The Canada Law Journal.

VOL. XXIV. FEBRUARY 1, 1888. NO. 2.

IN reference to the case of *Saylor* v. *Platt*, as to which we gave in our last number for 1887, a form of order for particulars in an election case, we find that the only point decided was as to the time for giving particulars in an election case. The learned judge stated, in giving judgment, that he would not follow his former decision in *Dickson* v. *Murray*. 19 C. L. J. 211, in which he held in accordance with the modern English practice that the time should be seven days, as he found that this view had not been generally adopted by other judges. For the sake of uniformity he would therefore follow the former practice, and make the order for delivery of particulars fourteen days before trial.

JUDGE F. MILLER, one of the nine judges of the Supreme Court of the United States, contributes an able article to the last number of the *American Law Review* on "The System of Trial by Jury." After tracing the history of trial by jury in the United States, he says that his practice in the courts, before he came to the bench, had left on his mind the impression that in civil suits juries were of doubtful utility. He would then have preferred a court composed of three or more judges, so selected from different parts of the circuit as to prevent any preconcerted action or agreement of interest or opinion, to decide all questions of law and fact. He now thinks that this preference was largely owing to the popular and frequent election of the judges of the court in which he was practising, and to their insufficient salaries. They were neither very competent as to their learning, nor secure in their positions. They could not, therefore, exercise that control over the proceedings, in a jury case, and especially in instructing the jury upon the law applicable to it, which is essential to a right result in a jury trial. A case left to the unregulated discretion of a jury, without that careful discrimination between matters of fact and matters of law which it is the duty of the court to lay before them, is little better than a popular trial before a town meeting. The judge should clearly and decisively state the law, which is his province, and with equal precision point out to the jury the disputed questions of fact, which it is their duty to decide.

An experience of twenty-five years on the bench has convinced the learned judge that, when the principles above stated are faithfully applied, a jury is in the main as valuable as an equal number of judges would be, or any less number. His experience in the conferences of the United States Supreme Court is that the nine judges come to an agreement very readily upon questions of law, while they often disagree in regard to questions of fact which are as clear as the law. His conclusion is that judges are not pre-eminently fitted, over other men of good judgment on business affairs, to decide upon mere questions of disputed fact.

The learned judge thinks it a hardship, however, in civil cases, that one or two jurors may prevent the decision of a case, where the other ten or eleven are quite agreed as to the verdict. Civil trials go by the preponderance of evidence, upon a balancing of the weight of testimony, and the contention is that it would be a useful extension of the principle, if some less number than the whole jury should be authorized to render a verdict. The number required to concur in the verdict should probably, the learned judge thinks, be as high as nine.

Trial by jury in criminal cases stands upon different ground. Here unanimity should be required. It is not a matter of preponderance of evidence, but of reasonable certainty. It is better that nine guilty men should escape than that one innocent man should be found guilty.

Exception is also taken to the rules governing the disqualification of jurors. These too often result in excluding the intelligent man, and accepting the ignorant one. The old principle of the English law that a man should be tried by a jury of his neighbours, has ceased to have any place in the system of criminal jurisprudence. The man who takes an interest in what is going on in public life, who reads the journals, and who is familiar with rumour and the current of public opinion, becomes, in the United States, disqualified, if they have had any influence in forming an opinion in his mind. The ignorant and stupid are often the remnant who try the defendant. This difficulty does not, of course, arise in this country.

WE are in receipt of a letter from an esteemed correspondent who writes in reference to the article on "The Law of Divorce" which appeared in our last number, but it arrived too late for insertion in this issue; we shall have pleasure in laying it before our readers at an early date. Discussions on the same topic are, we observe, not confined to Canadian journals, though the tenor of the remarks made, and the nature of the evils complained of, are somewhat different among our neighbours from what they are in Canada.

The American Law Review has an article on Divorce Legislation in which it is contended that any attempt to secure uniformity in the divorce laws of the various states, by means of national legislation, is needless. It is contended that the hardships which result from divorce proceedings are not so much a consequence of the diversity of causes for which divorces are granted, as of the refusal of some of the states to recognize as valid, decrees granted in other states in which but one of the divorced parties resides. While hardship may, and doubtless does, result from that cause, it must, we think, be conceded that national legislation would secure uniformity. *The Review* seems to think that the lapse of time will best bring about that result, through the growth of public sentiment, which, it asserts, is strongly in favour of two things, viz., not to grant divorces except for adequate causes, and to hold decrees valid where rendered, valid everywhere. Two of the chief evils of the American system are inadequately dealt with. One of these is the insufficiency of the grounds on which divorce is granted; the other is the loose, and often fraudulent, way in which the law, such as it is, is too often administered in many of the so-called courts.

COPYRIGHT AND PIRACY.

WE are somewhat interested in noticing in our esteemed contemporary, *The Law Quarterly Review*, at page 121 of the current number, a reference to this journal, in which the authors say that it is rather hard to find the enterprise of the Blackstone Publishing Company, of Philadelphia, in reprinting pirated editions of English text-books commended by their own fellow-subjects. *Interdum dormitat Homerus*, and we are inclined to think that *The Law Quarterly* was writing with less precision of thought than is habitual to it, which may perhaps be accounted for by the fact of the remarks coming at the very end of its usual able review of current cases and items of interest. The expression "pirated" is, in the first place, a begging of the question, because, no doubt, piracy in the sense of robbery is necessarily wrong and not to be commended either by British subjects or by anybody else, but the real question is whether it is possible to uphold the proposition that there is anything to be deprecated or blamed in Americans reprinting English copyright works under the present state of the copyright law. We will make, perhaps, the weakening admission that we, that is to say the writer, must own up to having had some qualms of conscience in subscribing to the Blackstone Publishing Company Series; but upon consulting a friend, in whose judgment on such subjects he has much reliance, he was met by a quotation of the text in the Bible about buying whatever is exposed in the shambles, asking no questions for conscience sake. We must confess that this appears to us a very insufficient way of meeting the point. In the case of the Blackstone Series there is no need of asking questions, inasmuch as they bear upon their very frontispiece the history of their shame, if shame it be; but we think that *The Law Quarterly Review* must either be prepared to support the proposition that these reprints are illegitimate morally (for obviously they are not illegal actually), or else it must confess that its observations to which we have above referred, are not founded on right reason. It seems to us that the right which is called copyright, is purely a matter of artificial creation, and that it would be quite conceivable to create a private and exclusive right in what a man says in ordinary conversation, that is to say, that it would be quite conceivable for the law to confine to the individuals, who utter brilliant remarks in conversation, the right of reproducing them either verbally or in writing, and thus very much injure the trade of many brilliant writers in the present day who write excellent books full of the conversational witticisms of other people; but because no such law exists anywhere, it has not entered, probably, into the head of anyone to say that it is wrong for such writers to utilize gems of thought which are not of their own creation. The mere fact, that in the case of copyright in certain countries and within certain limits, books which are published by the authors cannot be reproduced by other people without the author's consent, is surely no argument for saying that in places to which that copyright does not extend they may not be properly introduced. We are not writing this so much for the sake of propounding any theory on the subject ourselves, as for inviting our contemporary, to whom we gladly concede the blue riband of legal journalism,

to take up the subject and discuss it with its usual ability in some future number. We say nothing as to any rights or remedies English authors may have as to preventing the sale of this series in Canada. If they have any such rights they must come forward and enforce them, or expect the matter to go against them by default.

LEGAL ASPECT OF DISALLOWANCE IN OLD MANITOBA.

THE issue of this journal, of the first of December, contains an article entitled, "Disallowance—Manitoba and the North-West," contributed by "W." This article has attracted considerable attention in Manitoba, though the interest aroused by it was not due so much to its intrinsic merit, as to the manner in which the writer promulgated arguments which, it is submitted, have long been abandoned by even those who most warmly espouse the cause of monoply. Two contentions were made. One, that in reference to the Red River Valley Railway Act, was as follows: "The Provincial Act seems to have been beyond the powers of the Provincial Legislature under s. 94 (92?) of the B. N. A. Act; (*a*) as relating to a railway 'extending beyond the limits of the Province,' if not according to the letter, certainly according to the spirit of the said section, which expressly applies to railways connecting one province with another, and could hardly be intended not to apply to a railway connecting, as this was avowedly intended to do, a province with a foreign country. Sec. 91 of the B. N. A. Act, expressly subjects ferries between a province and any foreign country to the exclusive jurisdiction of the Dominion Parliament; and for good reason, any such ferry (and a portion of any such railway as that in question) requiring attention and regulation by the Dominion Customs Department."

The section of the B. N. A. Act referred to (92, not 94) is as follows:—

"XCII. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: . . .

"(10) Local works and undertakings other than such as are of the following classes:

"(*a*) Lines of steam, or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

"(*b*) Lines of steamships between the province and any British or foreign country;

"(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces."

