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DIARY FOR FEBRUARY.

16. Sat.....Hilary sittings of Com. Law Divisions, H. C. J. ends.
17. Sun.....*Sexagesima Sunday.* William Osgoode, first C. J. of U. C., died 1824.
18. Mon .....Maritime Court Act came into force, 1878.
19. Tue.....Supreme Court Session begins.
21. Thur ....Divisional Court sittings, Chan. Div. H. C. J. begin.
24. Sun.....*Quinquagesima Sunday.*
26. Tue .....Sir John Colborne, administrator, 1838.
27. Wed.....Ash Wednesday.
28. Thur ....Indian Mutiny began, 1837.

TORONTO, FEB. 15, 1884.

"JOHN BULL ET SON ILE" is probably as brilliant, and at the same time good-natured a satire, as has ever been written about the "right little, tight little island," and the inhabitants thereof. Amongst other things, solicitor's bills of costs come under the notice of Mossoo, who instances the following:—

		s.	*d.*
1.	To receiving a letter from you and reading it	3	6
2.	To writing the answer.....	3	6
3.	To hiring a cab.....	5	0
4.	To thinking of your affair in the cab	3	6
5.	To listening to your remarks	3	6
6.	To answering them	3	6
7.	To meeting your father-in-law and speaking to him of your affair..	3	6

But after all it is hard to beat the old story of the client who was bathing at the seaside, and suddenly saw the head of his solicitor emerge from the water. "Oh, I say, Mr. Gammon," he exclaimed, "how's my case getting on?" "Excellently, excellently," was the reply, and down dived Mr. Gammon again, and among the crowd of bathers eluded any further attempts of his client to question him. Later on, however, the unfortunate client found duly set out in his bill of costs:—

	s.	*d.*
To conferring with you at the sea-side on your case	5	0

WE find in Osgoode Hall Library a bright little infant in the shape of the *Manitoba Law Journal*, vol. 1, no. 1, of which Mr. John S. Ewart is the editor.

> Cœlum non animum mutant qui trans mare currunt,

says Horace, and the sentiment would appear to be equally true of those who cross the prairie as of those who cross the sea. At all events, our indefatigable friend, Mr. Ewart, is "at it again," and the latest evidence of his literary industry is a most creditable production, and deserves success. "Married Women," who engross so much of every lawyer's time, are the first attendants at the birth of this little stranger. "Professional Morality" naturally follows in the wake of these virtuous matrons, while "Important Decisions" must necessarily be expected at an early period in every baby's life, and are not absent in this case. On the whole, we feel quite justified in prophesying a useful maturity and a happy old age to the *Manitoba Law Journal.*

THE judges of the land will bear us witness that we have never let an opportunity pass of entering our protest against the penny-wise and pound-foolish policy of the Government (here speaking of both sides in politics) in paying inadequate salaries to those holding judicial positions. It is just as well, however, that the judges should understand that the profession have not that intense sympathy with them that they possibly suppose, and this for a very good reason. As a rule, when a member of the Bar becomes a member of the Bench he entirely forgets that he

once eloquently depicted the wrongs of brethren "below" in the matter of fees and emoluments, and their hard usage at the hands of invaders and plunderers of the profession. He now not only forgets his former wrongs (which are *still* the wrongs of those who are left behind), but assists in yet further curtailing their fees, or at least takes care that these are not increased —though the cost of living is doubled. When alterations in a tariff are proposed reasonable items are objected to, though very probably had the judge still been in the ranks he would have been foremost to urge their allowance; or when he could help the struggling practitioner in country places by taking a firm stand in the matter of appointing commissioners for taking affidavits, and in other ways, he practically plays into the hands of those he once looked upon as his worst enemies. We are glad to know that some of our most hard-working judges are exceptions; the profession know and appreciate their stedfastness, and wish that *their* salaries at least were twice as large. The moral is, let the judges do their duty by the profession and the latter will be more inclined to lend a hand towards obtaining proper salaries for the judiciary. One cannot be expected to feel very enthusiastic about another who stands by and sees one robbed. This view has probably not been brought prominently before their lordships, and it is therefore only fair to do so now, and to let them know that we have merely put in mild language that which is the common talk of numbers of thoughtful men in the profession who hold the judges responsible for much of the injustice which we are now suffering.

RECENT ENGLISH DECISIONS.

The numbers of the "Law Reports," for December 1st, comprise 8 App. Cas., pp. 777-913; 11 Q. B. D., pp. 625-782; 8 P. D., pp. 205-229; 24 Ch. D., pp. 253-744.

Will—"specific legacy"—Residuary bequest.

In the first of these, the only case requiring special notice here, is *Robertson* v. *Broadbent*, p. 812. The House of Lords there decides that a bequest by a testator, after giving certain pecuniary legacies of "all my personal estate and effects of which I shall die possessed, and which shall not consist of money or securities for money" to R., followed by a bequest of the residue of his personal estate to trustees, amounted, in the words of Blackburn, J., to "one residuary bequest to two persons." In other words, they held that the bequest to R. was not a specific legacy, and was accordingly not exempt from the payment of the pecuniary legacies. The judgments afford the following carefully expressed definition of a specific legacy, given by Lord Selborne, L. C., and approved of by Lords Blackburn and Fitzgerald, that it is "something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate."

Copyright—"Author" of photograph.

In the Queen's Bench cases, *Nottage* v. *Jackson*, at p. 627, raises the curious question of who is entitled to register as the "author of a photograph" within the meaning of the English Copyright Act. The conclusion come to by the full court, is that a firm of photographers who sent one of their employees to take a photograph, could not register themselves and claim a copyright as the authors. The

Court incline to hold that the person who takes the negative is the "author" of the photograph; and also that two or more persons may be registered under the Acts as the "authors" of a painting, drawing, or photograph, and they refer to, but do not decide, the question which thereupon arises as to whether, in such a case, the copyright would subsist for the joint lives of the authors, and seven years afterwards, or for the lives and life of the survivors and survivor, and seven years afterwards. Bowen, L. J., makes at p. 656, the following striking remarks: "It is to be remarked that this Act of Parliament treats photography as a fine art. It puts it on a level, for the purpose of registration, with paintings and drawings. In order to see who is the author of a photograph one must consider the question on the assumption that photography is to be treated, for the purpose of the Act, as such fine art. I think it is evidently not the man who pays—not the man who contributes the machinery—not the man who does nothing except form the idea—not the man who does nothing towards embodying the idea—not the man who finances the expedition, or who sends it out—none of those persons, in the ordinary sense of the term, can be considered the artist."

WRITTEN CONTRACT—SIGNATURE BY AGENT—PAROL EVIDENCE.

At p. 651, in *Young* v. *Schuler*, a contract had been signed by one S., holding a power of attorney from one of the parties to the contract, and it was sought to adduce evidence of contemporaneous statements of S., which, if admissible, made it clear that he intended to sign in his own right, as well as for his principal, and that he intended to be bound. The Court of Appeal upheld the admission of the evidence, as it did not contradict the written instrument. Grove, J., the judge of first instance observes:—"There being ambiguity in the contract as to the capacity in which S. signed, evidence as to what he said at the time as to the capacity is admissible."

DISTRESS BY LANDLORD AFTER TENANT HAS QUIT.

