THE

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WITH this number we publish the Index and Table of Cases, etc. This index is, in fact, a carefully-prepared analysis of the contents of the volume, and not merely a grouping together of headlines of cases. Each point decided or discussed will be found under its own proper heading, with full cross references, so as to obviate unnecessary reduplication. The Table of Canadian Cases gives as far as possible the number of the volume of the authorized reports in which each case appears, and in the Table of English Cases the report is also referred to.

THE zeal generally displayed by the judges of the High Court of Justice in the Province of Ontario in the discharge of their important duties is so well known, that it appears unfortunate that there should be any exception to the rule. The Chancery Division rejoices in one judge more than the other Divisions, and yet, for some reason not very clear to the public, at the recent sittings of the Divisional Court only two judges were in attendance. On the 16th of December, Mr. Justice Ferguson, who was to have taken the Judges' Chambers and Weekly Court, was unable to attend owing to illness. Mr. Justice Street gallantly came to his relief on Monday, and Mr. Justice Falconbridge held the court on Tuesday. On Wednesday, it appears, no judge could be found, and the Chancellor was under the necessity of announcing that he had telegraphed to Mr. Justice Meredith

with a view to his taking the business, but as he had not heard from him he would himself devote a part of the time of the midday adjournment of the Divisional Court, in which he was presiding, to the Weekly Court business. No one can suppose that Mr. Justice Meredith would be guilty of any intentional discourtesy to his chief; probably he never received the message. But it was hardly fair that the Chancellor, who has never shirked work, and who in his devotion to duty is second to no judge who ever sat on the Bench, should have to do another person's work unnecessarily. This incident brings up squarely the question as to whether any judge should reside at a place which is beyond the reach of a messenger when his presence is urgently needed at Osgoode Hall. The inconvenience of judges of the High Court residing out of Toronto has been before pointed out, and unless some other remedy can be found the Dominion Parliament may be moved to interfere.

It being, as we believe, the constant desire of the Benchers of the Law Society to administer their important trust for the benefit of the profession, we may expect that they will look with favour on a suggestion we desire to make. Among other conveniences of late established at Osgoode Hall have been two smoking rooms, to which members of the profession may, in the intervals of business, adjourn for the enjoyment of "the weed." The accommodation furnished in the way of cloak rooms has been improved; the younger members of the profession are accorded the use of the lawn for tennis and such like amusements. These conveniences are very well in their way, but there are some degenerate members of the profession who unhappily do not offer incense to the goddess Nicotina, on whose behalf we would venture to put in a plea for consideration. Occasionally time hangs heavily on their hands, and they need a little relaxation from the perusal of even the current reports or such toothsome morsels as Coke upon Littleton, and such like beauties of the law. We believe the society regularly takes the London *Times*, but we are not aware that any other periodicals, except those of a legal character, are taken by the Law Society. Even the *Times* is stowed away in a corner, and is only accessible upon a personal application to the librarian. Now we would venture to suggest that one of

the rooms at Osgoode Hall should be set apart as a reading room for current periodical literature, in which should be found some of the leading dailies, weeklies, and monthlies. These periodicals need not be preserved, but tenders for their purchase when done with might be obtained, and, if this plan were adopted, it would probably be found that this addition we propose to the conveniences of Osgoode Hall would not entail any very serious expense; and we have no doubt it would be very generally welcomed by all members of the profession.

APART from the question of the convenience of those who frequent Osgoode Hall, there is another feature of the matter which is of perhaps more importance. The legal profession, for its protection in all the Provinces of the Dominion, needs cohesion and the fostering of a strong *esprit de corps*. The above suggestion tends in that direction, and is therefore helpful so far as it goes. *Apropos* of this subject, we would call attention to some remarks of the Lord Chief Justice of England in the address recently delivered by him at the commencement of the course of lectures under the auspices of the Council of Legal Education. In the course of his remarks upon the present state of legal education in England, Lord Russell said: "It was the taunt levelled at the Bar that, while in other professions and in handicrafts long service and special preparation were considered necessary as a guarantee of fitness, there was no such safeguard in the case of the Bar. The taunt was the harder to bear because it was based on truth. It was said that a man had only to 'eat his way' to the Bar, which was a contemptuous mode of condemning the requirement of keeping term by dining in hall. I do not join in that condemnation. I maintain that the requirement is wise and useful, but it must not stand alone. Just as much of the advantage of university life springs from the association of students in their studies and sports, so the meeting in hall, for even the commonplace purpose of dining, has its direct advantages. Friendships are formed, schemes of mutual encouragement in study are set on foot, a spirit of emulation is cultivated, a feeling of good fellowship springs up, the rough edges are smoothed off, and a standard of manners and of conduct attained, which, fashioned by the students in the aggregate, will generally

be found to be higher than in the average individual. A disciplinary force is also thus brought into action which lasts during professional life. I do not hesitate to say that to the association which so largely prevails amongst us are in great measure to be attributed,in the first place,the honourable character which the Bar as a whole has always maintained, and, in the second place, the fact that, although our profession is one in which men are brought into close and severe personal competition, there is a marked absence of jealousy and ill-will amongst us, and a generous appreciation of men according to their deserts."

GOVERNMENT AID TO LAW ASSOCIATIONS.

The writer has heretofore taken advantage of the columns of this journal to bring before the members of the profession the great advantages which must accrue to the Bench and Bar alike in keeping up the interest in, and developing, the law associations now so largely organized throughout the Province of Ontario, and which we should like to see springing up and flourishing in all the other provinces. The action of the Government in recognizing law associations by asking the Legislature for a grant in aid of judges' libraries should naturally stimulate the members of the profession generally to renewed efforts in making their various local associations as influential and progressive as possible, but the indirect assistance thus given by the Government should form a certain and *definite* source of income to meet the yearly expenses of the law libraries. Some years ago a deputation waited upon the Attorney-General to urge upon him the importance of adopting what would be a more satisfactory basis of distributing the grant which is made annually towards the maintenance of judges' libraries at county towns in Ontario where law associations are established, and attention was drawn to what would be the result of dividing the appropriation equally among all the associations entitled to share in same. What was then predicted has been demonstrated in the amounts distributed during the past three years. For example, upon reference to the account of the treasurer of the Law Association at Hamilton it will be found that the grant in 1893 was $71.43; 1894, $66.68; and in the present year the share has

diminished to $55.56. This shows clearly that the organization of new county law associations (which means the creating o others entitled to share in the Government bounty) has had the result anticipated, of making a material difference in the amount available for each library.

It may, of course, be fairly argued that this scheme of distributing the annual grant is more advantageous to the smaller associations, weak financially by reason of their paying power being limited to the number of members, who, in small centres, are necessarily fewer than in the larger towns and cities. On the other hand, it can be with equal force contended that the larger centres represent the greater proportion of the public to be served, who might claim to be entitled to a larger proportion of the grant made under the head of "Administration of Justice."

Upon the principle that "the gods help those who help themselves," the members of the law association contributing their own money for the establishment and equipment of law libraries might with some reason expect the grant to be distributed upon a maximum or minimum scheme, the grant being based on the numbers of each association in good standing, the maximum not exceeding, say, $100, and the minimum grant, say, $20 or $25 per year. In that way, the weaker association would not lose by reason of its weakness, and the stronger association would be stimulated to even greater efficiency if the grant was a per capita grant, and that without, to any appreciable extent, increasing the sum annually voted by the Legislature.

The object in calling attention at this time to the steady falling off of this most acceptable grant is that law associations at their annual meetings might profitably deal with the matter, and perhaps, by united action, make such representation to the Government as would bring about some new arrangement for distributing the grant upon some such basis as has been outlined above, or on some lines which would prevent the continual reduction in the income of all associations, which must be the result if the presen system continues to govern the division of the money.

W. F. BURTON.

Hamilton, 31st December, 1895.

Reviews and Notices of Books.

The Ontario Assignments Act: with Notes. By Richard S. Cassels, of Osgoode Hall, Barrister-at-Law. Toronto: The Carswell Company, Publishers, 1895.

Mr. Cassels has given the profession a very useful, handy book, following on the lines of the pocket edition of the Assignment Act, published in 1891 by Henry Barber & Co., to which notes were appended by Mr. Cassels.

As the annotator tells us, several amendments to the Act have been made since then, and a number of decisions dealing with its construction have been decided. These decisions are now given in an accessible manner. A few forms have been added, and some cases noted, relating to composition agreement. Whatever Mr. Cassels does is always done carefully and well. We have therefore no hesitation in recommending this book to those who may be interested.

The Manitoba School Question. By F. C. Wade, Barrister-at-Law. Winnipeg, 1895.

