Canada Law Journal.

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DIARY FOR MAY.

1. Thur...Prince Arthur born, 1850.
2. Fri.....J. A. Boyd appointed Chancellor, 1881.
4. Sun.....*3rd Sunday after Easter.* Napoleon died, 1821.
6. Tues...Sittings of Supreme Court of Canada—First Intermediate Examinations.
8. Thur...Second Intermediate Examinations.
11. Sun.....*4th Sunday after Easter.*
13. Court Appeal Sittings begin County Court Sittings (York) Solicitors' Examination.
14. Wed....Barristers' Examination.

TORONTO, MAY 1, 1884.

THE new regulations of March 29th, 1884, making certain amendments in the tariff, will be found in another column.

BY way of experiment, to see if it will be of sufficient interest to our readers, or be by them appreciated, we publish the letter of a correspondent in England, under the heading "Our English Letter." Whether it is to become a permanency remains to be seen.

THE Statutes of New Zealand for three or four years past have been recently placed in the library at Osgoode Hall; they are handsome volumes, remarkable for the excellence of the typography, paper and binding, and certainly in all these respects cast in the shade the statutes of either the Dominion or this Province.

THE annual dinner of the Osgoode Literary and Legal Society will, this year, be held at the Walker House on the evening of May 14th. We would remind our readers that this is the only occasion which affords to all the members of the profession an opportunity of meeting one another in a social manner; and, in this connection, it would not be amiss if members of both the senior and junior Bars would be present with the students. Tickets, we understand, may be procured up to the 16th instant from Messrs. W. J. Wallace, W. E. Raney, W. B. Lawson, and Alex. Monro Grier, members of the dinner committee.

THERE is a tradition amongst Custom House officers that an article of wearing apparel which has been worn is not subsubject to duty, but that one which has not been worn, though *bona fide* the property of the traveller, and intended for his own personal use, is dutiable. Mr. Astor, of New York, who deserves to be reckoned amongst the benefactors of his race, thought otherwise, and having "plenty of money and nothing to do," has been amusing himself by laying rude and sacrilegious hands on this time-honoured theory, as we learn from the New York *World*:—

> When Mr. Astor returned home his baggage was seized for duties because it contained wearing apparel which had not been worn. Mr. Astor very commendably resisted the demand for payment of the alleged dues, and determined to test a construction of the law, which common sense told him was absurd, and which was a great annoyance and oppression to many persons who were not in a position to resist the exaction.
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> The United States Supreme Court has just rendered an interesting decision in this case. It is held that no duties can be levied on wearing apparel wholly manufactured, intended for the immediate use of a passenger or of his family accompanying him, or suitable for the season of the year approaching at the time of arrival, even though it has never been actually worn, provided that such wearing apparel does not exceed in quantity, quality and value what the passenger is in the habit of providing and keeping on hand for use.
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> This decision will put a stop to an inquisition

by custom house inspectors which has proved exceedingly offensive to European travellers, and which it is not supposable that the law ever contemplated.

AN old friend, from whom we are always delighted to hear, writes us, from Ottawa, as to the work of the Session. There has not been much that is of interest to lawyers; what there is, we may refer to hereafter. At present, we are concerned to give our readers a sugar plum to relieve the dry solidity of their fortnightly food. After speaking of a bill of the Postmaster-General's which died unborn,

"And closed its little being without light,"

our old friend discourses on the bills that did see the light, but then came to an untimely end, and thus invokes the muse *in memoriam cœdis innocentium:*

"Poor innocents, loved offspring of the heads
Of legislative sires, who fondly dreamed
They'd blossom into Acts of mighty power
To work great marvels for our country's good,
To make her statesmen incorruptible,
Her laws so clear that doubtful points no more
Should trouble puzzled judges, and her chest
So full that deficits should be unknown.
Fond hopes destroyed by fell Herodian sword,
The glory and the praise they might have won,
The well-planned good they might, perhaps, have done,
And all their promised blessings to the nation
Cut off by fate's sharp shears and—prorogation!
They died by Parliament's remorseless rule
And joined the martyr band of St. Ursule."

No tear, however, rises unbidden to our eye as we think of these slaughtered innocents—quite the reverse—all tears are gone, the last drop shed in bemoaning the rabbit-like productiveness of the Attorney-General of Ontario and the other fruitful mothers who have a yearly deliverance in the council chamber of our Legislative Assembly. When we think of these busy and expensive beings we are tempted to use the father's touching prayer as the olive branches came with annual regularity: "Oh, that Providence would only send them once in *two* years."

WE shall not now consider whether the charges that have recently been made, one against a solicitor for rendering fraudulent and excessive bills of costs, and the other against a Queen's Counsel of unprofessional conduct, are or are not well founded. We assume both persons to be innocent until proved guilty. The charge against the former is said by him to have been made for a contemptible political purpose, whilst the friends of the latter say that the charge against him was trumped up by way of retaliation. If there is any truth in any of these statements it is very discreditable to the parties concerned, and we trust the Law Society will make a full investigation, and will, so far as it has the power, see that justice is done in the premises.

But there is one feature of the case which is very important to the well-being and credit of the Bar, and being general in its character may properly be referred to now. It is quite inexcusable and highly improper for one barrister to make charges against another by an appeal to the public through the lay press, rather than to the Society of which they are both members, in the manner in such cases made and provided. We need not enlarge upon this; it has been alluded to before in these columns, and must now receive due attention no matter what may be the result of the present charges. Even assuming for the present that the utterances in Parliament were not justified, gentlemen of the profession should remember that two wrongs do not make a right. The gross injustice of thus publishing hearsay charges in the lay press is apparent to any one who sees the way in which the country papers twist things to suit political purposes or personal dislikes. In one now before us one of the accused persons, who we presume is waiting the proper time to make his denial or explanation, as he has as yet said nothing on the

subject, is held up to public scorn and contempt as one who for his misconduct will "probably have his gown stripped off his back." We are sure Mr. Macdonell never supposed that such use would be made of his hasty letter, but he must be held responsible for the natural result of his action, in case the result of the investigation should prove that the charge he has made against Mr. Blake does not result in the event alluded to.

THE JURISDICTION OF THE MASTERS IN CHAMBERS.

A very important question was recently raised before the Chancellor upon an appeal from the order of a Local Master in the case of *Freel* v. *Macdonald*, affecting the jurisdiction of the Master in Chambers, but, as the case went off on another ground, no decision was given regarding it. The point taken, however, must sooner or later be discussed and receive judicial consideration, and the sooner the better.

The case of *Freel* v. *Macdonald* was one affecting more immediately the jurisdiction of Local Masters, in respect to applications before them in Chambers, and the question raised, to which we refer, was whether they have in any case jurisdiction to entertain applications for speedy judgment, in actions when the writ of summons has been specially indorsed, under Rule S. C. 80. Under Rule S. C. 422 the judges of the County Courts and Local Masters are empowered to exercise the same jurisdiction as the Master in Chambers in certain cases, and subject to certain restrictions. Ever since the passing of the Judicature Act the Master in Chambers has assumed to exercise jurisdiction under Rule S. C. 80 without question. There are, however, certain limitations upon his jurisdiction, and it certainly is not free from doubt whether his right to act under Rule S. C. 80 is quite as clear as has hitherto been supposed.

The Judicature Act and Rules have been construed on the principle that wherever any power or duty is conferred on "a judge," or "the Court or a judge," by the Act or Rules, the words imply that a judge in Chambers may exercise the jurisdiction, and that whatever a judge in Chambers may do, may also be done by the Master in Chambers, unless the contrary is expressed.

Under this canon of construction no doubt many matters have been transacted by the Master in Chambers to the relief of the judges, and to the satisfaction of suitors and the profession. At the same time there is a doubt, and a grave doubt, how far it is a correct mode of interpreting the Act and Rules.

