# Canada Law Journal.

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## DIARY FOR JUNE.

1. Mon.......Fenian attack, 1866.
2. Tues......Maritime Court Sittings.
6. Sat.........Easter Sittings of Common Law Division, H. C. J., end.
7. Sun.......*1st Sunday after Trinity.*
8. Mon.......County Court and Surrogate Court Term (York). Parliament first met at Ottawa, 1866.
9. Tues......General Sessions and County Court (ex. York).
13. Sat ........County Court and Surrogate Terms (York) end.
14. Sun........*2nd Sunday after Trinity.*

*TORONTO, JUNE 1, 1885.*

THE *Central Law Journal* which ought to know and is not in the habit of using strong language, speaks of American life insurance companies in the following fashion: "Life Insurance is the great American fraud; and the only difference between the two systems—the regular and the co-operative—is the difference between two frauds. In both of them a fool trusts his cash to a man of whom he knows nothing, without security."

THE English *Law Times* in referring to the Torrens System of land transfer lately, although doubting the feasibility of its successful application to England, nevertheless gives the following commendation of the system:—"The fundamental principle of the Torrens System is the grant of certificates of title by a land registry office. Once granted, the certificate is for all purposes the conclusive document of title to the land. In a country where titles are more or less uniform in origin, and all date from within a period of fifty years or so, nothing could be neater or more effective."

What the *Times* considers the best field for its introduction is the very kind of one which the Province of Ontario presents. Mr. Mowat has made a beginning by the Act of last session—but this Act applies only to the County of York. It is, however, safe to say that if the system is found to work satisfactorily in one of the oldest settled counties, and one that includes properties held by such difficult titles as are to be found in the city of Toronto, it will work anywhere else within the Province, and its general extension may be looked for if its success in York is demonstrated by a fair trial.

The Act as finally passed has not yet been published. It would, therefore, be premature at present to attempt to discuss its details. We hope to return to the subject when the statutes have been issued.

## *TREASON-FELONY IN THE NORTH-WEST.*

THIS Dominion has just passed through an ordeal that has so far reflected the highest credit upon all those who have had in charge the maintenance of law and order. The administrative action has been excellent, and our citizen soldiers have fought and suffered with a courage and patient endurance which adds new lustre to the military renown of the Canadian militia.

We have now arrived at the legal stage of this matter—the trial and punishment of the chief offenders—men who have wilfully and without cause put the country to enormous expense, destroyed the property of its citizens, shed innocent blood, and created intense distress and suffering without stint or pity.

The principal Act to be looked at as regards the trial of Riel is 31 Vict. c. 14. Section 2 of this Act empowers the Governor-General to order a Militia General Court Martial to try a case like Riel's, supposing him to be, as it is said he is, a citizen of the United States; and section 3 applies this provision to a Canadian citizen or subject. Section 4 makes the offence a felony, punishable under ss. 2 and 3 by death, and it would be triable under the North-West Territory Act, 43 Vict. c. 25, ss. 75, 76, 77. In section 4 the word "Province" is used, and the offender may be tried in any county or district of the Province in which the offence is committed. Although the North-West Territories are not made a province expressly, yet the said Act and the Militia Act, 46 Vict. c. 11, are expressly extended to them (the North-West Territories) by 43 Vict. c. 25, so that Riel might probably be tried in any part of the North-West Territory by Court Martial; or if the Governor does not choose that he should be so tried, then he may be prosecuted and tried in any part of the North-West Territory for the felony, and if found guilty might be punished with death. In this case the trial would be by stipendiary magistrate and justice of the peace and a jury of six under the 43 Vict. c. 25, ss. 75, 76, with an appeal under sec. 77 to the Queen's Bench in Manitoba, which court could confirm the sentence or order a new trial, but could not alter the sentence. The mode of proceeding as to such appeal is to be governed by "ordinance of the Lieutenant-Governor (of the North-West Territory) in Council." Whether such ordinance has been made we are not aware.

It might be thought too late to make any such provision now in Riel's case (if it has not been done), though there would seem to be no real objection, if nothing but matters of form were affected, and not the evidence or punishment or liability of the accused.

This supposes the trial can only be by a stipendiary and justice of the peace, subject to the appeal to the Queen's Bench, but *query*, cannot the Governor-General, representing the Queen, appoint justices of gaol delivery at any place in the North-West Territory, and so send up one or more judges, making them for the nonce stipendiary magistrates; justices of the peace they would be, though perhaps not for the Territories, but they could be made so. The Revised Statute of Ontario, chap. 41, treats the appointment of judges of gaol delivery as a prerogative of the Crown and so does the Revised Statute of Manitoba, chap. 38, and it does not seem that any special statutory provision is required where English law prevails, as it does throughout Canada in criminal cases. If they acted as judges of gaol delivery their judgment might not be subject to appeal under 43 Vict. c. 25, but to the same incidents as in any province under our General Criminal Acts, 32, 33 Vict. c. 29, ss. 50, and 38 Vict. c. 11, s. 49 (Supreme Court); but then, how about the jury? There does not appear to be any provision in 43 Vict. c. 25 or the Amending Act, 47 Vict. c. 23 for the summoning of a jury of more than six, and this might possibly raise a difficulty in the way of treating such a court as an ordinary criminal court, and so not subject to appeal to the Queen's Bench, Manitoba.

The court martial, if that tribunal were

selected, would be a general one, and by the Militia Act, 46 Vict. c. 11, ss. 72, 73, 74, such courts are governed by the regulations made in like case for the regular army when not inconsistent with the Provincial Act. These regulations we have not before us, but by section 74 the sentence must be approved by the Queen; and by section 72 no officer of the regular army on full pay can sit on such court.

To sum up, Riel may be tried by court martial if the Governor pleases, the sentence only being subject to the Queen's approval, and we presume she can soften it if she pleases; or, he can be tried under the 31 Vict. c. 14 by a stipendiary magistrate with a jury of six, under 43 Vict. c. 25, subject to an appeal to Queen's Bench of Manitoba which may confirm the judgment or order a new trial, but cannot modify the judgment; if so confirmed the judgment would, we presume be subject to appeal to the Supreme Court under 38 Vict. c. 11, s. 49, unless the judgment of confirmation is unanimous; or the Governor may appoint a judge or judges to try the case, taking the precaution to make him or them also a stipendiary magistrate or stipendiary magistrates for the North-West Territory, and the foregoing remarks apply *mutatis mutandis* to cases of the other rebels.

It is desirable that justice should be meted out to Riel and the other leaders of the rebellion with as little delay as possible. Of course the cold-blooded murderer of Scott cannot now be tried for that crime, though the blood of his victim still cries for vengeance. There is, however, blood enough and to spare on his hands without that. In his case one cannot be said to prejudge in assuming that he will be found guilty of the highest crime known to the law, taken as he has been red-handed. At the same time let him have a fair trial; let it be conducted with due form and ceremony, with every opportunity of defence and without unseemly haste. If he is found guilty let justice swift and sure be done in the premises. Mr. Christopher Robinson, Q.C., and Mr. B. B. Osler, Q.C., have been retained by the Crown to conduct the prosecution.

## *RECENT ENGLISH DECISIONS.*

The May number of the *Law Reports* include 14 Q. B. D. pp. 561-837; 10 P. D. pp. 61-99; 28 Chy. D. pp. 469-726.

JUDGMENT DEBTOR—ORDER TO PAY DEBT BY INSTALMENTS—COMMITTAL.

