Canada Law Journal.

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DIARY FOR MARCH.

17. Fri.... St. Patrick's Day.
18. Sat.... Princess Louise born, 1843.
19. Sun.... *4th Sunday in Lent.*
23. Thur.. Sir George Arthur, Lieut.-Gov., U.C., 1838.
26. Sun.... *5th Sunday in Lent.*
28. Tue.... Canada ceded to France, 1632.
29. Wed... The Wills Act assented to, 1873.
30. Thur.. B. N. A. Act assented to, 1867.
31. Fri.... Lord Metcalfe, Gov. Gen., 1834.

TORONTO, MARCH 15, 1882.

THE *Albany Law Journal*, in graceful language, rejoices that, "the good and gracious lady who nominally rules the British Empire, has escaped the hand of the assassin." It is, indeed, a subject of deep gratitude and the kind wishes of our most able contemporary are fully appreciated. The word "nominally," however, is much less appropriate then might be generally supposed. The power and influence of a sovereign, who, though strictly constitutional in her acts, is beloved by a people, enjoying the freest government in the world, both for her private virtues and her patriotism, and who is *always* in office and personally conversant with all state matters, and has "kept the run of them" for so many years, is practically enormous.

The *Journal* concludes by saying that they "will watch the proceedings with a curious interest, to see if the British bench and bar can improve upon our dealing with Guiteau:" we trust they will have no cause of complaint. The extraordinary scenes that took place on the occasion of the trial alluded to, seem to us to have been in the main an outcome of the instincts, habits, and institutions of a Republic, built up rapidly from a number of different races. But though there is the extravagance of expression, and the self assertion appertaining to strong youth in the great nation that we are proud to call our kinsman, its heart is right, and its head is more "level" than the occasional froth on the surface might sometimes seem to indicate.

WE are glad to see the Library Committee have anticipated the suggestion in our last number, and have purchased not only the digest of the *American Law Register*, which we there referred to, but the whole series of volumes from the commencement. There can be no doubt that this new acquisition will be found a most valuable source of information, especially on points arising in connection with corporation law. In the January number, for example, is contained a full report of a recent case in Missouri, where it was held that a verbal agreement to insure is binding, and may be specifically enforced. To this are appended a series of notes, in which the writer observes that since *Warren* v. *Ocean Ins. Co.*, 16 Me. 439, where a waiver of forfeiture, irregularly endorsed by the company's agent upon the policy, was declared binding as a parol agreement, though the usual fee had not been paid,—the validity of a parol insurance has been so frequently and uniformly affirmed, that it may well be pronounced the undoubted American doctrine. He cites *Jones* v. *Prov. Ins. Co.*, 16 U. C. R., as showing that with us the insured cannot sue at law directly for the amount of the loss, upon a parol contract; his only remedy is in equity, or, perhaps, an action at law for the delivery of the policy. Again, in the same number is discussed in a similar manner the character of a certificate of stock, accompanied by a bill of sale and power, in the hands of a *bona fide* purchaser for value, the stock remaining untransferred upon the books of the company. It is certainly a question whether the plan

adopted by the *American Law Register*, of publishing the most important current English and American decisions, and appending notes to them after the manner of Smith's leading cases, is not calculated to be more useful to the profession than the more common editorial articles on legal subjects.

ONTARIO LEGISLATION.

Upon Friday last the Lieutenant-Governor porogued the Ontario Legislature, which had been in session since 12th January. During the nine weeks session 82 public Acts were passed and a considerable number of private Bills. The most important of the public Acts are the following:—

Chapter 6, "An Act respecting the Jurisdiction of the Court of Appeal." The important section of this Act is that which gives an appeal from all final decisions of a Judge of the County Court, whether sitting in Chambers or in Court, under the provisions of law relating to the examination of debtors, attachment for debts, and proceedings against garnishees, and from any final decision or order hereafter given in any cause or matter disposing of any right or claim.

We presume this section was passed in consequence of the decision of the Court of Appeal in *Sato* v. *Hubbard*, Ap. R. This Act also removes the difficulty which was frequently experienced on account of the signing of judgment in a County Court case ousting the right of appeal. Now an appeal will lie either before or after judgment is signed, provided that security is given within ten days from the decision appealed against, or within such further period, not exceeding 30 days, as a Judge of the County Court appealed from may allow. Provision is also made in this Act, for the reading of the judgment of a Judge of the Court of Appeal who may be unable to attend, and the giving of judgment of three Judges who may be unanimous, notwithstanding the fourth Judge who heard the cause may have ceased to hold office.

Chapter 9, "An Act to amend the Law of Newspaper Libel." This Act is short, but will be found a great boon to decent newspapers. It provides that any report published in a public newspaper of a public meeting shall be privileged, if the meeting was lawfully convened for a lawful purpose, and open to the public, if the report was fair and accurate, and published without malice, and if the publication was for the public benefit. A newspaper proprietor, however, who refuses to insert a reasonable explanation or contradiction by or on behalf of the person complaining, cannot set up the Act as a defence.

Chapter 10, "An Act for the removal of certain defects in the Law of Evidence." This Act adopts the Imperial Evidence Act, 32-33 Vict., cap. 68, as amended by 33-34 Vict. cap. 48. Under it parties to an action of breach of promise of marriage are made competent to give evidence, but there is to be no recovery by the plaintiff unless the evidence in support of the promise is corroborated. Parties to actions for adultery and their husbands and wives are also made competent witnesses.

This Act also removes a difficulty which has been at various times commented upon in the Courts of Justice, viz.—the loss which litigants were put to by the exclusion of the evidence of agnostics and atheists. This can now be obtained under its provisions. In case a judge is satisfied that the taking of an oath would have no binding effect on the conscience of a person tendered as a witness, who is objected to as incompetent to take an oath, the evidence of such person may be taken under this Act upon affirmation. Under 31 Vict., cap. 74, sec. 4 (Dom), and 32-33 Vict., cap. 23, sec. 2 (Dom), any person who, after taking such an affirmation, gives false testimony, is liable to the same punishment as he would be for perjury.

The legislature, having given to the judges full authority over the procedure of the High Court, the next Act, chapter 11., entitled

ONTARIO LEGISLATION.

"An Act to make provision in regard to certain legal matters," extends their powers to County Courts. It also removes doubts, which we believe were entertained by some of the judges, as to their authority to issue commissions for taking affidavits, since the merger of the Supreme Courts into the High Court of Justice.

Chapter 12, "An Act respecting the restitution of stolen goods." Upon the arrest of persons for larceny and other similar offences, stolen property belonging to many different people is frequently found in the criminal's possession. We understand that in one of our western towns, as many as forty charges were laid against one person for stealing from different individuals. The prosecutors naturally desired to get back their goods, and took this means to obtain a summary remedy, as a judge had, under the Dominion Act, no authority to make a summary order of restitution, unless where the party is actually tried in respect of the larceny of the particular goods embraced in the order. Of course it is simply absurd that the expense and inconvenience of a criminal trial should be incurred for this purpose alone. The present Act meets the difficulty, and enables the judge, after the prisoner has been convicted in one or more charges, to try his right to property so found in his possession and that of the claimant in a summary way. The order made, however, does not finally preclude the prisoner, as he may afterwards recover the goods in question from the person to whom their delivery is directed. The judge also may, if he thinks fit, before making an order, require the claimant to give security for the return of the property to the person convicted, in case the latter should thereafter be held entitled. These provisions were obviously inserted in view of the fact, that a person in custody does not possess the usual facilities for defending his rights. We notice that a section has also been added, reserving the right of the Crown to claim any property of a convict as forfeited for felony.

Chapter 14 is a repetition, verbatim we believe, of the vetoed Act of last Session, entitled "An Act for protecting the public interest in Rivers, Streams and Creeks." As our readers are aware, the Court of Appeal has since the Act was disallowed by the Dominion Government, declared the law to be substantially in accordance with what is alleged in this bill. The question, however, is still pending before the Supreme Court, and it is not improbable that the Dominion Government will refrain from taking any action in respect of this statute until that Court gives judgment.