Some time ago we referred to Mr. Ewart's book on this subject. Mr. Wade desires the public to know the other side of the question, and presents it in the small volume now before us. The public are having a dose of this at the present time from a political standpoint, and what cannot be found in these books can probably be found in the daily papers.

The Ontario Law Index. Embracing all the legislation of the Province of Ontario, down to and including the year 1895. By Harris H. Bligh, Q.C., Librarian of the Supreme Court of Canada, and one of the compilers of *The Dominion Law Index*, etc. Toronto: The Carswell Company, Publishers, 1895.

This useful compilation does for the Ontario Statutes what was done by Bligh and Todd for those of the Dominion. The index contains all the Acts, public and private, whether repealed or still in force, as well as referring to every subject upon which the Legislature has passed, continuing the same, with its amend-

ments, in an unbroken succession of references, from the earliest enactment down to the present time.

We quite agree with the thought of the author as to the propriety of indexing statutes which have been superseded or appealed. As he well says, they have historic value, and have often to be consulted in their relation to subjects still affected by them. As to the work itself, every index maker has his own way of doing his work. We might, perhaps, have done some of this a little differently: but, so far as we have had opportunity of judging, the contents need no apology, and will be of great convenience and utility to the profession and the public.

Constitution of the United States at the end of the First Century. By George S. Boutwell, Boston, U.S. D. C. Heath & Co., Publishers, 1895.

This volume by Mr. Boutwell, who is recognized as a competent authority on such matters, sets forth in a concise form the substance of the leading decisions of the Supreme Court, in which the Constitution of the United States has been examined and interpreted.

The author takes satisfaction in the thought expressed thus: "The line of sovereignty in the States, and the nature, extent, and limits of the sovereignty of the National Government, have been distinctly marked, and thus the gravest questions that threatened the harmony and questioned the existence of the Union have passed from the field of debate into the realm of settled law." It is possible that these congratulations may be a little premature, but, so far as the work itself is concerned, it is well put together, and will be of interest as a book of reference to all students, and must, of course, be a very valuable work to our friends on the other side of the line. It seems to be the only book in which the decisions of the Supreme Court of the United States on constitutional questions are cited under the section and clause of the Constitution to which the decisions relate, or, in other words, the only single volume in which a view, at once comprehensive and minute, may be had of the Constitution as it has been interpreted by the Supreme Court.

DIARY FOR DECEMBER.

1. Sunday .....*1st Sunday in Advent.*
3. Tuesday.....County Court Jury and non-Jury Sittings in York.
5. Thursday.....Chancery Divisional Court sits.
6. Friday.....Rebellion broke out in 1837. Convocation meets.
7. Saturday .....Michaelmas Term ends. Rebels defeated.
8. Sunday.....*2nd Sunday in Advent.* Sir William Campbell, 6th C.J. of Q.B., 1825.
10. Tuesday.....Niagara destroyed by U.S. troops, 1813.
12. Thursday.....Sir John Thompson, P.C., died 1894.
13. Friday..... S. H. Strong, C.J. of S.C., 1892.
15. Sunday.....*3rd Sunday in Advent.* J. B. Macaulay, 1st C.J. of C.P., 1849. Prince Albert died, 1861.
17. Tuesday.....First Lower Canadian Parliament, 1792.
18. Wednesday.....Slavery abolished in the United States, 1862.
19. Thursday.....Fort Niagara captured, 1813.
22. Sunday.....*4th Sunday in Advent.*
24. Tuesday.....Christmas vacation begins.
25. Wednesday.....Christmas Day.
27. Friday. .....St. John. J. G. Spragge, 3rd Chancellor, 1869. Upper Canada made a Province, 1791.
29. Sunday.....*1st Sunday after Christmas.* Sir Adam Wilson, C.J. of Q.B., died, 1891.
31. Tuesday.....Convocation half-yearly meeting. Montgomery repulsed at Quebec, 1775.

Reports and Notes of Cases.

ENGLAND.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

(Before Lord Watson, Lord Macnaghten, Lord Morris, Lord Davey, and Sir Richard Couch.)

VIRGO *v.* CITY OF TORONTO.

Municipal law—By-law—Hawkers—Nuisance—Restraint of trade—Public rights.

A statute giving a city corporation power to pass by-laws "for licensing, regulating and governing hawkers and petty chapmen, and other persons carrying on petty trades . . . and for fixing the sum to be paid for a license for exercising such calling . . . and the time the license shall be in force," does not include a power to prohibit hawkers from plying their trade at all in a substantial and important portion of the city, no question of apprehended nuisance being raised.

By a by-law of the municipal council of the city of Toronto, hawkers, petty chapmen, and other persons carrying on petty trades, were prohibited from carrying on business on certain streets comprising the busiest and most important thoroughfares of the city.

Held, that the by-law was *ultra vires* of the power granted to the corporation by s. 495. s-s. 3, of the Consolidated Municipal Act, 55 Vict., c. 42.

There is a marked distinction between the prohibition or prevention of a trade and the regulation or governance of it. The power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

A municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.

The effect of the by-law being practically to deprive residents of buying goods or trading with the class of traders in question, the question was one of substance, and should be regarded from the point of view of the public as well as of the hawkers.

[London, Nov. 16th, 1895.

This was an appeal from a judgment of the Supreme Court of Canada, reversing by a majority the previous decisions of the Court of Appeal for Ontario, and of Chief Justice Sir Thomas Galt. (22 S.C.R. 447 and 30 C.L.J. 355.)

The question for decision was whether a section of a by-law was competently and validly made by the corporation of the city of Toronto.

The section in question is designated as subsection 2*a* of section 12 of by-law 2,934, in amendment of section 12 of by-law 2,453. The last-mentioned section, as amended, requires a license to be taken out by —

"All hawkers, petty chapmen, or other persons carrying on petty trades, or who go from place to place, or to other men's houses, on foot or with any animal bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel, or other craft, or otherwise carry goods, wares, or merchandise for sale; except that no such license shall be required for hawking, peddling, or selling from any vehicle or other conveyance, goods, wares, or merchandise to any retail dealer, or for hawking or peddling goods, wares, or merchandise the growth, produce, or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of such goods, wares, or merchandise, or by his *bona fide* servants or employees, having written authority in that behalf, and such servant or employee shall produce and exhibit his written authority when required so to do by any municipal or peace officer: nor from any pedlar of fish, farm, and garden produce, fruit, and coal oil, or other small articles that can be carried in the hand or in a small basket, nor from any tinker, cooper, glazier, harness-mender, or any person usually trading or mending kettles, tubs, household goods, or umbrellas, or going about and carrying with him proper materials for such mending."

Section 2 was the only part of the by-law complained of. It is in the following words:—

"No person named and specified in subsection 2 of this section (whether a licensee or not) shall, after the first day of July, 1892, prosecute his calling or trade in any of the following streets and portions of streets in the city of Toronto."

Then followed an enumeration of eight streets in the city of Toronto, and it was stated in the evidence that these streets comprise the busiest and most important thoroughfares of the city.

The statutory power under which the corporation claimed to make this by-law is contained in the Municipal Act of Ontario (c. 184 of the Revised

Statutes of Ontario of 1887), section 495, which so far as is material is in the following words :—

"The council of any county, city, and town separated from the county for municipal purposes may pass by-laws for the following purposes :—

"For licensing, regulating, and governing hawkers or petty chapmen, and other persons carrying on petty trades, or who go from place to place or to other men's houses on foot or with any animal, bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel, or other craft, or otherwise carrying goods, wares, or merchandise for sale, and for fixing the sum to be paid for a license for exercising such calling within the county, city, or town, and the time the license shall be in force :

"'In case of counties for providing at the discretion of the council, either the treasurer or clerk of the county, or the clerk of any municipality within the county with licenses, in this and the previous subsection mentioned, for sale to parties applying for the same under such regulations as may be prescribed in such by-laws ;

"'Provided always that no such license shall be required for hawking, peddling or selling from any vehicle or other conveyance any goods, wares or merchandise, to any retail dealer, or for hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of this Province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of such goods, wares or merchandise, or by his *bona fide* servants or employees having written authority in that behalf ; and such servant or employee shall produce and exhibit his written authority when required so to do by any municipal or peace officer.' . . .

"(*a*) The word 'hawkers' in this subsection shall include all persons who, being agents for persons not resident within the county, sell or offer for sale tea, dry goods, or jewellery, or carry and expose samples or patterns of any of such goods to be afterwards delivered within the county to any person not being a wholesale or retail dealer in such goods, wares or merchandise."

Reference was also made to section 503 of the same Act, which occurs under the rubric "Markets." This section empowers the council of every city, town, and incorporated village, subject to the restrictions and exceptions contained in the last preceding six sections, to pass by-laws for : 1. Establishing markets. 2. Regulating markets. 3. "Preventing or regulating the sale by retail in the public streets, or vacant lots adjacent thereto, of any meat, vegetables, grain, hay, fruit, beverages, smallware, and other articles offered for sale."

