Canada Law Journal.

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DIARY FOR JULY.

1. Sat.. Long vacation begins. Dominion Day. Confederation, 1867.
2. Sun... *4th Sunday after Trinity.*
3. Mon.. Co. Ct. Term (except York) begins. Heir and Dev. sitt. begin.
5. Wed.. Last day for service of notice of appeal from Ct. of Rev. to County Judge.
7. Fri.... Gen. Simcoe, first Lieut.-Gov. of U. C., 1792.
8. Sat... Co. Ct. Term (except York) ends. Cyprus ceded to England, 1878.
9. Sun... *5th Sunday after Trinity.*
11. Tue.. Canada invaded by U. S., 1813.
14. Fri.... W. P. Howland first Lieut.-Gov. of Ontario. 1868.
15. Sat... Manitoba entered Confederation, 1870.
16. Sun.. *6th Sunday after Trinity.*
17. Tue... Heir and Devisee sittings end.
20. Thurs. British Columbia entered Confederation, 1871.
23. Sun... *7th Sunday after Trinity.* Union of Upper and Lower Canada, 1840.
24. Mon.. Canada discovered by Cartier, 1534.
25. Tue.. Battle of Lundy's Lane, 1813.
26. Wed.. Jews first admitted to House of Commons, 1858. Dr. Robitaille, Leiut.-Gov. of Quebec, 1879.
29. Sat.... First Atlantic Telegraph laid, 1866.
30. Sun... *8th Sunday after Trinity.* Government of U. C. removed from Niagara to York, 1793.

TORONTO, JULY 1, 1882.

IN accordance with our custom we shall be merciful to our readers during the long vacation, and only issue one number in July, and one number in August, namely, on the first of each month. After August our bi-monthly issue will be resumed.

JOHN CHARLES DAY, Q.C., has been elevated to the Bench, and takes the place of Sir Charles Bowen as a Judge of the Queen's Bench Division of the High Court of Justice. He was called to the Bar at the Middle Temple in 1849, and has the reputation of being a sound and practical lawyer. As *Punch* says: "The next thing will be to turn Day into Knight, and we trust it will be a long time before the break of Day."

WE conclude the discussion on the *Thrasher Case*, which has excited so much interest in British Columbia, by a second letter from Mr. Alpheus Todd. This case, which involves a very important constitutional question, will, probably, come before the Supreme Court at an early day. Much learning on the subject will be found in the correspondence and in the articles published in this Journal, which will be of great interest to all concerned in this important branch of the law.

THE following order has been issued by the Supreme Court, dated June 27, 1882: "Every County Court clerk shall keep his office open for the transaction of business, on every day, except on holidays, and (except as hereinafter provided) from 10 a.m. to 3 p.m. on and between July 1 and Sept. 1; and on and between Dec. 24 and Jan. 6 every such clerk shall keep his office open for the transaction of business from 10 a.m. until noon, and during the statutory sittings of the Court such clerk shall keep the office open, as aforesaid, on and between the said dates until 4 p.m."

A letter reaches us just before going to press, signed "Law Student," in answer to the one by "Professional," on the subject of scholarships in our last number. The letter is too long to print in full in our crowded space. The chief point the writer makes is, we think, a good one, namely, that the men who get the scholarships are the men who would be first, whether there were scholarships or not. But the giving of prizes and scholarships as a recognition of merit in examinations is so universal a practice that there is really very little use in discussing the

advantages or disadvantages of it. Stern moralists may no doubt find something in it not quite in accordance with the eternal fitness of things. But *palmam qui meruit, ferat*, is a sentiment which combines justice with generosity, and the grand old Homeric maxim, "Strive always to be first in excellence and to surpass all others," is not a bad one for the young men of this, or any other country, to adopt.

THE employees of the post office who lately objected to having a colored man as one of their fellow servants, may find some gratification, perhaps, in the thought that our enlightened brethren to the south of us are apparently of very much the same way of thinking. One of the circuit courts of Ohio, at all events, had recently occasion to decide, in the case of *Gray* v. *Cincinnati Southern Ry. Co.*, 11 Fed. Rep. 683, in the words of the head-note, that "A colored lady who had purchased and held a first-class ticket was entitled to admission into the ladies' car, if there was room for her therein; and, if she was refused admission and the railroad company declined to carry her except in the smoking car, containing only men, some of whom were smoking, she had a right to decline such accommodation, and it is liable to her in damages." What makes the matter worse is that the poor woman in this case had a sick child in her arms at the time she was refused admittance into the ladies' carriage, but it is only just to the fair members of the gentler sex to add that they apparently had nothing to do with her exclusion. At all events, it was to the credit of the jury that they brought in a verdict of $1000 damages against the Company.

WE have received the first four numbers of a new legal contemporary, the *American Law Magazine*, published at Chicago. It professes to report, in monthly issues, all recent decisions of any importance in all the State, Supreme and Federal, Courts, either in full or in carefully prepared abstracts. It certainly gives its readers a great number of decisions of a great number of Courts. Everything, however, depends on the care with which the cases are collected, and the competency of the editors to select from the great mass of material before them those decisions which are of permanent value. How far these requisites exist in the present case time alone can show. If, however, the scheme is carried out with ability, the *Magazine* ought to have many subscribers, as it embraces within its scope the combined objects of the *Federal Reporter* and *American Reports*, while the subscription price is very moderate. We notice, moreover, that the editors, in their advertisement, offer to supply subscribers with the full decision in any case where they only publish abstracts, for the mere cost of copying. We confess, however, to having been slightly prejudiced against the publication by the space given to what is called "Non-Essentials." This department appears to be a tribute to that curious side of American genius, which appears to find a strange delight in the wholesale consumption of anecdotes, neither very brilliant nor very refined.

A CORRESPONDENT, a law student, does us the honour to ask our opinion of the conduct of a certain County Court Judge, who presides over a Court held not a hundred miles from London, Ont. It appears, according to our correspondent, that upon a petition presented by a gentlemen, who has has some office in connection with the Court, but is not himself a member of the bar, and without consulting the convenience of the bar, jury, suitors or witnesses, His Honour saw fit to adjourn his Court over a day fixed for the "Queen's Plate" at some local races. No doubt, if our correspondent's letter is an exact account of what actually occurred, there

would appear to have been some lack of that courtesy and consideration which usually mark the relations of Bench and Bar, and which are illustrated by Serjeant Ballantine's account, in his "Recollections," of the opening of an Assize Court in England:—

The leaders have taken their seats, exchanged bows with the Judges, nodded to each other, and the stereotyped dialogue ensues between the Judge and the leader: "On what day, Mr. _____, will it be convenient to take special juries?" "The bar is at your Lorship's disposal." "What do you say to Thursday?" "It will suit admirably." "Thursday be it then. Mr. Sheriff, let the special juries be summoned for Thursday next."

But after all the arrangement of business is a matter in the discretion of the Court, and if His Honour acted on the occasion complained of, as he said he did, from a desire to "do honour to Her Majesty," we can only say his intention was good, though the execution of it appears to have been faulty. At all events, there is no appeal allowed in these cases—not even to the CANADA LAW JOURNAL; and the only consolation we can tender to our correspondent is the fact that when he himself is called to the Bar (not "Barr," by the way), he will be able to see to it that the Judges are not left without information as to what appears to him to be consonant to the convenience of the profession and the proper administration of justice.

RECENT ENGLISH DECISIONS.

Of the April numbers of the *Law Reports* there still remains for review 19 Ch. D. pp. 519–649; while the June numbers, which have now arrived, consist of the table of cases and index to 19 Ch. D., together with 20 Ch. D. pp. 1–229; 8 Q. B. D. pp. 585–712; and 7 P. D. pp. 61–102.

WILLS—UNCERTAINTY.

In 19 Ch. D. pp. 519–649, the first case, *in re Roberts*, was one in which the construction of a will containing a gift to descendants bearing a particular name was involved. The decision of the Court of Appeal was that in the case of this will the limitations to descendants was a gift for life to descendants living at the determination of the life interests, and bearing the name in question, as joint tenants, and that the limitations after the life interests were not void for uncertainty or for remoteness. But the only point in the case which it appears necessary to specially notice here is the *dictum* of Jessel, M.R., that—"The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty."

