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DIARY FOR JULY.

1. Tues...Dominion Day: 1867. Long Vacation, H. C. J., commences.
6. Sun.....*4th Sunday after Trinity.*
7. Mon....Col. Simcoe, 1st Lieut.-Gov. U. C., 1792 County Court and Surrogate Terms (ex York).
8. Tues...Cyprus ceded to England, 1878.
11. Fri.....Canada invaded by U. S., 1813.
12. Sat.....County Court and Surrogate Term (except York) end.
13. Sun.....*5th Sunday after Trinity.*
14. Mon....W. P. Howland, 1st Lieut.-Gov. of Ontario, 1868.

*TORONTO, JULY* 1, 1884.

WE learn from the *Law Times* that a brilliant assemblage dined at the Mansion House in London last month, as guests of the Lord Mayor to meet the judges. The Master of the Rolls, we are told, said some things worthy of meditation. One was that he was opposed to decentralization of the Courts of law. He would keep the judges in the Metropolis. He is undoubtedly right, and we are glad to see he takes this ground. Decentralization tends to the ruin of both Bench and Bar. He also warned people against a too ready surrender of trial by jury, and discouraged the craze for cheap law brought to any man's door.

THE decision of the English Queen's Bench Division in *London Scottish Permanent Benefit Society* v. *Chorby*, to which we referred in our last issue, has, we see by a late number of the *Law Times*, been affirmed by the Court of Appeal. The Master of the Rolls laying down the rule that in such cases costs are not to be taxed which the union of the two characters of party and solicitor renders impossible, *e.g.*, instructing, attending, or advising himself. The *Times* observes:—"It would be an interesting question whether this rule would be held applicable to members of the other branch of the profession litigating in person."

As we desire to be perfectly fair and accurate in any statement we make, especially when the conduct of a professional man is concerned, we would refer again to the charges made by Mr. Macdonell which were recently the subject of discussion in Parliament. In our remarks on the subject it was suggested that he should have the bills "taxed by the proper officer." We do not wish it to be understood that the bills were not taxed at all. It was stated during the discussion in Parliament (see *Hansard*, 1416,) that the bills were taxed by Mr. Small, then an officer of the Queen's Bench, but it also appeared that they were not taxed by Mr. Thom, who was the person especially named for that purpose by the Department, and very properly so, as he is peculiarly conversant with such matters. Upon further enquiries, however, we find that Mr. Thom declined to tax the bills, which fact the gentleman who was instructed by the Government to have the bills taxed reported to the Department at Ottawa. He was thereupon instructed to obtain the taxation of one of the other taxing officers in Toronto. This correspondence was not produced when the matter came up for discussion in the House, and the public therefore was not at that time in possession of all the facts as we now understand them. The bills were subsequently taxed by Mr. J. B. Read, solicitor for the Law Society, under the supervision of the then taxing officer of the Queen's Bench.

## *MECHANICS' LIENS.*

The second section of 41 Vict. chap. 17, which amends the Mechanics' Lien Act has, we believe, given rise to a good deal of difference of opinion. That section, it will be remembered, provides that the "lien shall, in addition to all other rights or remedies given by the said Act, also operate as a charge to the extent of ten per centum of the price to be paid as aforesaid by such owner, up to ten days after the completion of the work, in respect of which such lien exists, or of the delivery of the materials, and no longer, unless notice in writing be given."

The questions which have arisen are both with regard to the price upon which the ten per cent. is to be reserved, and also as to the effect of the charge which the section creates.

We think the solution of these questions is not far to seek. In the first place it must be borne in mind that the section is one passed for the benefit of sub-contractors, that is to say, for that class of lien holders who do not contract directly with the owner of the land himself. And we may best understand the effect of the section in question by considering what the position of this class of lien holders was before the passing of the Statute. If we turn to section 11 of the original Act, R.S.O., c. 120, we shall see that *all payments* made in good faith by the owner to the contractor were protected, and operated to discharge the claims of sub-contractors *pro tanto*. And if we look at section 6 of that Act we shall see that the lien of a sub-contractor cannot in any case attach upon the estate and interest of the owner, so as to make the same, or the owner, liable to the payment of any greater sum than the sum payable by the owner to the contractor. The position, therefore, of a sub-contractor before the 41 Vict. was this, his right of lien could not in any case be enforced to any greater extent than the amount which might remain due from the owner to the contractor through whom such sub-contractor might claim; and it might be defeated altogether by the *bona fide* payment by the owner to the contractor of the full amount due to the latter upon his contract.

Now, we do not find anything in 41 Vict. extending the liabilities of the owner. His liability is still governed by section 6 of the original Act, and the only change which the 41 Vict. c. 17, s. 2, effects is to require the owner to retain in his hands for ten days after all work shall have been completed, under any contract, ten per cent. of the price to be paid by him to the contractor by whom, or through whom, such work is done. We do not think that the sum to be reserved can by any possibility be intended to be calculated on the amount of the price to be paid to the sub-contractors, because the words of the section are, "the price to be paid by such owner," and the owner has nothing to do with the price to be paid to sub-contractors.

Neither do we think there is anything in the section which can be properly construed as giving the sub-contractor a right to the charge upon the ten per cent. required to be reserved, unless by performance of the work that sum becomes due and payable to the contractor. In other words, if the ten per cent. is never earned the sub-contractors, we should think, can have no charge upon it.

All the 41 Vict. was intended to accomplish was to give sub-contractors a chance of making good their claim to the ten per cent. before it should be paid over to the contractor, and this will very clearly appear by a consideration of section 11 of the original Act as amended by 41 Vict., and in connection with which the second section is obviously intended to be read. Section 11 as amended protects all *bona fide* payments up to ninety per cent. made

before notice in writing of a lien of a sub-contractor. Section 2 in effect says that the remaining ten per cent. cannot be paid even though no notice of lien be given by a sub-contractor, until ten days have elapsed from the completion of the work. In other words, for those ten days the lien of the sub-contractor is preserved as against the owner, and no payment made of the ten per cent. within that period can be set up as against any sub-contractor notifying the owner of his lien within that period. But that is a very different thing from saying that the ten per centum is liable to answer the claims of the sub-contractor in any event, even though it has never been earned by the contractor. Such a view of the statute would amount to a practical repeal of the equitable provision contained in section 6 of the original Act, to which we have referred.

The price on which the ten per centum is to be reserved we should have supposed must be the whole contract price. The statute is framed on the assumption that the contract is completed. The case of a contract being only partially performed is not apparently within the contemplation of the Act. Assuming that the contract is completed, there is no difficulty in determining what the statute means. It is when there has been a breach of contract by the contractor, and the ten per cent. has not been earned by him, that the difficulty arises.

To meet such a case it has been argued that the 41 Vict. c. 7, s. 2, requires that the owner should always keep back ten per cent. of the price of the work from time to time actually completed, and this view we see has been recently adopted in *re Cornish*, by the Divisional Court of the Chancery Division. The Court was not, however, unanimous in opinion, PROUDFOOT, J., holding that the ten per centum must be reserved on the whole contract price, and that the sub-contractor was entitled to a lien thereon, whether it had been earned or not by the contractor; while the other members of the Court held that it was the duty of the owner to reserve only ten per cent. of the price of the work actually performed, and on this sum only the sub-contractors were entitled to a lien.

This construction of the statute is in favour of sub-contractors, but appears to us to impose on owners of land a very serious responsibility. For while it may be easy enough for them to reserve ten per cent. of the whole contract price, it may be very difficult indeed to determine day by day what is ten per cent. of the value of the work actually performed. The question, we believe, is likely to receive further elucidation shortly by the Court of Appeal.

Another statute has been passed at the recent session of the Ontario Legislature, making further amendments in the original Mechanics' Lien Act. In order to ascertain the law on this subject, therefore, it is now necessary to search through and compare the various provisions of four statutes. Considering the nature of this legislation, we cannot but think that this is one of all other statutory enactments which it should be the aim of the Legislature to keep in as easily accessible a form as possible; and that instead of putting a patch here, and a patch there, from session to session, the Act, as often as amendments are needed, should be re-enacted with the amendments required.