The Red River Valley Railway did not come under (*c*) because it was not "declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces;" the reverse, if

anything, was declared by Parliament. It did not come under (*b*), because it was not a line of steamships between Manitoba and any British or foreign country unless we call it a line of steamships by analogy, the original means of transport in Manitoba, the Red River carts, having been termed "prairie schooners." Nor does it come under that portion of (*a*) which excepts "lines of steam, or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the province with any other or others of the provinces. That was a useful provision to prevent one province from trespassing upon the jurisdiction of another or others; but, as the Red River Valley Railway, whatever horrible things it was to do, did not propose to touch in or upon any other province, that portion of (*a*) does not apply to it. The only question is, what was meant by that other portion of (*a*), which excepts railways, etc., "extending beyond the limits of the province," from the local undertaking in relation to which the provinces "may exclusively make laws?" Was the Red River Valley Railway as projected a railway "extending beyond the limits of the Province?" It certainly was not; it was to go to the boundary, and no farther. But, it is said, it transgresses the spirit of the B. N. A. Act, because the section "expressly applies to railways connecting one province with another, and could hardly be intended to apply to a railway connecting, as this was avowedly intended to do, a province with a foreign country." Why not? The object in preventing one province from incorporating a railway to run over another province seems to have been to render it impossible for one province to trespass upon the jurisdiction of another. What could be the object in providing that a province may not "exclusively make laws" in relation to a railway passing from a province into a foreign country? Could the Dominion Parliament itself make laws in relation to railways extending into foreign countries? Evidently not. But, it is added, "sec. 91 of the B. N. A. Act expressly subjects ferries between a province and any foreign country to the exclusive jurisdiction of the Dominion Parliament," and from this it is argued that any railway connecting with a foreign country comes within the jurisdiction of the Dominion Parliament. On the contrary, the very fact that (*b*) expressly refers to "lines of steamships between the province and any British or foreign country," shows that when "lines of steam, or other ships, railways," etc., are mentioned in (*a*), no reference is intended to be made to connections with foreign countries which are provided for in (*b*). As a matter of fact, or rather of law, this whole question was decided in the Supreme Court of New Brunswick, in 1871, in the case of the *European and North American Railway Company for the extension from St. John's westward* v. *Thomas*, when Chief Justice Ritchie, now Chief Justice of the Supreme Court of Canada, held that just such a railway as the Red River Valley Railway, which was being built to the International boundary, there to meet an American line, was within the powers of New Brunswick to construct. The judgment, which was concurred in by Allen, Weldon, and Fisher, JJ., was as follows:—

"But it is claimed to have been shown by evidence outside the Act that, at the time it was passed, and also at the time of the passing of 32 Vict. c. 54, it was contemplated and intended by the promoters of the undertaking to connect

with a line of railway to 'be built in the United States to meet the E. & N. A. Railway for extension from St. John, westward,' at the boundary of the United States, and, therefore, it is contended, it was a railway extending beyond the limits of the Province. But we think we have no right to look to intentions or anticipations, or doings of parties outside the Provincial Legislature, either in the State of Maine or in the Province of New Brunswick, and that the intention of the Legislature, as expressed in the Act, alone can control us—that the fact of the Legislature of the State of Maine authorizing, or its people intending to construct, or actually constructing, a line of railway in that country, cannot in any way affect the authority of our own Legislature to legislate on, and deal with, railway undertakings; provided always, such railways do not connect the Province with any other or others of the provinces, nor extend beyond the limits of the Province.

"This is the simple question, and all we have to consider in determining on the validity of the Act. As to any possible or probable connection of the railway authorized to be constructed under this Act (which may have been thought of at the time of passing the Act) with a line or lines of railway to be constructed, not under the authority of these Acts, in the United States, we have nothing to do. We therefore think this is a local work and undertaking other than such as are of the classes enumerated in paragraphs *a*, *b*, and *c*, to ss. 92, in relation to which the Legislature of this Province may exclusively make laws."

This judgment stands unreversed. The fact that in the recent injunction cases in this Province no serious attempt was made to question its validity, and the further fact that a railway is being constructed under an Ontario charter from Port Arthur, south-westward to a point on the United States boundary, and that its constitutionality is not even questioned, seem to indicate that, so far as the B. N. A. Act is concerned, Manitoba has an undoubted right to build all the railways to the boundary she may desire. Then what is meant when railways "extending beyond the limits of the provinces" are excepted from the list of local works in relation to which the provinces may exclusively make laws? There seems to be no reason why that portion of s. 92 should not apply exclusively to lines projected to run from a province into a territory, as for instance, from Manitoba into the North-West Territories, as the Territories come under Dominion jurisdiction exclusively.

The other contention is, that under the monopoly clause (clause 15) of the Canadian Pacific Railway Contract, the Dominion agreed to give the C. P. R. a monopoly in all that country south of its line from Lake Nipissing to the Pacific Ocean, except "such as shall run south-west, or to the westward of south-west." The monopoly clause referred to is as follows:—

"For twenty years from the date hereof no line of railway shall be authorized by the Dominion Parliament to be constructed south of the Canadian Pacific Railway from any point at or near the Canadian Pacific Railway, except such a line as shall run south-west or to the west of south-west, nor to within fifteen miles of latitude 49, and in the establishment of any new province in the North-west Territories, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period."

That is, the Dominion Parliament undertakes not to authorize the construc-

tion of any railway south of the Canadian Pacific Railway with certain exceptions for the term of twenty years.

The Dominion Parliament might agree to refuse to "authorize" the construction of such railways for a thousand years, but that would not affect Manitoba's rights. Railways chartered by provincial legislatures are not "authorized" by the Dominion Parliament, and never were since the passing of the British North America Act. There would be no sense, then, in the construction it is sought to place upon the monopoly clause. What it meant was that the Dominion Parliament would not "authorize" such railways in the territories over which it, and it alone, exercised control. The latter part of the monopoly clause, namely, the provision that "in the establishment of any new Province in the North-West Territories, provision shall be made for continuing such prohibition," plainly reveals the knowledge that the erection even of a portion of the North-West Territories into a province would *eo ipso* take it out from under the yoke of monopoly, and place it in a position to build as many competing railways to the boundary as it might desire. It was expressly provided, in accordance with this, that the territory taken from the North-West, and added to Manitoba, should be subject to the monopoly clause. If it was necessary to enact that upon the erection of any portion of the already monopoly-ridden territories into a province, express provision should be made in order to continue its subjection to monopoly; why was it not necessary to make a similar express provision in relation to Manitoba, which was already an autonomous province? How is it possible to argue, then, that the monopoly was intended to apply to old Manitoba?

I might quote the speeches of Sir John A. Macdonald and Mr. Thomas White, in the Dominion Parliament, when the Canadian Pacific Railway was up for ratification in February, 1881; the speech of Sir Charles Tupper in 1884, on the application for the $30,000,000 loan; Hon. Thomas White's remarks to the Junior Conservatives of Winnipeg last March, and the assurance of the Minister of Justice to the Winnipeg Board of Trade in May last; but your contributor states that he does not care what the ministers said, but merely for the actual requirements of the law, and to the public the quotations from ministerial speeches on the Canadian Pacific Railway contract are sufficiently trite. It suffices to say that in all of them we have been assured again and again that neither the British North America Act nor the Canadian Pacific Railway Contract required monopoly in old Manitoba. The Red River Valley Railway Act was disallowed simply to carry out the trade policy of the Government, and not for the so-called reasons which your contributor has assigned.

WINNIPEG. F. C. W.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We now continue our notes on the cases in the first instalment of the Law Reports for December.

SALE BY DIRECTOR TO COMPANY—RATIFICATION AT GENERAL MEETING—VENDOR'S RIGHT TO VOTE AS SHAREHOLDER.

In the much litigated case of *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589, the Judicial Committee reversed the decision of the Supreme Court and restored the judgment of the Court of Appeal. The simple point in the case was whether or not a director of a company, who had entered into a voidable contract to sell certain property to the Company, was entitled to a vote as a shareholder at a general meeting called to ratify the contract. The Chancellor held that he could not (16 Ont. R. 300), the Court of Appeal held that he could (11 App. R. 205), the Supreme Court thought the Chancellor was right and reversed the decision of the Court of Appeal (12 S. C. R. 598), and now the Privy Council think the Supreme Court was wrong, and the Court of Appeal was right.

MARINE INSURANCE—BURSTING OF ENGINE—PERILS OF THE SEA.

Thames M. I. Co. v. *Hamilton*, 12 App. Cas. 484, is an appeal from the case of *Hamilton* v. *Thames M. I. Co.*, 17 Q. B. D. 195, noted *ante* vol. 22, p. 299. In this case a steamer was insured by a time policy in the ordinary form, on the ship and her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was used for filling the main boilers, when, owing to accident or negligence, a valve was open which ought to have been shut, and the water was forced into and split open the air chamber of the donkey-engine. The Divisional Court of the Queen's Bench Division, and the Court of Appeal, held that the damage to the engine was covered by the insurance, but the House of Lords reversed the decision, holding that whether the injury were due to accident or negligence, the loss did not fall under the words "perils of the seas," nor under the general words "all other perils, losses and misfortunes, that have, or shall come to the hurt, detriment, or damage, of the subject-matter of insurance." *West India Telegraph Co.* v. *Home and Colonial Insurance Co.*, 6 Q. B. D. 51, on which the Courts below relied was disapproved, their Lordships being unanimously of opinion that the general words only covered other losses, *ejusdem generis*, as those specifically mentioned.

LUNATIC OUT OF JURISDICTION—RIGHT OF FOREIGN OFFICIAL CHARGED WITH CARE OF LUNATIC TO PROPERTY OF LUNATIC IN ENGLAND.

Proceeding now to the cases in the Chancery Division *in re Barlow*, 36 Chy. D. 287, is the first to call for notice. In this case, a lady detained in a lunatic asylum in New South Wales, but not found a lunatic by inquisition, was entitled to the income (about £30 a year) of a testator's residuary estate, and was also absolutely entitled to £2,000, which had arisen from accumulations of the income. She had been maintained by the Colonial Government, at a total expense of

£803. By a local Act of New South Wales, extensive powers of management of the property of "lunatic patients" (*i.e.* persons detained as lunatics, but not so found by inquisition), were given to the Master in Lunacy in New South Wales, and he was entitled to sue for, and receive debts due to, the patient, but the Act did not vest the patient's property in him. The Master claimed to have the accumulations which were in England paid to him, upon which the trustees paid them into court, under the Trustee Relief Act. The Master then petitioned to have them paid out to him. Kay, J., ordered the £803 to be paid to him, and also the income of the remainder of the fund, as long as the person entitled should be detained as an insane patient in New South Wales, and authorized the trustees to pay him the patient's share of the income of the residuary estate, which the trustees undertook to do. The Master in Lunacy appealed from this order, but the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) held that, though in New South Wales the Master could enforce payment of any sums due to the patient, still, as the patient had not been found lunatic, and the property was not vested in the Master, he could not compel payment of any money due to the patient from persons in England, and his claim to have the whole of the accumulations paid to him was refused. But it was held that the English trustees were justified in paying over to the Master anything which the competent authority of New South Wales decided to be necessary for the maintenance or benefit of the patient, and the payments which had been directed, were upheld, but no case having been made to shew that more was required for the comfort or benefit of the patient, it was held that Kay, J., was right in refusing to order anything further to be paid. We believe a similar point was recently before Proudfoot, J. in the Chancery Division in *Charteris* v. *Charteris*, in which the question was whether the corpus of a fund in the province to which a lunatic resident in Scotland was entitled, should be paid to her *curator bonis* in Scotland, and he held that the mere fact that he was *curator bonis* did not entitle him to receive the corpus.

