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DIARY FOR SEPTEMBER.

17. Tues.....First U.C. Parliament met at Niagara, 1792.
20. *Sun.* .....16*th Sunday after Trinity.* Lord Sydenham, Governor-General, died, 1841.
24. Thur.....Guy Carleton, Lieut.-Governor, 1776.
27. *Sun.*.....17*th Sunday after Trinity.*
30. Wed.....Sir Isaac Brock, President, 1811.

TORONTO, SEPTEMBER 15, 1885.

WE learn from the case of *Commonwealth* v. *Perry*, Massachusetts Supreme Court, March, 1885, that a piggery is an indictable nuisance. The judge instructed the jury that the natural odour of one pig might not be a nuisance, but that from 500 such animals might be, and it was for the jury to say whether this was so or not. The Court, on appeal, affirmed the conviction.

IN these days when small-pox is rampant in one of our cities the case of *Gilbert* v. *Hoffman*, Supreme Court of Iowa, noted in the *Albany Law Journal*, will be of interest. It was there held that a hotel-keeper who, with the knowledge of the prevalence of small-pox in his hotel, keeps it open for business and permits a person to become a guest without informing him of the disease, will be liable for the communication of the disease to the guest, and the latter will not be chargeable with contributory negligence in not making inquiries as to the truth of a rumour that there was small-pox in the house.

THE *Gazette* announces the resignation of his Honor Judge Boyd, and the appointment in his place of the junior judge of the County of York, Mr. Joseph E. McDougall. Mr. Boyd has earned his retirement by faithful service for twenty-three years. His successor has proved his fitness for the position he now occupies by the ability he has shown in the subordinate position. A sound lawyer, clear-headed, prompt and courteous, the profession will have great satisfaction in appearing before him in the conduct of cases in the County Court of the metropolitan county of this Province.

OUR namesake in England says, "This week her Majesty's judges are engaged in an operation which recalls what happens in a certain children's game when there is a cry of 'general post.' The illness of one of their number—an event normally imminent—has thrown everyone out. Lord Esher, Master of the Rolls, instead of solving intricate legal problems in the Court of Appeal, is trying prisoners at the Old Bailey; Lord Justice Bowen has turned his hand again to the elements of law at judges' chambers; and Lord Justice Fry's keen aptitude for the niceties of equity is devoted to poor law and the Highway Acts in a Divisional Court." We would recommend the agility of the judges of the English Bench in this old game of "general post" to the attention of some of the ermine-clothed at Osgoode Hall.

THE ingenious audacity which characterizes some cases brought before the Courts is sometimes amusing; an instance of this may be seen in the recent case of *Tottenham* v. *Swansea Zinc Ore Co.*, 52 L. T. N. S. 738. The defendant company carried on the business of manufacturing zinc and spelter, sulphuric acid and

zinc oxide on leasehold premises; and for the purposes of their trade erected cupola and other furnaces, which, as between them and their landlords, were admittedly trade fixtures. In 1880 the Company conveyed the lands and premises comprised in its lease by way of mortgage to trustees for debenture holders. In 1883 the company executed a second mortgage to trustees for a second set of debenture holders, which comprised, besides the land and buildings, all stock in trade, stock of ores, and loose plant and material. In the course of smelting metals for the company's business small quantities of gold and silver were given off in the form of vapour, and became imbedded in the bricks lining the furnaces. The first mortgagees having sold, the second mortgagees thereupon took proceedings to be allowed, to enter and remove the gold and silver and other metals imbedded in the furnace bricks, which it was claimed were included in the second mortgage and not in the first; although it was admitted that the metals could not be extracted without pulling down the furnaces and pounding up some of the bricks. Mr. Justice Pearson, however, had no difficulty in dismissing the application on the ground that the doctrine of trade fixtures has no application between mortgagee and mortgagor, and that whatever might have been the right of the company as against their landlord, the first mortgagees were entitled to everything that the mortgagors, intentionally or not, and whether for trade purposes or otherwise, had fixed to the mortgaged premises.

The case of *Landers* v. *Davis*, 15 Q. B. D. 218, however, shows that though the doctrine of trade fixtures may have no application between a mortgagee and mortgagor, yet that a tenant of the mortgagor may be entitled to claim the benefit of that doctrine as against the mortgagee, even though his lease were created subsequently to the mortgage. We confess, however, that we have some doubts as to the soundness of the latter decision.

THE Franchise Act of the Dominion Parliament has been discussed *ad nauseam*. We do not propose to refer to it, but merely quote some pertinent observations of Hon. Mr. Senator Gowan in the course of his speech on the subject in the Senate, wherein he alludes, in becoming terms, to the endeavour on the part of some to cast suspicion upon the honour of a profession, which, as a body, would be a credit to any country:—

"An incredible thing has been broadly asserted with all the bitterness of party expression, that the object of the Bill was to enable the Government to appoint pliant partisans for corrupt purposes, and wretched creatures would be found in the several provinces of the Dominion to act as willing tools for that nefarious purpose. I do not think I state too strongly the inference of what was said—said, I must think, in frenzy of political prejudice. But I cannot see how a reasonable man, not hurried into absurd extremes, could think so. If the Government aimed at any such thing the office would be made at pleasure, but the thing is too absurd to dwell upon. I have entire confidence that the present Government will make the best appointments possible, and with the object of securing a just and honest administration of the law; and I will go further and say that I believe if the present Opposition held the reins of Government to-morrow their Government would be just as incapable of acting on such vicious principles. What hope would there be for the future of the country if our public men were capable of such conduct: inducing a judge sworn to the faithful discharge of his duty to violate his oath, and, oblivous to every principle of manhood and Christian duty, to favour a political friend? . . The talk I have referred to presupposes that members of the Bar would be found willing to sacrifice all that a man holds dear at the beck and nod of a Minister. I can scarcely bring my mind to believe that anyone seriously entertains the idea. I indignantly repel

it as a gross slander upon the noble profession of which I have the honour to be a member. I do so emphatically in the case of the Bar of Ontario, and I speak on the knowledge of nearly fifty years. At the close of the last century the Law Society of Upper Canada was established. In the language of the Act of Incorporation it was declared to be as well for the establishing of order amongst themselves as for the purpose of securing to the Province and to the profession a learned and honourable body to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the Province—and well and nobly have these object been carried out, as the records of the Court, the records of Parliament and the political history of the country abundantly prove. But I cannot think that a doubt of the honour of the Bar has permanent place with any."

THE LAND TITLES ACT.

THE year 1885 will be a memorable one in the legal annals of the Dominion as being that in which the first practical steps were taken to introduce into the Provinces of Ontario and Manitoba a change in the mode of transferring real estate. Like many other important changes which, of late years, have been made in the law, this one has been effected without creating any great controversy or discussion, and it remains to be seen whether the anticipations of the promoters of the measure will be realized in its practical working.

The operation of the Act of this Province (48 Vict. c. 22) is confined to the County of York and City of Toronto, and, pursuant to the proclamation of his Honor the Lieutenant-Governor, came into force on the 1st day of July last. This Act is mainly based on the Imperial statute, 38–39 Vict. c. 87, which we may say in passing has proved a failure, not so much from any defects in the Act itself, which any one who has studied it must admit to be an admirable specimen of the draughtsman's skill, but rather from a combined opposition on the part of solicitors, resulting in a general refusal of the public to adopt the benefit of its provisions.