This, we think, should be the general rule as to Acts of Parliament. If it were we should possibly have less tinkering, and it would certainly give both the profession and the public a great deal less trouble in mastering the details of statute law,—a task which every year becomes more difficult, as the production of our two legislative mills is annually thrown upon the public.

## OUR ENGLISH LETTER.

*(From our own Correspondent.)*

This is a peculiar time to choose for writing a letter upon legal subjects, for it is precisely the last day but two of the Whitsuntide vacation. Nevertheless, there is certainly not any dearth of legal topics, either of a technical or a more popular character. Two recent decisions upon the law of betting partake of both elements. In *Read* v. *Anderson* an action was brought by what is known as a Turf Commission Agent to recover money paid by him on account of his principal. The matter stands at present in this position that Hawkins, J., who is himself somthing of a sportsman, and Bowen and Fry, L.JJ., consider that the action is maintainable on the ground that if the agent had not paid the money which he had lost on behalf of his principal, he would have incurred a genuine loss in that he could have been posted at "Tattersall's" as a defaulter, and could have been deprived of future chances of earning his living. The Master of the Rolls on the other hand held that the action must fail because the wagers, which were its original subject matter, could never have been enforced at law. One other case was tried before Hawkins and Smith, JJ., sitting as a Divisional Court, and resulted in a judgment to the effect that it would be most irrational to say that a man kept premises for the purpose of betting merely because betting took place upon those premises. Henceforward, it will be essential for the guardians of the public morality to prove in these cases that either the occupier of the premises or his servants for him are interested in the betting which there takes place.

In other respects the past sittings of the Supreme Court, although they have been by no means barren of work, have been unfruitful of interesting results. Very few new lights have been shed upon the interpretation of the law, and the most important of new pieces of legislation, the new Bankruptcy Act, has been proved to be almost a dead letter. Under this, however, there have been a few decisions distinctly illustrative of the principle which underlies the Act. It is an Act for the glorification of officialism, and the tendency is to give such an interpretation of diverse sections as amounts to a reluctant confession that the official receivers have been placed in a position in which they are free from the control of, and above all responsibility to, the Court. In a recent case the official receiver simply declined to sanction the appointment of a trustee named by the majority of creditors, and upon an appeal it was held that the matter was one within the sole discretion of the official receiver, and that the court had no jurisdiction to interfere with him. The crop of books upon the subject is enormous; but the best of them is that of the veteran bankruptcy lawyer, Mr. Cooper Willis, Q.C. It is the only work which is thoroughly bold in suggestion, and it follows that, if the new Act is to be interpreted upon the principles enunciated by the late Sir George Jersel, this is precisely the class of book which is wanted.

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Meanwhile Parliament has been very active in the legislative way. The Franchise Bill will inevitably be passed, and will equally inevitably produce a large amount of work for lawyers. The Criminal Evidence Bill is, in its way, one of the most serious measures that has ever been introduced to the notice of Parliament. Its success is regarded as certain, and it cannot be long delayed. It has passed through the ordeal of the grand committee, its principle has long ago been approved by the House of Lords, and public attention has been directed to the matter by one or two recent cases. There was the

O'Donnell case which produced the memorable manifesto of the majority of the judges against statements by prisoner's counsel; a proclamation unprecedented in character and probably not binding in a legal sense, even upon the judges who had subscribed to its terms. Then there was the case of Lord St. Leonards, to which reference has been made in a former communication, an example of the peculiar class of case in which the Bill finds its strongest argument. Nevertheless the measure is one which cannot be regarded without considerable apprehension. The relaxation of the old rule which forbade the parties to a suit to give any evidence, has been followed by an enormous growth of perjury in the witness box. But in civil matters there is this safeguard against perjury that it is criminally punishable. In a criminal case, however, there is no safeguard. A man charged with a felony has every inducement to commit perjury; for, if he is not found out, he may by adding an additional burden of guilt to an easy-going conscience escape scot-free, and if he is found out he is in no worse a position than he would have been if he had said nothing and had been found guilty on the original charge. The position of prisoners as a class will not be improved. If they make no statement the presumption will be that they are guilty; if they do make a statement they will in the first place not be believed, and in the second place, if the burden of the independant evidence is against them, they will increase the severity of their punishments. There is, therefore, much to be said against a measure of which that experienced criminal lawyer, Sergeant Ballantyne, openly disapproves.

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MR. CHAMBERLAIN'S Railway Bill does not commend itself to the Association of shareholders of which Lord Brabourne and Sir E. Beckett are the leading spirits. It interferes, they say, with free contract between the railway companies and the public. But they omit to consider that free contract can only be justified where the contracting parties stand in a position of equality. Here it cannot be pretended that they do. By virtue of compulsory powers the railway companies practically monopolise the effectual means of transit from place to place; the public must travel; the public is powerful; and it does not care about being handed over, bound hand and foot to the tender mercies of Sir Edward Watkin and Sir E. Beckett. This is Mr. Chamberlain's argument, short and concise, but impossible to gainsay.

## REPORTS.

### *ONTARIO.*

(Reported for the CANADA LAW JOURNAL.)

### COUNTY COURT.

### IN RE ARBITRATION BETWEEN THE CANADA SOUTHERN RAILWAY COMPANY AND Z. B. LEWIS.

*Arbitration—Railway lands—Easement thereon—Ultra vires—Title by possession—R. S. O. cap. 108, sec. 35.*

The Directors of the E. & O. R. Co. in 1853 passed a resolution permitting Z. to lay pipes along the line of the railway from a reservoir to convey water to Elgin (Niagara Falls), some two miles.

Z. exercisod the privilege by laying the pipes alongside the track and enjoyed it until his interest was sold to L., who obtained from the E. & O. R. Co. a confirmation deed, and he has continued in use of the pipes ever since.

The E. & O. R. became vested in the E. & N. R. Co. It became necessary to altar the railway line and change the grade, and the C. S. R. Co. in doing the work at some places exposed the pipes, at others increased the depth of earth over them, and also placed tracks over the pipes at other points. The C. R. S. Co. required to take from L. a piece of land for right of way to which the privilege stated was appurtenant, and under the Con. Ry. Act, 1879, served an arbitration notice on L., and, besides offering compensation for the land taken, proposed to relay and depress those portions of the pipes that had been exposed, but said nothing as to the other portions affected. L. contended that having had quiet possession of the whole line of pipes for over twenty years the company was

bound to restore the whole line in as good a position as it was before, but *held*, that L. had not an absolute title to the easement, the resolution of 1853 and subsequent deed being *ultra vires* the company; and that, therefore, the easement could not be said to lie in grant so as to confer a title by possession by a user for a term shorter than forty years under sec. 35 R. S. O. cap. 108.

*Held*, further, that a railway company has no power to make grants in derogation of the purposes and objects for which it is incorporated, and which might prevent the performance of its public duties, the easement in question being of that character.

*Held*, also, that the C. S. R. Co. could not be required in this case to perform any works beyond those proposed in its notice to arbitrate.

[St. Catharines.

The line of the Erie and Ontario Railway which subsequently became the Erie and Niagara Railway, runs along the top of the bank on the west side of the Niagara River from a point above the Falls down to the town of Clifton, now Niagara Falls.

Mr. Zimmerman under the resolution set out in the judgment and about 1853 constructed a reservoir on the east side of the Railway in Range 10 just above the falls and from thence laid a water main six inches in diameter to Clifton, a distance of about two miles along the E. and O. track.

Subsequently Mr. Lewis purchased the interest of Mr. Zimmerman in the water works and having obtained the deed mentioned in the judgment, constructed a new reservoir on the west side of the track in Range 10 and connected it with the water main and continued in the uninterrupted use and enjoyment of the whole water works system until this time.