Passing by two or three cases of merely local interest we come to ***Ex parte Koster*** (14 Q. B. D. 597), a decision of the Court of Appeal which may perhaps be useful to note as bearing on a branch of Division Court practice in this Province, the question being whether a judgment debtor who had been ordered to pay a debt by monthly instalments, had "the means to pay." It appeared that the debtor had had an allowance of £5 per week made him by his brother as a voluntary gift, and the Court was of opinion that in estimating the debtor's means of paying, money derived from a gift may be properly taken into account.

MEMBER OF PARLIAMENT—OATH OF ALLEGIANCE—SITTING AND VOTING WITHOUT TAKING OATH.

The next case we think it useful to note here is that of ***The Attorney-General* v. *Bradlaugh*** (14 Q. B. D. 667), which occupies over fifty pages of the Reports. The action was in the nature of an information to recover penalties against the defendant for sitting and voting as a member of the House of Commons without taking the oath of allegiance prescribed by statute. It will be remembered that the defendant is unhappily a pronounced disbeliever in the existence of a Supreme Being, but had nevertheless, contrary to the will of the House of Commons and

against the orders of the Speaker, gone through the form of taking and subscribing the oath prescribed by statute. But the Court of Appeal very properly affirmed the decision of the Queen's Bench Division that an oath taken by such a person and under such circumstances is not a compliance with the statute, and is in fact no oath at all. The rule laid down in the celebrated case of *Omichund* v. *Barker*, 1 Atk. 21, as to the necessary religious belief required in a person taking an oath, was approved and held applicable to a person required to take an oath under a statute, as well as to a witness required to give evidence in an action.

Brett, M.R., quotes with approval the words of Willes, C.J., in that case: "I am of opinion that such infidels as believe in a God, and that He will punish them if they swear falsely, may, and ought to be, admitted as witnesses in this, though a Christian country. And, on the other hand, I am clearly of opinion that such infidels (if any such there be) who either do not believe in a God, or if they do, do not think that He will either reward or punish them in this world, or the next, cannot be witnesses in any case, nor under any circumstances," and Cotton, L.J., at p. 707, says: "What is meant by 'make oath'? It must mean that which by the law of England is an oath. Parliament undoubtedly is speaking with reference to the well established law of England, and the law of England undoubtedly is this: That if a person is in the unhappy position of not believing in a Supreme Being, or not believing that there is a Supreme Being who will punish for the offence of telling an untruth—it is immaterial whether it is in this or a future world—then the person who is in that state does not, though he goes through the form of taking the oath, take that which the law of England recognizes as an oath."

OFFICER OF BOARD—CONCERNED OR INTERESTED IN ANY CONTRACT OR BARGAIN.

The next two cases, *Burgess* v. *Clark* (14 Q. B. D. 735), and *Todd* v. *Robinson*, *Ib.* p. 739, although involving the construction of statutes of merely local operation, may nevertheless be here briefly noted. In the former case it was held that a demise of rooms was a "bargain or contract;" and in the latter, that an officer who was a shareholder of a company which had a contract with the board of which he was an officer was interested in a bargain and contract, and that in both cases the defendants were consequently liable to the penalties imposed by statutes for having or being interested in bargains or contracts with the board of which they might be officers.

EXPROPRIATION OF LANDS—HOUSE INJURIOUSLY AFFECTED—SPECIAL VALUE AS A PUBLIC HOUSE—COMPENSATION.

We now come to the case of *Re Wadham* and *The North Eastern Railway Co.* (14 Q. B. D. 747), which was a case stated by an arbitrator for the opinion of the Court, in which the Court was asked to say whether or not, where roads are altered and stopped up by a railway company, they are bound to make compensation to the owners of the adjoining property, for the depreciation in the special value of the premises as an hotel and public house. The Divisional Court, consisting of Matthew and Day, JJ., held that the owners of the premises were entitled to compensation for the depreciation thus occasioned to the special value of the premises.

Matthew, J., who delivered the judgment of the Court, thus stated what he considered to be the result of the previous authorities. "I do not understand the learned judges to have intended to lay down more than this, viz: that you are not, in calculating the damage for injuriously affecting the premises, to take into account any special and exceptional value which the premises

may have in the possession of the then proprietor, but you are to see whether or not the value of the property as a marketable article to be employed for any purpose, to which it may legitimately and reasonably be put, has been interfered with or not."

In the following case of the *Queen* v. *Essex*, (14 Q. B. D. 753), a similar question is discussed. In this case part of a building estate was expropriated for a sewage farm, whereby the value of other parts of the land near to the part so taken was depreciated, even in the absence of any nuisance from the sewage farm when made, and it was held by the same learned judges, that the owner of the property was entitled to compensation, not only for the land actually taken, but also for damage occasioned by the other lands retained by him being injuriously affected by the expropriation. In giving judgment Day, J., makes some adverse comments on the case of *Vaughan* v. *Taff Vale Railway Co.* (5 H. & N. 679), which he considers was decided on a mistaken view of the statutes, and which establishes that where no land of an individual is taken, the latter cannot recover damages merely by reason of his land being injuriously affected by public works constructed in the neighbourhood—but he thought it was equally well established, that when any portion of a man's land is taken, he shall have full compensation for the injury that is done to him.

#### Husband and wife — Separation deed — Covenant against molestation.

In *Fearon* v. *The Earl of Aylesford* (14 Q. B. D. 792), the Court of Appeal affirmed the judgment of the Divisional Court reported 12 Q. B. D. 539—and held that if in a separation deed a husband covenants to pay his wife an annuity, without restricting his liability to such times as she shall be chaste, the covenant remains in force, though the wife afterwards commit adultery—and further, that the commission of adultery by a wife, followed by the birth of a spurious child, is no breach of a covenant against molestation contained in a separation deed. The Court moreover held that covenants in a separation deed by which the husband covenants to pay to a trustee for the wife an annuity, and the trustee covenants with the husband that the wife shall not molest him, must be construed as independent covenants, in the absence of any express terms making them dependent, and therefore, a breach of the covenant against molestation is not an answer to an action to recover the annuity.

#### Indemnity—Goods lawfully seized for another's debt.

The next case which we come to is an important one on the subject of indemnity, viz: *Edmunds* v. *Wallingford* (14 Q. B. D. 811). The plaintiff was the trustee in bankruptcy of certain parties whose goods, prior to the bankruptcy, had been taken in execution and sold to satisfy a debt due by the defendant. After the sale the defendant, in consideration of the goods of the bankrupts having been so sold, had agreed to pay the plaintiff £300 a year until the trade creditors of the bankrupts should be satisfied. Having made default, the action was brought to recover the overdue instalments of £300, or, in the alternative, to recover the value of the goods seized. The Court of Appeal held that the plaintiff was entitled to recover. Lindley, L.J., who delivered the judgment of the Court, thus laid down the law. "Speaking generally, and excluding exceptional cases, when a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt the owner is entitled to recover the value of them from the debtor." This right to indemnity exists, though there be no agreement to indemnify

or contribute, and though there be in that sense no privity between the plaintiff and defendant, but, as pointed out in the judgment, the rule is subject to certain exceptions, *e.g.*, it may be excluded by contract —as where the person whose goods are seized is himself liable to pay the debt for which they are seized. The case of *England* v. *Marsden* (1 L. R. C. P. 529,) had also decided that when the owner of the goods leaves them for his own convenience where they could be lawfully seized for the debt of another—the latter in such a case was not liable to indemnify, but the soundness of this case was questioned, and the Court thought that it ought not to be followed.

ARBITRATION—COSTS TO ABIDE EVENT—PLAINTIFF SUCCEEDING ON CLAIM, AND DEFENDANT ON COUNTER CLAIM.

