Canada Law Journal.

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DIARY FOR MAY.

1. Sun..... *3rd Sunday after Easter.*
2. Mon .....Sittings of Supreme Court Canada begin. J. A. Boyd, 4th Chancellor, 1881.
3. Tues.....First intermediate examination.
5. Thur.....Second intermediate examination.
7. Sat.....Lord Chancellor Brougham died, 1868, æt. 90.
8. Sun.....*4th Sunday after Easter.*
10. Tues .....Sittings of Court of Appeal and of Co. Ct. York for trials begin. Solicitors' examination.
11. Wed .....Barristers' examination. Batoche, 1885.
15. Sun.....*5th Sunday after Easter.*

TORONTO, MAY 1, 1887.

THE pressure of the prolific Canuck, guided doubtless by the astute, far-seeing ecclesiastical power whose iron grip (like the "maiden" of the Inquisition) is closing on the Anglo-Saxon race, is apparently being felt by our contemporary, the *Legal News*. Its first number this month has one of its editorials in the French language, and all its editorials in the number for April 16th are in that language. So far as we have observed this is a new departure, and though it is a small matter whereon to found an argument, it is said that straws show which way the wind blows.

THE same journal says another movement is being made towards an increase of the judges' salaries, and that deputations of the Bar, both of Ontario and Quebec, are in communication with the Minister of Justice on the subject. We always understood that the great difficulty of obtaining this increase in Ontario was the fact, that if the increase were made here (the propriety of which was admitted) the Government would be compelled to make an increase, not only for the Court of Queen's Bench in Quebec, but also for all the so-called Superior Court judges in that Province. It is said that, considering the character and importance of the work of the latter class, occupying, as they do, positions very similar to our County Court judges, their remuneration is ample. If their salaries are increased, much more ought those of the County Court judges here, many of whom have much heavier work to do. We doubt, however, if the heavily taxed people of Ontario would submit to the additional burden that would be thereby thrown upon them. They practically would have to foot the bill. If it could be arranged that each Province should pay its own judicial salaries it would probably result in those of this Province being increased and those in Quebec reduced.

THE honour of Knighthood has been conferred upon Hon. Matthew Crooks Cameron, Chief Justice of the Common Pleas. The profession are always well pleased to hear of any distinction being conferred upon that gifted and true hearted gentleman, whose name is a synonym for honour and integrity. Some surprise has been expressed that the Chiefs of the other Divisions of the High Court of Justice, and the Chief Justice of the Court of Appeal, have not been similarly honoured. The degree of Knight Bachelor was also, we understand, offered to them, but declined, for reasons personal to themselves. Whether there was in their minds any fear of the usual democratic chaff at the further multiplication of the word "Sir" in this country, we have no means of knowing. Sir M. C. Cameron at least has (as he always had) the courage of his convictions, and we

respect him accordingly. The title was presumably offered to the gentlemen referred to by reason of their official position, and as an honour to the Courts over which they preside. At the same time it is quite reasonable that if they prefer not to have any such distinction, their wishes should be respected, and they should be free from any charge of want of respect to the powers that be. There is plenty of precedent for their declining the honour. Item—Wherein, so far as the subjects of Her Majesty are concerned, lies the difference between the word "Sir" and the word "Honourable" as a prefix, except in the matter of degree? Yet a person accepting the latter escapes the criticism which sometimes falls upon him who allows himself to be called the former.

RECENT ENGLISH DECISIONS.

PRACTICE—THIRD PARTY PROCEDURE—INDEMNITY.

Birmingham and District Land Co. v. *London and North-Western R'y Co.*, 34 Chy. D. 261, is a decision of the Court of Appeal on a point of practice. According to the English Rules the leave of the court must be obtained before a notice can be served on a third party, from whom the defendant claims indemnity. In this Province the notice may be served without leave, but the party served may move to set it aside, and on such a motion the point decided in this case would be an authority. Chitty, J., held (and the Court of Appeal affirmed his decision) that it is not enough for a defendant to say that he claims indemnity from the third party he wishes to serve; but he must show that he has a *prima facie* claim against him for indemnity under a contract express, or implied, or that he has a right thereto on some equitable principle, although the court will not on a motion for leave to serve the notice, determine finally whether the claim is well founded or not. In the case in hand the facts alleged, only showed that the defendants might have a claim for damages against the third parties, and leave to serve the notice was refused. It is well to note, however, that the English Rules of 1883 are more restricted than Ont. Rule 108, the former confining the right to serve the notice on a third party to cases where contribution or indemnity is claimed, whereas the Ont. Rule allows it to be served, not only in that case, but also where "any other remedy or relief" over is claimed.

An application was subsequently made to the court to allow the case to be reargued on the ground that a clause in a Statute had been overlooked in the former argument of the case; but the court refused to accede to the application on the ground that the decision was on a mere point of practice, and the Statute was not so clearly in point that there could be no argument on the question.

PRINCIPAL AND AGENT—ACTION FOR PRODUCTION OF DOCUMENTS IN AGENT'S POSSESSION.

Dadswell v. *Jacobs*, 34 Chy. D. 278, was an action brought by a firm of foreign merchants against their agent in England, claiming production of documents relating to their business to a person appointed by them for that purpose. The defendants put in a defence stating that the person appointed by the plaintiffs was a clerk in a rival and unfriendly house of business, for which reason they objected to produce the documents in question to him, but that they were willing to produce them to any proper person, and it was held by the Court of Appeal (affirming Chitty, J.) that this was a good defence; and the court refused to strike out the defence, and give judgment for production to the plaintiffs, or their agents generally, without hearing the evidence.

COMPANY—PREFERENCE SHAREHOLDERS—REDUCTION OF CAPITAL—INJUNCTION.

Bannatyne v. *Direct Spanish Telegraph* Co., 34 Chy. D. 287, raises, as Cotton, L.J., says, a very important question. The defendant company, which was formed in 1872, had a capital of £130,000, with power to add to that capital by issue of new shares, and with power to give preference to any new shares that might be thus created. All capital raised by new shares was to be considered part of the original capital. In 1874 resolutions were passed to increase the capital by 6,000 new

shares of £10 each, and those shares were to have a preferential dividend of 10 per cent., but no preference as regards capital. The company afterwards lost one of their cables, thus losing a considerable part of their capital. Resolutions were then passed that they should reduce their capital by reducing the amount of both the ordinary and preference shares one-half. A preferential shareholder brought the action for an injunction to restrain this reduction of capital so far as the preferential stock was concerned, and an injunction was granted by Bacon, V.C.; but on appeal the Court of Appeal reversed his decision, holding that the contract to pay a preferential dividend did not preclude the right to reduce the capital created by the new shares, and did not amount to a bargain to pay an annuity of £6,000 in respect to the whole of the preference shares, but simply to pay a preferential dividend on the amount of those shares—whatever it might be—the new capital being subject to reduction in like manner as the original capital.

On a subsequent application, *In re Direct Spanish Telegraph Co.*, reported at p. 307, Kay, J., confirmed the resolution for reduction.

PRACTICE—PARTNERSHIP ACTION—DISSOLUTION—JUDGMENT CREDITOR OF PARTNERSHIP.

In *Kearney* v. *Attrill*, 34 Chy. D. 34, after a judgment had been pronounced in the Chancery Division for a dissolution of a partnership, and appointing a receiver, a creditor obtained judgment in the Queen's Bench Division against the firm. An application was then made in the Chancery action by the judgment creditor for leave to issue execution, but, instead of granting leave to issue execution, Kay, J., gave the execution creditor a charge for his debt and costs on all the moneys then in the hands of, or which might be thereafter taken possession of by, the receiver, the execution creditor undertaking to deal with the charge according to the order of the court.

PRACTICE—ADMINISTRATION ACTION—ABSENT PARTIES.

In *May* v. *Newton*, 34 Chy. D. 347, Kay, J., was called on to consider the practice of the court as to binding absent parties in an administration action. The result of his examination of the practice may be best stated in his own words. He says at p. 350:

The effect of all these rules is that persons interested in the property which is being administered, and whose rights or interests may be affected by an order directing accounts or inquiries are not bound—at any rate when they ought to be served with notice of such order—unless they are so served, or unless such a representation order is made as I have mentioned (i.e., an order appointing one person of the class to which the absent person belongs to represent that class). If service upon them is dispensed with, or if under Ord. xvi. r. 46, the court proceeds in the absence of any one representing them, they are not bound.