In *Gray* v. *Stait*, p. 668, the full Court decide that a landlord cannot follow and distrain his tenant's goods which have been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises has come to an end, and he is no longer in possession. The short judgment of Cotton, L. J., gives in a few words the grounds of the decision:—"The statute 11 Geo. 2, c. 19, s. 1, gives a power of distress over goods fraudulently removed off the premises only where they would have been distrainable if they had remained upon the premises. The power to distrain after the expiration of a tenancy is conferred by 8 Anne c. 14, s. 6; but this power is limited by certain conditions contained in s. 7. In order to justify a distress, it is clear to me that there must be a possession either wrongful or rightful; in the present case there was no possession of the demised premises at the time of the seizure."

MALICIOUS PROSECUTION—PETITION TO WIND UP COMPANY—INJURY TO CREDIT.

The next case, the *Quartz Hill Consolidated Gold Mining Company* v. *Eyre*, p. 674, decides the interesting question of whether, and when, an action will lie for falsely and maliciously, and without reasonable or probable cause, presenting a petition under the Companies Acts to wind up a trading company. The M. R. and Bowen, L. J., agree in their reasoning and conclusions. The latter says:—"The first question to be considered is whether an action will lie for falsely and maliciously presenting a petition to wind up a company; and the second is whether an action will lie without further proof of

special damage than was presented to the judge in this case." No pecuniary loss, or special damage in the usual sense, had been proved. After an elaborate judgment he answers these questions thus, at p. 693:—"I think that the action will lie, for the reason that special damage is involved in the very institution of the proceedings (which *ex hypothesi* are unjust and without reasonable or probable cause), for the purpose of winding up a going company." He explains his meaning to be that no petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its credit. He shows that in this respect presenting such a petition differs from bringing an ordinary action, as to which he says:—"It seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. * * Therefore the broad canon is true, that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. * * It is unnecessary to say that there could not be an action of that kind in the past, and it is unnecessary to say that there may not be such an action in the future, although it cannot be found at the present day. The counsel for the plaintiff company have argued this case with great ability; but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause."

BREACH OF COVENANT FOR QUIET ENJOYMENT—DEED OF LAND.

The next case of *Howard* v. *Maitland*, p. 695, is an interesting decision on the question of what amounts to a breach of a covenant for quiet enjoyment. In a conveyance of land by the defendant to the plaintiff, the defendant covenanted for title and quiet enjoyment notwithstanding any act or thing done or suffered by him, or by any of his ancestors or predecessors in title. After a conveyance a decree was made in a suit in Chancery in which the plaintiff, though not a party, was represented as being one of a class of persons against whom the suit was brought, and by the decree the land so conveyed by the defendant was declared to be subject to a general right of common over it. The Court of Appeal held that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach of the defendant's covenant for quiet enjoyment. The M. R. says at p. 701:—"I adopt that which is laid down in 1 Shepard's Touchstone, p. 171—'And in all cases where any person hath title the covenant is not broken until some entry or other actual disturbance be made upon his title.' It is clear that there was no entry here, and it seems to me that there was no actual disturbance even supposing that a decree against the plaintiff would be an actual disturbance."

EASEMENT—RIGHT OF WAY—CONTINUOUS ENJOYMENT.

The case of *Hollins* v. *Verney*, at p. 715, raises the question what is such a continuous enjoyment of a right of way for

twenty years, as will satisfy the Prescription Act, Imp. 2-3 Will. 4 c. 71, s. 2 (R. S. O. c. 108, sec. 35). The easement claimed was to carry along a way the wood which happened to be cut upon a particular slope near this way, and it appeared that the wood was cut from time to time at intervals which were not very clearly ascertained, the whole wood being cleared at three cuttings, of three several years. It was also proved that the last exercise of this supposed right was within the proper period, that is to say, just before the commencement of the action, and that the last previous cutting of the wood had been fifteen years before that, and within twenty years. The cutting previous to that had been more than twenty years before action, and so could not be included in the twenty years enjoyment. The full court held there had not been an uninterrupted enjoyment of the way for twenty years, within the meaning of the Act, which did not apply to so discontinuous an easement as that claimed. All the judges declare it established law that in order to bring a case within the section of the act, there must be proof of an actual enjoyment and exercise of the right claimed, during the first of the twenty years which are material, whereas in this case during the first year the way in question was never used. Accordingly the court refused to accept the argument of the defendant, who claimed the easement, that although the right had not been actually enjoyed or used for the prescribed period, yet it might subsist without being actually exercised, and if it had been exercised from time to time partly before and partly after the period of twenty years had begun to run, that this would be a sufficient enjoyment to satisfy the statute.

WILL—EXECUTOR ACCORDING TO THE TENOR.

Among the Probate Cases only one seems to call for special notice, viz.: *In the goods of William Bradley, deceased*, p. 215. There a testator by his will said: "I appoint R. H. P. and J. E. W.," but did not state in what capacity he appointed them. He also bequeathed legacies to "each of my executors," and gave his "said executors" the residue of his property, with certain directions as to it. Sir. James Hannen now held that by the will R. H. P. and J. E. W. were appointed executors, and granted probate to them accordingly. He said—"The words of the will show that the testator meant to appoint R. H. P. and J. E. W. to something, and the inference I draw is that he intended to appoint them as executors." A. H. F. L.

A SOLICITOR at Hamilton, a member of a well-known firm, has sent us the following circular which he complains was sent by the firm which has signed it to one of his clients, a creditor of the insurance company named therein. Our correspondent evidently is smarting under what he supposes a gross breach of professional etiquette; and were we sure that he is justified in the view he takes we would publish not only the circular, but the names of the solicitors at the foot. We presume, however, that the Master had nominated the firm in question to represent the creditors, under G. O. Chy. 218, and that this is the real explanation. The following is the circular in question:—

TORONTO, 26th JAN., 1884.

DEAR SIR,—We are solicitors for creditors under the Order of Reference to the Master of the Supreme Court at Hamilton for the winding up of the Standard Fire Insurance Company.

Claims have been placed in our hands to the amount of more than $25,000, several of which are admitted and some disputed.

We have received from the secretary a list of claims for fire losses and your name appears on it as a claimant for $3,000,

We think it of importance to proceed with expedition with the reference to ascertain the liabilities of the company and to promote a call on the

stockholders, by order of the court, for the payment of debts.

It is probable that an Insolvent Act will be passed during the present session of Parliament and we fear a large number of the stockholders will not be able to pay the call which will be required and might take the benefit of our Insolvent Law.

Please advise us when your fire loss happened—whether your claim has been admitted or disputed—and if your claim is disputed whether you propose to have the question of liability of the company decided by the master of the Supreme Court at Hamilton in a summary manner and at comparatively small expense, or whether you propose to apply to the Court for leave to proceed to trial in the courts.

We will be pleased on application by you to furnish any information in our power to enable you to judge of the state of affairs of the company and of the propriety of the course to be pursued.

REPORTS.

ONTARIO.

MUNICIPAL CASES.

RE THOMSON AND MCQUAY.

Ditches and Water-courses Act, 1883—*Inferior owner—Remedy against superior owner.*

An inferior owner cannot invoke the aid of the Ditches and Water-courses Act to compel a superior owner to construct a ditch across the former's land. He is left to the common law remedies, or he may construct the ditch himself, and call in the township engineer to say in what proportion, if any, the other owner or owners should contribute towards its cost.

