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DIARY FOR MARCH.

17. Sat.... St. Patrick's Day.
18. Sun.... *Palm Sunday.*
23. Fri.... Good Friday. Sir George Arthur, Lieut.-Gov. U. C., 1838.
25. Sun.... *Easter Sunday.*
26. Mon... Easter Monday.
28. Wed... Canada ceded to France, 1632.
29. Thurs.. The Wills Act assented to, 1873.
30. Fri.... B. N. A. Act assented to, 1867.
31. Sat.... Lord Metcalfe, Gov.-Gen., 1834.

TORONTO, MARCH 15, 1883.

THE weekly notes for Feb. 10th, 1883, contain the new English Lunacy Orders. The previous General Orders in Lunacy are discharged, and the Lunacy Orders, 1883, substituted therefor.

THE rumour that Mr. Benjamin, Q.C., is about to accept a judgeship is an interesting one. The bar in England would no doubt cordially welcome so brilliant an addition to the bench, and the selection of one who had been an American citizen for so distinguished a position would be another illustration of the cordial feeling that now exists between the two great branches of our race.

WE notice in *Weekly Notes*, 1883, p. 6, that the case of *Sutton* v. *Sutton*, on which we commented in our number of Feb 15th ult. last, has since been followed in the case of *Fearnsider* v. *Flint*. There a mortgage debt was secured by a collateral bond of the same date as the mortgage. No interest on the debt had been paid since 1847, and the last acknowledgement of the debt was given in 1862. Proceedings to enforce the bond were taken more than twelve years after the acknowledgment. Fry, J., held that the remedy upon the bond was barred, as well as the remedy against the land.

WE have by accidental good fortune caught a glimpse of the first volume of decisions under the British North America Act, apparently compiled by Mr. John Cartwright, under the direction and solely for the use of the local government. It seems a pity if the profession in general are not to be allowed an opportunity of purchasing this compilation. At present, however, it appears to be inaccessible to the general public. It is an excellent idea collecting the cases from the various reports, and especially so as regards the cases in the various Provincial Courts, and many would be glad to have the authorities for our constitutional law in such a convenient form. The first volume which is already "out" for those who can get it, contains the reports of decisions in the Privy Council, the Supreme Court, and the Superior Courts of Ontario.

THE liability of trade protection societies for representations made by them to their customers, with reference to the commercial standing of persons, concerning whom information is sought, was recently considered in England by the Divisional Court of the Queen's Bench Division, in the case of *Tarling* v. *Cooper*, (*Law Times* for 30th Dec., 1882, p. 161), W. N. 1882, 187. The action was brought to recover damages against a mercantile agency for negligence in supplying information as to the status, respectability, and solvency of a trader. The information was furnished on a report which stated, "the information is obtained from the best sources available, and is given in confidence, but no

responsibility is undertaken on account thereof." The jury having found negligence in not communicating the existence of a bill of sale, gave a verdict for the plaintiff; and upon a motion for a new trial, the Court held that notwithstanding the condition against responsibility, the defendants were liable for negligence in omitting to obtain the information from the best sources available. In *McLean* v. *Dun*, 39 U.C. R. 551; 1 App. R. 153, a similar question was raised, but the plaintiff failed on the ground that the representations made by defendants were not in writing, signed by them, as required by R. S. O., c. 117, s. 9, and, therefore. the defendants were not liable for any damages resulting from the falsity of the information furnished.

The rule to be drawn from these cases appears to be that in order to entitle a party to recover damages for misrepresentations of this kind, they must be in writing, and signed by the party to be charged; and that a stipulation against responsibility for the information furnished, will not protect the party furnishing it, from liability for damages occasioned by actual negligence on his part.

ESCHEAT.

SIMPSON V. CORBETT.

The recent case of *Simpson* v. *Corbett*, noted in our last number at p. 59, is another contribution to the law of Escheat. The circumstances of the case are curious. A person of the name of Charles Munroe died in the year 1869, entitled to real and personal estate, which he devised and bequeathed, subject to the payment of his debts, to his two illegitimate infant children, Duncan and Ellen, with a proviso that in the event of either dying, the share of the deceased should go to the survivor. The real estate at the testator's death was subject to a mort gage to one Williams. Mr. Corbett, the defendant in *Simpson* v. *Corbett*, was named the sole executor and guardian of the infant devisees. Both Ellen and Duncan died without issue, Duncan having died last. After the death of Duncan, Mr. Corbett paid the amount due on the mortgage, and took a conveyance of the mortgaged lands from the mortgagee to himself in fee. Simpson then obtained from the Ontario Government a grant of the escheated estate, real and personal, of Duncan, and then as such grantee obtained letters of administration to Duncan's estate, and brought the action against Corbett for an account of his dealings as executor and trustee of the estate of Charles Munroe, and for a declaration that subject to the claims, if any, of Charles Munroe's estate, Corbett was a trustee for the estate of Duncan of the mortgaged estate and debt, and of all other gains and profits which had accrued to him by virtue of his executorship. The action was resisted on the ground that Corbett had acquired an absolute, irredeemable title to the mortgaged estate by virtue of the conveyance from Williams, and that the grant from the Ontario Government to the plaintiff was invalid according to the decision in the *Attorney-General* v. *Mercer*, 5 S.C.R. 538.

But Mr. Justice Ferguson, before whom the case was tried, granted the relief prayed on the ground that the plaintiff as administrator was entitled to an account, irrespective of the question whether his claim to the beneficial interest in the estate as grantee of the Provincial Government was good or bad, and that therefore the case was unaffected by *Attorney-General* v. *Mercer*.

The learned judge seems to have come to the conclusion, though we do not find this point expressly mentioned in his judgment, that the defendant Corbett, by paying off the mortgage debt, or as the defendant put it, buying the mortgaged lands at a price equal to the mortgage debt, and taking a conveyance of the mortgaged lands to himself, had effected a species of equitable conversion of the latter into personalty, and that it was as personalty in his hands, liable to be accounted

for to the plaintiff as the personal representative of Duncan's estate.

It is only in this view we think that the decision is maintainable in the face of the *Attorney-General* v. *Mercer.* It is true that the plaintiff claimed to fill a double capacity. He claimed to be both the real representative of Duncan and also his legal personal representative. His right to an account as real representative rested solely on his being the grantee of the realty. It is clear, therefore, that the validity of the grant was of vital moment to the success of his claim to an account, if it had altogether rested on that ground. But as personal representative, his right to an account did not depend on his being grantee of the personalty, but on his letters of administration constituting him legal personal representative.

By the terms of the plaintiff's oath to lead the grant of administration, he was bound faithfully to administer the estate by paying the debts, and distributing the residue "according to law;" and he would, therefore, be bound to account to those who might be found really entitled, in the event of the grant to himself being invalid. And although the grant of administration to him appears to have been made on the ground that he filled the character of grantee of the Crown of the escheated estate, yet after all, the validity of the grant for the reason we have mentioned, was not as the learned judge determined, in question.

Although it seems clear, that so far as the mortgagee was concerned, the equity of redemption on the death of Duncan did not escheat to the Crown, but merged in the legal estate—(*Burgess* v. *Wheate*, 1 Eden. 210; *Beale* v. *Symonds*, 16 Beav. 406; *Attorney-General* v. *Sands*, Tud. L. C. 604, 3rd ed.; *Chisholm* v. *Sheldon*, 2 Gr. 210; *Downe* v. *Morris*, 3 Ha. 394; and see *Dennis* v. *Badd*, 1 Chy. Ca. 156): yet when the estate came into the hands of the executor, it seems equally clear that he could not set up the indefeasible title of the mortgagee as against those beneficially interested in the estate of his testator: see *Foster* v. *McKinnon*, 5 Gr. 510; *Lamont* v. *Lamont*, 7 Gr. 258.

RECENT ENGLISH DECISIONS.

The February numbers of the *Law Reports* consist of 10 Q. B. D. 57-160; and 22 Ch. D. 129-282.

STATUTORY REMEDIES.

