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As our Ontario readers are probably aware, the Revised Statutes came into force from and after the 31st December last. They have not, however, as is also known, been distributed, and are not obtainable, though they can be seen in some favoured localities. It is perplexing and annoying not to be able to refer to laws that are in force, and which have to be acted and advised upon. The reason of the difficulty is said to be that the index is not ready. As the index of our last volume, which is a vastly more troublesome matter to make than an index to these statutes, was in the printer's hands before the end of the year, it clearly would not have been an impossibility to have had the latter ready at least within the same period. We presume it will be very elaborate. The statutes have been, speaking generally, so badly and defectively indexed up to the present time that we should be glad to be able to commend the labours of the person, whoever he may be, who has in charge the work under consideration, when the happy moment of its completion shall have arrived.

Unprofessional agents have, we presume, come to stay, and their existence cannot be ignored, though it may be deplored. Like mosquitos they probably have some use, though it is rather difficult to find out what it is. They have methods, some known to the law, some unknown, and some contrary thereto. They are not as often caught at illegal practices as should be. It is, therefore, refreshing to have an instance to record of their falling into the clutches of the law. A case occurred recently which may be noted: A man who calls himself the general manager of a collecting agency

in a city of the Dominion, undertook to collect a debt of some $30 from a verdant youth, by going to his premises, representing himself as a bailiff, and seizing and removing a quantity of goods from his premises, which he said he would hold until the debt was paid. The debtor being overpowered by the terror of the so called officer submitted to be robbed, but on mentioning the matter to a friend he was induced to indict the debt collector for robbery with menaces under s. 404 of the Criminal Code. The case was clearly proved, but the magistrate mercifully allowed the prisoner to go on suspended sentence, several respectable witnesses having spoken as to his previous good character. It is well to be merciful, though, perhaps, it was scarcely wise to let him off, as an example would have had a healthy effect.

The record of crime in the Dominion as set forth in the Government report for the year ending September, 1896, indicates an encouraging condition of things, the number of convictions being reduced from 5,474 in 1895 to 5,204 in 1896. Comparisons are odious, and statistics are not in all respects reliable, but one is compelled when speaking on this subject to refer to the remarkable contrast between the statistics above referred to and those of the country to the south of us. The *North American Review* gives some startling figures in connection with this subject, showing an enormous increase of crime in the United States as a whole, which, however, does not obtain in the best of the New England States, where the statistics are exceedingly satisfactory. The increase of crime is due largely to the large influx of population from Europe, which at one time was much sought after, but which has proved not to be an unmixed good.

The National Prison Association has recently referred to the matter at their annual meeting in Austin, Texas. The report of the Committee on Criminal Law Reform states that the progress of crime was "absolutely frightful," and recommends some changes in the handling of criminals as follows:

"Greater security of punishment; doing away with all technicalities in trials; abolishment of juries; making convictions more summary and trial more speedy; depriving defendants of the right to appeal to a higher court; offering rewards for the discovery and conviction of criminals; sterilization of defectives, both moral and physical; abolishment of poverty; removing or restricting the power to pardon; prohibiting the use of intoxicating liquors; reconstruction of the ethical code of lawyers; curing inherent defects in the law, as distinguished from its enforcement; developing a scientific motherhood; state regulation of marriage; restricting immigration; popular education and colonization of criminals; the reformation of criminals by the abolition of the definite sentence."

Some of these suggestions are even more remarkable than the report itself, and the fact that they are even hinted at as desirable is a sufficient indication of the difficulties to be grappled with. A moment's reflection on these suggestions shows that they hint broadly at a state of things appalling to contemplate. We trust this arraignment of governors, judges, lawyers, juries, and the administration of justice generally is overdrawn. The committee admits that some of these suggestions are practically impossible, but thinks that by following them as closely as possible the morals of the country would be greatly improved, and crime correspondingly decreased.

WILL AN ACTION OF NEGLIGENCE LIE FOR DECEIT?

We publish in another place a letter from Mr. J. S. Ewart, Q.C., of Winnipeg, referring to our criticism on an article written by him which appeared in the *Canadian Law Times*.

The first thought which a perusal of this letter suggests is that, even if the writer is correct in his assertion that our criticism of his article was "in no sense an answer to his article," he has himself made up most handsomely by the candid declaration with which he sets out for any shortcomings which may justly be laid at our door; a writer who, in a treatise which is presumably compiled for the use of prac-

titioners, admits that "it is not the law" that an action of negligence will lie for deceit is virtually in the position of a barrister who throws up his brief and consents that judgment be entered against his client. It seems to us that a gentleman who, in an ordinary legal treatise, undertakes to show not merely that there have been erroneous applications of accepted principles in particular cases, but that the accepted principles themselves are erroneous, seems to be singularly deficient in a saving sense of humour. All practicing lawyers desire to know what the law is. Comparatively few care to know what any individual author thinks it ought to be. The interence is obvious. Any writer who is ambitious to appear in the role of a legal reformer should carefully separate that part of his book which professes to state the effect of "the authorities" from the disquisitions in which he roams into the unfamiliar, though perhaps more attractive, regions of the ideal. In the present instance we venture to think that it would be well to adopt an arrangement which would do away with that unpleasant feeling of insecurity which must inevitably result from a doubt whether the reader has before him the ex cathedrâ utterances of those professors of the law who are termed judges, or the theoretic lucubrations of the author himself.

But we do not wish to insist too strongly upon the technical advantage which our opponent has given us by signing a confession of judgment in our favour. The question raised deserved to be argued briefly upon the merits also.

In the first place we should like Mr. Ewart to explain upon what theory he deems himself entitled to assert that the citations in our former criticism prove that "we are both right." In our innocence we had imagined that the two dicta quoted would serve as a most conclusive vindication of our own view. One who undertakes to crush an adversary by the extremely agreeable dialectic manœuvre of turning his own cases against him should at least extend to him the courtesy of indicating in what respect he has mistaken the meaning of those cases. But perhaps this assertion is intended to be a sort of proleptic condensation of the substance of the latter

part of his letter. At all events we shall treat it as such provisionally, and proceed to the assault of the citadel of his position.

"Why," it is asked, "should we have a class of actions based upon a breach of duty, and decree that deceit, the gist of which is breach of duty, should be excluded from it?" Were it not for the fact that Mr. Ewart supposes this question to be one which will cause us serious embarrassment, we should have thought it "as plain as way to parish church," that it is wholly irrelevant. There is no warrant whatever for the assumption which underlies it, for "the authorities" do not exclude deceit from the class of actions referred to. The essential point of difference between our author and those obstinate people who will persist in standing "*super antiquas vias*" is not at all what is here insinuated, but simply this—that the former starts with the hypothesis that negligence is a generic term, covering all breaches of duty, while from the standpoint of the latter there are several distinct kinds of duties, among which are included both that duty the breach of which constitutes negligence, and that duty the breach of which constitutes deceit.

The dialectic situation, therefore, seems to be truly hopeless. If, on the one hand, Mr. Ewart is incapable of seeing, or declines to admit, that the real issue presented is that which we have here set forth, it is impossible to meet him in argument, for we shall have reached that deadlock which results when antagonists are unable to agree upon any starting point. If, on the other hand, he does admit that we have fairly stated the issue between us, we confess that our case has no support except what it obtains from "the authorities," and he has apparently taken up the position that these have no final jurisdiction in the premises. Will our correspondent show us some way out of this dilemma?

The discussion has now once more reached a point at which we should be warranted in cutting it short, pending a more definite restatement of Mr. Ewart's case—an amendment of his pleadings, so to speak—which will furnish some common ground upon which the argument can be continued.

But the present article would scarcely be complete if we did not express our opinion as to the source of what we fear those who, like ourselves, feel constrained to defer to the "authorities" will persist in regarding as an error on Mr. Ewart's part. We shall thus, perhaps, facilitate the attainment of that "consummation devoutly to be wished"—a clearer understanding of the actual nature of the issue between us.

According to one very eminent "authority" whose definition has constantly been quoted with approval by other scarcely less eminent "authorities," negligence is simply "the absence of care according to the circumstances"(*a*), and the same fountains of the law, as it is usually administered, have also supplied us with the doctrine that the only standard for ascertaining what constitutes the "absence of care" is the conduct which a man of ordinary sense, knowledge and experience is accustomed to show in his own affairs (*b*). This is the only instance in which jurisprudence frankly acknowledges its inability to furnish any practical test for determining the quality of acts except the behaviour of the typical citizen who is supposed to perform all his social duties faithfully. There is no need to take the opinion of a jury upon the question whether it is tortious to utter or print a defamatory statement, to knock a man down with a bludgeon, or trample down his flower beds. All that has to be decided in such cases is whether the evidence shows that the defendant committed the acts which are alleged to render him guilty of slander, battery, or trespass. That they are an infringement of legal rights is assumed. And the same principle obviously holds good in regard to obligations arising out of contract.

