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FOUR examiners for the Law School instead of three, as hitherto, have been appointed for the ensuing term of three years; their names being A. C. Galt, B.A., W. D. Gwynne, B.A., M. H. Ludwig, LL.B., and J. H. Moss, B.A.

THERE was a pleasant evening spent on the 16th ult., when a number of the judges and members of the Bar met to tender a reception to Sir Richard Webster, Q.C. It was very fitting that one so eminent should be welcomed by his brethren to the seat of law and learning in this Province. The chair was occupied by Æmilius Irving, Q.C., the Treasurer of the Law Society, and, of the vice-chairs, one was appropriately filled by Mr. Christopher Robinson, Sir Richard's colleague from Canada in the Behring Sea arbitration, and the other by Mr. Britton Osler. Some regrets were expressed that arrangements were not made by which a much larger number of the members of the profession could have been present to meet the distinguished stranger, but there was very little time at the disposal of the committee, and doubtless they did the best they could under the circumstances.

WE have received two letters from correspondents who take exception to the remarks made, *ante* p. 466, as to the supposed discrepancy between R.S.O., c. 108, s. 5, and R.S.O., c. 132, s. 23. They argue that the proper construction of the latter provision for the distribution of a married woman's separate per-

sonal property—"As if this Act had not been passed"—is not, as we suggested, that it is to pass wholly to her husband, but that it is now governed by R.S.O., c. 108, s. 5. It is possible that our correspondents may be right in this contention. At the same time, we are disposed to think that neither of them have given sufficient attention to an important difference which we pointed out which exists between the two sections. One, R.S.O., c. 108, s. 5, is a provision affecting "the real and personal property of a married woman"; the other, R.S.O., c. 132, s. 23, relates to "the *separate personal property* of a married woman." It is apparently assumed by our correspondents that the "personal property" and "separate personal property" are equivalent expressions; but we think the many decisions under the Married Woman's Property Acts, both here and in England, have decided that there is a very material distinction. It is only necessary to refer to the late case of *Crowe* v. *Adams*, 21 S.C.R. 342, to see this. The question is how would "separate personal property" pass if R.S.O., c. 132, had not passed? We still think it would devolve on the surviving husband. Our correspondents say "No," because R.S.O., c. 108, s. 5, provides that her husband is to have one half, and, subject thereto, it is to go "as if her husband had predeceased her." To which we reply that that section applies to "real and personal property," but not to "*separate* personal property," which the Legislature has made a distinct class of itself. However, we very gladly publish our correspondents' letters, and must leave our readers to form their own conclusions.

If there is one building more than another of which the people of this Province have cause to be proud of, it is, we think, Osgoode Hall. The central part, with its chaste and classic beauty, is the admiration of all who see it, and certainly one would never expect to see a building of this character permitted to go to ruin for want of the most ordinary attention. If the Province were bankrupt, one could understand the state of affairs; but it is too bad, with a copious supply of funds in the Treasury and an army of skilful workmen only too ready for a job, that a building of this kind should be permitted to suffer injury for want of necessary repairs. Owing to the defective

state of the roof in some places, considerable damage has from time to time been done to the interior of the building; and though we believe that defect has now been repaired, yet the tesselated pavement in the central part of the building is still suffered to remain out of repair in many places, and the loose tiles not only are in danger of being lost, but their loss will in time endanger the whole pavement. The work of repairing the pavement has usually been taken in hand during the vacation, but this year it seems to have been neglected, or at all events very inadequately performed.

We think we shall express the sentiments of the public, and certainly of the profession, if we protest against the criminal parsimony which affects to save money by withholding the necessary expenditure for protecting this beautiful building from deterioration, and we trust the Minister of Public Works will see to it that the repairs which from time to time are needed are more carefully attended to in the future.

Within the last few months we are glad to notice that alterations, and, we trust, improvements, have been made in the ventilation of the building and the various court rooms. This was a matter which ought long since to have been attended to, and we are glad to see that steps have at last been taken to remedy this very patent defect. We only hope the effort at improvement in this respect may be crowned with success.

While speaking of the building, we think a word on behalf of the fence which now surrounds it is also needed. This fence was erected at the cost of thousands of dollars, and yet it is being permitted absolutely to rot away for the want of the most ordinary attention.

LAW REFORM—A CONTRAST.

At the congress lately held at Chicago on Jurisprudence and Law Reform, a paper by the Hon. Dudley Field was read which treated in a graphic and entertaining way of the triumphs of the Great Republic in the realm of law reform.

The learned writer of the paper evinced considerable admiration of the strides which had been made in this respect; and, we are inclined to think, took rather more credit for American

lawyers and statesmen in this department than they are strictly entitled to. Notwithstanding the slowness of law reform in England and in this country, we believe it must nevertheless be admitted that both here and in England solid progress has been made, and that we are several years ahead in the matter of law reform of several, if not of all, of the States of the Union.

But even the Hon. Dudley Field, though disposed to take a somewhat optimistic view of the achievements of his countrymen, was compelled to own to at least one "fly in the ointment," and felt obliged to admit that the system of selecting judges for short terms by popular suffrage had proved a dismal and lamentable failure. We think he might also have very fittingly deplored the low estate to which the law has fallen in many States of the Union owing to the lack of decency and order, which too often characterizes its public administration.

It would have been a good object lesson for the writer of the paper to have taken his assembled hearers to view for themselves the way the law is actually administered in the great commercial metropolis of Chicago itself. So far as the external appearance of the Court House is concerned, they would have reason to admire the building set apart for the administration of justice; but as soon as they had entered within its walls, and seen the dirty-looking rooms, and remarked the utter lack of all order and decorum which prevailed therein, it is just possible they might be a trifle disillusionized, and still more so if they could then have been transported to any of the Canadian provinces across the border, and have observed how very differently justice is administered here.

It may savour of freedom of a certain class for a lawyer to sit on the edge of a table, swinging his leg backwards and forwards as he examines a witness: but it appears to us to be the freedom of the bar-room, and not that freedom to which a Bar which has a proper respect for itself should aspire. It may, too, be interesting as a sort of fake show for a judge to sit on a pivot-chair, so that he can keep himself swinging in a sort of semi-circle, now looking out of the window, and occasionally at the counsel addressing him. In Ontario such behaviour would not be indulged in by any judge who had any respect for himself, and few counsel would regard it otherwise than as a piece of ill-bred impertinence if, unhappily, any judge should so act. But in

Chicago such things seem to be accepted as perfectly normal methods of behaviour. We only hope that the quality of the justice administered in the dirty, grimy Chicago courts is better than these externals would lead one to expect.

There are a few Canadians who have, we think, an undue admiration for the material progress of our cousins across the border; but we think that they would be forced to admit that in their manner of administering law we have nothing to learn from them, and that, on the contrary, we have every reason to be thankful that we have adhered to British precedents in this important matter.

In the concluding paragraph of Mr. Field's interesting address, he bewails the excess of legislation to which his countrymen are subjected. This is an affliction with which Canadians are also too familiar, and which in these columns we have often protested against. For this he declares that there is no remedy but in restraining the scope of legislative power, supplemented by self-restraining legislators. The limitation of the scope of legislative power seems a drastic and dangerous expedient, not likely to find favour here, and we can only hope, therefore, that, in time, our legislators may learn that they display greater wisdom by leaving the law alone than by continually contriving new patches.

CONTRACTS FOR INTEREST.

A case was decided in Ireland some little time ago which has raised the righteous wrath of a writer in the *Irish Law Times*. His remarks are appropriate to some decisions in this country, on the subject of interest, and we certainly agree with his very pertinent observations. There, as here, the courts have been led away by a desire to checkmate the greed of unconscionable money-lenders, and have assumed to make laws instead of expounding them. The following is the article alluded to:

"The decision of the Court of Appeal in the very important case of *Rae* v. *Joyce* must necessarily attract the attention of all lawyers. The facts are simple, and may be said to be undisputed. Joyce, the defendant, lent Mrs. Rae £100 on a mortgage of her reversionary interest in a sum of £2,050, charging interest at the rate of sixty per cent. When the time came for paying the

borrower brought an action for relief against her contract, and succeeded in getting the Vice-Chancellor to reduce the rate of interest to seven, and the Court of Appeal to five per cent. The defendant had to pay his own costs in the lower court, and those of both sides on his second venture. Mrs. Rae was an adult, having the protection of her husband, of no mean intelligence, and acting with the advice of an independent and astute solicitor. Joyce was perfectly open and straightforward, and used no "pressure of circumvention," as the Lord Chief Justice remarked. On the other hand, the plaintiff, although she denied it, was fully aware that she had contracted to pay interest at the rate of sixty per cent. The Lord Chancellor confessed that there was a great deal of her evidence on which he must decline to act. For the purposes of this case, he believed that she had "overstepped veracity." The Lord Chief Justice found also that she had deliberately made a false case. In spite of all this, the plaintiff, who seeks to break her contract, and with this end comes into a Court of Equity with a reckless and unsustainable charge of fraud, is allowed to ride off triumphant, leaving the astonished money-lender to pay the costs. We wonder if he now understands the meaning of equity, or whether he is speculating on the occasional divergeness between law and justice. Looked at in another way, the case works out as follows: Given a reversioner, who wishes to raise money cheaply, but finds great difficulty in getting any one to lend it him at moderate interest. What is he to do? Let him go to a money-lender and contract in the most solemn way to pay sixty per cent. Then let him betake himself to the High Court of Chancery and there repudiate his bargain. He can straightway, at a moderate cost, have the rate of interest reduced from sixty to five. He could not have done half as well at the Bank of Ireland. He may, if he likes, just to give colour and substance to his case, and spare his blushes, throw in a charge or two of fraud and "overstep ve city." It matters little. The court has a conscience which overlooks these trifles, but cannot away with sixty per cent. Before passing to the strictly legal aspect of the matter, we should like to ask if sixty per cent. in the case under consideration was really high interest? Events have proved that it was very much too moderate. If the defendant ever gets his £100 he will have paid his own costs in one court, and those of both

parties in the other. How much will his profit be on the transaction? But we suppose when dealing with reversioners it is "unconscionable" to look for profit, and "unreasonable" to conduct business on any but a purely benevolent basis. When an expectant heir comes to you, you need not ask him why he does not go to some one else. Nay, when he says, "Shylock, we would have moneys," your answer had better be either an abrupt negative, or "Certainly, my good sir, and at five per cent. only, so as to save myself from forfeiting capital and interest unto the State of Venice." There can be little doubt that the Court of Appeal was coerced by precedent into deciding as it has done. *Beynon* v. *Cook* (10 Ch. 389), which in some features resembles the case under discussion, though, perhaps, not going quite so far, is one of a series of cases in which the Court of Chancery in England has held that the repeal of the usury laws and the change in the law concerning the sales of reversions have not altered the general rules of equity as to dealings with expectant heirs. If a man takes advantage of the present poverty of an expectant heir to extort from him an exorbitant and ruinous rate of interest, he is liable to have the bargain set aside, and to be remitted to his claim for so much money as he had actually advanced with the legal rate of interest upon it. The lender must prove the "reasonableness" of the bargain, and that the transaction was a fair one. How he is to do this, no one can say. There is no reported case in which he has ever succeeded in doing it; and it is probable that there never will be. Rules of the same kind founded on superannuated doctrines directed against usury had at one time made it almost impossible to deal with reversionary interests. The cases had become so extreme and the resulting inconvenience so flagrant that Parliament had to interfere, and the Sales of Reversions Act, 1867, was passed. In accordance with this Act, Mrs. Rae might have sold her reversion for sixpence, and the sale could not have been opened or set aside merely on the ground of undervalue; but as she pledged it for a substantial loan, at high interest, she is permitted to repudiate her bargain. It is not easy to see the sense or justice of this distinction, or to believe that the Court of Appeal did so. That court, however, tells us nothing about it, but professes to base its decision on grounds of public policy, of which a learned judge remarked that it was a very unruly horse, and

when once you got astride it you never knew where it would carry you. On the same topic, Mr. Justice Cave has recently observed that public policy is a branch of the law which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy. The late Lord Bramwell *(venerabile nomen)* has also pointed out that no evidence is given in these public policy cases. "The tribunal is to say, as matter of law, that the thing is against public policy and void. How can a judge do that without evidence as to its effect and consequences?" In the present case the only hint we get of the meaning of public policy is given by our Lord Chief Justice. He thought that the dealing was against the policy of the law, because if sanctioned it would tend to make reversioners and remaindermen dilatory and negligent in looking for money elsewhere when they knew they could get it at an exorbitant rate of interest from a money-lender. It is a pity that this observation was not more developed; for as it stands it is not likely to command assent. When did it become the policy of the law to pose as a moral agent for the furtherance of care and expedition in raising the wind; and is it not the case that resort is rarely had to the money-lender until all other sources are exhausted? The next reversioner, however, who comes to the defendant is likely to be shown the door; and what will he think then of the policy of the law which prevents him from getting what, perhaps—nay, probably—he may require to enable him to encounter some overwhelming exigency?"

Another phase of the subject was before our courts, but it is the same old story of hard cases making bad law. We allude, of course, to those cases which have decided that after the maturity of a debt at a rate of interest above six per cent. only that rate can be recovered, although the parties have agreed that the debt shall bear a higher rate of interest until paid, unless the judge-invented clause, "whether before or after maturity," has been inserted, thus making a contract which the parties never intended. The law being now settled, so far as the courts are concerned, the legislature must step in to enable business men to make their own contracts, and prevent them falling into the pit which has been dug for them by soft-hearted judges, who in the attempt to prevent one injustice have committed, and enabled others to commit, a great many.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for August comprise (1893) 2 Q.B., pp. 121-225; (1893) P., pp. 209-232; (1893) 2 Chy., pp. 381-530; and (1893) A.C., pp. 205-350.

CRIMINAL LAW—JUSTICES—DISMISSAL OF INFORMATION—COMMITTAL FOR NON-PAYMENT OF COSTS—SUMMARY JURISDICTION ACTS, 1848 AND 1879 (11 & 12 VICT., C. 43, S. 22; 42 & 43 VICT., C. 49, SS. 35, 47).

The Queen v. *Mayor of London*, (1893) 2 Q.B. 146, was an application to quash an order for committal made against a prosecutor whose complaint had been dismissed with costs for non-payment of the costs, on proof that there was no sufficient distress. The complainant had preferred an information against a joint stock company for not keeping a register of members as required by statute. The charge was heard and dismissed with costs, and no sufficient distress being found a judgment summons was taken out, of which the complainant had notice, but he did not appear. At the hearing of the summons it was proved that he had the means, but would not pay, and therefore the order of committment was made which was sought to be quashed. The company was being wound up, and before the date of the commitment the liquidators had been removed, and no others appointed until after the commitment. It was contended that the proceedings were vitiated because of the change of liquidators, and that they could not properly be continued after the removal of the liquidators, and also that the solicitors of the company had no authority to act pending the removal of one set of liquidators and the appointment of others. The court (Lawrence and Wright, JJ.) overruled the objections, and held that the commitment was rightly made. (See R.S.C., c. 178, ss. 66-70.)

JUSTICES—QUARTER SESSIONS—APPEAL, NOTICE OF—SERVICE ON SOLICITOR—DURATION OF SOLICITOR'S AUTHORITY.

In *The Queen* v. *Justices of Oxfordshire*, (1893) 2 Q.B. 149, a point of practice is determined of some moment. Notice of appeal from an affiliation order was served upon the solicitor who had acted for the mother in obtaining the order, and such service was accepted by him on her behalf; he notified her of the receipt of the notice, and she subsequently employed another

solicitor in the matter. On the appeal coming to be heard, it was objected on behalf of the respondent that no valid notice of appeal had been given to the respondent. The justices, being of opinion that the service on the solicitor was bad, refused to entertain the appeal. A Divisional Court agreed with the justices, and the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.) upheld the decision, holding that the retainer of the solicitor was at an end on obtaining the order, and that he had no authority, in the absence of a further retainer, to accept service of the notice of appeal.

LANDLORD AND TENANT—BREACH OF COVENANT TO DELIVER UP PREMISES IN REPAIR—MEASURE OF DAMAGES.

Henderson v. *Thorn*, (1893) 2 Q.B. 164, was an action by landlord against tenant to recover damages for breach of covenant to keep and deliver up the demised premises in repair. Pending the lease, the landlord had brought an action for the breach of a covenant to repair, and in that action a sum of money had been paid into court and accepted in satisfaction of the damages sued for in that action. In the present action, the plaintiff's particulars included the items of non-repair in respect of which the claim had been made in the first action, and also some additional items arising since that action. The official referee to whom it was referred to assess the damages allowed a sum sufficient to put the premises in repair at the end of the lease, and from this he deducted the amount paid for damages in the first action, and a further sum to cover the necessary depreciation of the premises, had the covenant been kept, and the balance he awarded as the damages recoverable. The defendant appealed, contending that no items of damage in the first action could now be taken into account, and only the items of subsequently accruing damages could now be allowed. But Wills and Lawrence, JJ., were agreed that the damages recovered in the former action were for the loss to the landlord measured by the depreciation in the salable value of the reversion, and that therefore the damages previously recovered did not represent the sum necessary to put the premises in repair, and they therefore held that the principle adopted by the referee was correct.