[Whitby, 1883.

This was an appeal from the award of the township engineer made in pursuance of 46 Vict. ch. 27.

The arbitration in effect found that McQuay, being the owner of part of lot 8 in the 3rd concession of Pickering, constructed a tile drain thereon, leading in a south-westerly direction to the side road between lots 8 and 9, and across such road by a long established culvert, which side road and culvert furnished him with a sufficient, proper and lawful outlet without requiring to trespass on the lands of Thomson (lot 9) therefor. That McQuay has placed the drain with a view to the most natural drainage of the land, and that the culvert appears to have been the original water-course. That the water flowing from lot 8 would, by natural drainage, flow, by reason of the existing slope, into lot 9, and it is not necessary to go upon lot 9 in order to secure an outlet to the drain.

Thomson's requisition to McQuay required him "to construct a drain through lot number 9 or such part thereof as will carry off the water from your part of lot 8 under the Ditches and Water-courses Act of 1883." Failing an agreement the township engineer was notified and evidence was given before him upon which he made his award, the operative words of which are "the construction of the drain asked for by the requisition is left entirely to Thomson."

He fixed his own costs at $17 and directed them to be paid by Thomson, but made no provision for any other costs.

Thomson appealed from this award on the ground that it was "contrary to law and evidence, and in no way decides the matter in dispute, nor does it provide a remedy for Thomson from the water that illegally drains unto Thomson's land."

W. H. Billings appeared for the appellant, and cited *McGillivray* v. *Millin*, 27 U.C.R. 62; *Murray* v. *Dawson*, 19 C.P. 314; *Murray* v. *Dawson*, 17 C.P. 588; *Darby* v. *Crowland*, 38 U.C.R. 338.

J. E. Farewell for the respondent, cited Kerr on Injunction, 390; *Heward* v. *Banks*, 2 Burrs. 1114; *Smith* v. *Kendrick*, 7 C.B. 573.

DARTNELL, J. J.—I have carefully read and analyzed the evidence taken before the engineer. It has been fully and skilfully taken, and justifies the findings of fact in the award, which is very well drawn up. It in effect finds that to construct the drain asked for by the requisition would be entirely for Thomson's benefit. It remains for me to consider what is the full effect of this finding.

Mr. Billings relies upon the cases cited by him, as shewing that his client had no other *forum* in which he could assert his rights.

I do not think on examination of these cases

that they bear out his contention. *Murray* v. *Dawson* (1st case) simply decided that an award under the Fence Viewers' Act (C. S. U. C. ch. 57) cannot be sued upon, but must be be enforced in the manner pointed out by the Act. The second case of the same name was an action brought against the defendant for wrongfully obstructing the plaintiff's drain, and would be applicable to this case only if McQuay had been the plaintiff, and Thomson the defendant. It was there held that the penning back of the natural surface flow of water is not actionable, and that the plaintiff's remedy was under the Fence Viewers' Act. That Act was only applicable where it is the "joint interest of owners to construct a ditch." Now, in this case Thomson's contention is that he has no interest whatever in the drainage of McQuay's land, and yet he invokes the aid of these proceedings to compel him to carry off the water so as not to injure his land.

I do not think the Act has superseded his Common Law remedies.

The Corporation of Pickering could stop up or obstruct the culvert in question, and so I take it could Thomson himself; and McQuay could have no remedy, as "the right of drainage does not exist *jure naturæ*": *Darby* v. *Crowland*, 38 U.C.R. 343; *Crewson* v. *The Grand Trunk Ry.*, 27 U.C.R. 68. If his complaint is, as it appears to be, that McQuay, by means of this ditch, carried to and projected on the applicants land more surface water than otherwise it would have received, he has his remedy at law in an action for damages or for an injunction, or both: *Perdue* v. *Chinguacousy*, 25 U.C.R. 61; *Rowe* v. *Rochester*, 22 C.P. 319, and 29 U.C.R. 590; *Stonehouse* v. *Enniskillen*, 32 U.C.R. 562.

In *McGillivray* v. *McMillin* the defendant was the inferior owner, and the action was for obstructing a drain, just the reverse of the present case. I do not see how any of the cases cited by Mr. Billings apply.

Smith v. *Kendrick*, 7 C. B. 575, decides that it is the duty of the owner working on the lower level to guard against the water flowing upon him by banking or otherwise.

An examination of the form B. given in the schedule will throw some light upon the scope and meaning of the Act. It reads: "I require to construct a ditch or drain through said (my) lot *and find it necessary to continue same through your lands.*" Nothing can be more different from the requisition served in this case.

Thomson, in his evidence, asserts that his land does not require drainage, and that a drain will be an injury to him rather than a benefit, and yet he asks McQuay to construct a drain across his land (Thomson's), the costs to be borne by McQuay. I think this is turning the Act, so to speak, upside down, and that he has mistaken his *forum*. He is bound to receive McQuay's natural surface water, being the inferior owner. If McQuay has collected in one place more than such natural surface water, and discharged it upon Thomson's land he has a right either to erect an obstruction to divert such overflow, or he can bring an action for damages or for an injunction. If he desires to invoke the aid of this Act, I think his only course would be to build a drain across his own land, and call upon the township engineer to ascertain whether McQuay was benefited by its construction, and if so, in what proportion he should contribute towards its cost.

As the effect of my judgment is that the matter in question does not come within the provision of the "Ditches and Water-courses Act" my finding is practically that the township engineer had no jurisdiction to entertain the matter.

I have had some hesitation as to whether I should set aside the award in *toto*, but as I do not disagree with its findings, have concluded to confirm it. The engineer has omitted to provide for the costs of the Division Court clerk and of the respondent's witnesses. I therefore amend the award by directing "that the costs of the engineer, according to the tariff provided by by-law, and of the Division Court clerk and bailiff, and of the respondent and his witnesses be taxed on the Division Court scale by the clerk of the 2nd Division Court and paid by the appellant to the respondent forthwith after taxation."

In the event of non-payment the respondent can collect these costs under the machinery provided by the Act, or sue for them in the ordinary way, as he may be advised. I express no opinion as to which is the proper course.

The recent case of *Northwood* v. *The Corporation of Raleigh*, 3 O.R. 347, I think confirms the views that I have taken of the law

GENERAL SESSIONS—COUNTY OF BRANT.

Referred to Regina v Coutts 5 Ont. 644.

(Reported by B. F. Fitch, Esq., Barrister-at-law.)

THOMAS v. TURNER.

Municipal Act, 1873, *sec.* 495, *sub-sec.* 3—*Imperial Act*, 50 *Geo.* 3 *cap.* 41, *sec.* 6—*Hawkers and petty chapmen.*

An agent of a grocer doing business in London went from house to house in Brantford taking orders for tea, and the goods were delivered by J., another agent. The police magistrate fined J. for an infraction of the by-law passed by the city council under the Municipal Act. On an appeal to the General Sessions it was

Held, that it was an infraction of the by-law to thus deal without a license. The Provincial Act differs from the Imperial Act in not containing the words "exposing for sale." *Rex* v. *McKnight*, 10 B. & C. 734, held therefore not to be applicable.

[Brantford, 1883.

