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THE immense sums of money, belonging to suitors in Chancery in England, which remain unclaimed can scarcely be credited. A part of the surplus interest, namely £100,000, has been applied towards the erection of the Royal Courts of Justice in London, and although, owing to an increased spirit of research, large sums have been withdrawn, the balance is still enormous. The Crown received, during the year 1890, over fifty-five thousand pounds by reason of estates reverting to it. The unclaimed dividends upon Colonial stocks amounted to one hundred and fifty thousand pounds, and the unclaimed naval prize money to two hundred and fifty-seven thousand pounds.

A recent advertisement calls for the representatives of owners of shares in the West New Jersey Society, no dividends having been paid upon the shares since the year 1692, nearly two centuries. Should descendants of those original shareholders ever be discovered, or discover themselves, their windfall will be something very large. In an action a few years since, the plaintiff, the descendant of an original stockholder in the defendant company, made out his claim to £100 of stock, which with accrued dividends since the year 1760 amounted to £3600.

A PRACTICE has recently been introduced by the Provincial Legislature of submitting diverse questions to the Court for consideration. The provision for doing so is of comparatively recent date, having been introduced by 53 Vict., c. 13, which enacts that "The Lieutenant-Governor in Council may refer to the High Court or Divisional Court thereof, or to the Court of Appeal, for hearing or consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear or consider the same."

As the statute in no way limits the matters to be referred, the possibilities of the Act are unlimited; but the wisdom of the provision is doubtful. Experience teaches us that it is more expedient that points should be decided as they arise in litigation, and that judgment comes with far more weight when given in real actions. It is a well-known fact that the Court of Appeal have as much as they can do in keeping up with their ordinary and regular work, and it does appear to be extraordinary that the interests of litigants are to be placed on one side while some abstract problem is occupying the time of the Court. Besides it is hardly the province of the judges to be giving opinions, and it is extremely doubtful whether their commissions include the work which may be referred to them under this Act.

Then what effect have the answers of the Court? They are merely the opinions of the Court upon certain questions; and though doubtless entitled to great re-

spect, it is questionable how far they would be binding upon a court or judge should the point arise again in the ordinary way.

In the recent Local Option case which was submitted, under this Act, to the Court of Appeal, the Chief Justice, in giving judgment, said:—"I cannot but regret that it should be thought proper to submit such a question to the Court. . . . It is in effect the same as asking a definition of the powers of assignees in insolvency, or of sheriffs, registrars, or of railroads or other companies chartered by the Province." Mr. Justice Osler most emphatically declined to answer the questions submitted, remarking that when they would arise in a proper way he would deal with them. We trust that the Attorney-General will note the words of the Chief Justice and the refractory action of Mr. Justice Osler, and refrain from continuing a practice which threatens to work great injustice to litigants and become an intolerable nuisance to the judiciary.

JUDGMENTS BY CONSENT.

In another column we have reported an important ruling of the Chancellor upon a point of practice relative to the jurisdiction of the Master in Chambers and also that of the various Local Masters throughout the province. It will be seen that his Lordship has determined that these officers have now unlimited power under the Consolidated Rules to pronounce judgments by consent in all cases. Hitherto we believe it has been pretty generally considered by a good many members of the profession (especially among those familiar with the traditions of the former Court of Chancery) that the right of the Master in Chambers and Local Masters to pronounce judgments was strictly limited by the Rules to the classes of cases in which that power appears to be explicitly conferred, *e.g.*, to administration and partition actions commenced by notice of motion, mortgage actions for foreclosure, sale, or redemption, where infants were concerned, and to actions on specially endorsed writs in which they were empowered not to pronounce judgment, but to order judgment to be entered for the amount indorsed, notwithstanding an appearance by the defendant.

The Master in Chambers, however, has been accustomed to make orders—but whether they have been treated or entered as judgments, we are not able to state—under the provisions of Rule 756, which enables the order to be made by "the court or a judge"—see *Taylor* v. *Cook*, 11 P.R. 60. This jurisdiction, it will be seen, the Chancellor now affirms to be rightly exercised by the Master in Chambers, and by analogy to the power conferred by that Rule, he holds the still larger power of granting judgments in all cases on consent is implicitly vested in the Master in Chambers and Local Masters.

Formerly a decree in chambers, even by consent, was never granted in the old Court of Chancery except in the cases explicitly provided for in the former Chancery orders, and it has for a long time past been customary to move in court in the Chancery Division (and, we believe, in the other Divisions also) for judgments upon consents. This branch of business will be now shifted from court

to chambers. Having regard to the provisions of the Judicature Act, s. 53, s-s. 10, whereby it is enacted that an order of the court (which would probably be held to include "a judgment") shall not, as against a purchaser, whether with or without notice, be invalidated on the ground of want of jurisdiction, or want of any "concurrence, consent, notice, or service," it is plain that the jurisdiction now declared to be vested in these officers is one that needs to be very carefully and cautiously exercised.

We believe it is too much the fashion even for the judges to bestow a very perfunctory consideration to consent matters; it seems to be too generally assumed that only the parties to the consent can be affected or prejudiced by any order made in pursuance of a consent; but under the provision we have referred to it is quite clear that the rights of a purchaser under a consent judgment may intervene so as practically to oust the rights of persons who are not parties to the consent on which the judgment is based; for it will be observed the want of any necessary consent is not to invalidate the judgment as against a purchaser even *with notice*.

Kekewich, J., we believe, very correctly estimated the importance of this branch of business when he said, "I know of nothing which requires more careful exercise of judicial power than the deciding on or granting applications when there is no real argument; the consent business of the court being, according to my experience, as a rule, even more difficult than the contentious business": *Conway* v. *Fenton*, 40 Ch.D. 518. The reason is obvious: the judge or judicial officer receives practically no assistance from the bar; both parties are merely solicitous that what they have agreed to may be sanctioned by the court. As a matter of fact, it is common experience to find parties agreeing to judgments dealing not only with matters over which they have the exclusive power and the right to consent, but also with matters in which others besides themselves are concerned, who are in no way represented in the action; *e.g.*, as regards costs payable out of a fund in which the litigant may have only an interest in common with others not before the court, the parties are always ready to agree that they shall be taxed between solicitor and client, and shall be paid in priority to all other claims, altogether regardless of the interests of other parties in the fund. These and many other peculiarities of consents to judgments will have to be carefully scrutinized or trouble will ensue, and in any case it will be strange if the courts do not before long have some knotty points to solve arising out of judgments which have been thus obtained. For we shall have not only the able and experienced officer who now holds the office of Master in Chambers pronouncing judgments in all sorts of cases, but we shall have many others who have neither his ability nor experience doing so.

For instance, suppose some judicial officer were by consent of parties to grant a judgment declaring a marriage void in an action framed as in *Lawless* v. *Chamberlain*, 18 Ont. 296, and the parties should then marry again, what would be the position of the parties on their second marriage? Would the husband and wife be guilty of bigamy, and would the issue of the second marriage be legitimate or illegitimate? Would the issue of the first marriage be bastardised? Would a

purchaser from the husband subsequent to the judgment be entitled to hold free from the dower of the first wife?

Having regard to the wide extent of the jurisdiction of the court and to the consequent extensive range of subjects which may be made the subject of litigation, and consequently of consent judgments, it may perhaps ere long need to be considered whether this unlimited power of granting judgments by consent now held to be vested in the Master in Chambers and Local Masters ought not in some way to be curtailed and limited so as to confine it to cases of mere money demands and judgments for accounts and inquiries, which, we are inclined to believe, is the utmost limit to which such a jurisdiction should be delegated to any judicial officer.

Not only in the case we have put, but in others that might be mentioned, a judge, we believe, would refuse to pronounce a judgment upon consent, as being contrary to public policy, and on no consideration would he pronounce a judgment declaring a marriage void except on the most plain and sufficient evidence of its invalidity. But we can conceive that some inexperienced local officer might assume that he was bound to grant a judgment in accordance with a consent, no matter what the subject-matter of it might be. For it must be remembered that under the Judicature Act no previous professional training whatever appears to be necessary for the Master's office. The occupant apparently need not even be a law student, and still less a barrister or solicitor.

Assuming a judgment by consent to be pronounced in a case where the court itself would not have pronounced judgment, it would nevertheless stand in the same position as if it had been pronounced by a judge; and it would certainly be a hardship to deprive innocent persons of rights which they had *bonâ fide* acquired on the faith of it.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(August numbers of the Law Reports continued.)

ARBITRATION—APPLICATION TO STAY PROCEEDINGS—"STEP IN THE PROCEEDINGS."

Chappell v. *North* (1891), 2 Q.B. 252, was an application under the Arbitration Act, 1889, to stay proceedings and to compel the reference of a counter-claim to arbitration pursuant to an agreement. The statute authorized the motion to be made "at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings." After the delivery of the counter-claim, the defendant took out a summons for directions for the purpose of obtaining discovery from the plaintiff, and on the hearing of this summons the plaintiff applied for and obtained leave to administer interrogatories to the defendant. Denman and Wills, JJ., were of opinion that the plaintiff's applying for and obtaining leave to administer interrogatories was a "step in the proceedings," and consequently there was no jurisdiction to stay the proceedings.

STATUTE, CONSTRUCTION OF—ACT, WHEN RETROSPECTIVE.

In re Williams & Stepney (1891), 2 Q.B. 257, the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) reversed the decision of the Divisional

Court (noted *ante* p. 357) on the ground that by s. 25 of the Act it was expressly made retrospective as regards arbitrations commenced after the Act under any agreement or order made before the commencement of the Act, and that consequently the provisions of s. 2 were retrospective, there being nothing in the Act to except them from the rest of the Act as regards its retrospective effect.

SPECIAL STATUTORY REMEDY FOR RECOVERY OF MONEY—PROCEEDINGS UNDER SPECIAL ACT, BAR TO CIVIL ACTION.

In *Vernon* v. *Watson* (1891), 2 Q.B. 288, the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) affirmed the decision of Pollock, B., and Charles, J. (1891), 1 Q.B. 400 (noted *ante* p. 166). The Court was of opinion that the statute in question in effect gave the aggrieved party both a civil remedy and criminal remedy combined for the money misappropriated; that the order for payment was a remedy for the civil right which was enforcible by imprisonment; which operated not only as a punishment of the offender, but also as an execution; and which, being satisfied by the imprisonment, was a satisfaction not only of the criminal, but of the civil remedy also.

ADULTERATION—MILK IN COURSE OF DELIVERY UNDER CONTRACT OF SALE—SEPARATE INFORMATION IN RESPECT OF SAMPLES FROM SEPARATE CANS—(SEE R.S.C., C. 107, SS. 15, 22, 23; 53 VICT., C, 26, S. 9 (D.)).