E. Blake, Q.C., for the applicants.

Du Vernet (of the Ontario Bar) and *Horace Avory* for the respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by

Lord DAVEY : Their lordships are not required to construe this section, or to say whether the words "adjacent thereto" do not refer to both public streets and vacant lots and mean adjacent to a market. Having regard to the previous sections under the same rubric, they think the clause is one for the protection of the market only, and of limited application.

In the opinion of their lordships, it cannot be relied on in justification of the section now in question, and indeed the point was not pressed by the learned counsel for the appellants.

It appears to their lordships that the real question is, where under oath power to pass by-laws "for regulating and governing" hawkers, etc., the council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city, no question of any apprehended nuisance being raised. It was contended that the by-law was *ultra vires*, and also in restraint of trade and unreasonable. The two questions run very much into each other, and in the view which their lordships take it is not necessary to consider the second question separately.

No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise, both as to time, and, to a certain extent, as to place where such restrictions are, in the opinion of the public authority, necessary to prevent a nuisance, or for the maintenance of order. But their lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their lordships' view, for it shows that when the Legislature intended to give power to prevent or prohibit it did so by express words.

Their lordships refer (amongst others) to section 489, subsections 25, 26, 28, 29, 44, 46, 51, and section 496, subsections 3, 13, 14, and 15. The language of these subsections, "Preventing or regulating," "Preventing or regulating and licensing," tends to show that the framers of the Act did not intend to include a power to prevent or prohibit in a power to regulate or govern. Several cases in the English and Canadian reports were referred to in illustration of the respondent's argument. None of these cases are direct authorities, because the statutes from which authority was derived to make the by-laws there in question were framed in terms different from the statute now under consideration. But through all these cases the general principle may be traced, that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.

It is argued that the by-law impugned does not amount to prohibition, because hawkers and chapmen may still carry on their business in certain streets of the city. Their lordships cannot accede to this argument. The question is one of substance, and should be regarded from the point of view as well of the public as of the hawkers. The effect of the by-law is practically to deprive the residents of what is admittedly the most important part of the city of buying their goods of, or of trading with, the class of traders in question. And this observation receives additional force from the very wide definition given to "hawkers" in the Act. At the same time, the "hawkers," etc., are excluded from exercising their trade in that part of the city. There was no evidence, and it is scarcely conceivable that the trade cannot be carried on without occasioning a nuisance. The appellants in their printed case wisely disclaim any intention on the part of the council to discriminate against hawkers

and pedlars in favour of permanent shopkeepers. No other explanation of the object of the by-laws is offered. The question, therefore, is reduced to a bare question of power.

Their lordships, on the whole, have come to the conclusion that it was not the intention of the Act to give this power to the corporation. They therefore agree with the majority of the judges of the Supreme Court, and will humbly advise Her Majesty that this appeal be dismissed with costs.

ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

Div'l Court.] [Dec. 5.

STEPHENS *v.* BEATY.

Will—Construction—"Who may then be heirs at law"—Deed—Delivery—Operation—Trusts and trustees—Limitation of actions—Trustee Act, 1891, s. 13, s-s. 1 (a), (b)—Commencement of statute—Balance in trustee's hands—Letter—Acknowledgment—Estoppel.

The father of the plaintiff's deceased husband, by his will, left all his property to trustees, of whom the defendant was the survivor, in trust to convey and transfer it, after the death of his wife, unto all the surviving children, share and share alike, and their heirs forever; and, by a codicil, directed that the share of the plaintiff's husband should not be paid over or conveyed to him, but kept invested by the trustees, and the income paid to him during his life for his sole benefit, and after his death that such share should be paid over or conveyed to those "who may then be the heirs at law of my said son," share and share alike. The property in the hands of the defendant, as surviving trustee, at the time of the death of this son, was all real estate.

Held, per MACMAHON, J., the judge at the trial, that the words above quoted signified those who would take real estate as upon an intestacy.

Coatsworth v. Carson, 24 O.R. 185, followed.

The testator died in July, 1875, and his widow before the 1st August, 1876; the plaintiff's marriage to the son took place in July, 1885, and the son died in September, 1886, leaving no issue.

By an ante-nuptial contract the son assigned and conveyed to the plaintiff all his interest in the estate of his father.

By deed dated 1st August, 1876, the children of the testator made a partition of the lands among themselves, the trustees joining in the deed, which provided that the lands thereby assigned as the share of the plaintiff's husband should be held and retained by the trustees on the trusts set forth in the codicil.

By deed dated the 2nd March, 1887, the defendant, as surviving trustee, conveyed the lands so retained to the brothers and sisters of the plaintiff's husband as his heirs and heiresses at law.

This deed was, on the day of its date, signed and sealed by the defendant, and delivered by him to a person acting on behalf of the grantees, and wholly left the possession of the defendant on that day, and there was nothing to show that he did not intend it to operate immediately.

Held, by the Divisional Court, that it took effect from the day of its date.

In this action, begun on the 8th July, 1893, the plaintiff sought an account of the defendant's dealings with the estate of the testator, and a transfer and conveyance to her of her husband's share. The defendant pleaded the Trustee Act, 1891, s. 13, s-s. 1 (*a*) and (*b*), in bar of the action.

Held, notwithstanding that a small balance of $6.35, ascertained as early as the 3rd February, 1887, remained in the defendant's hands until the 21st July, 1887, that the statute began to run in his favour on the 2nd March, 1887, assuming a breach of trust on that day, and the plaintiff's action was barred before it was begun.

On the 27th September, 1892, the defendant wrote a letter to the plaintiff's solicitors, in which he stated that all the affairs of the estate between himself, as trustee, and the heirs were wound up "as long ago as July, 1887"; that he "could not see that he had anything to do with the matter, as all properties concerning which he had any trust were conveyed to the heirs at that time; and any claim the plaintiff might think she had must be settled with them, as he had no connection with any such since the date referred to."

Held, that this was not an acknowledgment which had the effect of taking the case out of the operation of the statute.

Held, also, that the defendant was not estopped by the letter from saying that the conveyance was as early as the 2nd March, 1887.

Judgment of MACMAHON, J., affirmed.

Osler, Q.C., and *N. F. Davidson* for the plaintiff.

Moss, Q.C., and *W. F. Kerr* for the defendant.

Div'l Court.] [Dec. 5.

HENDERSON *v.* HENDERSON.

Limitation of actions—R.S.O., c. 111, s. 5, s-s. 1; ss. 13, 14, 15—Purchase of farm—Possession by son of purchaser—Payment of mortgage—Contribution by son—"Profits of the land"—"Rent."

In March, 1881, the testator purchased a farm and had it conveyed to himself. In April, 1881, one of his sons, with the testator's assent, given after a conference with his other sons, went into possession of the farm, upon an understanding that he should contribute such sum as could be spared off the farm, after its yielding a living to him, towards payment of the mortgage thereon, until the mortgage should be paid, when he was to have the farm. He continued in actual possession and occupation from April, 1881, till his death in November, 1892. He contributed in all $1,000 towards payment of the mortgage, and with his contributions and payments made by his father the mortgage was paid off, after which he asked his father for a conveyance. His father declined, but said he would leave him the farm by will. He died before his father, leaving all his property by will to his wife and child. After his death his father made a will

leaving the farm to the plaintiffs, and died in 1894, the son's widow continuing in possession. In an action of ejectment brought against her by the plaintiffs,

Held, MEREDITH, J., dissenting, that on the purchase by and conveyance to the father of the farm the law put him into possession of it, there being no other person in possession in fact; that when the son went into possession, the father's possession ceased, and he was not thereafter in receipt of the "profits of the land," within the meaning of s. 5, s-s. 1, of the Real Property Limitation Act, R.S.O., c. 111; that the son was not a tenant from year to year, nor a lessee, and the money he contributed was not "rent," within the meaning of s. 14; nor was such money "rent" or "profits of the land," within the meaning of s. 5, s-s. 1, or in any way; and there being no acknowledgment by the son in writing within the meaning of s. 13, nor anything else which could stop the running of the statute, the title of the father was extinguished, under s. 15 of the Act, at least six months before the death of the son.

Watson, Q.C., and *L. M. Hayes* for the plaintiffs.

E. B. Edwards for the defendant.

Div'l Court.] [Dec. 5.

FERGUSON *v.* TOWNSHIP OF SOUTHWOLD.

Municipal corporations—Negligence—Way—Want of repair—Overhead obstruction—Liability—Finding of jury—Contributory negligence—Damages.

If something exists or is allowed to remain above a highway which interferes with its ordinary and reasonable use, this constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway.