Chapter 15, "The Mechanics' Lien Act, 1882." This Act extends the protection heretofore given to mechanics, and gives to them to the extent of thirty days' wages, a lien which operates notwithstanding an agreement between the owner and contractor for excluding a lien. This wages lien takes priority over all other liens under the former Act, and over any claim by the owner against the contractor in consequence of the failure of the latter to complete his contract. The affidavit of verification required by the Mechanics' Lien Act is very much shortened. Several persons are permitted to join in one statement of claim. Copying in registry book is dispensed with, and the Sheriff's fees are reduced to twenty-five cents.

Chapter 17, "The Joint Stock Companies Act, 1882." This Act is an important addition to joint stock companies legislation. It authorizes Courts to accept Trusts Companies, which have been approved by the Lieutenant-Governor in Council, as executors, administrators, trustees, receivers, guardians of infants, or committees of lunatics. No company, however, can exercise any of these offices which has issued or is authorized to issue debentures. Hitherto, wherever a company has been incorporated by a special Act, it has been necessary to apply to the Legislature to vary any of its provisions. The present Act gives the Lieutenant-Governor in Council authority, by letters patent, to vary

any provisions of the special Act in the same manner as might have been done had the company been incorporated under the Joint Stock Companies Letters Patent Act. It also contains very convenient machinery for the voluntary winding up or partial winding up of joint stock companies. Up to the present time this could only be done by the company taking proceedings under the Joint Stock Companies Winding up Act of 1878. As these proceedings are unnecessarily cumbersome and expensive, where a company is in a perfectly solvent condition and has few if any creditors, the present Act gives a simple method by which in such cases a company may, by its own officers, divide its assets amongst the shareholders.

Chapter 20, "An Act to extend the application of the Fire Insurance Policy Act." The effect of this Act to extend the statutory conditions of Fire Insurance policies, to interim receipts, and to Mutual Insurance Companies.

We have only space to give the titles of the following Acts which contain very important provisions:—

Chapter 21, "An Act to provide for the crossing of railways by street drains and water mains."

Chapter 22, "An Act to provide for the establishment of free libraries."

Chapter 24, "An Act respecting market fees."

Chapter 25, "An Act to provide for the construction of water works by cities, towns and villages."

Chapter 26, "An Act to make further provision for the construction of drainage works by municipalities."

RECENT DECISIONS.

A few cases still remain to be noticed in the lengthy number of L. R. Chy. Div. issued on Dec. 1.

MORTGAGE—WINDING UP.

In *in re Brown, Bayley & Dixon*, p. 649, FRY, J., held that mortgagees having a right of distress to enforce payment of interest, will be allowed to distrain, after a winding up, for interest accrued while the liquidators were in possession, but not for arrears accrued before the winding up. He arrives at this result by balancing two principles which he says ought to govern the Court in granting or refusing leave to enter and distrain under such circumstances, viz.: (i.) that as far as possible the independent rights of independent persons ought to be respected; (ii.) that the Court will administer the assets of a company among all the creditors at the time of the winding up *pari passu*, and will, so far as is possible, not give any preference or priority between the various creditors. "Those," he says, "are the two principles to be considered. In their generality they are manifestly inconsistent. In my view they are to be reconciled by drawing the line at the date of the winding up." A mortgagee and a lessor, although in one sense independent persons, are nevertheless creditors of the company in respect of any amount due on the mortgage or on the lease at the date of the winding up, and, as such creditors, they ought, in my judgment, to have neither preference nor priority. In respect of any rights arising after the winding up by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument, just as any other person must observe those terms."

PARTNERSHIP—ESTOPPEL BY LAPSE OF TIME.

In *Rule* v. *Jewell*, p. 660, the shares of two of the partners in a cost-book mine were forfeited in June, 1874, for non-payment of calls. Now, in September, 1880, they brought an action, alleging that the shares had not been regularly forfeited, and claiming to be still

partners, although they had taken no steps as to the mine up to July, 1879, when they made a claim. Kay, J., held that even assuming the shares not to have been regularly forfeited, the plaintiffs under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners. He says, p. 667,—"I think the lying by here was entirely analogous to the lying by in the case of *Prendergast* v. *Turton*, 1 Y. & C. Ch. 98. It was a lying by to wait and see whether the concern turned out sufficiently profitable to make it worth while to assert their claim to be partners; and when they think the time is come when it is worth their while to assert their title, then they bring their action. The time during which they lie by being more than six years, I consider the analogy of the Statute of Limitations to be one which is applicable, as it is impossible to lay down a hard and fast rule what amount of time shall be sufficient in every case. * * * Whether it is called abandonment or estoppel seems to me to be indifferent. If it were necessary to call it abandonment, I should be quite prepared to hold that what has taken place in this case amounts to abandonment as between the plaintiffs and their co-adventurers of any interest in this concern."

SETTING ASIDE VOLUNTARY DEED.

In *Henry* v. *Armstrong*, p. 668, the plaintiff had, shortly before going into business on the Stock Exchange, executed a voluntary deed, without power of revocation, by which he conveyed most of his property, real and personal, to trustees upon trust for the separate use of his wife for life, with remainder to his children. He now sought to have it set aside on the ground (i.) that he did not fully understand the purport of the deed, as to which Kay, J., held the evidence did not support it; (ii.) that the deed was irrevocable, which the learned judge held must be disregarded, since any power of revocation would have been entirely inconsistent with the objects of the settlement, and as to the question on whom the *onus* of supporting a voluntary deed when impeached, must be held to rest, he said that despite certain *dicta* to the effect that it rests with those who set up the deed—"As I understand it, the law is, that anybody of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside—especially if he comes a long time afterwards—he must prove some substantial reason why the deed should be set aside."

SPECIFIC PERFORMANCE OF SEPARATION DEED.

Of the next case, *Hart* v. *Hart*, p. 670, we have already noticed some of the points that arise in it among our Recent English Practice Cases, 17 C. L. J. 412, where our note is taken from 45 L. T. 13, the case being there also reported. The two further points decided which seem to require mention now are:—(i.) that the Court would not refuse specific performance of an agreement for a separation deed on the ground that it provided for the wife having the custody of the children. As to which Kay, J., held that since Imp. Act, 36 Vict., c. 12, sec. 2—enacting that no such agreement shall be invalid by reason only of its providing that the father shall give up the custody or control of the infant children to the mother, but that no Court shall enforce such agreement if it be not for the benefit of the children—the objection no longer holds good. We do not appear to have any such enactment, therefore presumably with us the objection would hold good on the authority of *Hope* v. *Hope*, L. R. 3 P. & M. 226; and *Vansittart* v. *Vansittart*, 4 K. & J. 62, the ground being that it is against the policy of the law for the husband to divest himself of his natural guardianship and custody of the children; (ii.) that it is no answer to a suit for specific performance for defendant to say that, though he understood what the words of the agreement were, he was under a mistake as to their legal effect, As to this Kay, J., says, p. 693—"Of course

it was sought to induce me to accept evidence of what the negociation was, but holding, as I do, that a written agreement has been come to which is complete in its terms and as to which the pleading is simply that the defendant signed it knowing what the words were, and putting a certain meaning of his own upon them, I have held that, under those circumstances, evidence to show that there was another agreement or any omitted terms, is not competent to the defendant. All I have to consider is, what is the meaning in this agreement of the words 'usual covenants.' Therefore I decline to receive evidence from these gentlemen of what the negociation leading up to this agreement was." We will only observe further as to this case that the learned judge held (iii.) that the agreement on the face of it being complete, the arbitration clause contained in it could only come into force in case of difference between the parties, and therefore did not oust the jurisdiction of the Court to settle the deed itself. After reviewing several decisions on this point, he says, p. 689:—"All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that where the agreement, on the face of it, is incomplete until something else has been done, whether by further agreement between the parties, or by the decision of an arbitrator, this Court is powerless, because there is no complete agreement to enforce."

PARTNERSHIP—SHARING PROFIT AND LOSS.

