient to mean judgment debt, which is the highest of all debts.

Per BOYD, C.: There was no splitting of demands in the present claim within the mischief of section 77 of the Division Courts Act. The claim for taxed costs is different and severable from the accruing claims for the gales or instalments of alimony, and forms of itself an entire and distinct claim of debt, or in the nature of debt.

Per MEREDITH, J.: The claim was made upon the whole sum payable for alimony as well as costs when the action was brought, the excess being abandoned.

The action for alimony is in this province based upon statute, and the ordinary proceedings and process for enforcing the claim and judgment are the same as for enforcing legal claims and judgments thereupon.

H. T. Beck for the appellant.

W. R. Riddell, contra.

Div'l Court.] [Sept. 9.

MORRIS *v.* THARLE.

Lien—Mechanics' lien—Prevenient general arrangement—Subsequent definite contracts—Filing of lien—Time.

Where there appeared to have been a prevenient general arrangement, though not by way of binding agreement, between the contractor and supplier of builders' material, whereby the former undertook to get all the material needed for the building of certain houses from the latter, so that though the quantities and prices were not defined until subsequent orders were given and deliveries made, still the entire transaction was linked together by the preliminary understanding on both sides.

Held, that a lien filed in January for all material so supplied was in time, although a part of the material was supplied under written contract as far back as the beginning of the previous November.

A. Macnab for the motion.

J. Haverson for the defendant Ryan.

Div'l Court.] [Sept. 16.

JOHNSTON *v.* EWART.

Slander and libel—Real intention of slanderous words—Judge and jury—Misdirection.

Action of slander for saying of the plaintiff, "You are a perjured villain, and I can put you behind the bars; you are a forger, and I can prove it."

The trial judge left it to the jury to say whether in their opinion the defendant was really charging the plaintiff with having committed the crimes mentioned.

Held, misdirection, and new trial ordered. What should have been left to the jury was, whether or not the circumstances were such that all the bystanders would understand that the defendant did not mean to charge the

plaintiff with the commission of crimes according to what he, the defendant, actually said—the undisclosed intention of the defendant in this respect having nothing to do with the question, and being wholly immaterial.

Heyd and *Williams* for the plaintiff.

Fullerton and *Segsworth* for the defendant.

Div'l Court.]

PEARCE *v.* SHEPPARD.

Negligence—Agister of horses—Bailee for hire—Liability—Onus.

Held, that the judgment of nonsuit in this action must be set aside and a new trial ordered.

The action was for damages for injuries received by the plaintiff's mare through the alleged negligence of the defendant, who had received her on a contract of summer-agistment, *i.e.*, to permit her to graze and depasture on his ground. The mare fell through the plank covering of a well in the defendant's yard, to which yard there was access out of the field in which the mare was at pasture.

Per BOYD, C.: Persons who take horses or cattle for hire into their fields to graze during the summer, or into their barn or stockyards to feed during the winter, are responsible for accidents to them which they could reasonably guard against, and slight evidence of want of proper care may be sufficient for this purpose. The test is not necessarily the care which the agister may exercise as to his own animals, for they may be accustomed to a place of danger to which a strange horse would be unused, and he may choose to take risks as to his own property which would be unwarrantable as to that of another for which he is to be paid. The test in general is not what any particular man does, but what men as a class would do with similar property as a class.

Per FERGUSON J.: The degree of diligence required by law of the defendant was what is called and known as ordinary diligence. A person receiving a horse to pasture for hire is only bound to the use of reasonable care of the property, and only becomes liable for loss or injury to such property where there is a want of such reasonable care. In this case the plaintiff gave sufficient evidence to cast the onus on the defendant to show that the mare was killed without any want of reasonable diligence on his part, and the case should not have been withdrawn from the jury.

Per MEREDITH, J., dissentiente: An agister is not an insurer. He is bound to take reasonable care, but the onus of proof or neglect of such his duty by the defendant was on the plaintiff; and the evidence given in this case that the mare broke through the well and was killed, and that some of the boards which formed part of the covering of the well appeared afterwards to be rotten, was not sufficient evidence of want of reasonable care on the defendant's part to make him answerable in damages for the loss which the plaintiff sustained by the death of his horse.

