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OUR correspondent at the metropolis of this Dominion of ours gives us an interesting sketch of various things going on there of interest to the profession. This letter will be found *post* p. 191. We do not concur on all points, but "great minds (do not always) think alike."

WE are glad to be told by many that the changes made this year in THE JOURNAL are for the better. Since the beginning of the present volume we have also given at the end of each number a digest of the cases reported and noted therein. We trust this will be found of some little assistance to our readers.

THE JUDICIAL POWERS OF THE CABINET.

A question important in a constitutional sense, as well as interesting from an historical point of view, has arisen out of the action of the Dominion Government in reference to the Manitoba school legislation. On the one hand, as contended by Mr. McCarthy in *The Canadian Magazine*, and in the debate on Mr. Tarte's resolution, ministers of the Crown have sought to evade political responsibility, inasmuch as they assumed that, in regard to this matter, their duties were of a judicial nature, and that they were to hear and determine the appeal to the Governor in Council from the Roman Catholic minority in Manitoba rather as judges in a court of law than as political functionaries responsible to Parliament.

Mr. McCarthy's contention appears to be that the only grounds upon which ministers can decide the "appeal" are political, using the term in its wide and general sense, and that as a

court of appeal, or as acting in a judicial capacity, they have no jurisdiction, either as members of the Cabinet or of the Privy Council in Canada.

On the other hand, it was argued by the Minister of Justice, on behalf of himself and his colleagues, that, while not denying or evading their political responsibility, the case with which they were called upon to deal was of a judicial nature, and to be treated as such, and that, in the action they took, there was no undue assumption of or misuse of judicial authority, and no evasion of ministerial responsibility.

Even as stated by the Minister of Justice the case of the government was, so far as we understand the matter, open to serious objection; but the actual course pursued by the government, the statements made by individual ministers, and, still more, the ground taken on their behalf by Dr. Weldon, who has a high reputation as a constitutional lawyer, carried it a great deal further, as we now propose to show.

The "appeals" under the Manitoba Act and the 93rd section of the B.N.A. Act are to the "Governor in Council." It is necessary then, in the first place, to enquire what are the powers and functions of the "council." Has the council any function or powers of its own apart from that which certain of its members exercise as members of the Cabinet; that is to say, as ministers responsible for their actions to the Crown and to Parliament? If so, what are those functions, and are they, or any of them, of a judicial character? As members of the Cabinet, ministers have not, nor can they have, judicial powers. For whatever they do, or for whatever advice they give to the head of the executive, they are responsible to Parliament. Clearly, they could not be so held responsible if their capacity was a judicial one, for the action of a judge must be entirely free, not only from political bias, but also from political responsibility.

The question, then, clearly seems to render itself into this: Have we in this country what we may term a Court of Privy Council, composed of members of the Cabinet, competent to determine "appeals" such as that sent up by the petitioners in the Manitoba case, and justified in declaring, as did certain members of the present Cabinet, that, in regard to this Manitoba question, their lips were sealed, as they were judges before whom the case was still *sub judice*?

To discuss this question intelligently we must go back, as Mr. McCarthy and Dr. Weldon did, to a remote period in English constitutional history in order to find out the original source from which alone such a court or jurisdiction could have arisen. The history of the Privy Council is an interesting one. It has existed under various forms from the time of the Norman Conquest. Out of it arose our courts of law and equity, which became entirely distinct both from the political and legislative functions of government. In the reign of Henry VIII., the Privy Council began to emerge out of the General Council, which by degrees lost alike its power and importance. From being advisers of the Crown, the council became its servants, and the mere executors of its will. Courts were formed out of it more fully to establish the royal prerogative, and finally its whole judicial power was transferred to a new tribunal—the well-known court of the Star Chamber, which, in addition to any regular judicial functions, exercised all the powers which previously belonged to the General Council. In the words of Mr. Dicey: "This august tribunal was merely the council under another name; and the court whose overgrown power the patriots of 1640 cast to the ground was the same body whose early encroachments had alarmed the parliamentary leaders under Edward III. and Richard II." He adds that "The process by which the judicial authority of the council passed into the form of the Court of Star Chamber admits of some dispute and is involved in no little obscurity," and he goes on to cite various authorities which have differed on this point. But on the main point all authorities concur.

With the abolition of the Star Chamber by the act of the Long Parliament, 16 Car. I., cap. 10, fell the whole system of government by councils, and government by Parliament began. Though the Star Chamber, as such, was abolished, the entire jurisdiction of the Privy Council was not removed till the Act 3 & 4, William IV., when its appellate jurisdiction was conferred upon what is now called the Judicial Committee of the Privy Council, the highest court of appeal for the trial of all colonial causes.

Thus it appears that from the time of Henry VIII. the purely judicial functions of the Privy Council, as a whole, have ceased to exist. Whatever powers it formerly possessed were merged in the general jurisdiction of the Star Chamber, and

ceased with it, except in so far as they were finally transferred to the Judicial Committee of the Privy Council, the Committee on Trade and Plantations, and similar bodies which existed by virtue of the special power conferred on them, and no longer as representing the council. As, for example, the members of the Judicial Committee become Privy Councillors because they are appointed as judges. They do not become judges because they are Privy Councillors. If, then, the Privy Council in England, as such, has no judicial functions, it follows that the Privy Council in Canada can have inherited no judicial functions from it. If our Privy Council has any judicial functions, they must be derived from some original authority. But the sections of the B.N.A. Act relating to the executive power, and establishing the Privy Council, make no mention of the judicial powers, which, as we have shown, are not inherent in the council as now existing. Nor do the sections relating to the judicature establish any judicial powers in the Privy Council. Nor have we anything analogous to the Judicial Committee of the Privy Council. The Supreme Court is an independent tribunal, quite distinct and apart from the Judicial Committee, to which it is inferior.

It would seem, therefore, that the Privy Council in Canada has no judicial functions or judicial powers, nor has it ever exercised such powers.

But we have a body, known as the Cabinet, whose members are of the Privy Council. By one of those curious anomalies with which the British Constitution abounds, the Cabinet, though all-powerful, is a body not known to the law or the constitution, though it virtually makes the laws, and is of the very essence of the constitution. In theory, the executive power is lodged not, as might be supposed, in the Governor and Cabinet, but in the Governor and Council. As a committee of Parliament, supported by a majority in Parliament, and responsible to Parliament for all that it does, the Cabinet virtually governs the country. But if, as we have shown, the members of the Cabinet have no judicial power by virtue of their being also members of the Privy Council, *a fortiori* they can have no such power as members of the Cabinet, which is purely a political body.

In a limited sense, it is true that the Cabinet, or the Privy Council, by whichever name it may be called, has judicial powers, as every body or every individual has who has to apply the rules

of law to the everyday affairs of life; but in the sense of being a court, or having any right in its members, either individually or collectively, to sit or act in a judicial capacity, it has none.

It would follow, then, that in dealing with the Manitoba school case the government must act in its political capacity. In that capacity it is certainly entitled to refer any doubtful point of law to the Supreme Court, but that in no way interferes with or lessens its ultimate political responsibility, and its obligation to deal with the question as a matter of political moment. And clearly, were it possible to admit the contention that a Cabinet Minister can, under any circumstances, shelter himself from political responsibility under the robe of a Privy Councillor, the doctrine of responsible government would, to say the least, be seriously called in question.

CURRENT ENGLISH CASES.

The Law Reports for February comprise (1893) 1 Q.B., pp. 125-209; (1893) P., pp. 9-37; and (1893) 1 Ch., pp. 77-213.

PRACTICE—AMENDMENT OF WRIT AFTER APPEARANCE—MOTION FOR JUDGMENT UNDER ORD. XIV., R. 1 (ONT. RULE 739).