In Ontario it is optional with landowners whether or not they will adopt the system of registration provided by the new Act. If the title to land, however, is once registered under the Act, the land cannot afterwards be withdrawn from its operation, but all subsequent transactions in reference to that land must be conducted according to the provisions of the Act.

The method of registration under this Act differs very materially from the system of registration heretofore in force. Under the new Act the title, and not merely the deed is registered. In other words—not merely the fact that a deed has been made is recorded, but the legal effect of the whole series of deeds in the chain of title is what is registered. In order to the first registration of land under this Act, therefore, it is necessary that an official examination of the title shall be first made, which, wherever an absolute or qualified title is claimed, differs but little from an investigation under the Quieting Titles Act. If upon this examination the title is found satisfactory, it is thereupon registered, that is to say, the person entitled is registered as the owner of the particular parcel, and a certificate corresponding to the entry in the register is delivered to him, and his title is thereafter evidenced by this official certificate, and not by a conveyance as formerly. All subsequent transfers of the land, whether by way of sale, mortgage, or otherwise, will thereafter (with certain exceptions) depend for their efficacy on being passed by the Master of Titles, and their legal effect duly recorded by him. In this way every transaction as it takes place must be scrutinized by the public officer, and its

legal validity then and there pronounced upon before effect can be given to it by registration; and in this way defects and objections to title will be prevented from smouldering for years to burst out into a flame when least expected, as is too often the case under the system of conveyancing heretofore prevailing in this Province. The whole scope and object of the Act is, first of all, to give official sanction to titles to land brought under the Act, and thereafter to give official sanction to all transactions which take place in reference to such land.

Having given this brief *resumé* of the purpose and object of the Act we may now turn to the Act itself for a little more detail as to its provisions, and we find that the Act is to be worked by an officer to be called the Master of Titles who is to be a barrister of not less than ten years' standing at the Bar of Ontario, and who is to exercise *quasi*-judicial functions. Mr. J. G. Scott, Q.C., Deputy Attorney-General, has been appointed to fill this position, and we doubt not will prove a very efficient officer.

Owners of an estate in fee simple, legal or equitable, and any person having a disposing power over the fee for his own benefit, and whether free from, or subject to encumbrances may apply to be registered; and any person who has contracted to buy the fee may, with his vendor's consent, also apply to be registered. Lessees may also, under certain conditions, have their titles registered. But no person can be registered as owner of an undivided share; nor can more than four persons be registered as owners of any land. If there are in fact more than four owners they must agree among themselves which four of their number are to be registered.

Three methods of registration are provided. First, registration with an *absolute title*, this is where the title is found by the Master of Titles to be free from defects. Such a registration is the most complete form of title a person can get. The second is, registration with a *possessory title*. The words possessory title, in this Act, however, have not the meaning ordinarily applied to them, viz., the title of a person who has acquired his title to land by length of possession. On the contrary they have a meaning peculiar to the Act, and signify merely that the title of the person who is so registered has not been officially passed by the Master of Titles, but that the person registered with such a title has merely established a *prima facie* right as owner, and that the title of the land thus registered is, notwithstanding the registration, subject to such defects, if any, as existed at the time of its first registration. The effect of such a registration is, that persons dealing with property held under such a certificate will be compelled to satisfy themselves as to the goodness of the title of the person first registered under the Act. In process of time, of course, many titles so registered will become capable of being registered as absolute, and in any case the registration will have the effect of stopping the accumulation of defects of title, as all subsequent transactions in reference to the land thus registered, will take place under the Act and be duly scrutinized by the Master of Titles before they can be registered.

There is also a third method of registration and that is with a *qualified title*. This is where the Master of Titles examines the title of the person registered, and finds it subject to certain specified objections, or encumbrances, or charges. These are specified in the certificate of title; but the title is in other respects as complete as an absolute title. The benefit of this method of registration is that the defects or qualification of the title are explicitly stated on the face of the register, and any person dealing with property so registered has, within the four corners of the certifi-

cate of title, all the objections specified to which the title is open.

After property has been registered under the Act, a certificate of the first registration is to be registered in the proper registration division, and thereafter the Registry Act is to cease to apply to such land (s. 14).

One most important provision of the Act is that contained in sect. 25, whereby the Statute of Limitations is virtually repealed as to all lands registered under the Act, except those registered with a possessory title only. In other words, possession for any length of time will no longer be able to cut out the title of the registered owner with an absolute or qualified title.

Mortgages upon registered land are no longer to be effected by a transfer of the fee, but by an instrument called a charge which the mortgagee, however, is to be entitled to enforce by sale or foreclosure in the same manner as if the fee were conveyed to him. Mortgages under the Act are very considerably abbreviated, and the form given in the schedule is comprised in seven or eight lines, and a transfer of a mortgage is contained in six lines. A transfer of the fee is reduced to eight lines, and by endorsement on the certificate of title it may be done in two lines. In all documents of charge or transfer under the Act certain usual covenants are by virtue of the Act implied. Provisions are made for the registration of the title of persons who acquire title either by the death of the registered proprietor, or by sales under execution, or by sales for taxes.

Any person claiming an interest in any land may lodge a caution with the Master of Titles, either against the first registration of the land under the Act, or after its registration against subsequent transfers, and a person so entering a caution is entitled to fourteen days' notice before the land is first registered, or before any subsequent transaction can be registered. Any person improperly filing a caution is liable to make compensation therefor to the person injured. The caution when once lodged continues in force until the expiration of fourteen days after service of notice on the cautioner. Power is also given to the court and to the Master of Titles to inhibit the registration of dealings with the land.

No notice of trusts is to be entered on the register. Persons placing property registered under this Act in the hands of trustees will have to do so on the understanding that the *cestuis que trust*, and not persons dealing with the trustee in good faith, are to take the risk of the latter faithfully discharging his duty as trustee. This will perhaps appear to some persons to be an objection, but we are of the opinion that the Act has placed the responsibility where it ought to be, and where, under most well-drawn trust deeds it is usually placed, by the familiar provision that purchasers dealing with the trustee are not to be required to see to the application of the purchase money. One safeguard, in addition to that of lodging a caution, is provided for the due execution of trusts, and that is this: when the settlor vests the trust estate in two or more trustees he can, by adding the words "no survivorship," prevent any dealing with the trust estate upon the death of any one of the trustees, except under the order of the Court. In this way the check which one trustee is upon his co-trustee will be preserved, as the Court would probably not sanction any dealing with the trust estate until the appointment of a new trustee or trustees to fill the place of the deceased trustee or trustees.

The official certificates of title are incontrovertible except for fraud, and even then only in the hands of the person committing the fraud or having actual notice of it; and in order to protect the rights of innocent persons who may be prejudiced

by any certificate granted under the Act. an indemnity fund is to be established, This fund is to be created by the exaction of 25c. for every $100 of the value of property registered under the Act. This fee is only payable on the first certificate of title issued under the Act, and, out of the fund so created, persons who suffer loss by operation of the Act are to be indemnified. The practice under the Act is very largely governed by the Rules appended, which re susceptible of alteration and modification as experience may suggest.