WILL—WILLS ACT S. 15 (R.S.O. C. 106 S. 17)—VOID LIFE INTEREST—ACCELERATION.

In re Townsend, Townsend v. *Townsend*, 34 Chy. D. 357, is a decision upon the effect of the Wills Act s. 15 (R.S.O. c. 106, s. 17). A gift of real and personal estate was made by a testator upon trust to convert and pay the income of the proceeds to A. for life, after his death to pay the capital and income to A.'s child or children, with gifts over, in case A. died without leaving issue living at his death. The gift in favour of A. was void because the will was attested by his wife, and A. had no children, and the question was: What was to be done with the income of the fund, which was the proceeds of realty only? And Chitty, J., held that until A. had a child the gifts upon the determination of his life estate could not be accelerated, and that during the life of A., and so long as he had no children, the income of the trust fund was undisposed of and belonged to the testator's heir-at-law, and could not be accumulated for the benefit of those entitled in remainder.

WILL—GIFT DURING WIDOWHOOD—GIFT OVER ON DEATH.

Stanford v. *Stanford*, 34 Chy. D. 362, is another decision of Chitty, J., upon the construction of a will whereby the testator gave the residue of his real and personal property upon trust for his widow during her life, provided she remained a widow; and from and after her death or remarriage he gave such residue to B., absolutely. In the event (which happened) of B. dying during the life of the widow, the property was given over to the testator's brothers and sisters, who should be living at the widow's death. B. died an infant and the widow married again, and it was held that upon such remarriage the gift over in favour of the testator's brothers and sisters took immediate effect and was not postponed until the widow's death.

Recent English Decisions.

RECTIFICATION OF AGREEMENT—SPECIFIC PERFORMANCE.

The short point determined by North, J., in *Olley* v. *Fisher*, 34 Chy. D. 367, is that since the Judicature Act, 1873, the court has jurisdiction (in any case in which the Statute of Frauds is not a bar), in one and the same action, to rectify a written agreement upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed.

VENDOR AND PURCHASER—CONDITIONS OF SALE—INTEREST.

In *Riley* v. *St. Aubyn*, 34 Chy. D. 386, an application was made to North, J., under the Vendors and Purchasers Act, to construe the rights of the parties as to interest on the purchase money. The conditions of sale provided that the purchaser should pay interest from the day fixed for completion in case of delay from any cause, "except the wilful neglect or default of the vendor." A delay not attributable to the wilful neglect or default of the vendor, took place, and the purchasers, by agreement with the vendor, deposited the purchase money with a banker "without prejudice as to any question of interest," and it was held by North, J., that this deposit of the money did not relieve the purchaser from his liability to pay interest.

PRINCIPAL AND AGENT—PURCHASE OF MINE BY SYNDICATE—RESALE TO A COMPANY—SECRET PROFIT—PROMOTER.

The case of *Ladywell Mining Co.* v. *Brookes*, 34 Chy. D. 398, was an action brought to compel the vendors of property sold to the plaintiff company to account for a profit made by them on the sale. The action was dismissed by Stirling, J., on the ground that the evidence failed to show that the vendors, at the time they bought the property, were promoters of, or in a fiduciary position to the company.

FURTHER ASSURANCE—TENANT IN TAIL.

Bankes v. *Small*, 34 Chy. D. 415, is the only remaining case in the Chancery Division. This was an action to compel the defendant to specifically perform a covenant for further assurance. The defendant being tenant in tail in remainder, had, without the concurrence of the tenant for life, executed a disentailing deed, whereby his estate was converted into a base fee in remainder; he then sold the remainder to the plaintiff, covenanting that he would execute every such disentailing and other assurance for further or more perfectly assuring the premises as the purchaser should reasonably require. The tenant for life having died, the plaintiff applied to the defendant to execute a further disentailing deed, which being refused, the action was brought. Kekewich, J., held the plaintiff entitled to the relief claimed.

BANKRUPTCY—MORTGAGEE OF POLICY—VALUATION OF SECURITY.

In *Deering* v. *Bank of Ireland*, 12 App. Cas. 20, the House of Lords reversed the decision of the Irish Court of Appeal, and held that where a mortgagee of a life policy having on the bankruptcy of the mortgagor valued his security and proved for the difference against the bankrupt's estate, he could not afterwards make a further claim for the value of the covenant to pay premiums.

COMPANY—LIEN OF COMPANY ON SHARES—MORTGAGEE OF SHARES.

The case of *The Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29, was originally before Field, J., 29 Chy. D. 149. (see *ante* vol. 21, p. 268), his decision was subsequently reversed by the Court of Appeal (31 Chy. D. 19). The House of Lords now reverse the latter court, and restore the judgment of Field, J. The question was one of priority between a company, who by virtue of their articles of association, claimed a lien on the shares of a share holder for a debt due by the shareholder to the company, and a mortgagee of the shares. The House of Lords held that the company could not, in respect of moneys which became due from the shareholder to the company after notice of the mortgage, claim priority over advances made by the mortgagees after such notice. The principle laid down in *Hopkinson* v. *Rolt*, 9 H. L. C. 514, being held to be applicable. Their lordships also held (reversing the Court of Appeal), that the notice of the mortgage was not a notice of a trust.

MORTGAGEE UNDER DEED ABSOLUTE IN FORM—SUBSEQUENT INCUMBRANCE—PRIORITY.

In connection with the foregoing case it will be useful to consider the *Union Bank of Scotland* v. *National Bank of Scotland*, 12 App. Cas. 53, in which, divested of the jargon of Scotch legal phraseology, the facts appear to have been as follows: The National Bank were mortgagees of certain property under a deed which was absolute in form. The mortgagor subsequently assigned her equity of redemp-

tion by way of mortgage to the Union Bank for value, and the question was whether the National Bank could hold the mortgaged property as security for advances made by them subsequent to their receipt of the notice of the mortgage to the Union Bank. The Scotch courts held that they could, but the House of Lords held that the principle of *Hopkinson* v. *Rolt*, 9 H. L. C. 514, governed, and therefore reversed the decision.

NEGLIGENCE—RAILWAY CO.—ONUS OF PROOF.

Wakelin v. *London and South Western Ry. Co.*, 12 App. Cas. 41, was an action by a widow, under Lord Campbell's Act, to recover damages for the death of her husband, who was run over by the defendants' train, and shows the difficulties that lie in the way of suitors under such circumstances. The defendants' line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman held guard during the day, but was withdrawn at night. The dead body of the plaintiff's husband was found on the line near the level crossing at night, having been killed by a train which carried the usual head light, but did not whistle or give other warning of its approach. No evidence was forthcoming to show how the deceased got on the line. Under this state of facts it was held by the House of Lords (affirming the Court of Appeal), that even assuming there was evidence of negligence on the part of the company, there was no evidence to connect such negligence with the accident, and that, therefore, the plaintiff failed.

In giving judgment their lordships, however, dissented from the view of the Master of the Rolls, that it was incumbent on the plaintiff, not only to establish that the accident was occasioned by the negligence of the defendants, but also to give affirmative evidence that the deceased did not negligently contribute to the accident. The burthen of proving contributory negligence on the part of the deceased, their lordships thought lies, in the first place, on the party who alleges it.

PRACTICE—APPEAL ON THE FACTS.

Allen v. *The Quebec Warehouse*, 12 App. Cas. 101, was an attempt on the part of the appellants to induce the Privy Council to reverse the decision of the court below on the facts. The action was brought against the defendants for damage to the plaintiff's ship which was injured owing, as was alleged, to a post on the defendants' wharf, to which it was moored, giving away. The court below dismissed the action. The defendants had brought a cross action for damage to the wharf, but this action had also been dismissed, and there was no appeal. Their lordships came to the conclusion that notwithstanding there had been these diverse findings of fact, yet they could not on appeal decide the case upon the view they would have taken of the facts if they had been a court of first instance, but that their decision must depend on whether or not they could say that it had been established that the judgment of the court below was clearly wrong. The appeal was dismissed.

