The Canada Law Journal.

VOL. XXVI. APRIL 16, 1890. No. 7.

THE Queen's Bench Divisional Court, in *Lamb* v. *Young*, a note of which will be found at page 219 of this number, following *Johnson* v. *Hope*, 17 A.R., *ante* p. 87, decide that an assignee for benefit of creditors under R.S.O., c. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must, in order to succeed, establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full. This is a decided advance on *Molson's Bank* v. *Halter*, 16 A.R., 323.

WE would, in the interest of the profession, most respectfully suggest to the Finance Committee of the Benchers, the desirability of obtaining a repeal of sec. 19 of the Solicitors' Act, relating to fines for failure to take out the annual certificates at the times prescribed. The amount of the fine exacted by the Society from struggling solicitors is altogether excessive and needlessly severe to obtain the end desired, and is, in truth, what it is called and purports to be, a penalty. We know of one instance where a practitioner who had just hung out his shingle was mulcted in the sum of $12, and compelled to pay it, at a time when he was struggling for bare existence. In cases of oversight, the rule operates in a manner not only unjust but oppressive. We would suggest that sec. 19 be repealed, and instead of the antiquated system of penalties, an amendment to the Act be obtained, making the fee for annual certificate $20, to be reduced to $17 if paid at the time prescribed. We think this would be sufficient to ensure punctual payment, and the Society would not then occupy the odious position of levying a tribute on the profession.

EQUITABLE EASEMENTS.

We extract the following article on this important subject from *The American Law Register*. The author, after defining an equitable easement to be a right without profit which the owner of land has acquired by contract, or estoppel, to restrict, or regulate, for the benefit of his own property, the use and enjoyment of the land of another, and distinguishing legal from equitable easements, proceeds:

The principal difference between a legal and an equitable easement is in the method of its creation and the circumstances under which the right can be enforced.

Equitable easements are in general created upon the division and conveyances in severalty of an entire tract to different grantees, and may be by reservation, by condition annexed to the grant, by covenant or by informal agreement: *Trustees of Columbia College* v. *Lynch* (1877), 70 N.Y., 445.

By Covenant or Reservation.—The enforcement in equity of easements created by covenant or reservation extends to cases where the covenant does not run with the land so as to be enforcible at law. This has been settled only after some conflict of authority. In *Keppell* v. *Bailey* (1834), 2 M. & K., 517, certain land owners and owners of iron works, and among others the lessees of the Beaufort Iron Works, formed a joint stock company, and under the provisions of the Monmouthshire Canal Act, constructed a railroad connecting a lime quarry with the several iron works. In the partnership deed of the railroad company, the lessees of the Beaufort Iron Works covenanted for themselves and their successors in interest to procure all the limestone used in their works from the said quarry, and to convey all such limestone, and also all the iron stone, from the mines to the said works along the said railroad, at a certain designated toll. A bill was filed by the shareholders of the railroad to enforce this covenant against a purchaser of the Beaufort Iron Works with notice of the partnership deed. The injunction was denied, on the ground that the covenant did not run with the land. Lord Chancellor Brougham said:—

"It appears to me very clearly that the covenant does not run with the land, and therefore is not binding upon the assignees of the [covenantors] . . . . . Between the estates of the occupiers of the three iron works, and the estates or the persons of their associates in the railway speculation, with whom they covenant, there is no privity, no connection whatever, of which the law can take notice . . . There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all lands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed."

Keppell v. *Bailey* has been overruled by *Tulk* v. *Moxhay* (1848), 2 Phil., 774, where the rule as now accepted was first established. In *Tulk* v. *Moxhay*, the plaintiff, being the owner in fee of a vacant piece of ground in Leicester Square, as well as of several of the houses forming the square, sold the vacant lot to one Ems, in fee, taking in the deed of conveyance a covenant from Ems for himself, his heirs and assigns, with the plaintiff, his heirs, executors and administrators, that the said piece of ground should be kept and maintained in sufficient and proper repair as a pleasure ground, in an open state, uncovered by any buildings, in neat and ornamental order. In granting an injunction to enforce the covenant against the purchaser with notice, Lord Chancellor Cottenham used this language:—

"It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant runs with the land is evident from this, that if there were a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

To the same effect, *Bleeker* v. *Bingham* (1832), 3 Paige (N.Y.), 246; *Barrow* v. *Richards* (1840), 8 Id., 351; *Coles* v. *Sims* (1854), 5 De G.M. & G., 1, and cases cited in note (2); *Whatman* v. *Gibson* (1838), 9 Sim., 196; *Lord Manners* v. *Johnson* (1875), L.R., 1 Chy.D., 673. *Earl of Zetland* v. *Hislop* (1882), L.R., 7 App. Cas., 427; *Gaskin* v. *Balls* (1879), L.R., 13 Chy.D., 324; *Trustees, etc.*, v. *Lynch* (1877), 70 N.Y., 440; *Hodge, Ex'r, et al.* v. *Sloan* (1887), 107 Id.. 244; *St. Andrew's Lutheran Church's Appeal* (1871), 67 Pa., 512; *Wilson* v. *Hart* (1866), L.R., 1 Chy., 463. These covenants may be said to run with the land in equity, though not in law.

An exception to the rule that the covenant need not run with the land at law is made in those cases in which the promise under seal calls for the performance of some positive act on the land, either of covenantor or covenantee. Thus in *Austerberry* v. *The Corporation of Oldham* (1885), L.R., 29 Chy.D., 750, a number of the inhabitants of the borough, being desirous of constructing a new road, executed a deed of settlement, which recited that the making of the proposed new road would be of great public advantage; that the several parties thereto had agreed to form amongst themselves a joint stock company and to raise capital for the purchase of land for the formation of the road and making and maintaining the same, and that certain trustees had been appointed to carry out the work in accordance with a plan therein minutely described. The trustees purchased from one Elliott, the plaintiff's predecessor in title, a strip of land in the line of the proposed turnpike, at the same time covenanting for themselves, their heirs and assigns, that they, or some one of them, would, within three years, make and fence off, in a workmanlike manner, the said tract of land into a road, to form part of the road provided for in the deed of settlement, and to form the remainder of said road, which, when completed, should be kept open and maintained by the said trustees for the use of the public, subject to such tolls as should be agreed upon. Under a Borough Improvement Act, the defendant purchased the said road, gave notice to the plaintiff to repair the portion on which his property fronted, and upon refusal, proceeded to make the repairs himself. An attempt was made to collect the expenses from the plaintiff, who filed a bill praying *inter alia*, an injunction restraining the defendants from further prosecution. The injunction was refused. Lord Justice Cotton said:—

"In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation, or

the trustees, from using the land in any particular way. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, that is, from its being used as a road or street, that would be a very different question. . . But here the covenant, which is attempted to be insisted upon, . . . is a covenant to lay out money in doing certain work upon this land; and, that being so, . . . it is not a covenant which a court of equity will enforce; it will not enforce a covenant not running at law, when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted; but, . . . a court of equity does not and ought not to enforce a covenant, binding only in equity, in such a way as to require the successors of the covenantor himself—they having entered into no covenant—to expend sums of money in accordance with what the original covenantor bound himself to do."

The rule is now firmly established that the court will not enforce, against the grantee of the covenantor, who has himself entered into no covenant, any covenant of his grantor in relation to the premises conveyed, which does not run with the land and which requires the expenditure of money: *Moreland* v. *Cook* (1868), L.R., 6 Eq., 252; *Haywood* v. *Brunswick Building Society* (1881), 8 Q.B.D., 403; *London & Southwestern Railway Company* v. *Gomm* (1881), L.R., 20 Chy.D., 562.

Huling v. *Chester* (1885), 19 Mo. App., 607, though an action at law, illustrates the distinction between covenants creating easements and covenants which can only be enforced where there is privity of contract. Huling and W. R. Chester being the owners of adjoining lots, by agreement under seal, provided for the erection of a line wall by Huling, and for payment for half of such wall by Chester, within six months from the date of the agreement, or at his option, by himself or his grantees, when he or they built upon the premises using the part of the wall standing thereon. Prior to his death, Huling placed the line wall as agreed, one half on the W. R. Chester lot. C. M. Chester, the defendant, purchased the lot from W. R. Chester, with notice of the contract, and erected a building on the lot, using the party wall. This action was brought by the heirs of Huling to recover the cost of one half of the wall. The court held that the plaintiffs could maintain an action for any interference with their enjoyment of the easement in the party wall, but could not, as owners of the Huling lot, maintain an action for the compensation which was to be paid to Huling personally. The right being personal to Huling, upon his death went to his personal representatives.

There is a class of cases in which equity grants relief by compelling the expenditure of money in the performance of the covenant, but in these cases the remedy is sought against the original covenantor, and relief is granted by way of specific performance, and is regulated by principles affecting that branch of equitable jurisdiction. Of this class of cases, *Randall* v. *Latham* (1869), 36 Conn., 48, is an example. In that case, the complainant claimed a right, under one Thomas, to the water from a raceway. Thomas, and the respondent Latham, who was the original covenantor, were respectively the owners of mills on the same stream. Thomas conveyed to Latham a tract of land adjoining the mill of the latter. The deed contained a reservation that the grantor should have the privilege of drawing water from the ditch of Latham's mill, and that

Latham and his successors should keep a spout ten inches square in the inside at the bottom of the ditch, to which the grantor should at all times have access for the purpose of drawing water. The ditch was never owned by Thomas, and he had no interest in it, beyond that acquired by this provision in his deed to Latham. The Court sustained the complainant's bill, saying—

"The deed purports to require the respondent to put in the spout upon land not conveyed, and the question is whether a court of equity can compel him to do it under the circumstances of the case. That the respondent, by accepting the deed containing the provision, thereby agreed to perform this duty, there can be no doubt. This duty was a part of the consideration of his deed. The respondent has received full compensation, and it is difficult to see why he is not bound to perform it."

In the case of easements created by reservation, courts of equity are more liberal than courts of law. On technical grounds, there is doubt whether at law, a reservation in a deed of conveyance, will create an easement in other lands of the grantee than the lands granted and conveyed to him. In equity there is no embarrassment on this subject. Thus, in *Case* v. *Haight* (1829), 3 Wend. (N.Y.), 632; s.c. 1 Paige (N.Y.), 447, Schuyler owned the south side of the lower falls in the outlet of Lake George, and also the land under the bed of the stream. Deals and Nichols were the owners of the lands on the north shore, and to them he made a grant of the bed of the stream, reserving to himself, his heirs and assigns, the right to abut any dam, or dams, on both sides or shores of the said waters. An injunction was granted to restrain a breach of the covenant. In construing this reservation, Sutherland, J., said—

"The reservation can have no effect as an exception. . . . . The deed of Schuyler did not convey, or profess to convey, any part of the north shore; he could not therefore reserve a right to build a dam against it. But, though void as an exception, the reservation is binding upon the grantees and their assigns, and becomes operative either as an implied covenant or by way of estoppel. The deed is to be construed as though the parties had mutually covenanted that each should have a right to butt a dam upon the shore of the other."

