Canada Law Journal.

VOL. XVII. DECEMBER 15, 1881. NO. 23.

DIARY FOR DECEMBER.

15. Thurs..Christmas vac. in Supreme Court and Exch. Ct. begin. Morrison, J., sworn in, Ct. of Appeal, 1877.
17. Sat..First Lower Canada Parliament met, 1792.
18. Sun..*4th Sunday in Advent.*
22. Thurs..Shortest day.
24. Sat..Court of Appeal and Chancery vacation begin.
25. Sun..*Christmas Day.*
26. Mon..U. C. made a Province, 1791.
27. Spragge, V. C., appointed Chancellor, 1879. Municipal nominations.
31. Sat..Rev. Stat. of Ont. came into force, 1877.

TORONTO, DEC. 15, 1881.

WE understand that the Benchers have decided to take no action towards obtaining any protection to solicitors as against unlicensed conveyancers, at least in the direction of legislation; the reason being that it is said any action of that sort would provoke hostility, and result in harm rather than good to the complainants. We feel rather curious to know wherein the profession could be placed in a worse position than they are at present, unless indeed they were compelled to carry on lawsuits and do conveyancing for nothing, and pay something to clients for this privilege. As it is at present, the privilege they enjoy is to do such work as they would in any event do by reason of their legal education, or, in other words, the work which now exclusively comes to them to be done is only such work as cannot be done by outsiders by reason of their want of legal or technical knowledge. As to the country practitioners, ther privilege is to pay $20 per annum for certificates which are, to use a stage simile, a "screaming farce," and for several volumes of reports which are practically useless from lack of business, litigation—except in Division Courts—being almost *nil*, and conveyancing being in the hands of outsiders for reasons often referred to. The only course that occurs to us in the premises is to abolish the Law Society, sell Osgoode Hall to a "collection bureau," and emigrate to Manitoba, leaving the library to the "invaders," in the Parthian hope that confusion to the public might thereby become worse confounded.

OSGOODE HALL LIBRARY.

The opening of Osgoode Hall Library in the evening is no doubt a decided boon, and we trust we shall not be deemed ungrateful for small mercies if we still decline to rest and be thankful. Osgoode Hall contains a noble collection not only of strictly legal works, but of works on history, on abstract jurisprudence, on metaphysical and moral philosophy, and of *belles lettres.* It would, no doubt, be out of the question to permit those legal text books and reports which are in every day use by practitioners to be taken away from the library and, as regards them, we are content; but we would say a word as to those other works, pertaining rather to general literature than to mere professional literature, which have been doomed to a more hopeless obscurity than ever in "the Bencher's room." Now many would gladly avail themselves of the collection of works of this kind, if a scheme were devised by which they might take them away for a limited period. We submit that to say that those who are so anxious to improve their minds as all that, can come in the evening, is scarcely an answer to this suggestion. We should not be content to give the minimum of help and encouragement to those

who aim at more philosophical and scientific culture, but rather should aid and assist them in every possible way. It is, an uncomfortable thing to start out after dinner and seek the dreary recesses of a large public library, the sight of which you have perhaps become heartily sick o for that day at least. We would earnestly appeal to the library commitee to consider whether a scheme could not be devised whereby, on giving proper security, members of the profession in Toronto should be able to avail themselves more conveniently of that portion of the library which does not consist of works of strictly practical utility. We allude to the works of such writers as Bentham, Austin, Cornewall Lewis, J. S. Mill, and Henry Maine, and to the large collection of historical works and historical records which exist in the library, which our popular librarian is now forced to refuse permission to take away, although he may be well aware that the gentleman asking for them has been the only one who has asked for them for six months, and that he is not likely to be asked again for them for another period equally long. We may remark that the books in the Parliamentary library at Ottawa are obtainable in this way by members of Parliament, and by officers in the civil service.

RECENT DECISIONS.

We have now before us for review the cases reported in L. R. 18 Chancery Div. p. 1—299, being one of the November numbers of the Law Reports.

VENDOR AND PURCHASER—POLICY OF FIRE INSURANCE.

In the first case,—*Rayner* v. *Preston*—the point to be decided was a somewhat curious one. It was in effect as follows :—Where after the date of a contract for the sale of a house, but before the time fixed for completion the house is damaged by fire, is the purchaser entitled, as against the vendor, to the benefit of a policy of insurance previously effected by the vendor, although there is not in the contract any mention of the fact that the vendor had insured, or of the policy? Brett and Cotton, L.JJ., affirming Jessel, M.R. (L.R. 14 Ch. D. 297), and following a decision of Kindersley, V.C., in *Poole* v. *Adams*, 12 W.R. 683, held the purchaser was not entitled as against the vendor. James, L. J., dissented. Cotton, L. J., takes three points in his judgment: (1) that though the contract of sale passes all things belonging to the vendors, appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, it does not pass collateral contracts, and such, at least independently of Imp. 14 Geo. III, c. 78, sec. 83, (which is intended to ensure the *bona fide* laying out of the proceeds of a policy of fire insurance in the rebuilding of the premises burnt) is a policy of insurance; (2) that, even if under Imp. 14, Geo. III, c. 78, the purchasers could have insisted on the proceeds of the policy being applied in rebuilding, the Act only gives a right to insist on the money being so applied, and their claim to have this done is the foundation of and essential to the existence of their right to the money; (3) that an unpaid vendor is a trustee for the purchaser in a qualified sense only,—he is so only in respect of the property to be sold, of which the policy is not a part. The money for the insurance is received by or in respect of the contract of insurance,—it is fallacious to say that it is received in respect of property which is trust property, by reason of the vendor's legal interest in the property. He also observes that, while in his opinion there was no decision in favour of the appellants, there was *Poole* v. *Adams*, supra, directly against them, —and remarks incidentally, p. 7, that the plaintiffs were not entitled, as against the defendants, to rely on a statement of opinion made by the solicitor of the defendants as to the legal rights of the parties. Brett, L.J., distinguishes between the subject matter of

insurance, and the subject matter of the contract of insurance, and shows that, whereas there did exist a relation between the plaintiff and the defendant with regard to the first, viz., the premises insured, there never was any relation of any kind between them so far as regards the second, which is in all cases money, and money only. "Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the plaintiffs; and, so far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants." On the other hand it is wrong to describe the relation which existed as to the *subject matter* of the insurance, as being one of trustee and cestui que trust. It is not a true description between the parties to say "that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase, of which a Court of Equity will, under certain circumstances, decree a specific performance." But he adds, p. 11, "even if the vendor was a trustee, the contract of insurance does not run with the land, but as a mere personal contract; and unless it is assigned no suit or action can be maintained upon it except between the original parties to it," and he compares the settled law as to marine policies, namely, that no interest under the policy passes unless it is made part of the contract purchase and sale of the subject matter of insurance, so that it would be considered in a Court of Equity as assigned. The dissenting opinion of James, L. J., seems to have arisen from his divergence from his colleagues on two points, viz., in holding (1) that the relation between the parties was truly and strictly that of trustee and *cestui que trust*, for "when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deed, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*," though, while the contract is *in fieri*, "it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*;" (2) a policy of *fire* insurance is not a mere collateral contract, but the trustee (the vendor) received the insurance money by reason of and as the actual amount of the damage done to the trust property. It may be observed that he does not cite authority as to his rendering of the law on the first point.

WILLS—INCONSISTENCY—EVIDENCE.

Of the next case, *in re Bywater*, it seems merely necessary to observe (1) that it was held, on appeal from the M. R., that the part of the will, construction of which was desired, was not a case of two inconsistent gifts, in which case the latter clause would prevail, if the Judge could find nothing else to assist him in determining the question, but of a gift of something to arrive at a future time with a subsequent direction as to the time of payment which was inconsistent with the terms of the original gift, and that such subsequent direction could not enlarge the gift, but must be rejected as inconsistent with it; (2) that it was held impossible to allow evidence to be adduced that the latter of the two clauses was inserted by a mistake in copying the altered draft of the will, and in opposition to the testator's direction (cf. Williams on Ex., Ed. 7, Vol. 1, p. 357; *re Duane*, 31 L. J. (P. & M.) 173).

BILLS OF SALE—USAGE—DISCOVERY.

We need not dwell on the next case, *Crawcour* v. *Salter*, so far as it is concerned with the bankruptcy law, but there are three points which came up in it, which it seems well to notice here, viz., (1) the plaintiff hav-

ing lent furniture on hire to the defendants, to be paid for by instalments—the property to remain in him till all instalments were paid—but then to pass to the defendants, this hiring agreement was held not to operate as a bill of sale, just as similar agreements with regard to pianos (*Stevenson* v. *Rice*, 24 C. P. 245; *Mason* v. *Johnson*, 27 C. P. 208; *Mason* v. *Bickle*, 2 App. 291,) or with regard to the sale of safes (*Walker* v. *Hyman*, 1 App, 545) have, in our own courts, been held not to pass the property, so as to come under the Chattel Mortgage Act (R. S. O., 119); (2) the Court of Appeal unanimously declare that the custom of hotel-keepers holding their furniture on hire is now so well established in England that it ought to be taken judicial notice of; (3) it was held by Malins, V. C., p. 36, that a client is not privileged to prevent his solicitor, on the ground of a breach of professional confidence, from giving evidence as to what persons were present at the time of the execution of the deed, which he was employed to have executed, and to which he was one of the witnesses, on the principle laid down by Lord Ellenborough in *Robson* v. *Kemp*, 5 Esp. 52, that if an attorney puts his name to an instrument as a witness he makes himself thereby a public man, and no longer clothed with the character of an attorney.

The next two cases, *Beckett* v. *Attwood* and *Farrow* v. *Austin*, concern points of practice, and have already been noted among our Recent English Practice Cases in former issues.

WILLS—CONDITIONAL GIFT.