PRACTICE—CONSOLIDATION OF APPEALS.

In *Heddingh* v. *Denyssen*, 12 App. Cas. 107, the Privy Council on motion consolidated the appeal with two other appeals arising out of the same will, but in a suit which had not been instituted until a year after the first appeal had been admitted; The appeals involving the same subject matter, and it appearing that there would be a saving of expense if they were heard together.

SALVAGE—REDUCTION OF SALVAGE ALLOWED.

The Owners of the Allen v. *Gow*, 12 App. Cas. 118, was an appeal in an admiralty case as to the quantum of an allowance for salvage. The judicial committee reduced the amount from $12,000 to $7,600.

PRACTICE—FOREIGN JUDGMENT—DEBTOR'S TRUSTEES—INTEREST ON JUDGMENT.

Hawksford v. *Renouf*, 12 App. Cas. 122, was an appeal from the Royal Court of Jersey to the Privy Council. The plaintiff who had recovered a judgment in England, sued on the judgment in Jersey, and joined as defendants the judgment debtor and certain persons who held property for him as trustees. The Jersey Court gave judgment in favour of the plaintiff for the amount of the judgment and interest thereon from its date, at 5 per cent., against all the defendants. The defendants appealed, and the judicial committee held that the trustees were improperly joined as defendants, and reversed the judgment as against them; and reduced the amount of it as against the judgment debtor by the costs occasioned by adding the trustees, and also reduced the inter-

est allowed on the judgment debt from its date, until the entry of judgment in the Jersey Court —from 5 per cent. to 4 per cent.—the rate recoverable thereon according to the law of England.

INSURANCE OF CARGO—"AT AND FROM PORT"—COMMENCEMENT OF RISK—INSURABLE INTEREST.

In *Colonial Insurance Co.* v. *Adelaide Marine Insurance Co.*, 12 App. Cas. 128, the judicial committee determined some questions of insurance law. The plaintiffs proposed to the defendant to insure a wheat cargo "at and from" port, and the defendants "in accordance with your written request" granted an insurance "from port." It was contended that the parties were not *ad idem*, and consequently there was no contract of insurance. The judicial committee, however, held that the defendants intended by their acceptance to insure "at and from" port. The insurance related to wheat then on board or to be shipped on board the vessel named, and it was held that the risk commenced as soon as any portion of the cargo was on board. The plaintiffs were both the charterers of the vessels and the purchasers of the cargo insured, and the master from time to time received delivery from the vendors; and it was held that this was a delivery from time to time to the purchasers, so as to vest in them a right of possession and property, and that consequently they had an insurable interest in such part of the wheat as had been so delivered. Their lordships took occasion to remark, that it was most desirable that colonial judges should comply with the Rule of the Privy Council of 10th Feb., 1845, requiring them to state their reasons for their judgments.

PUBLIC SQUARE—BREACH OF CONDITION—RIGHT OF ENTRY.

The case of *Chevrotiere* v. *Montreal*, 12 App. Cas. 149, was an appeal from the Superior Court of Quebec. Certain land had been granted in 1803 to the magistrates of Montreal, subject to a condition that the grantors, their heirs and assigns, should have a right to reenter if it should be turned to other uses than that of a public market place. The rights of the magistrates subsequently became vested in the municipal corporation, and in 1847 the market which had theretofore existed was abolished, and the land was thenceforward used as an open public place. The plaintiff, who claimed to be the owner of about seven-eighths interest as assignor of the original grantors, sought to recover the land under the condition, or a money compensation in lieu thereof, of $180,866. The council, however, affirmed the decision of the Superior Court and dismissed the action.

PARTNERSHIP—WINDING UP—PROFITS ACCRUED TURNED INTO CAPITAL—DISTRIBUTION OF ASSETS.

Certain questions relating to the law of partnership were considered by the Privy Council in *Binney* v. *Mutrie*, 12 App. Cas. 160. In keeping their accounts partners had treated their shares of accrued profits each year as accretions to their capital. It was held by their lordships that the profits of the year ending with the dissolution of the firm could not be so treated; and further, that the surplus assets should be distributed by paying to each partner his claims in respect of capital standing to his credit at the dissolution, and that the residue or deficiency would be profits or losses divisible in either case in the agreed proportions, and that the rateable application of the surplus assets in payment of capital claims must be subject to the liability to contribution to make up the deficiency, if any, and to the claim of any of the partners against the entire assets to answer such deficiency.

EXECUTOR—SALE BY EXECUTOR TO HIMSELF—SUIT BY LEGATEE TO SET ASIDE PURCHASE BY EXECUTOR.

The only remaining case to be noted is *Beningfield* v. *Baxter*, 12 App. Cas. 167. B. was a member of a firm of three partners, and also the surviving member of another firm of two partners, which was the sole or chief creditor of the first firm. B.'s executor joined in the sale, and also became the purchaser of the estate of the first firm for his own benefit, with the result that nothing was left for B.'s widow and universal legatee. This suit was brought by the widow to set aside the sale, and it was held that the sale was voidable, and that the plaintiff was not barred by delay or acceptance of money on the ground of either ratification, acquiescence or laches; but it was held that the decree for administration of B.'s estate, though declaring the sale should be set aside, should be without prejudice to its being shown, on taking the accounts, that any creditor was disentitled to the benefit thereof by estoppel or otherwise.

REPORTS.

ONTARIO:

MUNICIPAL CASES.

COUNTY COURT OF LINCOLN.

SPENCE V. CITY OF ST. CATHARINES.

By-law for destroying dogs—Municipal Act, 1883, *sec.* 49, *ss.* 12, 13.

Defendants held responsible for the act of the policeman who shot a dog under the authority of a by-law for the destruction of dogs roaming at large, not having on a specified tag or plate.

The purchase of the plate does not protect the dog unless it is worn.

A dog following its owner cannot be said to be wandering about at will, or to be roaming or running at large.

Discussion as to the object of the Legislature in reference to the provisions of the Act.

[St. Catharines—Dec. 29, 1886.

This was an action brought to recover damages sustained by the plaintiff in consequence of a cocker spaniel dog belonging to him having been shot by a policeman of the defendants, on the 6th August, 1885.

A by-law, called "By-law relating to Dogs," was passed by the municipal council of the corporation of the city of St. Catharines on the 23rd June, 1879, by the second section of which it was enacted that the owner, possessor or harbourer of any dog or bitch within the city shall pay a yearly tax to the city of one dollar for every such dog, and two dollars for every such bitch.

By the 4th section it was enacted that every owner of a dog or bitch in the city shall annually on or before the 1st August in each year procure the same, to be registered, numbered, described and licensed for one year from the 1st January next, thereafter ensuing, in the office of the general license inspector of the city, and shall cause the said dog or bitch to continually wear around its neck a collar bearing the name of the owner legibly written, stamped or engraved thereon, to which collar shall be attached a metallic plate having raised or cut thereon the letters C. L. P. (city license paid) St. Catharines, and the figures indicating the year for which the license has been paid, which said metallic plate shall be furnished by the inspector at the expense of the city, and further provides that the owner shall pay 25 cents for the license and metallic plate as a fee to the inspector for such registration and metallic plate; provided that no license shall be issued to any person, unless such person shall have paid first the yearly tax of the then current year to the collector of taxes, and produced the receipt of the collector therefor to the said inspector.

By the 5th section, it was enacted that "no dog or bitch shall be permitted to roam at large in the city without the collar and metallic plate, mentioned in the preceding section, and any dog or bitch running at large contrary to this by-law may be forthwith destroyed by the police of the said city."

The 6th section made provisions for Justices of the Peace ordering dogs that have attacked persons travelling in the street, or done any damage, or that have by barking or howling or in any other way disturbed the quiet of any person, to be destroyed.

The 7th section authorized the Mayor on being satisfied that there is danger to the citizens from mad dogs to give notice enjoining all persons in the city to confine their dogs and bitches or muzzle them for a period not to exceed two months from publication of the notice.

The 8th section authorized the killing of dogs or bitches known to be rabid.