A branch of a tree growing by the side of a highway extended over the line of travel at a height of about eleven feet. The plaintiff, in endeavouring to pass under the branch on the top of a load of hay, was brushed off by it and injured

Held, that the jury having found that the highway was out of repair, and the defendants having had notice of the position of the branch, they were liable, in the absence of contributory negligence.

Embler v. *Town of Wallkill*, 57 Hun. 384, specially referred to.

The question whether a highway is out of repair is a question for the jury.

Derochie v. *Town of Cornwall*, 21 A.R. 279, followed.

It appeared by the evidence that the plaintiff had hauled hay upon this road and passed this particular place not long before; that he and another man who was on the load with him, when approaching the branch, observed the situation, but concluded they could pass in safety: that the other man did pass safely under the branch, and the plaintiff, instead of lying close to the hay, put up his feet to raise the limb, which he failed to do.

Held, that the plaintiff was not called upon to do the very best and wisest thing; and, upon the evidence, the court could not interfere with the finding of the jury that the accident might not have been avoided by the exercise of reasonable care on the part of the plaintiff.

Connell v. *Town of Prescott*, 22 S.C.R. at pp. 162-3, referred to.

Held, also, upon the evidence, that the sum assessed as damages, $1,200, was not so excessive as to warrant the court in interfering.

J. M. Glenn for the plaintiff.

Osler, Q.C., and *James A. McLean* for the defendants.

Div'l Court.] [Dec. 15.

MCCULLOUGH *v.* ANDERSON.

Damages—Negligence—Evidence—Jury—Excessive damages.

This was an action to recover damages for injuries received by the plaintiff, while in the service of the defendants as a farm hand, from the kick of a horse. At the trial the jury found for the plaintiff, and assessed the damages at $800.

A motion by the defendants to set aside the verdict and dismiss the action, or for a new trial, was refused, ROBERTSON, J., dissenting.

Upon the question of damages the following observations were made by

FERGUSON, J.: It was also contended that the damages awarded are excessive in amount. As the authorities stand at present, it is, I think, in the power of the court to interfere where the damages are plainly excessive in amount, and the court can see that such interference would be right and necessary to the ends of justice between the parties; but I do not see the way to interfere, or that the court should interfere, in the present case. All the evidence as to the extent of the injury sustained by the plaintiff, and circumstances in which he received the injury, went fairly and properly to the jury. Some of the evidence was intended to show, and went to show, that the injury was not of a serious character, and that part of the plaintiff's suffering, inconvenience, expenses, and loss was attributable to a former injury received by him. Some of it went to show that the injury was of a serious character, and that his suffering, inconvenience, expenses, and loss were not in any part or degree attributable to a former injury received by him. The jury, with all this before them, assessed the damages at a sum which, when the circumstances and surroundings of the parties are considered, appears to be large, it is true, but, as I think, not so large as to be unconscionable, or to shock one's ideas of right and wrong. It is not a case in which any legal measure of damages is afforded by which the court can say that the jury was wrong.

Clute, Q.C., for the defendants.

C. E. Lyons and *M. Wright* for the plaintiff.

Common Pleas Division.

MEREDITH, C.J.
MACMAHON, J. } [May 30.

SYLVESTER *v.* MURRAY.

Contract—Sale of land—Conditional promise—Effect of.

Both the plaintiff and the defendants moved against the judgment in this case, reported *ante* p. 491, and 26 O.R. 599, by motion before the Divisional Court.

The court dismissed the plaintiff's motion with costs, and, on the defendants' appeal, varied the judgment by providing that set-off is to be allowed against the plaintiff's claim if they ever become entitled to recover the $500 ued for. The court gave no costs on the defendants' motion.

J. J. Scott and *A. McLean Macdonell* for the plaintiff.

G. H. Watson, Q C., for the defendants.

Practice.

WINCHESTER, Master.] [Nov. 29.

HALL *v.* MACKENZIE.

Security for costs—Surety residing out of jurisdiction having property within.

On motion to disallow a bond filed by the plaintiff, in compliance with an order for security for costs,

Held, that a person residing out of the jurisdiction, although possessed of property within the jurisdiction, is not a good and sufficient surety: *Knight* v. *Lord de Blaquier*, 1 Irish Eq. R. 375; *Miller* v. *Hales*, 17 L.R. Eq. 430.

W. E. Middleton for the defendant.

D. Armour for the plaintiff.

BOYD, C.] [Dec. 4.

PATTERSON *v.* KING ET AL.

Landlord and tenant—Garnishment of rent—Wrongful distress.

Rent may be attached, and when it is attached the legal result is that the collateral remedy of the landlord (the judgment debtor) by way of distress is suspended; and by virtue of the Act relating to the apportionment of rent, R.S.O., c. 143, ss. 2-6, a part of such rent may be attached as it accrues *de die in diem*, though not actually payable till the next sale day.

J. E. Cook for the plaintiff.

R. S. Neville for the defendants King and McIlwain.

Defendant L. J. Williams, in person.

BOYD, C.] [Dec. 10.

HUNTER *v.* STARK.

Counterclaim—Recovery of land—Joinder of causes of action—Rule 341—Mortgage action—Leave.

A counterclaim for the recovery of land is an action for the recovery of land, within Rule 341, as to joinder of causes of action.

Compton v. *Preston*, 21 Ch.D. 138, followed.

And a counterclaim for foreclosure and recovery of possession of mortgaged premises is within the exception contained in Rule 341 (*a*).

And where the plaintiff sought a mortgage account and redemption, and the defendant counterclaimed for foreclosure and possession;

Held, that if leave were necessary, it was a proper case for granting it, the rights being correlative.

B. E. Swayzie for the plaintiff.
Heighington for the defendant.

BOYD, C.] [Dec. 10.

IN RE GALWAY.

Devolution of Estates Act—Widow—Dower—Election—Money in court.

Where a widow desires to take, under the Devolution of Estates Act, her interest in the proceeds of her husband's undisposed of real estate, in lieu of dower, she must so elect by an attested instrument in writing, pursuant to s. 4, s-s. 2, even where the lands have been sold under an order of the court at her instance, free from her dower, and the proceeds are in court.

W. H. Blake for the widow.
F. W. Harcourt for the infants.

BOYD, C.] [Dec. 10.

WHEELER *v.* WHEELER.

Writ of summons—Service out of jurisdiction—Alimony—Contract—Marriage—Law Courts Act, 1895, s. 28.

The right to alimony is not based on contract, but on the special statutory provisions now found in s. 29 of the Judicature Act, R.S.O., c. 44.

Alimony, when granted, is not to be classed either as "debt" or "damages," terms which define the scope of s. 28 of the Law Courts Act, 1895, providing for the allowance of service out of the jurisdiction of a writ of summons where the plaintiff has a good cause of action upon a contract, and the defendant has assets in Ontario; it is that allowance to which a married woman is entitled upon separation from her husband.

Magurn v. *Magurn*, 3 O.R. 579; *Keith* v. *Keith*, 25 Gr. 113; and *Hooper* v. *Hooper*, 3 Sw. & Tr. 256, followed.

Service of writ of summons out of the jurisdiction in an action for alimony disallowed.

Watson, Q.C., for the plaintiff.
Wilkes, Q.C., for the defendant.

BOYD, C.] [Dec. 10.

ASHCROFT *v.* TYSON.

Security for costs—Action for penalty—Rule 1244—Time—Default—Dismissal of action—Indulgence—Merits.

An order under Rule 1244 for security for costs in an action for a penalty may properly contain provisions limiting the time for giving security and for dismissal of the action, without further order, upon default; and such an order, not appealed against, is conclusive between the parties as to all its terms.

Thompson v. *Williamson*, 16 P.R. 368, distinguished.

The action was brought against justices of the peace to recover a penalty for non-return of a conviction of the plaintiff, the error of the defendants being merely clerical, and one not prejudicing the plaintiff.

Held, not a case in which the indulgence of extending the time for giving security should be granted to the plaintiff.

Douglas Armour for the plaintiff.

Kilmer for the defendants.

Chy. Div'l Court.] [Dec. 10.

MUNRO *v.* ORR.

Summary judgment—Rule 739—Unconditional leave to defend.

Rule 739 was made to prevent defences being set up against good faith for the mere purpose of gaining time. Where the defendant shows a good defence he should be allowed to defend unconditionally.

Upon a motion for summary judgment under that Rule, in an action upon the covenant for payment in a mortgage, the defendant swore that he had a good defence on the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable. This was supported by the affidavit of another person; and it also appeared that the blanks in the printed form of covenant contained in the mortgage had not been filled up.

Held, that the defendant should have unconditional leave to defend.

Worrell, Q.C., for the plaintiff.

George P. Deacon for the defendant.

FERGUSON, J.] [Dec. 12.