In re Brown's Will, p. 61, a testator appointed his wife sole guardian of his daughters, to whom he bequeathed certain legacies contingent on their attaining twenty-one or marrying with the consent "*of their guardian or guardians.*" After the death of the wife, a daughter married under twenty-one without the consent of any guardian or guardians there being none, and died shortly afterwards under the age of twenty-one years. It was held by Fry, J., and by the C. of A. that the condition was not complied with, and that the daughter took no vested interest in the legacies—the condition not being inoperative by there being no guardians, since guardians could have been appointed by the Court, and the testator, on the language of his will, must be taken to have contemplated such an appointment. And a distinction is drawn both by Fry, J., and by the C. of A., between this case, and such a case as *Dawson* v. *Oliver-Massey*, L. R. 2 Ch. D. 753, which fell under the rule laid down by Story, J.—Eq. Jur. sec. 291—that "where a literal compliance with the condition becomes impossible *from unavoidable circumstances and without any default of the party*, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called *cy-pres.*" It may be added that James, L. J., expresses his opinion, p. 72, that the consent of a guardian appointed by the infant herself would not have satisfied the condition.

COPYRIGHT.

The point of practice as to costs which arose in the next case, *Dick* v. *Yates*, p. 76, was duly noted among the Recent English Practice Cases for Oct. 15 ult., and we will merely add here that some points of considerable importance as to the law of copyright in the matter of titles of books arose in it, and an opinion is clearly expressed (see pp. 89, 93), that there cannot in general be any copyright in the title or name of a book. At p. 90, James, L. J., distinguishes the unauthorized use of a man's name or of the title of his work as an ordinary common law fraud, and not one of the two modes of invasion, (*a*) "piracy," (*b*) "literary larceny," against which the Copyright Acts have protected an author.

EXECUTORS.

The main point in the next case,—*In re Morgan, Pilgrem* v. *Pilgrem*, p. 93, proceeds upon the "very clear" principles (per Fry, J., p. 99) that (1) if an executor, in pursuance of

the directions contained in the testator's will, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name, and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets; but (2) lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. Yet (3) when the possession and the time which has elapsed are in accordance with the trusts of the will, no such inference can arise.

MORTGAGE.

Ex parte Harrison, in re Betts, p. 127, is also a case "entirely covered by authority" (per Bacon, C. J.), the points decided being (1) that the proceeds of a distress for rent levied under an attornment clause in a mortgage deed are, in the absence of any provision to the contrary in the deed, applicable to the payment of principal as well as interest; and (2) the fact that the yearly rent reserved by the attornment clause is equal in amount to the yearly interest of the mortgage debt as provided by the deed, and is made payable on the same days, is not of itself sufficient to displace the *prima facie* right of the mortgagee to apply the proceeds of the distress in satisfaction of principal as well as interest.

PURCHASE BY RAILWAY— STATUTORY CONSTRUCTION.

In *in re Pigott & the G. W. Ry. Co.*, p. 146, there is a point decided which seems to call for some notice, viz., that a complete contract being established between a railway company and a landowner by the notice to treat, and an award under the Imp. Lands Clauses Consolidation Act, 1845, fixing the amount of the purchase money, the ordinary rules as between vendor and purchaser apply to such a contract, including the liability of the purchasing company, in a proper case, to pay interest on their purchase-money. The two sections of the Imperial Act, relied on as altering the general law, do not, however, occur in our General Railway Act, (R. S. O. c. 165), though it may be remarked that the argument grounded on sec. 75 of the Imp. Act might be raised equally speciously on sec. 22 of R. S. O., c. 165. The former provides that on deposit in the bank of the compensation awarded, the owner shall when required convey,—and the latter provides that upon payment of the compensation awarded, or on its deposit, as in that Act provided, the award shall vest in the company the power to take possession of the lands, and in neither case is interest mentioned. But as to this, Jessel, M. R., says (p. 152): "No doubt in the ordinary case, where the interest is payable, the vendor is not bound to convey till his purchase money and the interest thereon are paid to him; but the mere fact of his conveying without the payment of the interest would not deprive him of the interest: and in some cases, as we know, he has got interest even after the conveyance, so it is no conclusive that, because on payment the vendor is bound to convey, he therefore loses the interest when he is entitled to it." He ordered the Company to pay interest at 4 per cent. per annum on the purchase-money from the time when they might have taken possession or entered into the receipt of the rents, on a good title being shewn. It may be added that at p. 151, the M. R. observes that where it is not contended that there is any enactment in words, but where the Court is asked to infer an enactment from certain provisions to be found in the Act, —in such cases the argument of reasonableness and common justice ought to have great weight.

RAILWAYS.

The next case,—*In re Birmingham and Lichfield Ry. Co.*,—is a decision of the M.R. that a railway company which has never commenced to acquire the lands or construct the railways authorised by their Act is not an

"undertaking" within the meaning of sec. 4 of the Imp. Railway Companies' Act, 1867, (Imp. 30-31 Vic., c. 127,) of which a receiver can be appointed under that section. The section in question places restriction on execution by a judgment creditor against the rolling stock and plant of railways, but provides that such creditor may obtain the appointment of a receiver "of the undertaking of the company." There appears to be no parallel enactment in our own General Railway Act (R.S.O., c. 165), in the interpretation clauses of which, it may be added, "the undertaking" is defined to mean "the railway and works, of whatever description, by the special Act authorised to be executed." There is a *dictum* in the judgment in this case that a receivership, under the above section 4, does not extend to unpaid calls.

UNDUE INFLUENCE—PARENTAL CONTROL—SOLICITORS.

The case of *Bainbrigge* v. *Browne*, p. 188, is one of some interest, it establishes the propositions that (1) when a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, if the deed is subsequently impeached by the child, the *onus* is on the father to show that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with a free intention of giving the father the benefit conferred by it, and if this *onus* be not discharged the deed will be set aside; (2) this *onus* extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity, but not further. In this case the children, who desired to have a deed set aside as improperly obtained, were as follows: a daughter about twenty-five, a son about twenty-four, and a second son about twenty-two. Fry, J., held that none of them were entirely emancipated from the father's control. He says, p. 196, "None of them appears to me to have been conversant with business. The young lady had been residing in her father's house, and had not, apparently, in any way mixed in the world except under his control and under his roof; at all events she had not resided apart from him. The two sons were students in Universities, and were not familiar with legal matters." The deed in question was one in which the children had charged their reversionary interests under a marriage settlement with the payment of certain mortgage debts due by their father. They executed it in the presence of a clerk of their father's solicitor, who had prepared or approved the deed, the clerk attesting their execution. Fry, J., adverts to this fact, at p. 198 of his judgment, where he says:—"Unless I am to hold that it is absolutely necessary that the solicitor who is advising the children in such a case should be a different person from the solicitor who is advising the parent, I am unable to find that the defendants had notice of any of the circumstances from which undue influence can be inferred," and held the defendants had no such notice.

FORCIBLE ENTRY.

The case of *Edwick* v. *Hawkes*, p. 199, illustrates and interprets the statute of 5 Rich. 3, stat. 1, c. 8 relating to forcible entry, which would appear to be in force in this country just as other ancient English statutes relating to the same subject have been held to be, (*Boulton* v. *Fitzgerald*, 1 Q. B. 344; *R.* v. *McGreavy*, 5 O. S. 620.) The statute in question provides that even where there is a legal right of entry, no man shall enter with strong hand, nor with multitude of people, but only in a peaceable and easy manner. And Fry, J. held in this case that where a tenant, under a mistaken idea that he had forfeited his lease, and to avoid immediate eviction, signed a writing as follows: "I undertake to give you quiet possession on the 29th instant, and you may use this letter as leave and license to eject me without any process of law on that date;" this was in effect a license to commit a crime under the above act, and therefore void. The learned Judge further holds, p. 21, that the operation

of the statute is not confined to the mere act of getting over the border, the edge, of the property in question peaceably, but that, if an entry be made peaceably, and if, after entry made, and before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the Statute of Rich. II.

SPECIAL COVENANT BY TENANT.

It is also held in this case, that (1) a covenant by the tenant of a public-house to purchase of his landlord all beer to be sold or consumed in or upon the premises is not broken by the tenant buying through an agent, without the knowledge of the landlord, beer made by the landlord; and (2) an *obiter dictum* is expressed, p. 207, that in the case of such a covenant, and in the absence of express stipulation, there is an implied obligation on the part of the landlord to supply the tenant with such kinds of beer as he requires, and if this obligation is not fulfilled the tenant is at liberty to buy the beer which he requires elsewhere.

There still remain several noticeable cases in the number of the L. R. 18 Chy. Div. which we have been reviewing, but space compels us to postpone any remarks upon them until our next number, as also upon the recent issues of our own reports,—46 Q. B., Nos. 4 & 5; 5 S. C. No. 2; and 6 App. R. Nos. 5, 6 & 7—now before us.

ACTS OF LAST SESSION.

IMPERIAL 44-45 VICT.

It is obviously unnecessary to review the recent English enactments with the same particularity as we reviewed those of this Province and of the Dominion in our numbers for September 1 and October 15, respectively. Still it can scarcely fail to be of interest, and it may be of considerable importance, to review the more important measures of law reform passed by the Imperial parliament, the more especially as the wisdom of our legislature prompts it so often to avail itself of the ripe learning and wide experience of the lawyers and statesmen of the mother-country. As we observed on Oc 15, chaps. 1-22 of the volume of Imperial statutes now before us contain nothing in the nature of law reform, nor is it until chap. 41 is reached that special attention is called for.

Chap. 41 is entitled—"An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others, various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other instruments; and for amending in various particulars the Law of Property; and for other purposes:"—but as our contemporary, the *Law Journal* (Eng.) observes, brevity, alliteration and respect for its author claim it as "Cairns' Conveyancing Act." It is of considerable length, but the numerous articles, already published in our English contemporaries, greatly facilitate us in making such observations upon it as seem in place here. The *Law Times*, (Eng.) regards the Act very unfavourably, declaring that it is open to the criticism passed by Mr. Toots upon his distinguished friend, the Chicken, viz., that its expressions are coarse and its meaning obscure; and observes with amusing sarcasm—"If we were asked to take upon us the invidious task of pointing out the worst-drawn section in the Act, we should, humbly and with a deep sense of the difficulty of selection, yet with a modest confidence, lay our finger upon section 9;" while it also hazards the conjecture that sect. 14 "alone would suffice to provide the Chancery Division with work for years to come."