LANDLORD AND TENANT—DISTRESS—TITLE OF LANDLORD, RIGHT TO DISPUTE—ESTOPPEL—RIGHT OF STRANGER WHOSE GOODS ARE DISTRAINED TO DISPUTE TITLE OF LANDLORD.

In *Tadman* v. *Henman*, (1893) 2 Q.B. 168, the well-settled principle, that a lessee is estopped from disputing his lessor's title without first giving up possession, was sought to be extended to a third person whose goods were distrained on the demised premises; but it was held by Charles, J., that, as to such third person, there is no estoppel. In this case the third person was the wife of the lessee, and some goods which were her separate property were, whilst on the demised premises by license of her husband, distrained by the landlord for rent due by her husband. In an action for conversion of the goods she disputed the landlord's title, and it was held that she was not estopped from so doing, and that the principle relied on only applies to tenants or persons claiming under them who have obtained possession of the demised premises, and had no application to a person placing goods on the premises by license of the tenant.

EXTRAORDINARY STATUTORY REMEDY NO BAR TO CIVIL ACTION.

In *Midland Railway Company* v. *Martin*, (1893) 2 Q.B. 172, it was held by Mathew and Wright, JJ., that an order made under a statute enabling a person to obtain a summary order from a magistrate for the delivery of goods unlawfully detained from him is no bar to a civil action for damages for the detention of such goods by the person against whom the order was made, because the statute in question gave the magistrate no power to deal with the question of damages.

LANDLORD, LIABILITY OF, TO THIRD PERSON—NEGLIGENCE—DANGEROUS PREMISES—IMPLIED UNDERTAKING TO REPAIR.

In *Miller* v. *Hancock*, (1893) 2 Q.B. 177, the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, JJ.) has determined that where a landlord leases premises in flats to divers tenants he is liable in damages to third persons lawfully visiting the premises to see such tenants for any injury caused them by the defective state of the common staircase, and that in the absence of any stipulation to the contrary there is an implied undertaking on the landlord's part to keep such staircase in repair. The case was held to come within the principle of the decision in *Smith* v.

London and St. Katharines Dock Company, L.R. 3 C.P. 326; and inasmuch as the landlord must have known the stairs would be used by third persons, a duty arose toward such third persons to keep them in order.

PRACTICE—LIBEL—JUSTIFICATION—PARTICULARS ON WHICH JUSTIFICATION BASED.

Zierenberg v. *Labouchere*, (1893) 2 Q.B. 183, was an action for libel in charging the plaintiffs with being swindlers and imposters. The defendant pleaded justification in general terms, and alleged that the statements were true. On an application for particulars of the facts on which the defendant based his justification, it was held by the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.), affirming the Divisional Court, that the plaintiffs were entitled to the particulars they claimed. It may be noticed that the defendant contended that he ought not to be required to deliver the particulars until after he had obtained discovery from the plaintiffs. But the Court of Appeal, in answer to that contention, held that there was no relation existing between the plaintiff and defendant before action which would entitle the defendant to discovery before putting in his defence, and that if he could not furnish the particulars required without discovery it was plain that he ought not to have published the libel, and could not plead justification for having done so.

PRACTICE—FOREIGN PLAINTIFF—SECURITY FOR COSTS—MOTION BY PLAINTIFF FOR NEW TRIAL—FURTHER SECURITY FOR COSTS OF MOTION.

In *Bensten* v. *Taylor*, (1893) 2 Q.B. 193, the plaintiff was out of the jurisdiction, and had given security for costs. At the trial the action was dismissed, and the plaintiff gave notice of motion for a new trial. The defendant applied to the Court of Appeal for an order compelling the plaintiff to give security for the costs of the motion, which was refused; the court, however, intimating that as the motion for a new trial was a step in the litigation not contemplated when the amount of the security was originally fixed, the defendant's proper course was to apply in chambers to increase the security, and that an appeal on any order made on such application would lie to the Court of Appeal.

SOLICITOR, UNQUALIFIED PERSON ACTING AS—CONTEMPT OF COURT—COUNTY COURT, POWER OF, TO COMMIT—SOLICITORS' ACT, 1860 (23 & 24 VICT., C. 127), S. 26—(R.S.O., C. 147, S. 26).

In *The Queen* v. *Judge of Brompton C.C.*, (1893) 2 Q.B. 195, a Divisional Court (Lord Coleridge, C.J., and Cave, J.) determined that a judge of a County Court has no power under the Solicitors' Act, 1860, s. 26 (see R.S.O., c. 147, s. 26), to commit summarily an unqualified person doing business in the court as a solicitor for contempt of court. The decision proceeds on the ground that contempts of a County Court, except those specified in the statute creating the County Courts, cannot be punished summarily, but only by indictment. The decision would seem to apply to the County Courts of Ontario, whose power to punish for contempt seems to be similarly limited. See R.S.O., c. 47, s. 33.

BILL OF EXCHANGE—BILL PAYABLE "TO——ORDER"—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61), SS. 3, 5, 7, 55—(53 VICT. (D.), C. 33, SS. 3, 5, 7, 55).

Chamberlain v. *Young*, (18) 2 Q.B. 206, is a decision of the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.), reversing the judgment of Lawrence, J., and holding that a bill of exchange payable "to——order" is in effect a bill payable to "my order," *i.e.*, the order of the drawer: and having been indorsed by the drawer, it was a valid bill of exchange. It is possible that the result would have been different had the instrument read "pay to——or order."

LANDLORD AND TENANT—COVENANT BY LESSEE "TO REPAIR, UPHOLD, AND MAINTAIN" DEMISED PREMISES—INHERENT DEFECT IN PREMISES.

In *Lister* v. *Lane*, (1893) 2 Q.B. 212, the Court of Appeal (Lord Esher, M.R., and Kay, L.J.) held, that under a covenant by a lessee "to repair, uphold, and maintain" the demised premises there is no obligation on the lessee to rebuild premises which, in consequence of an inherent defect in their original construction, and through lapse of time, fall into ruin during the term. In the present case, owing to the building being erected on a defective foundation, a wall bulged, and the building was condemned by the district surveyor as a dangerous structure, and was pulled down. The house was at least one hundred years old;

and notwithstanding there was evidence that the wall might have been repaired during the term by underpinning, it was held that the lessee could not be held liable for the cost of rebuilding.

None of the cases in the Probate Division call for any notice here.

Notes and Selections.

REMEDY BY INJUNCTION.—There is a story told of a law student at his final examination being asked a question as to when a court of equity would interfere by injunction, and of his making answer, "Where the conduct of the defendant is such as to shock the conscience of the Lord Chancellor"—then Lord Westbury, about the sensitiveness of whose moral organ doubts had begun to be whispered. The naïve reply of the student may excite a smile; yet more is to be said in support of it than might at first appear. For the equity remedy by injunction is not one *ex debito justitiæ*, but one entirely in the discretion of the court; and when we once get into the region of discretion, the only guide we have is our knowledge of the mental and moral constitution—moral quite as much as mental—of the particular judge from whom an injunction is sought. The tender conscience of one might be roused by conduct on the part of a defendant which would not ruffle the equanimity of another.—*Ex.*

LOCAL IMPROVEMENTS.—The recent case of *City of Norfolk* v. *Chamberlain*, decided in the State of Virginia, is commented upon, in a recent number of *The Central Law Journal*, "As to how far a municipality may go in making improvements, such as sidewalks and sewers, and compel the owners of property abutting on the improved streets to pay for them." In this case the city council of Norfolk took by condemnation proceedings almost half of a vacant corner lot in order to widen one of the streets. The remaining part was practically valueless, being a very narrow strip along the newly-widened street the entire depth of the original lot. The city council next voted to build a sewer through this street, and assessed the narrow strip for betterments con-

siderably more than was paid for the part taken under the condemnation proceedings. An injunction restrained the collection of the assessment, and the Supreme Court made the injunction perpetual.

The general doctrine is that where needed improvements are made the owners of property specially benefited should bear a greater proportion of the expense than the general taxpayer. This doctrine, however, is rather flexible, as applied in the several States. New York takes the strongest ground in favour of local assessments in the early and now leading case of *People* v. *Mayor of Brooklyn*, 4 N.Y. 419, which seems to be based upon the idea that the legislature is possessed of inherent and absolute power over the subject of taxation, and may therefore arbitrarily distribute the burden of taxation, or authorize municipal corporations to do so. This strong ground is denied in Illinois (*Chicago* v. *Larned*, 34 Ill. 203, and *Ottawa* v. *Spencer*, 40 Ill. 211), but it is conceded that assessments may be made for actual benefits, the balance to be paid by general taxation. Pennsylvania takes practically the same ground in *Hammett* v. *Philadelphia*, 65 Pa. St. 146, the Case of Washington Avenue, 69 Pa. St. 352, and *Seely* v. *Pittsburgh*, 82 Pa. St. 360.