By Parol Agreement.—In *Tulk* v. *Moxhay* (1848), 2 Phil., 774, it was said, that if there was a mere parol agreement, and no covenant, the court would enforce it against a party purchasing with notice, on the ground that if an equity be attached to the property by the owner, no one purchasing with notice of that equity, can stand in a different situation from the party from whom he purchased. The agreement may be either written or oral. Thus, in *Tallmadge* v. *The East River Bank* (1862), 26 N.Y., 105, the owner of lots on both sides of a city street made a plan exhibiting the street as widened eight feet on each side, and represented to several vendees of different lots that all the buildings to be erected on the lots he had sold and should sell, should stand back eight feet from the line of the street. The vendees erected buildings in conformity with this plan: none of them being restricted by their conveyances or bound by any covenant in respect to the extent or mode of their occupation. An injunction was granted to restrain a subsequent purchaser of one of the lots, with constructive notice of the facts, from building upon the eight feet adjoining the street. The Court said—

"From the facts found by the judge at special term, it appears . . . . that the strips of eight feet in width on both sides of the street should not be built upon, but kept open. It is to be presumed that they [the purchasers] would not have bought and paid their money except upon this assurance. It is to be presumed that, relying upon this assurance, they paid a larger price for the lots than otherwise they would have paid. Selling and conveying the lots under such circumstances and with such assurances, though verbal, bound Davis [the vendor] in equity and good conscience to use and dispose of all the remaining lots, so that the assurances upon which Maxwell [a purchaser and one of the plaintiffs in the suit] and others had bought their lots, would be kept or fulfilled. This equity attached to the remaining lots, so that any one subsequently purchasing from Davis any one or more of the remaining lots, with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity."

To the same effect, *Parker* v. *Nightingale* (1863), 6 Allen (Mass.), 341; *Newman* v. *Nellis* (1884), 97 N.Y., 285; *Lenning* v. *The Ocean City Ass'n* (1886), 14 Stew. Eq. (N.J.), 606. The mere exhibition, however, of a plan, with proposed streets and buildings marked upon it, or representing the land as laid out in a particular manner, will not create a contract, in the absence of any stipulation affecting the course of improvements: *Squire* v. *Campbell* (1836), 1 Myl. & Cr. 458. The apparent conflict between these cases is explained by difference in the facts involved. In the New York case, the facts found by the judge at special term, and the facts admitted by the pleadings, showed that the lots were bought upon the assurance or agreement of Davis that all the houses on the plan, as shown in the map, were to be set back eight feet from the street. In the English case, the plan was exhibited upon the treaty for a lease. The lease as executed, contained on the margin another plan which did not extend to include that part of the property on which the injunction, if granted, would operate. In the former case, the evidence established a parol contract collateral to the grant; in the latter, the affidavits presented tended to vary the extent and form of the plan as embodied in the lease, and, in that respect, to alter the terms of the written contract.

The restriction on the use of the property must not amount to a general restraint of trade; for the law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital, in any useful undertaking in the kingdom, would be void: *Homer* v. *Ashford* (1825), 3 Bing., 326; *Brewer* v. *Marshall* (1868), 14 C. E. Green (N.J.), 537.

The rule as to what will constitute an illegal contract, as laid down in the leading case of *Mitchell* v. *Reynolds* (1711), 1 P. Wms., 181, is that where the restraint is not general, but partial, and is founded on a valuable consideration, it cannot be said to be an unreasonable restraint; and a restraint preventing a person from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the nature of the trade: *Catt* v. *Tourle* (1869), L.R., 4 Chy. App., 654; *Trustees, etc.*, v. *Lynch* (1877), 70 N.Y., 440; *Hodge* v. *Sloan* (1887), 107 Id., 244; *Wilson* v. *Hart* (1866), L.R., 1 Chy. App., 463; *Luker* v. *Dennis* (1877), L.R., 7 Chy. D., 227.

Change in Character of Property.—A court of equity will not enforce a covenant of the character under consideration, where the complainant has caused or permitted a material change in the property, for the benefit of which the scheme of restriction was adopted, nor where, by reason of the altered condition of the property, it would be oppressive to give effect to the covenant or agreement. This question arises in three classes of cases: *first*, where the complainant has himself altered the condition of the property with respect to which the scheme of improvement was devised; *second*, where he has permitted breaches by other covenantors; and, *third*, where the condition of things has been altered by changes referable to the acts of others. Thus in *Duke of Bedford* v. *Trustees of the British Museum*, often cited as the British Museum case, (1822), 2 M. & K., 552, the Duke of Bedford, being the owner of all the property in the neighbourhood of the British Museum, for the protection of a large part of that property, took a covenant from the person to whom he sold or let other parts of the property, restricting them from building otherwise than in a particular way. He afterwards himself built upon a large part of the property which was originally intended not to be built upon. In refusing his application for an injunction to restrain the defendant, being the grantee of the original covenantor, from building in violation of the covenant, the Court said—

"If this deed is permitted to be urged against what I must call, not the legal, but the actual intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed; but you cannot, under such circumstances, come into a court of equity for a remedy which the court never grants, except in cases where it would be strictly equitable to grant it. It is impossible to state as the doctrine of a court of equity, that the court will carry into execution a specific covenant, in all cases where the legal intention of the deed is found. . . . . The question is whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state."

To the same effect are *Sayres* v. *Collyer* (1883), L.R., 24 Chy. D., 180; *Lattimer* v. *Livermore* (1878), 72 N.Y., 174.

Where the covenant is framed to provide uniformity in the mode of building, so that the enjoyment which springs from regularity in a series of dwellings may be preserved, he who seeks to enforce the covenant must suffer no such breach of the stipulation by other grantees as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement. Thus, in *Roper* v. *Williams* (1822), 1 T. & R., 17, the defendant Williams had conveyed to the plaintiff a piece of ground, being part of a larger tract, convenanting for himself, his heirs, appointees and assigns, that all buildings to be erected on the adjoining land of the grantee should be built in a certain manner. The bill stated that Williams had contracted to sell, and was about to convey to the defendant, Burnand, part of the land belonging to him to the west of the plot conveyed to the plaintiff, without requiring any stipulation that Burnand should refrain from building houses in a manner not comformable to his covenant, and that Burnand had agreed to let the land for the erection of houses not in conformity with the covenant. It appeared by affidavits, that four years previously another

grantee of part of the tract had been permitted to build in disregard of the restriction. Lord Chancellor Eldon said—

"Every relaxation which the plaintiff has permitted, in allowing houses to be built in violation of the covenant, amounts *pro tanto* to a dispensation of the obligation intended to be contracted by it. Very little, in cases of this nature, is sufficient to show acquiescence; and courts of equity will not interfere unless the most active diligence has been exerted throughout the whole proceeding. . . . . In every case of this sort, the party injured is bound to make immediate application to the court in the first instance; and cannot permit money to be expended by a person, even though he has notice of the covenant, and then apply for an injunction. Taking all the circumstances together, the permission to build contrary to the covenant, and the laying by, four or five months, before filing the bill, this is not a case in which a court of equity ought to interfere by injunction, but the plaintiff must be left to his remedy at law."

So, also, *Peek* v. *Matthews* (1867), L.R., 3 Eq., 515; *Gaskin* v. *Balls* (1879), L.R., 13 Chy. D., 324; *Eastwood* v. *Lever* (1863), 4 DeG., J. & S., 114; *Child* v. *Douglass* (1854), 5 DeG., M. & G., 739.

The waiver relied upon, must be in respect of a material violation of the covenant. In *German* v. *Chapman* (1877), L.R., 7 Chy. D., 271, the law is recognized to be, as stated in *Roper* v. *Williams*, that—

"If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely, or so substantially changed, as that the whole character of the place or neighbourhood has been altered, so that the whole object for which the covenant was originally entered into, must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harassing and annoying some particular man, where the court could see he was not doing it *bona fide*, for the purpose of effecting the object for which the covenant was originally entered into."

The Court (in *German* v. *Chapman*) then proceeded—

"That is very different from the case we have before us, where the plaintiff says that in one particular spot, far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate who had taken covenants of this kind from several persons, could not do an act of kindness, or from any motive whatever, relax in any single instance any of these covenants, without destroying the whole effect of the stipulations which other people had entered into with him. For instance, in this very case, application was made to the plaintiff for a waiver. It would be monstrous to suppose, if he had acceded to that application, that therefore he was, by the mere act of kindness to the defendants themselves, destroying the whole benefit of the covenants as to all the rest of the estate."

The same ruling in *Western* v. *Macdermott* (1866), L.R., 1 Eq., 499, *s.c.* affirmed on appeal (1866), L.R., 2 Chy. App., 72; *Kent* v. *Sober* (1851), 1 Sim., N.S., 517.

Where a contingency has happened, not within the contemplation of the parties, which imposes upon the property a condition frustrating the scheme devised by them, and defeating the object of the covenant, thus rendering its enforcement oppressive and inequitable, a court of equity will not decree such enforcement. In *Trustees of Columbia College* v. *Thatcher* (1881), 87 N.Y., 311, the covenant was not to erect, establish or carry on in any manner, on any part of the said lands, any stable, school-house, engine-house, tenement or com-

munity house, or any kind of manufactory, trade or business whatsoever, or erect or build, or commence to erect or build, any building or edifice with intent to use the same, or any part thereof, for any of the purposes aforesaid. The breaches relied on by the plaintiff were that the defendant permitted the use of the several rooms in the houses upon the premises by his tenants, for the business of a tailor, milliner, insurance agent, newspaper dealer, tobacconist, and two express carriers. It also appeared that the general current of business had reached and passed the premises, and that during the pendency of the action, an elevated railroad was built with a station in front of such premises, which the trial court found affected them injuriously, and rendered them less profitable for the purpose of a dwelling house, but did not render their use for business purposes indispensable. The evidence also disclosed that the station covered a portion of the street, its platform occupied half the width of the sidewalk in front of defendant's premises, and from it persons could look directly into the windows, and that this, with the noise of the trains, rendered privacy and quiet impossible, so that large depreciations in rents and frequent vacations followed the construction of the road. Mr. Justice Danforth, speaking for the Court, said—

"It is now claimed by the appellant that there has been such an entire change in the character of the neighbourhood of the premises, as to defeat the object and purpose of the agreement, and that it would be inequitable to deprive the defendant of the privileges of conforming his property to that character, so that he could use it to his greater advantage, and in no respect to the detriment of the plaintiff. The agreement before us recites, that the object which the parties to the covenant had in view was 'to provide for the better improvement of the lands, and to secure their permanent value.' It certainly is not the doctrine of court of equity to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree, according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable. . . . If for any reasons, therefore, not referable to the defendant, an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere; or if, in fact, the condition of the property by which the premises are surrounded, has been so altered 'that the terms and restrictions' of the covenant are no longer applicable to the existing state of things. . . . And so, though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff. . . . In the case before us, the plaintiffs rely upon no circumstances of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed. But, on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled."