It remains to be considered what course the profession ought to adopt in reference to this Act. In England, as we have seen, the *vis inertiæ* of the profession has virtually killed the statute. Things are on a somewhat different footing in Ontario. The profession here responds much more readily than in England to the requirements of business and public convenience. Besides this, conveyancing is, to a large extent, in the hands of unlicensed practitioners, and as soon as the merits of the new system are generally understood by the public (if it has that superiority over the present system in the saving of time and money which is claimed for it), these merits will compel its adoption; and, if the profession were to create difficulties in the way of its success, we fear a remedy might be found by creating a class of land brokers who would speedily monopolize the whole business under the Act. The successful operation of the Act, however, is not by any means dependent on the legal profession; it will largely depend on the liberality of view possessed by the officer appointed to administer it. If he should require every title to be absolutely perfect before it can be registered, the Act cannot be a success. What is wanted to make it work smoothly is a careful discrimination between objections which are really serious and those which are only in effect technical, such as no prudent man would hesitate to run the risk of. The latter class of objections ought not to be strictly insisted on. It requires undoubtedly a man of considerable experience and breadth of view to make a just discrimination of this sort; we believe, however, it will be found that the first Master of Titles will be equal to the occasion.

RECENT ENGLISH DECISIONS.

The *Law Reports* for July comprise 15 Q. B. D. pp. 1-196; 10 P. D. pp. 113-130; 29 Chy. D. pp. 253-265.

Very few of the cases in the Queen's Bench and Probate Divisions require any notice here.

HIGHWAY—INJURY TO GAS PIPES CAUSED BY USE OF STEAM ROLLER.

The first case is *The Gas Light and Coke Co.* v. *St. Mary Abbott's*, 15 Q. B. D. 1, a decision of the Court of Appeal affirming a judgment of Field, J. The action was brought to restrain the defendants, a municipal corporation, from using a steam roller in repairing the public highway, on the ground that the plaintiffs' gas pipes were injured thereby. The Court held the plaintiffs entitled to the injunction.

STOPPAGE IN TRANSITU—END OF TRANSIT—GOODS BOUGHT BY AGENT FOR FOREIGN PRINCIPAL.

Ex parte Miles, 15 Q. B. D. 39, is a decision of the Court of Appeal overruling the decision of the registrar in bankruptcy. The case involves an important question of mercantile law. Certain manufacturers sold goods to a commission agent who had been instructed to purchase them by a foreign principal; the goods were to be forwarded to Southampton to be shipped pursuant to the agent's orders, and they were to be paid for by six months' bills to be drawn by the vendors on the agent, and accepted by him. The goods were forwarded to Southampton to the shipping agents named by the commission agent,

and by the latter's directions were shipped to his principals in Jamaica, the agent being named as consignor, and the principals as consignees. After the ship had sailed the commission agent stopped payment, and the vendors, who had not been paid for the goods, claimed the right to stop them *in transitu;* but the Court of Appeal held that as regards the vendors the transit came to an end when the goods reached Southampton. The Court held that the order from the foreign principal to purchase the goods was a request that the agent should buy in his own name as principal and re-sell to the foreign principals at the same price as he had purchased, plus the commission agreed on, and therefore; that the commission agent was really the purchaser in the first place as principal and not as agent for the foreign principals. The case is noteworthy also for the opinion of Brett, M.R., on the value of the judgments of Wilde, C.J. Referring to a dictum of that learned judge in *Valpy* v. *Gibson*, 4 C. B. 837, he says, "It is true that this may be said to be only a dictum, because the learned Chief Justice afterwards gave another ground for his decision. But upon mercantile law a written judgment of Wilde, C.J., whether it is a dictum or decision, is as strong an authority as you can well have, and the passage which I have read has always been treated as such."

TENANT IN COMMON—LESSEE OF CO-TENANT'S SHARE—USE AND OCCUPATION—REPAIRS.

In *Leigh* v. *Dickeson*, 15 Q. B. D. 60, the Court of Appeal affirmed the judgment of Pollock, B., 12 Q. B. D. 194. One tenant in common had leased his share to his co-tenant. The lessee continued in sole occupation after the expiration of the lease; the lessor sued for use and occupation for the period of which exclusive possession was held subsequent to the lease, and the defendant counter-claimed for repairs; and it was held that the plaintiff was entitled to recover, as the defendant's exclusive occupation subsequent to the lease was as tenant at sufferance under the terms of the expired lease; but that the defendant was not entitled to recover for repairs which were of an ordinary character, and such as he was not bound to make.

BREACH OF CONTRACT—SALE OF GOODS TO FULFIL A CONTRACT BY VENDEE—MEASURE OF DAMAGES.

The case of *Grébert-Borgnis* v. *Nugent*, 15 Q. B. D. 85, may be read in connection with the recently reported case of *Corbet* v. *Johnson*, 10 App. R. 564, as a somewhat similar question was involved in both cases. In the former case the defendants contracted to deliver certain goods by instalments at certain times; when the contract was made the defendants knew that the goods were required by the plaintiff to enable him to fulfil a similar contract, except as to price, which the plaintiff had made with a third party. The defendants broke their contract, and the plaintiff was consequently unable to fulfil his contract with his vendee, who recovered judgment against him in a French Court for £28. The question in controversy was, what was the proper measure of damages; and the Court held that the defendants were liable, not only for the profit the plaintiff could have made had he been able to carry out the sale to his vendee, but also for the damages which the plaintiff had become liable for, for the breach of the contract with his vendee; and in computing these latter damages, the £28 which the French Court had awarded might be allowed as reasonable, although the amount so awarded was not as a matter of law necessarily the amount recoverable. The gist of the decision is thus stated by the learned Master of the Rolls: "Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him

with a third person, he must show that the defendant, at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract." This concludes the cases in the Queen's Bench Division.

NOTICE BY TELEGRAM OF THE ISSUE OF PROCESS—CONTEMPT.

The only case in the Probate Division which calls for any notice is that of *The Seraglio*, 10 P. D. 120, in which notice of the issue of a warrant of arrest against a ship was sent by telegram by the Marshal to his substitute at an out-post, and by the latter communicated to the master of the ship who disregarded it, and by direction of the owner left the port. Sir James Hannen says: "I have only to deal with this matter as a contempt of Court. There is no doubt about the proper way of serving a warrant of arrest, but equally also no doubt as to the way in which notice of its issue may be communicated. It has been done in the present case precisely in the manner in which notice of an order for an injunction is transmitted in the Chancery Division, namely, by telegraph. In that Division, though a formal injunction is no doubt obtained by the party, yet the means of communication by telegraph having become more rapid it is employed by the Court. Everyone knows that in matters of business he cannot with safety disregard a notice given by telegraph, so also it must be understood that a litigant cannot disregard a notice sent to him by telegraph by an officer of the Court. This is so, even if there were reason to doubt the authenticity of the telegram, though then inquiry should be made. But in this case nothing can be more flagrant than the conduct of the owner of *The Seraglio*, who appears to have very distinctly pursued this line of conduct in order to test the law."