If we turn to Rule S. C. 420 we find the jurisdiction of the Master in Chambers is defined. He is to have the power, authority and jurisdiction heretofore in like cases possessed in the Superior Courts respectively by the Clerk of the Crown and Pleas of the Court of Queen's Bench, and by the Referee in Chambers of the Court of Chancery, and the latter part of Rule 420 expressly excludes from his jurisdiction the matters excepted from the jurisdiction of the Clerk of the Crown and Pleas of the Queen's Bench, and the Referee in Chambers by the Reg. Gen. of Trinity Term 1870, and Chancery Order 560.

It seems, therefore, to be clear that the jurisdiction of the Master in Chambers, is the same as that formerly possessed by the Clerk of the Crown and Pleas of the Court of Queen's Bench, and the Referee in Chambers of the Court of Chancery, and no wider and no greater, but on the contrary subject to the like restrictions.

In construing Chancery Order 560 (and it will be seen that Reg. Gen. Trinity Term 1870 is in similar terms) it was held

that the jurisdiction of the Referee was restricted to the jurisdiction exercised by a Judge in Chambers at the time that order was passed, and that where subsequent to the passing of that order any statute or order was passed giving additional powers to a Judge in Chambers, the additional powers so conferred could not be exercised by the Referee in Chambers unless he was expressly named. Thus, the power of setting aside fraudulent conveyances subsequently conferred by the Administration of Justice Act 1873 on a Judge in Chambers was held not to be exercised by the Referee, *Queen* v. *Smith*, 7 P. R. 429; and see *Re Nolan*, 6 P. R. 115; *Re Arnott*, 8 P. R. 39; but see *Collver* v. *Swazie*, 8 P. R. 421; 15 C. L. J. 137. If the principle laid down in those cases be correct, then it seems to follow that any additional power conferred upon a judge in Chambers by the Judicature, Act and Rules, cannot now be exercised by the Master in Chambers.

The power conferred by Rule S. C. 80 on "the Court or a judge" seems to us to be a power not formerly within the jurisdiction of a judge in Chambers, and therefore clearly an additional power, and therefore, upon the principle of construction adopted in *Queen* v. *Smith* and the other cases we have referred to, this is not a power conferred upon the Master in Chambers. In the same way, assuming that Rule S. C. 322 is intended to confer upon a Judge in Chambers power to award judgment upon admissions of fact contained in the pleadings, or in the examination of a party, etc. (a construction of the Rule, by the way entirely opposed to the practice of the Court of Chancery under General Order 270, from which that Rule is adapted), it is nevertheless an additional power, and therefore on the same principle excluded from the jurisdiction of the Master in Chambers, and yet under both of these Rules the Master in Chambers has been accustomed to act, and if he is right in so doing, then all the judges of the County Courts, and all the Local Masters throughout the country, have a similar right to act. If they are assuming to exercise a jurisdiction they do not rightfully possess, very serious questions may arise, and the sooner the doubts which have arisen are definitely settled the better.

CHIEF JUSTICE SPRAGGE.

Hon. John Godfrey Spragge, Chief Justice of Ontario, died on the 20th ultimo in the 78th year of his age, after a period of useful service to his country which seldom fall to the lot of the journalist to chronicle. The country will lament his loss as one who has in a long judicial career borne (as have all our judges) an unstained reputation, as well as one who has exhibited high ability as a jurist, combined with an industry worthy of all praise. We may on a future occasion refer more at length to the life and labours of this eminent judge, the last of the old regime, we can now merely copy the resolution passed at a meeting of the Bar, held after the announcement of his death, and that part of the address of Chief Justice Hagarty to the Grand Jury of York, in allusion to that event.

The resolution was in these words:—

"The members of the Bar now assembled, on behalf of themselves and their brethren throughout the Province, express their profound sorrow at the death of Chief Justice Spragge. He was permitted by a merciful Providence to continue the work of a laborious life to a ripe old age, with his physical and mental powers but little impaired, and he has passed away full of years and honours. He was a great judge and a good man, and in his public and private character was an example worthy of imitation. He occupied the judicial bench for the long period of thirty-three years successively, as vice-chancellor, chancellor and chief justice, and he discharged his high duties from first to last with a degree of zeal, uprightness, learning and ability which has rarely been surpassed in any country.

The judgments delivered by him, and which are recorded in the reports, will be an enduring monument to his name, though found side by side with the decisions of other judges of the greatest eminence. The lamented Chief Justice also possessed, along with the higher qualities, those minor graces of character and manners which so well become the judicial office. While maintaining the dignity of the bench, he was gentle and courteous to all, and never failed to secure the esteem and respect of the bar, and his brightness and geniality in private life endeared him to all who were admitted to his intimacy."

The remarks of the Chief Justice of the Queen's Bench were to the following effect:—

"The Court will adjourn early to-day in order to pay the last tribute of respect to the distinguished judge who has just passed from amongst us. To say that his judicial career of thirty-four years has been one of unsullied purity is a tribute that may safely be paid to the memory of all departed judges of Ontario. The Province has had the benefit of his high attainments, patient labours, courteous manners and sagacious judgment, for a period almost equal to that of his greatest predecessor, Sir John Robinson, a name dear to all Canadians, and especially to the bench and bar of his much loved country.

"Chief Justice Spragge has been taken from us in the midst of his labours, dying in his harness as a good judicial soldier. For myself I have to lament the loss of a valued friend and fellow labourer for many long years, and to one toiling in the same field for nearly nine and twenty years his death speaks with a mournful significance and timely voice of warning."

THE BRIBERY CASE.

WE do not propose to discuss this political *cause celebre* at least at present, because in the first place the alleged offenders are now placed on their trial charged with high crimes and misdemeanours, and in the second place because of the difficulty of discussing any case where the strife of party politics enters as largely as it has in this case until the bitterness of the feeling engendered has died out. We can with great advantage, however, reproduce and record the weighty words of Chief Justice Hagarty in his charge to the Grand Jury at Toronto at the opening of the present Assize for the County of York. He thus spoke:—

"I understand that you will be asked to investigate a very serious and unusual charge against certain persons of conspiring to alter and frustrate the constitutional action of the Legislative Assembly of Ontario by bribing members to vote in opposition to the existing administration in questions arising in such Assembly. I am not aware of any case precisely in point having occurred either in England or in Canada. Although we would gladly accept the guidance of precedent, our regret at its absence is modified by the consideration that, perhaps for the first time in our history, it is charged that men were base enough to offer bribes to members of the Legislature, or that such members were considered base enough to be capable of accepting them. Although from the absence of direct authority the law on the subject is not as clear as we could wish, I shall charge you for the purpose of this enquiry that the law of England is sufficiently comprehensive and elastic to include within its grasp as a high misdemeanour the bribery of the representatives of the people to vote contrary to their duty or belief for the corrupt consideration of a money payment or other corrupt consideration. Parliament has in England on several occasions taken on itself the investigation of charges as to bribing its members. They have been expelled from the House; they have been proceeded against by bill or by impeachment. But no case like that before us has as yet been referred to, especially where the charge was of a general character, to induce by bribery an abandonment of one political party for the support of its opponents. Conspiracy has been often defined as an agreement together of two or more persons to do an unlawful act, or to do a lawful act by unlawful means, and the offence is complete as soon as the agreement is made. It is not necessary to prove that the parties charged met together and expressly agreed to do certain unlawful acts. Conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them. Of course the mere declaration or statement by one defendant that another defendant is engaged in an unlawful conspiracy, or is acting with him in it, is not in itself evidence against such other defendant, though both must be connected therewith by something done or said or assented to by himself. Where the charge is a conspiracy between four

persons you may find a true bill against all, or three or two, but not against one alone, unless others be named or stated to be unknown, and then for conspiring with such other or others. I need hardly remind you that any bill found by you must be agreed to by at least twelve of your number. I have to entreat from you a grave and impassioned consideration of the case to be laid before you. I have intentionally abstained from a perusal of the evidence on which these charges have been founded. You will hear it from the witnesses produced before you.

