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DIARY FOR FEBRUARY.

1. Sun........*Septuagesima Sunday.*
2. Mon.......Hilary Sittings of Com. Law Divisions, H. C. J., begin.
7. Sat........Hagarty, C.J., C.P., sworn in, 1856.
8. Sun........*Sexagesima Sunday.*
11. Wed......Lord Sydenham, Gov.-Gen. of Canada, 1840.
14. Sat........Hilary Sittings of Com. Law Divisions, H. C. J., ends.

TORONTO, FEBRUARY 1, 1885.

WE publish in another column a very interesting letter from a correspondent in New York as to the legal profession there, and as to how far it can be said to be a good opening for aspiring Canadians. We recommend it especially to the perusal of law students. There is a large crop of them gathered in this year, and as Canadians are very properly highly appreciated in the United States some of them might do well to think over the information given.

WE accidentally heard the other day such an excellent, though indirect compliment paid to the Chancellor, that we cannot resist repeating it for the benefit of our readers. Two of the shorthand reporters were wrangling as to which of them should go on the Eastern Circuit of the Chancery Division. "Why," said a bystander, "what difference does it make to you, which of you goes the Eastern Circuit?" "That's all you know about it," replied the reporters, "the Chancellor's going the Eastern Circuit, and that means a day and a-half's work each day, and no copies of evidence wanted."

RECENT ENGLISH DECISIONS.

PROCEEDING to consider the December number of the Q. B. D., vol 13, pp. 693-878, the first part of it will be found to consist chiefly of bankruptcy cases, and there is nothing which appears to require noting here until *Read* v. *Anderson*, at p. 779, is reached.

PRINCIPAL AND AGENT—REVOCATION OF AUTHORITY.

This case illustrates the effect which the fact that a revocation of the authority of an agent by his principal may involve the agent, though not in any legal liability, yet in loss of business and great inconvenience, may have as evidence that it was a part of the contract of employment between the principal and the agent, that the authority of the agent should not be revoked under the given circumstances. In this case the plaintiff was a betting agent, and made bets at the request of the defendant, who gave him authority to pay and receive money, but in his own name; and after the bets had been made and lost, the defendant revoked the authority to pay them. The question was whether he had the right so to revoke. Of course the revocation did not involve the agent in any legal liability for the lost bets, because the payment of bets cannot be enforced by law; but it was shown that if the agent failed to pay the bets, he would be unable afterwards to pursue, what Brett, M. R., calls his "objectionable business" as a betting agent. Under these circumstances the majority of the Court of Appeal held the authority to pay could not be revoked. The reasoning of the judgments appears from the following passage in the judgment of

Bowen, L. J., at p. 782:—"It is true that this is a transaction between a principal and an agent; there is a delegation of power to the agent; there is a mandate to the agent; and, subject to certain exceptions, a principal it is said may revoke a mandate which he has given. But there is something in this transaction beyond a mere mandate given or power delegated to an agent. There is a contract of employment between the principal and the agent, which expressly or by implication regulates their relations, and if as part of this contract the principal has expressly or impliedly bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business, he cannot be allowed to break his contract. What was the contract or bargain?" His lordship then refers to the circumstances of the case indicated above and continues: "What is the inference of fact to be drawn as to the true bargain between them? . . As an inference of fact, it seems to me that it was well understood to be part of the bargain that the principal should recoup his agent, and should not revoke the authority to pay, but should indemnify the agent against all payments made in the regular course of business. . . There is a great deal of apparent difficulty in this case, because the action relates to betting and wagering; but the contract sued on by the plaintiff is not a wagering contract."

APPELLATE COURT—FINDING OF FACT BY JUDGE.

There is also a *dictum* of Brett, M. R. in this case which it may be well to call attention to. "The learned judge," he says, at p. 781, "has found many of the questions in dispute as questions of fact, and it seems to have been thought that the Court of Appeal cannot dispute his findings; but the Court of Appeal is not bound by the findings of fact by a judge who tries a case without a jury."

MARRIED WOMAN—ACTION FOR TORT—47 VICT. C. 19 S. 2, SUB-SEC. 2.

Of the next case, *Weldon* v. *Winslow*, p. 784, it may be said briefly that it decides that by virtue of the section of the English Married Women's Property Act, 1882, which corresponds to sec. 2, sub-sec. 2 of our Married Women's Property Act, 1884, a married woman can be sued alone for a tort committed before the coming into operation of the Act. It was argued that this was giving the statute a retrospective operation, and affected the husband's right to reduce the damages recovered into possession. But it is pointed out in the judgments that the action was for a personal injury done to the plaintiff, and that according to the law of England the action was always the action of the wife, subject to the right of the defendant to insist on having the husband joined; and the objection as to damages, which the section declares shall be "her separate property," is met in a way indicated by the following passage in the judgment of Bowen, L. J., :—"It is not desirable to affect vested rights, but the words of the section seem to me to alter the capacity of the wife for purposes of procedure rather than to deal with the right of the husband, at least, until we come to the provision as to damages, and considering even that provision, I think the words fall rather on the side of the line of statutes dealing with procedure rather than of statutes affecting vested rights." It may seem a little difficult, however, to understand how it can be said that if such is the force of the section it does not amount to an interference with vested rights, if damages are thereby made the separate property of the wife, which would otherwise be capable to being reduced into possession by the husband and so becoming his property. And Fry, L. J., though he concurs with the other judges, says:—"I am not insensible to the difficulty of holding that the Act has made damages which before the

Act might have been reduced into possession by the husband, the separate property of the wife. But the words of the Act are too plain, and there is nothing to confine their operation to actions for torts committed after the Act came into operation." He also expresses his view, which must also have been the view of the other judges, that the rights of the husband are not protected by that section which corresponds to s. 22 of 47 Vict. c. 19, O.

EVIDENCE—PEDIGREE—FACTS CONSTITUTING PEDIGREE.

At p. 818 comes what is probably the most valuable decision in the number, namely *Haines* v. *Guthrie*, first because it is a categorical decision of the Court of Appeal that though in cases of pedigree hearsay evidence is, contrary to the general rule, admissible to prove pedigree, yet nevertheless hearsay evidence is not admissible to prove such facts as birth, death, and marriage for purposes other than proving pedigree, although these are the facts which constitute a pedigree; and, secondly, because it contains a long judgment of Stephen, J., discussing the law as to the admissibility of hearsay evidence in pedigree cases. The facts of the case are simple. The action was for the price of certain horses, sold by the plaintiff to the defendant, and the defence was that at the time of sale the defendant was under twenty-one years of age. The evidence of this fact tendered was a declaration in an affidavit by the deceased father of the defendant as to the date of the defendant's birth. The question was whether this evidence was admissible. The Court of Appeal, affirming the decision of the Queen's Bench Division, held that it was inadmissible, as Bowen, L. J., says, p. 831:—"The exact point is that in such an action as the present, and on such an issue, the declaration of a deceased person is not admissible; for the question at issue is not a question of family, but merely as to the age of a particular young man:" or, in the words of Brett, M. R.:—"What the family of the defendant is is immaterial; whose son he is is immaterial; whether he is a legitimate or an illegitimate son is immaterial, and whether he is an elder or a younger son is immaterial. No question of family is raised in the case." It may be remarked that Brett, M. R., cites at length the passage from *Sturla* v. *Freccia*, 5 App. Cas. 623, wherein Lord Blackburn enumerates the exceptions to the general rule that hearsay evidence is inadmissible, and adds at p. 830:—"I think Lord Blackburn intended to make an exhaustive definition of the exeeptions to the rule against the admission of hearsay evidence, and he distinctly states that "in questions of pedigree" the statements of deceased members of the family " are evidence *to prove pedigree*."

CONTRACT—ARBITRATION CLAUSE—"DISPUTE ARISING ON THIS CONTRACT."

The last case necessary to notice here in this number is *Hutcheson & Co.* v. *Eaton & Son*, p. 861. In this case it appeared that in a written contract by which the defendants sold to the plaintiffs a cargo of cotton-seed cake of a specified quality, there was a clause that "should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance, together with any dispute arising on this contract, is to be settled by arbitration." The cargo proved of inferior quality, and an arbitration was had to determine the liability of the defendants. The arbitrators decided by their award that the defendants were not liable, inasmuch as it appeared that the defendants signed the contract with the addition of the word "brokers," and, after the contract was signed, named their principals; and the arbitrators found by their award that a custom existed that a broker, upon naming his principals, ceased to be liable on the contract. The Court of Appeal now held that this award was

no defence to an action brought to recover damages in respect of the inferior quality of the cargo, inasmuch as by their finding as to the custom the arbitrators had exceeded their jurisdiction. Brett, M. R., says at p. 866:—"Now the question is, had they (the arbitrators) any jurisdiction to inquire into the existence of that custom or not? Can a question whether a custom is to be added to the written contract, and thus to control the meaning of this contract, be held to be "a dispute arising upon this contract?" It seems to me that it cannot. . . . The only matter which they had authority to decide was any question arising on the contract itself; but they have taken on themselves to decide what the contract was, in order to give themselves jurisdiction to decide what the rights of the parties were. As far as I am aware, no case has decided that an arbitrator who has authority to decide a dispute arising on such a contract as this which is specified and described, has also authority to say what the contract is, in this sense, that he has a right to add something to the contract which is not expressed in it. I think he cannot do that. What the arbitrators have really done here, is by their own decision to attempt to give themselves a jurisdiction which otherwise they had not." Bowen, L.J., speaks to the same purport. Fry, L.J., however, dissents from his two colleagues. He says, p. 870:—"It appears to me that before an arbitrator can determine a dispute upon the contract he must be able to determine what is the contract, because otherwise it is impossible to determine the rights of the parties on the contract."

SIGNING CONTRACT AS "BROKERS."