CHATTEL MORTGAGE—AFTER-ACQUIRED PROPERTY—UNCERTAINTY.

In re Clarke, Coombe v. *Carter*, 36 Chy. D. 348, the Court of Appeal affirmed the decision of Kay, J., 35 Chy. D. 109. In this case a mortgagor, by deed assigned to the mortgagee all his household goods and farming stock, and "also all moneys of or to which he then was or might during the security become entitled under any settlement, will, or other document either in his own right, or as the devisee, legatee, or next of kin of any person," and also all real and personal property "of, in, or to which he was, or during that security should become beneficially seized, possessed, entitled or interested, for any vested, contingent, or possible estate or interest." The mortgagee having afterwards become entitled under a will to a share of the personal estate of the testator, the question arose between the trustee in bankruptcy of the mortgagor's estate and the mortgagee, whether this share passed under the assignment of after-acquired property. It was contended on behalf of the liquidator that the clause purporting to assign after-acquired property was too vague. But the Court of Appeal (Cotton, Bowen

and Fry, L.JJ.), affirming Kay, J., held that the assignment of after-acquired property was divisible, and that although the general assignment of all property to which the mortgagor might become entitled might be too wide, as to which the court gave no decision, the assignment for valuable consideration of all moneys to which the mortgagor should become entitled under a will operated as a contract which the court would enforce, and that the share of the personal estate in question therefore passed under the mortgage.

COMPANY—WINDING UP—REMOVAL OF LIQUIDATOR—APPEAL BY LIQUIDATOR AGAINST ORDER REMOVING HIM.

In re Adam Leyton, 36 Chy. D. 299, was a proceeding under the Winding-up Acts in which the question of the jurisdiction of the court to remove a liquidator was discussed, and it was held by the Court of Appeal, affirming North, J., that the jurisdiction of the court to remove a liquidator "on due cause shown" is not confined to cases where there is personal unfitness, but that whenever the court is satisfied that it is for the general advantage of those interested in the assets of the company being wound up, that a liquidator should be removed, it has power to remove him and appoint a new one. It was also held by the Court of Appeal that a liquidator who has been removed has a right to appeal from the order removing him.

RESTRAINT OF TRADE—PUBLIC POLICY—COVENANT "SO FAR AS THE LAW ALLOWS" TO RETIRE FROM BUSINESS.

This number of the reports is rich in cases on the law of covenants in restraint of trade. The first of these is *Davies* v. *Davies*, 36 Chy. D. 359. In this case, on a dissolution of partnership, the retiring partner, who received a large sum of money, covenanted "to retire from the partnership, and so far as the law allows, from the business, and not to trade, act, or deal in any way, so as directly or indirectly to affect" the continuing partners. The business had been carried on in Wolverhampton and London. The action was brought by the survivor of the continuing partners and his assignees to restrain the retiring partner from carrying on a similar business in Middlesex. Kekewich, J., had granted the injunction, but the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) reversed his decision, being of opinion that the covenant to retire from business, "so far as the law allows," was too vague for the court to enforce. The case is valuable for the exhaustive discussion of the principles on which covenants of this kind are upheld, and the changes in the doctrine of public policy in reference to this class of cases. Cotton, L.J., was of opinion that the old rule, that the law does not sanction an absolute covenant in restraint of trade, is still binding, but on this point the other judges refrain from giving any judicial opinion. The court was unanimous that the covenant not to trade or deal, so as to directly or indirectly affect the continuing partners was personal to the continuing partners, and could not be assigned, and in any case it would appear also too vague to be enforced by the court. A reference to the ancient case in 2 Hen. V. Pasch. Term, pl. 26, which Fry, L.J., calls the foundation of this branch of the law, is curious

as showing here how a little ebullition of temper on the part of Mr. Justice Hull, which has been enshrined by the reporter, has succeeded in rendering that worthy justice more remarkable than he would have been had he used less choleric language.

RESTRAINT OF BUSINESS—AGREEMENT NOT TO CARRY ON PROFESSION OF SURGEON—ACTING AS ASSISTANT.

Palmer v. *Mallett*, 36 Chy. D. 411, is another case on the law of agreements on restraint of trade. The defendant became assistant to Hall & Palmer, surgeons at Newtown, and entered into a bond to them conditioned that he should "not at any time hereafter directly or indirectly, and either alone or in partnership with, or as assistant to, any other person or persons, carry on the profession or business of a surgeon" at Newtown or within ten miles thereof. The bond contained a recital that the defendant had been taken into the employment of the obligees on the terms that "he should not any time set up or carry on the business of a surgeon" in Newtown or within ten miles thereof. The partnership was subsequently dissolved, and both Hall and Palmer continued to practice in Newtown, and Hall engaged the defendant as his assistant at a salary, whereupon Palmer brought the action to restrain the defendant from so acting. The action, as Chitty, J., observes, was not brought on the bond, but upon the agreement recited in the bond itself. The argument for the defence, however, appears to have been based on the supposition that the action was brought to enforce the bond, and it was contended on behalf of the defendant that as the bond was entered into with Hall & Palmer jointly, and for the protection of the joint business only, Palmer alone could not sue to enforce it, and, the joint business having come to an end, that the bond could no longer be enforced. But Chitty, J., decided that although the bond was joint, yet from a consideration of the terms of the agreement recited in the bond, it was intended that each partner should be protected thereby, and that the plaintiff had therefore an individual right to the relief he claimed, and this decision was affirmed by the Court of Appeal (Cotton, Bowen and Fry, L.JJ.). Cotton, L.J., points out the distinction between covenants not to carry on a trade, and covenants not to carry on a profession. While the former are not broken by the covenantor becoming a clerk or assistant to another person who carries on the trade in question, the latter are broken by the covenantor acting as assistant to another person who practises the profession in question.

COSTS—TAXATION OF COSTS—SEPARATE DEFENCES.

The only point worth noticing in *Boswell* v. *Coaks*, 36 Chy. D. 444, is that where the House of Lords had, subject to certain directions, left it to the taxing officer to determine how many sets of costs should be allowed to defendants who had severed in their defences, it was held by North, J., and the Court of Appeal, that no appeal would lie from the ruling of the taxing officer on the point, unless he altogether omitted to exercise his discretion.

DOMICIL—ABANDONMENT OF DOMICIL OF CHOICE—REVIVAL OF DOMICIL OF ORIGIN.

The short point decided *In re Marrett, Chalmers* v. *Wingfield*, 36 Chy. D. 400, by Stirling, J., and the Court of Appeal was that, in order to lose a domicil of choice and revive the domicil of origin, it is not sufficient for the person to form the intention of leaving the domicil of choice, but he must actually leave it with the intention of leaving it permanently.

PRACTICE—SERVICE OUT OF JURISDICTION—CONTRACT TO BE PERFORMED WITHIN THE JURISDICTION—R. S. C., ORD. xl., R. 1.

In *Reynolds* v. *Coleman*, 36 Chy. D. 453, the plaintiff was an American resident in England for the purpose of his business, and the action was brought against the defendant, who was an American resident in America, to enforce a contract made in England to transfer to the plaintiff shares in an English company; and it was held by Kay, J., whose decision was affirmed by the Court of Appeal, that under ord. xl., r. 1, it is not necessary that a contract should state in terms that it is to be performed within the jurisdiction, but that it is enough if it appears from a consideration of the terms of the contract, and the facts existing when the contract was made, that it was intended to be performed within the jurisdiction; and the contract in question was held to be one which, according to its terms and the position of the parties at the time it was made, ought to be performed within the jurisdiction.

RESTRAINT OF TRADE—RULE OF SOCIETY NOT TO EMPLOY SERVANTS OF OTHER MEMBERS—PUBLIC POLICY.

Mineral Water Bottle Exchange Society v. *Booth*, 36 Chy. D. 465. This was an action brought by a trade protection society to restrain one of its members from infringing a rule of the society whereby it was provided that no member should employ any traveller, carman, or outdoor employee who had left the service of another member, without the consent in writing of his late employer, till after the expiration of two years, and it was held by the Court of Appeal (Cotton, Bowen and Fry, L.JJ.), affirming the decision of Chitty, J., that the rule was an unreasonable restraint of trade, and therefore void.

WILL—CONSTRUCTION—"DIE WITHOUT LEAVING ISSUE."

In re Ball, Slattery v. *Ball*, 36 Chy. D. 508, is a case upon the construction of a will whereby the testator bequeathed personal estate in trust after the death of W. K. B. for W. R. B., and in case W. R. B. died without leaving issue male for J. B. W. R. B. died in the lifetime of W. K. B., having had only one son, who died an infant in his father's lifetime. It was contended on behalf of the next of kin of W. R. B. that the term "die without leaving issue" should be construed as meaning "die without having had issue," but North, J., held that the word "leaving" must be construed in its literal sense. The construction contended for, he held, could only be adopted "if the result of so doing is to make the whole instrument consistent, to make a gift over fit in with the intention of the testator as previously expressed, and avoid divesting a previously vested gift." He dissented from the case of *White* v. *Hight*, 12 Chy. D. 751.

ADMINISTRATION--COSTS—ASCERTAINING CLASS—TRUSTEE RELIEF ACT.

In re Gibbons' Will, 36 Chy. D. 486, it was held by Chitty, J., that executors, by payment into court under the Trustee Relief Act of a sum to answer a legacy to a class, cannot thereby relieve the general residue from bearing the costs of an inquiry to ascertain who are the persons entitled under the bequest.

Reviews and Notices of Books.

The History of Canada. By WILLIAM KINGSFORD. Toronto: Rowsell & Hutchinson. 1887.

