Vol. II. OCTOBER, 1896. No. 10.

The BARRISTER

A. C. MACDONELL, D.C.L., Editor.

CONTENTS.

Published by The CANADIAN LEGAL PUBLISHING CO.

Office: Equity Chambers, Cor. Adelaide and Victoria Sts.,
TORONTO, CANADA.

The Barrister.

VOL. II. TORONTO, OCTOBER, 1896. No. 10

EDITORIAL.

Turning Up New Ground.

Colonial customs, tastes and sentiments are naturally patterned upon those of the motherland; and in Canada we have a large share of old conservatism and reverence for conventionalities. We cling much more tenaciously here to the less material requirements of professional etiquette than in England, and we have an awe of ever losing sight of the eternal fitness of things in regard to the dignity of our profession. Perhaps in this direction we outdo the model upon which we have been fashioned; and perhaps, too, we allow the motherland to set us an example in up-to-date common sense and progressive improvement. Few of our readers will think that there is more of the old-fashioned and the straight-laced about the legal profession in Canada than in England. Yet we think we can make the fact apparent. The mission of a legal journal is to keep the profession apprised of what is going on in the legal world, and we are trying to be a legal journal in more than name. It may shock the profession in Canada to learn it, but we think it is worth knowing, that in England there is an association known as "The Solicitors' Benevolent Association," to assist lawyers in distress and their wives and families. We can imagine the pious horror with which some of the Ontario Bar would have viewed the proposal to get up such an organization here. The idea would have been distasteful to the refinement and sensitiveness of a profession at once elevated and aristocratic. But when we see what others are doing, we may well begin to think that lawyers are but men, and that the profession does not exist by divine right, and is really grounded on foundations quite as human as a trade or an industry. It will not, we trust, be thought that we favour revolu-

tionary tendencies, or that we could believe in advanced democracy. We still stand up for a reasonable veneration for formality and time-honoured custom, and for a discreet upholding of what has been found useful in the past. But we must also seek to avoid fossilization, and keep away from extremes. There is always room for improvement, and improvement is not inconsistent with a proper regard for existing institutions. Nor is it incompatible to be at once sound and unyielding, for those things which have the sanction of previous experience, and to seek—as times change and men and things meet altering conditions—the modernizing of those things. There are many matters pertinent to the practice of law in Canada where we think a too close adherence to the ancient is pursued, and the generalizing we are indulging in will not, we think, be without application. We refer to the benevolent society in England as indicating the spirit of modernism that obtains in the most civilized country of modern history. We shall have more to say in the same direction as the months pass by; and we are mistaken if the spirit which pervades this, and will pervade future articles on kindred subjects, does not strike a responsive key in the constituency we are addressing. As we cast a few glances over the field that is opened up in the consideration of such a line of questions as are involved, in the direction spoken of, we anticipate that we will have to turn up some new ground before we are through with it. What may be the event of such action on our part time alone will tell. We believe there are great possibilities in an earnest inquiry into the conditions that obtain in the legal profession of Canada. We will try and do our part, and look forward as a reward to sympathetic support from the profession.

* * *

Sir Walter Besant on Crime.

It has always been noticeable that it is easier to theorize than to carry into effective operation; and men are always mapping out on paper beautiful schemes which will never be materialized in any time. We are forced to regard in this light the views on the extirpation of crime expressed recently by Sir Walter Besant. Yet, coming from a gentleman of his known abilities, as well as from the plausability they possess, these views are not uninteresting. Taking the cases of five criminals now serving terms, which are anywhere from the third to the eleventh conviction, according to the prisoner, Sir Walter traces out the probable future that such people will lead, showing that under the present system of punishment the only thing ahead for a convict, both from necessity and inclination, on leaving a prison, is a return to his old tricks. A cure for this,

we are told, will be had from an utterly new treatment. Punishment is to be by hard labour for a period; and then a confinement for life with less rigorous treatment is to follow. The prisoners are to be allowed to earn by their work such luxuries as beer and tobacco. Sir Walter says: "The method would be cheap, efficacious and deterrent; it would rid us in a few months of the greater part of our habitual criminals; they would beget no more children to inherit their vices; we should shut up half our gaols and pension off half our police, not to speak of saving thousands in magistrates." This, of course, has a fine sound to it, and describes a Utopia that the world has long needed. But before we get our lips to this sweet cup what slips there are! If we succeeded in hiving all the light-fingered and badly-disposed within four walls, maybe there would be a few honest people attracted by the opening, who would be treading on one another's heels in their rush to get the vacant job. We are inclined to think that the activity and push that some would display would equal the rush for office in the civil service upon one Government going out of power and a new one coming in. There would be something remarkable in the way the ranks would be filled up, the back line stepping forward and standing where the other had stood. Besides, if one country adopted such a scheme there would be many from neighbouring countries, who had not been in good luck there, who would see a good thing in it to flit over to the country where things were so promising; and in the result that poor country would soon find a second complete outfit of scoundrels for whom to supply a prison workshop in which they could earn luxuries such as beer and tobacco. This is only one view of it; but certainly the experiment would be too much for a country to swallow at one mouthful. Things might be propelled and gravitated in the direction indicated, and if it should still look feasible in the light of partial experience it could then be extended onwards. However, the subject is one that will not be hurt by discussion, and Sir Walter Besant's views are well worth consideration.

* * *

Law Students and Vested Rights.

In Australia, it seems from the reports of cases recently decided there, the law students and the Board of Examiners have been locking horns in legal contest. In the September number of the *Queensland Law Journal* there are there several cases in which students have had to fight for their rights. In Ontario there has been some friction between the Benchers and the law students, but, as a general thing, the latter have given "a grum-

bling consent" to measures which have been distasteful to them. There has been a feeling at different times that the Benchers were too autocratic and high-handed in the government of the students. Some strong feeling was manifested a few years ago at the time of the establishment of the Law School. There had been no previous compulsory attendance at lectures; and it was, of course, not thought that it would be made to apply to any students but those who had entered the society subsequently to the creation of the Law School. However, there were no exceptions made in the general rule, and all students entered in the society were ordered to attend their last three years. This was considered a great hardship to those who had already been on the books of the society, and who had paid their $50 entrance fee on the understanding that on attending under articles for five years, and passing certain examinations, they might be Called and receive their certificate. Then for each of these three years an annual fee of $25 had to be paid to the Law School, and a student by reason of attendance at lectures was not able to command the same salary in a law office as he would otherwise have been. The students claimed "vested rights," but nothing was done but protesting, and everyone gradually wheeled into line. We think the Australia students pursue, perhaps, a better course. At least an occasional show of resistance is better calculated to save them from being treated unfairly.

* * *

The New Rules Again.

So used has a poor lawyer got to the perpetual grinding out of new rules of practice that he can hardly conceive of any that can have got very old. He is always hearing that Mr. This, Q.C., Mr. Justice That and Mr. Registrar Other are "busily engaged in the stupendous task" of consolidating the rules. And then it must be admitted that a consolidation does actually appear in time, but this poor unfortunate consolidation must soon be altered beyond recognition; and thus it goes on. In England it is the same way. We learn from *The Law Journal* (Eng.) that it is expected that the new rules of Court, in the preparation of which Lord Justice Lindley, Lord Justice Kay, Mr. Thomas Snow, Mr. W. Wills and Mr. Stringer spent so much time during the past sittings, will come into operation either at the end of Michaelmas term or at the beginning of the New Year. The draft rules will be considered and settled by the Rule Committee early next term.

* * *

The Lady Lawyer.

Though no one seems much exercised over it, it is apparent that the time is not far distant when we of the sterner sex shall

find the lady practitioner brushing up against us in our law practice. Miss Clara Brett Martin has already received permission to be a solicitor, and her application to be called to the Bar is now before the Benchers, and even if she is now refused, it is not likely that it will be for long. It is one of the signs of the times that women will come to the front. In New York state, during the present month, three women have been appointed receivers in supplementary proceedings in insolvency. Moreover, we have just received the July number of *The Law Digest and Recorder*, a legal paper published at Madras, India, from which we learn the interesting fact that Miss Cornelia Sorajbi, the first lady lawyer in the Indian Empire, has appeared at the Poona Sessions Court, and appeared on a case, addressing the jury and handling the entire conduct of the cause. It thus seems the lady practitioner is the inevitable, and though many will regret her advent in the Court room, it is likely that we will become used to it, and that in years to come we will, perhaps, see that the objection to her practicing arose from the novelty and unusualness of it. Most of us thought ladies riding on bicycles was unladylike and indelicate, till now that every second lady is an active bicyclist, we do not look upon it in the same light.

