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PART II.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From Elec. Ct.] [Jan. 8.

RE LINCOLN ELECTION.

Defective voters' list.

Held (Moss, C. J. A., Burton, Patterson and Morrison, J. J. A.), that the right of a voter, whose name has been entered on the voters' list to exercise the franchise, is not destroyed by the omission of a sufficient description (or any description) of the real property on which his qualification depends.

Hodgins, Q.C., for the petitioner.
Bethune, Q.C., for the respondent.

From C. C. York.] [Jan. 8.

RE WALKER.

Insolvent Act of 1875—Composition and discharge.

The Insolvent Act of 1875 does not contain any provisions for the joint and separate creditors dealing independently with the estates on which they respectively have a primary lien.

Held (Moss, C.J.A., Burton, Patterson, and Morrison, JJ.A.), that a deed made between a member of an insolvent firm and his separate creditors, without reference to the joint creditors i invalid.

J. K. Kerr, Q.C. (with him *W. R. Mulock*,) for the appellants.

Rose, for the respondents.

Appeal allowed.

QUEEN'S BENCH.

IN BANCO.—MICHAELMAS TERM.
DECEMBER 28, 1877.

PLOWES v. MAUGHAN.

Married woman—Separate estate.

The plaintiff, a married woman, acquired a farm with her own money, subsequent to the Married Women's Act of 1872. She and her husband and family lived together on another farm at some distance therefrom. The husband sowed the seed on the plaintiff's farm from which the crop of hay seized by the defendant under a *fi. fa.* goods against the husband was raised, but the hay was cut and stacked for the plaintiff as her own property, and the husband had not further interfered in the management of her farm.

Held, that the husband not being in the apparent possession or management of the farm, and the same having been acquired by the wife after the Married Woman's Property Act, 1872, it was to all intents the wife's separate estate, and that the hay raised from it was not liable to be seized by the husband's creditors.

Rule absolute to enter verdict for the plaintiff.

J. Reeve, for plaintiff.
F. Osler, for defendant.

BARBER v. MAUGHAN.

Chattel mortgage—Renewal of.

Held, following *Walker* v. *Niles*, 18 Grant, 210, and dissenting from *O'Halloran* v. *Sills*, 12 C. P., 468, that where the affidavit and statement filed on renewing a chattel mortgage

refer to each other and are intended to be read together they may be so read.

The statute requires the statement to set out the interest of the mortgagee in the mortgage and the amount due thereon, and says that the affidavit must vouch for these statements "as true." In this case the affidavit was that the statement "truly and correctly" set forth, &c. *Held* sufficient.

McMichael, Q.C., for plaintiff.

Robinson, Q.C., for defendant.

O'Donohoe v. Wilson.

Chattel mortgage—Sufficiency of.

Plaintiff's chattel mortgage recited "whereas the said mortgagee hath endorsed at the request and for the accommodation of the mortgagor . . . a promissory note . . . for $1,000," &c. The mortgage witnessed that the mortgagor, in consideration of such endorsement made before the execution of the mortgage, hath granted, &c. Plaintiff's affidavit stated that he endorsed the note; that the mortgage was executed in good faith and expressly to secure the payment of the note and security, and indemnity to plaintiff against said endorsement, and not for the purpose "of protecting" the goods, &c., covered by it from the creditors of mortgagor.

The bona fides of the mortgage was admitted, but it was contended that the recitals and the affidavit were insufficient under the statute; the recital because it did not set out the nature of the agreement between the parties, and the affidavit for non compliance with the statute in several particulars.

Held, that the mortgage and affidavit complied with the statute.

O'Donohoe, for plaintiff.

Donovan, for defendant.

Fitzhenry v. Murphy.

Seduction—Contradictory evidence—Excessive damages.

In this case the evidence was directly contradictory. The plaintiff, a married man, was an engine driver, and the girl his servant. There were circumstances which if the defendant was guilty would tend to inflame the minds of the jury, and there was no particular evidence of defendant's circumstances. The jury found a verdict of $2,000.

The Court refused to set aside the verdict as excessive.

Meredith, Q. C., for the plaintiff.

MacMahon, Q. C., for defendant.

Burgess v. Bank of Montreal.

Tax Sale—Insufficient description—32 Vict., cap. 36, sec. 155, O.

On the 9th November, 1860, the day of the sale, a sheriff gave a certificate to a purchaser of lands sold for taxes, describing the lands as "5 acres of land to be taken from the S. W. corner of the S. W. ¼ of lot 3, in the 11th con. of East Zorra." The Sheriff's book described the lands sold as "5 acres from the S. W. corner," &c. On the 17th September, 1866, the Sheriff who sold the land having died, his successor made a deed of the land to the purchaser, describing it by metes and bounds, making the land conveyed nearly a square at the S. W. corner.

Held, that the description in the certificate being indefinite and the deed made by a different Sheriff, it was impossible to identify the land sold, and the sale was void.

Held also, that the defect was not one cured by 32 Vict., cap. 36. sec. 155, O.

Bethune, Q.C., for plaintiff.

Becher, Q. C., for defendants.

Regina v. Nasmith.

Criminal law—Neglect to maintain a wife—32-33 Vict., ch. 20, sec. 25.

An indictment under 32-33 Vict., cap. 20, sec. 25, against a prisoner for neglect to maintain his wife need not allege that the wife is ready and willing to return and live with the husband, and such allegation, if inserted, need not be proved, and may be struck out.

Under this Act the Crown must make out such a case as would entitle the wife to a decree for alimony in equity.

In this case it did not sufficiently appear that the wife was in want of food, clothing, &c., or that the husband had the ability to provide it; the conviction was therefore quashed.

Irving, Q, C., for the Crown.

W. Francis, for the prisoner.

Regina v. Haines et al.

Criminal law—Trial by Judge—32-33 Vict. cap. 21. sec. 1104

Held, that where prisoners elect to be tried before a judge alone, the judge has the power to find them guilty of an offence under 32-33

Vict., cap. 21, sec. 110, in like manner as a jury could have done. *Ex. gr.*, he could, if the prisoners are charged with larceny, and the offence proved is false pretences, find them guilty of the latter offence.

Hardy, Q. C., for the Crown.

H. J. Scott, for prisoners.

Gibson v. City of Ottawa.

Municipal corporation—Liability for work not contracted for.

Plaintiff, engaged under a contract with the Water Commissioners of Ottawa to excavate certain soil and rock, and remove it not farther than 300 feet from the said works, was directed by the Engineer of the Water Commissioners to break up the material and spread it on the arches and approaches of a bridge built by the city, the defendants. The chairman of defendants' Board of Works verbally agreed to this.

Held, that plaintiff could not maintain an action for this work against defendants—a municipal corporation—though the work was necessary to the completion of the bridge and was a public benefit, as it had not been ordered or payment provided for it.

Beaty, Q. C., for plaintiff.

Bethune, Q.C., for defendants.

Hall v. Evans.

Statute of limitations—Easements—Ancient light.

Semble, that the recent statute of limitations of Ontario does not extend to easements.

The defendant and plaintiff occupied adjoining lots in a city, and defendant had had windows in his house on the plaintiff's side for over twenty years, and would in respect to these windows have acquired an easement, but that during the statutable period of 20 years he raised his house higher than the height of the windows, so that no portion of the windows in the new portion occupied any portion of them in their first position.

The law as to ancient lights in Ontario discussed, and the cases collected.

Beaty, Q. C., for plaintiff.

Ferguson, Q. C., for defendant.

Beigle v. Duke.

Possession—Statute of Limitations.

Where a patentee of a half-lot of 100 acres, in 1837, built a house on the south half of it, cleared land and cultivated it for a few years, and then sold first the south half of the lot, 50 acres, and then the quarter immediately north of it, and left the country and never returned to the lot.

Held, that she had under the circumstances taken actual possession of the North ½ undisposed of by her, so as to disentitle the plaintiff of the right to bring an action to recover possession under C. S. U. C., cap. 88, sec. 3, as amended by 27-29 Vict. cap. 29.

Armour, Q. C., for the plaintiff.