Another point decided in this case requires notice. The defendants signed the contract in question thus:—"W. Eaton & Son, brokers," and it was argued that they, having signed as brokers, were not personally liable. The M. R., however, says as to this:—"According to the authorities, as I understand them, when the contract is drawn up in this way, and the signature is of the name of the person, with "brokers" added, and the contract is not signed "as brokers," they are personally bound; for it is said to be a signature on their own behalf, and the word "brokers" is only a description. And, as to this, both Bowen, L.J., and Fry, L.J., appear to be of the same opinion.

A. H. F. L.

SELECTIONS.

UNDERTAKINGS AS TO DAMAGES

THE case of *Griffith* v. *Blake*, 53 Law J. Rep. Chan. 965, reported in the November number of the *Law Journal Reports*, decides a point of some importance in the law injunctions, and at the same time throws some light on the rather obscure subject of the undertaking as to damages given upon interlocutory injunctions. The plaintiffs in the action were a firm of solicitors at Cardiff, who unfortunately had very noisy neighbours in the shape of certain iron-workers. The process technically known as "blocking tin plates" was found seriously to distract the attention of those engaged in the drafting of deeds and the composition of letters to clients. A motion was accordingly made to restrain the operations of the neighbours as a nuisance, and Mr. Justice Chitty gave an interim injunction on the plaintiff undertaking to pay damages if the Court should think the defendants had sustained loss by the injunction. A motion was made in the Court of Appeal to rescind the order, and the appellant's counsel argued that if it should turn out that Mr. Justice Chitty was wrong in his law and that the tin-blocking was not legally a nuisance, the defendant would not be able to recover damages, and therefore the injunction ought to be taken off. He relied, as an authority for this proposition, on the case of *Smith* v. *Day*, L. R. 21 Ch. D. 421. Thereupon Lord

Justice Cotton, who was a party to the judgment in that case, disclaimed any concurrence in the view on that point expressed by the late Master of the Rolls. The learned Lord Justice repeated this view in giving judgment, and Lords Justices Baggallay and Lindley concurred. The appeal against Mr. Justice Chitty was affirmed on the ground that there was sufficient evidence of a nuisance, and the opinion expressed as to the undertaking in damages was only *obiter dictum;* still it was an opinion of great weight, and, at all events, destroys the authority of the *dictum* of the late Master of the Rolls already cited. The case, it is to be observed, was not reported in the *Law Journal Reports*, and ought not to have been reported at all, as it contained a mere *obiter dictum* of one judge from which another judge dissented, while the third judge, Lord Justice Brett, was neutral.

In the case referred to Sir George Jessel gave the history of the undertaking as to damages. He said that it was the invention of Lord Justice Knight-Bruce, and was originally only inserted in *ex parte* injunctions. It would, we think, have been better if it had never been extended. The undertaking for damages inserted in an *ex parte* application may be of use to protect the Court from misrepresentation, but to insert it when the Court has had the opportunity of hearing both sides seems to us to be totally out of place and contrary to the general principles by which the judgments of Courts ought to be guided. The Court ought to have sufficient confidence in its own judgment to give that judgment unconditionally, and ought not to call upon one of the parties to guarantee that its decision is right. If this is to be done in the case of injunctions, there is no reason in principle why it should not be done in any kind of case, and why a successful plaintiff should not always undertake to pay damages to the unsuccessful defendant in case it should turn out that, after all, the successful party ought not to have been successful. It is difficult to see how the practice which has sprung up can be defended in principle. However, the practice exists, and upon an interlocutory injunction, whether obtained *ex parte* or otherwise, the plaintiff always undertakes "to abide by any order the Court may make as to damages in case the Court should thereafter be of opinion that the defendant shall have sustained any by reason of the order which the plaintiff ought to pay." The case supposed is that of an interlocutory injunction being granted *inter partes* by the judge, and afterwards the judge alters his mind or the Court of Appeal reverses him, so that it appears that the injunction ought never to have been granted. In that case can it be said that the Court ought not "to be of opinion that the defendant has sustained damages?" If the defendant has suffered loss from the injunction, which ought never to have been granted, it is clear that he has sustained damages, and the Court ought to estimate them. The basis of the undertaking is that the injunction is the act of the party, and the party which illegally inflicts loss on another ought to be made to pay damages.

These considerations appear to us to be unanswerable in favour of the opinion now expressed by the Court of Appeal. To limit the application of the undertaking to the cases suggested by the late Master of the Rolls would be to disregard the terms of the undertaking. Sir George Jessel supported his opinion by remarking that "it is the duty of the judge to decide according to law, and the plaintiff cannot be considered as undertaking to be answerable for his not doing so." This appears to us to be an irresistible reason why the undertaking as to damages should not appear in the order *inter partes*, or why its terms should be modified, but to be no reason why according to the present practice the ultimately unsuccessful party should have to pay damages to the successful for having been partially successful. In fact, the practice, having gone so far, ought to go further. Why should not an undertaking in damages be given in respect of a final injunction when there is an appeal? It may be that the facts are not so fully ascertained on the interlocutory application as at the trial, but this cannot be said of the law. If there is any real doubt about the law the judge ought not to make an order for an interlocutory injunction at all, and his knowledge of law at the interlocutory hearing is the same as his knowledge of law at the trial. While, therefore, we agree with the Court of Appeal in its interpretation of the undertak-

ing as now given, we cannot help thinking that effect ought to be given to the views of the Master of the Rolls by confining the undertaking to cases in which there is a misrepresentation or suppression on the part of the applicant.—*Law Journal.*

REPORTS.

RECENT ENGLISH PRACTICE CASES.

LYELL V. KENNEDY.

Imp. O. 31, *r.* 12 (1883)—*Ont. R.* 222.

Discovery and production—Attempt to falsify claim for privilege—Affidavit of documents.

[27 Ch. D. 1.

Where in an answer to interrogatories, the party interrogated declines to give certain information on the ground of professional privilege, and the privilege is properly claimed in law, the Court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject-matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated.

The mere existence of a reasonable suspicion which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified.

A waiver of privilege in respect of some out of a larger number of documents, for all of which privilege was originally claimed, does not preclude the party from still asserting his claim of privilege for the rest. Although *prima facie* privilege cannot be claimed for copies of or extracts from public records or documents which are *publici juris*, a collection of such copies or extracts will be privileged when it has been made or obtained by the professional advisers of a party for his defence to the action, and is the result of the professional knowledge, research, and skill of those advisers.

LAWSON V. VACUUM BRAKE COMPANY.

Imp. O. 37, *r.* 5—*Ont. r.* 285.

Evidence—Examination of witnesses abroad.

Where it is sought to have a material witness examined abroad and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must show clearly that he cannot bring him to this country to be examined at the trial.

[27 Ch. D. 137.

BAGGALLAY, L.J.—There is no doubt the Court has jurisdiction to grant the application, but on what principles is that jurisdiction to be exercised? The Court, in considering an application of this nature, will no doubt take into consideration the difference between the expense of the witness being brought over to this country and of his being examined abroad, and the inconvenience, apart from the expense, which may be occasioned by compelling him to leave his occupation in a foreign country and come over to this country to be examined. But it appears to me that if an application is made (whether it is made by the plaintiff or by the defendants) for the examination of a witness abroad, instead of his attending in this country to give evidence at the trial, it is the duty of the party making that application, when making it, to bring before the Court such circumstances as will satisfy the Court that it is for the interest of justice that the witness should be examined abroad.

COTTON, L.J.—But I think that in a case of this sort, where it is important that the witness should be examined in Court, a heavy burden lies on the party who wishes to examine him abroad, to show clearly that he cannot be reasonably expected to come here.

PLATT V. MENDEL.

Foreclosure action—Mortgage—Subsequent incumbrancers—Period of redemption.

In a foreclosure action by the transferee of the first mortgage, the statement of claim alleged that the defendants other than the mortgagor claimed to have some charge upon the mortgaged premises subsequent to the plaintiff's charge. None of the defendants, including the mortgagor, put in a defence or appeared at the bar.

Held, that the plaintiff was entitled to a foreclosure judgment on the pleadings, allowing one period for redemption as against all the defendants.

[27 Ch. Div. 246.

CHITTY, J.—It is undoubted that in a simple case between mortgagor and mortgagee, and where there are no other incumbrances, the mortgagor has, whether he be defendant in a foreclosure action or plaintiff in a redemption action, six months, and six months only, to redeem. I put aside, of course, the cases in which by indulgence

he is allowed to come in after default made, and even sometimes in those peculiar cases where, after order absolute, he is allowed to come in, as in *Campbell* v. *Holyland*, 7 Ch. D. 166; but the established rule is that a mortgagor has six months, and six months only, to redeem, and undoubtedly, to my mind, it is an anomaly to say that a mortgagor by any dealings with the equity of redemption subsequent to the first mortgage should be able to gain for himself a right to a further time to redeem. . . . If, however, the defendants in a foreclosure action have put in a defence or appeared at the bar, and have proved their incumbrances, and there is no question of priority between them, it does appear that the course of the Court has been to make a judgment allowing successive periods for redemption, which, when examined in principle, will be found to be a judgment, not only in favour of the plaintiff, but a judgment as between the co-defendants. In order, to my mind, for the Court properly to make such a judgment as that, the defendants must appear, and either prove or have sufficient admission of their incumbrances in order to entitle the defendants asking for it to such a judgment as between the co-defendants. In my opinion, the mortgagor is not entitled to ask at all for such a judgment. It is the right of the *puisne* mortgagees.

HAMPDEN v. WALLES.

Order for payment into Court—Admission—Evidence.

Trust funds may be ordered to be brought into Court by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, and a recital to that effect contained in the settlement, his execution of which as trustee has been proved, although there is no formal admission in his pleadings or affidavits that he has received and holds the money.

[27 Ch. Div. 251.