IN THE EXCHEQUER COURT OF CANADA.

Toronto Admiralty Court.

No. 91.

JOHN SIDLEY,

Plaintiff.

AGAINST

"THE DOMINION," THE SHIP.

Action for Master's wages, disbursements and for an account.

—AND—

JOHN SIDLEY,

Plaintiff.

AGAINST

"THE ARCTIC," THE SHIP.

Action for an account as co-owner.

Judgment of His Honor Judge McDougall, Local Judge in Admiralty.

Held, as to the disposition of the costs where the proceeds of the sale were insufficient to pay the maritime liens and costs, that the costs of the action must be disposed of as follows:

First—Costs of sale to be a first charge on the proceeds.

Second—Party and party costs of both co-owners to be taxed, and the plaintiff (or defendant, as the case may be) to pay to the other the difference between one moiety of the total amount of said party and party costs and his own party and party costs.

As the result of the trial of these two actions, tried together by consent, and both being actions in rem between co-owners, one of them including a claim of the plaintiff (though part owner)

for wages and disbursements as master of "The Dominion," I have found upon the taking of the accounts a balance in favor of the plaintiff for nine hundred and fifty-six dollars and ninety-three cents ($956.93).

Both vessels have been sold under the direction of the Court, and the gross proceeds of both vessels was the sum of one thousand four hundred dollars ($1,400) only. Deducting the costs of sale, there will not be a sufficient balance of the proceeds in Court to satisfy the plaintiff's claim, apart from any question of costs.

There is no reason why the rule as to the incidence of costs in partnership actions, adopted by the Courts of law, should not apply to actions between co-owners in the Admiralty Court. That rule appears to be, where there are assets, to direct the payment of the costs of taking the partnership accounts out of the partnership assets.

Where there is a deficiency of assets, the aggregate costs of the plaintiff and defendant ought to be paid equally by the plaintiff and defendant. The Court of Admiralty has power to make an order that the costs of a proceeding shall be paid personally by the owners; at least that is the rule in damage actions. *The Dundee*, Holmes, 1; Haggard, 109. *The John Dunn*, Place, 1; William Robinson, 159. *The Volant*, 1; William Robinson. 390; *Ex parte Rayne*, 1 Q. B. 982.

I cannot see any reason for not following this practice in actions for an account between co-owners.

I make the following order as to the disposition of the proceeds of the sale of these two vessels:

1. The costs of the sale of the "Arctic" will be paid out of the proceeds of that vessel, so far as the proceeds will allow. I understand that in the case of that ship the sale did not produce sufficient funds to pay these costs in full.

2. In the case of the "Dominion" the costs of the sale shall be first paid out of the proceeds.

3. The claim of the plaintiff, as far as the proceeds will allow, he producing a voucher of payment to Magann of the sum of $363.79, which sum forms part of his claim as awarded him. In this case, too, I believe, after paying the costs of the sale, there will not remain sufficient funds to pay the plaintiff's claim in full.

4. The total amount of the party and party costs of both the co-owners (there are only two), parties in each action, shall be taxed, and the plaintiff, Sidley or Peters, the other co-owner, as the case may be, must pay to the said Peters or the plaintiff Sidley, the difference between one moiety of the total amount of the party and party costs and his own party and party costs. *Austin* v. *Jackson*, 11 Chy. Div. 942; *Hamer* v. *Giles*, 11 Chy. Div. 942; *Re Potter*, 13 Chy. Div. 845.

The only remaining question is as to the costs of the intervening mortgagee Magann. As the claim of the plaintiff for wages and disbursements absorbs the whole fund, Magann's mortgage only covering thirty-two shares, the plaintiff is entitled to be paid in priority to the mortgage.

I dismiss the claim of the mortgagee intervening against the res or proceeds, without costs.

Dated, Toronto, August 26th, 1896.

CORRESPONDENCE.

Letters to the Editor.

Editor, THE BARRISTER, Toronto.

Chattel Securities.

Sir,—I have read with interest your remarks in the September number on the case of *Baker and wife* v. *Ambrose* (1896), 2 Q. B. D. 372, and realize the importance of the decision, if it is applicable to affidavits required by our Bills of Sale and Chattel Mortgage Acts, as it is undoubtedly a common practice to take these affidavits for the sake of convenience before the solicitor acting for one of the parties.

Since your comments were written a full report of the case is published in the current (October) number of the Law Reports, Q.B.D., and Mr. Justice Wright's reasons for distinguishing this case from *Vernon* v. *Cooke* (49 L. J. C. P.), 767, are set out at length. His Lordship suggests that it may be distinguishable on the ground that there the solicitor acted for both parties, instead of for the grantee alone, as in this case, but holds that it is clearly so on the ground that it was decided under a different rule, which, by its terms, was applicable only to affidavits used in litigious business, and that the effect of that decision must be regarded as done away with by Order XXXVIII. R. 16.

In giving judgment in this case (*Vernon* v. *Cooke*) Thesiger, L.J., says: "Now, we find that a practice has grown up gradually in the Courts that when evidence is taken by affidavit, that affidavit shall not be sworn by an attorney in the cause. It was not an absolute rule, but a practice of particular Courts, and it appears not to have become universal until 2 Will. 4, when in order to obtain uniformity of practice a rule was laid down for all the Courts. That rule, however, was only in respect of affidavits used in litigious business."

The old rule referred to in this judgment is R. G. H. T. 1853, 143, and is given in Lush's Practice, 1865, Vol. 2, 876.

Order XXXVIII. R. 16, under which the decision in *Baker and Wife* v. *Ambrose* was given, was introduced in 1883, and provides that "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is used." Comparing this with our Consolidated Rule No. 613, which is as follows, "No affidavit shall be read or made use of for any purpose if sworn before the solicitor of the party in the cause in whose behalf the affidavit is made, or before the clerk or partner of such solicitor," we find a substantial difference. The words "in the cause" after "party" clearly limit it to actions and matters in litigation. These words are of frequent occurrence in this connection in the old rules and practice. We are not, however, without a direct authority on the point. In *Canada Permanent* v. *Todd*, 22 A. R. 515, it was contended under this rule No. 613, that an affidavit of bona fides in a chattel mortgage sworn before a commissioner employed in the office of the mortgagee's solicitor was bad. During the

argument Osler, J.A., remarked: "That rule applies only to proceedings in an action," and this dictum was subsequently adopted as the judgment of the Court on the point. R. S. O. c. 125, s. 28, (The Bills of Sale and Chattel Mortgage Acts) respecting the taking of the affidavits required by the Act does not in any way affect the question.

In view, therefore, of the authorities quoted, and for the reasons given, I do not think that the provisions of Consolidated Rule 613 are applicable to affidavits taken under the provisions of the Bills of Sale and Chattel Mortgage Acts.

Yours truly,

B. E. BULL.

Toronto, Oct. 22, 1896.

* * *

New Bicycle Law.

Sir,—It is a little difficult to understand the Scottish Judge's decision, noted in your last number, that a bicycle is not a "passenger vehicle." If it is not that, what is it? What is a "passenger?" A person who passes from one place to another; this a bicyclist certainly does. Then what is a "vehicle"? It is a machine going upon wheels (note the apparent identity of the words "vehicle" and "wheel") to carry something, for the word is a derivative of the Latin veho. Then a passenger vehicle is a machine going upon wheels to carry a passenger. It would be difficult to find a more precise definition of a bicycle. To compare a bicycle to a pair of skates requires a stretch of imagination and a misconstruction of terms, and disregard of their meanings which one would not expect to emanate from a legally trained mind. Has not one of our County Judges held that a bicycle is a vehicle?

TWO WHEELS.

Toronto, Oct., 1896.

* * *

Mechanics' Lien on a Child.