J. W. Kerr, for the defendant.

Vansickle v. Kelly.

Will, construction of—Right of way.

A testator by his will gave one-half of a lot to his son C. and the other half to his son W., and declared that in order to render it convenient for C. to obtain free access to his land from a side road, that a lane then running across the land devised to W, commencing at a gate named should "be kept and remain open for the free access" of C., his heirs and assigns.

Held, that the testator's intention was that the lane should remain in its condition at the time he bequeathed it, and that the words "shall be kept and remain *open*," did not give defendant, who claimed under C., the right to remove the gate.

Osler, Q. C., for plaintiff.

Robertson, Q. C., for defendant.

COMMON PLEAS.

IN BANCO.—MICHAELMAS TERM.

December 19, 1877.

Murphy v. Thompson.

Contract—Statute of Frauds—Authority of agent.

On the 5th January, 1877, the defendant, at Toronto, wrote to the plaintiff at Mount Forest, stating that "our Mr. Peters," defendant's agent, "advises me that you have a car or two of hogs" and requesting plaintiff to state average weight and lowest price for one or two cars. It did not appear whether there was any answer to this or not; but on the 19th January, Peters telegraphed the plaintiff from Harriston, to name lowest for one or two cars of hogs and give average. The plaintiff telegraphed Peters in reply, "Will take seven-ten

here, average two hundred." To which Peters telegraphed in reply: "Will accept your offer, seven-ten, $7.10 Order cars. Coming to-day." The defendant objected that there was no complete contract within the Statute of Frauds, as the words "Order cars" must be read, "Provided you order cars, thereby adding a new term to the contract, which had never been agreed to by the plaintiff; and also, that Peters in accepting for defendant had exceeded his authority, which was limited as to price; and in proof of such limitation telegrams which had passed between Peters and defendant, but of which the plaintiff was ignorant, were put in evidence. The jury found that the agency was a general one, and they entered a verdict for the plaintiff.

Held, that the plaintiff was entitled to recover; that there was a complete contract, the words "order cars" not having the effect contended for them; and that Peters had authority to bind the defendant.

Cattanach, for the plaintiff.

M. C. Cameron, Q.C., for the defendant.

Norval v. Canada Southern R. W. Co.

Land—Compensation—Ejectment.

The Canada Southern Railway Company requiring certain land owned by the plaintiff for the purposes of their railway, gave the plaintiff notice, under the Statute, of their so requiring it, and of their willingness to pay him $1,000 as compensation, and further notifying him that in case of his refusal to accept, an application would be made to the County Judge for immediate possession. The plaintiff having refused the compensation and to give defendants possession, they accordingly made application to the County Judge, and on giving the necessary security for the payment of the amount to be awarded within a month thereafter, obtained a warrant placing them in possession. On 21st March, 1876, an award was made which, after reciting all the proceedings as regular and sufficient, awarded the plaintiff $7,260 as compensation. The Company did not pay the amount awarded, but, acting under 38 Vict. ch. 15, appealed to a single judge to set the award aside or reduce the amount awarded on the ground of its being excessive. The case was heard, and on 10th March, 1877, judgment was delivered, dismissing the appeal. The Company then gave notice of appeal to the Court of Appeal. The plaintiff contended that the Company, by not paying the amount awarded within the month had lost their right to possession, and he brought ejectment.

Held, that the action would not lie, for the defendants having obtained the possession lawfully could not be deemed to be trespassers merely by reason of their taking advantage of the appeal afforded them to the single judge by the Statute; and that plaintiff's remedy was confined to the award.

December 29, 1877.

Doyle v. Carroll.

Promissory notes given to prevent a forgery becoming public—Right to recover on.

In an action on two promissory notes, it appeared that the defendant's son had committed forgery, and the jury found that the notes were given by the defendant, the father, for the money thus obtained by the son, in order to prevent the scandal of the forgery being made public.

Held, that there could be no recovery on the notes.

McMichael, Q. C., for the plaintiff.

Robinson, Q. C., for the defendant.

Ross v. Eby.

Agreement—Sale of Goods—Property passing.

By a written agreement, dated 19th February, 1876, made between the plaintiff and one Craig, Craig agreed to sell to the plaintiff the *Telescope* newspaper, job office, and subscription list, for $2,000; $500 to be paid on giving possession, Craig to be released at the same time of a mortgage of $500 to one Cooper on the plant, and to receive honses, &c., at a price to be ascertained. For the balance, which was to be paid within a year, from the date of the payment of the first instalment, Craig was to retain the Gordon press in the office, and such further portions of the jobbing plant as would fully secure him until he was paid. The agreement was only to take effect if Craig obtained an appointment in the Inland Revenue service; when it was immediately to take effect, as the newspaper was his only means of support. For the part retained by the plaintiff he was to pay rent equal to eight per cent. on the balance unpaid.

On the 1st March, Craig received the Government appointment, and on the evening of the 12th March the plaintiff paid $400 on account of the $500 instalment, having obtained time for the payment of the balance thereof;

and it was contended by the plaintiff that what then took place, constituted a delivery of the premises and property in the goods to the plaintiff, while for the defendant it was contended that no such delivery took place, but that the matter was to be completed on the following morning, when not being completed, Craig sold the goods to the defendant. The plaintiff having brought an action of detinue against the defendant,

Held, that he could not recover for that, under the agreement, the property in the goods was not to pass, until in addition to the payment of the $500, the Cooper mortgage was paid off; the horses, &c., delivered over, and the portion of the goods on which Craig was to have his lien ascertained.

Bain, for the plaintiff.

Bethune, Q. C., for the defendant.

SAMUELS v. COLTER.

Chattel mortgage—Absence of re-demise—Seizure before default—Right of action.

In this case the Court followed *McAuley* v. *Allen*, 20 C. P., 417, and held that an action will not lie at the suit of the mortgagor of chattels against the mortgagee for seizure of the chattels before default in payment or of any of the conditions of the mortgage, where there is no re-demise clause in the mortgage.

Osler, for the plaintiff.

R. M. Meredith, for the defendant.

WESTGATE v. WESTGATE.

Ejectment—Equitable defence—Injunction—Order to execute conveyance.

In ejectment to recover certain land, defendant set up a defence on equitable grounds, alleging that, in consideration of the defendant working and serving the plaintiff and managing his affairs, the plaintiff promised, as a reward therefor, to give the defendant the land, and the immediate possession thereof; that the defendant was put into possession and worked, &c., for a great number of years, and improved the land, and by his diligence greatly contributed to the accumulation of the plaintiff's property; that the plaintiff, in furtherance of his promise, and in consideration of the said services, etc., entered into a written agreement to give defendant the land, thereby confirming defendant in his possession, and defendant thereafter made improvements, and was assessed and paid the taxes on the land: that defendant had paid the full consideration for the purchase thereof, and had performed all conditions, etc., to entitle him to hold possession, and to all the plaintiff's rights in the land.

At the trial the plea was proved; but the plaintiff contended that the defendant could not set up title in himself, because in 1874, he had obtained possession from one Edwards, who was then in possession as the plaintiff's tenant, and had paid to the plaintiff $70, due to the plaintiff by Edwards for rent.

The Court held, that under the A. J. Act of 1873, the defendant was entitled to hold the possession, though he had obtained it from the plaintiff's tenant, although before that Act he would not have been able to do so, but would have been driven to a suit in Equity for specific performance of the agreement; and they ordered the verdict which had been entered for the defendant to stand; and granted a perpetual injunction against plaintiff taking any proceedings at Law to eject defendant, and also ordered the plaintiff to execute a conveyance.

Osler, for the plaintiff.

McMahon, Q.C., for the defendant.

WHEELHOUSE v. DARCH.

Contractor—Liability for default of—Lateral support—Right to.

In this case it appeared that the defendant's contractor so negligently dug a trench to lay the foundation of a house the defendant intended building on her land adjoining the plaintiff's as to undermine and take away the support to the wall of the plaintiff's house, so as to cause it to fall down.

