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DIARY FOR JUNE.

1. Tue....Maritime Court Sittings begin.
3. Thur..*The Ascension Day.*
4. Fri.....Lord Ch[illegible] born 1751.
5. Sat.....Easter Sittings of Q. B. and C. P. Div. end, unless shortened or extended by Rule of Court.
6. Sun. . *Sunday after Ascension.*
7. Mon...Sitting of Supreme Court of Canada begin.
8. Tue....C. C. Sittings for trials commence, except in York.
13. Sun....*Whit Sunday.*
14. Mon...C. C. York term begins.
15. Tue....Magna Charter signed 1215.

TORONTO, JUNE 1, 1886.

WE notice in a recent issue of the London *Times* a paragraph stating that arrangements are in progress for the opening of a telephone office at the Royal Courts of Justice for the convenience of barristers, solicitors and other subscribers who may have business there, and that the office is expected to be completed and opened very shortly. We have had these facilities for some years past, and it is pleasant to see that civilization is marching eastward. Perhaps the march has indeed been westward, and has got round to England across the intervening continents.

Several of our subscribers have recently drawn our attention to what they claim to be the character of judicial work that prevails in Ontario at present, and not the least so in respect to judgments delivered by some of the judges at Osgoode Hall. It is asserted that they are too often "slipshod" and careless, more in the nature of lay awards than legal judgments—not the strict application of accepted principles of law to a certain state of facts. It might be found well to refer to this subject more at length, as there would appear to be some ground for the complaint. An article in the pages of our English namesake, which we republish in another place, has some observations which are not entirely inappropriate to the views which our friends alluded to above would seem to hold.

THE VENDORS AND PURCHASERS ACT.

IN 1876 a useful provision was placed on the Statute book enabling many controversies between vendors and purchasers to be disposed of by the Court of Chancery in a summary manner which could formerly have only been determined by a suit. This provision is embodied in R. S. O., c. 109, s. 3, and was copied from the Imperial Statute, 37 & 38 Vict. c. 78, s. 9. It provides that "a vendor or purchaser of real or leasehold estate, or their representatives respectively, may at any time or times, and from time to time apply in a summary way to the Court of Chancery or a judge thereof in respect of any requisitions or objections, or any claims for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract); and the judge shall make such order upon the application as to him appears just, and shall order how and by whom all or any of the costs of suit incidental to the application shall be borne and paid."

The advantages which the Act holds out for the summary disposition of questions of title have not been so extensively recognized as they deserve. Latterly,

however, applications under the Act have been more numerous, and the broad and liberal interpretation which the Courts have given to the Act, both here and in England, is calculated to make it an exceedingly popular mode of disposing of disputes arising on contracts for the sale of land.

The jurisdiction to entertain applications under the Act was originally confined to the Court of Chancery; but under the Judicature Act the jurisdiction is now vested in all the Divisions of the High Court (J. A. s. 9).

Applications were formerly entertained in Chancery either in Court or in Chambers; but latterly the judges of the Chancery Division have decided that all petitions under the Act must be set down to be heard in Court on a Wednesday, and a copy of the petition must be left for the use of the judge at the time of its being set down for hearing. This regulation is due to the fact that questions of title cannot be satisfactorily disposed of in Chambers, where it is impossible to give them the deliberation they require, and because an offhand disposition of such matters might lead to serious consequences. In England, although such applications are always originated in Chambers, yet they may be adjourned into Court, and that is the course usually adopted: *Re Coleman & Jarrom*, 4 Chy. D. 165, 168. No special regulations have been made as to the hearing of such applications under this Act in the Queen's Bench and Common Pleas Divisions of the High Court.

Questions affecting the existence or validity of the contract cannot be entertained under the Act; but the effect of this restriction has been the subject of conflicting opinions. In *Re Henderson & Spencer*, 8 P. R. 402, Spragge, C., notwithstanding that the existence of the contract was denied by the affidavit of the purchaser, nevertheless decided the question of title raised by the petition, but without prejudice to the purchaser's right to file a bill to have the contract rescinded, or to resist a suit for specific performance; but in *Re Robertson & Daganeau*, 19 C. L. J. 19; 9 P. R. 288, Boyd, C., held that the existence of a dispute as to the validity of the contract virtually ousted the jurisdiction of the Court under the Act, and he refused to decide any matter affecting the title until the dispute as to the validity of the contract was disposed of. This probably is the more correct view, and the result of this construction of the statute is to confine the cases in which relief can be obtained under it to those in which the existence and validity of the contract are not disputed. But when a contract has been entered into, the jurisdiction of the Court will not be ousted by one of the parties subsequently claiming the right to rescind it. But the Court may, and in more than one reported case has, upon an application under the Act, determined the question whether the party claiming the right to rescind the contract has in fact the right so to rescind.

In *Re Burroughs*, 5 Chy. D. 601, James, L.J., stated what he considered to be the scope and object of the Act, thus: "My opinion is that upon the true construction of this Act of Parliament, whatever could be done in Chambers upon a reference as to title under a decree when the contract was established can be done upon proceedings under this Act, and that what this Act has done is this: it has enabled the parties to dispense with the form of a bill and answer, and at once to put themselves in Chambers, in exactly the same position in which they would have been, and with all the rights which they would have under the old form of decree": and this view was concurred in by the other members of the Court of Appeal, and was subsequently adopted by Spragge, C., in *Re Eaton*, 7 P. R. 396. A *dictum* of James,

L.J., however, occurs in the same case, and also in *Re Popple* v. *Barratt*, 25 W. R. 248, an earlier case, which is cited in the text-books, which, we think, is calculated to mislead, to the effect that the Act does not enable the Court to try disputed questions of fact. That remark was made in the course of the argument in *Re Burroughs*, and, we think, will be seen is at variance with the decision ultimately arrived at. In that case the question was whether on the conflicting evidence presented to the Court by affidavits and cross-examinations thereon, (and which the Court held to be admissible), the plaintiff had established a title to the soil of the land in question, or merely to a right of pasturage, and the Court in effect did try the disputed question of fact presented by the evidence, and found that the vendor had established a title to the soil.

It is, we therefore think, clear that questions of fact, as well as questions of law, arising upon the investigation of any title, may be inquired into and determined upon a summary application under the Act, and that whatever evidence would be admissible in the Master's Office upon a reference as to title, as to any question of fact, is equally admissible upon a summary application under this statute.

Applications under the Act are usually made in this Province by petition, and the only parties necessary to be brought before the Court upon such applications are those who would be necessary parties to an action for specific performance: *Re Eaton*, 7 P. R. 396; and as a general rule only the parties to the contract are necessary parties to a suit for specific performance, Fry (2nd Ed.), 62, 73. Parties who are unnecessarily served with the petition will be dismissed with costs: *Re McNabb*, 1 Ont. R. 94.

The decision of the Court on the question presented is only technically binding upon those who are actually parties to the application; and third persons who are not parties are not precluded from subsequently disputing the correctness of the decision which may be arrived at (see *Osborne to Rowlett*, 13 Chy. D., *per* Jessel, M. R., at p. 781). Whenever, however, the question of title is doubtful, the Court does not, as a rule, determine it in favour of the vendor, but is always guided in applications under the statute by the doctrine of equity "that a purchaser is not to be compelled to accept a doubtful title."

Under this statute almost any question arising in the investigation of the title, or as to the construction of the contract or liability thereunder, may be determined. In very many cases the Court has construed wills: *Re E. Williams*, 26 Gr. 110; *Re Eaton*, 7 P. R. 396; *Givins* v. *Darvill*, 27 Gr. 502; *Re McNabb*, 1 O. R. 94; *Re Casner*, 6 O. R. 282; *Re Winstanley*, *Ib.* 315; *Re Cooke*, 8 O. R. 530; *Re Brown & Sibly*, 3 Chy. D. 156; *Re Coleman & Jarrom*, 4 Chy. D. 165; *Re White & Hurdle*, 7 Chy. D. 201; *Re Methuen & Blore*, 16 Chy. D. 696; *Re Sturge & G. W. Ry. Co.*, 19 Chy. D. 444; *Re Portal & Lamb*, 27 Chy. D. 600; 30 Chy. D. 50; *Re Fisher & Haslett*, 13 L. R. Ir. 546; *Re Parry & Daggs*, 31 Chy. D. 130.