In *McBean* v. *Chandler*, 9 Heisk. 349, the Supreme Court of Tennessee approved the Illinois decisions, and held that it is beyond the power of the legislature to authorize a municipality to pave its streets and charge the cost thereof on the adjoining lots in proportion to their frontage. And even in New York, in the latter case of *Guest* v. *Brooklyn*, 69 N.Y. 506, the system as authorized and practised in New York and Brooklyn is condemned as "unjust and oppressive, unsound in principle, and vicious in practice."

The Virginia case, *supra*, in a very elaborate opinion discussing the whole system of local assessments, declares the doctrine to be "untenable and the principle unsound, capable of being made the means of indirect confiscation of property without compensation, and, in fact, often so used by over-zealous or unscrupulous city councils."

The statutory law in these States is not the same as ours, but the cases referred to by our contemporary are of interest in connection with the subject of local improvement taxation system, which has proved to be of great injustice in many ways. We

note the concluding observations of the writer, and would remark that over-zealous and unscrupulous city councils are not confined to the United States.

LEGAL RESTRAINTS ON EXTRAVAGANCE.—All interference with the liberty of the subject is repugnant to the spirit of British jurisprudence. Our law has declared contracts in restraint of trade or in restraint of marriage to be void, and, though in bygone days the press-gang coerced young men to serve in the navy, we refuse, in this age of toleration and advanced ideas, to follow the example of continental nations by introducing conscription. In fact, the ordinary British citizen practically enjoys perfect freedom of action as long as he is of sound mind, and not guilty of any crime. Whether it is desirable to allow individuals to do whatever they like, subject to these restrictions, is a question on which even the wisest men may differ. Freedom may be a "noble thing," as the old poet Barbour has expressed it in his poem "The Bruce," and the adage that "a man can do what he likes with his own" may commend itself to the great mass of English-speaking people; but, after all, the law should protect the weak, the incompetent, and the helpless from descending headlong to ruin through folly, inexperience, or sheer absence of will power. The careers of "the Jubilee Plunger" and of the late Mr. "Abington" Baird show that prodigals are not likely to make a good use of unlimited liberty. It is easy to talk about "sowing wild oats," but many persons are unhappily engaged all their lives in that barren kind of husbandry. When a man leaves no record behind him but that he spent nearly a million in betting, drinking, and harlotry, we may well ask, would it not have been better if the law had prevented him from recklessly squandering money in vicious pursuits?

In other words, why should there be no legal restraints on extravagance? At present our law interferes in no way with spendthrifts. Suicide, and even the attempt to commit suicide, is dealt with criminally; but the reckless misuse of money is not restrained by any civil or criminal process. Many cases of moral suicide have occurred through the evil use of wealth: and still we cling to the fallacy that liberty is a good thing, even for the confirmed prodigal.

It is time that some provision should be made to prevent persons who have, unfortunately, inherited more property than they know how to make use of from not only themselves going "the road to ruin," but also plunging their families into undeserved poverty. The state has an interest in the welfare of its citizens, and, if it protects the dipsomaniac against himself, why should it not tie up the hands of the hopeless spendthrift?

Restraints on extravagance have not been unknown in other systems of jurisprudence. The Roman law, which jurists have praised for its rational character, prevented prodigals from either managing their own estates, or from making wills. To quote a passage from Justinian's "Institutes": "Prodigus cui bonorum suorum administratio interdicta est testamentum facere non potest."

The Code Napoleon—the existing law of France—prohibits spendthrifts (*prodigues*) from suing, borrowing money, taking assignments of chattels, giving receipts, or mortgaging property, without the assistance of a family council, appointed by the courts. A person under such disability can lay out his own means, subject to the superintendence of the family council, but beyond this he is not a free agent. The economic qualities of the French people have been of late much discussed, both from a favourable and an unfavourable point of view; but it must be evident to all who recognize the infirmity of human nature that there is a decided advantage in this provision of the French law, if we value domestic regularity and thrift more than license and prodigality. The person who makes use of money only for the purpose of self-destruction—meaning thereby not mere ordinary suicide, but such riotous living as necessarily ends in beggary, starvation, or incurable disease—is as much a lunatic as the wretch who persists in drinking himself to death, or who perishes from the effect of monstrous vices.

The procedure for dealing with prodigals need not be complicated, or such as would lead to expensive litigation. The mode of treating lunatics who possess property would furnish an analogy, and a committee of trustees, composed of members of the family, might, under the direction of the Lord Chancellor, manage the affairs of the person proved to be incompetent for the ordinary business of life. The confinement of the prodigal would be a step only to be adopted in extreme cases, where

extravagance has ended in utter lunacy. As a rule, no restraint should be placed on his or her actions—for the law should contemplate thriftlessness in women as well as in men—beyond the control of property, which, unless preserved, would be wasted in vice and folly. The spendthrift should be allowed to contract matrimony, under certain conditions; his legitimate tastes should be gratified; but the law should take good care that no more money is placed within his reach than is required for the ordinary and rational needs of civilized existence.—*Irish Law Times.*

Reviews and Notices of Books.

Law of Foreign Corporations. A Discussion of the Principles of Private International Law, and of Local Statutory Regulatio ns applicable to Foreign Companies. By William L. Murfree, jr., of the St. Louis Bar. St. Louis, Mo.: Central Law Journal Company, Law Publishers, and Publishers of the *Central Law Journal*, 1893.

This book commences with a preface which is so modest in tone, and withal so short and to the point, that one is favourably impressed at the outset, and such examination as we have been able to give to the work leads us to think that no apology is necessary either for its existence, or for the way in which the author has done his work.

The commercial relations between citizens of various countries are now so intimate, and so much money is being invested from time to time by capitalists of one country in property situated or business done in another, that the volume of case law on the subject of foreign corporations is becoming very great. As the author states, the subject has necessarily received, in general works on private corporations, but cursory and insufficient treatment, and it is well to have a volume devoted to the discussion of private international law, and the mutual relations which exist and questions which arise between foreign corporations and citizens of the home country.

This work is divided into the following chapters: (1) The Rule of Comity; (2) Statutes regulating Foreign Companies;

(3) Action by and against Foreign Companies; (4) Federal Jurisdiction of Foreign Corporations; (5) Power of Foreign Corporations to take and convey Lands; (6) Stock and Stockholders in Foreign Companies; (7) Officers and Agents of Foreign Companies; (8) Notice of Corporate Powers; (9) Corporations created by Congress; (10) Consolidation of Foreign Corporations; (11) Dissolution and Insolvency. These chapters are divided into appropriate sub-heads, under which a large number of cases are referred to.

The cases referred to by the author are, of course, very largely citations from American Reports; but we are rather surprised that the author has not gone farther afield for authorities on the propositions discussed in the volume. A little wider research would have added much to the value of the book.

The Dominion Conveyancer, comprising precedents for general use and clauses for special cases. Selected and edited by William Howard Hunter, B.A., of Osgoode Hall, Barrister-at-Law, author of Treatise on The Insurance Corporations Act, 1892. Toronto: The Carswell Company (Limited), Publishers, 1893.

The profession, doubtless, were glad to receive the announcement that an effort was being made to supply what has long been felt as a want in this Province, and, in fact, in all the English-speaking provinces of the Dominion. The previous paucity of conveyancing precedents adapted to our law and the advantages of having a wider range of precedents to select from make us welcome into the field this, the first work for some time upon these lines. Mr. Hunter has given to those desiring the assistance of precedents a large selection; and the profession is indebted to him for this addition to their stock of office tools.

The book has many good features, and contains a large amount of material, most of which will be of general use in every conveyancer's office, whilst some of the forms are of special interest in special cases. It is, however, needless to point out that the value of a work on conveyancing, which is of almost daily reference in every solicitor's office, depends entirely upon its accuracy, and whether it can be placed in

t' hands of students and clerks without fear of mistakes. If not accurate to this extent, and if the forms should be found to require careful perusal and study on the part of the solicitor, the value of the work would be much impaired. Under these circumstances, it has been felt necessary to scan closely and to take time to examine the forms given by the compiler of the volume now before us.

Careful conveyancers very properly shrink from departing from well-established precedents, and the author has made himself secure in this particular by taking nearly all his forms eit' er from Mr. Rordans' Canadian Conveyancer, now out of print, and largely out of date, but which was found useful in its day, or from the very complete and valuable American work of Mr. L. A. Jones. In some instances, however, Mr. Hunter has allowed errors in the forms so copied to reappear in his work, and he has not made changes which have been rendered necessary by altered circumstances. For example, the form of Bill of Sale of a Vessel, which has, apparently, been copied from Rordans', is now useless, as the Merchant Shipping Act, 1854, gives a form the use of which is imperative, and none other can be registered.