The Canada Southern Railway operated the Erie and Niagara Railway and obtained an Act from the Dominion Parliament, 45 Vict. ch. 68, sec. 2, authorizing the construction of a branch from its main line to some point on the Niagara River, and under the authority of this Act, in the summer of 1883 located the branch from its main line at the town of Welland to the town of Niagara Falls near Suspension Bridge, adopting the right of way of the Erie and Niagara Railway in some places, from a point above the falls down to the town of Niagara Falls.

It became necessary to depress the old track very considerably in some places, and to raise it in others to make a uniform grade.

The C. S. R. required a portion of range 10 between the reservoirs for right of way; and for some distance along the track, the pipe line was exposed by the construction of the requisite works.

The cut at range 10 was about twenty-five feet deep and in excavating this, the two pipes, supply and discharge, leading between the reservoirs became exposed and suspended in the air.

On the 16th of September 1883 the C. S. R. served a notice under the Consolidated Railway Act 1879, sec. 9, sub-section 12: (1) describing the land required for railway purposes in range 10 and then proceeded as follows:—(2) " You are also notified that the said company intended to exercise certain powers (and which are hereinafter set out) in regards to certain appurtenances to the said land, comprising the pipe line now existing between the the said reservoirs, upon the said range 10, and from thence to the town of Niagara Falls, and used for the purpose of conveying water to the said town, and a right to lay pipes from the said reservoirs along the line of the E. and N. Ry. Co. to the said town, and the portion of the said pipe line, and appurtenance in reference to which such powers are to be exercised, may be more particularly described as follows" :—

The different points at which the pipe line would be exposed or become within five feet of the surface was then described and a general clause was added as follows :—

" And those portions of the said pipe, at whatever point the same may become within five feet of the surface of the ground, owing to the construction of its line or the alteration of the Erie and Niagara line, by the C. S. R. Co."

(3) " The powers to be exercised by the said company in regard to the said appurtenance are to relay, depress and lower the said pipes, and to replace them where necessary, with new and similar pipes to a sufficent depth to make them five feet below the surface of the land, as the same will be at the completion of the construction of the line of the C. S. R. Company, or the alteration of the line of the E. and N. Ry. Co. and to suitably connect the said pipes with the remaining portion of the said pipe and to restore the pipe so to be relaid to their former state of usefulness."

The last clause adopted the words of sec. 7, sub-sec. 6, of the Railway Act.

Compensation for the land and damages was also offered.

The proprietor, Mr. Lewis, served a notice refusing the offer, and then proceeded as follows:— " And I further give you notice that I claim that your expropriation in fact destroys my franchise, and under any circumstances will render my property useless as a means of supplying water to my present or future customers; and I further claim that you are not under any circumstances entitled or empowered to enter into my pipe line to elevate or depress the same, or replace the pipes or other fixtures or appurtenances necessary to put the works in repair again; and I further claim that

my entire damages, whatever they may be, must be determined by arbitration and paid me."

The arbitrators appointed were Judge Kingsmill for the company, Mr. Orchard for the proprietor, and Judge Senkler as third arbitrator.

The solicitors for the company and proprietor agreed that the arbitrators should decide as follows:—1st. What work shall be done; 2nd, what the cost of such work should be; 3rd, by whom it shall be done and within what time; 4th, provision as to costs; 5th, and in the event of the arbitrators determining that the company shall do the work, then the company is to be allowed to take possession of the pipe so far as necessary to do the work.

Evidence was taken at length before the arbitrators on behalf of both parties on the 10th, 11th, and 12th Oct., 1883, principally consisting of experts, to show what work was necessary to be done, the cost, etc., the question as to damages being left until the work was completed.

*McClive*, for the proprietor.—The proposed changes in the E. & N. line will practically render the pipe line useless even if the C. S. R.'s offer is carried out. The track itself when changed, in many places will be over the pipe line, and in other places many feet of earth will be thrown over it. It will make access to the pipes in future nearly impossible owing to passing of trains and necessity for taking up the track. It is necessary, therefore, that the whole pipe line should be moved out from the track.

The proprietor's title is absolute under the Statute of Limitations, having been enjoyed for over twenty years. The resolution and deed of the E. & O. Company were probably *ultra vires*, but this defect has been cured by the statute. The C. S. R. having interfered with this property in part must restore it altogether to its former state, and the proprietor is entitled to have a new pipe line throughout.

*Symons*, for the company.—The resolution and deed of the E. & O. Company were *ultra vires*, as tending to interfere with franchises granted for a particular purpose. If these instruments were valid they would prevent the carrying out of the objects for which the railway was incorporated, and would besides interfere with its duty of the public.

The Statute of Limitations would not operate before at least forty years, and the proprietor's right is not absolute yet, if it can ever become so.

The company would probably be entitled to treat the proprietor as a trespasser, but this position it has not taken, but offers to restore the pipe that is to be re-laid to its former usefulness. That is the utmost that can be asked.

The evidence clearly shews that the pipes when re-laid as proposed will leave the whole pipe line in a better condition than it was before.

Senkler, Co. J.—On the 18th October, 1853, a resolution was passed by the Board of Directors of the Erie and Ontario Railroad Company, giving to the late Samuel Zimmerman the privilege of laying the water pipes along the track from the pavilion to Elgin, past the station above the Clifton House for the purpose of conveying water to Elgin.

The Erie and Ontario Railroad ran along the westerly side of the Niagara River, and now is part of the Canada Southern Railroad and belongs to that company. The pavilion lies west of the railroad. Elgin is now the town of Niagara Falls.

Mr. Zimmerman constructed a reservoir near the pavilion, and by means of a water power on the Niagara River forced water through a pipe from the river into the reservoir; the pipe crossed the railroad being sunk under the track. He then, by other pipes along the right of way and beside the track of the railroad, conveyed the water from the reservoir to Elgin.

Nothing of this was done prior to 1853. Mr. Zimmerman died in 1857, and after his death the Bank of Upper Canada purchased the right of Zimmerman to these works at sheriff's sale under execution against Zimmerman's executors, and conveyed the same to Lewis and one Bender, and on or before January 11th, 1860, the executors of Zimmerman, and the Directors of the Erie and Ontario Railroad Company, by deed confirmed the sale so far as they had power to do so, and granted and re-leased to Lewis and Bender the rights and privileges which had been enjoyed by Zimmerman. Lewis has acquired the rights of Bender and is now the sole proprietor.

The privileges have been enjoyed continuously since about 1853.

The Canada Southern Railway Company are now engaged in laying a second track and making other changes in their road, including a deep cutting at the place where the pipe, through which water is forced from the river to the reservoir, crosses the railway by reason of which changes the last mentioned pipe is completely exposed, and its present position is a number of feet higher than the new track will be in the cutting, and the pipe leading from the reservoir to Niagara Falls is in some places exposed entirely, and in other places is almost uncovered and insufficiently protected by the earth left over it. The new track will in places be directly over this line of pipe.

The company, by their notice given under the Consolidated Railway Act 1879, propose to re-lay, depress and lower the said pipes, and to re-place

them where necessary with new pipes so as to make them five feet below the surface of the ground as the same will be at the completion of the line of the railway, and so connect the pipes so relaid with the remaining portion of the pipe and restore the pipes so re-laid to their former usefulness.

The claimant (Lewis) contends that the pipes cannot be satisfactorily laid beneath the track of the railway from the reservoir to the town, both on account of the shaking of the ground caused by passing trains and the difficulty of getting at the pipes to repair them when necessary, and contends that he has by length of possession or enjoyment obtained an absolute and indefeasible right to keep and maintain the pipes in their present position, and that the company had no right to interfere with them in any way without his consent.

The right is not claimed so much under the resolution of the Directors or the subsequent deed of confirmation (both of which it is hardly denied were *ultra vires*), as under the Prescription Act.