It is the natural and laudable desire of every man to know what he can of the history of the land he lives in, and in the volume mentioned in the heading to this article, Mr. Kingsford undertakes to tell us the story of Canada under French rule, from its earliest date to 1682. We understand that his intention is to continue the work to the Union of Upper and Lower Canada in 1841, so as to comprise the history of our country under French rule, until the capitulation of the Marquis de Vaudreuil in 1760, and its cession to Great Britain by the Treaty of Paris in 1763; and thereafter under the Government of Great Britain and of the United Kingdom of Great Britain and Ireland.

Mr. Kingsford's qualifications for the work he has undertaken are the intense interest he takes in his subject, indefatigable industry, a perfect knowledge of the languages in which the documents from which his information is derived are written, and a familiarity with the archives of Canada, now under the charge of Mr. Brymner, to whose ability and courtesy Mr. Kingsford bears ample and deserved testimony in his work on the archæology of Canada,—and above all, a reputation and character which justify our full faith in the assurance he gives in his opening chapter: "That he will make every effort to be fair and honest," and in his confident hope "that those with whom he may have the misfortune to differ, will recognize that he has consulted original authorities, and that whatever opinions he expresses are not hastily or groundlessly formed; but that, on the contrary, he has warrant for the belief that they are fully sustained by evidence." With this assurance he enters upon the story of the occupation and colonization of Canada, and shows us that in Canada, as in the English colonies in North America, the work was commenced, not by the Government, but by private enterprise moved by the spirit of adventure and the hope of gain, aided after a while in Canada by the desire to extend the influence of the Church, and for the conversion of savage nations to Christianity; receiving later some official assistance by the incorporation of a company with means and influence and special powers of settlement and organization; and lastly, by the direct intervention of the Sovereign, and the assumption of the government of the country by France as a Royal possession. He then narrates in ordered sequence the three voyages of Cartier to the St. Lawrence, and his ascent of that river to Montreal, his attempt at settlement, and the sufferings he and his crew endured from the Canadian

climate in winter, his discouragement and return to France; the twelve voyages of Champlain, his discoveries and explorations of the great rivers and lakes, his skilful diplomacy in treating and dealing with the Indians, and finally his appointment as Governor-General of Canada; the conquest of Quebec by the English under Kirke, in 1629, its occupation by them for three years, and its restoration to France under the Treaty of St. Germaine-en-Laye.

He then places vividly before the reader the great events and actions of what Lord Lansdowne, on a late occasion at Montreal, rightly styled *the heroic age of Canada*;—the long, fierce struggle with the Indians, then a numerous and most formidable enemy;—the attacks upon the French settlements and posts by tribes coming often from very distant parts of the country, as the Mohawks from the country still bearing their name in Western New York; and the counter expeditions of the French against them to like distant places, through tracts of thickly wooded country, with only the Indian trail for guidance and without horses or carriages, or in canoes over lakes and rivers then recently discovered, and but little known;—their exploration of heretofore unknown lakes and rivers, from the St. Lawrence upward to Lake Superior, and of the country north of it to Hudson's Bay, and southward down the Illinois and Mississippi to the Gulf of Mexico; the hardships suffered in these daring expeditions and explorations, and the courage and perseverance displayed in overcoming them;—the victories and defeats, successes and disappointments, incident to these Indian wars;—the various modes and forms of government tried by the adventurers, by the Company of the Hundred Associates, or by the Council appointed by the Crown or Governor; the introduction of the Seigniorial system; the contests of the ecclesiastical and lay elements for supremacy, and especially on the burning question of the prohibition of the sale of liquor to the Indians, in which Frontenac and Bishop Laval took opposite sides, the Governor being the winner:—and, in a word, the cares, labours, trials and vicissitudes of fortune under which were laid the foundations of the land we now live in, and in the narration whereof Mr. Kingsford shows us "Quantæ molis erat *Canadensem* condere gentem." He intersperses in his narrative incidents of the history of France, and even of England, respecting religious and political events, and throwing light on Canadian history, and short sketches of the lives and characters of those who play part in his drama, and does full justice to the ability and firmness of Frontenac, the indomitable courage and perseverance of De La Salle and his fellow pioneers in discovery, De Tonty, Duluth, Jolliet and others; the ability and religious zeal of Bishop Laval, and the martyr spirit of the Recollets, Jesuits, and religious ladies;—but his hero is Champlain, whom he calls the True Founder of Canada, and whose character and deeds he paints in glowing terms. Indeed, we cannot give our readers a better idea of the spirit and style of Mr. Kingsford's book than by citing the following excerpts from his character of Champlain, which follow the narrative of his death, and the incidents immediately preceding it:

"There are few men whose characteristics can be more distinctly traced than those of Champlain; there are few characters which more satisfactorily sustain the examination bestowed on them. There is no moral leaven to weaken the

regard and esteem with which Champlain's character must be considered. It is seldom that we become acquainted with a life in which the pure, tranquil, constant advance of an individualism can be so fully traced. . . . There is no character known to us in the British or French history of the American continent in modern days, which can advance higher claims to honourable fame. If I were to make a comparison between Champlain and any historic name which we possess, it would be with that of Julius Cæsar, with whose excellencies and genius he bears strong relationship, unalloyed by those vices and that social deformity which marked Roman life. Much of the brighter side of Cæsar's character is repeated in that of Champlain; his equanimity, his liberal opinions, his triumphs over difficulties and misfortunes, his modesty and ability in relating his actions, his high-bred stoicism. . . . . Both cultivated the elevating and consoling pursuits of literature. . . . . Judged by his writings Champlain comes before us with a rare modesty, and a careful observance of truth, so that his statements obtain immediate acceptance. A quiet humour runs through all he tells us. He does not sacrifice reality to effect. . . . . To him discovery was not merely sailing up the waters of a river and never penetrating beyond its shores. His genius was to advance to distant localities, to learn the resources of a country, its character, the extent of the population of the native tribes, and to study their manners and customs. He saw that the only means of gaining this end was by identifying himself with the Indians, with whom he entered into friendly relations. His discoveries were remarkable; he made known from personal examination the Ottawa, Lake Huron, Lake Ontario, the St. Lawrence, which he correctly describes, and Lake Champlain. He indeed traced out the southern portion of the Province of Ontario, without the precise minor details. . . . . No statue, no monument has been raised to Champlain's memory. No memorial exists to teach the youth of the Dominion what excellence there is in a noble, honest life, marked by devotion to duty, and an utter disregard of self. Canada has shown no honour to his name. It remained in modern days for Laval University to disseminate the true perpetuation of his genius in the record of his life and labours. It is a contribution never to pass away, and one by which Laval has established an enduring claim to consideration in the world-wide republic of letters. . . . . Champlain's name is imperishably written in the first and foremost pages of his country's history; it is the name of a man of genius, of pure and untarnished honour, the True Founder of Canada." (*See pp.* 131 to 141.) A captious critic might object to the comparison of Champlain to Julius Cæsar, and our substitution of *Canadensem* for *Romanam*, in Virgil's line,—but we must remember that, although not invested with the imperial purple, Champlain's were

"Hands that the rod of Empire might swayed,"

and he would have made a better legislator than the monarch whom he served. No French-Canadian can be dissatisfied with the account the book gives of his ancestors, and no English-Canadian can refuse to acknowledge the merits of his French precursors. We trust both will like and patronize this work, and though

some may differ from opinions expressed in it, with which others may agree, none can charge it with wilful misstatement or unfair prejudice.

Mr. Kingsford's style is simple and clear. Some minor slips of the pen or press may be found by keen-eyed critics, but they can mislead no one. We think it would be well if the author had appended, or would append in a future volume, a brief account of the several Indian tribes and the tracts of country they inhabited, and of the religious orders which are prominent in his narrative. But, take it all in all, no book yet published in English seems to us to give so clear and detailed an account of the period of French government in Canada as the one before us; and, believing as we do, for the reasons we have stated, that its statements of fact are correct, we hold it to be a work which no student of Canadian history can afford to be without. It is well got up and printed, and the dates inserted at the head of each page of the events recorded in it, much facilitate its use.

G. W. WICKSTEED.

Notes on Exchanges and Legal Scrap Book.

POINTS IN CRIMINAL LAW DECIDED AT THE ANARCHISTS' TRIAL.—The *Criminal Law Magazine* devotes more than a hundred pages of its space in the November number to a report of the Anarchists' trial in the Supreme Court of Illinois. The chief questions of law of general interest decided in the case, *Spies et al.* v. *People*, are the following:—

If several persons combine to commit murder by concerted action, the acts and declarations of one of them, done in furtherance of the common design, are regarded by the law as the acts and declarations of all.

When several are jointly charged with murder, proof of a conspiracy may be given to show a common design to encourage the murder charged against the accused, and to establish the position of the members of the combination as accessories to the crime.

If A hire B to kill C at a certain place at a certain time, but he kill him at another place at the designated time, A is none the less guilty of aiding, abetting, advising and encouraging the death of C.

On a charge of conspiracy it is not necessary to prove that the conspirators came together and in terms agreed to take a design and pursue it by common means. It is sufficient to prove that they pursued, by their acts, the same object, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of that same object.

A jury have a right to draw from proved circumstances such conclusions as are natural and reasonable.

Malice is always presumed where one person deliberately injures another.

Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all oppressors, and in the execution of their designs a murder is committed, all of the company are equally principals in the

murder, though at the time of the act one of them was at such a distance as to be out of view, if the murder is in furtherance of the common design.

Every person entering into a conspiracy on common design already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.

A combination of two or more persons, by concerted action, to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means, is a conspiracy.

One may become a partaker in a conspiracy by joining the others while it is being executed. As soon as the union of wills for the unlawful purpose is perfected the offence of conspiracy is complete.

He who influences people's minds and induces them by violent means to accomplish an illegal object, is himself a rioter, though he take no part in the riot.

Even though there be no special motive against the person slain, nor deliberate intention to hurt him, yet, if the act was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who dealt the blow.

MURDER RESULTING FROM COMMON UNLAWFUL DESIGN.—The grand jury of Barbour county, Alabama, found a true bill against J. W., S. S., and five others, charging them with murdering M. C., by shooting him with a pistol. At the trial on December 4th, 1886, S. S. was sentenced to be hanged, and J. W. to the penitentiary for forty years. The evidence tended to show that the defendants conspired together to assault or beat deceased, and for that purpose repaired to his house in the night time, and that while some of the defendants were trying to take a gun from him, S. S. shot and killed him. During the happening of these events some of the defendants were watching at the gate, some were in the yard, and others in the house.