It has also construed the contract: *Re Gray* and *Metropolitan Ry. Co.*, 44 L. T. N. S. 567; and has determined whether the conditions of sale under which the purchaser bought are misleading: *Re Marsh & Granville*, 24 Chy. D. 11; *Cumming* v. *Godbolt*, 29 N. J. 27; W. So (84) 204. Whether a purchaser or vendor is entitled to compensation for misdescription in the advertisement and particulars of sale: *Re Turner & Skelton*, 13 Chy. D. 130; *Orange to Wright*, 52 L. T. N. S. 606; 54 L. J. Chy. 590. Whether a particular covenant claimed by the purchaser should be inserted in the deed from the vendor: *Re Gray & Metropolitan Ry.*

Co., supra; Re Sawyer & Baring, 33 W. R. 26. Whether the purchaser was bound to enter into restrictive covenant with the vendor: *Re Moody & Cowan*, 51 L. T. N. S. 721; and also what parties should join in the conveyance to the purchaser: *Re Waddell*, 2 Chy. D. 172. Whether a liquidator of a company had power to affix the seal of the company to the deed to the purchaser: *Re Metropolitan Bank & Jones*, 2 Chy. D. 366. Whether a vendor is bound to deliver an abstract of title: *Re Johnston & Tustin*, 30 Chy. D. 42, 53 L. T. N. S. 281. Whether a vendor is bound to give evidence to show that he had duly performed his covenants with his lessor: *Re Moody & Yates*, 28 Chy. D. 661. Whether a married woman could convey without her husband joining in the deed: *Re Coulter*, 8 O. R. 536. The Court has also under the Act determined whether an estate bail has been barred: *Re Dudson*, 8 Chy. D. 628; and whether the legal estate is outstanding: *Re Packman & Moss*, 1 Chy. D. 214; *Re Kearley & Clayton*, 7 Chy. D. 615; *Re Mercer & Moore*, 14 Chy. D. 287; *Davis & Jones*, 24 Chy. D. 190. Also whether the consent of beneficiaries is necessary; *Re Mavis Trusts*, W. N. (80) 141; *Re Earle v. Webster*, 24 Chy. D. 144; *Re Tweedie & Miles*, 27 Chy. D. 315. Also whether the vendors have power to sell under a power of sale under which they have assumed to act: *Re Cooke*, 4 Chy. D. 454; *Re Ford*, 15 C. L. J. 108; *Re Tanqueray v. Landan*, 20 Ch. D. 465; *Osborne to Rowlett*, 13 Ch. D. 774; *Re Morton & Hallett*, 15 Ch. D. 143; *Re Inglehart & Gagnier*, 29 Gr. 418. Whether an administrator with the will annexed can exercise a power of sale: *Re Clay & Titley*, 16 Chy. D. 3. And whether the assignee of a mortgage can exercise a power of sale contained in the mortgage: *Re Gilchrist & Island*, *ante*, p. 147. Whether trustees have a power of sale: *Sutton to Church*, 26 Ch. D. 173; *Re McAuliffe & Balfour*, 50 L. T. N. S. 353; *Re Wright*, 28 Chy. D. 93. Whether trustees have been properly appointed: *Re Glenny & Hartley*, 25 Chy. D. 611. Whether requisitions have been properly answered: *Re Rayner & Greenway*, 53 L. T. N. S. 495; *Re Burroughs*, 5 Chy. D. 601. Whether an option to purchase had been validly granted by a trustee under which the vendor claimed title: *Hallett to Martin*, 24 Chy. D. 624. Whether the vendor has a right to rescind the contract; *Re Jackson & Oakshott*, 14 Chy. D. 851; *Re G. N. R. W. Co. & Sanderson*, 25 Chy. D. 788; *Re Deptford Creek Bridge Co. & Beavan*, 27 So J. 312; *Re Dames & Wood*, 27 Ch. D. 172, 29 Ch. D. 626; *Re Moncton & Gilzean*, 27 Ch. D. 555, 51 L. T. N. S. 320. Whether the Court had power to make an order: *Re Hall-Dare*, 21 Chy. D. 41; the effect of recitals in a deed: *Re Harman & Uxbridge Ry.*, 24 Chy. D. 720. The Court has also determined whether a purchaser is liable to pay interest, and from what term it should run: *Re Gold & Norton*, 52 L. T. N. S. 321; 33 W. R. 33; *Re Pigott & G. W. R. W. Co.*, 18 Chy. D. 146, and at what rate: *Ib. Moncton & Gilzean, supra*; and where interest has been paid by the purchaser under a mistake of law, the Court has ordered it to be refunded by the vendor: *Re Young & Harston*, 31 Chy. D. 168; 53 L. T. N. S. 837; in this case, however, an objection to the jurisdiction, which had been taken and allowed in the Court of first instance, was waived on the appeal.

The Court, when it finds the title of the vendor defective, may give him time to remedy the defect, and in default may declare a good title has not been shown, and order him to refund the purchaser's deposit with interest; *Re Metropolitan Ry. & Cosh*, 13 Chy. D. 607; 42 L. T. N. S. 73; *Re Smith & Stott*, 48 L. T. N. S. 513, and may also order him to pay the costs of the purchaser of investigating the title, and of

the application which may be charged on the vendor's interest in the property; *Re Higgins & Hitchman*, 21 Chy. D. 95, 99; *Re Yielding & Westbrook*, 31 Chy. D. 344.

On the other hand, where the Court is of opinion that the vendor has made out his title, it may proceed by order to enforce the contract, and it is improper in such a case for a vendor to commence an action for specific performance: *Thompson* v. *Ringer*, 44 L. T. N. S. 507; 29 W. R. 520; *Re Craig*, 18 C. L. J. 317; 10 P. R. 33.

The costs of applications under the Act are in the discretion of the Court. The general rule is to make them follow the event, and when the purchaser succeeds the vendor is usually ordered to pay the costs: *Re Packman & Moss*, 1 Chy. D. 214; *Re Mercer & Moore*, 14 Chy. D. 287; *Jackson & Oakshott*, *Ib.* 851; *Re Clay & Tetley*, 16 Chy. D. 3; *Re Methuen* v. *Blore*, 16 Chy. D. 696; *Hallett & Martin*, 16 Chy. D. 624, 633; and where the purchaser fails he is usually ordered to pay the costs: *Re Wadell*, 2 Ch. D. 172; *Re Cooke*, 4 Ch. D. 454; *Re Burroughs*, 5 Ch. D. 601; *Re Ford & Hill*, 10 Ch. D. 365; *Re Turner & Skelton*, 13 Ch. D. 130; *Re Morton & Hallett*, 15 Chy. D. 143; *Re Warner*, 17 Chy. D. 711; *Re Pigott & G. W. Ry. Co.*, 18 Chy. D. 14; *Re Tanqueray & Landau*, 20 Chy. D. 465, 483; *Re Dames & Wood*, 27 Chy. D. 172; *Re Tweedie & Miles*, *Ib.* 315.

In some cases no costs have been given to either party, as where the point submitted was a fair subject for discussion; *Re Coward*, 20 Eq. 179; *Re Metropolitan Dist. Ry. & Cosh*, 13 Chy. D. 607, 613; or there were conflicting decisions: *Osborne to Rowlett*, 13 Chy. D. 774, 798, and see *Re Bellamy & Met. Board of Works*, 24 Chy. D. 387, 392; and where the vendors took advantage of a condition of sale which entitled them to rescind the contract, the Court, though holding the vendors were entitled to rescind, nevertheless refused them their costs: *G. N. Ry. Co.* v. *Sanderson*, 25 Chy. D. 788; but in another case under similar circumstances costs were awarded to the vendor: *Dames & Woods*, 27 Chy. D. 172, 29 Chy. D. 626.

The general rule is to order costs to be paid by the purchaser when he fails, so as to assure his title and show that the Court entertains no doubt about it. Per Jessel, M. R., *Osborne to Rowlett*, 13 Chy. D. 798

Where an application under the Act is heard (as is now invariably the rule in the Chancery Division) in Court, it follows that no appeal to a Divisional Court can be had from the decision, except by consent of both parties: Rule S. C. 471; *McTiernan* v. *Fraser*, 9 P. R. 246; 18 C. L. J. 341; *Wansley* v. *Smallwood*, 10 P. R 233. When the parties do not consent, the party desiring to appeal must carry the case to the Court of Appeal.

RECENT ENGLISH DECISIONS.

The *Law Reports* for May include 16 Q. B. D., pp. 673-795; 11 P. D., pp. 29-55, and 31 Chy. D. pp. 503-690.

SOLICITOR AND CLIENT—TAXATION AFTER A YEAR—"SPECIAL CIRCUMSTANCES"—(R. S. O. c. 140, s. 35.)