For the defendant it was objected that there was no liability, as it was not the defendant's personal default; also, that no liability attaches where, as here, the relationship of employer and contractor exists; but only where it is that of master and servant; and also, that the defendant had the clear right to excavate on his own soil, without any right in the plaintiff to lateral support, or at all events that such support is limited to the land in its original state and not to the superincumbent weight of the house.

The Court *held* that defendant was liable for the default of his contractor; and that the objection as to the right to the lateral support were not tenable.

Bethune, Q.C., for the plaintiff.

Rock, Q.C., and *H. J. Scott* for the defendant.

Kilborne v. Russ.

Promissory notes—Stamps—Executor—Reading.

A declaration by plaintiff, executor of the estate and effects of Jacob Kitchen, deceased, under his last will and testament, proceeded to state a cause of action upon a promissory note made by the defendant, payable to Jacob Kitchen, or bearer, averring that the plaintiff became the bearer of the said note, and non-payment.

The defendant pleaded want of stamps, to which the plaintiff replied that when he became the holder of the note he had no knowledge that the note was not stamped, and that as soon as he acquired such knowledge, which was since the commencement of the action, he affixed double stamps.

The defendant demurred on the ground that if the testator Kitchen had not stamped the note in his lifetime, the plaintiff, as his executor, could not do so without averring that Kitchen himself had no notice that the note was not duly stamped.

Held, that on this record the plaintiff must be taken to have stated a cause of action accruing in his own right, and that the words (executor, &c.,) were merely descriptive.

Osler, for the plaintiff.

McClive for the defendant.

Pegg v. Nasmith et al.

Contract—Engineer's certificate—Condition precedent—Unnecessary plea ordered to be struck out

Action on the common counts for work and labour done by J. B. and W. B, alleging an assignment in writing to the plaintiffs.

There was also a special count setting up a written agreement, whereby the said J. B. and W. B. promised, covenanted and agreed to execute and complete, according to specifications certain grading and grubbing at certain named prices, and that defendants in consideration thereof promised and agreed to pay them the said prices, according to the amount of work executed and completed by them; that the said J. B. and W. B., in pursuance of their said agreement executed and completed certain specified amounts of grading and grubbing, but that defendants did not pay them or either of them for the same. The declaration then averred an assignment in writing to the plaintiff, and non-payment to him.

Plea: that by the said indenture in the last plea mentioned and by the said contract and agreement therein mentioned and referred to, it was further covenanted and agreed by and between the said J. B. and W. B. and the defendants, that all points in dispute, whether as to the quantities and qualities of work or material should be left to the decision of an engineer named, and from that decision there should be no appeal: that the alleged cause of action of the said J. B. and W. B. in the declaration mentioned, and alleged to be assigned to the plaintiff are matters in dispute as to the quality and quantity of work alleged to have been done by the said J. B. and W. B. in performance and execution of the said contract and of the covenants, provisoes and agreements contained therein; that the said engineer has not determined or decided that the said J. B. or W. B, or the plaintiff, are or is entitled to any sum of money whatsoever.

Held, by Wilson, J., plea bad; for, so far as appeared therefrom, the defendant's liability arose independently of the covenant to refer, and did not preclude the plaintiffs from suing until he had obtained the engineer's decision, though he might be liable for a breach of covenant for not referring.

The case was re-heard before the full Court, when, by consent the former plea was put in, which the Court considering sufficient to raise the defence set up by the eighth plea, they ordered the eighth plea to be struck out.

McCarthy, Q. C., and *Boultbee* for the plaintiff.

T. S. Kennedy, for the defendants.

Burnham v. Waddell.

Landlord and tenant—Landlord purchasing at bailiff's sale—Sale of goods—Bill of sale—Change of possession.

The plaintiff leased certain premises to P. and W., and the rent being in arrear, he caused the goods in question to be distrained, and after an unsuccessful attempt by the bailiff to sell them, the plaintiff with the tenants' consent became the purchaser. The goods were subsequently seized by the sheriff under executions against the tenants, and were sold by him. The plaintiff having brought an action of trover against the sheriff,

Held, that he could not recover, for in no event could the sale to him be supported; for if he claimed as a purchaser at the bailiff's sale, he could not as landlord become such purchaser; and, if he claimed as an ordinary vendee from the tenants, the sale would be void as against creditors, as the evidence shew-

ed there was no bill of sale registered under the Statute, nor any actual and continued change of possession.

Hector Cameron, Q.C., for the plaintiff.

Armour, Q.C., for the defendant.

THOMPSON ET AL. v. DICKSON.

Married woman—Separate estate—Promissory note.

Action against the defendant, a married woman, on a promissory note made by her to her husband's order, and endorsed by him to the plaintiffs. As evidence of the defendant being possessed of separate estate, it was proved that under the will of her father, who died in 1849, she was left 100 acres of land: that she married in 1858 while a minor; and that neither she nor her husband took possession of the land until she was twenty-one years of age.

Held, following *Johnston* v. *White*, 40 U. C. R., 309, that the land in question was not such separate estate as the law contemplates being bound at law for the wife's debts and engagements.

Quære, whether a note made by the wife to the husband and void as between them obtains vitality by being endorsed over by the husband to a third person.

Foy, for the plaintiff.

J. E. Robertson, for the defendant.

RE PETITION OF MINISTER OF EDUCATION.

Union School Section—Illegal formation—Subsequent Act legalizing—40 Vic., ch. 16, sec. 11, sub-sec. 14—Debentures.

In September 1874, the Reeves of the townships of East Nissouri and North Oxford, with the County Superintendent proceeded to form a Union School Section, comprising School Sections No. 1, North Oxford, and No. 5, East Nissouri. In January, 1875, and ever since, trustees were elected for the Union Section, as also for Section No. 1, North Oxford. And from the same date this Union Section has maintained a school-house for the Union, at which some of the North Oxford children attended. The Union Section levied school rates for 1875 over the whole Union Section, but none was levied by Section No. 1; and the Legislative grant for 1875-6 was paid to the Union Section, but under objection from Sec. No. 1. On the 28th June, 1876, it was decided in the case of *Halpin* v. *Calder*, 23 C.P., 501, that the Union section was illegally formed, and that there was no right to levy for Union purposes in Section No. 1. Immediately after that decision, Section No. 1, bought additional land and erected a new school-house, levied a school rate for the year 1876, and issued debentures, which are still outstanding. The school in Section No. 1, was closed from 1st April, 1875, to 31st December, 1876; but since the last named date has been kept open. On the 2nd March, 1877, the Act 40 Vic., ch. 16, sec. 11, sub-sec. 14 was passed.

The Court in answer to the petition, were of opinion, Gwynne, J. dissenting, that the Union Section existed as a fact on the passing of the Act, and was legalized by it, and absorbed Section No. 1, which therefore ceased to exist, but that further legislation might be necessary to provide for the debentures issued by School Section No. 1.

Rock, Q.C., and *T. Wells*, (Ingersoll), for the Union Section.

Read, Q.C., and *Ball*, Q.C., for Section No. 1, North Oxford.

J. G. Scott, Q.C., for the Minister of Education.

PEERS v. BYRON.

Ejectment—Tenant claiming as owner—Right to insist on notice to quit.

In ejectment, it appeared that defendant was put into possession of certain land as tenant from year to year, and paid rent. Subsequently he claimed the land as owner, and refused to pay any more rent; and at the trial, after claiming the land as such owner, and putting the plaintiff to proof of his title, set up that a six months' notice to quit had not been given, determining the tenancy,

Held, that the defendant having repudiated and disclaimed the tenancy, could not at the last moment treat it as still subsisting, and insist on a notice to quit.

Read, Q.C., for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

RAMSAY v. STAFFORD.

Lease—Surrender—Authority of wife—Evidence.

The plaintiff, a tenant of certain land, went away leaving his wife in possession, and she after his departure surrendered the lease to the landlord on payment of a sum of money, it being agreed at the same time that she might occupy the dwelling house on the place at a named rent. The tenant subsequently returned

and brought an action against the landlord for entering on the demised premises and seizing and selling the crops.