Certainly such evidence was not enough without some evidence that the defendant knew, or, in the exercise of ordinary care, might have known of the insecurity of the well.

Lynch-Staunton for the plaintiff.

J. W. Nesbitt, Q.C., for the defendant.

Common Pleas Division.

Div'l Court.] [March 4.

ROBERTSON *v.* GRAND TRUNK RAILWAY CO.

Railways—Special contract limiting liability—Validity of.

The plaintiff, on shipping a horse by defendants' railway, signed a document called a "Live Transportation Contract," which stated that the company received the horse for transport at the special rate of $7.20; and in consideration thereof it was mutually agreed that defendants should not be liable for any loss or damage, etc., except in case of collision, etc., and should in no case be responsible for an amount exceeding $100 for each or any horse, etc., transported. In a collision caused by the negligence of the defendents the horse was killed.

Held, that the agreement constituted a special contract limiting the defendants' liability to the amount named; and that s. 246, s-s. 3 of the Railway Act, 51 Vict., c. 29 (D.), did not apply so as to prevent the defendants from claiming the benefit of the contract where the negligence was proved.

Vogel v. *Grand Trunk R.W. Co.*, 2 O.R. 197; 10 A.R. 162; 11 S.C.R. 612; and *Bate* v. *Canadian Pacific R.W. Co.*, 14 O.R. 625; 15 A.R. 388, considered.

Collier for plaintiff.

Osler, Q.C., and *Wallace Nesbitt* for defendants.

Div'l Court.] [June 24.

REGINA *v.* BURK.

Criminal law—Speedy Trials Act—Bail surrendering—Right to elect to be tried summarily—Subsequent indictments quashed—Several offences—Valuable security.

The surrender of defendants out on bail, including the surrender by a defendant himself out on his own bail, committed to gaol for trial, has the effect of remitting them to custody, and enables them to avail themselves of the Speedy Trials Act, 52 Vict., c. 47 (D.), and to appear before the county judge and elect to be tried summarily; and where defendants had so elected indictments subsequently laid against them at the assizes were held bad and quashed, even after plea pleaded where done through inadvertence, 143 of R.S.C., c. 174, not being in such case any bar.

Two indictments were laid against defendants, one for conspiracy to procure W. to sign two promissory notes; and the other for fraudulently inducing W. to sign the documents, representing them to be agreements, whereas they were, in fact, promissory notes:

Held, that several offences were not set up in each count of the indictments; that it was no objection to the indictments that the notes might not be of value until delivered to defendants; and, further, that under s. 78 of R.S.C., c. 164, an indictment would lie for inducing W. to write his name on papers which might afterwards be dealt with as valuable securities.

Rex. v. *Danger*, 1 Dears. & B. 307; 3 Jur. N.S. 1011; *Regina* v. *Gordon*, 23 Q.B.D. 354, considered.

G. Lynch-Staunton for the defendants.

J. A. Cartwright, Q.C., *contra.*

Div'l Court.] [June 24.

REGINA *v.* MCGARRY.

Intoxicating liquors—Sale of liquors—R.S.O., c. 194, s. 131—Search warrant—Sufficiency of place to be searched and persons to make it.

A search warrant issued under section 131 of The Liquor License Act, R.S.O., c. 194. After reciting an information laid by a police inspector that there was reasonable ground for the belief that spirituous, etc., liquor was being unlawfully kept for sale or disposal contrary to the said Act in a certain unlicensed house or place, namely, in the house and premises of the Toronto Industrial Exhibition Association, directed the city license inspector, city constables or peace officers or any of them, to search the said house and premises and every part thereof, or of the premises connected therewith. In attempting to search defendant's booth, which was described as being under the old grand stand on the exhibition premises, a police sergeant who accompanied the inspector was obstructed by defendant. The evidence did not show there was any other booth on the premises.