See also the *dictum* above quoted from *Roper* v. *Williams* (1822), 1 T. & R., 17.

Object of Restriction.—It must also appear, either from the terms of the agreement, from the circumstances in which it originated, or the situation and condition of the property, that the restriction was intended to benefit that property, and not merely for the personal advantage of the original covenantee: *Keates* v.

Lyon (1869), L.R., 4 Chy. App., 218; *Parker* v. *Nightingale* (1863), 6 Allen (Mass.), 341; *Peck* v. *Conway* (1876), 119 Mass., 546; *Sharp* v. *Ropes* (1872), 110 Id. 381; *Clark* v. *Martin* (1865), 49 Pa., 289; *Tod-Heatly* v. *Benham* (1888), L.R., 40 Chy.D., 80. In *Nottingham Patent Brick and Tile Company* v. *Butler* (1886), 16 Q.B.D., 778, Lindley, L.J., stated the law to be as decided in *Harrison* v. *Good* (1871), L.R., 11 Eq., 338, "that it is an inference of fact in each case, whether the purchasers are bound *inter se* by such covenants, and that the mere fact that the vendor does not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers, is not material." It is the community of interest in the beneficial restriction which necessarily requires and imports reciprocity of obligation. This in *Renals* v. *Cowlishaw* (1878), L.R., 9 Chy.D., 125, the former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the defendant's predecessors in title, who entered into a covenant to build upon the land thereby conveyed, within a certain distance from a particular road; that the garden walls or palisades to be set up along the sides of the said road should stand back a certain distance from the centre of the road; that any house to be built upon the land adjoining the road, should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling houses only. The conveyance did not state that this covenant was for the protection of the residential property, or in reference to the adjoining pieces of land, or make any statement or reference thereto. Other pieces of the adjoining lands were subsequently sold, and the conveyance to the purchaser in each case contained restrictive covenants similar to that above mentioned. The same vendors afterwards sold the residential estate to the plaintiff's predecessors in title. The conveyances contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the conveyance to the plaintiffs, a covenant not to build a public house or carry on offensive trades upon a particular portion of the property conveyed, thus limiting their use of the purchased property, but not co-extensively with those convenants first given. Vice-Chancellor Hall dismissed a bill to restrain the defendants from building in contravention of the first mentioned covenants. In his judgment he said:

"From the cases . . . it may, I think, be considered as determined, that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that the right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but where a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of

the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant; whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important."

The Vice-Chancellor, being satisfied that the restrictive covenant was not inserted for the benefit of the particular property, but to enable the vendors to make the most of the property they retained, refused to order an injunction. This decision was affirmed by the Court of Appeals in (1879), L.R., 11 Chy.D., 866, and cited with emphatic approval in *Spicer* v. *Martin* (1888), L.R., 14 App. Cas. 12; *Master* v. *Hansard* (1876), L.R., 4 Chy.D., 718; *Badger* v. *Boardman* (1860), 16 Gray (Mass.), 559; *Tobey* v. *Moore* (1881), 130 Mass., 448; *Thurston* v. *Minke* (1870), 32 Md., 487. And where the restrictions are made for the benefit of the property, and enure in favor of the persons who become the respective owners of it, the original covenantee cannot by release discharge any part of it except such as he still retains: *Raynor* v. *Lyon* (1887), 46 Hun. (N.Y.), 227.

Title to land within the tract, for the common benefit of which the easement is created, is the only other requisite to support a prayer for an injunction to restrain a violation of the covenant by any proprietor. As restrictions of this nature are intended for the mutual protection of all the proprietors, neither privity of contract nor privity of estate is essential, and a prior may have a remedy against a subsequent purchaser of part of the same tract, even when a parol representation of a uniform building plan is the sole evidence of the contract: *Tobey* v. *Moore* (1881), 130 Mass., 448; *Talmadge* v. *The East River Bank* (1862), 26 N.Y., 105; *Gibert* v. *Peteler* (1868), 38 Id., 165; *Green* v. *Creighton* (1861), 7 R.I., 1.

It is necessary that the defendant purchase with full notice of the agreement. It is binding upon him, not because he stands as assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform: *Whitney* v. *Union Ry. Co.* (1858) 11 Gray (Mass.), 359; *Phœnix Ins. Co.*, v. *Continental Ins. Co.* (1882), 87 N.Y., 400. And slight circumstances will be construed as equivalent to notice of the existence of the equity. Thus, in *Talmadge* v. *The East River Bank*, cited above, the uniformity in the position of houses erected in the immediate neighborhood, in conformity with a general building plan, was held to be sufficient to put the purchaser on inquiry and charge him with notice. Similarly, *Salisbury* v. *Andrews* (1880), 128 Mass., 336; *Morland* v. *Cook* (1868), L.R., 6 Eq., 252.

It remains only to consider what will amount to a violation of an equitable easement, and the remedy which a court of equity will apply. The owner of the servient tenement can do no act on his land which interferes substantially with the easement, or with those rights which are requisite to the full enjoyment of its benefits; but the utmost extent of the duty which rests on the owner of the

servient tenement, is not to alter its condition so as to interfere with the enjoyment of the easement: Gal. & What. on Ease't, 7, 339; *Kirkpatrick* v. *Peshine* (1873), 9 C. E. Green (N.J.), 206; *Johnston* v. *Hyde* (1881), 6 Stew. Eq. (N.J.), 632. The extent to which the owner of the servient tenement is interdicted from the exercise of acts of ownership on his lands, will depend on the nature and qualities of the easement: *Atkins* v. *Bordman* (1841), 2 Metc. (Mass.), 457. Where a penalty or forfeiture is annexed to the doing of the act prohibited, this penalty does not authorize the party to do the act, and before the act is done, the Court will restrain him by injunction, unless it appears from a fair construction of the instrument that it was intended to make the stipulated sum the price of non-performance; but if the act is done the penalty must be paid, and the amount is unimportant: *French* v. *Macale* (1842), 2 Dru. & War., 269; *Coles* v. *Sims* (1854), 5 DeG. M. & G., 1; *The Phœnix Ins. Co.* v. *The Continental Ins. Co.* (1882), 87 N.Y., 400; *The Diamond Match Co.* v. *Roeber* (1887), 106 Id., 473; *National Provincial Bank of England* v. *Marshall* (1888), L.R., 40 Chy.D., 112. Nor is it necessary to show that any damage has been done. A covenantee has the right to have the actual enjoyment of the property, *modo et forma*, as stipulated for by him. The mere fact that a breach of the covenant is intended, is a sufficient ground for the interference of the court by injunction: *Kirkpatrick* v. *Peshine* (1873), 9 C. E. Green (N.J.), 206.

The usual and proper equitable remedy for a breach of a negative covenant or agreement, is an injunction. This will be awarded as of course, upon proof of the complainant's right and its violation by the defendant. In some cases, the court will import a negative quality into the covenant, and enforce the right by injunction: Kerr's Injunctions in Equity, 521; *Newman* v. *Nellis* (1884), 97 N.Y., 285. Thus, in the English brewers' leases, covenants are usually inserted stipulating for the purchase from the lessor of all the beer consumed at the public house demised. Such rights will be protected by injunction, against assignees with notice, even where they extend to other public houses held by the same lessees under other landlords: *Luker* v. *Dennis* (1877), L.R., 7 Chy.D., 227; *Catt* v. *Tourle* (1869), L.R., 4 Chy. App., 654. The ground of decision is, that the grant of an exclusive right of this description, contained in a covenant, is equivalent to a negative covenant, and the cases are thus brought under the operation of the rule in *Lumley* v. *Wagner* (1852), 1 D. M. & G., 604, that wherever a court of equity has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, so far as they can be bound, to a true and literal performance of their agreements, and will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. By thus importing a negative quality into an affirmative covenant, the courts have assumed to enforce agreements of which specific performance could not be decreed: *Cooke* v. *Chilcott* (1876), L.R., 3 Chy.D., 694. The propriety and extent of this exercise of jurisdiction it is not within the scope of the present article to examine.

Where interference with the easement is merely threatened, the preventative remedy by injunction is always adequate to the exigencies of the case; but if there has been an actual interference, a mandatory injunction may become necessary to supplement the usual remedy. The power of the court to grant such relief, though once questioned, is now admitted beyond doubt. In *Rankin* v. *Huskisson* (1830), 4 Sim. 13, the agreement was that no buildings should be erected on the plot of ground, south of the demised premises. The complainants built thereon, and afterwards the defendants began to erect stables on the adjoining land. Vice-Chancellor Shadwell awarded an injunction restraining the defendants, not only from continuing the projected buildings, or commencing any other buildings whatever, on the plot of ground described in the pleadings, or any part thereof, but also from permitting such part of said building as had been already erected to remain thereon. See note (1) to *Rankin* v. *Huskisson*; Kerr on Injunction, 231. The extreme limit of this jurisdiction, however, is the restoration of the property to its condition at the time the wrongful act or neglect began.

As has been said, specific performance of a proper covenant to perform positive acts, will be decreed, if the covenant is one which runs with the land, or if the bill is filed against the original covenantor. What are proper covenants under this head of equitable jurisdiction is a question to be determined solely under the rules regulating the granting of that kind of relief. It is unnecessary to discuss its limitations here.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports for March comprised in 24 Q.B.D., pp. 269-360; 15 P.D., pp. 25-36; 43 Chy.D., pp. 185-315; 15 App.Cas., pp. 1-51.

PARTNERSHIP—INTEREST IN LAND—AGREEMENT TO RETIRE—INTEREST IN LAND—STATUTE OF FRAUDS AGREEMENT EVIDENCED BY DRAFT—MORE FORMAL DOCUMENT INTENDED—SPECIFIC PERFORMANCE—RIGHT TO USE NAME OF RETIRED PARTNER.