We shall notice here such of the provisions as seem of special interest in the light of our own conveyancing law, which are not indeed very numerous. The character of conveyancing in England where pro-

perties are of immense value, where the retaining of estates in families is of vital importance to the nobility and landed gentry, and where, moreover, an effectual system of registration of title seems unattainable, is necessarily greatly more complex than it is ever likely to be on this continent, and many of the provisions of the Act have no bearing upon conveyancing as it exists with us.

The first section we would call attention to is sec. 4, which provides that if, on the death of any person, there is a subsisting contract for the sale of a freehold estate of inheritance, enforceable against his heir or devisee, "his personal representative shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract." Imp. 38-39 Vict. c. 87, sec. 48, which corresponds to our R. S. O. c. 107, sec. 5, provided, that if a bare trustee dies intestate as to fee simple trust estates, these shall vest in the legal personal representative from time to time of such trustee. But in *Morgan* v. *Swansea Urban Sanitary Authority*, L. R. 9 Ch. D. C. 582, the M. R. decided that a vendor who had let the purchaser into possession, and then died intestate before payment of the purchase money, was not a bare trustee within this last mentioned section. The difficulties arising from this decision appear rectified in England by the new enactment: and compare R. S. O. c. 107, sec. 25.

At sec. 7 commences that part of the Act which concerns certain covenants for title which are to be *implied* in conveyances made after the Act, but which may be varied by deed, and "as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied." This certainly appears a less satisfactory method than that adopted with us of giving short forms of covenant, with an enactment that the covenants given *in extenso* should be implied.

Then after certain enactments as to production and safe custody of title deeds, sec. 10 provides that the benefit of every covenant of a lessee, and the obligation of every covenant of a lessor, which has reference to the subject matter of the lease shall run with the reversion, and it also provides for the apportionment of all conditions contained in leases on severance. Sec. 14 contains restrictions on and relief against forfeiture of leases; sec. 15 enables a mortgagor to require a mortgagee to transfer instead of to re-convey; sec. 18 enlarges the leasing powers of mortgagors and of mortgagees in possession; sec. 19-24 contain new provisions as to mortgagee's powers of sale, insurance, timber-cutting, etc.; sec. 25 provides for sale in actions of foreclosure, sec. 26-29 provides for a statutory form of mortgage; sec. 30 provides that the legal personal representative of a sole trustee or mortgagee in whom an estate of inheritance is vested, and who dies after the act, shall have power to deal with the estate; thus going further than our enactment, R. S. O. c. 107, sec. 15, which only applies to mortgages, and to cases where the mortgage money is paid; sec. 32 provides for the retirement of a trustee, with the consent of his co-trustees, and such person if any who has power to appoint trustees, without any new trustee being appointed; sec. 35 relates to the mode in which trustees may sell, *e. g.*, by auction or private contract, etc.; sec. 37 empowers executors and trustees to compound for any debt or claim; secs. 41, 42 and 43 relate to sales and leases on behalf of infant owners, and to the management of land and receipt and application of income during minority; secs. 46-48 relate to Powers of Attorney, and enable a donee of a power of attorney to execute in his own name, and relieves him, when acting *bona fide* from all liability arising from the death, lunacy or revocation of the donor, of which he had no notice; secs. 49-64 contain sun-

dry enactments as to the construction and effect of deeds and other instruments, of which one of the most noticeable is contained in sec. 54 which provides that a receipt for consideration, money or securities in the body of a deed shall be a sufficient discharge for the same without any further receipt for the same being endorsed on the deed; sec. 65 provides for the enlargement of the residue of long terms into fee simples; lastly, sec. 70 contains a most important provision that an order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not. This goes far beyond the terms of Imp. 19-20 Vict., c. 120, sec. 28, (in force in this Province by virtue of R. S. O. c. 40, sec. 85), and as the *Law Journal* (Eng.) observes, one result will probably be that even a recent sale from the Court will generally be made a root of title on a resale out of Court.

Of the remaining Acts in this volume of the Imperial Statutes we need say but little. Chap. 49 comprises the Land Law (Ireland) Act, 1881, but it not until chap. 60 is reached that we find any statute of general interest from the point of view of law reform. Chap. 60 is an Act to Amend the Law of Newspaper Libel, and to provide for the registration of newspaper proprietors. Of this we need merely mention sec. 2, as the rest of the provisions of the Act relate to matters of procedure, and of registration of the proprietors. Sec. 2 provides that "Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit: provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

We can now pass on to chap. 68, which is an Act to Amend the Supreme Court of Judicature Act, and is to be called—"The Supreme Court of Judicature Act, 1881." Sec. 2 is of historical interest in that it provides that the present *and every future Master of the Rolls* shall cease to be a Judge of H. M.'s High Court of Justice, but shall continue by virtue of his office to be a Judge of H. M.'s Court of Appeal. The sections 3-8 inclusive merely relate to the organization of the Courts. Secs. 9-10 concern appeals under the Imp. Divorce Act, 20-21 Vict., c. 85. Sec. 11 amends sec. 4 of the Supreme Court of J. Act, 1875, by enacting that a judge who was not present and acting as a member of a divisional court of the High Court of Justice, at the time when any decision which may be appealed from was made, or at the argument of the case decided, shall not, for the purposes of that section, be deemed to be, or to have been, a member of such divisional court. (cf. Ont. J. A. sec. 4 taken in connection with R. S. O. c. 38, sec. 13). Sec. 12 provides that in cases of urgency one judge may officiate for another. The remainder of the Act concerns merely matters of administration and organization, and need not be further noticed here.

The next Act, chap. 69, applies to all parts of the empire, and is an Act to amend the law with respect to fugitive offenders. Sec. 2 provides that where a person accused of having committed an offence (to which this part of this Act applies) in one part of H. M.'s dominions has left that part, such person, if found in another part of H. M.'s dominions, shall be liable to be apprehended and re-

turned in manner provided by this Act to the part from which he is a fugitive. Sec. 9 provides that this Act is to apply to every offence, no matter by what name called, which is for the time being punishable in any part of H. M.'s dominions in which it was committed, either on indictment, or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment. The remainder of the Act is mainly concerned with supplying the necessary machinery to carry its main purpose into effect.

At the end of the volume are tables showing the effect of the year's legislation, consisting of Table A, which shows the effect of the Act on former Acts, and Table B, which shows the Acts of former sesssons (in chronclogical order) repealed and amended by Act of 44-45 Vict. The adoption of similar tables at the end of our own statutes could not fail to render it greatly more easy to keep track of the rapid changes in the law.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION

IN BANCO.—Nov. 26.

PHILLIPS v. GRAND RIVER, &c., INSURANCE CO.

Misrepresentation—Fixture—Waiver.

Plaintiff and his brother had a conveyance made to them by their father. The land was under mortgage at the time to one C., and plaintiff and his brother gave a mortgage to their father to secure the purchase money, their father consenting to pay the mortgage to C. A house was built by plaintiff for himself on a quarter of an acre of land, as agreed with his father and brother, plaintiff to retain the house as his property if his brother was unable to pay for the land. The house stood on blocks of wood. Plaintiff told defendant's agent that the house was free, and held by him in fee, though the land was encumbered. A condition in the policy provided that any encumbrances should be disclosed, and failing it should be void.

Held, (ARMOUR, J., dissenting) that the house was not a chattel, but a fixture, would pass with the land, that it had not been insured as chattel property, and that the non-disclosure was fatal; but that the chattels which the policy covered were not affected by the misrepresentation.

The directors, having resolved to pay the plaintiff's loss without knowing of the encumbrance and then rescinded their resolution, *held*, that defendants had not waived the right of making this defence.

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

Hardy, Q.C., contra.

WILSON v. TOWNSHIP OF YORK.

Arbitration—Validity of award—Umpire—Dismissal of Township officers.

Municipal Councils may dismiss their officers at pleasure without notice and cause.

Defendants pleaded to a suit for dismissal and on common counts an arbitration under which all differences had been determined between the parties. The submission was to S. and M. "and such third person as said arbitrators should appoint, so that said arbitrators or umpire make his award by 15th January," &c There was powef of enlargement. S. and M. appointed a third arbitrator, and the award was executed by S. and E. only, and was apparently that of the arbitrators.

Held, E. not an umpire, but a third arbitrator, and "umpire" in the reference was surplusage and the award bad.

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

McMichael, Q.C., contra.

FRASER v. MCLEAN.

Composition with creditors—Fraud.

Plaintiff and defendant agreed that plaintiff should take for his claim against defendant some timber limits and chattels and some money and should release defendant. Defendant entered into a compromise with his

creditors by a deed of even date, to which he got their assent by deceit.

Held, (ARMOUR, J., dissenting) that plaintiff should have repudiated the whole deed and not seek to avail himself of part only,—and that having being nonsuited the nonsuit was right.

Bethune, Q.C., for plaintiff.

McCarthy, Q.C., contra.

COMMON PLEAS DIVISON.

Osler, J.] [Nov.

BOSWELL v. SUTHERLAND.

Control—Impossibility of performance—Destruction of goods by fire.

The defendant by bond bound himself to produce the goods and chattels embraced in a chattel mortgage given by P. to plaintiff on P. making default in payment so as to enable the plaintiff to seize and sell them under the mortgage.

Held, that a contract of this kind is subject to the implied condition that if before breach performance becomes impossible because the specific articles have without default of the obligor ceased to exist, their performance is excused; and therefore to an action on the bond alleging such default, a plea setting up that before breach and without any default on defendant's or P's. part the goods were destroyed by fire, was a good answer.