PORT ELGIN PUBLIC SCHOOL BOARD *v.* EBY.

Judgment—Power of judge to vary—Costs.

The judgment of the trial judge, not drawn up or entered, but endorsed upon the record, was in favour of the plaintiffs against all three defendants with costs. Upon motion of two of the defendants, the judgment was reversed as to them by a Divisional Court. Afterwards, the other defendants moved the trial judge to vary his judgment against them as to costs in accordance with what they considered should have been the judgment had it been against them alone and in favour of the other defendants, they being administrators, and an administration order having been made before the trial. The judgment as pronounced expressed precisely what the trial judge intended; there was no clerical error, inadvertence, or oversight.

Held, that the judge had no power to vary his judgment.

Shepley, Q.C., for the plaintiffs.

Moss, Q.C., for the defendants, The Trusts Corporation of Ontario.

BOYD, C.] [Dec. 14.

REES *v.* CARRUTHERS.

Settlement of action—Dispute—Summary trial—Stay of proceedings—Costs.

The court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action.

And where, in an action of slander, the plaintiff excused his non-prosecution by alleging that an agreement had been entered into between himself and the defendant, by which the action was to be dropped, and $10 costs to be paid by the defendant, which agreement was denied by the defendant, an order was made directing a summary trial, or the trial by an issue upon oral evidence, of the question of the validity of the settlement; if the result should be a valid settlement, proceedings to be stayed perpetually and costs paid by defendant; if settlement invalid, action to be dismissed with costs to defendant.

Douglas Armour for the plaintiff.

W. H. Blake for the defendant.

Q.B. Div. }
Full Court. } [Dec. 14.

REGINA *v.* VERRAL.

Evidence—Prosecution for indictable offence—Foreign commission—Order for —Time—Preliminary inquiry—Use of evidence—Criminal Code, s. 683— —Return of commission.

Section 683 of the Criminal Code is merely an extension of the provision made by s. 681 for procuring the evidence of a person dangerously ill, to the procuring of the evidence of a person residing out of Canada.

Section 681 had its origin in 43 Vict., c. 35, and, reading its provisions in the light of the preamble to that Act, it is clear that the statement for the taking of which provision is therein made may be used as evidence at any stage of the inquiry relating to an indictable offence.

The time at which an order may be applied for under s. 683 does not differ from that under s. 681; the kind of evidence to be given in each case is substantially the same; and the words "for which a prosecution is pending" in s. 683 do not differ it from s. 681.

The order of MACMAHON, J., 16 P.R. 444, allowing the Crown to issue a commission to take evidence abroad, pending the preliminary inquiry before a police magistrate upon an information against the defendant for an indictable offence, was applied for and obtained at a proper time and under circumstances warranting the application and order; and although the use to be made of the evidence to be procured under it could not affect its validity, such evidence might be used at any stage of the inquiry at which evidence might be given relating to the offence or to the accused, the provision enabling it to be used as well before the grand jury as at the trial not preventing its being used at any other time, if required.

The order, however, should provide that the commission be returned into the High Court, and ought not to limit the use of the evidence.

Biggs, Q.C., for the defendant.

J. W. Curry for the Crown.

WINCHESTER, Master.] [Dec 21.

KING *v.* FEDERAL LIFE ASSURANCE CO.

Costs—Third parties—Indemnity.

The defendants, having paid to other persons the moneys claimed by the plaintiff, brought in those persons as third parties for indemnity, whereupon the third parties paid the plaintiff the amount of his claim and costs.

Held, that the defendants were entitled to be paid by the third parties their costs of defence, to be taxed between solicitor and client, and their costs of the claim over against the third parties, to be taxed between party and party.

Hartas v. *Scarborough*, 33 Sol. J. 661, followed.

Masten for the defendants.

G. C. Campbell for the third parties.

NEW BRUNSWICK.

SUPREME COURT.

BARKER, J.] [April 26.

DOHERTY *v.* HOGAN ET AL.

Practice—Foreclosure.

A mortgagor will be foreclosed though he may have had no interest in the premises to mortgage, but in such case a sale will not be decreed.

It is not desirable to order a sale where any substantial question is suggested as to the title which a purchaser might get under a sale made in pursuance of a decree of the court.

Pugsley, Q.C., for the plaintiff.

Tweedie for the defendant.

BARKER, J.] [April 26.

HALIFAX BANKING CO. *v.* SMITH.

Practice—Bill—Costs of amendment under Equity Act, 1890 (53 Vict., c. 4), s. 100.

Held, that the costs of an application by plaintiff to amend bill so as to introduce facts which arose after suit commenced should be costs in the cause.

Teed for the plaintiff.

Blair for the defendant.

BARKER, J.] [April 26.

CUNNINGHAM *v.* MOORE.

Lien—Conveyance—Agreement to maintain vendor—Specific performance.

An aged couple conveyed their farm to their daughter. On the same day the latter and her husband entered into an agreement to board the vendors on the farm, and to pay them an annuity, in consideration of the conveyance.

Held, that the vendors had a lien on the land for the performance of the agreement, and also that the court could not decree specific performance.

Skinner, Q.C., and *A. J. Trueman* for the plaintiffs.

Defendant did not appear.

BARKER, J.] [June 24.

ROBERTS *v.* HOWE ET AL.

Practice—Answer and disclaimer to whole bill—Costs.

Held, that a defence and disclaimer to whole bill is inconsistent, and where this is done on plaintiff's application to amend bill, so as to exclude parties who disclaim, defendants will not be allowed costs.

Wallace for the plaintiff.

Ebbett and *Belyea* for the defendants.

FORBES, CO. J.] [Sept. 18.

HALIFAX BANKING CO. *v.* CHARLETON.

Practice—Demurrer—Declaration—Incorporation of bank.

Demurrer by defendant to plaintiffs' declaration, upon the ground that the fact that the plaintiffs were an incorporated company was not set out in the declaration.

The plaintiffs, one of the banks described in 53 Vict., c. 31, schedule A, were also incorporated by an Act of the Nova Scotia Legislature.

Held, that a bank incorporated under the Banks and Banking Act, 53 Vict., c. 31, need not set out its incorporation in a declaration.

Waterous Engine Works Co. v. *Campbell*, 22 N.B. 503, distinguished

Gilbert, Q.C., for defendants.

Armstrong, Q.C., for plaintiffs.

BARKER, J.] [Aug. 6.

MCKAY *v.* MCAVOY.

Action—Reference—Decree for account not sued for.

In an action to ascertain how much was due on a mortgage transaction, it appeared that an outside general account was also involved, and the matter was sent to a referee, so that the court might be fully informed of both. The referee found that there was due the plaintiff $97.93 on the mortgage account, and $19.78 on the general account.

Held, that as the mortgage account was all that was sued for in this suit no decree could be made in regard to the general account.

Decree for payment of mortgage account and costs of suit to plaintiff.

Pugsley, Q.C., and *Tweedie*, *L. J.*, for the plaintiff.

Stockton, Q.C., and *Williston* for the defendants.

MANITOBA.

SUPREME COURT.

TAYLOR, C.J.] [Dec. 7.

BOLE *v.* ROSE.

Practice—Queen's Bench Act, 1895—Notice of motion by outside party—Statement of residence.

This was a motion made by a landlord claiming three months' arrears of rent from the sheriff as against a writ of execution placed in his hands by the plaintiff against the defendant.

The sheriff refused to recognize the landlord's claim, and the latter served a notice of motion for an order against the sheriff for payment. The residence of the landlord was not stated in the notice, and objection was taken on this account by the execution creditor.

Held, that under the Queen's Bench Act, 1895, such a notice should contain a statement of the residence of the party making the motion. The former equity practice should be followed in all cases where the rules are silent as to the practice.

As the execution creditor knew the residence of the landlord, the latter was allowed to amend, without costs.

Elliott for landlord.

Martin for plaintiff.

TAYLOR, C.J.] [Dec. 9.

RE RAPID CITY FARMERS' ELEVATOR CO.

Winding up—Company—When company deemed to be insolvent—Creditor must be shown to be such at the time of demand of payment.

This was a petition by an assignee of a judgment creditor of the company. The petitioner proved the judgment and assignment to himself, and that a sufficient demand for payment of the debt had been properly served on the company more than sixty days before the filing of the petition, but he did not show the date of the assignment of the judgment to him.

Held, that the petition must be dismissed on this ground, as the demand must be served by a creditor, and it was not shown that the petitioner was a creditor at the time of the service of the demand.

Elliott for the petitioner.

Clark for the respondents.

TAYLOR, C.J.] [Dec. 9.

DOLL *v.* HOWARD.

Practice—Examination for discovery—Removal of action from County Court—Appeal from order under section 86, Q.B. Act, 1895—Stay of proceedings—Commitment for contempt for default in obeying order to examine—Material defective.