The Court held, and even assuming that the wife had no authority to surrender the term, the plaintiff by his conduct as appearing by the evidence after his return, as also his paying six months' rent of the house, under a new and inconsistent tenancy, was precluded from recovering.

Robinson, Q.C., for the plaintiff.
S. Richards, Q.C., for the defendant.

Black v. Mottashed.

Agreement to appoint indifferent valuator—Breach of—Acceptance of person appointed.

By an agreement on the sale of goods, the price was to be ascertained by indifferent valuators to be appointed by the parties; and for a breach of the agreement, to appoint such indifferent valuators, or to comply with the valuation, a sum of $200 was to be recoverable as liquidated damages. The parties did not appoint indifferent valuators, but the persons appointed were accepted without objection, and made a valuation. The vendor refused to comply with the valuation on the ground of its not being made in accordance with the agreement; and on this ground an action brought against him to recover the $200, as liquidated damages for breach of the agreement, failed. The vendor then brought this action against the purchaser to recover the $200 as liquidated damages for the breach of the agreement to appoint an indifferent valuator.

Held, that this action would not lie as the appointment had been accepted without objection.

M. C. Cameron, Q.C., for the plaintiff.
Diamond, for the defendant.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by H. T. Beck, M. A., Student-at-Law.)

Little v. Lines.

Arbitration—Reference—Costs.

Held, that under the usual order of reference (Chit. forms, 9th ed, p. 193), giving the arbitrator all powers as to amendments of pleadings *and otherwise*, the arbitrator has power to certify for full costs, and that consequently when the arbitrator had not certified, a judge in chambers has no power to do so.

[November 12, 1877—Mr. Dalton—Wilson, J.]

A summons was taken out, calling on the defendant to show cause why an award made between the parties should not be referred back to the arbitrator, on the ground that he had neglected to certify for full costs, or why the judge in chambers should not certify for costs, under Rule 155. The order of reference followed Chit. Forms, 9th ed. p, 893, verbatim. The arbitrator found $73 to be due the plaintiff, and did not certify for full costs. It was alleged that $145 had been paid after the issue of the writ, and that the arbitrator had taken this sum into account in making his award. It was also alleged that the arbitrator had not certified because he thought he had no power to do so under the order.

Mr. Ponton (Beaty, Hamilton & Cassels), for plaintiff, contended that the arbitrator had no power under the order to certify. Such power must be given by the order in express terms, the words used therein having reference only to amending and adding pleadings, and disposing of record, &c.

H. J. Scott, for defendant. A judge in chambers has no power to refer back the award. The order gives the arbitrator full power to certify.

Mr. Dalton.—The motion to refer back is a motion which must be made in Court. The words of the order giving the arbitrator "all powers as to amendments of pleadings and otherwise, as a judge sitting at Nisi Prius," I think, give him power to certify, and if so a Judge in Chambers has no such power: *Calder* v. *Gilbert*, 3 Prac. R. 127. The summons must be discharged, but, under the circumstances, without costs.

From this judgment the plaintiff appealed to Wilson, J., who, however, refused a summons.

Reported for the *Law Journal* by N. D. Beck, Student-at-Law.

Gillespie v. Robertson.

Stakeholder—Lien on deposit—Interpleader—C. S. U. C., cap. 30.

A stakeholder allowed to retain, out of the moneys in his hands, a sum sufficient to cover his cost of an interpleader brought to try the right to the stakes.

[December 21, 1877—Mr. Dalton.]

This was an action brought to recover the

amount of a sum of money and a promissory note deposited by one Davenport with the defendant as a bailee, to be delivered to the plaintiff on the performance of certain conditions contained in an agreement between Davenport and the plaintiff. The defendant, who was an attorney, had drawn up this agreement and transacted some further professional business between the parties relative to the subject matter of the suit.

On the 21st October, 1876, an order was made in Chambers, under C. S. U. C., cap. 30, directing an issue between the plaintiff and Davenport, as to the right to the money and the note; the order proceeded as follows:—"That the costs of the defendant in this action and incidental to this action in reference to the subject matter of the said action and of this application, be paid by the unsuccessful party in the said issue, and that the said defendant in this action shall deliver up the said property the subject matter of this action to the successful party in the said issue, upon payment of any lien or claim which he may have thereon."

The issue having been decided in Davenport's favour, on 13th December, 1877, on the return of a summons which had been served on the defendant's agent, an order was made for the payment by the plaintiff of Davenport's and the defendant's costs, and for the delivery to Davenport of the sum of money and the note in the defendant's hands. On the 18th December, 1877,

Crickmore filed an affidavit of defendant stating that he believed the plaintiff was in insolvent circumstances, and that he would lose the costs he had incurred unless he were allowed to retain them out of the money in his hands, and obtained a summons to show cause why the order of the 13th December should not be varied by providing that the defendant should be at liberty to retain out of the money and note in his hands, the costs therein directed to be taxed and paid to him by the plaintiff, and also the amount of any lien or claim to which he should appear to be entitled, and that the master of the Court should be directed to take an account of the amount of such lien.

On obtaining the summons the following authorities were cited:—Ch. Arch. Prac. 1399; Simon's Law of Interpleader, 2nd Ed. 31; *Pitchers* v. *Edney*, 4 Bing. N. C. 721; *Duer* v. *Mackintosh*, 3 Moo. & Sc. 174, 2 D. P. C. 730; *Parker* v. *Linnett*, 2 D. P. C. 562; *Reeves* v. *Barraud*, 7 Scott, 281.

On the return of the summons, *Aylesworth* shewed cause. The defendant, upon obtaining the interpleader order, being obliged to shew (sec. 1), "by affidavit or otherwise that he does not claim any interest in the suit &c.," cannot now set up any lien, at all events he has no lien for any costs incurred before the commencement of the suit, and the provision in the interpleader order respecting the defendant's lien should not have been inserted: *Braddock* v. *Smith*, 9 Bing. 84, 2 Moo. & S. 131; *Deller* v. *Prickett*, 20 L. J. N. S. Q. B. 151. Defendant and Davenport being equally innocent, there is no reason why Davenport should pay defendant's costs. The English cases cited in support of the summons, were all cases in which the funds were directed to be paid into Court in the first instance, and the stakeholder's costs of the application were allowed to be deducted from such payment.

S. R. Crickmore, contra.

MR. DALTON said that the defendant having accepted the position he did between the parties at the request and for the convenience of both of them, they should keep him harmless, and the order he would make would be that the order of the 13th of December should be varied so as to provide that the defendant should be at liberty to retain out of the sum in his hands his costs incurred in the suit and in the interpleader proceedings, and that Davenport might add them to his costs against the plaintiff, but that defendant should not be entitled to retain anything for costs or charges incurred before the commencement of the suit, and that, as he had been served with the summons upon which the order of the 13th December was made, he should have no costs of this application.

Order accordingly.

CHANCERY CHAMBERS.

(Reported for the *Law Journal* by H. T. Beck, M, A., Student-at-Law.

Sadlier v. Smith.

Examiner's Room—Witnesses—Contempt.

Held, that under 34 Vict., cap. 12, sec. 9, a special examiner has power to exclude witnesses from his room during an examination, and he may exercise such power when the witness is a party to the suit.

Held, also, that a refusal to comply with the ruling of an examiner, in not withdrawing when ordered so to do, is a contempt of court.

[November 12, 1877.—Proudfoot, V.C.]

This was a motion for the costs occasioned to the plaintiff by the postponement of an examination and of a motion for an injunction, caused by the refusal of a witness to withdraw from an examiner's room during the examination of other witnesses. The examination of a witness on a motion for an injunction in the suit, of which motion notice had at that time been given, was being proceeded with, when the defendant in the suit entered the examiner's room. The plaintiff's solicitor asked that he might be excluded during the continuance of the examination. The solicitor for the defendant contended that the examiner had no power under the Act, to exclude witnesses. The examiner, however, held that he had power, and requested the defendant to withdraw, which he refused to do, on being so advised by his solicitor. The examination was thereupon postponed at the request of the plaintiff. The motion for an injunction was also postponed, the examination not having been taken at the time the motion was returnable.

Donovan for the plaintiff.