Osler, J.] [Nov.

BENNETT v. THE UNION INS. COMPANY.

Pleading—Non est factum—Effect of—Judicature Act, Rules 141-493.

To a declaration on a policy of insurance made by defendants, but not averring that it was made under the corporate seal, the defendants pleaded *non est factum.*

Held, plea good, for that the declaration sets forth a completed instrument, a policy of insurance made by defendants a corporation, and this, *ex vi termini*, imports a seal, but in any event the plaintiff cannot be embarrassed by the plea, as it must, under the Judicature Act, Rules 141-493, be treated as a mere denial of the rendering of the contract of insurance in fact and not of the legality or sufficiency in law.

Armour, J.] [Nov.

PARKER v. PARKER.

Executrix—Action against—Evidence in corroboration—R. S. O. ch. 62, *sec.* 10, *construction of—Common Counts—Money paid.*

Held, under R. S. O. ch. 62, sec. 10, which provides that in a suit by or against the heirs, executors, etc., of a deceased person an opposite party "shall not obtain a verdict, judgment, or decision therein on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence," any evidence adduced corroborating the evidence of the interested party in support of his claim or defence in any particular it must be submitted to the jury as sufficient corroboration in point of law, the weight to be attached to it in point of fact being a matter for their consideration.

Orr v. *Orr*, 21 Gr. 397, and *McDonald* v. *McKinnon*, 26 Gr. 12 commented upon.

In this case, which was an action on the common counts against the defendant as executrix, etc., for money paid to the defendant's, testator's, use, the transaction arose out of some promisory notes made by the testator and the plaintiff, but which the plaintiff alleged he signed for the accommodation of the testator and had subsequently paid for the testator.

Held, that on the evidence set out in the case, the evidence on the part of the plaintiff was sufficiently corroborated within the meaning of the Act, and that the evidenee supported the count for money paid.

The plaintiff, under the circumstances, was entitled to recover.

McMichael, Q.C., for the plaintiff.

Moss and *Falconbridge*, Q. C., for the defendant.

ONTARIO.

IN THE COURT OF APPEAL.

NOVEMBER 28.

From Queen's Bench.]

ROBINSON v. HALL.

Nonsuit—New trial—Appeal.

The plaintiff being in possession of land as tenant of H., was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to the possession, evidence of equitable rights to possession in the plaintiff being refused. A new trial was directed.

Held, that this Court should not interfere.

Bethune, Q.C., for the appellant.

J. K. Kerr, Q.C., for the respondent.

From Common Pleas.]

THE ANCHOR MARINE INSURANCE CO. v. THE PHŒNIX INSURANCE CO.

Insurance—Freight—Loss.

The plaintiffs were insurers of a cargo of grain, and the defendants insurers of both hull and freight of the vessel, which was owned by M. The vessel sank during the voyage and damaged the grain. The master refused to deliver it to the plaintiffs unless his freight were paid. The plaintiffs paid the freight and took an assignment of M.'s policy. Both the owner and the plaintiffs thought it more prudent to take the cargo to Buffalo, as being more saleable there than in Kingston, its original place of destination, which was accordingly done. The plaintiffs now sued on the defendant's policy as assignees of M.

Held, affirming the decision of the Court below (30 C.P. 570) that they were not entitled to recover; for their only rights were those of M., who had suffered no loss for which the defendants were liable, inasmuch as he had paid his freight.

Maclennan, Q.C., for the appellants.

Robinson, Q.C., and *H. W. M. Murray*, for the respondents.

GILDERSLEEVE v. MCDOUGALL.

Contract—Breach—Cause of action—C. L. P. Act, sec. 49.

The plaintiff, at Kingston, Ontario, having ascertained the price of forging a cross-head for an engine, wrote to the defendant at Montreal, Quebec:—"I am in receipt of your telegram in answer to mine, hoping you will forge cross-head at 7c. per lb., and enclose drawing, which explains itself. Please leave metal enough to finish up to the sizes in the drawing, and ship to me as soon as finished per G.T.R." In answer, the defendant wrote:—"Yours of 20th duly at hand, with sketch of cross-head inclosed. The same will have immediate attention, and as soon as ready I will ship to your address." The cross-head was planed in Kingston, where a defect in the forging was discovered, and the beam, after being used on the plaintiff's steamer for several months, broke at the defective point. On a motion to set aside the service of the writ, the plaintiff undertook to prove at the trial a cause of action which arose in Ontario, or in respect of a contract made therein.

Held, reversing the decision of the Court below (31 C.P. 164), that the contract being to forge and deliver on the G. T. Railway at Montreal, was a contract made in the Province of Quebec, and as the defect in the beam, being the breach of the warranty that it should be reasonably fit for the purpose for which it was made, existed when it left the workshop at Montreal, the breach also occurred in that Province, and the plaintiff should therefore be nonsuited.

McMichael, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

ROBINS v. VICTORIA MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Loss—Proof within 30 *days—Relief from—R. S. O. cap.* 162.

Held, affirming the judgment of the Court below, that R. S. O. cap. 162, applies to Mutual Insurance Companies.

Held, also, that the second section of that Act applies to the time within which proofs of loss may be delivered, as well as to the proofs themselves; and the plaintiff having failed, through accident, to deliver his proof within 30 days from the loss, was entitled to recover.

Burton, J.A., dissenting.

McCarthy, Q.C., and *Bruce* for the appellants.

Lennox, for the respondent.

PEAK v. SHIELDS.

Insolvent Act of 1864, *sec.* 8, *sub-section* 7—*Insolvent Act of* 1875, *sec.* 136—*Fraud in obtaining credit—Contract made abroad—Jurisdiction of Parliament of Canada.*

The plaintiffs sued for goods sold and delivered to the defendants, who were insolvents, and, under sec. 136 of the Insolvent Act of 1875, charged fraud in the defendants in pro-

curing the goods on credit, knowing themselves to be unable to meet their engagements and concealing the fact from the plaintiffs. The defendants were domiciled in Canada, and the contract was made in England.

Held, affirming the judgment of the Court below (31 C. P. 112), that the act charged was not a crime, nor were the proceedings criminal, but that the Statute gave an additional remedy for the recovery of the debt; and it made no difference, therefore, that the contract was made in England.

Per Spragge, C.J.O. (Morrison, J.A., concurring). Section 136 of the Insolvent Act of 1875, dealing with matter of procedure incident to the law of Bankruptcy and Insolvency, was within the jurisdiction of the Parliament of the Dominion of Canada to enact.

Per Burton, J.A. This section, which gives certain creditors a remedy for the recovery of their debts in full, is contrary to the policy of insolvency laws, which aim at a rateable distribution of the assets among all the creditors of the insolvent, and does not properly come under the head of Bankruptcy and Insolvency, and is, therefore, *ultra vires* of the Parliament of Canada. But section 8, sub-sec. 7, of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it.

Per Patterson, J.A. The plaintiff is entitled to recover whether sec. 136 of the Insolvent Act of 1875 is *ultra vires* or not; for the Parliament of the Dominion of Canada either had power to deal with the subject of this section, in which case it would be binding; or it had not the power to do so, in which case the same enactment in the Insolvent Act of 1864 is unrepealed and in force.

Bethune, Q.C., for the appellants.

Rose, Q.C., for the respondents.

From Court of Chancery.]

WATSON v. LINDSAY.

Unpatented lands — Mortgage — Sale under power—Patent—Statutes of Limitations.

D. A. C., being the locatee of the Crown, in 1860 mortgaged the north half and the south half of the land by two mortgages to McM. In 1865, he died. In 1870, McM. assigned one mortgage to D., and in 1874 he assigned the other. In 1875, the patent of the north half issued to one Campbell, who paid the purchase money due the Crown on the whole lot at the request of M. C. and H. C., the widow and son respectively of D. A. C., and patents of the east and west halves of the south half, issued to M. C. and A. C. respectively, without intending (as shown by the memo. in the Crown Lands Department), to cut out the rights, if any, of D. under his mortgage. In 1876, D. sold under the power in his mortgage to L., who, in 1877, made a mortgage to the plaintiff on which this suit was brought. D. A. C., M. C. and A. C. had, in the meantime, always occupied the land without paying interest, and they claimed title by possession.

Held, affirming the decision of the Court below (27 Gr. 253), that the Statute of Limitations having commenced to run, was not interrupted either by the sale under the power in D.'s mortgage, which conveyed only the estate which D. had, or by the granting of the land by patent in 1875.

Black and *Francis*, for the appellant.

J. K. Kerr, Q.C., and *Beck*, for the respondents.

THE ATTORNEY-GENERAL OF ONTARIO *ex rel.* BARRETT v. THE INTERNATIONAL BRIDGE COMPANY.

Injunction—Bridge Company—Specific performance of Act of Parliament—Locus standi of Attorney-General of Ontario.

The defendant company was incorporated for the construction of a bridge from Canada to the United States across the Niagara river, which was to be, "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed, seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put into condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. The bridge, owing to engineering difficulties, could not be adapted to the use of carriages and foot passengers.

Held, reserving the decree of Spragge, C. (28 Gr. 65), that the abandonment of that portion of the work which was to have accommodated foot passengers and carriages was not a public nuisance, but probably an abuse of the Act of Incorporation; that the Act of Incorporation was not a contract of the public, but merely gave conditional powers, creating correlative duties; that the Act was permissive, and specific performance thereof would not be enforced.

Held, also, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such a contract existed, had no *locus standi*.

The work being one within the jurisdiction of the Parliament of Canada, the Attorney-General of Canada, presumably with the

knowledge of the state of the bridge, allowed debentures to be issued charged upon it.

Held, that upon this ground, also, the Attorney-General of Ontario was not the proper party to file the information.

Held, also, that, as the bridge extended beyond the limits of the Province, part only being therein, it would be unavailing for the Court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason, also, the Court would not interfere.

