Canada Law Journal.

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DIARY FOR MAY.

18. Sun.....*Rogation Sunday.* D. A. Macdonald, Lieutenant-Governor Ontario, 1875.
19. Mon....Easter Sitting Com. Law Divisions, H. C. J. begin.
21. Wed....Confederation proclaimed, 1867.
22. Thur....*Ascension Day.* Earl Dufferin Gov.-Gen., 1872.
24. Sat.....Queen Victoria born, 1819. Ferguson, V. C., appointed, 1881.
25. Sun.....*Sunday after Ascension.* Princess Helena born, 1846.
30. Fri.....Proudfoot, V. C., 1874.

TORONTO, MAY 15, 1884.

HIS Excellency has been pleased to give to four of the members of the Manitoba Bar the privilege of wearing silk gowns instead of stuff ones. We trust the selection will meet with more general approval than the last batch in Ontario. The names are: Sedley Blanchard, Frederick McKenzie, J. B. McArthur and A. C. Killam.

THE question of standard time is still exercising those who are specially interested therein, and is likely to continue to do so, at least until the International Commission shall have made its report upon a standard meridian for all nations. This commission is to meet in Washington on the 1st of October next and doubtless the conclusion it may reach will have an important bearing upon the question of local standards. It is thought that this Commission will probably recommend one standard from Atlantic to Pacific for railway purposes and that citizens should keep natural time—mean solar. Why does not some ingenious person invent a clock that would always give the absolute solar time of day?

THE Chief Justice of the Queen's Bench is now the Chief Justice of Ontario and the head of the Court of Appeal. This appointment of Mr. Hagarty to the highest judicial position in this Province is what the public and the profession would have wished and expected. Chief Justice Wilson very properly takes the seat thus vacated, and Mr. Justice Cameron takes the Chief Justiceship of the Common Pleas. All these faithful public servants and learned judges have well earned any honour which the country had to bestow. The universal feeling is one of satisfaction that these appointments have been made.

In addition to the present vacancy in the Bench, the health of Mr. Justice Morrison is such that his friends fear he ought not for long continue the arduous duties of his position. Two men must therefore shortly be taken from the Bar; but it is difficult to say where men are to be found who, whilst having the learning and experience required, would at the same time be willing to accept a promotion which would so largely reduce their incomes. Men there are but the inducements appear to be insufficent to lure them to the Bench. Honour is pleasant but a reasonable emolument is a necessity. This necessity, the Government (and here we speak of both political parties) practically ignores. It is strange the public as well as statesmen do not realize the evils which must eventually flow from this state of things.

WE have received the new edition of Mr. J. S. Ewart's, "Manual of Costs," and welcome it most cordially. Lawyers at all events can appreciate a work of this kind, even if the *profanum vulgus* cannot.

There are few legal publications known to us a constant reference to which will better repay the practising lawyer. In fact he will do well to make as often as possible long extracts from its pages. It appears compiled with all the care and thoroughness of its predecessor in the same department. We cannot refrain from one observation, however. For a long time past an advertisement of this work has appeared on the back of our reports in which it has been stated that "in order to ensure complete accuracy, J. H. Thom, Esq., one of the taxing officers at Osgoode Hall, has kindly undertaken to personally peruse the proof sheets." This statement still continues to appear in the advertisement referred to. Nothing, however, appears in the preface of the book as issued to show that this revision by Mr. Thom, is a fact. If it is a fact it will be useful to call attention to it; if it is not a fact it is a pity Mr. Ewart's attention is not called to the continuance of a misleading assertion.

THE dinner of the Osgoode Legal and Literary Society at the Walker House on Wednesday last was an unmixed success, and the committee of management may fairly be complimented thereon. The dinner was good, and there was not too much of it. "The rosy," as Dick Swiveller would say, was allowed to pass in moderate quantities. Distinguished guests graced the festive board, and the President discharged his hospitable duties in a manner which left nothing to be desired. More than one excellent speech was made, and Mr. Edward Blake, Mr. Goldwin Smith, Mr. B. B. Osler, Mr. Charles Moss, Mr. Huson Murray and many others, expressing much interest in the existence and the working of the society. In fact a society such as this, which not only affords the members an opportunity of practising the art of public speaking, but which also, and this we take it is far more important, encourages and fosters *esprit de corps*, and a high tone of professional feeling must command the sympathy of all who have the highest interests of the profession at heart.

We cannot refrain here from giving our readers the benefit of a witticism which emanated in our hearing from one of the junior members of the bar at the dinner on Wednesday. One of the gentlemen present, seeing his partner immediately opposite him at table, expressed in an audible voice his gratification at finding himself opposite to "so distinguished a lawyer," to which the other replied that he had been on the point of making a similar observation. "Ah," said the third overhearing the conversation, "then each of you is the opposite of a distinguished lawyer!"

A CONTROVERSY has been raging in the legal body in the United States on the gown question. The Judges of the New York Court of Appeals have taken to wearing robes. *The Central Law Journal* has been very strong against this action, and thus comments:—

> "They will be held responsible for this arrogant assumption of superiority and contempt for the people, and the day may come when they will repent that they have heeded the counsel of those men who have but used this movement to demonstrate their influence."

The *Albany Law Journal* approves of the change, and earnestly "hopes that the *Central* will forgive the Judges before the next judicial election. But the new Judges, whoever they may be, will go into the gowns all the same, unless a statute or constitutional amendment shall forbid it. To be consistent, the *Central* should never again use the phrase, 'soiling the judicial ermine.'"

The *Washington Law Reporter* has the following sensible observations:—

"Too little respect for the proprieties and formalities of official position is far more injurious than too much, and certainly there can be no position which it is more important should command the very highest respect than that of Judge of the High Courts of both the states and the United States. There is no question, however much the statement of the fact may be ridiculed, that the appearance of the Supreme Court of the United States clothed in their gowns has a salutary effect upon the citizen who goes into the presence of that great tribunal."

"If gowns for the Judges will give more dignity to a court and enable it to command more respect from the public and the profession, why not have gowns?"

