Canada Law Journal.

VOL. XIX. SEPTEMBER 15, 1883. No. 15.

DIARY FOR SEPTEMBER.

16. Sun.... *Seventeenth Sunday after Trinity.*
17. Tue.... First U. C. Parliament met at Niagara, 1792.
19. Wed. ... President Garfield died, 1881.
20. Thurs.. Lord Sydenham, Governor-General, died 1841.
23. Sun.... *Eighteenth Sunday after Trinity.*
24. Mon.... Guy Carlton, Lieutenant-Covernor, 1766.
29. Sat.... St. Michael's Day.
30. Sun.... *Nineteenth Sunday after Trinity.* Sir Isaac Brock, President, 1811.

TORONTO, SEPT. 15, 1883.

WE published the letter of a correspondent in our last issue, criticising the work of some of the reporters of the Courts. As to the two principal errors referred to in the Supreme Court reports, they do not seem at present to exist, for the volume as bound up gives the points as they should be. There has been a gradual and marked improvement in these reports, and we understand some changes in the division of labour between the reporter and the editor at Ottawa will materially help to guard against mistakes in the future. As to the errors noted in O.R. vol. 1, it must be remembered that it comprises the work of three different gentlemen, and care must be taken not to lay the guilt at the wrong door. But as to the expression, "defendant company" and "plaintiff company," Mr. Grant is right, following the form of expression used in some of the best text writers.

Whilst we agree with our correspondent that our reports should be as complete and perfect as possible, we know quite enough of the difficulties of the position as to be very lenient in any criticism. It is easier for a critic to find fault with others than to do the same thing as well himself. As to the Ontario reporters (though we presume the Benchers give them as large salaries as they consistently can) their remuneration is not adequate to the labour and the sacrifice of time involved, for it must be remembered that, as a rule, a reporter's time is so cut into as to preclude him from engaging to advantage in the ordinary business of his profession. The almost inevitable result of a young barrister accepting this position, is that sooner or later he must elect either to throw it up, or else give up the chance of "making a business," and so become simply an official of the Law Society at a small fixed salary, with no chance of ever improving his position.

WE have before us (just received) No. 8 of O. P. R., containing apparently the reports of cases decided between 21st June, 1882, and 13th March, 1883. We are not disposed to be too critical of reporters' work, knowing the difficulties under which these useful officers labour. We may, however, be pardoned for suggesting that it would very much increase the value of practice reports if they were issued more promptly. We do not see why practice cases should occasionally remain unreported for so many months. If there are not a sufficient number of cases to make up one-twelfth of a volume we know of no immutable rule as to the size of a number which prevents the issue of a part containing only half the usual number of pages, giving the volume 24 parts instead of 12. Indeed, we think this should be the rule as to practice reports. We would also suggest that the Division in which the case is heard should be given, and that the judgments should, as far as practicable, and as used to be done some years ago, be printed in the order of date. There may be a good

reason why the judgment in *re Hall*, which was delivered on 4th September, 1882, should appear on page 373, while the judgment in *Bank of B. N. A.* v. *Eddy*, which was delivered on 11th July, 1882, appears on page 396, but it is not apparent. With respect to this matter, we understand there is a very proper rule of the Law Courts that cases are to be reported as soon as ready, without regard to the date of the judgments. Reasons may sometimes arise which delay the reports of special cases, as, for instance, difficulties in getting a sight of the briefs or papers, or the judge's note-book, or, perhaps, the original judgments may be wanted for use in the Master's office, and generally no evil results from judgments being reported out of the order of their date, if they are always prepared by the date of their delivery.

CURRENT CASES IN ONTARIO.

WHEN our note in our last issue, respecting the case of *Johnston* v. *Oliver*, was written we had not had the advantage of perusing the judgments delivered by the learned judges in that case. Since then the case, we are glad to see (although only disposed of on the 30th June, 1883), has already appeared in the authorised reports (2 O. R. 26). The point which we discussed in our note was thus dealt with by Mr. Justice Armour with his accustomed clearness. He says: "The only further question is, whether the widow being in possession of the land, and being entitled to dower in the land, she ought not to be held to have been in possession of one undivided third part of the land as dowress, the result of such a holding being that the title of the heirs at law to such one undivided third would not be extinguished. It seems anomalous that if the widow had been proceeded against by the heirs-at-law before their title was extinguished an account of the rents and profits of the land received by her, she would have been entitled to retain one-third of the rents and profits as having been received by her *qua dowress*, and yet during all the time during which these rents and profits were accruing her possession of the land was ripening into a title under the Real Property Limitation Act, on the ground that she was in possession not as dowress, but as a wrong-doer." And he proceeds to say that to an action of ejectment by the heirs-at-law it would be no *defence* to the action that she was entitled to dower. It may be that the claim for dower is no defence to an action of ejectment by the heir, as is stated by the learned judge, but certainly none of the cases cited by him in support of the proposition can, we think, be considered very conclusive. None of them are directly in point; but in *Carrick* v. *Smith*, 34 U. C. R. 389, which was not referred to, we find Wilson, C. J., although expressing doubt as to the validity of the defence, nevertheless, did allow the defendant, who claimed as lessee of a dowress before assignment of dower, to set up her equitable title to possession as dowress as a defence in an action of ejectment brought against him by the heir. The case ultimately went against the defendant on the facts, so that there was really no decision on the merits of the defence (see 35 U. C. R. 348). So far as it goes, however, it affords support to the view that a widow in possession before assignment would be entitled under the system of pleading which has prevailed since The Administration of Justice Act to set up her right as dowress as a defence *pro tanto*; and certainly it is a defence which, we think, the Court should favour and endeavour to give effect on the ground of natural justice.

The learned judge seems to think the equitable rule which relieves a widow in possession before assignment of dower from accounting to the heir for more than two-thirds of the rents and profits, creates an anomaly, but it is fairly open to question whether the anomaly is not one of the learned judge's own creation; and whether, following out the equitable principle which is established with regard to rents and

profits to its legitimate conclusion, it does not lead to the perfectly consistent and equitable rule that when a widow is in actual possession of land, of which she is dowable before assignment, she must in equity be taken to be in possession of an undivided third as dowress, and therefore not only free from liability to account for one-third of the rents, but also unable to acquire any title by possession to that one-third of the land.

Some doubt may seem to arise as to whether since the reversal of *Harlock* v. *Ashberry* in the Court of Appeal, the decision of the Chancellor in *Slater* v. *Mosgrove*, 29 Gr. 392, which is to some extent based on that decision, is good law. We are disposed to think that it is altogether unaffected by the reversal of *Harlock* v. *Ashberry*. The question in *Harlock* v. *Ashberry*, 19 Ch. D. 539, was whether payment of rent by a tenant of part of the mortgaged land, was a payment binding the mortgagor as an acknowledgment of title as to the residue of the land, and the Court of Appeal reversing Fry, J., held that it was not, the judges in Appeal, basing their decision on the ground that a payment to prevent the running of the Statute of Limitations, must be made by some person liable to pay the principal or interest secured by the mortgage; and that the payment must be on account of one, or the other; that a tenant of the mortgagor was not liable to pay either principal or interest, and that the payment of rent was not a payment on account of either, although it might ultimately be liable to be brought into account between the mortgagor and mortgagee. This being the ground of the decision, we think it clear that it does not in the least affect the correctness of the learned Chancellor's conclusion in *Slater* v. *Mosgrove*. In that case the plaintiff claimed a vendor's lieu, and the paymen the relied on as taking the case out of the statute, was made by an endorser, on account of a promissory note given by the purchaser for the purchase money. That was, therefore, the case both of a payment by some person liable to pay the principal and interest; and the payment in question was a payment on account of the purchase money. The case, therefore, irrespective of *Harlock* v. *Ashberry*, is governed clearly by *Chinnery* v. *Evans*, 11 H.L.C. 115, to which the learned Chancellor also referred, and upon the proper application of which case the decision in *Harlock* v. *Ashberry* in appeal turned.

THE decision of the Chancellor in *O'Donohoe* v. *Whitty*, 9 P. R. 361, appears to be in direct conflict with the decision of the Supreme Court in *Joyce* v. *Hart*, 1 S. C. R. 321. The question to be decided in *O'Donohoe* v. *Whitty* was, what was the amount in controversy in the action. The action appears to have been one for redemption, in which the defendant claimed a bill of costs amounting to $250. The bill was taxed at $187.10, and plaintiff desired to appeal, claiming that he was not liable to pay even as much as taxed. The Chancellor held the amount in controversy was, as to the plaintiff, only $187.10, and therefore no appeal could be had under the Judicature Act, s. 33, without leave. *Joyce* v. *Hart*, however, does not seem to have been mentioned to, or considered by, the learned Judge. In that case the plaintiff claimed by his declaration £500 damages and costs. He actually obtained judgment for only $100, and the Supreme Court nevertheless held that the amount in controversy was the sum originally claimed by the plaintiff, and that *the defendant* was entitled to appeal. Mr. Justice Strong dissented from the majority of the Court, basing his opinion on the case of *Macfarlane* v. *Leclaire*, 15 Mo. P. C., upon the which the Chancellor also relied.