Pecitt v. *Walsh* (1891), 2 Q.B. 304, was a case stated by justices. Two informations were preferred by the respondent against the appellant for an offence under The Sale of Foods and Drugs Act, 1875. It appeared that the appellant was the consignor of certain milk which was being delivered at a workhouse, the guardians of which were the purchasers. The contract provided that the milk was to contain a certain percentage of cream, and that it should be tested on delivery, and a reduction made in the price in the event of a deficiency of cream. In the course of delivery, the inspector on the same day and occasion took samples from two cans which, on analysis, were found to be largely deficient in cream; whereupon two separate informations were laid, one in respect of each sample. The appellant was convicted on both charges. Two questions were submitted to the Court (Day and Lawrance, JJ.): First, would a separate information lie in respect of each can which was found to contain milk deficient in cream? The Court held that the appellant had committed a separate offence as to each can, and therefore a separate information could be brought in respect of each can. Secondly, whether the stipulation in the contract providing for a diminution of the price in case of a deficiency of cream exonerated the appellant? and the Court held that it did not. It may be observed that the English Act, 38 & 39 Vict., c. 63, s. 9, is different in its terms from the Canadian statute, R.S.C., c. 107, s. 15. The former expressly provides that no person shall for the purpose of sale, without notice, abstract any part of an article of food so as to injure its quality, substance, or nature. The Canadian statute seems to be practically to the same effect, since it declares that milk from which any valuable constituent has been abstracted is to be deemed to be adulterated, and only authorizes the sale of skimmed milk in cans having thereon the word "skimmed," as provided in the Act.

SHIP—CHARTER PARTY—SHIPOWNER, LIABILITY OF, NOTWITHSTANDING CHARTER PARTY—PRINCIPAL AND AGENT—MASTER OF SHIP.

Baumvoll v. *Gilchrest* (1891), 2 Q.B. 310, is an interesting case on the law of principal and agent. The defendant Furness was owner of a ship which he had chartered to his co-defendant, Gilchrest. By the charter party it was provided that the captain, officers (except the engineer), and crew, should be appointed and paid by the charterer, and they were in fact so appointed and paid. The charter party reserved to the owner sufficient space for ship's officers, crew, tackle, and stores; and it was also thereby provided that the captain should be under the orders of the charterer, and that the latter should indemnify the owner from all liability arising from the captain signing bills of lading. The plaintiffs, without having any notice of the existence of a charter party, shipped on board a quantity of cotton under bills of lading, some of which were signed by the captain and the rest by a firm of Ross, Keene & Co., who acted as the charterer's agents at the port of shipment; but in the bills of lading they stated themselves to be "agents," but did not state who their principals were. The cotton was lost at sea under circumstances not excepted by the bills of lading. The question which Charles, J., was called on to decide was whether the owner was liable for the loss, and he came to the conclusion that he was, on the ground that, although he did not actually authorize the captain or agents, yet he "allowed them to appear before the world" as his agents, and was therefore liable to the plaintiffs, who contracted with the apparent agents in a matter within the apparent scope of the agency.

DEFAMATION—SLANDER—PRIVILEGED COMMUNICATION.

Stuart v. *Bell* (1891), 2 Q.B. 341, was an action for slander. The plaintiff was the valet of the celebrated explorer, H. M. Stanley, and had accompanied his master on a visit to the defendant, who was a magistrate and mayor of the town of Newcastle. The chief constable of the town showed the defendant a letter he had received from the Edinburgh police, stating that the plaintiff was suspected of stealing a watch while at an Edinburgh hotel, and suggesting that cautious inquiry should be made, so as not to injure the plaintiff, to ascertain whether the plaintiff was in possession of the property. The defendant did not make any inquiry, but just before Mr. Stanley left Newcastle he informed him privately that there had been a theft in the hotel, and that suspicion had fallen on the plaintiff. A few days afterwards the plaintiff was dismissed from his employment on the ground that he had been suspected of dishonesty. The judge at the trial directed the jury that the communication was not privileged, and they assessed the damages at £250; but on appeal the majority of the Court of Appeal (Lindley and Kay, L.JJ.) were of opinion that the occasion was privileged, and that in the absence of proof of malice the defendant was not liable. Lopes, L.J., however, dissented, and agreed with Wills, J., who tried the case. The majority of the Court base their conclusion on the ground that the communication was made in discharge of a "moral and social duty," which Lindley, L.J., defines to be "a duty recognized by English people of ordinary intelligence

and moral principle, but at the same time not a duty enforcible by legal proceedings, whether civil or criminal." But the difficulty of determining when a duty of this kind arises is sufficiently apparent from this very case, where we find out of four English people of more than "ordinary intelligence and moral principle" two holding that the defendant was discharging such a duty, while two others were agreed that he was officiously interfering and, without sufficient ground, impugning the honesty of the plaintiff, to his serious damage.

ADMINISTRATION—FOREIGN WILL OF PROPERTY ABROAD—INTESTACY AS TO ENGLISH ESTATE.

In re Mann (1891), P. 293, a testatrix had made a will expressly limited to her property abroad, and had died intestate as to her estate in England. Under these circumstances, the executors assenting, a grant of administration of the English estate was made to the next of kin.

ADMINISTRATION—GRANT TO SON, PASSING OVER HUSBAND.

In re Moore (1891), P. 299, the husband of the deceased, having been cited to accept or refuse administration, and not having appeared, a grant of administration was made to the son of the deceased, who was her sole next of kin.

CONTRACT OF SERVICE—AGREEMENT TO GIVE WHOLE TIME—INJUNCTION—SPECIFIC PERFORMANCE.

Whitwood Chemical Co. v. *Hardman* (1891), 2 Ch. 416, is an illustration of the rule that a court of equity will not attempt to enforce the specific performance of a contract for personal service. In this case the defendant had agreed to give, during a specified term, "the whole of his time to the company's business." There was no negative stipulation that he would not during that time engage in any other business or occupation. The action was brought to compel the specific performance of the agreement, and the plaintiffs claimed an injunction to restrain the defendant from setting up any business or entering into any agreement, or making any engagement with any person or company other than the plaintiffs by which the defendant would cease to devote his whole time to the plaintiffs' business, etc.; and the present decision is upon a motion for an interim injunction. Kekewich, J., was of opinion that the contract of the defendant to give his whole time was in effect an express contract not to give his time to any one else than the plaintiffs, and he granted an injunction restraining the defendant from giving less than his whole time to the plaintiffs; but the Court of Appeal (Lindley and Kay, L.JJ.) were clearly of opinion that *Montague* v. *Flockton*, 16 Eq. 189, in which an injunction had also been granted in the absence of an express negative agreement, had proceeded on an erroneous view of Lord St. Leonard's decision in the well-known case of *Lumley* v. *Wagner*, 1 D.M. & G. 604. The conclusion of the Court of Appeal was not only that there was no express negative contract, but that there was not even an implied one which could be enforced by injunction. The decision of Kekewich, J., was therefore reversed.

MISREPRESENTATION—PROSPECTUS—DECEIT—ONUS PROBANDI—NEGLIGENCE—DIRECTORS, LIABILITY OF, FOR MISREPRESENTATIONS IN PROSPECTUS—COSTS.

Angus v. *Clifford* (1891), 2 Ch. 449, is a case against directors to recover damages against them for misrepresentations in a prospectus put forth by

them. In this case the plaintiff became a purchaser of shares in a mining company on the faith of a prospectus issued by the directors, in which it was stated that the reports of certain engineers therein mentioned were "prepared for the directors." As a matter of fact, the reports had been prepared at the instance of the vendors from whom the company had purchased the mine, but there was no evidence that they were incorrect or exaggerated. Romer, J., held the defendants liable, and that they were under no obligation to prove that the reports were untrue or exaggerated, as he considered that question irrelevant; but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) reversed his decision, holding that in the absence of proof of fraud by the defendants, or of their having made the statement in question with a reckless disregard of whether it was true or not, which would be fraud, they were not liable even though the statement were false and had been negligently made. Lindley and Kay, L.JJ., without basing their opinion on that ground, also were of opinion that, even if fraud had been proved, it was also a material fact to be proved affirmatively by the plaintiff that the reports were in fact untrue. Though the action was dismissed, the defendants were refused their costs.

In connection with this case, it may well to note that a recent Provincial Statute (54 Vict., c. 34, ss. 4-6) materially modifies the law as laid down by the House of Lords in *Peek* v. *Derry*, 14 App. Cas. 337, as to the liability of directors to damages occasioned by misrepresentation in prospectuses issued by them.

WILL—DOUBLE PORTIONS—SATISFACTION OF LEGACY.

In re Lacon, Lacon v. *Lacon* (1891), 2 Ch. 482, the doctrine regarding the ademption of legacies comes under discussion. The testator bequeathed his shares in a partnership business to his three sons equally as tenants in common. At the date of his will he had 21 shares in the business, and Ernest, one of his sons, was employed as manager of the business at a salary; the other two sons were not employed in the business. Subsequently to the making of the will, Ernest pressed for an increase of salary, and the testator thereupon arranged a new deed of partnership whereby Ernest was admitted as a partner, the testator making over to him 2 of his 21 shares, Ernest accepting the position, and relinquishing his salary as manager, but receiving instead his proportion of profits as a partner, which was greater in amount. The question then arose, on the testator's death, whether Ernest was to be considered a purchaser for value of the two shares thus transferred to him, or whether they were to be regarded as a part satisfaction of his legacy. Romer, J., decided that the gift of the two shares was in the nature of a portion, and that the presumption against double portions arose, and that therefore the legacy to Ernest had been adeemed as to two of the shares thereby bequeathed to him; but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) inclined to the opinion that the circumstances under which the gift of the two shares had been made were such as to indicate that they were not intended as a portion, but by way of remuneration for his services as manager; but that even if they were given by way of portion, they were agreed that the presumption against double portions was rebutted by the cir-

cumstances under which the two shares were given, which showed that the testator intended Ernest to have a greater share in the business than his brothers.

COMPANY—INVALID INCORPORATION OF COMPANY—WINDING-UP.

In re National Debenture Corporation (1891), 2 Ch. 505, was an application for a winding-up order in which the point was taken that the memorandum of association had not been signed by the requisite number of persons, one of the signatories having signed twice in different names. Kekewich, J., held that the company not having been duly incorporated under the statute, he had no jurisdiction to order it to be wound up; but the Court of Appeal on the question of fact allowed further evidence to be adduced, and found that the proper number of persons had signed the memorandum of association and therefore made the order asked. We may observe that the further evidence was given orally before the Court of Appeal.

PRACTICE—ACTION TO RESTRAIN NUISANCE—TRIAL BY JURY—DISCRETION OF JUDGE.