The Municipal Act, 1883, sec. 495, sub-sec. 3, provides that councils may pass by-laws "for licensing, regulating and governing hawkers or petty chapmen, and other persons carrying on petty trades, or who go from place to place or to other men's houses, on foot or with any animal bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel, or other craft, or otherwise carrying goods, wares, or merchandise for sale, and for fixing the sum to be paid for a license for exercising such calling within the county, city or town, and the time the license shall be in force."

The Imperial Act, 50 Geo. III. chap. 41, sec. 6 is as follows:—"There shall be paid to His Majesty the rates and duties following, viz.: By every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise carrying to sell or exposing to sale any goods, a duty of $4 for each year."

The appellant was convicted by the Police Magistrate of the city of Brantford for a breach of the city by-law No. 342, to prevent pedlars and hawkers from exercising their calling within the city without a license, and a fine of $10 and costs was imposed on the appellant for the breach of the by-law.

From this conviction the appellant appealed to the December General Sessions of the Peace, when the appeal was heard before His Honour Judge Jones without a jury.

Smyth, for the appellant, relied on *Rex* v. *McKnight*, 10 B. & C. 734.

Wilkes, for the respondent.

JONES, Co. J.—The by-law was passed on the 18th June, 1883, and follows the words of the statute, Municipal Act, 1883, 46 Vict. sec. 495, sub-sec. 3.

The case of *Rex* v. *McKnight* has been cited on the part of the appellant as being a case in point with the facts as shown by the evidence in the present case. That case was decided under the English Act, 50 Geo. III. ch. 41, sec. 6.

The facts as to the manner in which the sale in that case was made are very similar to those in the present case, so that if the English Act and ours are the same the above decision would seem to be in point, and would decide the present case. There, as here, the orders for the sales were first taken, and after that the party who was fined for not having a license delivered the goods and received the pay therefor.

The Court there held that such a sale was not one that under the statute required the seller to have a license as a hawker and pedlar, and the Court remarked that there was "no exposing to sale" of the goods sold, such as there would be had the defendant taken the goods with him in the first instance instead of taking orders and afterwards supplying the goods.

Our statute, however, does not contain the words in the English Act "exposing to sale," and the city by-law was apparently framed also to meet a case like the present when there was not an exposing of goods for sale, and it prohibits making sales by taking orders by samples or otherwise.

I therefore think that the defendant has committed a breach of the by-law in question, and of our statute under which the by-law was framed, and was liable to be committed therefor. The evil that was intended to be guarded against by the statute and by-law exists just the same in the case where the goods are sold by first taking orders by samples and then

going around and delivering the goods and receiving the payment therefor as if the transaction was all completed at the one time. It would seem to be merely an evasion of the requirements of the statute which provides that a license shall be obtained. The seller has the advantage over the local trader by not having to pay rent or taxes, or in any other way assisting to bear the municipal burdens that the shop-keeper has to sustain. Besides this, the public are exposed to the evil of irresponsible persons from a distance going from house to house, very usually with inferior goods which are bought very generally by those who are inexperienced in business matters and while the head of the family may be absent from home.

FIRST DIVISION COURT OF YORK.

BARBER v. BINGHAM.

Division Court Rules—No power to add Defendants.

The plaintiff brought an action against one of two copartners upon a promissory note made in the firm name for a partnership debt. The partner not joined was within the jurisdiction at time action commenced.

Held, that under the rules of the Division Court there was no authority to add the partner not sued.

Held also, that the adding of a defendant was not a principle of practice of the Courts of Common Law, and not a case for the exercise of the Judge's discretion. *Building and Loan* v. *Heimrod*, 19 C. L. J. 254 followed, and rules of Judicature Act held not in force in the Division Court.

[Toronto, October 24, 1883.

MCDOUGALL, J. J.—For the reasons expressed in my former judgment in *Building and Loan Co.* v. *Heimrod*, *ante*, I do not think that the rules of the Judicature Act apply "*ex vi termini*" to the practice in the Division Court; consequently in this case the application at the trial to add a defendant must be refused or granted upon the authority of Division Court rules, acts, and practice. Now there is no express authority in the rules anywhere given to a judge to add a defendant, although there is an express rule dealing with the question of adding additional plaintiffs (Rule 111). There is express power given to strike out the name of one or more of several defendants (Rules 112 and 113); and by Rule 115, a person appearing at the hearing, and admitting that he is the person whom the plaintiff intended to charge, may have his name substituted for the defendant if the plaintiff consents; but none of these rules covers the case of a plaintiff who has sued too few in number (as in this case one member of a copartnership), and who asks leave to add the name of the party omitted as a defendant. The very fact that these various rules cover so many special difficulties likely to arise in the joinder of proper parties, renders stronger the argument that it was never intended to allow a plaintiff the relief asked for in this case, and that it was a case designedly left unprovided for, for reasons satisfactory to the framers of the rules. In this view of the effect and spirit of the rules which are so elastic in so many ways, I think I would be usurping the functions of the Legislature, or of the Board of County Judges, did I allow a new practice upon such an important point under any discretionary power conferred by section 244 of the Act. Besides, this power to add defendants was not a principle of practice of the Superior Court of Common Law until after the passing of the Judicature Act.

I must, therefore, nonsuit the plaintiff for not joining the partner of the present defendant, who has been proved to have been within the jurisdiction of the Court at the time this action was commenced. The present defendant will be entitled to his costs.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

SHIELDS v. PEAK.

Judgment on demurrer appealable—Supreme Court Amendment Act, 1879, *sec.* 3, 38 *Vict. cap.* 16, *sec.* 136—*Construction of—Purchase of goods by insolvent outside of Dominion of Canada—Pleadings.*

The action was commenced by P., and other merchants carrying on business in England to

recover $4,000 on the common counts from J. S., and other merchants, resident and domiciled in Canada, carrying on business in Toronto, and who were traders within the Insolvent Act of 1875, and had obtained a discharge in insolvency after assignment made under that Act.

The plaintiffs in their declaration charge that a purchase of goods was made by the defendants from them on the 13th March, 1879, and another purchase on the 29th March, of the same year, that when the defendants made the said purchases, they had probable cause for believing themselves to be unable to meet their engagements, and concealed the fact from the plaintiffs, thereby becoming their creditors with intent to defraud the plaintiffs, and sought to bring the defendants within the purview of sec. 136 of the Insolvent Act of 1875.

The defendant J. S. (appellant), amongst other pleas, pleaded, as a fifth plea, that the contract out of which the alleged cause of action arose, was made in England and not in Canada. To this plea plaintiffs demurred, and one of the matters of law to be argued was: "The fact of the contract being made in England does not exempt the defendant from liability under the provisions of the Insolvent Act of 1875 in this action." Issue was joined in the other pleas.

Held (TASCHEREAU, and GWYNNE, J. J. dissenting), that, although the judgment appealed from was a decision on a demurrer to part of the action only, it is a final judgment in a judicial proceeding within the meaning of the 3rd. section of the Supreme Court Amendment Act of 1879 (*Chevalier* v. *Cuvillier*, 4 S.C.R. 605 followed).

Per RITCHIE, C. J., and FOURNIER, J. (1) That sec. 136 of the Insolvent Act of 1875 was *intra vires* of the Parliament of Canada.

(2) That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency, over which subject matter the Parliament of Canada has power to legislate.