In *Paxton* v. *Baird*, (1893) 1 Q.B. 139, the writ was served indorsed with a claim for money lent, and it also had a claim for interest. This claim for interest could not, under the recent English decisions, be the subject of a special indorsement, and consequently the writ, though the rest of the claim was the subject of a special indorsement, was not "a specially indorsed writ" when served. The defendant appeared. The plaintiff then amended the writ by striking out the claim for interest, and he then moved for judgment as on a specially indorsed writ under Ord. XIV., r. 1 (Ont. Rule 739), and the question was whether by striking out the claim for interest the writ had become a "specially indorsed writ." A Divisional Court (Lord Coleridge, C.J., and Wills, J.) were agreed that it had, and that the plaintiff was entitled to a judgment as on a specially indorsed writ. As we have on a former occasion pointed out (see *ante* vol. xxviii., p. 296), the English construction of the Rules relating to special indorsements is opposed to the decisions of Boyd, C., and Meredith, J., sitting in Chambers. The English authorities, however, are decisions of the Court of Appeal and Divisional Courts, and

it will soon have to be considered whether or not the English construction of the Rules is or is not to prevail in Ontario over that adopted by Boyd, C., and Meredith, J.

TRESPASS—HIGHWAY—USE OF HIGHWAY FOR IMPROPER PURPOSE—DECLARATORY JUDGMENT—PRACTICE—ORD. XXV., R. 5 (ONT. JUD. ACT, S. 52, S-S. 5).

Harrison v. *Rutland*, (1893) 1 Q.B. 142, was an action which arose out of the following facts: The defendant had a right of shooting game over a certain moor. This moor was traversed by a highway. For the purpose of his sport the defendant's game-keepers drove grouse in the direction of certain butts erected near the highway, behind which the defendant was concealed. The plaintiff had some fancied grievance against the defendant, and for the purpose of preventing the birds approaching the butts he stood on the highway and waved his pocket-handkerchief and umbrella, so as to scare them away. The plaintiff, on remonstrance, refused to desist, and the defendant's servants then held him on the ground, using no unnecessary violence. For this act the plaintiff brought his action, claiming damages for the assault: and the defendant, besides justifying the alleged assault, counter-claimed for trespass by the plaintiff on the highway in question, and claimed a declaratory judgment as to the rights of the parties. Lord Coleridge, C.J., before whom the action was tried, held that the plaintiff, being on the highway, had a right to do as he did. But the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) were unanimous that the plaintiff was only entitled to use the highway for the purpose of passing and repassing, and that in using it for the purpose of obstructing the defendant in the lawful enjoyment of his rights he was guilty of trespass, and the defendant was held entitled to judgment both upon the claim and counterclaim. Lord Esher, M.R., however, thought it was inexpedient to introduce into a common law action the equity practice of pronouncing a declaratory judgment. The other members of the court saw no reason why the declaration should not be made, even though it should be subsequently enforced by injunction in the event of the plaintiff repeating his wrongful act. The English law as to the ownership of the soil of highways is thus summed up by Kay, L.J.: "The soil of a highway belongs *prima facie* to the owner of the land adjoining it. If the land on either side is the property of different owners,

each is owner of the soil on his side *ad medium filum* of the highway." In view of the provisions of the Municipal Act (55 Vict., c. 42, ss. 525, 527) as to the ownership of the soil of highways, the application of this case in Ontario is subject to the qualification consequent upon those provisions.

PRACTICE—ORDER FOR PARTICULARS—TERMS WHICH MAY BE IMPOSED IN ORDER FOR PARTICULARS.

In *Davey* v. *Bentinck*, (1893) 1 Q.B. 185, under Ord. xix., r. 7, which expressly authorizes the court to make orders for the delivery of better particulars of any matter stated in any pleading, notice, or written proceeding, it is held by the Court of Appeal (Lord Esher, M.R., and Lopes, L.J.) that it is competent for a court making such an order against a plaintiff to impose the terms that in default of the particulars being delivered pursuant to the order, the action shall be dismissed. The Ontario Rules make no express provision on the subject of the delivery of particulars, but such terms are often imposed in such orders, and this case is an authority for so doing.

STATUTE OF LIMITATIONS—"JUDGMENT."

In *Jay* v. *Johnstone*, (1893) 1 Q.B. 189, it may be noticed that the decision of the Divisional Court, (1892) 1 Q.B. 25 (noted *ante* p. 136), is affirmed by the Court of Appeal (Lindley and Bowen, L.JJ.).

SALE OF GOODS BY SAMPLE—ACCEPTANCE AFTER KNOWLEDGE OF DEFECT—RIGHT OF PURCHASER TO REJECT GOODS.

In *Perkins* v. *Bell*, (1893) 1 Q.B. 193, a question arose as to the right of a purchaser of goods to reject the same for deviation from sample, after having once accepted them after knowledge of the defect, under the following circumstances: The goods in question were a quantity of barley, which was bought according to a sample. After the sale the seller's servants mixed a quantity of inferior barley. The barley was to be delivered at a railway station. Before the delivery the seller notified the purchaser of the mistake, and offered that if defendant complained that it would make any difference to him in the sample he would make it good, but that he hoped it would not. Thereupon the purchaser wrote to the station master to forward him a sample of the barley, which the station master did. Having inspected

this sample, the purchaser ordered the station master to forward the barley to some brewers to whom he had contracted to sell it. This was done, but the latter refused to accept it as not being up to sample. The original owner of the barley sued for the price, and the purchaser resisted the action on the ground that he had never accepted it. Laurance, J., who tried the case, upheld the defendant's contention; but the Court of Appeal (Lindley, Bowen, and A. L. Smith, L.JJ.) unanimously reversed his decision, being of opinion that the defendant had accepted the barley by ordering it to be sent on, after knowing of the defect, and they gave judgment in favour of the plaintiff for the price. The defendant contended that, inasmuch as the sale was by sample, he was entitled to a fair opportunity of comparing the bulk with the sample before the property in the barley passed to him, and that the place of inspection was not necessarily the place of delivery; but the Court of Appeal considered that as the only destination of the barley known to the seller was the railway station, there was a *prima facie* presumption that the place of inspection was the place of delivery, and there was no evidence to alter that presumption.

PROBATE—WILL—DEPENDENT RELATIVE REVOCATION.

In re Andrews, (1893) P. 14, was an application to revoke letters of administration and to grant probate of a will which had been assumed to be revoked by a subsequent will which had been destroyed by the testator's direction, but which it was now claimed had been, in fact, re-established by the destruction of the later will. As there were infants interested in an intestacy who could not consent, Barnes, J., refused to grant the probate on motion, but left the applicants to propound the will for proof in solemn form.

LOST WILL. LIMITED ADMINISTRATION UNTIL WILL FOUND.

In re Wright, (1893) P. 21, was an application for administration until a lost will should be found. Evidence was adduced that the testator had duly executed a will, but that it could not be found, and that his widow, who refused to attend for examination, had stated that it had been destroyed accidentally. No evidence of its contents was forthcoming. On the consent of the other next of kin, a grant of administration was made to his only

son, limited to dealing with certain specified property until such time as the will or an authentic copy should be produced.

RESTRAINT OF TRADE—COVENANT NOT TO KEEP A COFFEE HOUSE—SALE OF REFRESHMENTS BY GROCER.

In *Fitz* v. *Iles*, (1893) 1 Ch. 77, the defendants were bound by a covenant contained in a lease not to use the devised premises as a coffee house. They carried on business as grocers, and proposed, as auxiliary to their business, to sell to their customers tea and coffee and bread and butter and other light refreshments, and the plaintiff claimed an injunction to restrain them from doing so, as being a breach of their covenant. North, J., held that the plaintiff was entitled to the relief claimed, and his judgment was affirmed by the Court of Appeal (Lindley and A. L. Smith, L.JJ.).