Mangan v. *Metropolitan Electric Supply Co.* (1891), 2 Ch. 551, was an action to restrain a nuisance caused by the vibration of engines, which North, J., had directed to be tried with a jury. The Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) declined to interfere with his discretion, as there was no reason shown for expecting a failure of justice from the action being tried as directed.

INJUNCTION—RESTRICTIVE COVENANT—OCCUPIER.

Mander v. *Falcke* (1891), 2 Ch. 554, is a decision of the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) holding that an injunction may properly be granted against a mere occupier of premises to restrain him from using them contrary to the terms of a restrictive covenant.

WILL—CONSTRUCTION—"CONTENTS OF DESK"—CHOSES IN ACTION—KEY OF A STRONG BOX—INTENTION OF TESTATOR.

In re Robson, Robson v. *Hamilton* (1891), 2 Ch. 559, a testator had given his desk, "with the contents thereof," to his nephew Joseph. The desk in question was found to contain money, a banker's deposit receipt, a cheque payable to the testator's order unindorsed, divers promissory notes payable on demand, and the key of a box in which securities were kept. It was admitted that the money passed to the legatee, but it was claimed that neither the choses in action passed, nor the contents of the box to which the key belonged. Chitty, J., decided that the word "contents" was sufficient to pass all the *choses in action*, including those which were negotiable only after indorsement by the executors; but he held that the key of the box did not pass to the legatee because it was accessory to the box to which it belonged, which was not given to the legatee. This latter point does not appear to have been argued by counsel so far as the report shows.

TRUSTEE—POWER TO APPOINT NEW TRUSTEE—EXERCISE OF POWER BY HEIR OF DECEASED TRUSTEE —"BARE TRUSTEE"—LAND TRANSFER ACT, 1875 (38 & 39 VICT., C. 87), S. 48—(R.S.O., C. 110, SS. 3, 5).

In re Cunningham & Frayling (1891), 2 Ch. 567, was an application under the Vendors and Purchasers Act for the purpose of obtaining the opinion of the Court as to whether the vendors were able to make title. The land in question was vested in 1836 by deed in W.D. and T.P. upon trust that they "or their assigns, or the survivor of them, or the heirs and assigns of such survivor, or other the trustees or trustee for the time being," should sell the same. The deed provided that if any of the trustees should die, it should be lawful for "the acting trustees or trustee for the time being, or the executors or administrators of the last acting trustee," to appoint new trustees. T.P., who survived W.D., died intestate in 1855, leaving T.H.P. his heir. T.H.P. died intestate in 1857, leaving T.S.H.P. his heir. T.S.H.P. died intestate in 1876 (after the coming into operation of the Land Transfer Act, 1875), leaving three daughters, A., B., and C., his co-heiresses. A., B., and C. never received the rents, nor otherwise acted in the trusts till 1890, when they executed a deed purporting to appoint the vendors new trustees, and to vest the trust estate in them. The questions Stirling, J., had to decide were: First, whether A., B., and C. were "trustees for the time being," and as such entitled to execute the power of appointing new trustees? The learned judge, on the authority of *In re Morton & Hallett*, 15 Ch. D. 143, held that they were, and that having on request executed the power of appointment they were "acting trustees." He also held that T.S.H.P. was not a "bare trustee" within s. 48 of the Land Transfer Act, 1875 (R.S.O., c. 110, s. 5), and therefore the estate did not on his death pass to his personal representative. The term "bare trustee," it may be remembered, had been differently defined by Hall, V.C., and Jessel, M.R.; the former in *Christie* v. *Ovington*, 1 Ch.D. 279, determined that a trustee who had active duties to perform was not a "bare trustee" even though he had no beneficial interest; whereas Sir Geo. Jessel in *Morgan* v. *Swansea*, 9 Ch.D. 582, intimated that a "bare trustee" meant a trustee without any beneficial interest. It will thus be seen that Stirling, J., adopted the view of Hall, V.C., in preference to that of Jessel, M.R.

COMPANY—WINDING-UP—SHARES PAYABLE BY INSTALMENTS—RIGHT OF LIQUIDATOR TO CALL FOR IMMEDIATE PAYMENT OF UNPAID SHARES.

In re Cordova Union Gold Co. (1891), 2 Ch. 580, was an application by a liquidator of a company in course of being wound up for an order authorizing him to make a call for the immediate payment of the amount remaining unpaid on the shares. The application was resisted on the ground that the shares had been taken upon an agreement with the company that the shares were to be paid up in instalments, and it was contended that the calls could only be made as the instalments became due under this agreement. But Kekewich, J., held that the agreement for payment of the shares by instalments only endured during the active life of the company, and that it was superseded by the provisions of the Winding-up Act in favor of creditors, and he therefore granted the order.

AGREEMENT—ILLEGAL CONSIDERATION—STIFLING PROSECUTION.

Jones v. *Merioncthshire Building Society* (1891), 2 Ch. 587, is a decision of Williams, J. The facts of the case were that the secretary of the defendants had embezzled money of the defendants' and that they had threatened him with prosecution; that he thereupon wrote to the plaintiffs (his mother and brother) informing them of the strait he was in and entreating them to come to his aid, and that unless the claim was settled by a certain day the defendants were likely to prosecute him. The plaintiffs thereupon waited upon the defendants and paid a part of the amount embezzled in cash, and gave their promissory notes to secure the balance. Nothing was said to, nor was any agreement made by, the defendants about abstaining from prosecuting. The Court, however, found as a fact that the defendants must have known that the plaintiffs' object in settling the claim was to prevent their relative from being prosecuted. The action was brought to recover the money and promissory notes which had thus been paid and given to the defendants. Williams, J., gave judgment in favor of the plaintiffs. It may be well to observe that in transactions of this kind a party making the payment, or giving the security, to relieve his relative from a prosecution is not *in pari delicto* with the person to whom the payment is made or the security is given.

COMPANY—TRANSFER OF SHARES—CONFLICTING EQUITIES TO SHARES.

Moore v. *North-Western Bank* (1891), 2 Ch. 599, was an action to determine the right to certain shares in a joint stock company. The shares stood in the name of Bradbury, the trustee of the will of J. L. Moore. The plaintiffs were beneficially entitled under the will. Bradbury had fraudulently deposited transfers of the shares with the defendants as security for a debt due by himself to them. By the terms of the articles of association every transfer of shares was required to be approved by the directors before registration. The transfer to the bank had not been approved or registered by the company when notice of the plaintiffs' claim was received by them. Under these circumstances Romer, J., held that the plaintiffs were entitled to the shares in preference to the bank. He says at p. 602: "As between two persons claiming title to shares in a company like this, which are registered in the name of a third party, priority of title prevails, unless the claimant second in point of time can show that as between himself and the company, before the company received notice of the claim of the first claimant, he the second claimant has acquired the full *status* of a shareholder; or at any rate that all formalities have been complied with, and that nothing more than some purely ministerial act remains to be done by the company, which as between the company and the second claimant the company could not have refused to do forthwith; so that as between himself and the company he may be said to have acquired, in the words of Lord Selborne (*Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 29), 'a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title.'"

Notes on Exchanges and Legal Scrap Book.

COMMISSIONER—SOLICITOR STRUCK OFF ROLL.—Mr. Justice Stirling holds, in *Ward* v. *Gamgee*, that where a solicitor was appointed a commissioner under 22 Vict., c. 16 (R.S.O. (1887), c. 62), and afterwards struck off the roll, he can still act under his commission.

PRESUMPTION OF DEATH.—A Scotch statute enacts that any person who has not been heard of for seven years may be assumed to be dead, and his heirs may enjoy his estate. If, however, the absentee should return within thirteen years, he may demand and receive it back.

STATUE, INJUNCTION TO RESTRAIN ERECTION.—In *Schuyler* v. *Curtis* (N.Y. Sup. Ct.) the erection of a statue of a deceased person was enjoined in a case where the deceased had always been a private citizen and not a public character. "Presumptively every person remains a private citizen until he voluntarily takes some step, such as becoming a candidate for public office, or publishing or exhibiting literary or artistic productions, which makes him a public character. A person does not surrender her status as a private citizen by merely engaging in private works of philanthropy."

ADVERTISEMENTS IN GERMAN.—An interesting decision has just been given by Chancellor McGill, of New Jersey. Recently ex-Judge Blair, as a special master, made a sale of some property. The Chancellor has refused to confirm the sale because ex-Judge Blair advertised it in a German newspaper. The legislature of New Jersey last winter passed a law making it mandatory in all judicial land sales to publish an advertisement in one German newspaper. Under this law ex-Judge Blair inserted an advertisement in one English paper and one German paper. The Chancellor decided that the law had not been complied with; that the advertisement in the German paper should have been printed in English. He quotes from 4 and 6 Geo. II., which provides that all judicial proceedings after 1733 shall be published in the English language. Prior to that date they were published in Latin. The Chancellor ordered another sale, and it will be advertised in accordance with his decision.—*N.Y. Law Journal.*

WILL WITNESSES.—Has it ever struck you that your reputation as a practising solicitor is liable to suffer from a little want of care on your part concerning the selection of witnesses to a will in the execution of which you are concerned? If you will bear with us for a short time, we think that we shall convince you that this may readily happen. You have prepared a will according to the instructions of a testator, who, not being sufficiently well to come to your office to execute it,

requests you to bring the document to his house for execution. You do so. You find that, though far from well, the testator's mind is perfectly clear, and that he understands the contents of the will, which you read over to him, and that they carry out his wishes. You yourself, since you take no interest of any kind under the will, will be able to act as one of the attesting witnesses to the will, but, as you omitted to bring with you your clerk to perform the office of second witness, you are obliged to ask the testator if there is any suitable person who will act as such witness. It chances that there is no one on the premises excepting the domestics—the housemaid, the parlor maid, the cook, and the kitchen-maid. Of these four females you select the cook, as, from what the testator tells you, she is considerably older and generally more important than the others, and, at your request, the testator directs her attendance. The will is duly executed by the testator in your presence and that of the cook, and all three names are duly appended at the foot of the will. The testator dies shortly after the execution, and, to your astonishment, the heir-at-law of the testator, who, by the terms of the will, and, as you know, by the testator's intention, is left entirely out in the cold, disputes the validity of the will, and enters a caveat against the probate thereof. The executor is consequently obliged to take steps to have the will proved in solemn form, and, with that object in view, warns the caveat and the heir-at-law—the caveator—entering an appearance to the warning; a writ is issued against him by the executor, asking that the will be proved. Proceedings go along, and, by way of defence, the heir pleads the formal defence that the formalities of the Wills Act were not complied with when the will was executed, and that the testator did not know the contents of the will, and, with the object of finding out whether this was so or not, he will cross-examine the witnesses to the will at the trial of the action. The case comes on, and you, the solicitor whose name appears as the first witness, are put in the witness-box, and you depose clearly and satisfactorily that the will was signed in your presence and in that of the cook, and that both you and the cook signed in the presence of the testator, and that all things were done as sect. 9 of the Wills Act requires. So far so good. Next the cook is put in the witness-box, and her testimony is found to be totally at variance with yours. She admits on cross-examination that, although it is quite true that the testator signed in her presence, yet she did not sign in his presence, since he left the room immediately after signing in order to take some physic, or for some other reason, and that both you and she signed in his absence, and that when both had signed, *the testator being absent*, you, the solicitor, put the will in your bag, and, for aught she knows, the testator never again saw the will. On re-examination counsel fails to shake her testimony. She gives her evidence in the most straightforward way possible. She has no interest in doing other than speaking the truth as far as on the face of the circumstances appears; and, to your consternation and dismay, the court pronounces against the will and decrees for an intestacy. The court's judgment in setting aside the will cannot fail to do your professional reputation harm. At the least it amounts to an accusation against you of carelessness in seeing to the proper execution of a most important document. In the opinion of those who