THE case of the *Pullman Palace Car Company* v. *Gardner*, reported in *Albany Law Journal*, vol. 29, p. 8, decides that a sleeping-car company is bound to use reasonable and ordinary care to protect the property of its passengers, the extent of such care being a question for the jury. In this case the watchman was absent from his post for only a few minutes, during which another man who wanted a watch stole one from under the pillow of a passenger. The company was held liable if the jury should find that the theft would not have occurred if the watchman had been at his post. In the course of his charge to the jury the judge made the following rather original observations:—

"A railroad company is under no sort of obligation to keep people from robbing us, except it would be by an onslaught, open violence on the cars, In such cases it has been held that the conductors are bound to protect, not only the persons of passengers, but also their property to a reasonable extent, as for instance, if some boy, fifteen years of age, with a wooden gun in his hand, should come in to rob a car, as I believe it is said they do out west, and the passengers should crawl under their seats, and the conductor and train hands run away, when, perhaps, if they had stood their ground they could have prevented it, the railroad company might be responsible if the jury should not find under the circumstances that the passengers ought to have defended themselves. We used to ride around in stage coaches; if robbed while in them, the company being under no obligation to carry a guard, was not responsible for the robbery, although you might go to sleep, and they knew perfectly well you would go to sleep, or ought to suppose you would, for a man could not ride half a dozen days or nights without going to sleep; but in the case of a sleeping-car company the great convenience and inducement held out to passengers is that they will give them a comfortable night's rest. They notify them they will make them pay for it, and say to them you may go to sleep."

THE Editor of the Canadian *Law Times* has come to the rescue of his critic and has overwhelmed us with a syllogism. Being struck with the originality of our contemporary's criticism of Mr. Holmested's latest work, in which he complained of the long list of *addenda* and *corrigenda* appended thereto, we observed that to us a long list of *addenda* and *corrigenda* is an indication of two things, industry and honesty. In the last issue of our contemporary we have our reply, and this time we are struck by the originality of his logic. He says: "we have looked through half a dozen of the later volumes of the *Canada Law Journal*, but have failed to find in them either of these things, that is *addenda* or *corrigenda*." The conclusion suggested of course is that this journal lacks industry and honesty. This is not very polite, but let us examine it a little more closely:

Addenda and *corrigenda* are marks of industry and honesty.

The *Canada Law Journal* has no *addenda* or *corrigenda*;

Therefore the *Canada Law Journal* has neither industry nor honesty.

What startling results this method of reasoning leads us to!

To cook his own food is a mark of a man.

The Editor of the *C. L. T.* does not cook his own food;

Therefore the Editor of the *C. L. T.* is not a man.

To be able to play several games of chess simultaneously and blindfolded is an indication of sanity.

The Editor of the *C. L. T.* cannot play several games of chess simultaneously and blindfolded;

Therefore the Editor of the *C. L. T.* is not sane.

We can give our contemporary a far better explanation of the absence of *addenda* and *corrigenda* from our volumes. We take such pains to supply our readers with the latest items of interest to the profession, up to the very moment of issue that there is no room for *addenda*, while the consummate carefulness with which our large staff of proof-readers examine our pages before publication removes all possibility of *corrigenda*. Several volumes of our contemporary are on the shelves of Osgoode Hall Library, and yet we look at the close of each for *addenda* and *corrigenda* in vain. We have never been able to conceive the explanation in the case of our contemporary. Now, however, we understand the matter, our contemporary does not like *addenda* and *corrigenda*.

A HALF A HORSE CASE.

The case of *Gunn* v. *Burgess* recently decided by the Chancellor (p. 191) was a singular one, and gives rise to serious considerations affecting the law governing the sales of chattels under execution.

The plaintiff in this case had purchased from one Garthwaite a half interest in a brood mare; Garthwaite retained possession of the animal, and while in his possession it was subsequently seized and sold under execution against Garthwaite; and the defendant became the purchaser. The action was brought to obtain the declaration of the Court that the plaintiff was entitled to a half interest in the mare, notwithstanding the sale under execution, and the action was resisted by the defendant on the ground that no bill of sale of the half interest in favour of the plaintiff was registered. The Chancellor in a very able, and clearly reasoned, judgment, came to the conclusion that no bill of sale was necessary and gave the plaintiff the relief he asked. With the correctness of this decision we do not pretend to quarrel; at the same time the state of the law as disclosed by this decision is anything but satisfactory.

The defendant attended a sale had under process of law, at which a whole horse, not a half a one, was offered for sale. In the present case the claim of Gunn, we believe, was notified to the persons attending the sale, but the result of the case would have been the same had no notice been given. Under such circumstances in the absence of such notice, how could a purchaser know that the beast before his eyes, and which appeared so desirable an investment, was not "all there" for the purpose of sale, but only an undivided half interest.

This illustrates the danger of buying at sales under execution. In most cases the purchaser really has to go on the principle that he is "buying a pig in a poke;" and he has to run the risk of the existence of persons having interests in the property offered for sale, which no amount of ordinary care on the part of a buyer will enable him to discover.

It is bad enough when such rights crop up as against a purchaser by private sale; but when they supervene as against a purchaser under judicial process it is a grave defect in the law.

The result of the present mode of offering chattels, or land, for sale under execution is detrimental both to the execution debtor, and to the creditor, and is, besides, a possible snare for the purchaser.

When property is offered for sale under judicial process the exact interest which is saleable ought surely to be definitely and conclusively ascertained, before the sale, and the purchaser guaranteed by law in the enjoyment of what he has purchased.

In the case of *Gunn* v. *Burgess* the purchaser bought and paid for a whole horse, and he finds to his loss that he has only got half a one.

RECENT ENGLISH DECISIONS.

THE March number of the *Law Reports*, consist of 9 App. Cas. p. 1-186; 25 Ch. D. p. 243-471; 12 Q. B. D. p. 141-207; 9 P. D. p. 25-33.

TRUSTEES—LIABILITIES FOR TRUST MONEY LOST THROUGH BROKERS.

The first case in the first of these is *Speight* v. *Gaunt*, an appeal from the decision of the Court of Appeal, reported 22 Ch. D. 727. The question was whether a trustee who, being authorized to invest the trust moneys in municipal securities, employed a broker to make such investments, and on receiving a bought-note, gave cheques for the purchase money to the broker on his request, was liable to the *cestuis que trustent*, the broker having absconded with the money, no stocks or securities having been in fact purchased by him. The House of Lords now held the trustee was not liable, the evidence showing that he had followed the usual and regular course of business adopted by ordinary business men in making such investments. The case shows, in the words of Lord Fitzgerald at p. 29, that, "although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust fund avail himself of the agency of third parties, such as bankers, brokers, and others, if he does so from a moral necessity, or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result," and he adds: "looking at the trust before us and the intended investment of the trust fund, I concur in thinking that the trustee was entitled to employ a broker, and not the less entitled to do so even if he could have obtained the securities direct from the corporations without the intervention of a broker."