ASSIGNMENT OF LEASE—RIGHT OF ASSIGNOR TO INDEMNITY—EFFECT OF SUBSEQUENT PURCHASE OF REVERSION BY ASSIGNOR.

The first case in the July number of the Chancery Division is that of *Re Russell*, *Russell* v. *Shoolbred*, 29 Ch. D. 254, which involves a somewhat intricate question as to the relative rights of the assignor and assignee of a lease, where the assignor after the assignment purchases the reversion and also the lease. The facts of the case are somewhat complicated. It may suffice to say, however, that H. and R. being lessees of four houses held under four different leases, H., in 1866, assigned all his interest to his co-lessee, R., the latter giving the usual covenant to indemnify H. against future liability on the covenants in the leases. The rent fell in arrear and H. was sued for, and paid it. Subsequently, in 1883, H. obtained an assignment of the reversion and also an assignment of the leases to R. which had in the meantime passed into other hands, and gave a covenant to indemnify his assignors against future accruing rent. In the present action H. claimed to recover against R.'s estate the rent which he had paid subsequent to his assignment to R., and also the rent which had accrued while he was the owner of the reversion, prior to his obtaining an assignment of the leases under which R. held, and it was held by the Court of Appeal, on appeal from Kay, J., that he was entitled to succeed, and it was held that the right was not defeated by his covenant to indemnify the assignor from whom he acquired R.'s leases, as that only extended to rents thereafter accruing. Nor was it defeated on the ground that the right of R.'s representatives, if they paid the rent, to recover it from the owner of the leases for the time being was interfered with by the assignment of R.'s leases to H., because the latter assignment could not take away any right of action which R.'s representatives

had against the persons who were lessees when the rent accrued. Nor was the right defeated on the ground that on H. paying the rent he was entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases; nor had he thereby discharged R.'s estate by releasing a remedy to the benefit of which R. as a surety was entitled; because a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 5 (see R. S. O. c. 116, ss. 2, 3). H. also claimed to recover a gale of rent which had accrued prior to the assignment of the reversion which he had not been called upon to pay, and had not paid, but it was held that, as there was no assignment of the overdue rent, he was not entitled to payment of it as against R.'s estate. There was also a further claim made for dilapidations prior to H. acquiring the reversion. A demand had been made against H. by the reversioner, but he had paid nothing, and in order to get rid of the liability had bought the reversion; and he had also purchased the leases from R.'s assignees for a less sum than their actual value in consequence of the breaches of the covenant to repair. He had since sold the property, and it was held, reversing Kay, J., that in respect of this claim H. could not recover against R.'s estate.

RES JUDICATA—ESTOPPEL—JUDGMENT IN REM.

In the case of *De Mora* v. *Concha*, 29 Ch. D. 268, the Court of Appeal was called upon to consider the question of how far a judgment *in rem* is an estoppel as regards persons not parties to the proceedings. The case was very ably and exhaustively argued, and Mr. Rigby, Q.C., for the respondent, received the somewhat unusual compliment of being publicly thanked at the conclusion of his argument by Lord Justice Baggallay on behalf of himself and his colleagues for the ability he had displayed. The facts of the case were as follows: A native of Chili made his will in London; he died in 1880. The will was propounded in solemn form, the executors alleging that the testator was domiciled in England. A daughter who contested the proof alleged the testator was domiciled in Chili, and that his will was not executed according to the laws of Chili. In 1860 the judge of the English Probate Court found that the testator was domiciled in England, and that the will was valid and granted probate to the executors. In November, 1860, a decree of administration was pronounced in the suit of the executors against the residuary legatee and a pecuniary legatee. In 1862 the daughter filed a bill against the executors, alleging that the testator was a domiciled Chilian; that his will being executed in England according to English law was good according to the law of Chili, but only so far as by the law of Chili he could dispose of his property by will; that according to that law he could only dispose of one-fourth of his property, and that the remaining three-fourths belonged to the daughter. The executors set up the decree of the Probate Court as a bar, and no further proceedings were taken in the suit. In 1877 an order was made staying proceedings in the latter suit, but giving liberty to any of the parties to apply to add to the decree in the administration suit all accounts and inquiries necessary to determine the questions in the suit so stayed. Pursuant to this leave the daughter and her husband applied to add to the decree inquiries as to the legitimacy of the daughter, and the domicile of the testator. In 1878 an order was made directing an inquiry as to the legitimacy of the daughter, the rest of the application to stand over. In 1881 and 1882 the conduct of the cause was transferred from the plaintiff (the surviving executor) to the residuary legatee, and

service of any further proceedings on the plaintiff was dispensed with, and the residuary legatee was appointed to represent the estate of the testator in the cause. In 1884 the application for an inquiry as to the domicile of the testator was renewed against the residuary legatee, without notice to the plaintiff. Bacon, V.-C., granted the inquiry; the residuary legatee appealed, and it was held by the Court of Appeal, affirming Bacon, V.-C., that the decree of the Probate Court was not conclusive *in rem* as to domicile, because it did not appear that the decree was necessarily based on the finding as to domicile, and further, that the finding as to domicile was not binding as between the daughter and the residuary legatee, the latter not being a party to the probate proceedings, and that as the residuary legatee was not bound by the executors litigating the question of domicile unnecessarily, so the daughter was not bound by the finding as against the residuary legatee, since estoppel must be mutual. It was also held that notice to the executor was unnecessary, and the Court refused to hear counsel on his behalf. Bowen, L.J., in giving judgment, says: "It is admitted to be the law of Chili that the will of a domiciled Chilian dying in England would be valid in Chili if executed in conformity with English law. The Court of Probate was therefore not in any way obliged in order to arrive at its judgment *in rem*, to adjudicate between the two domiciles. . . . Whatever be the exact limits of the rule as to the effect of judgments *in rem*, we think accordingly that the adjudication as to domicile does not, and cannot conclude any but the parties to the suit, their privies and those whose interests they represented, to the extent which they lawfully did represent such interests in such a suit." As to how far the executors could properly represent the residuary legatee in the probate suit, he says: "It is manifest that for many purposes the executors do represent such a legatee. But Adelinda (the daughter) and her husband are not seeking to impeach the title of the executors, the validity of the will, or the interest of the legatee under the will. Their contention is that by the law of Chili the testator could only dispose in favour of a residuary legatee of a portion of his property, and that the residue remained out of the testator's power of testamentary disposition. . . . We are of opinion that as to such a claim executors would not in a probate suit be the representatives of the residuary legatee to bind such a legatee by any issue which might be raised incidentally on a question of domicile, nor *legitimi contradictores* on his behalf in such a suit on such a point, within the meaning of the civil law or the law of this country. The scope of the probate suit is to establish that the will was executed in conformity with the law of the country of domicile, wherever that country was."

JUDGMENT BY DEFAULT—APPEAL.

In *Vint* v. *Hudspeth*, 29 Chy. D. 322, the Court of Appeal, although not denying its jurisdiction to hear an appeal from a judgment pronounced in the absence of the plaintiff, nevertheless directed the appeal to stand over until the appellant could apply to the judge who tried the cause to rehear the action.