are ready to think ill of you—and there are always plenty of this way of thinking concerning members of our much-abused profession—it amounts to an accusation that your sworn testimony was contrary to fact. The judgment gives much ground for complaint against you on the part of the persons who would have taken benefits under the will had it been properly executed, as it would have been had you not been guilty of carelessness, and the fact that these people have no remedy against you for negligence, since you were not acting as their solicitor, will add coals to the fire of their grievance against you; and you will bitterly repent that you did not secure the services of some more reliable person than a female domestic to act as witness to such an important document. It will take you a long time to forget this mishap; it will be a long time before you can forgive yourself; and very possibly, if you are a person of very scrupulous or over-scrupulous feelings, you may suffer in purse as well as in reputation, since you may consider yourself bound in conscience, though not in law, to make up out of your pocket to those who would have taken under the will, had the court decreed for it, the value of what they lost by the court decreeing against the will. But, you ask, surely such a case could not occur in practice? But why not? The cook may, in such a case, give her evidence quite honestly, for her memory may mislead her; and you must not forget that in such a case of conflicting testimony the court would not fail to array the facts, and to see that, in your own interests, and to preserve your character as a careful, painstaking solicitor, you might hesitate to give the true facts, and that no such reason for withholding them applies to the case of the cook. Again, the cook's testimony may have been intentionally false; she may have been put up to the move by those interested in setting aside the will—and persons whose expectations are defeated by the will of a deceased relative will go to extremes, will use bribes and persuasion, will be guilty of any corruption to gain their ends, to set aside the will which displaces them; and it is difficult, often impossible, to prove these things. The moral we would draw is this: Whenever you take a will to the testator's house for execution—and you will probably often have occasion to do so in the course of your practice—always take with you some person of mature years and of intelligence to act as second witness in a case where you yourself are able to be the other witness; and in a case where circumstances prevent you being an attesting witness—*e.g.*, when you are appointed an executor or trustee, and have a legacy for acting, or there is a clause in the will allowing you to charge for professional work done in the capacity of executor or trustee under the will, for here, if you attest the will, you will lose the legacy in the one case, and the benefit of the clause in the other, under sec. 15 of the Wills Act (*see Re Pooley*) —in such a case take care to have with you two reliable persons to attest the will. In short, let the witness or witnesses you procure to attest the will be persons whose testimony in support of the will, should it be contested, may be relied upon—witnesses who will be beyond the reach of a bribe, and who will depose to the true facts of the case—witnesses who will give their evidence in the witness-box in such a way that the court can have no doubt that the Wills Act requirements were duly complied with. And let us remind you, in conclu-

sion, that by carelessness in the selection of the witnesses to a will, not only are you risking your professional reputation, but you are neglecting your duties as legal adviser to your client, who relies upon your doing everything in conformity with the law and in such a way that there is no chance of his will being impeached after his death, and you are omitting that care which, as a righteous and proper-minded man, you ought to take in the interests of those who are to derive benefit under the will, the execution of which is left to your superintendence.—*Law Notes.*

Reviews and Notices of Books.

The Jurisprudence of the Privy Council. By J. J. Beauchamp, B.C.L. Montreal: A. Periard, 1891.

This is a very useful work, and should find a place in every law library throughout the Dominion. The Judicial Committee of the Privy Council is, so far as the colonies are concerned, the highest appellate court in the realm. Its decisions contain the final and authoritative statement of th jurisprudence, to which our courts have to conform. As these decisions are spread over a great number of volumes, it is somewhat surprising that no digest of them should have been made to assist the practitioner in finding a particular case or the decision on any special subject. Mr. Beauchamp's book supplies this long-felt want; and from an examination of it, we feel satisfied that it will be found of great service, not only in the study of the jurisprudence and practice of this tribunal, but also in practice for reference. In giving more than the usual head-notes, the author makes a decided improvement on the ordinary digest of cases. The work contains a digest of the subject-matters of the decisions in alphabetical order, each letter being prefaced with a summary of the headings coming under it, and comprises all the decisions of the Privy Council, omitting only the ecclesiastical cases and those of a purely local or private nature. With the decisions are given the dates of the various judgments, with a reference to the full report, and the names of the courts appealed from. A feature of the work which will be of special value to the student is the careful selection made in the extracts from the leading judgments containing the principles governing the cases and the pith of the decision. By way of illustration, under the head of Bank and Banking, we find the subhead of Transfer of Shares, with a reference to the case of *Bank of Montreal* v. *Sweeny*, 56 L.J. P.C. 79, cited in an important case reported in the current number of our own Court of Appeal. The head-note contains a succinct statement of the principles of the case and a full extract from the judgment of Lord Chancellor Halsbury. We note, however, one or two typographical errors in the head-note of this case. The introduction contains a valuable sketch of the history of the Privy Council and of the creation of the Judicial Committee. How few of our readers could without research give the date of the Act constituting the Judicial Committee as a Court of Appeal, or of the amendments which have been made to that Act, viz., 3 & 4 Wm. IV., c. 41, passed for the "better

disposal of appeals and other matters in litigation referred or submitted to His Majesty in His Privy Council." The introduction also contains a summary of the procedure in appeal to the Committee, comprising the rules of practice published by their Lordships with a schedule of fees allowed solicitors in conducting appeals or other business before the Committee. The work closes with three appendices. The first contains the names of all the British colonies, with the nature and origin of their laws. This appendix will be valuable in practice in showing the difference in the jurisprudence of the various colonies, and enabling the practitioner to decide how far the decisions in one colony can be applied to cases arising in another. The second comprises notes of all the decisions of the Court of Queen's Bench (appeal side) in the Province of Quebec rendered under the articles of the Code of Civil Procedure in appeal to the Privy Council. The third appendix is a double alphabetical index of the cases reported in the volume under the names of the respective plaintiff and defendants. We can recommend this work as containing a useful digest of the jurisprudence of the Judicial Committee and valuable in understanding its present constitution and history. We congratulate the publisher on the mechanical part of the work, although we have noticed several typographical errors; these, however, are perhaps not more numerous than is usually the case in a volume of the size of the present work.

The New Empire: Reflections upon its Origin and Constitution, and its Relation to the Great Republic. By O. A. Howland. Toronto: Hart & Company, 1891.

This volume is alike creditable to the author and to the publishers. It is well written and well printed—a good specimen at once of artistic skill in authorship and of mechanical skill in book-making. It would be too much to say that there are no defects. The learned author displays, here and there, too strong a tendency to make use of untranslated quotations from foreign languages and of highly technical legal terms. Should his work reach a second edition—and we hope it will see many—he might usefully do a little translation and a little explanation or substitution. The book is, in fact and in form, a highly popular treatise on some of the greatest political problems to which the Canadian people can turn their attention, and the more readily the people can understand the argument the better the author's purpose will be served.

The line of Mr. Howland's reasoning is not difficult to explain; and though he disclaims originality, it is in fact highly original. He takes ground that, viewed as a whole, no other publicist has ever taken. His position is that the old British Empire "fell" in 1783, when by the second treaty of Paris the independence of the British colonies in America was recognized, and he writes with perfectly judicial calmness of its downfall. That event may have left some room for regret that the great colonial experiment was terminated in a costly and bloody war, which has left its traces in the feelings of the descendants of the colonists to this day, but has left room also for satisfaction that human freedom has been immensely the gainer by the sacrifice. The treaty of 1783 he regards as a "treaty of partition,"

maintaining with praiseworthy ingenuity that it was so regarded by Lord Shelburne on behalf of Britain, as well as by Franklin and his associates on behalf of the United States. There seems to be little room to question the historical correctness of this view. There can be no doubt that had the British Ministry chosen to stand out in a stubborn mood the United States would have accepted far less favorable terms rather than continue or renew the war. It would be paying but a poor compliment to Lord Shelburne's intelligence to suppose for a moment that the Americans humbugged him in the matter of either the boundaries or the fisheries. It is much more creditable to him, as well as more reasonable every way, to adopt Mr. Howland's view that Shelburne deliberately carried through a policy of liberal endowment of the independent colonies with a view to securing perpetual peace between them and the mother country.

It is not, of course, necessary to follow Mr. Howland in his justification of Shelburne's liberality. Statesmanlike and humane it was, no doubt; but it was his business as Prime Minister to get the best terms of peace he could get, and leave the future relations of the two countries to the chapter of events. Assuming from the standpoint of 1783 that it was a good thing to establish two separate English-speaking nationalities in North America, it would surely have been better and wiser to insist on the retention of the Ohio as the southern boundary of what remained British. That boundary had been fixed by Parliament in 1774. The whole country north of the Ohio was an almost unbroken wilderness. No one of the revolted colonies had any tenable claim to it, and as a matter of fact they all subsequently surrendered it to the United States because they could not agree about their title to the land. Had the boundary fixed by the Quebec Act been retained, British America would have included the States of Ohio, Illinois, Indiana, Michigan, Wisconsin, and a large part of Minnesota. True, between this great region and the Atlantic would have come in Pennsylvania, New York, and New England; but if it had at any later period seemed to both nations expedient to fix a more convenient boundary, the means of arriving at a compromise would have been available. For giving up part of the Ohio Valley Britain might have secured part of New England, and there would have been a good basis established for a North American States system. One is tempted to wonder why, on Shelburne's reasoning, he stopped short of giving up all British America, and from Mr. Howland's point of view it is not easy to find an answer to the question.

To say this is virtually to imply that the arguments in this part of the book make for the absorption of the rest of North America into the United States, but this would not correctly represent Mr. Howland's attitude as it appears to himself. He is a strong and skilful exponent of the idea of a British Empire of which the "greater half of the American continent" shall continue to form an important part. He does not pose as one of the Imperial Federationists in the ordinary sense of that term, for he believes that we have virtual federation now, and he shrinks from changing this virtual for a more formal federal tie. In this he may be right; at least his arguments are well worthy of the attention of those who differ from him. Every reader will heartily endorse his plea for a suitable celebration of the centennial of Upper Canada next year, as all will join heartily

in his aspiration that in one way or another the *prestige* of the grand old Empire may be enhanced rather than diminished. It has survived the loss of the United States. It would survive the loss of Canada, but the loss of Canada would be a serious blow to British Imperialism.

