The Canada Law Journal.

VOL. XXVI. JUNE 2, 1890. No. 10.

IN the recent case of *Stephenson* v. *Dallas*, *ante* p. 253, the Chancellor has defined the scope of Rule 739, as to which some misapprehension exists. The Rule is only intended to apply where it is shown, from an acknowledgment by the defendant of the debt, or from other circumstances, that the defence is only for time, and the onus is thrown upon the defendant of shewing that he has a defence, where it is sworn on the part of the plaintiff that there is none. In the above case it was decided that when the facts are not clear and free from doubt, leave to sign judgment under the rule should not be granted; but where a distinct defence is not made out, terms should be imposed upon the defendant upon his being allowed to defend as a pledge of his *bona fides*, either by payment into court or otherwise securing a proportion of the amount claimed.

A BILL, indorsed by some of the most eminent members of the English Bar, has been introduced at the present session of the Imperial Parliament to regulate the procedure of the High Court. It is proposed to greatly reduce the operation of the Divisional Courts by enacting that motions for new trials and appeals from a judge sitting in court or chambers should be made to the Court of Appeal instead of the Divisional Court. We hope that a reform in a similar direction will be made in this Province, where numerous and expensive appeals, often on technical points, have disgusted suitors and diverted business from the courts. The Board of Trade has long ago provided means for settlement of disputes between its members by arbitration, and merchants prefer to resort to the same method of settlement rather than incur the risk of costly and prolonged litigation. The Divisional Court has not inaptly been called the fifth wheel of the legal coach, and there seems to be no good reason why it should not be abolished and its business transferred to the Court of Appeal. Its decisions are not decisive, nor are they in most cases accepted as final; while its varying constitution encourages defeated litigants to carry their cases to a higher court. The reform contemplated would necessitate a reduction in the expense of appeals to the Court of Appeal. The amount of money spent in the printing of pleadings, exhibits, and evidence in appeals to that court is a scandalous injustice to suitors, and benefits no one except the printers. There is no reason why appeals to the Court of Appeal should be more expensive than appeals as at present to the Divisional Court.

THE announcement that Mr. Justice Proudfoot has resigned his judicial office is not altogether unexpected. For some months past it has been obvious that the affliction of deafness from which he has been suffering has so seriously impeded his ability satisfactorily to discharge his duty as a judge, as to make his withdrawal from the bench a necessity. During the past winter he visited Europe, with the hope of obtaining relief, but, unhappily, in vain, and he has returned to Toronto to resign the office which he has filled for the past fifteen years. He was well read in civil law, but it cannot be said that he was a succees as a judge of facts.

And possibly his failure always to draw correct inferences from the facts proved before him, is due to his inability to attribute to others motives for their actions which would be utterly foreign to his own idea of truth and rectitude. Of him may be truly said as of "the man of Ross," that "E'en his vices leaned to virtue's side."

We do not think it can be said of the retiring judge that he will hereafter be remembered as one of our "great" judges. His judgments have been for the most part cold, dry expositions of law, somewhat lacking in that force and originality of expression to be found in the judicial utterances of the great lawyers of the past and of the present day. But we are sure that he will always be remembered by all his contemporaries as a patient, painstaking, conscientious judge, conspicuous for his courtesy to the bar, and one whose even temper it was almost impossible to ruffle.

While it is to be deplored that his grievous affliction should have necessitated his retirement while still in the full enjoyment of his mental powers, it is hoped that in the lecture-room and in the arena of literature he may yet have many years of usefulness before him.

PROVINCIAL LEGISLATION OF 1890.

The extra of the *Ontario Gazette* containing the public Acts passed at the recent session of the Legislative Assembly discloses the fact that at least four-fifths of them consist of mere amendments of existing statutes.

We have on former occasions deplored this passion for amendments with which our Provincial Legislature is affected. It is an expensive luxury, and one not by any means of unmixed benefit to the community.

The Government of the day can no doubt exercise considerable influence in controlling this species of legislation, and it is a pity they do not exercise it on some well-defined principles.

At present it would appear that so long as any proposed amendment is not *per se* positively objectionable, it is allowed to be passed almost as a matter of course; as though the constant tinkering of the statute law was of no moment, and had no detrimental effect.

When we look back on the early history of England, it is surprising to see with how little statute law our forefathers managed to get along. It was not

until the reign of George III. that the statute law began to develop to its present enormous proportions. This passion for constantly adding to the statute book is a modern craze, which is to some extent due to the anxiety of the members of the numerous British Legislatures to justify their existence, and to make their fellow-subjects believe they are getting some good of the large sums of money they cost the country.

It is almost useless to hope, and yet it does seem to be something greatly to be desired, that some restraint should be in some way placed upon the constant amendment and re-amendment of the statute law. There are one or two considerations, it appears to us, which should always control the question of amendment. We must start with this proposition, a change is *prima facie* objectionable and injurious. To warrant any change it should be made manifest (1) that the amendment is desirable *per se;* (2) that there is an urgent necessity for its immediate adoption. If not, then it might be reserved, either until further amendments of a more pressing character are proposed, or until the next general revision of the statutes.

We have before urged (unhappily without much effect) that when a statute requires to be amended it should be reprinted in full. If this plan were adopted, the law at any given date upon the subject dealt with by the statute could be more readily ascertained than at present. If the amendments proposed are so trifling and so insignificant that it is not worth incurring the comparatively small expense of reprinting the statute proposed to be amended, it would be better to defer the amendment until such other changes might be suggested by experience as to make it worth while incurring that expense. Under the present system, in order to arrive at the state of the statute law one has often to consult, not only the revised statutes, but every volume of statutes which has been subsequently issued. Whereas, if the plan we suggest were adopted, the law at the date required would always be found complete in one volume. When a statute is thus amended, the amendments might be indicated either by notes or by the use of a different type, so as to direct attention to the changes which are from time to time made. There would be the further advantage resulting from this method of legislation, that the work of statute revision would be immensely simplified; the statutes would be constantly revising themselves, as it were, and at the end of the decennial period the task of revision would be reduced simply to eliminating from the general mass of statutes those which had been repealed, and arranging those which remained in their proper sequence. But to proceed to the work of the past session.

The secrecy of the ballot at Provincial elections is further provided for by an Act (cap. 3) which imposes divers oaths on election officers; it is to be hoped that the remedy may prove effectual; but if secrecy is really desired, more effectual means could obviously have been devised to secure it. A secrecy which is only secured by official oaths may in some cases prove to be no secrecy at all.

One of the few original Acts passed during the recent session is the Act respecting Mining Regulations (cap. 10), which contains sundry useful regula-

tions regarding the employment of young people as miners, and the protection of those engaged in mining.

Power is given by chap. 13 for the reference to the High Court or Court of Appeal by the Lieutenant-Governor-in-Council "of any matter which he thinks fit to refer," and provides for the question being argued in presence of parties interested, or their counsel. By chap. 14 the Court of Chancery is declared to have had, and the High Court to have, power to sanction leases of settled estates containing agreements for renewal. Chap. 17 introduces sundry verbal amendments into the Surrogate Courts Act, so as to make it conform to the provisions of the Devolution of Estates Act, R.S.O., c. 108; amendments, by the way, which obviously ought to have been made when the statutes were revised. By sec. 21 of this Act an original provision is made, enabling a judge of an adjoining county to exercise jurisdiction where the applicant for probate or administration is himself judge of the court applied to. We are somewhat surprised to find that it has been found necessary to enact by chap. 18 that no judge or courts, except the High Court of Justice, courts of assize, *nisi prius*, *oyer and terminer*, and general gaol delivery, shall have power to try any treason, felony punishable with death, homicide, or libel. We were under the impression that such was already the law. This view seems to be borne out by the Act itself, for in the following section jurisdiction is expressly conferred on certain inferior courts of criminal jurisdiction to try certain cases of forgery. This Act, besides making one or two verbal amendments, also provides that the appointment and dismissal of constables is vested in the Justices of the Peace at the general sessions of the Peace, or any adjournment thereof, and not at any special ssssions.

By chap. 20 the pay of jurors is raised from $1.50 to $2 per diem; and by the same Act it is also provided that in case of a juror dying, or becoming incapacitated during a trial or assessment of damages, the presiding judge may direct the trial or assessment to proceed, and the verdict of the remaining eleven jurors is to be valid. This provision no doubt was suggested by the late St. George accident case, where a juror fell ill during the progress of the trial, and it, at one time, looked as if the immense expense of beginning *de novo* might possibly have to be incurred. It will be observed that the Act only provides for the case of the illness of one juror; if more than one should die or become incapacitated, the law remains as formerly. Any doubts as to the right of commissioners to take statutory declarations under the Devolution of Estates Act, or under any other Act, are intended to be removed by chap. 22.

By chap. 23, Justices of the Peace or other public officers sued for anything done in the exercise of their office by impecunious plaintiffs, are entitled to require security for costs to be given. By chap. 27 the Legislature has sought to some extent to overcome the effect of the decision of the learned Chancellor *In re Gilchrist & Island*, 11 Ont., 587, by providing that in cases to which that decision would apply, the assignee of the mortgagee may proceed to sell under the provisions of R.S.O., c. 102, part ii., and this provision is made retrospective. R.S.O., c. 102, part ii., we may observe, was amended by 51 Vict., c. 15, s. 3, and it may be a question whether the Act as it originally stood or as amended is

to apply to mortgages existing prior to the date of the amendment; if the amended Act, which is the only one now in existence, applies, the curious anomaly arises of an instrument being controlled by the provisions of a statute before the statute was enacted. Chap. 28 is an amendment of s. 68 of the Partition Act, which had been already amended by 51 Vict., c. 16. This second amendment of the same section within two years is a very good illustration of the justness of our preliminary observations. The amendment merely enables the inspector of legal officers to dispense with the advertisement required by s. 68 in certain cases.

Chap. 29 is an Act to protect persons assuming to act as personal representatives of persons who, on account of their absence for seven years, have been erroneously deemed to be dead. The first section is curiously worded, and manifests the want of care which characterizes so much of our Provincial legislation. The section commences with a reference to persons appointed administrators, but the concluding part of the section purports to protect executors also, who have not been previously mentioned. This ambiguity will no doubt necessitate a lawsuit to determine its meaning. While the persons acting as executors or administrators are protected from liability, except for the estate remaining in their hands undistributed, the persons other than creditors to whom the estate has been distributed remain liable to the owner, subject to the Statute of Limitations. The second section protects personal representatives for acts done by them under letters of administration granted under an erroneous supposition of intestacy, or under letters probate granted of invalid wills; but saves the right of the rightful owner to proceed against the persons to whom the estate has been distributed, subject to the Statute of Limitations. The Act does not protect persons acting fraudulently.