SELECTIONS.

REPORTERS AND JUDGES.

Some recent paragraphs in our current London exchanges furnish food for instruction if not amusement to judges and reporters. The *Solicitor's Journal* says: "A good deal of interest has been excited by the development of a new feature in the August number of the *Law Reports* (Chancery Division). There appears, at p. 427, the following remarkable passage: '[Counsel], in reply —I regret the absence of Mr. Davey in this important case, 'Baggallay, L. J.—I do not think that your clients have suffered by its being left in your hands.' We have not the slightest desire to say anything calculated to give pain to the counsel who was distinguished in this manner. Nor do we mean to call in question the wisdom displayed by the learned judge in making such a remark, which he probably never expected to see reproduced in such a fashion. But we ask ourselves with surprise, what view the editor and the reporter can take of the respective functions. Reports are, as we understand the matter, published solely for the information of the profession as to the state of the law; and everything which does not conduce to that end ought to be rigidly suppressed. Remarks made by the judges casually during the arguments, even though they strictly refer to the matter in issue, so seldom require reproduction, that no safer working rule could be devised than one which should irrevocably decree their total exclusion. The *Law Reports* have long been unpleasantly distinguished among their fellows by their superior zeal in reproducing judicial babble uttered *obiter*; and this fault has been so often pointed out that they are probably hardened in it beyond hope of improvement. But a new departure will have been taken if their pages are in future to be made the vehicle of such announcements as that conveyed by the noteworthy extract above cited." And the *Law Times* says: "In an interesting article on law reporting, which appeared in the *American Law Review* a little more than a year ago, and on which we commented at the time, it was made a principal ground of complaint against contemporary English reporters that they inserted in their reports too much of the dialogue which took place in the course of the cases reported. It is at least open to doubt whether this method of reporting may not be preferable to that commonly pursued in America of stating that 'the facts and arguments sufficiently appear from the judgment; the following cases were cited.' But there is, or ought to be, a limit to all things, and the observations of the American reviewer can hardly be said to be undeserved when read hy the light of such a case as *Re Scottish Petroleum Company*, reported in this month's *Law Reports* (Chancery Division), in which no less than fifteen interruptions of the argument by the judges of the Court of Appeal are set out, and the reporter solemnly records the regrets of a junior counsel that his leader is absent, and the assurance of a judge that the junior's clients have not suffered by their case being left in his hands. The statement was, no doubt, gratifying, but it is one which has not unfrequently been forthcoming on similar occasions, although the pages of the reports do not generally bear witness to the fact." When we were at the bar we grew to be as afraid of this sort of praise by the judges as Laocoon was of the Greek present. We regarded them as ribbons tied about the neck of the lamb (or perhaps calf) about to be immolated. We observed that the judges never praised our arguments, except when they were about to beat us. Really, such expressions mean as little as the formal tenderness which the judges exhibit toward other judges when they are about to overrule them. Of course, they have no proper place in the reports. While we are about it, we may as well say, however, that we do not admire the English fashion of making a statement of facts in a case where the opinion does it sufficiently, and we much prefer the American method of being satisfied with once telling a thing. On this side of the ocean our heads are not so thick that they require to have things beaten into them by reiteration.—*Albany L. J.*

NEGLIGENT USE OF FIREARMS.

In *State* v. *Emery*, Missouri Supreme Court, June, 1883, it was held culpable negligence to brandish a loaded revolver in a saloon, whereby the lives of the persons therein are endangered, and the person by whose negligence a pistol is unintentionally discharged, resulting in the death of another, is rightly convicted of manslaughter in the fourth degree. The court, Sherwood, C. J., observed:

"The first and sixth instructions given for the State correctly declare the law, and taken altogether announce this doctrine: That in order to find a person guilty of manslaughter in the fourth degree it is sufficient to show that the shooting, though unintentionally done, was the result of negligence in handling firearms, indicating on the part of such person a carelessness or recklessness incompatible with a proper regard for human life. Mr. Bishop says, 'there is little distinction, except in degree, between a positive will to do a wrong and an indifference whether wrong is done or not, therefore, carelessness is criminal.' Thus, if a person by careless and furious driving unintentionally run over another and kill him, it will be manslaughter; or if one in command of a steamboat, by negligence or carelessness, unintentionally run down a boat, and a person therein is thereby drowned, the act is manslaughter: 1 Bishop Crim. Law, §§ 313, 314 and cases cited. Or if a person points a gun without examining whether it is loaded or not, and it happens to be loaded and death results, he is guilty of negligence and manslaughter: *Reg* v. *Jones*, 12 Cox C. C. 628. So, also, if death ensues from discharging a loaded gun at night into a public highway, whether any person is in sight or not, the act being one of gross carelessness, calculated to endanger the lives of persons passing along the street: *People* v. *Fuller*, 2 Park. Crim. Rep. 16. In another case a revolver was found in the road with one load in it; six months thereafter repeated attempts failed to discharge it, or to remove the load; over four years thereafter the defendant, in sport, endeavouring to frighten a woman with the revolver, it was discharged, and killed her, and the defendant was held rightly convicted of manslaughter: *State* v. *Hardie*, 47 Iowa, 647; S. C., 29 Am. Rep. 496. These authorities abundantly support the instructions we have commented on; none of them show such a degree of carelessness and disregard of consequences as that exhibited in evidence in this record. We are not aware that anyone heretofore in this State has been prosecuted for manslaughter upon similar circumstances to those which the record presents. And yet we may judge, from the reports of the daily press, instances are not unfrequent within our borders where human lives are sacrificed by playful carelessness in handling firearms." See remarks on Frayne tragedy, 26 Alb. L. J. 461.—*Albany L. J.*

THAT the common law rule that the recovery in an action for damages is based upon pecuniary injury actually sustained, is inadequate to the ends of exact justice, is evident from the fact that in several classes of cases it is allowable for the jury, after infinitesimal pecuniary loss has been proved, to proceed to render a verdict based upon the plaintiff's injured feelings and mental sufferings. Such are cases of libel and slander, seduction and criminal conversation, and many negligence cases. It is unquestionably a misfortune that the law should be compelled to pursue the by-ways of indirection in order to reach the ends of justice, and the ugly features of this evil are never presented in a stronger light, than when seen through the circumstances of some particularly "hard case," which rests just across the dividing line and embodies all the elements requisite for a recovery, save only the formal one of some slight pecuniary loss. Such a one was the case of *Gulf etc. R. Company* v. *Levy*, recently decided, and very correctly decided by the Supreme Court of Texas. It was alleged that while plaintiff's son and his son's wife were in the country, his son's wife was taken violently sick and gave birth to a child, and that she died on the evening of the 30th of September, and that the child died soon after; that plaintiff's son was among strangers, without money and in desperate need of assistance and help from plaintiff; and that immediately upon the death of his child he delivered a telegram to defendant, paying the charges thereon, and informing him of the importance of its prompt transmission and delivery. That defendant failed to deliver it until after the lapse of twenty-four hours; that by the delay plaintiff was prevented from going to his son's assistance and from supplying him with money; that his son was compelled to borrow money from strangers, and was deprived of the presence of his father and mother in his sore trial, and was compelled, a stranger in a strange land, to be the only mourner at his wife and child's funeral; that plaintiff had suffered the keenest disappointment and sorest grief at being deprived of the privilege of being present at the burial of his daughter-in-law and grand-child, and of relieving his son's wants. A demurrer to the petition was sustained, and very properly. And yet if it had appeared that plaintiff had sustained pecuniary damages to the amount of 25c. as the consequence of defendant's negligence a very different conclusion might have resulted.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

MASTER'S OFFICE.

MUNSIE v. LINDSAY.

Improvements under mistake of title—Occupation rent—Tenants in common.

Improvements made under a mistake of title are not since R.S.O. c. 95, s. 4, allowed for as liberally as improvements made by a mortgagee in possession.

The enhanced value of a farm so improved is found by deducting from the present value of the land with the improvements, the estimated present value of the land without the improvements, *plus* any increase in value from other causes.

The occupation rent chargeable to a person improving land under a mistake of title should be the rental value of the land without the improvements.