I need hardly tell you that it is your duty, as it is mine, to approach this investigation in a calm judicial spirit, as remote as possible from the bitter prejudice and excited party feeling in which the public has been unfortunately compelled to hear the charges discussed since the matter has become known. It is my painful and most distasteful duty in asking your impartial consideration to lament the spirit in which the whole matter has been discussed in the public prints. The truth or falsehood of the accusation seems to occupy a small place in a discussion consisting chiefly of an angry storm of charges and counter-charges between the respective champions of the accusers and the accused. Looking back on very long acquaintance with the administration of justice in this country, I have no recollection of any case brought before the court in which the violence of party warfare has shewn so shamefully to prejudice a vital question affecting the character and honour of our public men, as well as the guilt or innocence of the persons charged with attempting by base and illegal means to destroy such character and honour. I feel confident that all honest minds, not hopelessly demoralized by party spirit, must agree that no surer means can be resorted to for the debauching of public opinion and preventing the calm consideration of changes like these than the turning of a grave accusation like the present into a ferocious party struggle in which the accuser and the accused are alike assailed with virulent abuse and denunciation. A healthy public opinion, ready at all times to estimate the conduct of our public men and fellow-subjects according to the known principles of honest and fair dealing, is the surest safeguard of public morality. An unwholesome partisanship blaming and vilifying every act of an opponent's upholding and defending every delinquency of a supporter is the surest method to turn public indignation away from really evil conduct and of compounding right and wrong in a discreditable wrangle between heated political parties. I am sorry to feel it my duty thus to address you. I do so in the hope of obtaining your aid in my endeavour to prevent the angry and bitter voices of the last few weeks' discussion from finding an echo in our courts or jury-rooms.

OUR ENGLISH LETTER.

A week of more than usual interest has just come to a close. On one day, at one and the same moment, four of the Courts were crowded to suffocation. In one, the Court of Appeal, was giving judgment upon application for a new trial in the case of *Bell* v. *Lawes*, a case, the fame of which must long ago have reached Canada; in another, Mr. Justice Hawkins was presiding over a somewhat unsavoury case of slander, known as *Page* v. *Harrison;* in another, Mr. Justice Grove was, with the help of a special jury, going into the merits of a patent for the manufacture of ladies' corsets; in the fourth the celebrated Mrs E. Weldon was winning the admiration of all who heard her, by the clearness of her method of argument. Taking these cases in detail, it is to be observed that the definite character of the final judgment in the Bell case, was such to commend itself to the universal approbation of the public and the legal profession. Every one agreed that the great trial had lasted far too long and had attracted far more attention than was warranted by the trumpery character of the original dispute; beyond this, it was also obvious that the judgment of the Divisional Court had been far from satisfactory. Lord Coleridge was clearly of opinion that the verdict in the original trial had been wrongly pronouced. Mr. Justice Denman failed to take any clear view of the circumstances. Mr. Justice Manisty evidently thought that the first verdict was correct. The result of this extraordinary division of opinion was that an unprecedented judgment was delivered to the effect that the rule for a new trial was to be made absolute unless the plain-

tiff would consent to reduce his damages to £500. This was an absurb proposition, for either there had been a libel or there had not; if there had been none, then, as of course, there ought to have been a new trial; if there had been a libel, then it had been of the most venomous and reprehensible kind. Therefore the vacillating judgment of the Divisional Court was generally censured, and the firm unmistakable language of the Court of Appeal in discharging the rule was exceedingly welcome. It is a matter of which every lawyer hopes to hear no more.

Of *Page* v. *Harrison* the less said the better; the material of the whole trial was disgusting. But, passing on to Mrs Weldon's action against Dr. Forbes Winslow, we come to a matter of great public importance. First it is only due to her to observe that she managed her case, an extremely difficult one, with consummate skill; in cross-examination she showed great tact, and more than once inveigled the specialist in insanity into pitfalls from which he emerged in a ludicrous plight. "You know what a soul is, Dr. Winslow?" was one of her queries: "Certainly" was the rash answer, upon which he was asked to describe a soul and was left speechless. But there was a serious background to this ludicrous trial, which ended in Mrs Weldon's being defeated upon technical grounds; it served to direct the attention of the public to the terrible state of our laws of lunacy. Mrs Weldon was suspected of being insane, and her husband accordingly communicated with Dr. Winslow who, amongst other things, keeps a private asylum for rich patients to whom he charges £500 a year. This is hardly the man whom an affectionate husband would ordinarily choose as a disinterested judge of the sanity of a possible patient; nevertheless the doctor immediately called upon Mrs Weldon, assuming a false name, and put to her a number of ridiculous questions to which it would have been impossible to give a sensible answer. But one medical certificate is not sufficient, and accordingly the father-in-law of the proprietor of the lunatic asylum also called and examined the unfortunate lady. This, in addition to a ten minutes interview with a Middlesex magistrate completed the formal preliminaries for her incarceration in a lunatic asylum. It is difficult to conceive any legal machinery which could afford better opportunities for fraud; yet, the law has been immensely improved of late years chiefly through the agency of Mr. Charles Reade, a sensational novelist, who is not the first author of works of fiction who has produced an amendment of the law.

The most important of recent enactments is the Bankruptcy Act, which has now been in operation since the 1st of January. It is quite the reverse of a success. As far as it is possible to judge, the estates of bankrupt debtors realize as little as ever, and the expenses are at least as great as they were under the Act of 1869. The surplus money finds its way into the money-bags of the Board of Trade. The result is that solicitors are naturally anxious to avoid practising in bankruptcy, seeing that they can make little or no profit by any business they undertake, and the new Act, instead of simplifying and cheapening the process, bids fair to become a nonentity. Already the number of bankruptcies has decreased by more than 1,000 compared with the corresponding period of last year, but it cannot be contended that insolvency is less frequent than it used to be. The plain fact of the matter is that no debtor will have recourse to the Court for relief, and that no creditor goes there if he can possibly help himself. Meanwhile, the presiding judge, Cave, J., is confessedly a man admirably qualified

for his position. He is clear-headed, quick in dispatching business, and has a wonderful knack of finding his way through the voluminous papers which are characteristic of bankruptcy proceedings. Hitherto he has done little more than hear County Court Appeals, in the course of which he has made it clearly understood that he has a keen eye for the fraud which is the inseparable incident of many of the cases which come before his notice.

At this moment the judges are sitting in committee, to consider the desirability of remodelling the present arrangement of the circuits. This is a serious matter involving many considerations. From the point of view naturally adopted by the judges and the bar, it is manifest that concentration is a thing much to be desired. Over and over again in the secluded rural circuits does the pompous procession of two judges with their retinue move from town to town to find either a blank calendar, or else nothing but two or three cases, of which a police magistrate would dispose in half an hour. On the other hand the authorities in the threatened assize towns are loud in apprehensive complaint; nor are they without logic to support their claims. For the provincial suitors, the circuits are a great advantage and saving of expense, for the prisoners they are infinitely serviceable. As matters stand even now, it is with difficulty that a prisoner, who is generally miserably poor, can, even if he is innocent, procure the attendance of witnesses. Yet now he is tried in the very locality in which the crime was committed, while, if the advocates of concentration prevail, he may be compelled to "stand on his deliverance" far away from his native county. The way out of the difficulty seems to be provided by the proposal to establish District Criminal Courts, to which London opinion is unfavourable; nevertheless, it is safe to predict that they must come, and must come soon. The question is one in which regard for the liberty of the subject pulls in one direction, and the pecuniary interests of solicitors doing a large agency business are on the opposite side, and it is earnestly to be hoped that the arguments of justice and humanity may prevail. Nor, perhaps, is it entirely unworthy of notice, that the circuit system is one of venerable antiquity.

London, March, 17th.

SELECTIONS.

THE LAW OF ARBITRATIONS.