But it is clear that acts of the class just referred to may also be considered as tortious, for the reason that they are such that the typical citizen who fulfils his various duties to the other members of the community in which he lives, will refrain from committing them. Theoretically, therefore, the conduct of this typical citizen may be appropriately used as a test

(*a*) Willes, J., in *Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 679 (p. 688).
(*b*) See Pollock on Torts (3 ed.) p. 24; Beven Negl. pp. 16, 17.

by which to determine the quality of *all* acts which are complained of as injurious. The classification of torts indicated by this consideration is obvious. All breaches of duty are not examples of negligence, the simple reason being that the area covered by the conception expressed by term "negligence" is co-extensive with that defined by acts which the typical citizen will not do in his special character of a man of average prudence, skill, diligence, etc., while the area covered by the conceptions expressed by the words which denominate other kinds of tortious conduct is co-extensive with that defined by acts which such typical citizen would not do in his special character of a man who deals uprightly with his neighbours and abstains from damaging them in person or property.

This form of statement not only enables us to see at a glance the fallacy involved in Mr. Ewart's theory, but also, if we are not much mistaken, indicates the origin of that fallacy. The character of the typical citizen is a composite one. He is prudent, skilful, and diligent, but he is also actuated by motives which induce him to avoid committing such wilful acts as those we have already referred to by way of illustration, as well as from many others. Mr. Ewart, however, draws no distinction between what such a citizen will do, as a man in the exercise of prudence, skill and diligence, and what he will do as a man who will not defame his neighbour, or inflict damage upon his person or his property. Logically such a confusion between the various moral qualities is wholly inexcusable, and the sole grain of truth which underlies it is that the special quality which saves a man from being negligent will be apt to save him from infringing legal rights, for the incidental reason that it is commonly inexpedient to commit such infractions (*a*). But this fact by no means warrants the conclusion that it is in his character as a careful man that the careful man is honest, just and the like. Such a doctrine

(*a*) The "authorities" have fully recognized that there is this point of contact between negligence and fraud in the line of cases which hold that gross negligence may be evidence of "*mala fides*" and involve the same civil consequences—a doctrine also embodied in several aphorisms of the Roman Law. See II Beven on Negl., pp. 1624, *et seq.* We wonder, by the way, that Mr. Ewart did not strengthen his position by referring to this theory. It is the only instance, so far as we know, in which the "authorities" can be said, to lend any countenance to his peculiar ideas.

savours of the infancy of metaphysics and jurisprudence, and is entirely out of harmony with the tendencies of that evolutionary process which, by the introduction of more and more minute differentiations, is constantly imparting increased clearness and definiteness to the fundamental conceptions of every science. In other words we are invited to adopt a theory which implies retrogression not advance. This fact alone is an insuperable obstacle to its acceptance.

After having made these rather lengthy comments upon what we regard as the essential and fundamental error of our antagonist, it would, we think, be trying the patience of our readers too far if we undertook to deal with all the minor details of his letter. One or two of his points, however, seem to call for a summary notice.

We do not feel at all dismayed or disconcerted by the question which Mr. Ewart triumphantly puts in one of the concluding paragraph of this communication. "When," he asks, "was a plaintiff non-suited in negligence because the defendant swore that the act complained of was accompanied by design and purpose?" Never, we sincerely hope, for the veriest ignoramus of a backwoods Dogberry would scarcely commit such a solecism in procedure as to deny the plaintiff the right of having his case tried on the theory on which his declaration is framed. Here again we seem to trace the effects of that lack of humour which we have already deplored in our adversary. Such an extraordinary potency we surely never attributed to an oath of the defendant's by any pleader, dead or alive. And even if this objection be waived it is certainly not easy to see what material advantage the defendant would gain by deliberately alleging that his act was wilful instead of being merely careless. Would Mr. Ewart expect that a client of his would be mulcted in smaller damages if the jury adopted the view suggested by such an allegation? We strongly advise him not to trifle with the common sense of the average panel by any such endeavour to turn the flank of his opponent.

In another place Mr. Ewart, with a condescension for which, under the circumstances, we cannot be too grateful,

observes that he agrees with Brett, M.R., in the definition of negligence quoted in our former criticism, provided that by the word "care" he means "care for the rights of others." If the quotation had been read a little more attentively, he might have avoided the very mild inconsistency of deferring to the "authorities" even to this extremely limited extent; for he would have noticed that the learned judge twice uses the word "skill," as one which belongs to the same circle of qualities as "care." Clearly, therefore, the condition upon which Mr. Ewart agrees in this instance to accept a judicial exposition of the law cannot be fulfilled. The use of the term "skill" as one implied in or analogous to "care" shows that the conception present to the mind of the Master of the Rolls was one very different from that which is conveyed by the term "regard." The alternative expression clearly refers us to the principle, that a man may subject himself to the penalties of negligence by undertaking a duty without having the skill necessary for its proper performance; and this liability is wholly independent of the question whether he has been heedful attentive to avoid injuring the person and property of others during such performance. The futility of attempting to reach firm ground in the manner suggested by Mr. Ewart will be still more strikingly apparent when it is considered that we may, consistently with the recognized signification of words, and without tautology, speak of a "wilful," as well as of a "careless" disregard to the rights of others. This phrase, in fact, has really no juridical meaning, unless it be construed in the sense of a violation of the rights of others—a sense which is, at best, decidedly forced, and which, even if accepted, would make it nothing more than a loose and unscientific paraphrase of the familiar technical expression "tort."

But our correspondent probably will not shrink from this conclusion. It merely illustrates once more that retrogressive quality of his theories upon which we have already animadverted, and brings us back again to a realization of the utter impossibility of finding any common ground upon which we

can argue with him. Fruitful discussion is manifestly out of the question where one of the disputants starts with the assumption that the official jurists on the bench are entirely warranted in their position that the rights of litigants may be settled with greater facility by dividing torts into several classes, while the other disputant reasons from a non-official theory of his own which not only does away with all distinctions between those classes, but elevates what has always been considered as merely a species to the dignity of a genus, and makes it cover every case in which a duty is violated.

ENJOINING A BOYCOTT.

The American legal journals have been discussing at considerable length the recent judgment of the United States Circuit Court of Appeals in the case of *Hopkins* v. *The Oxley Stave Co.*, on appeal from the Circuit Court of Kansas. A report of the case will be found in the *Albany Law Journal* of Dec. 4. The application of the plaintiff company was to prevent the members of a labor organization (defendants in the Court below) from conspiring to carry out a boycott against the company, having for its purpose the compelling the latter to withdraw from use a newly invented machine for hooping barrels. The contention of the defendants was that this machine largely reduced the number of men employed in the manufacturing of barrels. The substantial question was whether the agreement entered into by the members of the defendants' association to boycott the contents of all barrels and packages made by the company which were hooped by machinery, was an agreement against which a court of equity could afford relief. The court below granted an injunction, and the defendants appealed. The contention of the appellants was that it was a lawful agreement, such as they had a right to make and carry out for the purpose of maintaining the rate of wages then paid to journeymen coopers, and that

being lawful the injury occasioned to the plaintiff company, no matter how great, was an injury against which no Court could afford redress.

The injunction was sustained by the appellate court, which held that the combination amounted to a conspiracy to wrongfully deprive the plaintiff company of its right to manage its business according to the dictates of its own judgment, and that the action of the members of the combination to prescribe the manner in which the company should do its manufacturing, and to attempt to enforce obedience to its orders by a species of intimidation no less harmful than actual violence, could not be allowed. The Court also referred to the further consideration that another result of the conspiracy would be to deprive the public at large of the benefits to be derived from a labour-saving machine of great utility.

There can scarcely be a doubt as to the soundness of this decision and it is somewhat of a surprise that there should have been a dissenting judge. This consisted largely of a vigorous indictment of trusts and all the villainies following thereon. This judge, who was apparently talking to the galleries, held that a boycott is a legal weapon if used in a peaceable, orderly manner, in which expression he was, perhaps, partly right and partly wrong, but in fact it was simply begging the question. Most certainly any view other than that expressed by the majority of the Court would result, as one of our exchanges says, in the institution and perpetuation of a system of tyranny, the evil consequences of which it would be difficult to over-estimate.

Another decision of recent date on the subject of boycotting is *Hartnett* v. *Plumbers' Supply Association*, decided by the Supreme Judicial Court of Massachusetts. In this case an attempt was made to coerce an alleged debtor into paying a disputed bill by procuring suspension of his credit among persons in the same line of business with the creditor. The Court held that the facts constituted a conspiracy to coerce persons through a species of business duress which could not be permitted. This case is reported in 47 N.E. Rep. 1,002.

A STRANGE MURDER CASE.

In the year 1815, after the fatal 15th of June, a favorite officer of the defeated Emperor, determining not to live under the rule of any other sovereign, made his way to Canada. He went into what was then the wilds of the primeval forest, now a portion of the County of Hastings in the Province of Ontario. There he married the only daughter of an Indian chief, whose tribe roamed through that region. The only daughter of that marriage married a white man by the name of Davis, and several children were the issue of this union.

One of the sons, Peter Edwin Davis, was the hero of a remarkable trial for murder which took place at Belleville before Chief Justice Armour in April, 1890. The case is somewhat remarkable, not only from the facts of the case itself, but from the callousness displayed by witnesses closely related to the accused and to the victim.

One William Emory, who had been married to Mary Martha McGarvey, was found dead in September, 1889, in a hay marsh where he had been mowing. His rifle, which he had with him, was found about six feet away from the dead body, with the muzzle driven with force into the marsh some six or eight inches. It was quite certain that his death was occasioned by a bullet from this rifle. No signs of powder were found upon his clothes. The rifle was empty. The bullet had gone quite through the body shattering the spine; and death must have been instantaneous. There was nothing to indicate suicide and it seemed a clear case of murder.