(3) That although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in Canada, the defendant was not exempt for that reason from liability under the provisions of the 136 section of the Insolvent Act, 1875. and therefore the plea demurred to was bad.

Per GWYNNE, J.—That as the said fifth plea confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance, or in bar of the action, that the said plea is bad and therefore if the appeal be entertained it must be dismissed.

Per STRONG, HENRY, and TASCHEREAU, JJ.—There being nothing either in the language or object of section 136 of the Insolvent Act to warrant the implication that it was to have any effect out of Canada, it must be held not to extend to the purchase of goods in England by defendant stated in the second count of the declaration.

The Court being equally divided the appeal was dismissed without costs.

Bethune, Q.C., for appellant.

Rose, Q.C., for respondent.

MERCHANTS' BANK v. SMITH.

Warehouse Receipts, 35 *Vict. c.* 5 (*D*).

The appellants discounted for a trading firm, on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal, as having been deposited by them, to which they assented; the following warehouse receipt was given:—

"Received in store in Big Coal House warehouse at Toronto, from Merchants' Bank of Canada (at Toronto), fourteen hundred and fifty-eight (1458) tons stove coal, and two hundred and sixty-one tons chestnut coal, per schooners 'Dundee,' 'Jessie Drummond,' 'Gold Hunter,' and 'Annie Mulvey,' to be delivered to the order of the said Merchants' Bank to be endorsed hereon. This is to be regarded as a receipt under the provisions of Statute 34 Vict. ch. 5; value $7,000,000. The said coal in sheds facing Esplanade is separate from and will be kept separate and distinguishable from other coal.

"Dated 10th August, 1878. (sd.) W. Snarr."

The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt. The Chancellor who tried the case found that the receipt given was a valid receipt within the provisions of the Banking Act, and was given by a warehouseman, and that the bank was entitled to hold all the coal in store of the description named in the receipt. This judgment was reversed by the Court of Appeal for Ontario, and on appeal to the Supreme Court of Canada it was

Held, reversing the judgment of the Court of Appeal,

1. That it is not necessary to the validity of the claim of a bank under a warehouse receipt that the receipt should reach the hands of the bank by indorsement, and that the receipt given by W. S. in this case was a receipt within the meaning of 34 Vict. ch. 5 (D).

2. (RITCHIE, C. J. and STRONG, J. dissenting) that the finding of the Chancellor as to the fact of W. Snarr being a person authorized by the statute to give the receipt in question, should not have been reversed as there was evidence that W. S. was a wharfinger and warehouseman.

3. *Per* FOURNIER, HENRY and TASCHEREAU, JJ.—That the provisions of 34 Vict. ch. 5 (D), as to warehouse receipts do not invade the functions of the Provincial Legislature by an interference with property and civil rights in the Province.

C. *Robinson*, Q.C., for appellants.

Maclennan, for respondent.

GLOUCESTER ELECTION PETITION.

COMMEAU v. BURNS.

Appeal on Election Petition—The Supreme and Exchequer Court Amendment Act of 1879, *sec.* 10—*Construction of Rule Nisi by petitioners to rescind order of a judge in Chambers made absolute by Court in banc not a preliminary objection.*

A petition was duly filed and presented by appellant on the 5th August, 1882, under the "Dominion Controverted Elections Act, 1874," against the return of respondent. Preliminary objections were filed by respondent, and before the same came on for hearing the attorney and agent of respondent applied to, and obtained on the 13th October, from Mr. Justice Weldon, an order authorizing the withdrawal of the deposit money and removal of the petition off the files. This money was withdrawn, but shortly afterwards in January, 1883, appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained upon summons a second order from Mr. Justice Weldon rescinding his prior order of 13th October, 1882, and directing that upon the appellant re-paying to the clerk of the court, the amount of the security in petition be restored, and that the appellant be at liberty to proceed against the order appealed to the Supreme Court of New Brunswick, and the Court gave judgment rescinding Mr. Justice Weldon's order made in January, 1883. Thereupon petitioner appealed to the Supreme Court of Canada.

Held, that the judgment appealed from is not a judgment on a preliminary objection within the meaning of 42 Vict. ch. 39, sec. 10, and therefore not appealable.

Dickie and *Woodworth* followed.

Blair, Q.C., for appellant.

R. Harrison, for respondent.

WORTHINGTON ET AL v. MACDONALD.

Articles of partnership, Construction of—Estimatio facit venditionem.

This was an appeal from a judgment of the Court of Appeal for Ontario decreeing that the respondent was entitled to be credited in the winding up of the partnership between respondent and appellant with the sum of $40,000, the estimated value of certain plant, etc., used in the construction of the works done by the partnership. The article in the deed of partnership executed before a notary public in the Province of Quebec, under which the respondent claimed to be entitled to the said credit of $40,000, is as follows:—

"The stock of the said partnership consists of the whole of the plant, tools, horses, and appliances now, and for the construction of said works, by the said party of the first part; also all quarries, steam tugs, scows; and also all the rights in said quarries that are held by

the said party of the first part, or any of them, the whole of which is valued at forty thousand dollars, and is contained in an inventory thereof thereunto annexed for reference after having been signed for identification by the said parties and notary, but, whereas the said plant, tools, horses and appliances, steam tugs, scows, quarries and other items had been heretofore sold by the said party of the first part to the firm of Morland & Watson, of the city of Montreal, hardware merchants, to secure them certain claims which they had against said A. P. Macdonald & Co. for money used in the construction of the works referred to, to the extent and sum of twenty-four thousand dollars and interest; and whereas the said James Worthington has paid said amount of twenty-four thousand dollars and redeemed said plant, tools, horses and appliances, and quarries, steam tugs and scows, etc., and now stands proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses and appliances that are or may be put on the said work shall be and continue to be the entire property of the said James Worthington, until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to re-imburse him of the said sum of $24,000, and interest so advanced by him as aforesaid, as also any other sum or advances and interest which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said firm of 'James Worthington & Company'; that is to say: the one half shall revert to and belong to the party of the first part, and the other half to the said party of the second part, as the said James Worthington has a full half interest in this contract and all its profits, losses and liabilities, and the said A. P. Macdonald, W. E. Macdonald, and Randolph Macdonald, parties of the second part, jointly and severally, the other half interest in the same."

There was evidence that the plant had cost originally $57,000, and that it was valued in the inventory at $40,000 at the request of the appellant; it was also shown and admitted that the profits of the business were sufficient to reimburse the appellant of the sum of $24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership.

Held, That the plant, etc., furnished by the respondent having been inventoried and valued in the articles of partnership at $40,000 the respondent had thereby become a creditor of the partnership for the said sum of $40,000, but as it appeared by the said articles of partnership that the said plant was subject at the time to a lien of $24,000, and that said lien had been paid off with the partnership moneys, the respondent was only entitled to be credited, as a creditor of the partnership with the sum of $16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership. *Estimatio facit venditionem.*

C. Robinson, Q.C., and *Metcalf*, for appellant.
McCarthy, Q.C., and *Cameron*, Q.C., for respondent.

COURT OF APPEAL.

BAILEY v. JELLETT.

Trustee and cestui que trust—Solicitor and client—Deposit of client's money to credit of solicitor—Appropriation of payments.