Again, in preparing the note on page 1 as to affidavits and declarations, the writer seems to have overlooked the Criminal Code, 1892, by which a "misdemeanour" becomes an "indictable offence." This is not material, so far as the forms are concerned: but it must further be noticed that, owing to recent legislation, the forms of declarations given in the book on pages 1, 7, and 420 are no longer correct, and they must be carefully revised before being followed, as will be seen by reference to 56 Vict., 31 (D.), assented to April 1st, 1893. Statutory declarations may now be taken before a notary public or mayor, as well as before the functionaries mentioned in Mr. Hunter's note on page 7. The forms of Articles of Clerkship and of Assignment of such articles are also defective, and do not follow the forms required by the Law Society.

There are some other matters which cannot be overlooked in the criticism of Mr. Hunter's useful book. We would refer, amongst other things, to the following:

The passing of the Act respecting the Law and Transfer of Property, R.S.O., 1887, c. 100, renders the old-fashioned verbiage describing appurtenances to lands (see Form 336) unneces-

sary, as will be seen by a reference to section 12 of the Act. All were glad to see these relics of the past buried. Why they should be resurrected we fail to understand. Again, we would notice that in Form 341 there is no covenant by trustees against their own acts. This we think is proper, and should be inserted; and the form (No. 344) of a grant of an annuity charged on lands ought to contain a provision enabling the grantee to sell the lands in case of default in payment of the annuity.

One very material excellence in a conveyancing book in these days is brevity and compactness, and care must be exercised in leaving out forms of no general use in order to make room for those of more practical utility. In this view, it would seem scarcely necessary to insert Form 392 of a Crown Lease of Mining Lands, since, in all cases in which such a lease is given, the Crown Lands Department furnishes the printed form. The form here given covers ten pages, and the forms of affidavits to be used in applications for Crown lands occupy no less than twenty pages. These latter also are supplied by the Department. The size of the book, therefore, is to this extent increased without increasing its usefulness.

A good index, especially in works of this kind, is absolutely required, and such an index obviates the necessity, to a great extent, of collecting together forms belonging to any one branch of the subject treated. It would, however, have been a more convenient arrangement if the Land Titles forms had been collected into one place in the book. We notice *en passant* that some of these forms are no longer necessary, and there are others which it would be well to have inserted. We would also note, in reference to deeds under power of sale, that it is usually considered better conveyancing to set out that the sale by auction had proved abortive, and also to recite a subsequent sale by private contract. That there has been great want of care both on the part of the compiler and in the printing office in many cases is very apparent. A pronounced instance of this will be seen by reference to the forms of discharge of mortgage on pages 409, 410. These forms are in some places unintelligible, and in others so misleading and defective as to be useless.

In a few instances forms are repeated, Nos. 547, 548, and 241 being apparently repetitions of Forms 162, 163, and 236, and the only difference between Forms 291 and 292 is that the former

contains the statutory bar of dower; in order to insert or leave out that clause it was scarcely necessary that the forms should be repeated.

One feels regretful that, in the desire to issue this book as early as possible, so many mistakes should have been allowed to creep in, which (whether of much or little importance) are calculated to impair confidence in the general correctness of a work which contains much that will be useful to practitioners.

We also allude to some typographical errors and incorrect references; such as, for example—the word "mortgage" appears in several places instead of "mortgagor," etc. On page 237 there is a reference to Form 227 instead of to Form 236. In the index, wrong references to pages are too numerous. The reference to Assignments of Patents on page 544 should be pages 160 and 161 instead of to 161 and 162; on page 548, line 8, 320 should read 321; and on line 9, 321 should read 322. On page 550 the reader is referred to page 385 for a form of deed by executors instead of to page 285; on the last line of page 552, the reference to page 378 has been omitted: on page 554 the reader is referred to page 348 for "Lease System," etc., instead of to page 249: and the reference to "Ship—Bill of Sale of," is to page 142 instead of 193, etc., etc. We do not refer to many clerical errors, for these seem more or less to creep into almost every book: but they are so numerous as to lead to the impression that there was undue haste in putting the work through the press.

A book on this subject should have a large sale, and when a new edition is required we have no doubt the learned author will carefully revise his work so that it may be used with entire confidence as to its accuracy.

H.N.R.

Correspondence.

MARRIED WOMEN—DEVOLUTION OF ESTATES.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Is there not a fallacy in the reasoning of your article on "Married Women—Devolution of Estates," *ante* p. 460? R.S.O., c. 132, s. 23, provides that when a deceased married woman

leaves no children her separate personal property is to devolve "as if this Act had not been passed." From these words you draw the conclusion "that the whole of it is to devolve on the husband." I am unable to discover any such meaning in the words. You read them as though they were "as if this Act and R.S.O., c. 108, s. 5, had not been passed." In the interval between 47 Vict., c. 19, s. 20 (which contained the original enactment now appearing as R.S.O., c. 132, s. 23), and 49 Vict., c. 22, s. 5 (wherein R.S.O., c. 108, s. 5, was first enacted), doubtless the whole of the childless deceased intestate's separate personal property would devolve on her husband. But it seems to me that since the passing of the latter enactment the only effect of the phrase, "As if this Act had not been passed," in c. 132, s. 23, is, in the circumstances to which it applies, to remove the estate from the operation of that section, and to leave it to be distributed under c. 108, s. 5. The effect in these circumstances, I apprehend, is as if c. 132, s. 23, were omitted from the statute book. If it were omitted, we would have no difficulty, I think, in holding that the Devolution of Estates Act applied to the separate personal property of the married woman who died childless and intestate. In my humble opinion, wherein the oversight of the revisers of the statute consisted was in failing to observe that the earlier enactment was superseded by the later one, and should be omitted.

LEX.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Your article on page 466 of the August number, entitled "Married Women—Devolution of Estates," and dealing with what are termed therein "the apparently conflicting provisions of R.S.O., c. 108, s. 5, and R.S.O., c. 132, s. 23," places, in my humble judgment, a wrong construction upon the effect of the two sections, and assumes a conflict which does not really exist. It must be admitted that the sections are, at first sight, confusing, and overlap one another, but I think that they are quite capable of perfectly harmonious construction. The flaw in your argument rests in the construction which you give to the concluding words of R.S.O., c. 132, s. 23. You construe the words, "And if there be no child or children living at the death of the wife so dying intestate, then such property shall pass and be dis-

tributed as if this Act had not passed," as if they were, in effect, a deliberate and express provision that the whole of the separate personal property of a married woman dying without children shall devolve upon her husband. Had the statute said so, then there might be the conflict which you have pointed out. But the real effect of the words just quoted is, I take it, to leave such property, in the event of there being no children, unaffected by the Act at all. In fact, does not the section say so? The words are a reservation inserted for greater certainty, and no more. Such property, in the event aforesaid, being unaffected by any conflicting positive enactment in chapter 132, would come within the scope of R.S.O., c. 108, s. 5, and devolve, one-half to the husband, and the rest as if he had predeceased the intestate.

This would, I think, be the construction even if chapters 108 and 132 were both new enactments coming into force on the same day. But the Revised Statutes do not have the effect of new laws. Section 9, s-s. 1 of 50 Vict., c. 2 (to be found in R.S.O., p. 55), provides that the Revised Statutes shall not be held to operate as new laws, but shall be construed as a consolidation of the law contained in the Acts repealed, and as substituted therefor; and s-s. 2 of the same section provides that where the provisions in the Revised Statutes are substituted for, and are the same in effect as those of the Acts repealed, they shall be held to operate retrospectively as well as prospectively, and to have been passed upon the days upon which the repealed Acts came into effect. Now R.S.O., c. 132, s. 23, is s. 20 of 47 Vict., c. 19, and R.S.O., c. 108, s. 5, is s. 5 of 49 Vict., c. 22; and even if the concluding words of s. 23 of R.S.O., c. 132, bore the construction which you have placed upon them, it would be held that s. 5 of R.S.O., c. 108, being a later statute, had virtually repealed them. But placing upon them the construction which, I submit, is the proper one, there can be no doubt that s. 5 of 49 Vict., c. 22, now s. 5 of R.S.O., c. 108, operated upon the whole separate, real, and personal property of a married woman dying after July 1st, 1886.