Gray v. *Smith*, 43 Chy.D., 208, was an action for the specific performance of an agreement for the retirement of two partners from a firm, in which one or two points of law arise. The firm was composed of Gray, Smith & Bennett, and the agreement which the action was brought to enforce was as follows: "Rough draft—Memorandum from Gray, Smith & Bennett: This is to record that, in consideration of William Gray, or his executors, paying H. C. Bennett, or his assigns, the sum of £100 on the 1st of January, 1890, and the sum of £100 on the 1st of January for the nine succeeding years, H. C. Bennett agrees to withdraw from the firm of Gray, Smith & Bennett." This was signed by Bennett and delivered by him to the plaintiff. In the first place, the question was raised before Kekewich, J., whether this agreement was a sufficient memorandum within the Statute of Frauds of the assignment of Bennett's interest in the partnership lands. That learned judge was of opinion that though a partnership in

land may be proved by parol evidence, yet an agreement by one partner to assign his share in the land held in partnership to another must be evidenced by a sufficient memorandum within the Statute of Frauds, and that the memorandum was sufficient, within the statute. Then it was urged that the memorandum was not conclusive, because it was apparent a more formal document was intended to be drawn up; but he was of opinion that all material parts of the agreement had been embodied in the "rough draft," and though it might be intended to reduce it afterwards to a more business-like shape, yet the agreement was, without that being done, a binding and enforcible contract. On appeal the first point was not argued, but the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) expressed their approval of Kekewich's decision, that a writing was necessary for the assignment of a partner's share in partnership lands, and they also affirmed his decision as to the memorandum being sufficient under the Statute of Frauds and enforcible, notwithstanding a more formal document was intended. They also decided the further question, that as there was no agreement to assign the good-will, Gray had no right to use Bennett's name by carrying on the business in the name of the old firm. The point as to the agreement being a concluded one is neatly put by Cotton, L.J., thus: "They did not intend to leave to their solicitors whether they should make an agreement, but only how the agreement they had made should be carried out."

EXECUTION OF POWER—GENERAL BEQUEST—WILLS ACT, S. 27—(R.S.O., C. 109, S. 29).

Phillips v. *Cayley*, 43 Chy.D., 222, is a decision of the Court of Appeal which sets at rest a point which has been the subject of conflicting decisions in the courts below. North, J., *In re Marsh*, 38 Chy.D., 630, having taken one view, and Kay, J., in *Charles* v. *Burke*, not reported, and Chitty, J., in *Robinson* v. *Burke*, 41 Chy.D., 417, and Kekewich, J., in the present case, having taken the other, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirmed that taken by the majority of the judges in the courts below. Under the Wills Act, s. 27 (R.S.O., c. 109, s. 29), a general bequest in a will is to be construed to include any personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention appears by the will; and the question was, whether a general bequest in a will would, under the statute, be an execution of a power which imposed a condition on the mode of its execution by will, which condition was not complied with by the will in question. In this particular case the condition imposed by the settlement was, that the power, if exercised by will, must expressly refer to the power, and the will in question contained no reference to the power. Under these circumstances the Court of Appeal, agreeing with Kekewich, J., held that the statute did not apply, and that the will was not an execution of the power.

SHIP—MARITIME LIEN—TOWAGE.

In *Westrup* v. *Great Yarmouth S. C. Co.*, 43 Chy.D., 241, a question was raised which one would have thought would, in a great maritime nation like

England, have long since been placed beyond the region of controversy, and that was, whether there is any maritime lien for ordinary towage services rendered to a ship? It is somewhat surprising to find that there appears to be hardly any direct authority on the point. Kay, J., determined that there is no lien for such services.

WILL—DEVISE—CONTINGENT REMAINDER—PERPETUITY—REMOTENESS—POSSIBILITY UPON A POSSIBILITY.

In re Frost: Frost v. *Frost*, 43 Chy.D., 246, is a case upon the construction of a will, made by the testator in 1870, and who died the same year, by which a freehold estate was limited to trustees for his daughter E. for life, and after her death, "to the use of any husband whom she may hereafter marry" for his life; and after the death of the survivor of them, to the use of the children of his daughter, as she should appoint, and in default of appointment, to the use of all the children of the daughter who should be living at the death of her and her husband, or should have previously died leaving issue then living; but in case no child of his daughter should be living at the death of such survivor, or should have previously died leaving issue then living, then to the use of such of the testators and of his other daughters as should be then living, or should have previously died leaving issue then living, in equal shares. The will contained a residuary devise. The daughter E. was a spinster at the testator's death, but in 1872 married, and died shortly afterwards without issue. Her husband died in 1888. Kay, J., held that the limitations subsequent to the life estate to the daughter's husband were void for remoteness, and that on his death the estate passed under the residuary devise. He points out that the estate to the trustees was only for the life of E., and that consequently on her death the subsequent limitations to the husband and those in remainder were limitations of a legal estate. That the daughter might have married a person unborn when the testator died, and that, therefore, the limitation over to the children of the marriage would offend against the rule against perpetuities, and that the devise over could not be supported as a contingent remainder because it offended against the rule which prohibits limiting a possibility upon a possibility. The double possibility in this case being the possibility of the daughter marrying a person unborn at the date of the testator's death, and, secondly, her having issue by such person.

WILL—DEBT OF TESTATOR—LEGACY TO CREDITOR—DIRECTION TO PAY DEBTS ONLY—SATISFACTION.

The point *In re Huish: Bradshaw* v. *Huish*, 43 Chy.D., 260, which Kay, J., had to decide was, whether a debt due by a testator had been satisfied by a legacy under the following circumstances: The testatrix in her lifetime had given her nephew, to whom she was not *in loco parentis*, a bond for £1,000, payable within 12 months after her death to him, if living, or to his representatives if he should be dead leaving issue him surviving, but not otherwise. The bond was given on his marriage and was, with the knowledge of the testatrix, assigned to the trustees of his marriage settlement. By her will she made various gifts

to her nephew, including a legacy of £3,000 to him absolutely. A codicil directed "all just and lawful debts" to be paid at once. Kay, J., under the circumstances, held that the bond was not satisfied by the legacy, and that the direction to pay debts had the same effect as a direction to pay debts and legacies, and the distinction drawn by *Edmunds* v. *Low*, 3 K. & J., 318, was not a sound one. The rule that a direction to pay debts, or debts and legacies, is sufficient to prevent a legacy to a creditor from being deemed a satisfaction of the debt, seems anyway a somewhat artificial one.

RESTRICTIVE COVENANT—BUILDING SCHEME ON SALE OF ESTATE—IMPLIED COVENANT BY VENDORS—INJUNCTION.

McKenzie v. *Childers*, 43 Chy.D., 273, was an action to restrain the owners of an estate which had been laid out under a building scheme, and part of which had been sold to the plaintiffs, or their predecessors in title, subject to certain restrictive covenants as to building and use of the property, from selling the residue of the estate without such restrictions. The defendants had not given any express covenant not to sell otherwise than in accordance with the building scheme, but the deeds which they gave to the plaintiffs recited that it was intended to be a part of all future contracts for sale of the other lots that the purchasers should be subject to the same restrictions. The defendants, finding some of the lots which remained on their hands were unsaleable under the restrictions which had been imposed on the plaintiffs and their predecessors in title, were now attempting to sell them free from such restrictions; and it was held by Kay, J., that the recital in the deed was not a mere expression of intention which the plaintiffs were at liberty to change, but that it amounted to a covenant not to permit the unsold portions to be used in a manner inconsistent with the conditions of the building scheme under which the plaintiffs had bought, and the injunction was therefore granted as prayed.

PRACTICE—JUDGMENT IN DEFAULT OF DEFENCE—RELIEF ASKED BEYOND WHAT IS CLAIMED IN STATEMENT OF CLAIM.

Faithful v. *Woodley*, 43 Chy.D., 287, is an illustration of the rule of practice, that on the hearing of a cause, in default of defence, the Court will not grant any relief beyond what is asked by the statement of claim. In this case the action was for foreclosure, and the statement claimed that a specified amount was due, but asked that an account might be taken. The defendant did not appear, and on the motion for judgment the plaintiff asked for a personal order for immediate payment of the amount claimed to be due, but this was refused.

MARRIAGE SETTLEMENT—WIFE'S AFTER ACQUIRED PROPERTY—COVENANT BY HUSBAND TO SETTLE—WIFE'S REVERSIONARY INTEREST—FUND FALLING INTO POSSESSION AFTER WIFE'S DEATH.

Fisher v. *Shirley*, 43 Chy.D., 290, is a decision of Stirling, J., as to the effect of a husband's covenant, contained in a marriage settlement, to settle his wife's future property. The settlement was made in 1841, and contained a covenant by the husband that if the wife, or he in her right, should become entitled to any

other property whatever, the same should be settled on the trusts of the settlement. At the date of the marriage the wife was entitled to a vested interest in an unascertained share of a fund in reversion, expectant upon the death of certain persons. The wife died in 1852, leaving her husband surviving; the fund in question came into possession in 1888, the husband being still living. It was held that the covenant extended to the fund, and was not restricted to property falling in during the coverture, where the husband survives, though it would be so restricted where the wife survives.

TRUSTEE—BREACH OF TRUST—PREVIOUS ADMINISTRATION ACTION—INFANTS—RES JUDICATA.

Worman v. *Worman*, 43 Chy.D., 296, was an action brought against trustees, alleging a breach of trust and claiming relief. The breach of trust complained of was the purchase of an equity of redemption in certain property, upon which part of the trust funds were invested upon a second mortgage. A previous action for administration had been brought by other beneficiaries of the trust, who also complained of the same breach of trust, and the present plaintiffs, who were then infants, were served with the judgment in that action, and by order had liberty to attend the proceedings. That suit was ultimately compromised before any report had been made, and a petition was presented to the Court to which the present plaintiffs were respondents, praying *inter alia* that a partition might be made of the trust property, and that the sum of £2,500, which the plaintiff in that action had agreed to accept as her share in the trust property, might be raised and paid to her, and the proceedings stayed. The alleged breaches of trust were not referred to in this petition, though all the facts connected therewith were disclosed in the previous proceedings. The defendants now contended that the purchase of the equity of redemption having been made as being, in the best judgment of the trustees, the best course to take with a view to protecting the estate from loss, and which had had the effect of saving it from a greater loss, was not a breach of trust, and even if it were, the plaintiffs were precluded from complaining of it by reason of the compromise effected in the previous action to which they were parties; but Kekewich, J., held the purchase of the equity of redemption was a breach of trust, because, by the terms of the trust, the trustees had no power to invest the trust funds in that way, no matter what their motive in doing so may have been; and further, that the former action was merely a compromise of the claim of the plaintiff in that action, and did not estopp the present plaintiffs from complaining of the same breach of trust.

PRACTICE—AWARD—EXTENDING TIME FOR MOVING TO SET ASIDE AWARD—ORD. LXIV., R. 7 (ONT. RULE 485).

The point of practice decided by Kekewich, J., *In re Oliver & Scott's Arbitration*, 43 Chy.D., 310, was, that under Ord. lxiv., r. 7 (Ont. Rule 485), the court has now power to extend the time for moving against an award, although the time limited by 9 & 10 Wm. III., c. 15, s. 2, as enlarged by r. 14 of the same order, may have expired.