In re Norman, 16 Q. B. D. 673, was an application by a client to tax his solicitor's bill after the lapse of twelve months from its delivery. The bill in question contained the following charges:—£735 for costs of an action and a reference lasting six days, and £83 for witnesses' expenses, no part of this sum having been paid by the solicitor, but nearly the whole of it had been paid by the client, and the rest had never been paid. The bill also contained a charge of £71 for shorthand notes of the proceedings which had been taken by the solicitor's clerk, but it did not appear that the clerk had been paid any part of the £71 charged, the charge being made on the scale usually charged by professional shorthand writers. Stephen, J., considering these charges

in the bill constituted "special circumstances," had ordered a taxation, his order was affirmed by the Divisional Court of the Queen's Bench Division (Mathew and A. L. Smith, JJ.), and the latter decision was now affirmed by the Court of Appeal. The court was pressed with the rule laid down by Cotton, L.J., *In re Boycott*, 29 Chy. D. 571, but the Court of Appeal refused to adopt it, and preferred that stated by Bowen, L.J., in the same case, as follows:

Special circumstances, I think, are those which appear to the judge so special and exceptional as to justify taxation. I think no court has a right to limit the discretion of another court, though it may lay down principles which are useful as a guide in the exercise of its own discretion.

ADDING PARTY PLAINTIFF—CONSENT—ORD. XVI. RR. 2, 11—(ONT. RULE 103 *b*).

The short point decided in *Tyron* v. *The National Provident Institution*, 16 Q. B. D. 678, by Mathew and A. L. Smith, JJ., was that under Ord. 16, r. 11, a party cannot be added as a co-plaintiff without his written consent, even though he be indemnified against costs. In the case of *Cox* v. *James*, 19 Chy. D. 55; 45 L. T. N. S. 471, decided under the English Rules of 1875, and which more nearly correspond with the Ont. Rule 103*b*, then the English Rules of 1883, it was held that it was not necessary that the consent of the party to be added should be in writing; and that it was sufficient that the solicitor for the existing plaintiff states that he has authority to consent on behalf of the party proposed to be added. Although a consent in writing is not necessary under our Rule, the consent must be given either in person or by counsel or solicitor.

TRIAL—HOSTILE WITNESS—DISCRETION OF JUDGE—C. L. P. ACT, 1854, s. 22—(R. S. O. c. 62, s. 27).

The case of *Rice* v. *Howard*, 16 Q. B. D. 681, is one in which the defendant, on a motion for a new trial, sought to review the discretion exercised by the judge at the trial as to permitting the defendant's counsel to treat one of his own witnesses as a hostile witness. At the trial, in order to show that the witness in question was adverse, the judge was asked to look at an affidavit made by the witness in a former action. The judge being of opinion that there had been nothing in the witness's demeanour, or in the way he had given his evidence, to show that he was hostile, refused to look at the affidavit; and Grove and Stephen, JJ., were of opinion that the decision of the judge at the trial on this point was final and could not be reviewed.

INTERPLEADER AS TO PART OF A CLAIM—(ONT. JUD. ACT, s. 17, ss. 8).

In *Reading* v. *School Board for London*, 16 Q. B. D. 687, a Divisional Court of the Queen's Bench Division (Day and Wills, JJ.,) affirmed the order of A. L. Smith, J., holding that a debtor against whom an action is brought, and who has had notice of an assignment of the debt, may interplead as to part only of the claim, and may dispute the residue.

MUNICIPAL BY-LAW—UNREASONABLENESS—MUSIC IN STREET ON SUNDAY.

In *Johnson* v. *Croydon*, 16 Q. B. D. 708, a Divisional Court, composed of Hawkins and Mathew, JJ., were called on to consider the validity of a municipal by-law, which provided that "no person, not being a member of Her Majesty's army or auxiliary forces, acting under the orders of his commanding officer, shall sound or play upon any musical instrument in any of the streets of the borough on Sunday."

The court held that the by-law in question was unreasonable, and *ultra vires*, inasmuch as it prohibited all music, however harmless or free from offence it might be, and they therefore quashed a conviction made under it.

BALLOT PAPER—ABSENCE OF OFFICIAL MARK.

In *Re Thornbury*, *Ackers* v. *Howard*, 16 Q. B. D. 739, was a case stated by Field and Day, JJ., for the opinion of the court, as to the validity of ballot papers, which conformed in other respects to the requirements of the Ballot Act, 1872 (35 and 36 Vict. c. 33), but had not on their face the official mark directed by s. 2 of that Act to be marked on both sides of the ballot paper. This section provides that "each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting, the ballot shall be marked on both sides with an official mark, and delivered to the voter within the polling station. . . . Any ballot paper which has not on its back the official mark . . . or on which anything, except the

said number on the back, is written or marked, by which the voter can be identified, shall be void and not counted." The court, composed of Coleridge, C.J., and Hawkins and Mathew, JJ., were unanimously of opinion that the ballot papers were not invalid. Hawkins, J., delivered the judgment of the court, and the gist of the decision may be collected from the concluding words of his judgment, where he says:

If the Legislature had intended that the absence of the official mark from the face of the ballot paper should avoid the vote, it is impossible to suppose that in declaring in the second section what votes shall be void and not counted, it would have confined itself to the mark on the back. It would be difficult to suggest a case to which the maxim so often quoted during the argument, "*Expressio unius est exclusio alterius*," could be more justly and fittingly applied.

MARRIED WOMAN—CRIMINAL PROCEEDINGS AGAINST HUSBAND—DEFAMATORY LIBEL.

A further contribution to the law relating to married women is to be found in *The Queen* v. *Lord Mayor of London*, 16 Q. B. D. 772, in which a married woman sought to compel the Lord Mayor of London to proceed to hear and determine an application made by her for a summons against her husband for defamatory libel, alleged to have been published by him of and concerning the appellant. The application was attempted to be sustained on the ground that the libel was an injury to the married woman's property, that her reputation was property; but the court (Mathew and A. L. Smith, JJ.,) were unable to accede to that argument. They held that what was damaged, if anything, was the fair fame of the applicant, and that that was not "separate estate."

VENDOR AND PURCHASER—RESCISSION OF CONTRACT —MISLEADING CONDITIONS.

In *Nottingham Patent Brick Co.* v. *Butler*, 16 Q. B. D. 778, the Court of Appeal affirmed the decision of Wills, J., 15 Q. B. D. 261, noted *ante*, vol. 21, p. 330.

WRIT OF SUMMONS—SERVICE OF MEMBER OF FOREIGN FIRM WITHIN JURISDICTION.

An important point of practice was determined by a Divisional Court, composed of Matthew and Smith, JJ., in *Pollexfen* v. *Sibson*, 16 Q. B. D. 792. The defendants were a foreign firm, and one of the members of the firm happening to be in England on business he was served with a writ of summons in an action against the firm, which was the ordinary eight day writ. Wills, J., set aside the service as irregular; but his decision was reversed, the court holding that the rule enabling one member of a partnership to be served with a writ on behalf of his firm, applied to a foreign firm as well as an English partnership.

WILL—CONSTRUCTION—ILLEGITIMATE CHILDREN.

Passing now to the cases in the Chancery Division, the first to call for notice is *In re Haseldine*, *Grange* v. *Sturdy*, 31 Chy. D. 511, in which a majority of the Court of Appeal overruled Kay, J., upon a question of construction of a will and codicil. The point in controversy was whether a gift to "children" could be construed to mean illegitimate children. Kay, J., and Cotton, L.J., held that it could not, but Bowen and Fry, L.JJ., were of a different opinion. The testator, it appeared, was seized with paralysis in the house of his sister-in-law, M. A. L., and remained there until his death. M. A. L. had been married seven years but had no legitimate children; she had, however, three children by her husband born before her marriage with him, aged sixteen, thirteen and eleven, who were treated as legitimate, and with whom the testator was intimate. In October, 1860, having become worse, the testator was advised by his medical attendant to make his will, and made one containing the following dispositions: "I give and bequeath the following legacies to the following persons" (after which followed gifts of legacies to persons named) "and to each of the children of M. A. L. the sum of £5 for mourning, the same to be paid into the hands and on the receipt of M. A. L., their mother, for them, notwithstanding her coverture and their minority." On 5th August, 1881, two days before his death, he made a codicil by which he bequeathed £400 on the death of an annuitant "unto and equally between all the children who shall then be living of M. A. L., share and share alike;" and confirmed his will, except as varied by the codicil. M. A. L. was forty-four years old when the will was made. Cotton, L.J., was of opinion that the rule laid down by Lord Selborne in *Dorin* v. *Dorin*, 7 H. L. 568,

577, viz., that the word "children" in a will means legitimate children, unless when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them, and that there was no repugnancy or inconsistency in confining the word "children" to legitimate children; but Bowen and Fry, L.JJ., considered that the surrounding circumstances pointed to the conclusion that the word "children" in the will and codicil was meant to include illegitimate children, and that the will would be insensible unless so construed. They also considered this construction of the will applied also to the codicil.

APPOINTMENT OF NEW TRUSTEE — DISPENSING WITH SERVICE ON CESTUI QUE TRUST.

In re Wilson, 31 Chy. D. 522, was an application by the persons entitled to the residuary estate of a testator to appoint new trustees of his will in place of the original trustees, one of whom had died, and the other had become a lunatic. The petition was served on three of the four persons who were entitled to the proceeds of certain real estate devised on trusts for persons who took no interest in the residue; but the fourth was resident in Australia and was not served, and service on him was dispensed with.