THE case of *Fraser* v. *Ehrensperger*, reported in the March number of the *Law Journal Reports*, besides setting at rest on the authority of the Court of Appeal a question which has for twelve years rested on the authority of three judges to one, calls attention to the present chaotic state of the law of arbitrations. Much pains have of late years been taken to simplify and consolidate the procedure of the Courts, but although arbitrations have increased in number and importance of late years, nothing has been done since 1854 to improve the law on the subject. The law undoubtedly requires improvement both in form and substance. It has for its foundation certain rules of the common law which to modern notions are of a barbarous kind, supplemented by three statutes, one of them nearly two hundred years old, and the other two confusing in an almost inextricable manner two things which are totally distinct—namely, the reference of actions to arbitration and arbitrations without action. The subject commends itself to Chambers of Commerce and similar institutions, because not only is it faulty in form, but deficient in substance. Belonging, as it does, to a branch of law peculiarly important to laymen, it is not only unintelligible except to lawyers, but it has several pitfalls not visible by the light of nature. The most dangerous of these was illustrated in the case in question. It is now clear on the authority

of the Court that without the magic words "this submission to be made a rule of Court" in the agreement to refer, either party may retire from the agreement at any moment up to the making of the award. In other words, each party agrees to refer the dispute to arbitration, so long as he and his opponent remain of the same mind—an arrangement which is very far from being businesslike.

The history of the law on the subject may be very briefly sketched. At common law an arbitrator was merely the agent of both parties, and either might withdraw his authority to the agent to make an award until the award was actually made. The remedy on the award, if made, was at common law, by action, as upon an ordinary agreement; but as actions were often by rule of Court referred to arbitration by consent, a fictitious process grew up by which it was assumed that an action had been brought upon the claim in dispute, and the action was referred to arbitration by consent by rule of Court *per saltum*. This was called making the submission or the agreement to refer the dispute a rule of Court. It was regulated by 9 Wm. III. c. 15, which Act allowed submissions agreed to be made a rule of Court to be so made on proof of the submission by affidavit, and provided for setting aside awards improperly obtained, but it did not abrogate the common law right to revoke the submission, except that such a revocation would be a contempt of Court. The 3 & 4 Wm. IV. c. 42, s. 39, provided that where the submission was agreed to be made a rule of Court it could not be revoked except by leave of the Court or a judge, which was an important step in advance, The Common Law Procedure Act, 1854, s. 17, went further still, and provided that an agreement or submission in writing might be made a rule of Court, unless there were words shewing a contrary intention. Probably the draftsman thought that by this section he had altogether got rid of the necessity of inserting the words already referred to, and that agreements which did not exclude the making a rule of Court of the submission would have all the privileges of submissions agreed to be made rules of Court, including irrevocability. If so, he was mistaken, because in the case of *Re Meier and Rouse*, 40 Law J. Rep. C. P. 145, it was decided by the majority of the Court of Common Pleas, consisting of Mr. Justice Willes, Mr. Justice Montague Smith, and Mr. Justice Brett, with the dissent of Chief Justice Bovill, that the right to revoke survived unless there was an agreement that the submission should be made a rule of Court. It was pointed out that the Common Law Procedure Act, 1854, although it enabled a submission to be made a rule of Court without an express agreement for the purpose, contained no provision like that in the Act of Wm. IV. that the submission should not be revocable if there was an agreement that it should be made a rule of Court. Chief Justice Bovill dissented, on the ground that section 7 of the Common Law Procedure Act, 1854, put all arbitrations on the footing of actions referred by rule of Court. This section provides that "the proceedings . . . shall be conducted in like manner as to the power of the arbitrator and the Court, etc., as upon a reference made by consent under a rule of Court or judge's order." By the Act of William IV., references of actions by rule of Court or judge's order could not be revoked; and, therefore, it appeared to Chief Justice Bovill that references by agreement followed the same rule. It not unnaturally seemed to the other judges that the words "conduct of the proceedings" were hardly strong enough to carry this meaning.

The case of *Fraser* v. *Ehrensperger* happened to come before Lord Justice Brett, who, as a Judge of the Common Pleas, had decided the same point in the case of *Re Meier and Rouse*. No distinction could be drawn between the two cases. A contract for the sale of a cargo of rice contained a clause by which all disputes were to be referred to the arbitration of two London brokers or their umpire; but nothing was said about making the submission a rule of Court. The cargo was not delivered, and the purchasers called on the vendors to appoint an arbitrator. This they declined; whereupon the purchasers proceeded, under section 13 of the Common Law Procedure Act, 1854, to appoint one arbitrator, as they had a right to do. This right, however, was held to be subject to the common law right to revoke, and the vendors having duly revoked, it was held that the award of the arbitrator, made *ex*

parte, could not be enforced although made a rule of the Court under section 17. Lord Justice Brett upheld his previous decision, and was supported by Lord Justice Bowen. This decision cannot but be viewed with regret, and it may be questioned whether there is not enough in the Common Law Procedure Act, 1854, to shew a contrary intention. For example, section 11 allows an action to be stayed when there is an agreement to refer its subject matter, whether the submission is agreed to be made a rule of Court or not. Thus an action might be stayed, and yet an arbitration could not proceed, because the reluctant party revoked. In such a case the order staying the action would probably be rescinded, but the section evidently contemplates the stay of the action in order to enable the arbitration to proceed as if there was no reason why the arbitration should not proceed. The point is of sufficient importance to be taken to the House of Lords, although probably that tribunal would be reluctant to interfere with a branch of law analogous to practice which has existed for twelve years. The proper course would be for the Legislature to interfere, codifying the whole law on the subject, and removing this among other blots.—*Law Journal.*

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

COUNTY COURT OF THE COUNTY OF LINCOLN.

HALLADAY v. JOHNSON.

Bastardy—Affidavit of affiliation—R. S. O. cap. 131, sec. 3—Jurisdiction of county magistrates in cities.

A justice of the peace for a county can take an affidavit of affiliation when the mother resides in a city within such county.

[St. Catharines.

This was an action brought under R. S. O. cap. 131 against the defendant, as the father of an illegitimate child, to recover the value of food and other necessaries furnished by the plaintiff to the child.

The mother of the child was the daughter of the plaintiff. The question whether the defendant was the father was left to the jury who found against the defendant. A question was raised at the trial as to the sufficiency of the affidavit which had been made by the mother of the child in supposed conformity with the 3rd section of the statute, and upon this point a motion was made that judgment should be entered for the defendant.

The mother of the child at the time of the seduction, which she says took place in May, 1881, resided in the city of St. Catharines, where her father also resided (she was then at service in a family in the same place), and continued to reside there until the month of August, 1881, when she went to Rochester where the child was born in January, 1882. In February, 1882, she returned to St. Catharines, and continued to live there ever since.

On the 12th April, 1882, she made the affidavit before Josiah Holmes, a J.P. for the county of Lincoln, the oath being administered in the city of St. Catharines, and the affidavit was deposited by her with the City Clerk of St. Catharines on the 13th April, 1882, and a duplicate was deposited with the Clerk of the Peace for the County of Lincoln on the 18th of May, 1882.

The objection taken to the affidavit was, that as the mother of the child resided, at the time she made the affidavit, in the city of St. Catharines, the affidavit should have been sworn before a justice of the peace for the city, and that Mr. Holmes, being only a justice of the peace named in the commission of the county of Lincoln, and not being named in any commission for the city of St. Catharines, was not a justice for the city, and consequently not competent to take the affidavit, and at all events he could not take it in the city.

SENKLER, Co. J.—The 3rd section of cap. 131 of R. S. O. is as follows:—No action shall be sustained under the two last sections, unless it is shewn upon the trial thereof that while the mother of the child was pregnant or within six months after the birth of her child she did not voluntarily make an affidavit in writing before some one of her Majesty's justices of the peace for the county or city in which she resides,

declaring that the person who is afterwards charged in such action is really the father of the child, nor unless she deposited such affidavit within the time aforesaid in the office of the clerk of the peace of the county, or clerk of the council of the city as the case may be.