A tenant in comn on occupying the joint property is not chargeable with the value of timber cut by him during his occupancy.

[Toronto, June 11—Mr. HODGINS, Q.C.

The facts sufficiently appear in the judgment taken in connection with the report of the case in 1 Ont. Rep. p. 164.

THE MASTER—The judgment allows to the defendant, Lindsay, the amount by which the lands and premises in the pleadings mentioned have been enhanced in value by lasting improvements made thereon by the defendant under the belief that the lands and premises were his own.

The lands were originally owned by one William Munsie, who died in 1854. By his will he devised the lands to his wife for life, and after her death to his son, Robert Munsie, who, it appears, was one of the attesting witnesses to the will. Robert Munsie conveyed the lands, in 1861, to his brother, James Munsie, who, in 1864, sold them to the defendant Lindsay. The tenant for life died in 1874. The judgment declares the devise to Robert Munsie invalid, and that as to the remainder in fee, after the life estate, the testator died intestate. The defendant Lindsay, by virtue of the conveyance referred to, is a tenant in common with those heirs of the late William Munsie, who are not affected by the conveyances; and the judgment partially recognizes his rights as such. Compensation for improvements does not necessarily depend upon their being made under a mistake of title. Thus a part owner who *bona fide* permanently benefits an estate by repairs or improvements, and a tenant for life completing permanently beneficial improvements to an estate which had been begun by the testator, have been allowed a lien for their expenditures: Snell's Equity, p. 143.

The cases heretofore decided by the Court do not prescribe very clearly defined rules by which the enhancement of value of lands by reason of improvements made under a mistake of title should be arrived at.

The English cases appear to allow the full value of the improvements, as in the case of a mortgagee in possession: *Nelson* v. *Clarkson*, 2 Ha. 176; 4 Ha. 97. The American cases are much to the same effect: Hilliard on Vend. 48. And the earlier chancery cases in this country apparently follow the same principle. In *Bevis* v. *Boulton*, 7 Gr. 39; *Brunskill* v. *Clarke*, 9 Gr. 430; *Fitzgibbon* v. *Duggan*, 11 Gr. 188, the expenditure for improvements by which the estate had been substantially improved, was allowed. In *Smith* v. *Bonisteel*, 13 Gr. 29, 35, the decree directed an account of the improvements made by the defendant, and to what amount and in what proportion they had enhanced the value of the property. *Pegley* v. *Woods*, 14 Gr. 47 and *Morley* v. *Matthews*, *Ib.* 551, show that the compensation allowed was based upon the enhanced value given to the land by the improvements. In *Carroll* v. *Robertson*, 15 Gr. 173, cases were referred to which showed that improvements made under a mistake of title had been allowed far more liberally than to a mortgagee in possession. A mortgagee in possession is usually allowed the sums expended by him in necessary repairs and lasting improvements with interest thereon; *Quarrell* v. *Beckford*, 14 Ves. 177, s. c. 1 Mad. 273; *Webb* v. *Rooke*, 2 Sch. & Lef. 676; subject to certain restrictions: *Sanson* v. *Hooper*, 6 Beav. 246; *Jorton* v. *South-Eastern Ry. Co.* 2 Sm. & Giff. 48, 73.

Gummerson v. *Banting*, 18 Gr. 516, was decided prior to Mr. Bethune's Act, 36 Vict. 22, (R. S. O. c. 95, s. 4); and in that case Spragge, C., following a decision of Mr. Justice Story in *Bright* v. *Boyd*, 1 Story's Rep. 478, 2 Story's Rep. 605, directed an account of the value of the improvements made, and how far the value of the land had been increased by such improvements. The statute now defines the lien for improvements made under a mistake of title to be "the amount by which the value of the lands is enhanced by such improvements;" so that the liberal rule referred to in *Carroll* v. *Robertson*, 15 Gr. 73, is no longer applicable,

and the person claiming such lien cannot now be dealt with as a mortgagee in possession. The cases of *Fawcett* v. *Burwell*, 27 Gr. 445 and *McGregor* v. *McGregor*, 27 Gr. 470 and on appeal (not reported), do not show how the enhanced value of the land should be investigated.

During the evidence in this case I stated that because the measure of relief in cases like the present was new, the parties had not apprehended the change in the law, and were directing their evidence more to the ordinary case of a mortgagee in possession than to that of a person claiming a lien, not for the actual cost of the improvements, but for the enhanced value given to the land by reason of his improvemen s ; that I did not see how I could go into minute details or calculations based upon the cost of the separate materials used, the estimated cost of teaming such materials, the cost of construction, and the estimated value of the defendant's labor in making the various improvements claimed. I stated I should consider the case as it would be dealt with at Nisi Prius; and that in a case of this kind I thought a jury would be directed to find :—

1st.—Had the lasting improvements been made by the defendant under a mistake of title? And if they should so find then they might consider what, on the evidence, the improvements had cost the defendant, not so much with a view to their giving a verdict for the actual cost, but as an assistance to them in considering the other and further questions to be then considered, which would be :—

2nd.—What was the present value of the farm with the improvements made by the defendant?

3rd.—What was the value of the farm when the defendant purchased it, and what would the farm be worth now, if in the same state, without the defendant's improvements?

4th.—Had the farm, since the defendant's purchase, increased in value from other causes than the defendant's improvements, and if so to find such value?

That having ascertained the several values above enumerated, the jury might then be directed to find the enhanced value by deducting from the present value the unimproved value, and also the value from other causes than the improvements. And in arriving at such a conclusion that they might give some consideration to any opinion they had formed of the actual cost or value of the improvements, so that their verdict should not in any event exceed such actual cost or value.

Guided by these propositions I have considered the evidence, very conflicting in some instances, adduced by the parties. Ten witnesses place the present value of the farm, with the improvements, at $7,000, while three place it at from $6,000 to 6,500. The weight of evidence, therefore, is in favour of $7,000. But the evidence as to the unimproved value of the farm is not so satisfactory. Three witnesses belonging to the Munsie family were examined on behalf of the plaintiffs, but their evidence impressed me with the idea that their family pride had been hurt by the sale of their old home, and that they held the farm, and quite naturally, at a higher value than oth rs not so personally interested in it. I have not, therefore, given much weight to their evidence. Besides two of these three witnesses had not been on the farm for some time prior to Lindsay's taking possession in 1865. Two other witnesses for the plaintiffs stated that they had not been on the farm during the time Lindsay was in possession until they made their examination of it a few weeks previously with a view of giving evidence of values, and as to one of those witnesses I came to the conclusion which I noted during his examination, that I should not place much reliance on his evidence. The other of these two appeared to be a shrewd, hard man of business, who stated, in answer to a question, that his estimate of value was based upon what he would be willing to give if he were buying the property. Two other witnesses for the plaintiffs had that personal knowledge of the farm which showed they were competent to speak as to its original state, and they considered that the farm when the defendant purchased was worth $4,500 and $5,000, and that its value now would not differ from its value in 1864.

Against the opinion of these two witnesses, whom I considered competent to give evidence of the state and value of the farm, the defendant examined six witnesses, owners of adjoining farms, all of whom had personal knowledge of this farm prior to and during the defendant's occupation of it. The defendant was also examined on his own behalf, and proved that he gave $4,400 for the farm ; that he thought it was too much, but he got his own time to pay

for it. He gave his evidence as if he was trying to state his case in a fair manner. Other witnesses stated that their opinion, at the time the purchase was made, was that the defendant had given too much for the farm, and on cross-examination they gave the names of several of their neighbours who expressed similar opinions at that time. Five witnesses swore that $3,000 to $3,500 was the value of the farm when the defendant purchased; one placed the value at $3,700. The general effect of their evidence was that the farm at that time had been run down by reason of its having been badly farmed by tenants, and that as to its unimproved value it would not bring as much as it would in 1864, if now in the state it was then. These six witnesses placed the present value of the farm without the defendant's improvements, some at $3,000 and others at $3,500. They also swore that all the defendant's improvements had enhanced the value of the farm to the amount of $3,500. The actual value or cost of the improvements was placed by the defendant at $3,676.56.