CHITTY, J.—The late Master of the Rolls, in *London Syndicate* v. *Lord*, 8 Ch. D. 84, held that one mode of admission was as good as another. The old practice was not to order money into Court unless an admission was to be found in the answer. That practice was modified, and admissions in the proceedings were held to be sufficient.

LUMB v. BEAUMONT.

Imp. O. 50, *r.* 3—*O. J. A. r.* 398.

Inspection of property—Interlocutory order.

Under the above rules the Court has power to make an interlocutory order before trial, giving liberty to a plaintiff to enter upon land belonging to the defendant, and to excavate the soil thereof for the purposes of inspection.

[27 Ch. Div. 356.

FUSSELL v. DOWLING.

Imp. O. 17, *r.* 4 (1883)—*O. J. A. r.* 385.

Revivor—Discretion of Court—Expiration of time limited for appealing—Special circumstances.

By a marriage settlement the property of the wife was vested in trustees upon trust for the wife, for her separate use, and in case there should be no issue (which event happened) for the wife, her executors, administrators, and assigns, if she survived her husband, but if she died in his lifetime, then for the husband for his life, and subject thereto for the wife's next of kin. The marriage was dissolved in 1871, and in 1872 the wife, in a suit instituted by her against her late husband and the trustees of the settlement, obtained a decree that she was absolutely entitled to the property comprised in the settlement. By her will, dated in 1877, the wife disposed of the property as if it was her own absolutely, and died in 1881, in the lifetime of her late husband.

Held, in the absence of special circumstances, that the next of kin of the wife were not now entitled to an order to revive the suit or to carry on proceedings thereon for the mere purpose of appealing against the decree of 1872.

[27 Ch. Div. 237.

CHITTY, J.—(After reading the terms of the above rule) it seems to me that the Court has a discretion in making the order, and the applicant is bound to show that it is either necessary or deniable for the purpose of working out the decree. In this case the decree admittedly has been worked out, and a transfer of the fund has been made years ago. The only object, therefore, is that there may be an appeal from the decree. It appears to me, having regard to the observations which fell from the late Master of the Rolls in *Curtis* v. *Sheffield*, 21 Ch. D. 1, that in cases of this kind, where the only object of a party asking for an order is to appeal, and where there are no special circumstances in the case, where, for instance, there is no suggestion of collusion, or fraud, or the like, and where there is no irregularity, as there was in the case of *Walmsley* v. *Foxhall*, 1 DeG., J. & S. 451, where the decree had erroneously dealt with future rights, the right rule to be observed is this, that such an order should not be made after the expiration of the time which is limited now for an appeal, namely, one year. It is not necessary to go so far as that in the case which I am dealing with, because a period of something like twelve years has elapsed since that decree was made.

I think that theapplication ought not to succeed; that it certainly is not "necessary" nor, in my opinion, "desirable" that such an order should be made.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

Ontario.]

MERCHANTS' BANK v. KEEFER.

Will—Construction of—Contingent interest.

The question argued on this appeal was as to the construction of a particular devise contained in the will of T. McK., whereby the testator gave a certain parcel of land to one of his sons. T. McK., the testator, having previously given all his estate, real and personal, to trustees in trust for his wife for life or during her widowhood, made the devise in question as follows:—"In trust also that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot number 1, etc., which I hereby devise to him, his heirs and assigns, to and for his and their own use forever." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner.

He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage all his personal property and estate remaining was to be equally divided among his children: provided always, that in the event of any children dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue, if any, as shall have died leaving issue. The residuary clause was as follows:—"All my other lands, tenements, houses, hereditaments, and real estate," etc.

Held (RITCHIE, C.J., and FOURNIER, J., dissenting and reversing the judgment of the Court below) That the interest devised to Thomas was contingent upon surviving his mother.

Per STRONG, J.—That as a devise of *other* lands includes undisposed of interests in lands, in which partial interests or contingent interests which have failed have been previously given, the devise of lot number 1 at Thomas' death formed part of the residuary lands of the estate subject to the provisions as to survivorship and substitution mentioned in the will.

Mrs. E. Keefer, one of the testator's children, having died in the lifetime of her mother, the substitution in favour of her children was restricted to the children who survived their mother, and they became entitled absolutely among themselves as tenants in common (R. S. Ont. ch. 105, sec. 11) to an equitable estate in fee simple in remainder expectant on the death or second marriage of the testator's widow in one undivided fourth part of said lot number 1. And that upon the death of the said testator's widow, the testator's children, Annie Keefer, Christine McKay and J. Clark, the three surviving daughters of the testator, became entitled absolutely to an equitable estate in the remaining three undivided fourth parts of lot 1 as tenants in common in fee simple.

Appeal allowed, with costs of all parties to be paid out of the estate of testator.

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

S. H. Blake, Q.C., and *McIntyre* for respondents.

Ontario.]

PETERKIN v. MCFARLANE ET AL.

Purchase with agreement to resell—Registry Act notice.

P. filed a bill against McF. *et al*, claiming a right of redemption to a certain piece of land sold absolutely in form to McF., and subsequently resold by McF. to McK. and by the latter to B. By his answer to this bill B. admitted that the right of redemption had been given, and by amended answer set up the Registry Act and a *bona fide* purchase without notice. The Judge who tried the case found that the redeemable character of the transaction was admitted by the pleadings and proved, and that as a matter of fact the evidence established clearly that the parties had actual notice of P.'s right of redemption. This finding on this question of fact was affirmed by the Court of Appeal, and on appeal to the Supreme Court of Canada it was *held* (GWYNNE, J., dissenting) that there was evidence to justify the conclusion arrived at by the Courts below, that the parties had actual

notice, and therefore the registry title did not defeat P.'s right to redeem the property.

Appeal dismissed with costs.

Moss, Q.C., and *Scane* for appellants.

Atkinson for respondent.

Ontario.]

PECK V. POWELL AND POWELL V. PECK.

Sale of patent—Specific performance—Renewal.

By an agreement dated 1st June, 1877, Powell undertook to assign his interest in his pump patents to Peck *et al.*, for the counties of York, Peel, Halton, Simcoe, and Ontario; and by deed of same date he granted, sold, and set over to P. *et al* "all the right, title, and interest which I have in the said invention, as secured by me by said Letters Patent for, to, and in the said limits of the County of York," etc. The deed has an *habendum* to the full term for which the said Letters Patent are granted.

The deed was not completely executed till the 23rd June, 1877, and the patent expired on the 19th July, 1877. Powell renewed the patent in his own name for a further term. On a bill filed by Powell asking for a decree for payment of purchase money secured by a mortgage, or in default for a sale of the lands mortgaged, and on another bill filed by Peck *et al.*, praying that Powell might be ordered to transfer to them the patent for the residue of the renewed term of the patent, and that Powell be restrained from attempting to levy the purchase money until he should have done so.

Held (varying the judgments of the Court below), that Powell had parted with all interest, so far as the five counties were concerned, and that at the time of the expiration of the patent P. *et al.* were the legal holders under the statute of the patent for the said counties, and that P. *et al.* are now the legal holders, and as such entitled to a decree affirming their right to the patent in the said five counties to the full end of the further term granted to Powell; and that as regards Powell, he was entitled to recover on his mortgage.

Appeal in case of *Peck* v. *Powell* allowed with costs, and in the case of *Powell* v. *Peck* dismissed with costs.

Hector Cameron, Q.C., and *Fitzgerald* for appellants.

McCarthy, Q.C., and *Moss*, Q.C., for respondent.

Ontario.]

MOFFATT V. MERCHANTS' BANK OF CANADA.

Deed—Construction of—Misrepresentation.

G. M., a man of education, well acquainted with commercial business, executed a certain agreement and bond to pay certain sums of money in certain events to the defendants. The agreement recited *inter alia* that in consideration of this security the bank had agreed to make further advances to the firm of M. Bros. and Co., joint obligors and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in a mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the said agreement against G. M., alleging a deficiency in the assets of the firm and indebtedness to the bank, G. M. pleaded that the agreement had been executed by him on representations made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over-valuation of the property embraced in the mortgage and not otherwise.

Held (affirming the judgment of the court below, GWYNNE, J. dissenting), that G. M. was bound by the execution of the documents, and was liable upon them, according to their term and effect, viz., that the security was given to cover any possible *ultimate* loss there might be on the account of the firm.

Appeal dismissed with costs.

McCarthy, Q.C., and *Ferguson*, for appellant.

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

Ontario.]

WHITE ET AL. V. NELLES.

Possession fraudulently obtained—Estoppel—Tax sale—33 Vict. ch. 23, Ont.

N. was assignee in insolvency of H., who bought from the purchaser at sheriff's sale the north part of a lot, called lot 1, in one survey,

and lot 4 in another of 100 acres more or less, and which had been assessed variously as "number 1, north half," etc., "number 1, north part," etc., and "broken lots 1 and 4." H. leased to T., and put him in possession, and had some small buildings put on the land. Subsequently, O., one of the defendants, went to T. while he was still in possession, and by fraudulent representations induced T. to leave the place, whereupon O. went in and occupied, claiming under defendant W., who, he alleged, was owner in fee simple of the land, and claimed title as his tenant. W., by his answer, adopted O.'s possession, and claimed under conveyance from the Crown, but failed to prove his title.

Held (affirming the judgment of the Court below), that the possession of O. having been fraudulently obtained, defendants were estopped from disputing the plaintiff's title.

Per GWYNNE, J.—That as the defendants had failed to prove that the taxes had been paid before the sheriff's sale, the Ontario statute, 33 Vict. ch. 23 has removed all errors and defects, if any there were, which would have enabled the true owner, at the time of the sale, to have avoided it, and that pursuant to the provisions of ch. 40, sec. 87, R.S.O., the plaintiff was entitled to recover possession of the land in question in virtue of the title asserted by him in his bill and to have execution therefor.

Appeal dismissed with costs.