By chap. 30 sundry amendments are made to the Registry Act, none of which appear to be of any great importance. One of the amendments is to the effect that where a will is tendered for execution, with an affidavit of the personal representative that any land dealt with therein was subsequently conveyed away by the testator in his lifetime, and it so appears by the registry books, the will is not to be recorded against such property. This is a very superficial and insufficient attempt to deal with a very serious evil, viz., the registration of wills against property which is really not affected thereby, by reason of the will being invalid. By chap. 31 some insignificant amendment is made to the Custody of Title Deeds Act, enabling receipts for money to be deposited in the Registry office.

Some amendments to the Land Titles Act are made by chap. 32, but they appear to relate to matters of detail which it is not necessary here to discuss; save only, that in the case of possessory certificates the contribution to the guarantee fund is reduced by one-half.

By chap. 33 provision is made for vacating certificates of *lis pendens* for want of due prosecution of the *lis*. The court is also enabled to vacate a certificate of *lis pendens* upon payment of money claimed against the land into court. An order vacating the certificate, however, is not to be registered until the lapse of fourteen days from the date of the order, so as to give opportunity to appeal

from it. By chap. 35 an amendment is made to the Chattel Mortgage Act as regards mortgages made by companies to secure payment of their bonds; and the following chapter contains further amendments to the same statute. Why these amendments could not be embodied in the same statute is a mystery.

By chap. 37 an attempt has been made to simplify the procedure to enforce mechanics' liens. So little benefit has hitherto been derived from actions of this kind, that many judges and practitioners had arrived at the conclusion that for all the good it was to litigants the Mechanics' Lien Act might as well be repealed altogether. This new Act appears to be an heroic effort to give the principal Act some vitality. The scheme of procedure laid down by the Act is, shortly, this: Instead of issuing a writ, or taking any other preliminary proceeding, the plaintiff is to begin his action by filing a statement of claim, verified by affidavit, in the office of a Master, or Official Referee. This officer is then to issue a combined certificate and appointment, in duplicate, certifying that the claim has been filed, and appointing a time to adjudicate on it. One copy of this certificate is to be registered, and a copy of the other is to be served on all proper parties. No further pleadings are required to be filed, but in the appointment a day is first given for deciding (if the fact is disputed, which may be done by filing a notice) whether the plaintiff is entitled to a lien. That fact not being contested, or if contested, being decided, the officer is to proceed to take all necessary accounts of the amounts due by the owner, and to the plaintiff and other lien holders, and make a report. The owner is enabled to get rid of the suit, as far as he is concerned, by promptly paying the amount due by him into court, whereupon the lien may be summarily discharged. Or if nothing is found due by him, the action may be dismissed. Where the action is brought by a sub-contractor, the owner is to file a statement of the amount, if any, he admits to be due, and if more is established against him than he so admits, he may be ordered to pay the costs so occasioned. In default of payment by the owner, the Master or Referee is empowered to issue a judgment for sale of the land, on which the usual proceedings are to be taken. The total costs of the proceedings are not in any case to exceed twenty-five per cent. of the amount recovered for the satisfaction of the lien, and where there is more than one lien, we presume the twenty-five per cent. is to be governed by the amount realized for the lienholders collectively, though this is not very clear from the statute. The Master or Referee is also empowered to grant a certificate to the lienholders for the balance remaining due to them, which may be filed in the proper court, and thereupon may be enforced as a judgment of such court.

By chap. 38 a further amendment is made to the Mechanics' Lien Act by increasing the amount of the contract price to be retained under s. 7 according to a graduated scale, ranging from fifteen per cent. to ten per cent., according to the amount of the contract price.

By chap. 39 sundry amendments are made to the "Act to secure wives and children the benefit of Life Insurance" (R.S.O., c. 136). By chap. 74 the Act Respecting the Property of Religious Institutions (R.S.O., c. 237) is extended to Jews. None of the other statutes seem to call for any particular mention here.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for May comprise 24 Q.B.D., pp. 505-625; 15 P.D., pp. 49-65; and 43 Chy.D., pp. 469-637.

SOLICITOR AND CLIENT—ASSIGNMENT OF CHOSE IN ACTION—ASSIGNEE BECOMING SOLICITOR IN ACTION—GARNISHEE—ORDER—PRIORITY.

Davis v. *Freethy*, 24 Q.B.D., 519, was an interpleader action. Davis, who was a solicitor, purchased from one Marks a claim, for which he had recovered a verdict of £250 in an action of *Marks* v. *Raphael*. After the assignment, a new trial was granted, and Davis then became the solicitor in the action, which resulted in another verdict for the plaintiff for the same amount. Freethy was a creditor of Marks, and, after the second verdict, attached the debt in *Marks* v. *Raphael*, and he claimed that the assignment from Marks to Davis was void, under the authority of *Simpson* v. *Lamb*, 7 E. & B., 84, in which it was decided that a solicitor could not legally take an assignment from his client of the subject matter of a suit in which he was acting as solicitor. But the Court of Appeal, though approving of *Simpson* v. *Lamb*, distinguished it from the present case, and upheld the assignment because it was made before the relation of solicitor and client existed; and a contract so made is not affected by that relation being subsequently entered into.

LITHOGRAPHED SIGNATURES.

In *The Queen* v. *Cowper*, 24 Q.B.D., 533, the effect of a lithographed signature was discussed. Under the County Court Rules, in order to entitle a plaintiff to costs of a solicitor, the solicitor is required to sign the particulars. In the present case the signature of the solicitor was lithographed. Fry, J., agreeing with the Divisional Court, held this was not a sufficient compliance with the rules. Lord Esher, M.R., however, dissented.

PRACTICE—INSPECTION—AFFIDAVIT OF DOCUMENTS.

In *Wideman* v. *Walpole*, 24 Q.B.D., 537, the plaintiff had made an affidavit of documents which contained the usual clause, that he had not in his possession or power any documents save those produced by him. The defendant now applied on motion for the inspection of a document which he stated was in the plaintiff's possession, and he believed contained matters relative to the case, founding his affidavit on the fact that, in the course of an examination of the plaintiff, she had produced the document for the purpose of refreshing her memory as to a date. The plaintiff made no counter affidavit in answer to the application, but relied on her former affidavit of documents. She was ordered to permit the defendant to inspect, and the order was affirmed by Huddlestone, B., and Williams, J.

QUEEN'S PARDON—EFFECT OF.

In *Hay* v. *Justices of the Tower Division of London*, 24 Q.B.D., 561, a Divisional Court (Pollock, B., and Hawkins, J.) were called on to consider the effect

of a Queen's pardon for felony. By a statute it was enacted that every person convicted of felony should be forever disqualified from selling spirits by retail, and no license should be granted to a person who had been so convicted. The defendant applied for a license; he had been convicted of felony, but had received a free pardon under the Royal sign manual. Upon a case stated by the Board of Magistrates for the opinion of the court, it was held that the pardon removed the disqualification. In the words of Hawkins, J., the effect of the Queen's pardon is to absolve the person pardoned, not only from the actual punishment imposed, but from all other penal consequences.

NEGLIGENCE—MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT, 1880 (43 & 44 VICT., C. 42) S. 1, S-S. 3 (R.S.O., C. 141, S. 3, S-S. 4).

Snowden v. *Baynes*, 24 Q.B.D., 568, was an action for damages under the Employers' Liability Act (see R.S.O., c. 141, s. 3, s-s. 4). The plaintiff was employed by the defendant to work at a machine in a shed. A carpenter, also in the employment of the defendant, used to receive directions from the defendant or his foreman as to the work to be done, and give orders to the plaintiff and others as to what work each of them was to do, which orders they were bound to obey; but the carpenter had no control over the plaintiff in his work. One day while the plaintiff was working overtime at work which the carpenter had instructed him to do, the latter proceeded to stack timber in the shed, which was not safe for two persons to work in at the same time. By the negligence of the carpenter the timber fell, causing the injury to the plaintiff. Under these circumstances, Pollock, B., and Wills, J., held that the defendant was not liable, as the injury did not result from the plaintiff having conformed to any order given by the carpenter to do any particular work, and therefore s. 1, s-s. 3 of the Act did not apply.

BAILMENT—TITLE OF BAILOR—JUS TERTU—DISCOVERY—IRRELEVANCY.

In *Rogers* v. *Lambert*, 24 Q.B.D., 573, upon an interlocutory application, Denman and Wills, JJ., had to determine an important point of commercial law. The action was by bailors against their bailees for wrongful detention of a quantity of copper. The defendants claimed to examine the plaintiffs for discovery on the following point, viz., whether they had not sold the copper to Morrison & Co., and been paid the price by them; and whether they had not endorsed delivery orders in favour of Morrison & Co. Morrison & Co. were claiming the copper from the defendants, but the defendants admitted they were defending the action for their own interest alone, and not under the authority of Morrison & Co. The court held that the defendants were estopped from setting up a *jus tertu* under the circumstances, and that, therefore, the proposed questions were irrelevant and therefore inadmissible.

PRACTICE—ACTION AGAINST A FIRM—APPEARANCE—ORD. IX., RR. 6, 7; ORD. XII., RR. 13, 15, 16; ORD. XLII., R. 10 (ONT. RULES 265, 266, 288, 289, 876).

In *Davies* v. *Andre*, 24 Q.B.D., 598, the practice established by the judicature rules as to actions against firms received some elucidation at the hands of the

Court of Appeal. The action was brought against a firm of Andre & Co., and the writ was served on one Rath, who was alleged to be in charge of the business of the firm, and who, the plaintiff claimed, was a partner. Mr. Rath denied he was a partner, or in charge of the business, and he obtained leave to enter "a conditional appearance," unless the plaintiff would undertake not to seek to make him liable as a partner of the firm of Andre & Co. The Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were of opinion that the rules warranted no such procedure. That the party served must either appear or not appear, he cannot half appear. It does not appear to us, however, that the Court of Appeal has quite satisfactorily removed what appears to us to be the dilemma in which Rath was placed. He was served with the writ; he was not named in it as a member of the firm. But the plaintiff claimed he was a member of the firm. The service on him was therefore somewhat equivocal, and it was difficult for him to know whether he was served as being an alleged partner, or merely as a person in control of the business. He might be in control of the business without being a partner. And yet upon a judgment against a firm, the rules allow execution to issue against persons who have been served as partners and have failed to appear. Rath might be met, if he did appear, with the statement that he was not served as a partner, and therefore had no right to appear; but if he did not appear, then the plaintiff might turn round and say he had been served with the writ as a partner, and had not appeared, and was therefore liable to execution. It appears to us that the rules place a man served under such circumstances in a somewhat awkward position. How is a person to know whether or not he is "served as a partner" in a case where his name does not appear on the writ? Perhaps the proper explanation of the rules is, that a man cannot be said to be "served as a partner" unless he is on the face of the writ named as a partner.