In the former of these the first case, *Munday* v. *Thames Iron Works Co.*, is a decision under the Employers' Liability Act, 1880, but attention may be called to the passage in the judgment of Manisty, J., where he says:—"The ordinary principle is that if there is a statutory proceeding for a particular cause of action, and compensation is recovered, although limited in amount, an action at common law for large damages shall not be maintained."

AFFIDAVITS—HEADING.

The case of *Blaiberg* v. *Parke*, p. 90, was one on the Bills of Sale Act, 1878, which requires that an affidavit shall be filed with a bill of sale, showing the residence and occupation of every person attesting such bill of sale. In the present case, the affidavit was made by the attesting witness, and in the heading of the affidavit the deponent's residence was not specified in the body of the affidavit. The Divisional Court held the affidavit was, nevertheless, sufficient, Denman, J., going so far as to say, referring to a dictum of Lord Cairns in *Re Lowenthal*, 2 Jur. N. S. 451:—"I am inclined to think that after the strong dictum of Lord Cairns, the right conclusion is that the description in the heading forms part of the affidavit itself. . . . It seems to me that when the deponent swears that the contents of his affidavit are true, the heading of the affidavit describing him as it does here, he may be indictable for perjury, provided he does so

corruptly and with intent to deceive, in the event of such description being untrue."

GAMING—BETTING—PRINCIPAL AND AGENT.

In the next case, *Read* v. *Anderson*, p. 100, the point decided may be concisely expressed in the words of the Judge (Hawkins, J.), himself:—" If a person employs another to bet for him in the agent's own name, an authority to pay the bets, if lost, is coupled with the employment; and although before the bet is made, the employment and authority are both revocable, the moment the employment is fulfilled by the making of the bet, the authority to pay it if lost becomes irrevocable." Hawkins, J., first points out that wagering contracts are not illegal either by common law or statute, they are simply rendered by the latter null and void, and not enforceable by any process of law. He then arrives at the above result by the following process of reasoning:—" Although the law will not compel the loser of a bet to pay it, he may lawfully do so if he please; and what he may lawfully do himself, he may lawfully authorize anybody else to do for him; and if by his request or authority, another person pays his lost bets, the amount so paid can be recovered from him as so much money paid to his use. . . . As a general rule, a principal is no doubt at liberty to revoke the authority of his agent at his mere pleasure. But there are exceptions to this rule, one of which is that when the authority conferred by the principal is coupled with an interest based on good consideration, it is in contemplation of law irrevocable, that is, though it may be revoked in fact, that is to say, by express words, such revocation is of no avail . . . In the present case, the authority to pay bets, if lost, was coupled with an interest, it was the plaintiff's (the betting agent) security against any loss by reason of the obligation he had personally incurred on the faith of that authority to pay the bets if lost, the consideration for that authority was the taking upon himself that responsibility at the defendant's request. Previous to the making of the bets, the authority to bet might beyond all doubt have been revoked; but the instant the bets were made, and the obligation to pay them if lost incurred, the authority to pay became, in my judgment, irrevocable in law. In other words, the case may be stated thus: if a principal employs an agent to do a legal act, the doing of which may in the ordinary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time gives him an authority, if the obligation is incurred to discharge it at the principal's expense, the moment the agent on the faith of that authority does the act, and so incurs the liability, the authority ceases to be revocable. . . The opinion I have expressed as to the irrevocability of the authority to pay lost bets, applies only to cases where the agent by the principal's authority, makes the bets in his own name so as to be personally responsible for them."

PRIVILEGE—CRIMINATING QUESTIONS

The next case, *Lamb* v. *Munster*, p. 110, is an interesting one. The defendant in an action for libel, was asked whether he had, in fact, published the libel. He refused to answer on the ground that the answer "*might tend* to criminate" him. The Divisional Court held this was sufficient, where, as in this case, from the nature and the circumstances such a tendency seemed likely or probable. Field, J., says:—" The principle of our law, right or wrong, is that a man shall not be compelled to say anything which criminates himself. Such is the language in which the maxim is expressed. The words "criminate himself" may have several meanings, but my interpretation of them is "may tend to bring him into the peril and possibility of being convicted as a criminal." And Stephen, J., lays the law down thus:—" In every case the principle itself has to be considered, and it would not be well to lay down any kind of strict rule as to the particular form of words in which persons are to be compelled to express their opinion as to

whether or not the answer to questions would criminate them. When the subject is fully examined, it will, I think, be found that the privilege extends to protect a man from answering any question which "would in the opinion of the Judge have a tendency to expose the witness, or the wife or the husband of the witness, to any criminal charge:" Step. Dig. Law of Ev. 3rd Ed, Art. 120. . . . I do not think the cases cited go any further than this, viz.: that the Court which has to decide must be satisfied on the oath of the witness that he does object on that ground, and that his objection is *bona fide*. . . . A man is not to be forced to answer any question if the witness swears that the answer "may" or "will" or "would" endanger him (I care not for the form of words in which he expresses it), and in the opinion of the Judge the answer may, not improbably, be of such a nature as to endanger him."

MUNICIPAL LAW—HIGHWAY—NUISANCE.

Of the next case, *Kent* v. *Worthing Local Board*, p. 118, it seems only necessary to say that it is authority for the principle that municipal authorities are under a legal obligation to make such arrangements that works of whatever nature, under their care, shall not become a nuisance to the highway."

MUNICIPAL LAW—NUISANCE OR INJURIES TO HEALTH—R. S. O. C. 190, SECT. 4.

The next case requiring a word of notice is *The Bishop Auckland Local Board* v. *Bishop Auckland Co.*, p. 138, in which the Divisional Court held that where the Imp. Public Health Act, 1875, (cf. R. S. O. c. 190, sect. 4) enacts that "any accumulation or deposit which is a *nuisance or injurious to health*," shall be deemed to be a nuisance liable to be dealt with summarily under the Act, this must not be taken to mean "nuisance injurious to health," but "a nuisance *either* interfering with personal comfort, *or* injurious to health." Hence, they held that an offence within the section was committed when the accumulation emitted offensive smells, which interfered with the personal comfort of the neighbours, but did not cause injury to health.

CARRIERS—TEMPORARY LOSS—37 VICT. C. 25, SECT. 2, DOM.

The next case, *Miller* v *Brash*, p. 142, was an appeal from the decision of Lopes, J., reported L. R. 8 Q. B. D. 35, and noted in this Journal. It will be remembered the plaintiff delivered to the defendants, who were carriers for hire, a trunk to be shipped by them to Italy. By mistake, the defendants shipped it to New York, and it was not till after the lapse of a long time that the plaintiff recovered it. Some of its contents were goods which should have been declared under the Imp. Carriers Act, being above £10 in value. Substantially, the question raised by the present appeal was as to the liability of the defendants to pay damages for the loss or detention of these goods, which were not declared. The case has application here by reason of 37 Vict. c. 2, sect. 2, Dom., which enacts that "carriers by water shall be liable for the loss of or damage to the personal baggage of passengers by their vessel. . . . provided that such liability shall not extend to any greater amount than $500. . . . Unless the true nature and value of such articles so lost or damaged have been declared and entered." Lopes, J., had held in the Court below, that the carriers were liable to damages for the detention of the goods above £10 in value and undeclared, although, under the Carriers' Act, they were not liable for the loss of them. The Court of Appeal, however, over-ruled this, and held that "if goods which ought to be declared, and are not declared, are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences." They point out that not only is this view of the Act supported by authority, but that apart from authority, it would simply render the Carriers' Act nugatory to hold carriers liable for detention, which is itself the result of the loss for which they are not liable; and so in the case of a temporary loss by carriers, to hold them not

liable for the loss, but liable for the consequences of it, is practically inconsistent, and so to construe the Carriers' Act would, in effect, be to render it inoperative.

CONTRACT—PROMISE TO WILL—PART PERFORMANCE.