DISCOVERY—INTERROGATORIES—PRIVILEGED COMMUNICATIONS.

At p. 81, is the case of *Lyell* v. *Kennedy*, which is entitled No. 2, to distinguish it from the case of *Lyell* v. *Kennedy*, reported L. R. 8 App. Cas. 217, in which the right to discovery in actions of ejectment was established. The present case also bears on the subject of discovery. In answer to certain interrogatories administered by the plaintiff, as to the defendants information, knowledge, and belief in certain matters, the defendant gave, as Lord Watson says, at p. 89, in substance the following reply: "I have no personal knowledge, but I have certain information derived from communications oral or written with my solicitor, and I have no other information or means of forming a belief." The House of Lords held that this was a sufficient answer, for that since under such circumstances the defendant's knowledge and information were protected, so also was his belief when derived solely from such communications of his solicitor. It was agreed that the object of discovery is to ascertain the state not merely of the party's consciousness, but of his conscience, and that it is permitted to search the conscience of the party by inquiring as to his information and belief from whencesoever derived. As said by Lord Watson, at p. 92: "in this case the proposition which appears to be maintained is this, that you cannot get the brief which was handed to him (the party interrogated), but that you can get the opinion which he formed." The point is mentioned as a new one. Lord Watson observes: "I think it quite impossible to separate belief in the mind of a client and litigant, which is derived from such materials as information from his agent (it may be a written memorial, it may be partly advice and council) from the information itself. I cannot see upon what principle he can be called upon to state that belief, whilst at

the same time he is not under obligation to communicate or even to indicate any one of the grounds upon which it is founded." Lord Blackburn at p. 87 says the same thing in somewhat different words: "As it seems to me the plain reason and sense of the thing is that, as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also." And still more concisely at p. 93, Lord Bramwell says: "It appears to me upon the reason and principle of the thing, that a man ought not to be called upon to state what his belief is, founded upon information, which information is privileged, and which he is not bound to disclose."

CHEQUE—NEGOTIABLE INSTRUMENT.

The next case, *McLean* v. *The Clydesdale Banking Co.*, p. 95, may be noted as an authority in the court of last resort, on a point, which is, however, spoken of by their Lordships as well established, viz., that a banker's draft or cheque is substantially a bill of exchange, attended with many, though not all, the privileges of such, and is a negotiable instrument; and consequently the holder, to whom the property in it has been transferred for value, either by delivery or by indorsation, is entitled to sue upon it, if, upon due presentation, it is not paid. A cheque, says Lord Blackburn, at p. 106, is "an unconditional order in writing addressed to a banker, requiring him to pay a sum certain in money at a fixed or determinable future time, that is to say, on presentation;" and so comes within the definition of a bill of exchange.

B. N. A. ACT—POWER OF LOCAL LEGISLATURES.

The remaining cases which it is necessary to note from this number of appeal cases, are Canadian appeals. The first is the celebrated *Hodge* v. *The Queen*, which has already been so much commented on. The head-note commences with the statement that "subjects which, in one aspect and for one purpose, fall within sec. 92 of the B. N. A. Act, may, in another aspect and for another purpose, fall within sec. 91." Their Lordships observe, at p. 130, that this is the principle which *Russell* v. *The Queen*, L. R. 7 App. Cas. 829, and *Citizens' Ins. Co.* v. *Parsons*, *Ib.* p. 96, also illustrate. In *Hodge* v. *The Queen*, the points decided would appear to be these. The first is expressed at p. 131, thus: "Their Lordships consider that the powers intended to be conferred by the Act in question (the Liquor License Act of 1877, R. S. O. c. 181), when properly understood, are to make regulations in the nature of police and municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such, they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted. The subjects of legislation in the Ontario Act of 1877, secs. 4 and 5, seem to come within the heads Nos. 8, 15 and 16 of sec. 92 of the B. N. A. Act." The second point decided is to be found at p. 132: "Provincial Legislatures are in no sense delegates of, or acting under, any mandate from the Imperial Parliament. When the B. N. A. Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for this Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by

delegation from, or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have had under like circumstances, to confide to a municipal institution or body of its own creation" (such as the license commissioners in the present case) "authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect." The third point decided may be briefly expressed in the word of the head-note to be that "Imprisonment" in sec. 92, sub.-sec. 15, means imprisonment with or without hard labour.

DOMINION CORPORATION—POWERS OF DOMINION PARLIAMENT.

Lastly, there is another Canadian appeal to be noted in the case of *The Colonial Building and Investment Association* v. *The Attorney-General of Quebec*, at p. 157. Here the Board held that the Canadian Act 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. At p. 164 the judgment says: "Although the observations of this Board in the *Citizens' Insurance Co. of Canada* v. *Parsons*, L. R. 7 App. Cas. 96, put a hypothetical case by way of illustration only, and cannot be regarded as a decision of the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of companies." The judgment further decides that the fact that the association had hitherto thought fit to confine the exercise of its powers to one Province, could not affect its *status* or capacity as a corporation. It says: "The company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation." There is also a further passage in the judgment in which the *Citizens' Insurance Co.* v. *Parsons* is again referred to which may be noted: "It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens' Insurance Company, with regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any Province in which they sought to acquire it, had not in view the special law of any one Province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a corporation could only exercise its powers subject to the law of the Province, whatever it might be, in this respect."

THE March number of the Chancery Division contains a great number of decisions on points of practice which will be noted among recent English practice cases. The first case requiring noting here is *In re Columbia Chemical Factory, Manure and Phosphate Works*, at p. 283.

COMPANY—CONTRIBUTORIES—DIRECTORS' QUALIFICATION—ABORTIVE SHARES.