ACTION ON FOREIGN JUDGMENT.

Turning now to the appeal cases, we find in *Noniron* v. *Freman*, 15 App.Cas., 1, the House of Lords have affirmed the decision of the Court of Appeal, 37 Chy.D., 344 (noted *ante* vol. 24, p. 203), that an action will not lie on a foreign judgment which is not final and conclusive.

VENDOR AND PURCHASER—CONDITIONS OF SALE—RIGHT TO RESCIND CONTRACT.

In *Wolcott* v. *Peggie*, 15 App.Cas., 42, which was an appeal from the Supreme Court of Victoria, the Privy Council held, where a sale of land had been made subject to a condition that the vendor might annul the sale on his being unable, or unwilling, to remove any objection to the title, and it appeared that the purchasers had conditionally offered to give time for the removal of an objection which they had taken, and that the vendor, on good faith, objected to the proposed conditions, and was thereupon threatened by the purchasers with litigation; that under these circumstances the vendor was entitled to rescind; and the judgment of the court below dismissing the action, which was for specific performance of the contract, after the vendor had given notice of rescission, was therefore affirmed.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

DEAR SIR,—I like your last number much, and I was pleased to see that you had taken that very singular article from *Pump Court* about lithographed signatures, where the judges say that the subject is one upon which no two men could differ—and yet they all differ, the one from the other. The "glorious uncertainty" stands out in bold relief—and what a nice amount of costs might have been incurred if two rich litigants had been the parties interested! It has often struck me that the great facility of appeal from court to court, and the possibility, or even probability, of one winning his case and losing it ultimately, amounts almost to a denial of justice. Especially is this the case when we consider that, after having been encouraged to believe that he is right by judge after judge, a suitor of moderate means may be ruined by his first success, and through reliance on the judges appointed, and well paid, by Government to decide his case. I would suggest that the Government be compelled to pay the costs incurred by the mistake or negligence of the judges whose decisions were reversed on appeal to the court of last resort. The judges might not like it, but it would certainly make them more careful. If I employ a professional man, and by his want of skill or diligence about the work which he is employed to do I suffer damage, he must indemnify me. I employed him relying on the maxim "*cuique in arte sua perito credendum est*," and he turns out not to be sufficiently *peritus*. The public who pay the judges do so believing them to be *peritissimi*. Where is the fallacy?

We have the new Banking Act at last. I hope you will procure a copy, and tell us what you think of it. I, for my part, do not quite like the idea of the good banks guaranteeing the notes of the weaker ones, who might be tempted to issue by this provision—but, *nous verrons*. There, I have sinned by writing you officially in French (to you, a champion of Equal Rights!). Pardonnez, Monsieur. By the way, do you exchange with the *Canada Francais Review?* The last number contains a statement of the amount of Peter's Pence for last year, viz., $600,000, which, at one soul for each penny, would make sixty million souls. A goodly number to make into good Presbyterians, or Methodists, not to say Churchmen. I wish we could so manage it. The *Review* is under the supervision of the Professors of Laval, and is well written.

You will remember that in a little book I printed for private circulation only among my friends, and of which I gave you a copy, I made the following remarks about certain violations of the Act of 1887, amending that respecting the Independence of Parliament: "Many members have since resigned under its provisions, and almost all of them have been re-elected. The Act says nothing about profits (if any) obtained by the violation of the law, leaving the question open, as a matter of conscience, on which honourable members could scarcely have any doubt. Hamlet's uncle had a very strong opinion on the point:—

> "'Then I'll look up,—
> My fault is past—But oh, what form of prayer
> Can serve my turn:—Forgive me my foul murder,—
> That cannot be, since still I am possessed
> Of those effects for which I did the murder,
> My Crown, mine own ambition, and my Queen:—
> May one be pardoned and retain the offence?'
>
> —"*Hamlet, Act 3, sec. 3.*"

I should like to know how far you think the cases referred to in the said note are like one now under the consideration of the Election Committee of our House of Commons, and what in that case, if the alleged offence should be found to have been committed, would be the effect of such finding as regards profits the offenders made by such offence.

Ottawa, 27th March, 1890. W.

[We publish with pleasure the foregoing letter from an old subscriber to this journal and an esteemed contributor to its columns. It was not written for publication, but we think it may be of interest to our readers. We spare no pains in making the JOURNAL useful and interesting to our patrons, and we are pleased that our number for March 17 is approved by so competent a critic and judge as our Ottawa correspondent, *laudatus a laudato*.—ED. C.L.J.]

Reviews and Notices of Books.

The Lawyers' Periodical Statutory Record. By A. H. F. LEFROY. Toronto: Rowsell & Hutchison.

The object of this useful compilation is to show the supplementary amending and repealing enactments since the last Revised Statutes of Canada and of Ontario. It should have a place in the library of every practitioner, as we have found it most useful in saving time in referring to recent legislation.

The Western Law Times. Vol. I.

In 1885 *The Manitoba Law Journal* ceased publication, much to the regret of the profession in Manitoba. *The Western Law Times*, the first number of which has just been published, takes its place. The objects of its editors are to discuss questions of interest to the Bar of Manitoba and of the West, and to digest the current decisions. The first number, excellently printed on good paper, contains the salutatory and an interesting article on Law Schools, besides notes and comments and reports of legal decisions. If it keeps up the promise of its first number, it will prove to be one of the most valuable of our exchanges. We extend to it a hearty welcome, and wish it a generous support and every success.

Notes on Exchanges and Legal Scrap Book.

STATUTE-BARRED MORTGAGE DEBTS.—We cite from the *Law Journal* the following article on the construction of sec. 8 of the English Real Property Limitation Act (1874), corresponding with sec. 23 of R.S.O., c. 111. The Court of Appeal, in *Allan* v. *McTavish*, 2 A.R., 278, and *Boice* v. *O'Loan*, 3 A.R., 167, differ from the result arrived at in *Sutton* v. *Sutton;* and in the later case of *McMahon* v. *Spencer*, 13 A.R., 430, intimate that *Sutton* v. *Sutton* and the subsequent English decisions will not be followed. "Though all would agree that it is well that there should be some limit to the period within which it is possible to disturb the possessor of property, it may appear to many that the law is somewhat arbitrary in the various periods which it has fixed, and that the consequent confusion is wholly unnecessary. Be that as it may, the Legislature in its wisdom has ordained that the subject of the bar of actions by lapse of time should require some research, and we propose in this article to discuss by the light of modern decisions the limitations of actions for the recovery of mortgage debts. The Real Property Limitation Act, 1874, s. 8 (R.S.O., c. 111, s. 23), provides, in effect, that proceedings shall not be taken to recover any sum of money secured by mortgage, or otherwise charged upon or payable out of any land or rent, at law or in equity,

but within twelve years after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless meanwhile some part of the principal or interest shall have been paid, or some acknowledgment of the right thereto shall have been given in writing by the person liable, or his agent, to the person entitled thereto or his agent. After any part payment or acknowledgment the twelve years start afresh. In the well-known case of *Sutton* v. *Sutton*, L.R. 22 Chy.D., 511, it was unsuccessfully contended that this limitation only applied to the remedy against the land, and that the covenant to pay was not barred till twenty years. The Court of Appeal, however, held that the right to the mortgage debt was wholly extinguished. This was quickly followed by the case of *Fearnside* v. *Flint*, L.R. 22 Chy.D., 579, where the plaintiff sought to distinguish his claim from that in *Sutton* v. *Sutton*, as he had a collateral bond. Lord Justice (then Mr. Justice) Fry held that the fact that the covenant was on a separate piece of parchment could make no difference, and decided that his action on the bond was barred. A daring surety endeavoured *In re Powers*, L.R., 30 Chy.D., 291, to avoid payment in an action on a bond, conditioned to be void if the mortgagor paid the principal money and interest in accordance with the covenants in the mortgage. The mortgage debt itself was not barred, but it was contended on behalf of the surety that, as he had made no payment and given no acknowledgment for twelve years, no money could be recovered on his bond. The Court of Appeal decided against the surety. Lord Justice Bowen said: "An action against the mortgagor for the debt is an action to recover money which is charged on land. But an action on a bond given by another person to guarantee payment of that debt is not a proceeding against the same person, nor to recover the same sum; it is an action to recover damages from a third person because the mortgagor does not pay." *In re Frisby: Alison* v. *Frisby*, L.R., 43 Chy.D., 106, the surety was a party to the mortgage deed, and he and the mortgagor jointly and severally covenanted to pay both principal and interest. The claim was not barred against the mortgagor, but as the surety had made no payment himself, it was contended by his representatives that the right of action was dead against his estate. They also relied on the Mercantile Law Amendment Act, which provides that no co-contractor or co-debtor shall lose the benefit of the Statute of Limitations (3 and 4 Wm. 4, c. 42, s. 3) by reason of payment of any principal or interest by a co-contractor or co-debtor. There is not any such saving with regard to the provisions of the Act of 37 & 38 Vict., c. 57. There was a difference of opinion amongst the judges as to whether the said section 8 applied to a surety at all or not, Mr. Justice Kay and Lord Justice Bowen thinking that it did not, while Lord Justice Cotton thought that it did, and Lord Justice Fry expressed no opinion on the point. Their lordships were, however, unanimous in their judgment that, if that section did apply, payment by the mortgagor was sufficient to keep the debt alive against the surety. It may be observed that the section refers not only to a mortgage properly so-called, but also to money "charged upon or payable out of any land or rent." In a recent case the Master of the

Rolls in Ireland has decided that the principle of *Sutton* v. *Sutton* applies to an annuity charged upon real and personal estate, though that case was decided under different sections (*Re Nugent's Trusts*, 19 Law J. Rep. Ir. 140). Mr. Justice Kay held, *In re Stephens: Warburton* v. *Stephens*, L.R., 43 Chy.D., 39, that where a testator charged his debts on his real estate, a debt incurred between six and twelve years before a summons was taken out to adjudicate on it, though barred as against the personal estate was alive as against the realty. *Lewin* v. *Wilson*, L.R., 11 App. Cas., 639, is a decision of the Privy Council on the right of a mortgagee to foreclosure, and Lord Hobhouse, in delivering the judgment of their lordships, said: "In this case their lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeasance or redemption of the mortgage, are payments which . . . . give a new starting-point for the lapse of time." It is presumed that that decision would apply by analogy to any payment made under section 8 of the Limitation Act (R.S.O., c. 111, s 23), so that if money were advanced to A., and both A. and B. entered into covenants to pay, payments by B. would keep the debt alive. Where a man mortgaged a reversionary interest in personalty to his father, but paid no interest and gave no acknowledgment, and the father made another son his executor and residuary legatee, and the reversion did not fall in till nearly thirty years after the date of the mortgage, Mr. Justice Kay held that the executor had a perfect right to retain the property in payment of the mortgage debt, and that no Statute of Limitations applied (*Re Hancock: Hancock* v. *Berry*, 57 Law J. Rep., Chy., 793)."