As to the next case, and the last in the February number of 10 Q. B. D., *Humphreys* v. *Green*, the following remarks occur in the London *Law Times* for Feb. 24th ult. :—"The recent case of *Alderson* v. *Maddison*, L. R. 7 Q. B. D. 174, 48 L. T. Rep. N. S. 334, afforded a startling instance of the principle which guides the Courts in considering whether there has been a sufficient part performance of a parol contract relating to land to take it out of the operation of the Statute of Frauds. The general principle was thus stated by Baggallay, L. J., in delivering the judgment of the Court :—'If in any particular case the acts of part performance of a parol agreement as to an interest in land, are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement ; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the subject matter of the agreement; it is not sufficient that the acts are consistent with the existence of such an agreement, unless that agreement has reference to the subject matter.' This statement of the law has lately been approved in the still more recent case of *Humphreys* v. *Green*, L. R. 10 Q. B. D. 148. Exception was, however, taken by Brett, L. J., in his judgment in the latter case, to one of the examples adopted by Baggallay, L. J., as illustrating the general principle above quoted. It was as follows :— 'Thus payment of part, or even of the whole of the purchase money, is not sufficient to exclude the operation of the statute, unless it is shown that the payment was made in respect of the particular land, and the particular interest in the land which is the subject of the parol agreement.' To this illustration, Brett, L. J., takes exception, p. 160, for he says that in his opinion, payment of part or even of the whole of the purchase money, under any circumstances, is not sufficient to exclude the operation of the statute. It would, certainly, seem that *Nunn* v. *Fabian*, L. R. 1 Ch. 35, is an express authority for the words adopted by Baggallay, L. J. On this particular point, however, as to whether payment of the purchase money can amount to a part performance sufficient to take a parol contract out of the Statute of Frauds, it will require a decision of the House of Lords to put the matter beyond the range of controversy."

The remaining February number of the *Law Reports* is 22 Ch. D. p. 129 to p. 282.

CONSTRUCTION OF STATUTES—COSTS

The first case requiring notice is *Ex p. Webster*, p. 136. There are three points which may be called attention to here. The first relates to the construction of statutes. The question was whether a certain requirement in the Bill of Sale Act, 1878, had been complied with. Jessel, M. R. says :—"The present appeal is really a temptation to make bad law. It is a very hard case indeed. If I could so construe the Act as to decide in favour of the appellant, I should be very much inclined to do so. But that is not the province of a Judge. His duty is to find out the meaning of an Act of Parliament, without regard to the question whether it may not in the particular case produce a result which he may think contrary to the intention of the Legislature" The other two points relate to costs, and are (i) that costs will not be allowed of shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning on a question of law ; (ii.) where notice of appeal is served on a party whom the appeal does not affect, and on whom it should not have been served, and the said party appears on the hearing of the appeal, though he ought not to have done so, he will not be entitled to any costs of the appeal.

CONSTRUCTION OF STATUTES.

Of the main portion of the next case, *Spence* v. *Metropolitan Board of Works*, p. 142, it is unnecessary to take notice, as it relates to the construction of certain words in an Imperial Act relating to the taking of land by the Metropolitan Board of Works, to which we do not seem to possess an equivalent in our Acts relating to similar subjects. But there are two observations on the subject of the construction of the statutes which may be mentioned. At p. 149, Chitty, J., observes: "I take it as a general rule in construing statutes, that the same words must be *prima facie* construed in the same sense in the different parts of the statute." And at p. 157, Cotten, L. J., says:—"I do not see how we can construe a word in one statute by reference to its use in another, in which the context may be different;" and Jessel, M. R., says:—"I think you cannot refer to the other Act."

PARCELS—ADJOINING TENEMENTS

In the next case, *Francis* v. *Hayward*, p. 177, the question was whether the fascia over a certain gateway was a part of the premises demised to the plaintiff, or whether it belonged to the defendant. As Jessel, M. R. said, the question was one of fact, not of law—parcel or no parcel. But it may be worth while to notice his remark that "It is quite possible that something imbedded in one house may be a parcel of another house, though quite separate from it."

LEAVE TO APPEAL—LAPSE OF TIME.

In the next case, *Peareth* v. *Marriott*, p. 182, a certain order was made in 1861, in an administration suit, which had been acted upon ever since, and the Court of Appeal held, that considering the lapse of time, leave ought not to be given to appeal from the order.

A. H. F. L.

SELECTIONS.

MR. BENJAMIN, Q.C.

With the conclusion of the Civil War, Mr. Benjamin had to effect his escape from Richmond, and, more fortunate than his chief, Mr. Jefferson Davis, he succeeded in making his way to the coast of Florida. After experiencing strange adventures in a small craft laden with sponges, on board of which he put to sea, Mr. Benjamin landed safely in this country, to find that his fame as a lawyer and a statesmen had preceded him, and that the Confederacy which he served so warmly had still some friends. Mainly by the advice and assistance of the late Chief Justice Pollock, Mr. Benjamin contrived to get called to the English Bar without losing three years in keeping terms. He was fifty years old when he first put on the wig and gown of an English barrister, and the tremendous experiences through which he had already passed would have exhausted the energy of most public men. With the exception of a comparatively small sum lodged by him in the hands of Messrs. Overend and Gurney, Mr. Benjamin had nothing wherewith to make a new start in life, and he had come, moreover, at a mature age to an old country, where to rise Antæus-like from the ground is a thousand times more difficult than upon that young and exuberant continent which he had left behind him.

The history of the English Bar will hereafter have no prouder story to tell than that of the marvellous advance of Mr. Benjamin from the humble position he occupied as a junior in 1866 to the front rank of his profession in 1883. Adversity, however, had not yet done with him when she sent him, broken indeed in fortune, but endowed with inextinguishable vitality and hope, to this country at the end of 1865. In the following year there came that memorable "Black Friday," which is not yet forgotten in city circles, and was caused by the sudden suspension of Messrs. Overend and Gurney. By the fall of that great house Mr. Benjamin lost the sum of three thousand pounds—all that he possessed on earth—and had to cast about for something to do until his book on the "Sales of Personal Property" was completed. Having a wife and daughter to maintain in Paris, and himself in London, he prepared with that easy adaptability to circumstances

which has distinguished him throughout the whole of his versatile and many-sided career, to sustain himself for awhile by writing for the press. It was under these circumstances that he temporarily joined the staff of *The Daily Telegraph*, and continued for many months a series of brilliant leading articles to the columns of this journal. The publication of his book on "Personal Property" brought him immediately into notice; nor could any better evidence of his quick and incisive diagnosis be adduced than the fact that in the great and tangled wilderness of British jurisprudence he should so readily have discerned one track which was yet unmapped. Shortly after its publication Baron Martin, when taking his seat one morning upon the bench, asked to have Mr. Benjamin's work handed to him. "Never heard of it, my Lord," was the answer of the Chief Clerk. "Never heard of it!" ejaculated Sir Samuel Martin; "mind that I never take my seat here again without that book by my side." It was soon after this date that, speaking to one of Mr. Benjamin's most intimate friends, the same able judge pronounced the new ornament of the English Bar to be "the greatest advocate since Scarlett." It is doubtful, however, whether Mr. Benjamin would ever have been so effective before a British jury or in the atmosphere where Scarlett was omnipotent as he was in the Appeal Courts of the House of Lords and the Privy Council. To these Courts he confined himself exclusively towards the end of his English career, and it may be doubted whether any Lord Chancellor, assisted by noble and learned assessors, ever heard an advocate plead before them in whom a comprehensive knowledge of jurisprudence, a singulat force and lucidity of reasoning, and the most felicitous neatness and fluency of illustration and exposition were more happily combined. It was of Mr. Benjamin that a brother barrister said, "He makes you see the very bale of cotton he is describing as it lies upon the wharf at New Orleans. Many lawyers will doubtless be ready at this moment to recall Mr. Benjamin's great triumphant argument on behalf of the captain of the Franconia. Others, again, who have heard him plead in New Orleans and Washington, will remember that he was as well acquainted with the French and Spanish as he was with the English language. Sufficient will it be for us at this moment to hope, in the name of the Bar which has watched his brilliant and brave career, that many years of well-earned repose may be Mr. Benjamin's portion in the beautiful residence which he has built himself in Paris, and in the centre of that devoted family to which he is so deeply attached.—*Daily Telegraph.*

REPORTS

ONTARIO.