HUSBAND AND WIFE—SEPARATION AGREEMENT—RECONCILIATION.

In the case of *Nicol* v. *Nicol*, 31 Chy. D. 524, the Court of Appeal affirmed the decision of North, J., noted *ante*, vol. 21, p. 411. In this case it may be remembered husband and wife had agreed to a separation, and one part of the agreement was that the wife should be permitted the use of certain furniture. Subsequently the parties returned to cohabitation. Subsequently the wife met with a severe accident which rendered it necessary for her to be placed under medical treatment at a distance from home, and after that never returned to her husband. The present action was brought by the wife against her husband to recover possession of the furniture; but the court held that the reconciliation had put an end to the agreement, and therefore that the plaintiff could not recover.

MARRIED WOMAN—COSTS—RESTRAINT ON ANTICIPATION.

In re Glanville, *Ellis* v. *Johnson*, 31 Chy. D. 532, is a case in which the plaintiff, a married woman, sued by her next friend for administration of a trust fund. Upon the case coming on for further consideration it was held that the action was unnecessary, and the next friend was ordered to pay the defendant's costs. The next friend could not be found, and an application was then made by the trustees for an order authorizing them to retain such part of the costs as they could not recover from the next friend out of the income of the trust fund to which the married woman was entitled for her separate use, but without power of anticipation. Bacon, V.C., granted the application, but on appeal the Lords Justices reversed the order, holding that the effect of it was to defeat the clause against anticipation, which could not be done; but the order on appeal was, without prejudice to the trustees, applying to be paid the costs in question out of the *corpus* of the fund.

WILL—CONSTRUCTION—ILLEGITIMATE CHILD.

The hardship which occasionally results to individuals from the stringent rule of construction which prevents gifts to children being construed as gifts to those who are illegitimate, unless there is something in the will to alter the meaning of the word, is pretty well illustrated in *In re Bolton*, *Brown* v. *Bolton*, 31 Chy. D. 542. In that case the testator went through the form of marriage with J. A. C., whose husband had deserted her, and gone abroad many years before and was believed to be dead, but the testator was aware that there was no certain information of his death. By his will the testator gave to his "dear wife, J. A. B., formerly J. A. C.," certain property during her widowhood, and after her decease or re-marriage he gave the *corpus* to "all and every my child or children," and in default of children to his nephews and nieces. The testator continued to cohabit with J. A. C. for more than a year and a half after the date of his will, and died leaving her *enciente* of her only child. She enjoyed the income of the property in question until her death, upon which event the nephews and nieces claimed it under the gift over, and proved that J. A. C.'s child was illegitimate, her former husband having been

alive at the time of her marriage to the testator. It was held by the Court of Appeal (affirming Kay, J.) that the child could not take. Cotton, L.J., says at p. 551:

Assume that the testator thought it doubtful whether his marriage was void, and that the gift in his will was capable of being construed as a gift to existing children, who might or might not be legitimate, we still could not apply the gift to future children if illegitimate. *Occleston* v. *Fallalove*, L. R. 9 Chy. 147, was much relied on, but, in my opinion, that case does not cover this, and leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described only by reference to paternity.

And Bowen, L.J., says:

A man cannot provide for the illegitimate children either of himself or of another man by any reference that involves an inquiry as to their paternity. The law allows no criterion of paternity out marriage. . . . It is true that although the fact of paternity cannot be inquired into, the reputation of paternity may. The law does not forbid that, and if we could make out from this will that the testator meant that all children of the woman born during his cohabitation with her should be considered or reputed to be his, they might take.

ANCIENT LIGHTS—ALTERATION OF BUILDING.

Scott v. *Pope*, 31 Chy. D. 554, is a decision of the Court of Appeal on the law of ancient lights. The plaintiff was the owner of a building, on the east wall of which were various ancient lights. In 1872 the plaintiff pulled down this building and erected a new one in its place, of greater elevation and lighted by larger and more numerous windows. The east wall of the new building was advanced in one part 3 ft. 5 in., and in another part 1 ft. 7 in. nearer the defendant's building than the former wall had stood. In 1883 the defendant pulled down four old buildings immediately opposite the new buildings of the plaintiff, and began to erect houses of greater elevation on their site. No record had been kept of the exact position of the windows in the plaintiff's old building, but it was proved that the ancient lights corresponded with some part of the windows in the plaintiff's new building, and the planes of the old and corresponding new windows were very nearly but not quite parallel to one another. The plaintiff brought the action claiming an injunction to restrain the defendant from interfering with these ancient lights. It was contended by the defendant that the alteration in the position of the windows and in the site of the wall amounted to an abandonment of the easement, but both North, J., and the Court of Appeal, held that it did not. They considered that so long as the site of the wall and the position of the new windows were such as that the light which formerly went into the old windows would go into the new, the right to the access and use of light was preserved. It having been virtually conceded in the court below that if the plaintiff was entitled to the access and use of light, he was entitled to the injunction claimed, it was held to be too late for defendant to contend in the Court of Appeal that the plaintiff was entitled to damages only, and not to an injunction.

MORTGAGEE—FORECLOSURE—COSTS OF MORTGAGEE.

The case of *National Provincial Bank of England* v. *Games*, 31 Chy. D. 582, was one for foreclosure, in which the question was as to whether certain costs could be properly charged by the mortgagees against the mortgagor. By a consent order, it had been referred to the taxing master to tax the mortgagees' costs of the action, including therein any charges and expenses properly incurred by them as mortgagees, subsequently to the 6th May, 1882. The mortgage was by deposit of title deeds accompanied by a memorandum, whereby the mortgagor agreed to execute a legal mortgage. The taxing master disallowed the following charges in the mortgagees' bill. (1) Costs of an action for recovery of the debt incurred prior to 6th May, 1882. (2) Costs of correspondence with a surety for a part of the debt. (3) Costs of investigating the title with the view to procuring a legal mortgage to be executed by the mortgagor. (4) Costs of preparing a legal mortgage which the mortgagor refused to execute. (5) Correspondence with the mortgagor as to the legal mortgage. Pearson, J., held that heads (1) and (2) should have been allowed, but that the master was right in disallowing (3), (4) and (5). On appeal, however, it was held that although (1) would ordinarily be a proper charge, it could not be allowed in the present case, as it was excluded by the terms of the order direct-

ing taxation; that (2), (4), and (5), must be allowed; but that (3) could not be allowed, as an investigation of the title was not necessary for the purpose of preparing the legal mortgage; but that the mortgagees were entitled to be allowed all expenses properly incurred with reference to the preparation of the legal mortgage, which would include the expense of such inspection of the title deeds as was necessary for preparing it.

COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY — VOLUNTEER NOT ENTITLED TO BENEFIT OF COVENANT.

The case of *In re Anstis Chetwynd* v. *Morgan*, 31 Chy. D. 596, shows that the maxim, "equity looks on that as done which ought to be done," is by no means universally true, and that it cannot be invoked by a mere volunteer to avoid the effect of the non-performance of a covenant which he is not entitled to enforce.

By a marriage settlement certain personal estate was assigned to trustees upon trust, in case the husband should predecease the wife, and there should be no issue of the marriage, to stand possessed thereof, for the wife, her executors, administrators, and assigns: and the settlement contained a covenant on the part of the husband and wife, to settle any property the wife should become entitled to, upon the same trusts as the above-mentioned personal estate, or as near thereto as the nature of the property would admit of, and until so settled that it should be subject to the trusts aforesaid, and enjoyed accordingly.

By a subsequent deed certain lands were conveyed to trustees for the wife during the joint lives of herself and her husband, with restraint on anticipation, remainder to her for life, remainder as she should by deed or will appoint, and, in default of appointment, to her husband in fee. By a will made in her husband's lifetime, the wife devised these lands to two persons. The husband died in May, 1882, and the wife in the June following without republishing her will. There were no children of the marriage, and the lands above referred to were never conveyed to the trustees. The heir-at-law of the wife claimed to be entitled to the land under the settlement as against the devisees named in her will. But the Court of Appeal (affirming Bacon, V.C.,) held that the wife's heir was a mere volunteer, and could not enforce the performance of the covenant contained in the settlement, and was therefore not entitled to invoke the maxim of equity above mentioned. Lindley, L.J., who delivered the judgment of the court, though of opinion that the lands in question were within the terms of the covenant, was nevertheless of opinion that they were not actually subject to the trusts of the settlement. He says at p. 605:

Equity, no doubt, looks on that as done which ought to be done," but this rule, although usually expressed in general terms, is by no means universally true. Where the obligation to do what ought to be done is not an absolute duty, but only an obligation arising from contract, that which ought to be done, is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it. . . But the appellant appears to have no such right. The covenant was not entered into for his benefit in any way. He could never have enforced it against Mrs. Anstis, and her death has conferred no such right upon him. He cannot enforce any equitable right of hers, which she in effect declined to enforce herself. He has no independent rights of his own, and has no equity against her appointees. As against them he is in no better position than a volunteer, in whose favour an executory trust will not be enforced.