The next case, *Curtius* v. *Caledonian Ins. Co.*, has already been noticed, *supra* p. 172, as reported 51 L. J., N. S. 80.

FORECLOSURE ACTION—STATUTE OF LIMITATIONS.

The next case, *Harlock* v. *Ashberry*, p. 539, was an appeal from the decision of Fry, J., reported 18 Ch. D., 129, and noted *supra* p. 7. It will be remembered that in this case the tenant of certain mortgaged premises paid the mortgagees half a year's rent, in consequence of a notice from them that they claimed the estate, and Fry, J., held that this payment by the tenant was sufficient to bar the Statute of Limitations under Imp. 1 Vict. c. 28 (R. S. O. c. 208, sec. 22). The grounds of their judgment are clearly put in the words of Brett, L.J.—"The question arises whether payment of rent by a tenant to a mortgagee, who has exercised the right to demand the rent, is a payment of principal or interest within that section. I come to the conclusion that it is not, for three reasons: (i.) It is, at the present stage, no payment at all as between mortgagor and mortgagees—it is only an item in an account which will have to be settled between the mortgagor and mortgagee—an item in an account which is to go to the

credit of one party to that account, that account containing many items more on the same side besides principal and interest and costs—*e.g.* expenses, repairs, etc. That cannot be called payment either of principal or interest at all. (ii.) It is not a payment within the section because it is not, as made, a payment of principal or interest—it is a payment of rent—rent paid by the person making the payment, and rent received by the person receiving the payment. It seems to me that payment made as of rent and received as of rent cannot be said to be a payment of principal or interest. (iii.) But even if it could be held to be a payment of principal or interest, it is not a payment at all by the mortgagor or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest, to be a payment within this section, must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans*, 11 H. L. C. 115." And all the Judges expressed the same view that in all Statutes of Limitation the principle on which they are founded is, that in those cases in which a payment is allowed to take the case out of the operations of the Statute of Limitations, it must be such a payment as amounts to an acknowledgment of liability; or, in the words of Jessel, M.R., "The underlying principle of all the Statutes of Limitation is, that a payment to take a case out of the statute must be a payment by a person liable, as an acknowledgment of right." Hence it will be seen that the Court of Appeal agrees with that part of the judgment of Fry, J., in the Court below, in which he says—"I think a payment will keep the right alive if it be made by the mortgagor or by any agent of the mortgagor," but dissents from that part of his judgment in which he goes on to add, "or by any person who, as between the mortgagor and mortgagee, is liable to make any payment to the mortgagee in satisfaction of the mortgage debt."

ADMINISTRATION ACTION—COSTS.

Of the next case, *Re Middleton, Thompson* v. *Harris*, p. 552, it is only necessary to say that the Court of Appeal asserted and acted on the principle that it is only just that the costs of administration, so far as they have been increased by the administration of real estate, should be borne by that real estate; and also to notice the *dictum* of Jessel, M.R., that in such an administration action, if the estate should prove insufficient, the plaintiff, unless he be executor, does not necessarily get his costs in priority to the defendants.

PURCHASE BY RAILWAY—AFFIDAVIT.

So also of the next case, *Errington* v. *Metropolitan District Railway*, p. 559, it appears only necessary to notice so much of the judgment of the Court of Appeal as lays it down, on the previous authorities, that in the case of the purchase of lands by Railway Companies under the powers in their acts, it is the Company who are to be the judges of what they require unless they are not acting *bona fide*, and the evidence, and the only evidence required, is the opinion of the surveyor or engineer or other officer of the company, unless the other side can shew that they are not acting *bona fide*. To which the M.R. adds: "Now, of course, you can shew want of *bona fides* in two ways. You may show it by proving that the lands are wanted for some collateral purpose as a fact, or you may shew it by proving that the alleged purpose is so absurd, under the circumstances, that it cannot possibly be *bona fide*." It may also be added that in this case, which came up on motion for judgment, the M. R. declared a certain affidavit inadmissible, on the ground that "an affidavit made upon information and belief must state the source of information; a mere statement of belief will not do."

Recent English Decisions.

Gift by infant—undue influence.

The next case requiring notice, *Taylor* v. *Johnstone*, p. 603, is of an interesting nature. It was an action by the legal personal representative of a female infant, brought for the purpose of setting aside certain gifts made by the infant shortly before her death at the age of twenty years and three months, to a man and his wife, whom the infant's father had shortly before his own death, which occurred only a few months before his daughter's, requested to take charge of her and live in her house, and with whom the infant had deliberately chosen to go and live. Evidence was given to show that the infant in question was of firm will and business habits, and under these circumstances Bacon, V. C., refused to set the gifts aside. After making some remarks on the general law of infants, which, he observes, may be in some respects anomolous, but "must be said to be settled with all its faults," the V. C. says: "An infant may contract a marriage, and the legal impediment by which the infant is prevented from executing a settlement of his or her property is removed by statute; but I am not aware of any law which prevents an infant from making a donation of any chattels or personal property in his actual possession. There is, indeed, a special law, the creation of Courts of Equity in this country, and the same law with somewhat wider scope prevails in other European systems of jurisprudence, by which persons who stand in what is called a fiduciary relation to infants are precluded from obtaining, or at least from retaining, donations or benefits of any kind from their actual or *quondam* wards." But he held that in this case no such fiduciary relation—no relationship of guardian and ward—was proved to exist between the donee and the donor. It may be added that the cases on this branch of the law are collected in the notes to *Mitchell* v. *Humfray*, L. R. 8 Q. B. D. 587, in the June number of the American Law Register (21 Am. L. Reg. N. S. 371).

Wills Act—R. S. O., c. 106, sec. 35.

In the next case, *re Hensler*, p. 612, a father by his will devised certain real estate to his son, who predeceased him, leaving issue, but before his death made a will leaving all his real estate to his father, and the question was whether the legal fiction created by the above section of the Wills Act, by which the devise of a father to a son predeceasing him, leaving issue, is to take effect as if the death of such son had happened immediately after the death of the testator, was to be extended so far as to hold the devise by the son to the father, in this case, a valid devise. Hall, V. C., held against this view, and declared the son to have died intestate as to his property. He says: "It seems to me that the object and purpose of the section was to effectuate the will of the father, and that that object and purpose are satisfied by holding that the son took the estate. Effect would have been given to the will of the son in case he had left property to some other than his father and who in fact survived him, yet as he left it to his father the gift by the son fails, for I cannot hold that the section ought to be extended to any case beyond the one expressly provided for."

Principal and surety—transfer of securities.

The next case, *Forbes* v. *Jackson*, p. 615, illustrates the rights of a surety to a transfer of securities, on payment of his principal's debt. There was in this case, a mortgage of leaseholds for £200, and the assignment of a policy on the life of the mortgagor as collateral security. The plaintiff, as surety for the mortgagor, covenanted with the mortgagee that while the £200 remained owing, he would pay interest on that amount at 5 per cent. and also pay the premiums on the policy. Subsequently, without the knowledge of the plaintiff the mortgagee made further advances to the mortgagor on the security of the same premises. The plaintiff, then, having paid all arrears of interest, and also the premiums on the policy, gave notice of his

intention to pay off the £200, and requested the mortgagees to transfer to him all the securities comprised in the mortgage, including the leasehold premises. The latter, however, refused to do so, unless the plaintiff also paid off the subsequent advances and arrears of interest, and relied on *Williams* v. *Owen*, 13 Sim., 597. Hall, V.C., however, gave judgment in favour of the plaintiff, on the general principle laid down in *Mayhew* v. *Crickett*, 2 Sw. 185, the surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship:—"Nor does it matter in principle, whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt, they have nothing to do with the surety;" and he declared the decision in *Williams* v. *Owen* is not the law now. The V.C. goes further, and expresses an opinion that it is now settled that where additional security is taken by the creditor after the original security was given, and the contract of suretyship entered into, the right of the surety as regards the securities given to the principal creditor extends also to the additional securities; and he discusses this question at some length.

POWER OF SALE—DURATION.