FOURTH DIVISION COURT, VICTORIA

(Reported for the LAW JOURNAL.)

COWAN V. MCQUADE.

Application to sign judgment where no defence, under O. J. A. rule 80, refused.

DEAN, Co. J.—The plaintiff sued the defendant in this action upon a promissory note for $35. The defendant entered a note disputing the claim, and the plaintiff now applies upon an affidavit, such as is required under Order 10, rule 80, of the Judicature Act, for a summons, calling on the defendant to shew cause why the plaintiff should not be at liberty to sign final judgment.

The plaintiff asks this under sect. 244 of the Division Court Act, which reads as follows:—"In any case not expressly provided for by this Act, or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of Common Law to actions and proceeding in the Dominion Courts."

This is the first application that has been made to me in a Division Court under this order, and I know of no direct authority upon the point, though *Willing* v. *Elliott*, 37 U. C. R. 320, was decided upon an attempt to import into the Division Court practice a very similar principle, and there it was held that the procedure was not applicable to Division Courts; in that case a prohibition was granted restraining an order made by a County Judge for a defendant to be examined under the Administration of Justice Act. The object sought by examinations of defendants under that Act, in cases like those contemplated by Order 10, was usually the same as under this order. If the examinations disclosed that the defendant had no defence, that his pleas

were, in fact, false, they were struck out by the Court, and the plaintiff had leave to sign final judgment. Order 10 arrives at the same result by legislative enactment, and provides for substantially the same practice. Rule 80 provides that the judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents, or copies or extracts therefrom. The learned judge in that case, amongst other reasons, laid stress upon the fact that such practice would give the Division Court "power to examine persons situate in other parts of the Province it may be, than in the County (within) which such Division Court is established."

I am by no means sure that this case cannot be fairly regarded as an authority against the plaintiff's contention, but I need not decide this, for I do not feel that it would be a wise or just exercise of the discretion allowed by sect. 244 to introduce this practice. Nothing can be clearer than this, that where a judge advances beyond legislation, or in any way carries the law or practice beyond its former boundaries, he must see to it that his extension cannot work injustice. Whatever there may be of inequity in the law as he finds it, is no concern of his, but it is his duty not to lay down any rule or make any precedent which he sees may, in cases which would be governed by such rule or precedent, work a wrong. If I grant this summons, and so introduce this practice into the Division Courts of this County, I must grant a summons in every case where application is made upon like material, and it will be contrary to all experience if, before long, some defendant does not "disclose such facts as may be deemed sufficient to entitle him to defend the action," and at the trial establish his defence and get judgment in his favour. Meanwhile he has has been put to expense which may amount to a large percentage on the claim which he has successfully resisted in answering the interlocutory summons. It must always be returnable at the county town; so that a defendant living in a remote division, whom the Legislature has carefully protected from the trouble and expense of having to make his defence away from home, is compelled to incur an outlay and submit to an inconvenience entirely inconsistent with the spirit of the Division Court Act. But it is not the worst that would follow. A defendant in the County Court or in the High Court, having succeeded under such circumstances, would have taxed to him his costs of answering this summons; but in the Division Court there is no provision for his getting these costs, and so a serious injustice would be done him. On the other hand, the plaintiff, if successful, would get his costs of serving this summons (see Division Court Rule 2 and Schedule of Bailiff's fees). The practical working of this principle of practice would soon shew that this is no mere imaginary difficulty. If this plaintiff, with his claim for $35, can have his summons for this defendant, who lives only ten miles from town, another plaintiff with a claim for $10 cannot be refused a summons for a defendant who lives forty miles off, or for that matter, in a distant county hundreds of miles away. What is the defendant in such case to do, if he believes himself to have a good defence? Shall he spend the amount of the claim in costs, which he can not be recouped, or shall he meekly submit to the wrong?

The introduction of this principle into a court for the trial of small causes, even if this injustice could be got over, would make a procedure which was intended to be simple and inexpensive, complicated and burdensome. It must be borne in mind that Order 10 is not confined to actions where the plaintiff's claim is ascertained by the signature of the defendant, but extends to all actions where the plaintiff seeks to recover a debt or liquidated demand in money arising from a contract expressed or implied. This covers nine out of ten of the cases which come before Division Courts. But if it came to be generally understood that any plaintiff with his petty claim who had confidence in the goodness of his cause and in the weakness of the defence, could make an application, and, if successful, get his costs from the defendant, and if he failed not be liable to the defendant for costs, a state of things would grow up which would make the Division Courts little short of a public nuisance. How far this principle might wisely be applied to the extended jurisdiction, with proper provisions as to costs, is only for the Legislature to say; but until it chooses to make some change in the law, I shall regard it as the exercise of a sound discretion to leave the matters as it has left them.

Summons refused.

RECENT ENGLISH PRACTICE CASES.

Miller v. Pilling.

Imp. J. A. 1873, ss. 57, 58—Ont. J. A. ss. 48, 49—Official referee—Form of report.

A referee under the above sections is not bound to give his reasons for his findings; he may simply find the affirmative or the negative of the issues, and the issues in an action cannot be sent back to him for retrial or further consideration merely on the ground that his report does not set out the reasons for his findings.

[C. A. June 9, 1882—L. R. 9 Q. B. D. 736.

Per Brett, L. J.—"If it could be shown that the findings of the official referee were against the weight of evidence, they might be set aside."

Per Cotton, L. J.—"In my opinion the official referee is not bound to set out the steps by which he has arrived at his conclusion; it is unnecessary for him to do so; he has only to find the ultimate issues of fact."

[Note.—*The Imperial and Ontario sections are virtually identical.*]

Williams v. Mercier.

Imp. O. 1, r. 2, O. 40, r. 10—Ont. rules 2, 321—Interpleader—Motion for new trial—Power of Court of Appeal.

On the trial of an interpleader issue the jury found that certain properties belonged to B. and that the execution debtor, C., was not entitled to seize them. On an application for a new trial the Court of Appeal *held* the property belonged to A., the execution debtor, and that C. was entitled to seize them.

Held, the Court of Appeal had power under Imp. O. 40, r. 10, (Ont. r. 321), to order judgment in the interpleader issue to be entered for the execution cerditor without directing a new trial.

[C. A., May 25, 1882—L. R. 9 Q. B. D. 337.

Per Jessel, M. R.—"With respect to the order that we ought now to make, it is quite clear that Order 40, r. 10, (Ont. r. 321), applies to every application for a new trial; there is no exception of interpleader proceedings. It is true that O. 1, r. 2, (Ont. r. 2), the old practice of interpleader is continued, but there are no negative words in O. 40, r. 10, (Ont. r. 321), to exclude the new powers of the Court of Appeal in carrying out that practice."

[Note.—*Imp. O. 1, r. 2, is substantially identical with Ont. r. 2. Imp. O. 40, r. 10, is identical with Ont. r. 321.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[March 6.

Re Phipps.

Extradition—Forgery.

The judgment of the Queen's Bench Division, reported 1 Ont. Rep. 585, affirmed.

Bell v. Lee.

Will—Insane delusions—Fraud on power appointment.

The decree in this cause, 28 Gr. 150, reversed so far as the will was declared void, on the ground of insane delusion.

The testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or his brother or sister. By his will the testator gave portions, about one quarter of his estate to two of his children, and as to the residue he appointed the same to his brother, Charles Thomas Bell, desiring him to pay first his (testator's) indebtedness to his father's estate, and to release his policy of life insurance from such indebtedness, and then gave and bequeathed to Elizabeth Bywater the policy of assurance upon his life for $3,000, and all moneys arising therefrom.

Held, that as to the portions of his estate given to his two children the will was valid; but as to the appointment to his brother C. T. B., the same was void as being a fraudulent exercise of the power of appointment; and therefore that as to such residue the will was inoperative and void, and that as to so much there was an intestacy.

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

Maclennan, Q.C., for E. Bywater.

McCarthy, Q.C., and *A. Hoskin*, Q.C., for respondents.

McDonald v. McArthur.

Promissory note—Presentment—No funds.