The case of *Lund* v. *Campbell* (14 Q. B. D. 821), is another decision of the Court of Appeal, affirming the judgment of the Queen's Bench Divisional Court. The question was as to what was the proper form of judgment where there is a claim and counter claim and the action is referred to arbitration, and it is ordered "that the costs of the cause and the costs of the reference and award shall abide the event" and upon the arbitration the plaintiff succeeds on his claim, and the defendant on his counter claim, and after setting off the former against the latter the balance is in favour of the defendant.

Under such circumstances the Court held that the word "event" must be construed distributively and that the judgment should be entered for the defendants with the costs of the cause, reference and award, but that the plaintiff was also entitled to the costs of all those issues on which he had succeeded.

HUSBAND AND WIFE—ACTION BY HUSBAND AGAINST WIFE—MONEY PAID BY HUSBAND FOR WIFE BEFORE AND AFTER MARRIAGE—MARRIED WOMEN'S PROPERTY ACT 1882.

The only case in the Queen's Bench Division remaining for consideration is that of *Butler* v. *Butler* (14 Q. B. D. 831) a decision of Wills, J. The action was brought by a husband against his wife to recover moneys lent by him to his wife before and after their marriage, which took place in 1883; and it was held that the action would not lie for moneys lent before marriage, but that the plaintiff was entitled to recover against his wife's separate estate the moneys lent after the marriage.

None of the cases in this number of the Probate Division appear to call for any reference here.

EXPROPRIATION OF LAND FOR PUBLIC PURPOSES—TAKING MORE LAND THAN IS NECESSARY.

The first case in the Chancery Division for May to which we think it necessary to call attention is that of *Gard* v. *Commissioners of Sewers of the City of London* (28 Ch. D. 486), which, though a decision on the construction of certain Imperial Statutes, may nevertheless be useful as a guide in the construction of similar acts in force in this Province. Under certain statutes the defendants were authorized to expropriate land for the purpose of widening streets. Two houses adjoining a street which the defendants sought to widen belonged to the plaintiff, they were burned down and the outer walls only left standing. The defendants actually only required a strip of 5½ feet of the land for the purpose of widening the street, but they claimed the right to take the whole of the land on which the houses stood, intending to sell the surplus not required, without giving the plaintiff any option of pre-emption. This the Court held the defendants could not do, but on the contrary they were restricted from expropriating any more land than was reasonably necessary for carrying out the proposed improvement, and an injunction to restrain the expropriation was granted.

PETITION DISMISSED—DISCOVERY OF FRESH EVIDENCE—RES JUDICATA.

The case of *Re May* (28 Ch. D. 516) a decision of the Court of Appeal affirming

Pearson, J., requires but brief notice. It is to the effect that when a petition has once been presented to the Court and dismissed on the merits, a new petition in respect of the same matter cannot be subsequently filed, on the discovery of fresh evidence, without the leave of the Court being first obtained.

WILL—LIFE ESTATE TERMINABLE ON BANKRUPTCY—GIFT OVER—TIME FOR ASCERTAINING CLASS.

We now come to another decision of the Court of Appeal which also affirms the judgment of Pearson, J., *Re Bedson's Trusts* (28 Ch. D. 523), which termed upon the construction of a will whereby the testator gave a fund to trustees to pay the income to his son for life, and after his death to pay and divide the fund equally among all the children which the son should have as and when they should respectively attain twenty-one. There was also a proviso that if the son should be adjudicated bankrupt the fund and the income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of the child or children of the son "in the same manner as if he was naturally dead." After the death of the testator the son was adjudicated a bankrupt. At the date of the adjudication he had two children; other children were born to him afterwards, and the question was whether the subsequently born children were entitled to participate in the gift over? and the Court held that they were subject to the contingency of their attaining twenty-one. Lindley, L.J., thus states his conclusion as to the meaning of the will: "I think that the real meaning is that in the event of the bankruptcy of the son, such son's life interest is to cease, and the children are to take the interest in the fund as in the case of such son's death; but not that the fund is to be then divided amonst a particular class of children to the exclusion of any other class. The period of distribution is not the bankruptcy, but the death of the testator's son." The case is also noteworthy for the difference of opinion expressed by two of the learned Judges of Appeal as to the application of artificial rules of construction to wills of personalty. Brett, M.R., being of opinion that such rules have been carried too far, and "that a will, especially one of personal property, ought to be construed according to the rules of construction applicable to all documents, and not according to such artificial rules." Cotton, L.J., on the other hand, said: "I cannot agree to the departure from well-known rules of construction which apply, unless the testator has expressed a different intention by the words which he has used." In this case however, notwithstanding, the difference of opinion thus expressed they nevertheless arrived at the same conclusion as to the meaning of the will in question.

WILL—ADEMPTION OF LEGACY.

In the next case to which we think it necessary to refer, viz., *Re Pollock, Pollock* v. *Worrall* (28 Ch. D. 552), the law on the subject of the ademption of legacies was considered by the Court of Appeal. A testatrix, in pursuance of a request of her deceased husband who had left her his residuary estate, by her will bequeathed the sum of £500 sterling to his niece Julia "according to the wish of my late beloved husband." Evidence was adduced that the testatrix had said, in June, 1880, that she had asked the legatee if she would receive £300 down, instead of a larger sum after her, the testatrix's death, and that the legatee had answered by letter stating that she would prefer the £300 down, but no such letter was forthcoming, and the legatee denied having written any such letter. It appeared, however, from entries in the testatrix's diary that in July, 1881, she wrote to the legatee telling her that £300 had been paid into the bank for her, "being the legacy from her uncle John." On the

part of the legatee evidence was given that in July, 1881, she had received a letter from the testatrix saying that she wished to give her £300 in order that she might purchase a clock or inkstand as a *souvenir* of her uncle John, and that she purchased the clock out of the £300, and had written to the testatrix informing her of this and consulting her as to the inscription, which was supported by an entry in the testatrix's diary to the effect that she had received a letter from legatee "telling me she had got the clock and was waiting for the inscription." Mr. Justice Pearson had held that the payment of the £300 was a total ademption of the legacy of £500 given by the will, but the Court of Appeal was of opinion that it was only an ademption *pro tanto.* Lord Selborne, who delivered the judgment of the Court, said that numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to be made for the same purpose, a presumption is raised *prima facie* in favour of ademption. But he observed, "It is not without some degree of doubt that I have come to the conclusion that although the sum given in July, 1881, is the same which in June, 1880, the testatrix contemplated giving in lieu of the £500 (which would then have been a total ademption), the lapse of more than a year without the fulfilment of that intention, is enough to prevent any satisfactory inference that the gift made in July, 1881, was intended to be a total ademption of the legacy of £500."

Vendor and purchaser—Sale by trustee—Depreciatory condition.