Held, that the warrant was valid, that it was sufficiently definite as to the place to be searched, and the persons directed to make it.

DuVernet for the applicant.

J. A. Cartwright, Q.C., *contra.*

Div'l Court.] [June 24.

HARRISON *v.* BURK.

Specific performance—Contract for exchange of land—Alteration of—Married woman—Separate estate—Statute of Frauds—Parol evidence to identify land—Admissibility.

After a contract for the exchange of lands had been executed by the parties, the vendor being a married woman, the contract was altered by interlining the words "stock and" before the lands to be taken by the vendor in exchange.

Held, that in the absence of express notice to the wife and authority from her to make the alteration, or ratification by her, specific performance of the contract could not be decreed against her.

The separate property, the subject of the exchange, though the only separate estate owned by the wife, was sufficient for the maintenance of the action to enforce the contract or to satisfy damages for the breach thereof, and any after-acquired property would also be bound.

Per MACMAHON, J. : If the defendant had ratified her husbands acts, parol evidence would have been admissible under the circumstances to identify the stock, but not the lands to be given in exchange.

Hilton for the plaintiff.

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

Div'l Court.] [June 24.

REGINA *v.* HOGARTH.

Justice of the peace—Summary Trials Act—Trial of defendant for felony without consent—Conviction—Quashing.

The defendant, on being charged before a stipendiary magistrate with felonious assault, pleaded guilty to a common assault, but denied the more serious offence. The magistrate, without having complied with the requirements of section 8 of the Summary Trials Act, R.S.C., c. 176, by asking the defendant whether he consented to be tried before him or desired a jury, proceeded to try and convicted the defendant on the charge of the felonious assault.

Held, that the defendant was entitled to be informed of his right to trial by a jury, and that the conviction must be quashed.

Where a statute requires something to be done in order to give a magistrate jurisdiction, it is advisable to show on the face of the proceedings a strict compliance with such direction.

Douglas Armour for the applicant.

A. H. Marsh, Q.C., for the magistrate.

Middleton for the private prosecutor.

Practice.

Chy. Div'l Court.] [Sept. 9.

IN RE BRAZILL AND JOHNS.

Division Court—Prohibition—Time for application—Application for new trial.

Appeal from the decision of MEREDITH, J., dismissing an application for prohibition to a Division Court judge.

The defendant in the Division Court action had filed a notice disputing the jurisdiction. Judgment had, however, been given to the action against him in his absence, and he had applied for and obtained a new trial.

Held, that the want of jurisdiction being clear, prohibition should be granted.

The right to prohibition existing, it is optional with the defendant to apply at the outset of the Division Court proceedings, or he may wait till the latest stage of appeal, so long as there is anything to prohibit.

Kilmer for the defendant appellant.

McBrady for the plaintiff.

Chy. Div'l Court.] [Sept. 9.

OWEN SOUND BUILDING AND SAVINGS SOCIETY *v.* MUIR.

Libel and slander—Statement that directors of a company were improperly appointed—Libel on the company.

Action of libel. The defendant published an article in which he wrote that the directors of the plaintiff's company were self-appointed men, and that by reason of such unlawful, illegal, and irregular appointing they were unable to transact the business of the company.

Held, affirming the decision of ROSE, J., that this was a libel on the company.

Aylesworth, Q.C., for the defendant appellant.

Masson, Q.C., for the plaintiffs.

Chy. Div'l Court.] [Sept. 16.

FORD *v.* MASON.

Solicitor's lien—Change of solicitors—Fund in court—Priorities.

In an action for an account against a trustee, the plaintiffs changed their solicitor during the course of the action. Before the change the first solicitor obtained a judgment of reference, and, on the defendant's consent, an order for payment into court by the defendant of $250, which he paid in after the change, subject to further order and to a claim for commission. Nothing was done by the second solicitor to procure the payment in. The second solicitor then conducted the reference and brought the action to an end, with the result that the $250 was freed from all claims for commission, and left absolutely as money recovered for the plaintiffs.