GUARANTEE—RECITAL OF GUARANTEE IN A WILL—STATUTE OF FRAUDS (29 CAR. 2, C. 3), S. 4—AGREEMENT BY A PARTNER TO INDEMNIFY FIRM.

In re Hoyle, Hoyle v. *Hoyle*, (1893) 1 Ch. 84, raises what Lindley, L.J., calls "a curious question." A testator in his lifetime was a member of a firm of solicitors. His son was indebted to the firm, and it was agreed that he should take a mortgage from his son, and he verbally agreed to indemnify the firm against any loss by reason of the indebtedness of his son. In his will he recited that he had guaranteed the firm against loss in respect of his son's debt. Two questions arose: (1) Whether the promise of the debtor to the firm was a promise to answer for the debt, default, or miscarriage of another within the Statute of Frauds; and (2) was the recital in the will a sufficient memorandum in writing to satisfy the Statute of Frauds? Kekewich, J., decided the first question in the affirmative and the second in the negative; but the Court of Appeal (Lindley, Bowen, and Smith, L.JJ.) was against him on both points, and was of opinion that the promise was one of indemnity, and was not within the statute; but Smith, L.J., though not differing from his brethren, considered it was not necessary to decide that point, but the court was unanimous that, assuming the promise was a guaranty within the statute, the recital in the will was a sufficient note or memorandum in writing to satisfy the statute.

WILL—CONSTRUCTION—DEVISE OF LAND "NOW IN MY OWN OCCUPATION"—LAND SUBSEQUENTLY ACQUIRED AND OCCUPIED BY HIM—SUBSEQUENT CODICIL CONFIRMING WILL—MORTGAGE OF SUBSEQUENTLY-ACQUIRED PROPERTY BY HEIR—RIGHT OF BENEFICIARIES TO FOLLOW PURCHASE MONEY.

In re Champion, Dudley v. *Champion*, (1893) 1 Ch. 101, is a case which in some respects resembles *Hatton* v. *Bertram*, 13 O.R. 766. A testator by his will, made in 1873, devised a freehold cottage with all the land thereto belonging, "now in my own occupation," to trustees in trust for his wife for life, and after her death for his children in equal shares. Subsequently the testator purchased two fields adjoining the cottage, and occupied them with the cottage until his death. In 1877 he made a codicil by which he made some alterations in his will, but confirmed it in other respects. After his death it was assumed by the heir-at-law that the two subsequently-acquired fields had not passed to the devisees of the cottage, and he mortgaged them to the defendant Chapman with notice of the will, who subsequently sold them under the power of sale. The beneficiaries entitled to the devise of the cottage now claimed that they were entitled to the two fields, and claimed that Chapman should account to them for the purchase money he had received. The Court of Appeal (Lindley, Bowen, and Smith, L.JJ.) affirmed the decision of North, J., that by the confirmation of the will by the codicil in 1877 the two fields which had been in the meantime acquired and occupied by the testator passed under the devise of the cottage, and that the beneficiaries were entitled to adopt the sale and follow the purchase money; but that Chapman was entitled to deduct therefrom his costs of sale and any part of the money advanced by him on the mortgage which he could show had been applied for the purposes of the trust estate. It may be noticed that in *Hatton* v. *Bertram* there was no subsequent confirmation of the will, and it was there held that the after-acquired property passed under the devise of the property known as "Walkerfield," "being the property I now reside upon," the court holding that the will spoke from the death of the testator.

SPECIFIC PERFORMANCE—CONTRACT OF LANDLORD TO EMPLOY A POLICE FOR BENEFIT OF HIS TENANTS.

Ryan v. *Mutual Tontine Westminster Chambers Association*, (1893) 1 Ch. 116, is an appeal from a decision of A. L. Smith, J., (1892) 1 Ch. 427 (noted *ante* vol. 28, p. 261). We there ventured to

doubt the correctness of the decision, and we now find the Court of Appeal has reversed it. The action was for the specific performance of a contract by a landlord to employ a porter for the benefit of plaintiff and other tenants. A. L. Smith, J., granted the relief prayed, but the Court of Appeal holds that such a contract is not one that a court of equity can specifically enforce.

SOLICITOR-MORTGAGEE COSTS.

In re Doody, Fisher v. *Doody*, (1893) 1 Ch. 129, an attempt was made to extend to the case of solicitor mortgagees the rule laid down by Lord Cottenham in *Cradock* v. *Piper*, 1 Mac. & G. 664, to the effect that where two trustees are parties to a litigation, and one of them, being a solicitor, acts for both, he is entitled to full costs. In this case a mortgagee solicitor had acted as solicitor for himself and co-mortgagee in proceedings in and out of court in reference to the mortgage security, and the question arose upon taxation whether he could charge profit costs, and the Court of Appeal (Lindley, Bowen, and Smith, L.JJ.) have affirmed the decision of Stirling, J., that he could not, and that the decision in *Cradock* v. *Piper* is not to be extended to mortgagees. We may observe that that case appears to be on the high way to be overruled. It was followed, it is true, in *In re Corsellis*, 34 Ch.D. 675, but in that case Lindley, L., said: "I am not one of those who admire the decision in *Cradock* v. *Piper*." In the present case he gives it a further blow, and says: "The courts have repeatedly expressed doubts of the soundness of that decision. It came before us *In re Corsellis*. We did not overrule it, but we showed that we did not approve of it." And Bowen, L.J., says: "I cannot follow the reasoning in *Cradock* v. *Piper*." The process of decay may therefore be said to have fairly set in, and it will not be surprising to learn that it has soon ceased to exist as an authority.

INFANT GUARDIAN RELIGIOUS EDUCATION OF INFANT.

In re McGrath, (1893) 1 Ch. 143, the Court of Appeal (Lindley, Bowen, and Smith, L.JJ.) affirm the decision of North, J., (1892) 2 Ch. 496 (noted *ante* vol. 28, p. 550). The facts were fully noted then, and it is not necessary further to refer to them except to say that the application originated in the desire of cer-

tain Roman Catholic friends of the infants to procure the removal of a Protestant as their guardian and to obtain a direction to bring them up as Roman Catholics, which the court under the circumstances refused as not being in the interest of the infants. How far the rule that a child should be brought up in the religion of its deceased father is carefully considered, and the Court of Appeal lays it down that the rule is not so rigid that it may not be departed from where the interests of the child demand it. "The welfare of the infant is the ultimate guide of the court."

LEASE FOR LIVES — SUB-LEASE — SURRENDER OF ORIGINAL LEASE — STATUTE OF LIMITATIONS—RIGHT OF REVERSIONER TO RECOVER POSSESSION AS AGAINST SUB-LESSEE.

Ecclesiastical Commissioners v. *Treemer*, (1893) 1 Ch. 166, is an important decision under the Statute of Limitations. The facts of the case were that in 1805 the plaintiffs' predecessor in title made a lease for three lives of the property in question. The lessees sub-let for a term of ninety-nine years, terminable upon the lives mentioned in the original lease. In 1832 the persons entitled to the lease of 1805 surrendered that lease, and under 4 Geo. II., c. 28, s. 6, took a new lease for lives. The sub-lessees were no party to this. The lives on which the sub-lease was terminable fell in in 1874, from which time the defendant as sub-lessee continued in possession without paying rent. The plaintiffs had, however, been regularly paid the rent due under the lease of 1832, which expired in 1891, and they now claimed to recover possession from the defendant, who contended that he had acquired a title under the Statute of Limitations. Chitty, J., however, held that the new lease of 1832 had vested an estate in the lessees under the 4 Geo. II., c. 28, and that the plaintiffs' title did not accrue till 1891, when that lease expired, and therefore were not barred by the defendant's possession subsequent to 1874.