Bethune, Q.C., for appellants.

Blake, Q.C., and *Lash*, Q.C., for respondent.

Quebec.]

LA COMPAGNIE DE VILLAS DU CAP GIBRALTAR v. HUGHES ES QUAL.

Building Society—Purchase of land—Intra vires—Ch. 69, Con. Stat. L.C.

Le Cie. de V., a building society incorporated under ch. 69 Con. Stat. L.C., by its by-laws, on the 21st August, 1874, declared that the principal object of the society was to purchase building lots and to build on such lots cottages costing about $1,000 each for every one of its members.

In order to attain its object the company, through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-law, and contracted for the building of twenty-four cottages at $1,250 each, the amount that each of the shareholders had agreed to pay. A year elapse, during which the cottages are built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, borrowed money from the D. B. Society (respondents), and transfered to them the same as collateral security the money sued them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some moneys on account, and finally a deed of settlement *acte de reglement de compte* was executed between the two companies upon which was based the suit by H., the respondent, against the appellant company.

The question argued on this appeal was whether the purchase of the lots and contract for building entered into by the directors was *ultra vires* of the appellant company.

Held (affirming the judgment of the Court below, STRONG and GWYNNE, JJ., dissenting), that as the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its rules, it was not *ultra vires.*

Appeal dismissed with costs.

Beique, for appellants.

Globensky, Q.C., for respondents.

Quebec.]

SOULANGES CONTROVERTED ELECTION CASE.

CHOLETTE v. BAIN.

Dominion Elections Act, 1874, *sec.* 96—*Intimidation — Undue influence — Conspiracy between deputy-returning officer and respondent's agent to interfere with franchise by marking ballots—Effect of—Election void.*

In an election petition it was charged that the respondent personally, as well as acting by C. A., C. by D. P., others, his agents, did undertake and conspire to impede, prevent and otherwise interfere with the free exercise of the franchise of certain voters; and that in furtherance of a premeditated scheme, which the respondent and his agents well knew to be

illegal, they did, in fact, impede, prevent and interfere with the exercise of the franchise of certain voters by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of these voters was unjustifiably interfered with.

At a previous election the respondent had been defeated by a majority of three votes, and the election having been contested was set aside, and certain voters were reported by the judge as having been guilty of corrupt practices, but had not been found guilty of such corrupt practices under sec. 104 of the Dominion Elections Act, 1874.

At a public meeting before the election, A. C. C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him, threatened them with punishment if they voted; and subsequently printed notices to the same effect were sent to these voters.

On the polling day D. P., who had been appointed deputy-returning officer on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with A. C. C., and on his advice, and in collusion with him, marked the ballots of certain of these voters.

Held, That the election was void by reason of the attempted intimidation practised by A. C. C., the respondent's agent, and by reason also of the conspiracy between the said agent and the deputy returning officer to interfere with the free exercise of the franchise of voters, violations of sec. 95 of the Dominion Elections Act, 1874, which are corrupt practices under section 98 of the said Act.

Appeal allowed with costs.

Geoffrion, Q.C., and *Monk*, for appellant.

Ouimet, Q.C., and *Cornellier*, for respondent.

MORSE v. MARTIN.

Trade mark—Infringement of—Resemblance to deceive ordinary purchasers necessary.

The appellant, proprietor of a trade mark registered in Canada, and used by him on an article of his manufacture styled "The Rising Sun Stove Polish," the mark in question consisting of a printed vignette or picture of a rising sun above a body of water, with the words "The Rising Sun Stove Polish" printed across the picture, sued one C. M. (the respondent) for $5,000 damages for infringement of his trade mark. At the trial there was evidence that C. M. manufactured and sold in Canada a stove polish put up in packages bearing a vignette or picture of an orb or sun, with the words "Sunbeam Stove Polish" printed. One article was put up compact and the other in powder. The packages were not alike in shape or colour—one was put up in small oblong cubical blocks, in red wrappers, with the device of a well developed sun rising above a body of water, whilst the other was put up in cylindrical tin boxes, in yellow wrappers, with a small sun about the centre of the label, and had printed on it the name of the manufacturer.

Held (affirming the judgments of the Courts below), that plaintiff had failed to prove that any fraudulent imitation of his trade mark had been practised, or that one had been used having a resemblance to it, calculated to deceive or mislead ordinary purchasers purchasing with ordinary caution.

Appeal dismissed with costs.

Kerr, Q.C., for appellant.

Robertson, Q.C., for respondent.

THE QUEBEC WAREHOUSE COMPANY v. THE TOWN OF LEVIS.

44 & 45 *Vict. ch.* 40, *sec.* 2—*Construction of—By-law—Ultra vires—Injunction.*

Under 44 & 45 Vict. ch. 40, sec. (P. Q.), passed on a petition of the Quebec Central Railway Company, after notice given by them, asking for an amendment of their charter, the town of Levis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence River over and above $30,000. Appellants being ratepayers of the town of Levis, applied for and obtained an injunction to stay further proceedings on this by-law on the ground of its illegality. The proviso in sec. 2 of the Act, under which the corporation of the town of Levis claimed the by-law to be authorized is as follows:—"Provided that within thirty days from the sanction of the present Act, the corporation of the town of Levis furnishes the said Company with its

valid guarantee and obligation to pay all excess over $30,000 of the cost of expropriation for the right of way." By the Act of incorporation of the town of Levis, no power or authority is given to the corporation to give such guarantee. The statute 44 and 45 Vict. ch. 40, was passed on 30th June, 1881, and the by-law forming the guarantee was passed on the 27th of July following.

Held (reversing the judgment of the Court of Queen's Bench, Appeal side, P. Q., and restoring the judgment of the Superior Court), that the statute in question did not authorize the corporation of Levis to impose burdens upon the municipality which were not authorized either by their Acts of incorporation or other special legislative authority, and therefore the by-law was invalid and the injunction must be sustained.

Irvine, Q.C., for appellants.
Languedoc, for respondents.

Stevens v. Fisk.

Divorce in United States—Validity of, in Canada—Matrimonial domicile—Married Woman—Right to sue as femme sole—When—Art. 14 *C.C.P.—Comity of nations.*

In 1871 the parties F. and S. being native American citizens were married in the State of New York, where they then had their domicile. In 1872 they both came to Canada and established their domicile at Montreal. At the time of the marriage S. (the appellant) was possessed of a considerable fortune in her own right, which soon after her marriage she entrusted to the care and custody of her husband. In 1876 S. left her husband to return to the United States, and in 1880 she commenced a suit in the Supreme Court of New York against her husband for divorce for cause of adultery. It was served upon F. at Montreal. He appeared by attorney, and after proof, a decree of divorce was pronounced.

In an action brought by S. as a *femme sole* against F. for an account of her fortune, she set forth the facts of the marriage and of the divorce, and at the trial it was proved that by the laws of the State of New York the husband had no control over the separate property of his wife, and that she continued to exercise her rights over her own property the same as if she were a *femme sole*.

Held (reversing the judgment of the Court *a quo*, Strong, J., dissenting),

1st. *Per* Fournier, Henry and Gwynne, JJ., that it was not necessary for S., a foreigner, to obtain the authorization required by Arts. 176 or 178 C. C., in order to sue (*ester en jugement*) as in her own country such authorization is not necessary. (Art. 14, C.C.P.)

2nd. *Per* Ritchie, C.J., and Henry and Gwynne, JJ., that F. having appeared before and submitted to the jurisdiction of the Supreme Court of New York, the matrimonial domicile of both parties, and that Court having, as appears by the evidence, jurisdiction to entertain the suit, the decree of divorce obtained by S. was valid and binding on the parties here by comity of nations.

Appeal allowed with costs.

Laflamme, Q.C., and *Lafleur*, for appellants.
Kerr, Q.C., for respondent.

New Brunswick.]

J. D. Lewin et al. v. Georgiana Wilson et al.

Statute of limitations - Ch. 84 *s.* 40, *and ch.* 85 *ss.* 1 *and* 6 *Con. Stat. N.B.—Covenant in mortgage deed—Payment by co-obligor.*

J. H. borrowed $4,000 from M. C. on the 27th September, 1850, at which date J. H. and J. W. gave their joint and several bond to M. C., conditioned for the re-payment of the money in five years, with interest quarterly in the meantime. At the same time, and to secure the payment of the $4,000, two separate mortgages were given, one by J. H. and wife on H.'s wife's property, and one by J. W. and wife on W.'s property. Neither party executed the mortgage of the other. The mortgage from J. W. contained a provision that upon repayment of the sum of £1,000 and interest by J. W. and J. H., or either of them, their, or either of their heirs, executors, etc., according to the condition of the bond above mentioned, then the said mortgage would be void. A similar provision being inserted in the mortgage from J. H. The bond and mortgages were assigned to L. et al. (the appellants) in 1870, and the principal money has

never been paid. J. W. died in 1858, and by his will devised all his residuary real estate, including the lands and premises in the above mentioned mortgage to G. W. (one of the respondents) and others. J. W., in his lifetime, was, and since his death, the respondents, have been in possession of the premises so mortgaged by J. W., nor any person claiming by, through, or under him, ever paid any interest on said bond and mortgage, nor gave any acknowledgment in writing of the title of M. C. or her assigns. J. H., the co-obligor, paid interest on the bond from its date to 27th March, 1879.

On 20th January, 1881, under Con. Stat. N. B. ch. 49, a suit of foreclosure and sale of the premises mortgaged by J. W. was commenced in the Supreme Court of New Brunswick in equity, and the court gave judgment for the respondents.

On appeal to the Supreme Court of Canada,

Held (affirming the judgment of the court below, STRONG, J. dissenting), 1. That all liability of J. W.'s personal representatives, and of his heirs and devisees to any action whatever upon the bond was barred by secs. 1 and 6 of ch. 85 Con. Stat. N.B., although payment by a co-obligor would have maintained the action alive in its integrity under the English Statute, 3 and 4 Wm. IV., ch. 42.