In *Dunn* v. *Flood* (28 Ch. D. 586), to which we now come, the Court of Appeal affirmed the judgment of North, J., (25 Ch. D. 629). The action was brought for the specific performance of a contract for the purchase of lands, and was resisted by the purchaser on the ground that the plaintiffs were trustees, and that the conditions under which the property had been sold were of such a depreciatory character that the sale under such circumstances amounted to a breach of trust. The sale was made subject to certain general conditions of sale relating to the building and occupation of the houses to be erected on the land, one of which required the purchaser of each lot to covenant not to carry on upon either of the said lots the trade or business of a brewer, hotel-keeper, or simliar trade, following the words of a deed under which the plaintiffs claimed title. But in addition there was also a further condition that the lots were sold "subject to the existing tenancies, restrictive covenants, and all easements and quit rents (if any) affecting the same," and that the purchasers were to indemnify the vendors against the breach of any restrictive covenants contained in the abstracted muniments of title. The abstracted documents contained no other restrictive covenants than those comprised in the general conditions, and the vendors stated that they knew of no other restrictive covenants, and of no existing tenancies, easements or quit rents, affecting the property. And it was held that the condition as to existing tenancies and restrictive covenants were of so depreciatory a character as to constitute a good defence to the action. Bowen, L.J., thus states the objection to the conditions: "The trustees in the present case had a discretion to sell, but it was their duty in the first place to tell the truth; this was a duty due to themselves, their *cestui que trust*, and to the purchaser. In the second place it was not their duty to suggest any difficulty in the title that did not exist. The condition principally objected to is condition 6 (*i.e.*, the condition relating to the existing tenancies, etc.). Would a

prudent vendor who wished to sell at a fair price insert such a condition as this? It appears to me to be full of warnings and conditions, which, although in some special cases it may be proper to insert them, yet amounted in the present instance to a suggestion of traps and pitfalls where none existed. Taking into account that there was no compensation clause, I think such a condition was calculated to frighten away purchasers." As to the right of the purchaser to resist performance of the contract on this ground, Fry, L. J., made the following observations: "It was contended that the only cases in which the Court has refused to enforce such a contract have been where the trustees selling have been defendants, and it was argued that where the vendors are plaintiffs the Court will enforce specific performance. I think such a view is abhorrent to the practice of the Court. In truth, however, the question is not reasonably open. *Rede* v. *Oakes* (4 D. J. & S. 505), is a distinct authority where the plaintiffs are vendors who have entered into a contract which is a breach of trust, they cannot enforce it against the purchaser."

BREACH OF TRUST—ACQUIESCENCE BY CESTUI QUE TRUST.

The following case of *Sawyer* v. *Sawyer* (28 Ch. D. 595) is a decision of the Court of Appeal affirming the judgment of Chitty, J., and establishes that where a trustee claims that his *cestui que trust*, who is a married woman, has concurred in a breach of trust, he must show that she acted for herself in the breach of trust, and was fully informed of the state of the case in order to entitle him to claim indemnity out of her interest in the fund for the liability she incurs in consequence of the breach. It is not enough merely to show that she consented to the breach of trust. This decision appears to conflict with the modern trend of legislation, which is all the time striving to emancipate married women from the disabilities they were formerly subject to, and to place them on the same footing as men with regard to their property. Equity lawyers, however, do not seem to be able to rid themselves of the notion that a woman, in spite of the theories of modern legislators, needs special protection, and that acts which would bind a man do not necessarily bind a woman. Thus Fry, L.J., who gave the judgment of the Court was compelled to admit that while in the case of a man of full years consenting to a breach of trust the Court would presume him to be acting with a full knowledge of all the circumstances, yet in the case of a *feme covert* no such presumption exists in favour of the trustee whose primary duty is to protect the fund for her benefit.

SEPARATION DEED—ACCESS TO CHILDREN—REMOVAL OF CHILDREN OUT OF JURISDICTION.

The next case, *Hunt* v. *Hunt* (28 Ch. D. 606), requires but a brief notice here. The question was simply whether a husband who had covenanted in a separation deed to allow his wife access to his children, for at least one day in every fortnight, could be restrained from removing the children to Egypt whither he had been ordered as a medical officer in the army. Pearson, J., granted an injunction restraining the removal, but on appeal his decision was reversed on the ground that no case was made that the defendant was removing the children for the purpose of preventing his wife having access to them, and the covenant did not bind him to keep them in a place where she could conveniently have access to them.

SOLICITOR — STRIKING OFF ROLL — JURISDICTION OF COURT OF APPEAL.

In the following case of *Re Whitehead* (28 Ch. D. 615), a motion was made to the Court of Appeal to strike a solicitor off the rolls. The Court of Appeal had directed the official solicitor to take pro-

ceedings against the solicitor who, from his evidence given in a cause which had been before the Court by way of appeal, appeared to have been guilty of gross misconduct, and the question was discussed whether the Court of Appeal could strike him off the rolls or whether the proceedings for that purpose should not have been instituted in one of the Divisions of the High Court. The Court of Appeal, though not seeing fit to exercise the jurisdiction, nevertheless, were unanimous that they had the power to do so. The solicitor not having derived any pecuniary benefit from his misconduct, and being in reduced circumstances, and not having taken out his certificate for three years, the Court, instead of striking him off the rolls or suspending him, restrained him from renewing his certificate without the leave of the Court.

INCUMBRANCE—PRIORITY—LEGAL ESTATE.

Passing by two or three cases which do not appear to need any notice, we come to the case of *Newman* v. *Newman* (28 Ch. D. 674), which is an illustration of the well-known maxim of equity, that "where the equities are equal the law must prevail." One Brown was the owner of an undivided three-eighths of a certain leasehold, as to one moiety thereof for himself, and as to the other in trust for one Edwin Newman. Edwin Newman assigned his share in this leasehold, and also a policy of life insurance to his mother-in-law, Mrs. Armstrong, as security for £5,700. Subsequently Edwin Newman became indebted to Brown, and he and Mrs. Armstrong thereupon by deed, reciting the previous assignment to the latter, conveyed the leasehold and policy to Brown to secure £3,180, and subject thereto for Mrs. Armstrong. Edwin Newman died.

The action was brought by one of his children claiming to recover the value of his interest in the leasehold and life policy as one of the *cestuis que trustent* under his marriage settlement, whereby it was claimed that the leasehold and policy had been settled by Edwin Newman prior to the assignment to Brown, it being claimed that the £5,700 due to Mrs. Armstrong was so due to her as a trustee of the settlement. Brown alleged he took the assignment without notice of the settlement, which the Court on the evidence held to be the fact. Under these circumstances it was held by North, J., that Brown having the legal estate, and having no notice of the plaintiff's alleged prior equity at the time he took security for his debt from Edwin Newman, was entitled to priority over the plaintiff.

QUIA TIMET—INJUNCTION—NUISANCE.

The case of *Fletcher* v. *Bealey* (28 Ch. D. 688) is the next case which seems to call for observation here, and shows the principle on which the Court acts in entertaining *quia timet* actions for the purpose of restraining threatened injuries. The plaintiff carried on business as a paper manufacturer on the banks of the river Irwell, the water of which he used to a large extent in his business, and it was of great importance that it should be free from impurities. The defendants were alkali manufacturers, and were depositing on the banks of the river a quantity of refuse known as "vat waste" from which a highly noxious liquid was liable to percolate, and the plaintiff, being apprehensive that this liquid would get into the stream, brought the action to restrain the deposit of the vat waste near the river. No actual damage had been done. Pearson, J., thus stated what he considered to be the principle on which the Court should act in such cases: "There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should

almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied to him in a *quia timet* action." Applying this principle to the case, he came to the conclusion that the action was premature, and dismissed it without prejudice to any future proceedings by the plaintiff in case of actual injury or imminent danger.

Husband and wife—Joint investments—Will of married woman.

*In Re Young, Trye* v. *Sullivan* (28 Ch. D. 705), was a special case stated for the opinion of the Court, as to who was entitled to certain moneys which had been kept in a bank in the joint names of a husband and wife, and also certain investments made in their joint names out of the moneys so kept at the joint account. The moneys kept at the joint account were principally derived from the wife's separate estate. The wife survived her husband, having executed a will during coverture. Pearson, J., before whom the case was argued held that the balance of the joint account at the bank, and the investments made in the joint names of the husband and wife, survived to the wife, but did not pass under her will. He considered the proper inference to be drawn was, that by placing the moneys to the credit of the husband and wife jointly, the wife intended to sink all idea of their being separate estate, and that the investments stood in the same position.