LOWSON v. THE CANADA FARMERS' INSURANCE COMPANY.

Mutual insurance—Proprietary policy.

The defendants were authorized by their charter to carry on both proprietary and mutual insurance business; but they were debarred from taking risks which were extra hazardous in the mutual branch. The plaintiff's property, falling within the prohibited class, was insured with the defendants, and he gave a premium note, instead of making a cash payment, but the policy issued to him was not a mutual policy, but an absolute un ertaking to pay the loss. He also paid several assessments.

Held, reversing the judgment of the Court below, that the policy was not a mutual one, there being nothing except the premium note (which was not conclusive) to indicate that it was a mutual insurance, and the property being of such a nature that it could not be insured in the mutual branch.

Crooks, Q.C., and *Cattanach*, for the appellant.

Maclennan, Q.C., and *W. Cassels*, for tbe respondents.

From Proudfoot, V.C.]

GRIFFITHS v. PERRY.

Insolvent Act of 1875, *secs.* 130, 132—*Fraudulent preference.*

The plaintiffs, who were sub-contractors for the stone and brickwork of a public school, and who were to receive payment from the principal contractors, who were the only contractors recognized by the Public School Board, procured an assignment to themselves of the balance due them by the contractors for their completed work, and payable to the contractor by the Board. The contractors were, at the time, unable to pay their debts, which the plaintiffs knew, and an attachment in insolvency issued against them within three months after the assignment of the claim.

Held, affirming the decision of the Court below, that the assignment was a contract within the meaning of sections 130 and 132 of the Insolvent Act of 1875, and the plaintiffs could not maintain a bill to enforce payment of the balance assigned to them.

Bain, for the appellant.

W. Cassels, for the respondents.

DAVIDSON v. OLIVER.

Will, construction of—Legacy—Condition.

A., by the third clause of his will, devised and bequeathed the residue of his estate to his wife four sons and two daughters, the devise and bequest being subject to the condition that they all unite in paying to the executors the money for the legacies to two of the sons, Alexander and Duncan. By the 4th clause he gave the legacies without condition to Alexander and Duncan. By the 5th clause he devised to his sons Douglas and Oliver two lots; and after giving several legacies to his daughters he proceeded, "and further, that Alexander and Duncan work on the farm until the legacies become due." Alexander left the farm and entered into mercantile pursuits.

Held, affirming the decision of the Court below (Patterson, J.A., dissenting), that Alexander was entitled to the legacy absolutely, and that the testator's wish that he should work o the farm was not a condition precedent to his right thereto.

Moss, for the appellant.

Boyd, Q.C., for the respondent.

SCOTTISH AMERICA INVESTMENT COMPANY v. THE CORPORATION OF THE VILLAGE OF ELORA.

Municipal Corporation—Loan for encouragement of industry—Power to loan—Debentures—Rate of Interest on.

Held, affirming the decision of the Court below, that a municipality, acting under 36 Vict. cap. 48, sec. 372, sub-sec. 5 (O.) has power to lend money for the encouragement of any branch of industry, notwithstanding the use of the word "bonus" therein, which does not necessarily import a gift; and they are therefore liable on their debentures issued for the purpose of raising money to be so lent.

The rate of interest payable on the debentures was seven per cent.

Held, that section 217 of 29-30 Vict. cap. 51, has not been repealed, though marked "effete" in the schedule to, and not re-enacted in, 36 Vict. cap. 48 (O.), and that the above rate was lawful.

Jacob, for the appellants.

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

McEDIE v. WATT.

Collusive judgment—R. S. O. cap. 118.

Held, affirming the decision of Blake, V.C., that the cases under the Absconding Debtors' Act do not apply to cases coming under R. S. O. cap. 118.

Labatt v. *Bixel*, 29 Gr. (not yet reported) approved and followed.

Gibbons, for the appellant.

R. C. Smith, for the respondent.

CALVERT v. BURNHAM.

Specific Performance of agreement to lend—Cloud on title—Mortgage—Demurrer.

A bill alleged that a mortgage was executed by W. to the defendent in consideration of $450, that the defendant advanced only $150 thereon, and W. being entitled to receive the balance conveyed his equity of redemption to the plaintiff and assigned the rights to receive the balance, that the defendant refuses to pay the balance, and claims to hold the mortgage as security for $450. The prayer was for specific performance, or, in the alternative, a declaration of the above facts and for general relief. At the hearing the learned Judge allowed a demurrer *ore tenus*, on the ground that an agreement to lend money would not be specifically performed.

Held, reversing this judgment, that, upon the facts alleged in the bill, viz., that the mortgage was being held for more than had been advanced thereon, and therefore to that extent formed a cloud upon the title, the plaintiff would be entitled to a declaration to that effecr and appropriate relief and as the demurrer admitted the truth of the allegation it should have been overruled.

Bethune, Q. C., and *Poussette*, for the appellant.

E. Blake, Q. C., for the respondent.

From C. C. York.]

BANK OF MONTREAL v. GILCHRIST.

Landlord and tenant—Attornment—Title.

S., being indebted to the plaintiffs, entered into an agreement amongst other things to mortgage to them certain lands (amongst others) known as the Dominion Hotel property. A mortgage was the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly owned by S. adjacent thereunto inserted. The defendant had been the tenant of S., and after the mortgage attorned and paid some rent to the plaintiffs, believing them to have title to the lands. This action was for arrears of rent.

Held, affirming the decision of the Court below, that, after such attornment and payment of rent, the defendant could not be heard to deny the plaintiffs' title, and they, being the equitable owners of the land, were entitled to recover.

Held, also, that the title thus not being open to question the County Court had jurisdiction.

Tilt, for the appellant.

Ferguson, Q. C., for the respondent.

BOOTH v. PRITTIE.

Yearly hiring—Defeasible contract—Statute of Frauds.

Held, reversing the decision of the Court below, that a contract of hiring for a year or more, defeasible within the year, is within the 4th section of the Statute of Frauds.

Maclennan, Q. C., for appellant.

J. McGregor, for the respondent.

SATO v. HUBBARD.

Garnishee proceedings—County Court—Appeal.

There is no appeal from an order made in garnishee proceedings in a County Court, appeals from the County Court being expressly limited to the cases mentioned in section 35 of the County Courts Act. Section 200 of the C. L. P. Act does not give a general appeal from the County Courts, being controlled by the subheading preceding section 189.

Beaty, Q. C., for the appellant.

Tilt, for the respondent.

WATSON v. SEVERN.

County Court—Liquidated demand—Jurisdiction—Corroboration.

K. sold for S. (the defendant's testator) a quantity of goods, which the former in his evidence said was a definite quantity—which he could not recollect, but not less than 30 hhds., and not more than 40—at the price of $10 per hhd.. The plaintiff sued for the price of 30 hhds.

Held, that the demand was liquidated by the act of the parties at the time of the sale, and that the action was within the jurisdictition of the County Court.

K. had assigned to the plaintiff the moneys due him by S.

Held, that K., who was a witnesss, was not "an opposite or interested party to the suit,"

within the meaning of the Evidence Act, and his evidence did not require corroboration as against the executors of S.

Tilt, for the appellant.

Delamere, for the respondent.

From C. C. Peel.]

ANDREWS v. STUART.

Assignment for creditors—Revocable deed—Preference—R. S. O. cap. 118, *sec.* 2—*Surprise.*

A deed of stock in trade and lands was made by B., an insolvent debtor to the plaintiff, in trust to convert the same into money, pay the expenses of the trust, retain 10 per cent. of moneys received by way of compensation, and to pay "the present execution and other privileged creditors, if any, according to privilege, and in such amounts as they might agree to receive, next to divide the balance *pari passu* among other creditors, and to pay the surplus, if any, to B." The plaintiff took possession under the deed. The trustee was not a creditor, and there was no evidence of any acceptance of the deed by any of the creditors. The defendant seized under an execution a few days after the deed.

Held, affirming the judgment of the Court below, that the deed was a revocable, voluntary instrument, the relation of trustee and *cestui que trust* not having been established between the plaintiff and the creditors, and, therefore, was void as against the defendant.

Held, also, that it was void under R. S. O. cap. 118, sec. 2, as it did not provide for the paying rateably and proportionably, and without preference or priority, all the creditors, but gave a preference to others besides existing execution creditors.

The abstaining of a party from proof under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by suprise, is not a ground for granting a new trial.

J. A. Patterson, for the appellant.

Bruce, for the respondents.

From C. C. Northumberland and Durham.]

WATSON v. BRADSHAW.

Promissory note—Gift inter vivos.

The plaintiff had performed services for one P. in his lifetime; and he, intending to make some recognition thereof, told her that a certain promissory note, payable to himself, was hers, saying,—"Here is your note; take it when you want it." The plaintiff told P. to keep it for her as she had no place in which to keep it, and he did so.

Held, affirming the decision of the Court below, that the gift was not complete.

Moss, Q. C., (with him *R. R. Loscombe*), for the appellant.

J. K. Kerr, Q. C., for the respondent.

CHANCERY DIVISION.

Proudfoot, J.] [December 7.

SCHOOL BOARD OF NAPANEE v. THE MUNICIPALITY OF NAPANEE.

Mandamus—Return.

The mode of procedure, when a return has been made to a mandamus *nisi* and the plaintiffs are not satisfied with it, is to demur, plead to or traverse the return, to which the defendants may reply, take issue, or demur.

DICKEY v. NEIL.

Receiver—Costs.

The necessity for a Receiver's obtaining the sanction of the Court before commencing suits is for the protection of the fund. Where he proceeds without this sanction he will in general be refused his costs, though costs may be allowed him if his action has been beneficial to the fund.

Where a Receiver in such a case brought a suit without meaning to look to the fund,

Held, that he had a right to do so, and the defendant could not object to his obtaining the relief with costs.

RODY v. RODY.

Dower—Election.

A testator appointed three executors, and directed that his real estate should be leased to one of them until J. R. and J. should attain twenty-one. There were also benefits conferred upon his widow by the will.