In determining the compensation to which the defendant is entitled, I think I am bound to find, as one of the factors, what the present value of the farm would be without the defendant's improvements: (see Mr. Justice Story's decree in *Bright* v. *Boyd*, 2 Story's Rep. 605). The enhanced value can only be arrived at by a comparison of the present value of the farm as improved, with what its present value would be in the unimproved state. To take the value of the farm at the time of the purchase and compare it with the present improved value would obviously be unfair; for a farm may increase or decrease in value as years go on from various extrinsic causes, such as proximity to, or distance from, railroads, high or low prices of grain, nearness or remoteness from markets, general improvements in localities, speculation or other causes. In this case there was evidence that the farms in the township had increased in value since 1865, by reason of certain railroads. The evidence on this latter point was very general, and it is difficult to arrive at a fair estimate of such increased value. I think on the whole it will be more accurate, and therefore safer, to base such increased value upon actual calculations rather than the random guesses of witnesses. Several witnesses showed that the opening of the railroads in the locality had the effect of reducing the cost of transporting grain to market by about two cents per bushel, and that the farms in the neighbourhood produced about 1,400 bushels a year. This would give a profit of about $28 per year. From this should be deducted the annual railway tax, at present about $10 a year, which would leave a net annual profit of $18 representing the annual interest on a capital of $300.

The case is eminently one for the consideration of a jury; and although juries are bound to give their verdict "according to the evidence," it is well known to both judges and the profession that their verdicts are sometimes compromises on the conflict of evidence, than findings according to the weight of evidence. It is not proper in a case of this kind to seek to effect a compromise between the divergent opinions of the two sets of witnesses examined on this reference. The decision should rest upon the question which of the two sets of opinions given in the evidence is correct. I have already expressed an opinion in respect of some of the plaintiff's witnesses, and intimated that only two of them could safely be relied upon in forming a just judgment on the facts affecting this case. Against their opinions are the opinions of six others equally competent and equally reliable. In this conflict of opinion it is proper that the weight of evidence should govern, and such weight of evidence is in favour of the values sworn to by the defendant's witnesses. Excluding the defendant's own testimony I find that five of the witnesses say that the defendant's improvements have increased the value of the farm by $3,500, one that they have increased it by $3,000 to $3,500. But I prefer to find the value by the rules above referred to; and giving effect to the weight of evidence I find that the value of this farm, without the defendant's improvements, was $3,500 in 1864, and that if in the same state it would be worth the same now, but with a further value caused by the railways, which I find to be $300. These two values together make the present value of the farm, without the defendant's improvements, $3,800. The present value with the defendant's improvements is $7,000, and deducting from it the $3,800, leaves $3,200 as the amount by which the lands and premises, in the pleadings mentioned, have been enhanced in value by the lasting improvements made thereon by the defendant Lindsay

under the belief that the lands and premises were his own.

The judgment charges the defendant Lindsay with a proper occupation rent since the death of the tenant for life in 1874. The defendant is one of the tenants in common of this property, and has occupied it for his own use and benefit. Ordinarily a tenant in common occuping the joint property, without excluding his co-tenants, is not liable to them for an occupation rent or for profits; but the Court has not applied that rule to this case. The statute, 4th Anne c. 16, s. 27, enables a tenant in common to bring an action of account against his co-tenant "for receiving more than comes to his just share or proportion." Prior to the statute there was no such right of action at common law: *Wheeler* v. *Home*, Willes 208; for says Co. Litt. 199 b., "one tenant in common taking the whole profits, the other hath no remedy in law against him, for the taking of the whole profits is no ejectment." The only remedy therefore is the action given by the statute: *Henderson* v. *Eason*, 2 Phil. 308; and such action will lie only for a share of the rents actually received by such tenant in common, and not for the profits or produce derived from his sole enjoyment of the joint property: *McMahon* v. *Burchell*, 2 Ha, 97, 5 Ha. 322, 2 Phil. 127; *Henderson* v. *Eason*, 15 Sim. 303, 2 Phil. 308, 12 Q. B. 986, 17 Q. B. 701; *Sturton* v. *Richardson*, 13 M. & W. 17; *Nash* v. *McKay*, 15 Gr. 247. And then not more than six years arrears of rent are recoverable: *Reade* v. *Reade*, 5 Ves. 749; *Drummond* v. *Duke of St. Albans*, *Ib.* 439; *Tarlton* v. *Goldthwaite*, 6 Ala 346.

This occupation rent should be based upon the rental value of the farm in its unimproved state: *Morley* v. *Matthews*, 14 Gr. 551; *Carroll* v. *Robertson*, 15 Gr. 173; *Bright* v. *Boyd*, 2 Storey's Rep. 605; unless when interest is allowed on the expenditure for improvements: *Fawcett* v. *Burwell*, 27 Gr. 445; and it may be regulated by the amount of interest allowed to the defendant on the purchase money and on the value of his improvements, but should not exceed such allowance of interest: *Morton* v. *Ridgway*, 3 J. J. Marshall, 257; *Witherspoon* v. *McCalla*, 3 Dessaur 245. And this seems consistent with the rule that a vendor receiving interest on the purchase money is liable to the purchaser for the rents he has received: Sugden, V. & P. 493; see also *Stevenson* v. *Maxwell*, 2 Sandford Ch. 302.

On the rental value of the farm unimproved, the weight of evidence is with the defendant's witnesses, and though they vary in their estimate from $100 to $150, I think the latter sum is the fair value; and as the judgment determines the period of liability, I find that a proper occupation rent to charge the defendant since the death of the tenant for life in September, 1874, is the sum of $150 per annum. The judgment allows the defendant his taxes paid on the property, and as a tenant in common I assume he will be entitled to a share of the $150 rent with which he is chargeable.

The plaintiffs seek to charge the defendant for cutting and removing timber and other trees. The evidence shows that the defendant used the farm in a husbandlike manner, and that he considered the farm his own, and used only the fallen timber for fences and firewood. Besides, as a matter of law a tenant in common is not liable to his co-tenants for cutting timber on the joint property: *Martin* v. *Knollys*, 8 T. R. 146; *Rice* v. *George*, 20 Gr. 221. This portion of the plaintiff's claim cannot be allowed.

Brough, for plaintiffs.

Hoyles and *Barwick*, for defendant Lindsay.

SECOND DIVISION COURT, COUNTY OF ONTARIO.

Commented Quirk v Thompson, 17 N. W. Rep. 89.

STEWART v. BROCK.

Chattel mortgage—Re-filing.

A chattel mortgage was filed on the 19th September, 1881, at 2 o'clock p.m., and re-filed on the 19th September, 1882, at 11 o'clock a.m.

Held, too late.

[Whitby—Dartnell, JJ.

Upon the facts above stated the following judgment was delivered by

DARTNEL, J.J.—As far as I know the point raised in this case has not been expressly decided.

Armstrong v. *Ausman*, 11 U.C.R. 498, is the nearest in point, it being there held that where the first filing was on the 15th of May, a re-filing on the 14th of May following was clearly in time, In that case DRAPER, J., says, p. 503: "The year must commence generally on the day of filing, *i. e.*, at the commencement of that day, or on the hour of the particular day on which it is marked as received by the clerk."

And BURNS, J., says, p. 509 : "The first filing was upon the 15th of May, consequently the year expired on the 14th May succeeding, *at the latest moment of the day.*"

Mr. Barron, in his valuable work on Chattel Mortgages, at p. 191, expresses an opinion that a mortgage filed on the 1st January in one year, at 11:30 a.m., and re-filed on the 1st of January in the succeeding year, at 11.30 a.m., is re-filed in time, and cites *Armstrong* v *Ausman* as an authority.

With the greatest respect for the learned author, I think the proposition is a deduction hardly warranted by this and the other cases cited by him. The real question decided in *Armstrong* v. *Ausman*, was, whether the words of the Act excluded the twenty-four next before the actual hour and minute of the expiration of the year; or computing the day by its date, whether the day next before the day on which the expiration takes place is to be excluded. DRAPER, J., expressly says :—"I do not perceive any ground for so determining."

I think the learned judges in *Armstrong* v. *Ausman* expressly assumed that the day of the filing was not excluded. The words of the Act are "from the filing," not the "day of" or "date of" filing in which later cases it would be excluded.

Considering then that the year in the case before me expired, either at 2 p.m. on the 18th of September, 1882, or, at the best for the claimants contention, at the last minute before midnight between the 18th and 19th, I think a second year had been entered upon on the 19th, and any filing at any hour of that day, too late. I must therefore find for the execution creditor and bar the claimant's claim.

G. T. Smith, for the claimant.

J. A. McGilvray, for the execution creditor.

FLEMING v. DICK.

Division Court practice—Warrant of committal—Amendment—Renewal—Endorsement of mileage.

Errors of dates and recitals in warrants of commitment can be amended by the judge under Rule 118.

The omission by the bailiff to endorse upon the warrant the number of miles, and the amount of mileage required to be done under Rule 103, will not vitiate the warrant.

The warrant was issued and dated on 2nd October, 1882, and renewed under Rule 102, by judge's order, dated 4th February, 1883.