Correspondence.

SCHEDULES TO ACTS OF PARLIAMENT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—The following correspondence respecting the proper use, drafting and treatment of schedules to Acts of Parliament and Congress—embracing, as it does, the opinions of the highest authorities in America and England—ought to be read with the greatest interest. True it is that the "frightful example" of improper drafting commented upon was Bill 96 of the present session of the Dominion Parliament entitled, "An Act respecting the Ottawa and Parry Sound Railway Company": but we have in Ontario the same vicious system perpetuated, as in 46 Vict., c. 39 (1882-3), entitled, "An Act to legalize, confirm and declare valid certain by-laws of the corporation of the village of Renfrew." It is to be hoped that the Minister of Justice of Canada and the Attorney-General of Ontario will issue such orders as will compel for the future a closer following of the Westminster and Washington methods in the drafting of bills and the editing of acts introduced into and passed by their respective legislatures.

Letters were written by me to Anson G. McCook, Secretary of Senate, Washington, U.S.; Edward McMahon, Clerk of the House of Representatives, Washington, U.S.; Joseph H. Warner, Counsel to Chairman of Committees, House of Peers, London, England; and Hon. Edward C. Leigh, Q.C., Counsel to Speaker, House of Commons, London, England, as follows:—

"May I be permitted to ask you a question in connection with the duties of my own office which your experience in work of a similar character will enable you to answer without difficulty to yourself and with satisfaction to me.

"During my twenty years service in the Law Department of the House of Commons of Canada, it has been the custom to treat the schedules of private bills as matter apart from the body of the act. In other words, the agreements between railway companies, for example, are inserted in the statutes without correction and with all their imperfections; and although these agreements are in most cases divided into numbered paragraphs, no marginal notes are inserted by us indicating the subject-matter of these paragraphs.

"I have long endeavored to make a reform in this matter. The other day an aggravated case came before me in which there was little or nothing in the body of the bill but a reference to the schedule, in which was set out the full constitution of the company seeking incorporation; a bill very similar in the respect I

mention to the bill herewith enclosed. I wrote out marginal notes for the schedule, but the head of the office said that I might save myself the trouble, for 'we never do it.' I replied that if the custom now indulged in was a bad one it ought to be changed, and that I would endeavor to have the change effected before the next session.

"Will you kindly inform me what is the rule in this respect in your office? Do you give marginal notes to schedules which contain something more than forms? You have no doubt remarked the observation of Henry Hardcastle in his treatise on statutory law (1879), page 105: 'The schedule is an integral part of an act. To some acts of Parliament schedules are attached.' With respect to calling this part of the act a schedule, Brett, L.J., said: 'A schedule in an act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute and is as much an enactment as any other part.'

"Sir Henry Thring, Parliamentary Counsel, in his work on Practical Legislation (1877), page 40, writes as follows: 'As to schedules, great care should be taken in the preparation of schedules. It is desirable to include in a schedule matters of detail; it is improper to put in a schedule matters of principle. The drawing the proper line of demarcation between the two classes of matter is often very difficult. All that can be said is that nothing should be placed in a schedule to which the attention of Parliament should be particularly directed; for example, the constitution of an electoral or financial body of persons should be found in the body of the act; but the mode of conducting the election of the electoral body, and the rules as to the proceedings at meetings of the financial body, may not improperly be placed in a schedule.'

"In the interests of Canadian legislation, and to settle a point which is of some moment to the work in which we are engaged, I would respectfully ask your consideration of the foregoing and your valuable opinion thereon."

R. J. WICKSTEED.

Ottawa, October, 1891.

The following answers were received:—

From Edward McMahon, Clerk of the House of Representatives, Washington:

It is not customary in our practice to affix marginal notes to bills, private or public, while in legislative progress. After passage and approval, it is the custom of the State Department, in preparing the laws for publication, to affix such notes. Nothing in our practice would therefore aid in deciding the question to which you refer.

From Anson G. McCook, Clerk of the U.S. Senate, Washington:

The practice here appears to be so different from that which you describe that I can give you no information in regard to the matter you write about. So far as I have any knowledge, there are no schedules to our bills similar to the specimen which you send. After a bill receives the approval of the President, it is sent to the office of the Secretary of State, and it is there edited, printed and published under his direction. That includes, of course, the marginal notes, which you will see in the bills, copies of which I have sent you under my frank. This office has nothing whatever to do with them after their enrolment.

From George Francis Dawson, Editor of the Laws, Department of State, Washington:

In response to your communication addressed to the Chief Clerk of this Department, and by him referred to me, I beg to state that I know of no Congressional proceedings touching the incorporation into legislative acts of schedules of agreements between railroad companies analogous to those you mention as occurring in Canadian legislation. Congressional legislation on railroad questions comes under public and not private enactment with us, and does not embrace such schedules. In general legislation on other subjects, it has been my rule to give marginal notes to schedules of agreement which contain something more than forms. For instance, in the Statutes of the Second Session, 51st Congress, chapter 165, is "An Act to ratify and confirm agreements with the Sac and Fox Nation of Indians, and the Iowa tribe of Indians, of Oklahoma Territory, and to make appropriations for carrying out the same." The articles of agreement occur in the preamble to this act, and are fully annotated in the margin because they comprehend various important matters touching the tribal and individual rights, etc., of the Indians, which by the succeeding ratification, etc., become a part of the law itself, and because such annotation adds to convenience for reference. On the other hand, where an agreement is simply one of form, as in the statutes of the first session, 51st Congress, chapter 804, which is "An Act to ratify and confirm an agreement entered into by commissioners on the part of the States of New York and Pennsylvania in relation to the boundary line between the said states," no marginal notes occur, save the word "preamble," until the enacting clause is reached. From this illustrated statement you can, I think, get a clear idea of the rule prevailing in this office, and of the reasons upon which it is founded.

From Joseph H. Warner, Counsel to Chairman of Committees, House of Lords, London, England:

I will answer your questions with pleasure. Whenever Parliament confirms a provisional order, deed, agreement, or other document, the practice here is, as a general rule, to make any necessary amendments in the document as schedules, and to confirm the document "as set out" in the schedule. This is made more easy by Standing Order 104 of the House of Lords, which is as follows: "Any agreement intended to be scheduled to any bill shall contain a clause declaring the same to be made subject to such alterations as Parliament may think fit to make therein; but if the committee on the bill make any material alteration in any such agreement, it shall be competent to any party thereto to withdraw the same." The Order applies in terms to agreements only, but the principle is extended to other documents which are "confirmed by" and therefore derive validity from the act. As regards marginal notes to schedules, we insert them only when they are in the original document. A provisional order, as scheduled to a confirming act, has marginal notes, if the order, as made by the Government Department, has such notes, but not otherwise. If the original document has no marginal notes, we do not add them. There are remarkable instances in public legislation of schedules actually forming part of the act, but printed (wrongly perhaps) without marginal notes; see, for instance, schedules one and two of the Public Health Act, 1875. It is difficult to express an opinion as to the particular case you send me of the schedule to the Ottawa and Parry Sound Railway Company's Bill. We should not put marginal notes to such a deed, but we should decline altogether to schedule it. We should require a considerable part, probably the whole of it except the lists of names and assets, to be inserted as clauses in the act itself, and these clauses would, of course, have marginal notes. I will add that the *dicta* which you cite of Mr. Hardcastle and Brett, L.J., must not be understood as meaning that every schedule is part of the act. A schedule may, by proper words, be made part of the act, but in other cases it may be binding on particular parties only, or it may be inserted merely for information, as when an act contains a clause saving the rights of certain parties under a certain document, and the document is scheduled to show what is saved. Mr. Chandos Leigh, to whom you have also written, concurs in the views which I have expressed.

DIARY FOR OCTOBER.

1. Thur.....Wm. D. Powell, 5th C.J. of Q.B., 1816. Meredith, J., Ch. Div., 1890.
4. Sun.....*19th Sunday after Trinity.*
5. Mon.....Civil Assizes at Toronto. County Ct. Sittings for Motions, except in York. Surrogate Court sits.
6. Tues.....County Ct. Non-Jury Sitgs., except in York.
7. Wed.....Henry Alcock, 3rd C.J. of Q.B., 1802.
8. Thur....Sir W. B. Richards, C.J. Supreme Court, 1875. R. A. Harrison, 11th C.J. of Q.B., 1875.
9. Fri.....De la Barre, Governor, 1682.
11. Sun.....*20th Sunday after Trinity.* Guy Carleton, Governor, 1774.
12. Mon.....County Court Sittings for Motions in York. Surrogate Ct. Sittings. America discovered, 1492. Battle of Queenston Heights, 1812.
15. Thur....English Law introduced into Upper Canada, 1791.
18. Sun.....*21st Sunday after Trinity.* St. Luke.
19. Mon.....County Court Non-Jury Sittings in York. Last day for Call notice.
21. Wed.....Battle of Trafalgar, 1805.
23. Fri.....Lord Lansdowne, Governor-General, 1883.
24. Sat.....Sir J. H. Craig, Governor-General, 1807.
25. Sun.....*22nd Sunday after Trinity.*
27. Tues.....Supreme Court sits. C. S. Paterson, J. of Supreme Court, 1888. James Maclennan, J., Court of Appeal, 1888.
29. Thur....Battle of Fort Erie, 1813.
31. Sat.....All Hallows Eve.

Reports.

ONTARIO.

CHANCERY DIVISION.

THE LADIES' TAILORING ASSOCIATION *v.* CLARKSON.

(Reported for THE CANADA LAW JOURNAL.)

Practice—Consent judgment—Master in Chambers, jurisdiction of.

The Master in Chambers has jurisdiction to pronounce judgment by consent in any case.

[BOYD, C., Oct. 10.

W. R. Smyth, for plaintiff, obtained on consent an order from the Master in Chambers directing judgment to be entered declaring that the plaintiffs are entitled to rank upon the estate of the Colonial Umbrella Manufacturing Co., in the hands of the defendant as assignee thereof for the benefit of creditors, for $222.96 and interest, and to be paid their proportionate part as such creditors of the said estate and for payment of the same in due course of administration of the said estate; and also for payment by defendant to the plaintiffs of their disbursements and half their solicitors' fees; and also for payment to the defendant's solicitors of their fees, both sums to be charged by the defendant against the estate on passing his accounts.