The Devolution of Estates Act of 1886 being subsequent to the Married Woman's Property Act of 1884, all repugnant provisions of the latter Act would be superseded by the conflicting provisions of the former, and it would be strange indeed, especially in view of the fact that s. 9 of 50 Vict., c. 2, provides that the "Revised Statutes shall not be held to operate as new laws,"

if the effect of the revision of the statutes were to bring into force again a provision which had been repealed a year before.

Section 20 of 47 Vict., c. 19, having been superseded by s. 5 of 49 Vict., c. 22, should certainly have been omitted in the revision of the statutes, but I cannot see that its retention there gives rise to the conflict which you apparently find.

Ottawa, Sept. 11th, 1893. BARRISTER.

[We refer to the above letters in another place—*ante* p. 545. —ED. C.L.J.]

RIGHTS AND REMEDIES IN A FORECLOSURE ACTION.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—In reply to the letter of Mr. George Patterson, of Winnipeg, which appeared in this journal on the eve of vacation, criticizing the views I ventured to take of *Walker* v. *Dickson*, 20 A.R. 96, in your May number, I would like to add a few words.

One portion of my argument was certainly based upon the principle enunciated (although not for the first time) in *Campbell* v. *Robinson*, 27 Gr. 634—a case which I showed to have been approved and followed in our Ontario courts.

"But," says Mr. Patterson, "its authority has been very much weakened, if not expressly overruled, by the Supreme Court in *Williams* v. *Balfour*, 18 S.C. 472."

That was an action brought in Manitoba by a mortgagee against a mortgagor, and the defendant set up that in giving the mortgage he was acting merely as trustee for a syndicate, and he sought to have the members of the syndicate made parties and ordered to contribute to the payment of the mortgage debt. The plaintiff thereupon amended his bill, charging that the new defendants had executed a bond in favour of the original defendant, whereby each of them bound himself to pay the plaintiff $390, etc.

The plaintiff succeeded at the trial, and (by an equal division of opinion) in the court *in banc*.

On appeal to the Supreme Court, by three of the defendants, it was found that the *execution of the bond by the appellants had not been proved*.

It is difficult to see in what respect the principle of *Campbell* v.

Robinson, or of any other case, could have been successfully invoked by a plaintiff under such circumstances.

It does not appear to have been cited in the argument, and the idea that it has been weakened, if not overruled, seems to have arisen from a misconception of what was said by Mr. Justice Strong, who was the only judge who referred to it.

At page 479 his lordship says: "There is no direct privity of contract between the respondent Balfour and the appellants. The appellants Williams and Slaven did not execute the indemnity agreement, and, of course, were not liable upon it in any way; and, as the Chief Justice of Manitoba has shown, Vanwart is in exactly the same position—Deacon, who assumed to execute it in his name, having no authority whatever to do so. This being the state of facts, I know of no principle which entitles the mortgagee to a personal order against them. . . . . The weight of authority in Ontario is altogether against such an order: the case of *Campbell* v. *Robinson*, as Chief Justice Taylor has pointed out, is clearly distinguishable, the personal order there being made for the benefit of the mortgagor, who had become a mere surety for the purchasers of the equity of redemption, and was therefore considered, on that distinct ground, entitled to indemnity from them." Then follows the passage which seems to have given rise to Mr. Patterson's notion: "I should not, however, be inclined to follow even that case, as I do not see how the question could, on the pleadings, have been properly raised between the co-defendants."

The reason given by his Lordship for his disinclination to "follow" or apply the principle of *Campbell* v. *Robinson* in the case before him is perfectly clear and satisfactory, the pleadings in the latter case being so totally unlike those in the former. But, as if to remove any doubt upon the point, his Lordship adds: "Such cases as *Campbell* v. *Robinson* do not, however, apply at all."

I think I may be excused for not noticing *Williams* v. *Balfour* in my article.

But the view I advanced, respecting the right and duty of a mortgagee to add all the intermediate owners of the equity of redemption as original defendants, was based rather upon the modern rights of principal and surety, as administered under the Judicature Act, than upon the particular decision in *Campbell* v. *Robinson*.

On this head Mr. Patterson has nothing to say. He does not deny that the position of a mortgagor, upon selling subject to the mortgage, is altered from that of debtor to that of merely a surety for the payment of the debt, and *that*, not by reason of any contract with the mortgagee, but notwithstanding his contract. The new relationship does not depend for its existence upon any contract with the mortgagee. His rights are not affected prejudicially by an increase in the number of his sureties. He must only see that he does not infringe their rights. To enforce payment from the mortgagor in the first instance is to begin at the wrong end of the string; for the mortgagor, under the circumstances in question, is the very last man who ought to be called upon to pay.

With respect to the Milburn mortgage, I never questioned the proposition that a deed absolute in form may be held to be merely a mortgage. What I did say was: "That a short form deed from A. to B. may be read as a mortgage from C. to B. is certainly a discovery." Mr. Patterson does not cite, and I have been unable to find, any authority whatever for such a singular form of mortgage, except *Walker* v. *Dickson*.

September 15th, 1893. A. C. GALT.

UNPROFESSIONAL ADVERTISING.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Placards bearing the following inscriptions, and visible from the street, are hanging on the walls of a ground floor office of a "solicitor" practising on Yonge Street, in this city:

"Every description of legal business carefully attended to at moderate charges." "A will made is money saved." "Foreclosing mortgages, $25." "Proving wills, $5." "Wills drawn, $2." "Accounts collected up to $10, $1." "$10 to $50, $2." "$50 to $100, $3."

Perhaps this gentleman is the best judge of the value of his own services. JUNIOR.

Toronto, Sept. 18th, 1893.

ANSWERS TO CORRESPONDENTS:—We have received a letter from "Law Student," Stratford. We cannot depart from our usual rule, not to reply to letters unaccompanied by the name of the writer. If "Law Student" will send us his name and address, we think we can, perhaps, satisfy him upon the questions asked.

DIARY FOR OCTOBER.

1. Sunday.....*18th Sunday after Trinity.* Wm. D. Powell, 5th C.J. of Q.B., 1877. Meredith, J. Chy. D., 1890.
2. Monday.....Co. Ct. sitts. for motions, and sitts. of Sur. Ct., except in York.
3. Tuesday.....Co. Ct. sitts. for non-jury cases and sitts. of Surrogate Courts, except in York.
7. Saturday....Henry Alcock, 3rd C.J. of Q.B., 1802.
8. Sunday.....*19th Sunday after Trinity.* Sir W. B. Richards, C.J.S. Ct., 1875. R. A. Harrison, 11th C.J.Q.B., 1875.
9. Monday.....County Ct. sitts. for motions, and sitts. of Surrogate Cts. in York. De la Barre, Gov., 1682.
11. Wednesday..Guy Carleton, Governor, 1774.
12. Thursday....America discovered, 1492. Battle of Queenston Heights, 1812.
15. Sunday.....*20th Sunday after Trinity.* English Law introduced into U.C., 1791.
16. Monday.....County Court sittings for non-jury cases in York.
22. Sunday.....*21st Sunday after Trinity.*
23. Monday.....Lord Lansdowne, Gov.-Gen., 1883. Last day for notice for Call.
24. Tuesday.....Supreme Ct. of Canada sits. Sir J. H. Craig, Gov.-Gen., 1807.
27. Friday.....C. S. Patterson, J. of Sup. Ct., 1888. Jas. Maclennan, J. Ct. of Appeal, 1888.
29. Sunday..... *22nd Sunday after Trinity.*
31. Tuesday.....All Hallow's Eve.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Quebec.] [May 1.

FOGARTY *v.* FOGARTY.

Will—Construction of—Division of estate—Right to postpone.

T.F.F., who in partnership with his brother J.F. carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M.W.F., the appellant, and J.F., the respondent. The will contained also the following provision:

"But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself in copartnership under the name and firm of Fogarty & Brother. Should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor."

T.F.F. died on the 29th April, 1889.

On the 30th April, 1889, a statement of the affairs of the firm was made up by the bookkeeper, and J.F. and M.W.F., having agreed upon such statement, the balance shown was equally divided between the parties, viz., $24,146.34 being carried to the credit of M.W.F. in trust, and $24,146.34 being carried to J.F.'s general account in the books of the firm. At the foot of the statement a memo. dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them.

On the 6th March, 1890, M.W.F. brought an action against J. F. claiming that he was entitled to $24,146.34, with interest from the date of the division and distribution, viz., 30th April, 1889. J.F. pleaded that under the will he was entitled to postpone payment until five years from the testator's death, and that the action was premature.

Held, affirming the judgment of the court below, that J.F. was entitled under the will to five years to make the division contemplated and that he had not renounced such right by signing the statement showing the amount due on the 30th April, 1889.

Appeal dismissed with costs.

Carter, Q.C., and *Geoffrion*, Q.C., for the appellant.

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

Quebec.] [May 1.