Semble, properly renewed and in force.

[Whitby—DARTNELL, JJ.

J. B. Dow, for the judgment debtor, who was in custody under a warrant of commitment under the Division Courts Act, moved for his discharge, both on the merits and on various objections to the warrant, all of which are set out in the judgment.

W. H. Billings, contra.

DARTNELL, J.J.—I am against the defendant on the merits, and therefore have only now to consider the technical objections to the warrant itself. There are three errors in dates or recitals, made by the clerk. These I think I have ample power to amend under Rule 118. In *Peck* v. *McDougall*, 27 U. C. R. 362, HAGARTY, J., says :—"We should hesitate before we hold that the omission of the clerk to enter an order of commitment in the procedure book destroyed the validity of the warrant, and made the party applying for it a trespasser." I think this language is applicable to other mistakes or errors made by the clerk. The officer executing the warrant endorsed in writing, under Rule 103, the actual day of the arrest, but omitted to give the number of miles, or amount of mileage, as required by the rule. I think this is merely directory, and for the purpose of the defendants being made aware of the total amount of debt and costs, should he seek his discharge under the provisions of section 186 of the Division Court Act. In case of payment under this section the bailiff or officer would simply lose his mileage through his own neglect. I do not see how his omission affects the validity of the warrant.

The remaining question has more force. The warrant was issued on 19th October, 1882. It is shown that the defendant, having become aware of its issue, left the Province and did not return until after the expiration of three months from its date. Application was then made for a renewal, and a judge's order therefor was made on the 4th February, 1883, and the defendant arrested. The affidavit upon which the order was based, satisfactorily showed the cause of the non-execution, and that the debt and costs had not been satisfied.

I think it is quite clear that under Rule 101

the warrant ceases to be in force at the expiration of three calendar months from the date of the entry of the order for commitment, unless renewed by the judge. Mr. Dow contends that after that time the judge has no power to make an order for such renewal. Though not without doubt, I do not accede to this contention. The rule does not state, as in cases of writs of execution, that the renewal must be effected within the time limited. Notwithstanding the case of *Ex parte Dakins*, 16 C. 77, cited by Mr. Dow, I think the current of authority is against regarding these warrants as in the nature of writs of execution, but rather as process for contempt of court. The defendant, by evading service, has prevented execution of the warrant. He has not purged his contempt. I think I must over-rule all the objections, and discharge the summons.

UNITED STATES.

NEW YORK COURT OF APPEALS.

WOLHFAHRT V. BECKERT.

Negligence—Sale of poisons.

1. The sale by a druggist of a poisonous preparation without the word "poison" on the label, is not negligence when the purchaser is warned at the time of the sale of the dangerous nature of the medicine, and informed of the proper dose, notwithstanding the fact that the omission to place the word "poison" on the label constituted a misdemeanor.

2. But the sale of such a preparation without the word "poison" on the label, and without such warning is negligence both at common law and under the statute.

Appeal by defendant from an order of the General Term of the Supreme Court of the Second Department, granting a new trial and sustaining the exceptions of plaintiff taken at the trial. The jury had been directed to find a verdict for the defendant, and plaintiff's exceptions were ordered to be heard in the first instance at the General Term.

Plaintiff's intestate, being temporarily troubled with some bowel complaint, had been recommended by a peddler to take a small wine glassful of a comparatively harmless drug known as "Black Draught." The deceased, shortly after the peddler's recommendation, went to defendant's drug store and obtained ten cents' worth of "Black Drops" in a small bottle, which simply had a label upon it with the words "Black Drops," but without the word "poison" and without any direction as to the dose. "Black Drops" is a deadly poison, being one of the strongest preparations of opium, ten or twelve drops constituting a dose.

At the trial the only witness who gave testimony as to the sale of the drug was the defendant's clerk, who testified that the deceased asked for ten cents' worth of "Black Drops;" that he was cautioned at the time that the drug was a poison, and that ten to twelve drops were a dose. Deceased immediately after the purchase of the medicine repaired to his home, where his wife in his presence poured out a little wine glassful of the "Black Drops," being the amount of the dose of "Black Draught" recommended by the peddler; the deceased took the dose poured out by the wife and died a few hours thereafter, despite the efforts of medical skill to save him.

The action was brought to recover $5,000 damages for the negligence of defendant in the sale of the "Black Drops."

FINCH, J., delivered the opinion of the court:

Whether the case should have been submitted to the jury depends upon the inquiry whether the testimony of the defendant's clerk is to be taken as the truth of the transaction, or may be questioned or doubted. If he is to be believed, the druggist who sold the poison was guilty of no wrong or negligence toward the deceased, for he warned him that the "Black Drops" asked for was a strong poison, of which he should only take ten or twelve drops for a dose. Notwithstanding the warning he took probably ten times the prescribed quantity in reliance upon the previous statement of the peddler, Silberstein, that he had taken half a glass of what he called "Black Draught" and it had cured him. On such a state of facts a verdict against the defendant would not be justified. Although no label marked "poison" was put upon the phial, and granting that by such omission the defendant was guilty of misdemeanor and liable to the penalty of the criminal law, still that fact does not make him answerable to the customer injured, or to his representative in case of his death, for either a negligent or wrongful act, when toward that customer he was guilty of neither, since he fairly and fully warned him of all and more than

could have been made known by the authorized label. The statute requires the ringing of the bell or sounding of the whistle by an engine approaching a railroad crossing, but one who sees the train coming has all the notice and warning which these signals could give, and though they are omitted takes the risk of the danger which he sees and knows if he attempts to cross in front of the train. *Pakalinkski* v. *N. Y. etc. R. Co.*, 82 N. Y. 424 ; *Connelly* v. *N. C. etc. R. Co.*, 88 N. Y. 246. So here if the warning was in truth given, if the deceased was cautioned that the medicine sold was a strong poison, and but ten or twelve drops must be taken, he had all the knowledge and all the warning that the label could have given, and could not disregard it, and then charge the consequences of his own negligent and reckless act upon the seller of the poison. But if no such warning was in fact given, its omission was negligence, for the results of which the vendor was liable both at common law and by force of the statute. *Thomas* v. *Winchester*, 6 N. Y. 409 ; *Loop* v. *Litchfield*, 42 N. Y. 358 ; *Wellington* v. *Downer Ker. Oil Co.*, 104 Mass. 64 ; 3 R. S., p. 4, ch. 1, title 6, sec. 25. By the statute it is made a misdemeanor for any person to sell "any arsenic, corrosive sublimate, prussic acid, or any other substance or liquid usually denominated poisonous without having the word 'poison' written or printed upon a label attached to the phial, box or parcel in which the same is so sold." The liquid sold to the deceased was in fact a poison, and death resulted from taking a trifle less than the quantity sold. The evidence showed that the "Black Drops" in both forms of preparation was "deadly," and that it was usually denominated poisonous is to be inferred both from its well known character and from the evidence given by the pharmacist, who said that unless selling upon the prescription of a physician he would mark upon the medicine the dose, or label it poison, or do both. Indeed, the learned counsel of the defendant concedes all this, for he says "if any third party, unacquainted with the real contents of the phial, had been injured, then an action would lie against the defendant," and the defence interposed rests wholly upon the fact asserted that full warning of the poisonous nature of the liquid was given, and the quantity which might be safely taken was stated to the purchaser. So that the question here whether the non-suit ordered by the trial judge can be sustained or not turns solely upon the inquiry whether the warning was in fact given, and that again upon the question whether the jury would have been at liberty to disbelieve the evidence of the defendant's clerk. His story in itself was not improbable, so far as the defendant's actions are concerned. A druggist selling for ten cents a medicine which was a poison, and in a quantity capable of killing an incautious or ignorant purchaser would be quite likely, we should suppose, to give the brief information needed to protect his customer and shield himself from grave danger and disaster. Nor was the witness impeached by what are called the contradictions in his testimony drawn out on cross-examination. They were very slight and utterly immaterial. But two facts disclosed by the proofs opened his testimony to doubt and, possibly, disbelief. He was an interested witness. He had violated the law by omitting the label required. The medicine he delivered had killed its victim. The consequences of the act upon himself, upon his future, and upon his employer were certain to be disastrous in the absence of explanation or justification. The motive to avert the danger even by falsehood was plain and powerful. The label was not on the phial. No such defence was possible. The only other one was to swear to the verbal warning given to the customer. The witness, therefore, stood in a position such as to provoke suspicion, arouse doubt, and justify watchful and rigid criticism. And then joined to that came the facts of the conduct of the deceased. If the evidence was true, he took the poison in a deadly dose, and from the hands of his wife with knowledge that it was a poison, and that he was largely exceeding the prescribed quantity. Nothing in the case permits us to imagine that he did so purposely and intended suicide. What can be said, and all that can be said, is that he relied upon the peddler's story of his experienee in taking without injury one-half of a glass, rather than upon the druggist's warning that the medicine was a strong poison. That is possible, but has about it some doubtful elements. A man even of ordinary intelligence and very moderate prudence, who had been told by a friend that he had been cured by a particular medicine taken in the quantity of half a glass and thereupon went to a druggist, who was also a doctor, to purchase it, and was then distinctly told that the medicine