ATTACHMENT FOR CONTEMPT OF COURT—CRIMINAL MATTER.

The only case in the Probate Division to which it seems necessary to direct attention is *O'Shea* v. *O'Shea*, 15 P.D., 59, in which the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) determined that where, in a civil proceeding, an application is made against a person, not a party to the action, for contempt of court in publishing comments calculated to prejudice the fair trial of the action, it is "a criminal cause or matter," and therefore no appeal from the order made upon such an application will lie to the Court of Appeal; in which respect it differs from an attachment to enforce obedience to an order made in a civil action or proceeding, which is appealable.

LIGHT AND AIR—RAILWAY COMPANY—SALE OF SURPLUS LAND WITH HOUSE THEREON—IMPLIED COVENANT WITH PURCHASER.

Myers v. *Catterson*, 43 Chy.D., 470, though perhaps not strictly an authority in Ontario, is, nevertheless, an instructive case as to the implied obligation which a vendor assumes not to do or permit anything to be done on land he retains which will interfere with the enjoyment by the purchaser of the property he

purchases. The facts in this case were, that a railway company sold a piece of the land not required for their railway to the plaintiff, together with a house which they had allowed him to erect thereon. The house was close to their line of railway, which ran over a series of arches, through two of which there was some access of light to two of the lower windows of the plaintiff's house. The company retained in their own hands lands on the other side of the railway, opposite the plaintiff's house; and their conveyance to him contained a recital that all the land acquired by them, except that sold to the plaintiff, would be required by them for their railway, and it contained no express grant of right, or covenant as to light. The defendant's predecessor in title afterwards acquired from the company, under a conveyance, subject to any right of light which the plaintiff might have, the fee of the lands opposite the plaintiff's house, and erected buildings thereon, and he also took a lease of the arches. The defendant subsequently acquired this property, and blocked up the arches nearest the plaintiff's house with hoardings. The plaintiff claimed a mandatory injunction to compel the defendant to remove the hoarding; and it was held by the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), affirming Kekewich, J., that when the company sold the land to the plaintiff they had entered into an implied obligation not to do or permit anything on the land which they retained which would interfere with the plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of the railway, and that the hoarding not being for that purpose, the plaintiff was entitled to the relief claimed. The effect of this implied obligation, however, might possibly be held in Ontario to be modified by the R.S.O., c. 111, s. 36, which prevents any person now acquiring an easement of light over the land of another; at the same time it is not clear that it would do so, because it will be observed that the plaintiff's right in this case arose, as we have seen, not by prescription, but from an implied covenant or obligation on the part of his vendors, which might be held to arise notwithstanding the statute.

WILL—CONSTRUCTION—GIFT TO A CLASS.

In re Musther: Groves v. *Musther*, 43 Chy.D., 569, a testatrix by her will gave the residue of her property to be equally divided between her nephews and nieces, sons and daughters of her late brothers George, John, William and Christopher, "but should any of them be dead before me, I then direct that his or her share shall be equally divided between his or her children." Kay, J., held, following *Christopherson* v. *Naylor*, 1 Mer., 320, that the children living at the death of the testatrix, of nephews or nieces who were dead at the date of the will, did not take. This decision was affirmed by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), notwithstanding some contrary decisions of Sir George Jessel, M.R. It does not appear to have been argued that the fact that a will now speaks from the death of the testatrix has affected the question of construction of such a bequest, and yet we should have thought the point was worthy of discussion.

Correspondence.

DOMINION LEGISLATION OF LAST SESSION.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Allow me to congratulate the JOURNAL, its readers, and the country, on the close of what His Excellency calls a somewhat protracted session, and on his being able to thank our representatives for the diligence with which they have applied themselves to their important duties, and on his general approval of the 109 Acts they have passed. The speech and the list of Acts you have already in the official *Gazette*, and I hope in a day or two to send you the list with the Acts chaptered as they will be in the Statutes, and I trust you and your readers will find no reason to dissent from His Excellency's opinion of their value. The value of his opinions is a subject which does not interest the public. The Bank Act would, in the opinion of many, have been improved by the omission of the provision making the several institutions *quasi* indorsers of each other's notes, in order that all may pass currently in every part of the Dominion; to these dissenters it seems that it would have been better to make every bank have its agent for redeeming its notes in every Province, and letting its notes be current or not according to the standing of the bank in the estimation of the public. Everyone is pleased that the Government abandoned the idea of confiscating unclaimed dividends, and has adopted the English plan of giving public information respecting them. The amendments to the Criminal Law are undoubtedly improvements; perhaps it would have been well if they had included some provisions for the prevention and punishment of *boodling*, but Mr. Blake's promised Bill for better securing the independence of Parliament, with which that interesting offence has been shown to be closely connected, will deal with it; but of this hereinafter. Of the martyred innocents it is unnecessary to speak, their merits and the loss the country sustains by their slaughter are recorded in our Canadian Hansard, in the eloquent words of their respective parents, and if they deserved a better fate they will attain it in a future session, and emerge from the chrysalis state of Bills into the perfect state of Acts. I regret the fate of one little one for the legalization of standard time, which we have been using throughout the Dominion for years with great convenience, but illegally opening and closing polls, offices, banks, and sittings of legislatures, at Quebec, Montreal, Toronto, and all places in the Provinces of Quebec and Ontario by *l'Original time*, varying in many places from half an hour to nearly an hour from the solar time required by law. This Bill was brought into the Senate by Mr. MacInnes, on the suggestion of Mr. Fleming, who had distinguished himself at the Washington conference in 1884, for establishing a prime meridian for the reckoning of longitude, and of time as depending on it, and which agreed upon that of the observatory at Greenwich. But Mr. MacInnes moved too late in the session, and we are to go on illegally for another year before we follow the example set us by the Imperial

Parliament in 1880, by the Act 43 Vict., c. 9, doing for England and Ireland what Mr. MacInnes wants us to do for Canada. It seems, then, that something may be done by Congress for the United States, which has hitherto been prevented by a supposed difficulty as to State and Congress jurisdiction. If Congress takes the matter up we may perhaps follow; I would rather we had led.

Our session was stormy as well as long, the "Outs" accusing the "Ins" of all sorts of wickedness, legislative and otherwise, and the "Ins" retorting, as of old, "*tu quoque*"; each calling the other very ugly names, and receiving the same answer, "you're another," supposed to be a quite sufficient and unanswerable reply. But we had, as you know, two first-class scandals, of which General Middleton and Mr. Rykert were the central figures. In the General's case everyone grieves that a man so much respected and liked, and to whom our country is indebted, and has acknowledged its indebtedness, for most excellent service in the North-West, did not, when convinced of his mistake in declaring certain furs *confiscated*, and acting as if he were the *Fisc* and had a right to divide them between himself and his friends, say at once, as we are told and are willing to believe he has since done, that he was ready to pay the sum which the committee had reported as the value of the furs, and recommended that Bremner should be paid for them. In spite of Mr. Blake's clear exposition of the rules of the British service, I cannot believe that the General knowingly intended to do wrong. Mr. Rykert's case admits of no excuse. Elected as a member of that branch of Parliament especially entrusted with the care of the property and pecuniary interests of the people, and paid for his services as such, he, by means which a select committee of his fellow-members has formally declared to be "discreditable, corrupt and scandalous," and by misusing the faith which from his position members of the Ministry and public officers under them placed in him, is reported to have obtained from the Government for $500 a grant of timber limits which is said to have produced $200,000 to him, or the party for whom he obtained them, and from whom he says he received $3,000 for thirty days, during which he was using the means aforesaid for procuring them. Mr. Rykert, having resigned as a member of the Commons, is appealing to his former constituents for re-election; but would the House, after declaring his conduct to be discreditable, corrupt and scandalous, allow him to sit as one of its members, remembering the old adage as to similarity of plumage? Mr. Macdougall defended him very cleverly, but the defence was only a demurrer to the jurisdiction of the House, not a plea to the merits or an assertion of the morality of his client's conduct. And if the Attorney-General (Sir John Thompson) had, as some assert, previously prepared or agreed to a report favourable to Mr. Rykert, it must have been of the same nature as Mr. Macdougall's defence, and not an approval of what Mr. R. did. As to the question whether an offender can lawfully retain effects obtained by his offence, and whether the law affords means of compelling him to give them up, the answer on moral grounds is pretty clearly given in one of your late numbers, by Hamlet's uncle, that he cannot lawfully retain them; and the said uncle says further:—

> "In the corrupted currents of this world,
> Offence's gilded hand may thrive by justice;
> And oft 'tis seen the wicked prize itself
> Buys out the law. But 'tis not so above—
> There is no shuffling there."

In the case before us is there no way of obtaining the recission of the grant by which $200,000 worth of property are said to have been obtained for $500? Is there no mistake as to the property, no concealment of knowledge of its value by the grantee, no *fraud* which vitiates everything? The Roman law held taxation to the extent of half the value to be sufficient, and though our modern law, founded more on trading principles, does not go so far, I think it still says that very gross inadequacy may afford evidence of the existence of fraud. Is $200,000 obtained in the manner reported by the committee for $500 sufficiently gross inadequacy? If English law affords no remedy in such a case, or it exists and our lawyers cannot find it, so much the worse for the law and lawyers, and Mr. Blake's purifying Bill is the more urgently necessary. I think if a like case had been referred by Hamlet's father to his Lord Chancellor, or whoever might there be the proper authority, and he had reported no remedy, King Hamlet would have thought and said there was "something rotten in the State of Denmark," which must and should be cured. W.

Notes on Exchanges and Legal Scrap Book.

A valued correspondent has called our attention to an error in the last paragraph of the article on the "English Ceremonial on Taking Silk." It should read: "The Oaths Commissioners recommended that in altering the form of this oath the words '*unless* with license of Her Majesty' should be inserted where marked *."