2. That the right of foreclosure and sale of the lands included in the J. W. mortgage was barred by the Statute of Limitations in real actions, Con. Stat. N.B., ch. 84 sec 40.

Per GWYNNE, J.—The only person by whom a payment can be made or an acknowledgment in writing can be signed so as to stay the currency of the Statute of Limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor or some person in privity of estate with him, or the agent of one of such persons; and that moneys paid by J. H. in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by W.s' mortgage.

Appeal dismissed with costs.

Weldon, Q.C., for appellants.

Dr. Tuck, Q.C., and *Millidge*, for respondents.

Manitoba.]

LYNCH v. WOOD.

Vendor and purchaser—Agreement—Construction of—Consideration—Second mortgage.

W. agreed to sell to L., and L. agreed to purchase a messuage and land for $4,800, and W. accepted in part payment a mortgage on another parcel for the sum of $2,500. The mortgage on its face appeared to be a first mortgage, but it was in reality, however, made subsequent to another mortgage for a large amount. In an action on the agreement for the purchase of the said land, it was admitted that the mortgage was not a first mortgage upon the land described in it, and that nothing was said upon the subject, and that W. would be damaged by having to take the mortgage as a second mortgage if he was entitled to a first mortgage.

Held (affirming the judgment of the Court below), that W. was entitled to a good and valid mortgage, and that on the admissions in evidence he was entitled to a verdict.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Christie, for respondent.

Nova Scotia.]

PROVIDENCE WASHINGTON INSURANCE COMPANY v. CHAPMAN.

Marine insurance — Policy issued by foreign corporation — Agent — Countersigning — Proof of agency—Con. Stat. c. 46, sec. 16—Prior insurance clause—Meaning of words "premises hereby assured"—Insurance on freight—Whether came within clause—Warranty not to load more than registered tonnage with stone or ore without consent of agent—Verbal consent of agent—Whether sufficient.

A policy of insurance of a foreign corporation declared that it should not be valid unless countersigned by R., the company's agent at St. John, N.B. In an action on the policy, proof that it was couutersigned by R., as agent, and issued to the plaintiff on his application, and that he had previously dealt with R. as agent of the company, and received a policy from him purporting to have been issued by the company and countersigned by R., as such agent, is sufficient evidence under the Consol. Stat. c. 46, sec. 16 to prove that R. was the accredited agent of the company, and that the policy was executed by them.

Plaintiff insured $5,000 on a vessel valued in the policy at $40,000. The policy stipulated that if the assured had made any prior insurance, the underwriters should be answerable only for so much as such prior insurance was deficient towards fully covering the premises thereby insured. The plaintift's interest in the vessel amounted to $15,000, and he had prior insurance to the extent of $5,350; there was also insurance, by other persons, on the freight and disbursements of the vessel, and on advances made to the plaintiff.

Held (affirming the judgment of the Court *a quo*). (1) That the words "premises hereby insured," meant the plaintiff's interest in the vessel; and that as the value of his interest exceeded the amounts both of the prior insurance and ot the sum insured by the policy sued on, he was entitled to recover the whole of the latter sum.

(2) That the insurance on freight, etc., did not come within the prior insurance clause of the policy.

By the terms of a policy of insurance, a vessel was warranted not to load more than her registered tonnage with stone, marble, lead, ores, or bricks, without the consent of the agent of the underwriters. The vessel was loaded with phosphate rock beyond her registered tonnage.

On appeal to the Supreme Court in Canada it was

Held (affirming the judgment of the Court below), that a verbal consent of the agent to load down to the load line mark, the same as if loading coal was sufficient to allow insured to load beyond the registered tonnage of the vessel.

Appeal dismissed with costs.

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

Barker, Q.C., for respondent.

QUEEN'S BENCH DIVISION.

Full Court.]

STILWELL V. RENNIE.

Libel—Separation of jury after judge's charge—Consent of counsel—Delegation of counsel's authority—Possibility of outside influence—Refusal to interfere with verdict.

In an action for libel, after the charge of the judge, the jury were allowed to separate with the consent of the counsel for the plaintiff and for two of the defendants; the counsel for the other defendant, P., having left court before the judge's charge, but before leaving he had authorized F., the counsel for the other defendants in the same interest with P., to take, on his behalf, any objections he might think proper to the charges. Before re-assembling, some comments on the case very prejudicial to the defendant, P., were published by the *Mail* newspaper which the jury might have had the opportunity of reading. On re-assembling, the jury found a verdict against the defendant, P.

The Court, not being satisfied that P.'s counsel, as represented by F., did not assent to the separation of the jury, refused to disturb the verdict.

HOWELL V. ARMOUR.

Action against justice of peace—Notice of action and statement of claim—Defect in—Failure of action.

In an action against a justice of peace and constable for having issued a search warrant against the plaintiff for having, and concealing a colt belonging to another,

Held, that the notice of action and statement of claim being each of them founded upon a cause of action arising in a case in which the justice had jurisdiction, were defective for want of the allegation that the justice acted "maliciously, and without reasonable and probable cause;" and the statement of claim was defective in not showing a right to restitution of the property, although the plaintiff was acquitted of any wrongful taking, detention or concealment of the same.

Held, also, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or that, for some sufficient reason, no trial could be had, and the statement of claim here did not allege that the property had not been stolen.

REGINA V. BALL.

Forgery—Alteration of Dominion note—31 *Vict. c.* 46 (*D*)—32-33 *Vict.* (*D*) *c.* 19 *s.* 10.

Held, that the alteration of a two dollar Dominion note to one of the denomination of

twenty dollars, such alteration consisting in the addition of a cypher after the figure 2, wherever that figure occurred in the margin of the note, was forgery, and that the prisoner was rightly convicted therefor.

BLEAKLEY V. PRESCOTT.

Municipal corporation—Badly constructed sidewalk—Ice on sidewalk—Negligence.

A sidewalk in the town of Prescott was so constructed by the corporation that a portion of it slanted or declined lengthwise from west to east to the extent of eight or nine inches in a few feet. On this incline snow and ice had been allowed to accumulate and formed a ridge of hard beaten, frozen snow for a considerable distance on the sidewalk. The plaintiff, who was walking at the time from west to east, fell upon the incline and was injured.

Held, that the defendants were liable. *Burns* v. *City of Toronto*, 42 *U.C.R.* 560, and *Skelton* v. *Thompson*, 3 *O. R.* 11 distinguished.

SEYMOUR V. LYNCH.

Lease or license.

In an indenture, under the short forms of Leases Act, the plaintiff was described as lessor, and P. and H. as lessees. The granting part being that the lessor did "give, grant, demise and lease . . . the exclusive right, liberty and privilege of entering at all times for . . . in and upon that certain tract of land situated . . . reserving that portion thereof occupied, and hereafter to be occupied as a roadway . . . and with agents to search for, dig, excavate, mine and carry away the iron ores in, upon or under land, premises, etc." The lessees were also "to pay taxes and to do statute labour assessed upon the premises; and they were not to allow any manufacture or traffic in intoxicating drinks upon said premises, or carry on any business that may be deemed a nuisance thereupon."

Held, reversing the judgment of PATTERSON, J.A., a lease and not a mere license.

FEDERAL BANK V. NORTHWOOD ET AL.

Partnership—Accommodation endorsement—Failure to recover.

The plaintiffs, with notice that the endorsation of a partnership name was for the accommodation of one of the partners, nevertheless gave value for the same.

Held, that they could not recover.

HUGHES V. BRITISH AMERICAN ASSURANCE CO.

The application was by an insurance company to stay proceedings in an action on a policy pending an arbitration as to amount of loss. Under the statutory condition the Court granted a stay on the company admitting its liability on the policy, but at the request of plaintiff, without consent of defendants, the Court granted leave to either party to apply to the Court in respect of the costs of the arbitration. On a subsequent application on the part of plaintiff for an order directing defendant to pay the cost of the arbitration.

Held, that the Court had jurisdiction to deal with the costs.

GIBSON V. MCDONALD.

Temporary judicial district of Nipissing—Appeal to quarter sessions of Renfrew—Grouping clauses Act—R.S.O. ch. 42.

Held, that there is no appeal from the temporary judicial district of Nipissing to the quarter sessions of the county of Renfrew—the county nearest to Nipissing.

Held, also, that the judge of the County Court of the county of Lanark could not preside at the Renfrew sessions and try such appeals, notwithstanding R.S.O. ch. 42, under which these two counties are grouped together for judicial purposes.

GOLDY V. CUNNINGHAM.

A. conveyed land to B. in 1858; consideration $400. Deed not registered but delivered to C. till money paid. B. wrongfully got the deed from C. B. in November, 1866, conveyed to D., reserving a life estate to A. D. knew the $400 had not been paid by B to A. B. in

December, 1866, made another deed to D., omitting the reservation of the life estate for A. D. in 1876 conveyed to his son, E., the plaintiff, a large parcel of land, including the land in question. A. continued in possession till his death in April, 1884—having shortly before his death conveyed the land to his daughter, the defendant. D. and E. attempted by different means at several times to dispossess A.

Held, whatever claim D. or E. might have had to recover the land on paying the $400 to A., and whatever protection they might have had against the Statute of Limitations, if they had treated A. as tenant for life under the reservation in his favour, they had lost by their adverse conduct in not treating A. as tenant for life, and that they were now barred by lapse of time.

DONALLY v. HALL.

In action against sheriff for false return, defence was that the goods seized and abandoned by him, and which were on Bald Lake, etc., were under mortgage to a bank; the goods in which mortgage were described as being "now in and upon the waters of Mud Lake, etc., and the shore adjacent thereto." It appeared that the former waters were well known as such, and as distinct from, and forming no part of the latter, upon which, no part of the goods seized had ever been.