Held, per BOYD, C., in Chambers, that the fund in court had been directly "created" by the exertions of the first solicitor, and that he had a first charge upon it therefor.

Upon appeal to a Divisional Court,

Held, per FERGUSON and MEREDITH, JJ., that the general rule is that the solicitor who conducts the action to a successful termination is entitled to be paid first.

But, *per* FERGUSON, J., that the $250 should be considered as paid in immediately upon the order being made; and the general rule does not apply to a case like this, where the first solicitor has virtually preserved and recovered a fund by his exertions, and has not abandoned his right to a lien, or been paid.

Per MEREDITH, J.: That the fund was not "created" by the first solicitor; and there was nothing in the circumstances to take this case out of the general rule.

Cormack v. *Beisly*, 3 DeG. & J. 157, and *Re Knight*, (1892) 2 Ch. 368, discussed.

Kappele and *M. Malone* for the plaintiffs.

Hoyles, Q.C., for the first solicitor.

MACLENNAN, J.A.] [Sept. 19.

FERGUSON *v.* COUNTY OF ELGIN.

Contempt of court—Disobeying injunction—Motion to quash appeal.

The fact that a party to an action is in contempt is no bar to his proceeding with the action in the ordinary way, but only to his asking the court for an indulgence.

And where the defendants received certain moneys in disobedience to an interim injunction, which was made perpetual by the judgment at the trial, a motion by the plaintiff to quash the defendants' appeal from the judgment was refused.

James A. McLean for the plaintiff.

W. H. Blake for the defendants.

MASTER IN CHAMBERS.] [Sept. 20.

CODD *v.* DELAP.

Security for costs—Plaintiff leaving jurisdiction to avoid arrest.

Where the plaintiff after the commencement of the action left the province to escape arrest under orders of committal for comtempt of court in other actions, he was ordered to give security for costs.

G. G. Mills for the plaintiff.

Bristol for the defendants.

MASTER IN CHAMBERS.] [Sept. 21.

MILES *v.* BROWN.

Costs—Executors—Mortgage action—Personal order.

Where an action to enforce a mortgage by foreclosure is brought against the executors of a deceased mortgagor, and an order for payment of the mortgage debt is, in addition, asked against the executors, only the additional costs occasioned by the latter claim should be taxed against the executors personally.

Boland for the plaintiff.

T. W. Howard for the defendants.

ROSE, J.] [Sept. 25.

BARRY *v.* HARTLEY.

Costs—Taxation—Discontinuance—Rule 641.

Where the plaintiff serves notice of discontinuance under Rule 641, the defendant is entitled to a reasonable time within which to apply for an appointment to tax his costs, and until after the lapse of that time an appointment will not be granted to the plaintiff, even where he is entitled upon the final taxation to tax interlocutory costs, which may exceed the defendant's general costs.

Under Rule 641 it is not necessary for the plaintiff to ascertain the amount of the defendant's costs, and pay them, to make the notice of discontinuance effectual.

George Ross for the plaintiff.

G. G. Mills for the defendant.

[Sept. 28.

GALT, C.J.] CARTER *v.* CLARKSON.

Parties—Misjoinder—Demurrer—Mortgage action—Heirs-at-law of deceased mortgagor.

Since the Judicature Act the proceeding by demurrer for misjoinder of parties is no longer available.

Werderman v. *Société Générale D'Electricaté*, 19 Ch. Div. 246, followed.

In an action upon a mortgage of foreclosure, immediate payment, and immediate possession, the plaintiff joined as defendants the heirs-at-law of the deceased mortgagor (who died after the Devolution of Estates Act), with the administrator of the real and personal estate. One of the heirs-at-law demurred to the statement of the claim on the grounds that the administrator represented the estate in all regards, that the heirs-at-law were not bound by any covenants of the deceased, and that no relief was claimed or could be granted against them.

Held, that the demurrer was, in effect, one for misjoinder of parties, and that the proper remedy was a motion under Rule 324 (*a*) to strike out the name of the demurring defendant.