EMPLOYERS' LIABILITY.—The state of judicial opinion on the question when a workman precludes himself from recovering against his employer under the Employers' Liability Act is becoming as embarrassing as that upon the Bills of Sale Acts. It will be remembered that the famous decision in *Thomas* v. *Quartermaine*, which, unfortunately, did not go to the House of Lords, left the law in this position, as put by Lord Justice Bowen: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not *scienti non fit injuria*, but *volenti*." Then, after referring to certain conditions, the Lord Justice concludes: "Knowledge is not a conclusive defence in itself, but when it is a knowledge under circumstances that leave no inference but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete." That was the view adopted by Lord Esher and Lord Justice Fry, the other members of the Court. The decision has been very much can-

vassed and adversely criticised both in the High Court and the County Court, but never before has it met with judical comment so strong as that which fell from Lord Coleridge and Mr. Justice Mathew in the case of *Sanders* v. *Barker* last week. It is worth while looking at what were the facts in that case: The defendants, the employers, are brewers in the City, and had a hand-pump in their brewery used to force the liquor into pipes by means of steam-power. It was against the wall, and the fly-wheel was quite close to the wall, and it was worked by a turning wheel which let the steam into the pump. When the steam went in it ought to have worked by itself, but it required a touch or two to set it going, and these touches the workman gave with his finger. The plaintiff was the man employed at this work, and from time to time put his finger to the wheel for the purpose. On the occasion in question he had thus put his finger to it, when it was caught and injured so that he lost it. He admitted in cross-examination that he "knew there was a risk," that is, by reason, as he said of a defect in the machinery in not working without being thus touched by the finger, which defect he had asked to be repaired. The jury found (in the City Court) that there was a defect in the machinery by reason of neglect on the part of the employers, but that the plaintiff knew of the defect and worked voluntarily with that knowledge: though he had not, he said, full knowledge of the risk he was incurring, but only "that an accident might happen," and that he had given notice of the defect to the defendants, who knew of its existence. The Judge, (Mr. Kerr) directed the verdict to be entered for the defendants, giving leave, however, to the plaintiff to move to enter the verdict for him for damages, which the jury assessed at £20. It is difficult to see in what particular this case differs in point of fact from *Thomas* v. *Quartermaine*. The plaintiff there fell into the cooling-vat of a brewery. The County Court Judge held that there was evidence of a defect in the brewery, because there was no sufficient fence to the vat, but that the condition of the vat was known to both plaintiff and defendant; and he found that the plaintiff had not been guilty of contributory negligence. The Divisional Court, consisting of Justices Wills and Grantham, set aside the judgment in favour of the plaintiff, and directed judgment for the defendant. This was affirmed in the Court of Appeal, and thus the plaintiff was deprived of all remedy for the injury resulting from the negligence of the defendant which was found by the County Court Judge. Now, in *Sanders* v. *Barker* the judges said that they should shrink from a definition of "voluntarily" which would in many cases deprive the workman of any remedy. In dealing with *Thomas* v. *Quartermaine*, Lord Coleridge first said that the decision was no doubt right on the ground that there was no evidence of neglect in the employer. This is incorrect: There was not only evidence, but the finding of the County Court judge. His Lordship also asked whether there was any case in which, the workman having pointed out the danger and asked that it be remedied, the employers had been held not liable. To which the correct answer was made, that the point was covered by the judgment in *Thomas'* case. Whereupon Mr. Justice Mathew said: "No doubt the judgment was an effort to establish that proposition, and a judgment which is an astonishing instance of the capacity of the human intellect, though

it had not convinced him." We are surprised to see that Lord Coleridge repeated that he did not think *Sander's* case covered by *Thomas'* case, as, in our judgment, it most certainly is. The pressure of *Thomas'* case seems to have been felt by the Court of Appeal in the case of *Yarmouth* v. *France*, a case in which Lord Justice Lopes dissented from Lord Esher and Lord Justice Lindley. It was then what is called "distinguished," although the plaintiff was a workman injured by a vicious horse of his master, which horse he knew to be vicious. Lord Esher then took occasion to say that his position with regard to *Thomas'* case was an extremely delicate one, as he had dissented from the rest of the court, and thought the decision utterly wrong, and he said, "Does the judgment of Lord Justice Bowen mean to say that the mere knowledge of the workman and his continuing in the employ is fatal to him?" and he intimated his view that that would be wrong. Lord Justice Lindley did not consider that *Thomas'* case went so far as to protect masters who knowingly provide defective plant for their workmen, and who seek to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use. This, however, is not the general opinion of County Court judges and the profession. After what has fallen from the court in *Sanders'* case, and having regard to the weight of Lord Esher's authority and the view of Lord Justice Lindley, we would suggest that *Thomas* v. *Quartermaine* should be considered as no authority for the larger proposition, and should not be allowed to stand in the way of a workman injured by defective machinery known to be defective both to himself and to his master.—*Law Times.*

THE RULE OF THE ROAD.—It is a general, but not always a binding, rule that one vehicle in passing another in a highway should take the left side of the driver. This is called in the reports the law or rule of the road, and was, according to Lord Kenyon, "introduced for general convenience." Where carriages are driving on a narrow road, or where accidents might happen, the rule ought to be adhered to; and in driving at night the rule ought to be strictly adhered to, and never departed from, as it is "the only mode by which accidents can be avoided." But where, Lord Kenyon continued, the road was sufficiently broad for all persons and carriages to pass, though a carriage might be driving on the wrong side of the road, if there was sufficient room for other carriages and horses to pass on the other side, a person was not justified in crossing out of the way in order to assert what he termed the right of the road. It was putting himself in the way of danger, and the injury was of his own seeking. In a note by Mr. Epinasse to the report of the case, *Cruden* v. *Fentham*, 2 Esp., 684, from which these observations are taken (the case does not appear to have been reported elsewhere), we find that on a motion for a new trial Lord Kenyon expressed himself in nearly the same terms. The mere fact, however, of the defendant being on the wrong side of the road does not constitute sufficient evidence of negligence to render him liable, nor the mere fact of the plaintiff being on his wrong side afford any justification for the defendant to

run against him if there was sufficient room for the defendant to pass without any inconvenience. Thus, as in *Clay* v. *Wood*, 5 Esp., 44, the plaintiff's servant was riding on the wrong side of the road, but near the middle of it. The defendant was the owner of a chaise, then driven by his servant. On coming out of another road, the defendant's servant crossed the road over to that side of the road in which the plaintiff's servant was riding. This was the defendant's proper side. There was ample room to pass the plaintiff, even although he was on his wrong side. In crossing the road, which the defendant's servant did negligently, the shaft of the chase struck the plaintiff's horse and injured it. Notwithstanding the fact that the plaintiff was on his wrong side, the defendant was held liable. The question Lord Ellenborough left to the jury was, whether there was such room that though the plaintiff's servant was on the defendant's wrong side of the road, there was sufficient room for the defendant's carriage to pass between the plaintiff's horse and the other side of the road. Rook, J., took the rule of law to be that "if a carriage, coming in any direction, left sufficient room for any other carriage, horse, or passenger coming on its side of the way, that it was sufficient; but it was a matter of evidence if the defendant had done so. The driver was not to make experiments, he should leave ample room, and if an accident happened for want of that sufficient room he was, no doubt, liable," *Wordsworth* v. *Willan*, 5 Esp., 273. This has been followed in the recent case of *Finegan* v. *London and North-Western Railway Company*, *ante* p. 663. Should, however, persons, one of whom is on the wrong side, meet on the sudden or in a dark night, and an injury result, the party on the wrong side will be held answerable, unless it clearly appears that the party on the right side had ample means and opportunity to prevent it. It follows that if a person drives his carriage on the wrong side he must use more care, and keep a better look-out to avoid collisions or accidents than would be necessary if he were using the proper side of the road. In other words, where there are two courses, one of which is perilous and the other safe, the driver is bound to adopt that which is safe. When there is no carriage on the road the driver may keep in the middle of the road, and is not bound to keep on the left-hand side, even though the accident might have proceeded from the carriage not being on its proper side. If he sees a horse or carriage coming furiously along on its wrong side, while he is on his right side, it is his duty to give way and avoid an accident, although, in doing so, he goes a little on what would otherwise be his wrong side. A similar rule applies to saddle-horses, and also, it is presumed, to bicycles, as applies to carriages, but the rule does not apply to the case of a foot-passenger, although he has a right to walk along the carriage-way. Accordingly, the mere fact of a man's driving on the wrong side of the road is no evidence of negligence in an action brought against him for running over a foot-passenger who was crossing the road. Drivers of carriages, however, must take care to avoid driving against a foot-passenger who is crossing the road, and, on the other hand, foot-passengers in crossing the road, are bound to take due caution in avoiding vehicles. It follows, therefore, that, in order to sustain an action for injury sustained by the negligent driving of the

defendant, the injury must have been caused by the negligence of the defendant only, without the negligence of the plaintiff contributing in any way to the accident. "It is the duty of a person," said Pollock, C.B., in *Williams* v. *Richards*, 3 C. & K., 81, "who is driving over a crossing for foot-passengers at the entrance of a street to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon such crossing, so as not to get among the carriages and thus receive injury." In an action for injuries sustained through being run over by a vehicle, driven by a servant of the defendant, evidence that he might have seen the plaintiff in time to pull up, if he had not been looking at his horses, owing to the want of a "skid" in going down hill, was held sufficient evidence on the defendant's part; and also that even although there was some negligence on the plaintiff's part in crossing the road, yet the defendant was liable if his servant, by the exercise of reasonable care, could have seen the deceased, and avoided the accident, *Springett* v. *Ball*, 4 F. & F., 472. In cases of this sort, to warrant the judge in leaving the case to the jury, proof of well-defined negligence, and not merely some evidence of negligence on the part of the defendant, must be adduced. Where the evidence given is equally consistent with there having been no negligence on the part of the defendant as with there having been negligence, it is not competent for the judge to leave it to the jury to find either alternative; such evidence must be taken as amounting to no proof of negligence. Thus in *Cotton* v. *Wood*, 29 L.J.C.P., 333, the deceased endeavoured to cross the road, and had crossed the line of direction in which the defendant's omnibus was proceeding, when, alarmed at the approach of some other vehicle, she turned back and endeavoured to regain the pavement on the side from which she had started, and, in so doing, was knocked down by the defendant's horses and killed. The night was dark, and it was snowing fast, but the streets were well lit by gas lamps. The omnibus was proceeding at an ordinary pace and was on its proper side. The driver saw the woman cross the road clear of his omnibus, but at the moment she attempted to re-cross he had turned his head to speak to the conductor, and was not aware of the deceased's danger until too late. Upon the facts a non-suit was entered. Such are the principles on which the courts have acted in cases where injuries have been sustained in consequence of the infringement of the rule, and on which actions are maintainable at common law.

[In Ontario, by R.S.O., c. 195, ss. 1, 2 and 3, persons travelling or being upon a highway in charge of a vehicle, on meeting another vehicle, shall turn out to the right from the centre of the road, allowing to the vehicle or horseman so met one-half of the road; or if vehicle or horseman be overtaken by another travelling at a greater speed, the person so overtaken shall quietly turn to the right and allow said vehicle or horseman to pass, and if the driver is unable to turn out to the right he shall immediately stop, and if necessary for the safety of the other vehicle, and if required so to do, shall assist the person in charge thereof to pass without damage.—ED. C.L.J.]

DIARY FOR JUNE.