Suspicion at once fell upon Peter Edwin Davis. He was a stalwart, muscular man, over six feet in height, and straight as an Indian. Having something of the roving habits of his ancestry on the distaff side, he made his living by gathering ginseng, a plant, the root of which is esteemed in China a very valuable medicine, and which is exported in considerable quantities to that country.

After a coroner's inquest had been held, Davis and Mrs. Emory, the wife of the deceased, were arrested and were put

on their trial upon the same indictment. Mr. W. R. Riddell represented the Crown, while the prisoners were defended by R. C. Clute, Q.C., and the late S. B. Burdett, Q.C.

It was proved by the evidence of Stephen Davis, the brother of the prisoner Davis that the latter had said that he understood that Emory was going to shoot him, and that he would try and get the first ball in if he could; that shortly before the murder the prisoner asked him where Emory was, and on being told "at home," he answered with a fearful oath, "He had better be at home. I will have the blood of them that are making enemies for me."

This evidence was given with an indifference and callousness which one would not expect of any witness giving such evidence against even a stranger, but coming as it did (and apparently with perfect truthfulness) from a full brother of the prisoner, it caused a shudder to run through the court room. The brothers of the female prisoner gave evidence in much the same way. One of them swore that Davis had said that if he ran across William Emory, and Emory "mislisted" him, he would shoot him. Another of the brothers swore that he had seen the prisoners standing hand in hand, and a sister of the female prisoner swore that she had seen the latter sitting on Davis' lap. It was also proved by the brothers and sisters of Mrs. Emory that she had shown great agitation when Davis was accused or suspected of the murder, and cried "The Emorys will hang him yet." These people gave evidence with the utmost candour, and there was not the slightest feeling apparent of any concern as to how the evidence would affect their sister. One of them gave strong evidence against the male prisoner, of the threats made by him some time before, that he would ultimately marry Mrs. Emory, no matter who stood in the way; that he would marry her within a year, and that he would think no more of taking Emory's heart's blood than a dog's. A lad, another brother of Mrs. Emory, proved that Davis had said that he had half a mind to kill Emory with a club. This was about three weeks before the murder. He further gave evidence that he had carried letters from Mrs. Emory to Davis, who

was then in the woods. A cousin of the male prisoner gave evidence that shortly before the murder he had said that he was about to be married to a girl with four M's to her name. On being asked who it was, he said, Miss Mary Martha Masson. No person of that name was known or had been heard of by any of the witnesses.

A constable gave evidence showing the strong feeling entertained by Mrs. Emory for Davis. She frequently asserted that she would willingly die in his stead, that if he were hanged her heart would break, that she would have suffered death before she would have said a word against him, etc.; and upon his trunk being searched there were found letters from her to him, one of which was as follows;

"my dear cousen it is with much pleasure I take my pen in hand to right thes few lines to you i know you like me but i do like you if you loved me as well as i lov you you would be here all the time i know but you do not i see for if you did you would take me to the i love you every day and that is makes me sick so much love is higher then eny other thing my and did tremble so that i could not right plane good by be cind in all you say and that others may be cind to you if you would mary me I would may you dont say know it is to bad that you dont like me for i love you it is to bad you air promised for i love you so well."

There were also found a miniature of Mrs. Emory and a Christmas card on which was written "Mary M. McGarvey, Oh my dear, remember me, E. Davis." Further evidence was given by neighbors to show that the prisoners were frequently together, and that on one occasion when a shot was fired in the woods the female prisoner left her house and went in the direction of the shot and being followed by her husband turned on him and abused him in most fearful language for following her.

The movements of the prisoner, Davis, were traced from the time when he was said to have threatened to shoot Emory. He went from that part of the country to his uncle's some twenty or thirty miles away, got there his rifle which he had previously left in his uncle's charge, and left, saying he was going to be married. His movements were traced from his uncle's

home to a point within half a mile of where the murder took place where he was seen at a time which could not have been more than a few hours, and probably not more than half an hour before the time of the shooting. At this point in the course of the trial a dramatic incident occurred. Davis had throughout been sitting, leaning forward with his mouth partially open, watching the proceedings languidly, and apparently without taking much interest. An old Irishwoman was in the box giving evidence showing that he was near to the place of the murder at a time near to the time at which the murder must have taken place. Upon being asked how she identified him she pointed directly at him with a long skinny finger and said, "I have no difficulty in recognizing him, I know him. He has a tooth out of the front of his mouth. A little boy that was there after he left laughed at him having a tooth out." Upon this being said Davis shut his mouth with a snap, started back, throwing his head up, while his eyes flashed with anger. During the remainder of the trial he never opened his mouth but retained that position so that the tell tale gap could not be seen.

Davis' movements after the murder were traced by unimpeachable evidence. It was shown that he went away from the scene of the murder immediately after it must have taken place, and ultimately hid himself in the woods. Had it not been for suspicion resting upon one of the brothers of Mrs. Emory it might be that he would have escaped entirely. But when she found that one of her brothers was suspected, she permitted herself to be used as a decoy, and brought about Davis' arrest. The following letter was written by her to him:

"Mr. Edwin Davis Millbridge Ont. in hast

"Marmoar September 26th, 1889 oh my Dear Edwin its with mutch truble that i take my pen in hand to let you know that will is dead and the Emoreys has put you down for it he was shot in the march but know one nows how but Emorys say that you dun it and that it was maid up between you and me oh Ed everyone says if you wood come and say i haird you have got a warrent for me i and say i never dun it and i am willing to let them do there worst mr bounter says he

knows it would bee a loot in your favor for he says that their is not a mark nor a brack to bee fond nor thair is no witness agance you but he says if you should hair it and try to get away tht it would bee offle bad agance you oh my darling if you think it is best come at one oh my dear I do wish I could see you right of but know matter what comes or goes i will never beleve that you dun it may god help us both for i dont know the menet their will be a warrent for me but i think that the lord will help us out of our truble oh do come to me at once if you can if i am not at home come right to fathers for i have not been home ever since and i will tell you what to do for i have found out a good dll and the say if the cant pruve inny thung againce you that you can make it hot for george emorey for skendel oh my dear i am so onsey that i dont know what to do my Dear we are all well and i hope you are the same oh my dear dont for get me for i am sure that i never will for get you my dear i think you had bter come and sho them that you are not afraid for i know that you nev dun it but do as you think best but the say it would be so mutch better for you for it wood sho them you was inused and was not afraid to come so good Bye my Dear love."

This letter read between the lines is a curious psychological study.

The evidence against Mrs. Emory proved conclusively that she had reason to believe that her husband would be slain by Davis, but there was nothing to show that she approved of it or took any part in it. The jury after a short absence brought in a verdict of guilty against Davis, but acquitted Mrs. Emory.

A curious point as to the advisibility of evidence arose in this case. There was no ruling upon the point as the Counsel for the Crown decided not to offer the evidence. At the Coroner's inquest a witness had sworn that he had met Emory the night before the murder coming from the hay marsh, that Emory was crying and upon being asked what was the matter he said that Davis had come to him and had said that if he (Emory) would leave the country so that he (Davis) might have Mrs. Emory, he would spare his life, but if not he would kill him. Emory stated to the witness that he had promised Davis to leave the country, but

he said now he had changed his mind and he would take his rifle with him to the swamp and run his chances. It would seem to be fairly clear that this was not evidence, but the fact of it not being so is a striking commentary upon the artificiality of the rules of evidence as administered by our courts. Nine hundred and ninety-nine out of a thousand would say, without hesitation, that a statement of this kind made by Emory immediately before his murder would be strong proof of who the murderer was.

Davis died as stolidly as he had lived; he showed no desire for life or fear of death. Mrs. Emory, it is said, haunted the vicinity of the gaol where Davis was confined until his execution. She afterwards married again.

W. R. RIDDELL.

A contemporary relates the following incident which is worth noting now that attorneys have passed off the scene and solicitors have taken their place: When Lord Tenterden was Chief Justice a gentleman pressing into his Court, which was crowded at the time, complained that he could not get to his counsel. Lord Tenterden: "What are you, sir?' "My Lord, I am the plaintiff's solicitor." Lord Tenterden: "We know nothing about solicitors here, sir. Had you been in the respectable rank of an attorney I should have ordered room to be made for you."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MORTGAGE—FORECLOSURE—INTEREST—REDEMPTION

Hill v. *Rowlands* (1897), 2 Ch. 361, is a case touching the law of mortgages. The action was for foreclosure, and judgment had been obtained, and in pursuance thereof an account taken, and a day six months distant appointed for redemption. The defendant desired to redeem at once without the appointment of any day, and claimed that the plaintiff was bound to accept the money at once with interest only up to the date of payment; but the Court of Appeal (Lindley, Lopes and Chitty, L.JJ.) agreed with Romer, J., that the usual course of the Court is to allow six months to redeem in order to enable the mortgagor to find the money, and on the other hand to enable the mortgagee to find a new investment, and that after judgment it is not competent for the defendant to dispense with the usual time for redemption, if the plaintiff object. Although before judgment the plaintiff could not refuse to accept the money if tendered with interest to the date of tender. In view of 51 Vict. c. 15, s. 2 (O), and R.S.C., c. 127, s. 7, it is possible that a different view might be arrived at by the Courts in Ontario, where a mortgagor has a statutory right to pay off the mortgagor without notice, or the payment of interest in lieu thereof.