In the next case, *re Cotton's trustees*, p. 624, the principle of Fry, J.'s judgment is very clearly given in the head-note as follows:—"A power, given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be exercised, providing that the power in its creation was not obnoxious to the rule against perpetuities, and that the *cestuis que trustent* have not put an end to the trusts by electing to take the property as it stands. The learned judge observes at starting, that there is the greatest possible distinction between the determination of a power under the instrument which created it, and its extinction by the concurrence of the persons who are entitled to take the property which is the subject of the power. The former appears to me, subject to the question of the power going beyond the period allowed by law for the duration of such powers, to be a mere question of the intention of the donor of the power." Reference is made in this case to *Peters* v. *Lewes and East Grimstead Ry.*, L.R. 18 Ch. D. 429, noted *supra*, p. 69-70, in which it may be remembered the M. R. discusses the question of the duration of powers of sale.

MORTGAGES CONSOLIDATION.

The next case, *Harter* v. *Coleman*, p. 630, was also a decision of Fry, J., who himself thus concisely states the point in question in his judgment:—"A mortgagor mortgages Whiteacre to A., and he mortgages Blackacre to B. He then conveys the equity of redemption in Whiteacre to C., and subsequently A. and B. both assign their first mortgages to D., or which would come to the same thing, B. transfers his mortgage to A. Can D. in the one case, or can A. in the other, consolidate the mortgages as against C., the assignee of the equity of redemption of one of the two mortgaged properties?" He answers this in the negative, discussing the question first on priniciple and then with reference to authorities. "The principle," he says, "upon which the Court has proceeded with reference to the consolidation of mortgages I take to be this, that the mortgagor or his assignee who asks for the assistance or mercy of the Court, on the ground of his equity, must himself do equity, and the question is, what equity must he do?" And he comes to the conclusion that, as in the case of the assignment of *choses in action*—the assignee of a *chose in action* takes it subject to all equities subsisting at the time of the assignment, and not to equities that arise subsequently and which did not exist at that

time so, likewise, the Courts have laid down the principle, that the equities to be performed by the assignee of an equity of redemption are those to which his assignor was liable at the date of the assignment, and the equity to consolidate, arising from a subsequent union in the same person of the mortgage, of which the equity of redemption has been assigned to him, with another, is not an equity which was then subsisting, and therefore it is not one of the equities subject to which the equity of redemption was purchased. Turning to the authorities, he shews that there are two decisions of Courts of jurisdiction co-ordinate with his, antagonistic to each other, viz., *White* v. *Hillacre*, 3 Y. & C. Ex. 597, which supports his own view, and *Beevor* v. *Luck*, L. R. 4 Eq. 537, which is opposed to it; and as though the Court of Appeal had treated *Beevor* v. *Luck* as good law, the House of Lords had expressed the gravest doubts as to the propriety of that decision, he declares himself at liberty to choose between them, and says:—"I have no hesitation in saying that the decision in *White* v. *Hillacre* is, in my opinion, consonant with the only principles upon which the Court can proceed, and that the decision in *Beevor* v. *Luck* is not consonant with those principles."

This appears the last case requiring special notice in the number under review, which completes Vol. 19 of the Chancery Division. Among the June numbers of the Law Reports is the index and table of cases.*

A. H. F. L.

* An article on *London and County Bank* v. *Groom*, L. L. 8 Q. B. D. 288, noted *supra* p. 153, and relating to overdue cheques, is contained in 16 Ir. L. T. 202, where it is reprinted from the *English Law Journal*. The writer comes to the conclusion that the decision of Field, J., in that case, is "sound in policy as well as law, and in accordance with the ideas of the day, which lean greatly in favour of freedom of negotiability."—EDS. C. L. J.

LAW SOCIETY.

EASTER TERM, 45th VICTORIA, 1882.

The following is the *resume* of the proceedings of the Benchers during Easter Term, published by authority:—

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

George S. Lynch Staunton, with honours, awarded a silver medal; Arthur O'Heir, Thos. Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, Jno. Travers Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely:—

William Burgess, jr., Thomas Henry Luscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thos. Ambrose Gorham, Christpher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

The following gentlemen passed their first Intermediate Examination, namely:—

D. C. Ross, John Greer, R. V. Sinclair and W. D. Gwynne, with honours; Robert Smith, J. A. Hutcheson, H. G. Mackenzie, G. C. Thompson, J. McPherson, W. C. Widdifield, J. Denovan, A. E. Overell, C. W. Lasby, J. V. Ryerson, John Geale, D. Macdonald, C. F. Farewell, W. H. Robinson, J. Heighington, F. E. Cockrane, T. E. Williams, A. G. Murray, T. J. F. Hilliard, N. H. Beemer, T. B. Bunting, John Tytler, A. K. Goodman, D. B. S. Crothers, L. M. Hays, Thos. Johnson, D. F. McMillan, A. B. Shaw, and H. Brock.

The following gentlemen passed their second Intermediate Examination, namely :—

J. Bicknell, P. D. Crerar, E. Sweet, and C. C. McCaul, with honours ; and J. A. C. Reynolds, L. C. Smith, W. B. Dickson, R. W. Armstrong, R. P. Echlin, E. J. Hearn, S. F. Washington, C. Henderson, C. G. Jarvis, T. A. Elliott, T. Parker, W. J. Wright, A. E. Barber, J. Campbell, F. A. Munson, F. J. Dunbar, R. McLean, George Smith, W. J. Code, C. H. Ivey, J. W. Hanna, E. R. Reynolds, W. Masson, and R. N. Ball.

The following gentlemen passed the Preliminenary Examination as students and articled clerks, namely :—

Graduates—Archibald Gilchrist Campbell Alexander, W. A. Finlay, James Redmond O'Reilly. Matriculants of Universities—James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold William Fitz Hardinge Berkeley, John Lindsay Snedden, Charles E. Weeks, Alex. James McKenzie, Phillip Henry Allin, Herbert James Dawson, Angus William Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner James Arnold, James Herbert Kew, Ralph Herbert Dignan, William John McDonald, Shirley B. Ball, Alfred William Lane, Orville Montrose Arnold, Horace Bruce Smith, James Archibald Macdonald, Theodore Augustus McGillivray, George Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis Redmond O'Reilly. Articled Clerks—Edward Considine, Donald Archibald Cameron.

Monday, May 15th.

Convocation met. Present—Messrs. Bethune, Crickmore, Britton, MacKelcan, Maclennan, Irving, Ferguson, Hoskin, Read, Kerr, Foy, Benson, L. W. Smith, J. F. Smith, McMichael.

In the absence of the treasurer Mr. Irving was elected chairman.

The minutes of the last meeting were read.

Mr. Ferguson presented the report of the Special Committee on the Call of English Barristers and the admission of English Solicitors in this Province, which was read and the consideration of it deferred.

The petition of Mr. W. R. Armstrong praying for re-examination by the Benchers, was refused.

The petition of Thomas Scholefield was referred to Legal Education Committee.

The Petition of E. Gus. Porter was refused.

The petition of Zebulon Landon was referred to Discipline Committee.

The resignation by Mr. Galt of the office of reporter to the Chancery Division was accepted to take effect on the last day of the present term.

Ordered that the secretary do advertise for applications for the vacant reportership, and that a call of the Bench be made for Friday, 26th inst., to make the appointment.

The report of the Finance Committee was presented, read, and ordered to be considered on 16th instant.

Tuesday, May 16th.

Present Messrs Read, Mackelcan, Hoskin, Martin, Maclennan, Irving, Crickmore, Benson, Britton, J. F. Smith, Fraser, McCarthy, Robertson, L. W. Smith.

In the absence of the Treasurer, Mr. Irving was appointed chairman. The minutes of the last meeting were read.

The report of the special committee on Honors and Scholarships was received and read as follows :

EASTER TERM, 1882.

To the Benchers of the Law Society in Convocation,

The committee to whom was referred the question of who are entitled to Honors and Scholarships in reference to the Call and Intermediate Examinations, beg leave to report.