APPEAL—INTERLOCUTORY ORDER—(ONT. JUD. ACT, S. 35).

In re Lewis, Lewis v. *Williams*, 31 Chy. D. 623, is a decision of the Court of Appeal which bears on the construction of Ont. Jud. Act, s. 35, as to the meaning of the term, "interlocutory order." The action was for administration. The defendant obtained an order in Chambers directing the taxation of the costs of the plaintiff and defendant, and a creditor to whom the conduct of the action had been given, and the application of the funds in court in payment of a debt, and then *pro tanto* of the costs, and priority being given to the costs of the defendant, liberty was given to any of the parties to apply as to the getting in of an outstanding asset and generally. It was held that this was an interlocutory order.

THIRD PARTY INTERVENING—SECURITY FOR COSTS.

In *Appollinaris Co.* v. *Wilson*, 31 Chy. D. 632, an injunction had been granted restraining the defendants from parting with goods alleged to bear improperly the plaintiffs' trade mark. The defendants were carriers of the

goods, and had no interest therein. S., a resident in America, who claimed to be the owner of the goods, served notice of motion that he might be at liberty to reship the goods to a foreign port, and that if necessary he might be added as a defendant. The plaintiffs applied for security for costs from S., which was granted by Bacon, V.C., and his order was affirmed by the Court of Appeal.

MARRIAGE SETTLEMENT—AFTER-ACQUIRED PROPERTY.

In re Garnett, Robinson v. *Gandy*, 31 Chy. D. 648, is a case in which Kay, J., was called upon to determine whether certain property was subject to a covenant for settlement of after-acquired property contained in a marriage settlement. The settlement made in 1859 recited that the wife, amongst other property, was entitled to £10,000, part of her share of the residue of a testator's estate in the hands of the executors of the estate and secured by mortgage. This £10,000 was settled, and the settlement contained a covenant to settle after-acquired property. The day before the settlement the wife had given the executors a general release of all her claims to the testator's estate. Subsequently, in 1885, during the coverture, this release was set aside on the ground that her share was greatly in excess of that stated in the release, and the question was whether this excess, to which she became entitled on setting aside the release, was subject to the covenant to settle after-acquired property, and Kay, J., held that it was; and that not only the capital but also the income must be treated as a lump sum falling in when the release was set aside.

EXPROPRIATION OF LAND—RIGHT OF EXPROPRIATOR TO WAY OF NECESSITY.

In Serff v. *Acton Local Board*, 31 Chy. D. 679, the defendants had expropriated under their statutory powers half an acre of the lands of A, and five acres of the lands of B for the purpose of sewage works. The only way to the land taken was a warple way over other part of A's land, which for thirty years had been used by the occupiers of both A's and B's lands for the purposes of cultivation, but latterly by A for his own use only. It was held by Pearson, J., that the defendants had a right of way over the warple way for all necessary purposes in connection with the sewage works.

WILL—GIFT TO CHILDREN—PER STIRPES OR PER CAPITA.

The only case which remains to be considered is *In re Campbell's Trusts*, 31 Chy. D. 685, which is a decision of Pearson, J., upon the construction of a will, whereby the testator gave some houses to trustees, upon trust to receive the rents and to pay the same in equal moieties to his son and daughter during their lives; and after the death of either of them without issue living to pay the whole thereof to the survivor during the life of such survivor; but if there should be issue living of the first of them so dying, then upon trust to pay one-half to the survivor and to divide the other half between all and every the child or children of the one so dying; and after the decease of the survivor of the son and daughter on trust to sell the property and divide the proceeds equally amongst all and every the child or children of each of them, the testator's son and daughter, who should attain twenty-one, in equal shares and proportions. The question was whether the grandchildren took *per stirpes* or *per capita*. Although at first inclined to the opinion that the division must be *per capita* the learned judge decided that the proper construction of the will called for a division *per stirpes*. He distinguished the case from *Nockolds* v. *Locke*, 3 K. & J. 6, on the ground that the property in that case was personalty; and he considered that the division directed, in case of one of the testator's children dying before the other, precluded the idea that the testator intended to make a different division when the survivor should die.

SELECTIONS.

CRIMINAL EQUITY.

Unless the criminal law is to be allowed to sink into a state of unintelligibility, one of two things must occur. We must either have a Criminal Code, or we must have a more efficient Court of Criminal Appeal. The code of Mr. Justice Stephen, admirable example as it is of learning and logical skill, and carefully revised as it was by experienced judges, is very far from inspiring sufficient confidence to make its adoption possible. It has a tendency to break down in practice, as witness the recent case of *Regina* v. *Hyndman*, when the code said one thing as to the law of sedition and the Digest of its chief author another thing. The inefficiency of the Court for the Consideration of Crown Cases Reserved is due in no way to any shortcomings on the part of the judges who compose it, but to the nature of its constitution. No one who reads the judgments in *Regina* v. *Ashwell*, 55 Law J. Rep. M. C. 65 (reported in the May number of the *Law Journal* Reports), but will be struck with admiration at the learning, ingenuity, and dialectical power of the judges who delivered them. Each judgment is an essay in itself. The fault of them is, however, that they are wanting in practical character. The Court for the Consideration of Crown Cases Reserved consists of twenty-three judges, of whom fourteen sat on this occasion, but five of whom, varying from time to time, usually sit, and it necessarily wants cohesion. When the Court sits in full numbers there are too many judges to arrive at one conclusion; and when it sits in diminished numbers its decision will be overhauled, probably with the mischievous result of "distinguishing" on the next occasion by five fresh judges. The want of responsibility which results is the cause of the purely academic character of the judgments delivered. They are most interesting as embodying the varying opinions of judges, but any responsibility for making the criminal law work is entirely absent. We want a Court into which this sense of responsibility may be instilled, and probably we cannot do better than adopt the existing system of appeal in civil cases. If the Court of Appeal and the House of Lords are not capable of deciding what is and what is not larceny they are certainly not capable of deciding the much more intricate questions of civil liability which come before them; and that depth and width of knowledge of law which a Court of Appeal ought to possess cannot be reached by judges not thoroughly acquainted with the law of crime. What is required is a Court of Criminal Appeal which will lay down boldly the few essential principles of criminal law and not deviate from them.

Readers of the judgments of the Lord Chief Justice and Mr. Justice Cave in *Regina* v. *Ashwell* will rub their eyes and doubt whether they can really be reading a judgment in a criminal case. If there is one branch of law more than another in which facts ought to be dealt with boldly and even coarsely, it is the law of crime. The question was whether when the prosecutor handed Ashwell something, and Ashwell took it, there was a giving and receiving. If so, there was an end of the charge, because both the prosecutor and Ashwell thought at that time they were passing a shilling from one to the other. The thing passed was, in fact, a sovereign, but as Ashwell did not find this out until an hour afterwards, his misappropriation of it then would be no crime, because he could not steal what was already in his possession. Lord Coleridge says: "It seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law, any more than in sense, a delivery and receipt unless the giver and the receiver intend to give respectively what is respectively given and received." However sound this may be as a philosophical disquisition, is it applicable to the elucidation of the law of crime? According to this view, if a schoolboy put a toad in his sister's apron on pretence of its being an india-rubber ball, there is no receipt of the toad, yet there is a scream from the sister all the same. But Lord Coleridge modifies his proposition in his next sentence, in which he says that "all acts *to carry legal conse-*

quences must be acts of the mind," which he hopes is not "laying down anything broad or loose." With all respect, it seems neither broad nor loose, but wrong, as some familiar examples of criminal law show. A., who shoots at B. and kills D., is guilty of murder; if he steals B.'s watch to spite D., he is guilty of larceny. If he fire a gun into a street, meaning to discharge it, and kill a passer-by, he is guilty of manslaughter, or perhaps murder. These and numerous other examples seem to show the practical nature of the law of crime, and how little it looks at the metaphysical fact.