Sir,—The following incident is illustrative of the comprehensive character of the law respecting mechanics' liens in one of the southern states. It adds one more to the humorous incidents which are continually cropping up in law offices:

A medical practitioner in the State of ——— left with his attorney for collection an account against a former patient for services rendered in connection with the delivery of a male child. The debtor, on being notified to pay the account, hastened to the attorney, and explained to him that he was not in a position to enable him to pay the account then, whereupon the attorney assured him that it would be necessary for him to file a lien against the child. The paternal affection of the debtor was so thoroughly aroused by this startling proposition that he straightway went and procured the necessary funds to pay the claim, and thereby allayed the anxiety which the suggestion had caused.

The above is an incident related to me some time ago, and as I have never seen it in print I send it to you for publication, if it is not old. It may prove of interest to your readers.

Yours truly,

F. W. WILSON.

Petrolia, Oct. 7, 1896.

OSGOODE HALL NOTES.

A second division of the Court of Appeal has been constituted as follows: Meredith, C.J.; Rose, Falconbridge and MacMahon, JJ.; and it commenced sitting on the 5th October.

* * *

Mr. H. H. Robertson, of Hamilton, has been appointed a special examiner.

* * *

The Chief Justice of Ontario, the Hon. J. H. Hagarty, commenced his six months' leave of absence last month. The last case he sat on was *Montgomery v. Corbitt* on 25th September.

* * *

Chief Justice Hagarty went on the Bench in 1856, and has ever since continued in that capacity. So long a service merits a more extended notice, and this we promise our readers at an early date.

GLIMPSES INTO OLD UPPER CANADA LITIGATION.

Vol. 1, O. S. 1823-1829.

All those things which are now held to be of the greatest antiquity were at one time new, and what we to-day hold up by example will rank hereafter as a precedent.—TACITUS.

PAPER III.

In a third and last paper on the first volume of cases reported in this province, it will not be inappropriate to see who were the gentlemen whose names are recorded as appearing before the Court in those cases. It is almost certain that of all who took part therein, Judges, lawyers and litigants, none remain alive today. It is curious, however, as an evidence of the tendency for the son to follow the father's profession, to observe that there is hardly a name which shone in the legal world then which is not even yet a distinguished one among the profession of the present and recent times. A list has been made of those who appeared, as well as the number of times each appeared. The name most frequently appearing is that of Mr. Macauley, he being before the Court in the volume under review no less than 79 times. His great talents were destined at a later period of time to shed a lustre on the Bench. The gentleman whose name is next in order was Mr. John Beverley Robinson, who was engaged in 55 of the cases here reported. His subsequent career as a Chief Justice, and as the object of the Crown's favour, by being created a baronet, is well known. His sons have earned the highest laurels in our own times. The name of Boulton has always been known and carried to distinction in the Courts of this province. Mr. Boulton, the Solicitor-General, appeared during the period we are now examining in 54

cases. Mr. Robert Baldwin (whose name is revered by Reformers in politics) comes next with 45 cases. He is followed by Mr. Washburn, who appeared 35 times. These appear to have been the leaders of the Bar, and the other names, which I am about to mention, seem widely removed from the higher class. We find these names figuring from 10 times to once: Ridout, Rolph, Small, George S. Boulton, Cartwright, Taylor, Jones, Dixon, Bethune, George Jarvis, Beardley, Smith and Elliott. And this completes the list. These men were the pioneers of legal counsel work in Ontario, and the names, though without the Christian names or initials, will easily be recognized as great men of those times, or as the fathers of men high up in the country's annals of more modern days.

It will be remembered in the last paper an account was given of the case of *Brock* v. *McLean*, sheriff. As there shewn, the sheriff had to pay the amount due to Brock by a debtor whom the sheriff had released from custody on the order of a clerk in the office of Mr. Daniel Washburn, an attorney of the Court. Now, the sheriff felt that he was a very much aggrieved person, and he seems to have decided that the last should not be heard of the matter in settling the case of *Brock* v *McLean*. We accordingly find further on in the pages of this volume of reports that the case again came before the Courts under the style of *The King* v. *Bidwell*. The defendant is none other than the clerk, who had on the instructions of his principal, Mr. Daniel Washburn, ordered the release, and the proceedings were for an attachment for having practiced as an attorney without being authorized so to do. But the unfortunate sheriff was not destined to get relief. The Court seemed unanimous in laying all the blame on the solicitor who had instructed the defendant, and as Bidwell swore he was not a partner, they could not bring it home to him that he had practiced as an attorney.

The writ of attachment was a mighty weapon in old legal warfare. It was a sort of legal dragnet from which there was no escape once it fastened around a transgressor. It only issued, of course, out of the Superior Court, and it was not infrequently directed against officers exercising inferior jurisdiction, where there was misbehaviour of so flagrant a kind as to warrant it. Such a case we have in this volume, which has an additional interest from the fact that it has about it a flavour of "Drumtocty" and "The Briar Bush." The case, unfortunately, is a tale of a family quarrel in the kirk. The Committee of the Presbyterian Church at Williamstown, in the County of Alexandria, in Upper Canada, determined to have a minister straight from "the land of the mountain and the flood," and Alexander Wood and many others, signed a subscription paper, or agreement, to pay so much per annum for the clergyman's support. Now the terms of this agreement were not complied with by the elders and committee of the church, inasmuch as the clergyman, it was alleged, did not answer the proper description. Notwithstanding this, so it was alleged, Wood was sued in the Court of Requests, and two of the magistrates, John McIntyre and Alex. McKenzie, were

interested in the event of the suit, the former being an elder of the church, and the latter personally bound to see the salary paid to the minister. They tried the case, and though another elder, who was one of the commissioners of the Court of Requests, retired from the case because of his interest, the above two went on, and gave judgment against Wood. This was the complexion put on things by Wood's affidavits, and an attachment issued. But after the attachment had been executed and interrogatories answered by the magistrates, the sharp edge was taken off some of the allegations, and their case made to appear in much better light. The truth was, as the Court remarked, "The parties seem to have been acting in a wild party spirit." One of the magistrates who had been attached had remarked at the trial that he would take no part, yet his name appears by mistake as one of those trying the case. Then there were material statements of the prosecutor, which were emphatically denied, and it appeared that the magistrates had not bound themselves to pay the minister's salary, though there seemed ground for the prosecutor to have supposed so. The rule was in the end discharged, but without costs; and the magistrates, after having been brought 300 miles from their homes, were allowed to return. Thus ended, it is hoped, all the trouble in the kirk.

HUMOUR OF CANADIAN BENCH AND BAR.

At a trial for breach of promise to marry and seduction, after the woman had given her evidence she took her seat in the body of the Court-room, when the child which she bore in her arms commenced crying. One of the counsel, a great Toronto lawyer, presently said, "Well, my Lord, I presume the jury have by this time made up their minds whether it is I or my learned friend who should be responsible for that child; and the woman can remove it from the Court-room." The learned friend, who came from a distance, replied, "Well, your Lordship, no one can ever think that I could be the guilty party for, as your Lordship knows, I do not live around here."

His Lordship, C. J. Ar——-mr— "Oh, come now, Mr. ———, that does not let you out; you know that dogs never worry sheep near home."

* * *

When legislation was passed authorizing interchange of duties by County Court Judges, a learned counsel had occasion to attack the custom, and the Court agreed with him in a measure, saying, "Surely it is a great hardship to send a County Court Judge among people totally unused to his law."

* * *

Counsel, after raising a number of small objections, which were dismissed *seriatim*, takes a point which looks serious. Judge—"Oh, that is more important; that is a much larger hare than any you have yet started." Learned counsel—"All the easier to split, my Lord."

RECENT ENGLISH DECISIONS.

IN RE WINTLE. TUCKER v. WINTLE.

[NORTH, J., JULY 29, 30.—Chancery Division.

Will — Construction — Vesting — Gift of intermediate interest — Power of sale—Direction to pay and decide—Conversion.

A testator, by his will, gave, devised, and bequeathed his residuary estate as follows—that is to say:—

"And as to all the residue and remainder of my estate and effects whatsoever or wheresoever (real and personal) I give, devise, and bequeath the same unto ....upon trust to permit and suffer the same or any part thereof to remain in the same state of investment as the same may be at the time of my decease or otherwise with the consent in writing of my said wife during her life and afterwards at their or his own discretion) to call in and sell and dispose thereof, or of any part thereof, and to receive the money arising therefrom, and after payment of all my just debts...to invest the residue... upon such securities as trustees are by law authorized to do, and to receive the annual income of such investment or of my residuary estate and effects until sold or collected in as aforesaid, and pay the same unto my said wife ....during her life.... And from and after the decease of my said wife upon trust to pay and divide the whole of my said residuary estate unto and equally between all my children (if more than one, as or in the nature of tenants in common) as unto every child, if only one. And the issue of any of them who may have previously died (such last-named issue to take their parents' share) for their respective sole and separate use and benefit absolutely upon their respectively attaining the age of twenty-one years. I empower the trustees or trustee for the time being of this my will (after the decease of my said wife) to apply the whole or such part as they or he shall think fit of the annual income of the share or presumptive share of any of my children or grandchildren during minority for or towards his, her, or their education or maintenance."