In this case a company was registered in June, 1879. B. and H. signed the memorandum of association as subscribers for one share each. By the articles B. and H. were named as original directors, and it was provided that the qualification of a director should be fifty shares, provided that this should not invalidate any

acts of the first directors prior to their being so qualified. Both B. and H. accepted the office of director. B. attended two meetings of the board, and then resigned; H. remained and acted as a director until the winding up of the company, pursuant to a resolution passed on November 5th, 1879. Neither B. nor H. applied for any shares in the company, and no shares except those for which they signed the memorandum of association, were ever allotted to either of them, or treated in the books as belonging to them. The liquidator now sought to put B. and H. on the list of contributories for fifty shares each, on the ground of the stipulation in the articles as to the directors' qualification. The Court of Appeal, however, held (affirming the decision of Kay, J.) that assuming that the contract entered into by B. and H. to obtain a qualification amounted to an agreement to take fifty shares, they were entitled to a reasonable time for performing the agreement, and that under the circumstances such reasonable time had not elapsed since the commencement of the winding up of the company, and consequently they could not be held liable as contributories in respect of the fifty shares. In delivering the judgment of the Court of Appeal, Cotton, L.J., says:—"The contract of a director under such articles to acquire the necessary qualification must be to do so within a reasonable time; that is, the director must be allowed a reasonable time for performance. What is a reasonable time must depend on the circumstances of each case. Where the company is an established and going concern, the reasonable time within which the contract is to be performed may be before the alleged contributory has begun to act . . . In the present case, the company, though formally constituted, never had any business existence. No member of the public who had not signed the memorandum ever applied for, or had allotted to him, shares in the company; the board of the company was not fully constituted, no business was ever done, and nothing was done except to vary, and complete as varied, the agreement with L." (for the purchase of whose chemical factory the company was organized), "the working of which was to constitute the business of the company. The whole thing was inchoate only. Having regard to these circumstances, and to the very short time during which the company had even a formal existence, we are of opinion that a reasonable time for completing the contract to acquire a qualification had not elapsed before the company was wound." Kay, J., in his judgment, discusses the authorities bearing on the case *seriatim*, and gives a classification of them as follows:—

The cases on this subject seem to be divisible into the following classes:—

1. Where under similar articles a director has simply accepted the office, and there it is held he is not a contributory.

2. When, after accepting, and while he is director, shares have been registered in his name, and then he is presumed to know what was done, and to have accepted such shares.

3. When the articles make the possession of the qualification of shares a condition precedent, and then it is held that the director may have been improperly appointed, and he is not a contributory.

4. There is a separate class of cases in which, by virtue of the special terms of the articles or of the company's charter, a director, on accepting the office, becomes *ipso facto* a shareholder.

5. The last class of cases (within which it is contended that this comes) is where a director has not merely accepted that office but has acted as director, and it is contended that in that case there is an implied agreement on his part with the company to take from the company the proper number of shares for his qualification."

In connection with this case attention may be called to the recent decision of Ferguson, J., *In re Standard Fire Insurance Co.*, which will be found noted in this number of the JOURNAL.

SOLICITORS' CHARGES—TAXATION—PRESSURE.

The case of *In re Lacey and Son*, at p. 301, requires a brief notice. There, a tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December, 1882, of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was March 25th, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On February 2nd, 1883, the vendor's solicitors sent in their bill of costs, comprising certain charges to which the purchaser's solicitors objected. The vendor's solicitors, however, refused to allow completion unless they were paid, and on February 14th the purchaser paid them under protest, and completed the purchases. After this he applied for taxation of the bill. The Court of Appeal, however, hold that, having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were therefore no special circumstances to authorize taxation after payment. Cotton, L.J., says, at p. 30: "After payment special circumstances are requisite to authorize taxation, and these special circumstances must be pressure, and manifest over-charges, or over-charges so gross as to amount to fraud. It cannot be said that there are over-charges amounting to fraud, and I think that pressure is not shown."

MORTGAGE—COVENANT—JUDGMENT—MERGER.

At p. 328 a case of *Ex parte Fewings, In re Sneyd*, requires notice. A mortgagor covenanted in his mortgage that if the principal money, or any part thereof, should remain unpaid after the expiration of the time limited, he would, so long as the same sum or any part thereof should "remain unpaid," pay to the mortgagee interest for the principal sum, or for so much thereof as should for the time being "remain unpaid," at 5 per cent. per annum. After the expiration of the six months, the mortgagee recovered judgment against mortgagor on the covenant for the principal sum and interest in arrear. The Court of Appeal, over-ruling Bacon, C.J., held that the covenant being merged in the judgment, the mortgagee was, as from the date of the judgment, entitled only to interest on the judgment debt at the rate of 4 per cent., (the legal rate in England), and was not entitled under the covenant to interest at the rate of 5 per cent. on the principal sum. A passage from the judgment of Fry, J. at p. 355, explains the decision: "When there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed, as not to merge in a judgment of the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant, or on a judgment."

VENDOR AND PURCHASER—MISLEADING CONDITIONS OF SALE—MISLEADING STATEMENTS OF AUCTIONEER.

As to the next case *Heywood* v. *Mallalieu*, at p. 357, space only permits a note that in it specific performance of a contract for a sale of a house was refused on the ground that the conditions and particulars

of sale were misleading inasmuch as they merely stated that the lot was sold subject to any existing rights and easements of whatever nature, but made no specific mention of a certain existing easement of which the vendor's solicitor had notice, and, also on the ground that the auctioneer, who was informed of the easement in question, at the time of sale, on being questioned, told the audience they might dismiss the subject of the rumoured claims from their minds, as nobody would probably hear of them again, whereas the auctioneer should have more fully stated what was known to him as to the easement aforesaid.

RAILWAY COMPANY—POWERS—NUISANCE.

Lastly, it is necessary briefly to note the decision in the case of *Truman* v. *London, etc., R. W. Co.*, at p. 423. There a railway company were by their Act empowered to purchase (besides the lands as to which they had compulsory powers) any lands not exceeding in the whole fifty acres, for the purpose of making additional station yards for cattle and for other purposes, and were also empowered to carry cattle (amongst other things). The company accordingly purchased a piece of land adjoining one of their stations, and used it for unloading cattle. The noise of the cattle and drovers was a nuisance to the occupiers of certain houses near the station, and they now sought an injunction to restrain the company. Mr. Justice North, in an elaborate judgment, held that as the company were not obliged by their Acts to carry cattle or to have a station for cattle, and had not shown that this was the only available place for such a station, they had no power to create a nuisance at this place; and an injunction was granted with damages.

Of the cases in the remaining number of the *Law Reports* for March, there is, with the exception of practice cases which will be noted in another place, only one case specially calling for mention, viz., *Leigh* v. *Dickeson*, at p. 195 of 12 Q. B. D., in which Pollock, B. holds that one tenant in common of a house, who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. He cites the authorities on the writ by one of two tenants in common against the other *de reparatione faciendâ*, and points out that in all the cases the ground of the claim seems to be such as to presuppose that the condition of the things to be repaired would be dangerous or useless unless the repairs in question were effected.

A. H. F. L.

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

MASTER'S OFFICE, COUNTY OF ONTARIO.

RE BEITH, A LUNATIC.

Appointment of new member of a joint committee—Former bond superseded.