BURY *v.* MURPHY.

Partnership moneys - Sequestration of - Contre lettre.

In November, 1886, G.B., by means of a contre lettre, became interested in certain real estate transactions in the city of Montreal, effected by one P.S.M. In December, 1886, G.B. brought an action against P.S.M. to have a sale made by him to one Barsalou declared fraudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. In September, 1887, another action was instituted by G.B. against P.S.M., asking for an account of the different real estate transactions they had conformably to the terms of the contre lettre. The Supreme Court dismissed the the first action on the ground that G.B. had no right of action, but maintained the second action, and ordered an account to be taken. P.S.M. acquiesced in the judgment of the Superior Court on the second action, and G.B. appealed from the judgment, dismissing his first action, but the Court of Queen's Bench affirmed the judgment of the Superior Court. On a further appeal to the Supreme Court of Canada, it was

Held, reversing the judgment of the court below, that the plea of compensation was unfounded, the appellant having the right to put an end to the respondent's mandate by a direct action, and therefore, until the second action of account was finally disposed of, the moneys should remain in the hands of the sequestrator appointed with the consent of the parties.

Appeal allowed with costs.

Barnard, Q.C., for the appellant.

Monk, Q.C., for the respondent.

Quebec.] [May 1.

MACDONALD *v.* FERDAIS.

Action confessoire—Real servitude—Apparent registration—44 & 45 Vict., c. 16, ss. 5 & 6 (P.Q.)—Art. 1508 C.C.—Procedure—Matters of, in appeal.

By deed of sale dated 2nd April, 1860, the vendor of cadastral lot No. 369 in the parish of Ste. Marguerite de Blairfindie, District of Ibverville, reserved for himself, as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent, as assignee of the owner of lot 370, continued to enjoy the use of said carriage road, which was sufficiently indicated by an open road, until 1887, when he was prevented by appellant Cully from using the said road. C. had purchased the lot 369 from one McD. without any mention of any servitude, and the original title deed created by the servitude was not registered within the delay prescribed by 44 & 45 Vict. (P.Q.), c. 16, ss. 5 & 6.

In an action brought by F. against C. the latter filed a dilatory exception to enable him to call McD. in warranty, and, McD. having intervened, pleaded to the action. C. never pleaded to the merits of the action. The judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the court below, that the deed created a real apparent servitude which need not be registered, there being sufficient evidence of an open road having been used by F. and his predecessors in title as owners of lot No. 370.

Held, also, that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait et cause* for C. with his knowledge, and both courts had held them jointly liable, this court would not interfere in such a matter of practice and procedure.

Appeal dismissed with costs.

Paradis and *Belcourt* for the appellants.

Geoffrion, Q.C., for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Practice.

Common Pleas Court.] [June 24

FERGUSON *v.* PROVINCIAL PROVIDENT INSTITUTION.

Discovery—Production of documents—Life insurance applications—Untrue statements—Materiality—55 Vict., c. 39, s. 33 (O.).

It is provided by s-s. 2 of s. 33 of the Insurance Corporations' Act, 55 Vict., c. 39 (O.), that no untrue statement in an application for insurance shall vitiate the contract unless material thereto; and by s-s. 3 that the question of materiality is for the jury, or, if there is no jury, for the court.

Where, therefore, a benevolent and provident institution refused to recognize a certificate of membership issued to the plaintiff, under which he was entitled to certain insurance benefits, on the ground that he had untruly stated in the application that he was not and never had been subject to asthma, in an action to have it declared that the contract was a subsisting contract production by the defendants was ordered of all applications and medical examinations in which the answer as to asthma had been in the affirmative, and upon which certificates had issued.

James A. McLean for the plaintiffs.

C. Macdougall, Q.C., for the defendants.

C.P. Div'l Court.] [May 25.

SEARS *v.* MEYERS.

Writ of summons—Service out of the jurisdiction—Objection to allowance of —Waiver by appearance—Rule 271.

Upon a motion to set aside an order allowing service out of the jurisdiction of the writ of summons in an action upon a foreign judgment;

Held, that the defendant by entering an appearance had submitted himself to the jurisdiction of the court and waived his right to object to the allowance of service, even though the action did not fall within any of the provisions of Rule 271

W. C. McCarthy for the plaintiff.

H. M. Mowat for the defendant.

ROSE, J.] [June 27.

PETERSON *v.* FREDERICKS.

Parties—Replevin—Adding defendant—Third party—Rules 324, 328, 330.

J. stored certain goods with the defendant, and the plaintiff brought this action for possession of the goods and damages for their detention, and replevined them.

Held, not a case in which J. should be added as a defendant under Rule 324, and not a case for the application of Rule 328; but rather a case in which a notice should be served on him under Rule 330, in order to have him bound by the judgment to be given.

Masten for the plaintiff.

D. Armour for the defendant.

W. H. Blake for Johnston.

Chy. Div'l Court.] [Sept 9.

HEATH *v.* MEYERS.

Writ of summons—Service out of jurisdiction—Rule 271—Objection to allowance of service—Waiver—Obtaining order for security for costs—Opposing motion for judgment—Decision of court of co-ordinate jurisdiction.

The plaintiff, a foreigner, sued the defendent, also a foreigner, upon a foreign judgment, and, alleging that the defendant was the owner of lands in

Ontario, also claimed relief by way of equitable execution against such lands, and an interim injunction restraining the defendant from dealing therewith.

Held, not a case in which service of the writ of summons out of the jurisdiction could be allowed under any of the provisions of Rule 271.

Held, also, that the defendant, by obtaining an order for security for costs and by opposing a motion for speedy judgment, had not stopped himself from moving against an order permitting service of the writ to be made on him out of the jurisdiction.

Per BOYD, C.: A court is not bound by the decision of a court of co-ordinate jurisdiction where the matter is one of jurisdiction, and involving the settling of a new practice.

W. C. McCarthy for the plaintiff.

H. M. Mowat for the defendant.

BOYD, C.] [Sept. 12.

COUNTY OF WENTWORTH *v.* SMITH.

Attachment of debts—Rule 935—Garnishee "within Ontario"—Banking corporations—Head office—Branches.

Canadian banking corporations authorized by parliament to do business in Ontario, although having their head offices in another province, are to be deemed resident "within Ontario" within the meaning of Rule 935; and moneys deposited with them at branches within Ontario may be attached in their hands as debts due to the depositors.

Bain, Q.C., for the plaintiffs.

Bruce, Q.C., for the defendant Smith.

MANITOBA.

Full Court.] [May 27.

CARSCADEN *v.* PHILION.

Married woman—Next friend—Sufficiency of—Interest in partnership insufficient—Qualifications generally—Crown debtor—Effect of bond to Postmaster-General and not to Her Majesty.

Appeal from judgment of Dubuc, J., setting aside an order of the referee refusing to appoint one Joseph Sheppard as next friend to a married woman.

Sheppard having made an affidavit that he was worth $600 after payment of all his liabilities, and over and above and beyond all statutory exemptions, he was examined thereon, by which it appeared that his property consisted of real estate in the city of Winnipeg, and personal property.

The real estate was a lot, bought for $2,250, and on which $800 had been paid, and $400 laid out in improvements; the unpaid purchase money due being $1,450.

Held, (1) a person proposed as a next friend should at the least be shown to be possessed of such property as would formerly, had he been a plaintiff

resident abroad, have relieved him from the necessity of giving security for costs; to do that it has been held in Ontario and in England that the property must be unincumbered: *Gault* v. *Spencer*, 3 C.L.J., N.S. 70; *Ganson* v. *Finch*, 2 Ch. Ch. 296; *Swinburne* v. *Carter*, 23 L.J.Q.B. 16.

(2) Without going so far as to say that in no case will property subject to an incumbrance be deemed insufficient, yet the incumbrance must be of small amount, and in the present case it was more than three-fifths of the whole purchase price of the property.

(3) In any event, the fact of Sheppard having only an undivided interest in the property, held in common with his son, would render the security insufficient: *Higgins* v. *Manning*, 6 P.R. 147, affirmed on appeal.

(4) The personal property also being held in partnership with his son was insufficient, as all that could be seized and sold under an execution against him would be his unascertained interest in the partnership, a most unsaleable commodity; to realize that interest, whatever it might be, a suit in equity would be necessary, and an interest in an estate which has to be administered by the court will not be regarded as security: *Wilson* v. *Wilson*, 6 P.R. 152.

Haggart for plaintiff.

Hagel, Q.C., for petitioner, the married woman, relied mainly on *Stovel* v. *Coles*, 3 Ch. Ch. 421.

Full Court.] [May 27.

CHARLEBOIS v. GREAT N.W. CENTRAL R.W. CO. ET AL.