VENDOR AND PURCHASER — RESTRICTIVE COVENANTS — PROPERTY SOLD IN LOTS — BUILDING SCHEME — REPRESENTATIONS BY VENDOR.

Tucker v. *Vowles*, (1893) 1 Ch. 195, was an action brought by the plaintiff to enforce what he claimed to be a building scheme governing an estate parts of which had been purchased by the plaintiff and defendant. The estate in question was owned by

the defendant and one Shorland, and was offered for sale in lots. A plan exhibiting the lots and indicating roads and sewers was prepared for the local sanitary authorities' approval; on each of the lots on this plan the ground plan of a house and no other building was delineated. During the negotiations for purchase the plaintiff was shown a tracing of part of this plan, and was informed by the vendor that the houses were to cost at least £800 each, and that on certain specified lots the erection of stables would be permitted. The plaintiff signed an agreement to take four lots; the principal parts of this agreement were printed, and one of the printed clauses provided that the purchaser should not erect on any plot any dwelling or building other than a dwelling-house worth £800 (except a greenhouse of a specified description). The plaintiff erected houses in accordance with his agreement. The defendant subsequently acquired the interest of his co-owner in other lots facing the plaintiff's, and erected buildings which were not provided for by the plan shown to the plaintiff. The defendant's conveyance contained no restrictive covenant, except that he would not erect any building without the approval of Shorland, which he had obtained before building. It appeared that the printed agreement which the plaintiff signed had been adopted by Shorland and Vowles' solicitor from an old form in the office for his own convenience in dealing with the estate, and without any definite instructions from the owners. Under these circumstances Romer, J., held that the plaintiff had no cause of action, because on the evidence he was of opinion that there was no definite building scheme at the time of the plaintiff's purchase, and that there were no representations by the vendors that all the lots would be bound by any restrictive conditions.

Notes and Selections.

LONG BILLS AND SMALL BODIES.—What trivial amounts may breed a long bill of costs is shown by the litigation which has been proceeding for a long time between the guardians of the Barton-upon-Irwell Union and those of West Ham with regard to the settlement of a pauper. The amount originally in dispute was only £7; whereas the costs of the Barton Union in litigating the matter had amounted to £337 and those of the West Ham Union to over £1000. It was only to be expected that Mr. Jenner Fust, the Local Government Inspector, should remark that it was very unsatisfactory that the ratepayers' money should be spent in lawsuits of this kind, and to point out that the Local Government Board had power to act as arbitrators between two Unions on their agreeing to state a case.—*Law Gazette.*

RAILWAY—EJECTION OF PASSENGER FROM MOVING TRAIN.—In *Boggess* v. *Chesapeake, etc., R.W. Co.*, W. Virginia Sup. Ct., in December last, it was held that a person having a ticket for passage upon a railroad, and who boards a freight train which does not carry passengers, believing the ticket good on that train, is to be treated as a passenger, and is not a trespasser; and held, also, that where the conductor orders such a person to get off the train while running at a speed which would endanger him in getting off, the conductor refusing to stop the train to allow him to get off, and in violent and insulting language threatens to eject the person from the train by force if such order is not obeyed, and has force at his command to execute such threat, and the person jumps from the train to avoid ejection by force, this is sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train.

DEARTH OF LEGAL BUSINESS.—In this connection we read with grim pleasure an extract from the *Hampshire Chronicle*, wherein is published a paragraph taken from the columns of that paper as published in August, 1822, as follows: "No class of persons at the assizes on the Western Circuit, with the exception of convicts and losers of suits, have less reason to be satisfied with

them than the barristers. We believe there are no less than 70 of these learned gentlemen on the circuit, and at Salisbury they had but half a dozen cases or eleven briefs to share amongst them. From 50 to 60 learned and eloquent gentlemen touched neither paper nor fee. It was still worse at Dorchester, where there were but five briefs, not one per dozen barristers. Exeter provided 28 cases—at most but 40 briefs, and the whole of them were engrossed by about half a dozen leading and popular men. For Cornwall there appears to be but five prisoners, and an equal lack of business on the law side."

INNS OF COURT VOLUNTEERS.—The "Devil's Own" having shown unmistakable signs of decay, an earnest and commendable effort is being made to put new life into the corps. The four Treasurers of the Inns—Mr. Justice Wills, Sir Charles Russell, Mr. A. G. Marten, Q.C., and Mr. Walter D. Jeremy—none of whom, by the way, ever donned the uniform of the corps—have issued a circular inviting members of the Bar to attend a meeting, which will be held in the Old Hall of Lincoln's Inn, to-morrow (Saturday) afternoon, to consider what steps can be taken to improve the condition of the Inns of Court Rifle Volunteers. There is no doubt that the corps has sadly fallen from the high position it held in the days when Sir Henry Cotton and Mr. Justice Chitty were its most active members. Its management has passed into somewhat uninfluential hands; but this, we suppose, is the effect rather than the cause of the falling off in numbers. The fact remains that scarcely a barrister of any standing takes any part in the proceedings of the corps. In the keen race for briefs there is, indeed, little time for such luxuries as parading in uniform.—*Law Gazette.*

THE OLD AND THE NEW DEBTOR.—To run in debt in these days is a subject for light comedy—the burden of many a jest. In early times it was a truly tragic situation. The Roman debtor, as everybody knows, who made default for thirty days in paying up, was handed over to his creditors in execution, and with nice particularity (meant to be humane) the Twelve tables went on to define the exact weight of the fetters (not more than fifteen

pounds!) with which the creditor might load him. If this discipline failed, the creditor, after sixty days more, might slay or sell him, or, if there were several creditors, they might hew him in pieces among them; and the Roman law, in such a case, was not as precise as the law of Venice about a creditor getting more of the debtor's carcass than was proportioned to his debt. But this carving up of the debtor was an expensive luxury, only to be indulged in by a Roman Shylock. The usual and business-like thing was to sell him or keep him as a slave. In the pre-Solonian jurisprudence at Athens things were rather worse, for every debtor unable to fulfil his contract was not only liable to be adjudged as the slave of his creditor, but also his minor sons and unmarried daughters and sisters, whom the law gave him the power of selling. The Gentoo law of India also gave the creditor power to seize and confine the debtor, his wife, children, and chattels of all kinds; but it is peculiar in providing that before he proceeded to these "fierce extremes" he was to try various milder modes of obtaining payment. If speaking to the friends and relations of the debtor proved unsuccessful "he shall go in person," says the Gentoo Solomon, "and importune for his money" (no novelty this), "and stay some time at the debtor's house without eating or drinking." If this fails, "he shall carry the debtor home with him," and having seated him before men of character and reputation shall there detain him." Next, a little roguery may be practised; "he shall endeavour by feigned pretences to get hold of some of his goods." After these have been exhausted ineffectually the creditor "ramps for his money," and may exclaim with Romeo,

"Away to heaven respective lenity."