W. R. Riddell for the demurrer.

W. D. Gwynne, *contra.*

[Oct. 6.

ROSE, J.] CHRISTIE *v.* CITY OF TORONTO.

Third party—Directions as to pleading and trial—Costs—Rules 328-332.

Where a third party was called upon by the defendants for indemnity, and appeared; and, upon a motion by the defendants under Rule 332, an order was made against the plaintiff's objection, directing that the third party might deliver a defence to the plaintiff's claim against the defendants, and a defence to the defendants' claim for indemnity, and that the question of indemnity between the defendants should be tried after the trial of the plaintiff's action, as the trial Judge might direct, all costs being reserved;

Held, that the order was within the powers conferred by Rules 328-332, and was a proper order to make under the circumstances of the case.

Kilmer for the plaintiff.

W. C. Chisholm for the defendants.

W. R. Smyth for the third party.

[Oct. 9.

BOYD, C.] EXLEY *v.* DEY.

Receiver—Injunction—Equitable execution—Promissory note—Attachment of debts.

After the discharge of the attaching order in this case, *ante* p. 542, the plaintiff, two days before the maturity of the promissory note in question, obtained a new order attaching the same debt, making the holder of the note and the makers garnishees.

Upon a motion for payment over by the garnishees, or for alternative relief, an order was made appointing the plaintiff receiver of all moneys due or

accruing due upon the note, to apply on the judgment, and restraining the garnishees from paying out the moneys otherwise and from parting with the note.

Hyam v. *Freeman*, 35 Sol. J. 87, followed.

C. J. Holman for the plaintiff.

Middleton for the defendant.

BOYD, C.] [Oct. 10.

WEISER *v.* HEINTZMAN.

Discovery—Defamation—Examination of defendant—Privilege—Criminating answers—R.S.O., c. 61, s. 5—56 Vict., c. 31, ss. 2, 5 (D.).

The Ontario statute as to evidence, R.S.O., c. 61, s. 5, limits the scope of all preliminary examinations for discovery or otherwise in civil actions.

Jones v. *Gallon*, 9 P.R. 296, followed.

It has not been affected by s. 5 of the Dominion statute, 56 Vict., c. 31, which, by necessary constitutional limitations, as well as by express declaration (s. 2), applies only to proceedings respecting which the Parliament of Canada has jurisdiction.

The language used in the previous decision in this case, 15 P.R., at p. 260, *sub fin.*, is too broadly expressed, in the absence of concurrent Ontario legislation. And therefore a defendant, upon his examination for discovery in an action for defamation, cannot, even since the coming into force of 56 Vict., c. 31, be compelled to answer questions which may tend to criminate him.

Tytler for the plaintiff.

Kilmer for the defendant.

MACLENNAN, J.A.] [Oct. 11.

CANADIAN BANK OF COMMERCE *v.* TINNING.

Judgment—Effect of—Creditors' action—Settlement.

Before judgment in an action by a creditor, on behalf of himself and all other creditors, to set aside a fraudulent conveyance, the actual plaintiff may settle the action on any terms he thinks proper, and no other creditor can complain; but where judgment has been obtained by the plaintiff, it enures to the benefit of all creditors, and the defendants cannot get rid of it by settling with the actual plaintiff alone. If they should do so, any other creditor would be entitled to obtain the carriage of the judgment and to enforce it; and if, upon appeal from the judgment, the actual plaintiff refused to support it, the court would give the other creditors an opportunity of doing so before reversing it.

W. H. Blake for all parties.

Appointments to Office.

SUPREME COURT JUDGES.

The Honourable George Edwin King, one of the Judges of the Supreme Court of the Province of New Brunswick, to be a Puisné Judge of the Supreme Court of Canada, in the room and stead of the Honourable Christopher Salmon Patterson, deceased.

DEPUTY CLERK OF THE CROWN, CLERK OF THE COUNTY COURT, AND REGISTRAR OF THE SURROGATE COURT.

County of Prince Edward.