Lord Coleridge further fears that "to hold that a man did in law what he did not know he was doing, and did not intend to do, is to expose the law to very just, but wholly unnecessary, ridicule and scorn." It is unnecessary that lawyers should appeal to any such exoteric test of their principles. They can afford to despise the ridicule and scorn of all but those who understand the subject. Lord Coleridge's judgment follows with an argument of Mr. Justice Stephen turned against himself with a neatness which controversialists will admire. "It seems to me," says the Chief Justice, "with diffidence, that he creates the fiction who holds the man does what he does not know he does and does not mean to do, not he who says that an act done by an intelligent being is not an act of that being unless it is an act of his intelligence." In other words, a man who walks in his sleep does not walk at all, and it is a fiction to say that he does, and the fact to say that he does not. Mr. Justice Cave puts his decision on the ground that by reason of the coin being a sovereign, and not, as both supposed, a shilling, the possession of the sovereign did not pass, and the prisoner took it when he found out that it was a sovereign. He says, "A man has not possession of that of the existence of which he is unaware;" but this definition does not carry the learned judge to his conclusion. Ashwell was aware that the prosecutor had given him a coin; what he did not know was that the coin was gold and stamped as a sovereign. Suppose a warehouseman receives a picture as a copy of a great master, and it is lost by his negligence, could he by proving at the trial that the picture was an original show that he never in law had possession at all? Mr. Justice Cave asks, "Suppose that, while still ignorant that the coin was a sovereign, he had given it away to a third person, who had misappropriated it, could he have been made responsible to the prosecutor for 20*s.*? In my judgment he could not." Probably Mr. Justice Cave is right. If a man gives another man what he describes as a paste necklace to take care of, he cannot recover its value as genuine on proof of the fact. But this also does not go far enough. Mr. Justice Cave must say that the prosecutor under those circumstances could not recover the shilling. This, he admits, he could recover, and therefore the possession of something passed, and not of nothing. The robuster view expressed by Mr. Justice Smith will meet with better acceptance. The learned judge says: "In the present case it seems to me in the first place that the coin was not taken against the will of the owner, and, if this is so, in my judgment it is sufficient to show that there was no larceny at common law." In this we agree, although we are surprised to find Mr. Justice Smith further on agreeing with the *dictum* in *Regina* v. *Middleton*, 42 Law J. Rep. M. C. 73, that a cabman who is given a sovereign in mistake for a shilling, and who takes it knowing the mistake, is guilty of larceny. This opinion is inconsistent with Mr. Justice Smith's view, previously expressed, that if the coin was not taken against the will of the owner there is no larceny.

The statement of Mr. Justice Smith, that he was fully alive to the remark which had been made, that if the present case is not one of larceny it should be, supplies the key to the decision. This is the very argument which most impresses a bench of judges constituted like the Court of Crown Cases. The general assembly of the judges produces a deliberative and legislative body rather than a Court of law. A body of this kind is very likely to be sensitive to influences from without, and to consider what will be thought of their decision by the public rather than to lay down the law. They feel too many and too strong to resist the temptation of bending the law according to the dictates of common sense. In other words, they become a Star Chamber, which, as Mr. Justice Stephen points out in his learned judgment, decided "according to

the law of nature in Chancery." Some strange results followed when this unlucky law of nature found itself "in Chancery"; but the Star Chamber had its advantages in days when powerful and lawless men could not be reached by ordinary law. It was the necessary machinery for their coercion. When, however, advances were made in civilization, the Star Chamber became unalloyed tyranny, and is now universally stigmatized in history. The "criminal equity" which it used to administer does not, however, seem to have died out altogether. Chief Baron Pollock used to say that "criminal equity" died out with the Star Chamber, but he did not see the recent development of the Court for the Consideration of Crown Cases Reserved. In *Regina* v. *Middleton*, with the dissent of Barons Martin and Bramwell, the present Master of the Rolls and Baron Cleasby, the doctrine that larceny must be *invito domino* seems to have been struck out of the law; in *Regina* v. *Ashwell* a similar fate seems to have attended the doctrine that there must be a felonious taking, not, as in the other case, by a majority of the judges, but in virtue of the phrase, *Semper presumitur pro negante*. It is a characteristic example of this Court that this rule is not construed in its substantial sense—namely, that the crime was negatived—but in the artificial sense that the motion to quash the conviction was rejected.—*The Law Journal* (London, Eng.).

SELF-DEFENCE.

In a recent case in Iowa * the Supreme Court takes what is believed by some gentlemen of the bar in that State to be a new departure on the law of self-defence, and the duty of a person assailed to "retreat to the wall," before taking human life. In that case the prisoner was pursued by the deceased (who was his father), armed with a pitchfork, very angry, and apparently intent upon serious mischief. Without exhausting his remedy of flight, the prisoner turned upon his pursuer and shot him, and he died two days afterwards. The prisoner was convicted of manslaughter, and sentenced to imprisonment for fifteen years. In the trial Court, the judge charged the jury thus: "You are instructed that it is a general rule of law that, where one is assaulted by another, it is the duty of the person thus assaulted to retire to what is termed in the law a wall or ditch, before he is justified, in repelling such assault, in taking the life of his assailant. But cases frequently arise where an assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the person thus assaulted to retire without manifest danger of his life or great bodily injury; in such cases he is not required to retreat." This instruction, the Supreme Court held, stated the law on the subject correctly.

For the defence it was argued that the instruction was erroneous in holding that the assailed is bound to retreat, and is only exempt from the necessity of doing so, where it would be manifestly dangerous to attempt a retreat. It was insisted that the assailed is only bound to retreat where the assault is not felonious. Where it is felonious the assailed may well stand his ground and kill his assailant, if he has reasonable grounds as a prudent man for believing that if he does not, his assailant will kill him. And this under these circumstances, he may well do, irrespective of his means of escape by flight.

This line of defence the Supreme Court held was untenable, and, as we learn from a correspondent, the opinion of the profession in Iowa is divided on the subject.

If the time-honoured doctrine which requires a retreat to the wall is limited to non-felonious assaults, as seems to be argued against the reasoning of the Court, there are comparatively very few cases in which retreat can be required at all. The question can seldom arise except in cases which our statutes denominate "assaults to kill." In an ordinary affray or "fisticuff" the assault is not felonious, and in those cases the danger to life or of great bodily harm does not usually exist, and these are as essential to a successful defence as the retreat to the wall. Mr. Bishop says: "The cases in which this doctrine of retreating to the wall is commonly invoked are those of mutual combat. Both parties being in the wrong, neither can right himself except by retreating to the wall. Where one, contrary to his original expectation, finds himself so hotly pressed as to render the killing of

* State v. Donnelly, 27 N. W. Rep. 369.

the other necessary to save his own life, he is guilty of felonious homicide if he kills him, unless he first actually puts into exercise this duty of withdrawing from the place."†

An assault may not be in the first instance felonious, but if in the heat of the affray there arises danger to the life of either of the parties, it can hardly be possible that there shall not exist in one or the other, or both of them, a felonious design to kill and murder. And the very law that requires the retreat to the wall recognizes the existence of such danger and of such design as a condition precedent to the retreat to the wall and its subsequent fatal result. Unless a man engaged in an affray is in danger of his life, or of great bodily harm, he has no right to kill his adversary, either before or after retreating to the wall. And therefore, as it is in all cases necessary, in order to excuse a homicide *after* a retreat to the wall, to show that the prisoner was, or believed he was, in serious danger from his adversary, it follows that that adversary must have been in the act of committing a crime, the equivalent of the statutory assault to kill, which is felonious.

The argument against the ruling of the Court is based upon the idea that when one is attempting to commit a felony, it is justifiable to prevent it by taking the felon's life, if that is the only mode in which the perpetration of the crime can be prevented. This, it may be observed, is merely arguing in a circle, for if the intended felony of the elder Donnelly could have been prevented by the flight of the younger, the death of the former at the hands of the latter could not be excused even upon this principle. We think that the Supreme Court of Iowa decided this case correctly, for we believe that the true rule is that to excuse a homicide on the ground of self-defence the party must, if he could with safety, have retreated to the wall, and that the only exception to the rule is that when a man is assailed in his own house he is under no obligation to retreat at all.‡—*The Central Law Journal.*

† 1 Bish. Cr. Law, § 870; citing Foster, 227; State v. Hill, 4 Dev. & Batt. 491; Stoffer v. State, 15 Ohio St. 47; State v. Howell, 9 Ired. 485.

‡ On this subject see: People v. Sullivan, 7 N. Y. 396; Mitchell v. State, 22 Ga. 211; Lyon v. State, Ibid, 399; Cotten v. State, 31 Miss. 504; People v. Hurley, 8 Cal. 390; State v. Thompson, 9 Iowa, 108; United States v. Mingo, 2 Curtis, 1.

NOTES OF CANADIAN CASES.

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CHANCERY DIVISION.

Proudfoot, J.] [April 20.

COOK v. NOBLE.

Will—Devise—Legacy—Maintenance to widow and family—Abatement of legacies.

A testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate, with a direction to convert his personal estate into money, pay debts and invest balance. He directed them to pay his wife from time to time such money as might be sufficient to support, maintain and educate his family, and to maintain his wife in a manner suited to their condition in life, and for that purpose gave his wife power to collect money, and to take therefrom enough to maintain his family and herself. And he directed his sons to pay her $150 a year after they received their lands, charging it on the lands, but they were not to pay it so long as she and the family were maintained out of the estate. The trustees were to pay $1,000 to each of the daughters as they attained twenty-one, and if there was not sufficient personal estate to pay them the balance was to be a charge on the real estate; the real estate was to be divided between the sons when the eldest attained twenty-five; and then the trustees were to give him $2,000. The balance of the personal estate was to be divided between the sons, the eldest being charged with his $2,000.