This was a motion, under Rule 390 of the Queen's Bench Act, 1895, to commit the defendant for default in not attending to be examined under an order to examine him in the cause for discovery.

The action was brought originally in the County Court, but had been transferred, with all the papers, to this court, under section 86 of the Act, by an order of the County Court Judge, on the plaintiff's application. The defendant immediately took steps to appeal from this order, and filed an affidavit under section 317 of the County Courts Act.

The first objection to the motion was that all proceedings in the action were stayed under s...[illegible] section 317 upon the filing of the affidavit, but the learned Chief Justice, following *Harris* v. *Judge*, (1892) 2 Q.B. 565, and *Duke* v. *Davis*, (1893) 2 Q.B. 107, 260,

Held, that under section 86 of the Queen's Bench Act, 1895, there could be no stay of proceedings, as at the time of the filing of the affidavit there was no longer any action, suit, matter, or proceeding in the County Court. The second objection to the motion was that there was no proper proof of the service of a subpœna on the defendant. The affidavit of service attached to the subpœna and appointment produced stated that the deponent had personally served the defendant "with a true copy of the subpœna hereto annexed, marked B, and of the appointment annexed, marked A, by delivering such *appointment* to and leaving the same with the said John F. Howard personally."

Held, that this objection was fatal, as the motion was one to put the defendant in contempt, and the material in support of it must be strictly correct.

Quære: Whether, under the present practice, when an action is transferred from the County Court to the Queen's Bench under section 86, the plaintiff can have an order for examination until he has delivered a statement of [illegible] *Davies* v. *Williams*, 13 Ch.D. 550.

Motion dismissed without costs.

[illegible] for the plaintiff.

Hough, Q.C., for the defendant.

NORTH-WEST TERRITORIES.

SUPREME COURT.

WILKIE *v.* JELLETT.

Registry laws—Territories Real Property Act—Equitable interests—Execution—Unregistered transfer—Priority.

A transfer of lands or a binding agreement for sale, though unregistered, takes precedence of an execution duly filed in the Registry Office.

[REGINA, June 14th, 1895. En Banc.

Four actions were consolidated and tried together. In three of them the plaintiffs were the transferors of certain lands from the Edmonton and Saskatchewan Land Co., under transfer delivered to the plaintiffs on March 7, 1891, but unregistered, and in the fourth action the plaintiff had an agreement for sale for valuable consideration of the same date from the same company. On June 20, 1893, the defendant Robertson, the deputy sheriff at Edmonton, filed in the registry office a copy of an execution against the company, with a memorandum of the lands to be charged (which were the lands in question) according to the provisions of the Territories Real Property Act, and the registrar thereupon entered a memorandum of the executions in the register as provided by the Act. On Dec. 14, 1893, the plaintiffs in the three actions registered their transfers, and the registrar issued certificates of title, but subject to the executions. The defendant Robertson had, before action, offered the lands for sale under the executions. The actions were brought for a declaration that the executions were a cloud on the title, and a direction to the registrar that the entry be cancelled, and an injunction to restrain their sale by the deputy sheriff.

ROULEAU, J., the trial judge, dismissed the actions, and an appeal was taken to the full court.

N. D. Beck, Q.C., for the appellants.

S. S. Taylor, Q.C., for the respondents.

The judgment of the court allowing the appeal was delivered by

MAGUIRE, J.: The question to be decided is this: Is an execution against lands duly delivered to the registrar binding as against a prior but unregistered transfer for value to a *bona fide* purchaser? By s. 94 such a transfer can be registered subsequent to the coming in of the execution, but the registrar would, in issuing the certificate of title to the transferee, express thereon that it was subject to the execution. A transferee, taking such a certificate would not be practically affected unless and until a sale had been made by the sheriff and such sale had been duly confirmed by a judge; for by s. 96 no such sale shall be of any effect until the same has been confirmed by a judge, and it is only (if at all) upon the production to the registrar of a duly executed transfer having endorsed thereon an order of confirmation that the purchaser "is entitled to be registered as owner, and to a certificate of title to the same." So that it would seem that the holder of such a transfer on receiving a certificate expressed to be subject to an execution might not, by accepting such a certificate, be barred from contesting the right of the transferee from the sheriff to a confirmation of the sale

or his right to be registered thereunder as the owner. However that may be, it is obvious that if the holder of the prior transfer is not affected by the delivery to the registrar of the execution, he may rightly decline to accept a certificate subject thereto, and may come at once to the court to have the execution removed from the register as being a cloud upon his title.

It is clear, I think, that the receipt by the registrar of a copy of an execution against lands does not pass any title or any interest in the land. Certainly not to the execution creditor, for otherwise it might have been necessary for such creditor to join in the transfer to the purchaser at the sheriff's sale; not to the sheriff, and not to the purchaser from the sheriff, because at the time of the delivery to the registrar the person who may become purchaser is unascertained. So that one is not surprised to find s. 94 declaring that the execution "shall not operate as caveat," etc.

Let us now consider what is the effect of such an execution as against a prior *bona fide* purchaser for value who has omitted to register his transfer. It is contended by the execution creditor that so long as the certificate of title of the judgment debtor is in force and is uncancelled, the land mentioned therein must be deemed as against all the world, including persons interested under unregistered instruments, the property absolutely named therein subject only to certain matters set out—ss. 60, 61, and 62; one class of which is (61 s-s. *c*) "executions against or affecting the interest of the unregistered owners in such lands which have been registered and maintained in force against such registered owner"; s. 59 is read as showing that the transfer "until registered" shall not be "effectual to pass any estate or interest in any land," and that the result is that the land still remained at the date of the delivery of the execution to the registrar the property of the judgment debtor, and so liable to satisfy the execution.

That seems to have been the view pretty generally accepted throughout the territories and in Manitoba. The decision of Bain, J., in *Re Herbert* v. *Gibson*, 6 Man. L.R. 191, was, that a transfer has no effect upon the land until registered, and that the registrar was right in issuing a certificate to the transferee, subject to an execution theretofore delivered to him. In *Re Massey* v. *Gibson*, 7 Man. L.R. 172, it was held that Bain, J., was, in the case last recited, merely giving a direction for the guidance of the registrar, and the court there decided that it was still open for the parties to seek the establishment of their rights in the Court of Equity. They held also that under the Manitoba statute, which is substantially like ours, trusts may exist and be recognized by the court as between the parties, and Mr. Justice Killam, in his judgment on page 178, cites approvingly, among other things, a statement in Mr. a'Beckett's work, that, "as against the proprietor, trusts and contracts may be enforced as formerly, and, although a trustee may be absolute proprietor under the Act, a court of equity will reduce or deprive him of his interest, or compel him to apply the proceeds as justice may require"; and, again, "the land may be reached through the trustees, although the trust will not be attached to the land in such a manner as to be enforced against a person acquiring it without fraud on his part." Mr. Justice Bain, in his judgment, qualifies his general remarks in the former case by saying that they had reference only to his

opinion given for the guidance of the registrar-general, and only went to the length that the registrar-general could not recognize any interest in any one but the registered owner. It must be remembered that both these cases were under the Real Property Act of Manitoba, and were brought expressly to control the registrar-general in the exercise of his functions. No case was brought to our notice where the courts in Manitoba in a suit upon its equity side has dealt with the transferee under an unregistered instrument. The question was raised before me many years ago in *Re Thompson;* but while I was of the opinion then that the point was well taken, I found it unnecessary for the purpose of that case to expressly so decide. Bain, J., in *Massey* v. *Gibson*, is of opinion "that equitable interests can be created, and will arise by implication in these lands," just as in the case of lands that have not been brought under the Act, and that courts of equity, acting upon the registered owner *in personam*, will still recognize and give effect to them. Killam, J., by quoting approvingly the words cited above from a'Beckett's work, seems to go a little further, and to admit that "the land may be reached."

No doubt the language of s. 59 seems very strong, and to permit no effect whatever to an instrument until registered. Section 62 seems very emphatic that so long as the certificate of title is in force and uncancelled, it is conclusive evidence that the person therein named is entitled to the estate or interest mentioned, subject only to the exceptions not affecting an unregistered instrument. One must not forget, however, that the Act is largely framed for the guidance of registrars, and that,as far as that officer is concerned, the meaning of the Act is that he shall regard only instruments such as he is directed to receive or register, and when substantially in accordance with the provisions of the Act (s. 34), and when brought in and presented for registration, or delivered to him as provided; and that the positive language employed was not intended to prevent a court from giving effect to rights equitable or otherwise, whether evidenced by any other instruments or by one not capable of being registered, or by one which has been merely omitted to be registered. Before giving to ss. 59 and 62 the meaning contended for by the respondent, we must see what the logical consequence would be, if that would lead to a palpably absurd conclusion, such as it would not be conceived the framers of the Act could have contended. We must then return and consider whether the language of those sections is not capable of an interpretation which would not lead to such a conclusion.