The plaintiff was shown to have been the owner of a cocker spaniel on the 26th August, 1885, and to have owned it some time previously. He had paid the tax on the dog and had also had him registered and had obtained a tag or metallic plate, as required by the by-law, but owing to the collar which had been on the dog having been stolen or lost, the tag had not been attached to the dog. On the 26th August, 1885, the dog accompanied the plaintiff's little daughter and some other children, who had left the plaintiff's house on James Street, St. Catharines, and had gone along St. Paul Street in a westerly direction. When the children had gone nearly as far as Ontario Street, they stopped to look into a shop window on St. Paul Street, and the dog ran on, and while running about at or near the intersection of St. Paul and Ontario Streets Thomas Dow, a policeman of the city, who was walking along Ontario Street with a gun looking for dogs running at large without the metal plate came across the dog, and shot and killed it. The dog, at the time it was shot, was on the crossing leading from St. Paul Street across Ontario Street, near the west side of Ontario

Street, and, according to the evidence, had crossed to the west side, and was running on the crossing at the time it was shot.

Dow was, at the time he shot the dog, specially on duty for the purpose of shooting dogs which were without metallic plates, being appointed to that duty by the Chief of Police, and had in his possession a gun belonging to the defendants, and was followed by another man with a waggon, in which the dogs shot by him were put and carried away.

The statute under which the by-law was passed was R. S. of O. cap. 174, sec. 461, sub-sec. 10 & 11, which read as follows: 461. The council of every township, city, town or incorporated village may pass by-laws.

10. For restraining and regulating the running at large of dogs, and for imposing a tax on the owners, possessors or harbourers of dogs,

11. For killing dogs running at large contrary to the by-laws.

These sections are the same as in the act now in force, the Con. Mun. Act, 1883, sec. 490, sub-sec. 12 & 13.

It was not shown, or even suggested, that any proclamation had been issued by the Mayor under the 7th section of the by-law enjoining all persons in the city to confine their dogs or keep them muzzled, as can be done by the Mayor when he is satisfied there is any danger to the citizens from mad dogs; but the right to kill the dog is rested on the 5th section which enacts that "No dog or bitch shall be permitted to roam at large in the city without the collar and metallic plate mentioned in the preceding section, and any dog or bitch roaming at large contrary to this by-law may be forthwith destroyed by the police of the city."

SENKLER, Co. J.—In the case of *McKenzie* v. *Campbell*, 1 U. C. R. 241, the question arose whether under 4 Will. IV., cap. 23 (incorporating the city of Toronto) by sec. 22 of which power was given to the Mayor and Aldermen to make laws to prevent and regulate the running at large of dogs, and to impose reasonable tax upon the owners or possessors thereof, a by-law could be passed authorizing the Mayor to issue his proclamation requiring the owners of dogs to keep them confined for a period in his discretion, and that upon such proclamation being issued it should be lawful for the high bailiff, constables or any inhabitant of the city to shoot any dog running at large until the time limited in the proclamation should expire, and it was held that it could.

The act did not in terms authorize the killing of dogs, but it was held that for the purpose of preventing and guarding against hydrophobia, such a by-law might be passed.

A long judgment was rendered by Chief Justice Robinson, in which he points out that the act of killing the dog was an act of precaution for preventing an impending evil, or perhaps even an act for removing a present evil, and not a punishment for disobedience of the by-law, in which case he intimates that it might be illegal on the ground that other modes of punishment were provided in the Act (see page 248).

In the present case the killing the dog was not done in pursuance of any proclamation occasioned by fear of hydrophobia, under the 7th section, as already pointed out, but under the 5th section of the by-law, and can only be regarded as a punishment for not having the metallic plate attached.

The statute, however, now expressly empowers the killing of dogs running at large contrary to the by-law, and gives this power generally, and does not limit it to cases of apprehension of hydrophobia, so that the question considered in *McKenzie* v. *Campbell* does not arise.

The council have used the words "roam at large" instead of "run at large," the words used in the statute, in the first part of the 5th section of the by-law. No argument was based on this by the counsel for the plaintiff; it must, however, be shown that the justification comes within the words of the by-law. Under the circumstances it seems to me that that the only question to be considered is whether the dog can be said to be roaming at large at the time it was shot; the fact that the tax had been paid and the collar and plate procured cannot avail so long as the latter were not on the dog.

The dog was, at the time, accompanying the plaintiff's daughter along the street; it did not keep close to her heels and was not under any confinement or restraint, but the evidence shows, frequently ran a number of yards from her, as dogs will do while accompanying their owners, and the girl having stopped at a shop window, the dog ran on and crossed Ontario Street, and then came back, and seems to have been crossing again when shot. It was proved the dog was in the habit of following the little girl, and in fact was obtained by the plaintiff for her, and would only follow her.

It was urged by the plaintiff that the dog could not be said to be running at large under these circumstances, but that only dogs that were running about without their masters or members of the master's family could be so considered.

For the defendant it was contended that a dog's running at large when it is off its master's

premises, whether any one is with it or not, or at all events unless the person with it has it under his actual control.

Although the statute authorizing the passing of these by-laws has been in force for many years and many by-laws must have been passed under it, I have not been referred to nor have I discovered any case in the Canadian or English reports where the meaning of the words "run at large" or "roam at large" has been considered when applied to dogs.

Several cases can be found under the Act against horses or cattle being at large upon any highway within half a mile of any railway unless in charge of some person to prevent their loitering or stopping at the intersection (20 Vict., cap. 12, sect. 16). See *Cooley* v. *G.T.R. Co'y*, 18 U. C. R. 95; *Markham* v. *G.W.R. Co'y*, 25 U. C. R. 572. In these great stress was laid on the necessity of the animals being in charge of some person, and upon the object of public safety contemplated by the Legislature. In the case of *Hillyard* v. *G.T.R. Co'y*, 8 Ont. R. 583, it was held that a colt which was injured by a wire fence of defendants could not be said to be running at large, as it was following its dam, which was being led by a man with a halter along the road, as that is the customary way, and the universal custom ought to give the rule.

I have found some cases in the American reports, but they do not appear to be uniform. The Vermont statute permits any one to kill a dog running at large off the premises of the owner or keeper without a collar with the owner's name on it. In *Wright* v. *Clark*, 5 Vt. 130, a fox-hound kept for the chase and chained when not in the pursuit of game, was chasing a fox with its owner and one Stone, and while at some distance from its owner, but near and in full view of Stone, was killed by the defendant in shooting at the fox, it was held the shooting was wrongful and the defendant liable.

It was held that the hound when pursuing the deer or fox, at or with its master's bidding, is not "strolling without restraint," or "wandering, roving or rambling at will."

In the case of the *Commonwealth* v. *Don*, 10 Mit. 382, the defendant owned a dog which was not licensed. It left defendant's store (where he was usually kept chained) with a clerk of the defendant's, and followed said clerk through the streets of the town, not being confined, and following the clerk generally at a distance of from two to three rods, and was usually under the control of the clerk, and obedient to his call.

The judge instructed the jury that "if upon the facts of the case they were satisfied that the dog was by the side of the owner, or of his servant having the especial charge of him, or was so near to him that he might be controlled and prevented from doing mischief, although he was not tied, he was not in point of law at large; but if they were satisfied he was following through the streets his master or the clerk of his master loose, and at such a distance as that such control could not be exercised as would prevent mischief, he was at large within the meaning of the law.

The defendant having been found guilty, the Court of Appeal held that the instructions were sufficiently favourable to the defendant.

The by-law in that case used the words "go at large."

A dog playing with its owner's son on the owner's premises is not at large: *McAneaney* v. *Jewett*, 10 Allen 151.

Several cases considering the meaning of the words "at large" when applied to other animals, are collected in Br[illegible]ne's Judicial Interpretation at page 373.

The construction put upon them seems to vary according to the object the Legislature had in view in passing the enactment in which they are used.