On an appeal from the judge of a Division Court where the learned judge had given judg-

ment against the defendant, the defendant for the first time raised an objection that proof should have been given that there were no funds at the bank where the note was made payable.

The Court, (SPRAGGE, C. J. O.,) passing over the objection of the question being first raised at that stage of the case, *held* that no such proof of want of funds was requisite to entitle the holder of the bill to recover.

McMichael, Q.C., for appeal.

Falconbridge, contra.

DUMBLE v. DUMBLE.

Will, construction of.

The decree made herein (reported 20 Gr. 274) varied by striking out the words "absolutely for her own use," and substituting therefore "for and during her natural life," and adding "and upon the death of the said defendant the brothers and sisters of the said testator are, under the provisions of the will and letter, entitled to the said personal property absolutely to their use in equal portions."

ALLAN v. MCTAVISH.

Practice—Liberty to appeal after five years.

In January, 1879, judgment was given by this Court against the defendant, who did not appeal, but in February, 1883, applied to this Court for liberty to appeal to the Supreme Court on the ground that by a recent decision of the Court of Appeal in England, involving the same point, it had been determined that the defence of the defendant was good.

The Court, following the ruling in *Craig* v. *Phillips*, 7 Ch. D. 249, refused the appeal with costs.

QUEEN'S BENCH DIVISION.

Osler, J.] [Jan. 29.

ROBERTSON ET AL. v. KELLY.

Contract by lunatic, validity of.

The plaintiffs made certain necessary repairs upon the defendant's vessel. At the time the agreement for the repairs was made, one of the plaintiffs knew that the defendant was subject to insane delusions, believing that people were conspiring against him. He, however, superintended the repairs and talked intelligently to the workmen, but some months after he became violent and was confined in an asylum for the insane.

Held, that the plaintiffs were entitled to recover for the work done.

Tilt, for plaintiff.

McCarthy, Q.C., contra.

CHANCERY DIVISION.

Divisional Court.] [Feb. 6.

EVANS v. WATT.

Seduction — Marriage to third party during pregnancy — Cause of action — Evidence of daughter and husband, admissibility of.

Where an unmarried woman is seduced and pregnancy follows, or sickness which weakens or renders her less able to work or serve, the father's cause of action is complete and cannot be divested by the subsequent marriage of his daughter before birth of a child. The facts of seduction, pregnancy, and illness might be proved by the daughter, but she might refuse to answer as to who was the cause of her pregnancy if she asserted that the child she bore was born in wedlock.

But where the daughter was married to a third person during her pregnancy consequent upon her seduction by the defendant, and her child was born in wedlock, and the action was brought at the instigation of the husband, he and his wife being the only witnesses, and no proof of sickness or inability to serve was given,

Held, [ARMOUR, J., dissenting,] that a nonsuit was properly entered.

Per ARMOUR, J.—If loss of service were necessary to be proved a new trial should be granted for that purpose, and it cannot be said that under such circumstances a father sustains no damages apart from the loss of service.

Dunbar, for plaintiff.

Falconbridge, contra.

Divisional Court.] [Feb. 15.

KLEIN v. THE UNION FIRE INSURANCE CO. ET AL.

Insurance—Mortgage—Subrogation—Statutory conditions—Company—Misrepresentation.

This was an appeal from the judgment of

Ferguson, J., noted in this Journal *ante* Vol. 18, p. 345.

The facts of the case are concisely stated there, it being only necessary to add, for the understanding of the present judgment, that at the time of the insurance in the Union Fire Insurance Co., $1,000 had been paid on the plaintiffs' mortgage, leaving the balance $3,000.

Held, now (reversing FERGUSON, J.), that it should be declared that the mortgage has been paid, and that the proper discharge should be executed, and that the loan company should pay the balance of the insurance money to the plaintiffs, with interest from the time when it would be payable under the policy, with costs of suit to the plaintiffs as against both defendants, but without prejudice to the defendants litigating as advised their respective liabilities as between themselves.

For (I.) it was not correct to say that statutory condition No. 1 was broken, and the policy avoided, by reason of the non-communication to the Insurance Co. at the time the policy issued, of Klein's previous retirement from the firm, because (1) as a matter of law (*a*) Klein, though he had so retired, retained an insurable interest both as liable on the covenants in the mortgage, and as still retaining the right to redeem the mortgage; (*b*) even if Klein had no interest at all, the surviving partners could recover according to the extent of their interest, in the present action; and (2) as a matter of fact, the failure to disclose Klein's change of position, is not shown to have been to the prejudice of the company, or material to the risk.

Semble, even if notice of the change had been of moment, yet, since the evidence showed that the matter of the policy, as between the Loan Company and the Insurance Company, was left to the under-clerks to deal with, and that a clerk of the Loan Company informed a clerk of the Insurance Company of the change in question, a jury would on this evidence have little difficulty in finding that notice of the change was communicated to the Insurance Company.

(II.) It was not correct to say that statutory condition No. 1 was broken, and the policy avoided, by reason of non-communication of other mortgages, subsequent to that to the Loan Company, existing on the property, because (1) as a matter of law, (*a*) as held in *Samo* v. *Gore District Mutual Insurance Co.*, 1 App. 545, the existence of an incumbrance cannot be pronounced a material fact, the non-communication of which will, apart from stipulation, irrespective of its nature and amount, and without any imputation of fraudulent concealment, enable the underwriter to repudiate the liability; (*b*) as the Insurance Company dispensed with the usual application, and with any interrogatories as to the exact nature and extent of the interest to be insured, the assured were not bound to state it. There was, at least, contributory negligence on the part of the insurers, who may also be regarded as having waived information as to the incumbrances; (2) as a matter of fact, it did not appear from the evidence that the non disclosure as to the mortgages was a non-disclosure of a fact material to the risk, or that the rate of premium would have been affected by a knowledge of them on the part of the Company, but rather the contrary.

(III.) It was not correct to say that statutory condition No. 8 was broken, and the policy avoided, by reason of there being prior insurances unassented to by the Union Fire Insurance Co., because the evivence clearly showed that the policy of the Union Fire Insurance Co. was to take the place of the policy on the Royal Insurance Co., in pursuance of the usual mode of dealing between the Union Loan Co. and the Union Fire Insurance Co., and of the two prior insurances, one was marked on the face of the Royal policy as assented to, and the other had been taken in substitution for another which appeared in like manner as assented to in the Royal Policy; and *Parsons* v. *The Standard Insurance Co.* 5 S. C. R. 234, showed this substitution was immaterial so far as the Royal policy was concerned; and these two policies were current when the policy in the Union Fire Insurance Co. was taken out. It was the duty of the Union Fire Insurance Co. to have properly issued their policy, agreeing to take the position of the Royal, as also it was the duty of the Union Loan to see the policy properly issued. But as a reformation of the policy was not asked on the pleadings, the Union Fire might succeed on the technical defence as to the prior insurances not being assented to on their policy, so far as the $1,000, which had been paid on the mortgage was concerned.

(IV.) The representations made to the plaintiffs by the Union Loan Co., and especially their letter of March 14, 1881, stating that the policy was

indisputable on any grounds, were such as the said Company was bound to make good, especially since the only difficulty in the plaintiffs' way to recover was occasioned by the neglect of the Loan Company (acting as the plaintiffs' agent), in not having the other insurances properly assented to in the policy.

(V.) As to the claim of the Insurance Co. to foreclose the mortgage, as assignees of the Loan Co., this claim could not be entertained, because (1) since the plaintiffs could recover on this policy but for the failure to have endorsed on it the two prior insurances, and since such omission would be remedied on a properly framed record, it followed that the Union Fire Insurance Co. could not take advantage of their own default and neglect in making the formal entry of assent in their policy, to bring into play the subrogation clause for their own advantage. (2) Apart from this, the case was not governed by *Springfield Fire Insurance Co.* v. *Allen*, 43 N. Y. 389, which is distinguishable in that (*a*) there the policy became avoided by subsequent act of the mortgagor insured; (*b*) the policy there was made and accepted by the mortgagee personally intervening with full knowledge of all the terms and conditions of the policy, including the subrogation clause. Neither of the elements existed in the present case. Here the Union Fire Insurance knew that the premiums were being paid by or charged against the mortgagors, and, therefore, that the equity of the plaintiffs was to have the policy moneys applied in reduction of the mortgage, and as between mortgagors and mortgagees this could not be changed by an arrangement made between the latter and a third party, without the knowledge or assent of the mortgagors. Hence, in the present case, the claim of the plaintiffs to have the insurance money applied in satisfaction of the mortgage, was to be preferred to that of the insurers to have the mortgage assigned to them as a security. The mortgage, as a chose in action, passed to the insurers, subject to all equities.