The plaintiff placed in the hands of one J., a practising solicitor, a mortgage together with a discharge thereof duly executed for the purpose of enabling J. to receive payment of the amount due under the mortgage, which it was arranged, between the plaintiff and J. in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solictor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor, which J. should transmit to the plaintiff. J. did receive the money, amounting with interest, to $6.500, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for $3,000 which he deposited to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff and transmitted the same to the plaintiff on the 26th August, 1881, telling the plaintiff in his letter that "the balance will be sent next

week." He drew upon the fund and died, without rendering any account, on the 4th of September following.

Held, that the bank was not affected with notice of the money so deposited, being trust moneys, so as to render the bank liable for J.'s misappropriation thereof.

After the deposit of the plaintiff's money, J. recovered a sum of $1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th of August, 1881. Up to the time of J.'s death the amount at his credit always exceeded the amount deposited by him for S.

Held, that all the moneys so deposited by J. were impressed with a trust and might be followed; but (in this reversing the judgment of the Court below), as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand.

The bank claimed the right to charge against the account, in priority to the claim of the plaintiff and S., checks and notes of J. presented on maturing after notice to the bank of J.'s death.

Held, that they could not do so, and in consequence of having made such claim, both in this Court and the Court below they were refused their costs.

McEWAN v. McLEOD.

Consent reference—C. L. P. Act, sec. 205—Damages.

The judgment of the Court below, 46 U. C. R. 235, affirmed—Cameron, J., dissenting as to the quantum of damages.

Y. K. Kerr, Q. C., for appeal.

Bethune, Q. C., contra.

PETERKIN v. McFARLANE.

Notice—Mortgage, etc.

The Court being equally divided, the appeal and the judgment of the Court below, 17 C. L. J. 244, affirmed with costs.

Moss, Q. C., and *Scane*, for appeal.

Atkinson and *W. Cassels*, contra.

RE MURRAY, PURDHAM v. MURRAY.

Gift inter vivos—Trustee.

The widow of a testator claimed as a gift from her husband a promissory note payable to his order, but not endorsed by him. The evidence, in the Master's office, on taking the accounts of the estate, shewed that the wife had had possession of this and other notes belonging to her husband during his lifetime. The Master at London found that under the circumstances appearing in the report of the case, 29 Gr. 443, that the testator had intended the note to belong to the widow, and did not form part of the assets of the estate, which finding was reversed by the court.

Held [reversing the order then pronounced], that the evidence established a valid gift *inter vivos*.

Per BURTON and PATTERSON, J.J.A. The testator under the circumstances had constituted himself a trustee of his wife of the note.

Moss, Q.C., for appellant.

W. Cassels, contra.

CHANCERY DIVISION.

Proudfoot J.] [Nov. 9, 1883.

RE WINSTANLEY v. CARRICK.

Will—Construction—Estate tail—Restraint on alienation—Vendor and Purchaser Act.

A testator devised as follows:—

"The freehold property I hold at present in Jarvis street, in this city, to be divided in two lots from Jarvis street, the lot with the house to be given to M. L., to hold for her benefit during her natural life, and to dispose of the same by will and testament only, the remaining lot, thirty-five feet wide, in Jarvis street, running through to Mutual street, I bequeath to my daughter E. R., and that she shall not dispose of the same only by will and testament, and if either of my said daughters shall depart this life without leaving issue then, and in such case the survivor shall be possessed of the share of the deceased sister."

Held, that "dying without failure of issue," meant an indefinite failure of issue, and E. R. took an estate tail, and the condition against disposing of the property except by will and

testament is a valid condition and not repugnant and void.

The rule is well known that a condition prohibiting alienation attached to an estate in fee, in tail, or for life is void. But if the condition does not take away the whole power of alienation substantially it is good. The alienation may be restricted by prohibiting it to a particular class of alienation, or by prohibiting it to a particular class of individuals, or by restricting it to a particular time.

J. H. Macdonald, for the vendor.

Miller, for the purchaser.

Boyd C.] [Jan. 14.

THOMPSON ET AL. v. CANADA FIRE AND MARINE INS. CO. ET AL.

Company — Directors — Fraudulent transfer of shares to man of straw—Acquiescence—Laches.

When the shareholders of a certain company brought an action against the company and certain of its directors, and alleged that the said directors being a majority of the directorate had negotiated a transfer of a number of shares to one C., knowing C. to be a man of no sufficient means to pay calls thereon, in order to escape liability for certain impending calls, and claimed that the said directors should make good to them the amount of calls due upon the shares so transferred to C., and unpaid by him; and the said directors alleged acquiescence and laches on the part of the plaintiff in respect of the matters complained of; and the plaintiff proved the transfer as alleged.

Held, that the action of the said directors was a breach of their duty, and invalid, except so far as it was subsequently ratified by the plaintiffs, as shareholders.

Speaking generally, if any shareholder was aware of the transaction by which C. obtained the transfer complained of, and became manager of the company, and allowed the affairs of the company to be managed by him thereafter, taking the chance of prosperity attending his conduct of the business, then that "passive acquiescence" (to use Lord Cranworth's expression in *Spackman* v. *Evans*, L. R. 3 H. L., 193) would preclude such a shareholder from afterwards contesting the validity of the transfer; but it was not the duty of the shareholders to investigate as to the action of the directors, and they had the right to say that the facts, if not communicated, were concealed from them. On the other hand, if they meant to dissent effectually from what was being illegally done, the shareholders were bound to take active measures to prevent or undo it.

J. Bethune, Q.C., *Mackelcan*, Q.C., and *C. Moss*, Q.C., for the plaintiffs.

D. McCarthy, Q.C., *Laidlaw* and *Teetzel*, for the defendants.

Ferguson, J.] [Jan. 26.

SHANAGAN v. SHANAGAN.

Conveyance void for improvidence—Compensation for improvements under—Amounts.

On Aug. 30th, 1875, the plantiff conveyed a certain farm to the defendants, his sons. On the same day the defendants leased the farm to the plaintiff for the term of his natural life, reserving no rent. On Sept. 23rd, 1875, the plaintiff leased to the defendants the said farm for the term of his (the plaintiff's) life, reserving a rent of $100 a year, and "the proper board and clothing, and lodging" of the plaintiff, "so long as he remains on the said premises."

The defendants went into possession of the farm, on which the plaintiff also continued to dwell.

Now, in this present action, the plaintiff succeeded in having the grant of Aug. 30th, 1875, and the lease of Sept. 23rd, 1875, declared void, and directed to be delivered up to be cancelled.

The defendants had meanwhile erected a new house on the farm, and made sundry improvements.

Held, that the defendants were entitled to be paid all sums of money laid out in improvements, and repairs of a permanent and substantial nature by which the present value of the farm was improved, with interest from the time these sums were actually disbursed; also to be paid the moneys paid by them to keep down the interest of a certain mortgage, which has existed on the farm ever since the date of the original sale to the plaintiff, and any principal moneys thereof which they may have

paid; also rents paid the plaintiff, and the value of such maintenance as had been given by them to the plaintiff. On the other hand the defendants must be charged with deteriorations to be set off against improvements, and with rents and profits of all kinds received by them and also with an occupation rent for the premises occupied by them.

Reference directed to the Master to take the account; and further directions reserved.

PRACTICE.

Div'l Ct. Ch. Div.] [Dec. 13, 1883.

WELLS v. CARRALL.