Held, that the children were only entitled to maintenance until they attained their majorities.

Held, also, that the widow was entitled to maintenance until the provision as to the $150 come into operation, which would be when the

sons respectively attained twenty-five. Although the maintenance was to be made from the personal estate, and no part of the rents were assigned for that purpose, as the devisees of the real estate were not entitled until they attained twenty-five, the intermediate rents, not being disposed of descended to the heirs-at-law, *i.e.*, the children, and might be applied for their maintenance if the personal estate was insufficient.

When a testator has himself specified the time for the duration of maintenance that will be observed; but the right to maintenance and support when given in general terms will cease with the marriage or forisfamiliation of a child, *Knapp* v. *Noyes*, Amb. 661; *Gardiner* v. *Barber*, 18 Jur. 508, and *Wilkins* v. *Jordrell*, 13 Ch. D. 564, considered and commented on.

A widow ceases to be entitled to support and maintenance upon marrying again.

Query, as to her rights if she should again become a widow without means of support.

Held, if the $2,000 legacy to the son absorbs all the personal estate the daughters get none of it, as their legacies are charged on the land, and that the $2,000 legacy and the legacy for maintenance must abate proportionately.

Moss, Q.C., and *McPhillips*, for the plaintiffs.

Maclennan, Q.C., for the infant defendants.

Cassels, Q.C., and *Holland*, for the adult defendants.

Proudfoot, J.] [April 28.

REGINA EX REL. FELITZ V. HOWLAND.

Contempt of Court—Publication of letter by solicitor pending appeal—Time at which offence to be considered—Right of a relator to make the motion—Apology—Costs.

A judgment was delivered by the Master in Chambers on a *quo warranto* proceeding on March 23rd, 1886, and an article referring to it was published in *The Mail* newspaper on the next day. On March 26th, the solicitor for the defendant gave notice of appeal against the judgment, and on the same day wrote a letter in answer to the article commenting on the judgment of the Master in reference to the case, which letter was published in *The Mail* next day.

On a motion made by F., the relator, to commit the solicitor for contempt, notice of which was given on the same day as notice of the abandonment of the appeal, it was

Held, that the nature of the charge against the solicitor must be determined as at the time of the publication of the letter, and could not be affected by the fact of the abandonment of the appeal on the same day that the notice for the motion to commit was given; that the solicitor could not take advantage of his double character of citizen and solicitor; that it was not allowable for a solicitor engaged in a cause to comment in the press on it while pending; that the relator in the *quo warranto* proceeding had a right to make the application; that the letter was not only an injudicious but an improper one, and was a contempt of Court. An affidavit was put in and read on the argument, containing an explanation by the solicitor which was coupled with statements by his counsel as to the character, ability and conscientiousness of the Master, and a denial of any intention to impugn any of these.

Held, that as the appeal had been abandoned and no prejudice could now arise to the applicant, a proper disposition of the case would be to refuse the motion, which was done, but upon payment of the costs by the solicitor.

Bain, Q.C., for the motion.

S. H. Blake, Q.C., contra.

An appeal from this judgment is now pending in the Court of Appeal.

Proudfoot, J.] [April 28.

GORDON V. GORDON.

Will—Power to sell—Power to mortgage—Estate getting the benefit of unauthorized loan—Position of mortgagee.

A testator by her will devised and bequeathed all the rest and residue of her real and personal estate unto R. G., and his heirs, executors, administrators, and assigns, "upon trust to sell the real estate, and to call in and convert into money the remainder of the personal estate, with power to demise or lease any portion for any term or terms of years," and

out of the moneys arising from such sale to pay off a certain encumbrance existing on the property, and divide the balance among the four children.

Held, that the above words did not confer upon R. G. a power to mortgage the property, but that he having, as a matter of fact, mortgaged a portion of the said residuary estate, and applied the proceeds of the loan for the benefit of the estate, the mortgagee was entitled to claim against the estate, but he could only rank after certain encumbrances placed by specific devisees upon the property specifically devised to them.

Clute, for the executors of Patrick Turley, mortgagee.

Neville, for R. Gordon, the executor.

J. Hoskin, Q.C., *E. D. Armour*, and *Kappele*, for other of the parties.

Boyd, C.] [May 13.

WALLIS V. SCHOOL TRUSTEES OF LOBO.

New school section—Selection of school site—Change of same—Necessary requisites under 48 *Vict. c.* 49, *s.* 64—*Costs.*

A new rural school section being formed, it became necessary for the three trustees to provide a school site, etc. A public meeting of the ratepayers was called pursuant to 48 Vict. c. 49, s. 64, which nearly all the ratepayers attended, when the T. L. site was chosen by a majority vote of both the ratepayers and trustees as against the J. C. site.

A complaint against this result was lodged with the School Inspector under s. 32 of the statute, which led to his making attempts to have an amicable adjustment of the difficulty, the outcome of which was that two of the trustees gave notice of a subsequent meeting for the purpose of changing and selecting a school site, at which meeting a unanimous vote was had in favour of a third site called the C. site.

In an action by the other trustee and some ratepayers to have it declared that the last meeting was illegal, and to restrain building on the C. site, in which it appeared in evidence that fifty out of the sixty-seven ratepayers approved of the latter site, it was

Held, that the necessary precaution, under sec. 64 of the statute, of taking the opinion of the ratepayers was complied with, and the selection made was the T. L. site; that no change of a school site should be made without the consent of the majority of ratepayers present at a special meeting called for that purpose, and that under the circumstances of this case the school site had been ascertained and fixed by the first meeting, but it was competent for the second meeting to change this site with the consent of the necessary majority. The whole tendency of recent amendment of the Education Acts has been to give the rural school sections greater powers of self-regulation and self-government, and the Courts should not be astute to interfere, unless there has been a plain violation of the statute or a manifest usurpation of jurisdiction, or a reckless disregard of individual rights.

The action was therefore dismissed, but without costs, as it was a new point, and the statute was not plainly expressed.

Heilmuth, for the plaintiffs.

T. Meredith, for the defendants.

Galt, J.] [May 16.

CAREY V. GOSS.

Trade mark—Infringement—Injunction—Registration of trade mark—Registration of assignment—Trade Mark and Design Act of 1879—42 *Vict. c.* 22, *s.* 4 & 14 (*D.*).

The L. F. P. P. Co. published a newspaper called *The Commercial Traveller and Mercantile Journal*, which would be known as *The Commercial Traveller*, as those words were printed in much larger letters than the words "and Mercantile Journal," and registered it under the Trade Mark and Design Act, 1879, as *The Commercial Traveller's Journal*. The company sold the paper and good-will to the plaintiff, and on the negotiations for the sale the plaintiff saw the defendant, who was then employed by the company as manager and editor, and who showed him the assets of the paper, the printing contracts, etc., and recommended the purchase as a good investment.

After the sale, the defendant who had retained a mail list of the subscribers to the

paper published a new paper, called *The Traveller*, and used the list to send copies of his paper to some of the names contained therein. It was shown in evidence that while the defendant was in the employ of the company he often used the word "Traveller" as designing the paper then known as *The Commercial Traveller*. In an action to restrain the defendant from infringing the plaintiff's trade mark, it was

Held, that the title of the paper published by the defendant was an infringement of the trade mark of the plaintiff, and that the subsequent publication by the defendant of a newspaper under the name of *The Traveller* was calculated to mislead persons and induce them to believe the plaintiff's paper was the paper referred to.

Held, also, that although the 4th section of the Trade Mark and Design Act of 1879, 42 Vict. c. 22 (D.), requires registration of the trade mark before the proprietor can bring an action, and the 14th section provides for registration of an assignment, still the latter section does not enact that registration shall be necessary to give effect to such assignment.

An injunction was therefore granted.

Foy, Q.C., for the plaintiff.

Morson, for the defendant.

PRACTICE.

Proudfoot, J.] [April 12.

MOORE v. MOORE ET AL.

Dower—Pleading and practice—Ont. Jud. Act—Dower Procedure Act.

The writ of summons was indorsed under the O. J. A. with a claim for dower and arrears of dower. The defendants entered an appearance, but added to it an acknowledgment of the plaintiff's right to dower, and a consent to her taking proceedings to have the same assigned to her under the Dower Procedure Act, R. S. O. ch. 55. The plaintiff delivered a statement of claim, taking no notice in it of the acknowledgment and consent, and claiming dower and arrears.

Held, that it was necessary for the plaintiff to deliver a statement of claim in order to recover her dower, and she could not, having elected to institute proceedings under the O. J. A., be compelled to take any steps under the Dower Act.