In the last case in this number, *Pawsey* v. *Armstrong*, p. 698, Kay, J., laid down three points of law in his judgment: (i.) that the agreement to share profit and loss is quite conclusive of the relation of partnership between two persons who do so agree, and it is not possible for one of them afterwards to say, "I was not a partner." "The truth is," he said "that there are certain legal relations which are entered into by agreeing to certain conditions, and when those conditions are agreed to, it is quite idle for people to superadd, or to attempt to superadd, a stipulation that the necessary legal consequences of those conditions shall not follow from the arrangement;" and he distinguishes the present case from one where the agreement was only to share profit, but not loss; (ii.) that partners may stipulate between themselves, and one partner may force another partner, by the threat of dissolution, to agree to limit the rights and dealings of the other partner in certain ways,—as, *e.g.*, that he shall not draw cheques upon the banking account, or shall not enter into contracts, — without preventing thereby the partnership relationship continuing; (iii.) that such restrictions upon the rights and dealings of one of the partners does not prevent him claiming an interest in the goodwill in the event of a dissolution,—"how it can follow from that, that he is restricted in one of his principal rights, as to which there was no stipulation, I confess that I am unable to see," p. 709. This case completes L. R. 18 Ch. D.

The next number of the Law Reports for review comprises 7 Q. B. D., pp. 617 to 663, and 6 P. D. pp. 157–233, and was issued on Dec. 31st.

The digest and tables of cases of the two volumes take up most of the number, but there are a few cases to be noticed.

DEFAMATION—PRIVILEGED COMMUNICATION.

The first case, *Waller* v. *Loch*, p. 619, was a curious one. The plaintiff sued the Secretary of the Charity Organization Society for having reported a bad character of her to an applicant for information who was contemplating affording her charitable relief. The Society was formed for the purpose *(inter alia)* of investigating the cases of applicants for charitable relief. The Court of Appeal held the report a privileged communication, and that in the absence of proof of malice, the action could not be maintained. Both Jessel, M. R., and Brett,, L. J., endorse the definition of Blackburn, J., in *Davies* v. *Snead*, L. R. 5 Q. B. D. 608, viz.:—"Where a person is so situated

that it becomes right in the interest of society that he should tell to a third person certain facts; then if he, *bona fide* and without malice, does tell them, it is a priviledged communication."

BILL OF EXCHANGE—RE-INDORSEMENT—CIRCUITY OF ACTION.

The next case we have to notice is *Wilkinson* v. *Unwin*, p. 636. Here the vendors of goods drew two bills of exchange on the purchaser, and endorsed them to the defendant, who had agreed to become surety for the price of the goods, the defendant re-indorsing them to the plaintiff. The Court of Appeal held (i.) that the vendors were not precluded from suing the defendants on the ground of circuity of action for the amount of the bills, they having been dishonoured at maturity; (ii.) that the contract was not within the words or the reason of the Statute of Frauds, notwithstanding *Steele* v. *McKinlay*, L. R. 5 App. Cas. 754. Bramwell, L. J., said that there were several cases in which it had decided that, if the holder of a bill would not be liable to the endorser whom he is suing by reason of any previous indorsement of his own, he may enforce his claim, because no circuity of action arises; the holder of the bill may always show such circumstances as do away with any liability by reason of his previous endorsement."

WILLS—PROBATE.

In the Probate Division are some cases relating to wills which require notice.

In *In the goods of Aston*, p. 203, the President held that a gift of such money, stocks, funds or other securities, not hereafter specially devised, as I may die possessed of?' does not amount to a clear disposition of the residue.

In the goods of Hatton was a curious case. An intended will was written in duplicate, one copy of which was signed only by the deceased and the other only by the attesting witnesses. The President refused probate. "A will," he says, "may be composed of numerous papers, which together make but one instrument; but these are separate and independent documents."

In the next case, *In the goods of Stedman*, the deceased made two wills, the first dated May 21st, 1877. Subsequently he executed a codicil, which commenced, "This is a codicil to my will which bears date the 21st day of May, 1877," thereby referring to the former instead of the later will. The President held that the codicil thus referring to the will of 1877, so far confirmed and brought that will into existence, that it must form part of the probate in order that the codicil might have an interpretation put upon it; and that as the second will contained also the most important of the testamentary dispositions which the testator had made and which had never been revoked, the second will must also be admitted to probate, and, he added, —"the general intent to be collected from the three instruments will then become the subject of consideration, if necessary, for a court of construction." He also says, in another similar case reported with this, that—"where the simple mistake has been made as to the date of an instrument, the mistake can be set right; but in a case like this where the mind of the draftsman, whether the testator himself, or some one employed by him, has been really applied to the words of a particular instrument, it is impossible for me to say that it was by mistake that that instrument was referred to instead of another."

In *In the goods of Tomlinson*, p. 209, the President refused probate to a will of a *feme covert*, made during coverture, under a power, and disposing of real property only, though there was an appointment of a executor. He said, "where the will is of a man or a *feme sole*, the appointment of an executor has been held sufficient to entitle the will to proof; but where it is the case of a married woman executing a power by will, different considerations arise. Though it is in the form of a will, as required by the instrument giving the power, it is in fact a conveyance by means of the appointment exercised, and although an

executor is appointed the executor takes nothing in his character of personal representative."

In the next case, *In the goods of Von Buseck*, p. 211, the President held that a will of a foreigner, executed abroad according to the formalities required by English law, but not in conformity with the law of his own country, was invalid; that Imp. 24 & 25 Vict., c. 114, "An act to amend the law with respect to wills of personal estate made by British subjects," did not apply, for here the testatrix was a foreigner; and that sect. 2 of the Naturalization Act, 1870, (cf. R. S. O. c. 97) did not bring the case within the former enactment." As to this he said: "Such an interpretation must, I think, be rejected, unless it were made quite plain that the English legislature intended, with reference to personal property, that an alien should be able to make a will, in a form which is not in conformity with the law of his country. Of course an English Court might be compelled by plain language to give such a construction to an enactment, but it is not to be presumed that anything, which is so contrary to the comity of nations, has been intended by the English legislature, and therefore, I reject that as not being the meaning of this section."

In *In the goods of Brake*, p. 217, where a testator appointed W. McC., of Canonbury, an executor, and there was not in fact any person of that name, but there was a T. McC., of Canonbury, and a W. A. McC., son of the former. The President admitted parole evidence to show who was intended, citing as authority the words of Cairns, J.C., in *Charter v. Charter*, L. R. 7 E. & I. 377:—"The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably, and with sufficient certainty, applied."

The cases on points of practice in the number before us have been already noted among our Recent English Practice Cases, and therefore we have now come to an end of the Law Reports for 1881.

On January 2, were issued two small numbers of the Law Reports, comprising 19 Ch. D., p. 1 to p. 60; 8 Q.B.D., p. 1 to p. 69; and 7 P D., p. 1 to p. 5.

COSTS OF INCUMBRANCERS.

In the first of these, the first case which appears to require notice is *Johnstone* v. *Cox*, p. 17, the report of which, in the Court below, is contained 16 Ch. D. 571. It was an action to establish a charge in favour of the plaintiff in priority to other incumbrancers on a certain fund. Bacon, V.C., decided that another incumbrancer had priority over the plaintiff, but as to costs, he held that the fund must be cleared by first paying the costs of all parties, and that what remained must go to the incumbrancers in the order of their priorities. The Court of Appeal reversed this order as to costs, Jessel, M.R., saying:—"As an ordinary rule the costs of incumbrancers are allowed to be added to their securities, if any difficult questions arise as to the priority of incumbrancers, and so on; and unless there has been something vexatious, or something unusual in his conduct, the incumbrancer gets his costs if the fund is sufficient to pay them." And the Court refused to depart from this rule, though some of the incumbrancers, having taken a security on an insufficient fund, might thereby lose both debt and costs.

PRESCRIPTION ACT.