Semble, there was sufficient evidence, if it had been necessary, to establish an affirmation of the contract by the Union Fire Insurance Co., and an election to treat the policy as valid.

S. H. Blake, Q.C., for appellants.

Rose, Q.C., and *Macdonald*, for the Union Loan and Savings Co.

Bethune, Q.C., and *A. Galt*, for the Union Fire Insurance Co.

Ferguson, J.] [March 7.

HUGHES v. REES.

Private international law — "Community property"—Concurrent suit in Quebec—Locus of bank stock.

In the Province of Quebec when there is no ante-nuptial settlement the law makes a settlement of the property of the parties upon their marriage, and also of property subsequently acquired. This is called "Community Property," and it is not in the power of the husband, during the coverture, to make a gift of the community property, directly or indirectly, to his wife, although he is the administrator of it, and may make gifts to the children if the gifts are properly accepted. This legal settlement takes effect whether the marriage ceremony takes place in Quebec or elsewhere, and whether the property of the wife happen to be in that Province or elsewhere, provided the domicile of the husband is in that Province, and the parties intend immediately to go and reside in Quebec. Until two or three years ago the laws of the Province of Quebec did not recognize a trust created by deed *inter vivos*.

In this case the parties were married in Toronto in 1859. The husband was domiciled and carrying on business in Montreal. They intended, immediately after marriage, to go and reside in Montreal, which they did. On March 3, 1875, a deed was executed at Toronto between the wife of the first part and one A., and the husband of the second part, whereby the three parties covenanted that certain Ontario bank stock, in which certain monies which the wife had received after the marriage had been laid out, and which were then held in the name of the husband in trust for the wife, should be duly transferred into the names of A. and the husband, and that this stock, as well as a sum of $4,000, which the wife had received from her mother at the time of the marriage, and which had been put into the commercial business of the husband in Montreal, should be held by A. and the husbund in trust to invest as therein mentioned, and to permit the wife, during her life, to receive the income to her own use, and after her death in trust for the children of the marriage, and in default of surviving issue, over. The husband had always, up to the time of this suit, resided in Montreal; A. resided, and had long resided, in Toronto. On February 8, 1877,

the bank stock was transferred in trust pursuant to above deed. The head office of the Ontario Bank is in Toronto.

Held, inasmuch as all the property settled appeared on the evidence to have become and to have been community property, and, although the bank stock must be held to have been at the time of the execution of the deed, and of the transfer to the trustees, situate in Ontario, notwithstanding that the Bank had for convenience sake made provisions for making transfers in Montreal ; yet, since the trust deed did not purport to be a complete and consummated transfer of the property in the stock, but contained only a covenant to transfer, and was consummated afterwards, not in Ontario, but in Montreal, the case fell under the law of the owner's domicile, and applying that law, there was not a good transfer by the husband of the right of property in the stock.

Held, also, as to the money, that being at the time of the deed in Quebec, the validity of the transfer of it must depend on the law of Quebec, and under that law the transfer both as to the wife and the children was void. For, even if the wife's signing the deed amounted, as contended, to an acceptance by the children, it was only the acceptance of a promise and not of a gift.

Held, on the whole case, no property passed into the hands of the trustees by the transactions set forth.

The fact that a suit for the same matter is pending in Quebec, cannot be urged as a plea in bar to a suit for the same cause in this province.

S. H. Blake, Q.C., and *G. Morphy*, for the plaintiff.

J. Maclennan, Q.C., and *R. E. Kingsford*, for the husband.

Donovan, for the wife.

C. Moss, Q.C,, for the infant defendants.

PRACTICE CASES.

Mr. Dalton, Q.C.] [Dec. 8, 1882.

RE WITHROW, POUCHER V. DONOVAN.

Garnishment—Mortgage.

One Withrow was an execution creditor of the plaintiff Poucher for deficiency after sale of lands in a mortgage suit. Poucher obtained a judgment against the defendant Donovan under Mechanics' Lien Act, whereby it was referred to the Master in Ordinary to ascertain the amount of plaintiff's claim, if any, the judgment being the usual one under the Act.

Pending the reference Withrow applied for an attaching order against whatever amount might be found due Poucher.

On the application Poucher alleged fraud in the mortgage sale proceedings, and sought, by way of cross motion under the O. J. A., to attack Withrow's judgment. It was also urged that nothing was yet ascertained to be due Poucher, and consequently there could be no attachment.

THE MASTER IN CHAMBERS—It is most beneficial that suits be decided step by step, and that things should not be thrown into one general mass from the beginning, and an attempt be made to do justice upon the whole case in a summary manner.

In this garnishing proceeding the debtor sets up matter, not by direct statement either, but rather from suspicion and hints of what he would wish implied, attacking the plaintiff's judgment upon grounds prior to the judgment itself. I suppose he has a remedy if what he insinuates be true, but it is much better that he should directly attack the plaintiff's judgment, and have a decision upon what he complains of, then that he should be allowed to look back so far for a defence to this motion ; it is better to keep them separate. Should he succeed in avoiding the plaintiff's judgment the plaintiff will be ordered to pay back not only what the plaintiff may receive in the present proceeding, but what he has received hitherto. The interests of other parties are concerned in having this garnishing proceedings decided. I must make the order to pay over what, if anything, may be found due, with costs.

F. Moffatt, for the execution creditors.

Rae, for plaintiff.

Caddick, for defendant.

Cameron, J.] [Jan. 30.

SCHWOB V. MCGLASHAN.

Venue—Chancery sittings—Transfer—Rule 263 O. J. A.

Notice of trial had been given for Fall Chancery Sittings at Simcoe.

Defendant obtained a change of venue to London on terms *inter alia*, that the notice of trial given for Simcoe, should stand for London.

The Judge at London refused to take the case, as it belonged to the Common Pleas Division. The action was eventually decided in plaintiff's favour, but on the taxation of his costs, the taxing officer refused to allow him the costs of the abortive attempt at trial. On appeal, Cameron, J., without deciding whether the Master's order transferring the case to the Chancery Division was a proper one, held that the plaintiff was justified in acting upon it; that the costs incurred were caused by the defendant's application to change the venue, and should properly follow the event.

Leonard, for the appeal.

Aylesworth, contra.

Mr. Dalton, Q.C.—Proudfoot, J.] [Jan. 30.

SKINNER V. WHITE.

Lunatic plaintiff—Next friend.

The action was brought in the name of one Skinner, by his next friend, alleging that Skinner was of unsound mind, and claiming to set aside a sale of land.

The defendant applied to have proceedings stayed until plaintiff should be declared a lunatic.

An affidavit of the plaintiff, deposing that he was sane, and desired the action to be dismissed, and those of two physicians that he was sane, were filed.

The Master in Chambers ordered a stay of proceedings.

On appeal, PROUDFOOT, J., discharged this order, on the ground that the Master had no jurisdiction to direct an inquisition in lunacy, but that Skinner or defendant might apply to dismiss the action on the ground that the plaintiff was competent to manage his own business.

J. B. O'Brian, for plaintiff.

H. O'Brien, for defendant.

Boyd, C.] [February 12.

FERRIS V. FERRIS.

Collusive action—Right to defend—Dower.

The action was brought by Mathew Ferris and his wife against Archibald Ferris to recover nine years arrears under an annuity deed made by the defendant to secure $120 a year to the plaintiffs during their lives. Janet Ferris, the defendant's wife, joined in the deed to bar her dower. The defendant abandoned his wife and absconded. She brought an action for alimony and now makes application to be admitted to defend this suit on the ground that it is collusively brought for the purpose of defeating her suit for alimony, and to deprive her of dower in the lands.