The Act provides for a person having no beneficial interest in land being registered as owner. For example, s. 91 allows the personal representatives or a deceased owner of land to apply for and obtain a certificate to himself of such land, and by s-s. 2 he is thereupon "deemed to be the owner." For purposes of registration, he would doubtless be treated as the owner, so that if he executed a transfer or mortgage such instrument would be dealt with by the registrar exactly as if he were the absolute beneficial owner. But it would surely not be contended for a moment that if an executor contemplated dealing with the land contrary to the interests of the devisee, the latter could not by injunction or order restrain him from so doing. Yet, if literally, as against "all persons whomsoever," he is to be deemed the owner, how can he be interfered

with? It would not do to say that the only remedy of the devisee is to bring an action for damages against him; such a remedy might be a very empty one. Or will it be said that the execution creditors of such an executor could, by delivering their executions to the registrar, reach the land? Yet, if the respondent's contention is right, since the executor is to be deemed the owner and his certificate still in force, and is to be conclusive evidence of his ownership, and that the execution, when delivered, binds whatever land he owns, how could the result be otherwise than that such land would be taken to satisfy the executor's debts? Possibly if the person beneficially interested did not intervene, and there was a sale by the sheriff, and the transfer to the purchaser was confirmed by a judge, and then presented to the registrar, and a certificate was issued to the purchaser, the title of the latter might become absolute. This, I think, illustrates how the apparently general words of ss. 59 and 62 may be given effect to as being addressed to the registrar and to be observed by him, so far as he is concerned, in the performance of his duties. I do not mean to say that they have no further effect, but I cannot accept the proposition that a court exercising equitable jurisdiction is powerless, when confronted with a certificate, to question the ownership therein set forth, notwithstanding s. 62. But I find that s. 130 expressly provides that nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, or over contracts for the sale or other disposition of land, or over "equitable interests therein."

I find, also, that there are many sections which would be needless if ss. 59 and 62 had the wide meaning attempted to be given to them. For example, s. 64 provides that, as against a *bona fide* transferee, no instrument shall be effectual unless two conditions are complied with. First, that it be executed in accordance with this Act; but s. 34 had already provided that no instrument could be registered unless it is substantially in accordance with the provisions of this Act; and, second, that it be "duly registered," *i.e.*, if not duly registered, it shall not be effectual against a *bona fide* transferee; but the respondent says the effect of s. 59 is that if not duly registered it is not effectual as against anybody, whether he be a *bona fide* transferee or not. Section 64 leaves us to infer that an unregistered instrument may be effectual against a person other than a *bona fide* transferee. An execution creditor *quoad* his execution in the registrar's hands is not a *bona fide* transferee. Again, s. 126 seems to make provision for the protection of persons who would be perfectly safe without this section if s. 62 is as absolute as it appears to be; but we here find that the persons in the case there mentioned are protected, "any rule of law or equity to the contrary notwithstanding."

Considering, now, the particular case of an execution delivered to the registrar, it is unquestioned law that an execution affects only the debtor's interest in the property, and by this interest is meant "an interest in lands over which the debtor might have a disposing power, for his own benefit, without committing a breach of duty, *i.e.*, over which he had a right at law and equity to consider himself the beneficial owner": *Kinderly* v. *Jarvis*, 22 Beav. 1. Erle, J., in *Watts* v. *Porter*, 3 E. & B. 743, takes the same position, that all the execution attaches is the interest which the debtor could honestly transfer. Now, after

an owner has made a transfer for value to a *bona fide* purchaser could he thereafter honestly convey any interest in that land to any one? In equity, the purchaser, pending the passing to him of the title, is deemed the beneficial owner, and the vendor as a trustee for him of the legal estate. In Bacon's Abridgment, Vol. III., p. 675, it is said, "for the statute says all his lands shall be extended, which still must be understood of those only which he has a power over, and may charge; and, consequently, those which he has disposed of for valuable consideration before his entering into the statute are not liable in the hands of the purchaser, for they really in no sense can be called his lands."

Under the former law, when lands could be only conveyed by deed, if the instrument purporting to convey was not under seal, the legal estate did not pass to the vendee, and at law the vendor was deemed the owner, just as under s. 62 the person named in the uncancelled certificate of title is to be deemed the owner. Yet courts of equity treated the purchaser as the real owner.

In *Parke v. Riley*, 12 Grant 69, Andrews, the execution debtor, entered into an agreement, binding under the Statute of Frauds, to sell to Riley prior to the execution. Mowat, V.C., in delivering judgment, said: "As to executions coming in after the contract to sell, I do not think they can possibly affect the devolution of title as between vendor and purchaser." The judgment in the court below upheld on appeal 3 E. & A. 215. In *Morton v. Cowan*, 25 O.R. 529, a very recent case, there was a *bona fide* assignment for value of shares in a certain company, but no entry of the assignment was made in the company's books. The sheriff seized and sold those shares under an execution against the assignor subsequent to the assignment. The execution creditor relied on R.S.O., c 127, s. 52: "No transfer of stock, unless made by sale under execution or under the order of judgment of some competent court in that behalf, shall be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, etc., until entry thereof has been made in the books of the company."

One is struck with the resemblance of this section to our s. 59. It is not contended that s. 59 interferes with the effect of an unregistered instrument as exhibiting the rights of the parties thereof towards each other, so that the two sections seem almost identical in their character; yet it was held by Boyd, C., that the seizure and sale did not affect the interest of the assignee. He says: "This very section (s. 52 above quoted) admits, recognizes, and declares that a transfer may be valid as exhibiting the rights of the parties towards each other, and that concedes all that had to be ascertained in this case."

He has already referred to the fact that the rule "as to sales by the act of the law is that the measure of what is sold is the extent of the debtor's interest in the property sold, and not the exact specific property itself." On motion before the Divisional Court this judgment was upheld. The reasoning of Boyd, C., commends itself to my mind, and is, I think, applicable to the present case.

The decision in *The National Bank of Australia v. Morrow*, in the Supreme Court of Victoria, under a somewhat similar Act there, was upon a state of facts the same in effect as in the present case. It was there held that

a purchaser for valuable considera .a, prior to notice of the execution being served on the registrar, but hose transfer is not .ndered for registration until after such service, is not affected by a sale of the land under the execution until the transfer by the sheriff to the purchase has been registered, and that the person having the unregistered instrument and presenting it for registration, before the purchaser at the sheriff's sale gets his transfer registered, is entitled to a certificate of title.

There is another view of the case which may be considered in deciding whether the execution affects the equitable title of a prior purchaser. Section 94 says, "The execution shall operate as a caveat against the transfer by the owners of the land," etc. But can a vendor in such a case as the present be said to be the owner? In the quotation above given from Bacon's Abridgment, it is asserted that under such circumstances the land "in no sense can be called his lands." In *Roach* v. *McLachlan*, 19 A.R. at p. 501, Osler, J., says: "Notwithstanding the execution, the property remains the debtor's property, to sell or mortgage as he pleases. If he does so, it ceases to be his property and becomes the property of the purchaser, subject to the execution. If it is then sold under the execution, it is sold not as the property of the debtor, but as that of the purcha:er."

In *Breithaupt* v. *Marr*, 20 A.R. 689, *Roach* v. *McLachlan* was followed. Hagarty, C.J., at p. 693, says: "Whether the transfer is made by sale, mortgage, or voluntary assignment, the debtor's title is gone, and executions subsequently coming in against him do not affect the property that has been previously sold." Section 62 of the T.R.P. Act, it is true, says that the land in a certificate of title shall impliedly be subject, among other things, to an execution "against or affecting the interests of the registered owner of the land," which has been registered and kept alive. But where the registered owner, that is, the person who, so far as the register shows, appears to be the owner has become a mere trustee for someone else, who is the real, the beneficial owner, is the execution in such a case one which "is against or affects the interests of the registered owne:," since he has at the time no interest in the land? If the execution affects the land at all, it does so to the prejudice of the purchaser, and he alone, not the registered owner, would be concerned, whether the execution takes the land or not. In the view, however, already taken, it is not necessary to decide whether this latter view of the matter would alone dispose of the respondent's claims.

In all the cases now under consideration, except Erratt's, transfers were executed, and nothing remained to perfect the transferee's title under the Act but to register these transfers. In Erratt's case there was no transfer, but, we think, there was an agreement between the company and Erratt binding under the Statute of Frauds, and which would entitle him to maintain an action against the company for specific performance. The transfers given in the other cases, after all, are little, if anything, more than agreements binding the vendors; for a transfer not under seal would not, apart from the T.R.P. Act, pass any title, and it, being a creature of the statute, can become effectual formally to pass the estate only when it is duly registered. So that I think that there is in reality no difference between Erratt's case and the others, except

that they are in a position at once to complete their registered title, whereas Erratt must first procure a transfer, and may possibly have to bring an action to compel the company to give him one.