In the next case, *Laird* v. *Briggs*, p. 22, a question arose as to the amendment of pleadings, which we have already noted among our Practice Cases, 17 C.L.J., 346. The Court of Appeal also intimated that, though it was not necessary to decide the point, they must not be taken to agree with the view of

Fry, J., (L R. 16 Ch. D. 440,) that "person entitled to any reversion," in sect. 8 of the Prescription Act (R. S. O. c. 108, sect. 41), included a person entitled as a remainderman; and made some observations as to whether the Court could alter the word "convenient," in the second line of the Imp. Act, into the word "easement," which was apparently intended. It will be observed that our Legislature has made the alteration, and "easement" is the word in our Act. As to the former point, Jessel, M.R., observes that (p. 34) the whole of the section and the whole of the Act is of a strictly technical character from beginning to end; that so far as he could see technical words are used in their proper technical senses; that a reversion in law is not a remainder, the difference being that the reversion is what is left, and the remainder is that which is created by the grant after the existing possession; and that he was not prepared to say that he could find anything in the nature of the case or in the context which would allow him to alter the meaning of the word "reversion."

COMPANY—WINDING UP.

In the next case, *re Great Britain Mutual Assurance Society*, p. 39, the Court of Appeal having discharged an order made for the winding up of an assurance society on a petition presented for that purpose (cf. R. S. O. c. 5. s. 33), and having directed that a scheme should be prepared for a reduction of the amounts of the contracts of the society, Hall, V. C. held that the claims of policy-holders and annuitants which had matured before the date of presentation of the petition must be paid in full. As to this he says,—"It seems to me that the policy-holders whose claims upon their policies have matured, must be dealt with in the same way as other persons who could enforce their claims against the society by action or otherwise, but for the proceedings which have taken place. As a necessary consequence, it follows that these existing liabilities must be cleared off, just as much as if they were debts to persons who have supplied goods to the society."

TRUST IN FAVOUR OF VOLUNTEERS.

In the case of *Paul* v. *Paul*, p. 47, Fry, J., held that an ultimate trust in favour of the next of kin in a marriage settlement could not be revoked, refusing to follow a decision of Melius, V. C. (15 Ch. D. 580). He observes,—"I thought that a gift, conclusively made to or in favour of a volunteer, was incapable of being revoked by the donor; and I thought that one mode of making such a gift was by a completed declaration of trust in favour of the volunteer. In my opinion the law has been conclusively settled in that way."

MORTGAGE—COMPUTATION OF INTERRST.

In *Elton* v. *Curteis*, p. 49, the question before Fry, J., was, in his own words, as follows:—"When there are successive mortgages, and a decree is made for the foreclosure of the subsequent mortgages, and the mortgagor, which in the usual manner directs the computation of subsequent interest upon the amount found due to the prior incumbrancer, is that subsequent interest to be calculated on the total amount certified as due, or only on so much of it as consists of principal, or of principal and costs? To which he answers:—"It appears to me plain that the practice has been and still is to compute subsequent interest upon the entire amount, and that for the reason given by Lord Hardwicke, *Bickham* v. *Cross*, 2 Ves. sr. 471.

AWARDS—PRACTICE.

The last two cases in this number contain two decisions of Chitty, J., on points of practice relating to awards. In the first, *Jones* v. *Wedgewood*, he held that where an action has been referred to an arbitrator by the Chancery Division, it is not necessary to make the award a rule of Court before an order can be made founded on the award. In the second, *Mercier* v. *Pepperall*, he held that a notice of motion in the Chancery Division to set aside the award of an arbitrator should specify the

grounds of objection, by analogy to the practice under the Common Law Proc. Act, (cf. Reg. Gen. Ont. T. T. 141).

In 8 Q. B. D. p. 1 to p. 69, also issued on January 2nd, there appear to be few cases requiring notice here.

CONTRACT OF APPRENTICESHIP.

In the first case, *Royce* v. *Charlton*, Grove, J. and Bowen, J., held that where a deed of apprenticeship contained the usual provision that the master should teach the apprentice, but there was no express provision as to the place where the contract was to be performed by the master, no stipulation could be implied that it was to be performed at the place where, at the time of its execution, the master carried on business and the parties to the deed resided. Grove, J. observes :—"There may, no doubt, be some hardship in the result, and very likely the parties did not, at the time when the deed of apprenticeship was entered into, contemplate the removal of the business, but we must construe the deed as we have it before us."

The next case *Dalrymple* v. *Leslie*, we noted among our practice cases, 17 C. L. J. 480, and there seems nothing to require special notice till the case of *Miller* v. *Brash*, p. 35, is reached, in which a point arose as to the remoteness of damages.

REMOTENESS OF DAMAGES.

The plaintiff, in *Millen* v. *Brash*, delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped to Rome. Owing to the defendants negligence the trunk was sent to New York, and a long time elapsed before it was restored to the plaintiff. In the meanwhile the plaintiff repurchased, at Rome, other articles at enhanced prices in place of those temporarily lost, and it was held this was not too remote damage to be recoverable against the defendants. Lopes, J., says :—"Much depends on whether it was a reasonable and necessary act of the plaintiff to buy these articles in Rome. * * * I think it was both the reasonable and necessary consequence of the defendants' failure to deliver, that the plaintiff should purchase what he did at Rome—a necessity arising from the non-delivery of a trunk, which the defendant, might fairly assume contained wearing apparel. The observations of Mellish, L. J., in the case of *Le Blanche* v. *L. & N. W. Ry. Co.* L. R. 1 C. P. D. 286, are not inapplicable here. * * * I think the plaintiff would have gone to the same expense and bought the same articles for the use of his wife, if there had been no railway company to look to, and if the trunk had been lost by his own fault. There was nothing extravagant or unreasonable in his so doing.

RAILWAYS DETENTION.

The case of *Gordon* v. *The G. W. Ry. Co.*, p. 44, construes for the first time (p 49) a condition of a Railway Co. as to the carriage of cattle, viz.: that the company were "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof," except upon proof that it arose from the wilful misconduct of the company. Groves, J. and Lopes, J., held that the word "detention" as used in this condition does not mean any detention by absolute refusal, but by something that prevents the company from delivering the cattle at the proper time ; that withholding under a groundless claim to retain the chattels (as, *e. g.* in this case, that the carriage had not been paid) after they had arrived at their destination, and ready for delivery, is not a detention "in the receiving, forwarding, or delivery ; it is not in the course of delivery, but an absolute refusal to deliver at the end of the transit.

CRIMINAL LAW.

In *Queen* v. *Martin*, p. 55, the defendant had been convicted, under Imp. 24-25 Vict. c. 100, s. 20 (Dom. 32-33 Vict. c. 20, s. 19) of unlawfully and maliciously inflicting grievous bodily harm upon A and B, in that by putting out the gas, and otherwise, he had

caused a panic to arise among the audience leaving a theatre, whereby many of them sustained injuries, and amongst them A and B. The Court for Crown Cases Reserved held that he was rightly convicted. Stephen, J. observes that the word "malicious" is capable of being misunderstood, and he cites *Reg.* v. *Ward* L. R. 1 C. C. R. 356, and *Reg.* v. *Pembleton*, L. R. 2 C. C. R 119, where Lord Blackburn lays it down that a man acts "maliciously" when he wilfully and without lawful excuse does that which he knows will injure another.

WRIT OF SUMMONS—FICTION OF LAW.

Lastly we nave to call attention to *Clarke* v. *Bradlaugh*, p. 63, in the Court of Appeal, the hearing of which in the Court below we noted among the Practice Cases, 17 C. L. J. 343. The Court of Appeal now upheld the decision, holding that to issue a writ of summons is not a judicial act, and the Court may enquire at what period of the day it was issued. Lord Coleridge, C. J., observes that he does not recognize the universality of the rule as to the law taking no regard of fractions of a day even as to judicial acts; for it might, perhaps, be found that even of two judicial acts done on the same day, the Court would inquire, if it were necessary, which was done at the earlier time of the day, but, he said,—"I base my judgment on the safer and unassailable ground that there is an essential distinction between the writ commencing the action, and the writs issued in the course of the action." Brett, L. J., said: "As for the rule that judicial acts relate back to the earliest moment of the day, I know of no principle on which it can be founded. * * * The question is, whether those who promulgated the rule declared the issuing of a writ to be the act of the party, or whether they declared it to be the act of the Court. I think that they declared it to be the act of the party, and for these reasons:—The writ is issued before the action commences, it is issued on the application of the party, it cannot be issued without the application of the party, and it cannot be refused."