I think there can be little doubt that the chief object the Legislature had in view in passing the enactment in question was to enable measures to be taken to prevent and guard against hydrophobia. It is not so stated in the Act, but as said by Chief Justice Robinson in *McKenzie* v. *Campbell*, 1 U. C. R., at p. 244, "we cannot but know that the principal object of restricting dogs from running at large in a city is the consideration of the imminent danger to the community of the horrible affliction of hydrophobia spreading to a fatal extent and with great rapidity, unless instant measures are taken to prevent it. It is not that dogs are likely to commit injuries to fields and gardens such as may be apprehended from cattle or swine, nor that they are in the same sense a nuisance on account of their making the streets unclean and offensive, for we see when there is not the particular danger alluded to, which cannot be too much dreaded, and which by mankind in general is indeed regarded with almost superstitious terror, it is common to find dogs allowed to wander about towns at will, though possibly there may be exceptions to this in the general regulations of some very populous cities—we are at liberty then to infer, and I think we must judiciously recognize that one object at least, if not clearly the greatest or the only object the Legislature had in view, when they allowed the Mayor and the Commonalty to prevent and regulate the running at large of

dogs, was to protect the lives of the inhabitants against a danger which might be most urgent; this being so we must look at the regulation with this consideration in our minds."

When, however, we look at the by-law now under consideration, we see that although by the 7th section, provision is made for the Mayor by proclamation enjoining all persons to keep their dogs confined or muzzled in case of apprehension of danger from hydrophobia, for a certain time, no provision is made for the killing of dogs that may be found running at large unmuzzled, contrary to the proclamation, unless it can be held that the words "contrary to this by-law," in the 5th section make such provision, a construction difficult to support in the face of the earlier part of that section which refers solely to dogs running at large without the metallic plate and collar, and it seems equally doubtful whether any pecuniary penalty is imposed in such a case.

The by-law seems to me very inefficiently drawn as a protection against hydrophobia, the object aimed at in it seems to be merely the enforcement of the payment of taxes by the owners of dogs.

However reasonable it may be to authorize the immediate destruction of dogs running at large in contravention of proclamations for the prevention of hydrophobia (although even in that case Chief Justice Robinson points out that it would be better to pay some kind of respect to private rights, and give the owner some opportunity of reclaiming his property (1. U. C. R. at p. 249); it does certainly seem harsh to authorize such a procedure, when no such proclamation has been issued, merely as a means of enforcing a police regulation, for which enforcement ample provision is made by the by-law through the imposition of fines. The injustice that may be thus done is illustrated by the present case, where the violation of the law is simply technical and not real, the plaintiff having paid all the taxes, and the omission to have the metallic plate attached being the result of an accident.

Such a procedure entirely disregards all rights of property, and if a mistake is made no chance remains for remedying it.

Assuming, however, that such an enactment as contained in this by-law is within the purview of the Act, the facts must be shown to come within the fair meaning of the words of the by-law.

The Council have chosen to use the word "roam" in their by-law, and this word may narrow, although it cannot extend, the meaning of the word in the Act which is "run" at large.

I do not, however, see that there is any appreciable difference in the two words. I think that both mean "wandering about at will," to adopt the expression made use of by Chief Justice Robinson in the passage I have already quoted, and I cannot think that a dog following its owner or other person having charge of it, can be said to be wandering about at will, or to be roaming or running at large—its general course is governed by its master, although it does run backward and forward while accompanying him, and it is controlled by his will. I am therefore of opinion that the justification fails.

It was further objected that the defendants were not responsible for the acts of the policeman Dow, on the ground that he was appointed by the Police Commissioners, and also that he was only authorized to act within the scope of the by-law. Although, no doubt, Dow was appointed by the Commissioners (as all policemen are), he is a policeman of the city and paid by the defendants, and in what he was doing in this case, he was acting by order of the Chief of Police, and as he supposed under the authority of a city by-law passed by defendants' council.

The Act was one which might be within the authority of the by-law, and I am of opinion the city is responsible for it.

Then as to the value of the dog, the evidence on this point is not satisfactory. The animal is said to have been a cocker-spaniel. These dogs sometimes have a fancy value, either because they are of a particular strain of blood, or because they are well trained. There is no evidence that this dog came from a valuable strain, and but little evidence that he was well trained—he was not kept for hunting purposes, but as a house dog.

In my opinion $20 is a fair value for the dog, and I give judgment for the plaintiff for $20 with Division Court costs; no right of set-off to be allowed the defendants. I stay the entry of judgment for one month.

I would add that I think the mode of destroying dogs in this city most improper; it is not only in disregard of the rights of property, but the act of a policeman shooting a dog in the day-time in the public streets is one full of danger, not only from the risk of the bullets glancing, but as likely to frighten horses; and the sight of a wounded dog striving to escape while scarcely able to move, and its cries of distress are painful in the extreme, and should not be met with in public thoroughfares.

The by-law clearly requires amendment, and when this is done, I trust that some less arbitrary and more humane system of carrying out its provisions will be adopted.

THE LINE FENCE'S ACT.

THOMAS v. RENNIE.

Excess of authority by fence viewers—Setting aside award.

The fence viewers having awarded that the appellant should remove a line fence already existing and sufficient, and replace it by another, the nature and cost of which they prescribed.

Held, that they exceeded their authority, and the award was set aside with costs.

[Whitby, December 22nd, 1886.

The parties were owners of adjoining lands in the Township of Brock. They and the former owners of the land had, for some years, by mutual agreement, kept up one-half of the line fence between their lands. The appellant's portion consisted of cedar stumps and roots, built up into a fence. The evidence showed that it was reasonably fit to keep out cattle, and that similar fences were largely erected and maintained in the locality. The respondent, having erected a new fence upon his portion, called upon the appellant to remove his stump fence and erect one similar to his own. Upon Thomas' refusal he called in the Fence Viewers, who made an award in accordance with Rennie's demands. It was shown, on appeal, that apart from the cost of a new fence, the removal of the old fence would be both tedious and expensive.

DARTNELL, J.J.—Section 2 defines the duties of owners, and imposes upon such as are owners of adjacent lands the duty of keeping up a just proportion of the fence which marks the boundary between them.

By Section 3 it is provided that if such owners cannot agree, and there is a dispute between them respecting such proportions (that is, the just proportion spoken of in section 3), the aid of the Fence Viewers can be invoked in order to arbitrate in the premises; that is, to settle the just proportion.

There is nothing in the Act which seems to point out that it applies to any existing line fences. On the contrary, it appears to me only to apply where circumstances require the erection of a fence where none previously existed. The form of award given by the Act confirms this view, for it speaks of a fence to be made and maintained. The necessity may arise from a variety of circumstances, such as the clearing of bush land, or the sale of a portion of a lot, which would entail the erection of a line fence where none existed theretofore.

It might be that such a modification of surrounding circumstances would arise as to cause an agreement for the proportion of an existing fence which would be just at one time not be so later on. In such case, perhaps, the dispute could be adjusted by the Fence Viewers; but not so in this instance. Rennie does not complain of the proportion, but that Thomas' fence is an eyesore to him; that his sheep might be injured in attempting to jump over it; and that it tended to gather noxious weeds, etc. The answer to this is that the fence existed when he bought, and it was purchased with full knowledge of its nature and form.

I am clearly of the opinion that the Fence Viewers had no authority to make the award they did: that it should be set aside; and as Rennie persisted in his proceedings after notice of Thomas' objection to their jurisdiction, he should be ordered to pay all costs of the appellant.

DOMINION ELECTION LAW.

DIGBY (N.S.) ELECTION CASE.

CAMPBELL v. VAIL.

Recount—Duties and jurisdiction of County Judge.

[Digby, N.S., March 4.

The following judgment on a recount of votes in this case was delivered by

SAVARY, CO. J.:—The last three lines of section 56, "Dominion Election Act of 1874," enacting that the decision of the Deputy Returning Officer on an objection to a ballot, raised by an agent, shall be "final, subject only to reversal on petition questioning the election or return," suggest some doubt whether the judge, on a recount, can review any allowance or disallowance of the Deputy Returning Officer made after objection, or do more than correct any errors in the counting, strictly so called, of the ballots allowed for the respective candidates, and the allowances and disallowances the D. R. O. may have made of his own mere motion. Perhaps the better view is that those lines are repealed by implication by the provision for a recount. I have, therefore, not only corrected some errors simply of counting, but I have sustained one decision against a ballot, and counted two ballots, one for Mr. Vail at Meteghan, and one for Mr. Campbell at Salmon River, which were rejected by the D. R. O. The mark on the former, being across the candidate's name, is within his division of the ballot paper. The mark on the other, and a good mark in form, is higher up on the ballot paper than it should be, but there can be no doubt as to the candidate for whom it was intended. Single straight or oblique lines, without any line crossing them, or shewing an honest at-

tempt at an X, I disallow. (Bothwell Elec. Case, 7 S. C. Can. 677.)