In considering the effect of this Act it is necessary to bear in mind the law upon the subject prior to the passing of the Act.

At Common Law in England an enjoyment to confer a title to an easement must have continued "during time whereof the memory of man runneth not to the contrary," *i.e.*, since the reign of Richard I. The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment during a shorter time raised a presumption that such enjoyment had existed for the necessary period. When, however, the actual origin of the enjoyment was shewn to have been of more recent date than the time of prescription the right in earlier cases was held to be defeated.

The Courts seemed to have considered the subsequent Statutes of Limitation passed as to writs of right and possessory actions not to apply to easement, but they allowed a new kind of title to be set up by presumption of a grant made and lost or made on terms, and on this ground it was held that a title might be obtained by an enjoyment for twenty years, which was in reality prescription shortened in analogy to the limitation of the 21 Jac. 1, and introduced into the law under a new name, for "the law allows prescription only in supply of the loss of a grant, and therefore every prescription pre-supposes a grant to have existed." See Gale on Easements, 5th edition, 161, citing 2 Black. Com. 265, *Potter* v. *North*, 1 Ventris 387.

This was the position when the English Prescription Act 2 and 3 Will. IV. cap. 71 was passed. 10 and 11 Vict. cap. 5, embodied in the R. S. O. cap. 108 (sec. 34 to 41 inclusive), is about identical with the English Act.

Section 35 of the Revised Statute (which is the same as section 2 of the English Act), enacts that no claim which may be lawfully made of the common law by custom, prescription, or grant, to any way or other easement, or to any water course, or the use of any water to be enjoyed or derived upon, over or from any land or water, etc., when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to the period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated, and when such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Two distinct periods of user are specified with regard to the easements mentioned in this section. As far as regards the shorter period fixed, an enjoyment for twenty years, the statute makes no difference in the mode of defeating the user existing at common law, except that it shall not be defeated by proof of origin at some time prior to the twenty years. The enactment as to the longer period of forty years materially restricts the common law modes of defeating the effect of user of an easement, declaring that user for that time shall give an absolute and indefeasible right, notwithstanding any personal disability on the part of the owner of the servient tenement, unless it shall appear that the same was enjoyed under some consent or agreement by deed or writing.

It may be remarked here that easements as to light are placed by the statute on a different footing from other easements, only one period, viz., twenty years, being mentioned, and an enjoyment for that period having the same effect as an enjoyment for forty years or any of the other easements. This is only mentioned for the purpose of shewing that authorities on the question of light do not necessarily bear upon other kinds of easements.

In the present case there is no pretence that the easement has been enjoyed for forty years. The claim must be supported, if at all, as an easement which has been used or exercised for twenty years, and consequently is liable to be defeated in any way in which such a claim could be defeated at common law except by shewing that it was first enjoyed at any time prior to twenty years ago.

IN RE ARBITRATION BETWEEN THE CANADA SOUTHERN RY. CO. AND Z. B. LEWIS.

If such a claim had been made at the common law under a lost grant, it could have been defeated by shewing that the owner of the servient tenement was not capable of making a grant on the principle that when a good consent be expressly made none can be implied or presumed, and in the case of *Rochdale Canal Company* v. *Radcliffe*, 18 Q. B. 287, it was held that a plea under the Prescription Act of user for twenty years, although the user was proved, would not avail against the plaintiffs, who could not consistently with the enactments establishing and regulating their canal have granted the water for the purpose for which it was used by the defendant; that if they had attempted to do so such a grant would have been *ultra vires* and bad, and would not have bound them, and that consequently the twenty years' user would establish no right.

In the case of the proprietors of the *Staffordshire and Worcestershire Canal Nav.* v. *Birmingham Canal Navigation*, L. R. 1 E. & I. A. 254, it was held that there was in that case no existing stream of water the use of which could be claimed by the appellants, but if there had been such a stream the Prescription Act would not help them for the reason given by Lord Westbury at page 278, as follows:—

"But if the Prescription Act had been at all applicable it would be incumbent on the appellants to prove that the right founded on the claim by user might at the beginning of or during that user have been lawfully granted to them by the respondents' company. No such proposition can be maintained. Had any grant been made at any time by the respondents' company of the right now alleged by the appellants to have been acquired against them by user, such grant would have been *ultra vires* and void, as amounting to a contract by the respondents not to perform their duty by improving the navigation and conducting their undertaking with economy and prudence."

In the *National Guarantee Manure Co.* v. *Donald*, 4 H. & N. 8, the principle governing the *Rochdale Canal Company* v. *Radcliffe* above referred to, was recognized and adopted by Pollock, C. B., in his judgment on p. 16.

In *Mason* v. *Shrewsbury and Hereford Ry. Co.*, L. R. 6 Q. B. 578, the case last cited is referred to but no positive opinion is expressed on the point now under consideration, the case being decided on other grounds.

In Washburn on Easements, 3rd ed., at p. 120, it is said:—"It may be added, though already implied if not expressly stated, that in order to establish a prescriptive right, it must be claimed under and through some one who had a right to grant or create the easement claimed."

In Gale on Easements, 5th edition, page 202, note "M.," it is said:—"In respect of statutory disabilities to grant, a distinction appears to exist between those cases where there is simply no power to grant and those where there is an absolute prohibition; in the latter case it would seem that an enjoyment even for the longer period would confer no right, although in the former it might. In neither case can any right be gained under the statute by enjoyment for the shorter period."

As to the power of the Erie and Ontario Railroad Company, or any of the railroad companies which subsequently acquired the rights of that company and continued its railway to make a grant of a right to carry a water course through its land, or of anything else which would have the effect of lessening its control over its own land for railway purposes, it was not contended that such power existed, and I do not think it could be so contended.

This railway company had no doubt power to take the land belonging to individuals for the purposes of its railway, and it ought not to be allowed to apply those lands to other purposes foreign to the railway.

I am therefore of opinion that the claimant has not by the use of the company's land since 1853, for the purposes of conveying water through pipes to the (present) town of Niagara Falls, acquired any absolute and indefeasible right or easement to have the pipes maintained in their present position so as to prevent, limit, or in any way interfere with the use by the railway company of its land for the purposes of its railway.

If the Canada Southern Railway Company carry out the offer made by them in their notice to Mr. Lewis under the Consolidated Railway Act 1879 already referred to, in a proper manner, in my opinion Mr. Lewis will certainly get all he has a legal right to. It will remain for the arbitrators to consider (under the agreement signed by the counsel) whether the mode of carrying this out suggested by the company's engineer, will satisfactorily restore the pipes to their former state of usefulness.

Concurred in by the other arbitrators.

[The arbitrators subsequently made an award directing the company to do the work within thirty days in the manner and at the places proposed in their notice, the diameter of the pipes to be similar to old pipes except at the reservoirs, the pipes there being increased from 6 inches to 8 inches, also permitting the company to use the old pipes where that could be properly done.]

## RECENT ENGLISH PRACTICE CASES.

### SEARLE v. CHOAT.

*Imp. Jud. Act* 1873, *s.* 24, *sub-s.* 5, 7—*Ont. Jud. Act s.* 16, *sub-s.* 6, 8.

*Receiver—Action to restrain receiver appointed in another action.*

[C. A., L. R. 25 Ch. D. 723.

A person who is prejudiced by the conduct of a receiver appointed in an action by way of equitable execution, ought not without leave of the court to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority; but ought to make an application for such relief as he is entitled to in the action in which the receiver was appointed.

COTTON, L.J.—The whole tenor of the Judicature Acts is to require all proceedings as far as possible to be taken in one action.

### KEITH v. BUTCHER.

*Imp. O.* (1883) 16, *r.* 11—*Ont. r.* 103.

*Action for foreclosure—Discovery of puisne mortgagees—Amendment of judgment before entry.*

[L. R. 25 Ch. D. 750.

When judgment in a foreclosure action had been pronounced, but had not been drawn up and entered, and it was discovered that there were puisne mortgagees, leave was given under the above rule, to amend the writ and statement of claim by making the puisne mortgagees defendants.