Held, upholding the order of the Master in Chambers, that the applicant was entitled to be let in to defend.

Fullerton, for the application.

Clement, contra.

Proudfoot, J.] [February 19.

GRAND TRUNK RY. CO. V. ONTARIO AND QUEBEC RY.

Appeal—Security—Stay of execution—Ex parte order.

Under R. S. O. cap. 38, sects. 26-27, proceedings can only be stayed upon security being given both for the costs in the Court of Appeal and those in the Court below. Orders to stay execution pending an appeal should not be made *ex parte*. Such orders may be appealed to a Judge in Chamber without first moving before the Master in Chambers to rescind them.

G. T. Blackstock, for the plaintiffs, (appellants).

H. Cassels, contra.

Proudfoot, J.] [February 19, 1883.

HAMILTON V. TWEED.

Appeal—Time—Ex parte order.

By an order of reference the questions raised by the pleading were referred to a referee, under sect. 47 O. J. A. The referee made his report, which was dated the 17th January, and filed a day or two afterwards. On the 10th of February the defendants obtained from the Master in Chambers *ex parte*, an order, extending the time for appealing, on an affidavit of the Toronto agent of the defendant's solicitor, that such solicitor had been misled by a postal card of the

referee into believing that his report would be dated 20th January instead of 17th January, and that he was instructed and believed there was a good ground of appeal from the report.

Held, that such orders should not be made *ex parte*.

G. T. Blackstock, for plaintiff.

Watson, for defendant.

Proudfoot J.] [Feb. 19.

RE BATT, WRIGHT V. WHITE.

Executor—Commission.

An administration matter. Securities amounting to about $3,238.25, were either in the hands of the plaintiff at the testator's death, or were handed to her by the defendants (the executors) immediaiely afterwards. The plaintiff was an executrix and residuary devisee of the testator.

Held, that under this state of facts, the executors were not improperly allowed a commission in respect of that sum.

The total amount of their disbursements, including this $3,238.27, was $8,228.87.

Held, that $400 allowed by the Master at London, was not excessive.

Hoyles, for plaintiff.

F. E. Hodgins, for defendants.

Mr. Dalton, Q.C.] [Feb. 24.

KOHFREITSCH V. MCINTYRE.

Promissory note—Defence of fraud—Practice.

In an action on a promissory note, the seventh paragraph of the statement of defence was as follows :—

"The defendant further says she was induced to sign the said note by the fraud of the plaintiff or others, with the plaintiff's consent or knowledge, at the time of his receiving the same."

Held, on a motion to strike out the defence in default of particulars, that particulars should not be furnished, but the circumstances of the fraud should be set out in the statement of defence in a similar manner to the mode of pleading under the old Chancery practice.

Order accordingly.

Holman, for plaintiff.

Aylesworth, for defendant.

Mr. Dalton, Q.C.] [March 2.

REG. EX REL. BRINE V. BEDDOME.

Municipal councillor—Qualification—Relator—Costs.

The assessed value of his property determines the qualification of a municipal councillor.

The relator being an auditor of the corporation, the Master in Chambers, under *Regina ex rel. McMullen* v. *De Lile*, 8 U. C. L. J. 291, gave no costs.

Summons absolute to unseat respondent, and for new election accordingly.

Aylesworth, for relator.

H. W. M. Murray, contra.

Osler, J.] [March 2.

COGHILL V. CLARK.

Promissory note—Discretion of Master in Chambers—Amendment.

Action on a promissory note. The defendant applied for leave to amend his statement of defence by alleging that the note was not properly stamped, the note having been made before the repeal of the Stamp Act.

The MASTER IN CHAMBERS *held*, that under sect. 270, R. S. O. cap. 50, the defendant, as a matter of right, was not entitled to add this defence, as he had already set up a complete defence, if proved, and as he thought the defence of want of stamps was one without merit, he, as a proper exercise of his discretion, refused leave to add it.

On appeal the judgment of the Master was upheld.

Rose, Q.C., for defendant.

Justin, (Brampton), for plaintiff.

Mr. Dalton, Q.C.] [March 3.

REG. EX REL. BRINE V. BOOTH.

Municipal Councillor—Qualification—Liquor license.

On the 9th December, the liquor license of Booth Bros., of which firm respondent was a member, was transferred to one of the partners, T. W. Booth. The nomination took place on 22nd December.

On the books of the Registry Office, the respondent's freehold property appeared incumbered to nearly its assessed value. It was shown

that these mortgages had been reduced so as to leave the property worth, according to the assessed value, $965 over and above incumbrances.

Held, that the property qualification was sufficient, but that the respondent was the holder of a license within the meaning of R. S. O. ch. 174, sec. 74.

Aylesworth, for relator.
J. E. McDougall, contra.

Proudfoot, J.] [March 5.

LAWLOR V. LAWLOR.

Partition—Sale—Tenant for life—Dower.

Held, following *Gaskell* v. *Gaskell*, 6 Sim. 643, that a tenant for life may have a partition, and where there is a right to partition, there may be a right to a rule as the Court shall determine. R. S. O. ch. 101, sec. 81.

J. K. Kerr, Q.C., for plaintiff.
J. Hoskin, Q.C., for defendants.

Boyd, C.] [March 12.

ROBERTSON V. NERO.

Substitutional service—Rule 34, O. J. A.

The fact of a defendant being out of the jurisdiction is no reason for dispensing with personal service unless it appears that he is hiding or evading service, or that his whereabouts cannot be ascertained.

J. T. Small, for the plaintiff.

BOOK REVIEW.

A TREATISE ON THE LAW OF DOWER, by Malcolm Græme Cameron, Barrister-at-Law. Toronto: Carswell & Co., Law Publishers, 1882.

The preface to this book throws on this Journal the responsibility of its birth, in that the author says, in speaking of a work on this subject being required, "Expression has been given to this felt want in the *Canada Law Journal* to an article in which the author must ascribe his first impulse towards the preparation of this volume." We are not sorry that Mr. Cameron has answered the call.

Our law in Ontario has recently been advancing in the direction of the enlargement of the rights of a married woman in respect of her property during the life of her husband without as yet making any abridgement of, but rather extending her rights in respect of her husband's property. A knowledge of the law of Dower, and more especially of the more recent doctrines in regard to it, remains as necessary to the lawyer as ever. The law on this subject in the United States varies so much in the different States that, as Mr. Cameron points out, the comprehensive work of Scribner devoted as it necessarily is in a large degree to discussion of the conflicting decisions of the Courts of the different States, is of very little assistance to the Canadian lawyer. In England the law of Dower does not seem to have received much addition during the last forty years, and the now very old treatise of Park seems still to answer all the acquirements of the profession there. This may be owing to the facilities which the English Dower Act affords of dealing with lands so as to defeat rights of dower while only inchoate, so that questions of dower do not complicate the transactions which ordinarily come before the courts. In this Province, however, where accretions are from time to time being made to the law of Dower, English text books would only be valuable for the fundamental principles upon which Dower was originally built, and the modern additions have, for a long time, remained scattered through the reports and statute books. These are of course accessible with the cumbrous helps of digests, but their collection by Mr. Cameron into the convenient form of an orderly treatise, whose aim is to state merely the law as it exists in this Province, will be a welcome addition to our law libraries.

The general principles upon which Dower depends are fully and clearly treated in the earlier chapters of the present work, in which the writer necessarily does not depart materially from the mode in which the subject has been hitherto dealt with by text writers. The next ten or twelve chapters discuss the nature and incidents of Dower by considering in succession the various estates of the husband out of which it may or may not be claimed, such as estates in fee simple, in tail, in remainder or reversion, joint tenancy estates not of inheritance, partnership lands, trust and equitable estate, and in mortgaged estates. Modes in which dower is released or defeated follow, (chaps. 31-33), with

which may be mentioned the doctrine of election between dower and a devise or bequest in a will, this is very fully discussed in chap. 34. The work closes with a sketch of the proceedings in actions for dower.