LIEN FOR MONEYS ADVANCED TO KEEP UP LIFE POLICIES.—Two recent cases, *Re Earl of Winchelsea's Policy Trusts*, L.R., 39 Chy.D., 168, before Mr. Justice North, and *Strutt* v. *Tippett*, before the Court of Appeal on January 30th, show how dangerous it is for a stranger to advance moneys for keeping up a life policy in the expectation of obtaining a lien thereon for his advance, unless it is made upon the request (express or implied) of the beneficial owner of the policy.

In re Leslie, Leslie v. *French*, L.R., 23 Chy.D., 552, in a judgment of Lord Justice Fry (written after he had been appointed a Lord Justice of Appeal, but which Mr. Justice Pearson adopted as his own), it is said, page 560: "In my opinion a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases: First, by contract with a beneficial owner of the policy; secondly, by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; thirdly, by subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property; fourthly, by reason of the right vested in mortgagees or other persons having a charge upon the policy to add to their charge any moneys which have been paid by them to preserve the property." In *The Earl of Winchelsea's Policy Trusts*, L.R., 39 Chy.D.,

172, Mr. Justice North observed: "The principles enunciated by Lord Justice Fry in *Re Leslie* were in substance adopted by the Court of Appeal in *Falcke* v. *The Scottish Imperial Insurance Company*, L.R., 34 Chy.D., 234, and I think the Court intended to lay down exhaustively all the cases in which a person not the sole beneficial owner of a policy, who pays a premium in respect of it, is entitled to a lien upon the proceeds of the policy for the amount which he has paid." But in *Strutt* v. *Tippett*, although the Court held that the stranger who had there paid premiums had not any lien (a decision which seems to have been founded mainly on a special agreement), it would seem that Lord Justice Lindley was of opinion that the list of cases in *Re Leslie* in which a lien could be obtained was not necessarily exhaustive.

In *The Earl of Winchelsea's Case* policies on his life (and apparently in his name) were assigned by way of mortgage, the equity of redemption being reserved to the earl. A term in real estate was vested in trustees in trust, among other matters, out of the income, to keep down the interest and the premiums on the policies. The earl became bankrupt, and some time afterwards died. Meanwhile, the rents being insufficient to provide for payment of a premium, the trustee of the term had advanced the requisite amount to save the policy from lapse. It did not appear that this advance was made at the request either of the mortgagees or of the trustee in bankruptcy (it is not stated whether it was made with the knowledge of the latter). The trustee of the term claimed the application of a fund in Court, representing the balance of the policy moneys which remained after satisfying the mortgage, towards repayment of the premium. Mr. Justice North held that the case was not within the second rule in *Re Leslie*. The trustee of the term had "no trust and no duty in respect of the policy moneys." And the trustee in bankruptcy was declared entitled to the fund.

It would seem that notice of an intended payment of a premium might be important, as in *West* v. *Reid*, 2 Hare, 249, where, the mortgage of a policy being contested by the assignees in bankruptcy of the mortgagor, the solicitors of the mortgagees offered to pay a premium then coming due, if authorized to do so by the assignees; they, however, declined to interfere. The premiums were, in fact, paid by the mortgagees till the life dropped, and it was held that the mortgagees, though not entitled to the policy itself, had a lien for the premiums so paid, with interest. Lord Justice Cotton (L.R., 34 Chy.D., 244), referring to the case, thinks "it might well be held that there were circumstances from which the law would imply a request or a contract to pay these premiums if the policy ultimately turned out to belong to the assignees and not to the party making the payment"; and Lord Justice Bowen observes (p. 249): "Wherever you find that the owner of the property saved knew of the service being performed, you will have to ask yourself (and the question will become one of fact) whether under all the circumstances there was either what the law calls an implied contract for repayment or a contract which would give rise to a lien." Lord Justice Fry, in *Re Leslie*, L.R., 23 Chy.D., 561, refers to the law relating to "confusion:" "If I

pour my gold into your heap, or put my silver into your melting-pot, or turn my corn into that in your granary, I have no right to an account or any relief against you;" but in *Colwill* v. *Reeves*, 2 Campbell, 576, Lord Ellenborough assigns as a reason, because "it is impossible to distinguish what was mine from what was yours;" but such a reason seems inapplicable to a premium, where the amount must be known. And according to 2 Blackstone, 405 (Kerr's ed., vol. ii., p. 358), "if the mixture be by consent, both proprietors have, according to the English as well as the civil law, an interest in common in proportion to their respective shares."

As Lord Justice Cotton observes, L.R., 34 Chy.D., 241, a man who "does work upon a house without request gets no lien on the house for the work done." But in that case the house remains in existence, and to give such a lien would be to allow the stranger "to improve the owner out of his property." As to a policy, however, unless the premium is paid, the policy drops, and it would seem to be on this ground that claims for "salvage" have been urged. "It is said to be contrary to natural equity that one person should gain by another man's loss" (L.R., 23 Chy.D., 562), and possibly the maxim, "*Qui sentit commodum sentire debet et onus*" may give one reason why the question of lien has so often been mooted. Lord Justice Fry, L.R., 34 Chy.D., 254 (like Vice-Chancellor Kindersley in *Aylwin* v. *Witty*, 30 Law J.Rep,Chy., 860), doubts whether the term salvage can with propriety be applied to cases of this description. At all events, a person entitled to an interest in an equity of redemption cannot claim a lien for payment of premiums as against his mortgagee (*Falcke* v. *The Scottish Imperial Insurance Company*, L.R., 34 Chy.D., 243), for "it would be strange indeed if a mortgagor, expending money on the mortgaged property, could establish a charge in respect of that expenditure in priority to the mortgage"—compare *Otter* v. *Lord Vaux*, 6 D.M.G., 638.—*Law Journal*.

Baron Alderson had a very profound dislike to scientific witnesses, especially those of the medical profession, called upon to give an opinion upon the evidence they had heard in court, and he rarely failed in proposing some question to them which eventually proved a floorer.

At the end of a very long examination of a celebrated medical man, who had been called upon to establish the incompetency of a deceased testator to make a will, the witness unfortunately said that he believed "all persons were subject to temporary fits of insanity."

"And when they are in them," asked the judge, "are they aware of their state?"

"Certainly not, my lord," was the reply; "they believe all they do and say, even if nonsensical, to be perfectly right and proper."

"Good Lord!" exclaimed Alderson, "then here have I taken no less than thirteen pages of notes of your evidence, and, after all, you may be in a fit of temporary insanity, talking nonsense, and believing it to be true!"—*The Green Bag*.

DIARY FOR APRIL.

1. Tues....County Court Non-Jury Sittings, except in York.
4. Fri.....Good Friday.
5. Sat.....Canada discovered 1499.
6. Sun.....*Easter Sunday.*
7. Mon.....County Court Sittings for motions begin. Surrogate Court Sittings.
8. Tues....County Court Non-Jury Sittings, except in York.
12. Sat.....County Court Sittings for Motions end.
13. Sun.....*First Sunday after Easter.*
14. Mon.....County Court Non-Jury Sittings in York. Princess Beatrice born 1857.
15. Tues....President Lincoln assassinated 1865.
18. Fri.....First Newspaper in America 1704.
20. Sun.....*Second Sunday after Easter.*
23. Wed.....St. George's Day.
25. Fri.....St. Mark.
27. Sun.....*Third Sunday after Easter.*

Reports.

FIRST DIVISION COURT, COUNTY ONTARIO.

HENRY *v.* THE BOARD OF EDUCATION OF THE TOWN OF WHITBY.

Teacher—Contract of hiring—High School Act—R.S.O., c. 226, s. 47.

Held, under the contract of hiring, and the circumstances set out below, that the plaintiff was not entitled to be paid according to the manner provided for in the High School Act, R.S.O., c. 226, s. 47.

Observations as to the construction and meaning of that section.

[Whitby, Jan 25.

In the month of July, 1886, the plaintiff made application to the defendants as a candidate for the Mathematical Mastership of the defendants' Collegiate Institute. On the 19th of July, 1886, the defendants' secretary communicated to the plaintiff a letter which reads:

"I am directed by the Board of Education to inform you that you have been appointed to the position of Mathematical Master of the Collegiate Institute here, at a salary of $1,000 per annum, subject to the following conditions:—

"That the Board of Education shall retain one month's salary in arrears. That the Board and the teacher may at their option respectively terminate the engagement by giving notice in writing to the other of them, at least three calendar months previously, so as to terminate on the last day of a calendar month. Duties to commence 30th August, 1886."

Thereupon, the plaintiff entered upon his duties as master on the 1st Sept., 1886, and continued to act in that capacity until the 15th Oct., 1888, when the engagement was terminated by mutual consent, both parties waiving notice.

Nothing was said by either party, regarding arrears of salary, and the plaintiff received from the defendants all that he was entitled to, on the basis of monthly payments, at the rate of $1,000 a year.

The plaintiff made claim for a further sum, over what he had already received, and the defendants, by resolution, refused to entertain his claim. On the 11th June, 1889, he commenced this action.

The particulars read thus:

To balance of salary for the year 1886,	$66.67
" balance of salary for the year 1888,	14.15
" interest of $80.82 for 6 months at 6,	2.40
Total,	$83.22

The following is an abstract of the plaintiff's evidence. "There were 205 teaching days, in in 1886, of these I taught 88; I make no claim for that year. In 1888 I ceased teaching here, on the 11th October, at noon. In 1886, I taught 82 days, out of 205 teaching days. I was paid for 4 calendar months in that year; for this year I claim $\frac{82}{205}$ of $1,000. I taught 160½ days in 1888."

Cross-examined:—I have received 2 years pay in full and one month's pay, in addition, and credits for $13.35 on my taxes, and am chargeable with 80c. for telegrams. I abandon any claim for 1888 (query, 1886?). The total amount I have received is $2096.68 and the 80c. for telegrams.

DARTNELL, J.J.—The questions raised for adjudication here are:—

1. What, independent of the High Schools Act, is the true construction of the agreement between the parties?

2. Is the contract in any way controlled, affected or subject to the provisions of the High Schools Act, R.S.O., chap. 226, sec. 47?

3. In either case, has the plaintiff been paid in full, and, if not, how much is he entitled to?

My interpretation of the contract is that it was a hiring for an indefinite period, salary payable and vesting monthly (subject to one month's draw-back), at the rate of $1,000 a year, determinable by either party, on giving 3

months' notice, as required by the letter f appointment.

Upon this construction of the contract, and without regard to the other question raised, I think the plaintiff has been fully paid.