1. Sun....*Trinity Sunday.*
4. Wed...Lord Eldon born 1751.
5. Thu....Battle of Stoney Creek, 1813.
7. Sat.....Easter Term ends.
8. Sun....*First Sunday after Trinity.*
9. Mon ...County Court Sittings for Motions in York. Surrogate Court Sittings.
10. Tues...General Sessions and County Court Sittings for trial except in York.
11. Wed ...St. Barnabas. Lord Stanley Gov.-Gen., 1888.
14. Sat.....County Court Sittings for Motions in York end. Magna Charta signed, 1215.
15. Sun....*Second Sunday after Trinity.*
16. Mon ...Battle of Quatre Bras, 1815.
18. Wed ...Battle of Waterloo, 1815.
19. Thu....Battle of Blenhiem, 1704.
20. Fri.....Accession of Queen Victoria, 1837.
21. Sat. ...Longest day.
22. Sun....*Third Sunday after Trinity.* Slavery declared contrary to the laws of England, 1772.
24. Tues...Midsummer Day. St. John Baptist.
25. Wed ...Sir M. C. Cameron died 1887.
28. Sat.....Coronation of Queen Victoria, 1838.
29. Sun....*Fourth Sunday after Trinity.* St. Peter.
30. Mon ...Jesuits expelled from France, 1880.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[June 14, 1888.

PARTLO *v.* TODD.

Trade Mark—Registration—Effect of—Exclusive right—Property in words designating quality—Rectification of registry.

P., a manufacturer of flour, registered a trade mark, under the Trade Mark and Design Act, 1879 (42 Vict. c. 22), consisting of a circle containing the words, "Gold Leaf," surmounted by the number 196, and with the word "flour" and P.'s name underneath, the whole surrounded by the words "Ingersoll Roller Mills, Ont., Can."

In an action against T. for using a similar mark, and selling flour purporting to be the "Gold Leaf" of P., the defendant was allowed to offer evidence to show that "Gold Leaf" was a description applied to flour made by a particular process, and was in common use by the trade, both in Ontario and the Maritime Provinces, prior to the registration of such trade mark.

Section 8 of the Act provided that after registry the person registering a trade mark "shall have the exclusive right to use the same to designate articles manufactured by him," and the said evidence was objected to on the ground that under this section the validity of the trade mark could not be impugned.

Held (affirming the decisions of the Divisional Court, 12 O.R.C., 171, and of the Court of Appeal, 14 O.R.C., 444, TASCHEREAU, J., dissenting), that the evidence was properly admitted; that a trade mark is not made such by registration, but it is only a mark or symbol in which property can be acquired, and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use, that can properly be registered; and that the statute does not prevent a person accused of infringing a trade mark from showing that it is composed of words or symbols in common use, to which no exclusive right of user can attach.

Held, also, that where the statute prescribes no means, by way of departmental procedure or otherwise, for rectification in case of a trade mark so improperly registered, the Courts may afford relief, by way of defence, to an action for infringement.

Held, per GWYNNE, J., that property cannot be acquired in marks, etc., known to a particular trade as designating quality merely, and not, in themselves, indicating that the goods to which they are affixed, are the manufacture or stock-in-trade of a particular person. Nor can property be acquired in an ordinary English word, expressive of quality merely, though it might be in a foreign word, or word of a dead language.

Appeal dismissed with costs.

W. Cassels, Q.C., for the appellant.

Moss, Q.C., and *McCarthy*, Q.C., for the respondent.

[June 14, 1889.

BROWN *v.* LAMONTAGUE.

Chattel mortgage—Fraud against creditors—Prior agreement—Additional chattels in mortgage—Effect of.

B. sold a quantity of machinery, tools and fixtures to one P. for $3120.90. The goods were in a factory owned by B., and were to be paid for by monthly payments, extending over a period of forty-eight months. P. agreed to keep them insured in favor of B., and to give B. a hire receipt or chattel mortgage, as security for payment. P. was put in possession of the property, and received letters from B. recomending him to certain merchants in Montreal, and he went to Montreal and purchased goods from L. among others.

Two months after L. sued P. for the price of goods so purchased, amounting to about $1000, and after being served with the writ in such suit, P. gave B. a chattel mortgage on the goods originally purchased and other goods which it was alleged would have been included in the purchase from B., had it not been claimed that they were not in the factory at the time, but were afterwards found to be there. P. had not given a hire receipt or chattel mortgage at the time of the original purchase from B.

L. having signed judgment against P., issued executions, and caused the mortgaged goods to be seized thereunder. On the trial of an interpleader issue to try the title in said goods judgment was given in favor of B. for the goods originally sold to P., but not for those added in the mortgage. The Divisional Court held, on motion to set aside this judgment, that the mortgage was void for the inclusion of the goods not mentioned in the original agreement and reversed the judgment at the trial in B.'s favor. This decision was affirmed by the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, that the judgment of the Court of Appeal was right, and should be affirmed.

Appeal dismissed with costs.

O'Gara, Q.C., for the appellant.

Belcourt for the respondent.

PONTIAC *v.* ROSS.

Municipal aid to Railway Company—Debentures—Signed by Warden de facto—44 and 45 Vict., c. 2, s. 19, P.Q.—Completion of line—Evidence of—Onus probandi on defendant.

A municipal corporation under the authority of a by-law, issued and handed to the treasurer of the province of Quebec, $50,000 of his debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions on which the government provincial subsidy was payable under 44 and 45 Vict. c. 2, s. 19, viz.: "When the road was completed and in good running order to the satisfaction of the Lieutenant-Governor-in-Council."

The debentures were signed by S.M., who was elected warden, and took and held possession of the office after W. J. P. had verbally resigned the position.

In an action brought by the railway company to recover from the treasurer of the Province the $50,000 debentures, after the government bonus had been paid, and in which action the municipal corporation was *mise en cause* as a co-defendant, the Provincial treasurer pleaded by demurrer only, which was overruled, and the County of Pontiac pleaded general denial, and that the debentures were illegally signed,

Held (affirming the judgment of the Court below), 1st. that the debentures signed by the warden *de facto* were perfectly legal.

2nd. That as the provincial treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieut.-Governor-in-Council, the onus was on the municipal corporation, *mise en cause*, to prove that the government had not acted in conformity with the statute. STRONG, J., dissenting.

Appeal dismissed with costs.

Langelier, Q.C., and *McDougall* for appellant.

Irvine, Q.C., and *D. Ross* for respondent.

HARDY *v.* FILIATRAULT.

Demolition of dam—Transaction—Arts. 1918, 1920, C.C.—Report of expert—Motion to hear further evidence.

In an action brought by a riparian owner, asking for damages and the demolition of a second dam built by another riparian owner, in contravention to the terms and conditions of an agreement made between the parties, while a judgment ordering the demolition of the first dam was pending in appeal, the Superior Court appointed a civil engineer as expert, who reported that the second dam did not injnre the plaintiff's property.

The Superior Court subsequently rejected a motion made by the plaintiff, asking to examine the said expert to explain his report, and dismissed the action with costs. This judgment was confirmed by the Court of Queen's Bench for Lower Canada (Appeal side) and on appeal to the Supreme Court of Canada it was—

Held, per FOURNIER, GWYNNE and PATTERSON, JJ., that the provisions of arts. 1918 and 1920,

C.C., under the title of Transactions, were applicable to the agreement made in respect to the first dam, and that there was sufficient evidence in the case to dispose of the action by a judgment for the plaintiff. RITCHIE, C.J., and TASCHEREAU, J., dissenting.

Patterson, J., being of opinion that as the principal ground of appeal was to have the case sent back to the Court of first instance for further evidence, he would agree with the dissenting judges not to do more for the plaintiff.

Appeal allowed with costs.

Laflamme, Q.C., for appellant.

Geoffrion, Q.C., and *Beaudin* for respondent.

PIGEON *v.* RECORDER'S COURT.

Prohibition—By-law respecting sale of meat in private stalls—Validity of—37 Vict. c. 51, s. 123, sub-sec. 27 and 31 P.Q.—Intra vires of Provincial Legislature.

The Council of the City of Montreal is authorised by sub-sections 27 and 31 of s. 123 of 37 Vict. c. 51, to regulate and license the sale in any private stall or shop in the city, outside of the public meat markets, of any meat, fish, vegetables, or provisions usually sold on markets.

Held, affirming the judgments of the Court below, that the subsections in question are intra vires of the Provincial Legislature, and that a by-law passed by the City Council under the authority of the above-named sub-sections, fixing the license to sell in a private stall at $200, is valid.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Madore* for appellant.

Ethier for respondent.

DAVIS v. KERR.

Tutor and minor—Loan to minor—Arts. 297 298, C.C.—Obligation void—Personal remedy for monies used for benefit of minor—Hypothecary action.

Where a loan is improperly obtained by a tutor for his own purposes, and the lender, through his agent, has knowledge that the judicial authorisation to borrow has been obtained without the tutor having first submitted a summary account, as required by art. 298, C.C., and that such authorisation is otherwise irregular on its face, the obligation given by the tutor is null and void.

The ratification by the minor, after becoming of age, of such obligation, is not binding if made without knowledge of the causes of nullity, or illegality of the obligation given by the tutor.

If a mortgage granted by a tutor, and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action brought by the lender against a subsequent purchaser of the property mortgaged will not lie.

A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor, has a personal remedy against the minor, when of age, for the amount so loaned and used.

Appeal allowed with costs.

Laflamme, Q.C., for appellant.

Hutchinson for respondent.

[Oct. 9, 1888.

WYMAN *v.* IMPERIAL INSURANCE CO.

Fire insurance—Insurable interest—Mortgagee—Assignment of policy.

In 1877, T. held a policy of insurance on his property, which he mortgaged to W. in 1881, and an endorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W. an endorsement was made on the policy, permitting the the premises to remain vacant. The policy was renewed each year until 1885, when all the policies of the insurance company were called in, and replaced by new policies, that held by W. being replaced by another in the name of T. to which W. objected, and returned it to the agent, who retained it. The premiums were paid by W. up to the end of 1886.

The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T., having the vacancy permit, and an assignment from T. to W. endorsed thereon, and containing a condition not in the old policy, namely, that all endorsements or transfers were to be authorised by the office at St. John, N.B., and signed by the general agent there. The company having refused payment,

an action was brought on the new policy against them, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action, and ordered a new trial on the ground that his interest was not insured, and that T. had no insurable interest to enable W. to recover on the assignment. On appeal from such decision to the Supreme Court of Canada,

Held, reversing the judgment of the Court below (20 N.S. Rep. 487) that the company having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, they must be taken to have intended to deal with W. as the the owner of the property. And the contract of insurance was complete.

Appeal allowed with costs.

Graham, Q.C., for the appellants.

Henry, Q.C., for the respondents.

[May 6.

FORSYTH *v.* BANK OF NOVA SCOTIA.
IN RE BANK OF LIVERPOOL.