That of the two gentlemen who competed for Honors on the examination for Call, George S. Lynch Staunton alone passed with Honors, and he would have been entitled to a Gold Medal had he passed both his Intermediates with Honors, but his Second Intermediate passed in Hilary Term, 1881, not being passed without an oral, he is entitled to a Silver Medal only.

The following gentlemen passed their First Intermediate Examination with Honors, namely: D. C. Ross, John Greer, R. V. Sinclair and W. D. Gwynne, and of them D. C. Ross is entitled to $100, John Greer to $60, R. V. Sinclair to $40, and W. D. Gwynne to a Diploma.

The following gentlemen passed their Second Intermediate Examination with Honors, namely: J. Bicknell, P. D. Crerar, E. Sweet and C. C. McCaul, of whom J. Bicknell is entitled to $100,

P. D. Crerar to $60, E. Sweet to $40, and C. C. McCaul to a Diploma.

JOHN CRICKMORE,
Chairman.

The report was adopted.

Ordered, that in future on the first day of every term six copies of the printed and written questions submitted by the examiners at all examinations held since the preceding term be laid before Convocation, the questions submitted to each of the different classes to be grouped and fastened together.

The petition of John B. Hands was refused.

May 20, 1882.

Present—the Treasurer and Messrs Crickmore, J. F. Smith, Murray, Foy, Glass, Maclennan, Irving, Bethune, Dr. Smith, Hoskin, Read.

The minutes of the last meeting were read.

The report of the Finance Committee was considered, and with some ammendments was adopted.

Mr. Irving presented the report of the Library Committee, recommending that the salary of Mr. Williams, the junior assistant be increased to $600 per annum.

The report was adopted, and it was ordered that Mr. Williams' salary be increased to $600 a year to commence on the 1st April 1882.

The Hon. Edward Blake was elected Treasurer for the ensuing year.

The following Standing Committees were appointed for the ensuing year, namely:

Journals of Convocation.—The Hon. C. F. Frazer, Messrs Hoskin, Foy, Kerr, Moss, Maclennan, McCarthy, Hon. T. B. Pardee, B. M. Britton.

Legal Education.—Messrs Benson, Crickmore, Ferguson, Moss, Hoskin, Smith, MacKelcan, Lemon, Hon. T. B. Pardee.

Finance.—Messrs Foy, Crickmore, Martin, S. H. Blake, L. W. Smith, Murray, Meredith Hon. A. S. Hardy and D. B. Read.

Reporting.—Messrs Bethune, Britton, Cameron, MacKelcan, McCarthy, Martin, J. F. Smith, Maclennan, Glass.

Discipline.—Messrs Benson, Hoskin, Maclennan, Beaty, Kerr, Robertson, Glass, Martin, McMichael.

Library.—Messrs Bethune, Cameron, Beaty, Irving, McMichael, Ferguson, Moss, S. H. Blake, Bell.

County Library Aid—Messrs Benson, Cameron, Glass, Meredith, Kerr, Robertson, Britton, Hardy, Martin.

Mr. Crickmore was appointed representative of the Law Society in the Senate of the University of Toronto to the end of Easter Term 1883.

Mr. Murray gave notice that he would on the 26th instant bring up the subject of the telegraph and telephone office.

Friday, May 26.

Present—the Treasurer and Messrs Read, Crickmore, Benson, Foy, Hoskin, Murray, Bethune, Britton, MacKelcan, J. F. Smith, Maclennan, Ferguson, Martin, Kerr, Irving, Crooks, Beaty.

The minutes of the last meeting were read and approved.

The Legal Education Committee reported in the case of C. E. Irvine who passed his examination in Michaelmas Term, 1881, recommending that he receive his Certificfite of Fitness. Ordered accordingly.

The same committee reported on the Second Intermediate Examination of Mr. W. A. McLean which was passed in Hilary, 1882. Ordered that this examination be allowed.

The Committee on Reporting presented the names and applications of the candidates for the vacant reportership in the High Court.

The same Committee recommended that the Society subscribe in the future for 1,200 volumes of Supreme Court Reports, instead of 1,350. Ordered accordingly.

Mr. MacKelcan from the Special Committee appointed on the subject of short-hand writers' notes presented the following report:

TORONTO, 26th May, 1882.

The committee appointed last term to wait upon the Ontario Government with the view of securing a reduction in the fees charged for short-hand notes at the trial and hearing of causes, beg to report that they addressed a memorandum to the Attorney-General of Ontario, a copy of which is appended hereto, and that in answer to such memorandum the Government have reduced the cost of shorthand writer's notes as set forth in the communication of the Attorney-General hereto annexed.

F. MACKELCAN,
Chairman.

(Copy of memorandum).

TORONTO, 1st March, 1882.

The committee appointed by the Law Society to wait upon the Ontario Government with the view of securing a reduction of the fees charged for shorthand writers' notes at the trial and hearing of causes, beg to submit the following memorandum:—

No motion can now be made against the decision of a judge or to set aside the verdict of a jury until copies are furnished to the Judges of the Divisional Court of the evidence taken by the shorthand writer at the trial. The copies of the judges are charged for at nine cents per folio, three being supplied for that sum, and these must be paid for by the party who moves against the verdict or judgment. In some cases the judge will enter a *pro forma* judgment or decision, leaving the real determination of the questions at issue to the full Court, and in such cases it is putting the party who has to move under a very heavy penalty when he is compelled to pay a large sum for the notes of evidence before he can be heard by the Court. The same may be said of cases where there has been a manifest miscarriage of justice, rendering an application to the full Court necessary. The Committee are of opinion that all necessary copies of the evidence should be furnished to the judges without charge, and that a charge of five cents per folio would be ample for each copy furnished to the parties; with the improved type writers 210 folios can be copied in an ordinary working day, from five to ten copies being made at once, but assuming that 100 folios only would be copied five cents a folio for the copy required by each party would amount to $10 per day for the reporter's services while making the copies, which is more than his charge per day when taking evidence.

It is not to be expected that those who are obliged to go to the Divisional Court should contribute towards the cost of the taking of evidence in cases where the questions in dispute are finally disposed of at the trial, and it should be quite enough to ask them to pay for the copies of evidence they are obliged to obtain for their own use upon the argument before the Divisional Court.

There may be cases in which one copy only of the evidence will be required. In such cases five cents per folio will fully pay the cost of the copy, and in most cases two or more copies will be needed by the parties, yielding a good profit upon the work done.

Under the present regulations the five copies which are all made at once are charged for at the aggregate rate of nineteen cents per folio, namely, nine cents for the copies for the judges and ten cents for the copies for the parties, additional copies can be struck off at the same time and when required, are supplied at five cents per folio each.

A shorthand writer, with a good type-writer, copying 210 folios in ten hours, as can be done, is able, under the regulations now in force, to earn $40 a day, and in cases where more than two copies of evidence are required by the parties, may earn still more.

The Committee think that it is essential to the fair administration of justice that a change should be made in the mode of charging for copies of shorthand writers' notes, and that suitors should not be compelled to pay for the copies required by the judges, and they would respectfully request that the matter should be taken into consideration with a view to adopting some such change in the regulations as is herein suggested.

For the Committee,

F. MACKELCAN,
Chairman.

TORONTO, 26th May, 1882.

SIR,—Referring to yours of the 9th inst., with reference to the reduction of the short-hand reporters' fees, I beg to say that after consultation with the Judges an order in Council has been passed fixing these fees as follows: For copies required for the Judges under rules made or to be made in that behalf, and to be furnished at the expense of the parties, and for one copy for the party desiring to move thereon, ten cents per folio for the copies required, not exceeding four altogether; for any additional copies made for the parties, at the rate of five cents per folio, for each copy.

The Attorney General trusts these fees will be satisfactory to the Law Society.

Your obedient servant,

J. G. SCOTT,
Deputy Atty. Gen.

F. MACKELCAN, ESQ., Q.C.,

Mr. Lefroy was elected reporter of the High Court.

Mr. Maclennan, from the Committee on Reporting, presented the following statement :—

The Committee have to report that the work of reporting is in a fairly satisfactory state, the cases in the Queen's Bench and Common Pleas Divisions being, as usual, completely cleared off, and the other cases being well up so far as the present reporters are concerned. The Committee regret that Mr. Tupper has not yet completed the work which was unfinished in his hands when he resigned the office; he has, however, given strong assurances that the work will be completed at an early day.