St. Catharines was incorporated a city by a special Act of the Province of Ontario, 39 Vict. cap. 46, the incorporation taking effect on the 1st May, 1876. Before that time it had been a town. St. Catharines is one of the cities named in R. S. O. cap. 5, s. 3, and which are thereby declared for judicial purposes to be respectively united to, and form part of, the counties within the limits of which they are respectively situate, but for municipal purposes the said cities, and all towns withdrawn from the jurisdiction of the county shall not (it is thereby enacted) form part of the counties in which they are respectively situate.

Mr. Holmes was appointed a Justice of the Peace for the county of Lincoln by the last general commission issued for the county in 1863. St. Catharines was then a town. No commission has ever been issued for the city. It is said that a commission was once issued for the town, containing a few names not including Mr. Holmes. It was not produced and I have not been able to find it. It is, however, a matter of no importance as upon the erection of the town into a city the commission issued for the town ceased under the Ontario Act 36 Vict. cap. 48, s. 313, now R. S. O. cap. 71, s. 3.

No argument can be advanced on the ground of convenience, based on the cessation of authority in the town justices, as the aldermen of the new city all became justices for the city under the same Act, 36 Vict. cap. 48, sec. 306, now R. S. O. cap. 174, s. 395.

Various enactments limiting the power of county justices to act in cities and towns were referred to by Mr. McClive in his argument. I think I have examined them all, but I need not now allude to any earlier than the Ontario Act (of 1873) 36 Vict. cap. 48, s. 308. The statutes on the subject prior to this with most of the decisions upon them are enumerated and reviewed in the able and careful judgment of Mr. Dalton in *The Hamilton Election Petition*, 10 C. L. J. N. S. 170, decided on 25th March, 1874, in which he shewed that the last mentioned section was the only one then in force which took away the power of the county justices to act in a town or city within the boundaries of their county.

This section is now R. S. O. cap. 72, s. 6, and in *Longworth* v. *Dawson et al.*, 30 C. P. 375 it was held that this section and R. S. O. cap. 5, sec. 3 (already referred to in making certain cities for judicial purposes created, to and part of the counties in which they are respectively situate) contain the provision of the statute law on the subject, and that the meaning of these enactments is that county justices are, and shall be, justices over the whole area of the county, including the city, but that they shall not, when there is a police magistrate for the city, do any of the acts specified in the first named section, which are, that they shall not admit to bail or discharge a prisoner, nor adjudicate upon, nor otherwise act in any case for any town or city except at the general sessions.

The taking the affidavit in question is clearly not one of the acts specified, and if Mr. Holmes could take it at all he could clearly do it in the city.

I may also call attention to the words of this section not making any distinction between justices for the county and justices of the city; it precludes the latter from acting just as much as the former. If the effect of the prohibition to act were as general as claimed it would leave no one to do any magistrate's act in a city but the police magistrate. The object of the section was to prevent interference with the police magistrate in his official duties mentioned in it by any other justice, and was specially directed against such interference by the aldermen of cities.

As Mr. Holmes took the affidavit within the limits of the county it is not necessary to consider whether the taking such an affidavit is not one of the things which a justice of the peace could do anywhere (even out of his county), as being a mere magisterial act or an act of voluntary jurisdiction. From the authorities, and by Mr. Dalton in *The Hamilton Election Petition*, and those in Paley on Convictions, 6th Ed., p. 17-19, it would seem to be so.

The question however remains whether the statute does not require the affidavit to be made before a justice for the city.

As Mr. Holmes is a justice having the same

authority to act in the city as a justice for the city there is no valid reason why he should not take the affidavit, and it should be held sufficient unless the statute clearly indicates it must be sworn before a justice of the city only.

The original enactment on the subject of maintenance of illegitimate children is 7 W. 4, cap. 8. In it the affidavit is required to be sworn before a justice of the peace for the district, and filed in the office of the clerk of the peace for the district. No mention is made of a city. When the statutes were consolidated in 1859 the word district was changed to county or city when it first appears in the clause, and the language of the clause became the same as it now is in the Revised Statutes.

At that time the warrants of county justices required to be endorsed before they could be executed in a city, and justices of the county had no jurisdiction over offences committed in a city irrespective of the appointment of a police magistrate which now creates the prohibition. The city and the county, however, were not entirely separated even for judicial purposes; the aldermen of the city were justices for the whole county, and the general sessions of the county were held in the city although county justices could not sit in the city even to try offences committed in the county.

It seems to me that even under this state of the law it would be difficult to hold that there was no authority for a county justice to take such an affidavit in the city.

By Con. Stat. U. C. cap. 59, s. 361, every city and town separated was made a county of itself for municipal purposes, and for such judicial purposes as were therein specially provided for in the case of all cities *but for no other*.

The matters thus specially provided for in the case of all cities are those I have just mentioned, and have nothing to do with the taking of such affidavits.

I think that the object of the change was merely to extend the power to take such affidavits to justices for the city, and not to interfere with the right of county justices to take them.

However, even if under the law at that time, county magistrates were absolutely deprived of all authority in the city. The law is no longer so, and under the present law I can see no valid reason for holding that a county justice cannot take such an affidavit when the mother of the child lives in the city. I discharge the appeal with costs.

RECENT ENGLISH PRACTICE CASES.

LANGEN v. TATE.

Imp. O. 37, r. 4.—Ont. Rule, 285.

Evidence—Commission—Witness resident abroad.

[C. A.—L. R. 24 Ch. D. 522.

The Court should not grant a commission, which must involve a considerable amount of expense and trouble, unless satisfied that the evidence to take which the commission is desired, is material on the issues raised. It should be stated on behalf of the applicant, at all events to the best of the information and belief of the deponents, the points on which the witness sought to be examined can give evidence; so as to enable the Court to judge whether the evidence can be relevant and material, and whether, therefore, justice requires that the commission asked for should be granted.

Held, also, in this case, that since the party applying for the commission to issue might succeed in the action and yet, nevertheless, the Court might at the hearing be satisfied that the evidence was not material, even if relevant, he should give security, to be settled by the Judge in Chambers, if the parties differed, to pay to the opposing party all such costs of and occasioned by the commission as the Judge at the trial might think he ought to pay, whatever the result of the action might be.

Held, further, that it is not correct to say that, in every case where the plaintiff is seeking to rectify a written contract by the parol evidence of an interested witness as to what the real agreement was, it is essential that the witness should be in Court to be examined and cross-examined.

Berdan v. *Greenwood*, L. R. 20 Ch. D. 764, n. distinguished.

HYMAN v. HELEN.

Imp. sec. 24, sub.-s. 3—Ont. sec. 16, sub.-s. 4.

Counter-claim—Vexatious action.

[L. R. 24 Ch. D. 543

Quære, per Bowen, L.J., whether a counter-claimant before decree since the Judicature Act is not an actor to some extent, and in such a sense that it might be vexatious in him both to prosecute his counter-claim here, and to prosecute the same case by independent action elsewhere.

Recent English Practice Cases.

In re Knight, Knight v. Gardiner.

Imp. O. 38, *r.* 4—*Ont. Rule* 304.

Affidavit—Cross-examination—Costs.

[L. R. 24 Ch. D. 606.

This rule applies to all proceedings whether at the trial of the action or elsewhere, and not only to the production of deponents for cross-examination before this Court at the trial of the action.

Hence, where in an administration action, one R. K., in answer to the usual advertisements, brought in a claim as heir-at-law of him whose estate was being administered, and several persons filed affidavits in support of his claim, when one of the plaintiffs gave notice to cross-examine, and R. K., the party in whose behalf the affidavits were filed, took out a summons for the appointment of a special examiner.

Held, that R. K. was not entitled to call upon the party requiring production of the deponents for cross-examination to pay their expenses in the first instance, according to the former practice before the Judicature Act.

In re Lee and Hemingway.