Insolvent bank—Winding-Up Act—Appointment of liquidators—Discretion of judge.

The liquidators appointed by a judge of the Supreme Court of Nova Scotia to wind up the affairs of the insolvent Bank of Liverpool, were those nominated at the meeting of the creditors called for that purpose, according to the requirements of the Winding-up Act, R.S.C. c. 129.

The Bank of Nova Scotia was one of the said liquidators, and by a judge's order the local manager at Halifax was appointed to act for the bank in such liquidation. On appeal to the Supreme Court of Canada, from the decision of the Supreme Court of Nova Scotia, affirming the appointment of liquidators,

Held, 1. That a bank can be one of the liquidators of a bank under the Winding-up Act.

2. That the Act does not require the nominees of both creditors and shareholders to be represented on the board of liquidators, and the judge having, in his discretion, appointed the representatives of one class only to be appointed, such discretion should not be interfered with.

3. The appointment would not be overruled by an appeal Court, unless it appeared that the judge making it was clearly wrong in his law, or that he acted under an evident mistake as to the facts.

Appeal dismissed with costs.

C. W. Weldon, Q.C., for the appellants.

R. L. Borden, Q.C., for the respondents.

[Dec. 14, 1889.

MARITIME BANK OF CANADA *v.* THE RECEIVER-GENERAL OF NEW BRUNSWICK.

Insolvent bank—Winding-up Act—Assets—Crown prerogative—Right of provincial government to exercise—Lien.

The Government of New Brunswick, as creditors of the insolvent Maritime Bank of Canada, claimed a first lien on the assets of the bank, as representing the Crown in the Province.

Held, reversing the judgment of the Supreme Court of New Brunswick, GWYNNE, J., dissenting that the Government was entitled to such lien; but

Held, also, Strong and Taschereau, JJ., dissenting, that the lien was to be exercised only after the note holders were paid, the prerogative being postponed to the lien of the noteholders, by virtue of the Bank Act, R.S.C. c. 120, s. 79.

This case was decided by STRONG, FOURNIER, TASCHEREAU, GWYNNE and PATTERSON, JJ.

A. A. Stockton and *C. A. Palmer*, for the appellants.

Blair, Atty.-Gen. of New Brunswick, and *Barker*, Q.C., for the respondents.

[Dec. 14, 1889.

MARITIME BANK OF CANADA *v.* THE QUEEN.

Prerogative of Crown—Insurance Co.—Money deposited in insolvent bank—Lien for.

The Dominion Safety Fund Life Association, a mutual insurance society doing business in Canada, deposited $45,000 in the Maritime Bank of Canada at St. John, N.B., and sent the deposit receipt to the Receiver-General of the Dominion, to hold as the deposit of the Association with the Government, as required by the Insurance Act, R.S.C., c. 124. The Maritime Bank having become insolvent, a claim was made by the Dominion Government for this sum of $45,000 and a further sum of $15,000 held on ordinary

deposit in the bank by the Crown, to be recognised as crown monies, and entitled to a first charge upon the assets.

Held (affirming the judgment of the Supreme Court of New Brunswick, GWYNNE, J., dissenting) that the Dominion Government, as representing the Crown in Canada, was entitled to a first lien upon the assets of the insolvent bank in respect to the said sum of $15,000, and that the lien was not taken away by the section of the Bank Act, R.S.C., c. 12, 120, which gives note holders a first lien on such assets, it not being competent for the legislature to deprive the Crown of its prerogative, except by express words to that effect. See the Interpretation Act, R.S.C., c. 1, s. 7, s-s. 46.

Held, also (reversing the judgment of the court below, STRONG, J., dissenting) that the Government could not claim such lien in respect of the sum deposited by the insurance association, it not being public money, but held by the Crown merely as trustees for the society.

The judges deciding this case were : SIR W. J. RITCHIE, C.J., and STRONG, TASCHEREAU, GWYNNE, and PATTERSON, JJ.

Appeal allowed as to the sum of $45,000, and dismissed as to the sum of $15,000.

A. A. Stockton and *C. A. Palmer*, for the appellants.

Weldon, Q.C., and *Barker*, Q.C., for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

COURT OF APPEAL.

From ROSE, J.] [March 5, 1889.

DANIELS *v.* MOXON.

Mortgage—Shares—Sale — Wilful neglect or default.

The defendant, who was mortgagee of certain shares in a manufacturing company, offered them for sale at auction, when one N. was declared the purchaser. The plaintiff, who was entitled to the shares subject to the defendant's claim, knew of and ratified the sale. The purchaser refused upon various grounds to carry out the sale, and no attempt was made by the defendant to compel completion of the contract. Subsequently the shares fell very much in value.

Held (BURTON, J.A., dissenting), that there was no duty cast upon the defendant to take proceedings against the purchaser to compel completion, and that he was not liable to account for the shares at the price that would have been realized had the sale been completed. The plaintiff could have paid the defendant's claim and then have herself taken proceedings against the purchaser, and not having done so was not entitled to complain.

Judgment of ROSE, J., affirmed.

McCarthy, Q.C., and *P. McPhillips* for the appellant.

W. Cassels, Q.C., and *F. R. Ball*, Q.C., for the respondent.

From FERGUSON, J.] [March 5, 1889.

DAY *v.* DAY.

Fraudulent conveyance—Intent to defeat creditors—Secret trust—Evidence—Pleading.

If a defendent wishes to set up in answer to an action to declare him a trustee of land, the defence that the land was conveyed to him for a fraudulent purpose, he must in his pleading specifically say so, and admit his own criminality in joining in a criminal act.

If the plaintiff can make out his case without disclosing the alleged fraud, the defendant will not be allowed to show as a reason why the plaintiff should not recover, the fraud in which the defendant himself participated.

Judgment of FERGUSON, J., reversed.

Hardy, Q.C., for the appellant.

J. W. Bowlby for the respondent.

From STREET, J.] [Jan. 14, 1889.

MCARTHUR *v.* THE NORTHERN AND PACIFIC JUNCTION RAILWAY CO., ET AL.

Railways—Constitutional law — Limitation of action—R.S.C., c. 109, s. 27—Timber licenses — Intervals between licenses — Trespass — Continuing damage—R.S.O. (1887), c. 28.

The defendants, a railway company incorporated by an Act of the Parliament of Canada, and subject to the provisions (among other provisions) of s. 27 of the Railway Act of Canada, built their road through lands in the Province of Ontario, the fee of which was in the Crown, but over which the plaintiffs had for three

successive years held timber licenses issued by the Provincial Government. These licenses, giving the right to cut timber and exclusive possession in the usual form, were dated respectively the 5th of July, 1883, the 10th of December, 1884, and the 22nd of July, 1885, and each extended from its date to the 30th of the next April. The defendants entered upon the limits in question about the end of the year 1884, and the road was completed in July, 1886. In building the road the defendants cut down timber on the line and also both within and outside of the six rod belts mentioned in the statute. No timber was cut after December, 1885. The plaintiffs brought this action on the 9th of September, 1886, to recover damages for the timber cut. It was admitted that as to timber cut outside the six rod belts they were entitled to recover, but it was contended that as to timber cut on the line and within those belts the action was barred. The defendants had filed their plan and book of reference, but they had not taken any of the statutory steps to acquire the interest of the plaintiffs.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that the damage to the timber on the line and within the six rod belts was damage "sustained by reason of the railway" within the meaning of s. 27 of R.S.C., 109, and that that section was *intra vires* the Dominion Parliament. That the plaintiffs were entitled to damages for the illegal occupation of the limits, and as consequent thereon to damages for all injury done during the illegal occupation; but that the plaintiffs had no title to the limits sufficient to maintain an action, either on legal or equitable principles, in the intervals between the licenses. That, therefore, the right of action was barred except as to damages sustained during the currency of the last license, but was saved as to those by virtue of the occupation being illegal up to the 30th of April, 1886, less than six months before action.

Per BURTON, J.A., and MACLENNAN, J.A. That the section was *ultra vires* the Dominion Parliament as being an unnecessary interference with property and civil rights within the Province, but that even if valid would not avail for the protection of the defendants, as they were mere trespassers.

Per MACLENNAN, J.A. That even if the section were valid and applied, the plaintiffs were entitled to recover all the damages, the trespass having been a continuous uninterrupted one, and the plaintiffs' right of renewal of their licenses being sufficient to enable them to recover, notwithstanding the intervals between them.

The Court being divided in opinion, the judgment of STREET, J., 15 O.R., 733, was affirmed.

W. Nesbitt and *Aytoun-Finlay* for the appellants.

S. H. Blake, Q.C., and *E. Martin*, Q.C., for the respondents.

Irving, Q.C., for the Attorney-General.

From Chy.D.] [March 4.

MCDONALD *v.* MCDONALD.

Trusts and trustees—Executors—Acceptance of office—Purchase by trustee of trust property—Statute of Limitations.

The plaintiff and defendant were brothers, and their father who died in the year 1846, appointed the plaintiff and two other sons of the testator his executors, and among other devises devised the land in question to the defendant. The testator had endorsed a note for the accommodation of the plaintiff, and after the testator's death, the holders of this note sued the plaintiff and the two brothets as executors, and recovered judgment against them. The land in question was sold under that judgment at sheriff's sale, and was bought in by the plaintiff. The will had been registered, but had not been proved. Subsequently the plaintiff mortgaged the land in question, and sold it subject to the mortgage. The mortgagees afterwards sold, and the plaintiff again bought in the land.

Held, that the plaintiff and his brothers having defended the action on the note as executors, and judgment having been recovered against them as such, must be held to have accepted the office and want of probate was immaterial and the sheriff's sale was valid.

Held, also, that it being the plaintiff's duty to pay the note, he had not acquired title to the land for his own benefit at the sheriff's sale but, became a trustee for the devisee, the defendant, and that this trust revived when the plaintiff bought in the land for the second time.

Held, also, that assumiug that the plaintiff was not a trustee for the defendant and had no paper title, there was not, upon the evidence,

any possession of the land in question by the plaintiff sufficient to confer a title under the Statute of Limitations.

Judgment of the Chancery Division affirmed.

H. Symons for the appellant.

Moss, Q.C., for the respondent.

From Chy.D.] [May 13.

MACDONELL *v.* BLAKE.

Law Society—Bencher—"Retired Judge"—R. S. O. (1877), ch. 138, sec. 4—R.S.O. (1887), ch. 145, sec. 4.

A judge of a Superior Court of the Province of Ontario, who, after his voluntary resignation of his office, before he has become entitled to a retiring allowance, has been accepted, resumes the active practice of his profession, is a "retired judge" within the meaning of R.S.O. (1877), ch. 138, sec. 4, and as such is an ex-officio bencher of the Law Society of Upper Canada.