All which is respectfully submitted.

J. MACLENNAN,
Chairman.

On motion of Mr. Murray it was ordered that the question of the management and tariff for the telephone office be referred to the Finance Committee, to report at next meeting of Convocation.

Mr. Martin gave notice for Saturday, June 3rd, of the following notice of motion, namely :

That in the opinion of Convocation the Courts at Osgoode Hall should be used exclusively for the argument of cases. That no trials of causes involving the examination of witnesses should take place within the building.

Resolved—That a Committee be appointed to call upon the Judges and the Attorney-General for the purpose of representing the necessity of arrangements being made as early as practicable which will remove the inconveniences which have prevailed under the the present system and which are constantly increasing.

Saturday, June 3rd.

Present—Messrs. Maclennan, Irving, Foy, Martin, Murray, Hoskin, Crickmore, Read and J. F. Smith.

In the absence of the Treasurer, Mr. Read was appointed Chairman.

The minutes of last meeting were read and approved.

The report of the Finance Committee on the question of the fitting of the old Convocation Room, and on the question of the telephone office, was received.

Ordered that the first clause of the report, relative to the fitting up of the old Convocation Room, be considered at the meeting of Convocation on the 27th June.

Ordered that the second clause of the report, relative to the telephone office, be read as follows :

The Committee beg to report on the question of the telephone office, that they are of the opinion that the rate of two cents a message fixed last term is a proper charge, and that the operator be instructed to continue same till the end of the financial year, and collect the amounts from the various persons using the telephone, and that she be also instructed to collect the amount due for the past three months at that rate, and that persons refusing to comply with these terms be not allowed to use the telephones; and that the operator and boy be continued at the same salary as at present.

On motion of Mr. Murray this clause of the report was adopted.

The report of the Committee on Discipline that a *prima facie* case had been made out in the matter of Zebulon Landon, was received, read and adopted.

On motion of Mr. Murray it was ordered that the charges set out in the petition of Mr. Landon be referred to the Discipline Committee for investigation.

The report of the Committee on Legal Education on the Law School, was read as follows :

REPORT ON LAW SCHOOL.

The Committee on Legal Education beg leave to report as follows, on the subject of the Law School :

1st.—That the lecturers have furnished returns showing the subjects lectured upon during the past season, the number of lectures delivered to each class, and the attendance at each lecture.

2nd.—From these returns it appears that Mr. Hodgins delivered seven lectures to the Senior Class on the subject of "Constitutional Law," at which the average attendance was thirty-four.

That he delivered eight lectures to the Junior Class on "Criminal Law," at which the average attendance was fifteen.

That Mr. Macdougall delivered eight lectures to the Senior Class on the subject of "Negligence," at which the average attendance was twenty-two, and seven lectures to the Junior Class on "Bills and Promissory Notes," at which the average attendance was twelve.

That Mr. Delamere delivered eight lectures to the Senior Class on "Partnership," the average attendance at which was sixteen, and eight

lectures to the Junior Class on the subject of "Practice under the Ontario Judicature Act," at which the average attendance was forty-six.

That Mr. Armour delivered eight lectures to the Senior Class on the "History and Growth of Real Property Law," that he kept a record of the attendance at four only of these lectures, which record shows an average of twenty-two at each lecture; that he delivered eight lectures to the Junior Class on the subject of "Married Womens' Property Rights," at which the average attendance was eleven.

From this it appears that in all thirty-one lectures were delivered to the Senior Class, at which the average attendance was twenty-four; and that thirty-one lectures in all were delivered to the Junior Class, at which the average attendance was twenty-one.

The Committee beg to submit to Convocation with this report the returns of the varions lecturers. The attendance has been very irregular and unsatisfactory as to numbers considering the very numerous signatures to the petition for re-establishing the Law School, it is very disappointing to find so few students availing themselves of the lectures. Taking the average attendance on both lectures the numbers are reported as forty-five, but, in fact, as very many of the same gentlemen attend, as well the senior as the junior lectures, it is not probable that more than thirty-five gentlemen in all attended the lectures; this would show that the cost of the course for each gentleman is about twenty-three dollars. The Committee, however, agree in recommending that it is desirable to continue the experiment of the Law School for the period of two years, as already determined upon by Convocation.

JOHN CRICKMORE,
Chairman.

The Report of the Special Committee on the call of English Barristers and the admission of English Solicitors was received and read as follows:—

The Report of the Special Committee to whom it was referred by resolution of Convocation, passed during Hilary Term last, to consider the best means of carrying out certain changes in the existing rules of the Society for the Call of Barristers and Admission of Solicitors in special cases.

1st. That in the opinion of this Committee Convocation has power without the aid of further legislation to make the changes contemplated by the resolution.

2nd. That this Committee recommend that the said changes be carried out by amending rules 94 and 97 in accordance with the said resolution of Convocation, but it appearing that solicitors of the Supreme Court of Ontario may, upon certain conditions, be admitted to practice as solicitors of the Supreme Court of Judicature in England, this Committee recommend that Convocation enact a rule providing for the admission of solicitors of the Supreme Court of Judicature in England as solicitors of the Supreme Court of Ontario upon as nearly as possible the same terms and conditions as solicitors of our Courts are now admitted in England.

J. H. FERGUSON,
June 3rd, 1882. Chairman.

Ordered that the report be considered forthwith.

On the motion of Mr. J. F. Smith it was ordered that the recommendation contained in the report be adopted.

On the motion of the Chairman of the Legal Education Committee it was ordered that Mr. Rordans be paid a sum not exceeding $30 for the publication of the Curriculum in the New Law List.

Ordered that Mr. Martin's motion on the subject of the use of Osgoode Hall for the trial of causes do stand over to be considered on June 27th.

Mr. Ferguson gave notice of the first reading of the new rule respecting the Call of English Barristers and the admission of English Solicitors for 27th June instant.

Convocation adjourned.

CRIMINAL STATISTICS.

An appendix to the Report of the Minister of Agriculture gives the criminal statistics for the year 1880. It is very neatly and intelligibly got up and contains a great deal of information on the statistics of crime of all kinds, where committed, number of persons charged, with full particulars of the events which took place, and the dealings of justice with the criminals. It will doubtless be interesting and useful to many, though it cannot be said to be very lively reading or particularly interesting to a general student. The work must have been very laborious, and the compiler has shown much intelligence in the way he has collected and arranged his material.

REPORTS

RECENT ENGLISH PRACTICE CASES.

BURRARD v. CALISHER.

Imp. Jud. Act, 1873, sect. 50 — Ont. Jud. Act. sect. 47—Motion to vary report of official referee.

CHITTY, J.—In my opinion—and I wish to lay down this as the rule of practice I purpose to adopt in my Court where, in an action which has by the judgment been referred to the official referee, and in which the further consideration has been adjourned, either party to the action desires to vary the report, he should serve the opposite party with a notice of motion to vary. This notice of motion should be given for the usual motion-day in this branch of the Court; but when the motion is mentioned it will be ordered to be adjourned, as a matter of course, to come on with the further consideration. Where the further consideration has not been adjourned, then the practice which was laid down by the Master of the Rolls should be adopted; that is to say, the requisite notice should be given either by motion or summons to vary.

[NOTE.—*The Imperial and Ontario sections are nearly, but not quite, identical. Another matter arising in this case is noted* supra *p. 180.*]

ABBOTT v. ANDREWS.

Imp. O. 55, r. 1; Ont. rule 428—Costs Jury trial—Nonsuit on some issues — Procedure when judgment ambiguous as to costs.

When in an action tried by a jury, the plaintiff succeeds upon some issues but is nonsuited upon others, and no order is made as to costs, the defendant is entitled, under the above rule, to the costs of the issues upon which the plaintiff is nonsuited.

When a judgment is ambiguous as to costs, the proper course is, not to appeal from the Master's order refusing to tax the costs of one of the parties, but to apply to the Judge who tried the case to correct any ambiguity in the judgment.

LORD COLERIDGE, C. J., and GROVE, J.