The testator left eleven children surviving him, his other children having died infants and unmarried. Five out of the eleven predeceased the widow, two of them having died infants and unmarried, but the other three having attained twenty-one, and left children still living. Owing to these and other facts it became necessary to determine when the property vested, and whether it was converted into personalty at the death of the testator.

It was contended that Fox v. Fox, L. R. 19 Eq. 286, had not been overruled by the later authorities, and that the discretionary maintenance clause which was practically the same as that in Fox v. Fox, vested the contingent interests at the testator's death. As to conversion, it was urged that there was a general intention to convert, which controlled the trustees' prima facie option. There was a direction to pay and divide, and the whole will related to personalty.

Minors v. Battison, 46 Law J. Rep. Chanc. 2; L. R. 1 App. Cas. 428; Fletcher v. Ashburner, 1 Bro.

C. C. 497; Mower v. Orr, 7 Hare, 475.

Robertson Macdonald, G. W. Brabant, J. Gatey, M. L. Romer, J. G. Butcher, T. T. Methold, and Gilbart Smith for the various parties.

North, J., having decided that the word "previously" meant "previously to the decease of my said wife," held that, as there was no gift of the whole of the intermediate income in any event to the use of the legatee, but only of so much as the trustees thought fit to apply for maintenance, the direction for maintenance did not vest the contingent legacy. Fox v. Fox was too wide. As to conversion, there was a clear option in the trustees to sell or not. As there was a power of sale expressly given, it was unnecessary to imply a trust for sale, as in Mower v. Orr, where the direction to pay and divide was unaccompanied by any power to sell.

* * *

IN RE GRAY, AKERS v. SEARS.

[North, J., July 19.—Chancery Division.

Settlement — Construction — Who take — Next-of-kin — Statute of distribution.

The ultimate trust of the marriage settlement of Mary Ann Gray provided as follows, after the usual trusts for children:—

"But in case there shall be no child of the said intended marriage, or no child who shall live to attain a vested interest, then upon trust as to the said annuities and dividends for the person and persons who shall be next-of-kin in blood to the said Mary Ann Gray at the time of her decease, in case she had so died intestate and unmarried."

There was a previous gift of furniture "to the next-of-kin in blood....in the manner directed by the statute for the distribution of intestates' effects as if she had died intestate and unmarried."

Mary Ann Gray died without children, leaving brothers and sisters of the whole blood and half blood and children of deceased brothers and sisters.

The trustees took out a summons to determine who was entitled.

Henry Terrell, for the trustees, one of whom was the child of a deceased sister, contended that the reference to intestacy imported the Statute of Distributions.

I. Badcock, for a living brother, contended that "next-of-kin" must be construed strictly.

A. R. Ingpen for one of half blood.

It was admitted that the whole and half blood had equal rights.

North, J., said that the point was reasonably clear. The word "so" referred to the failure of children. There was a sufficient reference to the statute within Withy v. Mangles, 10 Cl. & F. 215; Garrick v. Lord Camden, 14 Ves. 372; and Smith v. Campbell, 19 Ves. 400. The omission of the words "to be divided among" made no difference. "Next-of-kin in blood" was the same as "next of-kin" (Halton v. Foster, L. R. 3 Chanc. 505). The gift of furniture showed that the words "next-of-kin blood" did not exclude the statute. He could not imagine why any reference to intestacy was made if the statute was not intended. A gift to next-of-kin simpliciter was the same whether the propositus was testate or intestate. Therefore the word "intestate" must import the statute. Whether the direction was to "divide" or "hold on trust for" made no difference, as could be tested by applying it to the case

of a single person entitled. True, the gift was joint, whereas the statute gave interests in common. That, however, did not prevent the statute ascertaining the persons and the shares. If the shares were unequal, the direction as to joint tenancy could have no effect given to it.

* * *

RE SMITH. DAVIDSON v. MYRTLE.

[W. N. 74; 101 L. T. 232; 31 L. J. 413; 40 S. J. 621.

Trustees' powers of investment.

Under a will trustees were empowered to invest in the bonds, debentures, or debenture stock of "any company incorporated by Act of Parliament." The question involved in this case was whether they were justified in investing in the securities of a company incorporated by registration under the Companies Act, 1862.

Held. No, they were not so justified (Kekewich, J.).

* * *

IN RE SMITH. BAIN v. BAIN.

[LINDLEY, L.J., LOPES, L.J., RIGBY, L.J., JULY 29.—Court of Appeal.

Security for costs—Plaintiff out of the jurisdiction — Application after delivery of defence—Practice—Rules of the Supreme Court, 1893, Order LXV., rule 6.

Appeal from a decision of Kekewich, J., refusing an application by the defendant that the plaintiff might be ordered to give security for costs, on the ground that the application was made after the defence in the action had been delivered, and was, therefore, not made within a reasonable time.

J. G. Butcher for the appeal.

Stewart-Smith for the plaintiff.

Their Lordships reversed the decision appealed from. They said that, as was decided in Martano v. Mann, 49 Law J. Rep. Chanc. 510; L. R. 14 Chanc. Div. 419, and the Lydney and Wigpool Iron Ore Company v. Bird, 52 Law J. Rep. Chanc. 640; L. R. 23 Chanc. Div. 358, the Court had, under Order LXV., rule 6, of the rules of the Supreme Court, 1883, a discretion to order security for costs to be given at any stage of the proceedings, and there was no hard-and-fast rule that the application for security must be made before any material step was taken in the action. In the present case nothing had happened which made it improper to order security to be given.

* * *

LOCH AND ANOTHER v. THE QUEENSLAND INVESTMENT AND LAND MORTGAGE CO., LIMITED.

[T. 478; L. J. 379; W. N. 70; L. T. 180; S. J. 598.—In the House of Lords.

The decision in this case has been affirmed by the House of Lords. Consequently it is now definitely settled that a company can properly agree to pay to shareholders who have prepaid their shares in advance of calls, interest on the amount prepaid, and if they do so the interest is payable not only out of net profits, but also out of the capital of the company, in the same way as any other legal debt.

* * *

NORTTON v. DASHWOOD.

[40 S. J. 635.

Does "tapestry" fixed to the wall of a room pass under a will to the devisee of the house, or does it pass as a chattel to the executor?

If intended to be fixed permanently to the wall it passes, said Chitty, J., to the devisee; and

in this case the Judge considered that this intention existed, as the evidence showed that the tapestry could not be removed from the walls without suffering injury by tearing, and that the removal of the nails holding the battens to the walls would involve some injury to the brickwork.

* * *

WHITTAKER v. SCARBOROUGH POST NEWSPAPER CO.

[W.N. 72; S. J. 598; L. T. 205; T. 488; L. J. 411.

If, in an action against a newspaper for libel, an interrogatory is delivered asking the number of copies printed and circulated of that issue, is it a sufficient answer to reply "a considerable number"?

Yes, said the Court of Appeal (Esher, M.R., Kay and Smith, L. JJ.), overruling the celebrated Times case, Parnell v. Walter, L. R. 24 Q. B. D. 441. (P. 194).

* * *

IN RE DOETSCH (DEC.).

[ROMER, J., JULY 24.—Chancery Division.

Agreement — Foreign law—"Lex loci contractus"—"Lex fori."

The plaintiffs were creditors of a partnership firm of Sundheim & Doetsch, who carried on business in Spain; the plaintiffs' claim arising under an agreement between themselves and the partnership executed in London in November, 1893. Doetsch died in 1894 domiciled in England, and having appointed the defendants his executors.