Mr. Doyle (J. O'Donohoe) for the defendant.

Proudfoot, V.C.—I am of opinion that the examiner had power to exclude the party from his room. An examiner is bound to observe the rules of evidence. If a party is dissatisfied with an examiner's ruling, he should nevertheless acquiesce. I think the refusal to withdraw was a contempt. The plaintiff is entitled to the order with the costs of the motion.

LAW STUDENTS' DEPARTMENT.

SCHOLARSHIP EXAMINATIONS.

The following is the result of the Examinations for Scholarships, held on the 29th and 30th November last:—

First Year.—P. H. Drayton. 226; B. F. Justine, 196; McCarthy, 171.—*Maximum*, 300.

Second Year.—W. Nesbitt, 278; F. Hodgins, 270; S. J. Weir, 170.—*Maximum*, 300.

Third Year.—H. P. Sheppard, 276; N. D. Beck, 236; Wm. Fletcher, 196; Patterson, 123.—*Maximum*, 300.

Fourth Year.—T. Ridout, 320; T. P. Galt, 312.—*Maximum*. 480.

The Examiners in their report directed the attention of the Benchers to the exceedingly good examinations passed by Mr. Galt and Mr. Hodgins, who stand second in the fourth and second years respectively, each of these gentlemen being so close to the competitor who succeeded in obtaining the first place as to make the question of competitive merit a difficult one to decide, and suggested the propriety of awarding additional scholarships to Mr. Galt and Mr. Hodgins; the suggestion, however, was not adopted by Convocation.

EXAMINATION QUESTIONS.

CERTIFICATE OF FITNESS, MICHAELMAS TERM, 1877.

Leith's Blackstone—Taylor on Titles.

1. State precisely the rule as to deeds and wills proving themselves after the lapse of time.

2. In examining a title it appears that one of the deeds was executed under a power of attorney. To what points should attention be particularly directed? Give the effect of any legislation which may have rendered attention to some of the points unnecessary.

3. Give the rule laid down in "Taylor on Titles" as to the circumstances under which the Court of Chancery will force a purchaser to take a title which he contends is doubtful?

4. What is the law as to presumption of death after absence in a question of title between vendor and purchaser?

5. What power has the Court of Chancery as to appointment of trustees?

6. Are Private Acts of Parliament of themselves notice to purchasers? What is the effect of a clause in such an Act declaring it to be a Public Act?

7. At a sale under execution of an equity of redemption, the mortgagee becomes the purchaser. State fully the rights of the mortgagor.

8. State the effect of the section relating to dispositions by tenants in tails for limited purposes in the Statute relating to the Assurance of Estates Tail.

9. What is the law relating to merger, when the legal estate and equity of redemption meet?

10. What is the meaning and the effect of the Statute which declares that "corporeal hereditaments shall, as regards the conveyance of the immediate freehold, be deemed to lie in grant as well as in livery?"

Smith's Mercantile Law — Common Law Pleading and Practice, and Statute Law.

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1. State the different ways in which the contract of partnership may be dissolved, with special reference to proper precautions to be taken on the happening of that event, and any statutory provisions relating thereto.

2. What is a bill of lading, and what is the effect of an endorsement of it: (*a*) At common law, (*b*) By statute.

3. Under what circumstances, if any, is a married woman liable on a promissory note made by her?

4. Is a shipowner liable for damages to goods shipped on board his vessel, where the damage occurs through misconduct of a pilot whom he is compelled by law to take on board? State fully the reasons for your answer.

5. Where a surety has entered into a *bond* for payment in default of the principal debtor, and the creditor extends the time for payment by the principal debtor, and afterwards sues the surety on the bond at law, what remedy has the surety? Give reasons for your answer in full.

6. What is the rule as to *appropriation* of payment? Within what time after payment on account can a creditor make an appropriation?

7. A is employed by B to make some repairs on a chattel, and the chattel is left with A for that purpose. Nothing is said about payment, but A owes B an amount greater than the amount properly chargeable. In what position will A stand (1) in case of action brought by him to recover the value of his work done? (2) In case of an action of detinue brought for delivery of the chattel? Explain fully, referring to any statutory enactments which may affect your answer.

8. What is the effect of a plea of "Not Guilty" in an action of tort against a carrier? Give authority for your answer.

9. Give the form of a jurat to an affidavit made by two or more deponents. To what extent is it imperative to comply with this form, and why?

10. If a Judge at *nisi prius* refers a cause by the usual *nisi prius* order to an arbitrator, and the arbitrator in dealing with the case makes a mistake in law or fact, what remedy have suitors?

Equity.

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1. A buys in his own name, by entirely separate contracts, two parcels of land. In making these purchases, A acted as agent for B, who paid the purchase money for one parcel only, A advancing his money to pay for the other parcel. B tenders to A the purchase money advanced by him, and demands a conveyance to himself of both parcels, which A refuses, and denies the existence of any trusts for B, and there is no writing by which to establish a trust. What, if any, are B's rights in respect to these parcels of land? Explain.

2. Under what circumstances, and by what authority, may the Courts of Law or Equity in this Province appoint a person to represent the personal estate of a deceased person? Wherein do the powers of the person so appointed differ from those of a legal personal representative, appointed by the Surrogate Court.

3. On the sale of lands the vendor in proof of title produces registered memorials, but not the instruments to which they relate. Under what circumstances are these memorials sufficient evidence of the instruments of which they purport to be memorials?

4. A being possessed at the time of his death of certain property, real and personal, dies intestate, leaving several children.

Under what circumstances may one or more of these children be excluded from any share in the estates?

5. Certain lands situate in the United States, are vested in A, a resident of Toronto, in trust to account for the rents thereof to B. On A's refusal to account, what jurisdiction, if any, has our Court of Chancery to grant relief?

6. It is provided by the Act of Incorporation of a mining company that if any shareholder makes default in punctual payment of any instalments called up on his subscribed shares, the shares themselves and all prior payments made on account thereof, shall be forfeited. A shareholder who has paid several instalments on his shares, refuses to pay a further call which has been regularly made, insisting that instead of forfeiting his shares, the company should sell them, apply the proceeds in paying up the stock and pay over the surplus, if any, to him. This the company refuses to do, and declares the shares forfeited, although had they sold the shares as requested, a far larger sum than was required to pay up the whole unpaid portion of the stock, would have been realized. Is the shareholder entitled to any relief against the company? Explain fully.

7. Several persons being tenants in common of certain lands mortgage the same, and the mortagee enters into and continues in possession for ten years. In the ninth year of his possession the mortgagee gives to one of the mortgagors only a written acknowledgment to the other mortgagors. Who is entitled to redeem?

Suppose the foregoing had been the case of one mortgagor, and several mortgagees under the same instrument, and each mortgagee entitled to an undivided interest in the mortgage money, and all the mortgagees had been in possession as above, and one only gives the acknowledgment, what effect, if any, has this on the other mortgagees? Give reasons for your answer.

8. A, having an insurance on his life, makes a voluntary assignment of the policy to B in trust to collect the insurance money on A's death, and apply the same for the benefit of A's children, no notice of the assignment having been given to the insurance company. A subsequently surrenders the policy to the company, and receives its surrender value. A never delivered the policy to B, and now claims to be entitled to retain the money got from the insurance company, on the ground that the assignment being without consideration, and that A had never delivered the policy to B, the assignment was not perfect, and that A could not have been compelled to perfect it. Give your opinion as to the soundness of A's contention.

9. Give an exception to the general rule that "a purchaser of personalty from an executor is not bound to see to the application of the purchase money."

10. A testator by his will gives a sum of money for the erection of a church on a named lot. After his death it is found that by reason of the Statutes of Mortmain, the money cannot be legally applied in aid of the particular charity mentioned in the will. What becomes of this legacy? Explain.

Leake on Contracts.

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1. Classify "Contracts implied by law."

2. In what cases is a party at liberty to shew that the agreement was understood by him in a manner consistent with its terms, but different from the application accepted by the other party?