April 25.—L. R. 8 Q. B. D. 648.

NOTE.—*The Imp. and Ont. rules are identical.*]

LUMSDEN v. WHITE.

Imp. O. 29, r. 12; O. 40, r. 11—Ont. Rules 176, 322.

Final judgment on defence and counter-claim.

Where plaintiff makes default in delivery of reply to the defendant's statement of defence and counter-claim, the latter may obtain an order for final judgment in respect of both claim and counter-claim, under rule 322.

April 28—L.R. 8 Q.B.D. 650.

Action for unliquidated damages for breach of contract and statement of claim accordingly. The statement of defence denied the allegations of the statement of claim and counter-claimed for money lent by the defendant to the plaintiff. The plaintiff having made default in delivery of reply, the defendant moved for judgment against the plaintiff on the claim and counter-claim.

GROVE, J.—The provisions of the rules with regard to counter claims are not very distinct so far as this point is concerned, but Imp. O. 19, r. 3, (Ont. Rule 127), which says that a counter-claim shall have the effect of a statement o claim in a cross action, seems to be applicable in this as in other cases. That being so, the counter-claim here is in the same position as if it had been a statement of claim. Then by Imp. O. 29, r. 12, (Ont. Rule 176), if no reply is delivered, the pleadings are to be deemed closed, and the statements of fact in the pleading last delivered are to be deemed to be admitted. It must be taken, therefore, in this case, that the statements of fact in the counter-claim are admitted. Then by Imp. O. 40, r. 11, (Ont. Rule 322), the defendant may move for any order to which he is entitled on admissions in the pleadings. I must admit I should have been inclined to think that this rule was not applicable to the present case but for the decisions on the subject. . . . It seems, however, that Courts of co-ordinate jurisdiction have held it to apply to final judgments, and by their decisions we are bound. So construing the rule the case seems, by virtue of the other rules to which I have referred, to be brought within it, and the defendant appears to be entitled to the counter-claim as well as the claim.

LOPES, J.—If there had been no decision on the subject, I should have been inclined to doubt whether Imp. O. 40, r. 11, (Ont. Rule 322), applied to final judgment or only to interlocutory measures of relief, but the decisions seem to go

the length of showing that the courts have under that rule granted final judgment on admissions in the pleadings. There does not appear to have been any case in which it has been applied as it is here sought to be applied in respect of a counter-claim, but it seems in principle that the counter-claim must, for this purpose, stand on the same footing as an action.

[NOTE.—*The Imp. and Ont. rules are not identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Proudfoot, J.] [June 14.

SIEVEWRIGHT v. LEYS.

Executors—Compensation—Rests—Master's report.

Although R. S. O., c. 107, sect. 41, does not render it necessary for the Court to allow compensation to an executor in every case, no matter how flagrant his misconduct, yet neglect of duty by an executor, such as retaining money in hand that should have been applied in payment of mortgage debts, and of such magnitude as to justify charging him with interest and rests, is not enough to deprive him of commission, nor even of the costs of the suit.

The course of decision has been that an executor or trustee will be allowed his commission, though he may have so managed the estate as to justify the appointment of a receiver, and to be deprived of and even made to pay costs.

In this case, therefore, where merely a balance had been found against the executor, some of the items of which were the result of a surcharge :—

Held, not such a case as to induce the Court to discharge him of his commission.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the Court to determine on the propriety of his decision.

Quære, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case.

Kingsford, for the plaintiff, appellant.

Moss, Q.C., for the defendant, respondent.

Proudfoot, J.] [June 14.

SAYLOR v. COOPER.

Rights of way—"Premises"—Parties.

Defendant and one A. H. Saylor, being owners of adjoining lands, on December 29th, 1865, executed a deed whereby in consideration of $30 the defendant granted to A. H. Saylor one acre of his land, not immediately adjoining Saylor's land, and the deed then proceeded thus :—"And I further convey the right of way . . to cross my land from the highway . . to the land owned by A. H. Saylor . . and the said A. H. Saylor is to make good all damages . . together with all the appurtenances thereto belonging, to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of the party of the third part, his heirs and assigns for ever."

By deed of August 20, 1872, the defendant conveyed to A. H. Saylor five acres adjoining the latter's land, but these five acres were not accessible without passing over the lands of the defendant or of some other person. By deed of January 3, 1880, A. H. Saylor agreed to sell to the plaintiff his lands—"And all rights and privileges contained in deeds from Cooper to A. H. Saylor" for $6,000.

Held, the plaintiff was entitled to a way of necessity to the five acres conveyed by deed of August 20, 1872, for since the defendant sold them a way of necessity was acquired, by implied grant, over the land.

Held, also, by the deed of December, 1865, a right of way became appurtenant to A. H. Saylor's land, and it was not a mere way in gross that was created.

Held, also, though the word "premises" is often used as applicable to the land conveyed, there is no rule requiring it to be limited in that way, but it is wide enough to cover all that goes before in the the deed, and, therefore, it could not be contended that the word "premises" in the deed of December, 1865, only applied to the land, and that the grant of the right of way was personal to A. H. Saylor.

Held, lastly, as regards the claim to the way of necessity which could only pass with the grant of the soil, it was necessary that the owner of the legal estate should be before the Court.

L. Wallbridge, for the plaintiff.

Moss, Q.C., for the defendant.

Ferguson, J.] [June 21.

CARMICHAEL V. SHARP.

Partnership action—Costs.

In this action the plaintiff claimed to have a partnership, which had existed between himself and the defendant, wound up, and to have all the necessary accounts taken, alleging that the latter had not properly carried out an agreement entered into at the time of the dissolution of the said partnership, by which the defendant was to wind up the affairs of the firm, and that he had not duly accounted to him in respect thereto. The defendant alleged that he had accounted, but that the plaintiff had not accounted to him for partnership moneys received. On reference the Master reported that the defendant had received more than his share of the firm moneys, and ordered him to pay the plaintiff the balance due.

Held, on further directions, the defendant must pay the said balance and the costs of the suit.

A. Hoskin, Q.C., for the plaintiff.

Farewell for the defendant.

Proudfoot, J.] [June 22.

DOBELL V. THE ONTARIO BANK.

Bank agent—Guarantee not under seal—R. S. O. c. 121.

In this case the defendant Rochester, on May 3, 1877, entered into a contract to sell to the plaintiffs a certain number of pine deals, which he delivered except 108 standards. On Nov. 20, 1877, being indebted to the defendants, the Bank, for advances, he gave as security a warehouse receipt for 108 standards. Afterwards, both defendants being anxious to realize on these pine boards, offered to deliver them to the plaintiff as a performance of the balance of the above contract of sale. The plaintiffs, however, required a guarantee from the Bank that the pines should be satisfactorily culled, and any deficiency be paid for by the Bank. The Board of Directors of the Bank, thereupon, resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. The head-manager notified the local agent of this, and told him to get a culler to examine the lumber. The latter, however, did not do this, but, with the assent of the former, nevertheless gave the guarantee. This document purported to "guarantee on behalf of the Bank" that the said deals should be satisfactorily culled, previous to shipment in the Spring. It was not under seal. On receiving it, the plaintiffs paid the Band for the lumber, but not until the Bank had been informed, at their head office, of the guarantee having been given. The culling did not turn out satisfactory, and the question was, whether the Bank was liable for the deficiency resulting, as well as Rochester.

Held, the Bank was liable on the guarantee, for the plaintiffs were warranted in assuming that the agent giving it had the necessary authority; and if the plaintiffs repudiated it, they ought to refund the money.

Semble, the above guarantee did not come within the description of a guarantee for the act of a thind party, for the Bank were selling, under R. S. O., c. 121, by virtue of being holders of the warehouse receipt, and giving the guarantee was an ordinary transaction, necessary to effect a sale, and was not within the class of cases requiring the sanction of a seal.

McCarthy, Q.C., (*Hogg* with him), for the plaintiff.

Blake, Q.C., for the defendant, the Bank.

Walker, for the defendant Rochester.

Proudfoot, J.; Ferguson, J.] [June 22.

FAULDS V. HARPER.

Equity of redemption—Limitations—Parties—R.S.O., c. 108, sects. 11, 19, 20, 43.