SUPREME COURT RULES.

At the opening of the Supreme Court, March 3, Sir Wm. Ritchie, C. J., before proceeding with the business of the Court, as much misapprehension appeared to exist as to the effect of the rules of this Court in regard to the printing required to be done in cases coming before this Court, read, for the information of the Bar, some observations which were addressed to the Minister of Justice on this subject, which showed conclusively, he stated, that there was not the slightest ground for attributing unnecessary printing to any failure on the part of the Court to make rules in reference thereto.

The Chief Justice read at length from the rules of the Court referred to, and called attention to the following memorandum of the Chief Justice and Judges of the Supreme Court in relation to a notice given by Mr. Blake of a resolution: "That in appeals to the Supreme Court of Canada, the printed Records in the Courts below should be accepted for the purpose of the Appeal without requiring the reprint of the same matter":—

The Supreme Court Act, section 28, provides that no writ shall be required or issued for bringing any appeal in any case before the Supreme Court, but that it shall be sufficient if the party desiring so to appeal shall, within the time limited in the Statute, have given the security required and obtained the allowance of the appeal. Section 29 provides tha the appeal shall be upon a case to be stated by the parties, or in the event of difference, to be settled by the Court appealed from or a Judge thereof, and the case shall set forth the judgment objected to and so much of the pleadings, evidence, affidavits and documents as may be necessary to raise the question for the decision of the Court. Rule No. 2 of the Supreme Court Rules provides that, the case in addition to the proceedings mentioned in the said section 29 shall invariably contain a transcript of all the opinions or reasons for their judgment delivered by the Judges of this Court or Courts below, or an affidavit that such reasons cannot be procured with a statement of the

efforts made to procure the same. It must be apparent that it is most necessary in justice to the Court below and the parties, especially the party in whose favour judgment below has been given (and which it is sought to reverse), that the Court should be in possession of the reasons which led to the conclusion at which the Court below arrived. This is required in all cases by the Privy Council. (*See* Imperial Statute 7 and 8 Vict. c. 69, section 11, and Rule of Privy Council No. xvi.) Rule 3 of the Supreme Court requires the case to contain a copy of any order made by the Court below, enlarging the time for appealing. This is necessary that it may appear to the Court that it has jurisdiction to hear the appeal. Rule 4 provides that the case may be remitted to the Court below in order that it may be made more complete by the addition of further matter. This is obviously necessary as it may happen and has happened that at the hearing it has been discovered that the case did not contain all that had taken place in the Court below and which was necessary for the hearing and determination of the matters in controversy. Rule 7 provides for the printing of the case, and Rule 8 for the form of the case. The form adopted is the same as that used in the Appeal Court of Ontario; this was done for the express purpose of enabling the practitioners in that Court to use the cases printed for that Court, should such be the case agreed on or settled under section 29, to which nothing would be required to be added but copies of the reasons of the Judges under Rule 2, and the order enlarging the time under Rule 3. At the time this Rule, as to the form of the case, was promulgated, there was no rule in Quebec on the subject. Since then we are informed that the Court of Appeal of Quebec had adopted a rule similar to the rule of the Supreme Court. So far from the Court having ever refused to receive the printed matter used in a Court below, when it contained the matter appealed, the attention of the Bar has been repeatedly called by the Bench to the advisability of utilizing the cases printed in the Courts below, when it could be done consistently with the requirements of the Statute, and so saving a large amount of printing. Rule 10 provides that certified copies of all original documents and exhibits used in evidence in the Court of first instance shall be deposited with the Registrar. The same rule provides that the production may be dispensed with by order of a Judge of the Supreme Court, so that if either or both parties think the depositing such copies unnecessary, and shall make the same appear to a Judge in Chambers, an order can be immediately obtained for dispensing with their production. It will be observed that nothing in this rule requires the exhibits to be printed. The Court has had repeatedly to call attention to the unnecessary amount of printing of matter not required by the rules, and has been compelled, in several cases, to direct the Registrar to refuse to allow such unnecessary printing to be taxed as costs in the cause. The statute requires that the contents of the printed case shall be settled by the parties, or by a Judge of the Court appealed from, and the only additional printing which the Supreme Court, by its rules, has prescribed is that of the opinion of the Judges in, and the judgment of the Court below. It may also be noticed that the form and size of the case established by the Supreme Court Rule is precisely the same as that prescribed by section 2 of the schedule annexed to the Order of the Privy Council of the 24th of March, 1871; and in one case from this Court the Judicial Committee of the Privy Council directed that the printed record of the procendings in this Court should be allowed to be used in the hearing of the appeal.

Mr. McCarthy, Q.C., said, in reference to the case which gave rise to the observations in the House of Commons, there appeared to be a great misapprehension. He unfortunately was not present when the matter was referred to, but could say in reference to the case of *McLaren* v. *Caldwell*, that neither their Lordships nor the Court below were to blame for the printing of the books. They were printed by parties now respondents. The only thing that was objected to by the appellants was about printing the plans, and that a Justice of the Court of Appeal said he had no power to dispense with their printing as they were documents necessary to the case. That, he hoped, he would have the opportunity of stating in the House.

Ritchie, C. J., said, with reference to the amount allowed for printing, at the time the tariff was established the greatest possible pains were taken to see what would be a fair remuneration for doing so, and the matter was laid before Parliament, and he presumed the Minister of Justice of that day had examined that tariff, and he had heard of no complaints until now. As far as he was concerned he had done all he could to keep down expenses.

REPORTS.

ONTARIO.

CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

MCCALL V. CANADA FARMERS' MUTUAL INS. CO.

Receiver — Joint Stock Co. — Simple contract creditor.

A simple contract creditor of a Joint Stock Company cannot obtain an interim order appointing a receiver of the assets of the company on the ground that the company is insolvent, or has made an assignment of its assets.

Mills v. *Northern Railway of Buenos Ayres Company*, 5 Chy. App. 621, followed.

[February 14, 15.—Boyd, C.

This was an action on a policy of insurance, and for the appointment of a receiver, and for the winding up of the defendant company, and for the distribution of the assets *pari passu* among the creditors of the company. A motion was now made by plaintiff for the appointment of an interim Receiver until the trial of the action. It appeared from the depositions of the president and secretary that the unpaid premium notes had been transferred by the company as collateral security for advances made to the company, and for which the directors were personally liable; and that the rest of the assets of the company had been assigned to the secretary in trust to realise the same and pay the debts due by the company thereout.

The company filed affidavits disputing the plaintiff's claim on various grounds, among others for breach of the statutory condition as to the disclosure of other insurances existing upon the property insured.

Duff, for the plaintiff—The defendant company appears to be insolvent and incapable of paying its creditors in full. On this motion the plaintiff's right to recover cannot be tried; she has made out a *prima facie* cause of action, and that is sufficient to entitle her to have a Receiver appointed. He referred to *Evans* v. *Coventry*, 5 D. G. M. G. 911; *McNeil* v. *Reliance Mutual Ins. Co.*, 26 Gr. 567, R. S. O. c. 161. ss. 69, 75. The Company has no right to assign its assets.