The case which follows, viz.: In *Re Price, Stafford* v. *Stafford* (28 Ch. D. 709) is another decision as to the effect of the will of a married woman. It will be remembered that the House of Lords in the case of *Wilcock* v. *Noble* (7 H. L. C. 580) decided in effect that the 1 Vict. c. 26, sec. 24 (see R. S. O. c. 106, s. 26) which provides that "Every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention appears by the will," has not the effect of making valid the will of a married woman which was invalid at the time of its execution, notwithstanding that it would have been valid if executed at the time of her death. The only question *In re Price* was whether the Married Women's Property Act of 1882 (see 47 Vict. c. 190) had made any difference in the law, and Pearson, J., held that it had not, and that consequently property acquired by a married woman after her husband's death does not pass by a will made by her whilst under coverture. The power to make a will during coverture, does not extend to property she may acquire after she becomes discovert.

Vendor and purchaser—Vendors' right to rescind.

The only case remaining for consideration in the May number of the Chancery Division is that of *Hardman* v. *Child* (28 Ch. D. 712), which turns upon the construction of a condition of sale, which provided that if any objection or requisition as to the title or abstract or conveyance should be insisted on, and the vendors should be unable or unwilling to remove or comply therewith, they should be at liberty to annul the sale. The abstract delivered to the purchaser showed that the conveyance to the vendors' testator was of the land, together with a wall on the east side of it, "which wall is to be ever hereafter repaired, and kept in repair" by the testator, his heirs and assigns. This obligation was not mentioned in the particulars and conditions of sale, and the purchaser did not know of it until the

delivery of the abstract. He accepted the title, and tendered a draft conveyance of the land with the wall, omitting all reference to the obligation to repair. The vendors' solicitors added the words "subject to and with the liability for ever to repair the wall." The purchaser would not agree to the addition, and the vendors thereupon gave notice of rescission; whereupon the purchaser brought this action for specific performance, claiming the right to a conveyance without the additional words. Pearson, J., says: "If the obligation to repair the wall did run with the land, it would bind the purchaser, whether there was any reference to it in the conveyance to him or not. If it did not run with the land, the vendors had no right to in sert any words in the conveyance imposing the obligation on the purchaser." As to the question of the right to rescind he said: "A condition of this kind is in my opinion intended only to meet the case of a purchaser insisting on an objection which the vendor is absolutely unable to remove; or if not absolutely unable, the removal of which would throw upon him such an amount of expense as it would be unjust that he should be compelled to bear."

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## REPORTS.

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## *ENGLAND.*

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### RECENT ENGLISH PRACTICE CASES.

### McILWRAITH v. GREEN.

*Payment into court—Denial of liability—Action for several breaches of contract—Payment into court in respect of one breach—Acceptance in satisfaction of all demands—Costs—Rules (1883). Ord. 22, rr. 6. 7. (Ont. Rules 215, 218.)*

In an action for breach of contract assigning two distinct breaches, the defendants pleaded denying the breaches and paid money into Court in respect of one of the breaches. The plaintiffs gave notice under Ord. 22 r. 7, that they accepted the money paid into Court in full satisfaction of the causes of action in the statement of claim.

*Held*, affirming decision of Q. B. D. (13 Q. B. D. 897), that the plaintiffs were entitled to the costs of action without proceeding to judgment. [C. A. 14—Q. B. D. 766.

BRETT, M.R.—"For the defendants it has been urged that the plaintiffs ought, in express terms, to have abandoned the prosecution of all the causes of action, and that they ought to have given a notice of discontinuance, or withdrawal of that breach in respect of which the money was not paid in by the defendants. . . . It seems to me, that the notice actually given by the plaintiffs, and the notice in the form suggested are exactly equivalent. . . I dissent from the view of Field, J., in *Crosland* v. *Routledge* W. N. (83) 228."

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### BARKER v. LAVERY.

*Appeal to House of Lords—Stay of execution.*

Execution for costs, pending an appeal from the Court of Appeal to the House of Lords, will not be stayed, unless evidence be adduced to show that the appellant will be unable to recover such costs from the respondent should the appeal be successful. [C. A. 14—Q. B. D. 769.

EARL OF SELBORNE, L.C.—"The defendant is not entitled to have the application granted as a matter of course. Evidence ought to have been adduced to show that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords. As to the request for time to make an affidavit about the plaintiff's means, we cannot accede to it; those who apply for a stay of execution must come before us prepared with all necessary materials."

### IN RE GILBERT, GILBERT V. HUDLESTONE.

*Appeal on question of costs—Special leave—J. A.* 1873, *s.* 49.—(*Ont. J. A. s.* 32.)

When leave is given to appeal from an order as to costs which are left by law to the discretion of the judge, the Court of Appeal will still have regard to the discretion of the judge, and will not over-rule his order, unless there has been a disregard of principle, or misapprehension of facts.

[C. A.—28 Ch. D. 549.

BAGGALLAY, L.J.—"When the Court of Appeal is acting under that section (*i.e.*, s. 49) it must still recognize the discretion of the judge, as in other matters which are left to his discretion. If there has been any violation of principle, or misapprehension of facts the Court will interfere, but not otherwise."

### DOBLE V. MANLEY.

*Foreclosure action—Subsequent incumbrance—One period named for redemption.*

In a foreclosure action, one day will be fixed both for the mortgagor, and subsequent incumbrancers, to redeem the plaintiff.

[Chitty, J.—28 Ch. D. 664.

CHITTY, J., said that he had consulted KAY, J., and PEARSON, J., and that they were all unanimously of opinion that when defendants did not appear, one time only should be fixed for redemption. . . . "If any subsequent mortgagee appeared, and claimed to have successive periods fixed, the Court would have to consider whether he was entitled to them."

### IN RE WARD.

*Solicitor and client—Costs—Taxation—Assignee.*

Whether an assignee of one or several bills of costs can obtain an order for taxation under 6 & 7 Vict. c. 73, s. 37 *quære.*

If an assignee can apply for an order for taxation, he must make a special application; he is not entitled to an order of course.

Where it is sought to tax one only of several outstanding bills of costs, the application must be a special application.

[Pearson, J.—28 Ch. D. 719.

PEARSON, J.—"In my opinion an order to tax one only of several bills of costs ought not to be obtained as a common order. A person ought not to apply for taxation piecemeal, but he ought to ask to have all the outstanding bills of costs against the client taxed together, otherwise there would be a risk of doing the greatest injustice to one side or the other. If it is possible for an assignee of costs to obtain an order for taxation, in my opinion he cannot obtain a taxation of one bill of costs, only by means of the common order, even if only one of the bills of costs have been assigned to him; he can only do so by means of a special application. The order to tax must be discharged with costs."

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

## COURT OF APPEAL.

### BEATTY V. THE NORTH-WEST TRANSPORTATION COMPANY.

*Incorporated Company—Directors of Company—Stockholders.*

J. H. B., one of the defendants, a director of the defendant company, personally owned a vessel "The United Empire," valued by him at $150,000; and was possessed of the majority of the shares of the company, some of which he assigned to others of the defendants in such numbers as qualified them for the position of directors of the company, the duties of which they discharged. Upon a proposed sale and purchase by the company of the vessel "The United Empire" the board of directors (including J. H. B.), at their board meeting adopted a resolution approving of the purchase by the company of such vessel; and subsequently at a general meeting of the shareholders, including those to whom J. H. B. had transferred portions of the stock, a like resolution was passed, the plaintiff alone dissenting.