NE EXEAT REGNO—TRUSTEE NOT IN DEFAULT.

The point of practice involved in *Colverson* v. *Bloomfield*, 29 Chy. D. 341, is of some importance. An order was made that a trustee within seven days after service of the order should pay to the plaintiff a sum found due to him by the Chief Clerk's certificate. The trustee could not be found to be served with the order, and the plaintiff then applied for a writ of *ne exeat* on the ground that the trustee was about to go out of the jurisdiction, but the Court of Appeal, affirming Chitty, J., held, that the trustee not being in de-

fault, as the order had not been served, that the debt was not now due and payable, and that the writ of *ne exeat* could not therefore be granted.

ADMINISTRATION—RETAINER—DEVASTAVIT.

The case of *Re Rownson, Field* v. *White*, 29 Chy. D. 358, is one in which an attempt was made by an administratrix to retain a debt claimed to be due by the intestate, under a promise which could not be enforced under the 4th sec. of the Statute of Frauds by reason of its not being in writing. It was argued that although under that section no action could be brought, that nevertheless by analogy to the decisions under the Statute of Limitations, the debt might properly be paid by the administratrix if due to a third party, and might therefore be retained by herself, that in other words the administratrix was not bound to set up the Statute of Frauds any more than she would be bound to set up the Statute of Limitations. As to this point Cotton, L.J., says, at p. 362: "It is quite uncertain what the origin was of allowing an executor to pay a debt against which he had a good defence under the Statute of Limitations, it being the duty of an executor or administrator not to pay claims he is not bound to pay, that is, he is not unnecessarily to diminish the estate which comes to his hands by paying a claim to which he has a defence. We know that there are some people, both judges and other persons, who think that to plead the Statute of Limitations is unconscionable, and in my opinion we must look upon that liberty which has been conceded to an executor not to plead the Statute of Limitations, or, if he has a statute-barred claim of his own, to retain it, not as a principle applicable to other similar cases, but as an exception from the general rule, admitted on the ground of the dislike which is entertained by many people to the plea of the Statute of Limitations."

PATENT—SPECIFICATION—COSTS.

In *Badische* v. *Levinstein*, 29 Chy. D. 366, the Court of Appeal reversed the judgment of Pearson, J., 24 Chy. D. 156, and held that where the specification for a patent for a chemical process applied equally to several substances, but only one would produce a useful result, and it could only be ascertained by experiment which that was, the patent was void. The patentee failed in establishing the validity of his patent, but succeeded on the issue of infringement, and it was held that he must pay the general costs of the action, but that the defendant must pay the costs of the issue of infringement.

RES JUDICATA—JUDGMENT RECOVERED IN ANOTHER ACTION PENDENTE LITE.

Houston v. *Sligo*, 29 Chy. D. 448, is one of those cases which we think should not be reported. D., the plaintiff, appealed from a decision of Pearson, J., holding that the defendant could set up as a defence of *res judicata* the recovery *pendente lite* of a judgment in an action in an Irish Court, and that it was unnecessary in the defence to set out the pleadings in such other action in detail. On the appeal the parties submitted to a compromise order which virtually left the whole matter at large for further litigation, and why the case is reported we cannot say.

ACTION OF DECEIT—FALSE REPRESENTATION—CONTRIBUTORY MISTAKE OF PLAINTIFF.

The case of *Edgington* v. *Fitzmaurice*, 29 Chy. D. 459, was an action of deceit brought by the plaintiff against the directors of a company for issuing a prospectus inviting subscriptions for debentures, and stating that the objects of the issue of the debentures were to complete alterations in the company's buildings, buy horses, and develop the trade of the company, whereas the real object was to pay off pressing liabilities. The plaintiff advanced money on some of the debentures on the faith of these representations, and also under the

erroneous belief that the prospectus offered a charge on the property of the company, and stated in his evidence, that but for such belief he would not have advanced his money, but that he also relied upon the statements contained in the prospectus. The Court of Appeal, affirming Denman, J., held that notwithstanding the plaintiff was influenced by his own mistake he was entitled by reason of the material misrepresentations made by the defendants to recover against the defendants the amount advanced.

POWER OF ATTORNEY—RECITAL.

The case of *Danby* v. *Coutts*, 29 Chy. D. 500, strikingly illustrates the caution necessary to be observed by those who deal with a person acting under a power of attorney. The power of attorney in question recited that the plaintiff was going abroad and was desirous of appointing attorneys to act for him during his absence, but the operative part appointed the donees to be attorneys of the plaintiff without any limitation of time; it was held by Kay, J., that the recital controlled the operative part, and that acts done by the attorneys after the plaintiff's return from abroad without his knowledge were not binding on him. The plaintiff went abroad a second time and gave the same attorneys a further power of attorney, reciting that he had been in England and was returning abroad, and again constituting them his attorneys. A bank, from which the attorneys had, after the plaintiff's return from England, borrowed money, which they had, unknown to the bank, converted to their own use, lent further sums under the second power of attorney, but it was not shown that any officer or agent of the bank, who knew of the previous transactions, had seen the recitals in the second power, and it was consequently held there had been no notice or knowledge of facts brought home to the bank to give reasonable ground for suspicion as to the *bona fides* of the attorneys, and that the subsequent transactions under the second power were therefore valid.

MARRIED WOMAN—TESTAMENTARY POWER.

The short point decided by Chitty, J., in *Rous* v. *Jackson*, 29 Chy. D. 521, is that when a married woman exercises a general testamentary power, the rule against perpetuities runs from her death and not from the date of the instrument creating the power. In arriving at this decision he refused to follow *Re Powell*, 39 L. J. Chy. 188, decided by James, V.-C.

ADMINISTRATION ACTION—JUDGMENT CREDITOR.

In *Re Womersley*, *Etheridge* v. *Womersley*, 29 Chy. D. 557, Pearson, J., refused to restrain a creditor who, prior to the granting of an administration order, had recovered judgment in a County Court against a sole executrix from pursuing his remedy against the executrix personally, but he ordered the receiver to pay the debt out of the assets without prejudice to the question whether the executrix should be allowed the amount so paid. This case of course does not in any way trench on those cases which show that proceedings by the creditor as against the estate will under such circumstances be stayed.

CHARITABLE LEGACY—LAPSE—CY-PRES.

The only remaining case to be noticed in the July number is *Re Ovey*, *Broadbent* v. *Barrow*, 29 Chy. D. 560, in which a legacy was left to an ophthalmic hospital which had ceased to exist, and the question was whether the legacy was to be treated as lapsed, or whether it must be administered *cy-pres*, and Pearson, J., determined that it had lapsed. The principle on which he proceeded is stated in *Clark* v. *Taylor*, 1 Drew, 644, which the learned judge quotes approvingly: "There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the

mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention, not of general charity, but to give to some particular institution; and then if it fails because there is no such institution, the gift does not go to charity generally; that distinction is clearly recognised, and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity."

REPORTS.

RECENT ENGLISH PRACTICE CASES.

SNELLING v. PULLING.