was a poison, and but ten or twelve drops must be taken, would naturally be somewhat startled. We should expect him to speak and manifest surprise, or at least seek the truth out of the contradictions. But this customer manifested none. He showed no curiosity. He asked no natural question. He did not say that a friend had taken ten times the doctor's dose with safety, and ask who was right or who was wrong, or if there was not somewhere a mistake as to the medicine. On the contrary, with the warning ringing in his ears, he quietly receives the medicine without surprise, allows his wife to pour nearly the whole contents into a spoon and says not a word to her of the information he had received ; does not tell her what the doctor said ; does not heed his warning ; relies upon the advice of an unskilled peddler, discarding that of the druggist and physician, and takes the fatal dose. It cannot be denied that this conduct matches naturally and exactly the line of action we should expect if no warning had been given, and does not appear so perfectly natural when confronted with the opposite theory. It tends, therefore, to throw doubt upon it, and to make one hesitate as to the truth, and when combined with the palpable interest of the clerk to shield himself and his employer makes a case in which there is a possibility of different and debatable inference from the evidence given, and so developes a question of fact rather than of law. In *Elwood* v. *Western Union Tel. Co.*, 45 N. Y. 553, it was said that the rule that where unimportant witnesses testify positively to a fact and are uncontradicted, their testimony must be credited, is subject to many qualifications, and among them this, that the interest of the witness may affect his credibility, and it was added, upon the facts of that case : "Such evidence as there is proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibilities for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive." To a similar effect are other cases. *Kavanagh* v. *Wilson*, 70 N. Y. 177 ; *Gildersleeve* v. *Landon*, 73 N. Y. 609. The General Term were, therefore, right in saying that the case should have been submitted to the jury.

The judgment should be affirmed and judgment absolute rendered in favour of the plaintiff upon the stipulation, with costs.

Wm. C. De Witt, for appellant.

Samuel Greenbaum, for respondent.

—*Central L. J.*, July 20.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[June 29.

DRISCOLL v. GREEN.

Chattel mortgage—Affidavit of debt.

In November, 1881, a chattel mortgage was made to secure the plaintiff as indorser of a promisory note of the mortgagor, dated 4th October, 1881, at two months. A recital in the instrument stated that it had been given "as security to the mortgagee against his endorsement of said note, or any renewal thereof that shall not extend beyond one year from the date thereof ; and against any loss that may be sustained by him by reason of such endorsement of said note, or any renewal thereof." The affidavit stated it was made "for the express purpose of securing the mortgagee against the payment of such his liability for the said mortgagor by reason of the promissory note therein recited, or any future note or notes which he may endorse for the accommodation of the mortgagor, whether as renewals of the said note or otherwise."

Held, reversing the judgment of the Court below, that as the mortgage itself was good, and the affidavit covered all that is required by the Act, that part of the affidavit from "or any future note" to the end was unnecessary, as far as creditors were concerned, and could not vitiate the security.

H. J. Scott, for appeal.

Gibbons, contra.

LOWSON v. CANADA INSURANCE CO.

Immediate execution—Practice.

Held, reversing the decision reported 9 P.R. 185, that R.S.O. ch. 161, sec. 61, as to Mutual Insurance Companies, providing that no execu-

tion shall issue against such a company upon any judgment until after the expiration of three months from the recovery thereof, does not apply to a judgment recovered on a policy issued by the company on the cash principle.

Lount v. *Canada Farmers' Mutual Insurance Co.*, 8 P.R., 433, over-ruled.

The proper way of enforcing the judgment of the Court of Appeal is to have the judgment of the Court below amended if necessary according to the judgment in Appeal, and when amended to issue process thereon.

Cattanach, for appeal.

BANK OF OTTAWA v. MCLOUGHLIN.

Increased jurisdiction of Division Courts—Balance of claim—Judicature Act.

Where the original demand is ascertained by the signature of the party liable, and a balance not exceeding $200 remains due, the Division Courts under the Act of 1880 have jurisdiction.

The Judicature Act and rules in relation to procedure do not apply to the Division Courts; and Rule 330 of the Supreme Court of Judicature applies only to the Courts to which in terms it is made applicable.

At the trial the plaintiff elected to take a non-suit and the judge refused a new trial.

Held, that plaintiff was entitled to move to set aside the non-suit, and if refused could appeal therefrom.

Held, also, that a promissory note could be stamped by the maker on the day of the making thereof, though after it had been signed and endorsed. (See *ante* p. 238).

RE MCDOUGALL.

Insolvent Act—Interest on claims.

After payment by the insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee.

Held, reversing the decision of the Court below, that notwithstanding the provisions of sec. 99 of the Insolvent Act, interest was payable on all debts originally payable with interest by contract or otherwise, but not where it was claimable by law as damages only.

Gormully, for appeal.

Bethune, Q.C., contra

FLEMING V. MCNAB.

Land tax—Sale for taxes—Invalid sale by reason of improper assessment—Principal and agent—Agent buying.

The assessment of land in the name of the plaintiff embraced seven acres already sold and separately assessed, of which fact the assessor was aware. The defendant purchased at a sale for taxes, and the plaintiff instituted proceedings impeaching the sale within two years thereafter.

Held, affirming the judgment of the Court below, that the assessment was illegal and vitiated the sale.

The defendant had for some years acted as agent of the plaintiff in attending to the payment of the taxes on these lands, but for some time before the sale the plaintiff procured the services of one H. in this behalf. H. employed the defendant to pay the taxes to the Treasurer, which he did. The land was placed in the hands of a land agent to sell when the defendant offered to procure a purchaser on being paid a commission by the plaintiff, and nothing further occurred to destroy the relative position of the parties until the sale for taxes.

Per BURTON, J.A.—The confidential relationship was determined by the employment of H. by the plaintiff to pay the taxes.

Per PROUDFOOT, J.—That what took place could not have the effect of determining the relationship between them, and therefore the defendant could not purchase the plaintiff's land to his prejudice.

C. Robinson, Q.C., and *O'Connor*, for appeal.

S. H. Blake, Q.C., and *Hall*, contra.

POWELL V. PECK.

Sale of patent—Renewal of patent.

The judgment of the Court below (reported 26 Gr. 322) reversed—Patterson, J.A., diss., the Court holding that from Peck's evidence before, as also after the expiry of the original patent he was aware when purchasing from Powell the patent he was obtaining the same for the unexpired term only, and that Powell did not lead Peck to understand or believe that the then existing patent had ten years to run.

Powell assigned all his right and interest in the patent to hold the same to the full end of the term for which the same had been issued as fully

as the same would have been held and enjoyed by him had such sale not taken place.

Held, per PATTERSON, J.A., that this did not restrict the assignment to the unexpired term of the original patent, but that Peck was entitled to a renewal thereof under the statute.

Per OSLER, J.—The right of Peck was restricted to the then existing patent.

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

Blake, Q.C., and *Fitzgerald*, contra.

RUSSELL v. CANADA LIFE ASSURANCE CO.

Life insurance—Statements of insured—independent inquiries by Co.

The managing officer of an Insurance Co. directed the local agent to make inquiries as to the habits and state of health of A. R., the answers made by him to the usual questions of the Company not being considered reliable, and on the agent giving a satisfactory report in reference thereto the application for insurance was accepted and a policy issued.

Held, that the Company was not thereby precluded from shewing that the application and answers of A. R. contained such wilfully untrue representations as rendered the policy void.

Bethune, Q.C., and *McTavish*, for appeal.

McCarthy, Q C., and *A. Bruce*, contra.

ROSENBERGER v. GRAND TRUNK RAILWAY CO.

Railway Crossing—Giving warning of approach of train.

The decision of the C. P. D. reported 31 C. P. 349, affirmed, Burton, J.A., dissenting.

DIRECT CABLE CO. v. DOMINION TELEGRAPH CO.

The decision of the Court below (28 Gr. 648) affirmed.

MACNAMARA v. MCLAY.

Registrar of deeds—Fees on searches, &c.—Public inspecting books.