Perhaps the portion of the work which is of most interest in Ontario is that in which dower in mortgaged estates is considered. In his preface the author modestly says that he makes no pretence to originality. In this branch of his subject, however, he has had scarcely any tracks to step in. The decisions of our own Courts and the Provincial Statutes form his materials, and these he has discussed with considerable freedom and ability, (see pp. 240 and 241), and has not hesitated to submit his own views where judicial decision has yet to be given. The author will doubtless expect to find practitioners who differ from him, and it may not be out of place to call our readers' attention to some of these as yet unsettled points. For instance, on p. 270, in the case of a purchase by the husband before marriage, he receiving a deed and giving a mortgage for a portion of the purchase money, and after marriage re-conveying to the mortgagee in satisfaction of the mortgage, his wife not joining. It may be reasonably urged that in such a case the American authorities cited to shew that the widow should be endowed should not be followed here. There are analogous authorities in Ontario under which it could be urged that the wife would only be dowable out of the equity of redemption, which the husband could convey without the concurrence of his wife, and so defeat her contingent right to dower. It does not, indeed, seem so clear as the writer puts it on pp. 248 and 249, that the statute 42 Vict. c. 22, disables a husband from conveying his equity so as to divest the dower without the wife's concurrence. The effect of *Calvert* v. *Black*, 8 Pr. R. 254, seems to be that the statute only applies in the case of a compulsory sale of the land. That case was not directly impugned in *Martindale* v. *Clarkson*, 6 App. R. 1, and has very recently been followed by the Chancellor in *Re Ward*, (March 12, 1883), though from some of the remarks made by that learned judge in giving judgment, it might be inferred that his decision might have been different if the matter were *res integra*.

The author's construction of the above statute also tinges his views as to the propriety of joining as a party to a foreclosure action the mortgagor's wife, who has joined in the mortgage to bar dower, (p. 248). In a suit for sale in the event of there being a surplus it would certainly seem proper that the surplus should not be disposed of in her absence ; but it is only upon the happening of that event that there would seem to be any more reason for her being a party than when *Davidson* v. *Boyes* (6 Pr. R. 27,) was decided, and it may well be doubted whether the mortgagor's estate should be burdened with the mortgagee's costs of making the wife a party from the commencement of the suit, while her interest arises only at the time when that of the mortgagee ceases. In a suit for foreclosure, as the mortgagee takes the land if the owner of the equity of redemption, the husband, does not redeem, no right of the wife under the statute would seem to arise at any stage ; and if that is the case why should she be made a party. It is possible, however, that practitioners will not care to run any risk in the matter, and will adopt the course which Mr. Cameron upholds, especially as it has been decided that the wife in the case of a mortgage since the statute, is not an improper party: (*Building and Loan Association* v. *Carswell*, 8 Pr. R. 73).

On the whole we think it will be found that the author has fulfilled the belief expressed in the preface that his work embraces references to most of the American cases in point, to nearly all the English cases, and, without exception, to all the Canadian ones. The profession will, we feel sure, have reason to be grateful to Mr. Cameron for his labours in rescuing from the Laureate's imputation of "codelessness" the "wilderness of single instances" in this branch of the "lawless science of our law."

The typographical appearance of the book is admirable. We have observed one or two clerical slips not noticed in the list of *corrigenda*; for instance, "vendor's," on p. 234, would seem to be intended to be "vendee's ;" "simply contract" for "simple contract," on p. 237 ; and "Bowes" for "Boyes" in the reference to *Davidson* v. *Boyes*, p. 248.

CORRESPONDENCE.

Signing Judgment in Division Courts under O. J. A.

To the Editor of the LAW JOURNAL.

SIR,—I enclose a judgment of Judge Dean, of Lindsay, for publication, if you consider it of sufficient importance. It is opposed to Judge Clark's judgment, recently published, and is in my opinion the safer decision. We do not want the Division Courts to supersede the County Courts, as they will do unless kept within bounds. Cases of importance involving nice questions of law, are being constantly decided without pleadings and without time for consideration, and the public interests must suffer. It is about the worst school for a young lawyer, and yet if things go on as they have been the Division Courts will monopolise the business, and leave nothing for the County Courts.

Yours, etc.,

A. B. C.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Contracts in letters.—*London L. J.*, Dec. 16, 1882.

The authority of auctioneers.—*Ib.*

Interpleaders and their subject matters.—*Ib.*, Dec. 23.

Gifts by infants.—*Ib.*

Restraining libels by injunction.—*Ib.*, Dec. 30.

Directors' contracts with themselves.—*Albany L. J.*, Dec. 30.

Directors as bank speculators—*Ib.*

Unconscionable contracts.—*Ib.*. Jan. 6.

Accidents to other than travellers on railways—Contributory negligence.—*Ib.*, Jan. 13.

Evasion of contract not to carry on business.—*Ib.*

Criminal attempts (continued).—*Irish L. T.*, 9, 16, 1882.

Contracts impossible of performance.—*Ib.*, Dec. 23.

Wigs and gowns.—*Ib.*, from *Pall Mall Gazette.*

Farming on shares.—*Central L. J.*, Dec. 15.

Liability of examiners of titles of real estate.—*Ib.*, Dec. 22.

Physicians, evidence in life insurance cases—Privilege.—*Ib.*

Evidence—Res gestee.—*Ib.*, Jan. 5, 12, 1883.

Forbearance of suit as a consideration.—*Ib.*, Jan. 5.

Proof of handwriting by comparison.—*American Law Review*, Jan., Feb.

Agreement for separation between husband and wife.—*Ib.*

The elements distinguishing the successful from the ordinary legal practitioner, and what they suggest.—*Ib.*

Auction sales.—*American Law Register*, Jan.

Witness refusing to give criminating evidence.—*Ib.*

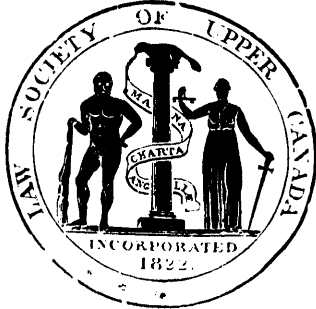
Discriminating tariffs for carriage of freight.—*Ib.*

Comparative criminal jurisprudence.—*Criminal Law Review*, Jan.

We have received an advertisement and circular as to the "Portable Electric Lighter." It is claimed that this little instrument, (costing only $5), by the mere pressure of a spring, gives an instantaneous light; that it has a burglar alarm attachment— a most useless thing, by the way, for the editor of a legal journal; that a medical battery can also be attached, which is more to the purpose, and it can be so arranged as to light up or ring a bell in a distant room, and perform various surprising feats which would have utterly subverted the solemnity of the Bench and Bar of half a century ago; but the profession of the present day is surprised at nothing; we should probably survive if the Attorney-General were to allow a session to pass without altering the procedure of the Courts or amending the Drainage Acts; in fact we cannot do better than suggest one of these instruments for the use of the Local Legislature, to throw some light on the necessity of half the Acts that we have to make ourselves acquainted with every year. We propose to get one of these instruments, and trust it may not result in our sanctum becoming the permanent residence of an aurora borealis, which the *Scientific American* tells us may now be produced to order in large quantities by an electric battery.

LITTELL'S LIVING AGE. The numbers of this excellent serial for the weeks ending March 3 and 10, contain The Brothers Henry and Thomas Erskine, *Westminster;* The Primacy of Archbishop Tait, *British Quarterly;* A Farewell Appearance, *Longmans;* Dr. John Brown of Edinburgh, and Church-yard Poetry, *Macmillan;* Mr. Gladstone's School-days, *Temple Bar;* In Alsace, Mr. Gladstone at Hawarden, and The First of the White Month, *Leisure Hour;* Some Curious Commissions, *All the Year Round;* The Humors of Examinations, and A Reminiscence of Sir Walter Scott, *Chambers';* with the conclusion of "A Singular Case" and instalments of "For Himself Alone," and "No New Thing," and the usual amount of poetry.

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1883.

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

William Renwick Riddel, Gold Medalist, with honours ; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

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

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

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 upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1883, 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 year.

Students-at-Law.

CLASSICS.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

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. & III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.