The Supreme Court of the State held that, if the defendants entered into a conspiracy to assault and beat, or kill the deceased, each is responsible for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences; and if, in pursuance of such common design, one of the defendants kills deceased, in his own house, and not in se. defence, the others being near at hand, all would be guilty of murder.—*Criminal Law Magazine.*

LARCENY.—From the same publication we learn that the Supreme Court of Alabama decided an appeal in which the main question was whether the acts admitted constituted a larceny. The defendants, farm labourers, who were hired to pick cotton at a certain price per hundred pounds, entered a cotton-house and removed some cotton with the intent to place it with some that they had picked, and which had not been weighed. The court held that this taking, being with the intent of depriving the owner of property, and placing it where the

taker could claim a lien on and hold it until certain false charges were paid, was larceny. The Chief Justice says: "We think deprivation of the ownership of property is one of the essentials of larceny. But is it necessary that the intent shall be to deprive the owner of the whole property taken? Is not the *animus furandi* as manifestly shown when the intent is simply to deprive him of a partial, though unsevered, interest in the property? There have been several decisions in which facts not distinguisbable, in legal or moral bearing, from those found in this record, have been pronounced larceny."

DEFINITION OF FRAUD.—A recent number of the *Law Quarterly Review* contains an elaborate discussion of the "Definition of Fraud," from the pen of Melville M. Biglow. This article is to be the first chapter of a work by its contributor on "Fraud." He states the grounds on which judges have sometimes declined to attempt a definition of fraud. These are chiefly the hopelessness of the undertaking, and the supposed danger attendant on circumscribing the limits within which fraudulent acts must lie. Definitions, however, have been attempted by the Roman laws by the dictionaries, by our judges, and by text writers. The author makes a distinction between a definition and a rule. To lay down a rule, limiting all frauds by it, would, he admits, be dangerous; but some clear and exact idea of fraud, such as a definition supplies, is necessary. The characteristic factor in fraud civiliter (the subject of this article) is either deception, touching motives; or it is circumvention, not touching motives. In the first form of the characteristic factor the parties are concerned together in some transaction; in its second form they are not. In either case general or particular rights may be affected. In the definition of fraud, its success or failure may be disregarded, for, though the courts generally refuse to take cognizance of fraud which comes to nothing, all the elements are present. Fraud may be said to consist in an endeavour to alter rights by deception touching motives, or by circumvention not touching motives. Such deception or circumvention may relate either to general or particular rights. We thus obtains four clauses of frauds, of each of which the author gives an illustration.

As an example of deception, touching motives and affecting general rights, we may take the action of a man who purchases my property on credit, not intending to pay me for it. He endeavours, by deception practised on my motives, to alter the right to my money. Again, if I am arrested on Sunday upon a trumped-up charge of crime, and held until Monday, for the purpose of arresting me on Monday on civil process, it is sought by circumvention (not practised on my motives) to alter one of my general rights, my right to liberty. The maker of a promissory note seeks to have me substitute for it another written agreement, apparently signed by the same surety as signed the note with him, on a false representation of the genuineness of the signature of the surety. He tries by deception, touching my motives, to alter one of my particular rights, the right to the benefit unimpaired of the obligation under which he and the surety are to me. Once more, when my debtor resolves not to pay me, and puts his property

out of his hands to prevent me from obtaining payment, he seeks by circumvention to alter a particular right of mine, the right to payment for the property sold.

The term "fraud upon the law" comes within the definition, and is used for convenience to designate a striking aspect of certain frauds. Every fraud must be against a person capable of rights; frauds "upon the law" are, like the rest, frauds upon an individual, a corporation, or the sovereign, generally in the evasion of some statute, such as the Bankrupt Acts, when the offence is nothing but fraud upon the creditors.

The writer discusses "constructive" fraud, a term loosely used, often denoting a contract obnoxious to public policy, and sometimes a synonym for actual fraud. The more legitimate use of the term is in the law of fiduciary relations. Here, however, it is only a case of legal suspicion or assumption of fraud. In this sense it does not fall within the definition. "Constructive" fraud is also applied, properly too, to the action of one who acquires a title with notice of its invalidity. The above definition is not wide enough, nor is it intended, to cover constructive fraud. The article discusses the assertion contained in the definition, that fraud can only be perpetrated upon rights, *i.e.*, upon legal rights. By representations which he knows to be false, A induces B to alter his will, already executed in favour of C, and to leave nothing to C. C cannot maintain an action against A for fraud, A having infringed no legal right of C.

In ordinary cases fraud is essentially active in nature, a feature which appears in the definition in the word endeavour. One may, however, endeavour by passive conduct to deceive another, and thus also be guilty of fraud. Some special duty may require him to speak; he cannot stand by and see his property sold by another as belonging to that other person, and then recover it from the purchaser. But he is not bound to take steps to protect a possible purchaser, of whose very existence he may be ignorant, from loss by the purchase of a note to which his name has been forged. When there is a duty to speak, silence would be misleading.

VOLUNTARY MAINTENANCE OF ANOTHER'S CHILDREN.—In the *Justice of the Peace* there is a somewhat full discussion of the law in reference to the right of a volunteer to recover, as against the parent, the amount which has been expended on his child for food, clothing and education. The cases cited in support of the contention that the father is not liable to one who provides for the child in the absence of any request or undertaking to pay on the part of the father are, *Law* v. *Wilkins*, 6 A. & E. 718; *Mortimore* v. *Wright*, 6 M. & W. 482; *Skelton* v. *Springett*, 11 C. B. 452. The conclusion arrived at from these cases is that, though the common law does not make the father liable, yet it may often be the case that the father does, by some letter or otherwise, undertake the payment of the son's debts. This is well illustrated in the case of *Andrews* v. *Garrett*, 6 C. B. N. S. 262, when a tailor seeks to compel the father to pay for clothes supplied to the son, the claim being based on an alleged promise of the father to pay half the debt. In *Knowelton* v. *Bluett*, L. R. 9 Ex. 307, the father of several illegitimate children made a verbal agreement with their mother (who

in law was only a stranger) to pay her £300 a year to keep the children. He, failing to keep his promise, the mother brought an action to recover arrears for two and a half years. The defence was that the agreement was not in writing, and was not to be performed within a year. The Exchequer Chamber held that it was intended to be performed immediately, and that it was only an accident that it might extend beyond the year, as it might be ended by due notice. Hence the Statute of Frauds did not apply.

The Journal of Jurisprudence and Scottish Law Magazine comes to us this year with promise of greater variety and interest, not only for its readers at home, but also for those on the Continent and in America. It seeks, as its name implies, to give prominence to the discussion of the fundamental principles of the science of Jurisprudence. To this end it undertakes to furnish, as a portion of its regular matter, discussions of the leading topics of the science by a number of the most eminent of the Continental jurists. The January number contains, among other very able articles, a scholarly paper on the Development of Right and the Right of Development, by Prof. Bluntschli, late of the University of Heidelberg, and another on Marriage in the German Middle Ages, by Dr. E. Friedberg, of the University of Berlin. Trial by Jury in Civil Causes, which is to be continued, will well repay perusal.

NUISANCES IN THE REPORTING ARENA.—We entirely agree with the *American Law Review* in the following obsevations on a practice occasionally indulged in by reporters and others:—"The late Judge Napton, of Missouri, is said to have detested the practice of referring to the parties in a judicial opinion as the appellant and respondent. The reason of his dislike of the practice is apparent to anyone. The mind is constantly on a troublesome search in reading the opinion where the parties are thus referred to, to ascertain and keep in view which party is appellant and respondent. This practice is still kept up in the opinions of the Supreme Courts of several of the states. . . . Another practice, scarcely less to be condemned, is that of several of the states, such as Illinois and Tennessee, in actions at law, where they reverse the names of the parties as they appear in the court below, and put the party appealing or prosecuting the writ of error as the plaintiff, although he may have stood in the court below as the defendant."

The *Central Law Journal* says on the same subject:—"We fully concur with our contemporary. In its best state the law has enough and to spare of conundrums, and it is simply cruel for its chosen ministers to burden the busy and hurried practitioner with puzzling problems of personal identity. It is the custom of courts, in their opinions, to avoid the use of patronymics; hence, a judge will often describe a party as 'the plaintiff in error here, defendant in the court below,' when he means simply 'Jones,' and if he really means Jones, we think he might say Jones without material derogation from his dignity."

Correspondence.

TO THE EDITOR OF THE LAW JOURNAL:

Sir,—It is a legal maxim that there is no wrong without a remedy. This seems satisfactory, but a correspondent thinks it is not applicable in all cases.

One of the statutory rules of the Post Office Savings Bank Department is, that where deposits are made by a trustee in the joint names of the trustee and the person on whose account the money is deposited, repayment will not be made "without the receipt or receipts of both the said parties or the survivor or survivors or the executor or administrator of such survivor." This sounds quite simple, but a Medo-Persian application of the rule works injustice, a correspondent thinks, under the following circumstances:—A gives B, in the presence of C, a sum of money to deposit for A in a Post Office Savings Bank. B, in making the deposit is asked for, and gives his name to the Post-master, who enters the deposit as having been made by B for A. A dies first; B then departs this life. A leaves a brother, one D, on whose behalf administration is obtained, there being other small assets. The administrator having possession of the pass book, and having filed his credentials, asks to have the deposits paid over to him, but is met by a quotation of the above rule, and is told that the money can be paid out only to B or to B's representatives. C, who was present when B was asked to make the deposit, was also present at the death of A, and the evidence is clear that there was no intention to constitute B a trustee, the money having merely been given to him because he happened to be going to the Post Office, and because A was leaving on a journey with C, and wanted to be saved the trouble of going with the deposit himself. B left no assets, and no one that can be found who will take out letters of administration for this trust estate. The parties are poor, and no possible way has been found by which the rule of the Department can be complied with. The Post Office authorities will pay the money to B's legal representatives, but not to A's. The fact is, B should have died first, the Department would then have been saved worry, and everything would have gone smoothly. There was once a robbery at Osgoode Hall; cash was taken out of the Chancery vault. A witty Chief Justice, whose common law prejudices were strong against every hing pertaining to the equity side, was hugely tickled at this summary way of getting money out of court, and condoled with his Chancery brethren over the undue haste so different from the procedure of that leisurely court in those leisurely days. It would be highly improper to suggest any such course in the case I have referred to; but so long as the officials of the Department remain swathed in their red tape, I know of no other remedy.