Practice—Staying proceedings on action pending result of another in foreign country.

Plaintiff having recovered a judgment in Ontario against defendants on September 28, 1891, in May, 1892, began the present suit in Manitoba to enforce such judgment.

In December, 1892, an action was begun by a shareholder of the defendant company on behalf of himself and all other shareholders in Ontario to set aside the judgment of September 28, 1891.

The defendant company made application to stay all proceedings in this suit until the determination of the action pending in Ontario, which was refused by the Referee and affirmed by Bain, J., on appeal: the company then appealed.

Held, 1. the ground taken that the plaintiff having brought his action in Ontario has elected his forum and is now entitled to come before this court cannot be maintained, nor can it be said that he is proceeding vexatiously with two actions in different countries at the same time.

(2) Though the court has jurisdiction to stay one of two actions for the same cause proceeding concurrently in different countries *McHenry* v. *Lewis*, 22 Ch.D. 397 yet the application here is to stay an action upon the Ontario judgment until an appeal against it is disposed of, for the pending action in Ontario is practically an appeal against the judgment obtained by consent: though the finality of a judgment is not affected by the possibility or likelihood of there being an appeal in the foreign country, nor even by the fact that an

appeal is pending, yet the pendency of an appeal may be ground for the equitable interference of the court: *Huntington* v. *Atrill*, 12 P.R. 36.

(3) The steps taken by the defendant company in Ontario in the pending action being *bona fide* and not for delay, and it appearing that if the suits here and in Ontario were both proceeded with the "expense would be simply enormous," including costs of commissions to England and possibly France, the court should under the circumstances in the interest of justice exercise its discretion and interfere, as not to do so and allow a useless heaping up of costs and disbursements would be a perversion of justice; by imposing terms the interference could be accomplished without prejudice to the plaintiff and the others interested in the proceeds of the Ontario judgment.

BAIN J.] [June 1.

BENARD v. MCKAY.

Pleading - Demurrer - Promissory note - Liquor Licens Act - Illegal to sue on note given for liquor or as pledge for liquor supplied.

Demurrer. Plaintiff, a licensed hotel-keeper, sued defendant on two promissory notes made by him in his favour. The defendant pleaded that part of the consideration for which the notes were given was for and on account of liquor supplied by plaintiff to defendant in his hotel, and that the notes were received by the plaintiff in payment for the liquor so supplied to the defendant, and also that the notes were received by the plaintiff as a pledge for the liquor supplied as aforesaid.

Haney, for plaintiffs, demurred on the ground that the pleas confessed but did not avoid the plaintiff's claim.

Elliott for defendant.

Section 134 of the Liquor License Act provides:

"If any hotel-keeper receive in payment or in pledge for any liquor supplied in or from his licensed premises anything except current money or the debtor's own cheque on a bank or banks he shall for such offence be liable to a penalty of $20, and in default of payment to one month's imprisonment."

Held, (1) that provision was *intra vires* of the provincial legislature: *Hodges* v. *Regina*, 9 App. Cas. 117; *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96.

(2) By the imposition of a penalty for taking anything but money in payment or as a pledge for the price of liquors supplied on licensed premises, the legislature intended to make it unlawful and illegal to take anything but money: it was therefore illegal for the plaintiff to take from the defendant the notes sued on, and if it were illegal for him to take them he certainly cannot bring an action on them: *Re Cork, etc.*, L.R. 4 Chy. App. 748; *Man. Elec. & Gas Co.* v. *Gerrie*, 4 Man. R. 210.

Demurrer overruled.

LAND TITLES ACT.

Re sales under powers in charges the attention of those desiring to register conveyances under powers of sale in charges is called to the following requirements :

(1) The rights of a chargee and the steps to be taken are governed by the terms of the power contained in his charge.

(2) Where a notice is required, it should be shown that such default existed at the time the notice of the proposed exercise of the power of sale was served as justified the action taken, and that such default has continued. Where no notice is required by the charge, but notice has, notwithstanding this, been given, the facts should be shown.

(3) Proof of proper service of the notice upon all persons entitled thereto should be produced. Where the acceptance of a solicitor is relied on, proof of his authority should be produced.

(4) Under 56 Vict., c. 22, s. 3, Ont., passed 27th May, 1893, the wife of a person purchasing land subject to a charge, or the wife of the owner of land whose marriage is subsequent to the charge, has only the same rights in respect of dower as she would have had if the legal estate had been transferred by an ordinary mortgage. As, however, this statute is not retroactive if the land was purchased by the registered owner, prior to this statute and subject to a charge, his wife should be served, though this would not be required under the ordinary system. The difference arises from the fact that a charge does not convey the legal estate to the chargee. It remains in the chargor and passes to his vendee. Where the purchaser, being a man, is unmarried, this fact should be shown, if the purchase was prior to this statute.

(5) Where entry upon the land is a condition precedent to the right to exercise the power, such entry should be shown.

(6) Where the property has been sold privately, it should be shown that proper means were taken to obtain the best price, and that a fair price has, in fact, been obtained. For this reason, where the private sale is after an abortive attempt to sell by auction, the proceedings in connection with the abortive attempt should be shown.

(7) Where property has been sold by public auction, proof that the sale was duly advertised and properly conducted should be filed. The conditions should be produced, and, where there is a reserve bid, the amount should be stated. The conditions should not be unduly stringent. The fact that the property is under the Land Titles Act should be stated in the advertisement and at the sale, and this fact makes the insertion of special conditions unnecessary, except in rare cases.

(8) An affidavit should be made by the chargee (or his assignee where the sale is by the assignee of a charge) stating that the sale is *bona fide*.

(9) Evidence intended for the Land Titles Office should be by affidavit. Affidavits in respect of proceedings under powers of sale should be headed "Land Titles Act," and entitled in the following manner: "In the matter of sale under charge No. 14892, A.B. to C.D."

J. G. SCOTT,
Master of Titles.

September, 1893.

Flotsam and Jetsam.

THE TALE OF A BEAVER;

OR,

BEAVER *v.* THE GRAND TRUNK RAILWAY.

(30 A. R. 476.)

A Beaver who travelled upon a railway
When asked for his ticket thus simply did say:
"I really have lost it—produce it I can't,
And pay once again for a ticket I sha'n't."
The conductor was wroth at that Beaver's tale,
Its veracity he began to assail,
And, glaring upon this ticketless Beaver,
He said: "I'm afraid you're but a deceiver;
Your ticket give up, or the train I will stop,
And out of it quickly I'll soon make you hop."
But Beaver, quite beaver-like, stuck to his tale,
And before that conductor he would not quail.
So without more ado the train it was stopped,
And from it the Beaver most rudely was dropped.

Now this Beaver was grieved and vexed to the heart,
For you know that his tail is his sensitive part;
Yet his tale was rejected, his person as well,
So his bosom did heave, and with rage it did swell,
And a suit he did bring against the railway
For serving him in such an outrageous way,
And damages heavy he claimed to assuage
His grief-stricken feelings and soothe his great rage.
The courts, when they heard of his pitiful tale,
Thought the Beaver abused, and his suit should prevail:
And to the defendants did solemnly say:
"When a Beaver his ticket doth lose on the way,
His tale you can't treat with such disrespect,
Nor on its veracity rudely reflect.
For bouncing this Beaver out on the road
In damages heavy you'll have to unload,
And we'll have you to know that it is not true
That a Beaver must keep his ticket on view
For inspection by any such duffers as you.
When once it is paid for, that quite ends the matter;
If you kick him out and his body you batter
Because to your view he declines to display
The ticket he says he has lost by the way,
You must for the job heavy damages pay,
And this is the law—because that's what we say."

MORAL.

The moral of this story I pray you now to learn:
An Elephant should never the tale of Beaver spurn.

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THE following is told of a Glasgow baillie: In Scottish courts of law, witnesses repeat the oath with the right hand raised. On one occasion, however, the magistrate had a difficulty. "Hold up your right arm," he commanded. "I canna dae't," said the witness. "Why not?" "Got shot in that airm." "Then hold up your left." "Canna dae that ayther—got shot in the ither ane tae." "Then hold up your leg," responded the irate magistrate. "No man can be sworn in this court without holding up something."

AT a term of a circuit court held not long since in one of the up-river counties a horse case was on trial, and a well-known horseman was called as witness. Counsel—"Well, sir, you saw this horse?" Witness—"Yes, sir, I—" Counsel—"What did you do?" Witness—"I jest opened his mouth to find out his age, and I sez to him, sez I: 'Old feller, I guess you're purty good yet.'" Opposite Counsel—"Stop! Your honour, I object to any conversation carried on between this witness and the horse when the plaintiff was not present." The objection was sustained.