Jurisdiction of Master in Chambers—Absconding Debtors' Act.

The Master in Chambers made an order under R. S. O. c. 68, s. 59, referring it to the County Court Judge to ascertain the amount due by an absconding debtor. Judgment was entered pursuant thereto (after judgment entered). Another creditor then obtained an order from the Master setting aside the judgment, and allowing him to defend.

Held, on appeal that the Master in Chambers has no jurisdiction to set aside such a judgment.

On appeal the Divisional Court upheld the order of PROUDFOOT, J.; but the relief sought for was granted on terms.

W. Cassels, Q.C., and *Holman*, for appeal.

Aylesworth, contra.

Ferguson, J.] [Jan. 24.

STANDARD BANK v. WELLS.

Appeal from Master in Chambers—Time—Rules 14 and 80, O. J. A.—Special Endorsement.

Appeal from the order of the Master in Chambers allowing judgment to be entered for the plaintiffs under Rule 80, O. J. A. Objection to the appeal that it was not brought on within eight days from the decision of the Master, as required by Rule 414, O. J. A., and that there was nothing to extend the time.

It appeared that Proudfoot, J., had, upon the *ex parte* application of counsel for the defendant for leave to bring on the appeal on Thursday, the 17th January, directed the appeal to be set down for Monday, the 21st January, the order appealed from having been pronounced on the 11th January, and that no order had been taken out as evidencing this leave.

Held, that the application not having been to extend the time beyond the eight days, and the judge having, for the convenience of the court, given leave to bring on the appeal for a day after the expiry of the eight days, the objection should not prevail.

Objection overruled. Upon the appeal it appeared: That the writ was endorsed specially for $910, the amount of a bill of exchange. The endorsement, however, went on and claimed other relief by asking to have certain conveyances and assignments set aside as fradulent, etc.

Held, that an order cannot be made for judgment under Rule 80, O. J. A., except in an action where the plaintiffs merely seeks to recover a debt or liquidated demand in money.

Appeal allowed with costs.

Hoyles, for appeal.

Cassels, Q.C., contra.

Mr. Dalton, Q.C.] [Jan. 28.

MONTEITH v. WALSH.

Defence—Set off—Striking out.

Motion to strike out a defence of set off in an action of trespass for entering the warehouse of a deceased person (of whom the plaintiff is the administrator) after his death, and taking and converting the goods therein. The set off was of a debt due by the deceased to the defendant. An administration order had been made, of which the defendant had notice before defence.

The defence of set off was held bad under 29 Vict. c. 28, sec. 28, and also because of the administration order.

MacGregor, for the plaintiff.

Walter Barwick, for the defendant.

Galt, J.] [Jan. 29.

DOERR v. RAND.

Security for costs—Praecipe order—Setting aside.

The order of the Master in Chambers of the 14th January, 1884, *ante* p. 33, affirmed with costs.

Cameron and *MacPhillips*, for the plaintiff.

A. B. Cox, for the defendant.

Wilson, C. J.]

NEALD v. CORKINDALE: FOSTER, THIRD PARTY.

County Court action—Third Party—Trial of issues between defendant and third party—Investigating accounts beyond pecuniary jurisdiction of County Court—Prohibition.

An action in a County Court on a promissory note made by the defendant, in which the defendant claimed indemnity against the third party. The third party having appeared, the learned Judge of the County Court directed certain issues to be tried between the defendant and the third party. At the trial he found for the plaintiff, and investigated accounts between the defendant and the third party amounting to more than $10,000 upon which he found that a balance of more than $3,000 would be payable to the defendant; and he directed that the third party should, out of this balance, pay to the defendant the amount of the plaintiff's claim. On a motion for a prohibition,

Held, that the order directing the issues between the defendant and the third party, and the proceedings taken under it, were right.

Held also, that as the only relief which could be given to the defendant against the third party was protection against the demand of the plaintiff, which was within the pecuniary jurisdiction of the County Court, the learned Judge was not acting beyond his jurisdiction in investigating accounts of sums beyond his jurisdiction.

J. H. Macdonald, for the motion.
McMichael, Q.C., and *Ogden*, contra.

SECOND DIVISION COURT COUNTY ONTARIO.

Div. Ct.] [Feb. 4.

LAWSON v. LAWSON.

Estoppel—Exemption.

Per DARTNELL, J. J.—A judgment debtor, who has been examined as such, and who then swore that he had no chattels, or any interest in such, is estopped from afterwards making claim to a joint interest in certain farm implements.

Chattels jointly owned, or held in partnership, are not exempt from seizure and sale under an execution against one of such joint owners or partners.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

Pollock on Contracts.—Byles on Bills.—Best on Evidence.

1. Point out as accurately as you can the tests of cases in which a corporation will be bound by a contract not under seal.

2. Compare our contracts under seal with the formal contracts of the Roman Law.

3. Explain the words "*unlawful intention*" in the rule: "If the unlawful intention is at the date of the agreement common to both parties to it, the agreement is void."

4. Define warranty. Discuss its applicability or inapplicability to the law that a buyer has a right to expect a merchantable article answering the description in the contract of purchase.

5. Is a verbal acceptance of an inland bill of exchange binding, and why? Give a brief sketch of any changes in the law on the subject.

6. What peculiarity is there as to the law of consideration as applied to promissory notes? In how far is partial failure of considerations a defence?

7. Mention the different kinds of *presumptions* in relation to the disposal of matters of fact by Courts giving examples of them.

8. What was the common law rule as to the admisability of the evidence of a wife on the part of her husband, and what changes have been made in the law in that respect?

9. Write short notes on the rule of practice which prohibits *leading questions*.

10. Point out the practice (*a*) where plaintiff makes default in delivery of statement of claim, and (*b*) where defendant makes default in delivery of statement of defence.

Pollock, Best, Byles, etc.

(*Honours.*)

1. Discuss the liability on a contract of a minor who represents himself as of full age.

2. Write a short history of varying opinions as to the effect of contracts of a lunatic.

3. Where a difference of local laws is in question, how is the lawfulness of a contract to be determined? Answer fully, stating exceptions.

4. What must be shewn with regard to a representation relied on by the party misled by it for rescinding a contract? Answer fully.

5. "The rules of evidence are generally the same in civil and criminal proceedings." Mention exceptions.

6. Mention and exemplify the different forms of proof of handwriting by resemblance.

7. Where several persons are proved to have combined to effect an illegal purpose, indicate the extent to which the acts or sayings of one may be used in evidence against another of them.

8. Explain accurately the maxim, *Res judicata pro veritate accipitur.*

9. A foreign bill of exchange falls due and is dishonoured at a place in or near to which there is no notary. What is necessary to be done? Answer fully, indicating cases in which protest is excused.

10. What is the effect on the rights of a defendant of pleading payment into Court, and paying in an amount and denying at the same time the whole debt sued for? Answer as fully as you can.

CORRESPONDENCE.

UNLICENSED CONVEYANCERS.

To the Editor of the LAW JOURNAL:

SIR,—The unlicensed conveyancer flourishes more powerfully than ever in the country districts, in spite of our long continued efforts to suppress him—and the unhappy practitioner is slowly but surely *starving*.