The plan indicated above of staying at the debtor's house without eating or drinking is technically known in India as "doing dharna." The most ingenious form of this debt-collecting process is hiring a Brahmin to do the sitting; for if this sacred person should be starved to death in mute importunity before the debtor's door, curses of the most appalling description would alight on the debtor's head. It is as if an English creditor were to employ an archdeacon, or some other dignified ecclesiastic, to dun his debtor. According to the Teutonic codes, again, the insolvent debtor falls under the power of his creditor, and is subject to personal fetters and chastisement. Cæsar, when he was in Gaul,

found Orgetorix surrounded with a retinue of these enslaved debtors of his (*obæratos suos*). King Alfred, in his laws, exhorts the creditor to lenity (Thorpe I. 53). This extraordinary and uniform severity of ancient systems of law to debtors, and the extravagant powers which they lodge with creditors, is remarked by Sir H. Maine. "It often strikes the scholar and the jurist," he says, "as singularly enigmatical," and he tries to explain it by the theory that the nexum, to take the case of the Roman debtor, was really in the nature of a conveyance and not contract, payment being artificially prolonged to give time to the debtor. Hence the debtor's default was regarded with great disfavour. This is ingenious, but too subtle. The explanation is probably much simpler; partly it was indifference to suffering, and partly it was that so long as slavery and serfdom were recognized institutions, so long a man's person was part of his property and a realizable asset; and probably the idea never occurred to members of such a primitive community that the debtor should not pay his debt with his person. The human-chattel view is, of course, very shocking to us, with all its attendant misery; but it requires no particular stretch of imagination to picture such a state of society. We have only to go back a century—hardly that, indeed—to find in our own country, with its boasted freedom and merciful laws, the same thing, slightly modified—debt, that is to say, expiated by life-long imprisonment with or without the tortures of damp dungeons and fetters (see 17 State Trials 298-618), an imprisonment involving not only the debtor, but his family. A trumpery matter of a few pounds might lodge a man in the Fleet, or King's Bench, and over their portal was written more unmistakably than that which Dante saw,

"All hope abandon ye who enter here."

History teems with examples. The comic poet Wycherly languished for seven years in the Fleet for want of £20. Sheridan, in the person of Sir Charles Surface, could flash his brilliant jests at the Jew; but he had to endure the final ignominy of being dragged from his bed, a dying man, to a sponging house. The scenes of "Little Dorrit," as everybody knows, were no fanciful creations of Dickens; but the veritable picture of his father's and family's own "Micawber" experiences. One bright exception to the blighting influence of the debtor's gaol is on record. The King's Bench prison made the fortune of Chief Justice Pemberton,

for having squandered his substance in riotous living, and being consigned to "durance vile," he fell to at his law books (hitherto neglected), and established such a reputation for learning as induced his Jew creditor to let him out (not from any weak motive of compassion, but that he might work out his debt by legal practice), and led ultimately to his attaining the highest honours of his profession.

From undue severity the law has now passed to an almost too easy tolerance of indebtedness. The so-called imprisonment for debt under the Debtors' Act is not imprisonment for debt, but for dishonesty, as the late Lord Bramwell pointed out in *Stoner* v. *Fowle* (13 App. Cas. 28), for it is only when a man has had the means of paying and has not done so that he can be imprisoned. The Bankruptcy Act, 1883, has for the first time struck the right note in recognizing that there are debtors and debtors, and in discriminating between insolvency induced by misconduct, such as extravagant living or reckless speculation, and insolvency induced by misfortune without misconduct. But it may be noted that the withholding the discharge is in the interests of the commercial community, not redress accorded to the creditor. The creditor's "sole remaining joy," now that whips and fetters are denied him, is to "heckle" his debtor at the public examination. —*Legal Gazette.*

Correspondence.

SOLICITOR AND COUNSEL.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I have for some time thought that an interesting discussion might be opened up in your columns upon the subject of professional etiquette in this Province with reference to the employment of leading counsel. I have practised a good many years here, and yet I am quite unable to settle to my own satisfaction whether there is, or is not, any recognized etiquette in the profession on the subject. I would like to have your views and those of any other members of the profession upon the following points:

(1) If a solicitor employs a counsel as leader at a trial of *nisi*

prius, and there is subsequently a motion before the full court in term, is there any etiquette requiring him to give a brief to the same counsel on the motion in term?

(2) If upon a motion in term a brief is given to a leading counsel, and the case is afterwards carried to the Court of Appeal, is there any etiquette entitling him to expect to have a brief in the Court of Appeal.

(3) If the opinion of counsel is taken before commencing litigation upon the questions about to arise in the suit, is there any etiquette requiring that he should have a brief in the case when it comes before the courts?

I think that these are the principal questions which arise, and which I think might be usefully discussed to see if there is any consensus of opinion upon the subject.

Yours, etc.,

BARRISTER.

Toronto, March 13, 1893.

[We know of no etiquette or unwritten law of the profession which requires that in any of the above cases the same counsel should be employed. We should be glad, however, to hear from any subscriber on the subject.—ED. C.L.J.]

AFFAIRS AT THE CAPITAL.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—The session draws its slow length along, like the wounded snake in Pope's lines; yet not more so than usual. Her Majesty's loyal Opposition, of course, as in duty bound, criticize both generally and particularly what the ministers say or do, and time is lost in disputes which decide nothing. Some object to Mr. Foster's proceeding gently in the reduction of the tariff, and demand an immediate change, in view of the probable changes the new administration in the United States will make in their tariff, and which must more or less affect Canada. The government, on the other hand, claim that the true policy is to make haste slowly. But a legal journal, of course, can only speak of such things to the tune of "confound their politics!" But you will not object to my remarking that we live in an age of contradictions. *E.g.*, farmers complain of cheap bread and cheap

farms, while Henry George holds that land is the only thing man wants. Farmers want a low tariff, cheap manufactures and implements. Manufacturers insist on a high tariff, and I assume that the government holds the scales evenly and pleases neither, a position which moderate and cautious rulers often occupy. A great bone of contention is the Franchise Act, the amendments promised being small, and chiefly in matters of detail and reduction of costs. The Opposition demands the repeal of the Act, and a return to the old plan under which the voters' lists were made by provincial officers; and, in truth, it does seem as if the Provinces should appoint those who are to represent them, and by whose acts they are to be bound; though it is right that the Dominion authorities should have power to reject unfit persons for cause. Ambassadors are chosen by the countries they are to represent, and not by those to which they were sent.

Mr. Weldon has a bill to disfranchise voters accepting bribes, the bribers only being now punishable; but the bill, though reasonable, does not seem generally acceptable. Can bribery be abolished while it is not deemed disgraceful, and is not unfashionable, and is practised by men who would scorn to commit a breach of trust or a petty larceny, especially when it is practised on a great scale and on whole constituencies, for the advantage of a party—and the good of the country, of course? The law has tried all it could to protect the voter by giving him the secret ballot to enable him to vote as conscience dictates, and so cheat the briber. A useful thing is such ballot, I believe, though its admitted usefulness is no compliment to the voters. Should we like members of Parliament to vote under similar protection? Yet the voter is virtually the representative of those who have no vote.

The Judicial Committee of Her Majesty's Privy Council for Canada have determined that they cannot safely proceed in the Manitoba school case until they have the opinion of the Supreme Court on certain points of the law arising out of it; the principal question being whether the British North America Act applies to Manitoba. If it does, there seems no doubt that an appeal lies to the Governor in Council under section 93; for the report laid before Parliament allows that the repeal of the right given to the Roman Catholics to have separate schools, by the Provincial Act of 1871, passed immediately after the creation of the Provinces, and enjoyed until the passing of the Act of 1891,

which denied it was an act by a provincial authority prejudicial to the Roman-Catholic minority in the Province within the meaning of the said section ; and that the British North America Act, which denies certain powers to Provinces constituted under it, applies to Manitoba cannot be doubted, for if it did not Manitoba would have all the powers assigned to the Dominion by the twenty-nine paragraphs of section 91, and could pass customs laws, patent and post-office laws, etc., therein enumerated. The manner in which the Governor in Council shall exercise the powers given him, or whether he shall exercise them at all, is a matter of policy and not of law, and the Supreme Court can say nothing about it ; but if the committee doubt the application of the British North America Act, they are clearly right in asking the opinion of the Supreme Court. The Governor in Council must hear the appeal, and let the opposing party and Mr. Ewart argue the case, if they choose to do so ; and if, as appears probable, the Manitoba Government refuses to appear or plead, it must be supposed that it has nothing to say, and then the Dominion Government, and Parliament if called on, will do what they may think right in the case.