McKelcan, Q.C., for defendant company—A company stands upon no different footing to an individual, and a simple contract creditor cannot obtain an interim injunction, or a Receiver against a company to restrain its dealing with its assets before judgment, any more than he could obtain such relief against any individual debtor. To entitle a person to apply for a Receiver he must have a lien on the property. The question as to the right of legislating on questions of insolvency is one which has been considered of late, and the strict right of the Dominion Legislature to exclusive jurisdiction over such matters was asserted recently by the disallowance of the Provincial Statute. 43 V., c. 10 on the ground of its being an invasion of the jurisdiction of the Dominion Parliament in matters of insolvency. What the plaintiff is in effect attempting to do is to put the defendant company into liquidation, and there is no statutory jurisdiction authorizing such a proceeding, and it would be an extraordinary thing if the Court were to assume jurisdiction to do that which even the Provincial Legislature cannot accomplish by statute, and were to take away the priority which creditors might otherwise acquire under execution against the Company. Here the plaintiff's claim is disputed for non-compliance with the conditions on the policy. He referred to Kerr on Receivers, p.p. 4, 12, 13, 38, 44 and 125; *Bowes* v. *Directors of Hope Life Ins. Co.*, 11 H. L. C. 389. The transfer of assets is no ground for the present motion. A corporation may make an assignment of its assets for the benefit of creditors: Abbott's Dig. of the Law of Corporations, vol. 1., p. 42 to 47, vol. 2, p. 16; *Nelson* v. *Edwards*, 40 Barb. 279; *Clark* v. *Titcomb*, 42 Barb. 122; *Hurlbut* v. *Carter*, 21 Barb. 221; *Hopkins* v. *Gallatree*, 4 Humph. 403; *Robins* v. *Emby Turnpike Co.*, 1 Snieder and M. 207-258; *Montgomery* v. *The Commercial Bank*, 1 Snieder M. 632; *DeRuyter* v. *St. Peter's Church*, 3 N.Y. (3 Coms.) 238; *McCallie* v. *Walton*, 37 Ga. 611-614; *B. and Ohio Ry.* v. *Glen*, 38 Md. 287. A corporation may pledge or mortgage its assets to borrow money or secure a debt; Abbot's digest of the Law of Corporations, vol. 1., p. 41., *Gillett* v. *Campbell*, 1 Den. 520; *Casey* v. *Giles*, 10 Ga. 9; *Brooke* v. *Bank of U. C.*, 4 Prac. R. 162, Dom. Stat. of 1867, 31 Vict., ch. 17, reciting and confirming assignment made by Bank of U. C. for benefit of creditors. The transfer which has been made for the benefit of creditors is a less expensive mode of realizing the estate for the

benefit of creditors than by winding it up under the direction of the Court, it ought not to be interferred with. The trustee is not a party.

Duff, in reply—The plaintiff is suing on behalf of herself and all other creditors. [THE CHANCELLOR—She can only represent creditors of the same class, she cannot represent those having executions]. If the receiver be not appointed the assets of the company may be dissipated before the plaintiff can obtain execution. Under the Judicature Act the plaintiff is entitled to pursue all her remedies in one action, and if she would be entitled, on obtaining judgment, to the relief she now seeks she ought to get it now in the present action. The objections to the plaintiff's claim are matters which do not go to the merits but can be cured. *Cur. adv. vult.*

THE CHANCELLOR—This case is, I think, governed by the case of *Mills* v. *The Northern Railway of Buenos Ayres Company*, 5 Chy. App. 621. In that case the plaintiffs who were creditors filed a bill to wind up a joint stock company, and an application for an interlocutory injunction and Receiver, was made. Lord Hatherley said :—"So far as the case rests on the simple fact of the plaintiffs being creditors of the company, it seems to me hardly capable of argument." * * "It is wholly unprecedented for a mere creditor to say :—'Certain transactions are taking place within the company and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed to see whether or not they are doing what is *ultra vires*, and to interfere in order that as by a bill *quia timet* I may keep the assets in proper state of security for the payment of my bill whenever the time arrives for its payment.'—The case must have occurred, of course, many years ago, before joint stock companies were so abundant, but certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must have been many thousands, yet I have never before heard—and I asked in vain for any such precedent—of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this Court on the ground that he, having no interest in the company except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this Court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a Court of Justice, but which he was about to proceed to establish."

These observations are so entirely apposite to the present case that it is unnecessary to add anything to them. I have not lost sight of the provisions of the Judicature Act which enable the Court to order the appointment of a Receiver "in all cases in which it shall appear to the Court to be just or convenient," (J. A. s. 17, s. s. 8). I do not think it would be either just or convenient at the present stage of this action to grant any such order, and thereupon refuse the motion with costs.

(See *National Provincial Bank of England* v. *Thomas*, 24 W. R. 1013 ; *Robinson* v. *Pickering*, 50 L. J. C. A. 527, *Hepburn* v. *Patton*, 26 Gr. 597.—Rep.)

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

IN THE GOODS OF TOMLINSON.

Jurisdiction—Judicature Act.

[May 24, 1881.—L. R. 6 P. D. 210.

The Judicature Act has no effect whatever upon the non-contentions branch of the jurisdiction of the Court of Probate in England, and no question of the enlargement of the jurisdiction existing in the Court, can arise in the non-contentions business.

CHINA TRANS-ATLANTIC SS. CO. v. COMMERCIAL UNION ASSURANCE CO.

Imp. O. 31 r. 11—Ont. O. No. 221.

Action on policy of marine insurance—Discovery of ship's papers—Form of order.

In an action on a marine policy, underwriters are entitled to discovery of ships papers in accordance with the practice before the Judicature Acts.

[Dec. 12. C. of A. L. R., 8 Q. B. D. 142—51 L. J. N. S. 132

In such an action the Master had ordered that, "the plaintiff and all persons interested in these proceedings, and in the insurance the subject of this action, by the oath of their proper

officer," do produce, etc.—following the practice in force before the Judicature Acts.

The Court of Appeal, *held*, that the practice obtaining before the Judicature Acts ought not to be disturbed.

BRETT, L. J.—Long before the Jud. Acts, the peculiarity of insurance business had given rise to a practice, both in Chancery and at common law, of granting discovery to a larger extent than in ordinary business. The reasons for this are not far to seek. The underwriters have no means to know how a loss was caused; it occurs abroad and when the ship is entirely under the control of the assured. In addition to this the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the under writers. The question, therefore, arose whether this practice had been altered, and it was held in *West of England and S. Wales District Bank* v. *Canton Ins. Co.* L. R. 2 Ex. D. 472, for the reasons there given that it had not.

[NOTE—*The Imp. and Ont. orders are virtually identical.*]

EX PARTE YOUNG—RE YOUNG.

Imp. O. 9, r. 6; O. 16, r. 10; O. 42, r. 8—Ont. O. No. 40; O. No. 100; O. No. 346.

Action against firm—Service—Debtor's summons—Judgment by default.

After the dissolution of a firm, duly advertised, W. issued a writ against the firm in the firm name, on December 18th, 1880. On December 21st the writ was personally served on one of the continuing partners at the firm's place of business. Y., one of the partners, who had retired shortly before the dissolution, was not served. No appearance was entered for any of the partners; and on December 29th., W. signed judgment for default. In June, 1881, W. took out a debtor's summons, under the Bankruptcy Act, 1869, founded on the said judgment and served Y. Y. applied to the Court to dismiss the summons, and his application was refused.

Held, by Court of Appeal, [diss. Brett, L. J.] that the summons should have been dismissed.

[Nov. 28, C. of A.—45 L. T. N. S. 493.

The above head-note sufficiently shows the facts. It was not shown that the debtor, personally, knew anything about the action until May 11th, 1881. The debt alleged was stated as due upon the judgment obtained by the creditor on Dec. 29th, 1880, not against the person served with the summons, but against a firm sued by the firm name.

SELBORNE, L. C., after expressing doubts as to whether it was correct to say that Imp. O. 16, r. 10, O. 12, r. 12 (Ont. O. Nos. 100. 57) assumed the existence at the time of action brought, of a subsisting partnership carried on under the firm named in the writ, for that the argument did not convince him "that the effect of a dissolution of a partnership, is to put an end to the partnership relation between the members of the dissolved firm, as to their joint liabilities and assets; or as to transactions in dependence at the date of the dissolution; or that the name of the firm under which their business had been carried on, may not, according to that mercantile usage of which the law does and ought to take notice, still continue to be applicable for any purposes for which the partnership relation may properly be said to continue,"—went on to say that the determination of the appeal did not depend upon these rules only; and that he had come to the conclusion that the summons should be dismissed for the following reasons:—

"The appellant, not having been named as a defendant to the action there is against him, *nominatim*, no judgment at present on record; and, as the whole proceeding under O. 16, r. 10 (Ont. O. No. 100) is new and statutory, it appears to me that a judgment against a firm cannot be sufficient to constitute a debt capable of supporting a petition in bankruptcy, against an individual person not named on the record in any other way than that which is either prescribed by, or can be shown necessarily to result from the provisions of the statute. The Rules of the Supreme Court on this subject, are part of the schedule to the Jud. Act, 1875. The same rules have, in O. 42, r. 8 (Ont. O. 346) expressly provided for this very case, in a manner which appears to me to show that judgment against a firm is not, and ought not to be held conclusive of the liability of any person who has neither admitted on the pleadings that he is, nor has been adjudged to be a partner in the firm sued, and who has not been served as a partner with the writ of summons."