Imp. O. 55, *r.* 1—*Ont. Rule* 428.

Costs—Discretion—Special Act.

[L. R. 24 Ch. D. 669.

When the purchase-money of land, taken by a company under compulsory powers conferred on them by a special Act passed before the Judicature Act, has been paid into Court by reason of the disability of the person entitled to the land, the Court has, under the general discretion as to costs given to it by this Order, power to order the company to pay the costs of a petition for payment of the money out to a person absolutely entitled, even though the special Act contains no provision to that effect.

Ex parte Mercer's Company, L. R. 10 Ch. D. 481 followed.

Smith v. Armitage.

Trial—Administration action—Wilful default—Practice prior to Judicature Act.

[L. R. 24 Ch. D. 727.

The plaintiffs instituted an action for the administration of the will of G. A,, and in their statement of claim made sundry charges of wilful default and improper conduct against the defendants.

When the action came on for trial the plaintiffs declined to go into these charges, not being prepared to do so, but asked for a decree for ordinary administration accounts and inquiries, and that they might be at liberty in the course of taking these accounts and inquiries to proceed with the case of wilful default raised by the pleadings.

Held, that this could not be allowed. All the the plaintiffs could have was the ordinary administration decree, and the action should be dismissed altogether with costs so far as it went for more than the ordinary decree. It would be most unjust to keep such charges hanging over the defendants.

Semble, that the Court has a discretion in every case to postpone enquiring into the conduct of trustees, and to allow the enquiry to stand over in such a manner as may appear reasonable, and it is not absolutely necessary for the Court in every case to decide all the issues at once which may be brought before it at the hearing. It would be competent to the Court if it saw good reason to try the case in part and to adjourn it in part. But it would require a very strong case to make it do so; and the hearing is the proper time at which allegations of fraud should be disposed of. Except in the strongest case, and for the strongest reasons, the Court ought not to allow parties to come with such allegations with no evidence to support them, and then to ask the Court to refer questions such as these for disposal by the chief clerk, or in any other way.

Semble, also, that it is important in matters of practice such as this not to go back to any old practice of the Court which may have existed before the Judicature Act, but to found decisions on cases decided since the Act, because it is obvious that when the pleadings have been materially altered, the rules of the old practice may not be applicable.

Booth v. Trail.

Imp. O. 45, *r.* 2 (1875)—*Ont. r.* 370.

[L. R. 12 Q. B. D. 8

A sum already accrued due to a retired police constable, in respect of his superannuation allowance, under Imp. 11-12 Vict. c. 14, may be attached in execution.

Lord Coleridge, C.J.—I am of the opinion that the judgment creditor is entitled to an order attaching so much of the pension as had already accrued due at the date of the summons. . . So much of the application as seeks to attach the pension prospectively as it falls due from time to time must be refused. It seems to be implied in the judgments in *Webb* v. *Stanton*, L. R. 11 Q. B. D. 518, that an order may be made attaching the payment already due. A sum in the hands of the garnishees, which they, in some way or other, can

presently be compelled to pay to the judgment debtor, seems to me to be a debt within the rule, and, therefore, attachable. It appears to me to be none the less a debt, because no particular mode of enforcing the payment is given by the statute. When there is a statutory obligation to pay money, and no other remedy is expressly given, there would be a remedy by action.

HALL v. BRAND.

Witness out of jurisdiction—"Trial"—Reference of action and all matters in difference—Imp. Jud. Act, 1873, s. 57—Ont. Jud. Act, s. 48.

[L. R. 12 Q. B. D. 39.

When an action and "all matters in difference" between the parties have been referred, by consent, to an arbitrator, no writ of subpœna will be granted under Imp. 17-18, Vict. c. 34, s. 1 (cf. C. S. C. c. 79, s. 4; R. S. O. at p. 781), for the hearing before the arbitrator is not a "trial" within the meaning of that enactment.

BRETT, M.R.—The present reference includes "all matters in difference"; the position of the parties is the same as if the writ had not been issued, and as if they agreed to submit all their disputes to the award of an arbitrator. The master had, by consent, jurisdiction to make the order of reference, and the question is whether the hearing before the arbitrator is a "trial," he having power to enter judgment in the action. I doubt whether it can be said after the reference that the action is "depending" in the High Court; but I do not decide on this ground; I decide on the ground that a hearing of all matters in difference cannot be said to be the "trial" of the cause.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

SEWELL v. BRITISH COLUMBIA TOWING COMPANY, AND THE MOODYVILLE SAWMILL COMPANY.

Contract of towage—Liability under—Sea damage—Joinder of defendants—Right of a sawmill company to let to hire a steam tug—Liability limited—25-26 Vict. (Imp.) ch. 63—31 Vict. ch. 58, sec. 12—Motion for judgment—Findings of jury not against weight of evidence—Practice.

The B. C. T. Co, entered into contract of towage with S. to tow their ship *Thrasher* from Royal Roads to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to Nanaimo, under arrangement between the B. C. T. Co. and the M. S. Co., the remainder of the engagement was undertaken between the two companies, and the M. S. Co.'s tug boat, *Etta White*, and the B. C. T. Co.'s tug, *Beaver*, proceeded to tow the *Thrasher* out of Nanaimo on her way to sea, the *Etta White* being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering upwards of ten miles of open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those board were strangers to the coast.

In an action for damages for negligently towing S. and other's ship, and so causing her destruction.

Held—1. That as the tugs had not observed those proper and reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their

omission to do so, the owners of the tugs were liable (TASCHEREAU, J., holding that the B. C. T. Co. were alone liable).

2. That under the British Columbia Judicature Act the action was maintainable in its present form by joining both companies as defendants.

3. That as there was nothing in the M. S. Co.'s charter or act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was for used in the present case.

4. That as the tugs in question were not registered as British ships at the time of the accident their owners were not entitled to have their liability limited under 25 and 26 Vict. (Imp.) ch. 63.

5. That the limited liability under section 12 of 31 Vict. ch. 58 (D.) does not apply to cases other than those of collision.

6. This case came before the Court below on motion for judgment under the order which governs the practice in such cases, and which is identical with English Order 40, Rule 10, of the orders of 1875. This enables the Court to give judgment, finally determining all questions in dispute although the jury may not have found on them all, but does not enable the Court to dispose of a case contrary to the finding of a jury. In case the Court consider a particular finding to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the Rule similar to the English Order 30, Rule 40.

The Supreme Court of Canada giving the judgment that the Court below ought to have given was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing.

Appeal allowed with costs.

Davie and *McIntyre* for appellants.

Benjamin for respondents.

MEGANTIC ELECTION CASE.

COTE, ALIAS FRECHETTE v. GOULET ET AL.

Status of petitioners, proof of—What sufficient—Corrupt practice by agent with knowledge of candidate—Disqualification—Short-hand notes.

At the trial of the petition, the returning officer, who was also the Registrar of the county of Megantic and secretary of the municipality of Inverness, was called as a witness, and, in his official capacity, produced in Court, the original list of electors for the township of Inverness and proved that the name of Lauchlin McCurdy, one of the petitioners whom he personally knew, was on the list. The original document was retained by the witness, and, as neither of the parties requested that the list should be filed, the judge made no order to that effect. The status of the other petitioners was proved in the same way.

Held, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related (37 Vict. ch. 10, sec. 7 D.). The shorthand notes of the shorthand writer employed by the Court to take down the evidence, were not extended in the handwriting of the said shorthand writer, but were signed by him.

Held, that the said notes of evidence could not be objected to.

Before setting out on a canvassing tour, the appellant, the sitting member, placed in the hands of one B., who was not his financial agent, $100, to be used for the purpose of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality. During the visit, K. indicated to B. his dissatisfaction with the candidate of his party and stated that, although he would vote for the Liberal party, he would not exert himself as much as in the former elections. Upon this, B. asked his host, "Do you want any money for your church?" and, having received a negative reply, added: "Do you want any money for anything?" K. then answered, "If you have any money to spare there is plenty of things we want it for. We are building a town hall, and we are scarce of money. B. then

said, "Will $25 do?" K. answered, "Whatever you like, it is nothing to me." The money was left on the table. When bidding the appellant B., good-bye, K. said: "Gentlemen, remember that this money has no influence, as far as I am concerned, with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of B. This amount of $25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agents of the appellant.