Our Premier has gone to Europe to attend the Behring Sea arbitration. The cases filed are said to be voluminous, and the evidence supported by numberless affidavits. The facts and arguments appear fairly well summed up in the LAW JOURNAL of the 16th September last. It is said that the United States now rely mainly upon rights they acquired from Russia, but Russia could not assign rights she never had, or alter international law, and extend her jurisdiction beyond the limits assigned by it. *Fiat justitia*, and I believe the arbitrators will do it.

The outgoing President entertained the incoming one to dinner at the White House on the 4th instant. I should have liked to hear their conversation, though I dare say they said little about politics. Will Sir John Thompson entertain Mr. Laurier, if, in the far distant future, they should change posts? Who knows; they are both very courteous, as great men always are.

Dr. Bourinot, who so ably defends our constitution as being better than the American or any other, has a very able article in *The Week* on the Swiss *referendum*, and seems inclined to favour it, in cases of any great changes in constitutional law, as better than our general elections, at which, he says very truly, it is

impossible to keep the voter's attention to the one important question; and there is certainly much truth in his argument. He illustrates his position by what occurs in our appeals to the whole body of electors in ses of money aids by municipalities or local option.

Our government declines to interfere in the coal-mine monopoly case in Nova Scotia, holding that it ought not to interfere with the right of a Province to dispose of its property to the highest bidder, even though such sale may injuriously affect the people of the Dominion generally. Public or private combines are of course again attacked, but there seems to be no bill concerning them before Parliament.

We have the single-tax question before our city council. Our assessors favour it, and with some show of reason, for there is certainly an immense amount of unearned increment in Ottawa since Mr. Sparks and others acquired the site of the city at almost nominal prices; but in most cases the property has passed into the hands of purchasers who have paid for the increase in the prices they gave. Where it is in the hands of the original proprietors or their heirs, it would be only fair to tax the increase; and vacant lots held for the rise are a fair mark for assessment. I am glad to learn that the claim to the strip of land bordering on the canal, on which the amount of the unearned increment must be very great, has ended in favour of the goverment, which made the canal that caused it.

As regards your humble correspondent, he still takes an interest in public matters, and has, in *The Week* of 24th February and 10th March instant, an article on bi-metallism, in answer to one favouring the double standard of value, and invites your comments on it. There are some law points in it, chiefly American, which may interest your readers.

Your faithful reader and subscriber,

W.

Ottawa, March 11th, 1893.

DIARY FOR MARCH.

5. Sunday.....*3rd Sunday in Lent.* York changed to Toronto, 1834.
6. Monday.....Toronto Civil Assizes begin.
7. Tuesday.....Court of Appeal sits. Gen. Sess. and Co. Sitts. for trial in York. Kingston Chancery sittings.
9. Thursday....Belleville Assizes.
12. Sunday.....*4th Sunday in Lent.*
13. Monday.....Lord Mansfield born, 1704.
16. Thursday....Ottawa Assizes.
18. Saturday....Arch. McLean, 8th C.J. of Q.B. Sir John Robinson, C.J. of Appeal, 1862.
19. Sunday.....*5th Sunday in Lent.* P. M. S. Vankoughnet, 2nd Chancellor of U.C., 1862.
23 Thursday....Sir George Arthur, Lieut.-Gov. of U.C., 1838.
26. Sunday.....*Palm Sunday. 6th Sunday in Lent.*
27. Monday.....St. Thomas Assizes
28. Tuesday.....Canada ceded to France, 1632.
30. Thursday....Hamilton Chy. sittings. B.N.A. Act assented to, 1867. Lord Metcalf, Gov.-Gen., 1843.
31. Friday.....Good Friday.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Exchequer Ct.] [Feb. 20.

THE QUEEN *v.* CLARKE.

Appeal—Limitation of time—Final judgment.

On the trial in the Exchequer Court in 1887 of an action against the Crown for breach of a contract to purchase a paper from the suppliants no defence was offered, and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the court, and judgment was given against the Crown for the amount thereby found due. The Crown appealed to the Supreme Court, having obtained from the Exchequer an extension of the time for appeal limited by statute and sought to impugn on such appeal the judgment pronounced in 1887.

Held, GWYNNE and PATTERSON, JJ., dissenting, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter, unless the time was extended as provided by the statute, and the extension of time granted by the Exchequer Court refers on its face only to an appeal from the judgment pronounced in 1891.

Held, per GWYNNE and PATTERSON, JJ., that the judgment given in 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings, and on appeal therefrom all matters in issue are necessarily open.

Appeal dismissed with costs.

Robinson, Q.C., and *Hogg*, Q.C., for appellant.

McCarthy, Q.C., and *McDonald*, Q.C., for respondents.

Ontario.]

GRAND TRUNK RAILWAY CO. *v.* COUNTY OF HALTON.

Railway—Bonus to—Bond—Condition—Breach.

The County of Halton, in 1874, gave to the H. & N.W. R.W. Co. a bonus of $65,000, to be used in the construction of their railway, and the company executed a bond, one of the conditions of which was that the bonus should be repaid "in the event of the company, during the period of twenty-one years, ceasing to be an independent company." In 1888, the H. & N.W. R.W. Co. became merged in the G.T.R., and, as was held on the facts proved before the trial judge and the Divisional Court, ceased to be an independent line.

Held, affirming the decision of the Court of Appeal (19 A.R. 252), that there had been a breach of the above condition, and the county was entitled to recover from the G.T.R. the whole amount of the bonus as unliquidated damages under said bond.

Appeal dismissed with costs.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellants.

Robinson, Q.C., and *Bain*, Q.C., for the respondents.

CAMPBELL *v.* PATTERSON.

MADER *v.* MCKINNON.

Chattel mortgage—Preference—Bonâ fide advance—Consideration partly bad—Effect on whole instrument—R.S.O. (1887), c. 124, s. 2.

R., being in insolvent circumstances, applied to P., his uncle, for a loan of $5,000, which he received, P. mortgaging his house for part of the amount and giving his note for the balance, which R. had discounted. The security for this loan was a chattel mortgage on R.'s stock of goods in his store. The money was applied by R. for the most part in taking up notes made by him and indorsed by his relatives. P. knew when he advanced the loan that R. was insolvent, but it was not shown that he knew how the money was to be applied.

R. gave another chattel mortgage to M. for another loan of money applied in the same way, but it was shown that part of the loan was R.'s own money, though alleged to have been advanced by his wife.

An action was brought on behalf of R.'s creditors to have these mortgages set aside as being void under R.S.O. (1887), c. 124, s. 2, and at the trial before the Chancellor both were set aside. The Court of Appeal reversed the decision setting aside the mortgage to P., and affirmed that setting aside the mortgage to M., holding as to the latter, following *Commercial Bank* v. *Wilson* (3 E. & A. Rep. 257), that the mortgage being void in part for illegal consideration the whole instrument was void.

Held, affirming the decision of the Court of Appeal in *Campbell* v. *Patterson* (18 A.R. 646, *sub nom Campbell* v. *Roche*), that the mortgage to P. being given for an actual *bonâ fide* advance the provisions of s. 2 of the Ontario statute did not apply to it, especially as P. was not shown to have had knowledge of R.'s motive in procuring the loan.

Held, also, overruling the decision in *Mader* v. *McKinnon* (18 A.R. 646

sub nom McKinnon v. *Roche*) in so far as *Commercial Bank* v. *Wilson* was followed, that that case was decided under the statute of Elizabeth and is not now law under the Ontario statute, and a mortgage may be set aside as to part and maintained as to the remainder, but affirming the judgment of the Court of Appeal on the ground that the evidence showed the whole of the consideration for M.'s mortgage to be illegal and bad.

Appeal dismissed with costs.