COTTON, L. J., agreed with the Lord Chancellor. In the course of his judgment he observes:—

"By English law, previously to the rules made

under the authority of the Jud. Acts, a firm had no such existence as enabled it to sue, or made it liable to be sued. It was a mere name under which certain persons as partners carried on their business, and the individual partners as such were alone capable of suing and being sued. The orders under the Jud. Act, which have the effect of an Act of Parliament, have no doubt varied the law in this respect; the question is, to what extent? In my opinion they apply only to persons who are, at the time of action commenced, partners in an existing firm, not to persons who have been partners in a firm which has been dissolved. In my opinion such persons can no longer properly be called partners. * * * As therefore the members of a dissolved firm are, in my opinion, not properly described as 'partners' and 'partnership' does not properly describe the relationship betweem them, the words 'partners' and 'partnership' ought not in the Orders to be held to apply to those who were formerly, but are not partners, or to a dissolved partnership, unless there is something in the Orders to show that these words are intended to be so applied. I can find no such intention."

BRETT, L. J., dissented from the other Judges, holding (i.) that under O. 16, r. 10 (Ont. O. No. 100) the firm name in which persons "liable as co-partners" may be sued is the name of the firm which existed when the debt was contracted; and a partnership though dissolved is by the rule considered still to exist for the purpose of suing or being sued in respect of transactions which occurred whilst it was in full force; (ii.) that the phrase "where partners are sued in the name of their firm" in O. 9, r. 6, (Ont. O. No. 40) must by the same course of reasoning, refer to the firm which existed when the debt was contracted, and the writ, therefore, may be served upon any one of the partners of that firm; and by the latter part of that rule such service is good service upon the partners of the firm which existed when the debt was contracted; (iii.) that although under O. 42, r. 8 (Ont. O. No. 346) execution could not issue against the alleged debtor in the present case, the judgment was none the less a valid judgment, and the remedies on a valid judgment, other than "execution," could be put in force against him.

NOTE.—*Imp. O. 9, r. 6, and Ont. O. No. 40 are virtually identical. Imp. O. 16, r. 10 and Ont. O. No. 100 were identical before the addition made to the latter by Ont. O. No. 501. Imp. O. 42, r. 8 and Ont. O. No. 346 are identical.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Osler, J.] [Feb. 28.

REGINA v. CLUFF.

Certiorari—Quashing.

Where the recognizance intered into to prosecute a writ of *certiorari*, which had been returned by the Justices before whom the conviction was had, after the allowance of the *certiorari*, was bad, while the conviction might be good, such allowance was *held* capable of being quashed on the return of the rule to quash the conviction, and that no substantive motion for the purpose was necessary. *Secus*, on a trifling objection or in the case of an undoubtedly bad conviction.

Aylesworth, for the plaintiff.
Watson, contra.

Osler, J.] [March 3.

RE LANGMAN v. MARTIN.

Contract—Arbitration.

L., a builder, and a building committee agreed that all former contracts should be ended and abandoned, L. to give up any claim for compensation except as presently agreed. Certain work already executed was to be viewed by E. and a valuation put upon it; and, should it not conform to the plans, L. was to make it right at his own charges. The building material on the ground was likewise to be valued by E. and paid for at first cost. *Held*, that the construction of the arrangement was that L.'s work was to be paid for at E.'s valuation, who was not an arbitrator, and the agreement was not a submission to arbitration and could not be made a rule of Court.

Aylesworth, for application.
Clute, contra.

CHANCERY DIVISION.

Boyd, C.] [March 3.

CROWTHER v. CAWTHRA.

Distributions, Statute of—Intestacy—Collaterals.

The proviso of the Statue of Distributions that, "there be no representatives admitted amongst collaterals after brothers' and sisters' children," exclude the children of a deceased nephew of the testator.

Moss, Q. C. and *J. Hoskin*, Q. C., for infant defendants.

Robinson, Q. C., for H. Cawthra.

S. H. Blake, Q. C., for Mr. Mulock and Mrs. Cawthra.

McArthur, for plaintiffs.

Proudfoot, J.] [March 8.

CHAMBERLEIN v. CLARK.

Administration—Deficiency of assets—Status of creditors—R. S. O. cap. 107. sec. 30—Secured creditors.

The R. S. O. cap. 107, sec. 30, which enacts that on the administration of the estate of a deceased person, in case of a deficiency of assets, all debts shall be paid, *pari passu*, not only abolishes privilege among creditors, but places them in the same position with respect to each other as in which legatees stand towards each other; and a creditor receiving payment in full either in an action against the executor, or by the voluntary act of the latter, must refund the excess above his proportionate share at the instance of other creditors. A secured creditor need not bring his security into hotch pot, as a condition precedent to ranking on the estate, his lien being expressly preserved by the Act.

H. Cassels, for the creditor moving.

Moss, Q. C., *G. H. Watson*, and *G. Pearson*, for creditors paid in full.

Proudfoot, J.] [March 8.

WILKES v. WILKES.

Will, Construction of—Legacy reducible by testator's debts—Payment of debts.

A testator bequeathed to his sister, M. J., "such sum as will together with what shall be at her credit in my books at Montreal, make $6,000." At the date of the will there was $3,258.42 at M. J.'s credit, but subsequently the testator disposed of his business, and in carrying out the terms of the sale $2,000 was placed at M. J.'s credit in the books, making her credit $5,258.42. Of this sum $3,000 was to be placed on a special account at interest, and $2,000 to be repaid to her by the purchasers in ten years. Her account was then debited with merchandise $5,000; the sum of $258.42 was paid to M. J., and her account was balanced. M. J. then accepted the purchasers' undertaking to pay the $5,000 pursuant to the terms of the purchase, and the books showed nothing due her by the testator at the time of his death.

Held, that the intention of the testator was that M. J.'s legacy should be reduced by the amount of his debt to her at the time of his death, that what had taken place amounted to payment of the debt, and that she was therefore entitled to the legacy of $6,000.

Moss, Q. C., for the executors.

Robinson, Q. C., for the legatee

CHAMBERS.

Boyd, C.] [March 1.

NATIONAL INVESTMENT CO. v. EGLESON.

Security for costs—Payment out.

The plaintiff paid $400 into Court under an order for security for costs, instead of giving the usual bond. He succeeded in the suit. The defendant took the case to the Court of Appeal.

This was a motion, pending the appeal, to have the money in Court paid out to the plaintiff.

BOYD, C., refused the application without costs.

Mr. Dalton, Proudfoot, J.] [March 8, 13.

RE KIRKPATRICK, KIRKPATRICK v. STEVENSON

Reference, Change of.

An application to change the reference in this suit from Goderich to Toronto on the ground that the Master at Goderich was unfitted by ill-health to prosecute it efficiently was granted Costs to be costs in the cause.

Plumb, for the motion.

Hoyles, *Langton* and *Cassels*, for defendants.

Affirmed on appeal.

CORRESPONDENCE.

Office Hours for Law Students.

To the Editor of the LAW JOURNAL.

SIR,—In these days of stiff curricula and high passing standards, when students, to have any chance of a successful examination, require to spend their days and nights in close study and rigid application, when the "burning of the midnight oil" goes on simultaneously with the consumption, by the brain, of that strength and vigor which, at this period of their life, is so necessary for physical development and perfection, I propose to enter a plea on behalf of my fellow students for shorter hours of office confinement.