Costs—Dismissal for want of prosecution—4 & 5 Anne c. 3, 42 and 43 Vict. c. 59.—Ord. 65 r. 1 (Ont. Rule 428).

When an action is dismissed for want of prosecution the defendant is not, as of right, entitled to costs, but they are in the discretion of the judge under Ord. 65, r. 1. (Ont. R. 428.)

[C. A.—29 Chy. D. 85.]

LINDLEY, L.J.—. . . "Subject to some exceptions not now material to be considered the new rule has placed all the costs of proceedings in the Supreme Court, including therefore the costs of dismissal of the action for want of prosecution, in the discretion of the judge. There is therefore no appeal in the present case."

HOUSE PROPERTY & INVESTMENT CO. v. H. P. HORSE NAIL CO.

Amendment—Adding parties—Ord. 16 r. 11, (Ont. R. 103 a.)

In an action by lessees for a long term of eleven houses of which ten were unlet and in their possession when the writ was issued, and by their sub-tenant of the remaining house as a co-plaintiff, for an injunction and damages in respect of an alleged nuisance for noise; the tenant after delivery of the defence refused to go on with the action. In the meantime the other ten houses were sub-let, and the plaintiff company at the trial applied for leave to add, as co-plaintiffs, two of the new tenants who consented to be added.

Application granted under Ord. 16 r. 11 (Ont. R. 103 *a.*), the persons proposed to be added being persons "whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon, and settle all the questions involved in the cause or matter."

CHITTY, J.—"This is a matter of discretion in the Court, and the late Master of the Rolls who took great part in settling the practice, discussed the question in *Broder* v. *Saillard*, 2 Ch. D. 692. After some argument, though this is not reported at length, the Master of the Rolls gave leave to amend the Bill by adding the occupier as co-plaintiff; and in his judgment in reference to the objection that the owners of the house, the nuisance being a temporary one, could not be properly plaintiffs, he says, 'thinking as I do, that the objection was a valid one, according to the cases of *Mott* v. *Shoolbred*, L. R. 20 Eq. 22, and *Jones* v. *Chappell*, *Ib.* 539, I gave the plaintiffs leave to amend, by adding as co-plaintiff the tenant of the house which they did.' . . . The only distinction in this case is that the persons proposed to be added as co-plaintiffs were not tenants at the time when the writ issued."

As the parties were proposed to be added in respect of property originally comprised in the action, the learned judge thought the case on that ground distinguishable from *Dalton* v. *Guardians of St. Mary Abbott's*, 47 L. T. N. S. 349, and gave leave to amend on the usual terms of the cause standing over and payment of costs of the day, and defendants to be at liberty to put in an amended statement of defence.

HAWKE v. BREAR.

Costs—Arbitration—Costs of action and reference to abide event—"Event" construed distributively.

An action and all matters in difference were referred to arbitration, the costs of the cause, reference and award to abide the event.

Held, following *Ellis* v. *Desilva*, 6 Q. B. D. 521; 44 L. T. N. S. 209, that the word "event" must be construed distributively, and the plaintiff having succeeded as to the matters in question in the action, and the defendant in respect of a matter in difference not raised in the action the plaintiff was entitled to the costs of the action and the defendant to the costs of the matters in difference not raised by the action.

Gribble v. *Buchanan*, 18 C. B. 691; 26 L. J. C P. 24 not followed.

[14 Q. B. D. 841.

MATTHEW, J.—. . . "I think the term 'event' in the order of reference must be read distributively and that the costs of the action must abide the event of the action, and the costs of the matters in difference must abide the event of the matters in difference."

SMITH, J.—. . . "It is true in *Gribble* v. *Buchanan*, a case very like the present, JARVIS, C.J., said that though the construction contended for by the plaintiff was reasonable the practice was the other way. In the case, however, of *Ellis* v. *Desilva* the Court of Appeal seem to have placed the practice on a more reasonable footing."

EDWARDS v. HOPE.

Set-off of damages and costs—Cross judgments—Solicitor's lien—Ord. 65 r. 14.—Reg. Gen. Hil. Term 1853 r. 63 (Ont. Rule Q. B. 52).

Upon an application to set-off cross judgments in distinct actions the Court may, notwithstanding Ord. 65 r. 14, order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party. Reg. Gen. 63 Hil. Term 1853 (Ont. Rule Q. B. 52) is superseded by Ord. 65 r. 14 and if the latter applies to set-off of judgments in distinct actions the Court has a discretion to allow the set-off subject to, or free from, the solicitor's lien, and if Ord 65. r. 14 does not apply the Court has the like discretion which the Common Law Courts had prior to Reg. Gen. 63, which is superseded.

[C. A.—14 Q. B. D. 922.]

BRETT, M.R.—. . . "Ord. 65 r. 14 supersedes the old practice under R. G. H. T. 1853 r. 63. Rule 14 says that a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. Whether this Rule does, or does not, apply to cases where the set-off is claimed in different actions the same results follow. If it does, the Court has a discretion whether or not it shall allow the set-off. If it does not, the old practice before the Rule of 1853 remains, by which the Court had a discretion, to order what it considered just with regard to the solicitor's lien."

Note.—In Ontario there is no Rule in force identical with the English Rule, Ord. 65 r. 14, which provides that "a set-off for damages and costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." According to the above decision, therefore, it would seem that Rule 52 (Holmested's Rules and Orders, p. 505) is still in force in this Province.

IN RE BROAD AND BROAD.

Costs—Taxation—Solicitor and client.

Where costs of an unusual and unnecessary character are incurred, a solicitor cannot recover them from his client, even though incurred by his express direction, unless the solicitor informs the client that even if successful he will not, or may not, be able to recover such costs from the opposite party.

Costs of a third counsel disallowed.

[Divl. Court.—15 Q. B. D., 252.

FIELD, J., referring to the decision of the Court of Appeal in *Blyth & Fanshawe*, 10 Q. B. D. 207, said: "I am of opinion that when the Court of Appeal clearly lays down a general principle as the ground of their decision in the case before them we are bound to follow it. BAGGALLAY, L. J., in delivering judgment in that case, says: 'I take it to be the general rule of law, and an important rule, that is to be observed in all cases, that if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will, or may, not be allowed on taxation between party and party whatever may be the result of the trial.'"

THE LONDON AND YORKSHIRE BANK v. COOPER.

Production of documents—Documents held in right of another.

The defendant had made a promissory note as security for money due by a limited company to the plaintiffs. The defendant had also been liquidator of the company, but the liquidation was at an end and the company had been dissolved. In an action on the note the defendant objected to produce the banker's pass-book and directors' minute-book of the company, on the ground that they were in his custody only as liquidator.

Held, that the plaintiffs were entitled to inspection of the documents as there were no interests which could be affected by their production, except those of the parties to the action. *Murray* v. *Walter*, Cr. P. 114, *Kearsley* v. *Phillips*, 10 Q. B. D. 465, and *Vivian* v. *Little*, 11 Q. B. D. 370 distinguished.

[Divl. Court—15 Q. B. D 7.