McCarthy, Q.C., and *McDonald*, Q.C., for appellants and respondents respectively.

Moss, Q.C., and *Thomson*, Q.C., for respondents and appellants respectively.

HUSON *v.* SOUTH NORWICH.

Municipal corporation—By-law—Submission to ratepayers—Compliance with statute—Imperative or directory provisions—Authority to quash.

The Ontario Municipal Act (R.S.O., 1887, c. 184) requires, by s. 293, that before the final passing of a by-law requiring the assent of the ratepayers a copy thereof shall be published in a public newspaper either within the municipality or county town, or published in an adjoining local municipality. A by-law of the township of South Norwich was published in the village of Norwich, in the county of Oxford, which does not touch the boundaries of South Norwich, but is completely surrounded by North Norwich, which does touch said boundaries.

Held, affirming the decision of the Court of Appeal (19 A.R. 343), that as the village of Norwich was geographically within the adjoining municipality the statute was sufficiently complied with by the said publication.

This case raises also a question as to the constitutionality of what is known as the "Local Option Act" of Ontario, the argument on which was postponed until the validity of the by-law was settled, and will be proceeded with at the May term.

Robinson, Q.C., and *DuVernet* for the appellant.

Maclaren, Q.C., and *Titus* for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[June 28, 1892.

DEVINS *v.* ROYAL TEMPLARS OF TEMPERANCE.

Insurance—Life insurance—Benevolent society.

Where the constitution of a benevolent society provides that beneficiary certificates may be granted to persons who take a certain degree, all the steps laid down in the constitution in connection with the taking of that degree must be complied with before any beneficiary certificate can be legally issued.

Where, therefore, the holder of a certificate, though in all other respects duly

qua[illegible] and accepted as a member of the degree in question, dies before actually going through the ceremony of initiation, the certificate is not enforceable.

Judgment of STREET, J., affirmed.

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

E. Martin, Q.C., for the respondents.

[Jan. 17, 1893.

CORRIDAN *v.* WILKINSON.

Defamation—Slander—Privilege—Malice—Justification—Evidence—Pleading.

Pleading justification in an action of slander where no attempt is made to prove the plea is not in itself evidence of malice entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion.

Judgment of the Common Pleas Division affirmed.

Laidlaw, Q.C., for the appellant.

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

[Mar. 7.

MITCHELL *v.* MCCAULEY.

Landlord and tenant—Rent—Acceleration of payment on issue of execution—Execution—Distress—Severance of reversion.

A condition in a lease that in case any writ of execution should be issued against the goods of the lessee the then current year's rent should immediately become due and payable, and the term forfeited, is personal to the lessee, and does not run with the land, and cannot be taken advantage of by the grantee of part of the reversion.

Judgment of ARMOUR, C.J., in the Divisional Court, *ante* 27 C.L.J. 600, affirmed; OSLER, J.A., dissenting.

Aylesworth, Q.C., for the appellant.

Douglas, Q.C., for the respondent.

CRANE ET AL. *v.* RAPPLE.

Specific performance—Sale of land—Partners—Abatement.

Where a contract is made by one partner for the sale of partnership lands to which the other partner refuses to consent, the purchaser cannot insist upon taking the share of the contracting partner, with a proportionate abatement in the price.

Judgment of the Common Pleas Division, 22 O.R. 519, reversed.

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

Watson, Q.C., for the respondents.

OSTROM *v.* BENJAMIN.

Solicitor—Notary—Services as agent—Taxation—Costs.

A solicitor, who is also a notary, and acting as a notary obtains for a client the allowance of a pension from the United States Government, is entitled to

charge for his services such sum as may be agreed upon, and is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed.

Judgment of the Queen's Bench Division reversed.

W. Nesbitt and *A. A. Abbott* for the appellant.

C. J. Hamilton and *A. J. Russell-Snow* for the respondent.

HUMPHREY *v.* ARCHIBALD ET AL.

Evidence—Discovery—Malicious prosecution—Police officer—Privilege.

In an action for malicious prosecution against a police officer arising out of a public prosecution initiated on an information sworn by him, he is not bound, on an examination for discovery, to give the name of the person from whom the facts were obtained.

Judgment of the Chancery Division, 21 O.R. 553, reversed.

J. R. Cartwright, Q.C., and *H. M. Mowat* for the appellants.

W. R. Smyth for the respondent.

HOLLIDAY *v.* HOGAN.

Principal and surety—Release of debtor.

A creditor may by express reservation preserve his rights against a surety notwithstanding the release of the principal debtor, the transaction in such a case amounting in effect to an agreement not to sue; but if the effect of the transaction between the creditor and the principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety.

Judgment of the Chancery Division, 22 O.R. 235, reversed.

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

Johnston, Q.C., for the respondent.

GILMOUR *v.* BAY OF QUINTE BRIDGE CO.

Negligence—Contributory negligence—Bridge—Collision.

The persons in charge of a vessel are bound, when approaching a draw-bridge, to keep the vessel under complete control, and are not entitled to assume that the draw of the bridge will be opened in time to let the vessel through. Therefore if a vessel is allowed to approach so close to a bridge that collision with the bridge cannot be avoided when the draw is found to be closed, damages are not recoverable from the bridge owners.

Judgment of the County Court of Hastings reversed; HAGARTY, C.J.O., dissenting.

Aylesworth, Q.C., and *Biggar* for the appellants.

Clute, Q.C., for the respondents.

RE GOULD *v.* HOPE.

Prohibition—County Court—Sheriff—Interpleader—Rules 1141 (a), 1141 (b).

A sheriff sued in the County Court by a judgment debtor for $100, the value of implements seized and sold by the sheriff without any special direction from the execution creditor, and alleged to be exempt, cannot obtain in that court an interpleader order directing the trial of an issue between the judgment debtor and the execution creditor.

The County Court having no jurisdiction to make such an order, prohibition will be granted.

Judgment of Queen's Bench Division, 21 O.R. 624, reversed; MACLENNAN, J.A., dissenting.

H. Cassels for the appellants.

Aylesworth, Q.C., for the respondent.

C. J. Holman for the plaintiff.

MANUFACTURERS LIFE INS. CO. *v.* GORDON.

Insurance—Life insurance—Premium — Payment — Forfeiture — Condition—Month.

Under a policy providing that "a grace of one month will be allowed in in payment of premium, at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void," and also that if any note given on account of the premium be not paid when due this policy shall be void, and all payments made upon it shall be forfeited to the company, the insurance comes to an end upon default in payment of a premium note unless the insurers elect to keep it in force, and proceedings by the insurers to collect a note given for a premium are not sufficient evidence of such election. Nor are equivocal acts such as carrying the policy in the books of the insurers as an existing policy, and including the amount in their official returns of insurance in force, any evidence of waiver of the forfeiture, these acts not being known to the insured or intended to influence his conduct.

"Month" in an insurance policy in the form here in question, with provisions for payment of *semi-annual* premiums on named days of *specific calendar months*, means a calendar month.

McGeachie v. *North American Life Ins. Co.*, 20 O.R. 151; applied and followed.

Per HAGARTY, C.J.O., and OSLER, J.A.: Payment must be made during the life of the insured; and if the life drop before the expiration of the time of grace and before payment, the risk comes to an end.

Per BURTON, and MACLENNAN, JJ.A.: Payment may be made at any time before the expiration of the time of grace, whether the life has dropped or not.

Judgment of MACMAHON, J., reversed.

W. Nesbitt and *R. McKay* for the appellants.

Shepley, Q.C., for the respondent.

HIGH COURT OF JUSTICE.

Chancery Division.

Full Court.] [Feb. 16.

HEADFORD *v.* MCCLARY MANUFACTURING COMPANY.

Employer's Liability—Master and servant—Contributory negligence—Going out of way to work.