The equity of redemption is an entire whole, and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all, and the mortgagee must submit to redemption as to the whole mortgage.

Hence, in this suit, which was one for redemption of a mortgage of land where the mortgagor had died intestate in 1858, leaving

certain children, the plaintiffs herein, some of whom, if they had been alone, would have lost their right to redeem by lapse of time under R. S. O. c. 108, sects. 19, 20.

Held, nevertheless, since some of the children had not been adult for the necessary period of five years preceding the filing of the bill herein, none of the plaintiffs were barred by the statute.

R. S. O., c. 108, sect. 11, only applies to contests between the joint owners, and it is not correct to say that R. S. O., c. 108, sect. 43, relating to disabilities, has no application to morgage cases.

Hall v. *Caldwell*, 8 U. C. L. J. 93, declared binding in this country, on this point, notwithstanding *Forster* v. *Patterson*, L. R. 17 Ch. D. 132, and *Kinsman* v. *Rouse*, ib. 104.

One of the children surviving the mortgagor died under age and intestate in April, 1868.

Held, the present suit enured to those entitled to her share, including her mother as tenant for life thereof under R. S. O. c. 105, sect. 27.

Held, also, her mother should be directed to be made a party in the Master's office under G. O. 438, since the present case did not fall under the Judicature Act.

Semble, if the present case had fallen under the Judicature Act the same might have been directed under Rules 89.

Street, for defendant Harper, who rehears.

W. Cassels, contra.

Proudfoot, J.] [June 22.

HOWES V. THE DOMINION INS. CO.

Subrogation by insurers to rights of mortgagee — Unconditional clause — Evidence — Material increase of risk.

This was a suit to redeem a mortgage. The plaintiff mortgaged certain lands to a Loan Company, covenanting to insure the same. Afterwards, at the plaintiff's request and on his behalf, the agent of the Loan Company insured the premises in the name of the Loan Company, with the defendants, and held the policy as collateral security to the mortgage; and the plaintiff paid the premium. The plaintiff's name was specified as owner both in the application for the policy made by the agent of the Loan Company, and in the policy itself. On the face of the policy it appeared that the loss, if any, was payable to the Loan Company, and the policy also contained what is called the "unconditional" or "subrogation" clause. The policy, moreover, purported to be an insurance of the property itself. A fire having occurred, the defendants paid the Loan Company the whole amount of their claim on the mortgage, and obtained from them an assignment of the mortgage. Before this assignment the defendants had notice of the plaintiff's claim to have the amount to be paid under the policy of insurance credited on his mortgage.

Held, the policy was a general insurance of the policy itself, and not merely of the mortgagees' interest, and parol evidence was not admissible to prove that the Loan Company and the defendants, in effecting the insurance, had under consideration only the interest of the mortgagees.

Semble, such evidence might have been admissible, if any case had been made for rectifying the policy, as having been executed under a mistake.

Held also, the unconditional clause itself afforded some evidence that an interest in the mortgagor was recognised, and that the defendants were not insuring merely the debt due the mortgagee.

Held further, the plaintiff having done no act avoiding the policy, was, in redeeming his mortgage so assigned to the defendants, entitled to have credit allowed for the amount paid by the defendants to the Loan Co. under the policy, although the defendants were not aware, and did not assent to the plaintiff paying the premium.

Among the conditions endorsed on the policy was one avoiding it on any change of occupation of the premises being made material to the risk, and within the control and knowledge of the assured. On the policy there was an endorsement to the effect that "this property used to *store* doors and sashes;" but the application for the policy stated that the property had been used as a bending factory, and that it was intended to be used as a *sash factory*, and inasmuch as this application was by the policy made a part thereof, and a warranty by the assured:—

Held, the property might be used as a sash factory, although a sash factory is undoubtedly more hazardous than a bending factory.

Held also, the use of the premises for ripping

timber for building, as well as for the mere proper purposes of a sash factory, did not increase the risk in such a way as to avoid the policy under the above condition.

W. Cassels, for the plaintiff.

Martin, Q.C., for the defendants.

PRACTICE.

Proudfoot, J.] [June 21.

JOHNSON v. BENNETT.

Equitable execution.

Motion for judgment. Plaintiff claims a debt of $200 from the defendant. Defendant did not appear to the writ. The only property the defendant owned was the equity of redemption in certain lands, on which there were two mortgages, one held by the plaintiff, the other outstanding in other hands. Plaintiff now asked for judgment for $200 and interest, and for a decree for sale of the equity of redemption.

Held, on authority of *Carr* v. *Styles*, 26 Gr. 309, plaintiff could have judgment as asked, notwithstanding that in this case there were no *fi. fas.* in the sheriff's hands.

W. Cassels for the motion.

Master in Chambers.] [June 28.

PECK v. PECK.

Interim alimony, time to make application for Chy. G. O. 489.

An application for interim alimony should not be made till the statement of defence is filed, or till the time for filing it has expired. Chy. G. O. 489 is unrepealed and applies by analogy to statements of defence.

In an action for alimony

G. M. Evans, for the plaintiff, moved for an order for payment by the defendan to the plaintiff of $16 a month as and for interim alimony.

N. W. Hoyles, for the defendant, contended that as the statement of claim was not filed no defence had been filed, and this application was prematurely made. He referred to Chy. G. O. 489.

THE MASTER IN CHAMBERS held that the application was prematurely made, as Chy. G. O. 489 is still in force, and now applies by analogy to the filing of the statement of defence. Motion dismissed without costs.

CORRESPONDENCE.

Constitutional Law—The Thrasher Case.

To the Editor of the LAW JOURNAL.

The letters which have appeared in your columns, in reply to my communication of 1st May, respecting the *Thrasher Case*, may seem to some of your readers to require a rejoinder from myself.

But it is with great reluctance that I again recur to this subject. I deem it quite undesirable to intrude personalties upon the public, and had therefore determined to refrain from any notice of the acrimonious letter signed "One of your Readers." But the subsequent letter from "An Exile," which took similar ground of objection to the views I had ventured to propound upon this vexed question, seemed to call for some remarks in explanation. This letter was written with the calmness and dignity befitting the discussion of such a weighty matter, and was, moreover, enriched by much interesting information, evidently from an authentic source, in regard to the framing of the British North America Act. The tone of the contribution from "One of your Readers," on the contrary, was not calculated to encourage a frank and courteous interchange of thought upon a difficult constitutional question. The writer is apparently impressed with the idea that it is great presumption for a layman to criticise a judicial utterance, and that any adverse opinions from such a quarter must necessarily be crude, unsound and unworthy of attention.

But inasmuch as my life-long studies have led me to devote much earnest and careful consideration to the Imperial statute which forms the basis of our present constitution, as well as to all the judicial interpretations of its various sections which have emanated from the Bench, whether of Canada or of the mother country, I may, perhaps, be permitted to state the conclusions at which I have arrived, upon any question arising out of this famous enactment, without being justly charged with dogmatism or impertinence.

My observations upon the judgment in the *Thrasher Case* were confined to the simple point as to whether "the Supreme Court of British Columbia is not within the description of those Courts in which alone procedure is controllable by the Local Legislature," "and **therefore, by**

the sweeping force of section 91, is reserved exclusively to the authority of the Dominion Parliament." In fact, the pith of the whole contention is involved in this enquiry.

This surely is a question upon which a difference of opinion is allowable. If so, I fail to see what objection can be reasonably entertained to the expression of the views which I hold upon it. Free discussion is helpful to the elucidation of truth, so long as it is conducted with propriety and forbearance on both sides. This rule I have sought to follow. Whether it has been equally respected by my opponent I leave your readers to decide.