On the order being brought to the Registrar of the Chancery Division, that officer doubted whether he was justified in entering judgment upon the order, and before doing so he brought the matter to the attention of the Chancellor.

BOYD, C., expressed himself as averse to putting parties to the expense of a motion in court where they were agreed as to the judgment to be pronounced. All former practice is abolished by the Con. Rules, and the practice now to be followed is to be regulated as far as possible by analogy to those Rules. Under Rule 756 he thought the Master in Chambers had jurisdiction to pronounce judgment upon any admissions of fact in the pleadings; and in the present case if the parties had put their consent on the pleadings, the Master in Chambers would clearly have had jurisdiction to pronounce the judgment under Rule 576. The parties ought not to be put to this circumlocutory procedure. In any case, therefore, where all parties are *sui juris*, there seems no good reason why a judgment by consent should not be pronounced by the Master in Chambers, and the analogy furnished by Rule 756 favors that view. It will be, of course, necessary for the officers exercising the jurisdiction in chambers to be careful to see that no improper clauses are inserted in such judgments. In the present case the direction to the defendant to pay his own costs and charge them against the estate does not seem to be proper unless the defendant represents all the creditors of the estate, which is not apparent from the order.

As to the form of the order, the Chancellor was of opinion that it should not be in the shape of an order to enter judgment, but that the judgment should be drawn up in chambers and should be entered, not as an order in chambers, but as a judgment by the proper officer, and should be based on a written consent duly signed and filed.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [June 22.

MCRAE *v.* MARSHALL.

Master and servant—Agreement for service—Arbitrary right of dismissal—Exercise of—Forfeiture of property.

By an agreement under seal between M., the inventor of a certain machine, and McR., pro-

prietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who, in consideration thereof, agreed to employ M. for two years, to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation.

By one clause of the agreement the employer was to be the absolute judge of the manner in which the employee performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal, but to have no claim whatever against his employer.

M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders.

Held, reversing the judgment of the Court of Appeal and of the Divisional Court, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, such right being absolute and not required to be exercised judicially, but only in good faith.

Held, per RITCHIE, C.J., FOURNIER, TASCHEREAU, and PATTERSON, JJ., that such right of dismissal did not deprive M. of his claim for a share of the profits of the business.

Per STRONG and GWYNNE, JJ., that the share of M. in the profits was only a part of his remuneration for his services, which he lost by being dismissed equally as he did his fixed salary.

Appeal allowed with costs.

Dalton McCarthy, Q.C., for appellant.

Quebec.] [June 22.

ROSS *v.* HANNAN.

Sale of goods by weight—Contract, when perfect—Art. 1474 C.C.—Damage to goods before weighing—Possession retained by vendor—Effect of—Arts. 1063, 1064—1802 C.C.—Depositary.

Held, (1) per RITCHIE, C.J., STRONG, FOURNIER, and PATTERSON, JJ., affirming the judgment of the court below, that where goods and merchandise are sold by weight the contract of sale is not perfect and the property of the goods remains in the vendor, and they are not at his risk until they are weighed, or until the buyer is in default to have them weighed; and this is so even where the buyer has made an examination of the goods and rejected such as were not to his satisfaction.

Held, also, per RITCHIE, C.J., FOURNIER, and TASCHEREAU, JJ., that where goods are sold by weight and the property remains in the possession of the vendor, the vendor becomes in law a depositary; and if the goods while in his possession are damaged through his default and negligence, he cannot bring an action for their value.

Appeal dismissed with costs.

Abbott, Q.C., and *Campbell*, for appellant.

Doherty, Q.C., for respondent.

THE EXCHANGE BANK *v.* FLETCHER.

Bank stock given to another bank as collateral security—Banking Act—42 Vict., c. 22, s. 8—Arts. 1970, 1973, 1975, C.C.

The Exchange Bank, in advancing money to F. on the security of Merchants Bank shares, caused the shares to be assigned to their managing director and an entry to be made in their books that the managing director held the shares in question on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Later on, the managing director pledged these shares to another bank and absconded.

Held, affirming the judgment of the court below, that upon repayment by F. of the loan made to him, the Exchange Bank was bound to return the shares or pay their value.

Appeal dismissed with costs.

Macmaster, Q.C., for appellants.

Archambault and *Lacoste*, Q.C., for respondent.

NORDHEIMER *v.* ALEXANDER.

Fire—Fall of wall after fire—Negligence—Damages.

Held, affirming the judgments of the courts below, that the owner of a wall of a house who allows it to remain standing after a fire in a dangerous condition, and takes no precautions to prevent an accident, is liable for the damage

caused by the falling of the wall, even if the falling takes place seven days after the fire during a high wind.

Appeal dismissed with costs.

Laflamme, Q.C., *Cameron*, Q.C., and *Butler*, Q.C., for appellant.

Duhamel, Q.C., and *Marceau*, for respondent.

SCHWERSENSKI *v.* VINEBERG.

Action for account of money paid—Receipt—Error—Parol evidence—Art. 1234—Art. 14 C.C.—Findings of fact—Duty of appellate court.

S. brought an action to compel V. to render an account of the sum of $2,500 which S. alleged had been paid on the 6th October, 1885, to be applied to S.'s first promissory notes maturing, and in acknowledgment of which V.'s bookkeeper gave the following receipt: "Montreal, October 6th, 1885. Received from Mr. D.S. the sum of two thousand five hundred dollars, to be applied to his first notes maturing. M. V., Fred."; and which V. failed and neglected to apply. V. pleaded that he never got the $2,500, and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, dismissed S.'s action.

On appeal, the Supreme Court of Canada

Held, 1. that the finding of the two courts on the question of fact as to whether the receipt had been given through error should not be interfered with.

2. That the prohibition of art. 1234 C.C. against the admission of parol evidence to contradict or vary a written instrument is not *d'ordre public;* and that if such evidence is admitted without objection at the trial, it cannot subsequently be set aside in a court of appeal.

3. That parol evidence in commercial matters is admissible against a written document to prove error. *Ætna Ins. Co.* v. *Brodie*, 5 Can. S.C.R. 1, followed.

Appeal dismissed with costs.

Cooke for appellant.

Hutchison for respondent.

Nova Scotia.] [May 12.

MERCHANTS BANK OF HALIFAX *v.* WHIDDEN.

Bank—Agent of—Excess of authority—Dealing with funds contrary to instructions—Liability to bank—Discounting for his own accommodation—Position of parties on accommodation paper.

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank, which he discounted as such agent, and without indorsing the drafts used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property, by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor, and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full, a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty; the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment,

Held, affirming the judgment of the court below, GWYNNE, J., dissenting, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.

Per RITCHIE, C.J.: K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm, and when the firm received that money they became debtors to the bank for the amount.

Per STRONG and PATTERSON, JJ., that the agent being bound to account to the bank for the funds placed at his disposal became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he failed to account. The right the bank had to elect to treat the act of the agent as a tort was not important, as in any case there was a debt due.

Per GWYNNE, J.: The evidence does not establish that these drafts were anything else

than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper, and were not obliged to look to any other for payment.

Appeal dismissed with costs.

Henry, Q.C., and *Ross*, Q.C., for appellant.

W. Cassels, Q.C., and *W. B. Ritchie*, for respondent.

MUNICIPALITY OF CAPE BRETON *v.* MCKAY.

Municipal corporation—Appointment of board of health—R.S.N.S., 4th ser., c. 29—37 Vict., c. 6, s. 1 (N.S.)—42 Vict., c. 1, s. 6 (N.S.)—Employment of physician—Reasonable expenses—Construction of contract—Attendance upon small-pox patients for the season—Dismissal—Form of remedy—Mandamus.

S. 67 of the Act by which municipal corporations were established in Nova Scotia (42 Vict., c. 1), giving them "the appointment of health officers . . and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R.S.N.S., 4th ser., providing for the appointment of boards of health by the Lieutenant-Governor in Council. RITCHIE, C.J., *dubitante* as to appointment by the executive in incorporated counties.

A board of health appointed by the executive council, by resolution, employed M., a physician, to attend upon small-pox patients in the district "for the season," at a fixed rate of remuneration per day. Complaint having been made of the manner in which M.'s duties were performed, he was notified that another medical man had been employed as a consulting physician, but refusing to consult with him he was dismissed from his employment. He brought an action against the municipality setting forth in his statement of claim the facts of his engagement and dismissal, and claiming payment for his services up to the date at which the last small-pox patient was cured, and special damages for loss of reputation by the dismissal. The Act allows the board of health to incur reasonable expenses, which are defined to be services performed and bestowed and medicine supplied by physicians in carrying out its provisions, and makes such expenses a district, city, or county rate, to be assessed by the justices and levied as ordinary county rates.

Held, 1. Per FOURNIER, TASCHEREAU, and GWYNNE, JJ., that the employment of M. "for the season" meant for the period in which there should be small-pox patients requiring his professional services.

2. Per FOURNIER, TASCHEREAU, GWYNNE, and PATTERSON, JJ., that notwithstanding no provision was made for supplying the municipality with funds in advance to meet the reasonable expenses that might be incurred under the Act, a claim for such expenses could be enforced against a municipality by action.

3. Per RITCHIE, C.J., and STRONG, J., that the only mode of enforcing such a claim is by a writ of mandamus to oblige the municipality to levy an assessment.

4. Per FOURNIER, TASCHEREAU, and GWYNNE, JJ., affirming the judgment of the court below, that M. was entitled to payment at the rate fixed by the resolution of the board up to the time in which there ceased to be any small-pox patients to attend.

5. Per RITCHIE, C.J., STRONG and PATTERSON, JJ., that the claim of M. was really one for damages for wrongful dismissal, which is not within the provision in the act for reasonable expenses.

Appeal dismissed without costs.

W. B. Ritchie for appellant.

Henry, Q.C., for respondent.

New Brunswick.] [May 12.

LAMB *v.* CLEVELAND.

Statute—Repeal of—Restoration of former law—Distribution of intestate estate—Feme coverte—Husband's right to residuum—Next of kin.

The Legislature of New Brunswick, by 26 Geo. 3, c. 11, ss. 14 and 17, re-enacted the Imperial Act, 22 and 23 Car. 2, c. 10 (Statute of Distribution), as explained by s. 25 of 29 Car. 2, c. 3 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal estates as heretofore.

When the Statutes of New Brunswick were revised in 1854. the Act 26 Geo. 3, c. 11, was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme coverte* her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission.

Held, per RITCHIE, C.J., FOURNIER and PATTERSON, JJ., that the right of a husband to the personal property of his deceased wife does not depend upon the Statute of Distributions, but he takes it *jure mariti*.

Per STRONG, J., that the repeal by the Revised Statutes of Geo. 3, c. 11, which was passed in the affirmance of the Imperial Acts, operated to restore s. 25 of the Statute of Frauds as part of the common law.