STAYING PROCEEDINGS—NON-PAYMENT OF INTERLOCUTORY COSTS—VEXATIOUS PROCEEDINGS.

In *Graham* v. *Sutton* (1897), 2 Ch. 367, an application was made by the defendants to stay the proceedings until the costs of an appeal had been paid by the plaintiff. The Court of Appeal (Lindley, Lopes and Chitty, L.JJ.), though conceding that according to the modern practice the mere non-payment of interlocutory costs is no longer of itself a ground for staying proceedings by the party in default, nevertheless

ordered the stay in the present case, on the ground that it appeared that the plaintiff had used the process of the Court vexatiously and oppressively.

BICYCLE—ARREST OF RIDER—NEGLECT TO CARRY LAMP.

Hatton v. *Treeby* (1897), 2 Q.B. 452, is a decision on a case stated by justices. By the Local Government Act, 1888, persons riding bicycles at night are required to carry lights. The complainant was riding a bicycle at night without a light and the defendant, a constable, had called on him to stop, and, upon his refusing to do so, had caught hold of the handle bar whereby the complainant was thrown to the ground, and the complainant thereupon summoned the constable for assault. The justices found that the constable did not know the name and address of the complainant, and could not have ascertained them without stopping him, and that in so stopping him he used no more force than was necessary, and they were of opinion that as the complainant was committing an offence punishable on summary conviction, within view of the constable, he was justified in doing as he did, and they dismissed the complaint, subject to the opinion of the Court on the case stated. The Divisional Court (Collins and Ridley, JJ.), however, were of opinion that as the Act gave no power to apprehend without warrant a person committing a breach of its provisions, the act of the constable was illegal, and the appeal was allowed.

FIXTURES—MOVABLE CHATTELS—ANNEXATION TO FREEHOLD—STUFFED BIRD COLLECTION.

In *Hill* v. *Bulleck* (1897) 2 Ch. 482, the Court of Appeal (Lindley, Lopes and Chitty, L.JJ.), have affirmed the decision of Kekewich, J. (1897), 2 Ch. 55 (noted ante vol. 33, p. 656), holding that a collection of stuffed birds attached to movable wooden trays placed in iron glass fronted cases affixed to the walls of a mansion house, were not to be treated as annexed to the freehold, but were movable chattels, and did not pass to a tenant for life of the mansion.

COUNTER CLAIM—LIBEL—ACTION BY FOREIGN STATE—ORDS. XXI. R. 15: XIX. R. 27—(ONT. RULES 254, 298).

South African Republic v. *La Compagnie Franco-Belge* (1897) 2 Ch. 487, was an action brought by the plaintiffs (a foreign state) against the defendants for the appointment of a new trustee of a fund raised upon debentures issued by the defendants, and guaranteed by the plaintiffs, and which by agreement of the parties were to be vested in two trustees, one of whom had died. The defendants by way of counter claim set up an alleged libel by the plaintiffs, and claimed damages therefor. On motion of the plaintiffs, North, J. struck out the counter claim and the claim for damages, and his order was affirmed by the Court of Appeal (Lindley, Ludlow and Chitty, L.JJ.), on the ground that if the case had been one between private individuals within the jurisdiction a counter claim for libel in such a case would be struck out and the defendant left to bring a cross action, as such a claim could not conveniently or properly be tried in an action to appoint a new trustee, and that the fact that the plaintiffs were a foreign state and therefore not amenable to a cross action for libel, was an additional reason why such a claim should not be allowed to be linked on to the present action. And the order was held to be justified by Ord. xxi. r. 15 (Ont. Rule 254), or Ord. xix. r. 27 (Ont. Rule 298).

TRACING DESCENT—HEIR AT LAW INHERITANCE ACT, 1833 (3 & 4 W. 4, C 106) SS 1, 2, (R S.O. (1887) C. 108, S 14)

In re Matson, James v. *Dickenson* (1897) 2 Ch. 509. The question to be determined was the manner in which real estate descends under the old law of descent in force in Ontario prior to the Devolution of Estates Act, 1886, under the following circumstances. The land in question was purchased in 1798 by one James Fictor. He died in 1804 intestate, and leaving one son and two daughters. The son entered as heir at law, and died intestate in 1862, leaving a sister, and a nephew and niece (the children of a deceased sister). The nephew became lunatic, and his moiety was

sold, and on his death the proceeds of the sale devolved as realty, and the question was how the heir to the deceased nephew's moiety was to be ascertained, was the descent to be traced from the original purchaser, James Fictor, or from the mother of the deceased nephew? Kekewich, J., by a judicious extension of the doctrine of *Cooper* v. *France*, 19 L. J., Ch. 313, held that the descent should be traced from the nephew's mother, notwithstanding the words of the Inheritance Act, 1833, s. 2. (R.S.O. 1887, c. 108, s. 14.)

RELIEF OVER AGAINST CO-DEFENDANT.

In re Holt (1897) 2 Ch. 525. This was an action brought against a tenant for life and the executor of a deceased trustee, of a settlement alleging that the deceased trustees had committed a breach of trust by advancing the trust funds to the tenant for life and her husband. The executors in their statement of defence claimed relief over against the tenant for life, a married woman, alleging that the alleged breach had been committed with her consent, and asking to be indemnified out of her interest in the trust estate. No notice had been given to the tenant for life of this claim, but at the trial of the action leave was given to the executors, without going into evidence, to apply in chambers, with reference to enforcing their rights, if any, to indemnity against the tenant for life.

COSTS INTERLOCUTORY APPLICATIONS ADJOURNED TO TRIAL. COSTS RESERVED.

British Natural P. P. Association v. *Bywater* (1897) 1 Ch. 531, was a motion after the trial for certain interlocutory costs, which had been reserved. Bryne, J., who heard the motion, stated that the following directions had been made by the judges as to interlocutory costs, viz.: "Where interlocutory applications have been ordered to stand to the trial, and are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action and taxed accordingly, and need not be mentioned in the judgment. When interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned, in the judgment or order, or allowed on taxation, without the special direction of the judge."

ALIMONY—CRUELTY.

In *Russell* v. *Russell* (1897) A. C. 395, the House of Lords have by a majority of one decided that a false charge of having committed an unnatural criminal offence brought by a wife against her husband, although published to the world, and persisted in after she did not believe in its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation. The Lords in favour of this opinion being Lords Herschell, Watson, Macnaghten, Shand, and Davey, and those of the contrary opinion, Lord Halsbury, L.C., and Lords Hobhouse, Ashbourne, and Morris.

RAILWAY—RIGHT OF RAILWAY TO EXCLUDE PERSONS FROM STATION.

The Perth General Station Committee v. *Ross* (1897) A. C. 479, was an action in a Scotch Court to determine the question how far a railway company has a right to exclude persons not being travellers from admission to their station, or to impose on such persons conditions of admittance. The controversy arose from the fact that the railway company had a hotel in connection with their station, and they refused to admit other hotel proprietors or their servants, except upon the terms that no such persons should wear any distinctive badge or livery. The House of Lords (Lords Halsbury, L.C., Watson, Davey and Macnaghten) reversing the decision of the Scotch Court held that the railway company had the right to do as they had done. Lord Morris, however, dissented from this judgment.

LIFE INSURANCE—PROVISO FOR CASH PAYMENT OF PREMIUM—ONUS PROBANDI—INSURER'S AGENT—PAYMENT OF PREMIUM BY NOTES.

London & Lancashire Life Assurance Co. v. *Fleming*, (1897) A.C. 499, determines a very important point on the law relating to insurance. The action was brought to recover on a policy of life insurance, which contained a provision to the effect that it was not to be in force until the first premium was paid, and that if a note be taken for the first or renewal premium, and not paid, the policy should be void at and from default. The defence was that the premium had not been

paid, and that the policy was therefore not in force. The evidence showed that the agent had accepted a note for the amount of the premium, which note had been discounted, but had not been paid at maturity, but that the agent had been charged with the premium in an account current with the assurance company and had given his note to the company in discharge of the account. At the trial Meredith, C.J. C.P., held that the premium had been paid: the Court of Appeal were equally divided, Hagarty, C.J.O., and Burton, J.A., being of opinion that there had been no payment of the premium established; while Maclennan and Osler, JJ.A., thought the evidence established payment of the premium. The Judicial Committee of the Privy Council (Lords Macnaghten and Morris and Sir R. Couch and Sir Henry Strong) were of the opinion that the onus of proving payment was on the assured and that he had not discharged that onus, that there was no presumption arising from the agent's acceptance of the note, that he was to raise money thereon and pay the premium. Nor did the charging of the premium against the agent by the company in his account create any presumption of an intention on the part of the company to treat their own agent as the agent of the insured, or the policy as subsisting contrary to its express terms, the appeal was therefore allowed and the action dismissed. We may note that the judgment of the Privy Council was delivered by Sir Heny Strong.

MISDIRECTION—WITHDRAWAL OF CASE FROM JURY—SETTING ASIDE VERDICT.

Kingston v. *Kingston* (1897) A. C. 509, was an action of ejectment. At the trial the plaintiffs' title was admitted, and the defendants set up title by possession. Conflicting evidence was offered as to the defendants' possession, and the jury were unable to agree on a verdict for the plaintiff, and they were thereupon recalled by the judge, who directed them that as the plaintiffs had not proved possession by themselves for twelve years prior to the action, their verdict should be for the defendant. This their Lordships of the

Privy Council (Lords Macnaghten and Morris, and Sir R. Couch and Mr. Way), held to the misdirection, and they allowed the appeal and ordered a new trial. In this case the judgment of the Privy Council was delivered by Mr. Way.