Held, that his widow was bound to elect.

DRYDEN v. WOODS.

Will—Construction of.

A testator directed that, at the death of his wife, if she survived him, all his estate (with certain exceptions) should be sold, and the proceeds equally divided among his four daugh-

ters and three sons and their children, after paying $200 to each of the three children of his deceased daughter R. He left surviving him his widow, who was still living, three sons and four daughters, and twenty-seven grandchildren. Two of the grandchildren were born after the date of the will but before the testator's death, and one was born after his death.

Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the Court declined to make an order.

McDONALD v. FORRESTAL.

Sale of goods—Passing of property.

The plaintiffs shipped crude oil to A., who was a refiner, on the agreement that the property should not pass till A. made certain payments. A., without making the payments, sold to the defendant, without the knowledge of the plaintiff, who dealt with A. as a refiner only.

Held, following *Hyman* v. *Walker*, 1 App. 345, that the plaintiff was entitled to judgment against the defendant for the price of the oil.

LEE v. CREDIT VALLEY RAILWAY CO.

Creditors' suit—Receiver discharged—Creditors' rights.

A Receiver was appointed under the decree in this suit to collect revenue, and, after paying expenses, to pay the balances into Court, which were to be paid out on the report of the Master to the parties entitled as found by him. The plaintiff, pursuant to advertisement for creditors, proved his claim. The Master had not made his report. By 44 Vict. cap. 61 (O.), the defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of C. and F., who were appointed creditors' trustees, in payment of all moneys necessary to be paid for the discharge of the Receiver in this suit. An order of Court was made, on the application of the defendants, discharging the Receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came in under it should take fifty cents on the dollar.

Held, that the position of affairs having altered since the time at which the plaintiff had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible.

HILLOCK v. BUTTON.

Marriage Settlement—Improvidence—Power of Revocation.

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside.

The plaintiff, who had just come of age, being about to marry, applied to her solicitor who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage.

Held, that it was not a voluntary settlement; and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake.

WRIGHT v. HURON.

Church Society—Commutation fund.

Quære, whether a written license to a parson is not necessary in the Diocese of Huron; but if necessary the defendants, having placed the name of the plaintiff on the list of clergymen entitled to a share in the Commutation Fund, could not afterwards object the want of such license in a suit instituted by him to enforce payment of his share of such fund.

The rights to pass by-laws necessarily imports a right to repeal the same, but this cannot be done to the prejudice of a party who has obtained rights under such by-laws without his assent. Therefore the Church Society of the Diocese of Huron, having received certain moneys, invested the same, and then appointed a committee to consider the future application of the surplus of such fund, and on the report of the committee passed a by-law providing that every clergyman of not less than eight years' active service in the diocese, who was not under ecclesiastical censure, not on the Commutation Fund, and not in receipt of any salary, should be entitled to $200 a year. Under such by-law the plaintiff was placed on the list of clergymen entitled to such allowance of $200 from the surplus interest of such fund, and for some time received it, and the defendants, under an Act of the Legislature, succeeded the Church Society:—

Held, that the plaintiff had a vested interes in such surplus interest of which he could not be deprived, so long as he came within the provisions of the by-law under which he had been placed on such list; and a subsequent by-law repealing all former by-laws, and declaring that all former grants made in pursuance of prior by-laws should cease, could not effect such vested rights of the plaintiff.

CHAMBERS.

Boyd, C.] [Nov. 28.

BANK OF COMMERCE v. BRICKERS.

Mortgage—Foreclosure—Final judgment after appearance—Rule 80.

In an action for foreclosure, the writ was endorsed pursuant to Rule 17 for foreclosure, possession, and immediate payment under the covenant. Upon appearance the plaintiff moved for final judgment under Rule 80, and the defendant filed affidavits imputing fraud to the plaintiff's agent, who obtained the mortgage.

Held, affirming the decision of the Master in Chambers, that the case was not within Rule 80, which applies only to actions when the writ is endorsed pursuant to Rule 14, a distinct procedure having been contemplated for the various claims in mortgage cases.

Held, also, that the Master rightly refused to allow cross-examinations on the affidavit filed, inasmuch as the motion was not properly made.

Tate Blackstock, for plaintiff.

C. Millar, contra.

Proudfoot, J.] [Dec. 5.

G. v. R.

Foreclosure — Married Woman — Separate Estate.

Action on a mortgage dated 8th June, 1873, and made according to Short Form Act, between G. & S., of &c., and Ellen R., &c., hereinafter called the mortgagors of the first part, and the plaintiff, of the second part.

The mortgagors covenanted in the mortgage that the mortgagors would pay the mortgage money and interest, and observe the above proviso. The bill (filed in June, 1881), contained usual clauses for foreclosure and immediate payment without any averment that the defendant, Ellen R., had any separate estate. The prayer of the bill asked, *inter alia*, for immediate payment by both defendants and foreclosure. The bill had been endorsed with a general endorsement instead of the long form. The case came before PROUDFOOT, J., by way of motion for judgment on Nov. 16.

W. Fitzgerald, for plaintiff.

PROUDFOOT, J.—I have no authority to make a personal order against the defendant, Ellen R., unless she has separate estate. The bill contains no allegation that she has separate estate, and therefore the decree cannot contain an order for payment against her, either out of her separate estate (if any) or otherwise. In other respects the usual decree may go.

Proudfoot, J.] [Dec. 5

SMITH v. BABCOCK.

Foreign Commission—Issue of—Practice.

By an order in the suit dated 4th Nov., 1881, it was directed that a commission might issue directed to John Babcock, Esq., Poughkeepsie, N. Y., a commissioner named on behalf of the defendant, for the examination upon oath of Robert Millard, *viva voce*, as a witness, &c., and of any member or members of the firm of Collingwood, Millard & Co., or persons in the employ of such firm, as witnesses, upon interrogatories on behalf of the defendant.

On 2nd Dec., 1881, the defendant applied to the Clerk of R. and W. for a commission to issue, directed to J. H., Esq., &c., under the order of 4th Nov., without having filed any interrogatories, noting that at present he only desired to examine R. M. *viva voce*, and not to act on the second part of the order. The Clerk of R. and W. refused to issue the commission except in the terms of the order, holding that defendant must either file his interrogatories, or, if he abandoned the latter part of the order, have the order amended accordingly.

A Hoskin, Q.C., applied for a direction to the Clerk of R. and W. to issue the writ as requested.

PROUDFOOT, J.—The Clerk of R. and W. acted properly in refusing to issue the commission. The defendant may amend his order, and take it for the examination of R. *viva voce* alone.

REPORTS.

RECENT ENGLISH PRACTICE CASES

(Collected and prepared by A. H. F. LEFROY, ESQ.*)

LAIRD V. BRIGGS.

Imp. O. 27, *r.* 1—*Ont. O.* 23, *r.* 1 (*No.* 178)

The plaintiff claimed to be tenant in possession of a part of the foreshore of the sea at Margate, and sought to restrain the defendant from removing shingle from the foreshore, and from placing bathing machines upon it. The defendant claimed an easement and by his statement of defence, denied that the plaintiff was or ever had been in possession of the foreshore in question, "save subject to the rights of the defendant."

Held, by Court of Appeal, that the defendant should be allowed leave to amend his statement of defence by striking out the qualifying words, making the denial of the plaintiff's possession an absolute one, and claiming the ownership of the foreshore.

[July 25, C. of A.—45 L. T. N. S. 238.

This was an appeal by the defendant from a decision of Fry, J. (reported 43 L. T. N. S. 632) who refused the defendant leave, at the trial, to amend his defence, so as to turn a qualified denial of the plaintiff's possession of the foreshore in question into an unqualified denial of mere possession.

JESSEL, M. R.—It appears to me that with a view of trying the real question between the parties, that amendment ought to have been allowed. The case between the plaintiff and defendant raised two issues; one issue was the title of the plaintiff to sue the defendant at all; the other was the title of the defendant to the easement he claims by virtue of the statutory right. Now if it could be shewn that the plaintiff had no right to sue the defendant, it seems to me it would not be proper to refuse the defendant leave to amend with the view of trying that question. The plaintiff is not prejudiced; because having stated what he can prove if the Court is of opinion that that is not sufficient he is not injured at all; aud on the other hand, if we allow the defendant to be fixed by what is now really an admission, except by the strictest rules of interpretation, it will deprive him of his property altogether. I think the amendment should be allowed, and the plaintiff should be put to show that he has a title, because I am by no means convinced that there ever was a case in which the Court of Equity or the High Court has interfered on behalf of the plaintiff simply in possession, who had no title to that possession.

[NOTE.—*The Imperial and Ontario Orders are virtually identical. This case was more briefly noted in our issue for Sep.* 15*th.*]

RE SLADE; SLADE V. HULME.

Imp. O. 9, *r.* 2. *O.* 45 *r.* 2 *O.* 47. *Ont. O.* 6 *r.* 2 (*No.* 34). *O.* 41, *r.* 5 (*No.* 370). *O.* 38 (*No.* 339).

Sequestration—Substituted service.

The sequestrators, under a writ issued by the Probate and Divorce Division, applied on motion in the Chancery Division, that a certain annuity, ordered in an administration action in that Division to be paid to him, whose property they were directed to sequester, should be paid to them.

Held, on return of order *nisi*, issued in Chancery Division, they were entitled to have the order made absolute, and it was not necessary for them to commence fresh proceedings to obtain such order.

Also, where he. against whose property the writ o sequestration was issued, had left England, and substituted service of the writ of sequestion, and of the order *nisi* (as it was at first) for the payment of the annuity to the sequestrators, had been made upon a firm of solicitors who had acted for him both in the divorce and Chancery proceedings, and who instructed counsel to appear for him, and show cause against the order *nisi* being made absolute:

Held, substituted service had been properly made, although the time allowed rendered communication between the solicitors and the party impossible.