Held, that the words in the mortgage, "now in, and upon" expressly limited the goods to which they referred to those goods then upon the latter waters and the shore adjacent, and could not include the goods seized on the former, and that defendant was liable.

ROBINS v. CORPORATION OF BROCKTON.

Plaintiff appointed (but not under seal) to make up defendants' books.

Held (WILSON, C. J., dissenting), defendants liable for the work done.

McLAREN v. MARKS.

In action for not delivering goods, one of defendants notified S. and M. of suit, and claiming contribution as to half of any sum recovered, because they were co-partners, etc. They appeared to notice, and the Master in Chambers afterwards gave them leave to appear, binding them by any judgment against defendants. *Held*, order right.

Notice of appeal from a single judge given 26th Nov., the decision on 14th Nov., the first day of term being 17th Nov.

Semble, an appeal from a judge, and not a substantive motion against his order, and if so, and rule 414 was to govern, appeal too late, but that even so the Court would extend the time, the merits being with the appellant.

Rose, J.]

REGINA v. LACKIE.

Fraudulent removal of goods under the statute of George is a crime, and a defendant is not therefore compellable to give evidence against himself.

REGINA v. WALKER.

Conviction under 32-33 *Vict. cap.* 28—*Fine and costs.*

A conviction under 32-33 Vict. cap. 28, for keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment.

Held, good.

WALDIE v. BURLINGTON.

Order amending plan by closing street—R. S. O. c. 111, *s.* 84—*By-law declaring street open—Quashing by-law—Municipal Institutions Act, R. S. O. c.* 174 *s.* 506.

By an order of the County Judge, upon the application of the plaintiff, after hearing numerous parties, including the defendants, a certain street on a registered plan was closed up. Thereafter the defendant municipality passed a by-law declaring the street in question open. On a motion to quash the by-law,

Held, that the by-law should be quashed as having been passed in disregard and contempt of the order.

Held, also, that as the order showed jurisdiction on its face, the evidence upon which it had been made should not be looked at on this application.

PRITCHARD V. STANDARD.

Private international law—Administrator—Right to sue for moneys payable in foreign state.

To an action by the administrator in Ontario of W. M. deceased, on a policy on the life of W. M., which by the terms thereof was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys.

Held on demurrer a good defence.

CHANCERY DIVISION.

Divisional Court.] [Dec. 18, 1884.

CLARK V. HAMILTON PROVIDENT COMPANY.

Fraudulent preference—Insolvent circumstances—R.S.O. c. 118.

The H. Company and C. were creditors of S. S. gave the H. Company security on his lands for their claim which appeared to be good and sufficient to secure the amount due. Afterwards S. gave C. a chattel mortgage on his goods to secure C.'s claim. It did not appear that there was any fraudulent intent on S.'s part to prefer C. to the H. Company in giving the chattel mortgage. The H. Company now alleged that S. was in insolvent circumstances when he gave the chattel mortgage to C., and sought to have it declared void as a fraudulent preference under R.S.O. c. 118.

Held, that the H. Company was not entitled to the relief asked.

BOYD, C.—Though the effect of mortgaging the chattels to the plaintiff (C) may be to delay the defendants (the H. Company) in making their money out of goods, and defeat them as to these goods, it does not follow that the provisions of the Act as to preference have been infringed. So far as defeating and delaying a creditor is concerned, that is often the inevitable result of preferring a favoured creditor, a thing that could legally be done at Common Law and under the statute of 13 Eliz.; but the special provisions of R.S.O. c. 118, which differ it from, and extend it beyond the statute of Elizabeth, are those relating to preference. Now the title of the Act shews what is struck at. It is the fraudulent preference of creditors by persons in insolvent circumstances. The preference must be an act of fraud on the part of the debtor with intent to prefer one creditor to another out of his goods. Here the judge has not found fraud, nor do I think it is to be inferred from the position of the parties. A creditor holding ample security is not a creditor who requires protection within the scope of R.S.O. c. 118. The creditor who is thus secured on land (as in this case) has been provided for by compact between him and his debtor, and it would not seem unreasonable that as against the secured creditors the debtor should be allowed to secure another creditor out of his goods, for that is not done at the expense of the former, nor is the debtor as to the former to be deemed in insolvent circumstances.

Quære, as to how it would be if the security given the H. Company were shown to be inadequate.

Creasor, for plaintiffs (appellants).

Bell, for defendants (respondents).

Divisional Court.] [Dec. 18, 1884.

WATERS V. DONALLY.

Contract — Rescission — Under advantage — inequality between the contracting parties.

If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress or recklessness or wildness or want of care, and when the facts show that one party has taken undue advantage of the other by reason of such a condition of things, a transaction resting upon such unconscionable dealing will not be allowed to stand.

Held, therefore, in this case (affirming the decision of OSLER, J.A.) that it appearing that the plaintiff, being overmatched and overreached by the defendant, without information, and without advice, made a most improvident exchange of certain real and personal property of his own for certain real and personal

property of the defendant, the plaintiff was entitled to have the said agreement of exchange rescinded. The plaintiff's general condition of ignorance, his want of skill in business, and his comparative imbecility of intellect were such as to require the Court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected.

McClive, for the defendant.

Miller, for the plaintiff.

PRACTICE.

Osler, J. A.] [Nov. 10, 1884.

VANSTADEN v. VANSTADEN.

Interpleader—Costs—Special directions to sheriff—Adverse claim contemplated.

An appeal from the direction of the Master in Chambers as to costs on a sheriff's interpleader application where the execution creditor abandoned after the claimant's affidavit had been filed.

Held, that when in addition to the writ of *fi.fa.* goods in the sheriff's hands, special directions are given to the Sheriff to seize particular goods, the Rule is, that, if the execution creditor abandons after interpleader proceedings have been taken, he must pay the Sheriff's costs, and there is no limitation to the Rule that the special directions must have been given in contemplation of an adverse claim.

Aylesworth, for the sheriff and claimant.

Clement, for the execution creditor.

Boyd, C.] [Nov. 10, 1884.

SMITH v. GILLIES.

Patent case—Particulars—Examination.

A motion by the plaintiff to commit the defendants for unsatisfactory answers on their examination for discovery before the trial in an action to restrain the infringement of the plaintiff's patent in which the validity of that patent is attacked by the defendants.

Held, tat the general law applicable to discovery governs in patent cases. A defendant may be properly interrogated as to the grounds of his attacking the plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintift to fix upon the defendant's witnesses.

Motion refused.

Howland, for the motion.

H. D. Gamble, contra.

Ferguson, J.] [Nov. 17, 1884.

RYAN v. SING.

Contract for sale of land—Authority to make—Agency—Variation in acceptance of terms of offer.

C. R. S. being the owner of certain leasehold property wrote E. E. K., a land agent, a letter in these works: "Please call on J. J. R. He keeps a small shop. . . . He resides in my house on P. street and has been wanting to purchase it for some time. Tell him if he gives me $235 cash at once I will send the papers to you for him and he can pay over the money to you. Please write me by return mail." On the following date E. E. K. wrote J. J. R. as follows: Mr. S., of Meaford, wishes me to say that if you desire to purchase some property he owns on P. street, that if you give him $235 cash he will send the deeds to me and deliver them to you. Your early reply will very much oblige." About a month after an acceptance was endorsed on the latter letter in these words, "I hereby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R.

Upon an action being brought for specific performance by J. J. R. against C. R. S. It was,

Held, that the letter from C. R. S. did not contain authority to E. E. K. to enter into a contract for the sale of the property.

Held, also, that even if there had been no question as to the authority of E. E. K. the insertion of the words "on the understanding that I pay no expenses" in the acceptance prevented it from being considered an acceptance of the offer said to be contained in the letter of E. E. K.

Murdoch, for the plaintiff.

H. J. Scott, Q.C., for the defendant.

Boyd, C.] [Nov. 24, 1884.

DUNSFORD V. CARLISLE.

Discovery—Privilege—Answers tending to incriminate—13 Eliz. ch. 5.

Held, that the penal provisions of 13 Eliz, ch. 5, afford no excuse for a refusal by a defendant in an action brought to set aside a fraudulent conveyance to answer questions put to him regarding the fraudulent transaction.

Shepley, for the plaintiff.

Smoke, for the defendant.

Mr. Dalton, Q.C.,
Osler, J. A. } [Nov. 1884.

GORING V. CAMERON.

Ejectment—Counter-claim—Rules 116, 127 *B*, 168 *O. J. A.*

In an action of ejectment. In I. G., the landlady of the defendant, D. C., intervened and appeared to the writ. The defendant, D. C., did not appear until statement of claim delivered, when he appeared and joined with M. I. G. in statement of defence.

Held appearance of D. C. regular.

The defendant, D. C., counter-claimed for damages in respect of a trespass by the plaintiff upon the lands in question, whilst he, the defendant, D. C., was in possession, and for an assault, etc., whereby he was compelled to quit the premises.

Held, that the counter-claim was not joining another cause of action with an action for the recovery of land within the meaning of rule 116.

Held, also, that the counter-claim should not be disallowed or excluded under rules 127 (B), or 168, on the ground of inconvenience, it not appearing that there would be any inconvenience and

Semble, that the counter-claim was sufficiently connected with the cause of action to make it advisable that they should be tried together.

Mr. Hodgins, Q.C.] [Nov. 1884.

RE REES URQUHART V. TORONTO GENERAL TRUSTS COMPANY.

Master's office—Security for costs—Creditors.

Parties residing out of the jurisdiction, who come into the Master's office in an administration action and claim to be creditors of an estate administered there, will be required to give security for costs.

G. M. Jarvis for the plaintiff.

H. D. Gamble for the claimant.

Rose, J.] [Dec. 2, 1884.

LIVINGSTONE V. TROUT.