Several ballots were not initialed by the D. R. O., but counting the unused ballots in such cases, I find no reason to suspect a fraudulent insertion into the boxes of any ballots not legally supplied, and therefore in those cases, I accept the decision of the officer at the close of the poll, that these ballots were supplied by him. In Sandy Cove, I find seven ballots for Vail, and four for Campbell, on which the Deputy Returning Officer has not put his initials, thus throwing upon the authenticity of the ballots a doubt which it is the decided policy of the law to guard against.

But the gravest mistake (or crime, if it was wilfully done for a purpose) is that in several districts, ballots, besides the initials, bear on their backs certain figures, which it is suggested to me, are the numbers of the voters on the electoral lists, or on the voters' list in the clerk's poll book. District No. 1, Hillsburgh, shows five ballots for Campbell, and eleven for Vail, with these figures on them. Weymouth, forty-five for Campbell, and eighteen for Vail, have such figures endorsed on them; and every ballot cast at No. 10 Church Point, and No. 15 Rossway has figures, with "No." before it thus endorsed. All these illegal marks are in the same handwriting, evidently that of the Deputy Returning Officer. If these figures really represent the numbers of the voters on the electoral or voters' list of the respective districts, then a serious wrong and injury has been perpetrated on every voter who has gone to the polls in full confidence that the secrecy of his ballot was to be sacredly preserved; but who has been delivered a ballot containing on its back a number that would, by comparing it with the list, show for whom he voted.

Mr. Campbell's majority being ninety-five, it would be reduced to fifty-two or fifty-three if I rejected the ballots containing these illegal marks; but I long ago concluded that the County Court judge ought not, on a recount, to reject ballots which have been supplied by the Deputy Returning Officer, in consequence of any mark calculated to identify the voter, unless such mark was placed there by the voter himself. To do so, would be to enable Deputy Returning Officers, through ignorance or evil design, to disfranchise whole districts at their will, and temporarily, at least, to seat in Parliament men who are not sustained by the voice of the people. The Deputy Returning Officer is required by sec. 55, Act of 1874, to "reject" all ballot papers "upon which there is any writing or mark by which the voter could be identified." Common sense requires that this rule should be read with this qualification, viz.: That a Deputy Returning Officer has no authority to disfranchise a voter; and, therefore, he is bound to count and allow a ballot, although he himself has put an illegal mark on it, to render it ineffective. The County Judge is to recount "according to the rules set forth in sec. 55"; that is, according to those rules qualified and limited, as I have explained, as respects ballots illegally marked by the Deputy Returning Officer. He is simply to count and allow what the Deputy Returning Officer *ought* to have counted and allowed, and reject and disallow what the Deputy Returning Officer *ought* to have rejected and disallowed. To go further would be to usurp the functions of the Superior Court, which alone has jurisdiction of election petitions, and can alone only apply the appropriate remedy, viz.: Vacate the election for irregularity, and order a new one, giving the wronged electors a chance to deposit their votes legally. On the contrary, by counting out the candidate for whom the people had properly marked the majority of the ballots, condemning those ballots for a defect in them caused by the Returning Officer's improper act, the County Judge himself would become the instrument of corrupt or ignorant officials to thwart, for the time being, the "well understood wishes of the people," leaving the onus of proceeding to set the election aside, on the man whom the people had signified their wish to elect. I am indeed, not to know whether these are identifying numbers or not, for I cannot take evidence, and will not examine the lists to see. My duty on a recount is, I hold, but little more than ministerial, in accordance with the view of it, which I have already set forth. I concur in every word of the judgment of his Honor Judge Cowan, then chairman of the Board of County Judges of Ontario, a judge of forty years' experience, as reported in 18 *Canada Law Journal* (N S.), 304. In this case, fortunately, the majority is so large that the error would not affect the result; but if it did—if the majority in this case were wiped out, and a majority given to the opposite candidate, by the destruction of these ballots in that way, I should, nevertheless, count them, and leave it to the Supreme Court to prescribe the remedy on petition; and I submit, with all deference and respect, that those of my learned brethren who have felt themselves impelled to a contrary conclusion have exceeded their authority.

Other irregularities of lesser moment have been committed in this election. Some Deputy Returning Officers put in the ballot-box no statement showing the numbers polled for each candidate; many of them did not annex to their statements the affidavit which, by sec. 57, must be annexed to it; some only put a statement in the poll-book;

some did not separate the ballots into several packages and seal them up, as the law requires. Had the majority been so small that these irregularities could effect the result, a new election would have been the consequence. Some of these officials should be fined; for if incompetent, they should not accept the office; and if competent, should pay some respect to the duties so clearly defined in the Statute and Manual of Instructions furnished them, to fail in which involves such serious consequences to the public and individual candidates.

Acting on the above principles I find Mr. Campbell elected by a majority of 95.

Since preparing the above I find that sec. 56 is repeated in the Revised Statutes, its inconsistency with the provision for a recount having escaped the attention of the Revisers.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Proudfoot, J.] [March 10.

HAISLEY v. SOMERS.

Tax sale—Cash sale—Advertisement of sale—Disadvantageous sale—Notice to owner—Compensation for improvements—R. S. O. c. 180, secs. 109, 150, 155, 159—R. S. O. c. 95, s. 4.

At a sale of part of a certain lot for taxes, the treasurer, who made the sale, marked in the sale book the part sold as the south one-tenth, but afterwards gave a certificate for the north one-tenth, and this was finally conveyed to the defendant on Dec. 5th, 1884; the bid was for one-tenth of an acre only.

Held, that the above state of facts did not invalidate the tax sale and the title of the defendant to the north one-tenth.

Held, also, that neither did the fact that the purchase money was not paid for a week or two after the sale invalidate it.

It appeared that in the advertisement of the sale it was not stated whether the land was patented or unpatented.

Held, that R. S. O. c. 180, ss. 150, 155 did not cure this defect.

Again, the part sold, the north one-tenth, was not the least disadvantageous to the owner, the southern boundary of it running through a house which was on the lot, leaving about four feet on the unsold portion.

Held, that on this ground the sale could not be sustained.

Again, though the owner of the land was known, he was not notified as required by R. S. O. c. 180, s. 109, of the assessment and liability to sell.

Held, that this also was an omission which was not cured by R. S. O. c. 180, s. 155.

Held, also, that the defendant was entitled under R. S. O. c. 95, s. 4, though not under R. S. O. c. 180, s. 159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest and expenses.

McCullough, for the plaintiff.

Hewson, for the defendant.

MCCLARY ET AL. v. JACKSON ET AL.

Lessor and lessee—Erection of buildings by lessee—Covenant by lessor to pay for—Not running with land—Land or devisees of lessor not liable for value of buildings.

Held, that a covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised did not run with the land, and that the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected.

Moss, Q.C., for motion.

Gibbons, contra.

CHANCERY DIVISION.

Boyd, C.] [March 5.

MASON v. MASON.

Devolution of Estates Act, 1886, *secs.* 4, 7—*Locke King's Act—R. S. O. c.* 106, *s.* 36.

The Devolution of Estates Act, 49 Vict. c. 22, is to be read in conjunction with R. S. O. c. 106, s. 36, and the words used in the 4th and 7th sections relating "to the payment of debts," applied to the payment of such debts as are charged on land, and by the terms of the R. S. O. c. 106, s. 36, are payable thereout as the primary fund.

A devise of one lot to a specific devisee, while the rest of the testator's land passes under a general devise to the executors in trust for the heirs-at-law, affords no indication of intention that the specific devisee is to enjoy free of the mortgage debt; nor is such an indication to be gathered from the fact that the testator directs his debts to be paid out of a mixed fund.

Miller, Q.C., for plaintiffs.

Donovan, for the widow.

Maclennan, Q.C., for D. Mason.

Moss, Q.C., and *W. Davidson*, for the other infants.

Boyd, C.] [April 6.

RE GABOURIE.

CASEY v. GABOURIE.

Will - Executor — Investment — Breach of trust.