3. Give Blackstone's definition of "Quantum meruit," and "Quantum valebat."

4. What is meant by "a common mistake of a matter of law," and "a common mistake upon a matter of fact"?

5. In what cases will a set-off not be allowed in an action on a contract?

6. What is a *chose in action?* and in what respect, and from what years, has the law in Ontario been altered (1) respecting the *choses in action* of married women; and (2) respecting assignees of *choses in action?*

7. Give exceptions to the rule which requires the common seal to contracts by corporations.

8. What is the effect upon a written instrument of an alteration (1) by one party without the consent of the other, and (2) by a stranger?

9. What is "an executory consideration"?

10. Give an outline of the provisions of the 4th and 17th sections of the Statute of Frauds.

CONVEYANCING MADE EASY.

We commend to our young friends the following cleverly rhymed, as well as accurate paraphrase of a statutory deed, sent to us by an occasional correspondent. He styles it,

"A DEED WITHOUT AN AIM."*

KNOW all men by these presents, and do ye remember,
This Indenture, made (say on some day in December),
One thousand eight hundred and seventy (dash)—
(Better not let the date and delivery clash);
By force and by virtue of Con. Stat. U. C.,
Chapter—(look in the Statutes and there you will see);
Between John Smith of (blank) in the county of (blank),
(Setting forth where he lives, and his calling or rank),
And Susan, his wife (of her free will and power),
Who joins for the purpose of barring her dower;
He, of the first part, of the second part, she;
And lastly, John Brown, of the third part, grantee,
Doth witness that, for and in consideration
Of (the sum here insert) lawful coin of our nation,
Which he hereby acknowledges he doth receive
As an adequate price for his lands, you perceive,
To John Smith, of the first part, as mentioned before,
Doth grant, convey, transfer, assign, and set o'er
All and singular those certain parcels or tracts
Of land (here describe them according to facts),
To John Brown aforesaid, his heirs and assigns,
With their easements, ways, waters, their woods and their mines;
Their profits, appurtenances, also their rents,
And in fact all that's meant by "hereditaments;"
Habendum, tuendum, which means, as you see,
To have and to hold unto Brown, the grantee,
To his use and behoof, and to that of none others,
His heirs and assigns, and his sisters and brothers,
His aunts and his uncles, and also his cousins,
And children, although he may have them by dozens;
And Smith, of the first part, the covenantor,
Whose name you observe has been mentioned before,
Doth covenant, promise, and also agree
With John Brown, aforesaid, the covenantee,
That he hath the right to convey the said land,
Notwithstanding aught done by him touching it, and
The said Smith and his heirs also make this concession,
That Brown and his heirs shall have quiet possession
Of all that the hereinbefore described land,
And that free and clear of all kinds of demand,
Gift, grant, bargain, sale, jointure, dower, and rent,
Entail, statute, trust, execution, extent,
Done, suffered, permitted, or otherwise made
By Smith or his heirs on the land now conveyed;
And, that Brown's estate may have the better endurance,
Smith hereby agrees that such further assurance
As Brown or his heirs may in reason request,
And in counsel's opinion may seem to be best,
He will execute; so that there may be no flaw
To subject Brown aforesaid to process of law;
Nor hath he done aught whose effect e'er will be
To incumber said lands in the slightest degree—
That his rights to the said lands may certainly cease,
Smith doth by these presents remise and release
All his interest, title, estate, right and claim
Of, in, to, from, out of, and touching the same
To him of the third part, *videlicet*, Brown,
And those claiming under him all the way down;
And Susan, in case she should outlive her spouse,
And should thereupon claim what the law her allows,
Doth hereby release all her claims and demands,
Right and title, to dower in or to the said lands.
In witness whereof, all the parties aforesaid,
Have hereunto set their hands and their seals, and—no more said.

Signed, sealed and delivered in presence of me:
(Let the witness sign here, whosoever he be.)

* *Shakspeare*—a little altered.

CORRESPONDENCE.

Fusion of Law and Equity.

TO THE EDITOR OF THE LAW JOURNAL:

SIR,—"What we want, and at this late day, at all events, have a right to expect, is one really good Act, which will settle everything for years to come, or at least put everything in the proper course to accomplish that result." So speaks Q. C., in his letter to your *Journal* for November last.

Most assuredly we want it. Just think of it,—"settle everything for years to come,"—grand, but oh! why not for ever? "Have a right to expect"? Well, perhaps we have suffered long enough, but then what good thing "in this late day"

have we done that entitles us to it? Are we any better than our fathers? If not, why before "this late day," was there no reason to anticipate the early approach of a legal millenium. However, admitting that we have an indisputable "right to expect" everything to be put straight "for years to come," who are we going to get to do it? Mr. Mowat could, but he won't. Mr. Macdougall evidently is not the man, for he will not admit as "the fact is, that such English Act has not accomplished all it aimed at." Who then? The qualifications required are great. Who can we get? His information must be extensive; his familiarity with the present systems, and particularly its abuses, large; his powers of conception and execution ingenious and bold. Have we a man equal to the task? I am not prepared, sir, to admit that we have not. Let me mention some of the qualifications which are possessed by one of our own profession, a gentleman who, for the present, shall be nameless, but who, at all events, is a Q. C. He is, sir, a man who thinks he has "*fairly, thoroughly* and *impartially*, in your pages, discussed the subject; a man who would rise superior to all the interests which would gather together for the purpose of defeating the realization of the scheme; a man who would not be retarded by any false sympathy with "those who know nothing but mere chancery law, who practice nowhere else than in the Chancery Court, and who feel in themselves that they have not the capacity of learning what would enable them to hold their own if the change occurred; whose occupation would be gone if such an Act were passed." A man who has studied the working of the English Act and can tell you exactly why it did not give satisfaction—because the greatest lawyers and statesmen in England made "a blunder as glaring as if they had enacted that from and after a given day, every ordinary old half-inch auger, every time it was used for boring, should make a two inch auger hole instead of, as heretofore, only a half-inch auger hole," (the blunder being that the English Legislature contented itself with enacting fusion of the Courts, and did not supply "them with any new and more comprehensive system of practice or procedure"—a very large blunder somewhere certainly, for, as a matter of fact, the English Legislature did supply one hundred and eighteen statutory pages of new practice for the fused Courts (see 38, 39 Vict. c. 77, pp. 778 to 896, and authorised the Judges to add to it); and above all, sir, a man who has perfect faith in the scheme, who sees clearly that as soon as it is accomplished "all will immediately be settled, and become certain and intelligible,"—Heaven bless him! But after all might he not fail; has he really mastered all the details, and foreseen and provided against all difficulties? Why, yes! Listen! First, change the names of the Courts so that the Judges won't know whether they are Chancery or Common Law Judges. For fear that any of them might find out, sort them up, so that every Chancery Judge will be between two Common Law Judges, and every Common Law Judge have equity on both sides of him. "This would fix in the minds of the Judges that their respective Courts no longer differ from one another in any respect." Secondly, "we must thoroughly fuse" the Courts, "by making all our Superior Courts, both Courts of Law and courts of equity to, all intents and purposes." This can "be accomplished at one stroke, by simply passing some statute,"—no difficulty upon that score. "Thirdly, *the Judges should devise a new practice and procedure which should apply always until changed.*"

You see, sir, it is quite simple,—by Act of Parliament *the Judges* are to be ordered to create a new practice. But after all, supposing that the creative principle is not sufficiently strong in the breasts of the unfortunate Judges. What then? Or supposing that the Chancery Judges were possessed of the absurd notion that their present practice was really an excellent one, and refused to have it abolished, to make way for the system in which a majority of the Judges had faith—what then? I am afraid, sir, that the only "devising" that the Judges would accomplish would be by their last wills and testaments, the greater part of which would undoubtedly reveal the impress of minds harassed, worn and prematurely decayed by years of hopeless effort to eradicate from other minds the ineradicable result of a life-long devotion to one or other system of practice.

Would it not be better, sir, if we are "fairly, thoroughly and impartially" to discuss this subject, to abandon "sweeping statements as to Chancery practitioners," and their system of practice, and to endeavour, by a comparison of the two systems, to arrive at some settled notion of what the new practice should be. I make no charges, at present, against the Common Law system, but will be glad, sir, you holding the equal scales of the tournament, to be the champion of the Chancery system of procedure, and on a scrutiny of abuses and anomolies, to defend and attack in turn.