Demurrer—Allowance—Costs—Rule 195 *(a) O. J. A.*

The plaintiff having demurred to a paragraph of the defence, the defendant did not within ten days after delivery enter the demurrer and give notice, nor did he serve an order for leave to amend, and the plaintiff was therefore by Rule 195 (a) O. J. A. entitled to the same benefit as if the demurrer had been allowed on argument.

The plaintiff moved *ex parte* for judgment upon his demurrer.

ROSE, J. (after consultation with OSLER, J. A.) *held* that the proper practice in such a case is to apply to a Judge in Court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading.

Clement, for the plaintiff.

Boyd, C.] [Dec. 15, 1884.

KELLY V. IMPERIAL LOAN CO. ET AL.

Costs—Payment of pending appeal.

The defendants being entitled by the judgment of the Court of Appeal to the costs of the action, obtained out of Court for suit the bond given by the plaintiff for security for the costs of the action.

Before action on the bond, and pending an appeal by the plaintiff from the judgment of the Court of Appeal to the Supreme Court of Canada, one of the sureties on the bond obtained leave and paid into Court to the credit of this action $400, the amount due on the bond, to abide further order. Upon the application of the defendants, the chancellor directed the $400 to be paid out to their solicitors upon the solicitors undertaking to refund the amount

if the Supreme Court should vary the disposition of costs made by the Court of Appeal.

Moss, Q.C., and *A. C. Galt*, for the defendants.

Wallace Nesbitt, for the plaintiff and the surety.

Boyd, C.] [Dec. 15, 1884.

RE THIN.

Trustee for infants—Insurance moneys—Security 47 Vict. (O.) c. 20.

An order having been made under 47 Vict. (O.) c. 20, sec. 12, for the appointment of a trustee to receive insurance moneys to which infants were entitled, the Master in Ordinary named a person as trustee, and required him to give security in double the amount to be received.

On an *ex parte* appeal from the direction of the Master that security should be given,

Held, that it would be contrary to the uniform practice of the Court to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties.

J. C. Hamilton, for the appeal.

Rose, J.] [Dec. 27, 1884.

MACDONALD V. NORWICH UNION FIRE INSURANCE SOCIETY.

Production in action—Privileged documents.

An action brought by the plaintiff as assignee of one McLean of a policy of insurance covering the goods in McLean's store.

Among the grounds of defence set up were (1) that McLean's books had been falsified; (2) that the fire had occurred through the wilful negligence of McLean.

The defendants employed two experts to investigate McLean's books and his conduct with respect to the fire, and these experts made reports.

The defendants' affidavit on production set out as documents which they objected to produce. Report of adjuster for Norwich Union Fire Insurance Society for counsel's opinion thereon. Various memoranda taken by adjuster for preparation of report and for information of counsel.

It was further stated in the affidavit that these documents were "privileged, being part of the defendants' case, and prepared for the instruction of counsel, and prepared specially for this litigation, and in contemplation thereof."

Held, on appeal (reversing the decision of the Master in Chambers) that these documents were privileged from production.

Osler, Q.C., for the appeal.

Shepley, contra.

Rose, J.] [Dec. 31, 1884.

RE WEST MIDDLESEX (PROVINCIAL) ELECTION CASE: JOHNSTON V. ROSS.

Ontario Controverted Elections Act—Costs—Interviewing witnesses before trial.

This was a petition under the Ontario Controverted Elections Act, R.S.O. c. 11. At the trial the petition was dismissed and the petitioner ordered to pay the respondent's costs. Sec. 100 of R.S.O., c. 11, provides that the costs may be taxed according to the same principles as costs are taxed between solicitor and client in the Court of Chancery.

Held, on appeal (reversing the decision of one of the taxing officers) that the respondent was not entitled to tax against the petitioner the costs of interviewing before the trial persons named in the petitioner's bill of particulars as bribers and bribees.

H. J. Scott, Q.C., for the appeal.

William Johnston, contra.

Mr. Dalton, Q.C.]
Cameron, C. J.] [Jan. 6.

BROWN V. NELSON.

Interpleader—Trial of issue—Postponement.

Where the execution creditor was attacking by an action in the Chancery Division the assignment under which the claim to the stock seized by the sheriff was made, to which action the claimant and the judgment debtor were both parties, the trial of the interpleader issue between the claimant and the execution creditor was postponed till after the trial of the action.

Aylesworth, for the sheriff.

C. R. W. Biggar, for the ex-creditor.

Wallace Nesbitt, for the claimant.

Osler, J. A.] [Jan. 6.

BROWN V. NELSON.

The order of Mr. Dalton, Master in Chambers, noted *ante* vol. 20, p. 390, directing a set-off *pro tanto* of the plaintiff's costs against the defendant's judgment on his counter-claim affirmed on appeal.

Wallace Nesbitt, for the appeal.

C. R. W. Biggar, contra.

Rose, J.] [Jan. 12.

POWELL V. LONDON ASSURANCE CO.

POWELL V. QUEBEC INSURANCE CO.

Jury notice—Application for leave to file—Costs.

The plaintiff omitted to file a jury notice with his last pleading, and applied *ex parte* to the Master in Chambers for leave to withdraw the last pleading and re-file it with a jury notice. The leave was granted. On appeal from the order granting leave,

Held, that when the plaintiff came to the Court to be relieved from his slip he should have been called upon to show that the case was one which should be tried by a jury and that unless he had been able to do so the defendants should not have had their statutory right to have the case tried by a judge without a jury taken away.

Held, also that notice of the motion should have been given to the defendants in accordance with the spirit of Rule 406, O. J. A. On such a motion costs should be refused to a party who appears merely to ask for costs.

The appeal was treated as a substantive motion for leave to file the jury notice and the order of the Master was affirmed without costs.

Charles Millar, for the defendants.

W. A. Foster, for the plaintiff.

Rose, J.] [Jan. 12.

THE QUEEN V. SCOTT.

(2 cases.)

Certiorari—Right of defendant to—32 & 33 Vict. (C.) c. 31, sec. 71 and 33 Vict. (C.) c. 27, sec. 2.]

The defendants having been convicted by the Police Magistrate of Chatham of an offence against the provisions of C. S. C. cap. 95, appealed to the Quarter Sessions, and the convictions were affirmed in appeal.

The defendants now applied for a *certiorari* to remove the convictions notwithstanding that 32 & 33 Vic. (C.) c. 31, sec. 71 as amended by 33 Vic. (C.) c. 27, sec. 2., expressly takes away the right to *certiorari* where there has been an appeal to the Quarter Sessions.

The defendants contended that the right to *certiorari* was not taken away because the evidence did not disclose any offence; the decision in *Regina* v. *Dodds* showed that the evidence taken in these cases proved no such offence as was set out in the convictions, and hence the magistrate had no jurisdiction.

Held, that where the magistrate has jurisdiction over the offence charged, and the right to *certiorari* is taken away, the Court cannot examine the evidence to see if the Magistrate had jurisdiction to convict.

Certiorari refused.

Langton, for the defendants.

Cartwright, for the Crown.

Mr. Dalton, Q.C.]

MCCULLOUGH V. SYKES.

Judgment — Revivor — Statute of limitations—Scire facias.

Judgment recovered in 1856.

Order to revive by entering suggestion on roll under C. L. P. A. by Mr. Justice Morrison on 23rd Oct., 1869.

Suggestion entered 22nd Jan., 1870.

No execution issued since that date.

On 6th Dec., 1884, *C. E. Jones* obtained from Master in Chambers an order for plaintiff to issue execution under Rule 255 O. J. A.

G. F. Harman moved to set aside order for execution on ground that judgment barred by Statute of Limitations.

THE MASTER IN CHAMBERS dismissed the application with costs on ground that entry of suggestion under C. L. P. A. gives a new starting point for the statute to run from, and that the period of limitations on judgment is twenty years under R. S. O. cap. 61 and not ten years under R. S. O. cap. 128. *Allan* v. *McTavish*, 2 A. R. 278, *Boice* v. *O'Loan*, 3 A. R. 161, commented on and followed.

C. E. Jones, and *George Bell*, for plaintiff.

G. F. Harman, for defendant.

Hector Cameron, Q.C., for garnishee.

CORRESPONDENCE.

ADMISSION TO THE BAR OF NEW YORK STATE.

To the Editor of the LAW JOURNAL:—

THERE seems to be a tendency of late among many young men in Canada to settle in the State of New York, with a view of practising the legal profession, some reading such books, in their course of study in Canada, as they deem will be of most advantage to them when reaching their destination, to the neglect of matters material to a successful practice at home; others not directing their energies to forming favourable connections in Canada, or abandoning such connections when already formed, and, in very many cases, in ignorance of the terms and conditions of admission to the Bar of that State, and the chances of success even after admission.

It is a prevailing opinion in Canada that the examinations, when any are necessary to be passed in order to be admitted to practice in any of the United States, are not as severe as those to which students are obliged to submit themselves in the Canadian Provinces, and in this respect the impression is fairly founded, not so much, however, in respect to the State of New York, as to the other States.

But members of the Canadian Bar and students for admission thereto have another and much more serious difficulty to overcome than the legal examination in order to secure the right to practice in New York State, and that is their citizenship, it being a condition precedent to admission to the Bar of that state, that the applicant shall be a citizen of the United States, the conditions of which require, among other things, a declaration of intention to become a citizen thereof, and renunciation of allegiance to the country from which the applicant comes, and five years continued residence within the United States.

The question whether citizenship was or was not a prerequisite to admission under the laws of New York State was fully considered and passed upon in a late case in the Court of Appeals (the Court of last resort in that State) reported in vol. 90, page 584, of the New York Court of Appeals Reports, where the learned judges were unanimous in the opinion that citizenship was a prerequisite to admission to the Bar of that State.