William Henry Richey Allison, of the Town of Picton, in the County of Prince Edward, Esquire, one of Her Majesty's Counsel learned in the Law, to be Deputy Clerk of the Crown and Pleas, Clerk of the County Court, and Registrar of the Surrogate Court in and for the said County of Prince Edward, in the room and stead of John Twigg, Esquire, deceased.

CORONERS.

County of York.

William Archibald Young, of the City of Toronto, in the County of York, Esquire, M.D., to be an Associate-Coroner within and for the said County of York.

DIVISION COURT CLERKS.

County of Wellington.

Thomas Young, of the Village of Erin, in the County of Wellington, Gentleman, to be Clerk of the Fifth Division Court of the said County of Wellington, in the room and stead of William Tyler, deceased.

County of Perth.

Francis Wellington Hay, of the Town of Listowel, in the County of Perth, Gentleman, to be Clerk of the Sixth Division Court of the said County of Perth, in the room and stead of W. J. Hay, resigned.

District of Manitoulin.

John Carruthers, of the Village of Little Current, in the District of Manitoulin, Esquire, M.D., to be Clerk of the Second Division Court of the said District of Manitoulin, in the room and stead of Herman Currie, resigned.

District of Muskoka.

Frederick D. Stubbs, of the Village of Port Carling, in the District of Muskoka, Gentleman, to be Clerk in the Fourth Division Court of the said District of Muskoka, in the room and stead of R. G. Penson, resigned.

County of Brant.

Walker E. Hooker, of the Village of Scotland, in the County of Brant, Gentleman, to be Clerk of the Fifth Division Court of the said County of Brant, in the room and stead of J. Ralph Malcolm, resigned.

County of Dufferin.

Francis G. Dunbar, of the Village of Shelburne, in the County of Dufferin, Gentleman, to be Clerk of the Second Division Court of the said County of Dufferin, in the room and stead of Alexander McLachlan, deceased.

DIVISION COURT BAILIFFS.

District of Parry Sound.

Joseph Wilson, of the village of Maganetawan, in the District of Parry Sound, to be Bailiff of the Fifth Division Court of the said District of Parry Sound, in the room and stead of W. E. Kennedy, resigned.

County of Essex.

Charles F. Cornetett, of the Village of Belle River, in the County of Essex, to be Bailiff of the Sixth Division Court of the said County of Essex, in the room and stead of Joseph A. Lupien, resigned.

District of Muskoka.

Edward Milner Davidson, of the Village of Port Carling, in the District of Muskoka, to be Bailiff of the Fourth Division Court of the said District of Muskoka, in the room and stead of Roger Mahon, resigned.

COMMISSIONERS.

State of California (U.S.).

Walter Scott Williams, of the City of Berkeley, in the State of California, one of the United States of America, Gentleman, Attorney-at-Law, to be a Commissioner for taking affidavits within and for the said State of California, and not elsewhere, for use in the Courts of Ontario.

LOCAL MASTERS OF HIGH COURT.

County of Grey.

John Creasor, of the Town of Owen Sound, in the County of Grey, Esquire, Judge of the County Court of the County of Grey, to be a Local Master of the Supreme Court of Judicature for Ontario, in and for the said County of Grey, in the room and stead of Alfred Frost, Esquire, deceased.

LOCAL MASTER OF TITLES.

District of Rainy River.

Frank Joseph Ap'John, of the Town of Rat Portage, in the District of Rainy River, Esquire, to be Local Master of Titles for the said District of Rainy River.

HIGH COURT JUDGES.

County of Middlesex.

Edward Elliott, of the Town of Perth, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-Law, to be Junior Judge of the County of Middlesex, in the Province of Ontario, *vice* Joseph Frederick Davis, deceased.

COMMISSIONER FOR TAKING AFFIDAVITS.

Colony of Victoria (Australia).

Horatio Samuel Vincent Busst, of the City of Bendigo, in the Colony of Victoria, Australia, Esquire, mining registrar, to be a Commissioner for taking affidavits within and for the said Colony of Victoria, and not elsewhere, for use in the courts of Ontario.