Yours,

LEX.

[The rule of the Department is, we fancy, a necessary one. There should, however, be some elasticity in the working of it. There should also be some discretion given to the judge on applications for administration enabling him to dispense with security in special cases.—ED. L. J.]

DIARY FOR FEBRUARY.

1. Wed....Sir Edw. Coke, born 1552. C. C. non-jury sittings in York. Barristers' Examination.
5. Sun.....*Sexagesima Sunday.* W. H. Draper, 2nd C. J. of C. P., 1856.
6. Mon....L. S. Hilary Term begins, H. C. J. sit. begin.
7. Tues....Maritime Court sits.
10. Fri.....Canada ceded to G. B., 1763. Union of Upper and Lower Canada, 1841.
11. Sat. ....T. Robertson appointed to Chy. Div., 1887.
12. Sun.....*Quinquagesima Sunday.*
15. Wed....Ash Wednesday.
16. Thur ...Chy. Div. H. C. J. sits. end.
18. Sat. ....L. S. Hilary Term ends. H. C. J. sits. end.
19. Sun.....*Quadragesima Sunday. 1st Sunday in Lent.*
21. Tues....Supreme Court of Canada sittings begin.
24. Fri.....St. Matthias.
26. Sun.....*2nd Sunday in Lent.*

Reports.

[REPORTED FOR THE CANADA LAW JOURNAL.]

STEVENSON *v.* MCHENERY.

Irregularity—Notice of motion—Premature hearing of motion—Defence filed after pleadings noted closed—Rule 596.

Where a notice of motion is given, returnable at a certain hour, "or so soon thereafter as the motion can be heard," it is irregular to bring the motion on to be heard at an earlier hour, even though the court may have appointed such earlier hour for its sittings.

Two days' notice of motion for judgment is sufficient. *Martens* v. *Birney*, 10 P. R. 368, approved.

When a defence is filed after the pleadings have been noted closed under Rule 596, it is a nullity.

[Boyd, C.—January 10, 1888.

Motion to set aside judgment for irregularity.

The defendant being in default of defence, the plaintiff duly filed a precipe with the proper officer, under Rule 596, requiring him to note that the pleadings were closed. Subsequently the defendant tendered, and the officer received and filed, a statement of defence, and, afterwards, on discovering that the pleadings had been closed, returned it to the defendant's solicitor.

The plaintiff, disregarding the defence, gave two days' notice of motion for judgment in default of defence, which notice was returnable on 7th December, at 11 a.m., "or so soon *thereafter* as the motion could be heard." On the 7th December, owing to the Divisional Court being in session, the court for the hearing of motions for judgment sat at 10 a. m., of which public notice was given by the Registrar. The motion came on and was disposed of at 10 a.m. The defendant's counsel was ignorant of the change in the hour of holding the court, and attended at 11 a. m., when he found the motion had been disposed of.

Velson, for defendant, now moved to set aside the judgment for irregularity, on the ground that the notice should have been a seven days' notice under Chy. Ord. 418; and that the motion had been heard prematurely and before the notice of motion was returnable; and also on the ground that the motion for judgment in default of defence could not properly be made, a statement of defence having been filed, and the Clerk of Records and Writs having no right to take it off the files.

Hoyles, for the plaintiff. The two days' notice of motion was sufficient, *Martens* v. *Birney*, 10 P. R. 368. The filing of a statement of defence after the note had been entered under Rule 596, was a nullity. The defendant was bound to take notice of the change in the time of holding the court.

The CHANCELLOR.—The plaintiff might have avoided the difficulty which has arisen by given notice returnable at the time named, "or at such other hour as the court may on that day sit"—owing to the form in which the notice was given, the motion appears to have been heard prematurely. But the defendant was no doubt then in default of defence, and if he had appeared he could only have obtained relief by an appeal to the indulgence of the court. This fact is entitled to weight in disposing of the costs. The judgment must be set aside, and the defendant allowed to defend, but the plaintiff's costs of noting the pleadings closed, and of the motion for judgment, and of this motion, must be costs in the cause to him in any event. The two days' notice of motion for judgment was sufficient.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

THE CONFEDERATION LIFE ASSOCIATION *v.* MILLER.

Life insurance—Application for policy—Declaration by assured—Basis of contract—Warranty—Misdirection.

An application for a life insurance policy contained the following declaration after the applicant's answer to the question submitted:

"I, the said George Miller (the person whose life is to be insured), do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read, or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said Association, and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the Association, during my lifetime and good health. I (the party in whose favour the assurance is granted), do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said Association."

Held, (affirming the judgment of the court below) that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to the best of my knowledge and belief;" and though some of the answers were untrue in fact, the policy was not thereby avoided unless they were wilfully untrue.

At the trial the jury were charged that if there was wilful misrepresentation, or such as to mislead the company, they should find for the defendants, but that if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant their verdict should be for the plaintiffs.

Held, a proper direction.

Appeal dismissed with costs.

S. H. Blake, Q.C., and *Beatty*, Q.C., for appellants.

Dr. McMichael, Q.C., and *McCarthy*, Q.C., for respondents.

COX & WORTS *v.* SUTHERLAND.

Principal and agent—Speculating in stocks—Instructions to broker—Broker's duty—Money paid for margins.

S., a speculator in stocks, instructed F., a stock-broker, to purchase for him a certain number of shares in F. B. stock, expecting to make a profit out of a rise in the value of said stock in the market.

Held, affirming the judgment of the Court below, that the relation between S. and F. was that of principal and agent, and F. was bound to purchase the stock and hold it as the property of S. He could not rely on his ability to procure a like number of shares when required, as his interest would then be to depreciate their value so as to obtain them cheaply, which would conflict with his duty to S.

F. being about to retire from business as a stock-broker, handed over his stock transactions, including that with S., to C., to which S. consented. C. acknowleged to S. having received from F. the amount paid for margins on the stock which F. was instructed to buy, neither F. nor C. having purchased the stock and set it apart as the property of S.

Held, affirming the judgment of the Court below, that C. was liable, in an action for money had and received, to refund to S. the amount so paid for margins.

Appeal dismissed with costs.

W. Cassels, Q.C., and *Cox*, for the appellants.

Thompson, for the respondents.

GARLAND *v.* GEMMILL.

Copyright – Infringement of by making extracts—Form of notice on title page—Copies deposited with the Minister of Agriculture.

A copyrighted work called "The Canadian Parliamentary Companion," contained biographical sketches of M.P's and others which the author had procured from the subjects for the purpose of his book. G. in preparing a similar work to be called "The Parliamentary Directory and Statistical Guide," sent circulars to a number of public men asking for short biographical sketches and was, by many of them, referred to the first-mentioned work and took such sketches therefrom.

Held, that this was an infringement by G. of the copyright in "The Canadian Parliamentary Companion," and G. was properly enjoined from publishing or selling the books containing such extracted matter.

By 38 Vict. c. 88, s. 9, a notice must be inserted in the title page or page following of every copy of a book copyrighted thereunder in the form following:—"Entered according to the Act of the Parliament of Canada in the

year ——, by A. B., in the office of the Minister of Agriculture."

Held, that the omission of the words "of Canada" in such form did not avoid the copyright, but was a sufficient compliance with the Act.

Held, also, that depositing copies of a book containing the said notice in the office of the Minister of Agriculture before the copyright has been obtained does not invalidate it after it has been granted.

Appeal dismissed with costs.

W. Cassels, Q.C., and *Walker* for the appellant.

F. Arnoldi for respondent.

BEAUDET *v.* NORTH SHORE RAILWAY CO.

43 & 44 Vict. c. 43, s. 9 (P.Q.)—Award—Validity of—Faits and Articles—Art 225, C. C. P.

E. B., *et al.*, joint owners of land situate in the City of Quebec, were awarded $11,900 under 43 & 44 Vict. c. 43, s. 9, for a portion of said land expropriated for the use of the North Shore Railway Company.

On the 12th March, 1885, E. B., *et al.*, instituted an action against the N. S. R. C., based on the award. The Company not having pleaded, foreclosure was granted, and on 21st April process for interrogatories upon *faits* and *articles*, was issued and returned on the 26th April. The Company made default. On 18th June, the *faits* and *articles* were delared taken *pro confessis*. On 16th May, E.B., *et al.*, consented that the defendants be allowed to plead, but it was only on the 7th July that a plea was filed, alleging that the arbitration had been irregular and was against the weight of evidence.

On September 2, E. B., *et al.* inscribed the case for hearing on the merits, on which day the Railway Company moved to be authorized to answer the *faits* and *articles*, and the motion was refused. The notice of expropriation and the award both described the land expropriated as No. 1 on the plan of the Railway Company deposited according to law, but in another part of the notice it described it as forming part of the cadastral lot 2,345, and in the award as forming part of lots 2,344-345. On the 5th December, judgment was rendered in favor of E. B., *et al.* for the amount of the award. From this judgment the Railway Company appealed to the Court of Queen's Bench, (Appeal Side), and that Court reversed the judgment of the Superior Court, holding *inter alia* the award bad for uncertainty, and that the case should also be sent back to the Superior Court to allow the defendants to answer the *faits* and *articles*.

On appeal to the Supreme Court of Canada it was

Held, (1) That there was no uncertainty in the award, as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated, and which was valued by the arbitrators.

Held, (2) That the motion for leave to answer *faits* and *articles* was properly refused. TASCHEREAU, J. dissenting.

Appeal allowed with costs.

Duhamel, Q.C., for the appellants.

Bedard, for respondents.

MACKINNON *v.* KEROACK.