As to the defendant Robertson, the deputy sheriff, I think he was a proper party. He might have severed in his defence and submitted himself to the judgment of the court, but instead of doing that he joins in the defence set up by his co-defendants and contests the plaintiffs' claim. Had he adopted the other course, I am not prepared to say that a court would order him to pay costs.

As to damages, I think the plaintiffs have suffered none which will not be sufficiently compensated with costs.

I think this appeal should be allowed, with costs to be paid the defendants to the plaintiffs, both of this appeal and in the court below, and it should be declared that the executions registered are clouds on the titles of the plaintiffs, and that the registrar should be, and is hereby ordered, to cancel and remove from the register of the lands in question in these several actions the entries made by him of the said executions, and that the said deputy sheriff be enjoined from selling the said lands under the said executions.

[The case has been further appealed by the defendant Jellet to the Supreme Court of Canada, where it is now standing for argument.]

Flotsam and Jetsam.

A correspondent in St. Paul, Minn., sends us a newspaper clipping from his scrapbook giving the report of a case of a very novel character, and very cleverly discussed in the judgment of Judge Kelly, one of the ablest judges in that State. Our correspondent showed cause to an order *nisi* to compel the defendant, one Woolsey, to deliver his false teeth, set in a gold plate, to the sheriff for the purpose of selling them and applying the proceeds on the execution. The learned judge thus discusses the application of the execution creditor.

"The defendant objects to surrendering his teeth. First, on general principles. That objection, like charity, embraces all possible grounds. Secondly, he plants himself on the bill of rights in our constitution, and says in order to force payment here, or a surrender of these teeth, the court may be compelled to imprison his body, and that imprisonment for debt is unconstitutional.

I have no difficulty, legal or otherwise, about the imprisonment for debt, and if I could lawfully take these teeth from the defendant's mouth, under the circumstances disclosed by the referee's return, I would feel myself justified in doing so. As to the general objection, it is suggested these teeth are a part of defendant's anatomy. It does not appear how securely they are attached, but the defendant evidently entertains great attachment for them. They have become, so to speak, fixtures, and whether or not they may be removed without serious injury to the freehold does not clearly appear. The court cannot take judicial notice of the manner false teeth are kept in place. Though not attached

to the realty in the ordinary sense, yet practically speaking they are, for 'all flesh is dust.' The greatest of poets, dead or living, thus voiced mankind:

> 'Imperial Cæsar, dead and turned to clay,
> Might stop a hole to keep the wind away;
> Oh, that that earth which kept a world in awe
> Should patch a wall to expel the winter's flaw!'

That these teeth are not chattels seems quite plain, although when the thermometer is 20 degrees below zero they may sometimes chatter. Indeed, plaintiff's counsel in his argument stated that defendant seemed to take pleasure in 'rattling' them in his face whenever interviewed for payment.

But defendant's counsel says that this gold plate and these teeth, though attached to defendant's person and in his possession, are not personalty. If they are not personal property, they must be real property; if real, they are not artificial, and therefore cannot be the same teeth plaintiff is making such a row about. This seems to be reasoning in a circle, and I will not stop to consider it, because a circle has no end, and if I once started on its course I might never reach a conclusion.

The plaintiff says the court can compel the defendant to open his mouth and produce these teeth. On the other hand, the defendant insists that, while section 3, article 1, of the constitution guarantees free speech, it is oppression to compel him to open his mouth when he is in a contemplative mood. And the court remembers that a philosopher has said, 'Speech is silver, but silence gold'—gold plate in this instance.

Suitable food is necessary to good health. Nature (and art in this case) provides teeth for mastication. To lose one's teeth may be cruelty to animals. It will not do to say that defendant may subsist comfortably on soups and hash. The one, as a steady diet, is thin and unsatisfactory, the other always mysterious. As a matter of public policy, this order should not be made. Teeth are necessary to correct and proper enunciation. If you doubt this, listen to some person who has temporarily removed his gold plate. Defendant may be elected to the common council. If he loses his teeth he cannot vote, under a strict construction of our city charter, for he must vote in a tone plainly understood by the presiding officer. See charter—tone, vote. See *Hennessy* v. *City of St. Paul*, in this court. These teeth, having become a part and parcel of defendant's anatomy, are, while so used and worn, not subject to levy and sale.

Plaintiff's contention leads to queer results. If I apply the law as plaintiff insists, where will the court draw the line? Legs, arms, eyes, wigs, curls, and bangs—the false and artificial of course—may all be brought to light and within the dread power of the sheriff.

On the whole case I am satisfied that the plaintiff, when he fitted and fastened this plate with its set of artificial teeth into defendant's mouth, parted with all lien thereon as long as they remain an automatical fixture and in permanent use in defendant's mouth. If defendant should accidentally slip on an icy sidewalk and drop these teeth, and plaintiff or the sheriff get them, I do not decide the legal effect; nor, indeed, what may happen in this regard, after the defendant shall have shuffled off this 'mortal coil' and have no further use for teeth."

HYMN TO JUSTICE.

"I demand on behalf of Justice that, having been shown to have reality and not to deceive those who truly possess her, she may now have appearance restored to her; and thus obtain the crown of victory which is hers also."

—*Plato: The Republic, ii. 444.*

Daughter of sovran Zeus, the Lord of All,
Astræa, who didst know a mortal throne
What time the Ages ran their golden zone,
Of thee I sing! O that we might recall
Those happy days when Earth, unvexed by brawl
Of lust and strife, sang to the stars
Sweet lauds of peace, and knew not wars;
When men wrought not for self alone,
But rather for the common good,
All welded in one brotherhood!
Thrice happy days, ere thou wast driven
By Mammon's ruthless horde from Earth to Heaven!

II.

Spirit of Justice, not all desolate
Didst thou leave Earth, thy whilom pleasant home!
For, as a star set in the ambient dome,
Thou beaconest to those that on thee wait
For light to thread the path of Duty straight.
And as the scent of some rare flow'r
Haunts its abode for many an hour
After its leaves to nothingness have come,
So what thou taughtest Man on Earth
Within his laws is shadowed forth
Through all the avenues of Time—
A spur and talisman of deeds sublime!

III.

Great souls have gazed upon thy loveliness
From Wisdom's heights; and when the vision rapt
Had sure unfolded what thou would'st have kept
As Right inviolate, that did they press
On Man's observance with supremest stress.
We hear thy note in Vedic song,
The Prophets burn with hate of wrong;
And Plato's trump thy wondrous message swept
Throughout the pagan world for aye!
And so we children of to-day
Upon the corner-stone of old
Would fain uprear another Age of Gold!

IV.

Imperial Rome first signalled thy return
When she promulged that mighty code of laws
Which breathes thy savour in its every clause,
And sets thy seal on Earth's remotest bourn.
O, they are blind who cannot now discern
The dawn of a new jural reign,
When thou shalt live with men again;

When only he shall win the world's applause
Who yields his brother truth and right,
And mirrors in his life thy light;
When all the surging waves of Hell
Shall break in vain on thy strong citadel!

V.

O Goddess, Essence, whatsoe'er thou art,
Let the glad pæan thrill our wistful ear:
"*Astræa Redux!* Once more is Justice here
To make her lodgment in the human heart,
Nor from that loved abode to e'er depart!"
Ah! this is what Man long has sought,
The end for which his laws have wrought,
The goal and crown of all the soul holds dear.
Come, then, and bring us sweet surcease
From wrongs that long have slain our peace;
Come, and the day millennial bring,—
Come, usher in the reign of Christ the King!

Ottawa. CHARLES MORSE.

THE contents of this number will be found in the General Index which is issued herewith.

ALL communications intended for the Editorial Department should be addressed to the Editor at 94 Church Street as heretofore, and all business communications to the "Canada Law Journal Company" at the office of publication, 2 Toronto Street, Toronto.

THE two hundred and eighth volume of *Littell's Living Age* will open with the issue of the week ending January 4th. The beginning of a new volume is an excellent time for the beginning of a new subscription, especially when, as in this instance, it includes a new—a lower—price. For 1896 the subscription price will be six dollars. We understand that the reduction in price means no reduction in price or falling off in value, or any lowering of the high standard which it has always maintained. Foreign periodical literature continues to grow, not only in bulk, but also in the variety, interest, and importance of the topics treated; and it absorbs to a greater extent every year the works of the most prominent authors of the day. Littell & Co., Boston, are the publishers.

ANALYTICAL INDEX

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