Action of negligence for damages received by the plaintiff while in the employment of the defendants.

The plaintiff, in going to that part of defendant's building where his work was, had to pass through a long room, the passage being nearly straight until within ten or twelve feet of a hoist, where it turned to the left. The plaintiff was quite familiar with this passage, but on the occasion in question, instead of turning to the left as he should have done, when he reached within ten or twelve feet of the hoist, having his attention arrested by seeing a man at work up near the ceiling repairing the hoist, he walked straight into the hole, and fell to the cellar below, thus causing the injury. There was no lack of light on the occasion. As a rule, there was a bar protecting the entrance to the hoist, but on the occasion in question this bar had been removed on account of the repairs which had to be done.

Held, that the verdict on the trial, which was for the defendant, must be set aside and the action dismissed upon the ground of contributory negligence on the part of the plaintiff.

Gibbons for the defendants.

Greer for the plaintiff.

MEREDITH, J.] [Feb. 9.

MCMILLAN *v.* MCMILLAN.

Mortgagor and mortgagee—Assignment of Mortgage—Payments made by assignee before assignment.

Appeal from the report of the Master at Cornwall.

From 1883 to 1890, A. J. McMillan, for some reasons not fully explained, made certain payments upon a mortgage given by a certain party upon certain lands. In 1885, a second mortgage was given upon the lands to a third person. In 1890, A. J. McMillan paid the sum of $97.35, being the balance claimed by the mortgagees of the first mortgage as due to them at that time, and took an assignment of the said mortgage. He now claimed priority over the second mortgagee, not only in respect to the $97.35 and subsequent interest, but also as to the former payments which, as above mentioned, he had made upon the mortgage prior to the assignment to him thereof.

Held, that he was only entitled to such priority in respect to the sum due or accruing due to the mortgagees at the time that he obtained his assignment, and not as to his former payments.

W. H. Blake for the appeal.

Hoyles, Q.C., *contra*.

[Feb. 11.

MCINTYRE *v.* CROCKER.

Dower—Procedure—Powers of commissioners—R.S.O., c. 56, s. 12, s-s. 3.

Appeal from the report of the commissioners in the Dower Procedure Act.

Where dower was claimed in certain property consisting of lands upon which stood two-thirds of a building, the remaining third of the building being upon the adjoining land, which was not dowable,

Held, that this was not a case within s-s. 3 of s. 12 of the Dower Procedure Act in which the commissioners had power to assess a yearly sum of money in place of assigning dower by metes and bounds.

There was plainly nothing in this case to prevent an assignment by metes and bounds; it is a case in which at common law such an assignment only would have been valid. But the commissioners were not bound necessarily to assign a portion of the buildings upon the property, but might give an equivalent. They must, however, assign one-third of the whole property, having regard to value as well as quantity.

W. H. Blake for the appeal.

E. D. Armour, Q.C., *contra.*

FERGUSON, J.] [Feb. 23.

ALDRICH *v.* ALDRICH.

Division Courts—Jurisdiction—Action on judgment of High Court—Alimony—Final judgment—R.S.O., c. 51, s. 70 (b).

Motion for prohibition.

Held, that the Division Courts have jurisdiction to entertain an action brought upon a judgment of the High Court where the judgment of the High Court is a final judgment.

In an action for alimony, the plaintiff recovered judgment against the defendant for $211.39 taxed costs, and for alimony at the rate of $226.00 per year, payable in equal quarterly instalments at specified times.

Held, that the judgment, so far as it related to the costs, was a final judgment, whatever might be the case with regard to the payments of alimony, and that as the law implied a promise or contract by the defendant to pay the amount of the costs thus adjudged against him a Division Court had jurisdiction under R.S.O., c. 51, s. 70 *(b)* to entertain a suit against the plaintiff for $100 in respect to the said costs, as being a claim for a debt owing to the plaintiff by the defendant, the plaintiff expressly abandoning the balance of the taxed costs awarded as aforesaid.

H. T. Beck for the motion.

W. Riddell, *contra.*

Practice.

Q.B. Div'l Court.] [Feb.

MASTIN *v.* MASTIN.

Lunatic—Action by—Next friend—Married woman—Inspector of prisons and public charities—Parties.

An action was brought in the name of the plaintiff, a lunatic not so found, confined in a public asylum, by his wife, as next friend, to set aside a conveyance of land made by him as improvident, etc.

Held, that the action, being for the protection of the lunatic's property, not for the disposal of it, was properly brought by a next friend; and although a married woman cannot fill the office of next friend, the fact that in this case she did so did not make her proceedings void; and the defendant's only remedy was to apply to remove her and to stay proceedings until a proper next friend should be appointed.

Held, also, that the objection that the action should have been brought by the inspector of prisons and public charities could not prevail, for it was discretionary with him to institute proceedings or not.

J. M. Clark for the plaintiff.

McGregor for the defendant.

[Feb 16.

SOUTHWICK *v.* HARE.

Security for costs—Action against justice of the peace—53 Vict., c. 23—Merits.

In an action against a justice of the peace for false arrest and imprisonment, it appeared that there was a valid warrant of commitment against the plaintiff in the county of O., which was endorsed by the defendant for execution in the city of T., and under which the plaintiff was there arrested.

The plaintiff alleged that the arrest was illegal because the defendant's mandate was not actually endorsed upon the warrant, and because the defendant's authority was not shown on the face of his mandate. It appeared, however, that the defendant's mandate was pasted or annexed to the warrant, and that the defendant, in fact, had authority, though it was not set out. It was admitted that the plaintiff was not possessed of property sufficient to answer costs.

Held, that the defendant was entitled to security for costs under 53 Vict., c. 23.

Per ROBERTSON and MEREDITH, JJ., that it was not intended by the statute that the merits of the action should be determined upon an application for security for costs.

Mackenzie, Q.C., for the plaintiff.

Gunther for the defendant Miller.

STREET, J.] [Feb. 20.

CRANSTON *v.* BLAIR.

Execution—Setting aside—Order for costs—Non-service of—Notice of taxation, absence of—Irregularity—Re-taxation.

The defendant obtained an order dismissing the action with costs for non-prosecution, upon notice to the plaintiff, who did not appear upon he motion. The defendant did not serve the plaintiff with a copy of the order, and went on and taxed his costs without notice to the plaintiff, and issued execution for the amount taxed.

Held, no ground for setting aside the execution that the order had not been served before the taxation.

Hopton v. *Robertson*, 23 Q.B.D. 126 *(n)*, distinguished.

Held, also, that the absence of a notice of taxation was not an irregularity entitling the plaintiff to set aside the execution, but only to a re-taxation of the costs.

Lloyd v. *Kent*, 5 Dowl. P.C. 125, followed.

W. H. Blake for the plaintiff.

Middleton for the defendant.

[Mar. 7.

BANK OF HAMILTON *v.* ESSERY.

[Noted for THE CANADA LAW JOURNAL.]

Judgment debtor—Extent of examination of—Motion to commit—Appeal from examiner.

This was a motion by plaintiff to commit defendant for unsatisfactory answers on his examination as a judgment debtor. The defendant had sold his stock-in-trade to his wife and one Brown, a bill of sale having been regularly executed and registered some time before the judgment was obtained.

The examiner ruled that the plaintiff could not examine as to the disposition of the goods after the date of the bill of sale.

It was contended that the motion was improperly launched, and should have been by way of appeal from the examiner.

Held, that defendant could not shield himself under the examiner's ruling, and that the motion was properly made.

Orpen v. *Kerr*, 11 P.R. 128, distinguished,

Held, also, that defendant must attend at his own expense and submit to be examined as to disposition of goods after date of bill of sale.

A. McLean Macdonell for plaintiffs.

Jas. Reeve, Q.C., for defendant.