For your enduring advocacy you have earned our gratitude—while the Legislature has treated us infamously from a fear of losing popularity—and while the benchers have remained, with one or two exceptions, inert—*you* have not been ashamed to raise your voice against an evil that is ruining our profession, and degrading its members. When the Mahon Bank failure caused a flutter in financial circles, the Dominion Government, to protect innocent depositers, passed an Act compelling private bankers to add the word "unincorporated" to their advertisements and signs; would it not also be in the interest of the public to compel every unprofessional conveyancer to have attached to his card, and to every instrument prepared by him, the word "unlicensed," to show persons that in employing him they do it at their peril? If the Government will not even do *this*, then we should not be compelled to pay such an unreasonable amount for our annual certificates. In my town the Division Court clerk does an enormous conveyancing business, and does not confine himself to that either but is, to all intents and purposes, a solicitor aided and abetted by the Government which should suppress him, and by a firm of city solicitors of high standing, so high indeed, that they can, and do act unprofessionally with impunity. Thanking you for your continued support, and trusting that the matter will not be permitted to rest until some measure of relief and justice is obtained,

I am,

Yours respectfully,

RED TAPE.

CONVEYANCING EXTRAORDINARY.

To the Editor of the LAW JOURNAL:

DEAR SIR,—The following specimen of conveyancing came under my observation the other day. The genius who drew up the instrument is to be found in the Georgian Bay region. It was a mortgage from a married woman—she was made a party of the first part, the husband was made a party of the second part. The property, was her separate property; all through she was the mortgagor, the husband not being joined.

The richest part is where the conveyancer comes to deal with the printed part of the dower clause: he strikes out "wife" and substitutes "husband," and makes the clause say that "the said party of the second part, husband of the said party of the first part hereby bars *his* dower in the said lands."

The mortgage has been assigned; the assignee

now wants to sell the mortgage. The person to whom it is offered has been with it to me for advice. You propounded a conundrum the other day; I hereby submit another: "How much is this mortgage worth assuming the face of it to be $1000?

Yours,

SOLICITOR.

[The subject of dower seems to be one which has exercised the mind of the unlicensed conveyancer considerably of late—our readers may remember a case quite "on all fours" with the above on which we recently commented; and a short time ago we came upon an interesting extension of the commonly received doctrine as to the wife's estate of dower, in a conveyance by two executors under a power of sale given them by the will, worthy farmers both, whose wives had been compelled to journey to town for the important purpose of barring *their* "dower in the said lands."—ED. L. J.]

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

Benjamin's Treatise on the Law of Sale of Personal Property, 4th Am., from the 3rd Eng. ed. 2 Vols. 1883.

Cases decided on the British North America Act, 1867, in the Privy Council, the Supreme Court of Canada, and the Provincial Courts, by John R. Cartwright, Vol. 2; Toronto, 1883.

The Judicial Interpretation of Common Words and Phrases, by Irving Browne; San Francisco, 1883,

Handbook of Roman Law, by Dr. Ferdinand Mackeldy; translated and edited by Moses A. Dropsie, from the 14th German ed. 2 Vols. in one; Philadelphia, 1883.

Commentaries on the Law of Statutory Crimes; including the Written Laws and their Interpretation in General. What is special to the Criminal Law; and Special Statutory Offences as to both Law and Procedure; by Joel Prentiss Bishop, 2nd ed.; Boston, 1883.

A Concordance of Words and Phrases Construed in the Judicial Reports, and of Legal Definitions contained Therein, by John D. Lawson; St. Louis, 1883.

Appleton's Annual Cyclopædia and Register of Important Events for the Year 1882; new Series, Vol. 7; New York, 1883.

The Practice at Law, in Equity, and in Special Proceedings in all the Courts of Record in the State of New York, by William Watt, Vol. 7; Albany, 1880.

The Laws of the State of New York relating to Railroads, with cases decided under and applicable to the Sections, also an Index to Records filed in the office of the Secretary of State relating to Railroad Corporations, 1883, by a Councillor at Law; Albany, 1883.

Are Legislatures Parliaments? A Study and Review, by F. Taylor; Montreal, 1879.

A Practical Treatise on the Law of Absconding Debtors, as Administered in the Province of Ontario, with Forms, by James S. Sinclair, Q.C., Judge of the County Court at Hamilton; Toronto, 1883.

The Consolidated Municipal Act, 1883, with Index, by George Bell; Toronto, 1883.

The Law of the Federal Judiciary: a Treatise on the Provisions of the Constitution, the Laws of Congress, and the Judicial Decisions Relating to the Jurisdiction of, and Practice and Pleading in, the Federal Courts, by Samuel T. Spear; New York, 1883.

Story's Conflict of Laws, 8th ed., by M. M. Bigelow; Boston, 1883.

The American Citizens' Manual, Governments (National, State, and Local), the Electorate, the Civil Service, the Functions of Government (State and Federal), by Worthington C. Ford; New York, 1883.

Lefroy and Cassels' Notes of Practice Cases, Being Notes of Decisions and Dicta (England and Canadian) illustrative of the Ontario Judicature Act and Orders, subsequent to Annotated Editions of the said Act up to July 1, 1883, by A. H. F. Lefroy, and R. S. Cassels, Barristers-at-law; Toronto, 1883.

A Treatise on the Criminal Law, by Francis Wharton, L.L.D.; 8th edition, in two volumes; Philadelphia, 1880.

Law Society of Upper Canada.

OSGOODE HALL.

MICHAELMAS TERM, 47 Vict., 1883.

During this term the following gentlemen were entered on the books of the Society as Students-at-Law, namely:—

Graduates—Thomas Francis Lyall, William George Hector McAllister, Charles Joseph McCabe, John Shaw Skinner, Walter Stephen Harrington, Francis Norman Raines.

Matriculants—Donald Reginald Anderson, Edward Peel McNeil, Charles Elliott, Isaac Benson Lucas, William Francis Bannerman, Frederick Bernard Featherstonhaugh, David Stevenson Wallbridge, Frederick Clarence Jarvis, Ira Standish, William Patrick McMahon.

Juniors—Ashman Bridgman, Hugh Crawford Rose, Colin McIntosh, Walter A. Thrasher, David Alexander Dunlop, Francis Brown Denton, Magloire Raoul Routhier, Heber Stuart Warren Livingston, John Alexander Chisholm, Paul Jarvis, Marcus Herbert Simpson, Thomas Scullard, John Harper.

The following gentlemen were called to the Bar, namely:—

George Kappele, honour man and gold medalist; Cornelius Arthur Masten, Robert Alexander Porteous, James Arthur Mulligan, John Soper McKay, William John Taylor, Thomas Chapple, Charles Macdonald, Rufus Adams Coleman, Chaucy Giles Jarvis, Fernando Elwood Titus, Archibald James Reid, Alexander Mackenzie, William Henry Barry, Edwin Bell, William John Wallace, John Johnstone Anderson Weir, James Garbutt, Ferguson James Dunbar.

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

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

Students-at-Law.

1884.

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

1885.

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a Selected Poem:—
1884—Elegy in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

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

FIRST INTERMEDIATE.

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

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

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

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

FOR CERTIFICATE OF FITNESS.

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

FOR CALL.

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

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

CURRICULUM.

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

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

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

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

5 The Law Society Terms are as follows:

Hiliary 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 Hiliary, Easter, Trinity and Michaelmas Terms.

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

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

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

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

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

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

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

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

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

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

FEES.

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