On the appointment o a new member of a lunatic's committee the former bond is superseded, and a new joint bond of the surviving and the newly-appointed member must be furnished and filed.

[Whitby, April 3—MR. DARTNELL.

H. B. and A. B. had been appointed a joint committee of the lunatic, and had given the usual bond as such. A. B. having died, by order of Court it was referred to the Master at Whitby to appoint I. B. in his place, "first giving security to the satisfaction of the Master." A bond of the new member of the committee, with sureties, was brought in for the approval of the Master by Loscombe & Leith, solicitors, of Bowmanville.

THE MASTER AT WHITBY.—I am of opinion that the old bond is superseded except as to acts done up to the present time. The office is a joint one, and the members of the committee are jointly liable. I therefore direct that the bond now required shall be that of both the old and the new members of the committee, with proper sureties.

I may add that the official guardian concurs in this view.

A bond such as directed was subsequently brought in, approved of and filed.

COUNTY COURT OF THE COUNTY OF ONTARIO.

RE ANDERSON V. SMITH.

Commission to take evidence under the Division Court Act.

Nadin v. *Bassett* (25 L. R. Chy., page 21) is not an authority to prevent an examination under a commission to a foreign country, under section 100 of the Division Court Act.

[Whitby, April 5.

Application for a commission to take the evidence of the plaintiff, who formerly resided at Port Perry, but who now resides at Minneapolis, U. S. The claim was for medical services, and the interrogatories shewed that merely formal proof of the claim was contemplated.

N. F. Paterson, Q.C., opposed the application, citing *Nadin* v. *Bassett*, *supra*.

DARTNELL, J. J.—Section 100 of the Division Court Act provides for the issue of such a commission as asked for, if, "in the opinion of the Judge, a saving of expense will be caused thereby." I am of this opinion, and therefore think the order should go. In the case cited a similar order for the examination of the plaintiff in New Zealand was made, but, as in that case a material question in the cause was the identity of the plaintiff himself, the order was qualified by inserting a proviso "that the depositions of the plaintiff are not to be read, if the defendant requires him to appear at the trial to be examined and cross-examined." I see in this case no reason for this qualification of the order, nor do I conceive that *Nadin* v. *Bassett* is any authority for refusing the order, but rather the contrary.

RECENT ENGLISH PRACTICE CASES.

NADIN V. BASSETT.

Imp. O. 37, 2. 5 (1883),—*Ont. r.* 485.

Evidence on commission—Examining a party on commission—Identity, question in dispute.

[L. R. 25 Ch. D. 21.

In an action for redemption the defendant admitted the plaintiff's right to redeem, if he was the person he represented himself to be, but disputed the plaintiff's identity. The plaintiff resided in New Zealand, and now applied for an order to examine himself, two other witnesses (naming them), "and others" in New Zealand in his behalf. The Court of Appeal held, under the circumstances of this case, it was proper the order should go, but only with a proviso that the depositions of the plaintiff should not be read if the defendant required him to appear at the trial to be examined and cross-examined, no case having been made that it was practically impossible for the plaintiff to attend at the trial.

Although it is true that in considering whether justice requires an examination before special examiners, a party does not stand in the same position as a mere witness, yet there is no doubt the Court has power under this rule to direct the examination of a party.

Although the Court will not direct a mere roving inquiry, and the person who comes for an order of the above kind must show there are material witnesses to be examined, yet it is not necessary that all the witnesses to be examined should be named in the order.

Semble (per KAY, J.), the intention of this rule is not that after an order is made under it, the discretion of the Court is taken away at the hearing the cause. Without any special limitation in the order made in the present case, if the plaintiff and his witnesses were cross-examined in New Zealand the Court would be at liberty at the hearing of the case, if the defendant required the plaintiff and his witnesses to be produced in England, to order them to be examined and cross-examined again before the Court, and if the Court were of that opinion there is nothing to interfere with the jurisdiction of the Court to order the trial to stand over, or make any other which the justice of the case may require.

Quære, whether the mere addition to the order for the examination asked for, of a proviso that "this order is to be without prejudice to the right of the defendant to cross-examine the plaintiff at the trial of the action in the presence of witnesses in England, who can speak to his identity," would authorize the judge at the trial to reject the plaintiff's evidence, if he, being still out of the jurisdiction, did not appear to be cross-examined.

IN RE BURGESS.

BURGESS V. BOTTOMLEY.

Rule 96.

Next friend of infant—Conflict of interests.

[C. A.—L. R. 25 Ch. D. 243.

Doubts having arisen as to the proper custody of an infant, a suit was commenced in her name for

the administration of her father's estate. A next friend was appointed who was a friend of the defendant's, the executor's and trustees of the will, and guardians of the infants, and accepted the office at their request, and on an indemnity from their father. The solicitors on the record for the plaintiff were the solicitors of the executors. On an application in the name of the infant by M., the husband of her paternal aunt, as next friend *pro hâc vice*, to remove the next friend and substitute M.

Held, that although nothing was alleged against the character, circumstances or conduct of the next friend, his connection with the executors made him an improper person to act as next friend, and that he ought to be removed and M. substituted.

Per COTTON, L. J.—It is a settled principle that a party ought not to be both plaintiff and defendant. Mr. O. (the next friend), no doubt is a respectable gentleman who intends to do what is right, but he is put in by the trustees and executors. On being put in by them he gets an indemnity from their father. I do not think that is itself material, but it shows how completely he is connected with them, and he leaves the matter entirely with his solicitor who is acting with his executors. There ought not to be either in form or substance the same person both plaintiff and defendant; there ought to be some person acting independently as plaintiff against the defendant.

IN RE PICKERING.

PICKERING v. PICKERING.

Imp. O. 31, *r.* 11 (1875)—*Rule* 221.

Production—Sealing up entries—Partnership books.

[L. R. 25 Ch. D. 247.

The defendant and W. P. were partners. W. P. died and appointed the defendant his executor. In an action by a person interested under W. P.'s will against the defendant a decree was made for administration of W. P.'s estate, and for taking accounts of the partnership as between the defendant, as surviving partner, and W. P.'s estate. An order having been made for the production of the partnership books by the defendant, he claimed to seal up such entries as related to his own private affairs.

Held, that, inasmuch as the plaintiff and defendant were both interested in the partnership property, the defendant was not entitled to the ordinary power to seal up such entries as he might swear to be irrelevant to the matter at issue in the action, but only to seal up entries which related to certain specified private matters mentioned in the order.

IN RE INDERWICK.

Solicitor—Order for delivery and taxation—R. S. O. c. 140, *s.* 40.