*Held*, reversing the judgment of the Court below, 6 O. R. 300, that although the purchase on the resolution of the directors alone might have been avoided, the resolution of the shareholders validated the transaction, and that there is not any principle of equity to prevent J. H. B. in such a case from exercising his rights as a shareholder as fully as other members of the company.

### ARMSTRONG V. FARR.

*Equitable Assignment.*

On the occasion of the defendant effecting a purchase of land in which the plaintiff had some interest, and which he refused to release until assured that part of the purchase money to be paid by the defendant to his vendor would be handed to one H., a solicitor acting in the matter, out of which the amount due plaintiff was to be paid, whereupon the plaintiff executed a conveyance of his interest which was duly registered. The defendant and his vendor made other arrangements for discharging all the purchase and obtained a deed of the property.

*Held*, affirming the judgment of the Court below, that, under the circumstances, an equitable assignment had been made of so much of the purchase money as was due to the plaintiff, and that the defendant was bound to pay the amount to the plaintiff—BURTON, J.A., dissenting.

### MOOREHOUSE V. BOSTWICK.

*Partnership and personal creditors—Dissolution of partnership.*

L. A. M. made an assignment of all his property to the defendant in trust to convert the same into money, and out of the proceeds to pay and satisfy all his debts and liabilities, ratably and proportionably, without preference and "recognizing such liens, claims, charges and priorities as the law directs." Some of the creditors were creditors of L. A. M. alone, whilst others were creditors jointly of him and his brother with whom he had for some time carried on business, and who had assigned to L. A. M. all his interest in the partnership effects, who covenanted to pay off all the partnership creditors.

*Held*, reversing the judgment of the Court below, 5 O. R. 104, that in respect of such portion of the assets as had been the joint property of the partners the partnership creditors had a claim to be paid in priority to the separate creditors of L. A. M.

### BRUSSELS V. RONALD.

*Agreement to carry on works—Bonus by municipality—Failure to carry on the work—By-laws—Want of consideration for mortgage.*

The municipal corporation of Brussels agreed to grant the defendant $20,000 by way of bonus to enable him to establish a manufactory of steam fire engines and agricultural implements which in pursuance of the by-law in that respect he stipulated to carry on for twenty years, and to secure the due performance of such agreement executed a mortgage on certain real estate. Having failed to carry on the works for the stipulated period the municipality instituted proceedings to foreclose, but

*Held*, affirming the judgment of PROUDFOOT, J., 4 O. R. 1, that the plaintiffs could only obtain an enquiry as to the damages sustained by reason of the breach, and have a lien on the estate for the amount found due.

The defendant subsequently, without any reference to the by-law, and without any consideration, executed another mortgage on the same property for $3000.

*Held*, also (affirming the judgment of PROUDFOOT, J.), that the municipality was not entitled to any relief on this mortgage.

### PETRIE V. GUELPH LUMBER CO.

*Deceit—Representation untrue in fact, though alleged to have been believed to be true.*

The defendants other than the company being directors of the defendant company, made certain representations concerning the affairs of the company, which they believed to be true, but which were not in fact true, and procured the plaintiff and others to take stock in the company. The company was at the time insolvent.

*Held*, affirming the judgment of the Court below, 2 O. R. 218, in an action for deceit, that the defendants were not liable.

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

*Robinson*, Q.C., and *Cassels*, Q.C., for respondents.

### COTTINGHAM V. COTTINGHAM.

*Sale and purchase of lands—Sale by auction—Excess in quantity.*

The judgment reported 5 O. R. 704 was reversed on appeal, the Court being of opinion, PATTERSON, J.A., dissenting, that the sum of $3,100 was bid for the premises, stated to be 100 acres more or less.

*Per* BURTON, J.A.—The price per acre was only a mode of arriving at the sum bid, assuming the lot to contain 100 acres.

### TOWERS V. THE DOMINION IRON CO.

*Sold by sample—Right to reject goods.*

The defendants bought by sample from W., who acted as a broker between them and the plaintiff, a quantity of cotton droppings or waste, to be delivered f.o.b. at St. Catharines, and by the directions of the defendants the same were forwarded to their branch house at Cincinnati, where it was alleged they were found to be not equal to the sample. In the meantime, however, the defendants had accepted a bill drawn on them by the plaintiff for the price of the waste.

*Held*, affirming the judgment of SENKLER, J.C.C., that the proper place to have inspected the goods was at St. Catharines, and that if even the goods were not up to sample, it formed no ground of defence to the action on the bill.

*Semble, per* HAGARTY, C.J.O., that the only remedy in the case in favour of the defendants was by cross action.

### WALMSLEY V. SMALLWOOD.

*Appeal for costs—Disclaimer—Practice.*

J., one of the defendants, had bid for and became the purchaser of a lot of land sold under the provisions of the R. S. O. ch. 216, by certain parties claiming to be trustees of the Coloured Wesleyan Church, whose proceedings in respect of such attempted sale were impeached in the action to which J. was made a party defendant, although he avowed his willingness to withdraw from the purchase, and by his answer disclaimed "all interest in the result of this suit, and no effort has been made by him to have said sale carried out, as he was aware that the same would have to be first confirmed by the members of the said church." At the trial judgment was given setting aside the sale, and ordering the defendants generally to pay costs.

*Held*, reversing the judgment of the Court below, that under the circumstances a formal disclaimer was not required, and J. was ordered to be paid his costs of the appeal, although the action in the Court below was dismissed as against him without costs.

### COSGRAVE V. STARRS.

*Guarantee—Effect of death of one of the partners to whom a guarantee is given—Notice to determine guaranty.*

The judgment in this action, reported in 5 O. R. 189, was varied on appeal by limiting the liability of the defendant under his guaranty to C. & Co. to what was due by Q., on the 5th of April, 1882, when notice to discontinue supplying him with goods was given to C. & Co. by the guarantee.

### BUTTERWORTH V. SHANNON.

*Principal and agent—Purchase of lands by agent—Ratification.*

The plaintiff paid $1,000 to the defendant for the purpose of investing the same in Manitoba lands for the plaintiff in case the defendant thought it advisable, if not, the money to be returned. The defendant did not pursue such authority, but purchased ten lots in Portage la Prairie. Two of these lots defendant alleged he purchased for the plaintiff, but there was no evidence of this other than the defendant's own statement, the conveyance of the ten lots having been taken in the defendant's name. The plaintiff subsequently agreed to take these two lots upon the representation of the defendant that they equalled the other lots in size, etc., which proved to be incorrect

*Held*, affirming the judgment of the Court below, that the adoption of the purchase by the plaintiff having been made by reason of the defendant's misrepresentations as to size and value of the lots, the plaintiff was not bound thereby, and was entitled to recover back the amount so entrusted to the defendant.

CAREY V. THE CITY OF TORONTO.

*Sale of lots by a plan showing streets and lanes.*

The mere fact of the owner of lands selling them by a plan showing streets and lanes thereon, does not bind him to continue such streets and lanes unless a purchaser is materially inconvenienced by the closing up of any of them.

A sale by auction was announced of lots, the advertisement stating that "lanes run in rear of the several lots." At the auction the plaintiff purchased a lot on the north side of Baldwin Street, which ran to a lane running from east to west, and a lane also ran in rear of other lots which joined at right angles the lane in rear of the plaintiff's lot.