Per GWYNNE, J.: When a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial courts, and *a fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. 3, c. 11 (N.B.), it was not necessary to enact the interpreting section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole Act.

Held, per RITCHIE, C.J., FOURNIER, GWYNNE, and PATTERSON, JJ., that the Married Woman's Property Act of New Brunswick (C.S.N.B., c. 72), which exempts the separate property of a married woman from liability for her husband's debts and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed.

The Supreme Court of New Brunswick, while deciding against the next of kin on his claim to the residue of a *feme covert*e, directed that his costs should be paid out of the estate. On appeal, the decree was varied by striking out such direction.

Appeal dismissed with costs.

W. W. Wells for appellant.

Skinner, Q.C., for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

BARBER *v.* CLARK.

Mistake—Will—Legacy—Interest.

This was an appeal by the defendant, John R. Barber, from the judgment of the Chancery Division, reported 20 O.R. 522, and came on to be heard before this court—HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.—on the 28th of September, 1891.

J. H. Macdonald, Q.C., for the appellant.

G. H. Kilmer for the respondent.

At the conclusion of the argument, the court dismissed the appeal with costs, agreeing with the reasons for judgment in the court below.

ABRAHAM *v.* ABRAHAM.

Alimony—Judgment—Registration—Priorities—Assignments and preferences—R.S.O. (1887), c. 44, s. 30—R.S.O. (1887), c. 124, s. 9.

This was an appeal from the judgment of MACMAHON, J., reported 19 O.R. 256, by one John Iddington, a creditor of the defendant, in the name of John Hossie, assignee for the benefit of the creditors of the defendant, pursuant to an order made under the provisions of the Assignments Act. The appeal came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 15th September, 1891.

Moss, Q.C., for the appellant.

J. P. Mabee for the respondent.

At the conclusion of the argument, the court dismissed the appeal with costs, agreeing with and adopting the reasons for judgment given in the court below.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

FALCONBRIDGE, J.] [Sept. 2.

IN RE DAVIS AND THE CITY OF TORONTO.

Municipal corporations—By-law—Construction of sewer—Acquiring easement over adjoining lands—R.S.O., c. 184, s. 479, s-s. 15—"Using," meaning of—Quashing by-law—Acting upon by-law—Estoppel—Notice to appoint arbitrator—Costs.

A by-law of a municipal corporation authorizing the construction of a sewer provided, *inter alia*, that for the purpose of the construction the corporation might enter upon and use and occupy with horses, etc., the lands lying within twenty-five feet on either side of the centre line of the sewer; also, that after construction the

corporation might enter upon a strip of land having a width of eight feet on each side of the centre line of the sewer, for the purpose of altering, repairing, etc., the sewer; also, that owners of land through which the sewer was to be constructed might fill up the land over the sewer, or within eight feet on each side of the centre line, and might build thereon provided they did not injure or endanger the sewer, but that no person might put up, repair, alter, or maintain any building thereon without submitting plans to the city engineer and obtaining his approval in writing; also, that the construction of the sewer should not be commenced unless and until the "aforesaid easement" should have been acquired by and vested in the corporation by conveyance from the owners, at a price to be agreed upon, or, in case of disagreement, to be determined by arbitration; and also provided for a penalty and for removal of buildings in case of a breach of the by-law.

Held, that however liberally the court ought to construe a statute in favor of the public right of eminent domain, yet where there is such a complete interference with the right of property as under this by-law, there must be express words authorizing that interference, and the statute of apparent authorization must be strictly construed; and

Held, that such interference was not authorized by s. 479, s-s. 15, of the Municipal Act, R.S.O., c. 184; the word "using" employed therein meaning "holding" or "occupying," when read with the rest of the section.

The sewer in question was part of a system, but the upper end, and not an outlet for any part already constructed.

Held, that, no money having been spent under the by-law, it had not been so acted upon as to prevent its being quashed.

The applicants for an order quashing the by-law before moving had appeared on a notice to name an arbitrator before a judge, who raised the objection to the by-law above referred to, whereupon the applicants gave notice of abandonment.

Held, that the applicants were not estopped, but that they should have no costs.

James Pearson for the applicants.

Biggar, Q.C., for the corporation.

GALT, C.J.] [Sept. 17.

IN RE CRIBBIN AND THE CITY OF TORONTO.

Municipal corporations—By-law prohibiting Sunday preaching in parks—Validity of—R.S.O., c. 184, s. 504, s-s. 10—Violation of constitutional right—Unreasonableness—Uncertainty—"Sabbath-day."

It is provided by R.S.O., c. 184, s. 504, s-s. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, etc.

Held, that the municipal council of a city had power under this enactment to pass a by-law providing that no person shall on the Sabbath-day in any public park, square, garden, etc., in the city, publicly preach, lecture, or declaim.

Held, also, that the by-law violated no constitutional right, and was not unreasonable.

Bailey v. *Williamson*, L.R. 8 Q.B. 118, followed.

Held, also, that the by-law was not bad for uncertainty as to the day of the week intended by reason of the use of the term "Sabbath-day."

C. B. Gordon for the applicant.

H. M. Mowat for the corporation.

Chancery Division.

BOYD, C.] [Sept. 5.

LASBY ET AL. *v.* CREWSON ET AL.

Will—Devise—Tenant for life—Tenants in common—Improvements—How made—Allowance for.

A husband devised his farm to his wife for life with remainder to his children in certain proportions. During the life of the widow, one of the sons, under an agreement with her, worked the farm, supplying her and her unmarried daughter with a home. The farm house becoming uninhabitable, he built a new one, paying for it himself, with the exception of a small sum received from his mother. On her death he claimed to be allowed by his co-devisees for the house as an improvement by a joint tenant.

Held, on an appeal from a master, that if improvements are made before the tenancy in common begins in part, *e.g.*, during a prior life tenancy, the equitable doctrines attaching to improvements made during tenancies in com-

mon do not arise, and that the improvements in this case were not made by the respondent in the character of a tenant in common, but as the agent of his mother, the life tenant, and could not be allowed for.

Hoyles, Q.C., for the adult appellants.
Aytoun-Finlay for the infant appellants.
Bigelow, Q.C., *contra*.

Full Court.]
FERGUSON, J.] [Sept. 5.
ROBERTSON, J.]

TAILLIFER *v.* TAILLIFER.

Private international law—Ante-nuptial contract—Matrimonial domicile—Lex rei sitæ.

Action for administration of estate of Alexis Taillifer.

The deceased, on March 31st, 1864, entered into an ante-nuptial contract in the Province of Quebec with his future wife, the present plaintiff, concerning the rights and property of the parties to it, present and future.

Held, that the provisions of this contract should govern not only as to the movable, but also as to the immovable property of the deceased, though situate in this province, provided that the laws of this province relating to real property were complied with; and it made no difference whether the matrimonial domicile of the parties at the time of the contract and marriage was in Ontario or in Quebec.

The ante-nuptial contract in question was signed by notaries who signed their own names, having full authority from both the contracting parties so to do.

Held, that this was a sufficient signature within the Statute of Frauds to bind the parties.

Shepley, Q.C. for the plaintiff.
Aytoun-Finlay for the infant defendants.
Snow for the adult defendant.

BOYD, C.] [Sept. 17.

ROGERS *v.* ONTARIO BANK.

Fixtures—Mortgagor and Mortgagee—Fi. fa. goods—Interpleader.

Interpleader issue as to certain machinery and buildings erected by the purchaser of an equity of redemption in certain lands upon the said lands.

The machinery in question was placed *in situ* on the land and housed with a view to the utilization of it at a phosphate mine; and it was intended to utilize the machinery upon the land so long as veins could be found. The soil was excavated in order to form a firm bed for the boiler and hoist, and the machinery was firmly attached by bolts to sleepers or skids placed on the rock-bottom of the excavation; and a house was erected over the machinery, to erect which the soil was also to some extent excavated. The boiler and machinery were also fastened to the building by rods inside underneath the floor.

Held, that the chattels in question were fixtures, and could not be removed without the consent of the mortgagee.

Semble, that, apart from this, it was impossible to sell these fixtures under an execution against goods so long as the physical attachment to the land existed, even if the owner of the equity of redemption had had the right to detach and remove them as chattels.

ROBERTSON, J.] [Sept. 17.

IN RE OWEN SOUND DRY DOCK, SHIPBUILDING, AND NAVIGATION CO. (LIMITED).

and

In the matter of the Winding-up Act, c. 126, R.S.C., 1886, and the Amending Act, 52 Vict., c. 32, Can.

Winding-up Act—Contributories—Solvency of company accepting a reduced amount in payment of stock—Right to do so.

A dry dock company, having issued stock to the extent of $15000 and having assets to over $30000 above their other liabilities, passed a by-law accepting from each of the shareholders $3000 as payment in full of $3750 stock. Subsequently the company got into difficulties and was put into liquidation under the Winding-up Act.

On an application by the liquidators to have these shareholders placed upon the list of contributories to the extent of $750 each, it was

Held, on an appeal from a master, that as the company was not only solvent at the time, but had a surplus of sufficient dimensions to warrant them in so doing, they had the right to accept $3000 in payment of $3750 stock, and the appeal was dismissed.

J. M. Kilbourn for the appeal.
Hoyles, Q.C., and *H. B. Smith*, *contra*.

Practice.

BOYD, C.] [Sept. 30.

FLETT *v.* WAY.

Costs—Scale of—Title to land—Set-off of costs—Solicitor's lien—Discretion of taxing officer—Rules 3, 1204, 1205.

Where, in an action by a monthly tenant against his landlord and other persons for wrongful entry upon the demised premises, the landlord denied the plaintiff's tenancy,

Held, that the title to land was brought in question and the costs of the plaintiff were properly taxed on the High Court scale, although the damages recovered were only $104.

Worman v. *Brady*, 12 P. R. 613, and *Danaher* v. *Little*, 13 P. R. 361, followed.

Tomkins v. *Jones*, 22 Q.B.D. 599, specially referred to.

By the judgment in the action, costs were awarded to the plaintiff against the chief defendant and to the other defendants against the plaintiff without any direction as to setting off costs, and the plaintiff's solicitor asserted a lien upon the costs awarded to his client against the chief defendant. The defendants all defended by the same solicitor.

Held, that under Rule 1204 the question of setting off costs was in the judicial discretion of the taxing officer, and that discretion was rightly exercised by the officer in refusing to set-off the costs ordered to be paid to the plaintiff by the chief defendant against the costs ordered to be paid by the plaintiff to the other defendants.

Construction of Rules 1204 and 1205.

The older decisions as to set-off are not applicable since Rule 3.

F. E. Titus for the plaintiff.

J. M. Clark for the defendants.

Flotsam and Jetsam.

COUNSEL: "What is the plaintiff's attitude as to this question?"