[C. A.—L. R. 25 Ch. D. 279.

Where an agreement has been made for the remuneration of a solicitor, and the solicitor alleges that the remuneration was for non-professional work, the person chargeable cannot obtain the common *ex parte* order for the delivery and taxation of the bill of costs.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

Ontario.]

GRASETT v. CARTER.

Boundary line—Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries—Conflicting evidence—Duty of Appellate Court.

T. was the owner of lot nine, and C. owner of lot eight adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T., being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked C. where he claimed that his northern boundary lay. C. pointed out an old fence, running part of the way across the land between the lots, and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, C. not objecting. A few days afterwards, T., with his architect and builder, went on the ground, and, in the presence of C., the builder again marked out the boundary by means of a line connecting the surveyor's marks, C. not objecting. Excavating was commenced according to that line

immediately, and T.'s house was built according to the line on the extreme verge of T.'s land. The first time that C. raised any objection to the boundary so marked was when the walls of T.'s house were up and ready for the roof.

Held, that C. was estopped from disputing that the line run by the surveyor, according to which money had been expended in building, was the true line.

Reversing the judgment of the Court of Appeal.

Per STRONG, J.—When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the land conveyed as defined by the plan are to be taken as part of the description.

In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they may be given in evidence and control the description, though they may call for courses, distances, etc., which do not agree with those in the deed.

In 1831, W. D. P., who owned a piece of land, bounded on the south by Queen street, on the east by William street, on the west by Dummer street, and running north some distance, laid out the southerly portion into lots, depicted upon a plan, which plan showed the boundary line between the plaintiff's and the defendant's lots to be exactly 600 feet from Queen street. There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of the land so laid out. Many years afterwards, the remaining land to the north of the parcels so laid out was laid out into lots, depicted on another plan, and a street was shown between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from Queen street was greater than the first plan on its face showed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if Queen street and the street at the north of the first plan were the actual limits of plan.

Per STRONG, J.—(1) The true boundary line between the plaintiff's and defendant's lots was a line commencing at a point 600 feet from Queen street, as measured on the ground at the time when the plan was made; but in the absence of evidence showing that a measurement at that time would be the same as a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary line in question. (2) Inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots so conveyed

Where there is a direct conflict of testimony, the finding of the Judge at the trial must be regarded as decisive, and should not be overturned in appeal by a Court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination.

C. Robinson, Q.C., and *E. Douglas Armour*, for the appellant.

McMichael, Q.C., and *A. Hoskin*, Q.C., for the respondent.

QUEEN'S BENCH DIVISION.

Rose, J.]

ATKYNS v. PTOLEMY.

Demurrer—Penalty—Party aggrieved.

In action for a penalty for violation of secs. 154, 142, 245 of 46 Vict. ch. 18, O.,

Held, there being no allegation of injury to plaintiff, he was not a party aggrieved under the Act. Also, that a suit for a penalty under the Act can only be brought for violation of s. 118 to s. 166 inclusive.

Lash, Q.C., for demurrer.

Teetzel, contra.

Rose, J.]

REGINA v. YOUNG.

Criminal law—32, 33 Vict. ch. 21, s. 110—Police Magistrate.

Defendant sold to C. besides other articles, a horse-power and belt, being portion of his stock in trade as a butcher, in which he also disposed of to him a half interest. One M. owned the horse-power, which had been hired by defendant from him, and the hiring had not expired when defendant sold to C. M., on the expiration of the hiring required its return, but

C. set up his purchase, on which defendant took it away from where it was kept and gave it to M. He was then convicted under 32-33 Vict. c. 21, s. 110, the conviction stating neither the time nor place of the commission of the offence.

Held, no offence within that section, and conviction also bad, as showing neither time nor place of commission of offence.

A police magistrate cannot try summarily for an offence under above sec. of act.

Clement, for application.

Holman, contra.

CHANCERY DIVISION.

Ferguson, J.] [March 17.

ROBINSON v. COOK.

Mortgage on going factory—Estoppel—Partner of mortgagor acquiescing in mortgage—Assignee for benefit of creditors.

S. gave a mortgage to R., partly for a past debt, and partly for future advances on certain land, describing them, "together with the machinery and foundry apparatus now in use and that may in future be used in the brick and frame building situate on the said lots used as a machine shop and a foundry down stairs and as a printing office up stairs, the machinery being composed of one printing press, etc., (describing various articles of machinery) together with all the machinery now in or that may hereafter be put in the said premises."

In the proviso in the mortgage, the property was mentioned as "lands and chattels."

The mortgage though duly registered in the registry office, was not filed as chattel mortgages are required to be by statute, and there was not the change of possession mentioned in the statute.

Held, that this was, in effect, a mortgage of the machine shop and foundry, and of the printing office, and had the same force and effect as if these had been mortgaged, naming them. The mortgage transaction was in respect of going concerns, and not in respect of land as such, and chattels as such, and the use of the word "chattels" was apparently for greater caution, lest any of the property might possibly be considered chattels. Therefore, certain articles in question in this action, viz.: two vertical drills, a planer, a grindstone and three iron lathes, which were at the time of the execution of the mortgage on the premises, and were essential parts of these going concerns, passed by the mortgage to the mortgagees.

Held, also, following *Kitching* v. *Hicks*, *ante* p. 112, the mortgage was in any event good without registration, so far as it was a mortgage upon property brought upon the premises after its date.

The mortgagees now having commenced proceedings under the above mortgage, one C. professed a claim or title to some of the property as an alleged partner of the mortgagor. The evidence, however, showed that he was present when the mortgage was given, and knew all about the transaction; that the money that had been advanced by the mortgagees, was partly for the purposes of the printing office, in which only he claimed to be interested as such alleged partner, and the money then to be advanced, was to be partly for the same purposes, and that he stood quietly by when the transaction was made with the mortgagees without asserting any claim to ownership or part ownership of the property, or giving the mortgagees any information whatever as to the claim he now set up for the purpose of subtracting from the rights of the mortgagees.

Held, that under these circumstances, C. was clearly estopped from setting up any right or title as against the mortgagees to the property, and the mortgagees title was just the same as it would have been if C. had joined in the mortgage to them.

The defendant in the present action, an assignee under a deed for the benefit of the creditors of the mortgagor, had removed or was threatening to remove certain of the property comprised in the mortgage. The plaintiffs, besides claiming foreclosure of their mortgage claimed, also, an injunction to restrain the defendant from so acting. In his defence he alleged that at the time of the execution of the mortgage, he was a creditor of the mortgagor, and that after the commencement of this present suit he recovered a judgment for the amount of his debt, and he

claimed a right to the property as against the plaintiffs as such creditor.