[Aug. 2, Chy Div.—30 W. R. 28, 45 L. T. N. S. 276.]

(1) With reference to the first point as to the application of the sequestrators, FRY, J., reviewed all the cases bearing on the subject, and said:—

"That exhausts all the authorities on the subject, and it may be observed that there is no case which says that an action is necessary, while there is at all events one case which says that in circumstances like the present an order may be made in an existing action at the in-

*It is the desire of the compiler to make the above collection of cases a complete series of all current English decisions, illustrative of our new pleading and practice, under the Supreme Court of Judicature Act.

stance of the sequestrators. I ask myself if there is any inconvenience in making such an order, and I answer that I can find none. The court is administering the estate of a deceased testator, and one of the persons interested under the will of that testator has, in effect, encumbered his interest in the estate. Nothlng is more common than for the Court to assist an incumbrancer, though not a party to the action, and in giving effect here to the sequestration, I am only, in effect, allowing an incumbrancer to assert his claim. I shall, therefore, hold that the application of the sequestrators, by way o, motion in this action, was regular, and that the order *nisi* was properly made."

(2) With reference to the form of order, FRY J., expressed his opinion that the proper form would have been to direct payment of the annuity named by the trustees under the will being administered to the sequestrators, and to order that no other money should be paid to him, whose property was sequestered, without notice being given to the sequestrators.

(3) As to the point with reference to substituted service, FRY, J., said—

"The only question, according to *Hope* v. *Hope*, 4 DeG. M. & G. 328, is this: Has the service been effected on a person actually or impliedly authorized to receive service as agent for an absent principal, and is the inference irresistible that the fact of the service having been affected will be communicated by the agent to the principal? In this case I have not the slightest doubt that Messrs. Stibbard (the solicitors) will communicate with W. S. (the party affected). It is their duty to do so. If I had had the slightest doubt as to the point it would have been removed by the course which the proceedings have taken, for this very firm, without having received special instructions from W. S., have instructed counsel to appear for him."

[NOTE.—*Imp. O.* 9, *r.* 2, *and Ont. Rule No.* 34, *though not identical, are virtually so as regards the part illustrated by this case. The same may be said of Imp. O.* 45, *r.* 2, *and Ont. Rule No.* 370. *We have no order corresponding to Imp. O.* 47, *which gives a right to issue writs of sequestration, without order, to enforce certain judgments; but Ont. Rule* 329 *provides that judgments for payment of money may be enforced by any modes before in use, and G. O. Chy.* 391 *provides for the issue of writs of sequestration.*

THE QUEEN v. SAVIN.

Imp J. A., 1873, *ss.* 19, 45—*Ont. J. A. ss.* 13, 14, 15, 37, 33, 34.

[Dec. 20th, 1880. C. of A.—29 W. R. 688.

No leave is necessary to appeal from a decision of the Q. B. D. upon a special case stated by Quarter Sessions, where the Court is exercising its original common law jurisdiction. Dictum of Lord Cairns, C., in *Overseers of Walsall* v. *L. & N. W. Ry. Co.*, L. R. 4 App. Cas. at p. 42, to that effect approved of.

NOTE.—*The contents of Imp. J. A.*, 1873, *sec.* 19, *seem comprised, though in terms not quite identical, in Ont. J. A. secs.* 13, 14, 15 *and* 37, *Ont. J. A. sec.* 33 *is not identical with Imp. J. A. sec*, 45; *the former seems to require leave in all cases of appeals from the judgment or order of any Divisional Court or Judge to the Court of Appeal, except in the cases therein mentioned whereas the latter appears only to require leave in the case of appeals from the decision of Divisional Courts given on appeal from inferior Courts.*

WILLIAMS v. BRISCO.

Imp. O. 20, *n.* 14.— *Ont. O.*, 25, *r.* 12 (*No.* 214).

Costs — Default of Pleading — Setting aside judgment.

[May 19. Ch. D.—29 W. R., 713.

Action for specific performance of alleged agreement. Plaintiff obtained judgment against the defendant on substituted service and in default of pleading, plaintiff alleging defendant was avoiding service.

Dates were as follows: Writ issued Oct. 19, 1880; statement of claims delivered Nov. 19, 1880; judgment obtained Dec. 18, 1880; and served upon the defendant by affixing it to the door of his residence in February, 1881. The defendant now moved to set aside the judgment,

and that he might be at liberty to appear and defend the action, and that the cost of his application might be costs in the action.

His case was that the judgment was the earliest notification he received of the action, and that, inasmuch as the alleged agreement did not in point of fact exist, he had a good defence on the merits. His affidavit disclosed the ground of his defence.

HALL, V.C., discharged the judgment, and gave the defendant liberty to appear and deliver a statement of defence not later than 14 days from the date of this order, but directed at the same time that the defendant should pay to the plaintiff all his costs of the action subsequent to the delivery of the statement of claim, and including his costs of, and consequent upon this motion.

[NOTE.—*The Imp. and Ont. Orders are identical.*

COX v. JAMES.

Imp. O. 16, *r.* 13—*Ont. O.* 12, *r.* 15 (*b*). *No.* 103.

[Nov. 4, Ch. D.—W. N., 1881, p. 134

The consent which Imp. O. 16, r. 13, (Ont. O. 12, r. 15, b) requires to be given by a person whom it is proposed to add as plaintiff need not be in writing; it is sufficient if the solicitor for the existing plaintiff states that he is authorized to consent on behalf of the proposed new plaintiff, the solicitor taking the ordinary responsibility of using a plaintiff's name.

[NOTE.—*The Imperial and Ontario Orders are identical as regards the part illustrated by this case.*]

HOWELL v. METROPOLITAN RY. CO.

Imp. O. 45. *r.* 3.—*Ont. O.* 41. *r.* 6 (*No.* 371). *Purchase money—Garnishee order—Attachment of equitable debt.*

[Nov. 9, Ch. D.—W. N. 1881, p. 134.

In August, 1878, the defendant company served the plaintiff with a notice to treat in respect of a leasehold house, and on the 27th of November the purchase-money was assessed by a jury and verdict given for £3,650. On the 4th of December a good title to the property was shewn. Before that date, but after the verdict, garnishee orders *nisi* were obtained and served by two judgment creditors of the plaintiff. On the 25th of January, 1879, the plaintiff issued the writ in this action against the company for specific performance, and on the 8th of May obtained judgment with costs accordingly, in pursuance of which the company paid the purchase-money into Court. Other garnishee orders *nisi* were served after good title shewn but before judgment.

Several charges having been given by the plaintiff upon the house and purchase-money, a question arose upon the priorities as between the several incumbrancers, whether the fund in Court was a debt which could be attached by a garnishee order under Rules of Court, 1878, Order 45, r. 3.

Counsel for the holders of the garnishee orders *nisi*, contended that the purchase-money in Court was in the nature of an equitable debt from a purchaser to a vendor, and as such was capable of being attached.

CHITTY, J., held that the purchase-money did not constitute a debt "due or accruing" within the meaning of Order XLV., r. 3, its payment being conditional only, that is, upon the execution of a conveyance by the vendor. The Order meant a debt that had been actually perfected. Consequently the fund could not be attached by the garnishee orders.

[NOTE.—*The Imperial and Ontario Rules are identical.*]

SCHGOTT v. SCHGOTT.

Married woman suing by her next friend—Authority.

[Nov. 4, C. of A.—W. N. 1881. p. 134.]

This was an appeal from the decision of Bacon, V.C., noted in our issue of Oct. 1., p. 365.

The COURT (Jessel, M. R. and Baggallay, Brett, and Lindley, L. J J.) dismissed the action with costs, to be paid by the solicitors of the next friend.

WARNER v. MOSSES.

Imp. O. 12 *Aug.* 1875, *r.* 26—*Ont. O.* 50, *r.* 15 (*No.* 442)—*Costs of interlocutory application—Copies of pleadings.*

[Nov. 5. C. of A.—W. N. 1881. p. 135.]

The Court of Appeal had ordered part of an affidavit filed on behalf of the plaintiff to be ex-

punged as scandalous, and had given the defendants their costs of the application as between solicitor and client. The taxing master disallowed the costs of copies of the pleadings for the use of council and the judges on the ground that it was not the practice to allow the expense of copies of pleadings except at the hearing. Bacon, V. C., disallowed objections to this finding.

The COURT (Jessel, M.R., and Brett and Lindley, L.JJ.) reversed the decision and allowed the cost of the copies, holding that the general rule laid down by the taxing master could not be sustained, and that as the copies were necessary to enable the case to be properly argued they must be allowed.

[NOTE.—*The Imperial and Ontario Rules are identical.*

CLARKE v. BRADLAUGH.

Time from which writ takes effect—Day, fractions of—Fiction of law.

[Nov 14, C. of A.—W. N. 1881, p. 139.

Appeal of defendant from judgment of Queen's Bench Division on his demurrer to the statement of claim, reported L. R. 7 Q. B. D. 151, and noted in in our issue for Sept. 15, p. 343.

The defendant in person argued, as in the Court below, and also that the Parliamentary Oaths Act, 1866, had been repealed in respect to penalties, as well as with respect to the form of the Parliamentary oath, by the Statute Law Revision Act, 1875.

The COURT (Lord Coleridge, C.J., and Baggallay and Brett, L.JJ.) now affirmed the judgment which had been given for the plaintiff by the Queen's Bench Division.

DALRYMPLE v. LESLIE.

Ont. O. 27.

Disclosure—Whether party interrogated is bound to state contents of documents in his possession.

[Nov. 10.—W.N. 1881., p. 138.

Motion by way of appeal from an order of Lindley, J., discharging a master's order directing that the defendant in an action for libel should make a further answer to interrogatories. The plaintiff's second interrogatory required the defendant to state whether she sent any letter or letters to a third person making any libellous statements of the plaintiff set out in the interrogatory, or statements to the same purport and effect, and further to state as fully as she could what her statement or statements were, and to exhibit a copy or copies of them if she had them. The defendant answered that to the best of her recollection and belief she did not send any letter or letters making the statements mentioned in the interrogatory "or any of those exact statements;" that she did write a letter to the third person, but she had no copy of it, and was unable to state "with exactness" what the statements contained therein were.