Held (affirming the judgment of the Court below), that the giving of the $25 by B. to K. was not an act of liberality or charity but a gift out of the appellant's money, with a view to influence a voter favourably to the appellant's candidature, and that although the money was not given in appellant's presence, yet it was given with his knowledge, and therefore appellant had been personally guilty of a corrupt practice.

Appeal dismissed with costs.

Crepeau, Q.C., and *Gormully*, for appellant.
Irvine, Q.C., for respondent.

BERTHIER ELECTION CASE.

GENEREUX ET AL. v. CUTHBERT.

Railway Pass—37 Vict. ch. 9, secs. 92, 66, 98, and 100—Questions of fact in appeal.

In appeal four charges of bribery were relied upon, three of which were dismissed in the Court below, because there was not sufficent evidence that the electors had been bribed by an agent of the candidate.

The fourth charge was known as the Lamarche case.

The facts were as follows:—

One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets or passes over the North Shore Railroad to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election, the voters having accepted the free passage without any promise being exacted from, or given by them. The tickets or passes showed on their face that they had been paid for, but there was evidence that L. had received them gratuitously from one of the officers of the N. S. R'y Co.

The learned judge, who tried the case, found as a fact that the tickets had not been paid for and were given unconditionally, and therefore held it was not a corrupt act.

On appeal to the Supreme Court—

Held, (1) (FOURNIER and HENRY, JJ., dissenting) that, taking unconditionally and gratuitously a voter to the poll by a railway company or an individual whatever his occupation may be—or giving a voter a free pass over a railway or by boat or other conveyance, if unaccompanied by any condition or stipulations that shall affect the voter's actions in reference to the vote to be given is not prohibited by 39 Vict. ch. 9.

(2) That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under section 96, and by virtue of section 98, a corrupt practice, and by virtue of section 100 the election would be void.

(3) That an Appellate Court will not reverse the decision of the judge who tried the case on a question of fact without its being made apparent that his decision was clearly wrong.

Appeal dismissed.

Mercier, Q.C., for appellant.
Lacoste, Q.C., for respondent.

CHANCERY DIVISION.

Ferguson, J.] [March 4.

EXCHANGE BANK v. SPRINGER.

EXCHANGE BANK v. BARNES.

Onus—Principal and surety—Guarantee—Negligence—Connivance.

It cannot be said that when the *onus* is upon a party to any litigation it is sufficient for him to say that he could furnish the necessary proof if he had certain papers. It is his duty to have those papers, or to have them produced, the means of causing their production being what the law deems ample. If the documents are his evidence, and they are lost, or cannot be produced, the misfortune is his, and he cannot be said to have proved his case, because he says he could prove it if he had certain papers—or rather says he cannot

prove it without the papers, and intimates that he could if he had the papers.

In this action the plaintiffs sued the defendants on a bond given by the latter to guarantee the honesty of one M. in discharging his duties as cashier of the plaintiff's bank, charging that M. had misappropriated large sums belonging to the bank. The defence set up that, owing to certain alleged conduct and negligence on the part of the directors of the plaintiffs' bank, the plaintiffs could not recover against the defendants as sureties in the bond. This alleged conduct and negligence had regard to dealings by the plaintiffs in stocks and neglect or want of diligence of the directors in not examining the books and knowing from time to time and at all times how they were kept, and precisely what entries were being made, and what business done, so that they would have been able to detect, and would have detected any errors of M., and notified the said sureties, who, as it was, said they did not know of the alleged defalcations of M. until he had absconded to the United States.

Held, that to sustain this defence the sureties must show connivance between the plaintiffs and their principal.

There are many authorities, showing that negligence is not fraud, but that it may be evidence of fraud. In the same way it may be said that negligence is not connivance, but may be evidence of connivance, though the degree of negligence that would be proof of fraud or connivance may be difficult to state. The chief reliance of the surety is, and ought to be, in the honesty of the man whose honesty he has guaranteed to another, and, unless an act of connivance is affirmatively proved, a very strong case of negligence must be made out. The surety is not in a position to say to the employer: You should have so diligently watched the conduct of the man whose honesty I guaranteed to you, that no serious wrong could have been accomplished by him.

J. Bethune, Q.C., and *Patterson*, for the plaintiffs.

S. H. Blake, Q.C., and *Martin*, Q.C., for the defendants.

Full Court.] [March 13.

SLATER v. OLIVER.

Fraudulent preference—Pressure.

R. S. O. c. 118, s. 2.

Appeal from the judgment of PROUDFOOT, J., of December 14th, 1882.

This was a creditor's action to set aside a certain bill of sale of personal property as fraudulent and void, as against the creditors of the grantee.

The evidence shewed that the bill of sale was reluctantly given by the debtor, and that he only yielded after some delay, and to a continuous insistence on the part of his creditors, and that the demand of the creditor was made in good faith, with no intent but to obtain the security, which she was advised she ought to have; and though the effect of it undoubtedly was to deprive the debtor of the means of paying his other creditors; his intent in giving it was to escape his creditor's importunity; and, but for the latter's unequivocal and pressing demand, it would not have been given.

Held, affirming PROUDFOOT, J., the bill of sale was not void under R. S. O. c. 118, s. 2.

This section requires us to look at the intent with which the conveyance, or gift in question, was made, and if there be honest pressure on the part of the creditor, that rebuts the presumption of an intent on the debtor's part to act in fraud of the law.

J. H. Macdonald, for the plaintiff.

C. Moss, Q.C., for the defendant.

QUEEN'S BENCH DIVISION.

RE HERRING v. NAPANEE, ETC., RY. CO.

Railway—Compulsory powers—Arbitration.

A notice of appointment of arbitrator and of that of third arbitrator, in conformity with 42 Vict. c. 9, D. may be made a rule of Court under sec. 201, C. L. P. A.

A letter was addressed by the construction committee on the closing of the evidence to the owner of the land proposed to be taken, consenting to what would diminish the injury to his property, and was delivered to the railway company's arbitrator before the award was made, and given by him to the umpire.

The advantages suggested in the letter were recited in the award, which gave compensation on the basis proposed in the first instance by the company, but the letter was not communicated to the owner of the land till award was made, which was not signed by his arbitrator. The award was held bad, notwithstanding the arbitrator's sworn testimony that they were uninfluenced by the letter in question.

Rose, J.]

REG V. RODWELL.

Selling liquor without license.

Proceedings must have been taken for a first offence in order to legalize convictions with increased penalties for a second and third offence under the Liquor License Act, sec. 52.

The punishment for contravention of sec. 43 is either imprisonment with hard labour or fine; and if the fine be not paid or recovered, the punishment is imprisonment without hard labour.

V. McKenzie, Q.C., for application.

Delamere, contra.

Rose, J.]

REGINA V. YOUNG.

A conviction under secs. 51 and 46, of the Liquor License Act, held bad for not showing for which offence penalty imposed, as also the locality of the offence.

V. McKenzie, Q.C., for application.

Delamere, contra.

PRACTICE.

Proudfoot, J.] [January.

CLARK V. LANGLEY.

Objections to title—Jurisdiction of Master.

By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense and was not to call for any abstract title deeds or evidences of title other than those in vendor's possession.

Subsequently, on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the Master leave to file five other objections.

On appeal, PROUDFOOT, J. held that the Master in Ordinary had no jurisdiction to grant the defendant such leave, but on a subsequent application to the Court he gave the leave required.

Moss, Q.C., and *H. D. Gamble*, for the plaintiff.

Maclennan, Q.C., and *Langton*, for defendant.