Capias—Petition to be discharged—Judgment on—Final judgment appealable under s. 28, c. 135 R. S. C.—Arts. 819, 821, C. C. P.—Fraudulent preference—Secreting—Art. 798, C. C. P.—Promissory note discounted—Arts. 1036, 1953, C. C. (P.Q.).

A writ of capias having been issued against McK. under the provisions of art. 798 of C. C. P. (P.Q.), he petitioned to be discharged under art. 819, C. C. P., and issue having been joined on the pleadings under art. 820, C. C. P. the petition was dismissed by the Superior Court. From that judgment McK. appealed to the Court of Queen's Bench for Lower Canada (Appeal side), and that court maintained the judgment of the Superior Court. Thereupon McK. appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction.

Held (TASCHEREAU, J., dissenting), that the judgment was a final judgment in a judicial proceeding within the meaning of s. 28, c. 135, R. S. C., and therefore appealable.

On the merits it was held per RITCHIE, C.J., and FOURNIER and TASCHEREAU, JJ., that

fraudulent preference to one or more creditors is a secretion within the meaning of art. 798, C. C. P.

Also that an endorser of a note discounted by a bank has the right, under art. 1953, C. C., to avail himself of the remedy provided by art. 798, C. C. P., if the maker fraudulently disposes of his property.

STRONG, HENRY, and GWYNNE, JJ., contra; *Gault* v. *Dussault*, 4 Leg. News 321, approved.

The court being equally divided, the appeal was dismissed without costs.

Macmaster, Q.C., and *Hutchinson*, for appellent.

Geoffrion, Q.C., and *Greenshields*, for respondent.

NORTH SHORE RAILWAY CO. *v.* TRUDEL.

Land, sale of—Delivery to agent—Pleading—Arts. 1501, 1502 *C. C.*

S. T. brought an action to recover $3,200 as balance of the purchase money of certain lands in Quebec sold by him to the N. S. R. Co. To this action the railway company pleaded by temporary exception that out of 3307 superficial feet sold to them, S. T. never delivered 710 feet, and that so long as the full quantity purchased was not delivered they were not bound to pay. To this plea S. T. replied specially that he delivered all the land sold to P. B. V., the agent of the company, with their assent and approbation, together with other land sold to said P. B. V. at the same time. At the trial it was shown that P. B. V. had purchased all the lands owned by S. T. in that locality but exacted two deeds of sale, one of 3307 feet for the Railway company, and another of the balance of the property for himself. By the deed to P. B. V. his land is bounded by that previously sold to the company. P. B. V. took possession, and the railway company fenced in what they required.

Held, affirming the judgments of the Court below, that S. T. having delivered to P. B. V., the agent of the company, with their assent and approbation, the whole of the land sold to them, together with other lands sold to the said P. B. V., at the same time, he was entitled to the balance of the purchase money.

Per Taschereau, J., that all appellants could claim was a diminution of price, or a realization of the sale under Arts. 1501, 1502, and that therefore their plea was bad.

Appeal dismissed with costs.

Duhamel, Q.C., for appellants.

Bedard, for respondent.

SHELBURNE ELECTION CASE.

ROBERTSON *v.* LAURIE.

Election petition—Service of copy—Extension of time—Discretion of judge—R. S. C. c. 9, *s.* 10.

Held, that an order extending time for service of the notice of the presentation of an election petition with a copy of the petition from five days to fifteen days by a judge in Nova Scotia, on the ground that the respondent was at the time at Ottawa, is a proper order for the judge to make in the exercise of his discretion under section 10 of c. 9 R. S. C.

Appeal dismissed with costs.

R. Scott, Q.C., for appellant.

Graham, Q.C., for respondent.

PRINCE CO. (P.E.I.) ELECTION CASE.

EDWARD HACKETT (Petitioner in the Court below) Appellant, and STANISLAUS FRANCIS PERRY (Respondent in the Court below) Respondent.

Legislative Assembly—Disqualification—Enjoying and holding an interest under a contract with the Crown, what constitutes—39 *Vict. c.* 3, *s.* 4 *and* 8 *(P.E.I.).*

The return of S. P. as member-elect for the House of Commons for the Electoral District of Prince County, P. E. I., was contested on the ground that S. P. being a member of the Provincial House of Assembly, he was not eligible as a member of the House of Commons. At the trial it was admitted that S. P. had been elected to the Provincial House of Assembly at the general election in June, 1886, and that there had been no meeting of the local house at the date of the general election for the Dominion House. S. P. prior to his nomination gave to two members of the House of Assembly a written resignation of his seat, and at the time of the general election for the House of Commons

S. P. had acquired for value, and was holding a share in a ferry contract with the Local Government, subsidized to the extent of $95 per annum.

The Judge at the trial held that S. P. had not properly resigned his seat, a. the Island Statute 39 Vict. c. 3, had not provided for the resignation of a member in the interval between the dissolution of one general assembly the first session of the next general assembly, but held that his seat had become vacant under the provisions of the 4th section of the Provincial Act, 39 Vict. c. 3 (P. E. I.).

On appeal to the Supreme Court of Canada,

Held, affirmative of the court below. TASCHEREAU, J., dissenting, that S. P. enjoyed and held such an interest in a public contract as rendered his seat vacant in the local House of Assembly (P. E. I.) under sections 4 and 8, 39 Vict. c. 3 (P. E. I.), and therefore that he was properly eligible to the House of Commons.

Appeal dismissed with costs.

Hodgson, Q.C., for appellant.

Peters, for respondent.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA (Appellant) *v.* THE ATTORNEY-GENERAL OF CANADA (Respondent).

B. N. A. Act s. 92 ss. 5, 109 and 146—47 Vict. c. 14, s. 2 (B.C.)—Provincial public lands, transfer of, to the Dominion of Canada—Effect of—Precious metals vested in the Crown in right of the Dominion Government.

Appeal from the Exchequer Court of Canada.

By section 2 of the Order in Council, passed in virtue of section 146 of the B. N. A. Act, under which British Columbia was admitted into the Union it was provided as follows:

"And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-west Territories and the Province of Manitoba."

By 47 Vict. c. 14, s. 2 (B. C.) it was enacted as follows:

"From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line, as provided in the Order in Council, section 2, admitting the Province of British Columbia into Confederation."

A controversy having arisen in respect of the ownership of the precious metals in and under the lands so conveyed, the Exchequer Court, upon consent and without argument, gave judgment in favor of the Dominion Government.

On appeal to the Supreme Court,

Held, affirming the judgment of the Exchequer Court, FOURNIER and HENRY, JJ., dissenting, that the Order in Council admitting British Columbia into Confederation and the statutes transferring the public lands described therein, the precious metals in, upon and under such public lands, are now vested in the Crown as represented by the Dominion Government.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Burbidge Q.C., and *Hogg* for respondent.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR CANADA (Appellant) AND A. S. FARWELL (Respondent).

47 Vict. c. 14 s. 2 (B.C.), Effect of—Provincial Crown grant void.

Appeal from the Exchequer Court of Canada.

By provision 2 of the Order in Council admitting the Province of British Columbia into Confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the Governments of Canada

and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th Dec., 1883, the Legislature of British Columbia passed the Statute 47 Vict. c. 14, by which it was enacted *inter alia* as follows: "From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing, and to aid in the construction of, the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of said line, as provided in the Order in Council, section 2, admitting the Province of British Columbia into Confederation. On the 20th Nov., 1883, by public notice, the Government of British Columbia, reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, to comply with the provisions of the Provincial Statutes, a survey of a certain parcel of land situate within the said belt of twenty miles was filed, and the survey having been finally accepted on the 13th January, 1885, Letters Patent under the Great Seal of the Province, were issued to F. for the land in question. The Attorney-General of Canada, by information of intrusion, sought to recover possession of said land, and the Exchequer Court having dismissed the information with costs, on appeal to the Supreme Court of Canada, it was

Held, reversing the judgment of the Exchequer Court, HENRY, J., dissenting, that at the date of the grant, the Province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the Crown for the use and benefit of Canada.

Per STRONG, J., That the appellant should be ordered, if insisted upon by respondent, to file the affidavit of the Chief Engineer of the Canadian Pacific Railway to prove that at the date of the grant the line of the Canadian Pacific Railway had been located within twenty miles of the land in question.

Appeal allowed with costs.

J. S. D. Thompson, *Burbidge*, Q.C., and *Hogg*, for appellant.

T. Davie, for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Re BOYLAN AND THE CITY OF TORONTO.

Tavern License — License Commissioners — Municipal By-law.

Held, (1) That the Council of the Corporation of the City of Toronto has the power under R. S. O. c. 181, s. 17, to pass a by-law limiting the number of tavern licenses, and that power is not interfered with or diminished by the law (39 Vic. c. 26), granting limiting powers to the Board of License Commissioners.

Held, (2) That though the by-law contained on its face no description of the local limits of its operation, the fact that it was passed by the Council of the City and could have had no operation elsewhere than in the City, shewed that it must by reasonable intendment be held operative there.

Held, (3) That the by-law was not unreasonable or oppressive, or in restraint of trade, having been passed under a power expressly given by the Legislature to the City to pass the same.

O'Donohoe, for motion.

McWilliams, contra.

GORDON *v.* CITY OF BELLEVILLE.

Municipal Corporation—Liability for injury caused by ice on sidewalk—Knowledge—Contributory negligence.

The plaintiff, a resident of Belleville, in going to and from the main part of the city, to and from his residence, usually used a part of Queen Street, west of George Street, and which was bounded on the west by the school lot, forming a *cul de sac*. Foot passengers were in the habit of walking through the school lot as a short cut, and going across it they would come unto and walk over this portion of Queen Street.

The municipality had laid down a plank

sidewalk about five feet wide on the south side of Queen Street, from the west side of George Street to the school lot. Overhanging about half of this walk was the projecting eave or roof of a cottage, the drippings from which formed a ridge of ice on the centre of the walk. Plaintiff knew the walk was dangerous —he passed and saw it every day; that portion of the street was not used for vehicles, and there was a travelled path through the snow to the north of the sidewalk. Plaintiff going home on a moonlight night used the sidewalk, slipped, fell, and injured his arm. Defendants contended he should have been non-suited, because he showed himself to have been guilty of contributory negligence.