Section 47 of the High School Act, R.S.O. chap. 226, enacts :—

"Every master or assistant of a High School shall be entitled to be paid his salary for the authorized holidays occurring during the period of his engagement with the trustees, and in case his engagement extends three months, or over, he shall then be paid in the proportion which the number of days during which he has taught bears to the whole number of teaching days in the year.

The word "then" I take to mean "in that case."

S.154 of the Public Schools Act (R.S.O.,c. 225) provides that :—

"Every qualified teacher of a public school, employed for any period not less than three months, shall be entitled to be paid his salary in the proportion which the number of teaching days during which he has taught in the calendar year bears to the whole number of teaching days in such year."

The words in italics are added in the last revision and are not to be found in the former Act ; the words "months *and* over" now read "months *or* over." If the altered phrases have made any change in purport or effect, the former Act must govern, for the contract in question was made before the new revision came into effect (see 50 Vict., c. 2, s-s. 3 of s. 9.) The Interpretation Act, s. 15, enacts that "year" shall mean a "calendar year."

The plaintiff contends that "year" means the year commencing 1st January and ending 31st day of December.

I can give it here no such construction. I take it, a year can or does commence from any particular date or event. The municipal year and the fiscal year commence at dates other than January 1st, yet are measured as calendar years.

It is to be noted that the verbiage of the two clauses differ. If, as is asserted, it was meant to ensure a teacher payment for the holidays, it is remarkable that one clause expressly provides for this, while the other is silent on the point.

The plaintiff says he is paid in full for the year 1887. He claimed a balance, according to his mode of computation, but finding he had been credited with an order for his taxes for 1888, he chooses to apply that order in extinguishment of this balance, and bases his whole claim upon the amount he contends to be due him, calculated upon the proportionate number of teaching days he taught in the year 1888.

I have come to the conclusion that the provisions of the statute, as then in force, do not apply to the particular contract herein, and that the plaintiff is precluded by this and other circumstances from recovering.

The plaintiff's construction is extremely plausible, and may be considered to be strengthened by the alteration made by the revision. The defendants admitted that the provision was there for some purpose and to meet some case, but no suggestion was advanced as to its purpose or intent.

My own interpretation of the clause, as it formerly stood, and I offer it with great diffidence, is a paraphrase in these words :

"When a teacher is engaged for any certain fixed period, extending three or beyond three months, and if, for any reason, and without a new engagement, he serves for any number of teaching days after the expiring of such fixed period, he shall be paid for such supplementary services according to the proportion such days during which he so taught bears to the total number of teaching days in the current year."

If this interpretation be correct, it is clear that the plaintiff's case does not come within its scope, and may be almost considered the converse of it.

Further, I think the claim is not even an equitable one. If the Board had relied upon the strict terms of his engagement, he would have lost the honorable promotion he was offered and obtained and also its increased emoluments. They had to consider whether they had to put up with the partial disorganization of a school consequent upon a change of masters, or retain the services of a disappointed and perhaps soured and discontented servant.

It is to be remarked that we have it in his own words that at the time of the severance of the connection "nothing was said about arrears of pay." No such claim was then made. The defendants thought they were paying him in full, and if such demand had been then made it might materially have modified their action. They had no opportunity of considering it ; it

was not made until after the plaintiff had left their service and in the words of the common phrase, "he had got the whip hand of them."

To my mind the plaintiff's claim was entirely an after-thought, and his action is dismissed with costs.

Under the terms of the statute, in order that the Minister of Education may consider whether my judgment is properly appealable, I withhold the formal entry of judgment for thirty days from this date.

[NOTE—A copy of the above judgment was communicated to the Minister of Education, who replied that as at present advised, he did not think it appealable, but reserved a final expression of opinion until the plaintiff appealed. The plaintiff did not appeal.]

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Ct.] [March 8.

DODDS *v.* CANADIAN MUTUAL AID ASSOCIATION.

Insurance—Life—Provision for payment in case of "total disability"—Construction of provision—Evidence.

The plaintiff, who was a farmer, had his life insured by the defendants, and there was a clause in the policy or certificate of insurance providing that in case of "total disability" of the insured, the insurers would pay him one-half of the amount of the insurance. About two years after effecting the insurance, the plaintiff conveyed his farm to his son, reserving to himself and wife certain benefits, but continued to work upon the farm for about a year thereafter, when he was attacked by bronchitis and asthma.

In an action to recover one-half the amount of the insurance, the evidence shewed that the plaintiff was totally disabled, permanently and for life, from doing manual labour, and that the diseases from which he suffered were the proximate and immediate cause of his disability. A medical witness said he considered the plaintiff's condition attributable to a considerable extent to his advanced years, he being about seventy.

Held, that total disability to work for a living was what was intended to be insured against, and disability from old age was not excluded, and the evidence shewed that the plaintiff came within the terms of the certificate. The arrangement made by the plaintiff with his son after the certificate was issued could have no effect upon the prior contract of insurance.

Elgin Meyers for the plaintiff.

Watson, Q.C., for the defendants.

Div'l Ct.] [March 8.

LAMB *v.* YOUNG.

Bankruptcy and insolvency—Insolvent debtor—Mortgage to creditor—Action by assignee under R.S.O., c. 124, to set aside—Notice or knowledge of insolvency.

Held, following *Johnson* v. *Hope*, 17 A.R., that an assignee for the benefit of creditors under R.S.O., c. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must, in order to succeed, establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full.

Mackelcan, Q.C., and *Mewburn* for plaintiff.

Clute, Q.C., for the defendant.

Div'l Ct.] [March 8.

IN RE DERBY AND THE LOCAL BOARD OF HEALTH OF SOUTH PLANTAGENET.

Municipal corporations—Public Health Act, R.S.O., c. 205, s. 49—Payment for services of physician—Judgment against local board of health as a corporation—Order upon treasurer of municipality—Mandamus.

Section 49 of the Public Health Act, R.S.O., c. 205, provides that "The treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act."

A physician recovered judgment in a Divi-

sion Court against a township local board of health, sued as a corporation, for services performed in a small-pox epidemic.

It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the the board he had brought an action against the municipal corporation for his services, in which he failed.

Upon motion by the physician for a mandamus under s. 49 to compel the members of the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered;

Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the Division Court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity. As there appeared to be no other remedy, the applicant was entitled to the mandamus.

Shepley for W. J. Derby.

Aylesworth for members of local board of health.

Div'l C't.] [March 8.

REID *v.* COLEMAN.

Partnership — Dissolution — Want of public notice—Credit given to firm after dissolution —No previous dealings with firm—Liability of retiring partner.

The plaintiffs received from their traveller an order for goods from the firm of C. Bros., hotelkeepers. Before they delivered the goods they became aware by means of a mercantile agency that a partnership had existed under the name of C. Bros., and that S. L. C. was one of the of the members of it, and they were at the same time informed that the partnership still existed. They shipped and charged the goods and also goods subsequently ordered to C. Bros. As a matter of fact, however, the partnership did not exist at the time the first order was given, S. L. C. having retired from the business, and the plaintiffs had had no dealings with the firm while it was in existence. No public notice was given of the dissolution; S. L. C. continued to live at the hotel except when he was absent on his own business; the lamp with the name of C. Bros. continued at the door; the liquor license in the name of C. Bros. continued to hang in the bar-room; the letter-paper with the heading "C. Bros., proprietors," continued to be handed to customers.

Held, that where a known member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware, as one of the public, that it existed, and has not become aware of his retirement, the retiring member of the firm is liable, unless he shews that he has given reasonable public notice of his retirement; and, as such notice was not given here, S. L. C. was liable, not only for the goods first ordered, but for those subsequently ordered, no notice of the retirement having ever been given.

C. Millar for plaintiffs.

J. M. Clark for defendant, S. L. Coleman.

Div'l C't.] [March 8.

MENDELSSOHN PIANO CO. *v.* GRAHAM.

Partnership—Agreement for participation in profits — Construction of — Relationship of parties—Joint business—Debtor and creditor.

The plaintiffs sued G. and W. for the price of goods sold to the firm of P. W. G. & Co., and the principal question in the action was whether W. was an actual partner in the firm; the evidence failing to show that he was an ostensible partner, and as such liable to third persons.

Held, that the true test to be applied to ascertain whether a partnership existed was to determine whether there was a joint business, or whether the parties were carrying on business as principals and agents for each other.

G. and W. did not intend to create a partnership between them. G. was carrying on business in the name of P. W. G. & Co., as a dealer in pianos and organs, and, being in want of money, applied to W. for a loan; he did not ask W. to become his partner, nor did W suggest it, but G. proposed to give W. half the profits of his business if W. would lend him $500.

The money was advanced and the following receipt was given by G.:—

Toronto, 13th February, 1888.

"Received from W. the sum of $500 to be used for carrying on the business of dealers in pianos and organs, in return for which I hereby agree to give the said W. one half of the profits of said business, after all expenses have been

paid, including the sum of $10 a week, which is to be charged as wages to G., this arrangement to continue until the first day of January, 1889, and to be continued thereafter if desired by Mr. W. The said W. reserving a claim upon instruments in the store to the value of $500, and he can also at any time demand the said sum upon giving one month's notice, in which case this agreement would be at an end."

W. made a subsequent advance of $500 to G., and on the 14th. April, 1888, a receipt was given for such advance containing an agreement to pay, "over and above the agreement of 13th February, interest at the rate of eight per cent. per annum."

This receipt was at the request of W. signed "P. W. G. & Co., P. W. G., sole partner of said firm."

Held, that these documents did not establish that the business was the joint business of G. and W., or that they were carrying it on as principals or agents for each other; but that they did establish that the true relation was that of debtor and creditor, and W. was therefore not liable to the plaintiffs.

R. S. Neville for plaintiffs.

Coatsworth for defendant West.

BOYD, C.] [March 14.

SPRATT *v.* WILSON.

Trusts and trustees—Investment of moneys left to infants by will—Deposit in savings bank—Liability of trustees for legal interest—Acquiescence of statutory guardian of infants—Costs.

Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the court. And

Held, that an executor and trustee who deposited funds so left in trust for infants at three and a half or four per cent. interest in a savings bank did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants not being for their benefit did not relieve him.

Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs.

Bicknell for the plaintiffs.

H. H. Robertson for the defendant.

Chancery Division.

ROBERTSON, J.] [Feb. 19.

BLACKLEY *v.* KENNY *et al.*

Mortgage to secure future advances—Voluntary conveyance—Subsequent advances—Renewal notes—Land held in suretyship—Giving time—Release—Assignment for benefit of creditors—Trustee representing estate—Proof of judgment in Court of Appeal—Evidence.