FIELD, J.—The documents in question are undoubtedly in the defendant's possession; he has a property in them, and power to deal with them in any way he pleases. The cases, therefore, upon which he relied do not apply. In *Kearsley* v. *Phillips*, which followed *Murray* v. *Wa ter*, the Court refused to order inspection of documents which were in the defendant's possession as joint trustee with another person, not a party to the action, and were the muniments of their title as mortgagees. . . . In *Vivian* v. *Little* the Court held that the

committee of a lunatic was not bound to produce the title deeds of the lunatic's estate, because they were not in the committee's custody, but in the custody and control of the Court. . . . There would have been great difficulty here in going beyond the doctrine laid down in these cases had not the defendant's counsel admitted that the company was at an end. No shareholder or other person had the smallest interest in the matter.

COLERIDGE, C.J., concurred.

Order of POLLOCK, J., *refusing inspection reversed.*

PEARCE v. FOSTER.

Production of documents—Papers prepared in suit by a plaintiff against a third party.

The plaintiff objected to produce documents partially prepared by his solicitors in an action previously brought by him against one D. (a person other than the defendant) for future use in carrying on that action, which were never completed or used, owing to the action not having proceeded in consequence of D.'s death, on the ground that the whole of the documents were of a private and confidential nature between counsel, solicitor, and client.

Held, that the documents were privileged from production. *Bullock* v. *Corry*, 3. Q. B. D. 356, followed.

[C. A.—15 Q. B. D. 114.

Appeal from order of Divisional Court (POLLOCK, B., and DAY, J.,) affirming order of FIELD, J.

BRETT, M.R.—It seems to me clear that these documents did come into existence for the purposes of the consideration of the course to be pursued in the conduct of an action, although the action did not ultimately proceed. Then the question arises whether, assuming them to be within this privilege, the privilege is any the less applicable because in the present case the inquiries with regard to the documents are being made in an action other than that, in regard to which they were originally brought into existence. I do not think if they were privileged in relation to the first action that the privilege ceases in relation to another action. The case of *Bullock* v. *Corry*, 3 Q. B. D. 356, seems to me to be an authority for that conclusion. . . . . The governing principle on the subject seems to me to be correctly laid down in "Bray on Discovery" at p. 371, where the author says: "It would seem clear that the extension of the privilege to all professional communications, whether passing in reference to litigation or not, must cover those which pass in reference to litigation with other persons, or with the same persons at other times."

BAGGALLAY and BOWEN, LL.J., concurred.

Appeal allowed.

RE LOVE.

HILL v. SPURGEON.

Costs—Trustee and Executor.

One executor commenced an action for administration against his co-executor, and a decree was made. There was no misconduct alleged on the part of the defendant. On further consideration, KAY, J., gave the plaintiff costs as between solicitor and client, but gave defendant only party and party costs, holding that two sets of costs as between solicitor and client should not be allowed to the trustees.

Held, on appeal, that defendant was entitled to costs as between solicitor and client as no misconduct was proved against him.

[C. A.—29 Chy. D. 348.

COTTON, L.J.— . . "In my opinion a trustee is entitled to costs in the ordinary way, *i.e.*, as between solicitor and client, unless it is established that he has been guilty of some misconduct, which would justify the judge in depriving him of what are the ordinary costs of a trustee. The judge appears to have gone on the ground that he could not allow to the trustees two sets of costs as between solicitor and client. A desire to prevent the costs of litigation being excessive is laudable; but I think that is not a sufficient reason for depriving the trustee, who admittedly has conducted himself properly in the litigation, of the ordinary trustee's costs, that is, costs as between solicitor and client, and in my opinion he must have them." . . .

FRY, L.J., concurred.

Appeal allowed.

WALCOTT v. LYONS.

Adding co-plaintiff—Rules S. C. 1883, Ord. 16 r. 11 (Ont. Rule 103.)

When a tenant for life brought an action against trustees to make them liable for an improper investment and the defendant set up acquiescence, and the plaintiff then applied to add as co-plaintiff his son who had a reversionary interest

Held, that Ord. 16, r. 11 (Ont. R. 103) does not authorize a plaintiff having no right to sue, to amend by adding as co-plaintiff a person who has such right.

[C. A.—29 Chy. D. 584.

COTTON, L.J.—" . . . Can it be said under these circumstances that the presence of the son is necessary to enable the Court to adjudicate upon all the questions involved in the cause? I am of opinion that it cannot. The object of the amendment is, that if it is shown that the father has no right to sue, there may be a plaintiff who has such right. It is contended that the main question in the cause is whether there has been a breach of trust. That is not so. The question in the cause is whether there has been any breach of rust of which the father has a right to complain."

FRY and BOWEN, LL.J., concurred.

Order of BACON, V.C., *reversed*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [June 8.

SMART v. SORENSON.

Dower Act of 1879—Dower in equity of redemption—Husband aliening.

On February 21st, 1884, the plaintiff recovered a judgment against C. S. in the suit of *Sorenson* v. *Smart*, reported 5 O. R. 678, for his costs, and the same were taxed at $315, and writs of *fi. fa.* placed in the hands of the sheriff of Essex on March 20th, 1884, but the sheriff could make nothing. At the date of the judgment C. S. owned certain lands, subject to a mortgage dated December 2nd, 1881, to one J. A., in which M. S., the wife of C. S., joined and barred her dower. On February 26th, 1884, five days after the above judgment, the lands were sold to C. for $2,250, and on same day they were conveyed by deed to C., and M. S. joined and barred her dower. C. and C. S. went to the sheriff of Essex and paid several *fi. fas.*, leaving a balance of $350 due C. S. on the sale of the lands, which C. was to secure by mortgage. On March 14th, 1884, C. executed the mortgage, which was made to M. S. as mortgagee. The plaintiff now bringing this action against C. S., M. S. and C., and claiming that M. S. held the mortgage merely as trustee for her husband, and the defendants alleging that M. S. had dower in the lands, and had refused to join in the deed to C. without getting the mortgage in her name, and thus had given valuable consideration therefor.

Held, that *Henry* v. *Pringle*, 26 Gr. 68, and *Black* v. *Fountain*, 23 Gr. 174, are still good law, and a wife only has dower in an equity of redemption where the husband dies seized, and the latter may defeat the right by alienation, and the Dower Act of 1879 does not affect the case of the husband not dying seized of the equity of redemption, and that therefore M. S. gave no valuable consideration for having the mortgage made to her, and must be declared trustee for her husband.

A. O. Jeffery, for the plaintiff.

PRACTICE.

Chan. Div.] [Sept. 3.

MORTON v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgage—Sale under power—Surplus—Account as to—Scale of costs—R. 515, O. J. A

The order of PROUDFOOT, J., of the 22nd April, 1885 (10 P. R. 636, *ante* p. 179), was affirmed by the Division Court.

Muir, for the appeal.

Watson, contra.

Chan. Div.] [Sept. 3.

MASSE v. MASSE.

Action in Chancery Division—Jury notice—Transferring action.

The order of BOYD, C., of the 20th April, 1885 (10 P. R. 574, *ante* p. 179), was reversed by the Divisional Court, following *Pawson* v. *Merchants' Bank*, decided in the Court of Appeal on the 12th May, 1885.