In an action brought against a County Registrar to recover back alleged over-charges, it was shewn that the plaintiff had called upon the Registrar to search the books and indices in his office, and informed him of the persons named as grantees in the last executed deed of a certain lot; and also what encumbrances there were registered against it. There were 28 entries on the abstract index, and the Registrar charged for these services at the rate of 25c. for the first four entries, and 5c. for each of the other entries.

Held, that this charge was proper.

The plaintiff told the Registrar that one A. owned a lot in the Township of B., but was ignorant as to the number of the lot, and asked the Registrar to tell him what encumbrances there were against it, which the Registrar did, and charged for those services 25c. for ascertaining the number of the lot, and 25c. for searching for the encumbrances.

Held, that both were proper charges.

The plaintiff asked to examine an original conveyance in the Registry Office, informing the officer of the names of parties thereto and the lands affected thereby, but did not tell him the number of the conveyance. The Registrar examined the index, for which he charged 25c., and 10c. for producing the document.

Held, also, to be proper charges.

The Registrar was required to produce the abstract index of a lot which contained 180 entries, for which he required to be paid $2.00 as for a general search, the plaintiff offering to pay 25c.

Held (BURTON, J.A., dissenting), that the Registrar charged $1.75 too much.

The Registrar charged $2.05 for an abstract of five folios—*i.e.*, $1.20 for searches, the remainder being for copying at the usual rate.

Held, the Registrar was entitled to those fees, though he only copied it from the index.

A Registrar when preparing an abstract is not bound to rely on the correctness of the abstract index, but may properly test its correctness by making all searches necessary for the preparation of the abstract; he may rely, however, on the index if he thinks proper and charge the same fees as for searches. But if he gives a certified copy of the abstract index only he can charge no more than the rate per folio.

Per BURTON, J A.—The Registrar is the proper person to make searches, and he must produce the original instruments and the books containing copies thereof only, but not the abstract index.

Per PATTERSON, J.A.—Every person interested in a lot of land is entitled to see the abstract in-

dex thereof for the purpose of making a search, as the book containing such abstract is one of those which the Registrar is bound to exhibit under the Registry Act.

McLay, in person.

Clement, contra.

MARTIN v. MCALPINE.

Cognovit—Collusion—Remedy against creditor.

The plaintiff was suing one F., an insolvent, when the defendant, also a creditor, applied to him in order to induce him to execute a confession of judgment, the defendant promising to give him time, whereupon F. signed the confession, by which the defendant obtained priority over the plaintiff, and both parties placed writs of execution in the hands of the sheriff, who sold under the defendant's writ, the defendant becoming the purchaser of part of the goods, the price of which he retained and received the balance from the sheriff.

Held, reversing the judgment of the Court below, that the confession was void under R.S.O. ch. 118, sec. 1, and that the price for which the goods were sold was properly applicable to the plaintiff's writ. An order was accordingly made directing the defendant to pay the amount to the plaintiff.

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

S. H. Blake, contra.

CHANCERY DIVISION.

Full Court.] [Sept. 7.

GILROY v. MCMULLAN.

Lease—Parol agreement.

The plaintiff sought to restrain the defendant from cutting timber on lands demised to him, contrary to the covenants in the indenture of lease.

At the hearing the defendant tendered parol evidence of an agreement between himself and the plaintiff, distinct from and prior to the lease, which, he contended, modified the restrictions in the lease, and gave him the right to cut the timber.

Held, (affirming FERGUSON, J.,) the evidence of the parol bargain could not be admitted.

Mason v. *Scott*, 22 Gr. 592 followed.

B. B. Osler, Q.C., for the defendant.

S. H. Blake, Q.C., for the plaintiff.

PRACTICE CASES.

Cameron, J.] [Aug. 28.

Writ of attachment—Debt not due—What may be considered an applicatian to set aside.

Motion to set aside a writ of attachment against an absconding debtor. Goods were sold to the defendant upon a five months credit. The defendant refused to accept a bill of exchange for the price of the goods at five months, and the plaintiff issued a writ of attachment before the expiration of the five months.

Held, that there was no debt due at the time when the writ issued.

Held, that the existence of a debt sworn to may be questioned on such an application as the present.

Writ of attachment set aside.

Aylesworth, for the defendant.

J. H. Macdonald, for the plaintiff.

CORRESPONDENCE.

To the Editor of the LAW JOURNAL.

SIR,—At the close of this year the Inc. Council of Law Reporting for England issued a triennial digest for the three years subsequent to the digest last issued by them.

Could not our Law Society give us at the end of this year a digest of the cases reported since Robinson and Joseph's digest and down to the end of 1883, and then follow the English plan of issuing a digest every three years. It would be a great boon to the profession.

Yours, &c.,

BARRISTER.

[The Law Society have instructed Mr. Robinson, the editor of the reports, to prepare a triennal digest, which will be issued by the beginning of January, just three years since the publication of Robinson and Joseph's digest. It will be presented to the profession with the reports. Mr. Robinson has secured the valuable services of Mr. Joseph in the preparation of the digest.—EDS. L. J.]

LAW STUDENT'S' DEPARTMENT.

EXAMINATION QUESTIONS.

SECOND INTERMEDIATE.—HONORS.

Real Property.

1. What methods are there of mortgaging leasehold property? Which is the most advantageous to the mortgagee? Explain.

2. Can a married woman make a valid devise of lands?

3. What was the question at issue, and what was the decision in *Doe dem Anderson* v. *Todd?*

4. What is a rack-rent?

5. Can a testator bar his widow's dower in any manner by his will? Explain fully.

6. What are the provisions of the Ontario Statute as to actions by and against the representatives of a deceased person for injury done to real estate?

7. It is sometimes said that the Statute of Frauds was not intended to apply to deeds, and therefore that signing is not necessary for a deed. Is there any special reason for or against signing in Ontario?

CERTIFICATE OF FITNESS.

Mercantile Law and Statutes.

1. Discuss briefly the circumstances *necessary* to constitute a partnership between two or more individuals, with special reference to any statutory enactments on the subject.

2. A promissory note made by A to the order of and endorsed by B, promising to pay $500 on 24th May inst., is dishonored. State accurately the *necessary* steps to be taken in order to bind B, distinguishing the same from expedient steps, giving grounds for your answer, and with special reference to any statute law involved.

3. State in general terms the steps necessary to be taken to secure a loan of $500 by mortgage upon one of our lake steamers, with reasons for the steps so to be taken.

4. Define Bottomry, Respondentia, Charter party, and Bill of Lading.

5. Point out any difference in principle between the contracts of Fire and Life Assurance, and mention any restriction placed on the conditions of a Fire Policy, and the means provided for enforcing such conditions.

6. A merchant is indebted to several persons and secures one of them by chattel mortgage on his whole stock-in-trade, representing his total assets. To what extent would this mortgage, supposing it formally correct, be valid, and why?

7. What effect will the negotiation of a Bill of Lading have on the right of Stoppage *in transitu?* Give reasons for your answer.

8. Give any statutory requisites of the sufficiency of a contract of sale of goods over $40 in value, referring as nearly as you can to the Statutes relating to the same.

9. Give a brief sketch of the practice in obtaining judgment under Rule 80 of the Judicature Act.

10. To what extent is misdirection on a point of law or improper rejection of evidence by the judge presiding at the trial of an action a ground for a new trial? How was it at Common Law, and how has the change, if any, been brought about?

CALL TO THE BAR.

Real Property and Wills.

1. What are the rules to be observed as to the commencement of the abstract of title to land? Explain fully.

2. Where there is no stipulation in the contract of sale, is it the duty of the vendor, or of the purchaser, to prepare and get executed the conveyance? At whose expense is it prepared, and at whose expense is execution procured?

3. What is the effect of the recitals upon the operative part of a conveyance?

4. What is the effect of a statutory discharge of a mortgage in fee simple made by a tenant in tail?

5. What becomes of property directed by a testator to be converted, which remains undisposed of by the will? Explain.

6. What are the rules of construction of devises, and bequests upon conditions?

7. Is it necessary to the valid execution of a will under the Wills Act of Ontario that the testator should actually see the witnesses thereto write their names upon the will as witnesses. Give your reasons.

8. A presents a mortgage of lot No. 1 to the Registrar for registration. The latter receives

and numbers it, enters it on his books and endorses a certificate of registration thereon, but by mistake he enters it on the *abstract index* under lot No. 2. By a subsequent search of lot No. 1 B ascertains that it is to *all appearances* unincumbered, and having no knowledge of A's mortgage, advances money upon mortgage of lot No. 1, and duly registers his mortgage which is correctly entered on the abstract index under lot No. 1. Which mortgage takes priority? Why?