### CARDINALLI v. CARDINALLI.

*Imp. O.* (1883) 36, *r.* 3—*Ont. Jud. Act s.* 45.

*Mode of trial—Trial by jury—Action assigned to Chancery Division—Trial before official referee.*

[L. R. 25 Ch. D. 772.

If in an action it appears that there is a simple question of fact, the verdict upon which would decide the issue in the action, it should be sent for trial by a jury; but if the action is one of these which by the Imperial Judicature Act, 1873, is assigned to the Chancery Division, and the question raised is a mixed one of law and fact, where the verdict of a jury would not decide the case, but the judge would have afterwards himself to decide the whole matter at issue between the parties, such a case should not be sent to be tried by a jury.

The mere fact that an action will be tried more quickly, is not a sufficient reason for sending it to be tried at the Assizes.

It was not intended by the Judicature Act that an official referee should decide the issue in an action; he is only to ascertain the facts so as to enable the Court to decide the issue.

PEARSON, J.—It is admitted that the question in the present case, partnership or no partnership, is a mixed question of law and fact, and in any direction which the judge could give to the jury, he could only put and obtain answers to certain questions; and, when he had got their verdict in this way, he must himself apply the law to the determination of the issue between the parties. The action has been properly set down in this Division, and it must be ultimately decided by a judge. It is probable that when it comes on for trial the judge will find that he does not require the assistance of a jury, and that the only difficulty will be in applying the law to the facts. I think I ought not to withdraw the action from the Division in which it has properly been set down. I do not consider it a fit case to send to an official referee. In my opinion it was not intended that official referees should decide the issue of an action; it was only intended that they should assertain the facts so as to enable the Court to decide the issue.

### UNITED TELEPHONE COMPANY v. DALE.

*Injunction—Breach before service of order—Committal.*

[L. R. 25 Ch. D. 778.

In order to justify the committal of a defendant for breach of an injunction, it is not necessary that the order granting the injunction should have been served upon him, if it is proved that he had notice of the order *aliunde*, and knew that the plaintiff intended to enforce it; and the rule is wrongly stated in the text-books, where it is said in no case after an injunction has been granted, and there has been sufficient time to pass and enter the order and to serve it, will the Court commit the defendant to prison for a breach of the injunction, unless the order has been served upon him.

PEARSON, J.—In any case in which the plaintiff has been guilty of such *laches* that he may possibly have misled the defendant, this Court will not interfere if he has not served the order, shewing by its service that he intends to act upon it. I use the word "possibly" in its largest and widest sense, to shew that this Court will never run the risk of doing that which may be harsh or unjust to the defendant in a case of this kind, by committing

him to prison for a breach of an injunction, if there be the slightest doubt whether, owing to the conduct of the plaintiff, he may not have been drawn into the idea that it never was the plaintiff's intention to enforce the injunction.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

### SUPREME COURT.

From Ontario.]

ST. JOHN v. RYKERT.

*Account—Payment under pressure—Statute of Limitations—Interest on judgment debt—Interest on covenant on a mortgage deed as collateral security.*

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between St. J. and R,, and the master found that $453.20 was due to R. by St. J., the plaintiff. The master disallowed to the plaintiff, the amount of a note of $510 and interest thereon, and reduced the interest on a sum of $3,000 advanced from 24 per cent. to 6 per cent. after judgment had been recovered. The note of $510 was dated 18th November, 1861, and was payable with interest at the rate of $10 per week from the 23rd November, 1861. On the 6th March, 1867, R., who had been sued by St. J. for certain other claims, entered into an agreement with him in order to relieve himself from the pressure of execution debts, paid him $2,000 on account of his indebtedness and got time for the balance. St. J. made no demand at the time for this note, and did not instruct his attorney who acted for him, to seek payment of it until 1870.

*Held* (affirming the master's report), that this payment of $2,000 was a payment on account of the debts for which R. was being pressed, and as this note of $510 was not included in said debts the master was right in treating the note of $510 as barred by the Statute of Limitations.

A note dated 11th January, 1862, and payable to and endorsed by one S. H. for $3,000, "with interest at the rate of 2 per cent. per month until paid." By a covenant for payment contained in a mortgage deed of the same date given by R. to St. J. as collateral security for the payment of the said note, R. covenanted to pay "the said sum of $3,000 on the 11th day July, 1862, with interest thereon at the rate of 24 per cent. per annum until paid." A judgment was recovered upon the note but not upon the covenant. The master allowed for interest, in respect of this debt, 6 per cent. only from the date of the recovery of the judgment.

*Held*, that the proper construction of the terms of both the note and covenant as to payment of interest, is that interest at the rate of 24 per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate, after such day, if the principal should then remain unpaid.

*Appeal dismissed with costs.*

*McCarthy*, for appellant.

*Bethune*, for respondent.

From Ontario.]

PAGE v. AUSTIN.

*Liability of shareholder—Estoppel.*

The Ontario Wood Pavement Company, incorporated under 27-28 Vict. ch. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from $130,000 to $250,000. P., and others, execution creditors of the company whose writ had been returned unsatisfied, instituted proceedings by way of *scire facias* against A. as holder of shares not fully paid up in said company. It appeared from an examination of the books that the company assumed to increase the capital, notwithstanding that the original capital had not been fully paid in, and that the shares alleged to be held by A. were shares of the increased capital and not of that originally authorized.

*Held* (affirming the judgment of the Court

below, GWYNNE, J. dissenting), that, as the directors had no power at that time to increase the capital of the company, the stock for which A. or his assignor subscribed had no legal existence, and therefore P. *et al.* were not entitled to recover.

When a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock he supposed to be in existence from questioning the legality of the issue of such stock.

*Appeal dismissed with costs.*

*Bethune*, Q.C., for appellant.

*Robinson*, Q.C., for respondent.

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From Manitoba.]

MAY V. MACARTHUR ET AL.

*Contract of sale—Rescission of—False representations—Fraud—Joint liability of parties who received consideration.*

M. filed a bill to set aside the sale of a parcel of land in the parish of St. John, described in the deed to M. as being block No. 35, containing fifty-two lots according to plan registered alleging conspiracy and false and fraudulent misrepresentations. The sale to M. was effected under the following circumstances:—McL. and McA. were interested in a contract with the Bishop of Rupert's Land for the purchase of three blocks of land containing fifty-two lots each, and McL. with McA.'s consent and sanction came to Toronto to sell the land. In Toronto one G. met McL. and agreed with him to find purchasers, G. to get any money over $100 per lot. G. thereupon solicited M. to purchase the land, stating that he had secured the lots for a very short time at $150 per lot, but that right was contingent upon his taking all the lots contained in the three blocks offered for sale, and represented that one block of the land in question was facing McPhillips Street. M. said he would purchase, provided G. and one D. and himself were co-partners or joint investors in the three blocks. An agreement was signed to that effect, but it was ultimately agreed that M. should pay for and take the conveyance to himself of block 33 at $150 per lot. G. filled up a conveyance which had been signed in blank by McL. of lot 35 from McA. to M., and induced him to accept it without further inquiry by producing and delivering a guarantee from McL. that he had a power of attorney from McA., and that the plan was registered and title was perfect. M. paid $5,200 cash and gave a mortgage for $2,500. G. got $2,500 of this purchase money. M. subsequently ascertained that the block of land in question did not front on McPhillips Street, and that G. and D. were not joint investors with him, and that statements in the guarantee were false. By his bill M. prayed that the sale be set aside, the portion of the purchase money already paid be repaid to him, and that the mortgage given to secure payment of the remainder cancelled.

*Held*, that the false and fraudulent representations made by G. and McL. entitled M. to the relief prayed for against McA. and McL. and G. jointly and severally.

*Appeal allowed with costs.*

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

*Lash*, Q.C., and *Moss*, Q.C., for respondents.