A. being indebted to a firm of which B. was a member, in January, 1883, gave him a mortgage as trustee for the firm to secure his indebtedness and all future advances. In September, 1884, A., with the advice and concurrence of B., conveyed the mortgaged property to his wife, subject to the mortgage, which he covenanted to pay off, the mortgage debt being then represented by ten promissory notes. As the notes respectively became due they were retired by B.'s firm from the bank where they had been discounted, payments were made thereon by A., further goods were supplied to him, renewals taken for the balances due, and the old notes were cancelled and given up to A. until the whole ten were thus disposed of. The wife was not consulted about this course of business, nor were any remedies reserved against her.

Held, that this was not payment of the original notes by A., but that as the wife was a surety in respect of the land for the due payment of the notes existing at the time of the conveyance to her, the land in her hands was discharged and released.

Held, also, following *Blackley* v. *Kenny*, 16 A.R., 522, that B. could not charge against the land any advances made after notice of conveyance to the wife.

Plaintiff set up that, in another action of F. as assignee and T. B. & Co. as judgment creditors against these defendants (16 A.R., 276), the conveyance to the wife had been held fraudulent and void as against creditors, and that, although his firm's security might be gone under the mortgage, they had proved their claim as creditors, and were entitled to participate *pro*

rata with the other creditors in the proceeds of the sale of the land.

Held, that as the conveyance was made with the advice and co-operation of the plaintiff, by his conduct he agreed to this alienation of the assets, and must be considered to have consented to take satisfaction out of the property which remained.

Held, also, that although Con. Rule 309 provides for trustees suing and being sued as representing the property or estate of which they are trustees, the Court of Appeal having held that F. had no *locus standi*, he could not be considered as representing the parties who were beneficially interested, and all the claims allowed to F. as assignee for creditors must be disallowed.

Held, also, that the judgment in *F.* v. *K.* (16 A.R., 276), or *T. B. & Co.* v. *K.*, as it was after F. was struck out, was not evidence in this action.

Semble, a certified copy of the certificate of the Registrar of the Court of Appeal as to the result of an appeal is not proper evidence of the judgment in the Court of Appeal.

A. C. Galt for the defendant Kenny who appealed.

Walter Macdonald for the plaintiff.

George Kerr, jr., for Ferguson, the assignee.

ROBERTSON, J.] [March 19.

RE CHAPMAN AND THE CORPORATION OF THE CITY OF LONDON, AND

RE CHAPMAN AND THE WATER COMMISSIONERS FOR THE CITY OF LONDON AND THE CORPORATION OF THE CITY OF LONDON.

Justices of the peace—R.S.C., c. 174, ss 80 and 140—"Person" in R.S.C., c. 1, s. 7, s-s. 22—Prohibition.

The law has not been altered in any way by 32 & 33 Vict., c. 29, s. 28 (R.S.C., c. 174, s. 140), so as to give Justices of the Peace jurisdiction in any matter which they did not have prior to the passing of that statute.

The word "person" in R.S.C., c. 1, s. 7, s-s. 22, includes any corporation to whom the context can apply according to the law of that part of Canada to which such context extends; but as Justices of the Peace never had jurisdiction by the criminal procedure to hear charges of a criminal nature preferred against corporations, such word does not include corporations in cases where a Justice of the Peace is attempting to exercise such a jurisdiction.

A Justice of the Peace cannot compel a corporation to appear before him, their "body" cannot be taken into custody, he cannot proceed *ex parte*, nor can he commit or detain them in custody, nor can he bind them over to appear and answer to an indictment; that being so, he has no jurisdiction to bind over the prosecutor or person who intends to present the indictment.

A writ of prohibition can issue to a Justice of the Peace to prohibit him from exercising a jurisdiction which he does not possess.

J. B. Clarke, Q.C., for the application.

Hutchinson contra.

ROBERTSON, J.]

ANDERSON *v.* HANNA.

Statute of Limitations—Lands—Heirs-at-law—Tenant by the courtesy—Redemption judgment—Mortgage—Power of sale.

Held, that the Statute of Limitations in respect to the recovery of lands does not begin to run against heirs-at-law during the life of the tenant by the courtesy, even though the right of the latter to recover the lands may have become barred by the statute.

Proper judgment where, in such circumstances, the heirs-at-law take proceedings for redemption of the lands during the life of the tenant for life.

Wigle v. *Merrick*, 8 C.P., 307, and *Re Gilchrist and Island*, 11 O.R., 537, followed.

J. H. Ferguson and *O'Brian* for the plaintiffs.

Reeve, Q.C., and *Mills* for the defendants Hanna and Kerr.

Ross for the defendant Fitch and the Western Canada Loan and Savings Company.

Div'l Ct.] [March 1.

LEESON *v.* THE BOARD OF LICENSE COMMISSIONERS OF THE COUNTY OF DUFFERIN *et al.*

License commissioners—Mandamus—Notice of action—R.S.O., c. 194.

Held (affirming FALCONBRIDGE, J.), that a mandamus to compel the defendants to issue a license to the plaintiff would not be granted where the retiring commissioners had not com-

pleted their functions, and their acts were revised by their successors.

Held, also, that a notice of action is necessary before action brought for damages against a board of license commissioners acting under R.S.O., c. 194.

Marsh, Q.C., for the plaintiff.

Delamere, Q.C., for the defendant.

Practice.

ROSE, J.] [Dec. 6th, 1889.

BROOKE *v.* BROWN.

Trusts and trustees—Provisions of will—Implied powers of trustees—Reasonable building lease—Specific performance of agreement for.

The plaintiffs were trustees under a will holding the legal estate in the property devised and bequeathed in trust to maintain themselves and their children, with remainder over to the children upon the death of themselves, with power to absolutely convey the property and to exclude any child from participating in the remainder.

Held, that the plaintiffs had implied power to make all reasonable leases. The plaintiffs made an agreement for a building lease to the defendant of part of the trust estate for twenty-one years, with a provision for compensation to the defendant at the end of the term for his improvements, and the draft lease settled provided that the plaintiffs should at the end of the term pay for such improvements or renew the lease for a further term of twenty-one years.

Held, that the provisions of the agreement and lease were reasonable, and bound the trust estate, and that the plaintiffs were entitled to specific performance.

Matthew Wilson for plaintiffs.

Morson for defendant.

Q.B Div'l Ct.] [March 8.

CONMEE *v.* NORTH AMERICAN CONTRACTING COMPANY.

Costs—Taxation—Counsel fees—Witness fees—Re-opening taxation.

Upon appeals from taxation of costs, the court will not interfere with the discretion of the taxing officer as to the *quantum* or *quoties* of fees; and this rule covers any question of distribution or allotment of charges among different cases or branches of a case.

Where costs were awarded to the plaintiffs upon a postponement of the trial, and the case was not tried till after the taxation of such costs was closed, but it appeared upon appeal from the taxation that some of the witnesses allowed for were not called when the case was actually tried, the taxation was re-opened upon payment of costs, and the taxing officer was directed to reconsider the allowance of witness fees.

C. J. Holman for plaintiffs.

Aylesworth for the defendants.

C. P. Div'l Ct.] [March 8.

LINK *v.* BUSH.

Costs—Set-off—Claim and counter-claim separate and distinct—Rule 1204.

The plaintiff recovered judgment against the defendant, with costs, upon a claim for the value of goods sold under a distress for rent, of which the defendant, the landlord, himself became purchaser; and the defendant recovered judgment against the plaintiff with costs upon a counter-claim for rent and damages to the demised premises. The judgment did not direct any set-off, and, the plaintiff's solicitors having asserted a lien upon the judgment for costs against the defendant, the taxing officer refused to allow a set-off of the costs awarded to plaintiff and defendant respectively.

Held, that the claim and counter-claim were separate, and sit distinct, and the judgments must be treated as judgments in separate actions; and Rule 1204 did not apply to enable the taxing officer to deduct or set off costs.

Under the circumstances of this case the Court (ROSE, J., dissenting) deprived the plaintiff, who was finally successful upon the appeals as to costs, of the costs of the appeals.

M. C. Cameron for plaintiff.

W. H. Blake for defendants.

FERGUSON, J.] [March 21.

ST. CROIX *v.* MCLACHLIN.

Arrest—Order for, signed by judge instead of clerk.

Con. Rule 544 provides that all orders made by a Judge of the High Court in Chambers shall be signed by the Clerk in Chambers.

Held, that an order for the arrest of the defendant signed by the judge who made it, and not by the clerk, was not properly issued.

FERGUSON, J., was also of opinion, upon the evidence, that the defendant was not about to quit Ontario with intent to defraud, and, acting upon both grounds, discharged the defendant from custody.

E. D. Armour for defendant.

Wm. Macdonald for plaintiff.

BOYD, C.] [April 1.

IN RE BRONSON AND CANADA ATLANTIC R. W. CO.

Costs—Expropriation of land by railway company—"Costs incidental to the arbitration."

In expropriation cases the costs should be taxed liberally in favor of the proprietor; but where the statutes mention "costs" only, and not "full costs," costs as between solicitor and client are not intended.

And where a railway company, in expropriating land under the Dominion Railway Act, agreed to pay the land-owners "all costs incidental to the arbitration" had to fix the compensation to be paid;

Held, that the words did not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration.

Arnoldi, Q. C., for land-owners.

Shepley for Railway Co.

Appointments to Office.

COUNTY JUDGE.

Leeds.

Herbert Stone McDonald, of Brockville, Judge of the County Court of the United Counties of Leeds and Grenville, to be a member of the Board of County Judges constituted under R.S.O., c. 51, s. 298, *vice* James Daniell, Esq., Judge of the County Court of the United Counties of Prescott and Russell, deceased.

POLICE MAGISTRATE.

Perth.

Joseph Egbert Terhune, of Listowel, Barrister, to be Police Magistrate in and for the Town of Listowel, without salary.

ASSOCIATE CORONERS.

Essex.

George McKenzie, of Essex, Doctor of Medicine, to be an Associate Coroner in and for the County of Essex.

Wentworth.

James Ross, of Dundas, Doctor of Medicine, to be an Associate Coroner within and for the County of Wentworth, *vice* Allan Holford Walker, M.D., removed from the County.

District of Algoma.

John Carruthers, of Little Current, Doctor of Medicine, to be an Associate Coroner within and for the Provisional Judicial District of Algoma.

DIVISION COURT BAILIFFS.

Kent.

Alexander Cuthbert, of Dresden, to be Bailiff of the Third Division Court of the County of Kent, *vice* John Gillespie, resigned.

Welland.

Elias Augustine, of Humberstone, to be Bailiff of the Sixth Division Courty of the County of Welland, *vice* Adolphus Boyer, deceased.

COMMISSIONER FOR TAKING AFFIDAVITS.

Howard Rumney, of 17 and 18 Basinghall Street, London, England, Solicitor, to be a Commissioner for taking Affidavits within and for the City of London, England, and not elsewhere, for use in the Courts of Ontario.