Yours, &c.,
Humble Stuff.

To the Editor of the Law Journal.

Dear Sir,—The letter in your November number, by "Q. C.," touching the question of fusion of law and equity, presents many mistaken views on the part of the writer. Why should he assume that those members of the profession who are accustomed to practise in the Court of Chancery are the stout opponents, not only of a proper measure for bringing about Fusion, but of the very principle itself; or why should he arrogate to himself the right to speak of them in the manner he does in his letter? The assertions he makes as to the practice and procedure of the Court of Chancery are not warranted by the facts, and he forgets the history of the Common Law pleading and practice, of which he would fain be the champion. It is not so long since special demurrers and various other iniquities of practice and procedure, now abolished, gave field and scope to the subtle ingenuity of gentlemen of the Common Law Bar.

For generations, if not for centuries, the Courts of Common Law and their procedure have been undergoing a process of pruning and amelioration, till they have attained their present state and practice. In this connection we may note the Statute 4 W. IV. (which abolished a long list of proceedings, to find out the meaning and object of which would require a considerable amount of study), and the Common Law Procedure Act, which wrought a vast change in the whole Common Law procedure. All these reforms were needed, but even "Q. C." will not deny that there is yet great room for much amelioration in the same quarter.

It is fair to say that all the Courts have, as far as possible, kept pace with the times, yet the blessings which we now enjoy, in a somewhat reasonable system of procedure and practice at law is due in no small measure to the pressure of the more liberal and enlightend jurisprudence and procedure administered in the

Court of Chancery in England and here. In fact, all the liberal ideas for which Common Law men are glad to take credit, have from time to time taken their rise from the Equity Court.

In the Court of Chancery in this Province, since the Honourable W. H. Blake became Chancellor, about ten years after its institution, reforms have been effected, where necessary, of quite as beneficial a character as those effected at law, but the same amount of arbitrary and unreasonable practice never obtained in the Court of Equity, during recent generations, as has been abolished by legislation of comparatively recent date at law.

To any one who is acquainted with its jurisdiction and practice, the suggestion of abolishing the Court of Chancery appears puerile indeed. Let us examine some of the reasons for this position as briefly as possible. It is a common mistake, not only with the laity but even with members of the profession, confining themselves to the Common Law system, to suppose that the business of the Court of Chancery is all, or nearly all, of the same nature, and capable of the same procedure as that of the Common Law Courts, as such. Now, more than half of the business of the Court of Chancery, it is well known, may be described as "administrative business;" familiar instances of this are the common proceedings for administration of testators' and intestates' estates; Suits for accounts of partnerships; suits and proceedings for winding up corporations and insurance companies, &c. These matters constitute the chief business in the offices of the masters, and in every such proceeding, the master is required to unravel, in a limited time, what the parties themselves have been wholly unable to do without his aid. Many administration and partnership suits which have come under my own cognizance, have been disposed of by the report of the master in a few months, when complicated transactions of a decade or two, or more, involving often hundreds of thousands of dollars, had to be investigated, sifted and adjusted; no other tribunal could have brought about the result as expediciously and well. Then the Court, in its administrative jurisdiction, and its jurisdiction over trusts, becomes the controller of a very large number of estates and funds, which the parties very gladly put under the safe guidance of the Court, to guard the interests of those too young, or from some other cause, unable to look after their own interests.

In administering these estates and funds, applications to the Court are from time to time, of course, necessary.

The laity, and those who do not understand, or do not wish to understand, the practice and jurisdiction of the Court, are pleased to regard the suit or proceeding, in respect of which the estate or fund came under the control of the Court as existing till the fund is paid out, and to cry out about delays; while the fact is that all the matters in which it was necessary to exercise the judicial function were disposed of in as short a time as anybody could wish, and the fund has remained in the Court merely awaiting the coming of age of the beneficiary or the happening of the event provided for under settlement or condition by which the estate or fund is bound. As to that part of the jurisdiction not administrative, it may be briefly comprehended under the head "litigious," and it is a matter of notoriety to all acquainted with the Court that this part of the jurisdiction is exercised as expeditiously and certainly, with just as much convenience to everybody, as the business requiring the same treatment is in any other Court. There is this great differ-

ence in favour of the Court of Chancery, that suitors are spared all the by-play of formal verdicts and motions in term which Common Law gentlemen are so well accustomed to, and so fond of.

For years the practice of the Court of Chancery has been so framed as to allow as little opportunity for delay in any part of its practice as possible. The greatest facility is afforded to the opposite side, always to assume the conduct of the proceedings, or have them summarily dismissed in the event of unnecessary delay. Each suitor has the matter of delay or no delay completely in his own hands. Without enlarging further, it must be plain that the jurisdiction thus exercised must always be existent in some tribunal, and perhaps "Q. C." would be satisfied if the name of the Court alone was changed, Since the passage of the Administration of Justice Act, 1873, it has been possible to bring in the shape of suits in the Court of Chancery many matters exclusively cognizable in Courts of law, and *vice versa*. I would refer "Q. C." to the officers of the different Courts as to what the result has been. He will find that the business of the Court of Chancery has increased enormously; a pretty fair evidence of the favour in which that Court is held by those acquainted with its jurisdiction, practice, and procedure.

When a fusion of law and equity, such as that proposed by "A City Solicitor," in the letter referred to by "Q. C.," is contemplated, one of the chief considerations is the best form of pleadings to be adopted. Once concede as the guiding principle that, in any case, full justice is to be done between the parties to the litigation, then the principle of equity pleading by statement and counter-statement ought certainly to recommend itself as the simplest way by which the Court can be informed of the different matters which its decree should reach and dispose of. The well-known difference between an equity decree and a judgment at law renders it impossible that matters disposed of by the first could be disposed of by the other, so as to do complete justice between the parties. I venture to say that in all cases where, owing to the Common Law pleadings, a Common Law judgment must follow, a comprehensive decree, dealing with all the rights involved, would be a much more effectual means of arriving at complete justice between the parties. It would be a great favour, I am sure, to the authorities of the Court of Chancery if "Q. C." would be more explicit, and point out the particulars in which the practice and procedure of the Court of Chancery is not in accordance with modern ideas, and also particularize the unnecessary delays, complications, technical obstructions to justice, and a host of petty expenses impossible to be got rid of, of which he complains. Of course, if it is assumed that the Court is in a wilfully purblind state, it will cherish these abuses to the end of time, unless they are clearly pointed out and exposed. "Q. C." claims to be one of the few who knows of their existence; let him come forward and candidly state them.

It would be well if, at the same time, he would explain why the Courts of Common Law have had to borrow, from time to time, many of those antiquated forms of procedure and practice of the Court of Chancery, which "Q. C." inveighs against. Let him tell us where the Common Law injunction, the production of documents at Common Law, the cross-examination of parties after issue joined, came from; and why Common Law Courts found it necessary to adopt these matters of procedure.

It is well known that you cannot cross-examine parties on affidavits made to support applications to Chambers or to

Court, at law, as a matter of course, and that great injustice often results. Such examinations are had, as a matter of course, in Chancery. Pleadings in Chancery can be amended without costly applications, if done within reasonable time. None of the many frivolous and expensive applications, as to forms of pleadings, which are necessary at law are necessary in Chancery. There is a weekly court in Chancery for the decision of all cases not requiring to be set down for trial on oral testimony, (in addition to the Court for motions and interlocutory applications); there is no such Court at Law. Let fusion take place at once, only do not let men of narrow mind, and with narrow prejudices, be the framers of the new system. "Q. C." evidently desires this fusion; the only thing he has to fear is that it may take place in his time.