AGREEMENT—CONSTRUCTION—MONOPOLY OF SUPPLY.

Kimberley Waterworks Co. v. *De Beers Consolidated Mines* (1897) A.C. 515, was an appeal from the Supreme Court of the Cape of Good Hope, in which the point at issue was the construction of an agreement whereby the defendants agreed, during the continuance of the agreement, to obtain and purchase all the water required for their mines from the plaintiff company, and no other person or company "provided that nothing herein contained shall prevent (the defendant company) from using any water obtained by it from the mines or its wells or reservoirs." The defendants had procured a supply of water for their mines from a municipal corporation gratis, and the question was whether this amounted to a breach of the agreement. The Judicial Committee of the Privy Council (Lords Hobhouse Macnaghten and Morris, Sir Couch and Mr. Way), were of opinion that it did, and was not within the proviso above referred to.

PAROL EVIDENCE—WRITTEN AGREEMENT

Bank of Australasia v. *Palmer* (1897) A.C. 540 turns upon a question arising on the the law of evidence. The plaintiff (Palmer) claimed damages for the dishonour of a cheque. He alleged that the cheque was drawn in pursuance of an agreement under which the bank was to allow him an overdraft or cash credit for six months certain, and that it was dishonoured in breach of this agreement. The defendants relied on a letter subsequently signed by the plaintiff, which purported to make the prior agreement terminable at any time at the option of the defendants. The question on the appeal was whether the judge at the trial was right in admitting evidence of a conversation between the plaintiff and the

defendant's agent at the time the letter was signed. The Bank contended that it ought to have been rejected because it was offered in contradiction of the written agreement, or part of the written agreement between the parties. The plaintiff on the other hand claimed it was properly admissible to explain the circumstances under which the plaintiff's name was subscribed to the letter which was no part of the agreement, but which was placed before him for his signature by the defendant's agent after the agreement was concluded. Their Lordships of the Privy Council (Lords Macnaghten and Morris and Sir R. Couch and Mr. Way) were of opinion that the evidence was admissible, notwithstanding that the subsidiary document in effect purported practically to make the prior agreement revocable at the option of the defendants. Lord Morris, who delivered the judgment, says: "Their Lordships cannot help observing that, if the bank should in future contract to advance money for a definite period, and at the same time desire to have the power of recalling the advance at their discretion, thus making the agreement nugatory, it would not be amiss to state clearly, what they do mean, and to take care that their meaning is understood by the person with whom they are dealing."

JUSTICES—DISQUALIFICATION—BIAS.

The Queen v. *Burton*, (1897) 2 Q.B. 468, was an application against two justices to show cause why the conviction of one Young should not be quashed on the ground that Burton, one of the justices, was disqualified. The prosecution was brought at the instance of the Incorporated Law Society against Young for falsely pretending to be a solicitor, and he was convicted and fined 40s. Burton was a member of the society, but no part of the fine was payable to the society. Lawrence and Collins, JJ. refused the motion, being of opinion that the facts furnished no reasonable ground for supposing that there would be any bias on the part of the magistrate, who was not disqualified from acting either on the ground of having any pecuniary interest in the proceedings, or as being a prosecutor. It may be noticed that the motion here was for a writ of certiorari to remove and quash the conviction. In Ontario it has

been customary first to obtain a certiorari, and then, upon the return, to obtain an order nisi to quash. *Reg.* v. *Huggins* (1895) 1 Q.B., 563, noted ante vol. 31, p. 264, was relied on by the applicant, but was held not to be applicable, on the ground that there the prosecution was brought for the benefit of a small class of privileged persons, of whom the justice was one, and in the present case the ordinary members of the Society had no control over or responsibility for any prosecution by the Society, and the case was held to be governed by *Allinson* v. *General Council*, &c. (1894) 1 Q.B. 750, noted ante vol. 30, p. 387.

Correspondence.

DECEIT AND ESTOPPEL.

To the Editor of the Canada Law Journal.

SIR,—Will you allow me to point out that your criticism of my article upon "Deceit and Estoppel" is, in no sense, an answer to it. You assert that the authorities are against me. I granted that much, when I wrote that what I alleged was "not usually said." You agree with me in this, and give citations to prove that we are both right. I contend that for an action of deceit a count, framed in negligence, ought to lie. You say "that such is not the law." Granted.

But should it not be the law? Is, or is not, an action of negligence an action for neglect of duty? Practically, you say: "Yes. But there are neglects of duty, for which negligence will not lie." Deceit, you admit, is a breach of duty; some action will lie for it; but not, you think, an action of negligence. Were it not for authorities, too easily accepted and followed, that is a conclusion which, I venture to say, few would arrive at. Why should we have a class of actions based upon breach of duty, and decree that deceit, the gist of which is breach of duty, should be excluded from it? Following Fry, J., you argue that "fraud imports design and purpose; negligence imports that you are acting carelessly and without that design." But is that distinction supportable?

Suppose that with the design of injuring my neighbour I allow accumulations of water to inundate his mines, am I not liable in an action of negligence? When was a plaintiff non-suited in negligence, because the defendant swore that the act complained of was accompanied by "design and purpose?"

You say that if negligence will lie for deceit that "is tantamount to saying that every cause of action gives rise to an action of negligence, inasmuch as every cause of action arises by reason of a breach of duty, i.e., for a neglect to perform such duty."

For my own part I would not include (in this generalization) causes of action arising out of contract (*a*); although historically much could be said in favour of their inclusion (*b*). But I would quite agree that all torts might be well sued upon as for breach of duty. You would say with Brett, M.R., that there must be "the neglect of the use of ordinary care or skill." I would not choose such language for general statement (although I would grant its perfect applicability to the case which the learned Judge had in hand); but if the word "care" be understood as meaning "care for the rights of others" (and that may well be), then I would agree that neglect of such carefulness is necessary for an action of negligence.

But I would also say that, when a man fraudulently represents to me that a merchant is wealthy, in order to obtain credit for him, from me, such a man is not observing or practising that care with regard to my rights which the law demands of him; that he is guilty of negligence of those rights; that for such negligence (plainly stating it as for breach of his duty to me) he is liable; which is equivalent to saying that I may sue him for negligence.

My proposed work is upon estoppel; not upon deceit.

JOHN S. EWART.

Winnipeg, Dec., 1897.

[We refer to this letter in our editorial columns.—ED. C.L.J.]

(*a*) *See Heaven* v. *Pender*, 1883, 11 Q.B.D., at p. 507.

(*b*) In early periods breaches of contract were so far (even public) wrongs, that judgment for plaintiff was accompanied by a fine to the King.

REPORTS AND NOTES OF CASES

Province of Ontario.

HIGH COURT OF JUSTICE.

Divl. Court.] PETRIE *v.* MACHAN. [Oct. 25, 1897.

Division Court—Jurisdiction—Contract—Fixed amount—Interest.

Defendant by a contract in writing signed by him directed to the plaintiff instructed the latter to sell certain saw mill machinery as follows: "Please enter in your descriptive catalogue of machinery for sale the . . . . to net me $1,000. I hereby authorize you to sell (setting out terms). I retain to myself the right of selling or of exchanging or of otherwise disposing of said goods in whole or in part without the assistance of (plaintiff) but agree in such case to pay you ten per cent. commission on the above amount . . . same commission to apply in case of withdrawal of offer." Defendant gave away the machinery to his brother who afterwards without the assistance of the plaintiff sold it for $350.

Held, that plaintiff was entitled to recover $100 as commission and that his claim was within the jurisdiction of the Division Court. Judgment of Division Court reversed.

R. McKay, for appeal. *Aylesworth*, Q.C., contra.

Boyd, C.] PALMER *v.* MAIL PRINTING CO. [Nov. 1, 1897.

Lease—Agreement as to vacancy—Condition—Breach—Avoidance of lease—Execution—Corporate seal.

In a lease was a provision that "In case the said premises . . . become and remain vacant and unoccupied for the period of ten days . . . without the written consent of the lessors this lease shall cease and be void, and the term hereby created expire and be at an end . . . and the proportionate part of the current rent shall thereupon become immediately due and payable and the lessor may re-enter and take possession" . . .

Held, that the term did not cease by the lessee going out and leaving the premises vacant for ten days, but that the agreement embodied in the lease was a subsequent condition, a breach of which could only avoid the lease at the instance of the lessors.

Semble. A lease by a corporation is validly executed if the corporate seal is affixed by the proper custodian.

E. B. Ryckman, for plaintiff. *J. B. Clarke*, Q.C., for company.

Street, J.] CONN. *v.* SMITH. Nov. 27, 1897.

Insolvency—Advances by bank to insolvent—Pledge of goods as security—Bank Act—Claim by creditor to recover from bank moneys arising from sale of goods—58 Vict., c. 23, s. 1 (O.)—"Invalid against creditors"—Retroactivity of statute—Warehouse receipts—Exchange of securities—53 Vict., c. 31, s. 75, sub-sec. 2 (D)—Collateral security—Mortgage—Declaration—Parties.