W. H. P. Clement, for the appeal.

J. C. Hamilton, contra.

Ferguson, J.] [Sept. 8.

HILL v. THE NORTHERN PACIFIC JUNCTION RAILWAY CO.

Single Judge — Power to review findings of referee—Sections 48 and 49 O. J. A,

Held, notwithstanding the language of sec. 50, O. J. A., a single judge, sitting as the Court, has power to review the findings of an official referee upon a reference under sec. 48, O. J. A.

Boulton, Q.C., for the defendants.

J. C. Hamilton, for the plaintiff.

C. P. Div.] [Sept. 5.

BULL v. NORTH BRITISH LOAN CO. ET AL.

Order made at trial—Judge in chambers—Res judicata—Jurisdiction of Divisional Court.

At the trial of the action at the Toronto Assizes ARMOUR, J., endorsed in the record: "Upon my own motion I order that the place of trial in this cause be changed to the town of Belleville, and that this cause be tried at the next assizes there by a jury."

ROSE, J., sitting in chambers, had previously refused to change the place of trial from Toronto to Belleville.

Held, that the question of place of trial was *res judicata* by the judgment of ROSE, J.

Held, also, notwithstanding sec. 28, sub-secs. 2 and 3, O. J. A., that the Divisional Court had jurisdiction to hear an appeal from the order of ARMOUR, J., because of the language of Rule 254, O. J. A., and of the order appealed from.

Semble, Rule 254 does not give a judge a right to interfere with the procedure in the action except at the instance of a party.

Wallace Nesbitt and *Urquhart*, for the appeal.
Millar, contra.

CORRESPONDENCE.

DISQUALIFICATION OF POLICE MAGISTRATES.

To the Editor of the LAW JOURNAL:

SIR.—In your last issue your Ottawa Correspondent when writing under the heading of "Disqualification of Police Magistrates and Justices of the Peace" expresses regret that practising solicitors are not prevented by law from being police magistrates and justices of the peace in Ontario. By referring to sec. 5, cap. 71, R. S. O. he will find provided, "except when otherwise *specially* provided by law, no attorney or solicitor in any Court, whatever, shall be justice of the peace during the time he continues to practise as an attorney or solicitor," and sec. 4, cap. 72 R. S. O. and sec. 9, sub-sec. 2, cap. 4, 41 Vict., Ont. Stat. provide that police magistrates shall be *ex-officio* justices of the peace: so that unless it be held the appointment as police magistrate of a practising solicitor is a special provision allowing him to continue his practice, notwithstanding he is *ex-officio* a justice of the peace, that police magistrate referred to by your correspondent had better look to himself or your Ottawa correspondent may "go for him."

Yours, etc.,
Walkerton, Aug. 17th, 1885. B.

To the Editor of the LAW JOURNAL,

SIR.—In addition to what Mr. R. J. Wicksteed has stated in September number of the LAW JOURNAL, I would call attention to chap. 100, sec. 2, page 1038, of the C. S. C., 6 Vict. c. 3. s. 2. The Revised Statutes of Ontario, cap. 71. sec. 5, re-enact it. The Act respecting police magistrates c. 72 does not interfere with the 6 Vict. c. 3. s. 2. Neither does the Act respecting the qualification and appointment of justices of the peace, c. 71, R. S. O.

Then by s. 4, c. 72, R. S. O. every police magistrate is declared to be *ex-officio* a justice of the peace, for the city town and county etc., 36 Vict. 48, ss. 306 and 307. A police magistrate being by this Act a justice of the peace, can he practice law, and act as a justice of the peace at the same time, in violation of s. 5. c. 71, R. S. O.?

Yours, etc.
A. R. DOUGALL,
Belleville, Aug. 26.

To the Editor of the LAW JOURNAL:

SIR.—In the JOURNAL of 1st September, 1885, there is a letter over the signature of Mr. R. J. Wicksteed referring to disqualifications of police magistrates and justices of the peace, and the writer refers to three statutes of Ontario, naming them as comprising "all the statute law of Ontario respecting the appointment, etc., of the great unpaid and the stipendiary magistrates," and he quotes with approval sec. 20 of cap. 7, Con. Stats. of Manitoba as containing a provision which he suggests Mr. Mowat might follow with advantage.

It is singular that in endeavouring to inform your readers on this matter Mr. Wicksteed should have quite overlooked cap. 71, R. S. O., which is an Act relating to the very matter of which he writes, and in sec. 4 of which there will be found an enacting clause similar to that of the Manitoba statute referred to.

If there be any evil in permitting barristers and solicitors to act as police or stipendiary magistrates the general public seem not to have found it out as they have not complained of it.

The Manitoba section of the Act referred to seems to have been taken from our Revised Statutes.

Yours truly,
R.

FLOTSAM AND JETSAM.

ONCE upon a time the learned wig of an English Chief Justice also got lost on circuit. Lord Ellenborough on one occasion took Lady Ellenborough with him on circuit, on express condition that the carriage was not to be encumbered with bandboxes, and as bad luck would have it—no doubt in just punishment of his lordship's masculine inappreciation of the receptacles—the great judge happened to strike his foot against something in the carriage, which he at once divined to be a bandbox, and instantly pitched out of the window. Sternly commanding the coachman to drive on, his lordship prevented well-meant attempts to recover the flying bandbox, which subsided ignominiously into the ditch by the roadside. The county town reached, Lord Ellenborough proceeded to array himself for the bench.

"Now where's my wig? where *is* my wig?" he demanded.

"My lord," said the attendant, "it was thrown out of the carriage window!"

THE *Law Journal* remarks upon an advertisement which recently appeared in a law periodical as follows: "A Barrister of large experience in conveyancing seeks an engagement as conveyancing clerk in a solicitor's office; the highest references given," and says that the practice of the higher branches of conveyancing no longer affords a remunerative occupation. The remark applies in other countries than England.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for August 29th and September 5th contain The French in North America, *Edinburgh;* The Huguenot Reformation in the Norman Isles, *London Quarterly;* An Appeal to Men of Wealth, by Lord Brabazon, *National*; Footprints, *Blackwood;* A Walking Tour in the Landes, *Macmillan*; Morning Calls in West Country, *Belgravia;* From "Some Reminiscences of My Life" by Mary Howitt, *Good Words;* The Krakatoa Eruption, *Leisure Hour;* The Princesse de Lamballe, and A Margate Grotto, *Temple Bar;* The Crown Diamonds of France, *All the Year Round;* Ground-Rents, *Estates Gazette;* with instalments of "A House Divided against Itself," and "Mrs. Dymond," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

OSGOODE HALL.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

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

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

Students-at-Law.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:

FRENCH.

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

or NATURAL PHILOSOPHY.

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

First Intermediate.

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

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

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

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

For Certificate of Fitness.

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

For Call.

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

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

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

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

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

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

5. The Law Society Terms are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

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

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

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

FEES.

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

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 133.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (vv. 1-33)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

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

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.
Critical reading of a Selected Poem:—
1886—Coleridge, Ancient Mariner and Christabel.
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

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

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.

1886, 1888, 1890 — Souvestre, Un Philosophe sous le toits.

1887, 1889 — Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

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

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