Held, that the defendant was entitled thus to avail himself of his position as a creditor at the date of the mortgage, by saying the mortgage was not good; and this although he did not recover his judgment and execution before the commencement of the suit.

An assignee for the benefit of creditors, takes only such title as his assignor had to the property.

C. Moss, Q.C., for the plaintiff.

S. H. Blake, Q.C., for the defendant.

Ferguson, J.] [April 25.

RE STANDARD FIRE INSURANCE CO.

KELLY'S CASE.

Company—Subscriber to memorandum—Allotment of shares—Winding up.

Appeal from the Master at Hamilton.

One K., the present appellant, signed a certain memorandum in the following words:—"We, the undersigned, do hereby subscribe for shares of the capital stock of Alliance Insurance Co., and agree to take the number of shares and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company 10 per cent. of the amount of stock subscribed by us respectively, within 30 days from the day of our several subscriptions."

Before any stock were actually allotted to K., the company was commenced to be wound up. The Act 38 Vict., c. 66, however, which incorporated the Alliance Insurance Co., by sec. 2, vests the shares of the company in the persons who shall subscribe for the same.

Held, that K., by signing the above memorandum, became a shareholder, and liable to the 10 per cent. upon his stock at the expiration of 30 days from the date of his subscription; and the above document could not be regarded as simply an application for stock, but amounted to a subscription for stock; and he was a shareholder in the company.

Nasmith v. *Manning*, 5 S. C. 417, distinguished on the ground that an allotment was plainly contemplated by the parties.

Semble, that acting within the bounds of its legislative jurisdiction, the Local Legislature is as omnipotent as any parliament.

Laidlaw, for the appeal.

A. Galt, contra.

Boyd, C.] [April 30.

ARKELL V. ROACH.

Will—Construction—Married Woman—Statute of distributions—R. S. O., c. 125, s. 25.

A. died leaving two sons and two daughters, and by her will directed that her property should be invested until C., her eldest son, should attain twenty-one, when it was to be divided into four equal shares, and he was to get the income of one share until he attained thirty, when he was to get his share out and out. The other three shares were to be invested, and the income arising therefrom was to be added to each until each of the remaining three children respectively attained twenty-one, when they were to receive the annual income thereof until the youngest (son), F., attained the age of thirty, when he was to get his share out and out, and thereafter the income of the remaining two shares was to be paid in equal payments to the two daughters, C. and I., until one of them should die, and then to pay one share to the person or persons who would be entitled thereto under the Statute of Distribution in case such share was the property of the daughter so dying. C. married and died before F. attained twenty-one, having made her will and left all her property to her husband for her children.

Held, that the proper effect of the will of A. was to vest in C.'s husband and children the one-fourth share that she was to draw the income of for life, and that these are the persons who would be entitled under the Statute of Distributions, pertaining to the personal estate of married women who die intestate. R. S. O. c. 125, s. 25.

Street, Q.C., for plaintiff.

Maclennan, Q.C., for F. W. Arkell.

Coyne, for the defendant, Roach.

Boyd, C.] [May 7.

GUNN V. BURGESS.

Indivisible chattels—Bills of Sale Act, R. S. O., c. 119—Sheriff's Sale.

A., having purchased from B. a half interest in a celebrated brood mare, paid in his

purchase money $50 more than the half interest was worth, on the understanding that B. was to keep and take care of the mare for a year, when A. was to have her, and her expenses were thereafter to be shared equally between them. The bargain was that they were to keep her for breeding purposes and share the profits equally.

During the year that B. was to keep her, she was seized and sold by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff and publicly at the sale. Subsequently the mare had a colt which was *in gremio* at the time of the sale.

In an action by A. against C., the purchaser at the sheriff's sale, in which C. contended that the Bills of Sale Act, R. S. O. c. 119, avoided the plaintiff's title as against the execution it was

Held, that the Act was intended to apply to personal chattels susceptible of specific ascertainment and of accurate description, and capable of being transferred and possessed *in specie*, and did not apply to an indivisible chattels like that in the present case. That A. and B. were tenants in common of the mare; that B.'s possession of the mare was not his sole or exclusive possession, but the possession of both; that the sheriff's sale passed only B.'s interest in the mare, and C., by his purchase, became a co-owner with A.; that the property in the colt followed that of its dam, and that A. was an owner of an undivided moiety in both.

Moss, Q.C., for plaintiff.

Cassels, Q.C., and *Fletcher*, for defendant.

Proudfoot, J.] [May 14.

HAMMILL v. HAMMILL.

Will—Construction—"Effects."

A testatrix, by her will, after giving to her two sons a certain mortgage, and after sundry other specific bequests continued as follows:—

"I further direct that the balance of personal property consisting of notes and other securities for money, be given to the children of my two sons aforesaid, that is to say, one-half of that amount to be given to the children of my son T. H., and the remaining half to the children of my son S. H., aforesaid; also, that if there be any other effects possessed by me at the time of my decease, that the same be divided equally in value among my grandchildren, share and share alike."

The testatrix had no real estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and other funds in the purchase of certain lands which were conveyed to her by deed on May 31st, 1880. She died on August 31st, 1883.

Held, that the grandchildren were entitled to the lands and personal estate of which the testatrix died seized and possessed, not specifically bequeathed.

It appeared clear that the testatrix did not mean to die intestate as to any part of her property. The clause directing the disposition of her personal property, consisting of notes and other securities for money, appeared to be distinct from that as to her other effects. Each is complete in itself. In one the grandchildren take *per stirpes*, in the other *per capita*; and, therefore, the word "personal" must not be read as necessarily connected with "effects," and the cases show that the word "effects" is wide enough to carry the real estate.

PRACTICE.

Boyd, C.] [Dec. 31, 1883.

ROBSON v. ROBSON.

Partition—Incumbrances—Inquiry as to.

The usual order in Chambers for partition or sale under Chy. G. O. 640, was pronounced on 15th May, 1882.

The Master reported on the 21st March that part of the lands had been sold on the 17th November, 1882, and that there were no incumbrances on the whole or any of the shares.

Upon petition by the purchaser for a reference back to the Master to take further accounts and inquire as to incumbrances.

Held, that the Master should ascertain and report what incumbrances affect the property down to the time of the sale, and not merely at the time when the order in Chambers was pronounced.

Report referred back to the Master.

Meek, for the petitioner.