*Held*, that as the plaintiff had ready access to the streets by the lane on which his lot abutted, he could not prevent the vendors from closing up any other lane upon the property.

## CHANCERY DIVISION.

Boyd, C.] [April 22.

MORRISON V. MORRISON ET AL.

*Will—Construction—Speaking from death—Contrary intention—After acquired property—R. S. O. c. 106, s. 26.*

A testator by his will, dated May 19th, 1873, devised to R. M. "the property on H. Street," and gave "all the residue of his estate real, personal and mixed, which he should be entitled to at the time of his decease to A. M." At the date of the will he possessed only one property on H. Street called the Red Lion Hotel. He subsequently acquired other property on that street, consisting of three houses and lots.

*Held*, that, notwithstanding R. S. O. c. 106, sec. 26, by which a will is made to speak from the death, "unless a contrary intention appears by said will, the after-acquired property on H. Street did not go to R. M. but fell into the residue." The testator had expressed his intention with reference to all land acquired by him after the date of his will by appropriate words in that will, and it would be going contrary to that intention to declare that some after-acquired property should be withdrawn from the residuary clause, and held to pass under the prior specific devise.

*Martin*, Q.C. and *Waddell*, for plaintiff.

*Furlong*, for the defendants, the Swans.

*Parker*, for the defendant, R. Morrison.

*Laidlaw*, for the defendant, A. Morrison.

Boyd, C.] [May 11.

MITCHELL V. GORMULLY.

*Partnership—Syndicate—Right of one partner to deal with his share—Profits.*

M. & G. met and agreed to jointly purchase 150 acres of land and to sell it in lots or perhaps *en bloc* to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. M. had one-third interest and G. had two-thirds. No syndicate was got up to take the whole, and G. telegraphed M. that he was going to arrange a syndicate for two-thirds, and he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds interest, and obtained a large profit thereon. This arrangement was made in writing and recited that G. was seized in fee of the lands and had executed a declaration of trust of one-third in favour of M., and executes this declaration as to the remaining two-thirds. A quit-claim deed was afterwards executed by M. in favour of G., and a declaration of trust as to one-third in favour of M. was signed by G. In an action by M. for a share of G.'s profit it was

*Held*, that there was no sale of any of the lots that belonged to M. The two-thirds had not been disposed of so that they had passed out of the partnership though as to them there might be a subpartnership; there had been no dealing with the joint property of the partnership, but only of the individual interest of one partner; he had sold some portion of his individual share and no injury had resulted to his partner, and even if any had it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern. The action was therefore dismissed with costs.

*McCarthy*, Q.C., and *C. H. Ritchie*, for defendant.

*S. H. Blake*, Q.C., for plaintiff.

Full Court.] [May 21.

KING V. ALFORD.

*Mechanic's lien—Railway buildings—Engine house.*

*Held*, following *Breeze* v. *The Midland Railway Co.*, 26 Gr. 225 (PROUDFOOT, J., dissenting), that a mechanics' lien does not attach upon an engine house and turn-table built for a railway company, and confessedly necessary for the proper working of the railway; and such engine house and turn-table, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanics' lien.

There is nothing in the Mechanic's Lien Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution, and ESTEN, V.C., decided in 1862 that no sale of lands and buildings of a railway could be effected under process of execution: *Peto* v. *Welland Railway Co.*, 9 Gr. 458. That has ever since been deemed well settled law in this Province. It is not correct to say that a mechanic's lien is analogous to a vendor's lien—it more closely resembles the lien of an execution creditor.

*Per* PROUDFOOT, J., the statute was intended to place mechanics on a more favourable footing than other creditors. General creditors have a right to sue for their debts upon the common law liability of the company, but they had no specific charge. Mechanics were given a specific lien on the property. Their case is not the same then as that of general creditors, and their right ought not to be measured by what could be realized upon an execution. The true gauge of their right I think is that which the name expresses, a lien, and their remedies such as a lien-holder might enforce, and it is immaterial whether the lien be created by mortgage or contract or imposed by statute. There seems no distinction in principle between their position and that of an unpaid vendor for land sold to the railway. And it has been settled by numerous decisions that to enforce such a lien an order may be made for the sale of the railway.

RICHARD ET AL V. STILLWELL.

*Guarantee—Form of—How sent and received—Names of parties.*

C. A. E. carried on business under the name of S. P. Co., became indebted to the plaintiffs and sold out to the defendant. The defendant then ordered goods from the plaintiffs which were supplied, and at the same time a demand was made for an acknowledgment of C. A. E.'s indebtedness to the plaintiffs. The defendant subsequently gave a further order for goods, but the plaintiffs declined to supply them until the acknowledgment was forthcoming. Soon afterwards the plaintiffs received in an envelope, addressed to their firm, an acknowledgment in these words:

"LAKE SUPERIOR, ONT.
"July 4th, 1883.

"*Gentlemen*,—I beg to inform you that I have assumed all liabilities of the 'S. P. Co.' lately carried on by Mr. C. A. E., and am responsible to the amount contracted by him up to July 24th, 1882. Kindly ship cases immediately. Respectfully yours.
"(Signed) C. J. S."

The envelope was lost but its receipt, superscription and subsequent loss were proved.

*Held*, that the plaintiffs were entitled to recover from the defendant the price of the goods sold to C. A. E.

*W. M. Hall*, for the plaintiff.

*G. H. Watson*, for the defendant.

## PRACTICE.

Osler, J. A.] [Dec. 19, 1884.

EXCHANGE BANK V. BARNES.

*Security for costs—Case in Court of Appeal.*

The plaintiffs having recovered judgment in the action, the defendant appealed to the Court of Appeal, and there moved to compel the plaintiffs to give security for costs, on the ground that the latter resided out of the jurisdiction, and had since the recovery of judgment ceased to carry on business in, and withdrawn their assets from this Province.

Under these circumstances the motion for security was refused.

*R. Martin*, Q.C., for the motion.

*Laidlaw*, contra.

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Ferguson, J.] [March 30.

RE HINDS, HINDS V. HINDS.

*Maintenance—Money in court—Lunatic not so found.*

*Holman*, for one Beaty Hinds, moved on petition for an order for payment out of Court to the petitioner from time to time of the moneys to which Charles Hinds was entitled for the support and maintenance of the said Charles Hind, who, as it appeared from the affidavits and papers filed, was a lunatic, though not so found, and was living with the petitioner, his brother.

*John Hoskin*, Q.C., official guardian *ad litem*, for the lunatic.

FERGUSON, J.—Is there any authority for such an order where the party has not been declared to be a lunatic?

*Holman* cited *Re Bligh* 12 Ch. D. 365; *Re Brandon*, 13 Ch. D. 773.

FERGUSON, J., made an order for payment to the petitioner, out of the lunatic's share of moneys in Court, of the costs of the application, and of an annual allowance to be expended for the maintenance of the lunatic.

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Mr. Dalton, Q.C.] [April 28.
Rose, J.] [May 4.

SMITH V. SMITH ET AL.

*Notice of appeal—Effect of.*

A notice of appeal to the Court of Appeal is not an initiation of the appeal, and therefore where a notice was given, but was not followed up by the appellant giving security as required by sec. 38, O. J. A.,

*Held*, that there was no appeal pending, and a motion to set aside the notice of appeal or to dismiss the appeal was refused.

*F. W. Hill*, for the motion.

*R. A. Porteous*, contra.

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Ferguson, J.] [May 13.

COTTINGHAM V. COTTINGHAM.