Judgement of the Chancery Division, 17 O.R., 104, affirmed, BURTON, J.A., dissenting.

J. Reeve for the appellant.

H. Cassells for the respondent, Blake.

A. H. Marsh and *Walter Read* for the respondents, The Law Society.

From Chy.D.] [May 13.

LEMAY *v.* CANADIAN PACIFIC R. W. CO.

Railways—Master and servant—Negligence—Any person injured—51 Vic., ch. 29 sec. 262, sub-sec. 3 (D).

A servant of a railway company is a "person" within the meaning of 51 Vic., ch. 29, sec. 262, sub-sec. 3 (D), and as such is entitled to recover damages if injured by the negligence of his employers.

Judgment of the Chancery Division, 18 O.R., 314, affirmed.

Robinson, Q.C., and *G. F. Shepley* for the appellants.

Delamere, Q.C., and *F. H. Keefer* for the respondent.

From Q.B.D.] [May 13.

BRADY *v.* SADLER ET AL.

Crown Patent—Reservation—Evidence.

The description of the lands conveyed by a Crown patent was "All that parcel of land containing by admeasurement sixty acres, be the same more or less, being composed of lot number nine, exclusive of the lands covered by the waters of the S. River."

Lot nine included, by metes and bounds, two hundred acres, but the S. River ran through it. At and for some time previous to the time of the issue of the patent the waters of the S. River at this place were penned back by a dam.

Held, that the words, "the waters of the S. River" did not mean the waters of the S. River flowing in its natural channel merely, or the waters at the height at which they might happen to be on the day of the issue of the patent, but had the effect of reserving from the grant that portion of the lot liable to be covered, owing to the existence of the dam, by the waters of the S. River at their natural height at any time during the ordinary changes of the seasons.

Held, also, that extrinsic evidence was admissible for the purpose of showing what was reserved under the description, and that, upon that evidence, the land in question had not passed under the grant.

Judgment of the Queen's Bench Division, 16 O.R., 49, reversed.

E. Blake, Q.C., *S. H. Blake*, Q.C., and *Stewart* for the appellants.

Robinson, Q.C., *Moss*, Q.C., and *H. O'Leary* for the respondents.

From Chy.D.] [May 13.

THE CORPORATION OF THE TOWNSHIP OF BARTON *v.* THE CORPORATION OF THE CITY OF HAMILTON.

Municipal corporations—Extending sewer through contiguous municipality—"Territory"—R.S.O. (1887), ch. 184, sec. 492, sub-sec. 2.

The "territory" of the municipality referred to in R.S.O. (1887), ch. 184, sec. 492, sub-sec. 2, is the land comprised within the bounds, and under the jurisdiction of, the municipality, and is not limited to lands that are the property of the municipality.

One municipality cannot, therefore, extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter or without taking the statutory steps, even although the lands through which the sewer is to run have been purchased by the former municipality from the private owners.

Judgment of the Chancery Division, 18 O.R., 199, affirmed, BURTON, J.A., dissenting.

Moss, Q.C., and *MacKelcan*, Q.C., for the appellants.

S. H. Blake, Q.C., and *W. Bell* for the respondents.

[May 13.

THE ELECTRIC DESPATCH COMPANY OF TORONTO *v.* THE BELL TELEPHONE COMPANY OF CANADA.

Contract—Telephone Company—Covenant not to transmit orders.

This was an appeal by the plaintiffs from the judgment of the Chancery Division, reported 17 O.R., 495, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.), on the 11th and 12th of March, 1890.

The Court being divided in opinion, the appeal was dismissed with costs.

Per HAGARTY, C.J.O., and BURTON, J.A., the covenant in question was broken, subscribers being enabled by the active intervention of the defendants to give orders of the kind referred to to persons other than the plaintiffs.

Per OSLER and MACLENNAN, JJ.A. The covenant was not broken, the defendants taking no active part in the transmission of the messages, but merely allowing subscribers to communicate with one another in the usual manner.

Robinson, Q.C., and *Moss*, Q.C., for the appellants.

Lash, Q.C., and *S. G. Wood* for the respondents.

From Chy.D.] May 13.

CUMBERLAND ET AL *v.* KEARNS.

Covenant for titles—Local improvement rates.

The defendant joined in a petition for local improvements which were carried out and a rate therefore payable in ten annual instalments but subject to commutation was imposed upon the land benefited, including that of the defendant. Subsequently the defendants sold the land to the plaintiffs and conveyed it to them by deed made in pursuance of the Act respecting Short Forms of Conveyances and containing the statutory covenants for title.

Held, affirming the judgment of the Chancery Division, 18 O.R. 151, that the rate was an encumbrance created in part by the action of the defendant and that the plaintiffs were entitled to recover damages under the covenants, the amount recoverable being the smallest amount necessary to discharge the encumbrance.

Haverson for the appellant.

J. H. Ferguson, Q.C., for the respondent.

From BOYD, C.] [May 13.

IN RE DINGMAN AND HALL.

Sale of land—Contract—Time for completion—Interest.

Where in a contract for the sale and purchase of land the parties fix the time of payment of the purchase money and the time from which interest thereon is to be computed, irrespective of the time fixed for completion, interest must, in the absence of actual misconduct on the part of the vendor, be paid from the time named notwithstanding the existence of difficulties as to title justifying the purchaser in refusing to complete until they are removed.

Judgment of BOYD, C., reversed.

Moss, Q.C., and *Rowan*, for the appellant.

S. H. Blake, Q.C., and *Kilmer* for the respondents.

Co. Ct., Hastings.] [May 13.

BALDRICK *v.* RYAN.

Bills of sale and chattel mortgages—Affidavit of bona fides—Description of chattels—Concurrent mortgages.

The affidavit of *bona fides* in a chattel mortgage taken to secure the mortgagee against his endorsement of two promissory notes, which were referred to in a recital, stated that the mortgage "was executed in good faith and for the express purpose of securing *me* the said mortgagee therein named against *his* endorsement of *a* promissory *notes* for (*sic*) or any renewal of the said recited promissory notes."

Held, that "his endorsement" might be read "my endorsement," as this was clearly a clerical error, but that even with this correction the clause remained vague and incomplete, and that the affidavit was therefore fatally defective.

Held, also, (HAGARTY, C.J.O., dissenting) that the mortgagee was entitled to fall back on a previous mortgage covering the same chattels, given to secure him against his endorsement of certain notes, of one of which one of the two notes referred to in the later mortgage was a re-

newal, there being evidence that when the later mortgage was taken it was not intended to abandon the former one.

What is a sufficient description of chattels and animals discussed.

Judgment of the County Court of Hastings varied.

Hislop, for the appellant.

G. A. Skinner for the respondent.

Co. Ct., York.] [May 13.

HALL *v.* PRITTIE.

Assignment—Equitable assignment—Chose in action—Bills of Exchange.

One E. who had a contract with the defendant for certain carpenter's work gave to the plaintiff an order upon the defendant in the following form :—

"Please pay to H. the sum of $138.40 for flooring supplied to your buildings on D. road and charge to my account."

Held, that this was not an equitable assignment, but a bill of exchange, and that in the absence of written acceptance by her, the defendant was not liable.

Judgment of the County Court of York reversed.

R. S. Neville for the appellant.

Fullerton for the respondent.

Co. Ct. York.] [May 13.

IN RE HERR PIANO COMPANY. CENTRAL BANK'S CLAIM.

Trusts and trustees—Breach of trust—Following trust moneys.

Three persons occupying a fiduciary position towards the bank, became partners in the firm of H. & Co., agreeing to pay for their interests a certain sum of money in liquidation of creditors' claims. They did pay this sum but out of moneys of the Bank wrongfully appropriated by them. Subsequently the firm of H. & Co. was formed into a joint-stock Company and the assets of the partnership were asssigned by the partners to the Company. The Company soon afterwards failed and a winding-up order was made, the original assets to a considerable extent coming into the possession of the liquidator.

Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in and that no actual notice to them or to the Company being shown the Bank had no lien.

Judgment of the County Court of York reversed.

J. K. Kerr, Q.C., and *R. S. Neville* for the appellants.

W. R. Meredith, Q.C., and *F. A. Hilton* for the respondent.

Queen's Bench Division.

ROSE, J.] [April 23.

STRETTON *v.* HOLMES.

Negligence—Mistake in compounding medicine—Physician—Druggist—Costs.

A physician wrote a prescription for the plaintiff, and directed that it should be charged to him by the druggist who compounded it, which was done. His fee, including the charge for making up the prescription, was paid by the plaintiff. The druggist's clerk, by mistake, put prussic acid in the mixture made up pursuant to the prescription, and the plaintiff in consequence suffered injury.

Held, that the druggist was liable to the plaintiff for negligence, but the physician was not.

Under the circumstances of the case no costs were awarded to or against any of the parties.

A. M. Taylor for the plaintiff.

Garrow, Q.C., for the defendants.

STREET, J.] [May 1.

GIBBONS *v.* MCDONALD.

Bankruptcy and insolvency—Insolvent debtor—Mortgage to creditor—Preference—Notice of knowledge of insolvency—R.S.O., c. 124, s. 2.

A farmer mortgaged his farm for $600 to secure a debt of $571.50, due by him to the mortgagee, and the sum of $28.50, advanced at the time the mortgage was made. He knew at the time he made the mortgage that he was unable to pay his debts in full, and that he was giving the mortgagee a preference over his other creditors. The practical effect was that the mortgagee was paid in full, and that the rest of the creditors received nothing. The mortgagee, however, was not aware at the time he took the mortgage that the mortgagor was in insolvent circumstances.

Held, following *Johnson* v. *Hope*, 17 A.R., 10, that the mortgage was not void against creditors, under s. 2 of R.S.O., c. 124.

Garrow, Q.C., for plaintiff.

M. C. Cameron for defendant, McDonald.

Maybee for defendant, Heffernan.

STREET, J.] [May 1.

ROSE *v.* TOWNSHIP OF WEST WAWANOSH.

Municipal corporations—By-law authorizing taking of gravel without specifying lands—Illegality—R.S.O., c. 184, s. 550, s-s. 8; s. 338—Injunction without quashing by-law.

By s. 550, s-s. 8, of R.S.O., c. 184, the council of every township is authorized to pass by-laws for searching for and taking such timber, gravel, stone, or other material or materials as may be necessary for keeping in repair any road or highway within the municipality.

Held, that the meaning of this section is that the council may, as necessity arises for their doing so, exercise the right to take gravel, etc., from any particular parcel or parcels of land, having first declared the necessity to exist, and chosen and described the land from which the material is to be taken by a by-law, and therefore a by-law purporting to be passed under this section, which authorized and empowered the pathmasters and other employees of the corporation to enter upon any land within the municipality, when necessary to do so, save and except orchards, gardens, and pleasure-grounds, and search for and take any timber, gravel, etc., was upon its face illegal, because it purported to confer upon its officers wider and more extensive powers than the statute authorized.