The plaintiffs brought this action, claiming that the surplus of the testator's estate, after satisfying his separate debts, was liable in equity to the joint debts of himself and his partner in respect of the partnership, and claiming administration. The defendants pleaded that the plaintiffs' rights under the contract were governed by Spanish law, according to which the plaintiffs were not entitled to have any part of the testator's estate applied in payment of the debt due from the partnership, unless and until the plaintiffs had (as they had not) had recourse to and had exhausted the property of the partnership.

H. T. Eve, Q.C., and Howard Wright for the plaintiffs.

Cozens-Hardy, Q.C., and J. Austen Cartmell for the defendants.

Romer, J., held that the objection failed. The difference between the laws of the two countries was a difference of procedure only. It was clear that, according to English law, the plaintiffs were entitled to claim against the assets which were being administered in England before proving that the partnership property was exhausted, and the Spanish law did not affect their rights here (Bullock v. Caird, 44 Law J. Rep. Q. B. 124; L. R. 10 Q. B. 276). The plaintiffs' rights were governed by the law of England, that being the lex loci contractus.

* * *

HIGGINSHAW MILLS AND SPINNING CO., LIMITED, RE. THE MANCHESTER AND COUNTY BANK v. THE HIGGINSHAW MILLS AND SPINNING CO., LIMITED.

[L. T. 254; L. J. 417; S. J. 634.

On the winding up of a company, can a mortgagee with a right to distrain on the company's premises for interest conferred upon him by the mortgage deed distrain for arrears of interest?

Only by leave of the Court, and this leave, said the Court of

Appeal, will not be readily given —not so readily as it will be given to a landlord to distrain for his rent, since the mortgagee has a security for the money due to him.

SCRAPS OF LEGAL SMALL TALK.

Odds and Ends of Law.

When will sensational and ridiculous absurdities cease to make their way into the Courts? In the columns of *The Minnesota Law Journal* there is a long and exceedingly humorous account of a case which breaks the record for triviality of law suits. The article is witty and thrown together in an ingenious way, but it cannot be hidden that the parties to the action discover themselves to be sadly light-minded people. No wonder that the writer intimates that to digest the facts requires a dose of pepsin. A fine Tom cat strayed on to the premises of a spinster lady, who took a fancy to it and kept it, feeding it well, and even securing the services of a veterinary to improve the cat's health. But now comes on the true owner, who takes his lost cat back to its original home. The lady then puts in a bill for milk supplied and care given to the animal during the months it was with her; and our contemporary states the matter is pending in Court now. If we ever see the decision in this grave case, we will take particular care not to inflict our readers with even a reference to it. When we learn of people who drag such cases into Court, we wonder less than we did at the apparent support the advocates of free silver are getting.

* * *

Here is a case which shows the tendency in people to reach for their full rights, and a little more. In *Tunnicliffe* v. *Bay City's Consol. Railway Co.* the plaintiff, a woman, sustained injuries which resulted in a miscarriage. Ordinary damages was not enough, a claim being made for the loss of the society of the child, and for the prospective earnings that it might become entitled to. This part of the claim was not allowed.

* * *

In Tennessee a chap finding his residence on fire, and being in an upper room with no escape from his all too warm surroundings, jumped from the window and sustained injuries. He then sought damages from his landlord for not having a fire escape, which he considered to being equivalent to disrepair. He did not succeed, however, in getting the Court to agree with him.

* * *

In an exchange we find the following good story of Lord Russell, which we have heard before, but it is worth recording here:

Lord Russell's visit to America reminds the *London Chronicle* of an ancient story. It says that during Lord Russell's previous tour in this country with Lord Coleridge, he came in contact with many members of the Bar, including Mr. Evarts. It was while walking with Mr. Evarts one day along the banks of a

stream that his attention was called to a point at which Washington, according to tradition, had thrown a dollar right across. The water was wide, and Lord Russell looked doubtful. "You know a dollar went further in those days than it goes now," the American lawyer blandly insinuated. "Ah," said Lord Russell, quite equal to the occasion, "and it may have been easy enough to Washington; it is well known that he threw a sovereign across the Atlantic."

* * *

An interesting case on accident insurance, in which everybody can feel an interest, is *Westmoreland* v. *Preferred Acc. Ins. Co.*, decided in Georgia in June last. The policy provided that there should be no liability where the injury resulted from anything accidentally or otherwise taken, absorbed or inhaled; or resulting from medical or surgical treatment. The assured, in order to avoid the pain of a surgical operation, took chloroform, and died without the operation, his end coming in a way that the doctors could not understand. The chloroform was properly administered, yet the deceased, from unknown causes, immediately suffocated. Held, that the policy could not be recovered on.

THE VOICE OF LEGAL JOURNALISM.

Extracts from Exchanges.

To Caliph Omar.

Omar, who burned (if thou didst burn)
The Alexandrian tomes,
I would erect to thee an urn
Beneath Sophia's domes.

Would that thy exemplary torch
Might bravely blaze again,
And many manufactories scorch
Of book-inditing men!

Especially I'd have thee choke
Law libraries in sheep,
With fire derived from ancient Coke,
And sink in ashes deep.

Destroy the sheep—don't save my own—
I weary of the cram,
The misplaced diligence I've shown—
But kindly spare my Lamb.

And spare, oh, spare this suppliant book
Against a time of need;
Hide it away in humble nook
To serve for legal seed.

The man who writes but hundred pages
Where thousands went before,
Deserves the thanks of weary sages,
And Omar should adore.

(The above has been going the rounds of exchanges, but we are unaware of its origin.)

* * *

New Trials.

"These repeated new trials are a scandal upon the administration of justice," said Williams, J., in delivering his judgment in the case of *Kilpatrick* v. *Huddard, Parker & Co.* It is very

difficult to understand exactly what the learned Judge means. If he intends to convey the impression that where a jury of laymen, possibly sympathetic, assess the damages which a poor plaintiff has in fact sustained, the liability in law of the defendant should be decided, not according to the ideas of law of the Judges constituting the Full Court for the time being, but upon eleemosynary principles, few persons will, we think, agree with him.—*Australian Law Times.*

* * *

Equity and Conveyancing.

"Ne sutor ultra crepidam" is a maxim of great value when applied to the drafting of Acts of Parliament; but however skilled the original cobbler may be, he should beware lest Parliament interfere with his skill. The late Mr. Brodie is said only to have consented to draw the Fines and Recoveries Act on the understanding that neither branch of the Legislature should tamper with a word of the bill as drawn by himself; the most enterprising M.P.'s of that time had to keep in check their knowledge of conveyancing; and the result of giving an expert a free hand was what is probably, considering the complexity of the subject, the best drawn Act of any time. If Mr. Wolstenholme had made a similar stipulation with reference to the Conveyancing Act, 1881, there would probably have been less need of judicial interpretation of that statute; while a satisfactory Married Women's Property Act seems a task as far surpassing the wit of man as a workable Home Rule bill. But perhaps the most colossal series of legislative blunders over a simple matter has been achieved by what are always known as Locke King's Acts, though they now have a statutory "short title," and can be cited as "The Real Estate Charges Acts, 1854, 1867 and 1877"—popular titles, however short, being apparently considered beneath the dignity of an Act of Parliament. The exploit of driving coaches and horses abreast through these unhappy Acts has for years been the source of much innocent merriment to the guileless equity practitioner. They did not apply to leaseholds; a general direction that debts should be paid out of personal estate was a declaration of a contrary intention; the provisions as to a vendor's lien only covered the case of land purchased by a testator, and not that of an intestate. Even after a horde of judicial decisions and two amending Acts, a statute that shall be consolidating and really amending is urgently needed to codify the law. It now appears that where an annuity is granted by deed containing a covenant to pay and a charge of the annuity upon a freehold house devised to trustees for a term to secure the annuity, with powers of distress and entry, the deed constitutes an equitable charge within the meaning of the Act of 1877. But it took the Court of Appeal to decide the point—the ground for the decision being that the house was made security for a debt by the deed which gave to the annuitant an equitable interest in the house. — *Law Journal (Eng.).*

* * *

Luring to Libel.

A recent case in the Supreme Court of New York—Miller v. Donovan—involved an attempt

to entrap a person into liability for the publication of a libellous letter by inducing him to permit others to read it. It was shown that the person defamed had heard of the existence of such letter, and sent agents to obtain sight of it. This they accomplished by concealing their relations to him and pretending that he had treated them badly. The Court charged the jury, that if the plaintiff invited and procured the publication of the letter for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the alleged wrongful act should be permitted to profit by it unless there had been a previous publication of the letter by the defendant. This, although undoubtedly correct and in harmony with the general doctrine as to the effect of instigation to crime as a defence to its prosecution, seems to be a novel point in the law of libel.—*Central Law Journal.*

* * *

The Astute Married Woman.