In the majority of Hamilton offices, students' hours are stated to be "from 8.30 a.m. to 6 p.m.," and not infrequently are these hours extended by pressure of work. Considering the amount of reading that has to be done "after hours," and their sedentary occupation during the day (not to mention the heavy renumeration for their services), such hours are altogether too long. Exercise, and that in the sunshine and open-air, which is so imperatively needful to the student in order to maintain the vitality and energy of the brain, is consequently out of the question, and he goes home in the evening fatigued after a hard day's writing in a dingy office, ill prepared for a "five hours' wrestle" with Blackstone, Broom, Snell, or Smith.

The present hours of law-students (in Hamilton, at any rate) are little better than those of ordinary day labourers, and hardly as good as those of skilled mechanics. This ought not to be the case. Our offices should be at least a little more professional than blacksmith or moulding shops.

The profession in this country, what with "cutting" and "knuckling" is rapidly degenerating into a sort of huckster business, and correspondingly losing that professional *esprit de corps* which is so predominant in the English bar.

Let us then be more professional in our hours and thus dispel the opinion now prevalent with the public, that "a lawyer's office, like a pawnbroker's shop, is always open for business."

While we can in this way materially enhance the dignity of this noble profession, we shall at the same time confer a boon on those young gentlemen who are now striving to qualify themselves to become worthy members of it.

Truly yours,

LEX.

BOOK REVIEW.

A MANUAL OF PRACTICAL CONVEYANCING; By D. A. O'Sullivan, L.L.B. Toronto: Carswell & Co., 1882.

The author of this treatise has selected a subject hitherto untouched by Canadian writers. The object of the present volume is to set out in a concise form the outlines of the law of real and personal property, as applied to practical conveyancing, particularly with the view of assisting the student and young practitioner. The main portion of the work treats of the laws affecting the transfer of real and personal property, including agreements, sales of land, leases, mortgages, assignments, bills of sale, and chattel mortgages, wills, etc., and contains many useful rules and directions to be observed by conveyancers. The remainder of the work is devoted to forms and precedents together with one or two of the more important statutes.

The text is in the most concise form and a large amount of useful information has been compressed into a small space. The chapters on Sales of Land and Personal Property will prove very useful to those who wish to acquire a knowledge of the law particularly applicable to conveyancing, without the necessity of reading large works upon those subjects. The chapter on Wills contains an excellent set of directions for the drawing and executing of wills and a brief sketch of the law relating to wills in general.

The want of a Canadian treatise on the subject of Conveyancing has long been felt, and the English work at present upon the list of books prescribed for students by the Law Society is of little use in Ontario. It would be well for the Benchers to consider the merits of Mr. O'Sullivan's treatise, with a view to adopting it as a text book.

The plan of the work is highly original and is much to be commended for clearness and conciseness. As the author acknowledges, nearly every chapter has been revised by some leading member of the Bar, and this fact in itself is a sufficient guarantee of the general reliability of the work.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

AGENCY.

Commentaries on the Law of Agency as a branch of Commercial and Maritime Jurisprudence, with occasional illustrations from the civil and foreign law; by Joseph Story, LL.D. 9th edition, by Chas. P Greenough. Little, Brown, & Co., Boston, 1882.

CITIZENSHIP.

A treatise on Citizenship by Birth and by Naturalization, with reference to the Law of Nations, Roman Civil Law, Law of the United States of America, and the Law of France; by Alexander P. Morse. Little, Brown, & Co., Boston, 1881.

CORPORATIONS.

A treatise on the Law of Private Corporations other than charitable, by Victor Morawetz. Little, Brown, & Co., Boston, 1882.

DIGEST.

A Digest of the Statutes, Rules and Decisions relative to the Jurisdiction and Practice of the Supreme Court of the United States, by Erastus Thatcher. Little, Brown, & Co., Boston, 1882.

ESTOPPEL.

A treatise on the Law of Estoppel and its applications in practice, by Melville M. Bigelow. 3rd edition. Little, Brown, & Co., Boston, 1882.

INSURANCE.

The Law of Insurance as applied to Fire, Life, Accident, Guarantee, and other none maritime risks, by John Wilder May. 2nd edition. Little, Brown, & Co., Boston, 1882.

Law Society of Upper Canada.

OSGOODE HALL.

MICHÆLMAS TERM, 1881.

The following gentlemen were entered on the books of the Society as students:—

GRADUATES.

Alexander George F. Lawrence, Charles Julius Mickle, Herbert McDonald Mowat, George Edward Evans, John Calvin Alguire, Donald McDonald Howard, John Armstrong, David Alexander Givens.

MATRICULANTS OF UNIVERSITIES.

John R. Shaw, Lewis Elwood Hambly, Samuel McKeown, John A. McLean, Alonze Edward Swartout, William James Tremcear, Frederick George McIntosh, George Francis Burton, James Vance, William Cherry.

JUNIOR CLASS.

Oliver Kelly Frazer, Thomas Reid, Noble Dickey, William Edgar Raney, William H. Sibley, A. M. Taylor, Franklyn Montgomery Gray, Marriott Wilson, Robert Stanley Hayes, John H. Bobier, William Leaper Ross, Samuel H. Bradford, Andrew Dodds, Richard Henry John Pennefather, William Edward Lount, Claude Foster Boulton, William Whittaker, John Wesley Ryerson, Marshall Orla Johnston, John O'Neill, H. D. Folinsbee, Edmund Montagu Yarwood, George Albert Jordon, Neil J. Clarke, Albert Edward Beck, Thomas Brown Patton, Frank Morris Gowan, Edgett William Tisdale, William Kenneth Cameron, Charles Henry Brydges, Horace Walpole Bucke, Edward Ernest Louis Pillsworth, John James Smith.

Herbert Dawson was allowed his examination as an Articled Clerk.

The following gentlemen passed their examination and were called to the Bar:

Rufus Shorey Neville, Ernest V. D. Bodwell, William Cayley Hamilton, Edward A. Peck, George William Begyon, John Henry D. Munson, Charles Crosby Going, Thomas Trevor Baines, Frank Marshall McDougall, Alfred Beverley Cox, Archibald James Sinclair, George H. Muirhead, Henry Yale, Sidney Wood, Newenham Parkes Graydon, James Russell, Archibald Stewart, Robert Cassidy, Victor Chisholm, William Humphrey Bennett, Frank Andrew Hilton, George Henry Smith, John Lawrence Dowlin, William Proudfoot, George Miles Lee, Daniel Fraser McWatt, Henry Boucher Weller, Nathaniel Mills; the names are arranged in order of merit.

HILARY TERM, 1882.

The following gentlemen passed their examination and were called to the Bar:

Edwin Taylour, English Honors and Gold Medal; Adam Johnston, Honor and Silver Medal; Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper, Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson; the names are in order of merit.

The following gentlemen were called to the Bar under the Rules in Special Cases:—

Donald McMaster, Henry Gordon McKenzie.

The following gentlemen were entered on the books of the Law Society as students at law:—

GRADUATES.

Marcus Selwyn Snook, Stephen Johnston Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick Macindoe Bankier.

MATRICULANTS OF UNIVERSITIES.

Nelson Sharp, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylesworth, Thomas Hislop.

JUNIOR CLASS.

Willard Snively Riggins, Allan Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Lorcy.

Frank Ernest Coombe was allowed his examination as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such

Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B.I., vv. 1-300; or
- Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles, V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

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

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—
- 1882—The Deserted Village. The Task, B. III.
- 1883—Marmion, with special reference to Cantos V. and VI.
- 1884—Elegy in a Country Churchyard. The Traveller.
- 1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1883 / 1885 — Emile de Bonnechose, Lazare Hoche.
1882 / 1884 — Souvestre, Un philosophe sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1882, the following books and subjects will be examined on :

FIRST INTERMEDIATE.

William's Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills; Snell's Equity; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 130.

FOR CERTIFICATES OF FITNESS.

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

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobold on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

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

The Law Society Terms begin as follows :—

Hilary Term, first Monday in February.
Easter Term, third Monday in May.
Trinity Term, first Monday after 21st August.
Michælmas Term, third Monday in November.