9. Land is vested in A in fee simple in trust for B and his heirs. A dies intestate leaving two daughters and a son. B. dies intestate immediately afterwards leaving two sons, and a son of a deceased daughter. Trace the descent of both the legal and the equitable estates.

10. Explain the doctrine that a use could not be raised without a consideration.

Criminal Law and Torts.

1. Define accessory *before* the fact. What is the extent of his criminal responsibility.

2. A, a servant of B, received certain money on account of his master, which he entered in his master's books, charging himself, however, with it, but did not pay it over, claiming a right to it. Discuss the offence, if any.

3. What is the rule as to the responsibility of a carrier for negligence where the party injured has been himself guilty of negligence?

4. What constructive breaking is sufficient to establish the crime of burglary?

5. State accurately any statutory changes made in Canada which have invaded the rule laid down in criminal cases that the defendant is not a competent witness.

6. State briefly what the prosecution have to prove under an indictment for robbery in order to secure a conviction?

7. What is the effect of an acquittal of a prisoner upon technical grounds, as, for instance, defect in proceedings? What if acquitted on grounds of insanity?

8. Under our Statutes how far is an Executor liable for the tort of his testator? Explain fully.

9. Discuss the general rule, and illustrate it briefly, that privity is not requisite to support an action *ex delicto*.

10. What legal duties are cast upon a parent with reference to his legitimate children? What as to his or her illegitimate children?

CALL—HONORS.

Equity Jurisprudence.

1. Permanently beneficial improvements are made to real estate (1) by a part owner; (2) by a tenant for life, and (3) by a person under a mistake of title. What relief are each of the above parties entitled to in respect of such improvements?

2. Define legal and equitable assets; and classify the latter which are equitable assets (1) by their own nature; and (2) by the act of the testator.

3. Explain the jurisdiction of equity in cancelling and delivery up of documents; and show the grounds upon which that relief is exercised in the case of (1) voidable, and (2) void, instruments.

4. Define Constructive Fraud, Constructive Trusts, Constructive Notice, and give illustrations of each.

5. Give illustrations of cases of election, (1) under powers, (2) where a testator affects to dispose of his own property, by an ineffectual instrument, and (3) show whether evidence *dehors* the instrument is admissible.

6. State proceedings necessary to be taken under the Quieting Titles Act, to obtain a Certificate of Title and the effect of such Certificate under the Act.

7. Explain what is meant by (1) the exclusive and (2) the concurrent, jurisdiction of equity respecting legacies, and classify the various classes of legacies.

8. State the practice under the Judicature Act in moving against the verdict (1) of a Judge without a jury, and (2) of a jury.

9. By what legislative authority may the present Parliamentary constitutions (1) of the Dominion of Canada, and (2) of the several Provinces of the Dominion, be amended or changed.

10. What is the legislative authority of the Dominion Parliament, and of the Provincial Legislatures, respecting the (1) punishment of crimes, and (2) enforcing the provisions of their statutes?

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Practice in cases of foreign extradition.—*American Law Rev.*, May—June.

Fraudulent mortgages of Merchandise.—*Ib.*

Trial by jury.—*Ib.*

Actions on judgments.—*Ib.*

Implied warranty of fitness of a chattel.—*Ib.*

Titles of statutes—*Ib.*, July—August.

American law governing the payment of debts of deceased persons.—*Ib.*

Functions of a prosecuting officer.—*Ib.*

The married woman's property Act, 1882, (England).—*Ib.*

Judicial discretion.—*Ib.*

Once in jeopardy.—*Crim. Law Rev.*, July.

Survival of actions.—*Am. Law Register*, June.

Specific enforcement of contracts to transfer stock.—*Ib.*, August.

Costs on the recovery of a balance.—*London L. J.*, May 12.

Injunctions under the Judicature Act.—*Ib.*, June 9.

Insurance between contract and completion.—*Ib.*, June 23.

Discovery under the Judicature Act.—*Ib.*

The same under the new rules.—*Ib.*, July 28.

Counter-claims without claims.—*Ib.*, June 30.

Distress damage feasant.—*Ib.*, July 7.

The new rules of procedure.—*Ib.*, 14, 21, 28.

Commissions of real estate agents.—*Central L. J.*, June 8.

Termination of the liability of a common carrier.—*Ib.*

Lawyer and client—Contingent compensation.—*Ib.*, June 15.

Donatio mortis causa.—*Ib.* June 22.

Married women's debts.—*Ib.*, July 6.

Mistake of a legal right.—*Ib.*, July 13.

Surface water on agricultural lands.—*Ib.*, July 20, 27.

Conveyance of expectancy—Release.—*Ib.*, July 27.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

MECHANICS' LIENS :—

A treatise on the Law of Mechanic's Liens on Real and Personal Property. By Samuel L. Phillips, Washington, D. C. Second edition. Little, Brown & Co., Boston.

VENDORS AND PURCHASERS :—

A treatise on the Law and practice relating to Vendors and Purchasers of real estate. By J. H. Dart. Fifth edition. Stevens & Sons.

CASES ON THE B. N. ACT :—

Cases decided on the British North America Act, 1867, in the Privy Council, the Supreme Court of Canada, and the Provincial Courts. Collected and edited by Jno. R. Cartwright, Queen's Printer.

MINING REPORTS :—

A series containing the cases on the law of mines found in the American and English Reports, arranged alphabetically by subjects, with notes and references. By R. S. Morrison, of the Colorado Bar. Vol. 1. Callaghan & Co., Chicago.

CARRIERS :—

With special reference to such as seek to limit their liability at Common Law by means of bills of lading, express receipts, railroad tickets, baggage checks, etc., etc. By J. D. Lawson W. H. Stevenson, St. Louis.

REAL PROPERTY :—

Principles of the Law of Real Property; intended as a first book for the use of students in conveyancing. By the late Josh. Williams. Fourteenth edition. By his son, T. C. Williams. H. Sweet.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for August 18th and 25th contain, The Real Lord Byron, *Quarterly;* Half a Century of Literary Life, *London Quarterly;* John Richard Green, by EDWARD A. FREEMAN, *British Quarterly;* Classic Conceptions of Heaven and Hell, *Westminster;* Cave Tombs in Galilee, *Fortnightly;* Terry Wigan, *Blackwood;* The North Farm: Now, by J. E. PANTON, *Tinsley;* Voltaire in England, *Cornhill;* The Empress Eugenie's Flight to England, *Temple Bar;* Grace Darling, *Leisure Hour;* Sea Island Cotton, *Chambers' Journal;* Benvenuto Cellini, *All the Year Round;* with instalments of "Uncle George's Will," and "Along the Silver Streak," and Poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1883.

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

C. L. Mahony, with honors; P. D. Crerar, with honors. (Mr. Mahony was awarded a gold medal and Mr. Crerar a silver medal.) Messrs. R. W. Leeming, C. G. O'Brian, M. MacKenzie, C. W. Plaxton, Ed. Poole, M. A. McLean, G. F. Ruttan, A. Foy, G. T. Ware, A. J. Williams, R. W. Armstrong. J. D. Gansby, A. D. Kean, D. Lennox, L. C. Smith, A. E. W. Peterson, W. H. Brouse, F. E. Curtis, A. O. Beardmore, H. C. Hamilton, C. R. Irvine and J. F. Canniff.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates—R. F. Sutherland, A. M. Ferguson, W. Hunter, C. D. Hossack, E. A. Holman, E. J. Bristol.

Matriculants—S. W. Burns, R. A. Grant, F. H. Kilbourne, A. J. Forward and H. J. Snelgrove.

Junior Class—A. M. Grier, H. D. Cowan, G. H. Douglas, W E. Hastings, A. D. Scatcherd, M. H. Burtch, J. B. Davidson, R. H. Hall, W. Lawson, W. C. P. McGovern, F. E. Walker, C. Horgan, R. R. Ross, C. A. Ghent, H. N. Rose, J. R. Code, F. W. Carey, D. Sinclair, W. Stafford, J. Fraser, W. Geary, H. M. Cleland, S. R. Wright, A. McNish, G. M. Brodie.

Mr. Donald Ross was allowed his examination as an Articled Clerk.

Trinity Term having been postponed until Monday, the 3rd September, the examinations will take place as follows:—

Primary—Junior Class, Tuesday, 14th August; Graduates and Matriculants, Thursday, 16th August.

First Intermediate—Tuesday, August 21st.

Second Intermediate—Thursday, August 23rd.

Solicitor—Tuesday, August 28th.

Call—Wednesday, August 29th.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From 1883 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Cantos V. and VI.
1884—Elegy in a Country Churchyard.
The Traveller.