Fusion of law and equity in the Province, looked upon as a means of arriving, as nearly as possible, at full justice, must, I humbly submit, result in the wholesale application of the pleadings, practice, and procedure of the Court of Chancery in all the Courts of Common Law. I fear "Q. C.'s" complaint about the labour of having two systems is sincere, and that his apparent total ignorance of the jurisdiction and practice of the Court of Equity, and opinions of equity practitioners, would entail a serious amount of self-education, did he continue to practise after this fusion took place. He will not be alone, however. It may be that the Legislature will find it a serious obstacle, in their efforts at fusion, to provide for a good many Common Law practitioners who have confined themselves to the Common Law system as exclusively as it would seem "Q. C." has done.

I have the honour to be,

Yours, &c.,

Equity.

REVIEWS.

Forensic Medicine and Toxicology. By W. Bathurst Woodman, M.D., F. R.C.P., and Charles Meymott Tidy, M.B., F.C.S, with plates and illustrations. Philadelphia: Lindsay & Blakiston. Toronto: Copp Clark & Co. 1877.

This is a very learned work by two eminent men, connected with the London Hospital, &c. The information it contains will be found of great use to the criminal lawyer, as a work of reference, when the occasion may require. It is especially intended, however, or at least will be especially valuable to the medical expert. The preface claims it to be "simply a comprehensive Medico-legal Handy-book. Although its subject is legal medicine, it deals with the medical rather than with the legal. The authors have felt that lawyers know the legal aspect of the subject better than physicians, whilst physicians know the medical better than lawyers. Recognizing, however, the existence of a part of the subject belonging to both lawyer and physician, but special to neither, they have ventured on this mid-territory, trusting that their medical view of the land in question may be found of service to those whose profession leads them to regard it primarily from a different point of view."

We are not competent to express an opinion of any value as to this book, so far as the medical part of it is concerned, but the arrangement seems admirably adapted to give the matter as handily as possible to the enquirer. The amount of information given is enormous and of a very varied kind, and we could not here give an idea of the multitude of matters discussed. It is impossible for medical men to write a book which will be at all perfect as a treatise on medical jurisprudence. They look at things from an entirely different standpoint, and we agree with a suggestion that we have seen, that a work of this kind should be the joint production of a physician and a lawyer. The subjects treated of are largely illustrated by coloured plates. Whilst it is quite possible for a lawyer to do without this book, no

good library would be complete without it, and we commend it to all who can afford it.

Blackwood, for December. The Leonard Scott Publishing Co., 41 Barclay Street, New York.

This is the last number of a year during which period the Magazine seems to have recovered the energy and vivacity of its early days. The following are the contents of this number:

1. The Tender Recollections of Irene Macgillicuddy, Part I; 2. Pelasgic Mykenæ; 3. Mine is thine, Part VI.; 4. The Opium Eater; 5. The Widow's Cloak; 6. The Parliamentary Recess; 7. Poems. By J. R. S.; 8. The Storm in the East. No. VII.

The periodicals reprinted by "The Leonard Scott Publishing Co." (41 Barclay Street, N.Y.) are as follows: *The London Quarterly, Edinburgh, Westminster*, and *British Quarterly Reviews*, and *Blackwood's Magazine*. Price, $4 a year for any one, or only $15 for all, and the postage is prepaid by the Publishers.

We strongly advise our readers to send in their subscriptions at once. They will get more valuable information and instructive reading matter for the money expended, from these publications than in any other way.

The following Rule of the Court of Queen's Bench and Common Pleas of Easter Term last does not seem to have been heretofore published:—

"Leave shall not be given to demur and traverse the same pleading unless an affidavit distinctly denying some one or more material statement or statements in such . and unless in exceptional cases, in the discretion of the Court or Judge, affidavits merely as to the belief of the existence of just grounds of traverse shall not be sufficient."

FLOTSAM AND JETSAM.

The manner in which a great proportion of our laws came into being is well illustrated in an essay read by Prof. Barbeck, of Cambridge, England, before the Antwerp congress. He said, "An attention to the history of law will, I think, further show that laws were established before penalties were invented for enforcing them, and that a penalty was exacted, because a law had been broken, as a consequence of a breach of the law; not, originally at least, as a part of the law itself. Take, for example, the rule of the road, I believe no trace of the existence of such a rule a hundred years ago can be found. It originated in no command of a political superior, nor in any command at all. About fifty years ago, if I remember rightly, the existence of the rule was denied by Lord Abinger, when Chief Baron of the Exchequer. It gathered strength because convenience demanded that there should be such a rule when thoroughfares became crowded. The rule required two carriages meeting each other to keep their left side of the road. And the rule became at length so well known in England, and so generally observed, that when an accident occurred in consequence of a carriage taking the right hand instead of the left, the owner of that carriage was held liable to make good any damage done to the other The judge who first gave this decision did not make the law. He gave the decision because he found the law already made—made by general, though tacit, consent. The judge merely recognised and declared the law. If he had not found it existing, he would have refused to act upon such a rule, as was the case with Lord Abinger. There are, moreover, many legal maxims, the observance of which depends on no penalty which can properly be said to be attached to the breach of them, but on the voluntary observance of them by those intrusted with the administration of the law. As for example, that an assignee generally takes no better title than his assignor: that a married woman cannot contract so as to render her-

self personally liable; and almost innumerable other general rules of the highest importance."—*Albany Law Journal.*

The London *Standard* thus speaks of the bar in Russia: "The bar is to this day far behind in its standard of professional honour and dignity. A system obtains of bargaining direct with the client on the 'payment by results' principle. In criminal cases the prisoner will agree to pay his counsel three or four times as much if he secures him an acquittal, and the counsel takes good care to get a large part of this money in advance. A barrister will even descend to frightening his client by exaggerated statements of the danger he is in; and, further, will not scruple to demand, also in advance, payments for 'secret purposes'—that is, for bribing influential officials. Indeed, the bar in Russia is mercenary and rapacious; and as the division of duties recognised in England between the solicitor and the barrister is not known in Russia, sharp counsel are brought face to face with their unhappy clients, and take the measure of their means and ignorant credulity. The barrister regulates his fees in much the same way as an advertising quack doctor would do, and carries on the action or cure in the lowest commercial spirit."—*Albany Law Journal.*

Mr. Thesiger.—The Hon. Alfred Henry Thesiger, who has been appointed a judge of the Court of Appeal in the place of Lord Justice Amphlett, is the youngest son of Lord Chelmsford, and was born in 1838. Mr. Thesiger was educated at Eton and at Christ Church, but was not distinguished for classical ability either at school or at college. He was called on June 11, 1862, and was a member of the Home and South-Eastern Circuits. He quickly acquired a large practice at the bar, and was created a Queen's Counsel in 1873. Since he took "silk," his business has increased with great rapidity; and very few men could shew a heavier fee-book. The learned gentleman was justly celebrated for his legal arguments. Before juries he was not very successful, his style being heavy, and his speeches being destitute of the ornaments of wit and eloquence. His industry was proverbial; and he never came into Court without having read his brief. No one at the bar enjoyed a higher reputation for honourable conduct in professional life. It is very gratifying to think that Lord Chelmsford, the most popular man with both branches of the profession ever known, has lived to see his son attain to so high a position at such an early age.—*Law Journal.*

Judges might be relieved of much unnecessary labour by the use of certain aids which, though not heretofore adopted here, are practicable and proper. The greater part of the labour connected with the determination of a case consists in (1) the collocation of the authorities bearing upon the issues involved in it, and (2) the writing out of the results of such collocation. In other words, looking up cases, and writing opinions, constitute a considerable part of the judicial work. Now the case law bearing upon the points argued in any cause could be looked up and arranged by any good lawyer, so that all the judge or court would have to do would be to apply the same. This could be done in an opinion delivered orally, and written down by a stenographer. A practice something like this, we understand, prevails, to some extent, in England, The magistrates have clerks who prepare the argued cases for decision, and the opinion, when one is given, is delivered *viva voce.* Such a plan might at first work awkwardly, but we are confident that once fairly tried, there would be no return to the one now in vogue. Not only would the judges be relieved of much drudgery, but they could dispose of business much more rapidly, and thus more nearly accomplish the duties which are imposed upon them. It is at least worth while to make a trial of the system suggested. That now in use certainly is not the proper one.—*Albany Law Journal.*