The COURT (Grove and Bowen, JJ.) held that the answer was sufficient, and affirmed the decision of Lindley, J.

Motion refused.

LAW STUDENTS' DEPARTMENT.

THE LAW SCHOOL.

The revived Law School is hard at work. The Chairman of the School, Mr. Thomas Hodgins, Q.C., opened on 13th inst., with an interesting lecture on Constitutional Law, a subject with which he is very familiar. In his first lecture he took up the question of the relation of the Colonies with local legislatures to the Empire. He will on Tuesday next discuss the various constitutions granted to Canada since the Treaty of Paris in 1763, and subsequently take up the British North America Act and the Criminal Law.

The other lecturers are Mr. J. D. Delamere, who lectures on Pleading and Practice, and Messrs. J. E. McDougall and E. D. Armour, on subjects not yet definitely arranged.

The lectures are given on Tuesday and Thursday until Christmas vacation. They begin again after January 9th, and will be delivered on the Monday, Tuesday, Thursday and Friday of each week until May 1st.

EXAMINATION QUESTIONS AND ANSWERS.

Q. 12. Does the Statute of Frauds affect the creation of trusts, and if so, in what cases and what manner? Give examples of cases where the statute would, and would not, operate.

A.—It requires, by section 7, all creations of trusts of lands to be proved by writing, signed by the party legally capable of declaring the trust; but section 8 makes an exception in favour of trusts arising by operation of law.

Examples. (1.) A person gives a sum of money to his brother and verbally directs the brother to hold it in trust for the brother's infant son and pay it to the son on his coming of age. Here a good trust is created, which can be proved by the verbal direction.

(2.) The same person assigns a leasehold house to the brother and verbally directs that it shall be held in trust for the brother's son. This is void, as a trust of land not evidenced by writing; there will therefore be a resulting trust for the assignor.

Q. 13. Under what circumstances may "secret trusts" or trusts affecting a devisee or legatee be created? State the leading points which have been established on the subject.

A.—If a testator informs a devisee or legatee of the devise to him and states that he wishes him to fulfil certain trusts, and the devisee or legatee promises to fulfil them, or by silence leads the testator to believe that he will fulfil them; then, although the proof of these trusts depends on verbal evidence only, the Court will compel the devisee or legattee to give discovery of what passed, and will not allow him to keep the property. Therefore, if the trusts so declared are lawful, the Court will compel their execution in favour of the objects named. But if the trusts are unlawful, such as a charitable trust of land, the Court will hold that a resulting trust arises for the heir-at-law. In like manner, if a person requests his heir-at-law or next of kin to perform a trust in consideration of his allowing property to devolve upon them, and they by assent or silence induce the person in question to die intestate, the trust will be enforced. (Lewin, Ch. v. s. 3, § 8-17.)

Q.—9. Testator by will directs that his debts be paid, and gives pecuniary legacies, and gives his residuary personalty to A., his executor (who proves), and devises his realty to B.

The personalty is probably insufficient for debts.

A legatee desires to obtain the best judgment for administration to which he is entitled.

State the terms of such judgment, and particularly whether plaintiff is entitled to have it extended to realty, and if so, on what grounds.

A.—The judgment would direct the ordinary accounts of the personal estate, and direct it to be applied in paying the testator's debts, and then the legacies given by his will, and would go on to say that if the personalty wss insufficient to pay the debts and legacies, then not only should the deficiency of the debts be raised out of the real estates, but also the legatees were entitled to stand in the place of the creditors against the real estate, to the extent that such creditors had exhausted the personal estate. It would then go on to direct inquiries as to the real estate, and give directions for raising the amount required to pay the debts and make good the personal estate. (Compare Seton, 4th ed. 981; and see next question.)

REVIEWS.

PRINCIPLES OF THE LAW OF TORTS, OR, WRONGS INDEPENDENT OF CONTRACT. First American from Second English Edition, by Arthur Underhill, M. A., of Lincoln's Inn, &c., with American Cases by Nathaniel C. Moak, Counsellor at Law, Albany, N. Y. William Gould & Son, 1881.

Mr. Underhill, though an Equity and Conveyancing Counsel, produced a work on Torts that filled a void, inasmuch as it dealt with principles apart from illustrations; that is, a rule of law was stated, and a few well-selected cases, carefully digested, were added, which, within the limits of the work, sufficiently illustrated the rule. This was found admirably suited to the requirements of students, and often as a handy book to the practitioner; and its value is proved by having now gone through three editions in England. The object of Mr. Moak has been to supplement the labours of the English editor for the benefit of practising lawyers in various States of his own country, with their differing laws. Situated as we are, it is obvious that a careful selection of United States decisions must often be of great use to usin Canada, where the circumstances, climate, habits and incidents of life are necessarily somewhat similar. The editor has in the work before us simply reprinted the text of Mr. Underhill's book, and added to it as part of the text, but within brackets, statements of the law in his own country, with appropriate reference to cases illustrating the propositions laid down. We are hardly competent, from want of familiarity with the state of the law across the border, to form an opinion as to whether this has been well done; but at least judging from the remarks of legal journals that should be able to form an opinion, we fancy it has; we

can at least testify to the amount of information given. The index is very full, and adds largely to the value of the book, which is well printed and in a readable shape.

A NEW LAW DICTIONARY AND INSTITUTE OF THE WHOLE LAW, by Archibald Brown, of the Inner Temple, Barrister, &c. Second Edition. London: Stevens & Haynes, Bell Yard, 1880.

Mr. Brown is well-known to the profession in connection with his edition of Snell's Equity, and a short treatise on the law of Fixtures, &c. The second edition of his Law Dictionary was rendered desirable by reason of the passing of the Judicature Act and other changes in the law. It seems very complete as regards the number of titles referred to, containing *les termes de la ley* in all its branches, Equity, Common Law, Roman, International, Constitutional, Parliamentary, &c., including the maxims, in fact a great mass of information on a variety of subjects, in an accessible form. Its main feature is brevity; with this is combined accurate completeness. One is astonished to see how much information can be compressed into such a comparatively small compass. The author, we remark, cites largely from the reports in giving his definitions, and does not fail to give the authority, so that for the purpose intended some of the titles are in the nature of a digest. A most useful thing is a good law dictionary, and no library can be complete, nor can any student comfortably or profitably carry on his studies without having one at hand to refer to. The general reader will also often turn with advantage to its pages.

This law dictionary has been very favourably received in England, and is a credit to both author and publisher.

CORRESPONDENCE.

Master and Servants Act—Appeal.

To the Editor of the CANADA LAW JOURNAL:

SIR,—In a case recently tried at Peterborough under the Master and Servants' Act, the learned Judge of the Division Court, on the appeal to him from an order of Justices of the Peace for payment of wages, held that the service of notice of appeal upon the solicitor who appeared for the servant before the magistrates was not sufficient, and dismissed the appeal He held that notice should have been served upon the respondent personally, although it was clearly proved to the satisfaction of the Judge that every effort had been made to effect personal service, but that the respondent had disappeared from the neighbourhood on the day of the trial before the magistrates and could not be found. If this decision be correct, then the Legislature had better patch up the Division Courts Act of 1880 by restoring the practice as to service of notice of appeal to what it was under the Dominion Act of 1870, which provided for service upon the Magistrate. Otherwise, servants who have obtained orders for payment from ignorant or prejudiced magistrates can easily avoid an appeal by keeping out of the way for four days, leaving their solicitor to manage the business for them. A serious feature in the case referred to is that the solicitor who appeared at the first trial for the servant appeared on the appeal for the magistrates, and took the objection to the notice.

Yours, etc.

E.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

APPLICATION OF PAYMENTS.—A Treatise on the Application of Payments by debtor to creditor; being a complete compilation of the law pertaining to the rights of debtor and creditor respectively; and also giving the various rules for the guidance of the courts when no appropriation has been made by the parties. By George G. Munger, late Judge of Munroe County, New York. Baker, Voorhis & Co., New York, 1879.

CRIMINAL LAW.—Principles of the Criminal Law. A concise exposition of the nature of crime, the various offences punishable by the English Law, the law of criminal procedure, and the law of summary convictions; with table of offences, their punishments and statutes; tables of cases, statutes &c., by Seymour F. Harris, B. C. L., M.A. (Oxon.) author of "A concise Digest of the Institutes of Gaius and Justinian." Second edition, revised by the author, and F. P. Tomlinson, M.A., London. Stevens & Haynes, 1881.

INDEX.—An Index to the Virginia Reports from Jefferson to 33rd Grattan, both inclusive, with a complete table of cases. By William B. Martin, of the Norfolk (Va.) Bar. J. W. Randolph & English, Richmond, Va, 1881.

STOCKS, BONDS, &C.—Law relating to Stocks, Bonds, and other securities, in the United States, by Francis A. Lewis, Jr. of the Philadelphia Bar. Rees, Welsh and Co., Philadelphia, 1881.

WILLS.—A Treatise on Wills, by Thomas Jarman, Esq., in three volumes. Fifth American, from the fourth London edition, with notes and references to American decisions. By Joseph F. Randolph and William Talcott, of the New Jersey Bar. F. D. Linn & Co., Jersey City, N. J., 1880.

TABLE OF REFERENCE

To Cases Noted and Reported in this Volume which Illustrate the Practice under the Ontario Judicature Act.

This table is intended to furnish an easy means of reference to the English and Canadian cases bearing on the present practice of our Courts, which have been noted and reported in the "Notes of Cases" and "English Practice Cases" in the Law Journal since September 1st, 1881. The first column indicates the number of the section or rule which is illustrated by a particular case (the rules being designated throughout by their marginal numbers) and the second column indicates the page in which the case in question is to be found

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