We have long been familiar with the married woman's capacity for successfully baffling her creditors, and when she runs up bills for smart gowns or diamonds with charming irresponsibility, we can half forgive the feminine foible; but business is business, and when a married woman takes to carrying on a trade separately from her husband, she really ought to be prepared to meet the trader's liabilities or face the consequences. So at least one might think; but the enterprising married woman in *In re Dagnall* saw a third alternative—dropping her business; and having done that, she said, "Now I am not a married woman carrying on business separately from my husband" within the meaning of section 1 (5) of the Married Women's Property Act, 1882 I did carry it on, and I contracted debts which are still unpaid, but I don't carry it on now, and I can't be made a bankrupt." It was a bold stroke, and for the moment it quite nonplussed a Divisional Court in Bankruptcy, because sections entailing bankruptcy disabilities have to be construed strictly. The Court in the end outmanœuvred the lady. "True," it said, "you have ceased to carry on business; but as long as any debts incurred by you in carrying on the business are unpaid you must be treated as still carrying on business. Checkmate!" An artificial doctrine, no doubt, this; perhaps a legal fiction; but technicality may be played off against technicality. The difficulty was that in two cases the Court of Appeal had held that a debtor was not still carrying on business because debts incurred in it were unpaid. But this was under the Bankruptcy Act, 1869; under the Act of 1849 it was otherwise.—*The Law Journal (Eng.).*

* * *

The Lawyers Lead.

The three nominees for Governor of this state are lawyers. This is not strange or exceptional We do not remember that West Virginia has ever had a Governor who was not a lawyer. The legal profession is the one practical school that fits the citizen for public station. Without the education and training it gives, a man in the office of Governor would find himself at sea, timid and without self-reliance, liable to blunder, appointed to lead without the qualifications for leadership.

It is coming to be recognized that the legal profession is our civil service school through which a man must pass if he aspires to official station. It is recognized not so much as a prescribed requirement, as a natural, essential training. The training itself lifts the citizen into that class and gives him the qualities to which, by common consent, we turn to find a public officer. Public sentiment would rebel against any limitations to a prescribed class—and against any such admission as that a single class of citizens were alone competent for official station, but at the same time tacitly act upon that hypothesis.

Our ideal Republic will include training in the law as a prerequisite to the exercise of the rights of citizenship.—*West Virginia Bar.*

* * *

Some Men Achieve Greatness.

Eugene Smith, who is running for clerk of the Superior Court on the silver ticket, is a nephew of "Whispering" Smith, who was known to the people of the west in the fifties and sixties as the greatest collecting lawyer in Chicago. He was the author of a creditor's bill which, like the Lord's prayer, was made to cover all cases. James B. Bradwell changed it somewhat and put it in the *Legal News* catalogue of blanks as No. 334, calling it the "Lawyer's Drag Net." "Whispering" Smith told the writer that "he had tried for a quarter of a century to find an appropriate name for this creditor's bill but failed," and said that the Lawyer's Drag Net was just the thing, as it caught all the fish, big and little, none could escape."—*Chicago Legal News.*

Citation of American Authorities by the English Courts.

"The American reports have this month attained the dignity of a place in a headnote of the Law Reports. The headnote *Kennedy* v. *Trafford*, 1896, 1 Ch. 763, says: '*Van Horne* v. *Fondu*, 5 Johns. Ch. N. Y. 388, not followed.' A decision of Chancellor Kent is cited as authority to the English Court of Appeal, and is not followed. Why not? Because, in spite of the great attainments, judgment and skill in the application of principles of Chancellor Kent, the English Court of Appeal did not know how far the law of the State of New York and the law of England were alike in these matters. And surely it is not their business to know. It is quite bad enough to cite foreign decisions arguendo and by way of analogy, unless the foreign law is proved as a fact; the citation is even then fairly useless. But the citation of such foreign decisions as authorities in an English Court should be repressed with severity as both dangerous and misleading. On this point we cannot do better than recall the strong remarks of Lord Halsbury and Cotton and Fry, L.JJ., *In re Missouri Steamship Co.*, 42 Ch. Div. 321, 330. On counsel proceeding to read the judgment of the Supreme Court of the United States in the Montana case, Lord Halsbury, C., said: 'We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions in our own Courts, is wrong. Among other things, it involves

an inquiry, which often is not an easy one, whether the law of America on the subject on which the point arises is the same as our own.'"—*Solicitors' Journal (Eng.)*.

* * *

Criticism of Courts.

No Court in the United States is exempt from criticism, but to have any criticism on it fair and just is the right of every Court. The matter is chiefly important, not to the Court or Judges, but to the people of the nation. The respect of law which all concede to be the very foundation of civil government, is tested largely by respect for the Courts which administer the law. Captious and chronic critics of the Courts do more than they could possibly do in any other way to teach hatred of the law itself. The insidious notion that law means tyranny, which is all the time fermenting in crime-diseased and morbid brains, is quickened and intensified by every charge of corruption or unfairness in the administration of law. The criticism of judicial decisions as unsound or wrong in law may be the privilege of every citizen, whether he be capable of judging the matter or not, and if criticism of this sort is in any case worthless, it is likely to be also harmless. But when Courts are attacked as corrupt or unfair, the falsity of the accusation, and even the recklessness or malice of the libeller, does not prevent the charges from finding lodging in the minds of many who have no means of knowing the truth of the matter. —*Case and Comment.*

FINDINGS' KEEPING.

Perhaps the exceeding brevity of this proposition has prevented it from ever having been accepted as correct in law; for brevity, though it be the very soul of wit, goeth not so often in company with a wig. Or, perhaps, if this saying were as much a maxim of the law, as undoubtedly it is an article of belief with the few who find, the number of these unfortunate people would be mysteriously multiplied, so that it would become even unsafer to temporarily relinquish one's hat and umbrella than it is at present. Be this as it may, two humble holders of the finder's faith have recently been before the Law Courts, where their errors were duly pointed out to them, and, perhaps, the brief consideration of those errors here will be, as the consideration of other people's errors usually is, gratifying, if not instructive.

Res nullius cedit occupanti says the law, which, of course, is a different thing from the English at the head of this article. Res nullius may be something that never belonged to anyone, as a wild animal, or it may be something that has been voluntarily abandoned by a former owner. But wild animals (outside the game laws) are scarce, and people who throw even halfpence into the sea for the fun of the thing are scarcer still. There is barely a living to be got out of finding things in these days, and the places where it is advisable to carry on the business are not many. Highways, market squares, and shop-floors seem best for the finder who wishes to retain what he finds; but even here, if there be

any mark upon the thing found by which the owner may be discovered, or the thing be in such a situation that it is reasonable to suppose the owner knew where it was and might be coming for it, the finder is liable to find himself in a criminal Court if he forthwith appropriates it. (See R. v. Thurborn, 18 L. J., M. C., 140.) Supposing, however, the finder reasonably believes at the time of finding that the owner cannot be discovered, he cannot be convicted of larceny, and in any case he has a qualified property in the thing until the owner turns up, and may retain it against everyone else, and maintain trover against anyone else who takes it from him. (Armory v. Delamirie, 1 Str., 504).

This seems to be about all the "keeping" the law admits of: and even then, if the find be gold or silver hidden in the earth, it may be treasure trove, in which case it must be given up to the Crown on pain of fine and imprisonment. (R. v. Thomas, 33 L. J., M. C., 22).

The commercial gentleman who picked up £55 in bank notes from the floor of a shop where he was calling, and who, having handed them to the shopkeeper to advertise for the owner, recovered the amount, less expenses, three years later, upon no owner coming forward, and the famous chimney-sweep Armory, are almost the only instances in the books of finders favoured by the law. (See Bridges v. Hawksworth, 21 L. J., Q. B., 75). The former was successful because he found the notes in a place to which the public had access; the shopkeeper had no more right to them because they were on his shop floor than the owner in fee of a market place would have to a shilling dropped there by some one passing. In Armory's case it is, of course, obvious from the facts, which are well known, that the place where the jewel was found was immaterial.—From the *Law Student's Journal.*

RECENT ONTARIO CASES.