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From Manitoba.]

HOOD V. MCINTYRE.

*Property—Offer to sell—Acceptance on completion of title—Specific performance.*

On the 26th of January, 1882, McI. wrote to H. as follows: "I, Alex. McIntyre, agree to take $35,000 for property known as McMicken Block. Terms one-third cash, balance in one year at 8 per cent. per annum; open until Saturday 28th noon." On the same day he accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McMicken Block, being the property on Main Street, for $35,000, payable one-third cash on completion of title, and balance in one year at 8 per cent. You will please have papers and abstract submitted by your solicitor to N. F. Hagel, Esq., 22 Donaldson's Block, as soon as possible, that I may get conveyance and give mortgage."

The property was then under lease of which H. had notice. On a bill for specific performance, the Court of Q.B. (Man.), decreed that H. was entitled to have said agreement specifically performed. On appeal to the Supreme Court of Canada.

*Held* (Ritchie, C. J. and Fournier, J. dissenting), that there was no binding acceptance of the offer of sale, and therefore no completed contract of sale between the parties.

*Appeal allowed with costs.*

*Lash*, Q.C., for appellant.

*McCarthy*, Q.C., for respondent.

## QUEEN'S BENCH DIVISION.

Osler, J.]

### Walker v. Murray.

*Charity—Devise to—Mortmain Acts.*

Incorporation will not be attributed to Sisters of Charity to invalidate a devise as within the Mortmain Acts.

Rose, J.]

### Regina v. Carter.

A Justice of the Peace cannot try misdemeanours in a summary way, unless so authorized by statute.

*H. J. Scott*, Q.C., for motion.

*N. Murphy*, contra.

Rose, J.]

### Laplante v. Peterborough.

*By-law—Closing of street.*

A by-law for closing up part of a street which was applicant's only means of access to land deeded to him by defendants, and which did not provide other mode of access, was held invalid on this ground: also because a month's notice had not been given of the intended by-law; because the mode of arbitration provided was by the mayor and one person, each named by the railway company—which was not the statutory mode; and because, instead of the award being directed to be made within a month from the appointment of the third arbitrator, it was to be made within a month from the passage of the by-law.

*Aylesworth*, for motion.

*Watson*, contra.

## COMMON PLEAS DIVISION.

Full Court.]

### Regina v. Corporation of the County of Perth.

*Ways—Road between two townships—Purchase by county—Omission of seal and signatures from by-law—Power to divest—Liability to repair.*

The road in question herein ran between two townships in the defendant's county, and was originally constructed by an incorporated joint stock company. In 1866 the defendants purchased the road at a sheriff's sale under an execution against the company and received a deed from the sheriff. A by-law was passed authorizing the purchase, but through inadvertance it was not signed or sealed, but the purchase was recognized in subsequent by-laws; and the defendants took possession and exercised exclusive jurisdiction over the road, and dealt with it as their own property until the 8th June, 1881, when they passed a by-law divesting themselves of the road

*Held*, that the county had no original jurisdiction over the road under the Municipal Act; and though they might acquire the road by purchase from the company under by-law legally passed for such purpose, and assuming that the defendants by their conduct were estopped from denying the validity ot the by-law passed authorizing the purchase, or that the seal and signature could now be directed to be affixed, both of which assumptions were open to doubt, still the defendants had, as they had the right to do, divested themselves of the road, and were therefore not liable thereafter to keep the road in repair.

*Idington*, Q.C., for the Crown.

*R. Smith*, Q.C., contra.

Rose, J.]

### Re Cromie and Corporation of Brantford.

*Tavern and shops—By-law fixing number of licenses—Whether should state number of inhabitants—Statement that by-law to remain in force until repealed—Duty in excess of $200—Ultra vires.*

It is not necessary that a by-law passed by a city respecting tavern and shop licenses

should state the number of inhabitants of the city, so as to show on its face that the number of licenses fixed is within the statutory limit.

*Held*, also, that a provision in the by-law for limiting the number of licenses "for the ensuing license year beginning on the first day of May, 1884, or for any further license until this by-law is altered or repealed" was valid.

*Held*, also, that a provision in the by-law that it should remain in force until altered or repealed was unobjectionable, being merely harmless, as it was merely a statement of what the statute provided.

An objection that the by-law was invalid because in addition to the other matters therein it provided for a duty in excess of $200 which required the assent of the electors, and therefore should have been by separate by-law, was over-ruled, because the by-law as a fact contained no such provision; but *quære*, whether the fact of a by-law containing provisions, some of which require the assent of the electors, would necessarily invalidate the by-law.

*Held*, also, that when a by-law states no particular power as its basis it must be judicially regarded as emanating from that power which could authorize its passage, and, therefore, the by-law here being silent on this point it must be deemed to have been passed by proper authority.

It was also objected that sec. 34 of the License Act of 1884 in effect repealed the by-law as it made the duty more than $200, and the council had not submitted the question to the electors; but, *held*, that if repealed, it could not be quashed; but, *semble*, that the effect of the section was to add the increased duty to the amount already provided for by the by-laws previously passed, unless the council saw fit, prior to 18th April, 1884, to amend the by-law as to the license duty payable thereunder.

*V. Mackenzie*, Q.C., for the applicant.

*Hardy*, Q.C., contra.

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Rose, J.]

### NORTH v. FISHER.

*Foreign judgment—Action on—Limitation of action.*

To an action on a foreign judgment recovered in the Supreme Court of Albany, N.Y., the defendant set up on a defence that the cause of action occurred more than six years before the commencement thereof.

*Held*, on demurrer, that under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation being governed by the law of the country when the action is brought, and not by the *lex loci contractus*, the period of limitation as set up constituted a good defence.

*Carscallen* (of Hamilton), for the plaintiff.

*Fitzgerald* (of Hamilton), for the defendant.

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Rose, J.]

### HEWISON v. TOWNSHIP OF PEMBROKE.

*Municipal corporations—Closing up road—Road running through several municipalities—Power to close—Rule nisi.*

An application to quash a by-law must be by rule *nisi*, and not by notice of motion.

A road, originally a trespass road, running from Ottawa to Prescott through more than one county, following the course of the Ottawa River, had been used for upwards of forty years and had become a public highway. The road in its course intersected diagonally lots 1 and 2, owned respectively by the applicant and D., running from the town line on the south of lot 1 to the concession line on the west of both lots. In October, 1883, D., who was then and had been for three previous years, a member of the township council, petitioned the council to pass a by-law closing up this portion of the road, and procured E. and M., two of the council, to pledge themselves to support the by-law, in the belief that it was for the public benefit; but on thus discovering the contrary, and asking D. to release them, he refused to do so. He, however, pretended that he was not anxious for the by-law to pass, and petitioned the council that his lands might be injuriously affected thereby, asking to be heard by counsel; but, as he wished, as he said, "to be let down easy," he arranged that E. should support the by-law, which he said would be defeated. E. accordingly voted for it, as also did M. and another councillor, D. being absent, and the Reeve not voting, and in consequence the by-law carried. It appeared that D.'s counsel, who was also the township counsel, appeared at the council meeting and spoke in favour of the by-law, and that D. guaranteed

the council against all expenses in the matter. It appeared also that the applicant had some buildings on his lot adjoining the road which were used by farmers, and which would be cut off by the closing of the road.

*Held*, by ROSE, J., that under the circumstances the by-law must be quashed with costs.

*Quære*, whether there is any power to close a road of this kind running through more than one municipality.

*Maclennan*, Q.C., and *Metcalfe*, for the applicant.

*Aylesworth* and *Deacon*, contra.

Rose, J.]

REGINA V. MACKENZIE.

*Indian Act—Conviction for selling liquor—Imprisonment in default of payment of fine—Sale under medical sanction—Amendment.*

A conviction under the Indian Act for giving intoxicating liquor to an Indian imposed a fine and costs, and, in default of immediate payment, imprisonment.