Bigelow, for the plaintiff.

Boyd, C.] [March 3.

RE STUBBING, ANTHES v. DEWAR.

Administration—Solicitor's commission under G. O. Chy. 643—Practice.

In an administration suit in which the estate was insolvent, the total assets being $72,000, the liabilities $138,475, and the creditors being 100 in number, and in which the commission of the solicitor who acted for all parties was allowed by the Master under G. O. Chy. 643, at $995, eight creditors at the close of the suit, and without notice to the solicitor, until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill, instead of the allowance of the commission, on the ground that the commission was excessive.

Held, that the commission was not so exorbitant as to warrant the substitution of a taxed bill and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling.

The scope of G. O. Chy. 643, is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation.

A very liberal compensation in such cases is not *per se* a reason for reducing the commission or directing the taxation of a bill in its stead, nor *per contra* is a low or inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill.

Semble, that in cases affected by this order any party interested in the estate who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the Master note it in his book, at the earliest stage possible in the proceedings; but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party.

C. Bitzer, for the motion.

Hoyles and *J. King*, contra.

Galt, J.] [March 28.

BOOK v. RUTH.

Appointment of Receiver.

Motion for a receiver under the following circumstances:—The plaintiff had a judgment against the defendant. The father of the defendant died a short time ago leaving the income to his wife for life, and on his death directed his executors to divide the corpus among certain parties, amongst others the defendant. *Foyle* v. *Bland*, L. R. 11 Q. B. D. 711, was cited as authority.

The learned judge made the following order:—Upon the motion of the plaintiff for an order that he be appointed a receiver without security and without salary, to receive the reversionary interest which the defendant has or may be entitled to under the will of his late father, Jacob Ruth, and all moneys that may be payable to the defendant under the provisions contained in the will of the said Jacob Ruth, upon reading, etc.,

1. It is ordered that the plaintiff be, and he is hereby, appointed receiver, without security and without salary, to receive the reversionary interest which the defendant has or may be entitled to under the will of the said Jacob Ruth, and all moneys that may be payable to the defendant under the said will, till the amount due the plaintiff for debt, interest and costs on his judgment recovered the second day of June, one thousand eight hundred and seventy-seven, and for costs of and incidental to this motion be fully paid and satisfied.

2. And it is further ordered that the costs of and incidental to this motion of the executors be retained by the said executors out of the share of the testator's estate coming to the defendant.

Boyd, C.] [April 2.

RE MURRAY CANAL, LAWSON v. POWERS.

Marriage with deceased wife's sister—Uncanonical marriage—Tenancy by the courtesy—Will by infant married woman—45 Vict. c. 42. D.

In 1866 one S. H. died undisputed owner of certain lands, leaving him surviving his widow and three daughters. The widow died in 1869. The eldest daughter married one L., and predeceased her mother, leaving L. surviving. The second daughter also pre-deceased her mother, and died unmarried and without issue. The youngest daughter, G., in 1869, married L., who thus married his deceased wife's sister. They had issue one child, who died in G.'s lifetime. In 1871 G. died. From before 1871

up to the commencement of this action, 1883, L. was in continuous occupation of the above-mentioned lands.

On a reference to the Master, he held L. had obtained title by possession against the heirs of G., on the ground that the marriage with G. was uncanonical, and, therefore, L. was not in as tenant by the courtesy, and 45 Vict. c. 42, D. did not come into force until after the heirs were barred.

Held now, on appeal, that the occupation of L. was not to be attributed to his rightful character, which was that of tenant by the courtesy, so as not to work tortiously against the heirs-at-law of his wife.

The marriage of a man with his deceased wife's sister was not *ipso facto* void by English law, which was adopted in 1792 as the law of this country by 32 Geo. III. c. 1. Such a marriage was esteemed valid for all civil purposes, unless a sentence of nullity was obtained from the ecclesiastical courts during the life-time of the parties. This state of the law was not affected in this country, as is pointed out in *Hodgins* v. *McNeil*, 9 Gr. 305. This continued the law here until 45 Vict. c. 42, D. was passed in 1882, by the first section of which all laws prohibiting marriage between a man and the sister of his deceased wife are repealed, both as to past and future marriages, and as regards past marriages, as if such laws had never existed.

It is incorrect to say, with Blackstone, Vol. II. p. 127, that it is essential to a tenancy by the courtesy, that the marriage must be canonical and legal. The requisition of a canonical marriage is not essential; and when G. died, in the present case, L. was in possession as life tenant by the courtesy, and the Statute of Limitations did not run in his favour.

In a so-called will, executed a few days before her death, G. assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age.

Held, that the will was invalid. C. S. U. C. c. 73, s. 16 (R. S. O. c. 106, s. 6), with respect to devises and bequests of the separate property of married women only removed the disability of coverture, not of infancy.

C. Moss, Q.C., for the appeal.

W. R. Riddell, contra.

Master in Chambers,] [April, 28.

FEDERAL BANK v. HARRISON.

Counter claim—Surety—Indemnity.

An action against the defendant on his bond as surety for H. & McT., for the amount due the plaintiff by H. & McT. on their banking account with the plaintiff.

Counter claim by the defendant against the plaintiff and H. & McT. alleging that the defendant is liable only as such surety, and that the plaintiff ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount and indemnify the defendant.

The counter claim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal and surety.

The Master held the counter claim bad and struck it out.

Holman, for the plaintiff, and defendant by counter claim.

Aylesworth, for the defendant.

Rose, J.] [May 12.

SAME CASE.

Upon appeal argued by the same counsel, ROSE, J., upheld the order of the Master, and dismissed the appeal with costs.

Master in Chambers.] [May 3.

NEW YORK PIANO CO. v. STEVENSON.

Notice of trial—Revivor.

The original defendant dying *pendente lite*, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for the 5th May at Cornwall.

The defendant moved to set aside the notice of trial as irregular.

Held, that as the order of revivor would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th of May was regular.

Holman, for the motion.

Hoyles, contra.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 47 Vict., 1884.

During this term the following gentlemen were called to the bar, namely:—

Messrs. James Bicknell, gold medalist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Campion, John James Maclaren. The last three being under Rules in special Cases.

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Matriculants — John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class — Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- 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.

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

Students-at-Law.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of 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.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somervilles Physical Geography.

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 Promisory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

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 Gov-

ernment 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.

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 Jusisprudence; 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 Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

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 Socity 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, six 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.

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 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 year, 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.

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 for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

Copies of Rules can be obtained from Messrs. Rowsell & Hutchison.