Action by a simple contract creditor of the defendant Smith to recover judgment for a debt, and on behalf of all creditors of Smith to recover from the defendants the Merchants Bank of Canada certain moneys and property of Smith alleged to have come to their hands by means of breaches of the Bank Act. Thirteen transactions were attacked. Eleven of them related to pledges of hay and grain made by Smith to the bank, in or before 1893, to secure advances. The plaintiff alleged that in these transactions there had been no contemporaneous advance, and that the pledge, whether in the form of a bill of lading or a warehouse receipt or a direct pledge, was invalid under s. 75 of the Bank Act, 53 Vict., c. 31. It was not disputed that the bank had before action disposed of the hay and grain, received the proceeds, and applied them in satisfying moneys advanced to Smith.

The plaintiff claimed, as one of the creditors of Smith, who had ceased before this action to meet his liabilities, to be entitled to obtain the moneys so received by the bank, and to apply them in payment of creditor's claims, under s. 1 of 58 Vict., c. 23 (O.) which is as follows: "In case of a gift, conveyance, assignment, or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift . . . was made shall have sold or disposed of the property or any part thereof, the money or other proceeds realized therefor by such person may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift . . . was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but shall exist in favour of all creditors of such debtor, in case there is no such assigment"

The evidence showed that there was sufficient pressure by the bank to exclude the intent of fraudulent preference in the transactions in question.

Held, that the words "invalid against creditors" should be treated as limited to transactions invalid against creditors, qua creditors, and not as extending to transactions declared invalid for reasons other than those designed to protect creditors.

Held, also, that the Act of 1895 did not apply, because the money had been received by the bank before it was passed, and that it was not retrospective, as was argued, because it conferred a right which had no previous existence, and did more than merely make an alteration in procedure.

The next question concerned a quantity of hops still remaining unsold, which were held for the bank in a warehouse, under a receipt given by Hiscox, the lessee of the warehouse. The defendant Smith was in the habit

of buying hops from time to time, and giving the bank his own warehouse receipts or direct pledges for the purpose of raising money to pay for them. Then at the request of the bank he constituted his bookkeeper, Hiscox, his warehouseman, and Hiscox issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held by the bank, there being no further advance made when the new securities were given. By sub-sec. 2 of s. 75 of the Bank Act, the bank, on receipt of the goods, may store them and take a warehouse receipt for them without forfeiting any existing right.

Held, that this exchange of securities should be treated as authorized under that sub section.

The remaining question related to the rights of the bank under a mortgage upon a block of brick buildings made by Smith to one Steele, and assigned to the bank. The plaintiff asked for a declaration that the advances by the bank upon this mortgage or some part thereof, were contrary to the Bank Act, and that the property was free from the mortgage, or that the amount received under it might be paid into Court, and applied in payment of the claims of Smith's creditors.

Held, that no such declaration should be made in the absence of Steele, who was liable to the bank as endorser of a promissory note of Smith for 8,000 collateral to the mortgage.

Aylesworth, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendants.

Ferguson, J.] NEIL *v.* ALMOND. [Dec. 13, 1897.

Execution against lands—10 years old—Renewal—Lien money charged upon land—Proceeding under fi. fa.—R.S.O. c. 111, s. 23.

The right of an execution creditor under a fi. fa. lands is a "lien," the money mentioned in it is money "charged upon lands" taking steps to sell under it is a "proceeding" under above statute: and such proceeding under a fi. fa. more than ten years old even although renewed from year to year will be enjoined.

W. H. P. Clement, for purchaser. *W. H. Blake*, for execution creditor. *R. B. Beaumont*, for a mortgagee.

Meredith, C.J., Rose, J., MacMahon, J. CONNOLLY *v.* DOWD. [Dec. 14, 1897.

Discovery—Examination of party—Residence out of jurisdiction—Subpœna—Special order.

Appeal by the plaintiff from an order of FALCONBRIDGE, J., in Chambers, affirming an order of the Master-in-Chambers, requiring the plaintiff to attend, at his own expense, for examination for discovery pursuant to a subpœna and appointment served upon him at Toronto for his examination there, he being only temporarily in Toronto when served, his residence being out of the jurisdiction, and he having failed to attend for examination pursuant to the subpœna and appointment.

D. Armour, for the plaintiff, contended that he could not be required to attend upon payment of ordinary conduct money, or without a special order, the Rules only providing for the examination at Toronto of parties resident in the county of York.

J. M. Clark, for the defendant Dowd, contra.

Held, that, owing to the changes in the Rules since *Comstock* v. *Harris*, 12 P.R. 17, that case is no longer an authority, and a party residing out of the jurisdiction cannot now be examined in the way that was attempted here. Rules 439, 443, 477.

Appeal allowed with costs to the plaintiff here and below in any event.

Armour, C.J., Falconbridge, J. } LIEZERT *v.* TOWNSHIP OF MATILDA. [Dec. 14, 1897.

Municipal corporation—Injury from non-repair of highway—Notice of damage.

Held, that the provisions of sec. 531, sub-sec. 1 of the Consolidated Municipal Act, 1892, as amended by 57 Vict., c. 50, s. 13, and re-amended by 59 Vict., c. 51, s. 30, as to the notice requisite to be given to municipal corporations, in order to hold them liable for accidents arising from non-repair of highways, are applicable only to cases of actions brought against a township, city, town, or incorporated village alone, and not to cases brought against two or more of them, as, in this case, against a township and an incorporated village jointly.

The cause of action is still a several one as regards each corporation, although the statute requires that both shall be joined in the action; and although the plaintiff may have failed against one corporation by reason of want of notice to it, he may still be entitled to recover against the other corporation which had due notice.

I. Hilliard, for plaintiff. *A. Johnston*, for defendants.

Meredith, C.J.] LIGHT *v.* HAWLEY. [Dec. 15, 1897.

Chattel mortgage—Validity of—Security taken in name of trustee—Affidavit of bona fides—Conversion of goods—Measure of damages—Amendment—Adding claim—Pleading

A chattel mortgage to secure a debt was made to a nominee of the creditor, as trustee for him. In an action by an assignee of the mortgage against the assignee for the general benefit of creditors of the mortgagor, for conversion of the mortgaged chattels, it was contended that the mortgage was invalid because the mortgagee could not properly make the usual affidavit of bona fides, as there was no debt due to him.

Held, notwithstanding there was nothing on the face of the mortgage to show the fiduciary position of the mortgagee, that the mortgage was valid.

Brodie v. *Ruttan*, 16 U.C.R. 209, applied and followed.

At the time the goods were taken by the defendant out of the plaintiff's possession, they were in the hands of the bailiff of the latter for sale under

the power contained in the mortgage, and when the defendant intervened and sold as assignee, the same bailiff conducted the sale, and the amount realized was the same as would have resulted from a sale under the power.

Held, that the plaintiff was entitled to recover as damages for the conversion no more and no less than was realized by the sale.

A part only of the goods which the defendant took out of the possession of the plaintiff's bailiff was sold; from the remainder of them the defendant realized nothing, claims having been made to them by other persons, which the defendant did not contest, though he did not actively take part in handing them over to the claimants. The plaintiff, having in his pleading limited his claim to the goods actually sold, was at the trial refused leave to amend by adding a claim for the other goods.

Clute, Q.C., and *John English*, for the plaintiff. *J. L. Whiting*, for the defendant.

Boyd, C., Ferguson, J.
Robertson, J. } O'CONNOR *v.* GEMMILL. [Dec. 18, 1897.

Solicitor—Services in Exchequer Court of Canada—Agreement with client—Compensation en bloc—Invalidity—Champerty—Ascertainment of proper compensation—Taxation—Quantum meruit.

The action was against a firm of solicitors for an account of moneys received by them for the plaintiff in respect of a claim against the Crown, for which action was brought by them for the plaintiff in the Exchequer Court of Canada, and the claim compromised. In answer to the action the defendants set up an agreement with the plaintiff by which they were to receive for their services one-fourth of the amount recovered for her. This agreement was attacked by the plaintiff as champertous and otherwise void. By a consent judgment a reference was directed to a taxing officer, who found that the agreement was invalid, and that the defendants should deliver a bill of costs for their services, which should be taxed.

Held, that the agreement was invalid, and was no bar to the investigation of what was fairly due to the defendants.

Ball v. *Warwick*, 50 L.J. N.S. Q.B. 382, and *In re Attorneys and Solicitors' Act*, 1 Ch. D. 573, referred to.

The solicitors were not engaged or doing business as officers of the Courts of Ontario, and were not acting under the provisions of the Solicitors Act, R.S.O. c. 147. Their services were rendered as solicitors of the Exchequer Court of Canada. Though they obtained their status as solicitors of that Court because they were already solicitors in Ontario, yet their acts were not as solicitors in any Court in this Province, and they were not subject to the summary jurisdiction affecting officers of the Ontario courts, nor to the special restrictions and rules affecting solicitors' costs and charges found in s. 31 et seq. of R.S.O. c. 147.

Williams v. *Odell*, 4 Pri. 279 *Re Anonymous*. 19 L.J. N.S. Ex. 219, and *Re Johnson*, 37 Ch. D. 433, 15 App. Cas. 203, referred to.

The solicitors must be left to the remedies given by the general law, *i.e.* in the absence of a tariff of costs between solicitor and client in the Exchequer

Court, they must recover upon a quantum meruit, and upon such evidence as was appropriate in the forum of litigation, in this case the Province of Ontario. *Paradis* v. *Bosse*, 21 S.C.R. 419, and *Armour* v. *Kilmer*, ante p. 29, referred to.