The facts of the case appeared to be that a British subject had practiced as an attorney at law in England from 1875 to 1881. That upon proof of that fact and upon satisfactory evidence of his character and qualifications and upon proof of age and of his having declared his intention to become a citizen of the United States, the Supreme Court of the State of New York in the second judicial department thereof, on May 8th, 1881, made an order admitting him to practice as an attorney and counsellor at law in the Courts of that State. He so practiced from that date until the matter was brought before the General Term of said Court, in said department, upon notice to all parties concerned, when the General Term made an order vacating its former order, admitting him to practice on the ground that the said Court had no power or jurisdiction to grant the former order, and his name was thereupon stricken from the roll, whereupon he appealed to the Court of Appeals, which Court affirmed the order of the Court below, revoking his license.

But granting that all the difficulties of admission have been overcome, the prospects are by no means the most brilliant, the competition being much more severe than in Canada. Take New York City, for instance, with nearly 6,000 lawyers, almost all of whom are natives of the State, familiar with the ways of the people, and have the advantages of extended business and social connection and acquaintanceship conducive in a great degree to the acquisition of clients.

Many Canadians are prone to think that to locate in New York means assured success. Let not the young men of Canada deceive themselves, they will find at the Bar of that State many hard working energetic capable lawyers, men who devote their time both early and late to the contínous and well directed prosecution of their profession, so many in fact, and so well directed, their efforts, that the competition there is most intense.

New York State undoubtedly presents some advantages in a pecuniary sense to the practitioner of the law, in as much as his compensation is entirely the subject of contract, expressed or implied between himself and the client, and not at all subject to taxation by the taxing officer, who has simply the taxation of costs, as between party and party. This has the effect of creating absolutely no limit or criterion upon which compensation may be based; but as an attorney or counsellor becomes known for his ability, and conspicuous in his profession, his clients not only increase in number but his scale of compensation also increases. In a case where no contract has been made for services, the extent of the compensation depends upon the nature of the services, amount involved, and the position in the profession

occupied by the counsel or attorney. The scale of charges is much higher in New York than in Canada, but so is the cost of living and expenses incidental to business, but the increase in compensation is higher proportionately than in the expenses of living.

New York presents much to attract the man who has fair ability and more than average health and energy, there being no limit to the results to be achieved in the extent of business obtained or the compensation thereof. He with good health, honesty and well directed labour, continuously applied, may rise above the average, and get beyond the strong current of competition, and then enjoy the fruits of his labour, if such labour has not as in so many cases it has done, left a ruined constitution, a physical and mental wreck. If a man justly feels that he has some merits which will enable him to outstrip the generality of men, New York affords him opportunities no other place on this continent does, to realize and reach the height of his ambition, but in the middle walks of professional life, the intense competition therein, caused by such vast numbers struggling in those paths, make the rewards of toil small, considering the necessarily unceasing efforts.

WILLIAM B. ELLISON.

New York, January, 1885.

BOOK REVIEWS.

THE LAW AND MEDICAL MEN. By R. Vashon Rogers, jr., of Osgoode Hall, Barrister-at-Law. Toronto and Edinburgh: Carswell & Co., 1884.

We welcome another book from the pen of an old friend. Mr. Rogers has marked out for himself an entirely new plot in the field of legal literature, and this plot is filled not only with things good for food, but with those pleasant to the eyes. This patch is also well tilled, andhas fewer weeds than most of its neighbours'. The first chapter on Early Practitioners and Law is a most readable sketch to any one, lay as well as legal. The next, on Fees, is especially interesting to the "Crafte of Surregeury and Barbouris," to whom we were previously introduced. Chapter III. wears a familiar face to us, and may be found in the columns of this journal in a previous volume. "Who may Practice" is also of special interest to this jealous craft. If lawyers could take a leaf out of their book and protect themselves instead of metaphorically cutting each other's throats, it would be a great many dollars in their pockets in the course of a year, and not leave them to fall a prey to managers of loan companies and that ilk, whose principal mission in life, next to seeing that their own services are appreciated to the full, by fat salaries, is to cut down lawyers' fees to starvation prices. We next have discussions on Negligence and Malpractice. Then Professional Evidence and Medical Experts; and what a curious lot these doctors are in the witness-box to be sure. The differences of doctors beside the bedside of a dying patient is a joke to the opposite views they express in court when pitted against each other on different sides of a case. The chapter on Relations with Patients comes very properly immediately before that devoted to Dissection and Resurrection. Dentists and Druggists bring up the rear, with a few pages on Partners' Goodwill and Assistants. We need only say that the book is in Mr. Roger's happiest vein, and should be on the shelves not only of the lawyers, but of the medical men, as also of all others who wish to gain much interesting information in a pleasant and easy way.

OUTLINES OF ROMAN LAW, Comprising its Historical Growth and General Principles. By William C. Morey, Ph.D., Professor of History and Political Science (formerly Professor of Latin) in the University of Rochester. New York and London: G. P. Putnam's Sons (the Knickerbocker Press) 1884.

From such examination as we have been able to give to this little work we should say it was well fitted to serve the purposes for which the author states it to have been written, viz.: those of a manual for the use of students and of others who desire an elementary knowledge of the history and principles of the Roman law, and of a guide to the further study of the Roman law. The first part is concerned with the history of the Roman law, and carries the reader from the period of the first beginnings of the ancient *jus civile* through the Empire and the Middle Ages, down to the present time. The second part discusses the general principles of the Roman law. At the conclusion of each chapter, as well as in the Appendix at the end of the volume, is a list of works by various authors intended as a guide to those who wish to carry on their studies of the subject. We should say, therefore, that any one desirous of studying Roman law can scarcely find a better work on which to commence than this. It is well fitted to serve as a scaffolding on which to build the fabric of a more extended knowledge. American authors have gained perhaps a higher reputation in the department of Jurisprudence than in any other, and we fancy the book before us will meet with much approval. As

illustrating the author's style, as well as touching upon a very interesting subject, we will quote a single paragraph from the work:—

"*The Jurists and Indirect Legislation.*—To appreciate still further the great influence exercised by the Roman lawyers in the days of the Empire, we must keep in mind the fact that the privileged class of jurists were not merely scientific expounders of the law. They were, in fact, a body of men who exercised a kind of legislative authority. The possession of the *jus respondendi* gave to them a position entirely unique in the history of jurisprudence. It is evident that their interpretation of the law partook of the character of indirect legislation; and, consequently, the rational principles which they advocated became actually incorporated into the body of the positive law. Let us look for a moment at the peculiarity of this kind of legislation, and the reforming influence which it exerted upon the substance of the law. The indirect method of legislation employed by those jurists who possessed the *jus respondendi* may be simply compared to what has been called in modern times 'judicial legislation.' The function of the judge is theoretically confined to declaring and applying the law to a given case. But in the very process of construing the law to meet the case in hand, the law may become specialized or even modified. Supplementary provisions thus grow up through judicial administration, which, by being enforced in the given case and by being used as precedents in similar cases, acquire the character of new laws. In certain respects this bears an analogy to the way in which the Roman law became modified by passing through the hand of the jurists. But the jurists were not judicial magistrates; and their opinions of the law were not restricted to cases actually presented for adjudication. Any legal question whatever might be made the subject of their discussion, and their opinion upon such a question obtained the same authority as though it had been declared as law by a legislative body."

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Common words and phrases—
- Wholesale Liquor Dealer—Mechanic—Needless torture or mutilation—Heirs—Merchant—Bridge—Wait—*Albany L. J.*, July 26th, 1884.
- Lodger—Soil—Rubbish—Filth—Debt—Ferry—Literary or Scientific—Voucher—Game—Settle—Beer—Standing by—*Ib.*, Sept. 20th
- Family—Clause—Gaming—Production of labour—Rates of taxes—Lodger—Lottery—Commit or make an assault—Saw Mill—*Ib.*, Oct. 25.

The presumption of payment—*Ib.*, Aug. 2, 9, 16.

Railroad accumulating surface-water—*Ib.*, Aug. 16.

Presumptions from alterations of instruments—*Ib.*, Sept. 27.

Compensation of husband who acts as wife's agent—*Ib.*, Dec. 6.

Selling liquor to a drunken person—*Irish L. T.*, Sept. 6.

Administration granted on concealment of will—*Ib.*, Oct. 11.

Equitable estoppel as affecting title to land—*Central L. J.*, Aug. 1.

Liability of employer for negligence of independent contractors and their servants—*Ib.*, Aug. 8.

Restrictive covenants in a conveyance of real estate—*Ib.*, Aug. 15.

Escrows—*Ib.*

Exhibition of personal injuries to the jury—*Ib.*, Aug. 22.

The transportation of live stock—*Ib.*, Aug. 29.

Liability of agents upon unsealed non-negotiable instruments—*Ib.*, Sept. 5.

Partial restrictions on business freedom—*Ib.*, Sept. 12.

Donatio mortis causa—*Ib.*, Sept. 19.

Waiver of mechanics' liens—*Ib.*, Oct. 3.

Liquidated damages—*Ib.*, Oct. 10, 17.

Directors of corporations (Authorities—Powers—Duties—Liabilities)—*Ib.*, Oct 17, 24.

Contracts of carriers limiting liabilities for negligence to a specified suit—*Ib.*, Oct. 24.

Damages for employees breach of contract for services for specified period—*Ib.*, Oct. 31.

Implied condition on the lottery of a furnished house—*Ib.*

The following notice is posted up on the Court door of the Queen's Bench Division :—

Hilary Sittings, 48th Victoria (1885).

It is ordered that there shall be a peremptory list of at least four cases on the first and every subsequent day of these sittings.

In case no counsel is present to support the motion or order *nisi*, the same shall be dismissed or discharged with costs.

In case no counsel is present to oppose the motion or order *nisi*, the same will be argued *ex parte*.

These rules will be strictly enforced.

By the Court.

James S Cartwright.
Registrar.

Dated this 24th day of January, 1885.