Chan. Div.] [Feb. 26.

WANSLEY V. SMALLWOOD.

Divisional Court—Appeal to—Judgment on further directions.

An appeal from the judgment of PROUDFOOT, J., pronounced in Court upon further directions, was set down upon the list of cases for hearing before the Divisional Court, Chancery Division.

25th February, 1884. *Richards*, Q.C., supported the appeal.

Walter Read, contra, objected that the Court had no jurisdiction to entertain it.

Richards, Q.C., argued that a hearing on further directions was in effect a continuation of the trial, and a judgment pronounced upon the trial could be appealed to the Divisional Court under S.C. Rule 510.

26th February, 1884,

BOYD, C.—The Judicature Act and rules make a plain and express distinction between the various modes of trial, and the trial before a referee is dealt with as a different thing from that before a Judge. (See sec. 46 and 47, and rules 277, 316 and 317). In this case the action was by consent of the parties not tried in the usual way, but the whole was referred to the Master, reserving F. D. and costs. After the Master's report was absolute it again came up in Court upon further directions before PROUDFOOT, J., who pronounced the judgment now in appeal. This is not, in my opinion, to be regarded as the trial of an action before that Judge under R. 317, or the substituted later rule, 510. If such a construction debared either party from the right of appeal, perhaps such an extreme latitude of construction as was contended for by Mr. Richards might be admitted, but there is always the right to go

to the Court of Appeal under sec. 37 of the Act, and that, I think (having regard to the line of decision upon the question), is the only appellate forum open to the defendant. *Re Galerno*, 46 U. C. R. 379; *Trude* v. *Phœnix*, 29 Gr. 426; *McTiernan* v. *Fraser*, 9 P. R. 247. In my opinion the Divisional Court has no jurisdiction to review the judgment of PROUDFOOT, J. The plaintiff should have moved as in *McTiernan* v. *Fraser*, and in *Trude* v. *Phœnix*, to strike the action out of the list as improperly set down. For that reason I am disposed to strike out the case now, but without costs.

PROUDFOOT, and FERGUSON, JJ. concurred.

Appeal struck out without costs.

Master in Chambers.] [March 12.

FRITH v. RYAN.

Affidavit on production—Cross-examination on.

Motion by the plaintiff *ex-parte* for leave to examine the defendant upon his affidavit on production filed.

Held, that Chy. G. O. 268 is superseded by Rule 283 O. J. A.

Rule 283 O. J. A. does not authorize the examination of a party upon his affidavit on production filed, and such an examination cannot be ordered, though the officer of a corporation may be examined on his affidavit on production, under Rule 226 O. J. A.

Motion refused.

A. J. Williams, for the motion.

Galt, J.] [April 4.

RE EBERTS v. BROOKE.

Prohibition—Division Court—Action on County Court judgment.

Application for a prohibition to the judge of the First Division Court of the County of Kent and to the plaintiff, to prohibit them from prosecuting this action, which is brought upon a County Court judgment for $211.87, the plaintiffs abandoning the excess of their claim over $100 and claiming $100.

Held, that an inferior Court has no jurisdiction to entertain an action brought upon the judgment of a superior Court.

Prohibition granted.

E. D. Armour, for the application.

Aylesworth, contra.

Boyd, C.] [April 9.

ATTORNEY GENERAL v. GOODERHAM AND WORTS.

Foreign commission—Names of witnesses—Professional or expert evidence.

An action to restrain an alleged nuisance caused by the defendants' cattle byres in the city of Toronto.

An application by the defendants for the issue of commissions to certain cities in the U. S. A. to take evidence in their behalf concerning the cattle byres in those cities.

It was admitted that the only point on which witnesses in the States could be usefully examined was as to whether proper means had been taken by the defendants to minimize the objectionable accompaniments or incidents of their business. None of the persons sought to be examined were named in the application, nor was it sworn that such persons could not be ready to attend personally at the trial.

Held, upon this state of facts that the order for the commissioners must be refused.

As a rule the Courts discountenance professional or *quasi*-expert evidence from being brought before them in writing.

G. F. Blackstock, for the application.

Bethune, Q.C., contra.

Boyd, C.] [April 15.

MCTAGGART v. TOOTHE ET AL.

Appearance entered gratis—Lis pendens.

The plaintiff issued a writ of summons and registered a certificate of *lis pendens* upon the lands of the defendant Toothe. The defendant, not having been promptly served with the writ, and being anxious to get rid of the suits, entered an appearance *gratis*.

The Master at London made an order in Chambers upon the application of the plaintiff striking out the appearance.

Held, upon appeal, that there is nothing in the Judicature Act or Rules which interferes with the well recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear *gratis* be preserved in a case where his property is directly and prejudicially

affected by the commencement of the action and the registration of its pendency.

Appeal allowed with costs in the cause in any event.

Hoyles, for the appeal.

Rae, contra.

Osler, J.A.] [April 21.

O'DONNELL v. O'DONNELL.

Short notice of trial—Rule 455 O. J. A.—Holidays excluded in computing time.

Clement moved to set aside notice of trial. The defendant was on terms to take short notice of trial, and the notice was accordingly served on Wednesday for the following Monday.

Aylesworth, contra.

The Master in Chambers was of opinion that the notice was irregular, as under Rule 455 O. J. A. which was held to apply to the case of a short notice of trial, Sundays and other holidays should be excluded; owing, however, to an affidavit being filed, suggesting that the defendant had agreed to take any notice and to go down to trial in any case, the application was enlarged to come before the learned judge who should take the St. Catharine's assizes, the application accordingly came before OSLER, J. A., who held the notice irregular, and set it aside without costs.

Galt, J.] [April 21.

MILLETTE v. LITLE.

Privilege of witnesses—Answers tending to criminate—Husband and wife.

This was an action of libel in which defendants who were husband and wife were charged.

In an action of libel against a husband as the writer of libellous articles, and as editor of a newspaper in which they were printed, and his wife as owner and publisher of the newspaper, on examination, after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles in question, and as to the editing of the newspaper, on the like grounds as to her husband.

Held, that defendants were justified in their refusals.

FLOTSAM AND JETSAM.

A KENTUCKY gentleman, on his death-bed, made a will, in which he bequeathed to his wife, who was *enceinte*, in case she should be delivered of a daughter, one-half of his estate, the other half to such daughter; but in case the expected heir was a son, one-third was to go to the wife and two-thirds to such son. Shortly after the testator's death the wife gave birth to twins—a boy and a girl. The question now puzzling the lawyers is: How shall the estate be divided? The wife claims one-half the estate because she had a daughter; the daughter's guardian claims one-half the estate under the will, and the guardian of the son vows he will not accept less than two-thirds of the estate. The matter is now pending in the Hickman Circuit Court. While the Judge is trying to solve this question, the lay members of the profession are trying their "'prentice han'." One attorney in New York city thinks it a case of "lapse;" that the "testator" died intestate, and that the law must make his will. Another, writing from Frankfort, Ky., says: "My solution of the question is, to construe the will as devising to the mother five-twelfths of the estate, to the daughter three-twelfths, and to the son four-twelfths; that is, one moiety to the mother and daughter in the proportion of one-half to each; and the other moiety to the mother and son in the proportion of one-third to the mother and two-thirds to the son." And a Hoboken attorney comes to the same conclusion. He says that he "simply bequeathed his estate twice. If he left a daughter, he gave half to the widow and half to the daughter. If he left a son, he gave one-third to the widow and two-thirds to the son. So each legacy abated fifty per cent. The widow took five-twelfths, the daughter one-fourth, and the son one-third." From Cincinnati and Toledo comes another solution, viz: "Is not the following a more equitable division all round: One-fourth to the wife, one fourth to the daughter, one-half to the son? This carries out the testator's intention to make the wife and daughter share equally, and son receive twice as much as the wife. He did not devise the estate twice, but only once upon contingencies—the ultimate events fulfilled neither contingency alone, but partook of each."