F. A. Anglin, for the plaintiff. *Arnoldi*, Q.C. for the defendants.

Robertson, J.] IN RE DOWLER *v.* DUFFY. [Dec. 27, 1897.

Division Court—Garnishee—Judgment summons—Committee—Examination—Affidavit—R.S.O. c. 51, s. 235—57 Vict., c. 23, s. 18.

The County Court Judge, presiding in a Division Court has no power to commit a garnishee for default in making payments pursuant to an order after judgment; and s. 18 of 57 Vict., c. 23, has not extended his powers in that behalf.

Before a garnishee can be examined under ss. 235 to 248 of R.S.O., 1887, c. 51, as now permitted by s. 18 above, it is necessary that the creditor, his solicitor or agent, should make and file the affidavit required by s. 235.

H. J. Duncan, for the garnishee. *Masten*, for primary creditors.

Rose, J.] [Dec. 30.

BANK OF TORONTO *v.* INSURANCE COMPANY OF NORTH AMERICA.

Particulars — Application for — Close of pleadings — Affidavit—Necessity—Trial.

After issue joined upon the statement of defence, the plaintiff cannot obtain an order for particulars of the defence without an affidavit showing the necessity for particulars. They cannot be for the purpose of pleading, and there must be evidence that they are required for the purpose of trial. *Smith* v. *Boyd*, 17 P.R. 463; 33 C.L.J. 435, followed.

R. McKay, for plaintiffs. *Ryckman*, for defendants.

Boyd, C., Rose, J. } [Jan. 3.
Falconbridge, J. } REGINA *v.* STERNAMAN.

Criminal law — Murder — Poisoning — Design—Evidence—Admissibility—Death of former husband of prisoner.

Upon the trial of the prisoner for the murder of her husband, who was living with and attended by her in his illness, it was proved that his death was due to arsenical poisoning. In order to show that the poisoning was designed and not accidental, the Crown offered evidence to prove that a former husband of the prisoner had been taken suddenly ill after eating food prepared by her, and that the circumstances and symptoms attending his illness and death were similar to those attending the illness and death of the second husband, and that such symptoms were those of arsenical poisoning.

Held, that the evidence was admissible.

B. B. Osler, Q.C., and *J. R. Cartwright*, Q.C., for the Crown. *W. M. German*, for the prisoner.

Boyd, C.] BRERETON *v.* CANADIAN PACIFIC R. W. CO. [Jan. 4.

Jurisdiction of Ontario Courts—Injury to land in another province—Local or transitory action.

The plaintiff complained that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises were alleged to be in the Province of Manitoba, where the plaintiff himself resided, and in which the defendants were legally domiciled, and actually carried on business. The defendants denied the plaintiff's title to the land upon which the house and furniture were situate.

Held, that the action, as regards the house, was in trespass on the case for injury to land through negligence, and this form of action was, like trespass to land, local, and not transitory, in its nature. The action, therefore, so far as the house was concerned, could not be entertained by the Ontario Court; but aliter as to the furniture.

Companhia de Mocambique v. *British South Africa Co.*, (1892) 2 Q.B. 358, (1893) A.C. 602, followed. *Campbell* v. *McGregor*, 29 N.B. Reps. 644, not followed.

Shepley, Q.C., for plaintiff. *Aylesworth*, Q.C., for defendants.

Rose, J.] GOLD MEDAL FURNITURE CO. *v.* LUMBERS. [Jan. 5.

Landlord and tenant—Agreement for termination of tenancy—"Disposing of" demised premises—Notice to quit—False representation—Covenant for quiet enjoyment—Disturbance—Breach—Acquiescence—Damages.

The plaintiffs were lessees of the defendant of part of a factory, under a lease made in pursuance of the act respecting short forms of leases, which contained a proviso that in the event of the defendant disposing of the factory, the lessees should vacate the premises, if necessary, on notice or payment of a bonus. Shortly after the lease was made, the defendant notified the plaintiffs that he had disposed of his interest in the factory premises, and they would be required to vacate the portion occupied by them. The plaintiffs vacated the premises, under protest, and brought this action for damages for fraudulent representations. By an agreement made between the defendant and G., it was recited that the parties "desire so to manage and deal with the said lands and premises as to cause the same to return an income greater than the expenditure now required to be made"; and it was provided that G. was to have superintendence of the building and of obtaining tenants at rentals greater than the rentals then being received; that the defendant was to advance money to make improvements; that whatever G. did was to be done for and in the name of the defendant, who was to collect all rents and returns; the leases to be in the defendant's name, and the tenants to be his tenants. Then there was a provision for a sub-lease of the premises to G. upon the happening of certain events, at a named rent, and for an option for purchase by G. at a fixed price at any time before the expiration of the sub-lease.

Held, that the defendant had not by this agreement disposed of the fac-

tory, within the meaning of the proviso in the plaintiffs' lease; but, as the defendant had not intentionally, wilfully, or maliciously misled the plaintiffs, and was acting in good faith upon what he believed to be his rights, there was no false and fraudulent representation to the plaintiff. *Peek* v. *Derry*, 14 App. Cas. 337, followed.

Held, however, that the plaintiff was entitled to succeed for a breach of the covenant for quiet enjoyment of the premises "without interruption or disturbance from the lessor;" for where the lessor covenants against his own acts, it is not material whether the act assigned as a breach was lawful or unlawful; and the acts here done were in breach of the covenant, for the defendant had no right to give the plaintiff notice to quit, and no right to complain that the plaintiffs acted upon the notice without waiting for an action to be brought. *Edge* v. *Boileau*, 16 Q.B.D. 117, followed. *Cowling* v. *Dickson*, 45 U.C.R. 94, 5 A.R 549, discussed.

It was urged that an agreement made after the notice to quit, under which the plaintiffs vacated the premises before the day named in the notice, was an acquiescence in the defendant's demand.

Held, not so; the plaintiffs went out under protest, and going out earlier merely lessened the damages. The damages to be assessed upon the same principle as in the case of an eviction.

S. H. Blake, Q.C., and *F. C. Cooke*, for plaintiffs. *Watson*, Q.C., and *S. C. Smoke*, for defendant.

Street, J.] WARREN *v.* VAN NORMAN. [Jan. 6.

Way—Right of—Prescription — Termini—Slight deviations—Interruptions.

The evidence showed that the plaintiff and his predecessors in title had for upwards of twenty years before the commencement of the action used and enjoyed as of right a way over the defendant's land from the plaintiff's land to a highway. The termini a quo and ad quem had not varied during the twenty years: but at two points, about fourteen years before action, one of the plaintiff's predecessors slightly altered the line of the way for the purpose of going round muddy spots, and the user of the original line at these two points was abandoned for the substituted one. These deviations were short as compared with the length of the way.

Held, that they did not operate to do away with the plaintiff's right to claim the way between the termini, that way having been substantially used during the whole period; and the plaintiff was entitled to have his right to the way between the termini declared, but should be confined either to the original or substituted line. *Wimbledon, etc., Conservators* v. *Putney*, 1 Ch. D. 362, Gale on Easements, 6th ed., p. 327, *Rouse* v. *Bardin*, 1 H. Bl. 352, and *Payne* v. *Shedden*, 1 M. & R. 382, referred to.

Slight interruptions by the defendant were insufficient to prevent the statute from running. *Carr* v. *Foster*, 3 Q.B. 581, and *Flight* v. *Thomas*, 11 A & E. 688, referred to.

J. A. Hutcheson, and *A. A. Fisher*, for plaintiff. *Britton*, Q.C., and *W. B. Carroll*, for defendant.

Boyd, C., Ferguson, J.
Robertson, J. } IN RE LUCKHARDT. [Jan. 10.

Dower—Mortgaged lands—Purchase of equity of redemption—Discharge of existing mortgage—New mortgage—Registration—Equitable dower—42 Vict., c. 22—Legal estate—Momentary seisin.

A married man, making a purchase of certain lands, as part of the consideration, paid off an existing mortgage and obtained a statutory discharge in favour of his vendor. On the same day the vendor executed a conveyance to him, and he executed the mortgage in which his wife joined to bar dower, in favour of the vendor, to secure the balance of the purchase money. All three instruments were registered on the same day, the discharge first, the conveyance second, and the mortgage third. The purchaser subsequently made another mortgage, his wife again joining to bar dower, under which the lands were sold.

Held, affirming the judgment of ROSE, J., (ROBERTSON, J., dissenting), that the dower of the wife of the purchaser did not attach.

Per FERGUSON, J.: The right to equitable dower in cases other than those where the equitable estate comes into existence by the husband, being the owner of the land, executing a mortgage upon it in which the wife joins to bar dower, is unaffected by 42 Vict., c. 22, and stands as it stood before that Act was passed; and as in the present case the husband was not, at the time of the making of the mortgage, the owner of the land, but there was an outstanding mortgage upon it made by one who was or had been the owner, the case did not fall within the statute, and the appellant was not entitled to the new right spoken of in *Martindale* v. *Clarkson*, 6 A.R.I.