Held, that the plaintiff having the right to use the sidewalk, it was a question for the jury whether, under the circumstances, he was exercising reasonable care, and that mere knowledge does not constitute contributory negligence.

Chancery Division.

Full Court.] [Dec. 21, 1887.

CHRYSLER *v.* TOWNSHIP OF SARNIA.

Drainage—Municipal corporation—Action for damages—Notice in writing—R. S. O. c. 33, s. 30, ss. 3.—47 Vict. c. 8 (O.).

Held, affirming the decison of Rose, J., that the proper construction of the Ontario Drainage Act, R. S. O. c. 33, s. 30, ss. 3, is that as a prerequisite to the maintenance of an action for damages arising from neglect to repair, there should be a reasonable notice in writing given by the plaintiff to the municipality alleged to be in default. This is not confined to the remedy by mandamus. It is intended to be for a safeguard to the municipality so as not to expose them to litigation before their attention has been called to that which is specially within the cognizance of the individual complaining. The repeal of ss. 3, and its re-enactment in 47 Vict. c. 8 (O.), makes it, if possible, more plain that a written notice should be given before the court is resorted to.

Lash, Q.C., for the plaintiff.
Wallace Nesbitt, for the defendants.

Full Court.] [Dec. 5, 1887.

SEIFFERT *v.* IRVING.

Partnership—Goods supplied to inchoate company—Liability.

Where a number of persons signed a certificate under R. S. O. c. 158, contemplating forming themselves into a co-operative association, but did not complete the necessary preliminaries and secure actual incorporation, and certain goods were furnished to them in good faith by the plaintiff.

Held, affirming the judgment of Boyd, C., in an action for the price of the goods against certain of them, that the plaintiff was entitled to recover, for that the defendants were engaged in a trading concern, and with their associates formed a partnership. They were not a company, having failed to fulfil the preliminary requirements to incorporation, and therefore they were a partnership.

Moss, Q.C., for the plantiff.
Lash, Q.C., for the defendants.

Falconbridge, J.] [Jan. 9, 1888.

STORY *v.* MCKAY.

Bill of exchange drawn in one country and payable in another—Law governing legality of consideration.

Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The defendant was at the time a domiciled Canadian of Ontario, and the firm of Toronto merchants were also domiciled Canadians. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York Stock Exchange, and that, as such, it was under the law of New York, an illegal contract and invalid.

Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario, and although the drawees were also domiciled in Ontario.

A. H. F. Lefroy, for the plaintiffs.
James Pearson, for the defendant.

Practice.

Boyd, C.] [Dec. 14, 1887.

STRANGE *v.* RADFORD.

Mortgage suit—Property in Manitoba—Sale or Foreclosure.

In a mortgage suit in the usual form for sale, for delivery of possession, and relief under the covenant in the mortgage, where the defendant resided in Ontario, but the mortgaged premises were in Manitoba.

Held, that the mortgagor could be foreclosed, because such a decree acts upon the person and not upon the land directly, but that any extension of this doctrine, such as putting the machinery of the court in motion to effect a sale of land in another province, would be a mischievous novelty. If the defendant refused to execute the conveyance on sale, title would not pass to the purchaser by a vesting order. To carry out a sale it is essential that the court should have territorial jurisdiction over the land.

It is not the course of the court to pronounce inoperative judgments. The plaintiff may have a foreclosure, or, he may, for a sale, go to the courts in Manitoba.

T. Langton, for the plaintiff.

C. P. Divisional Court.] [Dec. 23, 1887.

WELLBANK *v.* CONGER.

Judgment—"The court"—Trial judge—Divisional Court—High Court of Justice—Rules 315, 321.

The court may, upon motion, enter judgment upon the verdict given at the trial, where the trial judge has not done so.

Quære, whether such motion should be to the Divisional Court?

"The court," in rules 315, 321, means the High Court of Justice; whether as distinguished from its divisions or not.

It was directed that an order for judgment should be drawn up in the High Court before the three judges who composed the Divisional Court of the Common Pleas Division, as judges of the High Court.

Ritchie, Q.C., for the plaintiff.

W. H. P. Clement for the defendant.

Boyd, C.] [Jan. 12, 1888.

ARMSTRONG *v.* DOUGLAS, *et al.*

Assignment of debt—Garnishment after assignment—R. S. O. c. 116, s. 7—Res judicata—Demurrer.

A recovered a judgment against B, and B assigned to him an alleged debt due B by D. A then, in the suit of A *v.* B, took garnishee proceedings against D. The attaching order and garnishee summons were made by one County Judge returnable before another, and were subseqently discharged with costs. A then, as assignee of B, brought this action, and D, among other defences, set up the garnishee proceedings as *res judicata*.

To this defence plaintiff demurred, the principal ground of demurrer being that no jurisdiction was shown in the inferior or County Court.

Held, that even if jurisdiction was assumed, it did not appear that the disposition of the garnishee proceedings in defendant's favour was on the merits.

The assignment of the debt from the intended garnishee to the judgment debtor having been perfected to the judgment creditor, there was no longer a third party in the transaction, the debtor was directly liable to the assignee of the original creditor, as provided by R. S. O. c. 116, s. 7, the debt thus assigned was no longer within the purview of the debt attachment or garnishment clauses. A debt *bona fide* assigned by the judgment debtor before attachment cannot be garnished.

Demurrer allowed, and leave to amend given.

G. C. Campbell, for the demurrer.

H. J. Scott, Q.C., contra.

Miscellaneous.

SHEET ALMANAC, 1888.—By some mistake some changes in the "Canadian Judiciary," which should have been noted in our sheet almanac for this year, were not inserted George Wheeloch Burbidge, Q.C., formerly Deputy Minister of Justice, should appear as Judge of the Exchequer Court, under the Act of 50-51 Vict.; and Mr. L. A. Audette, as Registrar.

Mr. Augustus Power, Q.C., is acting Deputy Minister of Justice in room of Mr. Burbidge.

Law Society of Upper Canada.

MICHAELMAS TERM.

The following gentlemen were called to the Bar during Michaelmas Term, 1887, viz:—*Nov. 21st*—George Watson Holmes, Herbert Langell Dunn, Roderick James Maclennan, James Albert Page, Francis Foley Lemieux, Edward Holton Britton, Alexander Robert Bartlet, Robert James Leslie, Herbert Hartley Dewart, Robert Cleugh LeVésconte, D'Arcy de Lessert Grierson, William John Millican, George Filmore Cane, Horace Osmond Ernest Pratt, Richard Alexander Bayley. *November 22nd*—Abner James Arnold, William Percy Torrance. *November 26th*—William Arthur John Bell.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz:—*November 21st*—E. H. Britton, R. C. Le Vésconte, R. J. Maclennan, G. F. Cane, R. A. Bayley, G. R. O'Rielly, E. S. Wigle, E. A. Crease, A. F. May, G. J. Leggatt, R. H. Dignan, J. H. A. Beattie, E. Considine, A. D. McLaren, H. N. Roberts, H. Macbeth. *November 22nd*—A. Stevenson. *November 26th*—J. C. Grant, A. R. Bartlet, R. J. Leslie, G. W. Holmes, W. D. Gregory, W. A. J. Bell, G. A. Payne, J. P. Lawless, J. Y. Murdoch. *December 2nd*—W. P. Torrance, J. M. Quinn. *December 10th*—C. E. Weeks.

The following gentlemen passed the First Intermediate Examination, viz:—J. F. Orde, with honours and first scholarship; C. E. Burkholder, with honours and second scholarship; W. H. Hunter, with honours and third scholarship; A. Constantineau, with honours; and Messrs. J. Ross, D. Hooey, R. A. Widdowson, E. S. B Cronyn, J. Webster, A. C. Sutton, M. Routhier, W. L. Morton, T. W. Horn, A. J. J. Thibodo, H. A. Simpson, A. H. Wallbridge, W. A. Smith, A. B. McCallum, J. F. O'Brien, C. Elliott, J. H. Hegler, J. Miller, H. W. Macoomb, W. P. McMahon, J. A. Ritchie, M. Scandrett, W. C. Smith.

The following gentlemen passed the Second Intermediate Examination, viz:—J. A. V. Preston, with honours and first scholarship; A. Collins, with honours and second scholarship; C. D. Scott, with honours and third scholarship; and Messrs. F. W. Carey, G. C. Gunn, W. E. Tisdale, R. G. Smyth, H. Harvey, R. L. Elliott, J. H. Hunter, R. M. Macdonald, C. McIntosh, J. F. Edgar, R. M. Thompson, J. F. Woodworth, C. A. Ghent, S. D. Lazier, W. G. Burns, H. Miller.

The following candidates were admitted as Students-at-law, viz:—*Graduates*—F. J. Fulton, J. J. Maclennan, T. B. Gash, J. McEwen, T. D. Law, J. F. Carmichael, C. R. Dupuis, W. Davis. *Matriculants*—A. E. Sc. .on, H. T. Berry, J. E. Bird, W. J. Boland, W. Dick, W. Farnham, J. F. Jeffery, M. P. McDonagh, J. A. Oliver, R. S. Robertson, W. F. Scott, J. G. Shaw. *Juniors*—H. G. Hamilton, D. E. Stuart, G. A. Kingston, H. F. Gault, A. L. Malone, H. M. McConnell, J. F. McMaster, H. E. A. Robertson, T. H. Lloyd, T. W. McGarry, E. Harley, L. B. C. Livingstone, T. B. Martin. *Articled Clerk*—W. J. McCamon.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

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

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

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. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. 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.

10. 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.

11. 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.

12. 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.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with 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.

14. 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.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. 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 seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. 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.

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

21. 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.

22. No information can be given as to marks obtained at Examinations.

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

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	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

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM
For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. [illegible]. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

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

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

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

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:—

FRENCH.

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

or NATURAL PHILOSOPHY.

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

Articled Clerks.

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

RULE *re* SERVICE OF ARTICLED CLERKS.

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

First Intermediate.

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

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

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

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

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

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

Trinity Term, 1887.