G. lent money to W. on his promissory note, and when he died held such note as a security. By his will he directed his executors to get in the moneys outstanding, and invest the same in such stocks as they might deem advisable. C., the executor, who proved the will, left the loan outstanding on the note, and at a subsequent time renewed it, and took a new note made by the firm of W. Bros., of which W. was a member. The reason this was done was, as G. stated, because he could get 7½ per cent. interest for the estate, which was more than he could do if he invested it in stocks. W. Bros. afterwards became insolvent, and the amount of the note was lost to the estate. It was shown that the executor was advised not to invest in stocks. In taking the accounts in the Master's office it was held that the amount of the note should not be charged against him personally, but on appeal it was

Held, that it was a very obvious case of breach of trust which could not be excused, whatever may be the hardship resulting to the executor. Interest was allowed to him, however, at the increased rate from the date at which he was charged with the note, and it was directed that interest should not be charged against him at 6 per cent., if it was proved that he could not have invested in stocks to realize that rate.

Sherry, and *Stevphen O'Brien*, for adult appellants.

F. W. Harcourt, for infant appellants.

T. Langton, for the executor.

Boyd, C.] [April 9.

RE MORICE AND RISBRIDGER.

Vendor and Purchaser—R.S.O. c. 109—*Provision in deed—Lawful issue.*

A deed made by C. G. (mother) to I. H. G. (daughter) just after her marriage, contained the following provision: It being hereby declared and agreed that it is intended by this deed to vest in the said I. H. G. life interest and estate in the said land, and at her decease the same is to go to the lawful issue of the said I. H. G., and to be held by them, their heirs and assigns in equal shares, and was executed by both grantor and grantee, but no issue were in existence at the date of the deed. In an application under the Vendor and Purchaser Act, R. S. O. c. 109, it was

Held, that the children of I. H. G. were interested in the grant, and that I. H. G. could not make a good title without all the children joining in the conveyance.

Maclennan, Q.C., for the vendor.

D. M. McIntyre, for the purchaser.

PRACTICE.

Mr. Dalton, Q.C.] [March 26.

CANADIAN BANK OF COMMERCE v. MIDDLETON.

Costs, security for—Issue arising out of garnishment proceedings—Interpleader issue.

Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 to order security for costs; but

Semble, owing to there being no rule in Ontario similar to the English Rule 863 of 1883, there is no power to make such an order in an interpleader issue.

Belmonte v. *Aynard*, 4 C. P. D. 352, and *Tomlinson* v. *Land and Finance Corporation*, 14 Q. B. D. 539, discussed.

Walter Macdonald, for the plaintiffs.

McMichael, Q.C., for the claimant.

CORRESPONDENCE.

LIMITATION OF ACTIONS.

To the Editor of the CANADA LAW JOURNAL:

DEAR SIR,—Having become familiar with the decisions in the several cases referred to in your able article of the 15th January last, as they were reported, and noticing the conflicting opinions of the Court of Appeal here and in England, I have become interested in the question of "The Limitation of Certain Actions."

Without saying anything as to whether Mr. Justice Gwynne, Chief Justice Wilson and the late Mr. Justice Morrison's judgments, affirmed, as they were, by the Court of Appeal in England, by *Sutton* v. *Sutton*, and *Fearnside* v. *Flint*, or the judgments of our Court of Appeal in *Allen* v. *McTavish* and *Boice* v. *O'Loane*, are right or wrong, I beg with deference, as we are human, and liable to error, to call attention to that part of Mr. McClive's article of March 1st, where he says: "In England a judgment becomes a lien upon the lands of a debtor by a procedure called docketing, which binds the lands of a judgment debtor throughout England, no matter where situate." I have reason to recollect that in England, by 2nd and 3rd Vict. c. 11, which, after reciting that "it is desirable that further protection should be afforded the purchasers against judgments, Crown debts and *lis pendens*," enacted "that no judgment shall hereafter (4th June, 1839—nearly fifty years ago) be docketed under 4th and 5th W. & M. c. 20; but that all such dockets shall be finally closed immediately after passing of this Act (4th June, 1839), without prejudice to the operation of any judgment already docketed and entered under the said recited Act. No doubt under 4th and 5th W. & M. the docketing of a judgment did bind the lands of a debtor throughout England until the effect of docketing was (in the language of the late Sir John Robinson, in *Doe dem. Dougall* v. *Fanning*, 8 Q. B. 166, *Doe Dempsey* v. *Boulton*, 9 Q. B. 532) "done away with by the Imperial Act., and registration of judgment substituted." It will be well remembered by Chief Justice Wilson, Mr. Justice Gwynne, and other judges, that in this Province no judgment could be entered without a "docket paper," from which, as soon as the judgment was signed, it was docketed in a book kept solely for the purpose, as early as, and even before *Doe d. Auldjo* v. *Hollister*, 5 O. S. 739, by which our courts held that "lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them." Yet strange as it may appear, although in England the effect of docketing was by 2nd Vict. discontinued and registration substituted, docketing in England continued until, by Imperial Act, 12th Vict. c. 110, it was, as well in form as effect, abolished, and docketing continued in force here (without the effect it had in England up to 1839) until our Act, 9th Vict. c. 34, s. 36, as amended by several subsequent Acts, provided for judgments binding lands by registration.

What has probably misled Mr. McClive is the recital in our repealed Act, 9th Vic.: that the registration of a judgment "Shall affect and bind all lands belonging to the defendant from the time of registration, in like manner as the docketing of judgment in England affects and binds lands." At the time of passing of which Act here, the docketing of judgments so as to affect lands in England had ceased. Chief Justice Sir John Robinson, in another case—*Doe dem. Dempsey* v. *Boulton*, 9 Q. B. 532, showed clearly that the words quoted should be read to mean, as the judgment docketed in England (when docketing was required) *used* to

bind lands from the time of docketing and not from the entry of judgment. From this it is probable that the English courts, in considering *Sutton* v. *Sutton*, and *Fearnside* v. *Flint*, had no occasion to, and did not, allude to the effect docketing judgments once had on land in England.

From all this it would appear that the effect of docketing judgments in England, abolished nearly fifty years ago, will not assist either the Courts of Appeal in England or here to harmonize hereafter on the subject of "Limitation of Certain Actions." My own views on this important question were advanced for me by the counsel in *McMahon* v. *Spencer*, 13 A. R. 430, in which case, however the court, were not I apprehend, embarrassed by the conflicting opinions of the courts hitherto as to the ten or twenty years' limitation, for the judgment was over twenty years old, and nothing regularly done upon it for that time. But as the late Chief Justice Moss seemed to have misgivings, and would have agreed with Gwynne, Morrison and Wilson, JJ., had it not been for *Hunter* v. *Nockolds*, a pretty good guess can be given, (although Ardagh, Co. J., in *Somers* v. *Kenny*, says we have no means of knowing what the Court of Appeal may do when the ten or twenty years shall come up squarely again before them,) if meantime the two English cases should stand unreversed by the Privy Council.

Yours, etc.,

A. R. DOUGALL.

Belleville, 8th March, 1887.

FUSION OF LAW AND EQUITY.

To the Editor of the LAW JOURNAL.

DEAR SIR,—The Bar associations of this and other counties have passed strong resolutions bearing upon the importance of fusion of law and equity not only in name, but in reality; but another example of the "waste of judicial force" has occurred here to-day, showing the necessity of immediate action and the practical carrying out of the outspoken opinions of the profession here and elsewhere throughout the Province.

The learned Justice, to whom was assigned the duties of taking the "old-fashioned hearing" of the Chancery Division, arrived here this morning in due course, made his bow to about six people in the court room, heard one of the two cases "set down," was informed that the other case had been settled, and thereupon, after about three hours session, closed the court, which, by the way, will be opened again in a fortnight by another learned Justice, from the Common Law Division, who will conduct what is known as "an assize," though the case heard to-day might quite as readily have been disposed of at such assizes.

Surely, Sir, it is time this farce, repeated here every spring and autumn, be put a stop to, and the strength of the Bench concentrated and made more practically useful by doing away with two sessions of the court (I use the expression advisedly, as there is practically now one court at Osgoode Hall, though it may have the character of a trinity), and arrangements made to dispose of the civil and criminal business of the Province, not by piece-meal as is now the case, but by two or three sittings equally distributed throughout the year, and presided over by Judges of the court irrespective of the peculiar nature of the business they may have been heretofore in the habit of "practising."