*Held*, that the conviction must be quased, for that while sec. 9 imposes as punishment for the offence fine or imprisonment, or imprisonment or fine, it does not authorize a fine, and in default of payment, imprisonment.

*Held*, also, that the conviction was invalid, because it did not negative that the liquor was not made use of under the sanction of a medical man, or under the direction of a minister of religion.

*Held*, also, that a conviction cannot be amended after the return of a writ of certiorari.

*V. Mackenzie*, Q.C., for the applicant.

*Holman*, contra.

Rose, J.]

BRODER V. THE NORTHERN RAILWAY CO.

*Railways—Carriage beyond defendants' line—Loss by fire—Carriers—Warehousemen—Negligence—Proximate cause of damage.*

Four car-loads of flour were delivered to the defendants at Newmarket, Ont., to be carried to Chatham, N.B., under a special contract which provided that defendants were not to be liable for any delay occasioned by want of opportunity to forward goods addressed to consignees beyond the places where the defendants had stations; that the goods were to be forwarded to their destination by public carriers or otherwise as opportunity might offer; that the goods, pending communication with the consignees, remained on the defendants premises at the owner's risk; that the delivery of the goods by the defendants would be considered complete, and their responsibility to have ceased when they had notified the carriers to whom they were entitled to deliver them that they were prepared to deliver over the goods for further conveyance; and that they were not to be responsible for any loss, damage, etc., after such notice. It also provided that the defendants were not to be liable for damage occasioned by fire. It appeared that the defendants' line did not extend beyond Toronto, and that the goods were to be forwarded to their destination by the G. T. R.; that on their arrival the goods were placed in the defendants freight sheds, and notices addressed to the consignee sent to the consignor at Newmarket, and also to the G. T. R.; that defendants were prepared to deliver over the goods for further conveyance; and that after such notice, while the goods were in defendants freight sheds, they were destroyed by fire without any negligence on the defendants' part.

*Held*, that the defendants were not liable as carriers because they had expressly limited their liability as such; nor as warehousemen for no negligence was shewn, the only negligence suggested being that they did not furnish cars for transhipment before the fire, but that such objection was not tenable; and, even if this could constitute negligence, *quære*, whether the recovery could be for more than nominal damage, *i.e.*, whether the loss by fire was the damage naturally arising from such negligence.

*Falconbridge*, for the plaintiff.

*G. D. Boulton*, Q.C., for the defendants.

Rose, J.]

### BEGG v. THE CORPORATION OF THE TOWNSHIP OF SOUTHWOLD.

*Drain—By-law to clean, repair—Work done including deepening—Municipal Act* 1873, *secs.* 570, 589—*Alteration of amendment—Evidence.*

A by-law passed for raising the unpaid portion of the expense of cleaning out and repairing a drain otherwise good on its face, was objected to, on the ground that, while the resolution and by-law authorizing the work to be done was for such cleaning and repairing only, the work actually done included deepening.

*Held*, that the objection being without merits, and the by-law good on its face, and as the work had been done and paid for, the municipalities only authorizing the cleaning and repairing, and, if deepened, which was not free from doubt, the evidence shewed it was done accidentally and not by design, and as much inconvenience would ensue if the by-law were quashed, the application was refused; but apart from this, *quære*, whether under secs. 570, 589 of the Municipal Act of 1883, and 45 Vict. ch. 26, sec. 17, O., the municipality had not power without petition to do such work, including deepening, as might be incidental to maintaining the drain in an efficient state.

A further objection that the assessment was altered without notice being given affording an opportunity to appeal was disallowed, the evidençe failing to establish any such alteration.

*F. Lefroy*, for the applicant.

*Cattanach*, contra.

## CHANCERY DIVISION.

Boyd, C.] [April 30.

### MILL v. MILL.

*Infant—Costs against next friend.*

Where one commenced an action as next friend to an infant without any notice to the defendant, and without any investigation as to the good reasons which the defendant had for acting in the manner complained of,

*Held*, that the next friend should pay the costs.

*Golds* v. *Kerr*, W. N. 1884, p. 46 approved of.

*Gibbons*, for the plaintiff.

*Magee*, for the defendant.

Boyd, C.] [June 19.

### NELSON v. WIGLE,

*Registered owner of vessel—Goods supplied to vessel.*

Where one brought action against the registered owner of a certain vessel for the value of goods and supplies furnished by him not on the order of the defendant, but on the order of one G. C., between whom and the defendant no relation of agency was proved,

*Held*, that the plaintiff could not recover against the defendant.

The fact that the vessel got the benefit of the supplies and necessaries did not make the registered owner liable.

Boyd, C.] [June 25.

### ELLIOT v. STANLEY.

*Partners—Contract—Joint and several—Breach of contract not to trade.*

The two defendants, trading in partnership as hardware merchants at C., sold out their business to the plaintiff under a written agreement, wherein they stated as follows:—

"The parties of the first part (the defendants) do hereby bind themselves to the plaintiffs under a penalty of $2,000 that they will not do business in C. in hardware for the term of five years from this date."

Afterwards, and within the five years, one of them commenced business in connection with a third party as a hardware merchant at C.

*Held*, that this did not amount to a breach of the above agreement, though the matter was not free from doubt.

The undertaking as expressed was that they should not engage in a like business; it contemplated and provided against joint action. It was not merely that a rival trade should not be begun, but that they two would not be the parties to set up or enter upon such a business.

*Semble*, the rule stated in Rawle on Covenants, 4th ed., p. 536, that when two persons jointly covenant with another, a joint action lies for the covenantee on a breach of covenant by one of the covenantees only, because they are sureties for each other for the due performance of the covenant, should be limited to the case of antecedent breaches, and not be extended to promissory engagements in the absence of language imputing such suretyship in regard to future acts or breaches.

*W. Cassels*, Q.C., and *F. Lefroy*, for the plaintiff.

*Shaw*, Q.C., and *W. Barrett*, for the defendants.

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Boyd, C.] [June 25.

BUCKLE V. BEIGLE.

*Forfeiture—Breach of covenant for payment of taxes—Landlord and tenant—Judicature Act.*

In actions to re-enter for breach of a covenant in a lease the Court will, since the Judicature Act, dispose of questions on their equitable rather than their legal aspect in all cases where, under the former practice, the Court of Chancery would have relieved against the forfeiture. Such would be the case in reference to a breach of covenant for the payment of taxes; that is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a mere money payment.

*Atkinson*, and *Christie*, for the plaintiff.

*Douglas*, for the defendant.

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## PRACTICE.

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Boyd, C.] [March.

McDOUGALL V. LINDSAY PAPER MILL CO.

*Local Master—Jurisdiction.*

The plaintiff, as mortgagee of the defendants, by an instrument dated January 30th, 1883, purporting to be duly executed by the plaintiff, commenced an action for the sale of the mortgaged property. The writ issued, duly indorsed under Rule 17, O. J. A., and default being made, judgment was obtained under Rule 78, O. J. A., referring it to the Master at Lindsay to make and take the inquiries and accounts as prescribed by G. O. Chy. 441 (from 168 O. J. A.).

The Master gave certain execution creditors who had been made parties in his office, and proved their claims, priority over the plaintiff on the ground that the instrument in question was invalid, the terms of sec. 85 of the Canada Joint Stock Company's Act of 1877 not having been complied with.

*Held*, that under the decree the Master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors not having moved against the order making them parties, were also bound by the decree.

*Moss*, Q.C., and *Hudspeth*, Q.C., for appeal.

*Osler*, Q,C., and *McIntyre*, contra.

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Mr. Winchester.] [April.

HATELY V. MERCHANTS.

*Security for costs—Jurisdiction.*

Where a plaintiff leaves the jurisdiction while his action is pending he will be ordered to give security for costs past as well as future.

*Plumb* and *Millar*, for defendant.

*Aylesworth*, for plaintiff.