High Court of Justice.

CLARK v. VIRGO.

[Before Ferguson, J., 14th Sept. 1896.

Taxation of Costs—(Solicitor acting for two parties) only one of whom is given costs—Enlarging time for appeal—Rule 1230.

Judgment on appeal by plaintiff from decision of a local taxing officer in taxing the costs of the defendant, E. E. Virgo. There was judgment for plaintiff against the other defendant for $270 with full costs, and action was dismissed against appellant with costs. Both defendants defended by the same solicitor. The officer allowed defendant E. E. Virgo the full amount of costs, not only of the charges or terms in the bill appertaining solely to this defendant's defence, but also of those charges or items which were common to the defence of both defendants. The appeal was too late owing to a mistake of the solicitor in at first launching it

before the Master in Chambers. Held, a proper case for exercising the discretion of the Court to enlarge the time for appealing. Objections in writing were not carried in before the taxing officer as provided for by rule 1230, to enable him to review and reconsider his taxation. Held, that the provisions of those rules did not apply to the case, the objection to the taxation being an objection to the principle on which it proceeded. Held, as to the merits, that the officer was wrong in taxing the bill as he did. The judgment gave E. E. Virgo his costs, that is, his proper costs, which term does not embrace the costs of services performed partly for him and partly for his co-defendant, but at most only a proper proportionate share of such costs. The mode of taxation that should be adopted where an apportionment of costs has been directed is indicated in *Heighington* v. *Grant*, 1 Beav. 228. Appeal allowed with costs, and (unless the parties agree that the bill shall now be taxed in Toronto) the bill is to go back to the local taxing officer to be retaxed in accordance with his judgment. D. L. McCarthy for plaintiff. W. H. P. Clement for defendant E. E. Virgo.

* * *

RE MAGANN AND BONNER.

[Before Meredith, C.J., and Rose, J., 15th Sept., 1896.

Overholding Tenants' Act—Termination of tenancy on sale of property—Notice to quit—Jurisdiction of County Court.

J. MacGregor, for tenant, appealed from judgment of second junior Judge of County of York, in a proceeding under the Overholding Tenants' Act. The lease in question provided that upon a bona fide sale of the premises by lessor, she might "terminate this lease at any time after the first day of October, 1895, by giving the lessee three months' notice in writing." A sale of the premises was completed, and after conveyance the purchaser gave a notice to quit on the 1st July, 1896, which was served on the tenant on the 4th April, 1896. Worrell, Q.C., for Magann, purchaser, contra. Held, not a case within section 2 of R. S. O. c. 144, and County Judge had not jurisdiction. Appeal allowed, but as these proceedings were irregular, costs to be those as on a motion to this Court for a certiorari under section 6 of the Act.

* * *

IRVING v. MACARTHY.

[Before Meredith, C.J., Rose, J. and MacMahon, J., 15th Sept., 1896.

Title by possession—Statute of Limitations.

Judgment on appeal by plaintiff from judgment of Robertson, J., dismissing with costs action brought to recover possession of the east half of lot 10 in the first concession of township of Murray, in the County of Northumberland. Defendants claimed title by possession through the late Henry Macaulay, who entered on the whole lot in 1840, without legal right; or, if it should be found that he made an agreement to purchase the east half on 6th March, 1852, remaining in possession, then that the agreement was to purchase for £240, payable in six annual instalments of £40 each, and that at most Macaulay thereby became tenant at will, and his tenancy would cease one year from date of contract, at which time the Statute of

Limitations would commence to run. The action was commenced on 19th October, 1874. The plaintiff contended that Macaulay paid the first instalment under the contract, and that the statute would not commence to run until default of one year thereafter, if there was a tenancy at will, or if not a tenancy then until the second payment became due under the contract. Appeal allowed with costs, and judgment to be entered for plaintiff with costs. Clute, Q.C., for plaintiff. Shepley, Q.C., for defendants.

* * *

McDOUGALT. v. CITY OF TORONTO.

[Before Boyd, C., 16th Sept. 1896.

Damages — Defective roadway — Street Railway—Landing passengers on dangerous ground.

Judgment on question of liabilities between defendants and third parties, the Toronto Railway Co. Held, that the burden of the verdict must be borne by the third party in exoneration of defendants. The injury happened at a spot where the street had been opened by the servants of the railway company, and it was so left open for 16 days, without express notice being given to the city to replace it—if it was the duty of the city to replace it, which is by no means obvious. The evidence is that a barrier was erected to protect the public against or warn them from the part of the street where the work was going on, and that the railway car passed the barrier and took the passenger to the place of accident, and in effect invited him to alight in the comparative darkness at that point during the night, which was the proximate cause of the accident. No extra costs to be occasioned by this, as the whole matter should have been determined at one hearing. Judgment for defendants against third parties without costs. Robinson, Q.C., and W. C. Chisholm for defendants. Laidlaw, Q.C., for third parties.

* * *

HARGRAVE v. BARBER.

[Before Meredith, C.J., and Rose, J., 14th Sept., 1896.

Prohibition to Division Court—Lien for costs—Undertaking.

F. J. Travers and J. A. Mills, for defendant, appealed from order of Falconbridge, J., dismissing motion by defendant for prohibition to Junior Judge of County of York, presiding in the First Division Court, in action to recover $80 costs, to which plaintiff was entitled in action in High Court of one *Wilson and himself* v. *Gibbard*. Gibbard assigned under R. S. O. c. 124, to defendant Barber, and solicitors for Barber gave an undertaking in the following words: "Under instructions from Mr. Barber we beg to request you to instruct sheriff to withdraw bailiff from possession of the drug stock, it being understood that the bailiff's withdrawing shall not in any way affect your lien for costs that you are entitled to. This letter is not admitting your right either to issue execution or to the costs, but if you are entitled to any lien or costs they are to be a first charge on the estate, and we personally undertake, on behalf of Mr. Barber, to have them paid to extent of all the assets of estate that come to hands of assignee." Kilmer, for plaintiff, contra. Held, that it was competent for the Divisional Court Judge to find the question of lien in adjudicating upon the claim. Appeal dismissed with costs.

SMITH v. HARTFORD FIRE INS. CO.

[BEFORE BOYD, C., 23RD SEPT., 1896.

Admission of liability, but contention that action premature—Garnishment of insurance moneys.

Judgment in action for recovery of $490, amount of adjusted loss under policy of fire insurance. The defendants admitted liability, but defended on the ground that at the time action was brought insurance moneys were attached under Division Court proceedings and could not be paid over, and therefore action was premature. Per Boyd, C.—It appeared that the first four garnishing summonses were served on defendants prior to the bringing of this action. It was competent for defendants to have paid into the Division Court the amounts therein claimed, aggregating $111.78, and have left the balance ($380) available for plaintiff when this action was brought. But this was not done, and the whole of the money was retained by defendants: R. S. O. c. 51, s. 189. So when the attaching order of the Canada Permanent L. and S. Co. was served on the day after the writ issued in this action, claiming $123.78, the defendants could have paid that sum into the Division Court and held the balance free for the plaintiff. The plaintiff objected to the money being retained in respect of the four first garnishments, and his contention was right, for these attachments were discharged on 5th August, 1895, before delivery of proceedings in this action. The only contest that remained was to the $123 attached by the loan company, and this was settled by a payment of $50 to that company by plaintiff. The facts indicated that defendants were working in favour of that company. The delay seems to have arisen from the action or inaction of defendants, and in the result the matter of defence has been displaced in favour of plaintiff. Semble, also, that the amount adjusted never became a garnishable debt. Judgment for plaintiff with costs. A. R. Lewis, Q.C., for plaintiff. W M. Douglas for defendants.

* * *

MOLSONS BANK v. BROWN.

[BEFORE ARMOUR, C.J., FALCONBRIDGE AND STREET, JJ., 29TH SEPT., 1896.

Summary Judgment—Special indorsement—Married woman defendant, and averment as to separate estate.

D. Urquhart, for defendant, appealed from order of the Judge of the County Court of York permitting summary judgment to be signed against defendant, a married woman, under rule 739. The action was upon a promissory note made by the married woman as an accommodation note, and taken by the plaintiffs with knowledge of the fact. The special indorsement upon the writ of summons contained the following clause: "The defendant is a married woman, and is possessed of separate estate, and contracted the indebtedness herein set out in respect of her separate estate." Shepley, Q.C., for plaintiffs, contra. Appeal dismissed with costs.