This, and this only, is the way the business can be properly, expeditiously and economically despatched, and is the way, no doubt, contemplated by the Judicature Act, or perhaps better styled the "Fusing Act."

The hitherto tranquil state of our local bar has been somwhat disturbed by an agitation for the appointment of a junior Judge, which we have always managed to do without, and the only necessity for which it is urged is the occasional absence of the County Court Judge upon protracted outside arbitrations; but these gentlemen, forgetting again their resolutions that the practice should be more thoroughly fused, and ignoring the fact that there are two Masters in Chancery, have not thought fit to urge the extension of their powers to enable them to take the work of County Court Chambers (when the County Court Judge may be absent) rather than the appointment of some member of the profession, who, from the very nature of the emoluments attached to the office, must necessarily be one not enjoying a large or remunerative practice, and could therefore hardly be looked upon (if he be appointed) as lending any great strength by his experience to the Bench of this county.

Yours, etc. B.

Hamilton, March 28, 1887.

OSGOODE HALL LIBRARY.

(Compiled for THE CANADA LAW JOURNAL.)

The following is a list of books received at the library during the months of January, February and March, 1887:

Abbott's Ct. Appeal Decisions, 4 vols., New York, 1873-83.
American Reports (Various States), 25 vols.
American Probate Reports, 4 vols,, New York, 1881-86.
Beccaria on Crimes, Albany, '72.
Best on Evidence, 7th ed., London, 1883.
Bigelow on Estoppel, 4th ed., Boston, 1886.
Bigelow on Torts, 3rd ed., Boston, 1886.
Bishop on Criminal Law, 7th ed., 2 vols., Boston, 1882.
Books for a Reference Library, London, 1885.
Bosswell on Insanity, Boston, 1885.
Byles on Bills, 14th ed., London, 1885.
Canada, Rev. Stat. of, 2 vols. (8 copies), Ottawa, 1887.
Canada Patent Office Record, vols. 8 to 13, Ottawa, 1880-6.
Challis on Real Property, Philadelphia, 1887.
Chaster on Powers of Executive Officers, London, 1886.
Chicago Law Institute Library Catalogue, 1887.
Copinger on Rents, London, 1886.
Deane on Conveyancing, 2nd ed., London, 1883.
De Colyar on Guarantees, Philadelphia, 1887.
Dicey—"England's Case against Home Rule," London, 1886.
Emden's Digest for 1886, London, 1887.
Fletcher on Quantities, 4th ed., London, 1884.
Fletcher on Light and Air, 2nd ed., London, 1886.
Fletcher on Compensation, London, 1874.
Fletcher on Arbitration, London, 1875.
Geare on Investment of Trust Funds, London, 1886.
Geological Survey of Canada, Montreal, 1886.
Gormully and Sinclair on Banks and Banking, Ottawa, 1887.
Greenhood on Public Policy in Contracts, Chicago, 1886.
Hare on Contracts, Boston, 1887.
Harris on Criminal Law, 4th ed., London, 1886.
Hearn on Government of England, London, 1887.
Hearn, Aryan Household, London, 1879.
Jones (D.A.), Construction, Commercial and Trade Contracts, New York, 1886.
Jones (L.A.), Law of Mortgages, 3rd ed., Boston, 1882.
Kinney's Digest Sup. Ct. U.S., 2 vols., Boston, 1886.
Kneeland on Attachment, New York, 1885.
Krueger's Code of Civil Law, Berolina, 1877.
Law Times (N.S.), Index to vols. 41-50, London, 1886.
Law Quarterly Review, vols. 1 and 2, London, 1885-6.
Leith's Williams' Real Property, Toronto, 1881.
Maryland Reports, 21 vols. 1800-43.
Martin on Maintenance, London, 1886.
Marvin on Wrecks and Salvage, Boston, 1858.
Mommsen's Justinian, 2 vols., Berolina, 1877.
Morrison on Ct. Martial Procedure. Chatham, E., 1886.
Muirhead's Gaius and Ulpian, Edinburgh, 1880.
Mulhall's History of Prices, London, 1885.
Mulhall's Dictionary of Statistics, London, 1886.
McCaul, Satires and Epistles of Horace, Dublin, 1833.
New York C.P. Reports, Index to, Rochester, 1886.
Ontario Draft Rev. Statistics, 2 vols., Toronto, 1887.
O'Sullivan on Government of Canada, Toronto, 1879.
Pollock on Contract, 4th ed., London, 1885.
Pomeroy on Constitutional Law, 8th ed., Boston, 1875.
Pritchard's Admiralty Digest, 3rd ed., London, 1887.
Ransome, "Our Colonies and India," London, 1885.
Redman & Lyon on Landlord and Tenant, 3rd ed., London, 1886.
Reid's Patent Ready Reckoner, London, 1886.
Robert's Vermont Digest, Burlington, 1878.
Roby's Justinian de Usufructu, Cambridge, 1886.
Roby's Justinian, Cambridge, 1886.
Salkowski on Roman Law, London, 1886.
Savigny on Private Int'l Law, 2nd ed., Edinburgh, 1880.
Schouler on Wills, Boston, 1887.
Scotland, Digest Sup. Ct., 3 vols., Edinburgh, 1867.
Scrulton on Charter Parties, London, 1886.
Short's Crown Office Rules, London, 1886.
Smith (C.M.), Master and Servant, Philadelphia, 1886.
Smith (H.), Law of Negligence, Philadelphia, 1887.
Smith (H.), Law of Negligence (Whittaker's ed.), St. Louis, 1886.
Smith (J.W.), Law of Bills, Cheques etc., London, 1887.
Smith (J.W.), Manual of Common Law, 5th ed., London, 1886.
Smith (J.W.), Manual of Equity, 13th ed., London, 1880.

Show & Winstanley's Annual Practice, London 1886.
Spaulding on Public Lands, San Francisco, 1884.
Stephen's Digest Evidence (Chase's edition), New York, 1886.
Stewart on Husband and Wife, San Francisco, 1885.
Story on Military Law, London, 1886.
Stutfield on Betting, 2nd ed., London, 1886.
Taylor (H.O.), Private Corporations, Philadelphia, 1884.
Taylor (T.W.), Equity Jurisprudence, Toronto, 1875.
Tennesee Reports, 80 vols., 1791-1886.
Thornton's Cyclopædia of Law, Northport, N.Y., 1885.
Throop's Civil Procedure, N.Y., Albany, 1886.
Trendell, Her Majesty's Colonies, London, 1886.
Turner, Organization of a Solicitor's Office, London, 1886.
Welch's Digest Ohio Decisions, Cincinnati, 1877.
Washburn on Real Property, 5th ed., Boston, 1887.
Wharton on Criminal Law, 9th ed., Philadelphia, 1885.
Wood (H.G.), Master and Servant, 2nd ed., Albany, 1886.
Wood (H.G.), Law of Nuisances, 2nd ed., Albany, 1883.
Wood (J.D.), Mercantile Agreements, London, 1886. D.

FLOTSAM AND JETSAM.

NOT OF THAT KIND.—"Was your husband on the stand yesterday?" asked the lawyer of a woman in a case in which husband and wife were witnesses. "No," she answered with a snap, "he wasn't on the stand. He was on the set. That's the kind of a man he is, whenever there is anything to set on, from a sat-in sofy to the top rail of a worm fence."—*Ex.*

DEADLY WEAPON.—A knotty legal question has arisen in the State of North Carolina, which may have to be decided by the Superior Court of that State. All of this because a coloured man called a brother descendant of Ham a liar, and the offended party belaboured the head of the offending negro with the only available weapon, which chanced to be a ten pound mud turtle. The question to be decided is whether or not a mud turtle is a lethal weapon. The court is fully competent to struggle with this problem, one of its learned judges having already decided that a bull dog is a "deadly weapon."—*Washington Law Reporter.*

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

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

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

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

Law Society of Upper Canada.

5. The Law Society Terms are as follows:

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

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

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

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

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

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

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

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

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

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

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee ior Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887. 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

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

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

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

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

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

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

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

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

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

First Intermediate.

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

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act. Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

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

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' 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.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.