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## *ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.*

Contracts for the benefit of third persons.—*American Law Register*, January.
Libel—Privilege—Words spoken by Counsel.—*Ib.*
Party walls.—*Ib.*, February.
Innkeeper—Theft from one guest by another.—*Ib.*
Demurrage.—*Ib.*, March,
Error in quantity of land.—*Ib.*
Rights of checkholder as against bank.—*Ib.*
Drunkenness as an excuse for crime.—*Ib.*, April.
Fraction of day—When certain events take place. *Ib.*
Criminal contempts.—*Crim. Law Mag.*, March.
Abuse of the writ of *habeas corpus*.—*American Law Review*, January-February.
Preferred stock.—*Ib.*
Peculiarities of Manx law.—*Ib.*
Review of causes in courts of last resort.—*Ib.*
The Suez Canal in international law.—*Law Magazine*, February.
The laws relating to blasphemy.—*Ib.*
Common words and phrases.—*Albany Law J.*
Adjacent—Family—Seaman—Good hunter (horse)—Voluntarily—Health—Jan. 12th.
Tools of his occupation—Income contractor—Fence—Construction and erection—Last sickness—Jan. 19th.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

Privilege (use)—Personal indignity—Printed, tracing—Furniture—Coil—Account—Adjoining—Day—Peace—Feb. 2nd.
For—Adjoining—Standing or riding upon the platform—Out west—Bank note—Effects—Night, afternoon—Domestic animal—Child—March 15th.
Consent—Probability—Understanding—Culvert—Surprise—School—Manufactory, factory—Bridge—Traveller—Domestic animal—March 22nd.

Codification.—*Ib.*, March 8th.
Constructive notice, its nature and limitations.—*Irish Law Times*, Feb. 23rd.
Reasonable conditions in carriers' contracts.—*Ib.*, March 8th.
Dog shooting.—*Ib.*, March 22nd.
Liability of a parent for the torts of his minor child.—*Central Law Journal*, Jan. 4th.
Mistakes of law.—*Ib.*
Extension of time to collect taxes—Effect on sureties.—*Albany Law Journal*, Feb. 16th.
Assumption of mortgages.—*Ib.*, Jan. 11th.
Twice in jeopardy.—*Ib.*, Jan. 18th.
Intoxication as a defence in civil cases.—*Ib.*, Jan. 25th.
Costs in will contests.—*Ib.*, Feb. 1st.
Legacies given in a particular character.—*Ib.*
Authority of wife to dispose of her husband's property.—*Ib.*, Feb. 8th.
Party walls.—*Ib.*, Feb. 15th.
Liquidated damages and penalties.—*Ib.*

## *LATEST ADDITIONS TO THE OSGOODE HALL LIBRARY,*

CORPORATIONS.—American Corporation Cases embracing the decisions of the Supreme Court of the United States, and the Courts of last resort, in the several States and territories, of questions peculiar to the law of corporations. Vol. 6. Private Corporations.—Edited by Henry Binmore. Chicago, 1884.

MINING REPORT.—A series containing the cases of the law of mines found in the American and English reports, arranged alphabetically by subjects, with notes and references by R. S. Morrison. Vol. 3. Chicago, 1884.

MARRIAGE AND DIVORCE.—The law of Marriage and Divorce as established in England and the United States. By David Stewart. San Francisco, 1884.

DIGEST.—A Digest of the reported decisions of all the Courts, including a selection from the Irish (being a continuation of Fisher's Digest), with collections of cases followed, distinguished, explained and commented on, overruled and questioned, and references to statutes, orders and rules of Courts during the year 1883. By John Mews. London, 1884.

COPYRIGHT.—A synopsis of copyright decisions. By W. M. Greswold. Bangor, 1883.

MARRIAGE.—The Laws of Marriage, containing The Hebrew Law, The Roman Law, The Law of the New Testament, and the Canon Law of the Universal Church, concerning the Impediments of Marriage and the Dissolution of the Marriage Bonds, digested and arranged, with notes and scholid. By John Fulton. New York, 1883.

WATERS.—A Treatise on the Law of Waters, including Riparian Rights, and Public and Private Rights, in waters tidal and inland. By John M. Gould. Chicago, 1883.

PATENTS.—The Patentability of Inventions. By H. C. Merwin. Boston, 1883. A Summary of the Law of Patents for useful Inventions with forms By W. E. Simonds. New York, 1883.

DIGEST.—Digest of Moak's English Reports. Vol. 16-30 inclusive, with a list of cases reported, and table of cases affirmed and considered, overruled or revised. By James Simmons. Also a Digest of American Notes. By N. C. Moak. Albany, 1883.

COSTS.—A Treatise on the Law of Costs in the Chancery Division of the High Court of Justice, being the second edition of Morgan and Davey's Costs in Chancery, with an appendix containing Forms and Precedents of Bills of Costs. By the Rt. Hon. George Osborne Morgan and E. A. Wurtzburg. London, 1882.

CARRIERS.—Carriers' Law relating to goods and passengers Traffic on railways canals and steamships, with cases. By E. B. Watts. London, 1883.

CONTRACTS.—The Law of Contracts. By Theophilus Parsons. 3 vols. 7th Ed., with additions. By William V. Kellen. Boston, 1883.

EVIDENCE.—A Treatise on the Laws of Evidence. By Simon Greenleaf. 3 vols. 4th edition, revised with large additions. By Simon Greenleaf Croswell. Boston, 1883.

PATENTS.—Abstracts of Reported Cases relating fo Letters Patent for Inventions. By T. M. Goodeve. London, 1876. Appendix to above. London, 1877.

CARRIERS.—Wood's Browne on the Law of Carriers of Goods and Passengers by land and water. By J. H. Balfour Browne, with notes and references to American Cases. By H. G. Wood. New York, 1883.

PATENT CASE INDEX.—Containing list of all the Cases involving Patents for Inventions as reported in the States and Federal Reports, Robbs and Fisher Patent Cases, and the Patent Office Gazette up to the present time, together with a brief synopsis of the Law Points decided, arranged alphabetically. By W. P. Preble, jr. Boston, 1883.

PLEDGES.— A Treatise on the Law of Pledges including Collateral Securities. By Leonard A. Jones, Boston, 1883.

JUDICATURE ACT.—Wilson's Supreme Court of Judicature Act, Rules of the Supreme Court, 1883, and Forms, with other Acts, Orders, Rules and Regulations relating to the Supreme Courts, with practical notes. 4th edition. By M. D. Chalmers and M. Muir Mackenzie. London, 1883.

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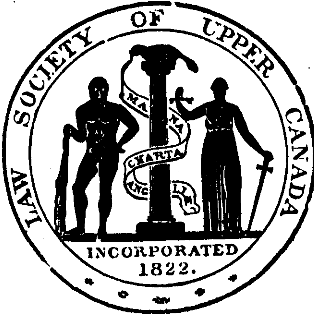
# Law Society of Upper Canada.




## OSGOODE HALL.

HILARY TERM, 47 Vict., 1884.

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

Messrs. James Bicknell, gold medalist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Campion, John James Maclaren. The last three being under Rules in special Cases.

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Matriculants — John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class — Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

## BOOKS AND SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

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

*Students-at-Law.*

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a Selected Poem:—
1884—Elegy in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

*or* NATURAL PHILOSOPHY.

*Books*—Arnott's elements of Physics, and Somerville's Physical Geography.

FIRST INTERMEDIATE.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jusisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m,

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

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| Notice Fees | $1 00 |
| Students' Admission Fee | 50 00 |
| Articled Clerk's Fees | 40 00 |
| Solicitor's Examination Fee | 60 00 |
| Barrister's " " | 100 00 |
| Intermediate Fee | 1 00 |
| Fee in special cases additional to the above. | 200 00 |
| Fee for Petitions | 2 00 |
| Fee for Diplomas | 2 00 |
| Fee for Certificate of Admission | 1 00 |
| Fee for other Certificates | 1 00 |

*Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.*