It was contended that the husband became entitled to the legal estate at the time of the discharge of the mortgage which was in existence when the equity of redemption came into his hands, and when he gave back another mortgage for part of the purchase money; but this contention could not prevail; upon the registration of the discharge, the legal estate which the mortgagee executing the discharge had, went directly to the purchaser's then existing mortgagee, without passing even momentarily through the purchaser.

W. David ... for Luckhardt. *J. C. Haight*, for receiver.

Armour, C J.,
Street, J. } BANK OF TORONTO *v.* QUEBEC FIRE INS. CO. [Jan. 17.

Discovery—Examination of officer of company—Assignor of chose in action—Rules 439, 441.

Rule 441 of the Rules of 1897 provides that where an action is brought by an assignee of a chose in action, the assignor may without order be examined for discovery.

Held, that this rule could not be extended by reference to Rule 439 or otherwise, to the examination of an officer of a corporation, the assignors of a chose in action.

R. McKay, for plaintiffs. *L. G. McCarthy*, for defendants.

Armour, C.J., Street, J.] JOHNSTON *v* GALBRAITH. [Jan 17.

Division Court—Appeal from—Issue as to satisfaction of judgment—Prohibition—Chambers.

An appeal by the plaintiff from an order of the Judge of the County Court of Halton dismissing an application by the plaintiff for a new trial of a question or issue tried by the Judge, upon oral evidence, in Division Court Chambers, as to the satisfaction of a judgment recovered by the plaintiff in the 2nd Division Court in that county. The plaintiff moved, in the alternative, for prohibition.

Held, that the appeal did not lie, and the application for prohibition should be made in Chambers.

R. S. Appelbe, for plaintiff. *D. O. Cameron*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

CROWN CASES RESERVED.

Full Court.] THE QUEEN *v.* HARTLEN. [Jan. 11.

Unnatural offence—Boy under age of fourteen held incapable of committing—Assault—Code s. 260.

Defendant, a boy under the age of fourteen years, was tried before the judge of the county court for the County of Halifax, and convicted of the offence of committing an unnatural offence upon the person of a younger boy.

Held, that at common law (which, in this particular, was unchanged by anything in the Criminal Code) defendant was incapable of committing the offence charged, and that the conviction must therefore be set aside.

Per RITCHIE, J.: If the act was committed against the will of the other party defendant could be punished for an assault under sec. 260 of the Code.

Attorney General, for Crown. *J. J. Power*, for prisoner.

Full Court] THE QUEEN *v.* TROOP. [Jan. 11.

Assault causing bodily harm—Rejecting of evidence as to statements made by witness before magistrate inconsistent with statements on trial—New trial.

Defendant was indicted, tried and convicted for an assault committed upon S., causing actual bodily harm. At the trial counsel for defendant, who gave evidence on his own behalf, proposed to ask certain questions with the view of showing that one of the principal witnesses for the prosecution when examined before the committing magistrate made statements at variance with her testimony given upon the trial of the indictment. The trial judge having rejected the evidence,

Held, that he erred in doing so, and that there should be a new trial.

The statement proposed to be given in evidence was one made by the witness as to what she and the accused said at the time the assualt was alleged to have been committed.

Held, that this was material to the matter in issue, and part of the res gestæ, and could be contradicted under the statute. Code ss. 700-701.

Attorney-General, for Crown. *W. E. Roscoe*, Q.C., for prisoner.

Full Court.] THE QUEEN *v.* CORBY. [Jan. 11.

Theft—Improper comment by prosecuting counsel on trial—New trial—Dominion Acts, 1893, c. 31, s. 4, sub-sec. 2.

Defendant was indicted for stealing a quantity of pine oil. He pleaded "not guilty," and on the trial gave evidence on his own behalf. The prosecuting counsel in addressing the jury commented unfavorably on the failure of the defendant's wife to testify.

Held, that the comment was a violation of the provisions of the Act (Acts of 1893, c. 31, s. 4, sub-sec. 2), and that defendant was entitled to a new trial.

Attorney-General for Crown. *A. Drysdale*, Q.C., for prisoner.

Full Court.] THE QUEEN *v* DAVIDSON. [Jan. 11.

Murder—Dying declaration—Belief of impending death.

On the trial of defendant on an indictment for the crime of murder, the Crown offered in evidence the dying declaration of the deceased, as follows: "He said he was shot. I said 'Do you really say you are shot?' He said 'I am shot in the body. I am going fast.' I said, 'Can't you take my arm and I will take you away.' He said, 'I can never walk again.' I said, 'For God's sake who shot you?' He said, 'Henry Davidson shot me. God help him. I hope he will not be hanged for it.'"

Held, that the evidence showed that deceased was speaking under a sense of impending death, and that the statement then made was properly received.

Held, further, that the fact that deceased asked for a doctor did not lead necessarily to the conclusion that he had still some hope of living.

Attorney-General, for Crown. *C. E. Gregory*, for prisoner.

Province of New Brunswick.

SUPREME COURT.

Vanwart, J.)
In Chambers.) KELLY *v.* KELLY. [Nov. 18, 1897.

Justices Court—Evidence—Title to land—Consent does not give jurisdiction.

Action in a Justices Court on a promissory note by endorsee against maker (the note having been endorsed to plaintiff after maturity). The defendant disputed liability on the ground that he had given the note for cordwood,

which had been cut on land owned by A., but which he discovered had been cut on Crown land adjoining A.'s lot, and on which defendant had a license from the Crown to cut. There were no lines run between the lots in question, and on the trial the issue was as to the title to the land on which the wood was cut, defendants' counsel stating that he would not object to the Justice's jurisdiction on the ground of the title to land coming in question. Defendant, subject to objection, gave evidence of his license to cut without producing the license. The Justice found that the wood was cut on the Crown land, but gave a verdict for the plaintiff for the amount of the note, less $4, deducted for stumpage. Defendants' counsel, on review, relied solely on the ground that the Justice having found that the wood was cut on the Crown land on which defendant held a license to cut there was no consideration for the note.

Held, that the evidence of the license being improperly estimated defendant had failed to make out a good defence, but that there must be a non-suit on the ground of the title to land coming in question, notwithstanding the agreement of the parties that the question should be tried by the Justice.

C. E. Duffy, for plaintiff. *C. W. Beckwith*, for defendant.

North-West Territories.

SUPREME COURT.

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

Richardson, J.] WOLF *v.* KOCH. [Nov. 4, 1897.

Practice—Judicature ordinance—Default judgment— Order dispensing with production of original writ—Endorsement of service of writ—Motion to set aside judgment—Irregularity.

Judgment in default of appearance. Material: Affidavit of bailiff dated Feb. 4th, 1895; of service on defendant at his residence; of copy of writ and statement of claim annexed to affidavit. On an affidavit of sheriff that bailiff had informed him he served original instead of copy of writ, an order, dispensing with production of original was made on April 6th, 1895, date of judgment, by Judge in Chambers was tried according to s. 30, sub-sec. 11 of the Judicature Ordinance. Original writ was not annexed to affidavit of bailiff; but copy writ bearing no endorsement signed by him, but merely an unsigned endorsement in handwriting of sheriff.

Affidavits filed on behalf of defendant deposed that he never resided at alleged place of service, that he was never served with writ or copy, and that he first became aware of proceedings by seizure by sheriff Sept. 21st, 1897, under writs of execution issued April 6th, 1895.

Held, that the weight of evidence showed non-service, that no affidavit of service had been filed in compliance with s. 80 of Jud. Ord. since the affidavit required was one of facts within deponent's own knowledge, and that affidavit of sheriff did not remedy defect in bailiff's affidavit, that Rule 15 of Order 9 of Rules of Supreme Court, England, 1883, is applicable in N.W.T. and

requires endorsement of service of writ, and that the application was made within a reasonable time. Further that the order made under s. 30, sub-sec. 11, did not dispense with proper proof of service of the original writ.

Order setting aside judgment, costs to defendant, no action against sheriff.

Rimmer, for defendant. *Ford Jones*, for plaintiff.

Book Reviews.

American Law Review.

Mr. Irving Browne writes an article for the last number on "The Allurement of Infants" in his usual sprightly style. The policy of modern law for the protection of juveniles, and the leading cases on the subject are discussed. The following is his conclusion: "Let me suggest that the leaning of judges in this matter is probably much influenced by their observation of their own small sons if they have any. Years ago I regarded the prevailing doctrine of the turntable case askance, but since I have been blessed and bothered with a grandson, I have become quite reconciled to it, and I own my allegiance to the Kansas judge who said: 'Everybody, knowing the nature and instincts common to all boys, must act accordingly.'"

Political Science Quarterly. Gunn & Co., 9 & 13 Tremont Place, Boston.

The December number of this excellent periodical, edited by the Faculty of Political Science of Columbia University, contains articles on a variety of subjects of interest to the general reader, and concludes with a valuable record of political events.

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BOOKS RECEIVED.

Beach on Trusts and Trustees—Central Law Journal Co., St. Louis, Mo., U.S.
Schoules on Bailments—Little, Brown & Co., Boston, U.S.
Alger on Promoters—Little, Brown & Co., Boston, U.S.
Gillett on Evidence—Bowen, Merrill Co., Indianapolis, U.S.
Law Quarterly Review—Stevens & Sons, London, Eng.
Wait on Engineering, &c., Jurisprudence—John Wiley & Sons, New York.
Newell on Libel and Slander—Callaghan & Co., Chicago, U.S.
Legislative Power in Canada—By A. H. Lefroy. Toronto Law Book Co.