Hoyles, for the plaintiff.

Rae and *Holman*, for the defendants.

Boyd, C.] [May 5.

THOMPSON v. FAIRBAIRN ET AL.

Executors' compensation—Administration order—Responsibility of executors—Charging executors with interest.

Executors claimed compensation in respect of collections amounting to $29,000, and of disbursements amounting to $5,000. All the work of collecting and paying over was done after an order for administration had been made, and was done under the advice of solicitors, and in the more important matters under the direction of the Master. An item introduced on each side of the account was a transfer of mortgage to the plaintiff amounting to $4,684.47, which was carried out in pursuance of an arrangement made by the solicitors and sanctioned by the Master. It also appeared that the plaintiff's solicitor collected and handed over to the executors $2,400, and also made a payment to them of $10,000 for which he was personally liable.

Held, that although the administration order did not put an end to the functions of the executors, yet it greatly diminished their responsibility, and it did so in this case to an almost vanishing point; and the compensation was reduced to $440, nothing being allowed in respect of the item of $4,684.47, one per cent. in respect of the items of $2,400 and $10,000, two and a half per cent. on the balance of the collections, and five per cent. on the disbursements except the transfer.

The executors retained in their hands a sum of $1,100 to meet claims against the estate, and were not called upon to pay it into Court.

Held, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it.

W. H. C. Kerr, for the plaintiff.

Hoyles, for the executors.

REVIEWS.

LAWS OF INTESTACY OF THE DOMINION OF CANADA. By J. Armstrong, Q.C., C.M.G., late Chief Justice, St. Lucia, W.I. Montreal: John Lovell & Son, 1885.

We owe an apology to the author of this pamphlet for not noticing it before now. He has done good service in drawing attention to the state of the law of intestacy in the different Provinces of the Dominion. The writer in his introduction quotes approvingly comments made in this journal at different times on the same subject. It will be a surprise to some to be told that the law of intestacy is not the same in any two of the Provinces; and should he desire to see a careful comparison, he cannot do better than examine the excellent summary of these various laws as given in this pamphlet.

It is a matter of more than passing interest to realize the differences referred to. The various sections of this Dominion ought to be growing together. As far as the Province of Quebec is concerned, the grievous error of past days in allowing that Province to retain its peculiar laws and language, thus perpetuating a disturbing influence, cannot easily be rectified, but in the other Provinces a step towards assimilation in the matter referred to would be a move in the right direction.

THE TORRENS SYSTEM OF TRANSFER OF LAND. A practical treatise on the Land Titles Act of 1885, Ontario, and the Real Property Act of 1885, Manitoba, by Herbert C. Jones, Esq., of Osgoode Hall, Barrister, etc. Toronto: Carswell & Co., 26 and 28 Adelaide St. East, 1886.

We can understand how Sir R. R. Torrens, familiar with the very expensive and tedious practice affecting land transfer in England, applied himself to remodelling the mode of declaring title and the transferring of land in Australia, where there was a clean sheet to begin on. In this country the evils have been of no great proportions, and we have not felt very much exercised on the subject. The Torrens system was taken up in this country originally, by persons interested in large companies loaning money on land, doubtless with the thought of facilitating the mortgaging and sale of properties. So far as the Legislature was concerned, it was only natural that it should take a fatherly interest in a system which, at least, appealed to the masses as one likely to save delay and expense in the sale and transfer of landed property. So far as lawyers are concerned, especially in country places, the Act will not affect them to any great extent, as conveyancing is no longer a distinctive feature of professional business. The question as to whether it is after all desirable that as great facilities should be given to the transfer of land as to the transfer of chattels was not, so far as we remember, discussed; the scheme was popular, and that was sufficient to ensure its immediate adoption. It is scarcely worth while to discuss the question now, but weighty arguments could, we think, be adduced to show that these great facilities are not entirely without serious objection.

So far, no great amount of work has devolved upon the officers appointed to work the Act; but as there is at present some activity in "corner lots" in the neighbourhood of Toronto and a few other cities, the Act will be invoked as an inducement to attract purchasers to properties, which have been bought on speculation for the purpose of being divided into small lots.

The book before us can scarcely be said to be a "practical treatise"; though this is, perhaps, not so much the author's fault as that of the fact that so far there is no practice to refer to, and it would be no light task to imagine or suggest, and then meet, the difficulties that will, we presume, crop up as well in the working of this Act as they have done in all others of a like character. There is much matter given which is of historical interest, and there are appropriate references to various statutes and annotations on similar acts in Australia and elsewhere, as well as to the few cases that have so far been decided under them.

Our author falls foul of the law of dower as something which should be done away with in Ontario, as it has been in Manitoba. In this we agree with him. We cannot, however, for reasons which will be obvious when we state that we write in the "bosom of our family," to say nothing of having drawn a prize, agree with him in the following remarks which we find on p. 138:

"Marriage is a lottery. The man is generally 'taken in,' and is like the fish that swallows the silver trolling spoon. When caught the fish finds he has been fooled, and that he is lying in the bottom of an old boat instead of being free in the St. Lawrence. The man that is fooled in the matrimonial market finds that all his real property is subject to a lien of one-third for dower, and he has to support his wife, or else be called before the police magistrate, and an inquisition entered into to find out why; and that his wife can have all the property she had when married, and all she acquires after, and can dispose of it as she pleases, and so far as the "purposes of this act" are concerned, is a *feme sole*. No wonder there are so few marriages in Toronto."

This is very sad.

FLOTSAM AND JETSAM.

THE ROMANCE OF THE WOOLSACK.—The "opportunity" that made Mr. Herschell was one of those rare and remarkable chances that occur in the legal profession. An old woman had been brutally murdered in her cottage on the road between Liverpool and St. Helens. A tramp was arrested by the police at the Old Swan, and was committed for trial on the capital charge. The case came on at the Crown Court, St. George's Hall, before the late Chief Justice Bovill. When the prisoner was placed in the dock and arraigned he said that he was undefended. There were only about four barristers in the court, of whom Mr. Herschell was one. The judge asked him to undertake the defence. The young lawyer cross-examined the witnesses—the evidence being purely circumstantial—with much acuteness; in dealing with the doctor's testimony he displayed considerable scientific knowledge; and his speech for the defence was remarkable for its eloquence and power. The result was that the prisoner was acquitted, and Chief Justice Bovill paid a high compliment to Mr. Herschell for his talent in conducting a defence under circumstances of exceptional difficulty. The result of the trial caused a great sensation throughout Lancashire. The fame of the young lawyer, to whose brilliant advocacy was mainly attributable the prisoner's acquittal, spread far and wide, and from that time briefs, both in civil and criminal cases, were freely sent to him.—*Liverpool Courier.*

TELEPHONE TESTIMONY.—All our "modern improvements," railroads, telegraphs, gas-light, electric lights, etc., produce much litigation, and bring before the courts new principles, or more properly, perhaps, the application of old principles of law to new conditions and circumstances. The railroad more particularly has been a most fruitful source of litigation. One can hardly open a modern book of reports without encountering the familiar abbreviation, "R. R. Co.," and our old acquaintances "negligence," and "contributory negligence." The telegraph, too, has done something, but very much less, in furnishing business to lawyers, and employment to courts, but the telephone is as yet behind and has evolved very few legal questions. It is young yet, and in due time will, no doubt, do better.

A rather singular case occurred a few days ago in a *nisi prius* court in this city, which brought up the question, whether a communication by telephone was admissible in evidence, the person receiving the communication not being able to recognize the voice of his interlocutor, nor identify him otherwise than by the fact that he had called up A. B., and that the party at the other end of the line stated that he was A. B. The "Central" official was not called to prove that he had put the two numbers into communication, and the testimony of the witness amounted simply to this: that he had heard somebody whom he did not recognize, say that he was A. B., and that he accepted the proposition made by the witness. The question was, is such testimony competent as tending to prove that A. B. by the response to the telephonic inquiry, incurred a civil liability? The court permitted it to go to the jury "for what it was worth."

The only case which as yet we have been able to find, was decided by the Supreme Court of Kentucky.* The facts were that A., desiring to talk over the telephone with B., asked the operator to call him. At A.'s request the operator conferred with B. by telephone and reported to A. what B. said. Upon being called as a witness, the operator could not remember what B. said, but the court admitted the testimony of A. and bystanders as to what the operator said that B, said; the trial court held that the testimony was competent.

Upon appeal the Supreme Court took the same view, regarding the operator in the light of an interpreter, who has been held to be, for the purposes of his function, as the agent of both parties, and his declarations of what was said by them are admissible in evidence.†

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* Sullivan *v.* Kuykendall, 24 Am. Law Reg. 442.

† Camerlin *v.* Palmer, 10 Allen 539; Schearer *v.* Harper, 36 Ind. 536; 1 Greenl. Ev. § 163; 1 Phillips Ev. 519.