Held, also, notwithstanding the provisions of s. 338 of R.S.O., c. 184, that the plaintiff was entitled, without quashing the by-law, to an injunction to restrain the defendants from proceeding to enforce the rights they claimed under this by-law by entering upon his lands.

Garrow, Q.C., for plaintiff.

M. C. Cameron for defendants.

ROBERTSON, J.] [April 29.

RE INGOLSBY.

Will—Execution—Construction—Election under devolution of Estates' Act.

B. I. died intestate June 15, 1889. His wife died August 31st following, having made her will August 28th, in which she elected to take a distributive share of her husband's estate in lien of dower.

Held, that although the will must be construed to speak as if executed immediately before the death in regard to the real and personal estate comprised therein, it took effect and became operative immediately after its execution in regard to the declaration of election, and that such declaration was a good declaration under sec. 4 (sub-sec. 2) of the Devolution of Estates Act.

McKechnie for the executor of the widow.

J. Hoskin, Q.C., for the infants.

Practice.

GALT, C.J.] [May 10.

ATTORNEY-GENERAL *v.* ÆTNA INSURANCE COMPANY.

Interest—Fire insurance — Reference — Powers of referee.

In an action upon fire insurance policies, a referee was directed to inquire, ascertain, and report the amount of the loss.

Held, having regard to the provisions of ss. 87 and 103 of R.S.O., c. 44, that the referee had authority to allow interest on the amount of the loss, as ascertained by him.

Irving, Q.C., for plaintiff.

W. B. Raymond for defendants.

ROSE, J.] [May 20.

HUDSON BAY CO. *v.* HAMILTON.

Appearance—Notice of, where entered late—Judgment for default—Rule 281.

Judgment may be signed under Rule 281 for default of appearance, where an appearance has been entered after the time limited, if no tice has not been given as required by the Rule and the knowledge of the fact that an appear ance has been entered, does not constitute such notice as the Rule requires.

Smith v. Dobbin, 3 Ex. D. 338, followed.

Lanark and Drummond Plank Road Co. v. Bothwell, 2, U.C.L.J.O.S. 229, not followed.

A. C. Galt for the plaintiffs.

Law Students' Department.

EXAMINATIONS BEFORE EASTER TERM : 1890.

FIRST YEAR.

Contracts.

1. In what different ways may an offer lapse?

2. What is the effect of a promise to keep an offer open for acceptance for a certain time? Why?

3. In what different ways may a contract originate?

4. How far can a party be held responsible for the consequences of false representation not made to the person who is injured by it? Explain.

5. Under what circumstances may a party recover money or goods which he has paid or delivered under an illegal contract?

6. What exceptions are there to the rule that past considerations will not support a promise?

7. In what cases is a request required to precede a promise, and when will the request be implied?

8. What is the difference in legal effect between mistake of intention and mistake of expression? Illustrate by example.

Broom's Common Law.

1. Explain fully the term Common Law.

2. Mention the rules for the construction of Statutes.

3. What is meant by the *Law Merchant?*

4. Explain the meaning of *injuria* and *damnum.*

5. Give an example of

Damnum absque injuria, damnum et injuria, injuria sine damno.

6. When can an individual maintain an action for a public nuisance? Example.

7. What is law as to merger of the tort in the felony where the same act is both the one and the other?

8. What is the law as to the immunity of Justices from actions at law? State the Statutory provisions.

9. What is the law as to the liability of (1) an Infant (2) a Lunatic (3) a Married Woman for torts committed by them respectively?

10. When will the intervening negligence of a third party not prevent a plaintiff recovering for the negligence of the defendant?

11. What is the liability of a master for an injury to his servant caused by the negligence of a fellow servant?

12. What is the law as to the liability of a person who does a bodily damage to another without any fault on his part?

Real Property.

1. Distinguish between a "general" and a special occupant.

2. Define an estate tail. How many different kinds may there be? Which is the larger, an estate tail or an estate for life? What statute, if any, was there passed dealing with estates tail during the reign of Edward 1st, and what was its purport?

3. Define dower and estate by the curtesy having reference to both legal and equitable estates.

4. A grant is made of certain lands to A. and B. (who are husband wife) and their heirs; what estate do they each take, and what are their several rights as to disposing of the lands? What difference, if any, would there be if A. and B. were strangers to each other?

5. Prior to the reign of Henry VIII., what power had an owner of an estate in fee simple to dispose of the same by will? What statutory provisions were there made in reference thereto during that reign?

6. Distinguish between a contingent remainder and an executory devise.

7. A. the owner of Blackacre wishes to convey the same to himself, and B. as tenants in common; can he do so? Reasons.

8. A. makes a will devising all his real estate to B., subsequent to his will and prior to his death, he purchases a farm in the township of York. Will B. take this farm under the will? Reasons for your answer.

9. A. by will leaves $5,000 to be expended in masses for his soul. Is the bequest good? Explain fully.

Equity.

1. Sketch briefly the origin and gradual enlargement of Equity Jurisprudence from its inception down to the present day.

2. Explain and exemplify the maxims "Equality is Equity," and "Qui prior est tempore potion est jure."

3. Trace briefly the origin and rise of trusts. What was the object of the Statute of 27 Henry VIII., and how, if in any way, was its object defeated?

4. What are the enactments of the Statute of Frauds in respect of trusts concerning real estate?

5. It is said that a trustee cannot delegate his trust. Is there any exception to this rule? If so, what?

6. What is a constructive trust? Give an example of one.

7. What rules govern in respect of general, specific, and demonstrative legacies respectively, when after payment of testator's debts there is a deficiency of assets for the payment of all the legacies?

8. Define the equitable doctrine of satisfaction, and state the general rules which govern where a question is raised as to whether or no a legacy is a satisfaction or a debt.

9. Write a short note on the law respecting the enforcement by specific performance of (1) contracts for the sale of land; (2) contracts for the sale of personal chattels, and state the requisites of a contract for the sale of land so that the same shall be binding.

10. State the law as to the right of a solicitor to purchase from his client during the pendency of the relationship between them.

Contracts—Honors.

1. Explain the difference between executed consideration and past consideration.

2. With regard to a promise to answer for the debt of another, does it make any difference under the Statute of Frauds whether the promise is made to the debtor or creditor? Why?

3. If an agreement not to be performed within a year provides that either party may put an end to it by giving a month's notice, how far does the Statute of Frauds apply? Why?

4. What is the effect of a letter of acceptance being lost and never reaching its destination? If the letter were one of revocation, how would the loss affect the parties? Why

5. Sketch briefly the history of the development in English law of the action for enforcing executory contracts.

6. A debtor wishes his creditor to accept a smaller sum than is due him in full of his claim, and the creditor agrees thereto in writing. How far is such agreement binding? Why?

7. What is the difference between the legal status of the contract of wager in England and in Ontario? Explain.

8. In the case of negotiable instruments for money payable under a contract, what difference does it make whether the contract be made illegal by statute, or made void by statute?

9. What is the test by which it is decided whether a party can enforce a contract growing out of or connected with an illegal transaction?

10. Can a plaintiff who has given no value for a note, recover on it against a maker who has received no value? If so, when?

Common Law—Honors.

1. Explain what is meant by *contributory negligence.*

2. When can a man by ratifying a tort committed by another take the benefit of such tort?

3. What difference is there between a man's right to use force to turn out a trespasser who has entered peaceably, and his right to use force to prevent a forcible entry?

4. What is the effect of Lord Campbell's Act?

5. Where an action is brought against two joint wrong-doers, and one has caused a much greater portion of the damage than the other, how much can the plaintiff recover from each? Why?

6. What different kinds of malice are there, and what is the difference between them?

7. When is a principal liable for a false representation by his agent?

8. Explain estoppee and distinguish the kinds of estoppee.

9. Illustrate by example the difference between trespass *ab initio*, and trespass by relation when the thing done was lawful at the time.

10. Into what three great classes are Bailments divided, and what degree of care is required in each of the three classes?

Real Property—Honors.

1. What, if any, statutory provision is there with regard to the release from a rent charge of part of the lands charged therewith? If there be such legislation, why was it enacted?

2. Is it necessary for a defendant who is relying on the ground of being a purchaser for value without notice to prove payment of the purchase money? If so, why? If not, why not?

3. Give an example of a tenancy in tail after possibility of issue extinct, with reasons.

4. Explain briefly how conveyance by way of lease and release became at one time so prevalent as it was.

5. A. leases property to B., who sub-leases to C.; the rent falls in arrears. Can A. sue C. for the same? Reasons.

6. Distinguish between the effect of (*a*) a gift to the first son of A. (a living person), who shall attain the age of twenty-four years; and (*b*) a gift to the first son of B. (also a living person), who shall attain the age of twenty-one years. Reasons for your answer.

7. What statutory provision is there as to the right of a mortgagee to set up the defence of purchase for value without notice?

8. What is the effect of a lease from A. to B., reserving rent to C., a stranger? Explain.

9. "A.," a legatee under a will, is one of the witnesses to a will. What effect has this on the will? "B.," a creditor of the testator, witnesses the execution of the will, which contains a charge for the payment of debts. Distinguish this from the first-mentioned case, if there be any distinction.

10. Can a man covenant to stand seized to the use of his son-in-law? If so, why? If not, why not?

Equity—Honors.

1. Define and illustrate the equitable doctrine of consolidation, giving an example; distinguish consolidation from taking, and give an example of the latter.

2. Define constructive fraud, and give an illustration.

3. Under what circumstances will a Court of Equity grant relief in cases of non-execution of a power?

4. State what are, and what are not, sufficient acts of part performance of a parol contract for the sale of lands in order to take the same out of the statute.

5. Under what class of contracts is silence on the part of one of the contracting parties deemed tantamount to actual affirmation?

6. A. and B. enter into a commercial partnership for a period of five years; the time expires and they still continue trading as partners. What relationship exists between them?

7. What is the test question as to whether an author, in writing a book, has been guilty of infringement of the copyright in another author's work?

8. Write a short note as to the law regulating contracts in restraint of marriage, and contracts in restraint of trade. Under what head of equity are they classed.

9. Explain what is meant by marshalling of assets.

10. What distinction is there as to the application of the doctrine of resulting trusts between cases where conversion partially fails when it is directed by will, and when it is directed by deed?

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

CURRICULUM OF THE LAW SCHOOL.

Principal, W. A. REEVE, Q.C.

Lecturers, { E. D. ARMOUR. / A. H. MARSH, LL.B.

Examiners, { R. E. KINGSFORD, LL.B. / P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks.

The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.