*Infant plaintiffs—Next friend—Appeal to Supreme Court of Canada—Indemnity against costs.*

Where the judgment of the Court of Appeal was adverse to the infant plaintiffs, and their next friend was desirous of carrying the case to the Supreme Court of Canada, and was advised by counsel so to do, and where it appeared that one of the judges in the Court of Appeal had dissented from the judgment of the Court, an order was made protecting the next friend out of the infants' money in Court in respect of the costs of the appeal.

*Watson*, for the next friend.

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Ferguson, J.] [May 13.

HERRING V. BROOKS.

*Action in Chancery Division—Jury notice—Transferring action.*

In an action for the price of goods sold and delivered, begun in the Chancery Division, the defendant's jury notice, which had been struck out by the order of the Master in Chambers, was on appeal restored, and the action was transferred to the Queen's Bench Division.

*Masse* v. *Masse*, *ante* p. 179, not followed, owing to the views expressed in the Court of Appeal in *Pawson* v. *The Merchants' Bank* (not yet reported).

*Watson*, for the appeal.

*W. A. Reeve*, contra.

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Rose, J.] [May 19.

ROSENHEIM V. SILLIMAN.

*Examination of witnesses before trial—Rule 285, O. J. A.*

The decision of the Master in Chambers, *ante* p. 178, was reversed on appeal as to the examination before the trial of the clerk who accepted the draft sued on in the defendant's name.

*Ogden*, for the appeal.

*Holman*, contra.

Rose, J.] [May 19.

CARTER v. BARKER.

*Dismissing action—Want of prosecution.*

The pleadings were closed six weeks before the commencement of the assizes, but the plaintiff's solicitors did not serve notice of trial in time for such assizes because they were waiting to hear from the plaintiff whom they had notified that they would not proceed unless certain costs were paid. On the last day for serving notice of trial, about eight o'clock in the evening (service after four not being good), the plaintiff's solicitors asked the defendant's solicitor to accept service of notice of trial, but the latter declined to do so, and afterwards moved to dismiss the action for want of prosecution.

*Held*, that if the plaintiff, without good excuse, neglect to proceed with the action the Court will not, as of course on his mere undertaking to speed the action and paying costs, refuse to dismiss; but, under the circumstances above set out, an order of the Master in Chambers refusing to dismiss and permitting the plaintiff to proceed, was affirmed on appeal.

*Aylesworth*, for the appeal.

*R. A. Porteous*, contra.

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Rose, J.] [May 22.

ROBERTS v. LUCAS.

*Order dismissing action—No bar to subsequent action—Rule* 255, *O. J. A.*

An appeal from the order of the local judge at Hamilton, in Chambers, made under Rule 255, O. J. A., dismissing the action for want of prosecution, and refusing to insert in the order a clause reserving leave to the plaintiff to bring a fresh action, was dismissed.

*Held*, that the order was not a dismissal on the merits, and not a bar to a subsequent action for the same cause.

*Holman*, for the appeal.

*A. Bruce*, contra.

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Boyd, C.] [May 26.

PAWSON ET AL. v. THE MERCHANTS' BANK ET AL.

*Production of documents—Privilege.*

The plaintiffs were allowed to read, upon a motion for a better affidavit of documents, the depositions of the Assistant General Manager of the defendants, the Merchants' Bank, taken for use upon an injunction motion.

G. was general solicitor for the defendants, the Merchants' Bank, and was also acting in the transactions in question for other parties, and had himself agreed to endorse certain notes which were in question, and was negotiating actively much of the whole transaction.

*Held*, that letters written by G. to the Merchants' Bank, in reference to the transactions in question, were not privileged from production.

*Moss*, Q.C., and *Hoyles*, for the Merchants' Bank.

*Shepley*, for the plaintiffs.

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The Master in Chambers.] [May 27.

MCCALLUM v. MCCALLUM.

*Interlocutory judgment—Irregularity—Claim for injunction.*

Where the endorsement on the writ of summons claimed, in addition to pecuniary damages, an injunction restraining the defendant from disposing of certain goods, an interlocutory judgment signed by the plaintiff for default of appearance, was set aside as irregular.

*Holman*, for the motion.

*Hoyles*, contra.

## BOOK REVIEWS.

General Rules and Orders of the Courts of Law and Equity of Ontario, passed prior to Ontario Judicature Act, 1881, and now in force, with the Rules passed since August 21, 1881, and the Tariffs of the High Court of Justice and the County Courts, with Notes by George Smith Holmested, Registrar of the Chancery Division. Vol. II. Toronto: Rowsell & Hutcheson, 1885.

A little more than a year ago the first volume of "Holmested's Rules and Orders" was published. The profession have been eagerly awaiting the arrival of the second volume, and the expectations raised by the first have not been disappointed by the one now before us.

The latter comprises the former Common Law Rules, the Election Rules — Parliamentary and Municipal—the Rules of the Court of Appeal, as well as the additional Rules of the Supreme Court passed since the Judicature Act came into force, together with the present tariffs of solicitors' and counsels' fees of the High Court and the County Courts. Mr. Holmested has adopted the same method with regard to the Common Law Rules which he followed in his first volume when dealing with the Chancery Orders. He has, whenever he considered a rule to be in force, printed it in full, and when it is considered not to be in force he has given merely a brief note of its purport.

The idea that the Judicature Act and Rules are intended to constitute a complete code of practice, which at one time prevailed in the minds of some, has, we believe, been by this time pretty well exploded, and Mr. Holmested, by his careful review of the Rules and Orders of the former Courts of Law and Equity, has shown how very largely the practice continues to be governed thereby. It is obviously therefore just as necessary for the practitioner to be familiar with the Rules and Orders of the former Courts which continue in force, as it is for him to be conversant with the Judicature Rules.

We are glad to observe that Mr. Holmested has obviated one objection which sometimes lies against the publication of a law book in more than one volume by appending to the second volume a complete index of the contents of both volumes, and also a complete table of cases cited in either volume. As showing the amount of labour expended on the work the latter table includes some 3,000 cases. Our author with his accustomed industry and accuracy has not failed to give us a full addenda, and this is so printed as to leave alternate blank pages for notes by diligent students and practitioners.

The whole of the Rules and Orders included in this volume are fully and evidently very carefully annotated. We know of no one more competent for the task than Mr. Holmested. He has done his work well, and his book is one which no practitioner can afford to do without.

The book is got out in excellent form, both as regards paper and printing, in fact, almost the best specimen of law publishing we have seen in Canada, and is a credit to the well-known house of Rowsell & Hutcheson.

## *OBITUARY.*

Since the issue of our last number the profession has had to deplore the loss of one of the most promising of its younger members. Mr. T. S. Plumb, from the time he commenced the practice of his profession in this Province, had been steadily advancing in reputation as a conscientious worker and an able lawyer. As a member of one of the leading firms in Toronto, his future success seemed to have been assured. Mr. Plumb was educated at Rugby, proceeding from there to Oxford, and took his degree from Balliol College, having obtained honours at both public examinations. On leaving Oxford Mr. Plumb was called to the English Bar, and very shortly afterwards returned to his native Province, commencing the practice of his profession at Toronto. It is to the zeal with which he threw himself into his professional work that many attribute his early death. Few have acquired so excellent a reputation in so short a time.

## *LAW SOCIETY.*

The following Rule was passed by Convocation last term:—"Ordered, that section 4 of the Rules for Examination, passed on the 26th December, 1882, be amended by inserting the words "at least 29 per cent. of the marks obtainable on the paper on each subject," and between the words "obtain" and "at least," where these words first occur in the second section.