Witness: "Recumbent, lies about it constantly."—*Ex.*

THE jury brought in a verdict of "Not Guilty." The judge said admonishingly to the prisoner: "After this you ought to keep away from bad company." "Yes, your honor; you will not see me here again in a hurry."—*Ex.*

Law Society of Upper Canada.

LEGAL EDUCATION COMMITTEE.

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THE LAW SCHOOL.

Principal, W. A. REEVE, M.A., Q.C.

Lecturers: E. D. ARMOUR, Q.C.; A. H. MARSH, B.A., LL.B., Q.C.; R. E. KINGSFORD, M.A., LL.B.; P. H. DRAYTON.

Examiners: FRANK J. JOSEPH, LL.B.; A. W. AYTOUN-FINLAY, B.A.; M. G. CAMERON.

ATTENDANCE AT THE LAW SCHOOL.

This School was established on its present basis by the Law Society of Upper Canada in 1889, under the provisions of rules passed by the Society in the exercise of its statutory powers. It is conducted under the immediate supervision of the Legal Education Committee of the Society, subject to the control of the Benchers of the Society in Convocation assembled.

Its purpose is to secure as far as possible the possession of a thorough legal education by all those who enter upon the practice of the legal profession in the Province. To this end, with certain exceptions in the cases of students who had begun their studies prior to its establishment, attendance at the School, in some cases during two, and in others during three terms or sessions, is made compulsory upon all who desire to be admitted to the practice of the Law.

The course in the school is a three years' course. The term or session commences on the fourth Monday in September, and ends on the first Monday in May, with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's day.

Admission to the Law Society is ordinarily a condition precedent to attendance at the Law School. Every Student-at-Law and Articled Clerk before being allowed to enter the School must present to the Principal a certificate of the

Secretary of the Law Society, showing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

Students, however, residing elsewhere, and desirous of attending the lectures of the School, but not of qualifying themselves to practise in Ontario, are allowed, upon payment of the usual fee, to attend the lectures without admission to the Law Society.

The students and clerks who are exempt from attendance at the Law School are the following:

1. All students and clerks attending in a Barrister's chambers, or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889, so long as they continue so to attend or serve elsewhere than in Toronto.

2. All graduates who on June 25th, 1889, had entered upon the second year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the fourth year of their course as Students-at-Law or Articled Clerks.

Provision is made by Rules 164 (*g*) and 164 (*h*) for *election* to take the School course, by students and clerks who are exempt therefrom, either in whole or in part.

Attendance at the School for one or more terms, as provided by Rules 155 to 166 inclusive, is compulsory on all students and clerks not exempt as above.

A student or clerk who is required to attend the School during one term only must attend during that term which ends in the last year of his period of attendance in a Barrister's chambers or service under articles, and may present himself for his final examination at the close of such term, although his period of attendance in chambers or service under articles may not have expired. In like manner, those who are required to attend during two terms must attend during those terms which end in the last two years respectively of their period of attendance in chambers or service, as the case may be.

Those students and clerks, not being graduates, who are required to attend the first year's lectures in the School, may do so at their own option, either in the first, second, or third year of their attendance in chambers or service under articles, upon notice to the Principal.

By a rule passed in October, 1891, students and clerks who have already been allowed their examination of the second year in the Law School, or their second intermediate examination, and under existing rules are required to attend the lectures of the third year of the Law School course during the school term of 1892-93, may elect to attend during the term of 1891-92 the lectures on such of the subjects of said third year as they may name in a written election to be delivered to the principal, provided the number of such lectures shall, in the opinion of the principal, reasonably approximate one-half of the whole number of lectures pertaining to the said third year, and may complete their attendance on lectures by attending in the remaining subjects during the term of 1892-3, presenting themselves for examination in all the subjects at the close of the last-mentioned term, and paying but one fee for both terms, such fee being payable before commencing attendance.

The course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

Friday of each week is devoted exclusively to moot courts, one for the second year students and another for the third year students. The first year students are required to attend, and may be allowed to take part in, one or other of these moot courts. They are presided over by the Principal or the Lecturer whose series of lectures is in progress at the time, and who states the case to be argued, and appoints two students on each side to argue it, of which notice is given at least one week before the day for argument. His decision is pronounced at the next moot court, if not given at the close of the argument.

At each lecture and moot court the roll is called, and the attendance of students carefully noted, and a record thereof kept.

At the close of each term the Principal certifies to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student is to be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series, delivered during the term and pertaining to his year. If any student who has failed to attend the required

number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal makes a special report upon the matter to the Legal Education Committee. The word "lectures" in this connection includes moot courts.

Two lectures (one hour) daily in each year of the course are delivered on Monday, Tuesday, Wednesday, and Thursday. The moot courts take the place of lectures on Friday. Printed schedules showing the days and hours of all the lectures in the different subjects will be distributed among the students at the commencement of the term.

During his attendance in the School, the student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions, or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, students will be provided with room and the use of books for this purpose.

The fee for attendance for each term of the course is $25, payable in advance to the Sub-Treasurer, who is also the Secretary of the Law Society.

The Rules which should be read for information in regard to attendance at the Law School are Rules 154 to 167 both inclusive.

Examinations.

Every applicant for admission to the Law Society, if not a graduate, must have passed an examination according to the curriculum prescribed by the Society, under the designation of "The Matriculation Curriculum." This examination is not held by the Society. The applicant must have passed some duly authorized examination, and have been enrolled as a matriculant of some University in Ontario, before he can be admitted to the Law Society.

The three law examinations which every student and clerk must pass after his admission, viz., first intermediate, second intermediate, and final examinations, must, except in the case to be presently mentioned of those students and clerks who are wholly or partly exempt from attendance at the School, be passed at the Law School Examinations under the Law School Curriculum hereinafter printed, the first intermediate examination being passed at the close of the first, the second intermediate examination at the close of the second, and the final examination at the close of the third year of the school course respectively.

Any student or clerk who under the Rules is exempt from attending the School in any one or more of the three years of the school course is at liberty, at his option, to pass the corresponding examination or examinations under the Law Society Curriculum instead of doing so at the Law School Examinations under the Law School Curriculum, provided he does so within the period during which it is deemed proper to continue the holding of examinations under the said Law Society Curriculum as heretofore. It has already been decided that the first intermediate examination under that curriculum shall not be continued after January, 1892, and after that time therefore all students and clerks must pass their first intermediate examination at the examinations and under the curriculum of the Law School, whether they are required to attend the lectures of the first year of the course or not. Due notice will be hereafter published of the discontinuance of the second intermediate and final examinations under the Law Society Curriculum.

The percentage of marks which must be obtained in order to pass an examination of the Law School is fifty-five per cent. of the aggregate number of marks obtainable, and twenty-nine per cent. of the marks obtainable upon each paper.

Examinations are also held in the week commencing with the first Monday in September for those who were not entitled to present themselves for the earlier examination, or who, having presented themselves, failed in whole or in part.

Students whose attendance upon lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations, either in all the subjects or in those subjects only in which they failed to obtain fifty-five per cent. of the marks obtainable in such subjects. Those entitled, and desiring, to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time of such examinations, of their intention to present themselves, stating whether they intend to do so in all the subjects, or in those only in which they failed to obtain fifty-five per cent. of the marks

obtainable, mentioning the names of such subjects.

The time for holding the examinations at the close of the term of the Law School in any year may be varied from time to time by the Legal Education Committee, as occasion may require.

On the subject of examinations reference may be made to Rules 168 to 174 inclusive, and to the Act R.S.O. (1887), cap. 147, secs. 7 to 10 inclusive.

HONORS, SCHOLARSHIPS, AND MEDALS.

The Law School examinations at the close of the term include examinations for Honors in all the three years of the School course. Scholarships are offered for competition in connection with the first and second intermediate examinations, and medals in connection with the final examination.

In connection with the intermediate examinations under the Law Society's Curriculum, no examination for Honors is held, nor Scholarship offered. An examination for Honors is held, and medals are offered in connection with the final examination for Call to the Bar, but not in connection with the final examination for admission as Solicitor.

In order to be entitled to present themselves for an examination for Honors, candidates must obtain at least three-fourths of the whole number of marks obtainable on the papers, and one-third of the marks obtainable on the paper on each subject, at the Pass examination. In order to be passed with Honors, candidates must obtain at least three-fourths of the aggregate marks obtainable on the papers in both the Pass and Honor examinations, and at least one-half of the aggregate marks obtainable on the papers in each subject on both examinations.

The scholarships offered at the Law School examinations are the following:

Of the candidates passed with Honors at each of the intermediate examinations the first shall be entitled to a scholarship of $100, the second to a scholarship of $60, and the next five to a scholarship of $40 each, and each scholar shall receive a diploma certifying to the fact.

The medals offered at the final examinations of the Law School and also at the final examination for Call to the Bar under the Law Society Curriculum are the following:

Of the persons called with Honors the first three shall be entitled to medals on the following conditions:

The First: If he has passed both intermediate examinations with Honors, to a gold medal, otherwise to a silver medal.

The Second: If he has passed both intermediate examinations with Honors, to a silver medal, otherwise to a bronze medal.

The Third: If he has passed both intermediate examinations with Honors, to a bronze medal.

The diploma of each medallist shall certify to his being such medallist.

The latest edition of the Curriculum contains all the Rules of the Law Society which are of importance to students, together with the necessary forms, as well as the Statutes respecting Barristers and Solicitors, the Matriculation Curriculum, and all other necessary information. Students can obtain copies on application to the Secretary of the Law Society or the Principal of the Law School.

THE LAW SCHOOL CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.
Deane's Principles of Conveyancing.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, Books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.

Personal Property.

Williams on Personal Property.

Contracts.

Leake on Contracts.

Torts.

Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada.

O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Clerke & Humphrey on Sales of Land.

Hawkins on Wills.

Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.

Criminal Statutes of Canada.

Equity.

Underhill on Trusts.

Kelleher on Specific Performance.

De Colyar on Guarantees.

Torts.

Pollock on Torts.

Smith on Negligence, 2nd ed.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.

Smith's Mercantile Law.

Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's construction and effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

THE LAW SOCIETY CURRICULUM.

Examiners: { FRANK J. JOSEPH, LL.B.
A. W. AYTOUN-FINLAY, B.A.
M. G. CAMERON.

Books and Subjects prescribed for Examinations of Students and Clerks wholly or partly exempt from attendance at the Law School.

FIRST INTERMEDIATE.*

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123, Revised Statutes of Ontario, 1887, and amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O., 1887, cap. 44; the Rules of Practice, 1888, and Revised Statutes of Ontario, chaps. 100, 110, 143.

FOR CERTIFICATE OF FITNESS.

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

FOR CALL.

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

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

*The First Intermediate Examination under this Curriculum will be discontinued after January, 1892.