The brevity of my remarks upon the point at issue has been complained of. But I must say in answer to this, that I took pains to state the substance of my argument with the utmost possible conciseness. By general consent the whole question turns upon the query above stated, and this is one of fact as well as of law. Abstractly considered, the expediency of relegating matters of such high import as the provincial administration of justice to the exclusive jurisdiction of the Local Legislatures of Canada, might reasonably admit of dispute. But the fact that Lower Canada was unwilling to enter Confederation unless secured against the possibility of outside interference with her juridical system is notorious, and will serve to explain this, as well as some other peculiar features in the British North America Act. Upon the constitutional question I was careful to urge whatever occurred to me as being material in support of the opinions expressed, as a slight contribution towards the final determination of this important issue. I now gather from "Your Reader's" letter, that the *Thrasher Case* is about to be submitted to the Supreme Court of the Dominion, a tribunal of acknowledged competency to decide upon it. Under these circumstances it would be superfluous and unbecoming in me to attempt to prolong the controversy.

I cannot refrain, however, from noticing two or three statements in "Your Reader's" letter. He says, "the change of [my] opinions in the Letellier case should have taught [me] a lesson." I am at a loss to imagine what your correspondent means by this assertion. For it is well known to all who care to ascertain the fact, that I have never altered my published opinions on the Letellier question in the slightest particular.

Again, "Your Reader" insinuates that I "may possibly have received communication, perchance at Ottawa, perchance at Victoria, or elsewhere, which has, may be unconsciously, had an influence in biassing [my] mind." Really this supposition is a poor substitute for argument, and a very unworthy weapon of attack. I might content myself with the assertion that this assumption is utterly untrue. But I will go further, and say that my opinions, be they sound or unsound, are exclusively my own, and that I have purposely refrained from inviting discussion with any one upon the matter. I know nothing of the sentiments of any person, either in Ottawa, Victoria or elsewhere, upon the merits of the *Thrasher* judgment, save only what I have seen in print, with the solitary exception of the opinions voluntarily expressed to me by two leading lawyers of Ontario, who both concurred in endorsing the position taken in my letter of May 1st to your journal. One of them added that he should have been disposed to press my conclusions still further. Were I at liberty to mention the names of these gentlemen, they would be recognized by common consent as two of the most able and experienced constitutional lawyers in Canada.

I have only to add, in reference to "Your Reader's" expressed surprise at my assertion that the British Columbia Judges had in vain appealed for support against the Local Legislatures to the Imperial as well as to the Dominion Governments - a statement which he declares I must have gathered from some source outside of the judgment,—that I find my warrant for it in Mr. Justice Crease's remarks (pp. 37, 38 of the *Thrasher Case*), where he refers to a protest, signed by all the Judges of the Court, addressed "to the Minister of Justice, and (it being ultimately possibly an Imperial matter) to the Secretary of State." But, it is added, "their most urgent representations to both Governments failed to elicit one single legal reason in answer to their respectful protests."

It is undoubtedly a subject for regret that the Dominion Government has not, so far as we know, seen fit as yet to authorize an investigation into the grievances complained of by the British Columbia judiciary. For while the jurisdiction of the Provincial Legislatures in all matters assigned to them in the distribution of powers, by the 92nd section of the B. N. A. Act,

is absolute as well as "exclusive," and cannot be impaired by any legislation of the Dominion Parliament,—to which, therefore, it is in vain to appeal for the redress of any complaint or inconvenience resulting from the operation of this statute,—there still remains the supervisory control of the Crown over all acts of legislation, whether within or without the competency of any Colonial or Provincial Legislature, to which resort can be had to remedy whatsoever grievances may arise out of local legislation.

The limits within which this prerogative power is exercisable in Canada under our existing constitution, I have sought to explain in my work on "Parliamentary Government in the Colonies," p. 358, *et seq.*

Furthermore, I would express my conviction that the remedial exercise of this control of the Crown—however sparingly it may and ought to be invoked—is unquestionably the keystone of the fabric of Confederation, and the only power which can be legitimately put forth to uphold unity of action, and to secure the adoption of sound principles of legislation in the various provinces of our wide-spread Dominion.

A great responsibility rests upon our statesmen in this matter. They are bound, on the one hand, not to yield to sectional outcries against the lawful and appropriate exercise of the prerogative of disallowance; and on the other hand, to be exceedingly careful that this prerogative is never made use of for party purposes, or otherwise than to protect and promote the general interests of Canada.

ALPHEUS TODD.

Ottawa, June 20, 1882.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

BANKING.

The History, Law and Practice of Banking, with an appendix of statutes. By Charles M. Collins. London, 1882.

BUILDING LEASES AND CONTRACTS.

The Law relating to Building Leases and Contracts, the improvement of land by and the construction of buildings, with a full collection of precedents of agreements for building leases; building leases, contracts for building, building grants, and other forms with respect to matters connected with building; together with statutes relating to building, with notes and the latest cases under the various sections, and a glossary of architectural and building terms. By Alfred Emden. London, 1882.

CLAIMS AND DEFENCES.

Forms of Claims and Defences in the Chancery Division of the High Court of Justice, with notes containing an outline of the law relating to each of the subjects treated, and an appendix of forms of endorsement on the writ of summons. By C. Stewart Drewry. London, 1876.

CONVEYANCING ACT.

Common Precedents in Conveyancing, together with the Conveyancing and the Law of Property Act, 1881, and the Solicitor's Remuneration Act, 1881. By Hugh M. Humphrey. London, 1881.

CONVEYANCING.

The Conveyancing and Law of Property Act, 1881, and the Vendor and Purchaser Act, 1874, with notes. By W. Manning Harris and Thomas Clarkson. London, 1882.

CONVEYANCING.

The Conveyancing and the Law of Property Act, 1881, being an Act to simplify conveyancing, with introduction, summary and practical notes and conveyancing precedents; and an appendix, containing Lord Cranworth's Act, 1860, The Vendor and Purchaser Act, 1874, The Settled Estates Act, 1877, and The Solicitor's Remuneration Act, 1881; with careful cross references and copious index and forms for use under the Act. By J. S. Rubinstein. 3rd edition. London, 1882.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Effect of the death of an acceptor of a bill of exchange, blank or to drawer's name.—*Irish Law Times*, June 10.

Liability of agents in actions based on fraud.—*Ib.*

Contracts of carriers of goods.—*Irish L. T.*, May 27.

Counter-claim on counter-claim.—*Eng. L. J.*, May 13.

Surviving causes of action.—*Ib.*, June 3.

Duty of Railroad Company to trespasser on its track.—*Albany L. J.*, April 22.

Sale of intoxicating liquor by druggist.—*Ib.*, May 13.

Wagers on horse races.—*Ib.*, May 27.

Emblements—Second crop—Plowing in oat stubble.—*Ib.*, June 17.

Rights and liabilities arising thro' the promotion and formation of a corporation.—*Am. Law Rev.*, May.

Constructive total loss.—*Ib.*

What shall be done with the reports.—*Ib.*, June.

Preferred stock.—*Ib.*

The action for the malicious prosecution of a civil suit.—*Ib.*, May and June.

Causing death by neglect of duty.—*Central L. J.*, June 2.

Imposition of licenses by municipal corporations.—*Ib.*

Defrauded vendors of chattels.—*Ib.*, June 9.

Collateral securities.—*Ib.*, June 16.

The rights and duties of a bailee towards rival claimants of the goods.—*Ib.*

Statutory provisions for leasing railroads.—*Ib.*, June 23.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1882.

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

George S. Lynch Staunton, with Honours, awarded Silver Medal; Arthur O'Heir, Thomas Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Travers Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely:—

William Burgess, jr., Thomas Henry Luscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thomas Ambrose Gorham, Christopher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

And the following gentlemen matriculated as students and articled clerks, namely:—

Graduates—Archibald Cilchrist Campbell, Alexander W. A. Finlay, and James Redmond O'Reilly. Matriculants of Universities—James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold Wm. Fitz Hardinge Berkeley, John Lindsay Snedden, Charles E. Weeks, Alexander James McKenzie, P. Henry Allin, Herbert James Dawson, Angus Wm. Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner Jas. Arnold, James Herbert Kew, Ralph Herbert Dignan, William John McDonald, Shirley B. Ball, Alfred Wm. Lane, Orville Montrose Arnold, Horace Bruce Smith, Jas. Archibald Macdonald, Theodore Augustus McGillivray, Geo. Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis R. O'Reilly. Articled Clerks—E. Considine, D. A. Cameron.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

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

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

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

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1882—The Deserted Village.
The Task, B. III.