* * *

REGINA v. MATHEWSON.

[BEFORE MEREDITH, C.J., AND ROSE, J., 15TH SEPT., 1896.

Quashing conviction—Sec. 83 Liquor License Act, ch. 194, R. S. O. —Ultra vires—Recent Privy Council decisions.

Judgment on motion by defendant for a rule absolute in the

first instance quashing the summary conviction of the defendant by a justice of the peace for the County of Renfrew, under section 84 of the Liquor License Act, R. S. O. c. 194, for tampering with a witness, upon the ground that that section is ultra vires of the Ontario Legislature: *Reg.* v. *Lawrence*, 43 U. C. R. 164. The Attorney-General, the magistrate and the complainant consented to the conviction being quashed without costs with the usual protection to the magistrate. The result of the recent judgment of the Privy Council being, so far as this point is concerned, to confirm the decision in *Reg.* v. *Lawrence*, that case must be followed. Rule absolute quashing conviction without costs, and with the usual protection to the magistrate. W. H. Blake for defendant. J. R. Cartwright, Q.C., for Attorney-General. H. M. Mowat for magistrate and complainant.

* * *

RE C. P. R. AND CARRUTHERS.

[Before Robertson, J., 26th Sept., 1896.

Carriage of shipment of grain—Mixture with other grain in carriers' elevator—Failure to deliver specific grain.

Judgment upon appeal by Joseph Harris, a claimant, from order of Master in Chambers, made upon application of railway company as carriers of 667 bushels of wheat delivered to them at Indian Head, Manitoba, by W. R. Bell, to be sent to Fort William, and addressed to the order of La Banque Nationale, by whom the bill of lading was endorsed over to the appellant, the Scottish American Investment Co. The appellant contended that the railway company were not entitled to interplead, because they had mixed the grain shipped with the other grain in their elevator, and could not deliver the specific grain. The learned Judge negatives this contention, following *Attenborough* v. *St. Catherines Dock Co.*, 3 C. P. D. 450, and *Rice* v. *Nixon*, 97 Iowa, 97. Appeal dismissed, with costs to be paid by appellant to both respondents. Marsh, Q.C., for appellant. Aylesworth, Q.C., for railway company. C. W. Kerr for investment company.

* * *

MOONEY v. JOYCE.

[Before Meredith, C.J.

Joinder of two causes of action in one—Two plaintiffs suing together for different causes though arising out of same matter.

Judgment on appeal by defendants from order of Local Judge at Sandwich refusing to stay proceedings until plaintiffs should have elected for which of the causes of action sued on they would proceed. Plaintiff Harman sued for the wrongful interference of defendants with him in the completion of a building which he was erecting under a contract with the Building Committee of a church, and for assaulting and arresting his co-plaintiff Mooney, his servant, who was engaged in doing the work, and claimed $500 damages. Plaintiff Mooney sued for the same assault and arrest, and claimed $2,000 damages. Held, that each of the causes of action is separate and distinct, and cannot be joined. *Smurthwaite* v. *Hannay* (1894), A. C. 494, specially refered to. Appeal allowed, and order made that the plaintiffs do elect within two weeks which plaintiff's claim will be proceeded with in this action, and do within the same period amend the writ

and statement of claim by striking out all parts that refer to the claim of the other plaintiff, and in default that the action be dismissed with costs. Costs here and below to defendants in any event. Aylesworth, Q.C., for defendants. L. G. McCarthy, for plaintiffs.

* * *

CERRI v. SUBSIDIARY HIGH COURT OF THE ANCIENT ORDER OF FORESTERS.

[Before Street, J., 10th Oct., 1896.

Life insurance certificate—False statement as to age—Statement made in good faith—Sec. 6 of 52 Vict. ch. 32.

Judgment in action tried with a jury at Toronto. Action by the widow of the late William Cerri to recover $1,140 and interest upon a beneficiary certificate issued by defendants upon his life. The deceased obtained admission to the defendants' order by the untrue statement that he was born in 1847, and was therefore under 45 when he entered the order, the truth being that he was born in 1846, and was then over 45. Upon the faith of this statement defendats admitted him, and issued to him the certificate sued on. Had his age been duly stated he could not have been admitted, because the 42nd law prohibits the admission of any person over 45, and he could not have effected the insurance, because none but members can be insured. The jury, however, found that the statement was made in good faith. Held, that section 6 of 52 Vict. c. 32 (O.), applies to benefit societies, and that the plaintiff was entitled to avail herself of its provisions, some action on the part of the order being necessary to terminate a membership once permitted. The deceased being at the time of his death a member in good standing, and there being nothing in defendants' laws depriving him of his rights, his certificate of insurance was subject only to the considerations applicable to ordinary contracts of that nature, and was binding on defendants, subject only to the reduction prescribed by section 6 in cases of a mistaken statement as to age. If the parties are unable to agree upon the amount payable according to this computation, the learned Judge will hear evidence to ascertain it. Subject to this judgment for plaintiff with costs. G. G. Mills for plaintiff. Aylesworth, Q.C., for defendants.

Stenographers.

TORONTO, ONT.

DOWNEY & ANGUS,

Chartered Stenographic Reporters.

Arbitrations, references, etc., reported.

Alex. Downey. Geo. Angus.

79 Adelaide St. East (first floor.)

TORONTO, Telephone 421.

Patent Barristers and Solicitors.

TORONTO, ONT.

J. G. Ridout, (late C.E.) Barrister, Solicitor, etc. J. Edw. Maybee Mechanical Mng'r.

RIDOUT & MAYBEE,

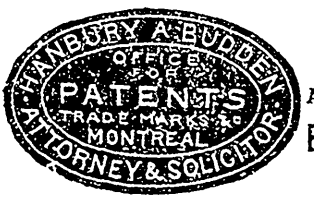
Solicitors of Patents,

Mechanical and Electrical Experts.

103 Bay Street, Toronto.

U.S. Office, 605 Seventh Street, Washington, D.C.
Telephone No. 2582.

MONTREAL, QUE.



**
CABLE
ADDRESS
BREVET.
**

Barristers, Solicitors, etc.

TORONTO, ONT.

FERGUSON, McDONALD & GLASSFORD,

Barristers, Solicitors, etc.

31 King Street West, Toronto.

Telephone No. 1697.

John A. Ferguson. W. J. McDonald, C. H. Glassford.

FOY & KELLY,

Barristers, Solicitors,

80 Church Street, Toronto.

J. Foy, Q.C. H. T. Kelly.

TORONTO, ONT.

HOWLAND, ARNOLDI, & BRISTOL,

Barristers, Solicitors, etc.

London & Canadian Chambers, 103 Bay St., Toronto.

Cable Address, "Arnoldi," Toronto. Telephone 540.

Frank Arnoldi, Q.C. Edmund Bristol. O. A. Howland, M.P.P. W. H. Cawthra.

LAIDLAW, KAPPELE & BICKNELL,

Barristers and Solicitors,

Office, Imperial Bank Buildings, 34 Wellington Street East, Toronto.

Telephone 19. Cable Address, "Laidlaw," Toronto.

William Laidlaw, Q.C. James Bicknell George Kappele C. W. Kerr.

MACDONELL & BOLAND,

Barristers, Solicitors, etc.

Solicitors Dominion Building & Loan Co.

Office, Quebec Chambers.

A. C. Macdonell. W. J. Boland.

Telephone 1076.

RITCHIE, LUDWIG & BALLANTYNE,

Barristers, Solicitors, etc.

9 Toronto Street.

C. H. Ritchie, Q.C., H. M. Ludwig, A. W. Ballantyne.

THOMSON, HENDERSON & BELL,

Barristers, Solicitors, etc.

Offices, Board of Trade Building.

D. E. Thomson, Q.C., George Bell, David Henderson, J. B. Holden.

Telephone 957.

WATSON, SMOKE & MASTEN,

Barristers, Solicitors, etc.

Offices, York Chambers,

9 Toronto Street, Toronto.

Geo. H. Watson, Q.C., C. A. Masten, Samuel C. Smoke.

Telephone 989. Cable Address, "Wathorne."